

# WIPO



**SCP/5/6 Prov.**  
**ORIGINAL:** English  
**DATE:** June 8, 2001

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**WORLD INTELLECTUAL PROPERTY ORGANIZATION**  
GENEVA

## **STANDING COMMITTEE ON THE LAW OF PATENTS**

**Fifth Session**  
**Geneva, May 14 to 19, 2001**

DRAFT REPORT

*prepared by the International Bureau*

### INTRODUCTION

1. The Standing Committee on the Law of Patents (hereinafter referred to as “the Standing Committee” or “the SCP”) held its fifth session in Geneva from May 14 to 19, 2001.
2. The following States members of WIPO and/or the Paris Union were represented at the meeting: Argentina, Australia, Austria, Azerbaijan, Belarus, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Congo, Côte d’Ivoire, Croatia, Czech Republic, Denmark, Dominican Republic, Egypt, Equatorial Guinea, Estonia, Ethiopia, Finland, France, Germany, Ghana, Guatemala, Honduras, Hungary, India, Indonesia, Ireland, Islamic Republic of Iran, Italy, Japan, Jordan, Kenya, Kuwait, Latvia, Lesotho, Lithuania, Madagascar, Mexico, Mongolia, Morocco, Netherlands, Nicaragua, Niger, Nigeria, Norway, Panama, Peru, Poland, Portugal, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Thailand, The Former Yugoslav Republic of Macedonia, Tunisia, Turkmenistan, Ukraine, United Kingdom, United States of America, Uruguay, Uzbekistan and Venezuela (78).
3. Representatives of the World Trade Organization (WTO), the Eurasian Patent Office (EAPO), the European Patent Office (EPO), the European Commission (EC), and the African Intellectual Property Organization (OAPI) took part in the meeting in an observer capacity (5).

4. Representatives of the following non-governmental organizations took part in the meeting in an observer capacity: American Bar Association (ABA), American Intellectual Property Law Association (AIPLA), Asian Patent Attorneys Association (APAA), Biotechnology Industry Organization (BIO), Brazilian Association of Industrial Property (ABPI), Brazilian Association of Industrial Property Agents (ABAPI), Chartered Institute of Patent Agents (CIPA), Institute of Professional Representatives before the European Patent Office (EPI), Intellectual Property Institute of Canada (IPIC), Intellectual Property Owners Association (IPO), International Association for the Protection of Industrial Property (AIPPI), International Federation of Industrial Property Attorneys (FICPI), International Federation of Inventors' Associations (IFIA), International Intellectual Property Society (IIPS), Japan Intellectual Property Association (JIPA), Japan Patent Attorneys Association (JPAA), Max-Planck-Institute for Foreign and International Patent, Copyright and Competition Law (MPI), Union of Industrial and Employers' Confederations of Europe (UNICE) and World Association for Small and Medium Enterprises (WASME) (19).
5. The list of participants is contained in the Annex of this report.
6. Discussions were based on the following documents prepared by the International Bureau of WIPO: "Agenda" (SCP/5/1), "Draft Substantive Patent Law Treaty" (SCP/5/2), "Draft Regulations and Practice Guidelines under the Draft Substantive Patent Law Treaty" (SCP/5/3), and "Results of the Questionnaires Concerning Disclosure of Information on the Internet and Other Issues Relating to the Internet" (SCP/5/4).
7. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions without reflecting all the observations made.

## GENERAL DISCUSSION

### Agenda Item 1: Opening of the Session

8. The session was opened by Mr. Shozo Uemura, Deputy Director General, on behalf of the Director General, who welcomed the participants. Mr. Philippe Baechtold (WIPO) acted as Secretary to the Standing Committee.

### Agenda Item 2: Adoption of the Agenda

9. The draft Agenda (document SCP/5/1) was adopted as proposed.

### Agenda Item 3: Draft Substantive Patent Law Treaty and Draft Regulations under the Substantive Patent Law Treaty

#### *General discussion*

10. In response to an invitation by the Chair to inform the SCP about recent developments in the United States of America on issues such as first-to-file, Hilmer and the best mode requirement, the Delegation of the United States of America explained that discussions with interested circles were still going on, based on consultations launched by the United States

Patent and Trademark Office (USPTO) on March 19, 2001. The consultations had produced 45 responses which had shown great diversity of opinion, but also a great deal of common ground. These comments were published on the website of the USPTO. The Delegation further said that it hoped to be able to draw a clearer picture of these issues at the next session of the SCP.

11. The Chair suggested that a first round of comments address the drafting style issue, and that, subsequently, each individual provision contained in documents SCP/5/2 and 3 be addressed in detail with a view to providing the International Bureau with clear directions for establishing revised documents to be submitted to the next session of the SCP.

12. The International Bureau introduced documents SCP/5/2 and 3 and explained, in particular, the background of Alternatives A and B contained in document SCP/5/2. It further explained that document SCP/5/3 did not contain alternatives, since its drafting style will depend on the drafting style decided upon for the draft Articles. The International Bureau emphasized that the alternatives were also intended to draw the attention of the SCP to certain ambiguities, for example the question whether a priority date applied to an application as a whole, or rather to the individual claims of an application. It suggested that such issues be addressed and clarified by the SCP.

13. A majority of delegations, supported by the representatives of two intergovernmental organizations and one non-governmental organization, expressed their support for Alternative A in principle, but indicated that they were open for discussion and that the drafting style issue should be addressed on an article-by-article basis.

14. The Delegation of the United States of America, supported by the representatives of two non-governmental organizations, stated that it supported the style used in Alternative B, since it used more simple and direct language. The Delegation further stated that it was willing to support an even more drastic departure from existing texts than the drafting style used in Alternative B.

15. A number of those delegations which supported Alternative A advised to utilize, where possible, known language coming from the Patent Cooperation Treaty (PCT) or the Patent Law Treaty (PLT) since, first, the future Substantive Patent Law Treaty (SPLT) should be seen in the context of those treaties, which also have to be implemented in national and regional laws, and second, confusion with those existing treaties, and thus legal uncertainty, should be avoided. Other delegations expressed a divergent opinion since, first, the PLT and the PCT did not bind future Contracting Parties with respect to substantive patent law issues and, second, none of the existing treaties achieved full harmonization.

16. The Chair summarized the discussions as follows: while a majority of delegations seemed to favor Alternative A, the general opinion was that discussions should proceed on an article-by-article basis. Further, there seemed to be some concerns about the compatibility of the future SPLT with the PLT and the PCT. Finally, delegations expressed their wish that principles such as clarity and legal certainty be taken into account.

*Draft Article 1: Abbreviated Expressions*

*Draft Rule 1: Abbreviated Expressions*

17. The SCP decided to revisit these provisions at a later stage when the contents of the draft Articles and the Regulations would be better known.

*Draft Article 1bis: Applications [and Patents] to Which the Treaty Applies*

18. A majority of delegations supported the inclusion of a provision along the lines of draft Article 1bis. Some delegations, supported by the representative of one intergovernmental organization, expressed the wish that the International Bureau examine the language of the provision in order to achieve compatibility with Article 2 of the PLT. Concerning a proposal from the representative of OAPI that the draft SPLT should also cover utility models, the SCP agreed that the draft Treaty should be limited to patents. In this context, one delegation pointed out that, in the field of utility models, relative novelty was the standard usually applied.

19. The SCP further agreed that divisional applications should be accommodated, either in the draft SPLT or in the Explanatory Notes. One delegation proposed to provide exceptions which apply to certain types of applications, such as re-issue applications.

20. A majority of delegations supported the inclusion of paragraph (1)(ii), which was presented in square brackets. Two delegations proposed to include the provision in order to ensure that the same standards of patentability apply to both the pre- and post-grant stages, but to exclude infringement issues from its scope.

21. The Chair summarized the discussion as follows: the SCP supported the inclusion of draft Article 1bis, subject to the inclusion of divisional applications, while utility models should not fall within the scope of the draft SPLT. Regarding paragraph (1)(ii), the SCP agreed that it should be maintained without square brackets, provided that infringement issues should be excluded from the scope of the provision.

*Draft Article 2: Right to a Patent*

22. A majority of delegations supported the inclusion of a provision on the right to a patent in principle.

23. One delegation, supported by the representatives of two non-governmental organizations, indicated that draft Article 2, in particular in conjunction with draft Article 19, raised the issue of improper derivation, which should be explicitly addressed, possibly in the draft Regulations or Practice Guidelines. In this context, that Delegation also noted that the Practice Guidelines should be binding on Contracting Parties, in order to achieve full harmonization, and proposed to set up a sub-committee to establish and amend the Practice Guidelines. A decision on this latter proposal was postponed by the SCP. Several delegations questioned the adequacy of the term “successor in title,” since it did not cover all situations, for instance where, in certain systems, the patent rights arose automatically in the person of the employer.

24. One delegation suggested that draft Article 2 could contain the principles, while draft Rule 2 could contain the exceptions.

*Draft Rule 2: Details Concerning the Right to a Patent Under Article 2*

25. A majority of delegations expressed the wish to keep a provision along the lines of draft Rule 2. While some delegations raised the point that draft Rule 2 did not achieve harmonization, since it left open an option to Contracting Parties, some other delegations supported the fact that Contracting Parties were given some freedom with respect to regulating employees' inventions. According to one delegation, this could be clarified in the Explanatory Notes. Several delegations indicated that the substance of draft Rule 2 should be moved to draft Article 2.

