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WORLD INTELLECTUAL PROPERTY ORGANIZATION
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INTERNATIONAL PATENT COOPERATION UNION
(PCT UNION)

WORKING GROUP ON REF ORM OF THE PATENT
COOPERATION TREATY (PCT)

Fourth Session
Geneva, May 19 to 23, 2003

SUMMARY OF THE SESSION

by the Chair

INTRODUCTION

1. Mr. Francis Gurry, Assistant Director General, on behalf of the Director General, opened the session and welcomed the participants.
2. As agreed by the Working Group, Mr. Philip Thomas (WIPO) acted as Chair of the session except for the discussions relating to the handling fee (see paragraphs 23 to 33, below) which were chaired by Mr. Francis Gurry (WIPO). Mr. Claus Matthes (WIPO) acted as Secretary. The list of participants is contained in the Annex.
3. The session's proceedings were informal and, therefore, there was no formal report. This summary, prepared under the responsibility of the Chair, sets out the status of the matters discussed by the Working Group, noting the range of views expressed and areas where agreement has been reached, and identifying what future work needs to be undertaken.

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

4. The Secretariat explained that it regretted the late issuance of working documents in French and assured the Working Group that it was making efforts to avoid similar problems in the future.

AMENDMENTS ADOPTED BY THE PCT ASSEMBLY IN 2002: CORRIGENDA AND CONSEQUENTIAL AMENDMENTS ²

5. Discussions were based on documents PCT/R/WG/4/4 (Annex V), 4 Add.3 and 4 Add.5.

Proposed Amendments of the Regulations

6. The proposed amendments of the Regulations set out in Annex V to document PCT/R/WG/4/4 and in the Annexes to documents PCT/R/WG/4/4 Add.3 and 4 Add.5 were approved by the Working Group with a view to their submission to the Assembly of the PCT Union ("the Assembly") in September 2003, subject to the comments and clarifications appearing in the following paragraphs and to possible further drafting changes to be made by the International Bureau.

Rule 16bis.2 (see document PCT/R/WG/4/4 Add.3)

7. It was noted that the 75% reduction provided for by the Schedule of Fees in the case of certain applicants from qualifying countries (including most developing countries) would, in effect, carry over to any late payment fee payable under Rule 16bis.2 by virtue of Rule 16bis.2(a)(i).

Rule 17.2 (see document PCT/R/WG/4/4, Annex V)

8. Several delegations expressed the opinion that designated Offices should continue to be able to request copies of priority documents from the International Bureau, even if they were available from a digital library. No digital libraries for priority documents had yet been established, and it would be preferable to await experience with them before changing the current system.

9. Accordingly, the International Bureau withdrew its proposal for the addition of new Rule 17.2(a-bis) and for a consequential amendment of Rule 17.2(a). The Working Group approved the proposed inclusion in Rule 17.2(a) of a reference to paragraph 17.1(b-bis).

Rule 44bis.1 (see document PCT/R/WG/4/4 Add.3)

10. The Working Group noted that, while the substantive content of an international preliminary report on patentability (Chapter I of the Patent Cooperation Treaty) would be the

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

same as that of the written opinion of the International Searching Authority on which it was based, it would nonetheless be desirable for the applicant to have a copy of the report itself, bearing in mind that it was the report which would be sent to designated Offices.

Rule 60.1 (see document PCT/R/WG/4/4 Add. 3 and 4 Add. 5)

11. Further to deletion of Rule 60.1(d), the Working Group agreed that consequential amendments should be made to Rule 60.1(c) (deletion of the words “Subject to paragraph (d),”) and to Rule 60.1(e) (replacement of the reference to paragraph “(d)” by a reference to paragraph “(c)”).

Rule 90.2 (see document PCT/R/WG/4/4 Add. 3)

12. The Working Group agreed that an indication of the address of the applicant should not be a requirement for an applicant to be appointed as, or considered to be, the common representative under Rule 90.2(a) or (b), respectively. The text presented in square brackets in Rule 90.2(a) as proposed to be amended should therefore be deleted, as should the corresponding text in Rule 90.2(b). The Working Group agreed that the Administrative Instructions should be modified to expressly state to whom correspondence intended for the applicant should be sent to in case the address of the applicant concerned had not been furnished.

Rule 90.5 (see document PCT/R/WG/4/4 Add. 3)

13. The Working Group agreed that proposed new Rule 90.5(c) and (d) should be worded as follows:

“(c) Any receiving Office, any International Searching Authority and any International Preliminary Examining Authority may waive the requirement under paragraph (a)(ii) that a copy of the general power of attorney is attached to the request, the demand or these separate notices, as the case may be.

“(d) Notwithstanding paragraph (c), where the agent submits any notice of withdrawal referred to in Rules 90bis.1 to 90bis.4 to the receiving Office or the International Preliminary Examining Authority, a copy of the general power of attorney shall be submitted to that Office or Authority.”

Rule 94.2 (see document PCT/R/WG/4/4, Annex V)

14. Following the observation by a delegation that Article 38(1) provided for access to the file of the international preliminary examination by elected Offices once the international preliminary examination report had been established, the International Bureau withdrew its proposal to amend Rule 94.2.

15. The Working Group noted that Rule 73.2 as adopted by the Assembly on October 1, 2002, with effect from January 1, 2004, had to be read in light of Article 38(1) and present Rule 94.2 and would not prevent an elected Office from gaining access to the file of the international preliminary examination once the international preliminary examination report had been established.

