

Standing Committee on the Law of Patents

Fourteenth Session Geneva, January 25 to 29, 2010

REPORT

adopted by the Standing Committee

INTRODUCTION

1. The Standing Committee on the Law of Patents (“the Committee” or “the SCP”) held its fourteenth session in Geneva from January 25 to 29, 2010.
2. The following States members of WIPO and/or the Paris Union were represented at the meeting: Algeria, Angola, Argentina, Australia, Austria, Barbados, Belarus, Belgium, Bolivia (Plurinational State of), Brazil, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Chile, China, Colombia, Congo, Costa Rica, Côte d’Ivoire, Cuba, Cyprus, Czech Republic, Democratic People’s Republic of Korea, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Finland, France, Germany, Ghana, Guatemala, Guinea, Hungary, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Japan, Jordan, Kenya, Kuwait, Kyrgyzstan, Lao People’s Democratic Republic, Latvia, Lebanon, Libyan Arab Jamahiriya, Lesotho, Lithuania, Madagascar, Malaysia, Mauritius, Mexico, Morocco, Myanmar, Netherlands, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Poland, Portugal, Qatar, Republic of Korea, Romania, Russian Federation, Saudi Arabia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Sweden, Switzerland, Syrian Arab Republic, Thailand, The former Yugoslav Republic of Macedonia, Tunisia, Turkey, Uganda, Ukraine, United Kingdom, United States of America, Uruguay, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia and Zimbabwe (103).
3. Representatives of the Eurasian Patent Office (EAPO), the European Commission (EC), the Council of the European Union, the European Patent Office (EPO), the Patent Office of the Cooperation Council for the Arab States of the Gulf (GCC), South Centre (SC), the

World Health Organization (WHO) and the World Trade Organization (WTO) took part in the meeting in an observer capacity (8).

4. Representatives of the following non-governmental organizations took part in the meeting in an observer capacity: Asian Patent Attorneys Association (APAA), Center for International Environmental Law (CIEL), Centre for International Intellectual Property Studies (CEIPI), Chamber of Commerce of the United States of America (CCUSA), Chartered Institute of Patent Attorneys (CIPA), CropLife International, European Committee for Interoperable Systems (ECIS), European Communities Trade Mark Association (ECTA), European Law Students' Association (ELSA International), Foundation for a Free Information Infrastructure (FFII e.v.), Free Software Foundation Europe (FSF-Europe), Fridtjof Nansen Institute (FNI), German Association for Industrial Property and Copyright Law (GRUR), Institute of Professional Representatives before the European Patent Office (EPI), Intellectual Property Institute of Canada (IPIC), International Association for the Protection of Industrial Property (AIPPI), International Centre for Trade and Sustainable Development (ICTSD), International Chamber of Commerce (ICC), International Federation of Industrial Property Attorneys (FICPI), International Federation of Pharmaceutical Manufacturers Association (IFPMA), IQSensato, Japan Patent Attorneys Association (JPAA), Knowledge Ecology International, Inc. (KEI), Latin American Association of Pharmaceutical Industries (ALIFAR), Max Plank Institute for Intellectual Property, Competition and Tax Law (MPI), and Third World Network (TWN) (26).
5. The list of participants is contained in the Annex to this report.
6. The following documents prepared by the Secretariat had been submitted to the SCP prior to the session: "Draft Agenda" (SCP/14/1 Prov.), "The Client-Patent Advisor Privilege" (SCP/14/2), "Technical Solutions to Improve Access to, and Dissemination of, Patent Information" (SCP/14/3), "Transfer of Technology" (SCP/14/4), "Opposition Systems" (SCP/14/5), "Report on the International Patent System: Revised Annex II of document SCP/12/3 Rev.2" (SCP/14/6), "Proposal from Brazil" (SCP/14/7) and "Conference on Intellectual Property and Public Policy Issues" (SCP/14/8).
7. In addition, the following documents prepared by the Secretariat were also considered by the Committee: "Report on the International Patent System" (SCP/12/3 Rev.2); "Addendum to the Report on the International Patent System" (SCP/12/3 Rev.2 Add.); "Standards and Patents" (SCP/13/2); "Exclusions from Patentable Subject Matter and Exceptions and Limitations to the Rights" (SCP/13/3); "The Client-Attorney Privilege" (SCP/13/4) and "Dissemination of patent information" (SCP/13/5).
8. The Secretariat noted the interventions made and recorded them on tape. This report summarizes the discussions reflecting all the observations made.