26. The Chair summarized the debate by stating that there was no real disagreement as to substance in respect of draft Article 2 and draft Rule 2, and that the International Bureau should redraft the provisions, taking into account the comments received.

*Draft Article 3: Contents of Application*

27. The International Bureau explained that, strictly speaking, a provision such as draft Article 3 was not necessary, in particular in view of the link of the draft SPLT to the PLT, which incorporates the requirements relating to form or contents of the PCT by reference. Therefore, Alternative A did not contain any provision on the contents of an application. Nevertheless, in terms of providing a basis for later references in the draft SPLT to the description, the claims and other contents of the application, such a provision may prove useful, and thus a suggestion had been included in Alternative B.

28. One delegation proposed that some references to the Regulations could be included in draft Article 3, so that draft Articles 5 and 6(3) may not be necessary. One delegation suggested to insert the words "for the examination" after the word "contain" in the introductory words, and another delegation proposed that the date of its conclusion should be added to the reference to the PLT.

29. The SCP agreed that the International Bureau should look into these questions when redrafting the provision.

*Draft Article 4: Lengthy Applications and Practice Guideline*

30. The International Bureau explained that draft Article 4 and the corresponding Practice Guideline had been included in order to stimulate a discussion on the need for additional requirements for special applications. The two delegations that spoke were of the opinion that the issue was not a substantive one, and that such additional requirements, if any, should be introduced by way of amending the PLT.

31. The Chair concluded that, in view of the discussion, but also having regard to draft Article 19(2), the SCP did not support draft Article 4, and that the provision should be deleted from the next draft of the SPLT.

*Draft Article 5: Contents, and Order of Contents, of Description*

32. One delegation, supported by another delegation, proposed that draft Articles 3 and 5 be consolidated, and that draft Article 3 provide a general reference to the Regulations by adding the words "and each of these elements shall be in the contents and be presented in the order as prescribed in the Regulations." Consequently, the words "in writing" would not be necessary.

The concern raised by the Chair with respect to the words “in writing” in the framework of electronic filing was shared by three delegations and the representative of one non-governmental organization, who suggested the deletion of these words. However, one delegation was in favor of retaining the words “in writing.” Another delegation said that the provision should specify the means of communication, such as on paper or by electronic means. The representative of one intergovernmental organization suggested that the style be harmonized with the PLT with respect to the form of the application filed with the Office.

33. The representative of one non-governmental organization stated that the substance of draft Article 5 and draft Rule 3 was already contained in the PLT, since PCT Rule 5 was incorporated in the PLT by reference. If the substance of draft Article 5 and draft Rule 3 was considered to be of a substantive nature, the SPLT should simply refer to PCT Rule 5. One delegation considered it necessary to have a common understanding in the Committee concerning what were substantive and what were formal requirements regulated under the PLT. The Delegation was of the opinion that a proper reference to the PLT was appropriate as regards the requirements of formal nature under draft Rule 3, and that the requirements of a substantive nature should be in the subsequent provisions relating to substance. It stated that draft Rule 3 should not give the basis for the rejection of an application. The representative of one non-governmental organization was of the opinion that the SPLT should answer questions that had not been answered by the PLT or the PCT. The representative of another non-governmental organization said that, since draft Article 5 related to the style of drafting patent applications, that draft article included formal matters. One delegation, while noting that the PLT did not provide substantive requirements, and PCT Article 27(5) allowed Contracting Parties to provide any substantive conditions of patentability, the simpler way would be to refer to the PCT provisions, and to add additional requirements such as the prohibition of the best mode requirement. One delegation stated that PCT Rule 5 was not incorporated by reference in the PLT, since the technical character of the invention, etc. were substantive requirements. Two delegations were of the opinion that draft Rule 3 should cover elements of the description, and any substantive requirements should be covered by other provisions.

34. The International Bureau explained the negotiating history of the PCT as well as the PLT, and said that the dividing line between formality requirements and substantive requirements was not always clear. Further, it stressed the importance of establishing a seamless interface between the SPLT and the PLT. It pointed out that the substance of draft Rules 3 and 4 was not exactly the same as the corresponding provisions of the PCT.

35. In response to a question raised by the Chair as to which requirements under draft Rule 3 were considered to be substantive requirements, the representative of one non-governmental organization, supported by one delegation, indicated that the last sentence of draft Rule 3(1)(iv) was a substantive requirement. One delegation and the representatives of three non-governmental organizations stated that the technical character of the invention under draft Rule 3 was a substantive issue. This view was shared by one delegation and the representative of one intergovernmental organization, who supported the retention of that requirement in the SPLT, possibly in draft Article 15. The representative of one non-governmental organization proposed that the International Bureau study the use of the term “technical.” One delegation said that draft Rule 3(1)(vii) related to a substantive requirement. The representative of one non-governmental organization pointed out that draft Rule 3(1)(vii) related to draft Article 16.

36. Following a suggestion made by the Chair, it was agreed that the International Bureau would conduct a study with respect to the interface between the draft SPLT and the PLT.

37. One delegation wondered whether there was consistency between the texts of draft Article 5, which required that the description be presented in a certain order as prescribed in the Regulations, and draft Rule 3(2)(a) which provided an option regarding the order. Another delegation was in favor of keeping the words “in the order” in draft Article 5, since the order referred to in draft Rule 3(1) was a logical one.

38. The Chair concluded that the relationship between the draft SPLT and the PLT as well as the PCT should be further studied in terms of formality requirements and substantive requirements.

*Draft Rule 3: Contents and Order of Description Under Article 5*

39. There was a full discussion concerning the necessity of the term “technical” in draft Rule 3(1)(i) and (iii). Seven delegations supported the retention of the word “technical,” while two delegations and the representative of one non-governmental organization proposed to delete that word. In this respect, several delegations made reference to the words “in all fields of technology” in Article 27.1 of the TRIPS Agreement, while one delegation stated that, in light of the negotiation history of the TRIPS Agreement, those words did not add any additional substantive requirement. The latter Delegation suggested a term such as “field of endeavor” or “field of invention.” This view was supported by the representative of one non-governmental organization, who explained that the thrust of the phrase in Article 27.1 of the TRIPS Agreement was to ensure that no Member would exclude inventions in certain fields from patent protection.

40. Three delegations and the representative of one intergovernmental organization suggested the deletion of the term “technical” from item (i) only, since an invention could relate to all spheres of human activity.

41. One delegation suggested the deletion of the term “technical” from item (iii) only, since where a claimed invention *as a whole* was considered to be technical, the invention would be subject to patent protection even if the problem was not technical. However, another delegation indicated that, although the advantageous effect of the invention could be non-technical, the problem should have a technical character. Another delegation opposed reference to the “problem-solution approach” in this context.

42. In response to the suggestion by one delegation to move a part of draft Rule 3 to the Treaty, and to a concern raised by another delegation, the International Bureau explained that the text was drafted so that general principles were included in the draft Treaty, while much of the detail was kept in the draft Regulations. However, this did not mean that the provisions under the draft Regulations could necessarily be easily amended, since a super majority could be required for the revision of certain Rules, if necessary.

43. The representative of one non-governmental organization sought clarification concerning the timing of the submission of each element under draft Rule 3(1) to the Office.

44. As regards draft Rule 3(1)(ii), one delegation wondered whether the practice of certain countries, which obliges applicants to present prior art in a disclosure statement, was covered under this item and, if that was the case, whether non-compliance with such a requirement

should be sanctioned under draft Article 19. Two delegations suggested that, in the Spanish text, the words “*para la comprensión de la invención, así como para la búsqueda y el examen y, de preferencia,*” be replaced by “*para la comprensión, búsqueda y examen sustantivo de la invención y, preferentemente.*”

45. As regards draft Rule 3(1)(iv), one delegation questioned whether the provision needed to contain such detail, and sought clarification about the terms “biologically reproducible” and “technologically reproducible.” The representative of one non-governmental organization indicated that the requirements under the PCT concerning nucleotide or amino acid sequence listings or the deposit of biological material should be incorporated into the SPLT.

46. One delegation and the representative of one non-governmental organization welcomed the deletion of the best mode requirement which appeared in the 1991 Draft.

47. The Chair summarized the discussion by stating that there were different views in terms of the requirement concerning the “technical” nature of an invention, and that the International Bureau would redraft the provisions taking into account the comments received.

#### *Draft Article 6: Contents, Style and Manner of Presentation of Claims*

48. The Chair noted that, concerning draft Article 6 and draft Rule 4, the International Bureau should conduct a study concerning formality requirements versus substantive requirements, as discussed under draft Article 5 and draft Rule 3.

49. Two delegations and the representative of one non-governmental organization proposed that draft Article 6(1) and (2) be combined with draft Article 12, and that draft Article 6(3) be combined with draft Article 3. In view of the importance of establishing a single set of rules, representatives of two non-governmental organizations stated that the draft SPLT should be fully in line with the PCT, and that PCT Article 33 and Rules 5 and 6 should be incorporated in the SPLT Practice Guidelines, instead of inventing a new rule. This direction was supported by the representative of one intergovernmental organization. Noting that the PCT did not bind national laws of Contracting States as regards substantive conditions of patentability, one delegation stated that national laws could be harmonized under the SPLT, and that the result could then be incorporated into the PCT. Another delegation said that, since the objective of the SPLT was to establish the best law and practice, the PCT could be brought in line with the SPLT through PCT reform. The representative of one non-governmental organization was of the opinion that the provisions in the PCT, which did not bind the Contracting States as regards substantive conditions of patentability, were not relevant to the SPLT.