ANNEXESTOTHEINTERNATIONALPRELIMINARYEXAMINATIONREPORT

16. DiscussionswerebasedondocumentPCT/R/WG/4/4Add.4.

ProposedAmendmentsoftheRegulations

17. TheproposedamendmentsoftheRegulationssetoutintheAnnextodocument PCT/R/WG/4/4Add.4wereapprovedbytheWorkingGroupwithaviewtotheirsubmission totheAssemblyinSeptember2003,subjecttothecommentsandclarificationsappearingin thefollowingparagraphandtopossiblefurtherdraftingchangestobemadebythe InternationalBureau.

Rule70.16

18. InapprovingtheaditionofproposednewRule70.16(b),theWorkingGroupnotedthat theamendmentssetoutindocumentPCT/R/WG/4/4Add.4tothetextofRule70.16(a) would notproceeduntilproposedamendmentsofRule 91.1weredealtwith(seedocument PCT/R/WG/4/4Add.2).

COMPUTATIONOFTIMELIMITS

19. DiscussionswerebasedondocumentPCT/R/WG/4/10.

ProposedAmendmentsoftheRegulations

20. TheproposedamendmentsoftheRegulationssetoutintheAnnextodocument PCT/R/WG/4/10wereapprovedbytheWorkingGroupwithaviewtotheirsubmissiontothe AssemblyinSeptember2003,subjecttothecommentsandclarificationsa ppearinginthe followingparagraphsandtopossiblefurtherdraftingchangestobemadebytheInternational Bureau.

Rule80.5

21. TheWorkingGroupnotedthattheoperationofproposednewitems(iii)and(iv)of Rule80.5wasrestri ctedtotheparticularcaseofOfficesincountrieswheretherewere differentpublicholidaysindifferentlocalities,forexample,wheretherewerebranchesin morethanonelocality,andwasthusindependentofitems(i)and(ii),whichalsodealtwith theexpirationoftimelimits,andthatnoconsequentialamendmentofitems(i)and(ii)was needed.

22. TheWorkingGroupagreedthattheword“neither”shouldbereplacedby“none”inthe concludingwordsofRule80.5.

PROPOSEDABOLITIONOF THEHANDLINGFEEANDINCORPORATIONINTO THE INTERNATIONAL FILING FEE

23. DiscussionswerebasedontheproposalsoftheInternationalBureaucontainedin documentPCT/R/WG/4/8andoftheUnitedStatesofAmericacontainedindoc ument PCT/R/WG/4/8Add.1.

24. The discussion covered the related questions of the place in the PCT fee structure of the handling fee paid in respect of demands for international preliminary examination under Chapter II of the PCT, having regard to the recent adoption of an enhanced international search and preliminary examinations system, and the amount of PCT fees and their implications in the context of WIPO's Program and Budget. The Working Group took into account the report of the sixteenth session of the Program and Budget Committee, held from April 29 to May 1, 2003 (see document WO/PBC/6/4, especially paragraph 116(i) to (iv)), at which the Proposed Program and Budget 2004 - 2005 (document WO/PBC/6/2) had been considered.
25. In response to questions raised, the Working Group was informed by the Secretariat that the proposed budget for 2004 - 2005 assumed income on the basis of an average PCT fee of 1,678 Swiss francs. Adoption of the proposal on the fee presented by the United States of America in document PCT/R/WG/4/8 Add. 1, which reflected a fee reduction envisaged by the 2001 PCT Assembly, was seen to result in an average PCT fee of 1,416 Swiss francs and a lower than anticipated income during 2004 - 2005 in the range of 70 to 80 million Swiss francs. It was further noted that maintaining a separate handling fee at the current amount of 233 Swiss francs while maintaining the initial average fee of 1,678 Swiss francs would require an international filing fee of 1,472 Swiss francs. This was based on the assumption that 25% of applicants would opt for Chapter II.
26. The Working Group recognized that PCT fee income received by the International Bureau was used to cover more than the recurrent expenses necessary for the immediate service delivered to users on particular application files. It was recognized that various other units and services within the International Bureau provided essential support to the Office of the PCT and that there was certain capital expenditure that had to be undertaken, in particular in relation to buildings and information technology projects, both specifically for the PCT system and for the other units and services whose support was essential to the PCT system. In addition, the PCT system constituted, in a sense, a network of Offices, performing various functions, whether in the international phase as receiving Offices or in the national phase as national Offices. An important item of expenditure in relation to PCT fee income was the enhancement, through development cooperation activities, of the services of the PCT system conceived in this way as a whole.
27. While there was general recognition of the foregoing range of objects of expenditure for PCT fees, there was a definite divergence in views in relation to the level that was proposed for PCT fees in the 2004 - 2005 biennium to cover those objects of expenditure. That divergence derived essentially from differing views of the balance that should be achieved between the use of PCT fee income for the provision and enhancement of services directly to PCT users and the use of PCT fee income for other objects of expenditure related to the PCT system conceived more broadly and including development cooperation.
28. The minority view considered that the balance had gone against PCT users and that there was a tendency for there to be an insufficient focus on the core mission of the Organization. PCT users, according to the delegations supporting this view, were the source of PCT fee income and should be the principal beneficiaries of the expenditure of that income. These delegations also believed that it was wrong to conceive of PCT users as merely taking from the system, since the inventions, and the patents that they asked for through the PCT system, made important contributions to the improvement of social and economic conditions in the world. These delegations also expected that there should be reductions in the level of PCT fees in the long run as a result of the capital expenditure that

had been and was still being undertaken by the Organization in information technology projects, and also as a result of PCT reform and simplification.