GENERAL DISCUSSION

Agenda item 1: Opening of the session

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

Agenda item 2: Election of a chair and two vice-chairs

10. The SCP unanimously elected, for one year, Mr. Maximiliano Santa Cruz (Chile) as Chair and Mrs. Dong Cheng (China) and Mrs. Bucura Ionescu (Romania) as Vice-Chairs.

Agenda item 3: Adoption of the draft agenda

11. The SCP adopted the draft agenda (document SCP/14/1 Prov.) with the addition of the proposal from the Delegation of Brazil (document SCP/14/7) under agenda item 7(b), to be included in the final version (document SCP/14/1).

Agenda item 4: Adoption of the draft report of the thirteenth session

12. The Committee adopted the draft report of its thirteenth session (document SCP/13/8 Prov.1) as proposed, with amendments received from the Delegation of Japan and the Representatives of ALIFAR and CEIPI, which will be included in the final report (document SCP/13/8).

Agenda item 5: Report on the Conference on Intellectual Property and Public Policy Issues

13. The Chair presented an oral report on the Conference on Intellectual Property and Public Policy Issues, which was held on July 13 and 14, 2009.
14. The Delegation of El Salvador, speaking on behalf of the Group of Countries of Latin America and the Caribbean (GRULAC), was very pleased about that excellent Conference. The Delegation was very interested in continuing that type of activity in the form of seminars, for example, or of a second conference that could enrich further discussions. The Delegation considered that the Conference put WIPO in a key position at that important time, for example, in the area of climate change and in the context of the Copenhagen Summit. The Delegation called upon the Director General to consider holding a second conference.
15. The Delegation of Sri Lanka welcomed the first step taken by the SCP and WIPO in organizing and holding discussions on intellectual property and public policy issues and the approach of placing global challenges at the center of the intellectual property debate. The Conference had covered many global issues which were great challenges for the international community and all the Member States to properly manage. The Delegation felt that, while the Conference had been well organized in terms of logistics, the discussions could have been more balanced and more interactive. In its view, too many topics of vast importance had been discussed within two days, which had set out the background, but had not enhanced discussions. The Delegation expressed its hope that the Conference would be followed up in a way that themes would be treated in a focused and a balanced manner in the future, making it more relevant for developing countries.
16. The Delegation of Angola, speaking on behalf of the African Group, noted that it would be very useful for the delegates to have the report on the Conference on IP and Public Policy Issues available to them in the form of a written document, translated into all the United Nations (UN) languages.
17. The Delegation of Yemen, speaking on behalf of the Asian Group, welcomed the organization of the Conference on IP and Public Policy Issues. The Asian Group was pleased to have participated in its discussions. The Conference was a positive step in the right direction which needed to be taken up further in WIPO's deliberations and through more interactive and focused discussion on each of the themes. The Asian Group also welcomed the preliminary studies on selected issues prepared by the Secretariat as a good basis to facilitate discussions among the Member States and to develop a balanced international patent system. The Delegation stated that, in keeping with the General Assembly's directive on mainstreaming the Development Agenda, its

Group also urged to ensure that the studies reflected ground realities by factoring in the development dimension that acknowledged and analyzed the correlation between specific aspects of the international patent system and the different levels of socio-economic development in Member Countries. The Asian Group welcomed the Brazilian proposal on exceptions and limitations as a basis for discussion and looked forward to constructive deliberations on the proposal. The Group reaffirmed its commitment to the work of the SCP with the aim of developing a balanced international patent system.

18. The Delegation of India thanked the Director General and the Secretariat for organizing the Conference on IP and Public Policy Issues. As had also been stated by the Asian Group Coordinator, it believed that the Conference was a positive step in the right direction. In order to mainstream the consideration of those issues in WIPO's deliberations as originally envisaged, it urged a meaningful follow-up by holding more focused and interactive panel discussions on each of the themes which could then be discussed in a follow-up conference as proposed by some other delegations.
19. The Delegation of the Islamic Republic of Iran expressed its appreciation to the Secretariat for organizing the two-day Conference on IP and Public Policy Issues, which was a good starting point for discussions on the interface of the patent system with other public policy issues. The Delegation observed that that kind of initiative played a crucial role in increasing the understanding of different views and concerns among Member States, and should continue to be kept on the SCP agenda. The Delegation suggested that similar conferences be organized on an annual basis.
20. Following the suggestions of some Member States, the report on the Conference on Intellectual Property and Public Policy Issues, presented by the Chair (document SCP/14/8), was submitted to the Committee.