50. The representative of one non-governmental organization noted that draft Article 6 was a mixture of three issues, namely, (i) validity of claims; (ii) form/format of claims; and (iii) claim construction. The validity issue related to draft Article 6(2), which should be moved to draft Article 19 and be redrafted in a form that would answer the question when was the subject matter of a claim in a particular application invalid to incorporate the timing of invalidity. The Representative was of the opinion that the “clear and concise” requirement should not be a ground for invalidity. As regards the term “individually and in their totality” in draft Article 6(2), he wondered whether the claims could be individually invalid, if they collectively failed to be concise. Concerning the second issue, the Representative supported the term “limitation.” On the third issue, the Representative pointed out the link to draft Article 14. He indicated that the claim should be construed by identifying each of the



limitations in the claim, determining their scope based on the specification, and that the claimed subject matter could be defined by the limitations so construed.

51. The International Bureau observed that, while the PLT established a mechanism where a single application would be validly accepted by all Contracting Parties for the purposes of filing an application, the draft SPLT aimed at allowing a single application to be prepared for the purposes of substantive examination in all offices. However, the discussion revealed that there was a third category of requirements that fell between these two, which related to formal aspects that were strongly linked to substance. For example, a certain structure of claims or the contents of the description might not be compatible with the requirements concerning the structure and contents during examination, although they would be accepted to meet the requirements for a complete application. Against this backdrop, in view of the possible link with the PCT, the International Bureau suggested that the draft SPLT also regulate minimum requirements concerning the third category of requirements so that there would be uniformity in the results of examination by all Contracting Parties.

52. *Draft Article 6(1)*. One delegation expressed its support for not making draft Article 6(1) subject to the sanctions under draft Article 19. The representative of one intergovernmental organization suggested the deletion of the words “[as prescribed in the Regulations],” while the representative of another intergovernmental organization proposed to delete the square brackets surrounding those words but retain the text.

53. *Draft Article 6(2)*. One delegation asked whether this provision could be interpreted in a way that the Office could limit the number of claims, and if so, it should be explicitly expressed in the provision. This view was reflected by another delegation, which stated that no provisions were found in the PCT or in its national law to reject claims on the ground of the number of claims. While recognizing the freedom of applicants to present as many claims as they wish, another delegation stated that the Office should have the power to limit claims to a reasonable number in each particular case. However, three delegations and the representative of one non-governmental organization opposed any limitation of the number of claims. In response to a question raised by two delegations, one delegation explained that at the Diplomatic Conference in 1991, its Delegation had proposed to include the phrase “both individually and in their totality,” since some applications contained many independent claims, where each claim was clear and concise, but where it was not clear whether the full number of claims was actually necessary. However, this provision did not allow an Office to limit the number of claims, but only to delete redundancies. The Chair clarified that, in his view, the draft provision was not intended to allow Contracting Parties to raise objections against the number of claims in an application. One delegation was in favor of deleting the words “both individually and in their totality.”

54. Three delegations indicated that the terms “clear” and “concise” should be clarified in the Regulations and Practice Guidelines. However, one delegation wondered whether a definition of these terms would be helpful, since such a definition may vary in different cases in practice. The representative of one intergovernmental organization explained that the “clear and concise” test was of importance in view of the function of claims in defining the matter for which protection was sought, and that the meaning of the terms of the claims should be clear enough for the person skilled in the art to understand.

55. The Chair summarized the discussion as follows: the SCP supported the restructuring of draft Article 6 in view of draft Articles 3 and 12 as well as 19. The terms “clear and

concise” and “both individually and in their totality” should be clarified in view of the next draft of the SPLT.

*Draft Rule 4: Details concerning Claims Under Article 6*

56. Concerning the various terms which were placed within square brackets as alternatives, the International Bureau explained that the intention was to use the term “limitation,” which was a more objective expression, wherever appropriate. One delegation supported the usage of the word “limitation” throughout the draft Rule. Five delegations supported the term “technical features” throughout the draft Rule. The representative of one non-governmental organization was in favor of the deletion of the word “technical.” Another delegation requested the clarification of the term “limitation” in the Notes.

57. *Draft Rule 4(1)*. The representative of one intergovernmental organization stated that this paragraph related to a formality requirement.

58. *Draft Rule 4(2)*. Two delegations and the representative of one intergovernmental organization proposed to retain the word “technical.” However, another delegation preferred the words “elements or steps” or “limitations” rather than “technical features,” since the claims could be defined by non-technical elements, even though the invention *per se* should be technical. In his view, which was supported by one delegation and the representative of one non-governmental organization, this was a substantive matter under draft Article 15. One delegation proposed to harmonize the terminology with PCT Rule 6.3. Another delegation, supported by the representative of one non-governmental organization, suggested the words “technical or functional features.” Replacement of the word “Method” in the title with “Form” was suggested by another delegation.

59. The Chair wondered whether draft Rule 4(2) and (3) addressed the same issue.

60. *Draft Rule 4(3)*. One delegation preferred the word “elements,” while another delegation supported the word “limitation.”

61. *Draft Rule 4(4)*. Five delegations proposed that the words “at the option of the applicant” be replaced by the words “at the option of the Office,” to allow their Offices to require claims in the form indicated in item (i). One delegation preferred the option of item (i), but reserved its position. The representative of one intergovernmental organization stated that, although he was in favor of the option of item (i), the Office should not impose one way of claiming, and supported the text in PCT Rule 6.3(b). Four delegations and the representatives of one intergovernmental and three non-governmental organizations supported the text as proposed.

62. One delegation sought a clarification of the words “wherein the improvement comprises” in item (i). Three delegations stated that a functional claim with a single element should not be allowed under item (ii).

63. *Draft Rule 4(5)(a) and (b)*. The representatives of two non-governmental organizations pointed out that the words “except where absolutely necessary” were found in the corresponding provision of PCT Rule 6.2(a). One delegation, supported by the representative of one intergovernmental organization, felt that there might be cases that needed accommodation of drawings, graphs or diagrams. Another delegation said that a reference to drawings should be allowed. Further, three delegations as well as the representative of one

non-governmental organization stated that so-called omnibus claims should be allowed. The representative of one non-governmental organization supported flexibility in terms of drafting claims in view of possible challenge in court at a later stage. The retention of the term “technical” was suggested by one delegation.

64. *Draft Rule 4(5)(d)*. One delegation, supported by the representative of one non-governmental organization, proposed to move this provision to the Practice Guidelines.

65. *Draft Rule 4(6)(a)*. Two delegations and the representative of one non-governmental organization stated that the limitation to the same category was too narrow. Clarification of the words “as the case may be” and “same category” was sought by two delegations.

66. *Draft Rule 4(6)(b)*. Four delegations indicated that the examination of multiple dependent claims that depended on other multiple dependent claims was too much of a burden for Offices. However, one delegation and the representatives of two non-governmental organizations supported the retention of the text. In response to a question of the Chair, the Delegation of the United States of America stated that its office had established a practice to handle Markush-type claims efficiently.

67. One delegation proposed the inclusion of the following provisions concerning independent claims and categories of claims allowed under the unity of invention requirement in paragraphs (5bis) and (7):

“(5bis) [*Independent Claims*] (a) Depending on the complexity of the invention there may be several claims, independent and dependent.

(b) The independent claim shall ensure the protection of the invention within those limits in which the invention can be implemented while having the same technical effects and, also, containing the new elements sufficiently outlined so that to ensure the reproduction of the subject-matter of the invention.

(c) If the patent application relates to two or more inventions and the unity of invention is observed, an individual claim for each individual invention shall be drawn up.

(d) Any independent claim may be followed by a reasonable number of dependent claims which should refer thereto and should develop - or explain - the technical features already stated in the independent claim or should introduce embodiments of the subject-matter of the invention, provided that the unity of invention be observed.

(7) [*Categories of Claims Allowed in an Unitary Invention*] Subject to complying with the requirement of unity of invention in a single patent application relating to a group of inventions there could be included:

- (i) independent claims of various categories;
- (ii) independent claims of the same category;
- (iii) dependent claims.”

68. The SCP agreed that the International Bureau should carefully examine these questions when redrafting the provisions.

*Draft Article 7: Unity of Invention*

*Draft Rule 5: Details Concerning the Requirement of Unity of Invention Under Article 7*

69. One delegation was concerned about allowing the use of a “special technical features” approach, for unity of invention, which it considered was outdated in view of complex applications relating to, for example, genetic sequences. The Delegation suggested the establishment of a Working Group to consider a new standard for patent applications in emerging technologies, which would report to the SCP or the International Bureau. This view was supported by four delegations and the representative of one non-governmental organization. Though the above concerns were understood by the representatives of several non-governmental organizations, they expressed concerns about deviating from the general rules for certain special cases, and wondered whether complex applications could be dealt with by other mechanisms, such as fees or the “clear and concise” requirement. Several delegations did not support the establishment of such a Working Group. Two delegations pointed out that the unity of invention requirement was not a question of complexity or fees, but had been established for the benefit of third parties to understand the scope of the invention. In conclusion, the Chair invited the Delegation of the United States of America to provide the Committee with further background and detailed information on this matter.