29. On the other hand, the great majority of delegations felt that the level of fees proposed for the next biennium was appropriate and considered it to be appropriate, in particular, because of the expenditure that was needed on the infrastructure of the PCT system conceived as a whole. Those delegations also felt that the rights that were ultimately obtained through the PCT were very important rights that justified both the level of the fees and also the fact that PCT fee income was the source of funding of development cooperation activities for the enhancement of the PCT system as a whole. Some of those delegations also expressed concern about the evolution of demand in the patents system, in general, and the PCT system, in particular, and felt that a certain amount of caution needed to be exercised in fixing the level of PCT fees for the next biennium. They finally emphasized that the quality of service that was delivered to PCT users depended not only on the services that were rendered by the International Bureau, but also on the services that were rendered to PCT applicants throughout the PCT system conceived as a whole.

30. On the question of the level of PCT fees proposed in the draft budget for the next biennium, the majority view was that the level was appropriate, although there were certain important dissentions from that position.

31. In relation to the issue of the structure of PCT fees and whether there should be a single international filing fee or a separate handling fee, strong support was expressed for a separate handling fee. There were, however, some differences of views. Those who supported a separate handling fee tended towards an empirical approach to the matter and suggested that it would be preferable to wait to see what use was made of Chapter II after the enhanced international search and preliminary examinations system came into effect in January 2004. Those delegations also felt that it was not consistent with the direction and objectives of PCT reform to load the handling fee into a single international filing fee. The opposing view, in favor of a single international filing fee, took account very much of the fact that, under the enhanced international search and examinations system that would come into operation, much of the work that was done by the International Bureau under Chapter II would be undertaken under Chapter I, justifying the abolition of these separate handling fees.

32. In view of the strong support for a separate handling fee, it was agreed that the International Bureau would prepare a revised proposal with regard to the amounts of the international filing fee and the handling fee, the latter being retained as a separate but reduced fee, taking into account the need to generate the same level of income from fees as mentioned in documents PCT/R/WG/4/8 and WO/PBC/6/4.

33. Certain delegations expressed the wish that further reductions in PCT fees be granted to nationals of developing countries. The International Bureau indicated that it would study what additional options might be available for such reductions.

34. One delegation asked that a study be undertaken of the cost of the various inputs in the services provided by the International Bureau under the PCT and that the results of that study be made available. The Secretariat indicated that it considered that there was, as a result of the deployment of information technology, too much change within the PCT administration to enable the study to be undertaken now, and that it would consider doing it after more stability had been introduced through the deployment of information technology.

OPTIONS FOR RESTORATION OF THE RIGHT OF PRIORITY

35. Discussions were based on document PCT/R/WG/4/1, which set out three options for provisions designed to allow for restoration of the priority right in the international and/or the national phase, as consistently as possible with the principle adopted in the Patent Law Treaty (PLT), and document PCT/R/WG/4/1 Add.1, which outlined the replies received in response to a questionnaire concerning the application of the criteria of “due care” and “unintentionality” under national practice in cases of restoration of rights. The three options covered in document PCT/R/WG/4/1 were the following:

- Option A: “unintentionality” criterion (set out in Annex I of document PCT/R/WG/4/1);
- Option B: “due care” criterion (also set out in Annex I of document PCT/R/WG/4/1);
- Option C: retain priority claim for international phase leaving restoration for national phase (set out in Annex II of document PCT/R/WG/4/1).

36. The question of restoration of the right of priority had been discussed at several previous meetings in the context of reform of the PCT. Although the Working Group agreed that providing for such restoration was important, there remained no consensus as to how this should be implemented in the PCT procedure.

37. The Working Group agreed that several general principles needed to be recognized in any draft provisions allowing for restoration of the right of priority during the international phase. First, there was a need that a decision by a receiving Office to restore a right of priority be recognized and given effect in designated Offices. Second, it needed to be clear that such a decision related only to the restoration, as such, of the right of priority and not to the ultimate validity of a priority claim in terms of substantive patent law, for example, as regards whether the subject matter of a claim was disclosed in the earlier application concerned. Third, a decision by a receiving Office refusing to restore a right of priority should not preclude the possibility that designated Offices might subsequently allow such restoration in the national phase.

38. However, the Working Group remained divided as to whether the appropriate criterion for the restoration of a right of priority was that the failure to file the international application within the 12 month priority period was unintentional (as under Option A) or occurred in spite of due care having been taken (as under Option B), noting that those two alternatives were provided for under the PLT. A number of delegations expressed a preference for Option A and a slightly smaller number for Option B. Two delegations stated that the Offices in their countries had no experience with such restoration procedures and that they would need more time to consider the implications of the proposals in the context of their national laws. One of them requested that the possibility of making a reservation on the issue of restoration of the priority right be included.

39. A large number of delegations stated that they could, at least by way of compromise, support provisions that would allow for a priority claim to be retained in the international application during the international phase, leaving a decision on restoration of the right of priority to be made separately by each designated Office during the national phase, as under Option C. However, several delegations opposed Option C, and some of the delegations that expressed support for it indicated that they would prefer a solution that would give greater

certainty to applicants and to minimize the need for restoration to be determined before separate designated Offices in the national phase. This might be achieved, for example, by combining certain elements from Options A, B and C. However, such a “combined” solution would necessarily require receiving Offices to apply one or other (or both) of the criteria referred to in Options A and B. Several delegations expressed concern at the possibility that Offices might be obliged to apply different criteria under different procedures, whether in respect of international applications (in the international phase in their capacity as receiving Offices and in the national phase in their capacity as designated Offices) and in respect of direct national filings. Some delegations queried in connection with Option C, in particular, whether a claimed priority date should be taken into account for the purposes of the international search and international preliminary examination where no decision on restoration was made during the international phase.