Agenda item 6: Report on the international patent system

21. The discussions were based on documents SCP/14/6, SCP/12/3 Rev.2 and SCP/12/3 Rev.2 Add.
22. The Secretariat informed the SCP that comments recently received from the Delegation of Guatemala would be incorporated in the following version of Annex II of document SCP/12/3 Rev.2 which referred to country legislations.
23. The Delegation of Brazil recalled that it had indicated a correction on Brazil's legislation in the previous session of the SCP under the agenda item concerning exclusions from patentable subject matter, and requested to incorporate that correction into the next version of the document. The Delegation explained that patents were granted in Brazil for pharmaceutical products, provided they were approved beforehand by the National Agency for Public Health.
24. The Delegation of India stated that it would submit its corrections in writing regarding India's legislation on exclusions from patentable subject matter.
25. The Delegation of Uruguay stressed the importance of the Conference on Intellectual Property and Public Policy Issues. It stated that the Conference represented a huge and positive step forward and that that work should continue. The Delegation was of the opinion that having started analyzing the diverse and complex international patent system was very beneficial, which needed to be acknowledged in order to move forward. The Delegation lauded the excellent technical level of the documents and stated that that important work should be complemented by work from the delegations and other technical entities. The Delegation further indicated that there were a couple of errors in the Annex of document SCP/14/6 regarding Uruguay, and that it would submit corrections in writing to the Secretariat.

26. The Delegation of China observed that the Report on the International Patent System was very comprehensive and was worthy of in-depth study, and that it provided a very good value for better study of the patent systems of different countries. The Delegation informed the SCP that China's patent law had been amended in December 2008, and that the new patent law had come into effect in 2009. Some adjustments had been made regarding the exclusions from patentable subject matter and exceptions and limitations to the rights. The Delegation indicated that it would submit those amendments in writing so that the Report would reflect the changes in China's patent law.
27. The SCP agreed that document SCP/12/3 Rev.2 would remain open for further discussion at the next session of the SCP. Document SCP/14/6 will be updated, based on the comments received, or that will be received, from Member States.

GENERAL DECLARATIONS

28. The Delegation of Kyrgyzstan, speaking on behalf of the Regional Group of Certain States of Eastern Europe, Caucuses and Central Asia, appreciated the efforts made by the Secretariat in preparing the six preliminary studies and expressed its hope that the results would serve as a basis for productive and constructive discussions. It was of the opinion that a professional approach from the experts in studying those topics would help Member States of WIPO to extend their understanding and convergence on the complex issue of patent law. The Delegation gave assurances that its Regional Group would continue to be committed to the principle of international harmonization of patent legislation and the work carried out within the SCP.
29. Speaking in its national capacity, the Delegation of Kyrgyzstan stated that the Secretariat and the Committee had done a great deal of work in analyzing the patent legislations of various countries, thus making it possible to have maximum convergence in the harmonization of patent legislations within regions and throughout the world. The Delegation noted that the Kyrgyz Republic had currently prepared a draft law on changes and revisions to its patent legislation in which provisions on exceptions and limitations to the rights would be more clearly spelled out.
30. The Delegation of El Salvador, speaking on behalf of GRULAC, commended the way that the SCP had progressed in its work through the non-exhaustive list of topics that had been identified by its members. The Delegation stated that it had been positive for the Committee to maintain the discussion on the studies, including on those related to the international patent system, as an open item on its agenda, for ongoing revision and comments by Member States. It noted that it was very important to maintain constant progress on the new preliminary studies that were still pending and that would be presented in the future, particularly regarding those of interest to developing countries. The Delegation expressed its hope that the Secretariat would be able to keep the Committee updated on the other pending topics, so that Member States could submit their comments. The Delegation stated that the SCP had made significant work to guarantee the inclusiveness of all Member States through the discussion of topics of their interest. In its view, work could be accelerated in the SCP on those topics that Member States deemed pertinent for the progressive development of the law of patents on an international scale. Along those lines, GRULAC welcomed the proposal by the Delegation of Brazil on exceptions and limitations to the rights, which was a fundamental issue relating to development. The Delegation observed that several recommendations of the Development Agenda had a direct or indirect link to that issue. Presently, the existence of different approaches to exceptions and limitations could cause uncertainty on the available flexibilities to Member States. The Delegation considered that the proposal aimed to close the gaps between the various legislations and the proper use of flexibilities by Member States. In its opinion, the key element of the proposal was the