70. Concerning the two Alternatives, a number of delegations and representatives of non-governmental organizations supported Alternative B and, in particular, a combination of Alternative B with paragraph (2) of Alternative A. One delegation stated that the details should be regulated under the Regulations or the Practice Guidelines on the basis of the PCT Administrative Instructions. One delegation and the representative of one non-governmental organization wondered whether the unity of invention requirement was a formality issue, and therefore, whether the PCT provisions were incorporated by reference into the PLT. Two delegations questioned whether draft Article 19 that referred to draft Article 7 contradicted paragraph (2).

71. As regards draft Rule 5(1), one delegation proposed to replace the words “technical features” with the words “elements or steps” or “limitations.” Another delegation suggested the deletion of the word “technical,” since it was not a matter to be dealt with under draft Rule 5. The representative of one non-governmental organization suggested either a deletion of the word “technical” or the replacement with the words “technical or functional.” On the other hand, one delegation and the representatives of two intergovernmental organizations proposed to delete the square brackets surrounding the word “technical.”

72. Concerning draft Rule 5(2), one delegation proposed to insert the words “each of” before the words “the inventions are claimed in separate claims.”

73. The Chair concluded that a majority of delegations were in favor of combining Alternatives A and B, and stated that the International Bureau should redraft the provisions taking into account the various comments received.

*Draft Article 8: Definition of Prior Art*

*Draft Rule 6: Availability to the Public Under Article 8*

74. The Chair noted that the questions concerning the priority date and the claimed invention that had been discussed earlier were also related to this draft article. In this regard, one delegation supported the inclusion of an additional provision that would regulate the requirements relating to the entitlement to priority. The Delegation questioned whether reference should be made to the “priority date of the application.”

75. One delegation supported the comprehensive definition of prior art in draft Article 8 subject to a uniform grace period and other exceptions. Another delegation indicated that, although the national law of the Delegation’s country provided an exhaustive list of prior art, it did not oppose a comprehensive definition. Concerning the distribution of provisions between the Treaty and the Regulations, one delegation and the representatives of two non-governmental organizations stated that draft Article 8 should include more substance, which was currently contained in draft Rule 6. Another delegation suggested that the substance of draft Rule 6(1) could be incorporated in draft Article 8(1) by way of stating that the prior art consisted of everything made available to the public “in any form.”

76. Fourteen delegations and the representative of one intergovernmental organization preferred Alternative A. Five delegations and the representatives of one intergovernmental organization and two non-governmental organizations supported Alternative B because of the inclusion of the phrase “subject to Articles 9 and 10” and because of the link between the prior art and the claims. The Delegation of Uruguay expressed concerns about the fact that Alternative B made reference to the claims, and not to the application as a whole.

77. One delegation wondered whether the text in Alternative A appropriately covered the case where multiple priorities were claimed. The representative of one intergovernmental organization pointed out that, in that respect, Alternative B was not complete either, since each of several embodiments within one claim might be subject to different priority dates. The International Bureau explained that the term “priority date” was not found in Article 4 of the Paris Convention. Rather, the Paris Convention referred to a priority period for each earlier application referred to in the priority claim. The International Bureau considered it necessary to clarify terms such as an “invention,” an “invention of an application” or a “claimed invention,” so that there would be a clear distinction between each claim and each embodiment of the claim. One delegation proposed to use the term “subject matter of the claim” rather than “invention.” After some discussions, concerning the entitlement of priority for the purposes of defining prior art, it was found that many Offices, irrespective of their preference for Alternative A or B, considered each claim on case-by-case basis. One delegation, however, expressed concerns about a single claim having multiple priority dates. This was supported by the representative of one non-governmental organization, who urged the adoption of a harmonized rule. With respect to priority, the representative of another non-governmental organization suggested to include a reference to the Paris Convention and the TRIPS Agreement.

78. One delegation expressed its concern about the word “information” in Alternative B, which was unfamiliar to it. Another delegation wondered whether the term “information” included a physical entity or an act of conduct. The representative of one non-governmental organization stated that the capturing of information, including information on the Internet and in the field of traditional knowledge, was important. One delegation suggested that the

Regulations and the Practice Guidelines address the prior art status of information disclosed on the Internet.

79. For the purpose of determining prior art, one delegation explained that, under the national law of its country, not only the date, but also the time of disclosure was relevant for the judgement of novelty and inventive step. Another delegation, supported by one delegation, proposed to establish a unified rule for the determination of the date of publication of prior art in the Regulations or the Practice Guidelines.

80. Concerning draft Rule 6(1), one delegation suggested the words “Prior art shall qualify as such when ...” at the beginning of the paragraph, since this provision should not be read as an optional provision. One delegation proposed to include acts such as “on sale” and “offering for sale” in the context of loss of rights where an invention was commercialized before the application was filed.

81. As regards the accessibility to the public, one delegation, supported by another delegation, stated that “accessibility to the public” in draft Rule 6(1) was not the same as “making available to the public.” The Delegation explained that, under the national law, a doctoral thesis in a public library was considered as made available to public, even if nobody consulted that thesis. However, inventions known to colleagues of the inventor but not to others, were considered not made available to the public. Another delegation, supported by two other delegations, sought clarification on the meaning of the term “public,” which could be construed as a private individual, and suggested a deletion of the words “one or more members.” One delegation suggested deeper harmonization as regards “reasonable possibility that it could have been accessed by one or more members of the public.” Another delegation said that further details on indexed or catalogued information should be included. Two delegations considered that the expression “reasonable” was too subjective. Another delegation said that a “reasonable possibility” could be a “legal possibility for access” or a “possibility of access on a legal basis.” The representative of one non-governmental organization preferred to apply the reasonable accessibility test to “a person skilled in the art,” not to the general public. One delegation said that the word “information” in draft Rule 6(2) could be replaced with the words “prior art.”

82. One delegation stated that, since there was no geographical limitation on the definition of prior art, detailed provisions should be provided in draft Rule 6(3) concerning support documentation or corroboration for non-written prior art. Another delegation also raised concerns about an oral disclosure in a foreign country. The representative of one non-governmental organization supported a higher objective standard for oral disclosures in view of the difficulty of evidential support.

83. The Chair summarized the discussion as follows: a majority of delegations supported Alternative A, while it was recognized that the provisions should appropriately cover the issues concerning entitlement of priority. The International Bureau should redraft the provisions taking into account the comments received, for example, the clarification of the terms “inventions,” “subject matter of the claims,” “reasonable possibility,” “information,” “one or more members” and “accessibility to the public,” as well as the distribution of provisions between the Treaty and the Regulations. The Chair further indicated that the International Bureau might prepare a questionnaire concerning the definition of prior art in order to collect information regarding national and regional practices, and suggestions for redrafting.

*Draft Article 9: Prior Art Effect of Earlier Applications*

*Draft Rule 7: Prior Art Effect of Certain Applications Under Article 9*

84. As regards Alternative A of draft Article 9, the International Bureau suggested the insertion of the words “Subject to Article 8,” at the beginning of the sentence, the insertion of the words “(former application)” after “an application” in the first line, and the insertion of the words “from the filing date or, where priority is claimed, the priority date of the former application” after “part of the prior art” in the third line. Consequently, it suggested the deletion of the words “from the filing date or, where priority is claimed, the priority date of the former application” in the fourth line of draft Rule 7(1)(a).

85. Many delegations and the representative of one non-governmental organization supported Alternative A in view of the administrative difficulties in accessing former applications filed in foreign countries, the period for the publication of former applications, and legal uncertainty. Three delegations pointed out that a reference to a claimed invention in Alternative B should be taken into account. The representatives of two non-governmental organizations were in favor of a worldwide effect as prior art for former applications. One delegation wondered whether the global effect of former applications could be introduced, as a first step, to the PCT applications. The representative of one non-governmental organization, who was interested in having a simple and certain global first-to-file system, observed that, instead of an 18-month publication, if an application were published immediately after the filing date, all the earlier filed applications worldwide could be treated as published prior art for the purposes of both novelty and non-obviousness.

86. One delegation pointed out that the whole contents of a former application should be determined at the time of filing of the application, and should not include subsequent amendments to that application.

87. One delegation stated that draft Article 9 and draft Rule 7 should also apply to the determination of “non-obviousness,” which was currently placed within square brackets, since obvious variations of earlier patented inventions should not be patented. Otherwise, a single act of infringement could be subject to multiple suits. However, since an inventor did not have access to the information contained in former applications, a number of delegations and the representatives of one intergovernmental organization and two non-governmental organizations supported the limitation to the determination of novelty only.

88. As regards draft Rule 7(1)(c), one delegation said that the abstract could be part of the “whole contents” if the applicant prepared it. The representative of one non-governmental organization wondered whether the inclusion of utility models in draft Rule 7(1)(d) collided with the principle that the SPLT should apply to patents only.

89. Concerning withdrawn, abandoned or refused applications under draft Rule 7(2), one delegation questioned the applicability of this paragraph to the cases where such withdrawn, abandoned or refused applications were revived and patented subsequently under national law. Another delegation proposed to establish a harmonized rule concerning how and when an applicant could withdraw his application before publication.

