

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

### **Sixteenth Session Geneva, May 16 to 20, 2011**

#### **DRAFT REPORT**

*prepared by the Secretariat*

#### **INTRODUCTION**

1. The Standing Committee on the Law of Patents (“the Committee” or “the SCP”) held its sixteenth session in Geneva from May 16 to 20, 2011.
2. The following States members of WIPO and/or the Paris Union were represented: Algeria, Angola, Argentina, Australia, Austria, Bangladesh, Belgium, Botswana, Brazil, Bulgaria, Burkina Faso, Cambodia, Cameroon, Canada, Chile, China, Colombia, Congo, Costa Rica, Côte d’Ivoire, Cyprus, Czech Republic, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Germany, Haiti, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Italy, Japan, Kuwait, Kyrgyzstan, Latvia, Lebanon, Malaysia, Mexico, Morocco, Myanmar, Namibia, Nepal, Netherlands, New Zealand, Nigeria, Norway, Oman, Panama, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saudi Arabia, Senegal, Serbia, Singapore, South Africa, Spain, Sweden, Switzerland, Syrian Arab Republic, Thailand, Togo, Trinidad and Tobago, Turkey, United Arab Emirates, United Kingdom, United States of America, Uruguay, Venezuela (Bolivarian Republic of), Zambia and Zimbabwe (85).
3. Representatives of the African Union (AU), the Cooperation Council for the Arab States of the Gulf (GCC), the Eurasian Patent Office (EAPO), the European Patent Office (EPO), South Centre (SC), the Organization of Eastern Caribbean States (OECS), the World Health Organization (WHO) and the World Trade Organization (WTO) took part in the meeting in an observer capacity (8).

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), Chamber of Commerce and Industry of the Russian Federation, 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), 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 Intellectual Property (AIPPI), International Centre for Trade and Sustainable Development (ICTSD), International Chamber of Commerce (ICC), International Federation of Intellectual Property Attorneys (FICPI), International Federation of Pharmaceutical Manufacturers Association (IFPMA), International League of Competition Law (LIDC), International Publishers Association (IPA), IP Federation, Japan Patent Attorneys Association (JPAA), Knowledge Ecology International, Inc. (KEI), Latin American Association of Pharmaceutical Industries (ALIFAR), Medicines Patent Pool (MPP), *Médecins sans Frontières* (MSF), Third World Network (TWN) (26).
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: "Summary of the Experts' Study on Exclusions, Exceptions and Limitations (document SCP/15/3)" (document SCP/16/INF/2), "Report on the International Patent System: Revised Annex II of document SCP/12/3 Rev.2" (SCP/16/2), "Draft Questionnaire on Exceptions and Limitations to Patent Rights" (SCP/16/3), "Confidentiality of Communications Between Clients and their Patent Advisors" (SCP/16/4 Rev.), "Proposal from the Delegations of Canada and the United Kingdom" (SCP/16/5), "Accreditation of Observers" (SCP/16/6) and "Transfer of Technology" (SCP/14/4 Rev.).
7. In addition, the following documents prepared by the Secretariat were also considered by the Committee: "Draft Questionnaire on Exceptions and Limitations to Patent Rights" (SCP/16/3 Rev.), "Proposal submitted by the Delegation of South Africa on behalf of the African Group and the Development Agenda Group" (SCP/16/7), "Corrigendum: Proposal submitted by the Delegation of South Africa on behalf of the African Group and the Development Agenda Group" (SCP/16/7 Corr.), "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.), "Exclusions from Patentable Subject Matter and Exceptions and Limitations to the Rights" (SCP/13/3), "The Client-Attorney Privilege" (SCP/13/4), "The Client-Patent Advisor Privilege" (SCP/14/2), "Transfer of Technology" (SCP/14/4), "Opposition Systems" (SCP/14/5), "Proposal from Brazil" (SCP/14/7), "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 SCP/14/2, 3 and 5" (SCP/15/4 Add.).
8. The Secretariat noted the interventions made and recorded them on tape. This report reflects all the observations made.

#### AGENDA ITEM 1: OPENING OF THE SESSION

9. The sixteenth session of the Standing Committee on the Law of Patents (SCP) was opened by Mr. James Pooley, Deputy Director General, who welcomed the participants. Mr. Philippe Baechtold (WIPO) acted as Secretary.

## AGENDA ITEM 2: ELECTION OF A CHAIR AND VICE-CHAIR

10. The SCP unanimously elected, for one year, Mr. Albert Tramposch (United States of America) as Chair and Mrs. Dong Cheng (China) as Vice-Chair.

### Agenda item 3: Adoption of the revised draft agenda

11. The Delegation of France, speaking on behalf of Group B, proposed that the title of agenda item 12 be modified to “Contribution of this Committee to the implementation of the respective Development Agenda recommendations”. The Delegation recalled that that agenda item was not a standing item and that it had been introduced in the sixteenth session of the SCP in order to contribute to the report of the SCP to the General Assembly.

12. The Delegation of Spain reiterated its request to provide a Spanish translation of the Annexes to document SCP/15/3.

13. The Secretariat explained that the translation of the Annexes to document SCP/15/3 was underway, following the request made by the Delegation of Spain at the fifteenth session of the SCP.

14. The Delegation of Brazil supported the suggestion made by the Delegation of France on behalf of Group B concerning the title of agenda item 12, and stated that the suggested wording could be adopted in other Committees as well.

15. The Delegation of South Africa, speaking on behalf of the African Group, supported the proposal made by the Delegation of France on behalf of Group B.

16. The Delegation of Hungary, speaking on behalf of the European Union and its 27 Member States, supported the proposal made by the Delegation of France on behalf of Group B.

17. The Delegation of India noted that it would have had preferred the wording “Contribution of this Committee to the implementation of the Development Agenda”, since in its opinion, all the recommendations of the Development Agenda and their spirit were relevant for all WIPO bodies and Committees. The Delegation, however, supported the proposal made by the Delegation of France on behalf of Group B, recognizing that the proposed wording was taken from the decision of the General Assembly in 2010. Further, the Delegation also suggested that the proposed wording become a template for discussions within other WIPO Committees and bodies in the future.

18. The SCP adopted the revised draft agenda (document SCP/16/1 Prov.1) as proposed, with the title of agenda item 12 being amended as follows: “Contribution of the SCP to the implementation of the respective Development Agenda recommendations.”

## AGENDA ITEM 4: ACCREDITATION OF OBSERVERS

19. The SCP approved the accreditation of the Medicines Patent Pool as *ad hoc* observer (document SCP/16/6).

## AGENDA ITEM 5: ADOPTION OF THE DRAFT REPORT OF THE FIFTEENTH SESSION

20. The Delegation of Mexico noted that, as stated in paragraph 157 of the draft Report of the fifteenth session of the SCP (document SCP/15/6 Prov.1), it had submitted information

concerning amendments made to its industrial property law relating to opposition procedures and third party observations.

21. The Delegation of Egypt requested a correction in the list of participants.

22. The Delegation of Australia requested that the words “constituted half” in paragraph 81 be replaced with the words “was at the heart”.

23. The Committee adopted the draft report of its fifteenth session (document SCP/15/6 Prov.1) as proposed, with the amendments requested by the Delegations of Australia and Egypt.

#### AGENDA ITEM 6: REPORT ON THE INTERNATIONAL PATENT SYSTEM

24. Discussions were based on documents SCP/12/3 Rev.2, SCP/12/3 Rev.2 Add. and SCP/16/2.

25. The SCP agreed that documents SCP/12/3 Rev.2 and SCP/12/3 Rev.2 Add. would remain open for further discussion at the next session of the SCP. Document SCP/16/2 will be updated based on the comments received from Member States.

#### GENERAL DECLARATIONS

26. The Delegation of South Africa, speaking on behalf of the African Group, stated that its approach to the patent system was premised on the need for a balance between patent right holders and the public interest. Recalling its request at the fifteenth session of the SCP to consider discussing the topic “patents and public health” and subsequent inclusion of that topic in the agenda of the sixteenth session of the SCP, the Delegation stated that public health was one of the key priorities of its continent. The Delegation noted that most African countries were searching for strategies to reduce the costs of our health care delivery whilst improving access and quality, particularly to medicines. The Delegation stated that the African Group had identified some areas where WIPO could undertake work on patents and public health, including studies on use of compulsory licenses, development of a database on communicable and non-communicable diseases, a series of interactive dialogues among the Member States in the sessions of the Committee and technical assistance activities. In its view, such an approach allowed for the gathering of information through studies, databases and dialogues and it also facilitated the nature of technical assistance needed by Member States. Further, the Delegation expressed its appreciation to the Delegations of Canada and the United Kingdom for their proposal on the quality of patents. The Delegation noted that it had studied the proposal carefully, and expressed its willingness to provide its view during discussions under the relevant agenda item. In addition, the Delegation state that the African Group attached great importance to flexibilities provided in the intellectual property system, and that it had consistently supported the work of the Organization on flexibilities, particularly exceptions and limitations. The Delegation therefore supported the implementation of the proposal made by the Delegation of Brazil on exceptions and limitations. The Delegation welcomed the draft questionnaire prepared by the Secretariat for soliciting the views of Member States on the utilization of patent flexibilities. Similarly, the Delegation stated that transfer of technology was an important issue to the African Group. It observed that, in recent years, transfer of technology had become a topical issue in many fora, notably in the climate change negotiations, the International Telecommunication Union (ITU), the World Meteorological Organization (WMO), the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Health Organization (WHO), among others. It considered that transfer of technology ranged from the transfer of technical know-how, which could be abstract, to the transfer of hardware material.

The Delegation was of the view that WIPO, by being the main organization responsible for intellectual property in the United Nations system, should actively participate in the discussions on the interface between patents and technology transfer. While stating that the Delegation supported the preliminary study on transfer of technology, it suggested that more work be undertaken in analyzing practices that impeded the transfer and dissemination of technology. In addition, the Delegation suggested that the Committee discuss transfer of technology with a specific focus on capacity building and technical assistance, joint venture through SME's, investment, technical know-how and collaboration with academia on research and development (R&D). The Delegation noted that the main thrust of those activities was, on the one hand, to develop models suited to facilitate the transfer and dissemination of technology through the patent system and, on the other hand, to ensure that the patent system contributed to the promotion of innovation in a competitive environment and to the transfer and dissemination of technology while responding to the public interest. With regard to client-attorney privilege, the Delegation reiterated the position of the African Group that that issue should be addressed at the national level. In its view, any activities that sought international cooperation on that area should take cognizance of the diverse domestic laws of Member States. Concerning the issue of opposition systems, the Delegation considered that that issue deserved further attention as it appeared to be a useful tool to the patent system, especially for validating the granting of patents by third parties. In addition, the Delegation expressed its willingness to provide its annual assessment of the Committee's work in the implementation of the Development Agenda in line with the decision of the General Assembly which had instructed the relevant WIPO Committees to report to it accordingly. With respect to future work, the Delegation stated that the Committee should focus on issues of common interest to the membership, and reiterated that the non-exhaustive list of issues should remain open for further elaboration and discussion, and that any addition to the list should be agreed by consensus. In addition, the Delegation requested that the Report on the International Patent System should remain open for future sessions.

27. The Delegation of France, speaking on behalf of Group B, stated that the sixteenth session of the SCP initiated a new stage for the Committee with the concrete launching of its new work program adopted at the last session, reflecting the various interests of delegations. The Delegation expressed its belief that it was a great opportunity for the SCP to implement its mandate. The Delegation noted that its Group had reviewed with particular interest document SCP/16/3 containing a questionnaire on exceptions and limitations, and might suggest some improvements. Concerning document SCP/16/5 containing a proposal made by the Delegations of Canada and the United Kingdom, the Delegation expressed Group B's broad support to the work program on the quality of patents contained therein. The Delegation expressed its belief that the three main components proposed, *i.e.*, technical infrastructure development, information exchange on quality of patents and process improvement, were all important to improve the quality of patents. The Delegation stressed that the proposed work program was complementary to what had been done in the framework of the PCT system: the PCT Working Group dealt with the quality of PCT tools and processes, whereas the proposed work program was intended to make progress on quality management at the level of national offices. Further, with respect to agenda item 9 on patents and health, the Delegation was of the view that the Committee should concentrate on the added value WIPO had brought, and could bring, to global challenges such as health from the point of view of its technical expertise, and should not attempt to import discussions held in other fora. Regarding the issue of client-patent advisor privilege, the Delegation stated that Group B was committed to advancing work on that issue, which was of real interest to users of the patent system. Concerning agenda item 11 on transfer of technology, the Delegation considered that the Committee should be mindful of the projects on the same subject undertaken in the Committee on Development and Intellectual Property (CDIP) so as to avoid any duplication of efforts. The Delegation expressed its willingness to engage constructively in fruitful discussions in order to allow the Committee to more concretely identify its roadmap for each item under consideration.

28. The Delegation of India, speaking on behalf of the Development Agenda Group, stated that, since 2009, the SCP had provided a valuable forum for a useful exchange of views on a range of important patent related issues. Given the fact that, among all, intellectual property rights, such as patents, had the most direct impact on innovation, economic growth and national development, discussions in the Committee were of a particular interest to the members of the Development Agenda Group. The Delegation noted that the Development Agenda Group had followed very closely the discussions in the Committee pertaining to exclusions, exceptions and limitations, transfer of technology, patents and standards and anticompetitive practices. The Delegation reiterated that the useful exchange of views had contributed to a better understanding of how patent systems could be calibrated to suit national development needs, and in that process, had disabused the Committee of the dogma until recently projected as a conventional system that granting patents and enforcing them strictly would automatically generate innovation. Further, the Delegation considered that the discussions in the Committee so far had not only brought out the complexities inherent in the patent system, but also had illuminated the Committee about the substantial challenges that countries faced in getting the patent system right. In its view, the discussions in the Committee had shown that the patent system did not exist in the vacuum, and had to serve the betterment of mankind ultimately. The Delegation observed that it was not sufficient to simply have appropriate legislative frameworks, but that it was even more important to implement the provisions wisely, bearing the larger goal of societal welfare in mind. As a group of countries that were committed to mainstreaming the Development Agenda meaningfully in WIPO's work, the Delegation expressed the Development Agenda Group's willingness to strengthening, in the work of the SCP, the fundamental balance that should be safeguarded in the patent system between the private rights of right holders and the interest of the larger public. Further, the Delegation expressed its satisfaction to the balanced agenda including important issues such as the continuing consideration of the proposed work program on exclusions, exceptions and limitations, continuing discussions on transfer of technology, opposition systems and client attorney privilege as well as commencement of discussions on patents and health and quality of patents. The Delegation expressed its hope that frank and constructive discussions would lead to the evolution of a work program that would reflect the desired balance in the patent system that was acceptable to all Member States. Recognizing the important inter-linkages between the patent system and development, the Delegation noted that the sixteenth session of the Committee would take stock of the developmental implication of its work and report to the General Assembly on how it saw the Development Agenda being integrated in its work. The Delegation expressed its hope that meaningful discussions in the SCP would guide the work of the Committee in the right direction. Given the dynamic nature of the international patent system and the rapid evolution of new issues and challenges, the delegation stressed the importance of remaining abreast of new and emerging issues. Therefore, the Delegation suggested that the non-exhaustive list of issues remain non-exhaustive and open to proposals for inclusion of topics that were agreed to by all Member States. In its view, that would also ensure comprehensive consideration of various aspects of complex issues, which was the original rationale behind the idea of the non-exhaustive list of issues in the work of the Committee. The Delegation considered it important that background papers and rich discussions on them were captured effectively so that countries' researchers and others could readily access and make use of them in order to promote greater understanding of the issues. In that context, the Delegation expressed its satisfaction with a pragmatic manner in which discussions in the SCP were captured on the WIPO website. The Delegation expressed its hope that comments made on all the studies would continue to be posted on the WIPO website beside the relevant study through a hyperlink. The Delegation expressed the Development Agenda Group's willingness to engage in constructive and purposed discussions in the Committee.

29. The Delegation of Hungary, speaking on behalf of the European Union and its 27 Member States, expressed its appreciation for the work of the SCP that had been done so far, and expressed its willingness to participate in fruitful and constructive discussions in the SCP. In that respect, 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 way in order to achieve the objectives of the SCP. Recalling its statement made at the fifteenth session of the SCP, the Delegation drew the attention of the Committee to the growing overlap of work with other Committees and Working Groups in the Organization. Therefore, the Delegation requested that thorough consideration be given to the objective of each Committee or Working Group before a particular subject was selected for further work.

30. The Delegation of Poland, speaking on behalf of the Central European and Baltic States, stated its commitment to the ongoing work in the framework of the SCP and to its continuing support to the work of the Committee. The Delegation expressed its appreciation for new working documents, especially the revised working document on the client-attorney privilege which was the issue of special importance for the Central European and Baltic States. The Delegation welcomed the submission of the proposal for an SCP work program on quality of patents, including opposition systems, by the Delegations of Canada and the United Kingdom. The Delegation considered that further exploration of that issue would be helpful in developing various options, measures and conditions which would contribute to ensuring and improving the issuance of high quality patents. The Delegation was of the view that most of the discussions which had already started in the previous sessions of the SCP had rightly highlighted important issues related to the wide range of relevant questions on the patent system as a whole. The Delegation was convinced that, by addressing those issues, the SCP should be aiming at enhancing access to patent information and ensuring a more efficient and user-friendly international patent system. The Delegation expressed its hope that a balanced work program would be promptly established in order to enable the SCP to achieve its primary objectives. In addition, noting its disappointment on the fact that delegates had not reached a compromise on a coordination mechanism at the last session of the CDIP, the Delegation expressed its willingness to continue the negotiations on that issue. However, in its view, that topic should not dominate the work of the Committee, and delegations should be able to focus their debates on the substantive documents.

31. The Delegation of the United States of America considered that the detailed preliminary studies prepared by the Secretariat had provided valuable contributions to the SCP's work in addressing important questions of the current international patent system. Supporting the statement made by the Delegation of France on behalf of Group B, the Delegation renewed its commitment to the ongoing balanced work program of the SCP. The Delegation expressed its willingness to engage in rich discussions on the issues before the Committee, and expressed its hope that work on those topics would lead the Committee to pinpointing and addressing specific issues or questions impacting the international patent system, whereby further work could be developed by the SCP. In its view, a return to technical exchanges on patent laws, practices and policies should be the next benchmark in maintaining progress in the SCP. The Delegation considered that the common thread in those topics for discussion and in the varying viewpoints among regional groups was to engage in work that ensured a more efficient and accessible international patent system. The Delegation was confident that that could be achieved if the Committee did not lose sight of such a goal. In particular, the Delegation expressed its hope that all of the issues to be discussed could be undertaken in a manner that sought to improve the functioning and effectiveness of the patent system to deliver economic and social policy objectives. Further, the Delegation welcomed a robust dialogue on the access to technology issues to be discussed during the sixteenth session of the SCP. The Delegation expressed its hope that exchanges of views on those issues would highlight the existing structures, incentives and mechanisms in place and the important role those issues played in the international patent system.

32. The Delegation of Mexico stated that the preliminary studies had increased the general understanding of the issues under consideration, and expressed its appreciation for the study prepared by external experts on exclusions, exceptions and limitations. The Delegation also

expressed its support to the draft questionnaire, which in its view was an excellent way to pursue the issue and to assist preparing a work program for immediate implementation. Further, the Delegation expressed its appreciation to the Delegations of Canada and the United Kingdom for the proposal on quality of patents, and expressed its willingness to discuss the proposal when it had more in-depth knowledge of the subject. In addition, the Delegation suggested that the issue of patents and health be developed through a questionnaire or through a study to be undertaken by the Secretariat, and referred to the work undertaken on that issue in other fora.

33. The Delegation of Egypt reiterated its wish that all the documents be prepared in the Arabic language. Supporting the statements made by the Delegation of South Africa on behalf of the African Group and the Delegation of India on behalf of the Development Agenda Group, the Delegation stated that the Committee dealt with important matters related to development. The Delegation considered that the Committee must bear the full responsibility in order to push that issue forward and to achieve at least a minimum of progress. The Delegation expressed its hope that there would be a complete conviction that the question of development was a protected area within the work of the Organization, in particular, the SCP. The Delegation considered that there was a central link between the question of patents and the question of development. The Delegation stated that it was particularly interested in the questions of exceptions and limitations and transfer of technology, because they were closely linked to the effort of development and were linked to the Development Agenda recommendations. Regarding patents and health, the Delegation considered that the question on health was one of the basic sectors of the policies of States, and expressed its continued support to the provision of necessary flexibility. In that context, the Delegation expressed its support to the proposal submitted by the African Group on that matter. Further, the Delegation expressed its appreciation to the Delegations of Canada and the United Kingdom for their proposal on quality of patents, which was the first step towards a better understanding of the important issue of the quality of patents, about which there were still conflicting points of view. The Delegation expressed its belief that serious and profound discussions on basic questions relating to the studies were the best way to advance the work of the SCP.

34. The Representative of KEI noted that an opportunity should be given to provide technical comments on working documents, such as document SCP/16/2, during the session. While the Representative considered public health an important area to be looked into by the SCP, he suggested that the Committee explore some other areas such as patents and standards and anti-competition issues in that area.

35. The Representative of CEIPI welcomed all the substantive issues to be discussed by the Committee, in particular, the questions relating to exceptions and limitations and client-attorney privilege.

36. The Representative of AIPPI noted that document SCP/16/4 Rev. established a basis on which the study could go forward to solve the problem of protecting confidential legal advice cross-border. While AIPPI had some reservations on the study, he noted that his constructive comments should not be taken as detracting from AIPPI's overall support for the study. The Representative considered that the study helpfully highlighted the similarities of common and civil law in the protection from forcible disclosure of confidential information in communications between clients and their advisers. He noted that civil law applied to professional secrecy to support what was necessary for the accomplishment of the tasks of the professional adviser, while common law applied privilege from forcible disclosure to enable full and frank communications between a client and his adviser. Referring to the suggestions made by a few delegations at the previous session of the SCP that privilege was based on the right to appear in court and obligations which lawyers had on the code of ethics, the Representative noted that, from the first case in which privilege had been reported in the 16<sup>th</sup> century, authoritative treatises on evidence from the 18<sup>th</sup> century, and in the more recent case law reviewing the



origins of privilege, all indicated that privilege was derived from the need for a relationship of trust and confidence to support the obtaining of correct legal advice. The Representative therefore was of the view that the common thread that applied to the protection from forcible disclosure under civil and common law was the need to get correct legal advice. In his view, both systems of law recognized that an open dialogue between a professional adviser and his clients was necessary for proper instructing on facts and advising: in other words, it was accepted that there was greater potential for getting wrong advice without protection from forcible disclosure. The Representative observed that, by creating and supporting conditions in which correct legal advice would be given, protection from forcible disclosure promoted broader public interests in the observance of law and efficiency in administration of justice. In his view, administration of justice meant that it recognized that courts could not handle all the disputes that were going to arise in the communities. They had to be assisted in their tasks by lawyers and by non-lawyer patent attorneys who gave legal advice, helping people to resolve their disputes, and it never came to court therefore. He expressed his belief that it was the public interest to achieve such efficiency. The Representative noted that although the applicability of the protection to non-lawyer patent advisers had always been a thorn, application of the protection to non-lawyer patent advisers was not an extension of the law – the patent advisers were doing the same job for clients that patent lawyers did. The Representative also considered the lack of adequate protection for communications with a patent adviser (as compared with a lawyer) meant that a client might be inclined to consult a lawyer as opposed to non-lawyer patent advisers. In his view, many economies had supported the creation of such a “new” profession. He observed that refusing to grant non-lawyer patent advisers protection from forcible disclosure of confidential communications with clients in effect pulled the rug from under the feet of the newly emerged profession. The Representative pointed out that the imbalance between the protection which applied to one relationship of trust (*i.e.*, between clients and their lawyers) and the other such relationship of trust (*i.e.*, clients with non-lawyer patent advisers) also brought a serious risk that the protection of confidentiality which was applied to client/lawyer advice nearly everywhere would be lost by its transmission from the client-lawyer side to the non-lawyer patent attorney side. Further, the Representative noted that not only had the protection from forcible disclosure been applied at common law for over five hundred years, in civil law countries, it had been over two hundred years. Without any proposal anywhere that those laws be abrogated, the Representative considered that the balance between the public interests of ascertaining by all means the truth on the one hand and obtaining of correct legal advice on the other hand had been decided for centuries to be firmly in favor of applying the protection to get correct legal advice. He further observed that not a single decided case had been correctly cited as support for reversing such a position. The Representative noted that the case of Nobelpharma had been raised by the Representative of TWN to question the wisdom of privilege being applied to non-lawyer patent attorneys, arguing that protection against forcible disclosure might be an instrument of fraud. The Representative was of the view that the Nobelpharma case did not involve privilege, but involved fraud by a professional in which no issue as to privilege arose. In his view, privilege was not the cause or catalyst of such fraud: dishonesty was. He considered that, although virtually anything could be used for fraud (like money for bribery and corruption, like pen to carry out counterfeiting, like fuel to be used in getaway car form a robbery) and each of them could be an aid to crime, commonsense dictated that we would not give up the benefits of money, pens or fuel simply because of the possibility that someone might use them in aid of crime. In his view, the same commonsense applied to privilege. Further, the Representative stressed the necessity of certainty. Noting that there was much uncertainty where national rules regarding the preservation of confidential communication with foreign patent advisers were not clearly regulated, he considered that that was a risk factor for clients who were increasingly involved in disputes in foreign countries or sought advice from foreign advisers. The Representative was of the view that such uncertainty created fear in the mind of clients as to their security in having frank and open discussions with their advisers. Referring to Mr. J. Rehnquist in the *Upjohn Co v United States* 449 US 383 (1981) case, the Representative observed that an uncertain privilege was a little better than no privilege at all. Regarding development concerns, the Representative expressed his deep sympathy for the

concerns of developing countries, constantly asking to focus on their needs. The Representative observed that most intellectual property owners were companies, and to develop trade, countries needed to provide the conditions through their laws which were attractive or at least no barrier against owners of intellectual property rights doing business in those countries. The Representative was of the view that the failure to respect the confidentiality of legal advice given in a particular country or obtained in another country was a strong disincentive to doing business in the particular country. He considered that owners of intellectual property rights might not accept to conduct trade where confidentiality of their legal advice was put at risk, and that that was particularly so if the market was less attractive than in other countries. Therefore, in his view, whilst failure to fix such a problem affected all countries, developing countries were more at risk from the failure than developed countries. The Representative considered that the following points had been well-established in the WIPO/AIPPI Conference on Privilege in May 2008 and in the proceedings of the SCP as well as in the oral and written submissions of the intellectual property non-governmental organizations (NGOs):

- (i) Nearly every country provides some level of protection in maintaining the confidentiality in communications between clients and their patent advisers from forcible disclosure. However, problems arise from a lack of harmonization in respect of cross-border recognition of this protection.
- (ii) The problems of the lack of cross-border recognition of national protection of the confidentiality of client/patent adviser communications can only be solved by international agreements.
- (iii) The two main forms of protection of the relevant communications between clients and their patent advisers are privilege (common law) and professional secrecy (civil law).
- (iv) Both privilege and professional secrecy exist to enable full and frank communications between clients and their legal advisers to support the obtaining of correct legal advice.
- (v) An exception to the application of both privilege and professional secrecy is crime/fraud in which the legal advice is allegedly implicated.
- (vi) The protection from forcible disclosure is not in conflict with the disclosure requirements provided by patent law.
- (vii) In relation to overcoming the cross-border problems of CAP, there are mechanisms which Member States could adopt which would supplement their national protection whilst allowing flexibility as to differences particularly in relation to exceptions and limitations.

37. The Representative therefore suggested that, as the next step, WIPO be mandated to carry out information gathering necessary to provide further information on the mechanisms that could be applied in solving failings in protecting IP professional advice from disclosure. The Representative further suggested that the Committee mandate WIPO to study and report on how the SCP should decide which of the mechanisms identified by WIPO should be preferred by Member States.

## AGENDA ITEM 7: EXCEPTIONS AND LIMITATIONS TO PATENT RIGHTS

38. Discussions were based on documents SCP/14/7, SCP/16/INF/2, SCP/16/3 and SCP/16/3 Rev.

39. The Chair asked whether delegations had any general comments on the draft questionnaire contained in document SCP/16/3.

40. The Delegation of Switzerland stated that, in view of the complexity of the questionnaire, enough time should be given to Member States for responding to the questions.

41. The Delegation of Hungary, speaking on behalf of the European Union and its 27 Member States, expressed its gratitude to the Secretariat for the preparation of a summary of the Experts' Study on Exclusions, Exceptions and Limitations (document SCP/16/INF/2), which provided an excellent synopsis of the external experts' study. Regarding the draft questionnaire, the Delegation expressed its conviction that the questionnaire would contribute substantially to the knowledge of the Committee about the state of laws in different countries. The Delegation reiterated its suggestion that all discussions on substantive patent law should be held in the Committee to maximize resource efficiency in the Organization. In that context, the Delegation noted that it had carefully considered the proposal made by the Delegation of Brazil concerning exceptions and limitations to patent rights (document SCP/14/7). The Delegation stated that the European Union and its 27 Member States recognized the importance attached to those issues, and recalled its statement made at the previous session of the SCP, in which it had been said that a strong intellectual property system with enforcement provisions was fully consistent with exceptions and limitations. As regards exclusions from patentable subject matter and subject matter not considered to be inventions, the Delegation noted that the international legal framework was explicitly set by the Agreement on Trade-Related Aspects of Intellectual Property Rights (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 the European Union law and the European Patent Convention. Regarding exceptions and limitations to patent rights, the Delegation noted that the relevant international instruments were the Paris Convention, the Convention on International Civil Aviation and the TRIPS Agreement with the Declaration under the TRIPS Agreement and Public Health. It further noted that the issues concerning compulsory licensing of pharmaceuticals, experimental use of pharmaceuticals and biomedical research, patentable subject matter in biotechnology as well as farmers' privilege and breeders' exception had all been harmonized within the legislative framework of the European Union. The Delegation expressed its belief that, in the case of exclusions from patentability and exceptions to patent rights, an appropriate balance should be maintained between the interests of the right holders and the general public. With regard to the future work of the Committee, the Delegation reiterated its view that neither exclusions from patentability nor exceptions and limitations to patent rights should 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.

42. The Delegation of Morocco noted that its legislation, based on international agreements and its agreements with the United States of America and with the European Union, excluded certain subject matter from patentability, in particular, discoveries and scientific theories, aesthetic creations, software, animal breeds, and any other inventions which could affect public morals or public order. The Delegation further noted that compulsory licenses and automatic licensing for certain products were also provided under its legislation. Concerning computer software, the Delegation explained that inventions which required the use of a computer program were considered patentable subject matter. In addition, it noted that the possibility of patenting plant varieties had also been considered. The Delegation was of the view that it would be timely to clarify those issues through the work of the SCP.

43. The Delegation of India, speaking on behalf of the Development Agenda Group, stated that, given the significance of the issue for the work of the SCP and WIPO as a whole, particularly after the adoption of the Development Agenda in WIPO, the changed context of discussions in the Committee had allowed for a useful exchange of views on different aspects of the patent system that had a direct bearing on how developing countries should calibrate their national models of patent law according to their specific social and economic realities, while leaving behind in the process the dogma that granting patents and enforcing them would automatically generate innovation. The Delegation considered that the discussions on exceptions and limitations were paramount for those countries intending to develop their intellectual property systems. In its view, exceptions and limitations served to balance the interests of society and right holders, thus assuring that the latter received a rightful reward for their innovation, while avoiding stifling competition and innovation for the former. In a nutshell, the Delegation noted that the goal was the highest degree of innovation with the lowest social cost. The Delegation stated that the results of the GATT Uruguay Round which had produced the TRIPS Agreement had made them even more important, given the reduction in policy space caused by limitations on the limitations and exceptions available. The Delegation considered that further studies on economic theories underlying the intellectual property system, including the role of exceptions and limitations, were needed. In that context, the Development Agenda Group welcomed the cooperative spirit of all WIPO members towards the proposal on exceptions and limitations presented by the Delegation of Brazil. The Delegation observed that the draft questionnaire drew up many interesting questions aimed at better understanding the use of exceptions and limitations in the patent system, and the outcomes of such use. In its view, the questionnaire complemented the first element in the Brazilian proposal which in the first phase called for “the exchange of detailed information on all exceptions and limitations provisions in national or regional legislations as well as on the experience of such provisions, including jurisprudence” and adding that addressing why and how countries use – or how they understand the possibility of using – the limitations and exceptions provided in their legislations. The Delegation therefore considered the questionnaire as a good starting point for promoting the exchange of information. The Delegation, however, stated that the results of the survey and mapping exercise should not be a basis for engaging in an exercise of finding common positions that could potentially result in restricting the scope of available exceptions and limitations. The Delegation expressed its belief that the first step towards the adoption of the Brazilian proposal in the form of a questionnaire would pave the way for the second and third phases, bringing much needed comprehension and useful tools for all WIPO Member States to design optimal and effective patent systems. It considered that the questionnaire would in the second phase enable an investigation as to what exceptions or limitations were effective to address Development Agenda concerns and what were the conditions for their implementation. In addition, the Delegation stressed the importance of evaluating how national capacities affected the use of exceptions and limitations. The Delegation expressed its hope that that would lead to the third phase in which elaboration of a non-exhaustive exceptions and limitations manual, which could serve as a reference to WIPO members, would be considered. The Delegation observed that the envisioned manual would help each country adapt international agreements to its own domestic needs and realities, maintain the necessary policy space for its development goals and allow dynamic adaptation when necessary. The Delegation noted that, as rightly stated in the Experts’ Study presented at the last SCP session, an optimal arrangement for the United States of America was not necessarily optimal for India or Malawi. The Delegation, therefore, welcomed the cooperation of all Member States in the implementation of the work program which was also an important step towards the implementation of the Development Agenda.

44. The Delegation of Brazil expressed its appreciation for the preparation of the questionnaire which, in its view, was one step towards the implementation of the first phase of its proposal, and referred to the statement made by the Delegation of India on behalf of the

Development Agenda Group with respect to the second and the third phase of its proposal that would lead to a manual on exceptions and limitations.

45. The Delegation of Japan requested ample time for responding to the questionnaire, which was voluminous with eleven sections and 93 questions that covered the areas overseen by various divisions and sections in its government.

46. The Delegation of Spain supported the statement made by the Delegation of Hungary on behalf of the European Union and its 27 Member States. The Delegation observed that if the questionnaire was responded to by all Member States, the Committee would have a very clear picture of what was done throughout the world on the issue of exceptions and limitations. While the detailed questions of the questionnaire were its great virtue, the Delegation considered that they were also one of the great drawbacks to it, since due to the available resources of the patent offices in many countries, the number of offices responding to the questionnaire might not be sufficient to have a statistically useful result. The Delegation therefore suggested that questionnaires in the future be simpler and only cover the essential points.

47. The Delegation of South Africa, speaking on behalf of the African Group, reiterated its support for the three-phase proposal made by the Delegation of Brazil on exceptions and limitations to patent rights. The Delegation noted its understanding that the questionnaire was in reply to phase one of the proposal made by the Delegation of Brazil. It welcomed the draft questionnaire that kept to the letter and spirit of the proposal by soliciting detailed information on exceptions and limitations found in national and regional laws of Member States as well as experiences of their implementation. The Delegation expressed its expectation that once information was gathered, the second phase would be to analyze the flexibilities that could be of use to developing countries with the view to compiling then in a manual of exceptions and limitations as outlined in the proposal by the Delegation of Brazil. The Delegation therefore stressed the importance of having a clear roadmap concerning exceptions and limitations, which would lead to practical activities.

48. The Delegation of China stated that the proposal made by the Delegation of Brazil requesting an in-depth study on the issues of exceptions and limitations was very important and useful, since exceptions and limitations were important parts of the patent system. The Delegation considered that the questionnaire provided a good basis for an in-depth study by the Committee, constituting the first phase of the three-phase proposal. The Delegation expressed its belief that compiling all the information regarding exceptions and limitations provided by different countries would help discussions of the issues and lay a good foundation for further work by the Committee.

49. The Delegation of the Russian Federation stated that the legislation of its country in relation to exceptions and limitations to patent rights was reflected in document SCP/15/6. With regard to document SCP/15/3, the Delegation stated that it was a systematic compilation of information on exceptions and limitations prescribed by national and regional legislations, and, consequently, was useful for the development of the patent system. In that context, the Delegation found it appropriate to support research related to the implementation of exceptions and limitations in national and regional legislations. In addition, it supported research in the following directions: studying the experience and jurisprudence of the evaluation criteria for patentability of the claimed subject matter, in particular, based on the identification of the technical nature of the claimed invention, the availability of physical transformations; studying the experience and jurisprudence relating to exceptions to patent rights, in particular, with regard to implementation of public policies on health and the environment; and studying economic aspects of exceptions and limitations in different countries, including bilateral and regional free trade agreements. In relation to the draft questionnaire on exceptions and limitations to the rights, the Delegation stated that, in general, the list of exceptions and limitations to patent rights presented in the questionnaire reflected the exceptions and

limitations found in the legislation of its country. However, the Delegation stated that the legislation of the Russian Federation contained features that were not included in any of the sections of the draft questionnaire. Those were related to Section VII of the questionnaire on obtaining the approval from the competent authority, Section X on farmers' privilege and/or limitations to plant breeders' rights, the right of subsequent use, as well as limitations related to a patent that was created in accordance with a state or municipal contract. The Delegation stated that it would provide detailed information on those exceptions during the discussion of that agenda item. In general, the Delegation supported the questionnaire, as the analysis and synthesis of experiences in different countries in respect of exceptions and limitations of patent rights were of interest, both, for patentees as well as for the society as a whole in terms of stimulating the development of science and technology. In addition, in relation to the proposal made by the Delegation of Brazil which contained a work program on exceptions and limitations to patent rights, the Delegation stated that it did not oppose the exchange of information on exceptions and limitations prescribed by national legislations.

50. The Delegation of the Republic of Korea welcomed the questionnaire which would clarify the types of limitations and exceptions available in many jurisdictions, and would give a concrete idea on the options available for national legislature to make use of limitations and exceptions to patent rights. The Delegation suggested more work on the interplay between the international treaties and the limitations and exceptions on patents. What was meant by interplay was that, as the report of the previous session pointed out, while limitations and exceptions were allowed to some degree in the TRIPS Agreement, regional and free-trade agreements had imposed certain limitations on the limitations and exceptions to patent rights. The Delegation therefore noted that although there were options that each national jurisdiction had in making use of limitations and exceptions, there were limitations on national authorities to establish limitations and exceptions. Thus, the Delegation expressed its interest in looking at the limitations that many governments had in establishing a limitations and exceptions regime within their patent laws. The Delegation observed further that, even though the questionnaire was very detailed and comprised many options and ramifications, certain elements and terms that were not clear to the Delegation, and, as an example, referred to Section X: Farmers' privilege and/or breeders' exception. The Delegation noted that there were many gray areas that existed in the interaction between trade agreements and the UPOV agreement. It observed that an interaction between the patent system and the breeders' rights' system also existed in national legal systems, some countries providing a breeders' exception and some countries providing a farmers' privilege. In its view, however, the difference between farmers' privilege and breeders' exception was not clear in some jurisdictions.

51. The Delegation of Canada noted that for some of those exceptions and limitations, the scope of the exception might not be clear in certain jurisdictions. For example in Canada, the exceptions for experimental uses had not been explicitly clarified. As such, it might be difficult to answer the questionnaire to the level of precision requested. The Delegation stated that the questionnaire should anticipate the possibility of a certain level of ambiguity in the law. It also noted the extensive nature of the questionnaire and it aligned itself with the other delegations that had required a sufficient amount of time to respond in a proper and fulsome manner.

52. The Delegation of France supported the statement made by the Delegation of Hungary on behalf of the European Union and its 27 Member States and the statement made by the Delegation of Spain. It observed that the questionnaire was extremely detailed and that it was therefore difficult to fill in. It felt that the questionnaire should be shorter and focus on the essential points under the current legislative framework of States regarding exceptions and limitations.

53. The Delegation of Chile stated that the questionnaire was fairly detailed and did adequately cover the various scopes of exceptions and limitations. Likewise, as it had already pointed out at the fifteenth session of the SCP regarding the general treatment of exceptions

and limitations and the proposal put forward by the Delegation of Brazil, it reiterated the importance Chile attached to that topic. The Delegation stressed the importance of the Committee moving forward in the area of exceptions and limitations. The Delegation considered that the proposal put forward by the Delegation of Brazil was an interesting baseline for the work to be undertaken.