40. The Working Group invited the International Bureau to prepare, for consideration at the next session, a draft proposal combining certain elements of Options A, B and C. A decision by the receiving Office to restore the right of priority would be binding on those designated Offices that applied the same or a less strict criterion. However, a designated Office that applied a stricter criterion than the receiving Office would not be bound by the receiving Office’s decision but would be permitted to decide the matter in the national phase based on its own criterion. In this connection, the Working Group noted that a decision to restore a right of priority based on the criterion of “due care” would be binding on designated Offices that applied the “unintentional” criterion. In any event, however, whatever criterion was applied and whatever decision was made by the receiving Office, the priority claim would be retained in the application and would be used as the basis for computation of PCT time limits, as under Option C.

41. One delegation suggested that, with a view to avoiding the need for certain Offices to apply different criteria in the international and national phases, considerations should be given to providing for the International Bureau to decide requests for restoration of the right of priority on a centralized basis. That suggestion was felt by several delegations to warrant further consideration but doubts were expressed by certain other delegations. The International Bureau noted that such a procedure could, if desired, be implemented by adapting the existing procedure under Rule 19.4, which already provided for the transmittal of international applications to the International Bureau as receiving Office in certain cases.

42. Two delegations expressed concern that allowing for restoration of the right of priority could conflict with Article 8(2)(a), under which the conditions for, and effect of, any priority claim shall be as provided under the Paris Convention for the Protection of Industrial Property. It was noted that this concern needed to be borne in mind in the drafting of revised proposals.

43. The Working Group noted the following suggestions made by delegations and representatives in respect of the proposals contained in Annexes I and II of document PCT/R/WG/4/1, to be taken into account by the International Bureau in preparing a revised proposal:

(a) The period for submitting a notice correcting the priority claim so as to comply with the requirements of Rule 4.10 should be subject to Rule 80.5 where that period expired on a non-working day (see Rule 26bis.2(b)).

(b) It should be ensured that the computation of time limits under proposed new Rule 80.8 would operate satisfactorily in relation to the time limit for performing the international search under Rule 42.1.

(c) Where the international application as filed did not claim the priority of an earlier application, the request for restoration of the right of priority should be accompanied by a notice adding the priority claims so as to comply with all the requirements of Rule 4.10 (see proposed new Rule 26bis.3(e)).

(d) In addition to the proposals contained in document PCT/R/WG/4/1, Rule 4 should be amended to enable the inclusion in the request for restoration of the right of priority, at least where that request for restoration was on the ground of "unintentionality."

(e) The importance of a prompt decision by the receiving Office under proposed new Rule 26bis.3(b) should be expressly reflected in the wording of the provisions.

(f) Information concerning a request for restoration should always be published together with the international application, that is, not only upon request made by the applicant (see proposed new Rule 26bis.3(g)(i)).

(g) Under Option C, a request to a designated Office for restoration of the right of priority should be made at the time of entry into the national phase or, at least, not later than the date on which the requirements under Article 22 must be complied with (see proposed new Rule 49ter.1(b)).

44. The Chair invited delegations and representatives to submit directly to the International Bureau, preferably via the PCT reform electronic forum on WIPO's Website, any further comments or suggestions for the preparation of revised proposals concerning restoration of the right of priority.

"MISSING PART" REQUIREMENTS (CHANGES RELATED TO THE PATENT LAW TREATY (PLT))

45. Discussions were based on document PCT/R/WG/4/2.

Existing Rules 20.8 and 20.9

46. The International Bureau explained that it was not proposed to delete existing Rules 20.8 and 20.9, which should have appeared in document PCT/R/WG/4/2 as renumbered Rules 20.6 and 20.7, respectively. Further consequential amendments to both Rules would also be needed.

Rule 20 – Title

47. The proposed amendment of the title of Rule 20 was approved by the Working Group.

Existing Rules 20.1 to 20.3

48. The deletion of Rules 20.1 to 20.3 and the transfer of their contents to the Administrative Instructions were approved by the Working Group.

Rule 20.1(d)

49. The Working Group agreed that a decision of the Assembly should be sought, when the proposed amendments were submitted to it, so as to clarify that transitional reservations that had been made under existing Rule 20.4(d) would continue to be effective under that provision when renumbered as Rule 20.1(d).

Rule 20.2(a) and (b)

50. The deletion of Rule 20.2(a) and the transfer of its content to the Administrative Instructions were approved by the Working Group. It was also agreed that the International Bureau should review the wording of Rule 20.2(b), consequential on such deletion.

Rule 20.3(a)

51. The amendment to change the reference to "Article 11(2)" to read "Article 11(2)(a)" was approved by the Working Group.

Rule 20.3(b)

52. The Working Group agreed that the International Bureau should review the wording of the provision in the light of a suggestion that this provision should additionally give the applicant the opportunity to make observations, consistent with existing Rule 20.8 and PLT Article 5(3).

Rule 20.3(c)

53. The Working Group agreed that proposed Rule 20.3(c) should be revised to provide that, where the outstanding requirement(s) under Article 11(1) were complied with after the time limit applicable under Rule 20.3(d) but before the receiving Office sent out a notification under Rule 20.4(i), the outstanding requirement(s) concerned should be considered to have been complied with before the expiration of that time limit, similarly to the provision in respect of the payment of fees under Rule 16bis.1(d).

Rule 20.3(d)

54. There was a clear division of opinion as to the time limit that should apply under this provision. Some delegations and representatives supported a two-month period in order to be consistent with the PLT. One representative also noted that a two-month period was desirable in countries in which difficulties with communications were experienced. Other delegations and representatives were in favor of a one-month period in view of the stringent time frames that governed the PCT procedure (for example, the requirement under Rule 22.1(a) that the record copy be transmitted in time for it to reach the International Bureau by the expiration of 13 months from the priority date). The Working Group noted that the amendment agreed to in respect of Rule 20.3(c) (see paragraph 53, above) would effectively extend the period under Rule 22.1(a).