90. In respect of draft Rule 7(3), one delegation sought clarification of the meaning of “same person” and “same invention.” In reply to a question of one delegation, the International Bureau explained that the words “validly granted” addressed the case where a patent granted by the Office was subsequently invalidated by a court. The representative of

one non-governmental organization supported the inclusion of paragraph (3), which would provide a safeguard for one's own disclosures. However, one delegation and the representative of one non-governmental organization did not support that provision, since it was related to a continuation-in-part system and could lead to legal uncertainty. The representative of another non-governmental organization said that, if draft Article 9 and draft Rule 7 did not apply to non-obviousness, paragraph (3) could be deleted.

91. The Chair concluded that a majority of delegations were in favor of Alternative A, and that the International Bureau should redraft the provision taking into account, in particular, the following points: the geographic limitation, the limitation to novelty in draft Rule 7, the inclusion of utility models and of PCT international applications as prior art and self collision.

*Draft Article 10: Disclosures not Affecting Patentability (Grace Period)*

92. Since the issue of the grace period was related to other matters to be discussed later, the Chair invited the delegations to limit the discussion to information on existing national and regional rules concerning the grace period.

93. The Delegations of Azerbaijan and Canada said that they provided a 12-month grace period from the filing date for the information disclosed by the inventor. The Delegation of the United States of America explained that the legislation of its country provided a 12-month grace period from the filing date, covering third party disclosures. A grace period of 12 months from the filing date for the information disclosed by the inventor or his successor was provided for in the legislation of the Republic of Moldova and Romania. Belarus, Kenya, Ukraine and OAPI member States provided a 12-month grace period from the filing date. The Delegation of Argentina said that a 12-month grace period from the filing date, or the priority date if applicable, was provided in its country. The Delegations of Indonesia, Morocco and the Russian Federation stated that they provided a 6-month grace period from the filing date. The Delegation of Japan explained that the legislation of its country provided a 6-month grace period from the filing date for the inventor's disclosures made through an experiment, in a presentation in writing at a scientific meeting, in a printed publication, at an exhibition, or on the Internet. The Delegation of Venezuela explained that the Andean Pact provided a 6-month grace period from the filing date, or the priority date if applicable. The Delegation of Germany said that, although it did not have a grace period under the current patent law, the utility model law provided a 6-month grace period from the filing date, or the priority date, if applicable.

94. The Delegation of Australia explained that it was considering the introduction of a 12-month grace period from the filing date, or the priority date, if there was an international consensus. The Delegation of Chile said that its country was planning to introduce a 6-month grace period.

95. The representative of one non-governmental organization stressed the importance of the grace period for inventors. The representative of another non-governmental organization noted that an increasing number of countries were introducing a grace period into their legislation.



*Draft Article 11: Disclosure in Application as a Whole [Alternative A]*  
*Adequacy of the Disclosure [Alternative B]*

96. Although the text of Alternative A was more familiar to them, many delegations expressed their support for Alternative B that provided further details, such as undue experimentation, timing of disclosure, notions of clearness and conciseness and a reference to the claimed invention, and suggested the combination of Alternatives A and B. In this respect, one delegation, supported by two other delegations, suggested the following structure:

“(1) The application as of the filing date should be clear and complete.

“(2) In the application, there should be a disclosure of the invention.

“(3) It should be clear and complete if taking into account the description, claims and drawings ... [text in Alternative B follows].”

97. One delegation pointed out that the meaning of the term “disclosure” in draft Articles 11 and 12 was different from the one in draft Article 10, which meant laying the information open to the public. Further, another delegation sought clarification on the concept of “disclosure” and of its relation with the notions of “description” and “claim.” In response, the International Bureau explained that Alternative B covered the disclosure of an application that related to the subject matter of the claim, and that it would redraft the provisions to avoid ambiguity. One delegation said that the disclosure requirements were not relevant to the analysis of the quality of the description *per se*. Another delegation said that, in Alternative A, it was not clear whether the word “disclosure” meant an initial disclosure at the filing date or a disclosure including further amendments.

98. Two delegations and the representative of one intergovernmental organization requested clarification of the term “adequate.” Three delegations sought clarification of the meaning of “undue experimentation.” One delegation stated that the written description of the invention should be set forth in a manner that evidenced the applicant’s possession of the claimed invention as of the filing date. Further, the Delegation said that the necessity for the best mode requirement was under consideration in its country. The representative of one non-governmental organization stated that it was opposed to the best mode requirement.

99. The representative of one non-governmental organization suggested the inclusion of Practice Guidelines along the lines of the PCT Examination Guidelines. The representative of another non-governmental organization proposed to include some provisions on the correction of sequence listings and a reference to an earlier deposit of micro-organisms in the Regulations or the Practice Guidelines.

100. As regards the Spanish text, one delegation said that the word “*idoneidad*” in Alternative B should be replaced with the word “*adecuación*.” Another delegation pointed out that the translation of the words “carried out” in Alternative A was “*realizada*,” while the translation of the words “made and used” in Alternative B was “*realizada y utilizada*.”

101. The Chair concluded that a majority of delegations supported a combination of Alternatives A and B, and that the International Bureau should review the draft taking into account the comments made.

*Draft Rule 8: Disclosure Under Article 11*

102. Concerning item (i), after some discussion, it was agreed that the International Bureau should review the draft in light of the disclosure in the initial claim. In this regard, the representative of one non-governmental organization said that the words “for the purposes of the filing date” was misleading and that the words “the claims” should be replaced with the words “any claim.” As regards item (ii), three delegations and the representative of one non-governmental organization suggested further elaboration of the term “undue experimentation” either in the Regulations or in the Practice Guidelines. The representative of one non-governmental organization suggested the insertion of the words “at the time of filing” after the words “the general knowledge.”

*Draft Rule 9: Deposit of Biologically Reproducible Material Under Article 11*

103. Three delegations and the representative of one intergovernmental organization did not support the second sentence that allowed a deposit to be made later than the filing date. However, one delegation supported the existing text which provided flexibility, and indicated that subsequent evidence showing the possession of the claimed biologically reproducible material by the applicant on the filing date might be necessary. Another delegation stated that a reference to the filing date should be replaced with a reference to the priority date, if any. Clarification of the meaning of “a depository institution” was requested by one delegation. The representative of one non-governmental organization proposed to provide a link with the Budapest Treaty. Further, one delegation, supported by the representative of one non-governmental organization, suggested that the Regulations or the Practice Guidelines spell out when a correction could be made in the specification where a deposit was involved.

104. The SCP agreed that the International Bureau should look into these questions when redrafting the provisions.

*Draft Rule 10: Person Skilled in the Art Under Articles 11, 18 and 20(3)(b) and Rules 3(2)(b), 8, 9, 10, 11(1) and [(2)], 13(3) and 14(2)*

105. One delegation said that the Regulations or the Practice Guidelines should elaborate more detailed practices. Another delegation, supported by the representatives of one intergovernmental organization and two non-governmental organizations, stated that the knowledge of a team of persons should be taken into account, and that the level of skill might depend on the technology concerned. Another delegation suggested that the basic principle of the level of a skilled person should be a hypothetical person with an average level of experience. The representatives of two non-governmental organizations suggested the deletion of the words “without highly specialized skills.” One delegation was of the opinion that full knowledge in the relevant field, not only general knowledge, was needed. The representative of one non-governmental organization considered that an ordinary practitioner “reasonably well versed” was a person who knew all the prior art.

106. One delegation said that the person skilled in the art should not relate to any specific technology, and that this person should be able to analyze the invention independently, taking into account only the prior art. The Delegation stated that the person skilled in the art should be considered as a specialist, and that the details should be provided in the Practice Guidelines or the Notes. The representative of one intergovernmental organization, supported by one delegation, was also in favor of providing the detailed provisions in the Practice Guidelines in order to ensure flexibility, since the definition of a person skilled in the art depended very

much on each specific case. The Representative said that there was no reference to the state of the art, i.e., whether a person skilled in the art should be considered to know the state of the art as contained in the search report.

107. The Chair summarized the discussion by stating that further clarification of the terms were needed, and that the International Bureau should redraft the provisions, considering the inclusion of detailed requirements in the Practice Guidelines.

*Draft Article 12: Relationship of Claims to the Disclosure*

108. A number of delegations and the representatives of one intergovernmental organization and one non-governmental organization supported Alternative A. One delegation preferred Alternative B for its broader scope. Five delegations pointed out that the first sentence of draft Article 13 was redundant in light of Alternative A. In response to the point raised by one delegation, the International Bureau explained that Alternative B intended to express the fact that the claim to be issued should be supported by the description, drawings and the initial claims as filed. This view was supported by two delegations and the representatives of two non-governmental organizations. Further, another delegation stated that a disclosure contained in the claims as initially filed, but not in the description, should not have negative consequences, and that this should be included in draft Article 14.

109. The representative of one non-governmental organization said that the question of “when the subject matter of a claim in an application was adequately disclosed” should be answered by a single article. The Representative suggested that such a single article provide that the subject matter of a claim in an application would be regarded as being adequately disclosed whenever the application provided a description of the subject matter and enabled a person skilled in the art to make and use that subject matter without undue experimentation. Further, the Representative pointed out that Alternative A was inconsistent with PCT Article 6 which required that the claim be “fully” supported. One delegation wondered how this provision fit with amendments and corrections under draft Article 20(3), and suggested that the provisions take into account the situation at the time of grant.