54. The Representative of CEIPI drew the attention of the SCP to a recently published book that had been presented at WIPO during a side event on the occasion of the recent meeting of the CDIP. The book was entitled “Intellectual Property Rights in a Fair World Trade System” with the sub-title “Proposals for Reform of TRIPS”. It was the result of a joint project carried out by the Max-Planck Institute for Intellectual Property and Competition Law in Munich, Germany and the Institute for Intellectual Property in Market Flow of the University of Stockholm in Sweden, in which the Representative participated in a personal capacity. Among the various proposals contained in the book for amendments to the TRIPS Agreement, the Representative noted that there was a proposal to amend Article 30 of the TRIPS Agreement. The Representative stated that the questionnaire intended to establish facts, namely, what was the existing situation in terms of exceptions and limitations, whereas the book had been prepared by academics and dealt with what was desirable in their view. For those interested, he noted that the text of the proposal was available on the website of the Max-Planck Institute ([www.ip.mpg.de](http://www.ip.mpg.de)).

55. The Representative of ALIFAR noted that exceptions and limitations were an essential tool for patent law. She, however, considered that it was not always possible to fit them into the relevant legislative framework. Therefore, in her view, an in-depth analysis of exceptions and limitations for patents was fundamental. The Representative expressed its belief that the questionnaire proposed in document SCP/16/3 was a good first step which would allow Member States to understand the case law and practice that were not always available in a clear and precise fashion. In her view, that would make it possible to learn from experience and modify national legislation with clear rules accommodating those practices. The Representative further considered that information collected through the questionnaire would be useful for the preparation of a non-exhaustive manual on exceptions and limitations, which would be a useful tool to guide and help countries in taking national measures.

56. The Representative of KEI stated that it should be clear in the questionnaire that it would include cases of limitations on remedies, not just on the rights. For example, according to 28 USC 1498, the Government use permission under the law of the United States of America was essentially a limitation on the ability to get an injunction against the use of a patented invention. Regarding medical practitioners, the Representative explained that performance in the medical activity was another important exception in the law of the United States of America, according to which the right existed but there was no remedy to the right, *i.e.*, there was a limitation on the zero damages and an inability to get an injunction. The Representative observed that, regarding non-disclosed biological product patents for sale for medicines, in certain circumstances, there was no availability of an injunction or in some cases of even a royalty, or a limit on the royalty. The Representative noted that those were examples of important flexibilities in the law of the United States of America to achieve public interest objectives. Given all the attention in free-trade agreements and the Anti-Counterfeiting Trade Agreement (ACTA) to the issue about remedies to rights, the Representative highlighted the importance of flexibilities through limitations and remedies as opposed to just a limitation on the right itself, and suggested clarifications in the questionnaire in that regard.

57. The Representative of ITSSD noted that certain questions should be added in the questionnaire as follows: (i) in Section II, there did not appear to be any reference to the notion of adequate remuneration contained in the law of the United States of America for non-governmental commercial use, and the forfeiture of the right for an injunction for reasons other than law suits; (ii) in Section IX dealing with compulsory licenses, there was no discussion

on the notion of adequate remuneration for purposes of compensation to be received from the patent holder when in the case of the issuance of a compulsory license; (iii) in Section VII concerning acts for obtaining regulatory approval from authorities, there was no question concerning the treatment of intellectual property rights that might be engendered as part of a regulatory submission, such as trade secrets, confidential information and data, including clinical testing data, the disclosure of which to third parties would, if adequately marked by the IP right holder, engender criminal penalty at least in the United States of America.

58. The Delegation of India, speaking on behalf of the Development Agenda Group, suggested to rephrase question 4 in Section II that read “What is the rationale for providing the exception? Please explain”, which was replicated many times in different parts of the questionnaire under different Sections, to catch more effectively the public policy objective behind the particular exception or limitation. The Delegation was of the view that that could be achieved by referring, for example, to the legislative history and judicial interpretation of the provisions. The Delegation therefore suggested that questions 4, 11, 23, 31, 42, 51, 66 and 84 of the questionnaire be amended as follows: “What is the public policy objective for providing the exception? Please explain with reference to the legislative history, parliamentary debates and judicial decisions, where possible.” In the Delegation’s view, such an orientation to the question would help guide Member States and contribute to a better understanding of the public policy imperatives behind exceptions and limitations provided by the country.

59. The Delegation of the United States of America noted that the questionnaire was very long, and expressed its concern that someone confronted with the questionnaire would be overwhelmed. In order to encourage completion of the survey so that quality results could be achieved, in relation to the proposal made by the Delegation of India, in order to encourage at least stating the public policy objective, but not necessarily oblige countries to conduct a research project to find out where such public policy objective was found, the Delegation suggested that 4(a) should request the public policy objective and 4(b) would encourage countries to provide additional documentation, if they had time to do so.

60. The Delegation of India observed that the two words found in its proposal, “where possible” gave the discretionary element to the respondent to respond in detail in case they had them, and also the degree of detail that they wished to reflect. The Delegation therefore was of the view that its proposal had given such flexibility and option to a patent office replying to the questionnaire.

61. The Delegation of South Africa, speaking on behalf of the African Group, endorsed the proposal made by the Delegation of India.

62. The Delegation of Brazil stated that some well-known scholars on intellectual property divided limitations in two classes: the first, which were called “intrinsic limitations” were those within the framework of the intellectual property system, while the second, which were called “extrinsic limitations” were those outside the intellectual property framework. An example of the former was the research exemption where the researcher may use a patented invention in order to advance the knowledge available and eventually discover a patentable product or process. The latter included, but was not limited to, limitations such as competition policy whereas parties who used intellectual property illegally in order to raise their market power and eliminate competition were subject to penalties provided by law, penalties which may include compulsory license or fines and damage. The Delegation therefore stressed the importance of addressing the latter exceptions and limitations as a separate question, and to take into account the numerous documented cases of anti-competitive behavior by right holders in the recent past. The Delegation stated that the main goal of its proposal was to stimulate a comprehensive reflection on the patent system from the exceptions and limitations, since the subject was intrinsically linked to others. In its view, that would provide real utility for governments, such as transfer of technology and disclosure of patent information.



63. The Representative of ITSSD, in referring to the proposal made by the Delegation of India with respect to question 4, observed that the terminology “legitimate public policy objective” rather than just any public policy objective might be more appropriate, since the TRIPS Agreement contained that terminology.

64. The Chair noted that, according to the Rules of Procedures, non-governmental organizations could make recommendations, but not proposals, so that their recommendation needed to be seconded by any member delegation.

65. The Delegation of the Republic of Korea suggested providing the relevant provisions of the TRIPS Agreement or the Paris Convention that allowed those limitations and exceptions, section by section, for the purpose of enhancing the understanding of the questions.

66. The Representative of TWN stated that a patent was a statutory monopoly and affected the social and economic development of people, especially those living in developing countries. Hence, it was important to ensure that patent monopoly did not hamper the wider social goals, like the right to health, right to enjoy progress of science and technology, protection of the environment, research and innovation, industrialization of developing countries, etc. She considered that there was ample evidence on the threat of patents on development, especially in the area of health. Therefore, the Representative stressed the importance of using exceptions and limitations to achieve social and economic development. The Representative observed that WIPO Member States in general and developed country members in particular had been using exceptions and limitations for the same purpose. However, in her view, during the previous two decades there had been an organized effort to increase the scope of protection resulting in skewing the space for exceptions and limitations. She considered that while the objective of the TRIPS Agreement was mainly to expand the scope of patent protection, free-trade agreements (FTAs) and bilateral and multilateral cooperation and technical assistance targeted the reduction of the scope of exceptions and limitations. The Representative noted that certain unilateral actions of WIPO Member States also had had the potential to hamper the use of exceptions and limitations, for instance, the seizure of medicines in transit hampered the parallel importation of medicines. Further, in her view, expansion of intellectual property rights, like data exclusivity through FTAs could hamper the use of compulsory licenses in developing countries who were parties to FTAs with developed countries. The Representative urged Member States to undertake a stocktaking of the potential threat to the use of limitations and exceptions to patent rights. She also noted that developing countries were facing many constraints to make use of exceptions and limitations, including information asymmetry, institutional constraints, legal constraints, lack of understanding, political pressures from industrialized countries, etc. Hence, the Representative stated that the discussions on exceptions and limitations should be translated into concrete work programs to eliminate the constraints for developing countries in terms of using exceptions and limitations. The Representative further observed that it was also important to reorient WIPO’s technical advice to developing countries on patents in order to re-equip developing country governments, individuals, civil society organizations and private sector to make use of exceptions and limitations.

67. The Delegation of Switzerland sought clarification on the exceptions regarding prescribed medicines under Section IV.

68. The Secretariat explained that it had tried to deal with the exceptions and limitations that appeared in a number of countries where the preparation of medicines by pharmacists for an individual patient in accordance with the prescription by a doctor, a dentist, or any medical practitioner, was considered as a non-infringement of patent rights even if those medicines were under patent protection, and referred to paragraph 115 of document SCP/13/3.

69. The Delegation of the United States of America noted that following the explanation by the Secretariat, the exception was more correctly described as the preparation of medicines, whether or not the medicine was prescribed by a doctor appeared in general irrelevant, and suggested a more general title for Section IV.

70. The Chair noted the proposal to delete the word “prescribed” in the title of Section IV and concluded that there appeared to be no objection in principle to that proposal.

71. The Delegation of the Russian Federation stated that, on the whole, the draft questionnaire on exceptions and limitations to patent rights as set out in document SCP/16/3 was consistent with Russian legislation. There were, however, specific differences. In relation to Section V of the draft questionnaire (right of prior use), the Delegation noted that the right of prior use specified in Article 1361 of the Civil Code of the Russian Federation (hereinafter, the Civil Code) according to which a person who, prior to the invention’s priority date, used an identical solution created independently of the inventor in good faith on the territory of the Russian Federation, or who had made serious preparations to that end, maintained the right to use the identical solution free-of-charge in the future provided that the scope of such use was not extended. Further, the Delegation noted that the right to use an invention, where such use or preparations for use were carried out in the period between the termination date of the patent for an invention, and the publication date of information on the restoration of the patent in the Official Gazette of Rospatent, was known as the right of subsequent use and was regulated by the provisions of Article 1400 of the Civil Code. In other words, a person who started using the invention or made serious preparations to that end within the prescribed period, maintained the right to use it free-of-charge in the future, provided that the scope of such use was not extended.

72. The Delegation of El Salvador expressed its understanding that the Delegation of the Russian Federation was referring to so-called “second” patents where, for example, a patent had been granted already on a particular invention and then subsequently a second patent was granted on a new application of that invention. The Delegation observed that that had applied to one particular case in El Salvador.

73. The Representative of ITSSD stated that the questionnaire did not address the notion of the use of intellectual property rights in a global commons with respect to stationary structures, floating vessels, etc. He noted that in certain treaties, for instance in the UN Law of the Sea Convention, there was a commons area that applied and that there was a question of whether intellectual property rights could be used in the global commons physical area and how they would be treated. In his view, such an issue would involve a national government liaison with an intergovernmental body.

74. The Delegation of the Russian Federation drew the SCP’s attention in relation to Section VII of the draft questionnaire (acts for obtaining regulatory approval from authorities). The Delegation noted that in its country, there existed the notion of legal protection of secret inventions. The specific features of legal protection and use of secret inventions were regulated by Articles 1401-1405 of the Civil Code. Under Item 1 of Article 1405 of the Civil Code, a secret invention could be used and exclusive rights in a secret invention could be enjoyed in accordance with legislation on State secrets. Thus, Law No. 5485-1 of the Russian Federation of July 21, 1993 on State Secrets established three levels of secrecy for information constituting a State secret, and secrecy stamps for the holders of said information corresponding to those levels: “Of Special Importance”, “Top Secret”, and “Secret”. Under the Civil Code, applications for secret inventions for which the level of secrecy had been designated as “Of Special Importance”, or “Top Secret”, and likewise for secret inventions relating to armaments and military technology, and to methods and resources in intelligence, counter-intelligence and operative-investigative activity, and for which the level of secrecy had been designated as “Secret”, were filed depending upon their classification by federal executive authorities

authorized by the Government of the Russian Federation, and the State Atomic Energy Corporation, Rosatom. Applications for other secret inventions were examined by Rospatent. State registration of a secret invention in the State Register of Inventions of the Russian Federation, and grant of a patent for a secret invention were carried out by the authority which took the decision to grant the patent, with Rospatent being subsequently notified. Accordingly, a secret invention could only be used with the approval of the appropriate federal executive authority. Furthermore, no information on an application and patent for a secret invention was published. For a secret invention, a public proposal to conclude an agreement on the alienation of a patent and an application for an open license were not permitted. A compulsory license relating to a secret invention could likewise not be granted. In addition, with regard to Section VII of the draft questionnaire, the Delegation informed about the specific features of using inventions relating to medicines, pesticides and agrochemicals. In order to introduce those subject matters into the market, the patent owner was obliged to obtain the approval of an authorized body in accordance with the Federal Law No. 61-FZ of April 12, 2010 on the Circulation of Pharmaceuticals (as in force since January 1, 2011) and the Federal Law No. 109-FZ of July 19, 1997 on the Safe Use of Pesticides and Agrochemicals.

75. Referring to Section IX, the Delegation of the Russian Federation noted that the issues concerning compulsory licensing and use by government authorities were separated in the legislation of the Russian Federation. Under Article 1360 of the Civil Code, in the interests of national defense and security, its government was entitled to approve the use of an invention, utility model or industrial design without the owner's consent while notifying him accordingly as soon as possible, and compensating him appropriately. The possibility of compulsory licensing was envisaged by Article 1362 of the Civil Code. Under the provisions of item 1 of that Article, where an invention was not used or was insufficiently used by the patent owner within four years of the date of patent grant, and that led to insufficient supply of relevant goods, work or services onto the market, any person who was ready and willing to use said invention, upon refusal of the patent owner to conclude a license agreement with that person on terms corresponding to established practice, was entitled to bring an action in court against the patent owner for the grant of a compulsory license for use of the invention on the territory of the Russian Federation.

76. The Representative of KEI expressed the belief that question 64 would cover the cases in the United States of America following the precedent established by the e-bay case, where the Supreme Court had held that in cases involving precedence in injunction, the Court had to consider whether or not an alternative to the injunction, such as a court order on royalty, was appropriate. The Representative stated that a large number of cases had since been resolved in that way, and thus welcomed the inclusion of question 64.

77. In relation to Section X of the draft questionnaire concerning the farmers' privilege and/or breeders' exception, the Delegation of the Russian Federation noted that the legislation of its country did not envisage the farmers' privilege in relation to inventions in biotechnology and/or the food industry. In that regard, the Delegation considered it appropriate to exclude questions relating to farmers' privilege from the questionnaire, since the Civil Code only regulated limitations of exclusive rights in a selection achievement. Furthermore, in the legislation of the Russian Federation, there were provisions that were not included in any of the Sections of the draft questionnaire. The Delegation considered that those might be reflected in Section XI. In particular, the Civil Code regulated the procedure for obtaining a patent for an invention created on performance of contract work (Article 1371 of the Civil Code) and under State or municipal contracts (Article 1373 of the Civil Code), and also cases of limitations of rights in such inventions.

78. The Delegation of Chile expressed the understanding that the document referred to exceptions and limitations to patent rights, and as a result, did not include exceptions and limitations for new varieties of plants protected outside of the patent system or under a

*sui generis* system. As was known generally, the Delegation noted that there was the possibility to give diverse treatment to new varieties of plants according to Article 27 of the TRIPS Agreement. Against that backdrop, the Delegation considered that Section X, as it stood, was not entirely straightforward, as it could be regarded as a possibility of applying exceptions and limitations to new varieties of plants when those were protected outside of the patent system. The Delegation stated that its answer to that question, as it stood currently, would be no. The Delegation, however, observed that that would only be the case because its legislation dealt with that matter in a different body of law and not under the patent law. If that was the case, in its view, the questions in Section X could cause confusion. The Delegation therefore suggested that Section X be clarified so that those questions would refer exclusively to exceptions and limitations under patent law. In its view, such clarification could be made in a footnote or in the heading indicating that the questions should be answered without prejudice to the existence of exceptions and limitations in other bodies of law.

79. The Secretariat confirmed its intention to cover only cases that related to patents and the patent system under Section X and expressed its willingness to clarify it in the revised text.

80. The Delegation of the Republic of Korea observed that it had similar problems with understanding Section X. The Delegation considered that describing the farmers' privilege and breeders' exception as privilege and exceptions was specific to certain legal traditions, for example, common law tradition. The Delegation noted that it was not the case in civil law traditions, for example, in the Republic of Korea, where a different set of statutes protected breeders' rights. The Delegation explained that breeders' rights protected under the breeders' rights law might limit or compromise the rights protected under the patent law, but they were not an exception under the patent law. The Delegation noted that the term "breeders' exception" used in the questionnaire was not a correct term for such a concept in some jurisdictions. The Delegation further observed that the farmers' privilege was also a new concept in some legal traditions, such as that of its country where no distinction between farmers' privilege and breeders' exception were found. The Delegation therefore suggested rephrasing it to "limitations or exceptions relating to farmers and breeders".

81. The Delegation of Congo observed that the SCP was dealing with exceptions and limitations under the patent law, and stated that references to the farmers' privilege and breeders' exceptions in the questionnaire mixed up two issues: patents and new plant varieties.

82. The Chair confirmed that the SCP would not be extending the questionnaire to intellectual property rights other than patents and that those questions will only apply to the extent to which that country protected plants through patents and not through, for example, a UPOV type of plant variety protection, and that that would be made very clear.

83. The Delegation of the Russian Federation pointed out that that part of the document did not take into account certain exceptions and limitations which existed in Russia such as, for example, the code on granting licenses on patents for discoveries which emerged from contracts with municipalities or working contracts. It would provide the Secretariat with a drafting suggestion which it would like to be included in the questionnaire.

84. The Delegation of El Salvador raised concerns about exceptions contained in case law. By creating law through case law, in its view, something that had not already been in the law was created. The Delegation explained that the decision made by a judge on exceptions would be taken into consideration in its country. Therefore, the Delegation questioned whether more power was granted to the decision made by a judge in certain legal systems.

85. The Delegation of Cambodia, referring to Section X on the farmers' privilege and/or breeders' exception, noted that since in its country, the breeders' exception was not dealt with by the patent law, but by another law, it would not be answering questions 80 to 91.

86. The Delegation of Syria supported the observation made by the Delegation of Egypt about the questionnaire. Since the question of exceptions and limitations was extremely important for every country as far as intellectual property policies were concerned, the Delegation sought clarification regarding the contents of the questionnaire.

87. The Delegation of the United States of America expressed its appreciation to the Delegation of Brazil for the effort made in preparing the analysis of the subject of exceptions and limitations. Although the suggestions made earlier would make the questionnaire a better survey, the Delegation expressed its reservations about a questionnaire on exceptions and limitations to patent rights. The Delegation observed that although the questionnaire was already quite long, it did not collect information about the patent rights in respect of which an exception or limitation would be taken. As described by the Delegation of France, the Delegation considered that the questionnaire did not address the legislative framework in which the exceptions and limitations were used, and noted that the Delegation of the Republic of Korea had made a similar point in respect to plant patents. In its view, without that background information, the usefulness of that questionnaire would be limited. It expressed its belief that a more comprehensive study would be helpful to enable all members to use the results of the study for questionnaire, and would meet the objective of Development Agenda recommendations 37 and 38. The Delegation stated its understanding that the three-step approach outlined by the Delegation of Brazil had not been adopted at that time. The Delegation expressed its willingness to seeing further revisions to the questionnaire and to contributing to the revised document.

88. Referring to the intervention made by the Delegation of El Salvador, the Delegation of Brazil observed that, according to its understanding, each section of the questionnaire had a specific question on legislation and a different question on case law.

89. The Delegation of Switzerland supported the statement made by the Delegation of the United States of America. It expressed its belief that it was important to complete a revised version of the questionnaire. The Delegation welcomed the possibility to continue contributing actively to finalize a revised version of the questionnaire which should take into account its questions and comments. The Delegation suggested that once the final version was adopted, the SCP decide on a timetable for delegations to supply the full replies. In that manner, the Delegation was of the view that a useful number of replies would be received and would give rise to a solid basis for answers to the questionnaire.

90. The Delegation of Japan observed that, listening carefully to the suggestions and comments to allow the questionnaire go forward, it felt that more time was needed to discuss the questions. The Delegation therefore expressed its wish to work on the revised questionnaire in the future. The Delegation shared the point made by the Delegation of the United States of America, and noted that when dealing with exceptions and limitations, it would be very useful to know the starting point, *i.e.*, the general rule underlying the exceptions and limitations.

91. The Delegation of Hungary, speaking on behalf of the European Union and its 27 Member States, supported the proposal made by the Delegation of the United States of America.

92. The Delegation of Brazil noted that it had understood the intervention made by the Delegation of the Republic of Korea differently from that of the Delegation of the United States of America. It had understood that the Delegation of the Republic of Korea suggested providing specific provisions in the treaties to which the exceptions related. The Delegation considered that suggestion as non-problematic, however, it was concerned about the time the Secretariat would need to revise the questionnaire, to circulate it to the delegations, and the time

delegations would need to fill in the questionnaire. In its view, a complete document would be available before the next session of the SCP.

93. The Delegation of the United States of America clarified that its focus was on the underlying patent law, the law that set forth the conditions upon which a patent would be granted and the rights that were associated with it. In its view, without an understanding of the starting point, it was not possible to understand what would be taken out of the rights.

94. In response to the query made by the Chair, the Secretariat noted that, if the SCP so decided, a revised version of the questionnaire could be distributed before the next session.

95. The Delegation of Switzerland expressed its wish that the questionnaire would be re-examined at the next meeting, based on the modifications to be made. The Delegation noted that it was a procedure that had been followed in many Committees when questionnaires had been drafted.

96. The Delegation of Chile observed that it was certainly possible for the Secretariat to circulate a revised draft before the next session, and it would probably also be possible to have the responses by the next meeting. The Delegation cited the precedent of the Standing Committee on Copyright and Related Rights (SCCR) where a similar questionnaire had been drafted with even more questions than contained in the present document. The deadline that the members gave themselves for the answer was around four months, and the Secretariat had needed a month or a month and a half to analyze the responses and to issue a document. The Delegation considered that it had been a perfectly reasonable period of time to work and to move forward with the subject.

97. The Delegation of Denmark questioned whether the questionnaire should be sent out and responses should be collected rather than spending more time on the details of the different questions. In its view, there was always the opportunity of sending out new questionnaires if some questions had not been answered sufficiently.

98. The Delegation of Japan stressed that it rather preferred to have a second look, because without knowing the contents of the revised questionnaire, it could not guarantee answers. The Delegation considered that a revised questionnaire should be received from the Secretariat well in advance of the next session so that the questionnaire could be analyzed prior to the next SCP meeting and substantive contributions could be made to the discussion at the next session.

99. The Delegation of the United States of America supported having an opportunity for a second look at the questionnaire. It observed that, in the past, such as in the Standing Committee on Trademarks, Industrial Designs and Geographical Indications (SCT), there had been a lot of confusion as to the meaning of some questions and thus, some of the survey results had been less than valuable. The Delegation further noted that if the final questionnaire was available in 2012, it would be possible to issue it in Arabic, which would allow obtaining even a more comprehensive response to the questionnaire.

100. The Chair suggested the following timetable taking into account the need to conduct inter-agency consultations within each government due to the breadth of the scope of the questionnaire: (i) to ask the Secretariat to go as expeditiously as possible to revise the questionnaire; (ii) to distribute the revised questionnaire electronically to all the delegations for comments within a deadline; (iii) to revise again the questionnaire based on the comments received; and (iv) to present the finalized draft to the next meeting of the SCP and to distribute it virtually the next day to the offices with a 6-month deadline.

101. The Delegation of Brazil considered it too late to start receiving the answers before the SCP a year later limited and punctual. The Delegation was of the view that the Secretariat could revise the questionnaire in a month, circulate it to delegations, give the deadline suggested by the Chair for further revision, and that in two months, the final version of the questionnaire could be ready.

102. The Delegation of Switzerland, referring to the timetable suggested by the Delegation of Brazil, observed that more time would be needed in the next session of the Committee to analyze the questionnaire, since the revision by the Secretariat would obviously need to be rebalanced. The Delegation noted that there would be no time to respond before the next session of the SCP, even if the revised questionnaire was received before the next session.

103. The Delegation of India observed that there had not been too many comments made by delegations on the questionnaire, which was an indication that there were not many substantive or fundamental difficulties delegations had on the questionnaire. In its view, there was nothing like a perfect questionnaire. The Delegation raised the question as to whether it was possible for the Secretariat to provide a revised version within two or three days, so that the revised questionnaire could be revisited during the current SCP session.

104. The Chair stated that the Secretariat was prepared to do its best to revise the questionnaire over the next couple of days.

105. The Chair expressed his wish to move forward, if possible, on the basis of consensus.

106. The Delegation of India shared the view of the Chair that the questionnaire would not be adopted without consensus. It noted, however, that the Committee could revisit the revised questionnaire during this session, and only if there was consensus, the Committee would adopt it, and hopefully by the next session, responses would be available to the Committee.

107. In the absence of disagreement, the Chair stated that the Committee agreed to move forward as proposed by the Delegation of India.

108. The Secretariat submitted a revised Questionnaire on Exceptions and Limitations to Patent Rights (document SCP/16/3 Rev.) to the Committee for its consideration.

109. The Delegation of the Republic of Korea reiterated its request for the addition of references to provisions of international treaties that provided for exceptions and limitations. Although the Delegation recognized the addition of new paragraph 2 in the revised document for information purposes, the Delegation requested the provision of the relevant international treaty provisions either under each section of the questionnaire or as a separate document.

110. The Secretariat explained that one should be extremely careful in linking any exception or limitation to any provisions of international treaties, in particular, when those international treaties were not administered by WIPO. The Secretariat clarified that it was not in a position to give any interpretation of international treaties. The Secretariat considered that, the inclusion of certain provisions in a list might not be agreed by all delegations.

111. The Chair also noted that assuming whether or how answers to the questionnaire did or did not comply with provisions of a treaty was not the intent of this questionnaire.

112. The Delegation of Brazil expressed its agreement with the Chair's statement. Referring to the proposal made by the Delegation of the United States of America question 1, the Delegation considered that the objective of the questionnaire was to focus mainly on exceptions and limitations and not exclusions. The Delegation stated that even if exclusions were indeed a very important subject, in its view, they should deserve the same treatment given to exceptions and

limitations. The Delegation therefore considered that exclusions would deserve a questionnaire of their own, and suggested removing the corresponding part specific to the exclusions from question 1.

113. The Delegation of the United States of America considered that the part referring to exclusions was an important part of question 1, because it would give a baseline of what rights were granted in the various Member States and from which those exceptions and limitations were applied to. The Delegation was of the view that if there was an exclusion from patentable subject matter, there would be no need to provide an exception addressing the same excluded subject. The Delegation therefore considered that providing a listing of the exclusions could give the Committee an idea as to why there might be no exceptions based on that same subject matter.

114. The Delegation of Brazil specified that, in its country, there were exclusions and exceptions on the same subject, because they might apply differently depending on the case. The Delegation stated that a further treatment of the issue of exclusions should not be precluded through the adoption of a very simple question. The Delegation proposed treating the subject of exclusion in a broader and more extensive way, in a different place. The Delegation therefore stated that it could go along with question 1 as drafted, if a footnote saying that the listed exclusions were not intended to be exhaustive, and that the right to propose a questionnaire or another study on exclusions at a later stage would be reserved. The Delegation proposed that another questionnaire on exclusions be prepared for the next session of the SCP.

115. The Delegation of the United States of America stated that in order to move forward and maintain the flexibility that many delegations had shown, it agreed with the proposal made by the Delegation of Brazil to introduce a footnote indicating that that question was intended to be non-exhaustive.

116. The Delegation of Switzerland, on a provisional basis, stated that taking into account the already significant scope of the existing questionnaire which could take long time to complete, the Committee had to reflect whether it was necessary at that stage to embark for a second questionnaire on exclusions.

117. The Delegation of Denmark expressed the assumption that after receiving the results of the questionnaire, the Committee would need to launch a new questionnaire. In the view of the Delegation, the Committee should have an opportunity to look at the responses to the first questionnaire review the missing aspects in the questionnaire and take an overall look on it.

118. The Delegation of Spain stated that the details included in the questionnaire might prove a little problematic. Therefore, it supported the suggestion made by the Delegation of Denmark that it was first necessarily to go on to a conclusion which could be drawn from the questionnaire and then to look at the possibility for a second questionnaire, as proposed by the Delegation of Brazil. In its opinion, there was no need to further delay the submission of the questionnaire to Member States. The Delegation suggested that the situation on the second questionnaire should be looked at based on the results of the first questionnaire to be received for the next session of the Committee in December 2011. However, the Delegation noted that it might had been appropriate to set the same deadline for the questionnaire as the deadline set for patents and health issue as well as quality of patents so that all three deadlines were the same, taking into account the need for translation of the responses to the questionnaire.

119. The Delegation of Brazil, on the issue of having a new questionnaire on exclusions, referred to the statement made by the Delegation of the United States of America that had mentioned that in order to work on exceptions it would had been useful to know the exclusions. It was understood by the Delegation that the idea of having a specific questionnaire on



exclusions was based on the fact that the question suggested by the Delegation of the United States of America would not provide the Committee with thorough analysis of the exclusions. Noting that such a questionnaire may require a lot of work, the Delegation stated that the footnote would clarify that the possibility of a questionnaire on exclusions was still on the table of the Committee for future discussion. Further, the Delegation supported the suggestion made by the Delegation of Spain that the first results of the questionnaire and its analysis by the Secretariat would be available to the Committee at its next session.

120. The Delegation of India supported the suggestion made by the Delegation of Spain that the Committee would have a first reading of the input to the questionnaire at the next session in December. Further, the Delegation endorsed the concerns expressed by the Delegation of Brazil about including exclusions in the questionnaire in a rather restrictive manner without giving a fair treatment that the subject “exclusions” would deserve in a questionnaire. Since the question called for the provision of the source of exclusions as well as citing available case law or interpretative decisions, any answer given to such a question, which was only one question about exclusions in the whole questionnaire, could present a scudded picture. The Delegation noted that it would prefer that the present questionnaire would focus on exceptions and limitations, as suggested in the title. Nevertheless, it agreed to look at different flexible options.

121. The Delegation of Norway expressed its hesitation as to whether the Committee would get quality answers within the suggested time limit, as the Committee was getting ready to embark upon a lot of ambitious work between current and the next session. The revised version of the questionnaire included the proposal from the Delegation of India to elaborate references to legislative history, parliamentary debates, judicial decisions which might present difficulties for Member States to respond with high quality until the next session.

122. The Delegation of Japan requested clarification on the common practice of WIPO on the deadline for the kind of questionnaire that was under consideration in the SCP. Should such practice be six months and the Committee adopt that approach, the Delegation was of the view that all the issues discussed at the SCP should have the same time limit of six month, which may not be the intention. In addition, the Delegation wished to reiterate that the questionnaire was very voluminous requiring sufficient time for each country and its Offices to respond.

123. The Delegation of Chile expressed its satisfaction with the modification made in Section X of the questionnaire, reflecting its comments. In relation to the query made by the Delegation of Japan on the common practice of WIPO to set a deadline for the questionnaire, the Delegation noted that in the framework of the SCCR, the deadline for the questionnaire on exceptions and limitations to copyright had been set to be four months, the Secretariat had prepared a document based on the responses within two months, and the whole process had taken six months. Referring to the part of the questionnaire added by the Delegation of the United States of America on exclusions, the Delegation noted that, in the Spanish version, the words “all exclusions” needed to be changed for “any exclusions” to correspond to the English version of the questionnaire, which should reflect the point in the footnote that the question was of a non-exhaustive nature.

124. The Delegation of Switzerland supported the statements made by the Delegations of Japan and Norway as, in its view, it was important to provide sufficient time for receiving full responses to the questionnaire from Member States and in sufficient quantity.

125. The Delegation of Spain, referring to the interventions made by the Delegations of Japan and Norway, stated that, while the Delegation understood the reservations made by those Delegations in relation to the deadline, one should not forget the proverb which stated that perfection was an enemy of the good. The Delegation expressed its concern that, if too long time was given to the provision of responses to the questionnaire, the provided information might get outdated. The idea behind the questionnaire was to receive a broad picture on the

subject matter discussed in the questionnaire and, as it had been stated by the Delegation of Denmark, another improved questionnaire could follow. Thus, the Delegation concluded that a six month period for completing the questionnaire would be reasonable.

126. The Delegation of Brazil agreed with the arguments put forward by the Delegation of Spain. Further, the Delegation pointed out that the French version of the questionnaire should also be corrected in line with what had been proposed by the Delegation of Chile. In particular, the Delegation stated that the words "*toutes les exceptions*" should be corrected in order to correspond to the footnote which clarified that the exceptions were of non-exhaustive nature.

127. The Delegation of India supported the proposal made by the Delegation of Brazil.

128. Concerning the possibility of having a separate questionnaire on exclusions, the Chair asked the Delegation of Brazil whether it would be acceptable if the footnote clarified that the probability of having another questionnaire was reserved, and the next session of the Committee would decide whether to go forward and prepare a questionnaire on exclusions.

129. The Delegation of Brazil agreed with the proposal made by the Chair that the issue would be included in the agenda of the next session and that at that session the Committee would decide on the possibility of having another questionnaire.

130. The Delegation of France expressed its reservations in relation to the Chair's proposal. The Delegation stated that it would prefer to wait for the results of the first questionnaire before moving forward on that issue.

131. The Delegation of Switzerland stated that it supported the statement made by the Delegation of France. In particular, once the results of the questionnaire were provided, the Committee could then decide whether there were other points that it should look at in greater depth in another questionnaire. In its view, it was not necessary to decide at the sixteenth session whether the Committee should discuss the possibility of having a questionnaire on the exclusions at the next session. In any case, the Delegation was of the view that questionnaires on any subject could be reposed to the next session depending on the need.

132. The Delegation of Brazil stated that, in its understanding, the Committee was not agreeing on having another questionnaire at the sixteenth session, it was agreeing on having the discussion on the possibility of having another questionnaire at the next session.

133. The Delegation of Denmark reiterated that it would be natural to have the outcome of the questionnaire to decide on the further steps.

134. The Delegation of Brazil noted that there were two separate things on the table. One was related to the questionnaire on exceptions and limitations and, in particular, the review of results of that questionnaire. Another issue was related to the proposal of the Delegation of the United States of America that requested more clarity on exclusions, which the Delegation fully supported. According to its opinion, the question was when the Committee would be doing that. In its view, that should be discussed at the next session. If that discussion could take place under the agenda item on the follow-up to the questionnaire, the Delegation did not have any objection.

135. The Delegation of Spain supported the proposal made by the Delegation of the United States of America that touched upon the issue of exclusions. In its opinion, that would mean that there should be another questionnaire different from the questionnaire on exceptions and limitations. The Delegation considered that the essential point at that stage was to decide when to submit the questionnaire. If Member States agreed to discuss the results of the questionnaire at the next session in December, the discussion on those results could lead to a new

conclusion. In its view, there was no need to discuss issues which might take place in the future.

136. The Delegation of Hungary stated that it joined the reservations expressed by the Delegations of France and Switzerland.

137. The Delegation of Norway stated that the only reason that it had hesitation towards the proposed deadline was because it was always concerned with quality and the usefulness of the whole exercise. However, in the spirit of trying to find a solution, the Delegation agreed with other delegations who had proposed to have some kind of temporary results ready for presentation at the next session to move along with.

138. The Delegation of Switzerland stated that the discussions on the procedure were very artificial because the subject was already on the agenda for the next session without depending on the deadline fixed. It considered that the Committee would start looking at the replies at the next session and examine whether something else should be done and whether there was a need for an additional questionnaire. Thus, in its opinion, there was no need to add items to the agenda of the next session at that stage as those issues would be taken up naturally. The Delegation of Switzerland stated its understanding that the next session's agenda would contain an item entitled "exceptions and limitations", which would relate to the questionnaire. Noting that, in its view, it was premature to start putting the items on the agenda of the next session, the Delegation agreed with other delegations that had stated that the need for a questionnaire on exclusions should be decided on the basis of the replies to the questionnaire on exceptions and limitations to the rights. Thus, the Delegation concluded that the item on the agenda for the next session should be exceptions and limitations and the questionnaire.

139. The Delegation of Chile suggested that one way of resolving that issue without adding any item to the agenda would be to describe the views expressed on the issue in the report of the current session. In other words, the report would state that some delegations expressed their interest in discussing, at the next session, a possible questionnaire on exclusions. In that way, according to the Delegation, the outcome of the discussion would not be prejudged.

140. The Delegation of Brazil stated that the suggestion made by the Delegation of Chile was acceptable.

141. The Delegation of Switzerland, referring to the proposal made by the Delegation of Chile, noted that if the issue was just the reflection in the report of the issues discussed, delegations would be free to make any proposal for the discussion at the next session, and at that session, the Committee would take a decision on a new questionnaire on exclusions, if proposed. The Delegation was of the view that agenda item 7 should be kept as it was.

142. The Delegation of Chile clarified its proposal by stating that the Summary by the Chair would include a sentence stating that some delegations expressed their interest in having a discussion in the future on a new questionnaire on exclusions.

143. The Chair summarized the discussions on that agenda item and asked delegations what the deadline to answer the questionnaire should be.

144. In response to the query made by the Delegation of Japan, the Chair stated that his understanding was that four months for reply plus two months for analysis had been suggested by the Delegation of Chile.

145. The Secretariat explained that there was no typical deadline for responding to a questionnaire and analyzing the responses. The Secretariat considered that six months for

responding to the questionnaire might be appropriate due to its complexity, however, the Committee was absolutely free to decide on the deadline.

146. The Delegation of Spain posed a question to the Secretariat in relation to the time needed to prepare a document once the responses or majority of the responses had been received.

147. The Secretariat noted that the answer would depend on the responses received, *i.e.*, the number and the volume of responses, as well as on the type of document the Committee wished to have. If the responses were to be simply compiled and published, it would not require much time. However, if the Committee requested the Secretariat to analyze responses, more time would be needed.

148. The Delegation of Panama stated that, in its legislation, the provisions on exceptions and limitations were clearly stated. However, the questionnaire requested including case law. In its view, the inclusion of the case law would make it more complicated, since in the Roman system, jurisprudence did not carry the full force of law.

149. The Delegation of Germany asked the Delegation of India whether the wording “where possible” in question 6(b) meant that the question could be answered in a very broad or a narrow way, or whether it could be left with no answer at all.

150. The Delegation of India explained that the idea behind that language was that the first part of the question, which was related to public policy objectives for providing the exception, would be answered by everyone because there was a reason behind an exception. The Delegation noted that in the second part, if there was no record in the legislative history or the parliamentary debate or judicial decision, the country could indicate that, and if there was some record on the reasoning behind the exception, the country could elaborate that record.

151. The Delegation of the United States of America stated that since the purpose of the questionnaire was to facilitate the exchange of information, it would not expect the Secretariat to do any real analysis, but compiling the information. However, to build upon what the Delegation of Spain had stated, the Delegation was of the view that the Secretariat should not start compiling the information and creating a new document if no statistically significant number of responses from developed, developing and least developed countries (LDCs) had been received. The Delegation expressed its concern about considering a questionnaire result if it turned out that it was too difficult for countries to meet the set deadline.

152. The Delegation of France stated that, in view of the various statements made, the information given by the Secretariat and the length of the questionnaire, it would be difficult to request countries to respond to all those questions and, in addition, to have an analytical response from the Secretariat within a period of six months. The Delegation stated that the compilation of answers and their in-depth analysis would be different matters.

153. The Delegation of Spain suggested that the Committee set a deadline of four months for the responses from those States which could or wished to respond. It stated that those compiled responses could be looked at the next session of the Committee without any further debate about timing, and that Member States that would not be able to respond or did not wish to respond within the deadline would not be required to do so.

154. The Chair stated that another way of going forward would be to present simply the responses to the questionnaire to the next session, giving a long period for responding to the questions. The Committee might decide what type of analysis it would request from the Secretariat taking into account the number of responses received and the extent of information contained in the responses.

155. The Delegation of Denmark support the Chair's proposal. In its view, giving Member States as long time as possible to respond would also go along with what had been suggested by the Delegations of Spain and the United States of America. The Delegation agreed that the responses received would be compiled without any analysis, and that that could be done at a later stage. The Delegation expressed its hope that the Committee would secure enough time to respond so that many responses would be received and that the quality of responses would be high.

156. The Delegation of the Republic of Korea requested the Secretariat to further elaborate on the concept of farmers' use of patented inventions and breeders' use of patented inventions, which was found in footnote 2.

157. The Secretariat stated that it would add further explanation in the final version of the questionnaire.

158. The Delegation of Brazil sought clarification as to the exact deadline for answering the questionnaire in order for the answers to be translated and compiled in a single document.

159. The Chair noted that the Secretariat had indicated a deadline of September 30, 2011, which would be roughly two months before the next meeting.

160. The Delegation of Denmark supported the suggestion made by the Chair, which would give the Committee the maximum time for responding to the questionnaire.

161. The Delegation of Spain supported the suggestion made by the Chair.

162. The Delegation of India supported the suggestion made by the Chair. The Delegation sought clarification as to the status of discussions on a follow-up questionnaire to be taken up at the next session.

