

Committee on Development and Intellectual Property (CDIP)

Tenth Session
Geneva, November 12 to 16, 2012

FUTURE WORK ON PATENT-RELATED FLEXIBILITIES IN THE MULTILATERAL LEGAL FRAMEWORK

prepared by the Secretariat

1. The Committee on Development and Intellectual Property (CDIP), at its ninth session held from May 7 to 11, 2012, discussed document CDIP/9/11. Concerning paragraph 2 (c) of that document, the Committee discussed four possible topics to be addressed in a future document on patent-related flexibilities.
2. The Committee requested the Secretariat to provide information regarding those four topics and to invite Members States to provide comments by August 31, 2012.
3. The document CDIP/10/11 containing *inter alia* comments received from Members States was issued on October 3, 2012.
4. The Secretariat has now received additional comments from Canada, which are reproduced in the Annex to this document.

5. The Committee is invited to consider the information provided in the Annex to this document.

[Annex follows]

PURPOSE

During the ninth session of the Committee on Development and Intellectual Property, the Committee discussed the Work Program on Flexibilities in the Intellectual Property System – New Elements Proposed at CDIP/8 (CDIP/9/11). In respect of paragraph 2(c) of document CDIP/9/11 (Work Program on Flexibilities in the Intellectual Property System – New Elements Proposed at CDIP/8), the Committee agreed the Secretariat would invite Member States of the Committee to submit written comments on the list of four patent-related flexibilities. In response to the above invitation from WIPO, Canada is making the following submission on the Canadian experience regarding these flexibilities. This submission is made without prejudice to comments that may be provided at a later date. The intent is that it be shared among Member States, the WIPO Secretariat, and governmental and non-governmental organizations (NGOs).

COMMENTS

1. The scope of the exclusion from patentability of plants (TRIPS Art. 27): The Canadian Supreme Court ruled (*Harvard College v. Canada (Commissioner of Patents)* [2002] 4 SCR 45) that higher life forms do not fall under the scope of the definition of an invention under the Canadian Patent Act. However, this case does not preclude the patentability of the cells of higher life forms. In Canada, new plant varieties can be protected through the Plant Breeders' Rights Act.
2. Flexibilities in respect of the patentability, or exclusion from patentability, of software-related inventions (TRIPS Art. 27): In Canada, a computer program is not, by itself, statutory subject-matter. However, if the result of running the program on a computer is to provide a novel and inventive technological solution to a technological problem, then the program is viewed as modifying the technological nature of the computer as a whole. The program in such cases is not a discrete element of a claim to the computer (Manual of Patent Office Practice 16.03.02). Therefore, in Canada, a computer program on its own is not patentable but software can be an element of a patent eligible invention.
3. The flexibility to apply or not criminal sanctions in patent enforcement (TRIPS Art. 61) Canada does not apply criminal sanctions in patent enforcement *per se*. Canada does apply criminal sanctions in cases of fraud (Patent Act arts. 75 and 76) and for failures to comply with the Patented Medicines regime (Patent Act art. 76.1).
4. Measures related to security which might result in a limitation of patent rights (so-called "security exception") (TRIPS Art. 73). The Canadian Patent Act requires that the Canadian Nuclear Safety Commission be notified prior to the examination or the public disclosure of a patent related to the production, application or use of nuclear energy (Patent Act art. 22). The Minister of Natural Resources, responsible for the Nuclear Energy Act, is empowered to acquire these patent rights.
5. The Governor in Council has the authority to order that an invention or application, including all related documents, relating to any instrument or munitions of war be kept secret (Patent Act art. 20).

[End of Annex and of document]