110. One delegation stated that the claim should be supported by the description, but not by the drawings, which served illustrative purposes only. In response to a question raised by the Chair, one delegation observed that sequence listings and computer program listings should be properly incorporated, and the representative of one intergovernmental organization suggested that draft Article 12 provide “the description as prescribed in the Regulations,” which would allow those additional listings to be covered in the Regulations. The representative of one non-governmental organization stated that the provision should encompass the full disclosure, including sequence listings.

111. One delegation, the country of which did not provide for a support requirement under its national law, but rather used the enablement requirement to refuse overly broad claims, questioned the difference between the two requirements. In its view, if the support requirement limited the scope of the claim, draft Article 13, Alternative B, second sentence, was necessary as a safeguard. One delegation pointed out that the support requirement was not a ground for revocation under its national law.

112. Following the suggestion by one delegation, the Chair proposed that the International Bureau review the possibility of substituting the words “The claims” for “The claim,” “Each claim,” “A claim” or “Any claim.” Concerning the words “the description and the drawings,”

modifications were suggested by several delegations, for example, “the description and/or the drawings,” “the description and, if necessary, the drawing” and “the description and, if any, drawings.”

113. The representative of one intergovernmental organization, supported by one delegation, said that the provision should state that the claims must be based on the description, and that everything mentioned in the claims must be disclosed in the description and the drawings.

114. The representative of one non-governmental organization said that, in the French text, the word “*supportées*” should be used instead of “*étayées*.”

115. The Chair summarized the discussion as follows: a majority of delegations considered it important to include draft Article 12 in the SPLT. Questions were raised as to the relationship of claims to the description, the drawings as well as special types of disclosures such as sequence listings. The provision should be reviewed in view of draft Articles 13, Alternative B and 11. Further, amendments and corrections under draft Article 20(3) should be taken into account for the preparation of the next draft by the International Bureau.

#### *Draft Article 13: Scope of Claims*

116. In view of the discussion concerning draft Article 12, the International Bureau noted that the first sentence relating to the disclosure could be considered in conjunction with draft Article 12, and that the second sentence concerning interpretation of claims could be discussed together with draft Article 14.

#### *Draft Article 14: Scope of Protection [Alternative A] Interpretation of Claims [Alternative B] Draft Rule 11: Interpretation of Claims Under Article 14*

117. One delegation observed that claim interpretation and the scope of claims related to two purposes: the determination of patentability and the determination of infringement. These two purposes involved different procedures within different contexts; for example, equivalents and file wrapper estoppel related to infringement issues only. The Delegation was not in favor of infringement issues being included in the SPLT, but did not oppose further discussion of these issues in the SCP. Concerning the interpretation and scope of claims for the purpose of the determination of patentability, the Delegation considered it necessary to provide more detailed rules. For example, the wording of the claims should provide the primary basis for the interpretation, while the description and the drawings should form a secondary basis for the clarification of ambiguities; the terms in the claims should be interpreted in accordance with their normal meaning, unless they are specifically defined; and procedures for claim interpretation for special types of claims, such as means-plus-function claims, product-by-process claims, and claims associated with use, should be provided. The Delegation noted that draft Article 14(1) could be the basic principle, and draft Rule 11(1) and (4) could provide more specific details. Further, draft Rule 11(2) should be redrafted as an exception, taking the different existing practices into account.

118. One delegation, supported by the representative of one intergovernmental organization, said that Alternatives A and B were not real alternatives, since the interpretation of claims for the purposes of examination and the determination of rights were different issues. The Delegation, supported by the representative of one non-governmental organization, proposed to focus on the pre-grant issues, and to preserve draft Article 13, second sentence. The

International Bureau noted that casting the distinction as one between patentability/validity and infringement, rather than as pre-grant and post-grant, would clarify the issues at stake for future redrafting. One delegation was of the opinion that, although equivalents and the scope of claims related to infringement, they could not be separated from validity issues, and, therefore, proposed to consider them together.

119. Several delegations and representatives supported Alternative A, and, in particular, were in favor of the inclusion of equivalents in paragraph (2). One delegation suggested the deletion of the words “which are equivalent to the elements expressed in the claims” in paragraph (2).

120. One delegation preferred Alternative B with the word “disclosure,” since Alternative A addressed post-grant interpretation of the scope of protection. The Delegation suggested the inclusion of “by the patent or the published application” in paragraphs (1) and (2) of Alternative A. The representative of one intergovernmental organization suggested the deletion of the words “which are to be interpreted in the light of the description and drawings” in paragraph (1) of Alternative A. The Representative said that paragraph (2) of Alternative A had no *raison d’être*, and that, in Alternative B, the words “description and drawings” were appropriate, since the claim interpretation could not depend on the claims, which were a part of the disclosure.

121. The representative of one non-governmental organization stated that the draft SPLT should deal with both validity issues and pre-grant patentability issues. The Representative proposed to recast the provisions as articles concerning claim construction issues, i.e., one article dealing with claim construction for patents and another article dealing with issues relating to claim construction for claims in pending applications. For example, the first article would require that the disclosure be used to construe the patent claim, and that the statements made during the prosecution by the applicant, the prior art considered during the examination and the equivalents be taken into account. This would be different from the second article that would identify each limitation of the claim, determine the literal scope based on the disclosure understood by a person skilled in the art, and define the scope of the claim.

122. Concerning Alternative B, one delegation pointed out that the reference to the prior art should be replaced by a reference to the general knowledge. The representative of one non-governmental organization opposed the inclusion of the prior art under this provision.

123. One delegation, supported by another delegation, stated that it would be clearer if Articles 4 and 21 of the 1991 Draft were combined into one provision.

124. Concerning draft Rule 11(1), the representative of one non-governmental organization supported the inclusion of this provision. One delegation said that, in the French text, “*certitude*” was an outdated word. Another delegation suggested the inclusion of provisions on the interpretation of means-plus-function claims.

125. As regards draft Rule 11(2), the suggestion of one delegation that the word “and” in the fourth line should be replaced by “or” was opposed by another delegation. Another delegation said that the obviousness test should apply to both “the same function” and “the same result” assessments.

126. One delegation proposed to replace the title of draft Rule 11(3) with “File Wrapper Estoppel,” and wondered whether “prior statement” included any amendment to the application.

127. The Chair summarized the discussion as follows: Alternative A received more support than Alternative B, while it was pointed out that the two Alternatives potentially address different issues. For further redrafting, the structure of the provisions as well as the provision concerning equivalents should be reviewed carefully in terms of validity and infringement issues. There were divergent views as regards the details concerning equivalents.

*Draft Article 15: Patentable Subject Matter*

128. There was unanimous support by the Committee to include a provision concerning patentable subject matter in the SPLT.

129. All the delegations that spoke considered that this provision was very important. Therefore, it was suggested that most of its substance be included in the draft Treaty. Many delegations were in favor of providing basic principles or critical conditions in the draft Treaty, and the details or clarifications in the draft Regulations. This approach would provide flexibility for adapting to future developments of technology. The Chair, supported by one delegation and the representative of one non-governmental organization, suggested that the draft Treaty set up basic principles and the draft Regulations provide exclusions. One delegation pointed out that the real issue was not the distribution of the provisions between the draft Treaty and the draft Regulations, but rather a question of the future amendment of the provisions concerned. The Delegation explained that flexibility could be achieved by way of setting provisions in the draft Regulations providing for unanimity for their amendment, or in the draft Treaty with the possibility of amendment by the Assembly. This view was supported by two other delegations, which suggested that the provisions should be in the Treaty, subject to amendments by the Assembly. However, another delegation, supported by one delegation, stated that this provision, which was of great importance, should only be subject to revision by a Diplomatic Conference. Another delegation expressed concerns about the Assembly being able to take a decision on behalf of countries not present.

130. One delegation stated that, in order to meet the requirement of patentable subject matter, the invention should provide a practical application having a useful, concrete and tangible result, but that it should not be required to have a technical character. The Delegation explained that this approach allowed flexibility for new fields of technology, while still prohibiting the patenting of abstract ideas. This view was supported by the representatives of six non-governmental organizations, who considered it important to provide flexibility for future technological development. Another delegation explained that, in the national law of his country, an invention was defined as a technical idea utilizing a law of nature. Consequently, scientific theories, mathematical methods, methods for performing mental acts and methods of doing business *as such* were not considered to be patentable subject matter. As regards software-related inventions, the Delegation said that a computer program stored on a medium, as well as a computer program where the information processed by the software was embodied in the claim by means of hardware resources, were patentable subject matter. The Delegation was of the opinion that these detailed practices should be provided in the draft Regulations. Three delegations and the representatives of one intergovernmental organization and one non-governmental organization stated that the invention should have a technical character. The representative of one non-governmental organization said that the title

“patentable subject matter” was confusing, since the issues at stake in this draft article were patent eligibility and sufficient utility of the claimed inventions.