Rule 20.4

55. One delegation suggested that this provision should also cover cases in which no observations from the applicant were received by the receiving Office within the applicable

time limit. The delegation also suggested that the expression “the application is considered not to have been filed” (see Rule 20.4(i) as proposed to be amended) was inconsistent with Article 25 which provided for a review by designated Offices. One representative suggested the use of the words “is considered not to have been filed as an international application.” It was agreed that the International Bureau should review Rule 20.4 in the light of these suggestions.

Rule 20.5(a)

56. The Working Group agreed that, in general, proposed new Rule 20.5 should apply in cases where a missing part of the description, claims or drawings was furnished either before or after an international filing date had been accorded, so that the Rule could result either the first according of an international filing date or the correction of an international filing date that had already been accorded, depending on the circumstances.

57. The Working Group agreed that a restriction should be added to Rule 20.5(a) with regard to the requirement for the receiving Office to invite the applicant to furnish any missing part, similar to PLT Article 5(5), which is restricted to the situation where the Office notices the apparent omission of a part of the description or drawing “in establishing the filing date.” In this context, reference was made to Note 5.19 of the Explanatory Notes on PLT Article 5. The Working Group also discussed the possibility of including an outer time limit under this provision (which could perhaps be fixed to be consistent with the time limit for acting under Article 14(4)).

58. The Working Group agreed that proposed new Rule 20.5(a) should be reviewed with a view to putting it beyond doubt as to the cases in which it applied, that is, in the case of a missing part of the description, a missing part of a claim or of the claims (including the case where an entire claim was missing), and a missing part of a drawing or of the drawings (including the case where an entire drawing was missing). The operation of the Rule in relation to the minimum requirements for according an international filing date under Article 11(1)(iii)(d) and (e) relating to the description and claims also needed to be clear, as well as in relation to the specific provisions of Article 14(2) concerning references in the international application to missing drawings.

Rule 20.5(b)

59. The Working Group noted that the reference in Rule 20.5(b) to “paragraphs (e) and (f)” should be corrected to read “paragraphs (d) and (e).”

60. The Working Group agreed that a provision should be added, in Rule 20.5(b) or elsewhere, so as to require the receiving Office to promptly notify the applicant and the International Bureau of the international filing date accorded or corrected under Rule 20.5.

Rule 20.5(c)

61. The Working Group noted that, although the considerations were not exactly the same, the clear division of opinion under Rule 20.3(d) as to whether the time limit should be one or two months also existed under this provision.

62. In response to a suggestion that the time limit under this provision should be calculated from the date of receipt of the invitation, the Working Group noted that the general regime

under the PCT was that time limits in such cases were recalculated from the date on which the invitation was sent and that any change in this respect would therefore need to be considered in the context of that general regime.

63. The Working Group noted that the word “an” should be deleted in the first line of Rule 20.5(c)(ii).

Rule 20.5(d)

64. The Working Group agreed that, in order to ensure that the applicant has sufficient time to take advantage of this provision, the time limit for requesting that a missing part furnished under Rule 20.5(b) be disregarded should be one month from the date on which the applicant was notified of the change of international filing date under that Rule.

Rule 20.5(e)

65. The Working Group noted that the reference in the chapeau to “the time limit under paragraph (b)” should be changed to “the time limit under paragraph (c).” In item (iii), the word “in” should be inserted before the words “the same language.” In item (iv), the reference to “item (iv)” should be changed to “item (iii).”

66. Two delegations and one representative expressed concern that the proposed requirement, presented in square brackets, “on the date on which one or more elements referred to in Article 11(1)(iii) were first received by the receiving Office, [the international application contained an indication that the contents of the earlier application were incorporated by reference in the international application]” would impose an unnecessary (formality) requirement, limiting the situations where missing parts could be filed without loss of the international filing date. The Working Group noted that the requirement was consistent with an optional requirement under PLTR Rule 2(4)(v) and that, without such a requirement, insofar as it related to missing drawings, the provision could be considered to conflict with Article 14(2) which prescribed the procedure to be applied where drawings were furnished after an international filing date had been accorded. Although it was agreed that the inclusion in the request of a pre-printed statement that the contents of earlier application(s) the priority of which was claimed was included by reference appeared to be undesirable, it was suggested that such a pre-printed statement might be restricted to incorporation by reference for the purposes of Rule 20.5(e), for example, using wordings similar to that used in present Rule 4.9(b) with regard to “precautionary” designations in the request. The Working Group invited the Secretariat to review Rule 20.5(e) in the light of these considerations. The Secretariat also invited delegations and representatives to submit suggestions on the electronic forum.

67. In response to a concern of one delegation and one representative, the Working Group invited the Secretariat to consider whether the copy of the earlier application furnished under item (ii) should be certified, taking account of the corresponding provisions under PLTR Rule 2(4)(i) and (ii) which provide for the certified copy to be furnished later.

68. In response to a concern of one delegation, the Working Group noted that the obligation was on the applicant to establish where in the earlier application(s) the “missing part” was contained and agreed that the following text should be deleted from the Comment on the item: “;it would thus appear that the receiving Office would be required to compare the missing part furnished later with the “missing part” as contained in the earlier application.”

Rule 26

69. The Working Group agreed that the wording of Rule 26.1 as proposed to be amended should be further amended so as to “give the applicant the opportunity” to make observations rather than “inviting” the applicant to do so.