163. The Chair stated his understanding that the Committee had reached the consensus that the Chair's summary would reflect the fact that some Member States had expressed interest in having a follow-up questionnaire on the issue of exclusions.

164. The Delegation of Norway supported the suggestion made by the Chair, and renewed its support to move forward with the questionnaire on exceptions and limitations with as many and as comprehensive answers as possible.

165. The Chair presented his suggestion to the Committee on the future work relating to the topic under discussion. After some discussion, the Committee agreed that:

(a) This topic will remain on the agenda of the seventeenth session of the SCP.

(b) The Secretariat will invite Member States to submit written answers to the questionnaire (document SCP/16/3 Rev.) as amended and adopted at this session, by September 30, 2011. The questionnaire will contain a footnote in relation to the second part of Question 1 clarifying that that question does not imply an exhaustive treatment of the issue of exclusions from patentable subject matter. The Committee will discuss, at the next session, possible future steps, such as requesting the Secretariat to prepare an analysis of the answers, and some Member States expressed the wish to also discuss preparing of another questionnaire specifically addressing exclusions.

(c) The Secretariat will post the answers received on the SCP electronic forum, and will compile them in a document to be submitted to the next session of the SCP.

## AGENDA ITEM 8: QUALITY OF PATENTS, INCLUDING OPPOSITION SYSTEMS

166. The Chair gave the floor to the Delegation of Canada to present document SCP/16/5.

167. The Delegation of Canada, speaking on behalf of its delegation and the Delegation of the United Kingdom, provided Member States of the Committee and observers with an account of the genesis of the proposal set out in document SCP/16/5. The Delegation noted that past efforts of the Committee to engage in a viable work program had been stymied by a lack of consensus among the membership. Following an unfortunate hiatus, in its view, the Committee had been able to build upon a renewed spirit of understanding and compromise in recent sessions and had successfully overcome differences in agreeing on areas of broad interest for future work that balanced the interests of all. Recalling the mandate of the SCP “to serve as a forum to discuss issues, facilitate coordination and provide guidance concerning the progressive international development of the law of patents”, and recognizing that all Member States, regardless of their level of development, had national patent legislations, administered by national patent offices, that were granting domestic patents rights, at the previous session of the SCP, Member States had agreed that the time had been ripe to engage in a discussion within the Committee on how national patent regimes, including IP offices, could enhance the quality of granted patents. The Delegation further stated that the Committee had studied and discussed a wide range of issues that in one way or another dealt with important aspects of the patent system and its relationship with innovation as a key driver to economic prosperity. The Delegation considered that, irrespective of the utilization of various exceptions and exclusions or sovereign definition of patentability, the Committee could agree on the importance of ensuring that patent officials granted patents that met the standards that fostered respective national IP policy objectives. In its view, national patent systems must seek to achieve an appropriate balance of interests between innovators, third parties and the public, if those systems were to serve their purpose of promoting innovation and fostering technological, social and economic development. The Delegation expressed its belief that the SCP had an enviable mix of both policy and technical expertise that enabled them to focus on the work that patent offices did to promote quality patents, and to benefit from the experience of others. The Delegation further said that most importantly, the proposal was created with a mindset to focus the substantive expertise within the SCP on work that would produce tangible benefits to both developed and developing countries by creating a framework for enhancing patent quality that furthered the goals of the Development Agenda, including recommendation 10 - Capacity Building for Patent Offices, and recommendation 11 - Technical Assistance. The Delegation noted that the proposal contained in document SCP/16/5 was meant to guide interested and willing Member States in their future work on the agenda item “Quality of Patents, including Opposition Systems”, by setting out a broad framework, consisting of three foundational components that would encourage the creation of synergies, the leveraging of existing work tools, and the sharing of best practices. The first element “technical infrastructure development” was meant to encompass the leveraging of existing information technology mechanisms to enhance examination resources and to promote improved quality by providing access to new sources of information. The Delegation was of the view that the SCP contribution to that element would be to encourage delegations, as well as the International Bureau, to share with the membership the technological tools that they had developed and implemented, and detail how those tools were effective in enhancing quality. The Delegation stated that they expected that work under that element would identify gaps in existing work tools or recognize a need for new mechanisms. While the membership of the SCP had many talents and wide-ranging competencies, the Delegation did not believe that IT development was the most efficient use of the Committee’s resources and any such projects would be handed off to an interested national office or the appropriate WIPO body, with well-elaborated requirements and an expectation that progress would be shared with the Committee. Referring to the second component of the proposal which was “information exchange”, the Delegation explained that it was intended to help offices gain a greater

understanding of the benefits that quality in patent office processes could have upon the patent system at large. It was envisioned that the primary focus of that element would be an information exchange between offices on how quality assurance of administrative processes and operational issues led to improved quality of granted patents. There would also be the opportunity for offices to collect views and experiences from their users for future consideration by the Committee. The Delegation stated that under the third element “process improvement”, delegations might wish to identify measures that their own offices had implemented to improve the patent granting process, taking into account respective levels of development, resource limitations, and flexibilities available under international agreements. Discussion might focus on national search and examination processes but should also give due consideration to processes relating to protest and opposition (both pre- and post-grant), and techniques utilized by offices to enhance the quality of the documentation submitted to the office. The Delegation stated that in the Canadian context, there was an expression that was frequently used in consultations with the agent community, that being “Quality in, Quality out”. Those three components had been considered by Canada and the United Kingdom to be fundamental aspects of quality improvement and to represent a logical push-off point for the Committee’s work on patent quality. The Delegation encouraged other delegations to submit individual work elements within that framework with a view to achieving near-term results and gains where possible. In its view, by making step-wise progress initially, the Committee could build momentum towards greater gains in the future. The Delegation recalled that at the previous session of the SCP, there had been some misunderstanding amongst certain delegations, in particular those who had less experience in the workings of the PCT system, over the fact that the issue of quality was being examined by the PCT Working Group and, in their estimation, consideration by the SCP of the topic would be duplicative. It had been explained that the discussion on Quality within the PCT dealt strictly with the international phase of the PCT process as carried out by the 16 offices that functioned as International Authorities, and that the work within the SCP would be complementary. The Delegation observed that there were significant differences between the work done by an International Authority and the decisions taken by a national patent office, the most important distinction being that the end result of the PCT international phase was a search report and a non-binding opinion on patentability criteria as set out under the provisions of the treaty. The International Authorities themselves did not grant patent rights but simply furnished helpful information to national offices to utilize as they saw fit within the provisions of their own national legislation. The Delegation noted that, in fact, it would be rare that work on quality issues within the PCT context be directly transferrable to national offices. The Delegation further recalled that in the end, it had been agreed at the previous session of the SCP by the Member States that Quality of Patents, including Opposition Systems, was a topic worthy of detailed consideration by the Committee. With that proposal, the Delegations of Canada and the United Kingdom hoped to establish a general framework for future work on Quality of Patents, including Opposition Systems, that would resonate with all delegations, which would encourage delegations to work together constructively and cooperatively and which would focus the work of the Committee and culminate in concrete actions for the benefit of all. The Delegation expressed its belief that the proposal was in keeping with the mandate and core expertise of the Committee and that it was inclusive of a broad range of interests of Member States at varying levels of development, as well as the interests of users of the patent system and society in general. The Delegations of Canada and the United Kingdom welcomed the opportunity to meet with interested delegations on a bilateral/plurilateral basis to address any questions. In conclusion, the Delegation welcomed the opportunity to receive further feedback on specific initiatives that could fall under the framework of the proposal.

168. The Delegation of Norway expressed its support for the proposal of Canada and the United Kingdom for a work program on quality of patents. The Delegation was of the opinion that all the proposed lines of work for the Committee should be pursued and would be beneficial to all involved in the patent system. The Delegation stated that high quality patent processing remained of essential and strategic importance to its national industrial property office. The

office was always looking at ways to further improve its handling processes and the quality of the ongoing search and examination work. The Delegation expressed its belief that, in order for the patent system to deliver according to its purpose, patents granted must be robust and of high quality, which would involve dedication to a wide set of tools and procedures and a constant focus on improvement. As regard quality systems for processing and experiences on how to conduct quality reviews, the Delegation expressed its conviction that information exchange between Member States was a very practical and useful approach to further the common goals in the Committee. In the Norwegian Industrial Property Office, the application process, as well as commercial services were covered by a quality management system. The system was certified by ISO 9001 and aimed at ensuring timely, uniform, high quality case handling. The basic tool for quality management was a web-based system which allowed all employees to have the opportunity to comment on documents and to suggest improvements and report on deviations. The Delegation noted that those features were very dynamic and easy to use. The Delegation further stated that its office also conducted regular work product reviews in all technical fields. That was done by a highly skilled staff to review the compliance rate and to take measures needed to ensure proper quality. Referring to the third element of the proposal, the Delegation considered that it was important to build on each other's experience and to focus on knowledge sharing to increase national capacities for patent processing. Further, the Delegation expressed its strong support for the proposal for identifying ways to improve search and examination processes. The Delegation observed that in the everyday work of the examiners, developing and sharing of search strategies was essential. The Delegation was of the view that it could be a good idea for the Committee to look at ways of increasing the sharing of examiners' search strategies in national offices, which could involve both sources of search and search words used. In conclusion, the Delegation suggested that the Committee consider, for instance, finding practical mechanisms for a better exchange between national offices on search strategies and the search and examination process.

169. The Delegation of the Republic of Korea expressed its full support for the proposal made by the Delegations of Canada and the United Kingdom on the subject of quality of patents. The Delegation observed that the current problem of quality of patents was not domestic only but had become an international issue. The Delegation noted that there was a duplication of applications for patents worldwide, which meant that the same invention was being filed with different national patent offices around the world, which caused a duplication of the examination workload. In its view, that in turn made the quality of patents worse day by day. The Delegation recalled that there had been several international work programs undertaken to solve that problem such as the Patent Prosecution Highway (PPH) and the PCT reform. The Delegation proposed a fourth component of the work program on the issue of quality of patents for future consideration, which was international work sharing as a possible solution to solve the problem of duplication of patent applications worldwide. As an example, the Delegation referred to the PPH and other regional operational schemes for sharing work among patent offices.

170. The Delegation of Denmark expressed its full support for the proposal made by the Delegation of Canada. The Delegation shared the view that a high quality of patents was paramount for the well-functioning of the patent system, thus fulfilling the economic and social policy of countries. For that reason, the Danish Patent and Trademark Office had established a quality management system, which was ISO 9001 certified system. The system provided applicants and the public with the certainty that the Danish patent process was transparent, patents products were uniform and met the goals set out by the Danish Patent and Trademark Office. The Delegation further stated that the objectives and goals and how the officers performed were published for the benefit of users. It explained that the quality management system had built-in mechanisms to ensure continuous process and product improvement to secure the deadlines for delivering the products. The Delegation added that the entire quality system was integrated in the ISO system to ensure that all actions taken by the office and any documentation related to the individual cases were publicly available, free of charge, by an online file inspection system. Concerning the activities outside the quality management system,



the Delegation noted that its Office benchmarked with patent officers on, for instance, prior art searches and participated in different work sharing arrangements in order to gain experience for improving the quality of work. Summing up, the Delegation supported the exchange of information and experiences on the three main components outlined in the proposal.

171. The Delegation of India, speaking on behalf of the Development Agenda Group, stated that the question of patent quality was an important issue for developing countries. It expressed its appreciation for the complexity that the term posed in relation to its breadth and, therefore, the Delegation expressed its belief that it was important to define what was meant by the term "patent quality". In the view of the Delegation, the quality of patents was linked to compliance with the three criteria for patentability set out under Article 27.1 of the TRIPS Agreement, namely, novelty, inventive step and industrial applicability, and as defined in the various jurisdictions. Noting that the concept of quality of patents varied from country to country, the Delegation observed that the quality of patents was primarily determined by the domestic law of each country. In other words, the issue related to the application of the highest threshold for the patentability criteria, which were prescribed under the domestic law. The Delegation noted that often, patent offices faced various constraints in applying the domestic law effectively when examining patent applications. Therefore, the quality of patents depended on the ability of the patent office to apply the domestic patent law effectively. Hence, quality improvement efforts could not be improved by simply adopting the practice of other patent offices. In its view, such practices would lead to harmonization of patent law practices and would undermine the flexibilities existing in various national patent laws. In that regard, the Delegation noted that the question of quality of patents was a much broader concept than that referred to in the joint proposal of Canada and the United Kingdom. The Delegation therefore requested more clarity as to the meaning and content of the term "patent quality" as used in the proposal. According to the view of the Delegation, a necessary fundamental first step in considering a work program on that issue within the SCP should be to focus on developing a commonly agreed concept and definition for the term "quality of patents". Part of that exercise would be to identify what the problem of low quality patents was and what was the best way to resolve it in different jurisdictions. Referring to paragraph 3 of the proposal which stated that the SCP was in a position to make a meaningful contribution to achieving positive, concrete results related to the Development Agenda, the Delegation welcomed such a spirit. However, it expressed its wish to also caution against duplication of efforts in the organization. In particular, the Delegation noted that work of a similar nature covering the three components of the proposal was already on the way in the framework of the Development Agenda projects, the PCT system, particularly its Working Group, as well as in technical assistance and capacity building programs of the Secretariat with a number of IP offices. Therefore, the Delegation wished to request the proponents to clarify how the present proposal was different from efforts already on the way in those other fora in WIPO, and how the other processes linked up to the present proposal. Referring to paragraph 5 of the proposal, which referred to the aim of the patent system, the Delegation highlighted that the key function of the patent system was to contribute to the transfer and dissemination of technology. In its view, paragraph 6 of the proposal appeared to place the burden of quality solely on the shoulders of patent officers. It believed that the judicial system, among others, also had an important role to play in that regard. Further, according to the Delegation, paragraph 7 of the proposal pointed to a limited link between the concept of patent quality and the Development Agenda, portraying solely those elements of building capacity of patent offices and providing technical assistance to such offices as needed. In its view, other clusters of the Development Agenda including, in particular, Cluster B on norm-setting, flexibilities, public policy and the public domain, and Cluster C on technology transfer, information and communication technologies and access to knowledge were also relevant. With regard to the first component of the proposal on technical infrastructure development, the Delegation appreciated the importance of having a good technological infrastructure to enhance the capacity of patent offices to access information to examine patent applications. However, in the proposal, the focus on technical infrastructure development through IT systems to enhance existing examination resources could be seen as being similar to earlier proposals for work

sharing among IP offices. Under such a mechanism, in its view, many developing countries with insufficient resources for processing patent applications would be encouraged to rely on the work done by other offices, particularly those in developed countries. It observed that patent offices in developed countries had such mechanisms and cooperation networks with other patent offices in place, which would facilitate patent applications to be processed on fast track, in an office of second filing, based on the work of the office of first filing. In the view of the Delegation, the idea of work sharing could be problematic, because any process to reduce the burden of patent offices through such work sharing at a functional level could run the risk of undermining the flexibilities existing in the domestic patent law at a policy level. In its view, a more appropriate place to start would be to assess the quantity of information available to patent offices to conduct high quality searches and examinations and the extent of access they had to various databases. It therefore proposed to conduct a study on the current state of affairs among the patent offices of WIPO Member States concerning access to information and various databases, including the cost of access to information for patent examination purposes. The Delegation further noted that, in order to enhance the quality of search and examination processes, it should also look at the possibility of providing free or subsidized access to value added databases existing in both the public and private domain in developing countries. With regard to the second component of the proposal on information exchange on quality of patents, the Delegation observed that the proposed information exchange among patent offices on the quality of granted patents was to be based on the feedback of users. The Delegation considered that since, in its view, it was reasonable to expect that patent applicants would provide their feedback from the perspective based on their interests in securing the grant of a patent, users might be interested in securing faster and efficient grant of patents, for example, by reducing duplication and encouraging reliance on the work of other offices. Thus, in its view, that review could amount to the review of the processes followed by a particular patent office rather than a review of the quality of the patents granted. The Delegation was of the view that its concern was also born out by the focus of the third component of the proposed work program on improving search and examination processes. The Delegation noted that the function of the patent offices was not to serve the users of the patent office who might seek more rapid and efficient processing of patent applications leading to the quick award of patents, rather than high quality search and examination processes that would ensure granting high quality patents and avoiding frivolous patents. Therefore, in its view, the focus of information sharing should be to make arrangements to access the widest possible prior art databases as well as the decisions of various patent offices including reasons for rejection of patent applications. Finally, with regard to the third component of the proposal on process improvement, the Delegation expressed its support and stated that it was important to place safeguards to improve the quality of patents in order to implement the patentability criteria effectively. The Delegation observed that, often, once a patent was granted, there was no way for the patent office to correct a mistake in a *suo motu* manner. However, acknowledging that such practices nonetheless existed in some jurisdictions, the Delegation stated that it would be important to conduct a survey of such practices and to seek submissions with the aim of providing information to improve the quality of patent examination. The Delegation was of the view that the key problem with the issue of patent quality from the perspective of developing countries was how to prevent evergreening of patents or the granting of frivolous patents. The Delegation stated that it was a known fact that several frivolous patents had been granted in developed countries that made no significant contribution to society. In its view, the real test in that regard for a patent of high quality should be what would be the contribution of the patented invention to society. The Delegation suggested that the SCP should consider the exchange of information between governments on dealing with those issues. It observed that even in developed countries, the government agencies had reported that patents were often used to prevent competition rather than for the advancement of innovation. For example, the European Commission's Pharmaceutical Sector Inquiry Report stated that, in the pharmaceutical sector, patents had been strategically used for the purpose of preventing the entry of generic medicines into the European market. The US Federal Trade Commission had also called for improving the patent system noting that patents had been strategically used to distort competition and could also

deter innovation. Hence, the Delegation suggested that a meaningful discussion on improving the quality of patents also address systemic deficiencies in the patent system. Furthermore, discussions in the SCP should not result in the loss of policy space for countries to regulate their patent regime and implement in practice the threshold level for the sovereign patentability criteria. The Delegation concluded that the deliberations and the work program adopted should not lead to direct or indirect harmonization of patent law or practice.

172. The Delegation of Hungary speaking on behalf of the European Union and its 27 Member States, expressed its agreement with the statement made by the Delegation of Canada that the patent system must function properly and achieve an appropriate balance between the interest of innovators, third parties and the public at large if it was to serve its purpose of promoting innovation and fostering technological, social and economic development. The Delegation observed that the quality of patents was indeed a key aspect of how the patent system should function in order to deliver economic and social policy objectives. The Delegation stated that, as a first step, it supported the work plan for the SCP as proposed by the Delegations of Canada and the United Kingdom consisting of three main components: technical infrastructure development, information exchange on quality of patents and process improvement. Emphasizing that that work program was complementary to what was being done in the framework of the PCT System, the Delegation expressed its belief that the proposal was fully in line with the mandate and core expertise of the Committee taking into account the number of recommendations of the Development Agenda, including, but not limited to, recommendations 10 and 11. The Delegation reiterated that nevertheless, one of the most important aspects of the issue of quality of patents was the adequate application of the patentability criteria, such as novelty, inventive step and industrial application to ensure that patent protection was granted for inventions that were truly innovative and enriched the state of the art. Furthermore, the Delegation was of the view that the quality of patent applications, as well as the quality of the examination and enforcement procedures were of paramount importance to ensure that the whole system was functioning to serve the purposes for which it was designed. Therefore, in its view, the Committee should establish a work program elaborating options, measures and conditions, both legal and practical that would be required to ensure and, where necessary, improve the issuance of high quality patents.

173. The Delegation of South Africa, speaking on behalf of the African Group, noted its satisfaction on the fact that the proposal by the Delegations of Canada and the United Kingdom made references to the Development Agenda recommendations. The Delegation stated that the issue of patent quality was indeed a matter of direct relevance to development, as it related to ensuring the attainment of the objectives of the patent system. However, the Delegation considered that it was open to differing interpretation as to the definition and proper scope of the term "quality of patents". According to the view of the Delegation, the term "quality of patents" related to the satisfaction of the criteria of patentability defined by each country. As such, it was a term whose content would necessarily vary from country to country. Therefore, the African Group expressed its interest in examining the necessary steps to ensure the application of the highest threshold of the patentability criteria in each Member State in accordance with its own domestic law. The Delegation stated that, as such, improving the quality of patents could not be simply a matter of adopting the practice or processes of another patent office. That would simply lead to the harmonization of patent law practices, while not addressing the real issue of quality and, at the same time, compromising patent law flexibilities. In that regard, the Delegation noted that the proposal by the Delegations of Canada and the United Kingdom acknowledged the importance of a high quality of patents granted for a well-functioning patent system. In that context the proposal stated that patent offices played an important role by taking appropriate measures to ensure that patents granted by them met standards that conform to the policy objectives of the patent system. The Delegation further observed that the proposal also suggested that focusing on patent quality was in line with the Development Agenda objectives of capacity building and technical assistance for patent offices. The Delegation expressed its agreement with paragraph 5 of the proposal that stated that an important aspect of the patent

system was the quality of patents granted and that the patent system must function properly and achieve the appropriate balance of interests as between innovators, third parties and the public if it was to serve its purpose of promoting innovation and fostering technological, social and economic development. However, the Delegation stressed that the key function of the patent system was to contribute to the transfer and dissemination of technology. The Delegation stated that the common outlook on the quality of patents should resonate with the need for a balance between right holders and public use and the attainment of public policy objectives leading to promoting innovation and fostering technological, social and economic development and the transfer and dissemination of technology. While appreciating the lynchpin of the proposal, the Delegation, however, drew the attention of the Committee to the following points: first, the Delegation questioned the meaning of the term “quality of patents”. In its view, there was no universal definition or standard for quality of patents. It was not clear to the Delegation how the granting of quality of patents defined in the proposal would deliver economic and social policy objectives as purported in paragraph 5 of the proposal. Second, the Delegation requested clarity on the interface between quality of patents and access to technical infrastructure. In particular, the Delegation questioned whether the lack of technical infrastructure would be the reason for the lack of quality of patents. Furthermore, the Delegation observed that reference to “enhancing existing examination resources” referred to in paragraph 10 was akin to sharing arrangements among IP Offices that had been critically debated in other WIPO fora and, therefore, the Delegation found that issue to be problematic due to variance in substantive law in different countries. As a third point, the Delegation referred to paragraph 11 of the proposal which stated that information exchange on quality of patents was intended to help patent offices gain a greater understanding of the role of quality in patent office processes as they might contribute to the well-functioning of the patent system. The Delegation stated that that information exchange would primarily focus on the narrow question of administrative processes and operations and that the source for that information would be restricted to one set of stakeholders in the patent system, namely, users of the patent office. The Delegation was of the view that that was a restrictive view of the issue of patent quality, which also suffered from a limitation to the view of the patent users that might have different interests from those of the larger public policy aims of the patent system. In that regard, in the view of the Delegation, there was a need to address more fundamental questions, that was, why the patent system was not well functioning, and how the exchange of information would influence the “quality assurance in the grant of patent rights”. The Delegation stressed the importance of understanding the challenges that offices and public policy were facing. Further, the Delegation requested clarification on the intention of paragraph 12 which stated that process improvement was intended to identify ways offices could improve their patent granting processes to ensure an appropriate degree of quality, taking into account resource and other constraints as well as flexibilities provided for under international agreements. The Delegation requested clarification on the flexibilities provided by the international agreements to improve patent granting processes. Further, the Delegation suggested that the Committee exchange information on safeguards introduced to improve the quality of patents and how the patentability criteria in the various jurisdictions were effectively implemented.

174. The Delegation of the Russian Federation stated that the issue of patent quality was extremely important and was of interest not only to patent offices, but also to inventors seeking to protect their creations. It noted that inventors were interested in obtaining a patent which had the broadest scope of rights, but which, at the same time, was protected from challenges by third parties to the greatest extent possible. Similarly, patent offices were interested in reducing labor costs while at the same time enhancing the quality of processes at all stages of work in examining applications and granting patents. The Delegation explained that one specific feature of the organization of work in managing examination quality within the Rospatent was a creation of the Quality Service in 2006 as an independent sub-division for the purpose of enhancing not only the quality of examination of applications for subject matter of patent rights and quality of patents granted, but also of monitoring and creating conditions for the application of uniform approaches in implementing administrative procedures relating to the registration of

the subject matter of patent rights and subsequent transfer of rights. Moreover, as an International Searching Authority, the need to implement a system of quality management conforming to the requirements of the PCT documents had become another significant factor on the issue of quality. The Delegation further stated that the quality control in operation at Rospatent was on two levels, which included internal monitoring implemented directly by the management of examination sub-divisions and external monitoring that was carried out by the Quality Service. One of the fundamental tasks of the Quality Service was developing and implementing measures aimed at creating conditions to improve examination quality. In the first instance, that was a methodical coordination of the work of the management of the sub-divisions of a different level, aimed at improving quality. That work was assigned to the methodology board, which examined controversial methodological issues and drafts of method and technology-related documents in development, which reflected current examination practice. The Delegation noted that the most important aspect of the Quality Service's activity was organizing the trainings. In 2010, the Quality Service had carried out systemic work in monitoring the practice of applying intellectual property legislation, in the first instance by highlighting issues not fully regulated in Part IV of the Civil Code of the Russian Federation, and by developing appropriate clarifications in order to unify the approaches to examining patent applications for inventions and improving examination quality. As a result of that work, clarifications had been made on the content of requests involving claims, which comprised recommendations for regulating the practice of making requests, reducing periods for correspondence relating to applications, and also for improving the quality of examination documents. In order to safeguard the quality of search regarding patent applications for the same applicant's invention, recommendations had been developed by the Quality Service to include in the prior art information contained in the said application the earliest priority date, upon examination of the applicant's subsequent application. The Delegation continued that taking all that into account, the issue of patent quality was very significant for the Russian Federation, since a great number of factors affected the quality of patents granted, including a quality of applications filed, quality of search and examination, an examiner's qualifications, information and methodological support for examiners, provision of access to various information resources, use of advanced technologies in carrying out work and a system for filing objections. Further, the Delegation supported the proposal of the Delegations of Canada and the United Kingdom as set out in document SCP/16/5. In its view, the capacity of patent offices and the level of development of technical infrastructure affected the time taken for, and quality of, search and examination. In turn, information exchange between offices was also essential from the point of view of harmonizing legislation and ensuring uniform approaches to assessing patent quality. The Delegation therefore considered it appropriate to undertake research and to study experiences in each area, *i.e.*, the development of technical infrastructure, information exchange on patent quality and improvement of procedures affecting patent quality. Furthermore, the Delegation supported the proposal made by the Delegation of the Republic of Korea on the inclusion of an additional component concerning the expansion of information exchange between patent offices.

175. The Delegation of Australia supported the proposal made by the Delegations of Canada and the United Kingdom on quality of patents. The Delegation agreed that the patent system should aim to promote innovation that in turn would foster economic and social development. The Delegation stated that granting of high quality patents was an important factor in meeting those aims, and that the proposal provided a good starting point for further discussion on the topic. In its view, there was a great value in the opening of exchange of information in general which would help delegations and IP offices recognize practices and procedures that might be of use in their own system. That could also identify issues which offices might have to respond to in the future and suggested possibilities to deal with those issues. The Delegation informed the Committee that the Australian Office was working hard on various aspects of quality in its processes and products. Stating that the Office had recently introduced a rigorous quality system across IP rights, including patents, the Delegation expressed its willingness to share its experience in those endeavors with interested delegations and offices and the SCP in general.

Referring to the three areas of work that were suggested in the proposal, namely, technical infrastructure development, information exchange and process improvement, the Delegation expressed its belief that they provided a good general framework to work on. In relation to the technical infrastructure proposal, the Delegation suggested that the SCP request information from WIPO on the current activities in that area, possibly including improvement to PATENTSCOPE and Access to Research for Development and Innovation Resources (aRD<sub>i</sub>).

176. The Delegation of Brazil associated itself with the statement made by the Delegation of India on behalf of the Development Agenda Group. Noting that granting high quality patents was one of Brazil's priorities, the Delegation stated that its country welcomed the discussion on quality of patents as being an international searching and examination authority. However, before moving forward in that discussion, the Delegation stressed the importance of agreeing on a clear definition of "quality of patents". The Delegation stated that, without defining that key element, it could not fully assess what was being proposed under information exchange and process improvement components, and whether they were pertinent and adequate to the debate. The Delegation questioned whether the term "quality of patents" in the proposal meant quality of the examination, *i.e.*, the ability of patent offices to verify after thorough examination if the patent application complied with the three criteria of patentability or whether the term referred to the quality of the internal procedures of the patent offices, their operational design or the tools that they use, such as the ISO standards. The Delegation also requested clarity on the meaning of "technical patent law" stated in paragraph 6 of the proposal. In addition, the Delegation sought clarification on what was meant by "quality of the applications filed" stated in paragraph 12 and whether that would include, for instance, sufficiency of disclosure. The Delegation stated further that it could not share the understanding of the Delegation of the Republic of Korea that the term "quality of patents" should include some sort of harmonization of laws. While the Delegation expressed its willingness to engage in the discussion, it stressed the need to know exactly the direction the Committee was heading.

177. The Delegation of Japan expressed its support for the concept described in the proposal made by the Delegations of Canada and the United Kingdom on quality of patents. The Delegation stated that there might be several ways to pursue a higher level of patent quality. Patent granting procedure which included patent examination and opposition procedure gave significant influence on the quality of patents. Therefore, the Delegation believed that the analysis of the current state of such procedures and consideration of their improvement would be an efficient way to proceed on the issue of quality of patents. The Delegation stated that its country supported the idea to discuss various elements regarding the quality of patents in granting procedures from a practical viewpoint. Referring to the three main points of the proposal, namely, technical infrastructure development, information exchange on quality of patents, and process improvement, the Delegation considered that those three pillars were important to achieve high quality patents and would be a good starter for the discussion of quality of patents. In its view, the IT infrastructure that contributed, for instance, to prior art search in the patent granting process played a very important role in terms of patent quality. The Delegation was of the opinion that sharing and exchanging information on patent quality of patent offices was also a very useful approach at various phases, as users of the patent system would be able to learn from each other. In addition, the Delegation noted that process improvement would also contribute to ensure the quality of patents. Furthermore, as stated by the Delegation of Hungary on behalf of the European Union and its 27 Member States, the Delegation also expressed its belief that the issue of novelty and inventive step were important aspects to consider in relation to quality.

178. The Delegation of Germany expressed its support for the proposal made by the Delegations of Canada and the United Kingdom. The Delegation stated that for the German Patent and Trademark Office, it was very important to strike a fair balance between quantity and quality. It presented an overview of their quality management from two aspects: public and internal work. With reference to public work, the Delegation explained that there was a special

department for information services for the public. One of the objectives of having such a department was to improve the quality of the application. Furthermore, the department offered the public directives, brochures, and individual feedback by phone, e-mail or in person to applicants. In relation to internal work, the Delegation stated that its office had established a working group for further development of quality management at the end of 2006. The Project Group had drafted a basic concept outlining the continuous further development of the existing quality management in 2008, aiming at systemizing and complementing quality management. Further, the Delegation stated that some key issues were of particular importance to produce high quality results in patent examination. For example, profound scientific and technological knowledge of patent examiners was essential for professional examination. In addition, careful selection and ongoing training of personnel were key to high quality work. A high degree of independence and autonomy of patent examiners which provided a crucial incentive for good work, adequate time for processing applications in order to efficiently deal with complex cases and awareness among all staff of the office were also important for high quality work. To achieve those goals, the Project Group had also been in touch with staff members in charge of quality of other patent offices.

179. The Delegation of New Zealand stated that if the patent system was to meet its policy objective, it was essential that granted patents were of high quality and did not claim rights over technologies that should be free for anyone to use. Poor quality patents might not only prevent third parties from making use of existing technologies, but might stop innovation, as innovation was cumulative, building on what already existed. On that basis, the Delegation considered that the subject of patent quality was a very worthy subject for discussion by the SCP, and stated that the proposal put forward by the Delegations of Canada and the United Kingdom formed a good basis for discussion in the SCP on how patent quality could be improved and maintained.

180. The Delegation of Spain supported the statement made by the Delegation of Hungary on behalf of the European Union and its 27 Member States. It also welcomed the introduction of such an important issue as quality of patents in the agenda and expressed its hope that the discussion of the issue would be continued in the future. The Delegation stated that quality could be defined as the fulfillment of patentability requirements by patent offices. In its view, at later sessions, as proposed by the Delegations of Canada and the United Kingdom, the Committee should look not only at the technical infrastructure and exchange of information, but also consider the improvement of the patent process as well as oppositions and observations by third parties that certainly gave a contribution in ameliorating the quality of patents in providing prior art documents not detected by examiners. The Delegation further noted that it was necessary to address harmonization of substantive patentability issues and to continue addressing issues concerning the grace period, prior art, novelty, and inventive step as well as reviewing methodology of their evaluation. In addition, the Delegation considered that the Hilmer Doctrine should be eliminated and the Committee should address the definition of sufficiency of disclosure. In its view, the improvement of the patent system could be achieved only by the harmonization of those substantive requirements and their correct evaluation by examiners in patent offices, above all, the International Searching Authorities and International Preliminary Examining Authorities under the PCT, *i.e.*, the granting to innovators of the exclusive rights during a specific period of time, as long as there was inventive activities and that they were fully divulged in a clear and complete manner so that once the invention was in the public domain, every person skilled in the art would be able to carry out the invention. Lastly, the Delegation stated that the Committee should also consider substantive elements of Chapter 21 of the PCT International Search and Preliminary Examination Guidelines.

181. The Delegation of India supported the statement made on behalf of the Development Agenda Group, by the Delegations of Brazil and South Africa on behalf of the African Group. Noting that the term "quality of patents" in document SCP/16/5 was not defined, the Delegation expressed difficulty in understanding what was meant by "quality of patents". Further observing that three main components described in document SCP/16/5 did not refer to exclusions and

exceptions, the Delegation stated that the quality of patents of the individual country depended upon the national law and upon the exclusions and exceptions provided in that country. Referring to the work of the International Preliminary Examining Authorities, as well as the International Searching Authorities, the Delegation observed the diversity of opinions on the patentability of the invention within the same organization. Under those circumstances, the Delegation considered it difficult to harmonize the quality of patents at the international level. Further, the Delegation stressed the difficulty of maintaining the same quality for a patent granted in two countries, where in one of those countries the patent was opposed due to the discovery of new prior art. The Delegation noted that in the Indian patent system, there was a position called “examiner of patents” whose duties were to examine the case and to give his opinion to the Controller who could agree, defer or disagree with that opinion. In the process of the quality assessment there were several factors that came into the picture, first one of which was the understanding of the given disclosure. The Delegation explained that an examiner of its office applied the problem-solution approach, which was to understand which problem was solved by which solution, whether there were many solutions to the same problem or whether there were many solutions for many problems having a single inventive concept. Then, the examiner had to select key words which would result in obtaining different prior art documents. The Delegation questioned whether the selection of key words would be used to assess the quality of the examined application or whether the number of prior art documents or the quality of the prior art documents was relevant to such an assessment. After that process, the examiner would analyze whether the prior art documents had an effect on the novelty or inventive step, etc., which often was based on the interpretation of the examiner. At a later stage, all those steps had to be followed by the Controller. Thus, the Delegation reiterated that, in the Indian context, they had difficulty to understand how to assess the quality of patents, whether it should be the quality of a person or a style of functioning. The Delegation added that the complexity or simplicity of the application might need to be taken into account in the assessment of quality. The Delegation stated that there could be a simple application having ten pages of specification or a complex application having 1,000 pages of specification. The Delegation further stated that Section 8.2 of the Indian Patent Act allowed the Controller, when there was a doubt whether a patent should be granted, to require the applicant to furnish details relating to the processing of his application in a country outside of India, and the applicant should furnish such information within a certain time period explaining why the application had been allowed or refused in the said country. That was another mechanism to maintain the quality of patents. Noting the number of checks existing in the Indian patent system before granting the patents, the Delegation stated that its Government fully understood the importance of the patent granting system and related public policy issues; therefore it strived to ensure patent quality. In that regard, the Delegation observed that the pre-grant opposition procedure was a most efficient system in India. Turning to the proposal made by the Delegations of Canada and the United Kingdom, the Delegation requested further clarification with respect to the three components described in that proposal. In conclusion, the Delegation stated that when the same patent application had been filed in several countries, it would be important to have access to the patent prosecution history of the corresponding applications in those countries, as that would automatically improve the quality of patents at the international level.

182. The Delegation of China expressed its appreciation to the Delegations of Canada and the United Kingdom for their proposal. The Delegation stressed the importance of improving patent quality. In its view, for all countries around the world, improved quality and capabilities of national patent offices was a key issue. The Delegation suggested that the SCP also conduct comprehensive and in-depth analysis and consider different aspects of issues so that countries could exchange information on the subject matter.

183. The Delegation of Venezuela, referring to the proposal of the Delegations of Canada and the United Kingdom, noted that the subject of quality of patents should be considered in conjunction with balancing the public interest and patent owners’ rights, ensuring transfer of technology and its impact on development. The Delegation stated that there was a need for



flexibility in relation to patents, particularly, given that they had an influence on fundamental issues affecting the interest of developing countries, such as access to drugs, food and other areas in connection with life as such and human development. In line with the Millennium Development Goals (MDG) agreed upon by the United Nations on which the principles of the Organization should be based, the Delegation was of the view that the Committee should continue assessing the issue before its full approval, because patents could not be taken in isolation from the society and the surroundings in which they were granted. Further, the Delegation requested to correct the Spanish text with regard to paragraph 13 of document SCP/16/5. In particular, it stated that the word “*beneficios*” should be replaced by “*plusvalías*”.

184. The Delegation of France shared the view expressed by the Delegation of Hungary on behalf of the European Union and its 27 Member States, and supported the proposal of the Delegations of Canada and the United Kingdom on quality of patents. Underlining the importance of improving the quality of patents, the Delegation stated that the proposed work program regarding the improvement of the infrastructure and the process improvement could be completed by the work on the improvement of the concept of substantive patent law, in particular, the pre-criteria of patentability, which would contribute to the delivery of better quality patents. The Delegation also supported the intervention made by the Delegation of Japan regarding the addition of a study on prior art and inventive step.

185. The Delegation of Mexico stated that the proposal of the Delegations of Canada and the United Kingdom was an excellent roadmap for the Committee to achieve the goals for which it was established, particularly on such an important issue as the quality of patents. The Delegation also expressed its support for the proposal made by the Delegation of the Republic of Korea.

186. The Delegation of the United States of America expressed its strong support for the proposal made by the Delegations of Canada and the United Kingdom on a work program on the quality of patents. The Delegation expressed its belief that patents of high quality were important to the well-functioning of the patent system. High-quality patents provided certainty to the rights conferred and provided an increased incentive to innovate. The goal of obtaining high-quality patents was beneficial to both developed and developing countries. In the Delegation's view, such goal furthered the aims of the Development Agenda, such as capacity building, providing the necessary technical assistance to the offices and improving access to information relevant to patentability. The Delegation supported the recommendations set forth in the proposal for technical infrastructure development, information exchange and process improvement. In that respect, the Delegation noted that while a number of delegations had suggested first defining the term “quality”, the Committee could collectively come to a better understanding of the term as it was implemented. The Delegation stated that the appropriate procedures of national offices would be specific to the national office and that there was no one-size-fits-all approach. As a result, the Delegation suggested that harmonization of quality management practices should not be the goal, but an understanding of practices by other offices would be helpful. Referring to the intervention made by the Delegation of India, the Delegation observed that a number of good examples of the concerns of the offices had been cited in that intervention and offices having those concerns would benefit from the information exchange envisioned by the proposal of the Delegations of Canada and the United Kingdom. In summary, the United States expressed its support for the work plan proposed, since it was in line with the mandate and the core expertise of the Committee and with Development Agenda recommendations 10 and 11. The Delegation expressed its belief that the proposed work program would help the Committee to return its focus to technical discussions and cooperation and move to expert based technical discussions, for example, in the field of infrastructure improvements, information sharing and process improvement among others, rather than addressing political issues which would be better handled in other fora. In that vein, responding to the comments made by the Delegation of Brazil, the Delegation explained that the reference to “technical” in paragraph 6 was understood to highlight that they were there as technical

experts and that the discussions to be held should be of a technical nature. The Delegation further wished to share with the members of the Committee the experience of the United States Patent and Trademark Office (USPTO) on the topic of patent quality as an example of the information that could be exchanged on quality of patents under the proposed work plan. In the USPTO, the quality of patents was measured and evaluated by the Office of Patent Quality Assurance, which was referred to as the "Quality Office". The Quality Office was composed of a highly-skilled staff that had technical and procedural skills that covered all areas of patent prosecution. Those specialists had spent a substantial number of years as primary patent examiners in the general technical area in which they reviewed. Many had served as supervisory patent examiners for at least several years. The Quality Office conducted work product reviews that were used to generate the official USPTO examination quality metric. The metrics were reported out in the Office's Annual Performance and Accountability Report. The specific goals of the Quality Office included providing timely, reliable and meaningful indicators of examination quality, identifying trends and examination quality, identifying opportunities for improvement, developing data driven improvement strategies, and assisting the patent operation business units in training examiners and implementing quality initiatives. Further, the Delegation stated that the measure of quality at the USPTO had changed over time. In fiscal year 2010, the USPTO adopted two metrics, first, the final disposition compliance rate which was based upon a sample that consisted of allowances and final rejections in order to assess the correctness of the examiner's decisions regarding the patentability of claims through the decision to finally reject or allow. The second metric was the non-final IPR compliance rate. The final disposition and non-final IPR compliance rate, while useful, had been considered by both the USPTO and its stakeholders to be insufficient to present a balanced and comprehensive picture of quality. As a result the USPTO had adopted new procedures for measuring the quality of patent examination at the end of fiscal year 2011. The USPTO in consultation with the Patent Public Advisory Committee had formulated a composite quality metric which greatly expanded the previous procedures for the measurement of examination quality. The new composite quality metric was composed of seven factors that took into account stakeholders' comments including three factors drawn from the USPTO's previous quality measurement procedure. In four new factors, the focus was set upon data never before acquired or employed for quality measurement purposes. Specifically, the factors that had been carried out and modified from the previous procedure measure include: (i) the quality of the action setting forth the final disposition of the application; (ii) the quality of the action taken during the course of the examination; and (iii) the perceived quality of the patent process as measured through external quality surveys of applicants and practitioners. The newly-added factors measured: (i) the quality of the examiner's initial search; (ii) the degree to which the first action on the merit followed the best examination practices; (iii) the degree to which global USPTO data was indicative of compact robust prosecution; (iv) the degree to which patent prosecution quality was reflected in the perceptions of the examination corps as measured by internal quality surveys. The new composite metric was designed to yield the comprehensive picture of overall examination quality and to impose a balanced response to quality concerns, such that the overall quality of the patent process would be improved.