131. Concerning software-related inventions, the representative of one intergovernmental organization clarified that, in relation to the recent revision of the EPC, the Revision Conference had felt that it was premature to delete programs for computers from the list of exceptions in the EPC, since a draft Directive was being prepared by the European Commission. The Representative of the EPO confirmed that the decision was postponed, but that the discussion was still open, and that computer-related inventions, but not computer programs *as such*, could be patentable under certain circumstances.

132. One delegation pointed out that discussions concerning intellectual property and access to genetic resources had begun in the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Another delegation recalled the transitional provision for certain product patents under the TRIPS Agreement. The representative of one non-governmental organization, supported by the representative of another non-governmental organization, stated that the requirements concerning patentable subject matter and the accommodation and the use of subject matter were different issues, and that patent laws were not appropriate instruments for regulating such use.

133. One delegation expressed the position that Article 27.1 of the TRIPS Agreement could not form a basis for requiring a technical character for inventions. Several countries urged caution before introducing TRIPS language, as it currently was under review. The representative of one non-governmental organization said that the TRIPS Agreement could be a starting point, but that the draft SPLT should not merely provide minimum requirements.

134. The representative of one non-governmental organization pointed out that the question of patentable subject matter related to the requirement of industrial applicability (utility).

135. As regards the words placed in square brackets, one delegation was in favor of the word “be,” which would embrace the claimed invention as a whole, while another delegation supported the word “contain.”

136. One delegation suggested that this draft article be placed before draft Article 8.

137. The Chair concluded that the SCP agreed to include a provision concerning patentable subject matter in the SPLT, and that, in view of the importance of this provision, a majority supported the inclusion of most of the substance in the Treaty itself. As regards the requirement concerning the “technical character” of an invention, opinions within the SCP were divided. Exceptions to patentable subject matter as well as a mechanism for future amendments of the provisions concerned should be further reviewed.

*Draft Article 16: Industrial Applicability/Utility*

*Draft Rule 12: Definition of “Industry” Under Article 16*

138. The International Bureau explained that the intention of Alternative B was in effect to abolish the industrial applicability/utility requirement, and to subsume the substance that is usually dealt with under this requirement under other articles, such as the provision concerning patentable subject matter.

139. One delegation was in favor of Alternative A with the words “have a specific, substantial and credible utility,” since the alternative words risked unwarranted self-limiting effect for future innovation. The representative of one non-governmental organization expressed his support for a functional definition such as “credible utility.” The representative of another non-governmental organization supported the separation of utility, which could only be established by the applicant, and eligibility. On the other hand, a number of delegations and the representative of one intergovernmental organization preferred Alternative A with the words “be made or used in any kind of industry.”

140. One delegation suggested to replace the words “any kind of industry” by “any area of activity” and to include a reference to the Paris Convention in the draft Regulations. The Delegation further proposed the inclusion of the following in the Practice Guidelines: (i) whether the function of the invention is clearly shown, (ii) whether the application has disclosed the need for the invention, (iii) whether means of technology fulfills the declared function. Another delegation suggested the retention of industrial applicability and also the words “or fulfil utility.” The representative of one intergovernmental organization proposed that both texts within square brackets be included in draft Rule 12, since the invention should be able to be used in industry as well as have a practical use in any area of human activity.

141. One delegation suggested further reflection on Alternative B, since any requirement under draft Article 16 could be dealt with under other provisions, such as patentable subject matter or the enablement requirement. This view was supported by several delegations and the representatives of two non-governmental organizations, one of whom said that the requirements related to patentable subject matter should not hide in draft Article 16. In response to a concern raised by two delegations with regard to discoveries and inventions in the field of biotechnology, for example, gene sequences, another delegation said that the issue should be fully discussed. The representative of one intergovernmental organization indicated that the industrial applicability requirement was not given great importance in practice, since the requirements concerning patentable subject matter could be imposed instead. However, the Representative could not give a final opinion on the importance of industrial applicability for biotechnological inventions.

142. Concerning the structure of the articles, three delegations suggested that draft Article 15 provide, as in Article 27 of the TRIPS Agreement, requirements concerning patentable subject matter, industrial applicability, novelty and inventive step. In response, the International Bureau clarified that draft Article 15 dealt only with eligibility, whereas Article 27 of the TRIPS Agreement dealt with eligibility along with the other matters mentioned. One delegation, supported by the representative of one intergovernmental organization, suggested that, in view of draft Article 19, draft Article 16 be redrafted using terms that refer to a condition of patentability, rather than as a definition of industrial applicability/utility.

143. The representative of one non-governmental organization, noting footnote 5 of the TRIPS Agreement, stated that the requirement on industrial applicability was not narrower than that on utility. One delegation proposed that the substance of that footnote be included in the Regulations or the Practice Guidelines.

144. The Chair summarized the discussion by stating that, although a majority of delegations supported Alternative A with the words “be made or used in any kind of industry,” the debate revealed different national practices and divergent views, and that the relationship between draft Articles 15 and 16 should be further explored.



*Draft Article 17: Novelty*

145. A majority of delegations, supported by the representatives of three intergovernmental organizations, expressed their preference for Alternative A, while a number of delegations, as well as the representatives of two non-governmental organizations, supported Alternative B, since they considered it to be more precise.

146. However, many of the delegations which spoke indicated that they could envisage a combination of both alternatives. For example, some delegations that favored Alternative A stated that they preferred the term “claimed invention” in Alternative B over “invention” in Alternative A. One delegation proposed to use Alternative A in the draft SPLT and to keep Alternative B as a Rule. The representative of one non-governmental organization suggested to refer to the PCT instead of establishing a different standard for novelty in the draft SPLT.

147. One delegation, supported by another delegation, proposed to include a provision on loss of rights, which would encourage applicants to promptly disclose their invention. This proposal was opposed by two delegations and the representatives of one intergovernmental organization and one non-governmental organization. The proposal of one delegation, supported by one intergovernmental organization, to introduce a provision on second medical use did not find further support.

*Draft Rule 13: Items of Prior Art Under Article 17*

148. *Draft Rule 13(1)*. While two delegations supported some kind of provision under draft Rule 13(1), one delegation stated that such a provision should rather be included in the context of draft Article 11 on disclosure.

149. *Draft Rule 13(2)*. Those delegations which favored Alternative A of draft Article 17 generally supported draft Rule 13(2) and stated that it should be combined with Alternative A of draft Article 17. The provision would not be required in the case of Alternative B, since that text already contains the elements of draft Rule 13(2).

150. One delegation raised some drafting issues in the French version of draft Rule 13(2) (namely to replace “*Base de référence*” in the title by “*Éléments principaux*”) and pointed out that the term “*caractéristiques*” in the French version of the draft SPLT was used for both the English terms “characteristics” and “limitations.” The Delegation of Spain requested that, in the Spanish version of draft Rule 13, the term “*referencia primaria*” be replaced by “*anterioridad*.”

151. *Draft Rule 13(3)*. The Chair clarified that this provision related to both Alternatives of draft Article 17. Although a majority of delegations supported the draft provision in principle, an extensive discussion on several issues took place. Firstly, the SCP agreed to a suggestion from the International Bureau to replace the term “primary reference” by “primary item of prior art” in subparagraphs (a) to (d), and to add, at the very end of the paragraph, the words “together with the primary item of prior art.” One delegation, supported by two other delegations indicated that, in subparagraph (b), the term “incorporated by reference” was unclear and that the draft provision should cover only explicit references. One delegation, while indicating support in principle, flagged two issues for later consideration by the SCP, namely, selection inventions, and the definition of novelty for particular types of claims such as claims defined by parameters or product-by-process-claims. One delegation stated that this

provision should provide the possibility to rely on a later document clarifying an inherent disclosure.

152. The Chair summarized the discussion as follows: while a majority of delegations favored Alternative A of draft Article 17, many delegations indicated that they could also accept Alternative B or a combination of both Alternatives. Those delegations which favored Alternative A expressed the wish to combine it with draft Rule 13(2). Some delegations thought that the term “claimed invention” used in Alternative B was more precise than “invention.” Two delegations spoke in favor of including a provision on loss of rights. Finally, some debate took place on draft Rule 13(3), in particular on the meaning of the term “incorporated by reference,” the possibility to rely upon a later document clarifying inherent disclosure, and the determination of novelty in the case of special types of claims.

*Draft Article 18: Inventive Step/Non-Obviousness*

153. The International Bureau introduced draft Article 18, and pointed out, in particular, that Alternative A referred to the prior art as defined in draft Article 8, while Alternative B also covered the prior art effect of earlier applications as contained in draft Article 9 for the purposes of inventive step/non-obviousness.

154. The SCP considered draft Article 18 to be a crucial provision in light of the fact that over 80% of applications were rejected on the basis of lack of inventive step/non-obviousness. A majority of delegations, supported by the representatives of one intergovernmental organization and three non-governmental organizations expressed their preference for Alternative A, while some delegations, as well as the representative of one non-governmental organization supported Alternative B.

155. A number of delegations indicated that they could envisage a combination of both alternatives, for example, by moving the term “claimed invention” used in Alternative B into Alternative A. A majority of delegations, however, said that they did not wish to apply the prior art effect of earlier applications to inventive step/non-obviousness.