70. The Working Group agreed that Rule 26.5(b)(i) as proposed to be amended should be further amended so as to take into account that the time limit fixed under Rule 26.2 may be extended by the receiving Office. The Working Group agreed further that Rule 26.2(b)(ii) should be reviewed with a view to its possible deletion, noting that Article 14(2) required the sending of an invitation to correct as a condition for considering the application withdrawn where the applicant failed to correct the international application within the prescribed time limit.

Existing Rule 20.8

71. One delegation suggested that the provisions of existing Rule 20.8 be split into two separate provisions: one provision would cover the situation in which the receiving Office realized itself that it had made an error, and the other provision would cover the situation in which the receiving Office only realized that it had made an error after this had been pointed out to it by the applicant. The Working Group agreed that the International Bureau should consider whether the provisions should be split and wherein Rule 20 the provision(s) should be included.

ACOMMONQUALITYFRAMEWORKFORINTERNATIONALSEARCHAND PRELIMINARYEXAMINATION

72. Discussions were based on document PCT/R/WG/4/12 containing the initial report of the quality framework task force prepared by the United Kingdom as its coordinator, document PCT/R/WG/4/12 Add.1 containing proposals by the United Kingdom, and document PCT/R/WG/4/12 Add.2 containing extracts from the report of the eighth session of the Meeting of International Authorities under the PCT (“PCT/MIA”).

73. The Working Group warmly welcomed the draft quality framework set out in Annex I to document PCT/R/WG/4/12, regarding it as an important step to fostering confidence among users and designated Offices in the work of the International Authorities, which should lead to more effective use of international search and preliminary examination reports by designated Offices in the future with consequent cost and workload benefits to applicants and Offices alike. The Working Group noted that the draft differed in a number of significant respects from the first draft which was presented by the United Kingdom Patent Office to the task force, but considered that it was an appropriate compromise between the wishes of designated Offices and applicants and the need of International Authorities to meet the demand for their work.

74. The consensus of the Working Group was that the quality framework should be incorporated into the draft PCT International Search and Preliminary Examination Guidelines which were under review by PCT/MIA. One delegation would have preferred that the framework be approved, as an independent text, by the Assembly and incorporated in the Agreements between the International Authorities and the International Bureau, on the grounds that this might allow for speedier implementation and, if required, amendment of the

framework, and that the process of approval of these Agreements by the PCT Assembly provided transparency. Another delegation would have preferred that the framework be implemented in a separate guidelines document. However, it was agreed that including the framework in the PCT International Search and Preliminary Examination Guidelines would have an equivalent effect since each existing Agreement included the following undertaking: “In carrying out international search and international preliminary examination, the Authority shall apply and observe all the common rules of international search and of international preliminary examination and, in particular, shall be guided by the PCT Search Guidelines and the PCT Preliminary Examination Guidelines.” (See also, in this connection, the provisions of Article 16(3)(b), second sentence, and Article 32(3).) It was also noted that including the framework in the Guidelines rather than in a number of separate Agreements would ensure consistency when possible future changes to the text were being considered.

75. One delegation suggested that the framework might include customer service standards that could be expected by applicants and designated Offices, and it was noted that such a possibility could be further explored when a body of experience had developed with the framework as presently proposed. Express reference to feedback and dialog between the Authorities and applicants and designated Offices could also be explored.

76. One delegation, while expressing its support for the framework, did express concerns over the resource-intensive nature of the proposal and over its possible increased cost to applicants.

77. The Working Group also noted the need for certain other issues mentioned in Annex II to document PCT/R/WG/4/12 to be addressed in the broader context of reform of the PCT, although they had been beyond the mandate of the task force. Those issues included a possible common infrastructure for Authorities, including databases and search tools.

78. The Working Group approved the content of the draft quality framework set out in Annex I to document PCT/R/WG/4/12, subject to the modifications set out in paragraph 80, below, and on the understanding that some redrafting would be necessary when the text was included in the PCT International Search and Preliminary Examination Guidelines. It was noted that PCT/MIA would be considering a further text of the Guidelines, incorporating the quality framework text, at its ninth session in July 2003.

79. The Working Group noted as a suggestion that the quality framework might also, when experience in its operation had been gained, be considered for adoption as a WIPO standard or model for use by other Offices as well as the International Authorities.

80. The Working Group agreed to the following modifications of the text set out in Annex I of document PCT/R/WG/12:

- (a) In the title, the word “quality” should be inserted before the word “framework.”
- (b) In paragraph 3, the words “, which are recognized by all Authorities and national and regional Offices,” should be deleted.
- (c) In paragraph 4(a), the word “has” at the end of the first line should be replaced by “maintains.”

(d) Paragraph 4(g) should be deleted and paragraph 4(h) renumbered as paragraph 4(g).

(e) Paragraph 5(d) should be moved to the section entitled "Quality Assurance" and renumbered as paragraph 6(d).

(f) Paragraph 17 should be amended to read: "Following the initial reporting in stage 1, annual reports should be prepared by each Authority, identifying the lessons learned and actions taken, and making any recommendations in the light of the review."

(g) A new paragraph 18 with the heading "Future Developments" should be added, reading: "Proposals for future changes to this framework should be made available by the International Bureau for comment by interested parties prior to their adoption."

81. The Working Group agreed that the mandate of the task force had been discharged and that it should now be considered disbanded. The Working Group expressed its thanks to all those who had contributed to the work of the task force, which had completed its work in a remarkably short time, and especially to the United Kingdom Patent Office for the work which it had done as task force coordinator.