187. The Delegation of Hungary expressed its wish to share with the Committee its view on the proposal made by the Delegations of Canada and the United Kingdom and referred to the experience and ambitions of the Hungarian Intellectual Property Office with regard to the important issue of quality of patents and patent granting procedures. The Delegation stated that they had been studying very carefully the proposed work plan and that they were convinced that it could meet the aspirations of patent authorities throughout the globe and serve as a solid basis for the future work of the Committee. In 2010, the management of the Hungarian Patent Office, in accordance with its mid-term institutional development strategy as a condition of high level official and service activities and of the participation in international patent work sharing, had made a decision on implementing the ISO quality management and obtaining a certificate. The Delegation observed that a new period in the history of the Office had begun with that decision where the Office maintained and continually improved its system according to the

requirement and of the standards in order to provide quality and secure services to its customers. Under that decision, a management system had integrated industrial property, especially patent examinations and procedures under the competence of the Office, state activities concerning documentation and procedures, and services provided within the basic activities of the Office. The Delegation expressed its conviction that within the framework of that management system, the maintaining and continuing development of the search and examination capacity, the quality of administrative patent processes and operation issues played a key role. In its Office, the quality of the patent granting process was monitored and evaluated through check and evaluation points and the system provided the opportunity for users to express their views relating to the quality of the work done by the Office and the quality of the results, such as the issued patents. The Delegation stated that the Hungarian Patent Office would be glad to contribute to the work of the Committee within the framework of the proposed three components and would also be interested in gathering knowledge on experiences of other IP and Patent Offices of Member States. Expressing its belief that such work would contribute to realizing the mandate and core function of the Committee, the Delegation expressed its full support for the proposed work plan.

188. The Delegation of Singapore, expressing its support for the proposal made by the Delegations of Canada and the United Kingdom, also agreed with the statement made by the Delegation of India who had stated that the Committee had to be mindful of duplication of work in other fora. The Delegation noted that the SCP's advantage of commencing on the issue only at the sixteenth session was that it could tailor its work to complement and reinforce the work in other fora. In view of the many observations that the term "quality of patents" was not clearly defined, the Delegation suggested that the term be defined as the proper examination of patent applications based on the criteria or requirement as set out by the respective patent offices. In that line, the Delegation proposed that consideration be given to use the phrase "quality of examination of patent applications" instead of "quality of patents". In its view, such a formulation would clearly reflect that: first, the focus of the work on quality of patent was to assist each patent office in areas where it felt the need in examining patent applications properly; and second, such examination was clearly based on the national laws. The Delegation was of the view that the three components proposed by the Delegations of Canada and the United Kingdom were good starting point for the discussion on that issue. With regard to the component of information exchange, building upon the intervention made by the Delegation of India, the Delegation wished to propose for consideration that the phrase "information exchange" be revised to "information access and exchange". The next step in this area could then be to scope out further details in that area. Possible elements could include: access to search reports, written opinions and examination reports of corresponding applications; access to search methodology; access to relevant databases, as well as to search tools or search engines; necessary training for the proper use of such databases and such tools. After the scope of information exchange and access was clarified, the Committee could then look into the component of technical infrastructure to support it. The Delegation was of the view that that was a logical sequence to adopt. Referring to the statement made by the Delegation of India on behalf of the Development Agenda Group where it had proposed to conduct a study on current state of affairs on access to information in various databases, including the cost of access, the Delegation considered that that proposal was complementary to the proposal made by the Delegations of Canada and the United Kingdom. In its opinion, the Committee could study the current state of affairs on access to information, existing mechanisms on information sharing and then consider the leveraging those mechanisms. The Delegation noted that consideration on leveraging of those mechanisms need not be restricted to one mechanism, but Member States could decide the mechanism best for their use. The Delegation reiterated that it was mindful that the work of the Committee should complement the work in other international fora and platforms, and not to duplicate it. In particular, the Delegation suggested that consideration be given to how WIPO's PATENTSCOPE could be leveraged. Regarding the component of process improvement, the Delegation was of the opinion that that was a relevant component. A proper examination of patent applications, if not done in a timely manner, could impose

uncertainty. The Delegation stated that for as long as a patent application was pending, third parties and members of the public would not have certainty as to whether they could freely work the invention. Therefore, the swift conclusion of the examination work, resulting in either in a patent grant or refusal, would create more certainty for users of the invention. The Delegation expressed its belief that, in that area, patent offices would not be simply adopting the processes and procedures of other patent offices. Instead, the sharing by patent offices of information on their processes would be useful for other patent offices to improve their processes. Thus, substantive national patenting criteria or requirements would not be affected by such process improvements. A possible component to add would be, where patent offices felt their need, a training aiming to further develop the technical examination capabilities of their patent offices.

189. The Delegation of Poland, speaking on behalf of the Central European and Baltic States, stated that its group recognized the high importance of the issue of the quality of patents. In its view, the development of commonly recognized standards on high quality patents would provide for re-use of examiner's work. That would significantly contribute to backlog reductions which seemed to be one of the key problems regarding patent offices' examining capacities. The Delegation reaffirmed its view that the proposal made by the Delegations of Canada and the United Kingdom and further exploration of the issue would contribute to ensuring the insurance of quality with respect to patents, as only high quality patents were key drivers of innovation, technological progress and economical development. The Delegation stated that, for all those reasons, the Central European and Baltic States group supported the proposal.

190. The Representative of the EPO supported the statement made by the Delegation of Hungary on behalf of the European Union and its 27 Member States. The Representative expressed readiness of the EPO to contribute to the topic by sharing with the Committee the experience gathered within the framework of the European Quality Management System. The European Quality Management System aimed to support the national patent offices of the European Patent Organization as well as the European Patent Office to achieve continued improvement in the quality of their products and services. That encompassed a basic requirement regarding, among others, the management of resources, quality assurance, a two-way communication between offices and users, internal and independent review mechanisms and minimum requirements of the standards of the search results. The Representative noted that the EPO had established its Quality Management System along the lines of the European Quality Management System. The EPO Quality Management System covered the processing of applications, oppositions and requests for revocation or limitation along with support management processes. The Representative concluded that an essential element of the EPO Quality Management System was the continuous dialogue between the EPO and the users of the patent system. In that regard, the EPO allocated great value to the exchange of views with patent users.

191. The Representative of CIPA/EPI supported the proposal made by the Delegations of Canada and the United Kingdom on quality of patents as set out in document SCP/16/5, noting the importance of trustworthy quality monitoring, both, internal and external.

192. The Representative of FICPI supported the proposal made by the Delegations of Canada and the United Kingdom on quality of patents. As regards the process improvement component of the proposal, the Representative expressed its belief that the quality of patents required a good search or possible supplementary searches by other offices, before an assessment was made under the national law. The Representative recognized that there were differences between various jurisdictions as regards the assessment of patentability, especially in respect of various exceptions. Nevertheless, the Representative expressed its belief that there were convergences in respect of the basic criteria of novelty and inventive step, and that there was still room for improvement of the processes and work sharing among offices. The Representative considered that when a qualified search and assessment had been made by another Office, it would be sensible to make use of that previous effort and build on it. To

enable such a utilization of previous work done, the Representative considered that the patent system would benefit by an increased transparency so as to enable the examiner in a particular patent office to readily understand how the previous search was made, and the results thereof, even without asking the local representative. In that manner, the examiner could avoid repeating the same work and he or she could try new approaches, with the final assessment to be made in view of the particular domestic law and practice. The Representative stated that a dialogue between the Office and a local representative was also essential, as pointed out by the Delegation of India. The Representative continued that in order to provide a better search for all relevant prior art, he believed that the PCT system was the ideal vehicle to improve the search processes. The international search report should form the basis even for the possible additional search made in the subsequent national phase. In his opinion, at present, that was often not the case and the offices that had their own search facilities often started out from scratch. Therefore, the Representative stated that the international search reports should be supplemented with more detailed information on how the search was conducted, with details of the search strategies used and the databases searched, the classes searched, at the most detailed level, *i.e.* at a level at which an examiner would use a given classification system, such as the European Classification System (ECLA) at the EPO, the F-terms at the Japan Patent Office (JPO) and the corresponding US classes at the USPTO, the keywords, keyword combinations and keyword/class combinations that were actually used, and the claims that were actually searched, *i.e.*, those published with the PCT application, or amended claims. In the view of the Representative, if such an improved process and avoidance of duplicate work in the offices achieved, there would be more time for high quality work by the examiners. At least, we would avoid that patents were being granted without taking into account of relevant prior art found by another office. In relation to the PCT system, the Representative noted that there was also room for improvement, which was discussed in the PCT Working Group, where a good number of recommendations had been agreed upon at its last session. The Representative expressed his hope for an increased quality by way of an ongoing feedback mechanism as was being discussed among the PCT Authorities. He further stated that the overall quality of the search efforts during the international phase were satisfactory, virtually all countries could rely on the PCT work product as a starting point when making the final assessment under national laws. That, in his view, would no doubt improve the quality of the patents granted.

193. The Representative of KEI stated that in terms of the patent quality issue, it would be interesting and relevant to have more information on the cost of patent litigations in different countries, which, in his view, influenced the quality of patents. He also stated that what could be feasible countries such as the United States of America or Germany was probably not the case in a small market country. He thought it might also be interesting for the SCP to think about various ways of sharing of information on patents that were being challenged so that, if the same patent had been filed in dozens of countries but it had been subject to an expensive litigation in one of those countries resulting in invalidation of claims, a database to be developed by WIPO would contain information on such proceedings and their outcomes in different countries. The Representative also stated that when patents under the PCT entered the national phase, the patents were granted with assumption of their validity in many countries. Thus, in his opinion, if poor quality patent was invalidated in one of those countries, it would still be valid in all other designated countries. In that regard, the Representative considered that if it would be useful to allow a country to change the presumption of patentability of such patents once that patent had been invalidated in another country. Finally, the Representative concluded that one of the challenges to be resolved was how to deal with low quality patents which were inevitable in the patent system and what the practical ways were for managing those patents.

194. The Delegation of Panama endorsed the proposal made by the Delegation of Singapore on the subject matter. The Delegation stated that the issue of "quality of patents" was particularly related to ensuring that the patent applications fully met the patentability criteria, such as novelty, industrial step and industrial application. In addition, the Delegation stated that

the discussions should not interfere with the issue of exceptions which were to be established by the legislation of each country.

195. The Representative of ALIFAR stated that the issue of patent quality was the basis of the current patent system. In her view, the patent quality could not be only resolved by only improving the infrastructure of the Offices or access or exchange of information among them. While it was important that patent granting process was improved, the Representative stressed that the determination of the patentability criteria should remain at the discretion of each country because that was directly related to designing the respective industrial technological and health policy of each country. The Representative was of the view that the aims of the patent system were being undermined by increasing number of patents being filed year by year which did not reflect very little innovation and technological growth. In particular, the Representative stated that in certain sectors, such as pharmaceutical sector, large number of patents being filed for drug compositions and chemical formulas enabling the filing companies to establish technical barriers to trade. The Representative observed that minor patents were being filed aggressively to prevent competition from local enterprises, as had been clearly reflected in the report of the European Commission on its pharmaceutical sector enquiry in 2009. The Representative stressed that for developing countries the impact was felt strong in the markets, as they faced severe difficulties in controlling the market in the face of big multinational monopolies and difficulties in ensuring the access to medicines. The Representative stated that the industrial patents did not generate concerns in low value industries, which might mean that there was some laxity in the examination of patents which had also worrying social concerns. In her opinion, the proper interpretation of patentability criteria was essential to ensure credibility of the system bearing in mind that those criteria should reflect health and industrial policy of each country. Therefore, the Representative considered that they should not necessarily be the subject of harmonization, *i.e.*, they should be up to each country to decide upon. In her view, such harmonization could lead to a situation where the interests of each country were not fully taken into account. Acknowledging that WIPO, as part of the implementation of the Development Agenda, had been promoting the access by patent offices to international databases which included specialized bibliographies and literature as a valuable contribution, the Representative, however, stated that there was a need to look at criteria for selection of such tools and to reflect what was the intention to be achieved in guiding patent examiners in deciding whether to grant a patent or not. In other words, the Representative called for a need to ensure that those tools were selected in a balanced manner.

196. The Representative of TWN expressed its belief that the quality of patents was an important issue that Member States should focus on. Granting of low quality patents had encouraged filing patent applications containing trivial inventions which resulted in creating floodgates of patent applications and backlogs in many patent offices. She observed that low quality patents also led to unnecessary litigation and waste of resources. From a public policy perspective, poor quality patents increased the level of monopoly in markets and consequently prevented competition. Hence, the Representative stressed the importance of applying the highest possible threshold level of patentability criteria when examining patent applications. However, the Representative noted that there was no shared understanding about the term "quality". She explained that, in a developing country context, "quality of patents" generally meant granting patents on inventions which satisfied the highest level of patentability criteria. In other words, patents should not be granted for incremental modification of existing inventions. For example, patenting of modifications to known molecules led to patent evergreening. Hence, the quality of patents should ensure that only real inventions were granted a patent monopoly, trivial claims for patent protection should not be entertained. Further, the Representative stressed the following five points related to the issue under the discussion. First, it was important that patent offices were able to apply exclusions plainly and clearly without attempting to accommodate excluded subject matter through back doors and interpretations. In that regard, the Representative stressed the importance of respecting public policy objectives behind the rigorous patentability criteria. Any effort to improve the quality of patents should not result in

the virtual harmonization of patent laws across the globe, ignoring the social and economic differences and priorities existing among WIPO Member States. She also wished to caution against allowing the discussion on patent quality to drift into the harmonization of substantive patent law through forum shopping. Second, quality of patents was the threshold level to satisfy the patentability criteria in terms of novelty, inventive step and industrial application according to Article 27 of the TRIPS Agreement. Observing that there was a shift toward lowering down the threshold level for patentability, the Representative noted that the discussion on patentability criteria should maintain the objective of elevating such threshold for patent protection. For instance, in relation to determination of novelty, some countries did not use all types of prior art available globally. As a result, oral knowledge was not recognized as a prior art in some countries. If oral knowledge or undocumented knowledge would get properly treated as prior art they could prevent patenting of traditional knowledge and prevent biopiracy. Third, disclosure requirement was an important element of ensuring quality of patents. If the invention was disclosed properly, patent applicants could not bypass the scrutiny of patent examiners. Therefore, applicants should be forced to fully disclose their inventions. The Representative continued that, however, there was no format for disclosing the patent specifications in various technology areas. Four, a transparent and effective opposition system, including pre-grant and post-grant oppositions, was an important mechanism to ensure quality of patent examination by providing an opportunity for larger public scrutiny of patent applications. Fifth, the Representative suggested that patent offices should establish a mechanism to review their decisions regarding granting of patents throughout the life of the patent whenever there was an emergence of new evidence which could not affect their decision when the patent had been granted.

197. The Representative of the EAPO drew the attention of the Committee to certain issues taking place in the EAPO. In certain countries where patents were granted under both the national and the regional systems, standards stemming from domestic legislation and standards stemming from regional legislation might sometimes be contradictory and, therefore, a patent granted by a regional office might have different status within the jurisdiction of different countries. Thus, considering that such a dual system might raise considerable difficulties, the Representative considered that whether there was a need to harmonize the national and regional legislations and a need for standardization even at the international level. In his view, different approaches taken at the national and regional levels, for example, exclusions and opposition proceedings might also have a major instance on the quality of patents.

198. The Representative of ICC, on the issue of quality of patents, drew the attention of the Committee to the policy statement of June 28, 2010, prepared by the ICC Commission on Intellectual Property entitled: "Cooperation between patent offices: prior art searching of patent applications". The Representative informed the Committee that that paper, available on the ICC's website, dealt with the issues of backlogs of patent application, the importance of prior art search for patent quality as well as search procedures and contained a proposal for what was called "an early comprehensive coordinated search".

199. The Delegation of the United Kingdom expressed its appreciation to all of the delegations and observers who had spoken on the topic and provided interesting and constructive comments on its proposal. The Delegation noted that a number of interest expressed on the subject encouraged the Delegation to discuss further on the topic. In providing a general preliminary response to questions raised by some delegations, it stated that the Delegations of Canada and the United Kingdom would be following up bilaterally with those delegations that had raised concerns so as to better understand the issues and to facilitate the work in that area in future. The Delegation reiterated that the proposal was to suggest a general framework which would guide discussions on that very important topic. The Delegation explained that in choosing three areas, the proponents had tried to anticipate issues that would be of broad interest to many Member States irrespective of the level of development or whether they were examining offices or non-examining offices. It clarified that the proposal was not intended to be

prescriptive. The Delegation noted that the sharing of information and what individual delegations and offices could do with that information was a matter entirely for each delegation and each country and each office to choose. From the experience of the Delegation working bilaterally with other offices, the exchange of information on quality could be very useful, resulting in improvements to its national office system. The Delegation stated that there were advantages of discussing the issue within the Committee over bilateral engagements as it allowed exchange of views among a great number of different offices from different backgrounds. In relation to the comments made on the definition of “quality of patents” and some suggestions made on the need for a common definition of that term, the Delegation explained that it was not the intention of the proposal to be prescriptive on that point. The Delegation was of the view that such a common definition would not be helpful given that countries have different national systems and different understanding of what quality encompassed. Referring to the issue of duplication of work among the different WIPO bodies raised by some delegations, the Delegation fully shared those concerns, and noted that the work which was suggested in their proposal was intended to complement any work which was being done elsewhere. The Delegation referred to the explanation given by the Delegation of Canada on where the proposal could fit with the work of the PCT Working Group. The Delegation stated that the PCT Working Group was looking at the areas where improvements could be made in international work products. Noting that its Office was not one of the International Authorities under the PCT, but it was a Contracting State of the PCT, the Delegation stated that while it had a strong interest in improving the PCT system, its main focus was the improvement of its own system. Thus, it was constantly striving to improve its national processes to ensure the granting of high quality patents. The Delegation expressed its belief that there was much it could learn from other national offices in their efforts on improving quality of patents. In its view, the SCP was a valuable forum to discuss the issue of quality and should look at ways on how it could complement the work of the other bodies. In developing the discussions on that topic, the Delegation expressed its belief that the Committee would be mindful of the space in which the SCP could make a meaningful contribution. Agreeing with what had been said by the Delegation of Canada that the SCP had an enviable mix of technical and policy expertise, the Delegation stated that it was looking forward to exercising those expertise and talents in furthering discussions on quality of patents.

200. The Delegation of Canada expressed its appreciation to the delegations that spoke on the topic of quality of patents and noted great interest expressed on that issue. The Delegation welcomed questions raised by other delegations on the proposal, and stated that they could only help to move forward the discussions. Referring to a number of complementary proposals made by other delegations, the Delegation expressed its interest in exploring those issues by speaking to those delegations in order to answer their questions and to better understand their proposals. Thus, the Delegation requested that the discussion on that issue to be put on hold for the time being.

201. The Chair gave the floor to the Delegation of India to make a statement on the topic of opposition systems.

202. The Delegation of India stated that the Development Agenda Group welcomed the topics for discussion under that agenda item, specifically the quality of patents and the important question of opposition system. The Delegation noted that the term “quality of patents” was a broad term that referred to different concepts and different jurisdictions and which was not a universal standard. On the other hand, the issue of opposition systems was a more concise term that the SCP had been debating in recent sessions based on a preliminary study prepared by the Secretariat as presented in document SCP/14/5. The Delegation wished to make a few comments on that preliminary study on behalf of the Development Agenda Group. As stated by the Group during the previous session of the SCP, the Development Agenda Group attached a great importance to the potential role the opposition systems could play in fostering a strong and balanced mechanism of administrative review that prevented the grant of invalid patents. The



Development Agenda Group maintained the view that the study provided a basis for discussions on the subject of opposition systems in the Committee which included among others: pre-grant opposition, post-grant opposition and the grounds for oppositions that Member States, particularly developing countries, could utilize in pursuit of development. The Delegation further noted that, nonetheless, there were a number of aspects where the study could be revised to provide more value and be more pertinent to a development-oriented discussion on that important question in the Committee. First, when the preliminary study suggested that patent opposition systems helped to enhance the quality of patent examination, the Delegation believed that it should also examine how patent opposition systems support the broader public policy objectives of countries. Second, the study did not sufficiently highlight the benefits of patent opposition systems, nor the cost of failure to have an effective opposition system in place. For example, it had been highlighted elsewhere that in the United States of America re-examination procedures were rarely used and the common practice was litigation, which was costly. It had been suggested that a post-grant review process, modeled on the European opposition system, would improve patent quality, reveal overlooked prior art and reduce subsequent litigation. Third, and as also stated by the Development Agenda Group in the previous session of the Committee, the study referred to the cost that arose in the patent system due to patent oppositions. Thus, in paragraph 21 of the preliminary study, it was stated that to set up an opposition procedure, a patent office would need to have relevant resources, such as technically qualified examiners. In footnote 3, it was noted that as an alternative, patent offices which did not have resources to conduct substantive review might conclude cooperation agreements with other offices. In that regard, the Delegation requested a clarification whether that was a suggestion advanced by the study or whether such cooperation mechanisms between offices in relation to patent opposition systems indeed existed. If such cooperation existed, it was not very clear to the Delegation how examiners in one office could be sufficiently qualified to conduct reviews of patents applied in another office because substantive standards of patentability could differ considerably between jurisdictions. The Delegation explained that even between patent offices with similar standards of patentability, there might be differences in judicial interpretations of patent law. Moreover, availability of technically qualified examiners was a basic requirement of all aspects of a patent examination system, not just the opposition system. In its view, the lack of sufficient patent examiners made a stronger case for a robust opposition system because of the greater likelihood of the erroneous grant of invalid patents. Fourth, in paragraph 22 of the preliminary study, it was observed that opposition procedures inevitably caused delay in the granting of patents and that in practice, only a small number of applications were opposed. In that regard, the question should be posed as to how opposition procedures can cause inevitable systemic delay in the grant of patents if only a small number of applications were actually opposed. According to the view of the Delegation, the systemic delays in patent examination were caused by the increasing number of patent applications, facilitated to a large extent by the availability of PCT application procedures and perhaps a disproportionate lack of qualified patent examiners. Fifth, the Delegation continued, the study suggested that delay in granting patents caused by opposition proceedings might have a negative effect on innovation. It specifically referred how in Japan and China opposition proceedings had been gradually eliminated as they were considered to be duplicating revocation proceedings and delay efficient grant of patents. However, in the view of the Delegation, the study failed to provide an analysis of the positive role played by opposition systems and its use as a tool for enhancing innovation in those countries, notably in Japan. Finally, another aspect of opposition systems that the study failed to mention was factors that would contribute to the enabling environment for a strong opposition system. Those included availability of sufficient information, unpublished patent applications to trigger opposition proceedings, fees for opposition proceedings and also availability of qualified patent examiners to facilitate the efficient functioning of the opposition system and the patent system as a whole. In conclusion, the Delegation invited the Secretariat to revise and re-orient the focus of the study with regard to the positive role played by opposition systems in many countries. Taking into account the above comments, and those delivered in previous sessions, the Delegation stated that the Committee should focus on how opposition systems could be strengthened. The

SCP could most beneficially act as a forum where experiences of countries in using the opposition system could be usefully shared. And in that regard, the Delegation also called for the establishment of a dedicated page on WIPO's website where studies and experiences on opposition systems could be posted and an online discussion could take place.

203. The Delegation of Switzerland supported the proposal made by the Delegations of Canada and the United Kingdom on quality of patents. The Delegation considered that the comments made by the Delegation of Japan were a useful contribution. Referring to the issue of opposition systems, which was closely linked to the issue of patent quality, the Delegation stated that document SCP/14/5 provided a good overview of the existing opposition procedures in different countries and that the system played a very important role in guaranteeing patent quality and credibility. It was also a quick and inexpensive means to allow users to contest patent applications and improve the quality of patents. In that line, the Delegation suggested that the Committee should continue to work on that issue and that, at the next meeting, the Committee should look at the various different mechanisms identified in document SCP14/5 in greater detail, including re-examination procedures. The Delegation was convinced that that work could be useful to boost patent quality. Thus, the Delegation requested the Secretariat to prepare a new document on patent quality for the next meeting in order to better understand the different mechanisms that existed in that regard. In its view, it would be useful to have a more complete reference document to which each Delegation could refer.

204. The Delegation of Hungary, speaking on behalf of the European Union and its 27 Member States, stated that the opposition procedure could be an important tool for ensuring the proper functioning of the patent system as it could contribute to improving the patent quality and increasing the credibility of granted patents. To fulfill that function, the opposition procedure should provide a rapid, easy and cost-effective mechanism for third parties to challenge the grant of a patent. The Delegation reiterated its wish to receive further information based on the evaluation on various procedures mentioned in the study that were not exactly opposition procedures but still enabled the intervention of third parties in the patent granting procedure and that also contribute to improving the quality of granted patents. Furthermore, the Delegation noted that the PCT Working Group, at its third session held in June 2010, had recommended the development of a third party observation system under the PCT. The Delegation was of the view that the freedom of all WIPO Member States in deciding whether or not to introduce an opposition mechanism into their national legislation should be preserved. Finally, for the above mentioned reasons, the Delegation expressed its preference to keep the issue of opposition systems on the work program of the Committee.

205. The Delegation of the Russian Federation stated that since the quality of patents and the filing of oppositions were extremely important in ensuring high quality and reliability of patents, the SCP should continue studying the issue. In its view, document SCP/14/5 was a good basis for further discussion. It recalled that in the course of the discussion of that document at the fifteenth session of the Committee, the importance of studying the experience of various countries had been noted with the aim of developing certain recommendations for regulating opposition systems. The Delegation confirmed the readiness of the Russian Federation to continue working in that area. Further, the Delegation referred to paragraph 161 of the approved Report on the fifteenth session of the Committee, where provisions of Russian legislation on the opposition procedure were stipulated. According to the view of the Delegation, for conducting an effective analysis of the issue, it was expedient to prepare a questionnaire similar to document SCP/16/3, for the next session of the Committee.

206. The Delegation of South Africa reiterated its position that the issue of opposition systems deserved attention as it appeared to be a useful tool to the patent system, especially for validating the granting of patents by third parties. However, the Delegation expressed its concern that the study on opposition systems seemed to portray pre-grant and post-grant opposition systems as impediments to a fast granting of patents. In its view, the study should

re-orient its focus on the positive role played by opposition systems in many countries. The Delegation stated that, for example, a strong opposition system actually had facilitated local innovation in Japan. Therefore, in its opinion, the future work of the SCP should focus on how the opposition system could be strengthened further. The SCP could be a forum where experiences of countries in using the opposition system were shared.

207. The Secretariat stated that it would take the comments made by the delegations into account and provide an update to the study at the next session of the Committee. In that regard, the Secretariat requested Member States to provide any additional information they had about their national experiences concerning opposition systems and related approaches in order to assist the Secretariat in preparing that document.

208. The Representative of KEI, in relation to the revision of the study on opposition systems suggested that such a revision contain information on staff resources that patent Offices make available to work on those proceedings as well as the fees applied to parties requesting opposition or re-examination proceedings in different countries and aspects relating to the economics of those procedures.

209. The Representative of ALIFAR stated that it would be important to continue studying the issue of opposition systems, because it was an important part of the patent system preventing the grant of invalid patents. The Representative noted, however, that the study should not be only focused on the issue of patentability. Opposition systems were vital in the patent system to avoid squandering resources of offices and to avoid unnecessary litigation. The Representative considered that the further study should go into more details on pre-grant and post-grant opposition systems and examine the experience of countries and obstacles to the use of those systems. In her view, if used properly, the systems would not affect the speed of proceedings. Such an analysis could lead to greater patent quality.

210. The Delegation of Canada, speaking on behalf of its Delegation and the Delegation of the United Kingdom, thanked the membership of the SCP for the consideration of their proposal on quality of patents. The Delegation expressed its appreciation for the contributions of those delegations that intervened to express their opinions and offered their feedback on document SCP/16/5. The Delegation stated that the intent behind the submission of their proposal was not to seek approval for specific actions for work under the agenda item, "quality of patents", but rather to present a broad framework that might serve as a catalyst for discussion: one that would stimulate ideas and interest within the Committee. In that respect, the Delegation was of the opinion that the proposal had been successful, as many delegations had taken the floor to intervene. It considered therefore that there was wide support for the proposal. The Delegation stated that even those delegations that were not yet ready to fully endorse the proposal had acknowledged the importance of quality of patents and had engaged in the discussion by sharing their specific concerns regarding the document. The Delegation considered it as a very positive development. Pursuant to the exhaustion of the substantive discussion on the proposal, the Delegation stated that the Delegations of Canada and United Kingdom had invested time reviewing the various interventions and meeting with delegations and coordinators to clarify their concerns, answer their questions, and discuss their suggestions for possible future work items. The Delegation expressed its belief that those bilateral and plurilateral conversations highlighted some recurring themes that deserved additional attention in order to moved forward. For example, the Delegation stated that it should have come as no surprise to any member of the Committee that the avoidance of duplicative work was an issue of which all delegations were keenly aware. The Delegation expressed its confidence that their proposal was not a duplication of work being done elsewhere in the Organization, but it was warned to be vigilant to ensure that that was indeed the case. For that reason, the Delegation welcomed specific examples for the Members States' consideration where there was the potential for duplication. The Delegation noted that some delegations shared concerns that the proposal might result in the adoption of practices and processes of other patent offices and run the risk of

undermining the flexibilities existing in the domestic patent law at a policy level. The Delegation stated that it had never been their intention to be prescriptive on the issues. Nevertheless, when moving forward, the Delegation expressed its commitment to do their utmost to mitigate any concern in that regard. As an example of their desire to be inclusive of all points of view and opinions, and to not confine Member States, the Delegation expressed its reluctance to define "quality". In its opinion, each jurisdiction may have its own definition of what constitutes quality in the granting of patents based upon internal patent office priorities, national patent policies, and the impact of patents on their respective social and economic realities. Therefore, the Delegation noted that one size certainly did not fit all when it came to quality. However, in its view, if delegations started exchanging ideas and experiences, the result would be, at the very least, of interest to all. Furthermore, the Delegation considered that the Delegations of Canada and the United Kingdom had benefited from additional clarification from a number of delegations on their request for a clear common understanding of what was meant by quality with respect to patents. The Delegation was of the view that the Delegation of Singapore had provided an excellent starting point on the topic and expressed its hope to capture some additional ideas for future consideration by the Committee. The Delegation welcomed further contributions in that regard. Noting that a number of delegations had expressed concern over a perceived narrow view of the link between quality of patents and the Development Agenda recommendations, the Delegation stated that those delegations had accepted their suggestion to work in a cooperative manner to better expand upon those inter-linkages. The Delegation therefore proposed to revise document SCP/16/5 for reconsideration at the seventeenth session of the Committee. The Delegation expressed its intention to attempt to address the concerns shared with them, to clarify the misunderstandings expressed, and present a proposal that would be worthy of the support of all delegations. Additionally, the Delegation specified that they would elucidate upon some specific work actions that the Committee could undertake on the issue of universal importance. The Delegation noted that several of the delegations that had taken the floor in respect of their proposal had utilized the opportunity to suggest specific work items of their own inspiration. The Delegation considered that many of those informal proposals merited consideration and were well suited for further elaboration under the quality umbrella. The Delegation encouraged those delegations and any other delegations with interesting ideas but who had not vocalized them to the Committee, to prepare written submissions to the Secretariat for consideration at the next session of the SCP. The Delegation therefore asked the Secretariat to provide the membership with a target timeframe for the submission of documents to ensure translation and availability to the Member States of the SCP in advance of its next session.

211. The Delegation of the Republic of Korea reiterated its support for the proposal made by the Delegations of Canada and the United Kingdom, and, as invited by the Delegation of Canada, it expressed its wish to submit a paper, if necessary and possible, within the timeframe set by the Secretariat or Member States. In particular, the Delegation noted its intention to present a concrete and detailed proposal to be added to the original proposal made by the Delegations of Canada and the United Kingdom. The Delegation recalled its proposal suggesting the consideration in detail of the beneficial effects of international work-sharing schemes in promoting the quality of patents. Referring to, for example, the existence of the Patent Prosecution Highway (PPH) and other bilateral or regional work-sharing schemes that were already in place, it observed that positive effects had been resulting from those bilateral and regional arrangements that enhanced the quality of patents and quality of the examination patents in general.

212. The Delegation of Egypt requested the Delegation of Canada to present its proposal in writing.

213. The Delegation of India, speaking in its national capacity, expressed its appreciation to the Delegation of Canada for their very comprehensive and excellent overview of the discussions it had had informally with them. The Delegation agreed that the issue of quality of patents was

something important for it as for many other delegations. The Delegation expressed its willingness to work along the lines proposed by the Delegation of Canada. The Delegation also requested to circulate the proposal in writing. The Delegation expressed its hope to have a common agreement on what was meant by quality of patents. It stressed the importance of understanding what should be meant by that expression in order to look at the concrete work to be carried out as indicated by the Delegation of Canada. The Delegation considered that it would be difficult to agree on a work program if a divergence in the meaning of quality of patents emerged. The Delegation expressed its willingness to engage with the Delegations of Canada and the United Kingdom on that issue, and expressed its intention to present in writing its intervention as well as ideas that might contribute to taking the work further in the Committee.

214. The Delegation of Angola agreed with the proposal made by the Delegations of Canada and the United Kingdom. However, it stated that there were some issues that had not been addressed, such as the lack of human and infrastructural capacity of certain patent offices. The Delegation noted that when the issue of the quality of patents was considered, there was the need to specify how it was intended to address the lack of human and infrastructural capacity in developing and least developed countries, including accessing databases online. The Delegation hence asked some clarification about the way the proposal intended to address such issue.

215. The Delegation of Canada specified that they had laid out three foundational components that at that time it believed to be of interest in a number of areas on quality, and it had not been their intention to provide specific work items under those components. Noting the statement made by the Delegation of Angola, the Delegation stated that it would take that on board in the process of the revision of the document. The Delegation encouraged once again individual delegations who had concerns with specific aspects under quality to submit written proposals as well so that the Committee could engage in discussions on elements of quality that were important to those delegations.

216. The Delegation of Angola stated that before approving this proposal unanimously, every member should be on board.

217. Recalling the suggestion of the Delegation of Canada, the Secretariat noted that any Member State could make a proposal, which would then be published on the WIPO website as an official WIPO document and be discussed under the agenda item on quality at the next SCP session. The Secretariat hence suggested the end of August as the timeline for the submission of those proposals.

218. The Delegation of Panama supported the proposal, which it considered very interesting. The Delegation stated that when defining the term "quality of patents", the basic requirements of patentability, namely, novelty, inventive step and industrial applicability, should be considered, although, in its view, that should not lead to a limitation of flexibilities in national legislations. The Delegation expressed its intention to submit its statement in writing.

219. The Delegation of Egypt, having the opportunity to get a written copy of the proposal made by the Delegation of Canada, considered that there was sufficient flexibility in the proposal, which it considered very interesting. The Delegation expressed its willingness to further discuss the proposal.

220. The Delegation of Venezuela proposed not to go further into the substance, leaving future work on other agenda items still open. The Delegation therefore suggested addressing the matters left under other agenda items.

221. The Delegation of India asked for a clarification about the process of submission of suggestions and proposals. The Delegation asked whether the written comments from Member

States and observers would be included into the revised document that the Delegations of Canada and the United Kingdom proposed to present to the next session of the SCP, if a deadline, for instance August, was established for receipt of those comments. The Delegation observed that if that was the case, the revised document would be received much later than August. The Delegation requested, in that case, that sufficient time be given to Member States to consider the revised document in their capitals in order to prepare and provide meaningful comments on the revised document. The Delegation therefore asked if there would be a timeframe when such revised document would be made available and if it would be available on the WIPO website with the inputs.

222. The Delegation of Brazil stated its understanding that the Delegations of Canada and the United Kingdom would revise their proposal in accordance with the comments they had received. The Delegation noted that the Delegations of Canada and the United Kingdom, however, might not take all the comments into account. The Delegation therefore considered that the comments would be helpful for the Delegations of Canada and of the United Kingdom to revise their own proposal. If other countries had different views on the topic, in its opinion, they could come up with different proposals.

223. The Delegation of Canada noted that the statement made by the Delegation of Brazil had reflected its thought. The Delegation specified that it was not its intention to become the Secretariat for quality. The Delegation expressed its intention to improve their document by taking comments that had been received on board, but it was not their intention that others would submit comments to them during the inter-sessional period. The Delegation hence proposed that those individual delegations submit their own proposal to the Secretariat.

224. The Delegation of India reiterated its wish to receive the revised document in time. In addition, the Delegation stated that later submission of comments and proposals should not be disqualified and that the proposals and comments presented after the deadline should be circulated.

225. The Delegation of the United Kingdom agreed with the understanding of the Delegations of Brazil and Canada.

226. The Delegation of South Africa asked for some time to reflect on the proposal of the Secretariat concerning the timeframe so that the Delegation could discuss it within the African Group.

227. The Chair presented its suggestion to the Committee on the future work relating to the topic under discussion.

228. The Delegation of Canada clarified that it would revise its proposal contained in document SCP/16/5 in light of the comments that had been received during the current session. The Delegation further encouraged other delegations to separately submit any written proposals pertaining to quality of patents for consideration at the next session.

229. The Committee discussed some issues relating to submission of proposals and comments prior to the next session of the SCP, for example, a deadline for the submission and translation of the submitted proposals and comments, and agreed that it would follow the general procedures of the SCP. After some discussion, the Committee agreed that:

(a) This topic will remain on the agenda of the seventeenth session of the SCP. Discussions will be based on the proposal by the Delegations of Canada and the United Kingdom (document SCP/16/5) to be further revised by those delegations, and other comments/proposals presented by Member States.

(b) Observers are invited to submit their comments in as many working languages of the Committee as possible.

(c) The Secretariat will revise the preliminary study on opposition systems (document SCP/14/5), taking into account the comments made, and any additional information to be submitted, by Member States.