156. A discussion took place concerning the phrase “the differences between the claimed invention and the prior art” used in Alternative B. A majority of delegations took the view that the use of this phrase was confusing, and that, in practice, inventive step/non-obviousness was assessed taking into account the whole invention, and not merely the differences. The International Bureau suggested that the words “the differences between the claimed invention and” could be added to Alternative A, second line, after the words “having regard to,” thus allowing a Contracting Party to assess inventive step/non-obviousness on the claimed invention as a whole, but still to take into account the differences between the claimed invention and the prior art.

157. The Committee was of the opinion that the methodology for assessing inventive step/non-obviousness should be further elaborated by the International Bureau. Some delegations, supported by the representatives of a few non-governmental organizations, expressly stated that such an assessment should not be done based on the so-called problem-solution approach, but that a different methodology should be used, since the problem-solution approach did not allow the standard to be applied to inventions which did not contain a technical problem.

158. The representative of one non-governmental organization suggested to refer to Article 33(3) of the PCT instead of establishing a different standard for inventive step/non-obviousness in the draft SPLT.

*Draft Rule 14: Items of Prior Art Under Article 18*

159. The SCP agreed that draft Rule 14 required more reflection on the part of the International Bureau. Some delegations raised concerns in particular in respect of the fact that the term “multiple items of prior art” was not precise enough, for example, where several elements were found uncombined in a single item of prior art. Further, where all the combined items were obvious, inventive step/non-obviousness could only be recognized if it was not obvious to a person skilled in the art to combine those items. The representative of one non-governmental organization proposed to add the words “at the filing date or, where priority is claimed, the priority date,” after the words “skilled in the art” in the second line of draft Rule 14(2).

160. The Chair summarized the debate as follows: although there was a preference for Alternative A, a number of delegations also supported Alternative B or a combination of both Alternatives. In general, delegations seemed to be willing to discuss revised texts to be submitted by the International Bureau. There was also support for revisiting and clarifying the notion of “differences.” While the issue of methodology requested further elaboration, some opposition was raised as to the problem-solution approach.

*Draft Article 19: Patentability of Claimed Invention*

161. In view of the fact that this draft provision will depend on the future contents of the draft SPLT, the Chair’s proposal to hold a discussion concerning principles only was agreed. The Chair further pointed out that this provision was essential, since it would be the basis for a possible future mutual recognition of patents in different countries.

162. The International Bureau introduced the provision and suggested that it may be useful to examine whether, for clarity, draft Article 19 should be moved before draft Article 15. Further, it pointed out that some, but not all, grounds of patentability may also be grounds for revocation of a patent, and that the next draft may clearly express the differences. One delegation agreed that certain grounds may be raised in the process of examination of an application, but not used for the revocation of the patent, such as draft Article 7 on unity of invention. Therefore, the relationship between this type of provisions and draft Article 19 should be revisited. Another delegation pointed out that including draft Article 2 into draft Article 19 would pose problems, since draft Article 2 was dealing with entitlement issues, which may not be known to the Offices.

163. One delegation expressed concerns that notwithstanding draft Article 23, draft Article 19(1)(iii) would allow the addition of new matter if the claimed invention did not rely on the added disclosure.

164. The representative of one intergovernmental organization stated that the case where claims were broadened in post-grant opposition procedures was not covered by draft Article 19, and that an additional provision along the lines of Article 123(2) and (3) of the European Patent Convention should be included.

165. It was agreed that the International Bureau would further elaborate this draft provision, taking into account the comments received.

166. In respect of draft Article 19(2), the Delegation of the Dominican Republic, speaking also on behalf of the Delegations of Nicaragua, Peru, Venezuela and Brazil, opposed this draft provision which would not allow Contracting Parties to include further requirements of patentability. The Delegation said that certain countries were bound by other international obligations imposing the implementation of certain principles, such as the conservation of biodiversity under the Convention on Biodiversity. Indeed, the access to genetic resources had to be subjected to prior informed consent in order to guarantee fair distribution of benefits. Since the draft SPLT should not contravene such objectives, or the fulfillment of international obligations, it should allow countries to provide certain sanctions, e.g. the revocation of a patent where the genetic resource had been obtained illegally. This statement was also supported by the Delegations of Colombia, Argentina, Uruguay, Kenya and Sudan. On the issue of international obligations, the Delegation of Colombia referred to the Andean Pact, and in particular Decision No. 486 and Resolution 0210. The Delegation of Argentina further mentioned that, beyond international agreements, some grounds for obtaining a patent were completely alien to patents, such as the requirement of legal age to obtain a patent.

167. The Delegation of the United States of America stated that the proposal of the Delegation of the Dominican Republic seemed to introduce an additional requirement of patentability, which may, *prima facie*, constitute a violation of the TRIPS Agreement. The Delegation further pointed out that this type of issue was already discussed in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, and advised to wait for the results of the work undertaken in that Committee. The Delegation of Japan supported the last point made by the Delegation of the United States of America. It further pointed out that the type of requirements mentioned by the Delegation of the Dominican Republic seemed to be outside the scope of patentability issues. On the compatibility with the TRIPS Agreement, the Delegation reserved its position at this stage.

168. The International Bureau explained that, within WIPO, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore had been established and was equipped for dealing with the type of issues raised by the Delegation of the Dominican Republic.

169. The Chair summarized the discussion as follows: the SCP agreed that the International Bureau should in particular study the issue of patentability requirements versus validity requirements, bearing in mind other issues, which may not fall into either category, such as unity of invention. The Chair further stated that the objective of the future SPLT was to ensure a valid patent in all Contracting Parties, and that, in light of the proposal made by the Delegation of the Dominican Republic, the outcome of that objective could not be predicted.

*Draft Article 20: Amendment or Correction of Application*

170. *Draft Article 20(1)*. One delegation requested some further clarification in the draft Regulations or Practice Guidelines for offices that have a continuation practice.

171. *Draft Article 20(2)*. One delegation questioned the meaning of the term “in order for grant.” Three delegations, supported by the representatives of one intergovernmental organization and one non-governmental organization, pointed out that the last part of the

provision was too narrow, and that the possibility to amend the application should be open until grant. Two other delegations and the representative of one intergovernmental organization supported the provision as proposed.

172. *Draft Article 20(3)*. The representative of one non-governmental organization, supported by one delegation and the representative of one intergovernmental organization, stated that subparagraph (b) should not be drafted as an exception, but rather as a test to assess whether the correction leads to a disclosure exceeding the disclosure as originally filed. One delegation, supported by another delegation, proposed to delete the references to “clerical errors,” since any clear or obvious mistake should be covered, in accordance with PCT Rule 91. Two delegations expressed the opinion that the term “going beyond the disclosure ...” needed further elaboration. One delegation further proposed to delete, in the fourth line, the words “of the invention contained in the amended or corrected application” and, in the fifth line, the words “the invention contained in.”

173. The Delegation of the Republic of Korea introduced a written proposal that suggested the inclusion of a provision in the draft Regulations, which would ensure the application of the same disclosure test for evaluating amendments of the application, novelty and the priority claim. The representative of one intergovernmental organization pointed out that this proposal should be looked at carefully, since the disclosure was not necessarily the same in all three cases. After some discussion, the SCP agreed to study this issue at a later stage.

#### *Draft Articles 21 to 24*

174. In response to a proposal by the Chair to have a very short discussion on draft Articles 21 to 24, which would be elaborated at a later stage, the following general comments were made:

175. On draft Article 22, one delegation stated that countries should be free to join the SPLT alone or together with the PLT.

176. On draft Article 23(3), one delegation, supported by two other delegations, strongly opposed majorities based on the number of applications received, since that would constitute a discrimination among States. One delegation stated that, if such majorities were not included in the provision, a significant number of provisions would have to be included in the draft Treaty itself.

#### Agenda Item 4: Results of the Questionnaire Concerning Disclosure of Information on the Internet

177. The discussion was based on document SCP/5/4. The International Bureau noted that, in addition to the countries listed in paragraph 3 of the document, it received replies from the Offices of the following countries and the intergovernmental organization: Algeria, Bulgaria, Gambia, India, Malawi, Mexico, New Zealand, Pakistan and the European Patent Office.

178. As regards the disclosure of information on the Internet and its impact on patentability, after a short discussion, it was agreed that the Committee would first establish general principles concerning prior art under the SPLT, which would also cover disclosures on the Internet, and then consider the necessity for special provisions specific to Internet disclosures in the Practice Guidelines.

179. Concerning the issues relating to the enforcement of patents on the Internet, one delegation said that, in view of the fact that the draft SPLT did not address enforcement issues, this matter could be discussed at a later stage. Another delegation was in favor of continuing the discussion at the SCP, since this matter was becoming more and more important. The Chair concluded that, although it might be premature to discuss the issue of Internet and enforcement of patents at this stage, the importance of this issue should be kept in mind for future discussion.

## CONCLUSION OF THE MEETING

### Agenda Item 5: Future Work

180. The International Bureau stated that the SCP had agreed that the sole item on the agenda of the next session would be the draft SPLT, based on revised working documents. The next session would tentatively be held during the first half of November 2001.

### Agenda item 6: Brief Summary by the Chair

181. The draft Summary by the Chair (documents SCP/5/5 Prov.) was adopted as proposed.

### Agenda item 7: Closing of the Session

182. The Chair closed the session.

[Annex follows]

ANNEXE/ANNEX

LISTE DES PARTICIPANTS/LIST OF PARTICIPANTS

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