OPTIONS FOR FUTURE DEVELOPMENT OF INTERNATIONAL SEARCH AND EXAMINATION

82. Discussions were based on document PCT/R/WG/4/7.

83. Several delegations considered that it was premature to discuss this document. Reasons for this included: that there was a need for further consultation among member States; that there was a need to evaluate the effect of the new enhanced international search and preliminary examinations system before any further requirements could be determined; and that concerns over the effects of the international patents system more generally on developing countries, particularly in respect of environmental, public health and other public policy issues, needed to be addressed before any conclusion was reached on fundamental changes to the structure of the PCT system. On the other hand, many delegations wished to exchange preliminary views, whether on broad principles or on more specific options contained in the document, while recognizing that no firm conclusions could be drawn, or specific measures decided upon, at this stage.

84. While some delegations considered that the document presented a useful starting point for discussing ideas about developing international search and examination, other delegations expressed the view that the document did not adequately take into account the relationship between the PCT system and the international patents system more generally, particularly as it affected developing countries with concerns about the social, economic and other general implications of the international patents system for their national interest. The latter delegations recalled that the Director General had given an assurance that a study would be undertaken of the implications of the international patents system for developing countries, and the Secretariat informed the Working Group that the study results were expected to be submitted to the 39th series of meetings of the Assemblies of the Member States of WIPO in September-October 2003.

85. Several delegations emphasized the need to keep in mind the interests of a wider range of stakeholders, including not only applicants and patentees, third parties, industrial property

Offices and governments, but also civil society and a range of interest groups not directly involved in the administration of the patents system.

86. Some delegations and representatives of user groups expressed the hope that the eventual destination of the systems should be the grant of international patents which meet a common international standard, though all recognized that this was a long way off. Others expressed the view that this may not be a desirable goal for the foreseeable future in view of the different social and economic needs and states of technological development of the various member States.

87. Many delegations and user groups indicated that it would be desirable to consider possibilities for enhancing the results of international search and preliminary examination so as to further increase the likelihood that granted patents would be valid. Those measures included the options of extra searches, whether by different Authorities for the benefit of searching prior art in different languages by specialists in those languages, or later on during the examination process in order to find relevant documents that had not been available at the time of the original search. Varying emphasis was given to this by different delegations. Certain delegations noted that some of this work might reduce further work in the national or regional phase, but others felt that it would not be appropriate to consider such matters at this time given the workload presently faced by some Authorities and the problems that they had in meeting the demand for their services. Several delegations expressed interest in the possibility of limited opportunities for allowing observations by third parties during international examination.

88. A number of delegations and representatives of users emphasized the importance to users and third parties of the issuance of a high quality and timely international search report. Some stated that the current time periods for establishing international search and preliminary examination reports, as well as national phase entry, should not be extended. The view was expressed that the present provision for entry into the national phase at 30 months from the priority date struck a good balance between the needs of applicants to assess the value of the application and the need for certainty of third parties as to the status of the application. It was, however, also pointed out that examination would have to take place over a longer period if a greater dialog was to be entered into during the international phase with a view to achieving a result which would be more widely accepted by designated Offices in the national phase. Two delegations indicated that it would be particularly useful if the system made it possible to process national and equivalent international applications in parallel. One delegation suggested that one way of bringing national and international practices into convergence would be the implementation of a 30-month priority period by national Offices. Some delegations expressed interest in the possibility that further international search or examination might be made available at later stages, after the application had entered the national phase.

89. A number of delegations addressed issues concerning the use made by designated Offices of the results of international search and examination. Many hoped that duplication of work among Authorities and national Offices could be reduced, noting that this objective depended on success achieved in other aspects of the development of the international patent system, including the implementation of a common quality framework (see paragraphs 72 to 81, above) and further harmonization of patent laws. Some delegations considered that the possible introduction of a more formal optional system for recognizing international search and examination reports would be worthy of consideration. It was suggested that this might be particularly useful for countries with small patent Offices which did not wish to develop a

patent examination capacity, although a number of delegations questioned the appropriateness of that approach. It was emphasized that any such options should preserve the sovereignty of member States, which should retain the power to make a decision as to whether to grant, or refuse to grant, a patent. One user representative suggested that, if the reports of International Authorities were to play a greater role in the national patent granting procedure, the possibility of introducing appropriate appeal mechanisms within the PCT system should be investigated.

90. The Chair noted that, in the course of the discussion, some delegations had emphasized their view that it would be premature and inappropriate to consider more specific or even general proposals for changing the PCT system in isolation from the resolution of broader issues, but that others had expressed interest in having further discussion of possible optional features of the system. The Chair concluded that document PCT/R/WG/4/7 should remain on the agenda for further discussion at a later session. In addition, the International Bureau would explore options which might be available to States that wished to make greater use of international search and examination, such as through optional protocols to the Treaty, for discussion at the next session of the Working Group.

91. Noting that this summary would include only an outline of the views expressed during the discussion, the Chair pointed out that delegations and representatives could, if they wished, submit more detailed observations for posting on the PCT reform electronic forum.

DECLARATION OF THE SOURCE OF GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE IN PATENT APPLICATIONS

92. Discussions were based on document PCT/R/WG/4/13 containing proposals by Switzerland regarding the declaration of the source of genetic resources and traditional knowledge in patent applications.

93. The Delegation of Switzerland stated that its proposals were intended to continue its constructive participation in the discussion on the issues arising in the context of access to genetic resources and traditional knowledge and the fair and equitable sharing of benefits arising out of their utilization. In its view, the proposal to amend the Regulation to explicitly enable the Contracting States of the PCT to require applicants to declare the source of genetic resources and traditional knowledge, in case where an invention was directly based on such resources or knowledge, presented a simple and practical way forward that could be introduced in a timely manner and would not require extensive changes to the provisions of relevant international agreements.