## AGENDA ITEM 9: PATENTS AND HEALTH

230. The Delegation of South Africa presented a proposal on behalf of the African Group and the Development Agenda Group. The Delegation recalled that, at the fifteenth session of the SCP, the African Group had proposed that the Committee should undertake a work program on the topic “patents and health.” The African Group and the Development Agenda Group were of the view that the patent system should be consistent with fundamental public policy priorities, and in particular the promotion and protection of public health. It noted that the issue of patents and its impact on public health had been the subject of discussion in many fora: for example, in 2003, the 56<sup>th</sup> World Health Assembly of the World Health Organization (WHO) had urged Member States “to reaffirm that public health interests are paramount in both pharmaceutical and health policies,” and “to consider, whenever necessary, adapting national legislation in order to use to the full the flexibilities contained in the Agreement on Trade-Related Aspects of Intellectual Property Rights”. Furthermore, in 2001, the Doha Ministerial Declaration on the TRIPS Agreement and Public Health affirmed, *inter alia*, that the TRIPS Agreement did not and should not prevent Members from taking measures to protect public health. The WHO Global Strategy and Plan of Action (GSPOA) on Public Health, Innovation and Intellectual Property, adopted in 2008, stated that while international IP agreements contained flexibilities that could facilitate increased access to pharmaceutical products by developing countries, they might face obstacles in the use of flexibilities, and thus there was a need to address such problem and remove obstacles faced by developing countries in making full use of the public health related flexibilities. The GSPOA also stated that IPRs should not prevent Member States from taking measures to protect public health, and that international negotiations on issues relating to IPRs and health should be coherent in their approaches to the promotion of public health. In order to protect public health, the flexibilities and safeguards contained and allowed by the TRIPS Agreement would need to be incorporated in the national legislation. There was equally the need to ensure that international commitments, including regional and bilateral arrangements, did not restrict those flexibilities and safeguards. Moreover, those safeguards and flexibilities had to be workable in practice, particularly with respect to ensuring access to medicine. In that context, the Delegation stated that it would be pertinent for the Committee to discuss the issue of patents and health and draw up a work program that assisted countries in adapting their patent regimes and making full use of the patent flexibilities. Against that backdrop, the African Group and the Development Agenda Group proposed the following work program that sought to enhance the capacities of Member States, and particularly developing countries and LDCs, to adapt their patent regimes to make full use of the flexibilities available in the international patent system to promote public policy priorities related to public health. The Delegation explained that the work program was composed of three interlinked elements that were to be pursued simultaneously. Those three elements were: (i) the elaboration of studies to be commissioned by the WIPO Secretariat, following consultations with the Member States at the SCP, from renowned independent experts; (ii) information exchange among Member States and from leading experts in the field; and (iii) the provision of technical assistance to Member States, and particularly developing countries and LDCs, in relevant areas, and building upon work undertaken in the first two elements of the work program. As regards element (i), the Delegation noted that the Secretariat would be requested to commission a framework study by leading independent experts to examine the challenges and constraints faced by developing countries and LDCs in making full use of the public health related patent flexibilities both in the

pre-grant and in the post-grant stage. It further stated that the study should also include a component on the law and practices with regard to compulsory and government use licenses in WIPO Member States. Such a study would also provide, as detailed as possible, information concerning Member States that had issued or that had attempted to issue compulsory and government use licenses, the details of the license issued, the challenges faced as well as the impact on public health. In addition, the study should also include the provision of empirical data on the royalty rates set in each case. Another component proposed by the Delegation was examining the extent to which countries used exhaustion of rights to allow parallel trade in medicine. The third component proposed by the Delegation was an assessment of the benefits of mandatory disclosure of International Non-Proprietary Names (INNs) in the abstract or title of patent applications. In its view, that would enable an easier identification of the generic name of the medical product subject described in the patent application. Further, the Delegation proposed that, as the fourth component, a cost-benefit analysis of the admissibility of Markush claims, *i.e.*, broad patent claims that might apply to a broad range of compounds, be conducted. In its view, it could be worthwhile to analyze whether such claims based merely on theory could be considered to satisfy the criteria for patentability. Regarding the second element related to information exchange, the Delegation proposed that the Secretariat invite the UN Special Rapporteur on the Right to Health, Mr. Anand Grover, to the seventeenth session of the SCP, to present his report to the Human Rights Council on intellectual property rights and access to medicines. The Delegation further requested the Secretariat to organize, in consultation with Member States, experience-sharing sessions on countries' use of patent flexibilities for promoting public health objectives during the seventeenth and eighteenth sessions of the SCP. The Delegation also proposed that the Secretariat organize a technical workshop on state practice involving compulsory licensing of medical technologies, including the application of Articles 30, 31 and 44 of the TRIPS Agreement. Lastly, under the element of information exchange, the Delegation requested the Secretariat to develop a database on the patent status in WIPO Member States of relevant diagnostic tools and medicines for at least ten non-communicable and communicable diseases. Such information would also include information on the availability of generic versions of the tools and medicines. The list of the ten non-communicable diseases and communicable diseases would be identified in consultation with Member States with the support of WHO. The Delegation was of the view that the database would be useful in identifying the patent status of medicines for both communicable and non-communicable diseases and how access to those medicines could be better ensured by making full use of the available flexibilities. The Delegation noted that that request was not new, since in 2003, WHO had requested the WIPO Secretariat to provide information about the patent status of essential medicines. Concerning the third element on technical assistance, the Delegation proposed that, based on the outcomes of the studies and information exchange contained in the two previous elements, the WIPO Secretariat, in consultation with Member States, develop targeted technical assistance programs. The Delegation also requested the Secretariat to develop a technical assistance module that explicitly demonstrated the difference between compulsory licenses that were granted under the procedures of Part II of the TRIPS Agreement, concerning patent rights, and those granted by Part III of the Agreement concerning the remedies for infringement of those rights. The Delegation considered that those technical assistance programs would explain both approaches and focus on the flexibilities afforded to both systems, noting that under the structure of the TRIPS Agreement, Article 44 compulsory licenses were not subject to the restrictions that existed for Articles 30 and 31 of the Agreement. The Delegation stated that those targeted technical assistance programs would proceed from the studies identified in element (i) above. The Delegation explained that the proposed work program had links to the Development Agenda recommendations, most specifically to recommendations 1, 7, 9, 14, 31 and 40.

231. The Delegation of Panama expressed its appreciation to the African Group and the Development Agenda Group for their proposal, and requested the distribution of their proposal in writing.



232. The Delegation of South Africa stated that it would submit its proposal in writing to the Secretariat so that it would become a working document of the SCP.

233. The Delegation of Hungary, speaking on behalf of the European Union and its 27 Member States, emphasized that the issue of public health was of great importance and was a common goal of mankind to reach a deeper understanding and tackle the emerging global threats relating to it, such as the high incidence of diseases and malnutrition. The Delegation therefore expressed its appreciation to the African Group and the Development Agenda Group for raising that issue as an area for future work and further discussion in the SCP. Noting that it was a complex issue of paramount interest and bearing in mind the work being done in other international organizations, for example in WHO and WTO, the Delegation was of the view that the Committee would need further information to evaluate WIPO's possible added value to discussions on the issue of patents and health. The Delegation considered that WIPO had significant technical expertise in that area which could usefully contribute to work on the issue as we had seen, for example recently in the WHO's work on Pandemic Influenza Preparedness in which context WIPO had conducted a patent search. The Delegation requested that the Secretariat provide, during the current session of the SCP, preliminary oral remarks on its work and projects, including those carried out in cooperation with other international organizations concerning patents and health.

234. The Delegation of France, speaking on behalf of Group B, expressed its appreciation to the Delegation of South Africa for presenting its proposal. Noting that it was a very dense proposal, the Delegation requested a copy of the proposal in writing in order to consider the proposal properly. The Delegation stated that, under the agenda item "patents and health", the Committee should concentrate on the added value WIPO brought, and could bring, to global challenges, such as health from the point of view of its technical expertise. In its view, the Committee should not attempt to import discussions held in other fora. The Delegation supported the request made by the Delegation of Hungary on behalf of European Union and its 27 Member States concerning the Secretariat's oral report on its work and projects.

235. The Secretariat presented WIPO's activities in relation to intellectual property and public health as follows:

"Towards the background of the Development Agenda and in the broader context of the United Nations' Millennium Development Goals (MDGs), WIPO has established its program on Intellectual Property and Global Challenges. Through this program, WIPO, as the specialized United Nations agency for intellectual property, endeavors to lead the international policy dialogue on the intersection between intellectual property and global public policy issues. WIPO cooperates actively with diverse international partners, particularly within the United Nations system, in order to contribute to the shared solutions to the major challenges facing humanity, in particular, global health, climate change and food security. The focus on these three subject areas is guided largely by Member States' requests, among others, in the Development Agenda, as the most immediate impact of many of these global problems is borne by developing and least developed countries.

"Building on the achievements of the former Life Sciences Program, the Global Challenges Program works to improve partnerships with WIPO's policy partners. Public health is a central issue. WIPO established a strong and well functioning working relationship with WHO and WTO in the context of the discussion, the adoption and the implementation of the WHO Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property (GSPOA). This trilateral cooperation is intended to contribute enhancing the empirical and factual information basis for policy makers and supporting them in addressing intellectual property issues in relation to public health.

“The cooperation and the enhanced policy dialog with WIPO’s international organization partners, such as WHO, WTO and UNCTAD, but also with regional and national organizations as well as with NGOs, civil society, the private sector and academia is an important part of the strategy. To this effect, since 2007, WIPO has organized a series of pertinent Life Sciences Symposia. Those which are most relevant to public health include:

- IP and Bioethics;
- Current Issues in Intellectual Property and Public Health;
- Intellectual Property and Life Sciences Regulation;
- Public Policy Patent Landscaping in the Life Sciences;
- Public Sector Intellectual Property Management;
- Symposium on Future Challenges of International Law: the Way Forward in Patenting Biotechnology;
- The Evolution of the Regulatory Framework on Pharmaceutical Test Data.

“WIPO works actively with WHO and WTO to identify and provide its contribution to the implementation of the WHO GSPOA. To this effect, the three organizations meet on a regular basis to discuss and exchange on their relevant activities. A joint WHO, WIPO and WTO Technical Symposium “Access to Medicines: Pricing and Procurement Practices” was held on July 16, 2010. The Symposium provided extensive factual information on prices of medicines and issues relevant to the procurement of medicines. Another joint Technical Symposium “Access to Medicines, Patent Information and Freedom to Operate” was held on February 18, 2011. It built on the first Symposium and looked into available patent information resources and discussed their use for public health purposes. In this context, a case study looked into the patent status of medicines that had been recently included in the WHO Model List of Essential Medicines. This second Symposium was preceded by a Workshop “Patent Searches and Freedom to Operate” on February 17, 2011 that introduced participants to the basic concepts of how to do patent searches and how to do freedom to operate analyses.

“Furthermore, WIPO has supported with its intellectual property expertise the WHO Intergovernmental Meeting on Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and other Benefits (IGM). WIPO, upon request by WHA Resolution 60.28, contributed a working paper “Patent issues related to influenza viruses and their genes” in 2007. Following a request of the WHO Open-Ended Working Group (OEWG) for Member States on Pandemic Influenza Preparedness (PIP) in December 2010, a WIPO Patent Search Report on Pandemic Influenza Preparedness (PIP)-related Patents and Patent Applications was prepared and submitted to the meeting of the OEWG in April 2011. These papers are published on WIPO’s website and on the WHO Avian influenza website.

“WIPO is equally engaged in providing intellectual property expertise to the initiative of the Special Programme for Research and Training in Tropical Diseases (TDR) to set up an African Network for Drugs and Diagnostics Innovation (ANDI), the African Union Pharmaceutical Manufacturing Plan for Africa, UNITAID and the Medicines Patent Pool. In cooperation with UNITAID, a group of experts came together to help illuminating pertinent issues on licensing that was intended to help UNITAID preparing the setup of the Medicines Patent Pool. In cooperation with the Medicines Patent Pool and WIPO’s Global Information Service, the patent status of two antiretroviral medicines has been examined. The Medicines Patent Pool has published relevant information on its website.

“The information presented above highlights our work on health and patents and intellectual property, and introduces you to the major aspects of the trilateral cooperation. WIPO, WHO and WTO get increasingly engaged in providing input in their respective

training activities. For example, WHO and WIPO participate in national and regional seminars organized by WTO on the implementation of the TRIPS Agreement.

“WIPO is committed to continue working with all stakeholders on the issues in the context of intellectual property and public health.”

236. The Delegation of India expressed its appreciation to WIPO for its work done in the area of health. The Delegation expressed its belief that it was a very important area of engagement for WIPO and suggested further strengthening of that area within WIPO's activities. With regard to the contributions made to the recent WHO PIP/OEWG meeting, the Delegation recalled that, following reports of widespread patenting based on PIP biological material, the Delegations of India and Brazil had requested in the WHO PIP-OEWG meeting in December 2010 that WIPO be asked to prepare a report on PIP-related patents including patent applications in connection with H5N1 and H1N1 pandemic virus. The Delegation noted that many delegations had been keenly looking forward to WIPO's valuable and specialized input that could shed light in the issue and help taking the discussion forward in a useful manner, especially inputs in relation to PATENTSCOPE. While the Delegation expressed its appreciation for the report presented by WIPO, the Delegation observed that the report was released only on April 1, 2011, just in time for the final round of the PIP/OEWG meeting which was held on April 11, although the study was requested in December 2010. In its view, the delay in presenting the report led to limited utility of the report, and had that report being presented earlier, it would have allowed delegations time to consider it and make better use of its contents. The Delegation observed that an NGO had been able to prepare an elaborated report on the said issue as early as March using the PATENTSCOPE database. Further, the Delegation noted that, compared to the document produced by that NGO, the WIPO report had treated the issue rather superficially and had lacked adequate graphics and analytical details. Moreover, the Delegation pointed out that WIPO's report contained a long list of disclaimers which appeared to put a question mark on the entire presentation itself and its usefulness to delegations. The Delegation further observed that the report had gone into, in its view, extraneous issues such as the rationale of patenting, and seemed to project a defensive approach by making statements such as “companies based in industrialized countries are now co-owned by companies of developing countries”. In its view, such a defensive approach to the issue was unnecessary. The Delegation noted that those points had been highlighted by India and other developing countries in the OEWG meeting, and added that it would have been useful if the presentation by WIPO had been followed by interactive discussions with a question and answer session. The Delegation expressed its hope that further work in the area of IP and health in WIPO would contribute to greater clarity in WIPO's work in that area and enable more focused and useful inputs to processes outside of WIPO and more productive engagement with other IGOs and UN bodies working in that important area.

237. The Delegation of Brazil shared the same concerns as the Delegation of India. The Delegation noted that it would have hoped that the report on the PIP-related patents had been more comprehensive, more detailed and therefore, more useful for the work in WHO. The Delegation observed that, as many other global issues, the health issue had not had an intergovernmental home in WIPO, and consequently, Member States sometimes lost track of what was being done in that area. The Delegation therefore noted that the establishment of an intergovernmental format of participation by Member States for taking decisions on global issues might be desirable.

238. The Delegation of the United States of America expressed its appreciation for the WIPO report in relation to PIP. The Delegation noted that that report was extremely extensive and valuable, and that the disclaimers had reflected the complexity of the report and the inability to fully analyze the data, given the small number of patents compared to the large number of published applications as well as the moving-target nature of that report. Although it would have

been favorable to have the report in January, the Delegation considered that that would have been an extremely unreasonable or difficult target to meet.

239. The Secretariat expressed its appreciation for the feedback on its PIP report. He noted that for the sake of transparency and in order to avoid providing false expectations, the report had clearly stated both what it had achieved and what it could not have achieved. The Secretariat further noted that he was not in a position to evaluate his report against another study, and considered that the best approach might be to view each study as a complementary material. The Secretariat expressed its willingness to respond to any further questions, if necessary, in the WHO meetings.

240. The Delegation of Switzerland requested the Representatives of WHO and WTO to describe the work on the subject in their respective organizations so that the Committee could have a full picture of the situation.

241. The Representative of WHO stated that he would complement the presentation made by the WIPO Secretariat by providing additional information on the mandate of WHO and common activities, and delivered the following statement:

“WHO has a long standing mandate to work on public health and intellectual property. That mandate has been reinforced by the Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property that was adopted in 2008 and 2009, as mentioned by the Delegation of South Africa and the WIPO Secretariat.

“That strategy points out that “WHO shall play a strategic and central role in the relationship between public health and innovation and intellectual property within its mandates, capacities and constitutional objectives, bearing in mind those mandates of other relevant intergovernmental organizations”. Consequently, the resolution requests the Director General of WHO: “to coordinate with other relevant international intergovernmental organizations, including WIPO, WTO and UNCTAD, to effectively implement the global strategy and plan of action”. Against that backdrop, the Directors General of the three organizations (WHO, WTO and WIPO) have agreed to intensify the collaboration among the Secretariats and to work more closely together on issues relating to public health, intellectual property and trade.

“The objective of such collaboration is to build up a continued sustainable collaboration to make best use of available resources through closer coordination and enable more effective program delivery. For that purpose, WHO, WIPO and WTO have set up regular joint coordination meetings on all issues related to public health and intellectual property. In these meetings, the Secretariats are discussing what is on the agenda in terms of training programs, workshops, publications and others. The three organizations are requesting each other to provide information to the relevant activities of the other organizations within our specific fields of expertise, meaning that WHO is providing information on medical products, what are the essential medical products, WIPO is contributing, for example, patent information and WTO is contributing information and knowledge on specific trade issues including tariffs and taxes. The three organizations, therefore, are able to assemble the specific expertise that is available in them, making their programs much more comprehensive, because if those programs are done on its own, it will only be able to cover one side and one aspect of the very complex area of intellectual property and public health.

“As mentioned already, one of the joint activities is a series of joint technical symposia, where more facts to the debate on public health and intellectual property are intended to be provided. In the preparation of the symposia, it was very clear that none of the three organizations could have organized such an event without the knowledge and the

expertise provided by the two other organizations. It was a much more useful event than doing those activities separately.

“The three organizations also work together on the issue of patent information under CDIP projects. WIPO is going to prepare or to mandate a patent landscape on vaccines to provide WHO with an overview on who is doing the patenting, which diseases these researchers are focusing on and where innovation is taking place. That is another example of collaboration where three organizations have a common interest, and WIPO is able to provide such information.

“Following a request of the Member States of the PIP/OEWG, WIPO has provided a Patent Search Report on Pandemic Influenza Preparedness (PIP)-Related Patents and Patent Applications. This report contributed to the success of the Working Group and the adoption of the Framework on Pandemic Influenza Preparedness at the end of the negotiations in April. Hopefully, the World Health Assembly that will discuss this issue in Committee A, will be able to adopt this framework on virus sharing at the end of the Assembly this week. WHO is very thankful to WIPO that they were able to react on this request of our Member States and to provide us with such a comprehensive report in such a short timeframe.

“This was a very interesting report in terms of the debate we have, but all the other information on patents that were relevant to this process were of course very much welcome. It is very difficult to compare different reports if they do not follow the same search methodology, and although these reports were not identical and there were differences among the reports, in order to have a more comprehensive picture, it is important to look at all of those reports.

“The overall objective of the collaboration among the three organizations is to provide more evidence and facts to the debate on public health and IP. And the past experience shows that the three organizations have complementary mandates, complementary expertise and complementary knowledge. All would benefit greatly if the three organizations work more closely together, which is being done on a daily basis.”

242. The Representative of WTO outlined the basis for the activities of the three organizations, details of those activities and sources for further information as follows:

“The three organizations share a common goal that is to ensure that existing medical technologies, including medicines, vaccines, medical devices etc. get to the patients needing them and that further progress is made through the innovation of new technologies in the pharmaceutical sector. By joining the forces, it is believed that the three organizations can offer an effective tool to achieve this objective. Besides domestic policies and practices, the evolving state of the global disease burden and innovation patents and issues regarding the production and dissemination of medical technologies, the international trade world and intellectual property rights deserve full coverage, as they intersect with public health objectives in many areas and in various ways. By bringing together respective areas of expertise, it is hoped that the common knowledge base will be strengthened. The purpose is to consolidate available data and practical experiences which are expected to constitute a useful and accessible information source for policy makers, as well as to respond to and accompany each organization’s technical assistance and capacity building programs. The aim is certainly neither to offer policy recommendations nor to interfere with the ongoing debate, such as the one in the SCP.

“Often cited, the very starting point for WTO’s active engagement in the discussion on the interface between public health and intellectual property rights was the Doha Declaration on the TRIPS Agreement and Public Health in 2001, which still constitutes the landmark

and benchmark for all the work WTO is carrying out in this area in close cooperation with WIPO and WHO.

“There is an increased focus in WTO’s technical cooperation activities as regards intellectual property rights and public health, which is very closely assisted by the very cooperation with our sister organizations. This has led to better informed factual background, based on mutual participation and input from both WHO and WIPO.

“A number of workshops which are meant to raise awareness, to provide information and to share experiences have been carried out every year. The most interesting one of those may be the specialized workshop on intellectual property rights and public health, which will be held this year in October in very close cooperation with WIPO and WHO. WTO also hosts an advanced course for government officials which is taking place this week in Geneva, where a day and a half session on intellectual property and public health is held with active participation of representatives of WIPO and WHO. Further, WHO organizes a colloquium for teachers that also has a full component module on IP and health, which is meant to spread the knowledge within the academia community. Various regional and national workshops which generally contain fully-fledged sessions on intellectual property rights and public health have been also held. Since the goal is to provide factual and technical information, those activities do address TRIPS flexibilities extensively. In addition, WTO has a number of other types of core activities, for example, an annual review of the so-called paragraph 6 system every year in the TRIPS Counsel in October. Since October 2010, it has moved beyond the narrow discussion of the operation of the system itself to the broader aspects of intellectual property rights and public health. The delegates are encouraged to look into the Minutes of that annual review which provides a wealth of information for discussions. WTO works also in the area of solving disputes, and if there is one case to be cited, the regulatory review exception case which by now almost ten years old but which provided a very important confirmation of the interpretation of exceptions to patent rights, especially in the area of public health.

“WTO provides, every year in October, a report on technical cooperation activities in general to the TRIPS Counsel. The WTO report contains a specific section on activities as they relate to public health, and for example WHO and WIPO also provide their reports in this context. Comprehensive oral reports are given by the WTO Secretariat as part of the Annual Review of the paragraph 6 system which can be found in the Minutes of the October meeting of the TRIPS Counsel and also of the March meeting this year. In addition, regularly updated information is provided on the dedicated webpage covering the TRIPS Agreement and public health, for example, information on how to accept the Protocol amending the TRIPS Agreement and on national implementing legislation which is a useful source of inspiration for countries. Finally, WTO’s in-training module and a Handbook on TRIPS matters deserve to be mentioned here as well because both have a stand-alone module on public health addressing the linkage between intellectual property rights and public health.”

243. The Representative of KEI, noting that Element 5.3(a) of the WHO Global Strategy on Public Health, Innovation and Intellectual Property stated “explore it and, where appropriate, promote a range of incentives schemes for research and development including addressing, where appropriate, the de-linking of the costs of research and development and the price of health products, for example through the award of prizes, with the objective of addressing diseases which disproportionately affect developing countries”, requested the Representative of WHO to provide more details on how that Element had been implemented. In addition, he asked the Representative of WHO whether WHO had any data on the impact of patents on access to cancer drugs.

244. The Representative of WHO noted that the Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property addressed the issue of alternative mechanisms of financing innovation in relation to the statement found in the Global Strategy that “intellectual property rights are an important incentive for the development of new health-care products. This incentive alone does not meet the need for the development of new products to fight diseases where the potential paying market is small or uncertain”. He explained that Member States, when they had negotiated and adopted the Global Strategy, had said that if the patent system was not working well, it was not working with regard to neglected diseases because the market was not there and that was why the investment in innovation was lacking. Then, other mechanisms to finance innovation have to be explored in order to finance research and innovation in neglected diseases. That is the background of Element 5 and of the paragraph quoted by the Representative of KEI. WHO had a group of independent experts working on these issues of innovative financing mechanisms in the past years that had submitted a report to the last World Health Assembly in 2010. That report had been discussed by Member States who had found that there had been additional elements that needed to be covered and that WHO should invest further work. Following the request by Member States, another expert working group to tackle those issues was established. A report to be drafted by that expert working group will be submitted to the World Health Assembly in 2012. In response to the second question raised by the Representative of KEI, the Representative of WHO stated that, to his knowledge, WHO did not have such data, which was not easy to obtain. He however expressed his willingness to work together with his partners on that issue.

245. The Delegation of Chile stated that the agenda item on patents and health was a very important issue and thanked the African Group and the other delegations who had worked on producing that proposal, which it viewed favorably. The Delegation noted that it had just begun to study several elements contemplated in the proposal. The Delegation asked the Delegation of South Africa for some clarification. In particular, the Delegation noted that while the proposal stated that the three elements being proposed would or should be worked on together simultaneously, in reading element 3 of the proposal, that element would appear to come afterwards. The Delegation therefore asked for some clarification on that point in order to study the proposal as a whole properly.

246. The Delegation of Hungary, speaking on behalf of the European Union and its 27 Member States, thanked the Secretariat and the Representatives of WHO and WTO for their very useful presentation on the work being done in the three respective international organizations in relation to patents and public health. After having carefully listened to them, the Delegation considered that the issue under that agenda item had to be handled with reasonable cautiousness due to the necessity of coordination among numerous actors cooperating in that field. The Delegation thanked the African Group and the Development Agenda Group for their joint proposal concerning the SCP work program on patents and health. It noted that the proposal included several elements to step forward in relation to fundamental public policy priorities, in particular, the promotion and protection of public health. In that respect, the Delegation asked the proponents of that proposal to highlight the way the proposed work program would fit into such a complex framework of cooperation between international organizations. The Delegation considered that it was premature for them to decide on any aspect of the proposal before having the issue deeply analyzed, taking into account the great importance and complexity of the issue and bearing in mind the presentations of WHO and WTO as well as the fact that they had not had enough time to consider the elements included in the proposal. The Delegation emphasized the need for Member States to consult experts in the capital in that respect, given the fact that the issue of patents and health involved several different fields of expertise. The Delegation reiterated their wish to receive more information in relation to WIPO’s contribution to the ongoing work and projects concerning the issue of patents and health, in particular, those carried out in cooperation with other international organizations, in order to enhance their further internal evaluation of the proposed work program. The Delegation therefore requested the Secretariat to prepare a written document containing such

information for the next session of the SCP. The Delegation stated that such a document would be essential in order to enable the Committee to discuss and determine its further work appropriately.

247. The Delegation of France, speaking on behalf of Group B, thanked the African Group and the Development Agenda Group for the very detailed and ambitious work program and expressed its willingness to discuss it at the next session of the SCP. The Delegation noted that the issue of patents and health was a cross-cutting issue which required the consultation in capital of various administrations in order to get instructions, as already underlined by the Delegation of Hungary on behalf of the European Union and its 27 Member States. The Delegation therefore expressed its wish to use the inter-sessional period to take stock of the work already carried out by WIPO and other organizations and to put it into perspective with the contents of the South African proposal. The Delegation therefore suggested that the proposal be discussed at the next session of the SCP, believing that at that point all delegations would be prepared to engage in constructive discussions.

248. The Representative of KEI expressed its appreciation and support to the joint proposal of the African Group and the Development Agenda Group, which was both comprehensive and well thought of. The Representative noted that the proposal largely focused on studies, information exchange and technical assistance relating to the use of TRIPS flexibilities with some novel proposals, such as to explore the benefits to mandating the disclosure of International Non-proprietary Names of relevant medicines in the abstract or titles of patent applications. The Representative observed that SCP members could use the studies, information sharing and technical assistance proposed in the joint proposal to enhance their bargaining power and access to affordable medicines. In its view, both developing and developed countries should be supportive of the African Group/Development Agenda Group proposal. The Representative stated that there could be no realistic expectation of universal access to life saving medicines and other medical technologies unless governments could issue or be threatened to issue compulsory licenses and could take other steps to enable competition for products. The Representative considered that that was true in all countries, but in particular in countries with lower incomes. The Representative stated that UNITAID forecasted that more than 20 million HIV positive persons in developing countries would need access to antiretroviral (ARV) drugs by the year 2025. Further, according to a new study prepared by the National Institute of Health (NIH), the early availability of ARV drugs might cut the transmission of AIDS by 96 percent. The Representative deemed that there was simply no way for Northern donors or developing country governments to support such an extensive program of treatment unless they had access to very cheap generic drugs, and a failure to provide treatment would lead to millions of preventable deaths and the high rate of infection. The Representative believed that for that reason alone, the SCP should be supportive of the proposals contained in document SCP/16/7. The Representative noted that for some types of cancer, it was essential to have access to new drugs, such as Herceptin, a biologic drug used to treat HER2 (Human Epidermal Growth Factor Receptor 2) positive breast cancer: the patented version of that drug could cost as much \$100,000 per year, and was not available to the majority of women who needed that drug. The Representative further noted that there were also very costly diagnostic devices that were needed to provide acceptable standards of care for cancer, HIV, tuberculosis, hepatitis, and other diseases. In that regard, his organization was recently asked whether there would be support for a new global fund program for hepatitis, and some people had suggested expanded donor support for expressive cancer drugs and vaccines. In his view, taxpayers in the Group B countries would agree to pay for all of the expensive patented drugs that were needed to treat cancer, hepatitis, HIV-AIDS and other diseases. The Representative stated that, in the United States of America alone, the number of low income HIV positive persons on waiting lists was 7,873 persons in May 2011, as compared with 361 persons in January 2010. In the Representative's view, the fact that the United States of America could not afford to have universal treatment for AIDS patients living in that country underscored the challenges of providing universal access in developing countries. The Representative pointed out as well that



similar concerns about access to new drugs for cancer and orphan diseases had been also expressed in Europe and other high income countries.

249. The Representative of ALIFAR pointed out that there was a broad consensus about the role of patents to promote research and development. The Representative however noted that the patent system also played a decisive role in terms of costs and national capacity in the health field because it conditioned access to those drugs. The Representative considered that while IP should play an important role on health policies, the international legal framework on IP, after the creation of WTO, had limited the capacity of countries to design their own patent systems even if there was a margin of flexibility which could be used to establish insofar as possible certain balance between incentives for innovation and the interest of the consumer. In her opinion, that was a difficult equation but authorities had to administer that. The Representative hence encouraged countries to avail themselves of the rich experience in the patent systems existing throughout the world. The Representative considered that the first step in such a process was to be able to use those experiences, knowing them and being aware about what other countries were doing. In the Representative's view, the design of patent legislation should be accompanied by other questions closely linked to protection of public health, competition and the transfer of technology; in other words, development of a coherent legal framework that would facilitate access to medicines and health. Noting that WHO had been working for a long time on this subject and had made important contributions to Member States, the Representative considered WIPO had a fundamental role in disseminating information and facilitating the access to it. In her opinion, developing countries within their restrictions of the international obligations should be able to design a patent system which would encourage competition, establish strict standards for the evaluation of patents, tools to control abuse and foster innovation. The Representative stated that with the proliferation of bilateral trade agreements pushed by some developed countries, new obligations having an impact on health had been introduced, such as limitations on compulsory licenses, patent term extension, data protection, link between patents and market authorization. The Representative pointed out that the obligation to grant patents on therapeutic or diagnostic methods and new uses and second use of know products even if those patents did not imply a therapeutic advantage in relation to the product already known could have a decisive impact on health. In her view, such obligations not only would have an impact on health, but would also hurt the basis of the patent system, because their aim was to protect investment, not innovation. The Representative considered that those obligations extended the term of patents and made difficult for generic drugs to enter into the market. The Representative noted that although countries were free to enter into agreements only they deemed convenient, in many cases, the acceptance of such obligation in the patent field was a condition to the acceptance of the agreement *in totum*. The Representative expressed the belief that discussions on the topic was very useful even if a great effort had to be made in order not to reduce it to an intellectual exercise. The Representative pointed out that results and progress must be shown in practice and that the flexibilities of the TRIPS Agreement should be implemented in practice, adapting them to national legislations and using the room for manoeuvre they offered. The Representative considered WIPO and the SCP the appropriate fora to help developing countries to pursue the objectives of public health, making patent standards more flexible and implementing the necessary legal tools. Lastly, the Representative supported the proposal submitted on behalf of the African Group and the Development Agenda Group.

250. The Delegation of Norway thanked the Delegation of South Africa for having presented on behalf of the African Group and the Development Agenda Group a very interesting proposal for a work program on patents and health. The Delegation noted the greatest importance it attached to that issue, and stated its engagement in several fora to address the issue of patents and health. The Delegation aligned itself with the statement made by the Delegation of France on behalf of Group B. The Delegation considered it important to stress its will to ensure both a proper understanding of the contents of the proposal and engaging in discussions to find a good common ground for further work. The Delegation considered that it was not in a position to do

so at the current session and suggested the Committee to revert to the issue and the document for constructive discussion at the next session. The Delegation further requested that the report of the current session reflect the oral presentations made by the Secretariat and the Representatives of WHO and WTO on their successful collaboration between those organizations. The Delegation considered that such a written report would be very useful for it to guide its further deliberations in the Committee.

251. The Representative of TWN welcomed the inclusion of the agenda item on patents and health at the SCP. The Representative considered that health was a priority developmental concern in all developing countries. The Representative thus pointed out that where issues of public health intersected with intellectual property, it became critical for the matter to be discussed in the context of WIPO and particularly in the Committee, without prejudice to discussions and activities taking place in other intergovernmental organizations on the same issue. In her view, it was a well-known fact that pharmaceutical patents did result in high prices of medicines and limited access to affordable generic medicines, and that the problem had become more acute since the adoption of the TRIPS Agreement that had reduced flexibility in the area of patents, as developing countries had to put in place minimum patent standards. The Representative considered that the problem of access to medicines was prevalent and the situation was likely to worsen, as more and more newer pharmaceuticals were patented in developing countries, thus hindering the ability to use and produce generic versions. The Representative also noted that patents could hinder access to upstream research and R&D in new medical tools and technologies, for instance, according to a study prepared for the WHO's report by the Commission on Intellectual Property Rights, Innovation and Public Health (CIPRH), a survey conducted for 103 Indian firms revealed that among 30 variables that could determine the abandonment of R&D projects by the Indian pharmaceutical industry, restricted access to patented upstream technologies caused by contractual difficulties was likely to have the biggest impact on a firm's decision to abandon such projects. In her view, the TRIPS Agreement provided some policy space to formulate patent provisions in a manner not hindering national public health objectives, and several countries had used such policy space as well as flexibilities such as compulsory licensing, government use, public health sensitive patentability criteria, pre- and post-grant opposition, all of which had been of tremendous benefits in the domain of health and access to medicines. The Representative however noted that, unfortunately, few countries had made maximum use of the full range of flexibilities available. The Representative pointed out that there was a number of reasons for such underuse of flexibilities, including lack of awareness on the availability and methods of using flexibilities, poor quality technical assistance provided by international organizations dealing with intellectual property issues, pressures placed by industries on governments to limit the use of such flexibilities, pressure by developed countries on countries using or attempting to use such flexibilities and the lack of political will. The Representative was mostly concerned about the proliferation of bilateral and regional free trade agreements, as well as plurilateral initiatives related to intellectual property that undermined public health, particularly as those agreements and initiatives were aimed at shrinking the remaining policy space available under the TRIPS Agreement. While those issues had been discussed in international organizations, such as the WHO, UNCTAD and the WTO, the Representative considered that WIPO had much to contribute to the debate on patents and public health. The Representative referred to some of the landmark outcomes, such as the report of the WHO's CIPRH which led the way to WHO's global strategy on public health, innovation and intellectual property adopted in 2008, and noted that there was an abundance of valuable research and resources which could inform the SCP's discussion to enhance its knowledge and understanding of the topic. The Representative considered that the subject was important not only for developing countries but also for developed countries, noting the impact of patents on public health. The Representative therefore considered that it was now the time for WIPO to undertake a dedicated discussion on the matter. The Representative endorsed the joint proposal by the African Group and the Development Agenda Group stating that the proposal, with the three elements it encompassed, offered a pragmatic approach to real challenges facing developing countries and LDCs in the context of IP and health. The

Representative considered that in view of the adoption of the Development Agenda, WIPO's engagement in the discussion should be viewed as part of its commitment to a better understanding of development related issues where such issues intersect with public health.

252. The Representative of IFPMA stated that his organization represented the research-based pharmaceutical industry including the biotech and vaccine sectors: IFPMA members comprised 26 leading international companies as well as 44 national and regional industry associations covering low, middle high income countries. The Representative pointed out that the modern patent system had been providing needed incentives for the pharmaceutical industry to develop the majority of the medicines currently available. The Representative considered that that innovation model had been behind some of the most extraordinary progress in modern medicine. The Representative expressed its belief that it did not mean that there was no room to enhance intellectual property in order to increase even further pharmaceutical innovation. The Representative stated that innovative and creative ideas and solutions were needed to improve research where a market failure was identified, such as research for some tropical diseases and antibiotics. The Representative pointed out that, in that spirit, IFPMA members had been exploring new R&D models, for instance, open innovation and public-private partnerships, in order to find additional options to improve public health globally, and welcomed WIPO's engagement in that debate. The Representative noted that, as a UN technical agency, WIPO could work as a much needed convention center for partnerships to foster innovation and improve public health.

253. The Delegation of Poland, speaking on behalf of the Central European and Baltic States, thanked the Delegation of South Africa for presenting a joint proposal on behalf of the African Group and the Development Agenda Group countries concerning SCP work program on patents and health. The Delegation noted that the problem of patents and health was important not only for developing countries, but also for countries of other more developed regions of the world including those of its Group. The Delegation therefore shared the views expressed by other delegations of having all the issues tackled in the proposal to be thoroughly considered and analyzed. Due to the fact that the proposal and the subsequent document was submitted only in the course of the current session, the Delegation asked for more time to reflect on it internally, to study it in-depth and consult with their relevant authorities in the capitals. The Delegation considered that that would enable them to constructively contribute to further discussion on that issue at the next SCP session in December. Further, the Delegation supported the request from the European Union and its 27 Member States to the Secretariat to prepare a document on WIPO's contribution to the ongoing work and projects concerning the issue of patents and health, including those in cooperation with other international organizations.

254. The Delegation of Ecuador, in respect of the proposal submitted by the Delegation of South Africa on behalf of the African Group and the Development Agenda Group, expressed its wish to participate actively by describing its experience regarding flexibilities. The Delegation noted that a compulsory license of a non-commercial nature had been issued on April 14, 2011, in relation to a pharmaceutical patent. The Delegation expressed its availability in providing the Secretariat all information about that, in particular the drawbacks and past experiences and all the legal proceedings that had been involved in that procedure, believing that it would contribute to the development of the proposal presented by the Delegation of South Africa.

255. The Delegation of India, speaking on behalf of the Development Agenda Group, stated that it attached particular importance to the consideration of the issue of patents and health. It expressed its satisfaction for having that issue finally on WIPO's agenda, believing that the SCP was the right forum to discuss issues in the context of patents. The Delegation noted that the intersection between the patent system and public health goals had been an area of growing concern worldwide as well as the subject of vigorous discussion particularly in the last decade after the coming into force of the TRIPS Agreement. The Delegation noted the fact that the patent system responded inherently to the market, had led to research and development and

production of medicines only in profitable diseases, but had neglected to a great extent widespread diseases in large parts of the developing world. In its view, the fact that the patent system was essentially market-driven meant that pharmaceutical products were priced to make profits which ultimately rendered many key medicines out of the reach and out of access for the common man in the developing world. The Delegation considered that that, and other such concerns, had agitated civil society, policy makers and governments worldwide and had led to much debate in fora such as WHO and WTO. The Delegation pointed out that those debates had resulted in concrete policy initiatives, such as the WHO Global Strategy and Plan of Action (GSPOA) and the 2001 Doha Ministerial Declaration on the TRIPS Agreement and Public Health. The Delegation expressed its surprise and regret that, despite so much debate on how intellectual property rights impacted public health goals in other bodies, that issue had never been addressed intergovernmentally in WIPO, the only specialized UN agency dealing with intellectual property. In its opinion, WIPO had been conspicuous by its absence in that global debate on a key issue of public concern. The Delegation hoped that this would be redressed soon by the Committee, and stated that to that end, the Development Agenda Group had co-sponsored the joint proposal on patents and public health as contained in document SCP/16/7 with the African Group. The Delegation expressed its willingness to hear comments from various delegations on the substance of the proposal and remained open on exchange of views on its various elements. Referring to the characterization of their proposal as ambitious by the Group Coordinator of Group B, the Delegation stated that its proposal was neither ambitious nor far reaching since WIPO was embarking on work in that area after much debate and actions had already taken place elsewhere. The Delegation considered that its proposal was simply an effort in helping WIPO to catch up with work being done in other United Nations and international organizations in that area, while focusing on WIPO's core competence in the area of intellectual property. The Delegation expressed its hope that other members of the Committee would approach the proposal from the same perspective and engage in substantive and constructive discussion to collectively move forward in that important area.

256. The Delegation of Brazil was of the view that the proposal presented jointly on behalf of the African Group and the Development Agenda Group was of great importance to advance the work of the SCP in a balanced manner. The Delegation pointed out that facilitating access to essential medicines at affordable prices was a common goal of both developed and developing countries, as that was a necessary and fundamental step to achieve the Millennium Development Goals. The Delegation noted that, as a specialized agency, WIPO had indeed the task of supporting the implementation of those goals and, in its view, the proposed project would certainly help executing that. The Delegation considered that the relationship between patents and health was the utmost example of the trade-off inherent to the intellectual property system, as it was needed to find the adequate balance between the incentives required to spur innovation and the need to provide broad access to medicines to ensure a better quality of life for populations of all countries. The Delegation therefore noted that the proposed work program sought to enhance the capacities of Member States, particularly developing countries and LDCs, to adapt their patent regimes to make full use of the flexibilities available in the international patent system to promote public policy towards public health. The Delegation expressed its openness and eagerness to discuss with Member States the way forward to the full implementation of that much needed initiative in WIPO. The Delegation took note of the concerns of some delegations on the need to assure that the work of the SCP was complementary and not duplicative of the work done elsewhere, and expressed its availability to take those concerns on board. The Delegation urged all delegations to analyze the proposal with due care taking into account its paramount importance for everybody.

257. The Representative of MPP thanked the Committee for its accreditation. The Representative stated that the MPP was a new initiative aimed to improve access to medicines and innovation for the treatment of HIV in developing countries by negotiating patent licenses. She noted that in September 2010, MPP had obtained its first license for HIV medicines and related patents from the NIH, and that MPP was currently in negotiation with five HIV medicine

patent holders, mostly pharmaceutical companies. The Representative stated that WIPO had been an important collaborator in MPP efforts, and welcomed the discussions at the SCP on the important topic of patents and health. The Representative stated that her organization had launched the most comprehensive source of patent status information of HIV medicines in developing countries on April 4, 2011. The Representative considered that understanding what was patented and where was a key to SCP's work, and in that regard, MPP had decided to make the patent status information it had had publicly available for others to use and to add to. The Representative considered that WIPO's assistance and the help of many national patent offices had been invaluable in gathering the information in the database which could be accessed on MPP's website. The Representative observed that also under the Development Agenda project on developing tools for access to patent information, WIPO had commissioned two patent landscape reports on HIV medicines at the request of the MPP and UNITAID. The Representative renewed her commitment to continuing collaboration with WIPO and its Member States.

258. The Representative of AIPPI welcomed the agenda item and thanked the Delegation of South Africa, the African Group and the Development Agenda Group for their proposal. The Representative stated that AIPPI had studied the question of the impact of health issues on patent rights in 2008 and had received the very large number of almost 40 reports from AIPPI's national groups, all available on AIPPI's website, and expressed his hope that that information was useful for the SCP work on the issue of patents and health. The Representative therefore expressed AIPPI's availability to support that item if need be with further research.

259. The Representative of CSC supported the proposal presented by the Delegation of South Africa. The Representative recognized that that proposal presented a number of salient features and also provided CSC with the opportunity for new thinking around how the access to public health could be improved. The Representative recognized that there were many very important ideas that needed to be tabled in terms of advancing that agenda item. Therefore, the Representative expressed its hope that delegations would take time to consider the proposal in its totality and to advance it further.

260. The Delegation of South Africa thanked all delegations that took the floor on that item, very important not only to developing countries but to all countries, such as the Central European and Baltic States as mentioned by that Group. The Delegation expressed its belief that their proposal in paragraph 6 stipulated that their proposal was meant for the membership of the whole Committee, particularly to developing countries and LDCs. The Delegation thanked all delegations that took the floor to support the agenda and looked forward to their constructive engagement on their proposal. In reply to the query of the Delegation of Chile about the possible contradictions between paragraphs 6 and 13 of its proposal, the Delegation explained that since the Secretariat had been already providing technical assistance on those issues, it could be carried out simultaneously with other activities, such as studies, but a "targeted" technical assistance would be informed by the outcome of the studies and the information exchange. In reply to the query made by the Delegation of Hungary, the Delegation referred to the statement by the Development Agenda Group. It considered that WIPO had been left behind in discussing health and patents, and expressed its concern about the fact that in WIPO, being the main specialized organization tasked with IP issues, the issue of patents and public health had not been discussed in-depth. The Delegation stated that the proposal simply complemented what had already been done. The Delegation noted therefore that the proposal was to ensure that WIPO also would feature in the discussions on that subject matter, given that WIPO should be the relevant organization that carried out the task of the interface between patents and public health. The Delegation considered that by proposing to WIPO to undertake that task, it would be filling the gap currently existing in the international arena on the discourse on patents and public health. The Delegation further noted that it recognized the need of many delegations to have more time to look into the proposal in-depth. The Delegation welcomed written comments on its proposal from other delegations and suggested setting a

timeframe for those comments in order to be able to engage on discussions constructively at the next session of the SCP with the view to agreeing on a work program on patents and health.

261. In response to a query made by the Chair, the Delegation of South Africa suggested that any contributions from other delegations be submitted by mid-October and that the Secretariat publish them on WIPO's website. In that manner, the Delegations would have access to all contributions in order to be prepared and not to engage on a fruitless exercise during next session of the Committee.

262. The Delegation of France asked whether delegations still had the possibility to express their views during the next session of the SCP even if they had not had any particular proposals to submit in writing. In its view, delegations should be able to participate in the discussion without having first sent written submissions.

263. The Chair clarified that there was the opportunity to provide written comments particularly if delegations wished other delegations to consider their comments beforehand. The Chair stated that it was also possible for delegations to bring their comments to the meeting itself.

264. The Secretariat informed the Committee that if the deadline for comments was mid-October, it was very likely that not all the comments in all languages would be ready in time for the Committee.

265. The Delegation of Egypt, stressing the importance of receiving comments sufficiently in advance to enable a fruitful discussion in the next session of the SCP, suggested that the same deadline for the submission of comments to the proposal from the Delegations of Canada and the United Kingdom with respect to quality of patents be provided.

266. The Delegation of Hungary expressed its appreciation for the statement made by the Delegation of South Africa, and reiterated its need for more coordination at the expert level. After having held those consultations, the Delegation noted that it would bring back its position to the SCP.

267. The Delegation of India expressed its support for the proposal of the Delegation of Egypt, and therefore requested the Secretariat to clarify the timetable toward the next session of the SCP.

268. The Secretariat informed the Committee that the next session of the SCP would be held during the week of December 5, 2011. It noted that translations of documents should be ready two months before the meeting, and therefore, comments should be presented about three months before the actual date of the meeting. The Secretariat noted that it was possible to set up a different deadline, in which case translations might be delayed.

269. The Delegation of Japan considered that the deadline might depend on when the SCP would discuss the whole issue. The Delegation pointed out that even if delegations had been encouraged to submit a written comment or proposal, that should not prevent those delegations to express their opinion on the respective proposals at the next session. The Delegation considered that a deadline should be set, but that would not impede delegations to present their comments in oral form, for example, at the next session of the SCP.

270. The Chair reiterated that, at the next meeting, each delegation would have the full ability to make any comments, reactions or new proposals orally.

271. The Delegation of Venezuela supported the proposal made by the Delegation of South Africa on behalf of the African Group and the Development Agenda Group. The Delegation further noted its agreement with the Delegation of Egypt. However, it considered that since the

subject of health and patents was something that countries had been discussing for about 10 years since the TRIPS Agreement had been adopted, it was not a new topic. It observed that as possible solutions to the issue of health and patents were put off, thousands and thousands of people who did not have access to medicines in their countries were suffering. In that regard, the Delegation noted that the topic of health was not the same as patents and quality, and highlighted the need for dealing with that subject with a certain degree of urgency. The Delegation considered that attempt by WTO to resolve those issues using the Doha mechanism had been a failure, and therefore the SCP should deal with those issues with the maximum amount of urgency, human lives being at stake.

272. The Delegation of Angola considered patents and public health as a very important issue for both developing and developed countries, and noted that a great deal had been written and said at WIPO and at the WHO with regard to that matter. The Delegation explained that the work plan put forward by the African Group and the Development Agenda Group contained three different phases or elements, and thus was a very flexible one. In its view, the SCP should start with the Secretariat looking at studies. In its view, although it would also need to consult with its capital if it was asked why such studies should be carried out, the Delegation of Hungary went back a step. In relation to the comments made by the Delegation of Japan, the Delegation pointed out that the current practice in the UN system was to set a deadline for comments, and if there were no comments by the deadline, it could be assumed that there were no comments to be received. The Delegation therefore considered that it was justified to establish a deadline for the receipt of comments and if there were no comments by the deadline, the Secretariat should be required to go ahead. In its view, otherwise, the Committee would not make any progress in its discussions.

273. The Delegation of Japan, referring to the procedure suggested by the Delegation of Angola, stated that it fully agreed with the opinion of the Chair, and considered that it was common for participants to the Committee to have always the opportunity to express their opinion in the formal session of the SCP.

274. The Delegation of Hungary reiterated its request that a written document on WIPO's contribution in that field be prepared by the Secretariat.

275. With respect to the opportunity to provide comments, taking into account the intention of the proposal made by the Delegation of South Africa, the Chair suggested that additional written proposals from delegations between now and the next meeting would be solicited and that, at the next meeting, the Committee would discuss those proposals, which would be open to full discussion. The Chair expressed its belief that it was not at all the tenor of the meeting for any written document to foreclose any type of discussion at the next meeting.

276. The Delegation of South Africa clarified that its request for written comments on their proposal had been made in order to solicit the views of the membership in time so that it would be possible to know the different views from the membership and to save time. Instead of reopening entire debates at the next session, the Delegation explained that their purpose was at least to advance some of the outlined activities. As it was mindful that it did not circulate its proposal on time, the Delegation expressed its wish to give the other delegations sufficient time to go back to their capitals in order to agree on a work program at the next session of the Committee. In its view, the solicitation of written views would facilitate that process. The Delegation considered that the same reasoning could be applied to some delegations that needed to consult their capitals due to the fact that their experts from capital were not present at the Committee. On the issue of the deadline and the opportunity to make contributions at the next session, the Delegation observed that the Delegation of India had raised the same issue in relation to the project on patent quality. In its view, delegations could always come and voice their opinion in the SCP. It reiterated that what it had been encouraging was submission of written comments by delegations.

277. The Delegation of France reiterated its understanding of the SCP's working method that delegations were completely free to send written submissions if they wished to and to make contributions at the next meeting if they wanted to. The Delegation expressed its belief that it was not a good idea to increase a number of constraints on delegations, which were not conducive to a consensus. The Delegation hence considered that the usual practice should be applied, without making any exceptions.

278. The Delegation of Angola considered that a deadline for making comments should, where possible, be respected. In its view, if the Committee was supposed to be productive, delegations that had not had time to make comments not come back later on the same issues, because that was a real source of time wasting, preventing the SCP from making progress. The Delegation however stated that if that particular method was not adopted, the Committee would remain open to all potential proposals, leaving delegations the possibility to come back to the issues when needed.

279. The Delegation of South Africa clarified that their proposal in relation to written comments was inspired by what had been said earlier on the proposal on quality of patents. The Delegation therefore encouraged the Chair to make the same conclusions agreed to on the item of quality of patents.

280. The Chair stated that any written submissions could be made according to the discussed procedure but the lack of submission of a written document would not in any way affect any delegation's right to speak at the next meeting to comment on other proposals or to make proposals of their own.

281. The Delegation of Norway agreed with the Chair's statement. The Delegation stated that it was a good idea to encourage everyone, whenever possible, to present their views on the proposal well in advance of the next session, given that that would advance discussions, when possible. Noting that some oral presentations during the current session would be reflected in the report could be integrated into its internal deliberations, the Delegation asked the Secretariat when the report of the current session in all languages could be ready. In its view, such information was useful in deciding on a deadline that would enable the delegations to have enough time to possibly present written views.

282. The Delegation of Switzerland, expressed its support for the Chair's proposal. The Delegation considered that delegations should be able to submit written proposals but that the failure to do so should not prevent them from making comments at the next meeting. Further, the Delegation stressed the importance of having a written report so that delegations could have access to all the information which had been already made available. In addition, the Delegation stated that a document to be prepared by the Secretariat suggested by the Delegation of Hungary on behalf of the European Union which would also be useful if the Committee would have to take a stand on the proposals which had already been made and to forge ahead with the work of the Committee on patents and health.

283. The Delegation of Egypt supported the Chair's statement, but requested for an express statement that it applied both to patents and health and to patent quality.

284. The Chair clarified that his statement applied to both. Given the absence of any disagreement on the issue, the Chair stated that, at the next meeting, the proposal presented by the Delegation of South Africa, a document to be prepared by the Secretariat and any written document submitted by the deadline would be submitted to the Committee in all working languages. The Chair noted that documents submitted after the deadline would be submitted in the original language and any other languages that the Secretariat would have time to translate



them into, and that any delegation would be able to make any oral statement or proposal at the following session.

285. The Representative of MSF, an independent medical humanitarian organization that worked in over 60 countries, primarily in developing countries, stated that MSF had been able to treat many people, because it had been able to rely on generic medicines which in itself had relied on the various and diverse patent laws in many countries. The Representative expressed its concern about the future direction, because the TRIPS Agreement was going to be in force not only in key generic-producing countries, but also in importing countries. The Representative therefore supported the joint proposal of the African Group and the Development Agenda Group to carry out a series of studies. The Representative in particular commended that proposal for having a mixture of practical requirements such as the proposal to develop a database on the patent status. In her view, such a database was particularly important for treatment providers such as MSF, because it enabled to identify the options to purchase and import medicines. Further, the Representative supported the proposal to carry out a series of studies on the use of flexibilities and expressed its availability to share with the Committee the experience of MSF in using those flexibilities. The Representative supported the proposal to have a technical workshop and expressed its wish to share its experience of using compulsory licensing as well as both the benefits and the difficulties MSF had faced, particularly when it had sought to use the paragraph 6 mechanism.

286. The Delegation of Brazil, after having heard the intervention made by the Representative of MSF, suggested inviting also comments from NGOs and other relevant stakeholders.

287. The Delegation of South Africa fully endorsed the proposal of the Delegation of Brazil, and expressed its appreciation for the intervention made by the Representative of MSF.

288. The Delegation of India endorsed the suggestion made by the Delegation of Brazil and noted that the comments from NGOs and other stakeholders would also be circulated. The Delegation then assumed that such a process was a standard practice which would apply to all, for example, the item on quality of patents and others.

289. The Chair reiterated his understanding that this would also apply to the issue of quality as well.

290. The Delegation of Egypt invited non-governmental organizations to provide their comments as much as possible in as many languages as possible. The Delegation considered that an organization such as MSF had that capacity.

291. The Delegation of Venezuela supported the idea regarding the submission of comments by NGOs. With regard to languages, it noted that NGOs might be requested, wherever possible, to present their submissions in one of the six official languages.

292. The Chair presented his suggestion to the Committee on the future work relating to the topic under discussion. After some discussion, the Committee agreed that:

(a) This topic will remain on the agenda of the 17<sup>th</sup> session of the SCP. Discussions will be based on the proposal submitted by the Delegation of South Africa on behalf of the African Group and the Development Agenda Group (document SCP/16/7), and other comments/proposals presented by Member States.

(b) Observers are invited to submit their comments in as many working languages of the Committee as possible.

- (c) The Secretariat will prepare, for the 17<sup>th</sup> session of the SCP, a document describing WIPO activities on patents and health, including the relevant cooperation activities with other international organizations.

#### AGENDA ITEM 10: CLIENT-PATENT ADVISOR PRIVILEGE

293. Discussions were based on document SCP/16/4 Rev.

294. The Delegation of Switzerland, recalling its intervention made at the previous sessions of the SCP where it had made a number of comments on the subject matter and had informed the members of the Committee on the legislative reform undertaken in that area, stated that the new patent law on patent advisors would enter into force in June 2011. Thus, the status of lawyers under its civil law would be extended to patent advisors. Stressing the importance of the subject for its country, the Delegation supported the work on the issue to be pushed forward at the subsequent sessions of the SCP. The Delegation was of the view that despite differing national laws on confidentiality of communications between clients and patent advisors, common areas could be identified. In conclusion, the Delegation recalled its suggestion made at the previous session of the SCP that the Committee should consider the possibility of drawing up a potential guide on the subject matter.

295. The Delegation of Hungary, speaking on behalf of the European Union and its 27 Member States, stated that the preliminary study on the confidentiality of communications between clients and their patent advisors was an outstanding and comprehensive addition to other preliminary studies on that topic, both at the international, national or regional levels. The study tackled a large number of important issues, including the differences between common law and civil law countries and among national laws within the same legal tradition concerning the preservation of confidentiality of communications with professional representatives, as well as the cross-border recognition of confidentiality. The Delegation expressed its hope that the preliminary study would assist the Committee in further exploring the topic and would pave the way for the approximation of diverging positions. In that respect, recalling its statement made at the previous session of the SCP on that issue, the Delegation stressed the necessity of free communication between professional representatives and their clients in the framework of intellectual property matters. The Delegation stated that the freedom of communication necessarily required that the confidentiality of communications was ensured for both parties, *vis-à-vis* third parties and particularly in the event of judicial proceedings. The study highlighted *inter alia* that clients who had to seek advice from foreign professional representatives who were exposed in patent disputes in foreign countries often had to face legal uncertainty concerning the recognition of confidentiality. In that regard, the European Union and its 27 Member States stressed the importance of finding a solution for better recognizing the confidentiality of communications between European Union professional representatives and their clients in third countries. Finally, the Delegation expressed its wish to endorse the Secretariat's recommendation to come to a common understanding that could become the basis for further discussions on that topic.

296. The Delegation of Australia stated that document SCP/16/4 Rev. gave a useful summary of the relevant issues and addressed the key concepts in both common and civil law systems. In its view, the preliminary study correctly pointed out that there were differences between the two types of legal systems, and also that there were differences between countries belonging to the same system. Given these differences in national systems, in its view, it was important for advisors and patent applicants to understand the limits of confidentiality in potential trading partner states. In general, cross-border issues were becoming increasingly relevant due to the globalised nature of IP in its role in supporting international trade and transfer of technology. The Delegation expressed its belief that the SCP's role in the discussion of the issue could focus on the international or cross-border dimensions as expressed in paragraph 34 of the

preliminary study. Particularly, the Delegation considered that the discussion should be focused on how the confidentiality of communications between an applicant and their advisor in one country would be affected when the applicant sought to defend their patents in another country or countries. Referring to Section IV of the document, which listed some proposed principles for further work in that area, the Delegation considered that those principles provided a good basis for further discussion, in particular, principle (1) which related to the cross-border aspects. Furthermore, the Delegation was of the opinion that the gathering of information on the topics listed in Section V of the document would provide a valuable resource for applicants looking to trade internationally. The Delegation was of the view that discussions should not seek to reduce Member State's flexibility in adopting their own national measures, but merely provide information for IP offices and other interested parties on the issue. Further, the Delegation provided an update on the current status of the issue in Australia's domestic legislation. As noted in earlier document SCP/14/2, privilege did not apply in Australia to communications between clients and foreign attorneys who were not registered under the Australian Patents Act. However, the process of IP Rights reform had been underway in Australia and one facet of that process was a change to provisions relating to the client-patent attorney privilege. The current draft of the Bill proposed amendment to the Patents Act to include specifically recognizing confidentiality of communications between an applicant and a suitably qualified or accredited foreign patent attorney. This meant that Australia was considering extending the privilege it provided to its own registered attorneys and to attorneys who were authorized to do patents work under the law of another country or region. That privilege would be for communications made for the sole or dominant purpose of the client being provided with intellectual property advice. There would be no requirement that the patent practitioner should have additional qualifications to practice as a lawyer. The potential requirement for authorization to do patents work under a law of a country or region reflected Australia's view that high quality representation, and a mechanism for the regulation of that quality, would lead to well-drafted specifications, greater certainty in the validity of granted patents, and an increase in the quality of information disseminated to the public for the purpose of further innovation.

297. The Delegation of the Russian Federation thanked the Secretariat for the continued high-quality work on the issue of confidentiality of communications between clients and their patent advisors as reflected in document SCP/16/4 Rev., in which shortcomings of preserving such confidentiality had been identified following two other preliminary studies and discussions at the thirteenth, fourteenth and fifteenth sessions of the Committee. The Delegation stated that it should be acknowledged that some delegations, including that of the Russian Federation, whilst taking into account divergences in different countries' legislation relating to the issue under consideration, had repeatedly drawn attention to the need to develop harmonized approaches to establishing a reasonable balance between the duty of the patent attorney to safeguard a client confidentiality, and the duty to give evidence in court and to other State bodies. The Delegation therefore supported the non-exhaustive list of principles for further discussion in the SCP, as proposed in Section IV of document SCP/16/4 Rev. Furthermore, the Delegation considered it expedient to continue working on developing appropriate recommendations in the area under consideration in order to lend support to persons acting in good faith who provided that type of service. The Delegation stated that, specifically, those recommendations might include requirements as to the presentation of protected information, for example, should protected information only be provided in writing, or did it also encompass verbal disclosure; on the volume of information, *i.e.* whether only the volume of information included in the application or relating directly to the substance of the claimed subject matter, or should that right be extended to all information, for example, regarding the applicant's identity; requirements regarding the term of protection of the information, for example, whether it was appropriate to apply such protection following the publication of information on the application and/or on the patent grant, and to what extent. Likewise, in its view, the necessity to inform the client about the legal consequences in relation to the observance and non-observance of suggestions made by patent attorneys and the patent office could be included in those recommendations. The Delegation further stated that another issue that might be addressed in

the recommendations was the cooperation between patent attorneys and lawyers in conducting client affairs in court, *i.e.*, to what extent information obtained by a patent attorney from his client could and should be disclosed to a lawyer, and *vice-versa*. The Delegation considered that it was appropriate to suggest to the Secretariat to prepare a draft of such recommendations based on Member States' proposals, and taking into account Member States' comments and the outcome of discussions, the draft would be revised for further discussion at subsequent sessions of the Committee. In addition, the Delegation noted that the Russian Federation's current legislation regarding the topic under consideration was addressed in detail in document SCP/14/2. Referring to paragraph 32 of document SCP/16/4 Rev., the Delegation informed the Committee that the Russian Federation's legislation stipulated that citizens residing permanently outside the Russian Federation and foreign legal persons must conduct business with the Rospatent through Russian patent attorneys, unless envisaged otherwise by an international treaty to which the Russian Federation is a party. In that regard, the Delegation explained that its country had a series of bilateral agreements in which alternative procedures were prescribed. For instance, a treaty on collaboration relating to the protection of industrial property between the Government of the Russian Federation and the Government of the Republic of Belarus provided that when patent applications were filed, and patents were obtained and maintained in force by a patent attorney from one of the States, the right was granted to conduct business directly with the Patent Office of the other State. In addition, the right to deal directly with the Patent Office of the other State in obtaining patents and maintaining them in force, *i.e.*, without the involvement of a patent attorney, was also granted to local applicants of one of the States. Further, the Delegation noted that the Russian Federation had concluded bilateral agreements of that kind with a number of countries of the Commonwealth of Independent States, whereby national applicants were granted the right to deal directly with the Patent Office of the other State based on the principle of reciprocity. Information of that nature, in the view of the Delegation, would preferably be included in the document SCP/16/4 Rev.

298. The Delegation of India, speaking on behalf of the Development Agenda Group, thanked the Secretariat for its efforts in preparing document SCP/16/4 Rev. on the client-patent advisor privilege and for clarifying that the purpose of that study was to further discuss the issues that surfaced during the preliminary study of WIPO document SCP/14/2, which not only noted that the client-attorney privilege was not recognized in all countries, but also acknowledged variances in approach, treatment and legal/judicial practices existing even in those countries with similar legal systems. In that context, the Development Agenda Group reaffirmed the caveat mentioned by the Secretariat that the preliminary study was not intended "to present draft international norms or an international legal instrument". Further, the Delegation stated that the Development Agenda Group did not share the view of the Secretariat where it suggested that the Committee could come to some common understanding that might become the basis for pursuing the topic further, nor did it concur with the non-exhaustive list of subjects that were presented in the preliminary study for the following reasons. First, in many countries, the law of privileges was a matter that fell within the purview of the law of evidence. It was not a substantive patent law issue, hence it should not be discussed in the Committee. The Delegation noted that in so far as the issue involving a cross-border recognition of the qualification of patent attorneys, the professional regulation and grant of privilege to communications with their clients, the issue would be one of international recognition of services and its domestic regulations which could be discussed in other fora, notably under the framework of the WTO General Agreement on Trade in Services (GATS). In view of the competency of the Committee to discuss the matter, in the view of the Delegation, many of the concerns indicated in the current study and even in the preliminary study presented during the fourteenth session of the SCP, clearly went beyond patent protection or patent litigation and touched on national, judicial procedures that reflected the fundamental legal structure and tradition of each country as was reflected in paragraph 261 of document SCP/14/2 which stated: "it appears that it is neither practical nor realistic to seek a uniform rule that could involve fundamental changes in national, judicial systems". Secondly, the study suggested that the rationale behind extending the privilege between patent attorneys and clients was that patent

advisors rendered advice which was not only of a technical nature, but was also of a legal nature. The Delegation further noted that there was considerable divergence of judicial opinion even in countries where the client-attorney privilege was recognized regarding the extent and scope of such privilege. In the view of the Delegation, the analysis and suggestions contained in the preliminary study did not take that into account substantially, but suggested a broad scope of privilege that might be accorded to client-attorney communication. The Delegation was of the opinion that the privilege of confidentiality between a lawyer and a client was not based on the legal nature of a lawyer's work *per se*, but on the judiciary relationship between the lawyer and the court. That privilege was extended to lawyers in some jurisdictions because they had a strict primary duty to the court which was enforced by strong professional codes of conduct. In some jurisdictions, there was no separate recognition accorded to patent advisors who were not member of the bar as the practice of law in some countries constitutionally accorded only to lawyers who were nationals of those countries. Abusing that privilege had serious consequences for lawyers. Extending the privilege to other actors such as patent attorneys and patent agents who were not lawyers and did not have such a duty to the court was even more likely to result in abuse. Further, the Delegation stated that it was interesting to observe the variances of responses of members of the AIPPI to report Q163 entitled "Attorney-Client Privilege and the Patent and/or Trademark Attorneys Profession". In the said report, it stated that "although nearly every group indicated, the attorney-at-law to be subject to disciplinary action for violation of professional conduct rules, some countries go further and impose civil and criminal sanctions as well". The Delegation further observed that the AIPPI report also mentioned that some of its members "express the desire to leave some control over the implementation of an international rule to the individual country". In addition, in the report, it was suggested by some members of the AIPPI to "make a recommendation to its member countries but respect the authority of each country to implement their own internal laws". Thirdly, as acknowledged by the Secretariat in paragraph 29 of the preliminary study, the extent to which attorney-client privilege was needed depended on the extent to which discovery was allowed in a given jurisdiction. The Delegation observed that the undisputed fact was that the rules and modes of discovery varied in different legal systems. Thus, it would not be viable to even attempt to institutionalize a broad and strong privilege globally if there was not equally strong power of discovery worldwide. In the view of the Delegation, harmonization in that regard was highly unlikely as the practice of the Bar and the Bench was anchored in constitutional provisions in some Member States. Far from elucidating on the aforementioned issues, the current study, according to the view of the Delegation, only reinforced the diversity of legal systems and public interest consideration attendant thereto. The Delegation concluded that as such, there was no basis upon which to advance the discussions forward apart from conducting a specific study to sufficiently analyze what would be the possible adverse implications of having uniform legal standards on client-attorney privilege.

299. The Delegation of Morocco stated that its country was amending its legislation in that regard, particularly with the view to regulating the professions related to intellectual property. It had been suggested that the notion of professional secrecy should be reformed in consultation with patent officials and clients to develop fixed professional code which would be enshrined in the code of conduct of the Moroccan Intellectual Property Office. The Delegation observed that some national and regional IP offices were bound by the professional secrecy in relation to procedures relating to IP. The authorities in Morocco, particularly the IP Office, had particular constraints related to professional secrecy. The legislative reform would prevent information from being divulged, published or used, in particular, information received from WIPO.

300. The Delegation of France considered that the new preliminary study shed light on some of the concerns which had been previously expressed, whereby the chapters describing the role of patent advisors as well as links to the subject matter to technology transfer were particularly useful. The Delegation drew attention of the Committee to the importance it attached to the topic and expressed its desire to push the work forward. The Delegation suggested that the

Committee should look in greater detail at the mechanisms in place around the world in order to shed more light from the trans-border aspect of the issue.

301. The Delegation of Japan stated that its country understood that the issue of protection of confidentiality of communications between clients and their patent advisors, especially in common-law countries, was one of the important issues. However, the Delegation recognized that, at the same time, such protection would also be beneficial to the systems of civil-law countries as suggested in the preliminary study. According to the view of the Delegation, it was important to achieve a system in which applicants could apply for patent protection to different jurisdictions with comfort. Therefore, the Delegation expressed its expectation that the discussion on the issue would be further deepened.

302. The Delegation of Denmark aligned itself with the statement made by the Delegation of Hungary on behalf of the European Union and its 27 Member States. The Delegation stated that although its country did not have a law regulating the matter, the necessity of such regulation had been felt, and it had been considering how to deal with that issue. The options which could be employed were either to change the national patent law in the same manner as the EPC had been changed, or to change the civil procedure law, which, according to the Delegation, might not be a very realistic approach. The Delegation stated that there was a need for regulation in that area, and that a solution in the WIPO framework would bring the best preferred outcome.

303. The Delegation of the Philippines stated that it built upon the intervention made by the Development Agenda Group to which the Philippines belonged, and expressed its wish to share the following information to facilitate a fuller understanding of the issue from the perspective of the Delegation of the Philippines. The Delegation noted that there was a constitutional prescription in the Philippines (Article 12, Section 14 of the Philippine Constitution) which limited the practice of all professions to Filipino citizens. With reference to the practice of the legal profession in the country, Article 8, Section 5 of the Philippine Constitution vested upon the Supreme Court the sole authority to promulgate rules concerning the admission to the practice of law and the integrated bar, among others. The Delegation noted that the constitution not only limited the practice of law to Filipino citizens, it also limited the practice of the profession to residents of the Philippines. The Delegation explained that the practice of law, more than being just a profession, was conceived to be a form of a public trust and that was the basis for the constitutional prescription. Accordingly, while the communication between a client and his/her attorney was considered as privileged communication and was thus confidential, there was no Philippine law that allowed non-lawyers, such as patent or trademark advisors to engage in legal practice in the country. As such, a patent or trademark advisor-client privilege was not recognized in the Philippines. The Delegation concluded that given the constitutional and remedial rules and regulations existing in the Philippines, the concept of a cross-border liberalized law practice which would specifically extend the rule on privileged communications to non-lawyers was theoretically not possible in the Philippines.

304. The Delegation of the United States of America noted that the preliminary study indicated the variance in laws that existed on the issue of client-patent advisor privilege, particularly with respect to the scope of the privilege and the international dimensions of difficulties with the current system. It noted that the preliminary study also laid out four principal options for addressing the issue which were not mutually exclusive and varied in the level of ambition. The Delegation stated that the United States of America was aware that the differences in the international application of those privileges, especially with regard to the handling of non-lawyers and foreign patent advisors created uncertainties for innovators and their representatives and might affect the quality of the services those advisors provided to their clients. Therefore, the Delegation supported further study in that area with the view to identify how best to recognize the confidentiality of communications between patent advisors and their clients, especially with regard to non-lawyers and foreign patent advisors, without attempting to

seek a uniform national judicial law and procedure. For instance, the Delegation fully supported the suggestion made by several delegations that experiences of countries that provided the privilege for patent advisors, including non-lawyer patent advisors, or that allowed patent advisors to refuse the testimony or submission of documents relating to confidential communications with clients could be shared within the SCP. The Delegation considered that WIPO should, as noted in the submission of AIPPI, study what mechanisms might suit the needs of Member States and provide a report to the SCP on potential and preferred remedies to the problems of inadequacy and loss of privilege. The Delegation expressed its support for further work to be undertaken by WIPO on those complex issues.

305. The Delegation of Venezuela expressed support for the statement made by the Delegation of India on behalf of the Development Agenda Group. The Delegation stated that harmonization of legal standards in that field would be problematic for its country. The Delegation noted that protection of confidentiality in Venezuela for certain profession, such as priest, doctors, lawyers and others, was set in a very specific legal context which was based on moral criteria and was related to the need to safeguard information. The Delegation stated that in the case of lawyers, the concept was based on tradition of criminal law which was founded on Roman law, and at that time, the Delegation recalled that it had never been intended to protect confidentiality. The Delegation concluded that the privilege issue was a national issue and therefore, it was not appropriate to extend such protection at the international level.

306. The Delegation of Norway expressed the belief that there were some very important challenges in attempting to find any uniform solution to the issue of confidentiality. The Delegation considered that, at least in Norway, the issue was one of horizontal procedural law. At the same time, the Norwegian Delegation supported exploratory work on exchanging national practices as to how to protect confidential communications between the client and its patent advisors. It further informed the Committee that the question of whether and how to possibly extend the client-attorney privilege to cover also patent advisors was being explored in Norway. Therefore, the Delegation was of the view that it would be useful to hear national practices in other Member States on how they regulated the same issue.

307. The Delegation of South Africa, speaking on behalf of the African Group, noted that the main thrust of the issue of the client-attorney privilege was based on two aspects, *i.e.*, whether countries which did not recognize professional communications between patent attorneys and clients as privileged communications should do so, and whether countries that only recognized communications between nationally registered patent attorneys and clients as privileged should extend such privilege to communications with foreign patent attorneys. The African Group further noted that in the preliminary study, the Secretariat had provided some options on moving forward addressing those two options, whether to extend privilege under the national law to other countries on the basis of reciprocity, whether to recognize privilege granted in other countries and to treat the same as privileged in one's own country, whether to grant privilege to all foreign IP advisors even if they were not privileged in foreign countries and the last option was whether developing minimum international standards of privilege applicable to IP advisors could be adopted by Member States. The Delegation observed that those options should not be viewed in isolation from the broader national domestic laws. In that respect, it was well-known that the issue of client-attorney privilege was also a matter that fell within the scope of private law and the regulation of professional services. The Delegation considered that, for example, in many countries, the law of privilege was part of the law of evidence, and not a substantive patent law issue. On that note, the African Group was of the view that the issue was a matter of national jurisprudence. The Delegation expressed its conviction that any activity at the international level seeking to foster cooperation in that area must be based on the differences of national laws in Member States. Therefore, the African Group suggested that the Secretariat invite Member States to provide their views on the legal implications of extending privilege to communications between patent attorneys and clients and developing a uniform

scope of privilege at the international level, mindful of the differences of national laws pertaining to that particular matter.

308. The Delegation of China, reiterating its position voiced in the previous sessions on that subject matter, stated that while client-attorney privilege protected law and public order, the differences of countries, especially in relation to their legal systems, should be taken into account in consideration of the issue. The Delegation stated that the SCP could conduct a study on the issue, without being in a hurry to reach any conclusion on the subject matter.

309. The Delegation of Chile shared the views of those delegations that expressed difficulty in reaching any common principle in that area. The Delegation was not convinced that there was a historical background showing that such common principle was actually necessary. The Delegation clarified that it was not against continuing to study the issue in order to learn the experiences of other countries. However, the Delegation wished to note that as far as Chile was concerned, that area went beyond patents and intellectual property and, therefore, any discussion should cover various other elements, including the different legal traditions enforced in various countries.

310. The Delegation of New Zealand stated that there was a value in the SCP undertaking work in identifying potential ways dealing with the issues raised in the preliminary study. The Delegation informed the Committee that New Zealand had a generous client-attorney privilege regime. In general, within New Zealand, communications between clients and lawyers and between clients and non-lawyer patent attorneys were privileged. Communications between a client and a foreign advisor relating to New Zealand litigation, including communications between clients and foreign non-lawyer patent attorneys would generally be subject to privilege as well. Referring to document SCP/16/4 Rev. on chapter "subjects for international cooperation", the Delegation stated that all those issues seemed worthy of consideration. However, in its view, it was not practical to consider all of the issues, but the cross-border recognition of privilege and the extent of privilege to non-lawyer advisors might be given the highest priority.

311. The Delegation of South Africa supported the statement made by its Delegation on behalf of the African Group.

312. The Delegation of El Salvador supported the views expressed by other delegations on the issue of client-attorney privilege. It further noted that under the civil and criminal laws, there was a confidentiality obligation as regards the information obtained by a lawyer from his client. A lawyer is obliged not to reveal information received from his client. However, if a client authorized his lawyer to disclose the information, he could do so, as a lawyer should not do anything that could harm his client's interest. On the other hand, a client could communicate to third parties what his lawyer had told him, since that situation was not regulated.

313. The Delegation of India reiterated its position expressed during the previous session of the SCP with respect to document SCP/16/4 Rev. Under the Indian Patents Act, there was no provision concerning the client-attorney privilege. Such provision was included neither in the Paris Convention nor in the TRIPS Agreement. Therefore, in its view, each country should be allowed to set its own level of privilege and the extent of disclosure depending upon the social and economic circumstances and the level of development of each country. The Delegation was of the opinion that 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. The Delegation underlined that that point might be critical to determine the issue of patentability as disclosure of not only technical information but also of other relevant information relating to patent applications was a substantial element of the patent system. Further, the Delegation stated that according to Section 10.4 of the Indian Patents Act, every specification shall fully and clearly



describe the invention and its operation or the use and the method by which it was to be performed. In addition, the applicant was expected to disclose the best mode of performance of the invention which was known to the applicant and for which he was entitled to claim protection. Therefore, the applicant could not have a confidential matter which could not be disclosed under the Patents Act. If any confidentiality should be maintained, patent agents who might be lawyers or non-lawyers, would be found guilty of misconduct in their professional capacity, and the opinion of the Controller would render such professionals unfit to be kept in the register and to practice before the Patent Office. Therefore, in the view of the Delegation, one of the important duties of patent attorneys was to promote dissemination of information through patent applications and therefore, any effort of harmonization of the client-attorney privilege would ultimately lead to a *de facto* unenforceable grant of the patent. In its opinion, any confidentiality of the information between a client and his/her attorney could be protected through a non-disclosure agreement. Therefore, 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.

314. The Representative of AIPPI underscored the progress made by the SCP on the issue of protection against forcible disclosure of IP legal advice. He noted that the similarity of the purpose of common and civil law, which was to support the obtaining of correct legal advice, was remarkable. In its view, for both systems of law, public interest was fundamental. The civil law public interest was expressed as giving assistance to those who gave advice to do their job. The common law public interest was expressed as supporting communication to assist the administration of justice. They were meant to limit disputes being brought to court by the provision of correct legal advice which would enable disputes to be resolved before reaching court. The Representative further observed that the protection was centuries old, and that there was no proposal that the law establishing that protection be abrogated. Referring to document SCP/16/4 Rev, the Representative noted that WIPO nailed to the wall that the international problem was one of the non-recognition in one country of the confidentiality of legal advice established under the law of another country. In his opinion, another important aspect of the work of WIPO was that it established mechanisms which the Member States could adopt to overcome the cross-border problems of the loss of confidentiality in legal advice with minimal impact on existing national laws, whilst allowing flexibilities such as, exceptions and limitations which individual countries might wish to apply to the protection. The Representative supported the views of some Member States suggesting WIPO to undertake information gathering from Member States on mechanisms that could be applied by countries in maintaining confidentiality of IP cross-border legal advice, as well as to study and report on how the SCP should decide which of the mechanisms identified by WIPO should be preferred by Member States. The Representative was of the view that the process of information gathering might well involve a questionnaire to the Member States. Turning to document SCP/16/4 Rev, the Representative commended to Member States the non-exhaustive principles identified by the Secretariat in paragraph 64 of the document, subject to one comment on item (iv) which related to disclosure. He observed that it had been established in the SCP that disclosure would not be affected by the improvement of the protection, which implied that there was no conflict between disclosure obligations in the patent law and the protection of the confidentiality of communications between clients and their IP advisors. In that respect, the Representative referred to paragraph 3.11 of the AIPPI submission to WIPO, dated February 28, 2011, which had stated that an applicant must comply with the specified disclosure requirements to be entitled to the grant of a patent. Thus, if certain information that the applicant was required to disclose was caught up in privileged communications, whether written or oral, and could not be disclosed by some other means, the applicant must still provide that information to the relevant patent office, to be entitled to the grant. If it were necessary to waive privilege to make that disclosure, privilege would have to be waived. Further, the Representative stated that WIPO had acknowledged the lack of tension between disclosure and privilege in its document SCP/14/2. In particular, the Representative referred to paragraph 251 of that document which stated that the disclosure

requirements under the patent law, which was a statutory requirement and must be complied with to obtain patents, could not be influenced by the existence or non-existence of the client-attorney privilege. Thus, the Representative stated that it was not correct to say that the protection threatened the applicants' disclosure obligations. Further, pointing out the experience of AIPPI with drawing up the questionnaire on the subject matter, the Representative offered its assistance to the SCP, should Member States decide to go ahead with such questionnaire in the framework of the Committee. In response to the statements made by the Delegation of India concerning the AIPPI's Resolution Q163 on the reservations expressed by some National Groups on applying the protection to non-lawyer patent attorneys, the Representative pointed out that the matter had not been left at that point, and therefore, the delegations should not think that the problems which had been raised by the National Groups remained unresolved. The Representative explained that AIPPI had gone on to pass a Resolution Q163 which had stated that "AIPPI supports the provision throughout all of the national jurisdictions of rules of professional practice and/or laws which recognize that the protections and obligations of the attorney-client privilege should apply with the same force and effect to confidential communications between patent and trademark attorneys, whether or not qualified as attorneys at law (as well as agents admitted or licensed to practice before their local or regional patent and trademark offices), and their clients, regardless of whether the substance of the communication may involve legal or technical subject matter". Thus, the Representative stressed that AIPPI had resolved that the protection which applied to clients of lawyers should apply to the clients of non-lawyer patent attorneys. Further, in relation to another comment made by the Delegation of India on the relevance of the GATS to the issue under consideration, the Representative stated that reference to GATS Mode 4 was a legal mistake because GATS Mode 4 did not deal with or affect such protection. In that regard, the Representative read out the AIPPI's Submissions of August 31, 2009 to WIPO which stated that GATS Mode 4 related to the provision of the services of employees from one country to another. The Agreement gave individual governments the ability to choose which services were included, and as to those services selected, to set limitations specifying the level of market access and the degree of national treatment they were prepared to guarantee. GATS did not affect the national ability of a country to regulate services. Legal services were normally governed by national law requiring citizenship and/or residency in that country plus locally obtained qualifications. Accordingly, GATS Mode 4 did not affect or in any way embargo the potential for making an agreement between countries to harmonize their laws relating to privilege, professional secrecy or any form of protection against forcible disclosure of IP professional advice. Thus, the Representative concluded on that matter that GATS was not an issue affecting WIPO's standing to deal with the protection. In conclusion, the Representative stated that AIPPI considered that protection of confidentiality in IP legal advice was a most important issue in the interests of the users of the IP systems and that had been shown by the number of statements to the chair in favor of further work on the matter which would be worthwhile. The Representative stated that while discussing the matter with delegations who were generally opposing to the issue, he understood that even those delegations recognized the value of the comparative law exercise to be conducted on that work. Accordingly, the Representative commended to the Member States the continued study of the problem as set out in the preliminary study prepared by the Secretariat.