94. Many delegations expressed agreement as to the importance of the issues arising in the context of access to genetic resources and traditional knowledge and of the fair and equitable sharing of benefits arising out of their utilization. However, there was a divergence in views as to how best to achieve the common goal of timely solutions to the issues at hand and as to whether the Working Group was the appropriate forum to discuss those issues, noting that various approaches to those issues were currently being discussed at the international level in different forums, including WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore as well as other forums in the context of the Convention on Biological Diversity and the World Trade Organization.

95. Many delegations welcomed the proposals as an important and constructive contribution to the ongoing debate concerning genetic resources and traditional knowledge in

the context of the intellectual property system. Some expressed the view that discussion in the context of the PCT, as well as of the draft Substantive Patent Law Treaty currently being considered by WIPO's Standing Committee on the Law of Patents, would be appropriate and complementary to the discussions in other forums. Some other delegations, while not opposing discussion of the proposals by the Working Group, suggested that such discussions should await the outcome of discussions in other forums, while others stated their view that it was not appropriate to address the issues concerning genetic resources and traditional knowledge in the context of the PCT, and opposed discussion of the proposals by the Working Group. Several delegations drew attention to specific aspects of the proposal that may need to be clarified or elaborated.

96. In view of the discussions and the divergence in views, the Delegation of Switzerland stated that it would appear that more time was needed by delegations, including its own, to further study the issues, and the Delegation requested that the proposals contained in document PCT/R/WG/4/13 be further discussed at the next session of the Working Group. The Chair concluded that this would be an appropriate way to proceed.

LATE FURNISHING FEE FOR LATE SUBMISSION OF SEQUENCE LISTINGS

97. Discussions were based on document PCT/R/WG/4/4, Annex I.

98. The Working Group agreed that the Secretariat should prepare revised proposals taking into account the comments and clarifications set out in the following paragraphs.

Rule 13ter.1

99. The Working Group agreed that Rule 13 *ter.1(a)* as proposed to be amended should be further amended so as to also require the payment of a late furnishing fee in the case where an invitation was issued under Rule 13 *ter.1(a)(i)*.

100. The Working Group agreed that Rule 13 *ter.1(c)* as proposed to be amended should be further amended to read:

“(c) If the applicant has ~~does not~~, within the time limit fixed in the invitation, furnished the required sequence listing and paid any required late furnishing fee ~~comply with an invitation under paragraph (a) within the time limit fixed in the invitation~~, the International Searching Authority shall not be required to search the international application to the extent that ~~such non-compliance has the result that~~ a meaningful search cannot be carried out ~~without the required sequence listing~~.”

101. Certain delegations suggested the fixing of a maximum amount for the late furnishing fee, but other delegations noted that the Regulations in general left the fixing of fees to the discretion of each Authority.

102. One delegation expressed concern as to the operation of Rule 13 *ter.1* in the case where an international application is forwarded from one (non-competent) Authority to another (competent) Authority.

AUTOMATIC INDICATION OF ALL DESIGNATIONS POSSIBLE UNDER THE PCT

103. The representative of a user or organization expressed the view that applicants should be permitted, by way of a checkbox in the request form, to exclude the designation of their own State when filing an international application, since it was common for applicants to pursue a domestic application in parallel with an international application, and the prosecution of an international application simultaneously with a corresponding national application could lead to difficulties in some jurisdictions. Such an exclusion was not provided for under amended Rule 4.9, which would enter into force on January 1, 2004. The Chair noted that the Assembly, in adopting the relevant amendments of the Regulations, had agreed upon the general principle of a system of automatic and all-inclusive designations. Those amendments were based on the premise that all choices and consequences relating to the designations of particular countries would, under the national law, be able to be made at the time of entering the national phase. The amendments provided for transitional reservations which would allow for the exclusion of certain designations in limited cases where national laws relating to "self-designation" posed a problem for applicants; such transitional reservations had been made by Germany, the Republic of Korea and the Russian Federation. Any problems arising in other countries should be dealt with under the national law concerned.

MATTERS ON WHICH CONSIDERATION WAS DEFERRED

104. Having regard to the time available for discussion during the session, consideration of the following matters, not mentioned above, was deferred until the next session:

- (i) aspects of copyright and other rights in non-patent literature made available by intellectual property Offices (see document PCT/R/WG/4/3);
- (ii) simplified protest procedure in case of non-unity of invention (see documents PCT/R/WG/4/4 (Annex II) and 4 Add. 1);
- (iii) publication of translation furnished by the applicant (see document PCT/R/WG/4/4 (Annex III));
- (iv) international form for national phase entry (see document PCT/R/WG/4/4 (Annex IV));
- (v) rectification of clear mistakes (obvious errors) (see document PCT/R/WG/4/4 Add. 2);
- (vi) form of amendments (see document PCT/R/WG/4/4 Add. 6);
- (vii) formalities checking under the PCT (see document PCT/R/WG/4/5);
- (viii) central electronic deposits system for nucleotide and amino acid sequence listings (see document PCT/R/WG/4/6);
- (ix) divisional applications under the PCT (see document PCT/R/WG/4/9);
- (x) period for performing the international search (see document PCT/R/WG/4/1 1).

105. The Chair encouraged delegations and representatives to continue to progress the discussion of current issues via the PCT reform electronic forum on WIPO's Website.

NEXT SESSION

106. The International Bureau indicated that the fifth session of the Working Group was tentatively scheduled for November 17 to 21, 2003.

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

[Annex follows]

ANNEXE/ANNEX

LISTE DES PARTICIPANTS /
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