315. The Representative of ICC stated that the client privilege in intellectual property advice was in the interest of justice. In his view, it was in the interest of society that a legal advisor must be able to represent his client with frank opinions in writing without fearing that those opinions would be exposed in court. The Representative further noted that since business and trade were more international than ever, companies needed legal advice on an international scale on the IP matters. He was of the opinion that the client's privilege in IP advice was a global issue that went beyond national borders. He informed the SCP that ICC had made a specific proposal for an international instrument to deal with the problem which was referred to in the preliminary study prepared by the Secretariat. In conclusion, ICC strongly encouraged the Committee to mandate the Secretariat to continue with work on legal privilege and to

explore different possible options to address the various issues identified in the preliminary study.

316. In response to the intervention made by the Representative of AIPPI concerning GATS Mode 4, the Delegation of India clarified that, in so far as the issue involved questions concerning cross-border recognition of the qualifications of patent attorneys, the professional regulations and grant of privilege to communications with the clients, that issue would be one of international recognition of services. Therefore, in its view, its domestic regulation could be discussed in other fora, notably under the framework of the WTO/GATS. Further, the Delegation stated that similar proposals had been made with regard to legal services under the discussions on GATS Mode 4 in April 2006 and September 2007.

317. The Representative of TWN expressed the belief that one of the fundamental principles of patent law was the disclosure of information on technology. Non-disclosure or partial disclosure was one of the grounds for refusal or revocation of patents. In her view, the extension of the client-attorney privilege to patent advisors went against that fundamental principle of disclosure. She explained that since patent specifications and descriptions were considered public documents, any related records which had been used for the preparation of those documents should also be available to public scrutiny in order to verify claims provided in them. Considering public policy concerns emerging out of patent law, she stated that it was important to maintain absolute transparency around the granting and litigation of patents. The Representative further noted that societies could not afford opacity around patent information. Therefore, she stated that extending the client-attorney privilege to patent advisors compromised the transparency requirement in the administration of patents which included both patent prosecution procedures and litigation. In her view, extension of privilege would also incapacitate patent offices of developing countries from safeguarding public interests following the granting of patents. She expressed concern about unintentional consequences of the privilege extension on the effective implementation of the TRIPS flexibilities, such as patent opposition and revocation. She stated further that the issue of professional privilege came out only when a judicial or quasi-judicial body requested certain documents to be submitted by an advisor or a client. She was of the view that such privilege compromised the power of authorities to access quality evidence. Hence, in her opinion, there was no confusion regarding the confidentiality and privilege. The privilege could take away the evidentiary value of a document which had been exchanged between a client and his patent attorney. She felt that extending the client-attorney privilege to non-lawyers would be a backward step that would encourage poor quality of patents. In other words, the Representative considered that it was not the right step in light of efforts to improve the quality of patents. Moreover, in the view of the Representative, the issue was not a substantive patent law issue even though it had substantial law implications. Noting that the SCP had little to offer in terms of building the confidence of an IP applicant toward patent attorneys, the Representative suggested to leave the issue to relevant self-regulating parties. Further, she stated that the issue of cross-border recognition of client-attorney privilege squarely fell within the domain of trade in services and had implications on the ongoing WTO negotiations on domestic regulations of services. Therefore, she reiterated that the SCP was not the right forum to discuss the issue.

318. The Representative of FICPI noted that the client-patent advisor privilege should be considered in a global context: most patent matters were no longer related just to one country but were of international character. He stated that for a proper functioning of the IP systems throughout the world, it was of utmost importance that IP advisors and their clients could have frank, honest and open communications so that clients could obtain the best opinion and advice. He noted that the preliminary study provided comments and starting points for future work in that respect. The Representative supported the notion that client-attorney privilege was a privilege rewarded to the client, not to the attorney and stated that that should not be different for a client-patent advisor privilege. The Representative further noted that one of the internationally recognized common objectives of patent law was a balance between a monopoly

awarded to an inventor and the full disclosure of the inventions. Recalling some fears expressed by some delegations during the previous discussions in the SCP that awarding privilege could lead to deterioration of disclosure of inventions in patent applications, the Representative brought attention of the Committee to Chapter C of the preliminary study which responded to that question. The Representative supported the distinction made in the preliminary study between the issue of sufficiency of disclosure in patent applications as required in national and international patent laws and the issue of privilege. Since lack of disclosure should lead to a refusal of the grant of patents or nullity of already granted patents, in his opinion, client-patent advisor privilege should not lead to changes in the completeness of disclosure in patent applications. Further, referring to paragraph 53 of the preliminary study which provided an example of a case where a patent agent had removed from a draft patent specification a reference to prior art, a book, which could become highly relevant to patentability, the Representative stated that that example was used to show that client-patent advisor privilege could be misused. The Representative, however, emphasized that in such case, the client could not hide his knowledge behind client-patent advisor privilege. Since during discovery, the client himself would be obliged to disclose his knowledge about the book, its relevance could then be assessed in open court. He noted that, in the same paragraph of the preliminary study, it was suggested that the patent agent in the given example acted against his code of conduct because he was advising the client to seek the grant of the patent which was not valid, or at least at risk to be invalidated because of the existing prior art. However, although the existence of a code of conduct did not in itself justify privilege for patent advisors, the Representative observed that, there were differences between codes of conduct in various countries that had regulated profession, for patent advisors. For countries where there was no such regulated profession such code of conduct might not even exist. Therefore, should the Committee of the opinion that a code of conduct could or would play a role in the development of client-advisor privilege issue, it was important that a study and an assessment was made of the differences and more importantly similarities between such existing codes of conduct and codes of conduct for lawyers. Further, the Representative fully supported the suggestion made in paragraphs 54 and 55 of the preliminary study to collect experiences of various countries about the application of patent-advisor privilege in relation to the clients and international institutions, such as patent offices and courts. The Representative further noted that, from the preliminary study, it appeared that the Committee recognized the similarity between client-attorney privilege and client-patent advisor privilege. In his view, the code of conduct for patent advisors similar to that of attorneys at law would solve at least probably the most relevant difference. Out of four possible directions for further development proposed by the preliminary study, the Representative considered the second option (recognition of the confidentiality of communication protected in other countries), as a possible solution for the near future and as a possible stepping stone to the third option (minimum convergence of law).

319. The Representative of CIPA-EPI supported the statements made by the Representatives of AIPPI, ICC and FICPI. He stated that the non-forcible disclose of advice given to clients by patent advisors was an extremely important matter as had been recognized in many countries for centuries. Therefore, in his opinion, the SCP should not go backward but forward.

320. The Representative of CEIPI reiterated that he had been interested in keeping that item in the agenda, and noted that the discussion being held during the current session had further strengthened his support for the work to be continued in that area.

321. The Chair observed that a number of delegations had stated that the client-attorney privilege was a matter of national jurisprudence, and added that he had not heard any delegation being in favor of setting international norms on the issue. Recognizing the national differences in laws and rules on client-attorney privilege, he also noted that he did not sense that there was any consensus among Member States to adopt common principles. On the other hand, he stated that he did sense a great deal of support for having the Secretariat collect more information for exchanging national practices and national experiences, for example, the

experiences of countries that had national laws or rules dealing with the cross-border aspect of the client-attorney privilege providing client-attorney privilege to non-lawyer advisors. He further noted that some expressed their interest in looking at potential and preferred remedies of individual Member States for the problems of cross-border aspects of confidentiality. In his view, those were the areas that the Secretariat could continue to study.

322. The Delegation of Hungary, speaking on behalf of the European Union and its 27 Member States, supported the further work suggested by the Chair.

323. The Delegation of the Philippines stated that it was quite apparent that there were wide divergences in terms of national experiences on the issue. Therefore, the Delegation sought clarification on the level of expectations on the issue, in particular, on the aim of further collection of information. The Delegation recalled its earlier statement that, as far as its country was concerned, it was a prerogative of the Supreme Court of the Philippines to determine the rules of the court. Therefore, the Delegation stated that it was not able to move forward until such time that its Constitution was amended.

324. In response to the question raised by the Delegation of the Philippines, the Chair stated that it was very clear that the Committee was not moving in the direction of recommending to any particular country that it should change its system. However, the Chair observed that there were a number of countries and a number of user groups that had indicated problems and expressed the wish to consider potential solutions that could be adopted voluntarily by countries. The Chair stated that that not mean that those solutions would be recommended on a broad basis, and that a country that had a particular constitutional or jurisdictional system would have to change it to adapt it to any type of solution. He clarified that collection of information was simply a way of providing information on what other countries were doing.

325. The Delegation of India stated that the issue under discussion was an issue that posed difficulties to many members of the Development Agenda Group. Therefore, noting that the Development Agenda Group was not in a position to react immediately to the suggestions made by the Chair, the Delegation stated that it needed to hold an internal consultation, and requested the Chair to keep that agenda item open.

326. The Chair responded positively to the request made by the Delegation of India. After the informal consultations, the Chair presented his suggestion to the Committee on the future work relating to the topic under discussion.

327. The Committee discussed, in particular, how to accurately reflect, on the future work, the current difficulties and challenges that had been expressed by some delegations. After some discussion, the Committee agreed that:

- (a) This topic will remain on the agenda of the 17<sup>th</sup> session of the SCP.
- (b) Some delegations stated that this issue was a matter of national law. Recognizing the differences in national law and procedure, the Chair stated that the Committee felt that there was no consensus on international norm setting or a set of common principles at this stage.
- (c) The Secretariat is requested to gather information about national and regional practices and present it, without any recommendations or conclusions, to the next session of the SCP for exchange of views among Member States. This information should include, inter alia, information on:
  - national laws and rules dealing with cross-border aspects of confidentiality of communications between clients and patent advisors;

- problems in relation to cross-border aspects of confidentiality of communications between clients and patent advisors; and
- remedies that are available in countries and regions to solve the problems that remain at the national, bilateral, plurilateral and regional levels.

## AGENDA ITEM 11: TRANSFER OF TECHNOLOGY

328. Discussions were based on document SCP/14/4 Rev.

329. The Delegation of India, speaking on behalf of the Development Agenda Group, noted that many of the gaps the Group had identified in the previous study had not been filled. In its view, the study focused rather narrowly on the issue of ensuring the availability of sufficient patent information, skilled professionals and the involvement of public funded research institutions and the role of the patent system in facilitating technology transfer. Referring to paragraph 52 of the document which stated that the patent system could make positive contributions to an efficient transfer of technology only where the system functioned in the way for which it was intended, the Delegation reiterated that the primary gaps in the study that had been identified in the previous sessions by the Development Agenda Group needed to be addressed in a further revision of the study. Without reiterating the points raised by the Group in previous sessions, the Delegation highlighted a few issues as follows. First, the study on paragraph 24 showed how patents encroached on the public domain, making it more difficult to build upon existing ideas and innovation, and pointed the need for an absorptive capacity on the part of the transferee to explore, understand and imitate the technologies imbedded to facilitate reverse engineering. The Delegation expressed its belief that WIPO's work on technology transfer should not focus on increasing national capacity to simply file patents, but on helping to create absorptive capability in developing countries. In its view, the capacity to repeat trials and errors and to reverse engineering was affected by existing patents on technologies, and the more patents on existing technologies, the less able national firms were to experiment and learn. The Delegation stated that that aspect was not adequately explored in the current study. Second, with regard to paragraph 26, the Delegation noted that the problems with obtaining licenses for the use of patented technology were not adequately addressed, and needed to be further elaborated upon. It considered that contracts tended to be secret and negotiations of terms tended to be among unequal entities, since a patent holder firm knew much more about the value or lack thereof of the patent and might impose terms too stringent on the licensee. Another problem raised by the Delegation was that users usually did not know how many patents might be covering a single technology and how many licenses might be needed from whom and at what price. The Delegation therefore was of the view that WIPO should work on mechanisms to improve information about licensing contracts, develop model contracts which were in compliance with competition law and create a new international mechanism to provide more information about the status of valid or expired patents on specific technologies. Third, referring to paragraph 35 of the study stating that while middle income countries had collected royalty income of 12.7 billion dollars from OECD countries, the amount that had been collected by low-income countries had been 2 billion dollars, the Delegation noted that that data was incomplete and misleading, since while it provided evidence of growing royalties being collected by middle-income countries and low-income countries, it did not provide any information on the growing royalties being paid out by middle-income and low-income countries to OECD countries. In its view, that was critical information as it showed that, as patents and other IPRs had increased, so had the cost of payment for licenses and royalties. Fourth, the Delegation considered that the description on paragraph 55 of the study which stated that "much depends on how the exclusive patent rights are designed under the respective national laws, how they are deployed and used as a vehicle for technology transfer to the benefit of both the transferor and the transferee" was worth highlighting, since it shed light on the point as to why it was so

necessary for countries to maintain their autonomy to design their patent laws and the means to promote transfer of technology. In its view, WIPO should explore how patent law flexibilities could be better exploited to promote transfer of technology, for example, to ensure that patents was not a value in itself for the transfer of technology. Further, the Delegation stressed the importance of the disclosure requirement. The Delegation was of the view that a patent holder had the incentive to disclose as little as possible in order to avoid facing competition after patent expiry. It therefore noted that there was a need for WIPO to assist developing countries in increasing the capacity to examine patent applications to ensure that patent applications that did not fully disclose the invention were not finally granted. Lastly, the Delegation highlighted the importance it attached to the description on paragraph 59 of the study that there was no conclusive evidence that demonstrated either a positive or negative impact of patent protection on technology transfer, as well as to the outcome of the study that there was no evidence of a positive relationship with regard to the effects of IPRs on trade and foreign direct investment. With regard to the effects of IPRs on licensing, the Delegation was of the view that the study did not point to any of the several studies that had found a negative correlation of IPRs and licensing. In the cited case with regard to biotechnology, the Delegation noted that the European Union had revised and strengthened its patentability standard with regard to biotechnological inventions because it had found that broad patenting in biotechnology had been hindering innovation. In conclusion, the Delegation reiterated its request for a further revision of the present study taking on board the comments made by the Development Agenda Group. The Delegation further reiterated the specific proposals that the Group had made in the last session on the issue of transfer of technology: firstly, a further study should analyze values to technology transfer arising from patents taking into account the comments made on various aspects; secondly, an international commission or experts' group, nominated by Member States, should be set up to address issues pertaining to technology transfer as identified above, particularly on the use of flexibilities in patent law for promoting technology transfer; and thirdly, a forum to exchange countries' national experiences on technology transfer should be organized in an upcoming session of the SCP.

330. The Delegation of Hungary, speaking on behalf of the European Union and its 27 Member States, was of the view that the document in its present form enabled the Committee to have an even clearer overview regarding the issue of technology transfer. The Delegation expressed its belief that the dissemination of technological information had an utmost relevance regarding the united efforts being made in order to combat the present and future challenges of the globe. In its view, the study left no doubt in that regard, and the Delegation emphasized that the determining factors of international technology transfer were complex and that the dynamic interaction among national factors, the differences in the innovation systems, markets and human resources should all be taken into account as a whole in analyzing it. Bearing in mind the complexity of the issue and that the capability to absorb and further develop the technologies received was different from region to region and country to country, the Delegation considered that it was not possible to draft a one-size-fits-all solution which could result in an equally positive impact on every country. However, the Delegation reiterated its view that the study included many issues, mechanisms and strategies that could be used locally to improve the current situation of technology transfer without amending the current international framework, for example, clearly defining property rights and reducing transactional costs. Finally, the Delegation pointed out that, at its sixth session, the CDIP had adopted a Project on Intellectual Property and Technology Transfer - Common Challenges, Building Solutions. In the framework of that Project, the Delegation noted that extensive work dealing specifically with the issue of technology transfer was being undertaken. Therefore, in order to avoid duplication of work, the Delegation was of the opinion that the SCP should consider the activities already included in the ongoing projects and take stock of their possible outcomes. The Delegation renewed its commitment to take part in the highly important work of facilitating technology transfer worldwide and to contribute to the creation of new models to promote innovation by facilitating the collaboration between the private and the public sectors, and welcomed and

encouraged voluntary initiatives to facilitate the flow of technological knowledge on a global scale.

331. The Delegation of the Russian Federation thanked the Secretariat for updating the preliminary study on the topic of Transfer of Technology based on comments made by Member States at previous sessions of the Committee. The updated document, which focused on the problems of transfer of technology in the context of development, illustrated *inter alia* the recommendations of the Development Agenda, which were of particular interest to the Russian Federation, including for establishing and developing Technology and Innovation Support Centers that were designed to provide innovators with access to high-quality information on technologies and other services. The Delegation stated that establishing such Centers: (i) enabled users to benefit effectively from the advantages of rapid access to information provided by Internet searches, by means of individual support; (ii) enhanced the national technology base by developing trade secrets (know-how); (iii) increased technology exchange, e.g., through licensing, creating joint ventures, etc.; and (iv) facilitated national users in creating, protecting, owning and managing their intellectual rights. The Delegation noted that Federal Law No.284-FZ on the Transfer of Rights in Integrated Technologies was currently in its country, and its norms reflected the aims of Russian State policy in the development of science and technologies, a feature of which was the formation of economic conditions for bringing to market competitive and innovative products in the interests of satisfying national strategic priorities and the transition to an innovation economy. The Delegation explained that one of the methods for resolving the numerous problems with the innovation development was the project "Skolkovo", that combined science and manufacturing, with its experience being further replicated throughout the whole country. In order to achieve that aim, the Federal Law No.244-FZ of September 28, 2010 "On the Skolkovo Innovation Center" had been adopted. That law regulated the development of research, development and commercialization of their results in specific areas; namely, energy efficiency and energy saving, including developing innovative energy technology, nuclear technology, space technology, principally in telecommunications and navigation systems, medical technology in developing equipment and drugs/medicines, and strategic computer technology and software. In order to stimulate research activities at the innovation centre, the Delegation further noted that Federal Law No. 243-FZ had been adopted, which amended and supplemented the Budget, Urban Development and Fiscal Codes of the Russian Federation as a series of legislative acts, and also 13 federal laws. The Delegation observed that those legislative acts could be divided into two categories: those stipulating direct exceptions from the general legal framework of the Russian Federation, and those granting various kinds of privileges and preferential treatment to the "Project Skolkovo" participants, and likewise to persons conducting research activities at the innovation center. In its view, "Project Skolkovo" therefore had created special conditions for the work of innovative Russian businesses. The Delegation however noted that it should be realized that the "Skolkovo" mechanism was not merely privileges, but also a special legal framework for business in the field of science, and was extended to businesses involved exclusively in research activities and commercializing their results, including intellectual property sale and-purchase agreements. The principal aim of such mechanism was to create the most favorable conditions for launching the Russian science onto the global intellectual market, where Russian scientists would be able to compete on an equal footing with any foreign scientists. The Delegation considered that the implementation of "Project Skolkovo" was one example of public-private partnership, albeit with virtually the total absence of a mechanism of State control over the carrying out of its fundamental provisions, in particular over the use of earmarked funds from the Federal Budget. The Delegation explained that the project was only a part of the wide-ranging program for the structural redevelopment of the entire Russian economy. The Delegation further noted that the Institute of Intellectual Property played a central role in the innovation development of Russia's economy. At present, the issue of creating a center for intellectual property under the "Skolkovo" was under consideration, as were courts for intellectual property rights within the framework of the Russian arbitration court system. Those initiatives were aimed at providing assistance in preventing loss of intellectual



property rights and being involved with commercialization of those rights. Taking all the above into account, the Delegation was in favor of continuing studies on the topic of transfer of technology.

332. The Delegation of Switzerland supported the statement made by the Delegation of Hungary on behalf of the European Union and its 27 Member States with respect to the evaluation of the results of the study and the manner in which the Committee should proceed on the issue of transfer of technology. In particular, the Delegation stressed the importance of concluding the Project on the Transfer of Technology within the CDIP in order to determine what activities should be pursued by the SCP in the future and to develop synergies between the two Committees.

333. The Delegation of South Africa, speaking on behalf of the African Group, expressed its appreciation for the study that had provided useful insights on the complexities surrounding the transfer of technology. The Delegation also noted that the study pointed to two fundamental conditions for effective technology transfer, *i.e.*, the availability of information about the needs of technology holders and recipients and the capacity of the recipient to absorb the technology. The Delegation was in agreement with the conclusion of the study that meeting those conditions required the availability of sufficient patent information as well as skilled lawyers and IP experts to negotiate technology licenses, and also the involvement of public-funded research institutions, universities and SMEs and traditional knowledge holders in knowledge transactions. However, the Delegation noted that confining the study to those areas only had left some of the concerns about the patent system unaccounted for, thus the study fell short of analyzing how patents could be a barrier to transfer of technology. In its view, while the study suggested that patents were not synonymous to market monopoly, rather patents allowed patentees to exploit the patents in a manner other than preventing third parties from using the patented invention, such assumption contradicted the fact noted in many studies that where standards of patenting were very liberal, patents often led to problems of patent trolls and patent thickets which retarded the stream of innovation. In sum, the Delegation noted that the study on transfer of technology limited its analysis to issues of improving availability of patent information, enabling voluntary licenses of technology and promoting university-industry collaboration, but it did not analyze how the patent system could impede transfer of technology or the importance of preserving the public domain for effective technological development of developing countries. The Delegation therefore reiterated that, for the future work of the SCP, it was worthwhile considering further studies and other activities on the issue of transfer of technology. In its view, the objective of such activities should be to identify measures available in the TRIPS Agreement under technology transfer, improving understanding of developing country policy makers of the role of IPRs in technology transfer, learning from experiences of developed countries in acquiring technology and building technological bases, collating information on research and development policies of developing countries, identifying appropriate policies that could be implemented by developed country governments and entities to facilitate technology transfer to entities in developing countries and analyzing the extent to which developed countries had fulfilled their commitments under Article 66.2 of the TRIPS Agreement.

334. The Chair suggested that, as a way forward, the Secretariat revise the preliminary study based on the discussions held, and that the Committee, at its next session, decide by consensus whether to either conclude the agenda item or undertake other activities in relation to the topic of transfer of technology.

335. The Delegation of India, recalling the specific proposals made by the Development Agenda Group, welcomed any comments from other delegations on those specific proposals.

336. The Representative of ITSSD noted that the preliminary study reflected hard work to address a number of complexities involved in the whole process of technology transfer, part of which dealt with patents and licensing, and a good deal of which dealt with capacity building,

absorptive capacity, funding and government policies, most of which were beyond the scope of the SCP's expertise. However, the Representative suggested that the Secretariat consider, in its effort to balance the document, adding a section dealing with the effects of national provisions restricting the exclusive exercise of patent rights and contractual rights of licensing of private parties on trade, in a similar manner as the section preceding paragraph 60, "the effects of IPRs on trade". The Delegation noted that while the proposal made by the Delegation of South Africa on behalf of the African Group was worthy of consideration by the Committee, it failed to consider that essentially, technology innovation was induced by private rights protection, on which point the preliminary study had not mentioned enough.

337. The Representative of ALIFAR considered that the advantages of the patent system from the viewpoint of the contribution of patents to society did not seem to be working, at least in her sector. She observed that, sometimes, patent offices did not notice drawbacks and deficiencies existing in many sectors. In her view, sometimes, patents were granted without full disclosure which led to limiting reproduction of patented inventions and limited the society from using those inventions that went against promoting the exchange of knowledge and collaboration between researchers. The Representative considered that the Committee should examine how the quality of patents and patentability could be obstacles to the transfer of technology. The Representative was of the view that businesses were not very keen on transferring technology, which might lead to increasing competition. She considered that that was an obstacle in developing countries and in the way of access to technology as they needed for development. The Representative noted that the problem was not in technologies, but rather in the necessity of being competitive in the present world and due to increased protection for the providers of technology. Regarding the international framework to ensure that technologies would be produced in a competitive environment, in her view, Article 66 of the TRIPS Agreement had not had effects, and no positive effects as regards Articles 7 and 8 of the TRIPS Agreement had been found. The Representative therefore stated that it would be necessary to avoid IP becoming an obstacle in itself to the spread of knowledge and to design a program that would include appropriate incentive policies in developed countries to promote benefits for those companies that encouraged the transfer of technology to developing countries. In that regard, she stressed the importance of effective policies on competition in developing countries and the availability of funds to develop scientific and technological capacities through international scientific cooperation.

338. The Representative of KEI noted that technology transfer was obviously a very difficult issue that went to the real problems of development itself. The Representative suggested that the Office of Chief Economist identify kinds of statistics or data that would be useful in evaluating the effectiveness of technology transfer initiatives in terms of development.

339. Referring to the suggestion made by the Delegation of India that technical assistance be provided to train examiners so that patents with insufficient or incomplete disclosure would not be granted, the Delegation of Singapore stated that that suggestion could be linked to its proposal in relation to quality of patents that was discussed earlier in the Committee. Recalling its suggestion that patent offices, where needs were felt, receive training to further develop the technical examination capabilities of patent examiners, the Delegation expressed its belief that a training for examiners to deal with incomplete or insufficient disclosure could be one key component of a more holistic training assistance in building up the technical capabilities.

340. The Delegation of Venezuela, expressed its support for the suggestion made by the Representative of KEI, which could allow transfer of technology to be seen in real terms. In its view, transfer of technology was connected to development, and development was connected to economic and social aspects.

341. The Delegation of India, supporting the statement made by the Delegation of Venezuela, noted that the issue of technology transfer related directly to socio-economic development and

growth in countries, and that discussions on technology transfer could not be divorced from that reality. While agreeing that the SCP should not become an economic body, the Delegation considered that, on the issue of technology transfer, it would only be apt if trained economists contributed to the discussion. Recalling its proposal that a group of external experts be constituted to study the issue of transfer of technology and would make concrete suggestions, the Delegation observed that, since transfer of technology was a dense subject, not everyone was competent to discuss it in the kind of details and the kind of exactitude that the subject deserved. Coming back to its proposal on the establishment of a group of external experts, the Delegation noted that it might be worth exploring an idea that the Chief Economist of WIPO be asked to provide inputs that could contribute to the work of the Committee in a tangible manner.

342. The Delegation of France stated that since the subject of technology transfer had also been studied in the CDIP, in order to avoid any overlap of work, the Committee should first study the link between the work of the two Committees before deciding on the continuation of studying that subject in the SCP.

343. The Delegation of France, speaking on behalf of Group B, reiterated its position stated at the fifteenth session of the SCP, and stated that it was not in a position to agree to the proposal which had been made by the Delegation of Brazil at that session and which had been recalled by the Delegation of India on behalf of the Development Agenda Group at the sixteenth session. The Delegation was of the view that the Committee should wait for the advancement of the Project on IP and Transfer of Technology which had been adopted at the sixth session of the CDIP. Before taking any new initiative in the framework of the SCP on the subject of transfer of technology so as to avoid any duplication of work and to maximize synergies, the Delegation requested the Secretariat to keep the SCP informed on the progress of the above CDIP Project.

344. The Secretariat noted that, in connection with the suggestions on the possible establishment of an independent group of experts and a study by the Office of the Chief Economist, whatever the other merits of those proposals might be, at least at present, there was no budget allocation in the current biennium for establishing a separate committee of experts. The Secretariat further noted that in view of the workload and budget of the Chief Economist, it would be extremely difficult to commit to another project in the near term. The Secretariat therefore presented an alternative idea for the consideration by the Committee that he would take an initiative to discuss with the Chief Economist the organization of a session similar to those economic-related seminars that had been already held by the Chief Economist.

345. The Representative of ITSSD suggested that the preliminary study include additional paragraphs relating to the positive role of patents in a triple helix scenario which involved a partnership between the government sector, the academic sector and the private sector in commercializing technologies that were granted by the government to private and public universities. In his view, there was enough practical experience in a number of jurisdictions to show how technology could be developed to R&D activities jointly and then commercialized into innovations that benefited society.

346. The Representative of TWN stated that the preliminary study did not explore how patents were affecting or impacting transfer of technology, although there was enough historical documentation on it. The Representative observed that the study did not provide policy measures which had been applied by developed countries in the last 200 years to ensure technology transfer even though there had been patent protection in many of those countries. She further noted that the UNCTAD study mentioned in the study was co-authored by WIPO.

347. In relation to the suggestion made by the Secretariat to hold a seminar by the Chief Economist, the Representative of KEI suggested that the Chief Economist report back to the SCP as to the observations or suggestions that were made by various participants to the

seminar so that the SCP could reflect upon the suggestions made with respect to economic data that would be useful in evaluating the patent system as it related to transfer of technology.

348. The Delegation of India noted that while a number of useful seminars on the economics for intellectual property had been held, other commitments had made it difficult to fully attend those seminars. The Delegation therefore was of the view that the seminar suggested by the Secretariat should be held at the beginning of the SCP session, in the morning of the first day. Further, it suggested that the Chief Economist be asked to formally report back to the SCP the discussions that had taken place so that those who had not been present could also benefit from the discussions. The Delegation expressed the wish to consult with its Group on that matter.

349. The Delegation of Bulgaria noted that the preliminary study missed factual information which could be gathered from a number of organizations, such as the Licensing Executive Society International (LESI) or the Association of University Technology Managers (AUTM), which were involved in the day-to-day transfer of technology. The Delegation considered it useful for the Committee to listen also to their experience and mainly to the obstacles which they saw in the transfer of technology. In its view, while the preliminary study well stated transfer of technology in general and at the international level, transfer of technology should start at the national level. It observed that although transfer of technology between national universities and national enterprises should be encouraged, there was a gap in most of the countries. The Delegation considered that the experience of LESI and AUTM, as well as national institutions in Switzerland, Germany and Sweden, could offer the Committee an idea that would meet the short-term objective, *i.e.*, how to use, not only in theory, the patent system to promote the transfer of technology. Quoting Albert Einstein who had said that theory was when we knew everything but nothing worked, and practice was when everything worked but we did not know why, the Delegation considered that practical examples would be helpful to show whether, for example, exceptions and limitations were impediments or a promotional tool for transfer of technology. It noted that the patent system had been working for the last 250 years, whether good or bad, and had been used by business. The Delegation observed that the Committee had so far discussed the issues from the point of view of governments, meaning bureaucrats, but had not listened to business people. Referring to attempts to solve problems through institutional involvement or by regulations and a draft Code of Conducts in 1970s, the Delegation was of the view that they had not worked for the simple reason that they had been discussed by politicians and not by practitioners. The Delegation expressed its belief that, in practice, transfer of technology took place more and more, and that where there was a will, there was a way. The Delegation concluded its statement by saying that more practical examples mainly on impediments and obstacles to transfer of technology, could be gathered so that the Committee would eventually address a point where the patent system could be improved in order to support transfer of technology.

350. The Delegation of South Africa supported the statement made by the Delegation of Bulgaria. The Delegation considered that the Committee should identify barriers in the patent system and resolve problems derived from such barriers. The Delegation noted that, as highlighted in its proposal, since not everything could be captured by a study, other issues could be dealt with in the form of information exchange.

351. The Delegation of India, supporting the statement made by the Delegation of Bulgaria, stated that the Committee had to focus on the practical dimension of technology transfer, focusing on the impediments to technology transfer. In its view, a theoretical and abstract study could not contribute to the appreciation of the practical impediments to technology transfer. Whatever initiative the Committee might decide to follow up on the issue, the Delegation suggested that the Committee focus simply on that aspect, *i.e.*, the constraints to technology transfer or impediments to technology transfer and possible solutions to overcome them. The Delegation suggested a two step approach, first identifying the constraints to transfer of

technology. The Delegation further suggested that a seminar to be held by the Chief Economist could also include that theme along with the theme suggested by the Representative of KEI.

352. The Chair sought clarification by the Delegation of India as to the scope of obstacles to transfer of technology that ought to be looked into by the Committee, more specifically, whether impediments to transfer of technology that went beyond intellectual property should be also covered by the Committee's work.

353. In response to the Chair, the Delegation of India stated that since there had been a tremendous amount of literature already on that subject, the Committee might, as an introductory part, identify the scope of impediments which included issues beyond patents in order to acknowledge the breadth of the challenges that effective technology transfer faced, and then identify those impediments which were related to patents and elaborate those in details. As the other issues had been dealt within UNCTAD and elsewhere, the Delegation was of the view that the Committee should focus on patent-related impediments to technology transfer.

354. The Delegation of El Salvador reiterated that transfer of technology was an area where Member States, particularly developing country Member States and LDCs, could look at with the view to obtaining significant advantages on harnessing the experiences from successful case studies. Supporting the statements made by the Delegations of Bulgaria and India, the Delegation noted that, while the issue had been discussed for many years, there had not been any specific cases or a road map to follow. The Delegation considered that the SCP was more than competent to deal with that domain, and suggested the involvement of other UN organizations which were carrying out similar activities, for example, UNCTAD and WTO.

355. The Delegation of Brazil supported the statement made by the Delegation of Bulgaria and the suggestion made by the Secretariat.

356. In response to a query made by the Delegation of Australia, the Chair explained his understanding of the statement made by the Delegation of Bulgaria, which was to associate with organizations that had particular expertise in technology transfer, for example, LESI and AUTM, and to have them either submit materials or make presentations to the SCP, and of the suggestion by the Secretariat to encourage the Office of the Chief Economist to hold a seminar on the topic and to report to the Committee on its results.

357. The Delegation of Bulgaria noted that, as stated by the Delegation of India, the Committee should first identify whether there were any obstacles by the patent system to transfer of technology, and eventually search for solutions in order to overcome those obstacles. In its view, information which could be provided by LESI and AUTM and also from the Chief Economist would give examples where such impediments existed. The Delegation considered that although all the other aspects such as lack of resources, regulatory aspects, etc. could be mentioned in the study, it was not the task of the SCP to discuss, for example, financing or technical standards.

358. The Delegation of Australia sought clarification as to whether the suggestion elucidated by the Delegation of Bulgaria would be a conclusion to the preliminary study on technology transfer and whether it would become part of the future work program that might be launched after the completion of the preliminary study.

359. The Delegation of Norway supported the statement made by the Delegation of France on behalf of Group B that progress should first be made in the CDIP project in order not to duplicate work. The Delegation, who expressed its agreement with the statement made by the Delegation of Bulgaria, pointed out that one of the elements of the CDIP project on technology transfer was indeed studies on identifying possible obstacles to technology transfer in relation to intellectual property.

360. The Delegation of Switzerland supported the statement made by the Delegation of Norway, and stated that the Committee should be careful not to duplicate its work.

361. The Delegation of Germany supported the statement made by the Delegations of Norway and Switzerland.

362. The Delegation of Japan supported the statements made by the Delegations of Germany, Norway and Switzerland.

363. The Delegation of the Syrian Arab Republic observed that many points which had been raised in the CDIP had been raised in the SCP. It supported the statements made by the Delegations of Hungary on behalf of the European Union and its 27 Member States, India and Japan in view of the importance of the topic of technology transfer.

364. The Delegation of Hungary, speaking on behalf of the European Union and its 27 Member States, associated itself with the statements made by the Delegations of Germany, Japan, Norway and Switzerland.

365. The Delegation of Ecuador supported the proposal made by the Delegation of India to look into the impediments to transfer of technology in greater detail, and sought clarification as to what constituted duplication of work between the SCP and the CDIP.

366. The Secretariat noted that, among a number of activities in the CDIP on technology transfer, the project that had been referred to by delegations was contained in document CDIP/6/4 Rev. That project, which was adopted at the penultimate session of the CDIP, consisted of five phases: (i) five regional consultation meetings; (ii) the elaboration of a number of peer reviewed studies including economic studies; (iii) a high-level international forum on technology transfer and IP – common challenges, building solutions; (iv) the creation of a web forum on technology transfer; and (v) streamlining the outcome of the above phases into the work of the Organization. As regards the studies, the Secretariat explained that a series of economic studies on IP and international technology transfer would be conducted. Those studies would specifically focus on areas that had received less attention in the available economic literature and on identifying possible obstacles and suggesting possible ways in which technology transfer could be enhanced. Some other studies would provide information on existing intellectual property rights related policies and initiatives that would promote technology transfer. A series of case studies on cooperation and exchange between research and development institutions in developed countries and such institutions in developing countries, a study on favorable incentive policies and others were also foreseen. In conclusion, the Secretariat noted that there would be a number of different studies which would also focus on the economic aspects and, in particular, on the practical aspect of technology transfer in the context of the CDIP project.

367. The Delegation of India was of the view that the CDIP project did not specifically address patent-related impediments or impediments in the international patent system, since those issues were best left to the specialized WIPO Committee that dealt with patents. Recalling that the CDIP project was a two-year project, the Delegation further stated that if the SCP should wait, as suggested by some delegations, two years for the completion of the CDIP project, that would seem to be a long waiting period on an issue as important and as central to the patent system and to the interest of developing countries.

368. The Delegation of Uruguay expressed the opinion that the SCP had as its purpose the analysis of the situation as a whole. It stated that the work of the Committee should not be reduced to studies of possible rules without examining the effects that they had on various different aspects. In its view, the tendency to limit too much the work of the Committee to

drawing up legal norms had to be avoided in order not to make the mistake of considering that patent law could be drawn up independently of studies on how the system actually worked. Referring to the TRIPS Agreement that stated that the purpose of the patent system was to promote innovation and generate transfer of technology, the Delegation considered it indispensable to analyze, in the SCP, how the present patent system affected transfer of technology. In its view, it was not a question of theoretical studies or economic analysis, but of the examination of how a certain system governed by certain rules had an impact on the achievement of its final aims. The Delegation expressed its wish to avoid duplication of work, particularly with much broader work undertaken by the CDIP, and stated that the SCP should be focusing on the consequences of the patent system itself and the impact it produced on transfer of technology. It considered that it was a specific subject that affected the work of the Committee, and if the SCP continued to avoid it, other fora that were not specialized on patents would end up dealing with issues for which the SCP was originally designed. The Delegation therefore suggested that the study examine, for example, the impact of patents of doubtful quality, patent thickets and insufficient disclosure of patented inventions to transfer of technology.

369. The Delegation of the Dominican Republic associated itself with the proposal made by the Delegations of Bulgaria and India.

370. The Delegation of South Africa, speaking on behalf of the African Group, supported the proposal made by the Delegation of India. The Delegation expressed its belief that the CDIP and the SCP had different mandates, and hence the Delegation was mindful of the risk of duplication. The Delegation considered that there would not be duplication of work, rather, the work of the SCP would complement the project under the CDIP.

371. The Delegation of Switzerland stated that the question to be answered before taking any decision appeared to be whether the CDIP dealt with patent-related impediments that had been proposed by the Delegation of India.

372. The Delegation of India stated that the study should be revised, without prejudging whether it should be the final revision or not. In its view, there was a consensus that obstacles to technology transfer from the viewpoint of patents were at the intersection between technology transfer and patents and of immediate relevance to the SCP. The Delegation expressed the wish that the revised study would focus on that key issue. In connection with the statement made by the Delegation of Switzerland, the Delegation was of the view that while patents and technology transfer were the purview of the SCP, further clarification would be needed in terms of the CDIP. In any case, the Delegation considered it appropriate that the Chief Economist's involvement should also be limited to focusing on the key questions as to how the international patent system affected technology transfer, and more importantly, in what manner it impeded technology transfer, and if there were any solutions, what kind of solutions could they be.

373. The Delegation of Spain stated that it had no objection to the Chief Economist's contribution to a better understanding of the matter. As regards the studies in the CDIP project, noting that the SCP should avoid duplication of work, the Delegation stated that it had no objection to studying patent-related impediments in the SCP rather than in the CDIP.

374. The Delegation of Bulgaria, supporting the Delegation of Spain, considered that the Secretariat could easily communicate horizontally to clarify the matter, and therefore, it was not necessary to wait, before taking any decision, its report at the next session of the SCP. The Delegation noted that, in any event, documents to be prepared under other fora in WIPO did not need a decision by the SCP.

375. The Delegation of the Islamic Republic of Iran, supporting the proposal made by the Delegation of India, stated that that proposal would be complementary to the CDIP project

which covered general studies. The Delegation expressed its belief that transfer of technology would be a key element to be incorporated in the work program of the SCP, and if that element could not be incorporated in the work program, it would not be balanced and comprehensive.

376. The Chair observed that the Committee appeared to be in consensus that the Secretariat would revise the preliminary study and submit it to the next SCP meeting. With respect to the involvement of the Office of the Chief Economist, the Chair summarized the discussion by stating that the Committee would ask the Secretariat to coordinate with the Office of the Chief Economist so that the Committee could benefit from its expertise. With respect to the work of the CDIP, the Chair asked the views of the Committee members as to whether the Committee could ask the Secretariat to elaborate on the possible impediments to technology transfer in the revised preliminary study. The Chair noted that he would not presuppose any results of the work of the Committee by focusing on patents as a possible impediment to technology transfer - it was very much equally likely that absence of a patent could be an impediment to transfer of technology. Concerning the question as to whether the Secretariat would have in-depth discussions on the parameters of the work in the CDIP and the SCP in order to avoid overlap between the two, the Chair noted that, if there was no overlapping, by the next meeting, the SCP would have the baseline, as suggested by the Delegation of India, of possible impediments to technology transfer, which included all types of impediments, in the revised study, and the Committee would be able to begin its work immediately at the next session.

377. The Delegation of Norway requested the Chair to clarify whether the Secretariat would provide more guidance on the relationship between the CDIP project and a possible work in the SCP at the current session or at the next session.

378. The Chair clarified that the result of the consultation would be reviewed at the next session, since it would be an in-depth consultation. He noted that, on its face, the CDIP project dealt with intellectual property which included patents. The Chair's intention, however, was to have an in-depth consultation in order to understand the real intention of the CDIP when it had adopted the project.

379. The Delegation of Spain supported the proposal made by the Chair.

380. The Delegation of the Republic of Korea, supporting the proposal made by the Chair, stated that the current preliminary study had the position that the patent system itself might not be a barrier nor might promote technology transfer by itself, as stated in paragraphs 52 to 59 of document SCP/14/4 Rev. With that proviso, it went on saying that there were cases where the patent system might act as an impediment, but at the same time it showed examples how the patent system could help promoting transfer of technology. The Delegation pointed out an example found in paragraph 169 relating to the CDIP project entitled "Capacity-building in the use of appropriate technology-specific technical and scientific information as a solution for identified development challenges", which was proposed by its government. With the neutral position of the preliminary study, the Delegation was of the view that directing the Chief Economist to conduct a study with an anticipated result that the patent system might have a negative impact upon technology transfer might not be a well-balanced direction the Committee could give. The Delegation therefore proposed that the Committee direct the Chief Economist not only to study how or whether the patent system could act as an impediment or an obstacle to technology transfer, but also to conduct research on how patent information, the patent infrastructure or the patent system itself could act to promote technology transfer at the international level.

381. The Delegation of the United States of America requested some time for internal consultation.



382. The Delegation of France, referring to the statement made by the Delegation of the Republic of Korea, noted that its understanding of the Secretariat's suggestion was that a seminar would be organized by the Chief Economist, and not a study. In addition, the Delegation requested clarification by the Chair as to the incorporation of the consideration of patent-related impediments in the revised study on the one hand and a possible clarification by the Secretariat on the work of the SCP and the CDIP on the other hand.

383. The Chair expressed the belief that the thrust of the statement made by the Delegation of the Republic of Korea was on the work of the Office of the Chief Economist which did not necessarily mean that there would be a study. With respect to the further revision of the preliminary study, the Chair observed that although the preliminary study included descriptions of the many different possible impediments to technology transfer, they were spread throughout the study, and therefore, they could be gathered together and pointed out as had been requested by the Delegation of India. The Chair noted that its suggestion was not a further study, but rather, gathering information together so that the Committee could look at what the possible impediments might be.

384. The Delegation of Chile supported the suggestions made by the Chair, stating that they were reasonable and well-balanced.

385. The Delegation of Angola stated that it supported the Chair's suggestions. The Delegation was of the view that the CDIP project on transfer of technology had been put forward with a section on patents and a study of the possible obstacles to transfer of technology brought by patents. However, in its view, the SCP could start studying the possible obstacles, bearing in mind that a similar study had been planned in the last stage of the CDIP project. The Delegation considered that if the SCP had already studied the matter at that last stage of the CDIP project, there was no need to conduct the same study in the CDIP and thus time could be saved. The Delegation stated that such an approach was realistic and that there would be no duplication of work between two Committees.

386. The Delegation of France, speaking on behalf of Group B, stated that it could go along with the revision of the preliminary study as suggested by the Chair. The Delegation was of the view that it would be more logical to have first the in-depth consultations within the Secretariat to determine the exact coverage of the CDIP project on transfer of technology, and then to decide at the next session of the SCP on steps to be taken. While the Delegation did not oppose the Office of the Chief Economist to dedicate one of its seminars on the Economics of IP to the impact of the patent system on transfer of technology, it expressed its preference to hold a seminar not in connection with the SCP.

387. The Delegation of Algeria sought clarification on the Chair's suggestions, and noted that the CDIP project, which was described in document CDIP/6/4 Rev., did not refer to patents. In its view, the SCP was the most appropriate forum to discuss the implications of the patent system for the transfer of technology. The Delegation considered that there was no duplication of work between the CDIP and the SCP, since the SCP was a rule-making Committee. Supporting the suggestion made by the Delegation of India, the Delegation was of the view that a seminar by the Chief Economist should be held during the first few days of the SCP with sufficient time to discuss the matter with the Chief Economist.

388. The Chair clarified that the revision of the preliminary study would reflect the interventions made by delegations, but it would not require an additional study. Further, with respect to the possible overlap with the CDIP, the Chair suggested that the Committee instruct the Secretariat to look into the matter between the current session and the next session of the SCP, since there was an ambiguity that needed to be clarified. Regarding a presentation by the Chief Economist, the Chair noted that the Committee might leave that to the discretion of the Secretariat.

389. The Delegation of India, speaking on behalf of the Development Agenda Group, expressed its wish to revise the preliminary study to include an elaboration of how the patent system could be a barrier to transfer of technology. The Delegation reiterated that the study focused on how the patent system contributed to transfer of technology, and not how it could impede transfer of technology. In its view, where there was a reference to a possible negative role that patents could play, there was simply a general statement with neither citation nor elaboration. The Delegation stated that, for instance, although the present study cited the case of one particular scholar who had come to the conclusion that the patent system was not an issue in the ongoing climate change negotiations, no elaboration of the other views or citations were found with respect to possible impediments. Further, the Delegation welcomed the idea of a seminar to be convened by the Chief Economist, and stated that it was amenable to having it as a side event immediately preceding the SCP, for example, from 9.00 to 11.00 a.m. on the first or second day of the SCP meeting in order to facilitate the attendance of the members of the SCP. The Delegation reiterated that the focus of the seminar should be on two issues: first, patent-related barriers and incentives to technology transfer, taking into consideration the comment made by the Delegation of the Republic of Korea; and second, the types of data needed to evaluate the performance of the patent system as regards technology transfer.

390. The Delegation of Brazil considered that if a CDIP study had been done, there was no need to wait until the next SCP meeting to clarify the possible overlapping and duplication of work between the two Committees.

391. The Chair noted that the key question might be whether the study fell within the terms of reference decided by the CDIP.

392. The Delegation of Egypt, supporting the statements made by the Delegations of India on behalf of the Development Agenda Group and Brazil, referred to the CDIP project described in document CDIP/6/4 Rev. which was supposed to start with drafting a project paper that should be completed in the first quarter of the first year according to the implementation timeline. The Delegation therefore considered that, if not complete, at least the vast bulk of the work had been done already. Consequently it was of the view that the responsible person could elaborate the project paper in order to avoid duplication. While recognizing the clear mandates given to the CDIP and the SCP and respecting the principle of not undertaking any duplication of work, the Delegation expressed its belief that, regarding the particular project under discussion, the Committee would be guided by the project timeline. The Delegation also pointed out that the focus of the CDIP project were specific to four Development Agenda recommendations referred to in the project, whereas the focus of work in the SCP and its perspective should be different.

393. The Delegation of Switzerland appreciated the clarification that an internal consultation on the exact focus of the CDIP project would be undertaken. In addition, referring to the statement made by the Delegation of Algeria, the Delegation considered that the CDIP project ought to look at patents, and not just, for example, industrial designs.

394. The Delegation of Angola stated that, in view of the Delivery Strategy 2.3(a) in document CDIP/6/4 Rev., the study to be conducted under the CDIP project would not cover patents.

395. The Delegation of China expressed its agreement with the Chair's suggestions.

396. The Delegation of South Africa was of the view that an in-depth consultation suggested by the Chair was not necessary. In its view, the relevant official who was responsible for the CDIP project could inform the Committee about the exact scope of the project during the current session. The Delegation noted that, according to its understanding of the Delivery Strategy 2.3(a) in document CDIP/6/4 Rev., the CDIP project was broader than the SCP work under the discussion, since the SCP focused only on patents and norm-setting in the area of patents.

397. The Delegation of Algeria supported the statement made by the Delegation of South Africa, and considered that the question as to the impact of the patent system on technology transfer should be discussed within the SCP. It noted that the argument alleging the possible duplication of work was superficial, and that there was also an overlap between the work of the SCP and the PCT Working Group in terms of patent quality.

398. The Delegation of Bulgaria supported the suggestions made by the Chair.

399. The Delegation of India supported the suggestion made by the Delegation of South Africa, noting that the immediate clarification by the Secretariat would save time. Referring to the Delivery Strategy 2.3(a) in document CDIP/6/4 Rev. which read "This new study should avoid duplication of work and constitute an addition to work already undertaken in WIPO", the Delegation stated that the CDIP project had been adopted after the SCP project on technology transfer, and thus the CDIP project should ideally build on the preliminary study on technology transfer that had been already under discussion in the SCP. The Delegation therefore concluded that there was no difficulty with regard to duplication of work.

400. The Representative of ITSSD noted that the Delivery Strategy 2.3(g) in document CDIP/6/4 Rev. included "a review of the patent landscaping reports being prepared under the Project on 'Developing Tools for Access to Patent Information' (CDIP/4/6), with a view to identifying the possibilities of international transfer of technology in these areas. A similar analysis of patent landscaping, from the viewpoint of technology transfer, in the areas of food and agriculture should also be undertaken".

401. The Delegation of India explained its understanding that the proposal by the Delegation of Bulgaria was, following the current preliminary study, to have an exchange of practical best practices adopted by Member States with regard to how they could have overcome the patent system impediments to technology transfer. In its view, the Committee had agreed that the preliminary study had described the patent system and its impact on technology transfer, but had not dealt with the practical aspects of how to overcome the barriers to technology transfer posed by the patent system. The Delegation considered that the above exchange of experiences between countries in the SCP did not duplicate with the CDIP project, since the CDIP project, as approved, had already taken measures to avoid such duplication.

402. The Delegation of Norway stated that Member States had two common goals: identifying possible obstacles in the IP system for technology transfer and, at the same time, not to duplicate work so that resources in WIPO could be spent in an optimal manner to the benefit of all. The Delegation was of the view that, when the CDIP project on technology transfer had been adopted, the mandate of its studies that would be commissioned in the third quarter of 2011 had been to cover IP-related issues of technology transfer and specifically, to identify possible obstacles. The Delegation considered that when launching those CDIP studies, they should take into account what had already been done in other fora.

403. The Delegation of Egypt, supporting the statement made by the Delegation of India, noted that the SCP should be in good harmony with the CDIP: all WIPO Committees should run in good harmony with each other. Since both the CDIP project document and the discussions in the SCP indicated non-duplication of work, the Delegation considered that the best way forward would be to ensure that whatever study was agreed in the SCP, it should not be replicated, but rather it should be supportive to and coordinated with the work that would be undertaken by the CDIP.

404. The Chair expressed his concern about the term "patent-system impediments" which prejudged the outcome. The Chair shared his personal view with the Committee that, although it might go beyond the mandate of the SCP, impediments to transfer of technology needed to be

looked at beyond the patent system, since the effect of the patent system could not be considered in isolation of the other aspects of technology transfer, such as absorptive capacity, funding, know-how, licensing, adaptation of technology to local environment and local regulations etc. He considered that if the SCP was to exchange best practices and experiences, the Committee needed to look at it broadly.

405. In relation to the point raised by the Chair on the exchange of experiences and best practices with respect to the patent system and technology transfer, the Delegation of France requested more time to consult with Group B members.

406. The Delegation of India stated that when it had proposed an exchange of ideas and best practices on how countries were coping with the challenges that the patent system posed to technology transfer, it had been mindful that the issue could not stand in splendid isolation from the rest of the world. The Delegation clarified that the barriers that the patent system posed to effective technology transfer encompassed the aspects of funding, absorptive capacities and other issues mentioned by the Chair as long as they were related to the patent system. The Delegation expressed its willingness to look at all issues that surrounded the patent system and that linked to it. The Delegation, however, explained that the focus should be on how countries and their business entities had coped with the challenges and barriers posed by the patent system, since that was an area that had not been addressed sufficiently and had not got the adequate attention in the Committee. The Delegation expressed its hope that once such an exercise was embarked on, it would result in a meaningful outcome, providing Member States practical ideas that could be implemented in their countries.

407. The Delegation of Switzerland stated that the preliminary study should remain neutral, covering both positive and negative aspects of the patent system, and that the revision of that study should not prejudice the outcome.

408. The Delegation of South Africa reiterated its view that the preliminary study should address a missing element, *i.e.*, impediments to transfer of technology.

409. The Representative of KEI stated that, in order to evaluate the various claims about either positive or negative aspects of patents on technology transfer, the Chief Economist might invite several experts to present papers about the kind of data required to evaluate what's true and not true about technology transfer, and report back to the Committee. In his view, it would be complementary to the ongoing and future studies.

410. Following a request by the Delegation of Egypt, the Chair distributed his suggestions in writing.

411. The Chair, pointing out that the paper entitled "Chair's Statement on Technology Transfer" was a mere suggestion of possible ways to go forward in relation to the topic under discussion, which consisted of several elements. The first element was the revision of the preliminary study on technology transfer by the Secretariat on the basis of Member States' input provided during the SCP sessions, including the inclusion additional information on impediments to technology transfer as suggested by the Delegations of Bulgaria and India. The second element was the consultation by the Secretariat with the Chief Economist to hold a seminar along the lines discussed earlier. The third element was the interaction of the work between the SCP and the CDIP.

412. The Delegation of the Republic of Korea provided a brief comment on item 1 of the Chair's suggestion, stating that it agreed that if there was any revision to be made on the preliminary study, such modifications should be made appropriately. Referring to the suggestion made by some delegations that a separate section on impediments to technology transfer be included in the revised study, and the Delegation recalled the basic principles suggested by the Chair in

going forward with the discussion. They were: firstly, the introduction of the section in question was not prejudging the result of the study; and, secondly, it would balance the positive role of the patent system and its negative effects with regard to technology transfer. Taking those two principles in mind, the Delegation was of the view that if a section on impediments to technology transfer was added, a separate section on the positive effects of the patent system to technology transfer should also be looked at in order to have a balanced study. The Delegation stated that there were actual examples where the patent system and patent information could help the promotion of technology transfer. The Delegation noted that, concerning the organization of the study, it would be natural to have first a section on how patent system promoted technology transfer, followed by the obstructive nature of the patent system on technology transfer.

413. The Delegation of Hungary, speaking on behalf of the European Union and its 27 Member States, fully supported the Chair's suggestion.

414. The Chair took note that the SCP had decided to go forward with the revision of the study as set out in item 1, and as based on the interventions of the Delegations of Bulgaria and India, the SCP would go forward with its work without impinging on the work of the CDIP.

415. The Delegation of France, speaking on behalf of Group B, supported the three elements in the Chair's suggestion. The Delegation, in relation to the second element concerning the Chief Economist, showed some flexibility in order to have a seminar of the Chief Economist held as a side event to the next session of the SCP as previously requested by some delegations in order to facilitate the participation by all delegates. However, the Delegation reiterated that such seminar would not be conducted in connection with the SCP, *i.e.*, on the margins of the SCP without any reporting to the SCP.

416. The Delegation of India stated that, in its understanding regarding item 1, the revised study would try to arrange the gaps that were foreseen by some delegations and it would take on board the observations made in the current session by it on behalf of the Development Agenda Group, the Delegation of Bulgaria and the discussion that followed. The Delegation reminded the Committee that it had also made comments at the fourteenth and fifteenth sessions on the same issue identifying the gaps and requesting that the study be revised taking on board those gaps. Therefore the Delegation requested that those comments be also incorporated when the Secretariat would revisit the document. Noting the point made by the Delegation of the Republic of Korea that there should be also a section on the positive effect of the patent system on technology transfer, in the Delegation's view, if another section was added, this could be seen as a replica of a large part of the study because that issue was already treated by the study. The Delegation expressed its consent to put the topic of the positive effect of the patent system on technology transfer under a separate heading. However, having another section which would simply repeat what was already contained in the study would not, in its view, contribute to taking the study forward. The Delegation nevertheless left the decision on that matter in the good hands of the Secretariat. The Delegation stated that the best possible efforts would be made to address the gaps in the study that would be presented at the next session, hoping that it would be a more balanced study. Concerning item 2, the Delegation expressed its consent to go along with the idea of having a seminar as a side event at the SCP hosted by the Chief Economist. The Delegation requested to organize such a side event in the morning before the session of the SCP, suggesting the time from 9 to 11 a.m. with a coffee break between it and the SCP. The Delegation considered that it could be very useful if the Chief Economist could present his summary orally to the members of the Committee when the SCP would discuss the relevant agenda item. Concerning the specific topics for the seminar, the Delegation recalled its suggestion with three points: firstly, "what type of data is needed to evaluate the performance of the patent system as regards transfer of technology". The Delegation considered that that point was an academic exercise where the Chief Economist would outline the data required in the first place to conduct an empirical evaluation. The second

suggested subject of the seminar was “what are the patent related barriers and incentives to transfer of technology”. The Delegation pointed out that the seminar had to focus on what was deemed a key gap in the study under discussion within the Committee, *i.e.*, how the patent system could impede transfer of technology. The Delegation noted that, taking into account the comments according to which the seminar should be well-rounded and holistic in its approach, its proposal was reworded as “barriers and incentives to transfer of technology”. The Delegation, on the third point, welcomed the clarification made by the Secretariat and fully supported that suggestion.

417. The Chair asked the Member States, given some divergences between the delegations that spoke, some input about the issue of the scheduling of the seminar, in particular if it should be organized during what would otherwise be meeting time so that the members of the SCP would be able to attend the seminar itself and whether there were a need to have in addition to that also a second report by the Chief Economist to the meeting.

418. The Delegation of India reiterated the wish of the Development Agenda Group of having the Chief Economist giving an oral summary of the seminar at the SCP, because the idea was to bring the economic aspect of the discussion in the seminar to the SCP discussions so that delegations would be better guided and the SCP discussions would be more productive and focused. The Delegation, however, stated that having had an exchange of views with the coordinator of Group B, it expressed the wish to have another internal consultation with the Development Agenda Group.

419. After some time for informal consultations, the Chair stated that the only outstanding issue was whether, after the conclusion of a seminar to be held by the Chief Economist, he would be invited to give a report to the SCP on the seminar.

420. The Delegation of India, speaking on behalf of the Development Agenda Group, explained that, although the Development Agenda Group had been very keen to have an external expert group, due to the lack of consensus, the Group had agreed to the proposal by the Secretariat to have a seminar by the Chief Economist as a reasonable way forward. Against that backdrop, the Delegation was of the view that it was the SCP that mandated the seminar and requested the Chief Economist to organize a seminar focusing on two issues. The Delegation therefore had considered it logical, reasonable and productive to the work of the Committee if the Chief Economist would report back to the SCP in the form of a written report. Recognizing some difficulties raised by other delegations to have a written report, the Delegation suggested that the Chief Economist present an oral report to the Committee, which would be a summary on the discussions in the seminar. The Delegation considered that, since transfer of technology was a complex issue requiring certain academic rigor and economic analysis to understand it better and to have a more informed discussion in the SCP, an oral presentation by the Chief Economist would bring the benefit of his academic rigor to the discussions within the SCP.

421. The Chair asked the Delegation of India whether a report by the Chief Economist would be a report of the Chief Economist on the results of the seminar or a report of the Chief Economist to the SCP on the results of the seminar.

422. The Delegation of India clarified that it did not have any problem with a report of the Chief Economist on the proceedings of the seminar. It stated that the issue was to bring back the discussions in the seminar and make it useful for the discussion in the Committee.

423. The Delegation of France, speaking on behalf of Group B, noted that since the seminar would be one of the seminars held by the Chief Economist on the economics of IP, it was not an established practice that the Chief Economist reported to any committee on the contents of the discussions held in those seminars. The Delegation stated that Group B was reluctant to set a precedent that the results of those seminars would have to be reported to any specific

committee. In its view, the possibility of holding the seminar as a side event would allow all interested delegations to participate in the seminar.

424. The Delegation of Egypt stated that what was important was the outcome of the seminar and the SCP would benefit from the information exchange during the seminar. The Delegation expressed its belief that an oral report by the Chief Economist to the SCP would be an added value to the work of the Committee.

425. The Delegation of the United States of America expressed its doubt about the added value of the report by the Chief Economist if his seminar would be held just before the SCP session on Monday morning.

426. The Delegation of Brazil considered that a written report of the seminar by the Chief Economist would be valuable if the presentations and the summary of the discussions were put on the website after the seminar as reference materials. It noted that presentations and a summary was posted in other seminars organized by WIPO.

427. The Delegation of the United States of America supported the proposal made by the Delegation of Brazil to post, on the WIPO website, any information, including a summary, relating to the seminar.

428. The Delegation of Switzerland supported the proposal made by the Delegation of Brazil.

429. The Delegation of Denmark supported the proposal made by the Delegation of Brazil.

430. The Delegation of India expressed its willingness to consider the proposal made by the Delegation of Brazil in a spirit of cooperation and flexibility. The Delegation however stressed the need to expedite the reporting process so that it would meaningfully inform the discussions in the SCP, for example, if a seminar would be on Monday morning, a summary might be provided by the end of the second day.

431. The Delegation of Egypt supported the statement made by the Delegation of India.

432. The Delegation of Portugal supported the statement made by the Delegation of India.

433. The Delegation of Brazil supported the statement made by the Delegation of India.

434. The Delegation of South Africa, speaking on behalf of the African Group, supported the statement made by the Delegation of India.

435. The Delegation of the United States of America supported the statement made by the Delegation of India.

436. The Delegation of Switzerland supported the statement made by the Delegation of India.

437. The Delegation of Djibouti supported the statement made by the Delegation of India.

438. The Delegation of Denmark supported the statement made by the Delegation of India.

439. The Delegation of Mexico supported the statement made by the Delegation of India.

440. The Representative of ITSSD noted that since an academic expert in the field of economics might not have expertise in the practical application of technology transfer, any conclusions to be drawn up from a seminar should be considered as reflecting only one view of the complex subject matter.

441. The Chair noted that the definition of experts was that they were fully aware of their limitations.

442. The Chair presented his suggestion to the Committee on the future work relating to the topic under discussion.

443. The Committee discussed, in particular, how to accurately reflect, on the future work, the discussions held on the topic, in particular, the further revision of the preliminary study by the Secretariat, a seminar to be organized by the Chief Economist and avoiding duplication of work between the SCP and the CDIP.

444. For the record, the Delegation of India expressed its understanding that a seminar by the Chief Economist would address the following three issues: (i) the issues proposed by the Delegation of Bulgaria; (ii) analyzing the barriers and incentives to transfer of technology from the viewpoint of the patent system; and (iii) types of data needed to evaluate the performance of the patent system as regards transfer of technology.

445. After some discussion, the Committee agreed that:

(a) This topic will remain on the agenda of the 17<sup>th</sup> session of the SCP.

(b) The Secretariat will revise the preliminary study (document SCP/14/4 Rev.), based on Member States' inputs reflecting comments of delegations at the sessions of the SCP and addressing in greater detail, the discussion on impediments and elaborating further on incentives to technology transfer, for submission to the next session of the SCP.

(c) The Secretariat will invite the WIPO Chief Economist to organize a seminar on patents and transfer of technology on the margins of the next session of the SCP, along the lines discussed at the 16<sup>th</sup> session of the SCP, and to publish the presentations and summary of the discussions on WIPO's website "Economics of IP" by the end of the second day of the next session of the SCP.

(d) The Secretariat will assist Member States in facilitating the complementary and non-duplicative nature of the work undertaken by the SCP and CDIP on the issue of transfer of technology.

## AGENDA ITEM 12: CONTRIBUTION OF THE SCP TO THE IMPLEMENTATION OF THE RESPECTIVE DEVELOPMENT AGENDA RECOMMENDATIONS

446. The Delegation of Brazil noted that, since Member States did not yet have an agreed format for reporting to the General Assembly, in the previous session of the Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications (SCT), the Chair had invited delegations to express their views on how the Committee had been contributing to the implementation of the Development Agenda recommendations. In that session, delegations had expressed their views freely, and those views had been included in the report which would be sent to the General Assembly. The Delegation suggested that the SCP adopt the same procedure.

447. The Delegation of India, speaking on behalf of the Development Agenda Group, supported the proposal made by the Delegation of Brazil and delivered the following statement:

"The Development Agenda Group attaches great importance to this agenda item and is pleased to see that in keeping with the directive of the General Assembly, this Committee is



taking stock of how it has so far contributed to the mainstreaming of the Development Agenda in its area of work. The patent system is a key element in the intellectual property framework, and one that impacts directly on national socio-economic development and societal welfare. The fundamental premise of the patent system is that a country confers an artificial and temporary monopoly on the inventor, in exchange for disclosing the invention to benefit the larger interests of society. There is a growing acknowledgement that the current IP system focuses heavily on ensuring rights to IP title holders, without adequately ensuring that the other side of the trade-off is taking place as it should, consequently leading to the concern that the patent system is not working as it was originally intended. If the IP system has to thrive and encourage innovation and growth – a goal that all of us share and support - this can only happen if its shortcomings are effectively addressed. While we are happy that there has been a tentative initiation of discussion in this Committee on some of these aspects, we need to have a more open and frank discussion about some of the current deficiencies in the patent system and try to recover the essential balance that ought to be inherent in the patent system. This can again only happen if there is a willingness to revise old, incorrect assumptions and a commitment to improving the system, where needed, both for the benefit of Member States, and for the future viability of the system itself. To this end, we welcome the analytical and conceptual discussions that have taken place in the last few sessions of this Committee on a range of issues, such as the economic impact of the patent system, anti-competitive practices, standards and patents, alternative models of innovation etc. They have indeed contributed to a more balanced and holistic understanding of many complex aspects of the international patent system. However, we need to go beyond theoretical discussions to the concrete practices and post-grant realities in the outside world, which are being hotly debated outside WIPO, but not yet addressed in this Committee. We must not shy away from discussing and better understanding how patents are actually being used in the market, and how these are encouraging or impeding innovation, technological growth and development. For instance, we know that the actual inventor hardly corresponds today to the owner of the patent; many patents have become a tool for extending market monopolies to enable the rich to grow richer; and that patents can be misused to promote anti-competitive behavior – all of which are counter to the notion that patents are to be accorded to the right holder only to benefit society as a whole. Only through such frank discussions can we hope to forge the collective will and action necessary for improving the system. The issue of patent quality is one such key issue to address if we want an effective and credible international patent system. High quality and credible patents are an objective that all countries share and are concerned about. There is considerable amount of literature and ongoing debate on this issue, in developed and developing countries, alike. However, we need to ensure that we have a shared and common understanding of what is meant by ‘patent quality’ before we proceed to discuss and finalize a work program in this regard. Another critical area is the issue of patents and health, which has seen animated discussions in the public realm and has led to many concrete actions in other organizations like the WTO and WHO. WIPO has been conspicuously silent. It is therefore heartening that this issue is on the agenda of this Committee. We hope that the time lag in WIPO in addressing this issue will be made up in terms of concrete and meaningful actions in the SCP’s work program. Similarly, more tangible discussions are needed in the SCP on how patents can contribute to better addressing the key challenges facing humanity today - in areas such as food and energy security to environment, disaster management, climate change and education. We hope that in the days ahead, there will be open and constructive engagement on these important issues. The long prevalent and naïve assumption that providing patent holders with stronger rights will, by itself, foster innovation and attract investments has been rejected in the light of global economic realities and experiences. How countries can optimally calibrate the level of IPR protection using exceptions and limitations and other tools and flexibilities has so far been an academic discussion in this Committee. The formulation of a Questionnaire will hopefully be the first step towards having a concrete work program, enabling WIPO to play its due role in assisting countries in evolving tailor-made IPR policies. Finally, and most importantly, the issue of ‘transfer of technology’ is at the heart of the fundamental trade-off

inherent in the patent system. An objective assessment of how the patent system has so far enabled or impeded technology transfer and identification of ways by which WIPO can help the patent system contribute to this goal, is at the heart of the work of this Committee. We are happy that the past few sessions have seen some useful discussions, and look forward to translating these discussions into useful elements of the SCP's work program. In conclusion, the SCP has started an important and necessary discussion on various development-related aspects of the patent system, which were hitherto not addressed. We welcome this positive step and look forward to a meaningful translation of these discussions into concrete elements of a work program for the Committee. We also hope that many critical issues that have not yet been addressed in this Committee will become the subject of honest and constructive consideration, leading to their integration in a holistic, development-oriented and balanced work program for the SCP."

448. The Delegation of Brazil made the following statement:

"The Delegation of Brazil welcomes the opportunity to express its views on how the SCP has been contributing to the implementation of the Development Agenda recommendations. We are particularly glad to do so on a specific agenda item called "Contribution of the Committee to the implementation of the respective Development Agenda recommendations". We believe this is a very positive development and we hope the same model can be replicated to the other relevant WIPO bodies. In what concerns specifically the contribution of the SCP to the implementation of the Development Agenda, the Delegation of Brazil recalls that after some unsuccessful attempts, the SCP has agreed at its last session to a work program which in our view is quite balanced and will allow this Committee to make concrete progress. We believe that this work program is in line with the recommendations of the Development Agenda, and in this sense the Delegation of Brazil feels that the SCP is indeed making a positive contribution to the implementation of the Development Agenda. Turning now to this session of the SCP, we consider that the approval of the questionnaire on exceptions and limitations to patent rights brought a very positive step in complying with Recommendation 17, which states "In its activities, include norm-setting, WIPO should take into account the flexibilities in international IP agreements, especially those which are of interest to developing countries and LDCs". We recall that the questionnaire is one element of the first phase of the Brazilian proposal that aims in its third phase to elaborate a manual on exceptions and limitations to be used by members as they see fit. The Delegation of Brazil is also glad that the SCP is starting to address the relationship between patents and health. The joint proposal by the African Group and the Development Agenda Group seeks to develop a work program to enhance the capacities of Member States and, particularly, developing countries and LDCs to adopt patent regime that make full use of the flexibilities available in the international patent system to promote public policy priorities related to public health. This is very much in line with Development Agenda recommendation 22 that states that "WIPO norm-setting activities should be supportive of the development goals agreed within the United Nations system, including those contained in the Millennium Declaration". We are confident that the SCP would be able to make progress on this issue at its next session. To conclude, I wanted to add that the Delegation of Brazil is also committed to show the necessary flexibility to have a good conclusion of this session of the SCP."

449. The Delegation of South Africa, speaking on behalf of the African Group, made the following statement:

"Following the adoption of the coordination mechanism and monitoring, assessing and reporting modalities of the Development Agenda at the forty-eighth WIPO General Assembly, the African Group would like to provide its views on the contribution by the Standing Committee on the Law of Patents to the implementation of the Development

Agenda recommendations. The African Group would like to reiterate its position on the importance of a balanced approach between intellectual property rights holders and public use. Underpinning the Development Agenda recommendations is the need to address the asymmetrical relations between the intellectual property rights holders and public use. It is within this context that the African Group recognizes the role this Committee could play in enhancing the understanding and adoption of patent laws suited for Member States in respect to their different levels of development. The African Group remains encouraged by the current discussions on the role that the patent system can play in the economic development of Member States, particularly developing countries and LDCs. In this regard, we appreciate the studies and activities undertaken on exclusions, exceptions and limitations to the rights; technology transfer; and dissemination of patent information, amongst others, within the context of building capacity at the national level. Not to single out one substantive issue, but the topic of exceptions and limitations to patent rights merits recognition. The minimum standards for intellectual property use through exceptions and limitations to patent rights remain an important issue not only to the African group but to all developing countries. We are of the firm view that, if properly applied, exceptions and limitations could play a significant role in advancing development goals in many developing countries. We hope that the Committee will continue intensifying its work in these areas and other relevant areas with a view to bringing out the associated development dimensions. We are pleased that the Committee will be undertaking work on patents and public health, as this is a critical issue not only to the developing countries but to all Member States. In executing its work, we expect the Committee to take into account the different levels of development of Member States and on how these countries could derive benefits from the patent system. It is therefore important that the list of issues for the consideration of the Committee remain non-exhaustive so as to accommodate the views of all Member States. This session of the Committee has underlined the importance of the coordination mechanism. This was clearly illustrated by the substantive discussion on technology transfer. We call for a coordinated approach among the WIPO bodies on cross-cutting issues through the Coordination Mechanism. In conclusion, the African Group remains positive that the Committee will find an equitable approach for its future work in the spirit of the WIPO strategic objectives to advance the development of the patent system in a balanced manner to the benefit of all Member States, especially developing countries and LDCs, giving due consideration to the Development Agenda recommendations. This will provide developing countries and LDCs policy space to design and implement national patent law in a manner conducive to their national development.”

450. The Delegation of France, speaking on behalf of Group B, made the following statement:

“Group B notes that the SCP has just adopted in its last session a new work program so that the bulk of our comments would come later under this item when the Committee is more advanced in the implementation of its program of work. At this stage, we would like to underline that the SCP may, because of the very nature of its mandate on the law of patents, contribute to the implementation of the Development Agenda in a variety of ways. In general, the work of the SCP is directed to the improvement of the functioning of the patent system which promotes innovation and transfer of technology. Also, we should be cautious not to duplicate the work with other committees, in particular, the CDIP.”

451. The Delegation of Egypt associated itself with the statements made by the Delegations of South Africa on behalf of the African Group and by India on behalf of the Development Agenda Group.

452. The Delegation of Hungary, speaking on behalf of the European Union and its 27 Member States, made the following statement:

“The Delegation of Hungary, on behalf of the European Union and its 27 Member States, would like to recall that the SCP was established to serve as a forum to discuss issues, facilitate coordination and provide guidance concerning the progressive international development of patent law. In June 2008 the Members of this Committee decided to launch work on various issues relating to patent law and the international patent system. The components of this new work program reveal how the SCP, in fulfilling its mandate, can serve the well-functioning of the patent system and the promotion of innovation and technology transfer, and also contribute to the implementation of a number of Recommendations of the Development Agenda. Having studied the summary contained in SCP/15/INF/2, it can be observed that the SCP is on its way to contribute to the implementation of WIPO’s respective development goals. This document provides a clear guidance on how the respective recommendations may be linked to the topics in the non-exhaustive list and the related activities carried out by this Committee. Nevertheless, it should be mentioned that the components of the Committee’s new work program are still under elaboration and need further advancement, hence, the exact evaluation of their contribution to the implementation of the Development Agenda may not be carried out at this stage. We also would like to point out that when implementing a balanced work program of the SCP, we should avoid duplication of work with other WIPO committees and we should take due care of the efficient utilization of the available resources of the organization. We would like to assure you that the European Union and its 27 Member States will contribute with detailed comments to the exchange of views on the implementation of the respective Development Agenda recommendations by the SCP after the Committee’s work program has been implemented to a greater extent.”

453. The Delegation of Spain made the following statement:

“The Delegation of Spain would like to contribute to the discussion on the contribution of this Committee to the implementation of the WIPO Development Agenda under item 12 of the agenda. In our view, there are very few doubts as to the achievement of the objective of integrating development considerations into the activities of this Organization in the work of those bodies where this is relevant. Today, the approach to all substantive issues of intellectual property has been enriched, thanks to the consideration of various countries of the Member States and the resulting approaches can be considered as reasonably satisfactory. The implementation of the Development Agenda has been particularly widespread in this Committee. This work obliges us to consider the work of the Standing Committees, like this one and the CDIP. As regards the latter, there are many projects adopted to implement the principles of the Development Agenda to the sphere of patents. By way of an example, we could mention the two projects on the relationship between patents and the public domain under recommendations 16 and 20, one of which is already being implemented, namely, the Project on Intellectual Property and Technology Transfer: Common Challenges – Building Solutions, implementing recommendations 19, 25 and 28, the Project on IP and Competition Policy implementing recommendation 7, the Project on Specialized Databases’ Access and Support implementing recommendation 8, the Project on Capacity Building in the Use of Appropriate Technology-Specific Technical and Scientific Information as a Solution for Identified Development Challenges implementing recommendations 19, 30 and 31 and the Project on Open Collaborative Projects and IP-Based Models implementing recommendation 36. Regarding this Committee, the agendas adopted at the previous sessions include items such as exceptions and limitations which implements recommendation 17, quality of patents and the proposal made by the Delegations of Canada and the United Kingdom which implements recommendations 10 and 11, patent information which implements recommendations 20 and 25, patents and health which implements recommendations 1, 7, 9, 14, 40 and 41 and transfer of technology which implements recommendations 22, 23, 26, 28, 29, 31 and 39. In conclusion, we understand that, in a fairly short period of time, a great effort has been made to include development issues in the discussions on patents. This has

been enriched by considering more aspects related to social reality. This intense process has raised a number of questions which would have to be answered in the near future, such as distribution of work among committees, with the view to better using the organization's resources and making smoother progress on patent-related issues. To this effect, a project concerning patents and the public domain was submitted to the CDIP, whereas in this Committee, we have been discussing exceptions and limitations without making proper use of the synergies with other studies. We should also give some thoughts to the possible overlaps that exist in transfer of technology. And finally, the inclusion of the development perspective should not prevent discussion in the committees such as this or other of their own business, because the need for the necessary balance would otherwise convert this Committee into a replication of others, whereas this Committee has its own dynamics."

454. The Delegation of the United States of America supported the statements made by the Delegations of France on behalf of Group B, Hungary on behalf of the European Union and its 27 Member States, and Spain. In particular, it supported the conclusion voiced by the Delegation of Spain that the work which had been carried out in the current session on patent quality as proposed by the Delegations of Canada and the United Kingdom was supportive of Development Agenda recommendation 10.

455. The Delegation of Australia associated itself with the statement made by the Delegation of France on behalf of Group B, and made the following statement:

"This delegation recalls the instruction of the 2010 General Assembly and recognizes the importance of development issues. We consider that the current work program includes topics which are linked to the Development Agenda recommendations. In the Delegation of Australia's view, most of the topics on the current agenda related to the Development Agenda recommendations demonstrating that the SCP is fulfilling its commitments to mainstreaming the Development Agenda. As the Delegation of Hungary noted, document SCP/15/INF/2 gave a useful summary of the linkages between the work of the Committee and the Development Agenda recommendations. In particular, we would like to draw our attention to the item of quality of patents, including opposition systems, which was linked to Development Agenda recommendations 10 and 11 in the joint UK/Canadian joint proposal. Like the Delegation of India, the Delegation of Australia shares the view that this topic could have relevance to a wider range of Development Agenda recommendations. We would also note the strong linkages between the Development Agenda recommendations and the work on patents and health and technology transfer. We look forward to the further evolution of the SCP work program and its contribution to the Development Agenda."

#### AGENDA ITEM 13: FUTURE WORK

456. The Committee agreed that the non-exhaustive list of issues would remain open for further elaboration and discussion at the next session of the SCP.

457. Further, the Committee agreed that the future work of the SCP would be carried out as agreed above (see paragraphs 165, 229, 292, 327 and 445).

458. The Secretariat informed the SCP that its seventeenth session was tentatively scheduled to be held from December 5 to 9, 2011, in Geneva.

#### AGENDA ITEM 14: CHAIR'S SUMMARY

459. The Chair introduced the draft Summary by the Chair (document SCP/16/8 Prov.).

460. The Delegation of Egypt suggested that, in paragraph 10, a new sentence "Some delegations also presented their views on the issue of quality of patents." be added before the last sentence of that paragraph.

461. The Delegation of India suggested that the word "declarations" in paragraph 20 be replaced with the word "statements" in all instances.

462. The Delegation of the Republic of Korea expressed its concerns about the text in paragraph 9 which stated that the questionnaire had been amended and adopted during the current session. Referring to its request made during the discussion relating to the draft questionnaire, the Delegation stated that it could accept that questionnaire only if the requested revisions were made.

463. The Chair stated that the position of the Delegation of the Republic of Korea would be clearly reflected in the report of the current SCP session.

464. The Summary by the Chair (document SCP/16/8) was noted and agreed.

465. 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 15: CLOSING OF THE SESSION

466. The Chair closed the session.

*467. In accordance with the procedure previously adopted by the Committee (see paragraph 465 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]

## LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS

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(dans l'ordre alphabétique des noms français des États)  
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