establishment of a work program in three phases, so that wide and sustained discussions on the issue could be carried out. The Delegation further noted that the Conference on Intellectual Property and Public Policy had been an excellent opportunity for discussions among Member States. In view of the contributions by Member States for the establishment of a work program, and the high level of participation and valuable contributions made by the participants during the Conference, the Delegation stated that the SCP should take measures for a follow-up to the Conference.

31. The Delegation of Slovenia, speaking on behalf of the Central European and Baltic States, observed that its Regional Group remained committed to the ongoing work in the framework of the SCP. The Delegation was convinced that discussions on important issues relating to the patent system were an appropriate step towards enhancing access to patent information, as well as ensuring a more efficient and user-friendly international patent system. The Delegation reiterated its Group's readiness to be actively engaged in setting up a balanced SCP work program with a non-exhaustive list of items to be dealt with. The preliminary studies prepared by the Secretariat presented a most welcome stepping stone for future work. The main focus should remain to achieve significant harmonization of international patent law, which would be beneficial to all Member States. The Delegation welcomed the two new documents dealing with transfer of technology and opposition systems, as well as the further studies on client-attorney privilege and dissemination of patent information. Its Regional Group was looking forward to the external experts' study on exclusion from patentable subject matter and exceptions and limitations to the rights due in October 2010, and reiterated its active participation in the discussions.
32. The Delegation of Spain, speaking on behalf of the European Union and its 27 Member States, reiterated its commitment to the work carried out so far by the SCP and looked forward to a constructive, efficient and fruitful session. The Delegation stated that the objective of the SCP work program was to discuss important topics such as standards and patents, exclusions from patentable subject matter and exceptions and limitations to patent rights, client-attorney privilege, dissemination of patent information, transfer of technology and opposition systems, with a view to increasing the understanding of those complex questions and their role and impact on the international patent system as a whole. The Delegation stated that discussions should eventually contribute to a more efficient and accessible patent system. The European Union and its 27 Member States expressed its willingness to contribute to the drafting of a balanced work program based on a non-exhaustive list of issues identified by the Committee. The Delegation appreciated the objective and thorough handling of the preliminary studies prepared by the Secretariat. Such studies constituted a valuable contribution to answer important questions of the current international patent system and could be interesting for the future discussions on the international harmonization of patent law. The Delegation expressed the European Union and its 27 Member States' strong commitment to international harmonization of patent law and the work of the SCP. It particularly welcomed the second study on the client-patent advisor privilege as well as the two new preliminary studies on transfer of technology and opposition systems which provided a comprehensive overview of the current international patent system. The Delegation reiterated its full commitment to cooperate and participate actively and constructively in the discussions with the hope of achieving the objectives of the SCP.
33. The Delegation of the Islamic Republic of Iran associated itself with the statement made by the Delegation of Yemen on behalf of the Asian Group. It observed that the SCP should serve as a forum for establishing an IP regime, which provided guidance and progress in the international development of patent law, while taking into account the inherent link in the patent agenda and public policy issues as well as the varying degree of social and economic development of the countries. In its view, the international

harmonization of patent law would only be beneficial if the process was sensitive to the developmental aspects of the countries. From the Delegation's perspective, the following principles were essential for the effectiveness of any future work program of the Committee: firstly, the SCP work program should be broad, flexible and balanced, allowing open discussions on a wide range of patent law related issues. The Delegation stated that the list of topics identified at the 12th session of the Committee should remain open for any new proposal by Member States. Secondly, cross-cutting issues, such as development and its inter-relationship with the IP system should be examined. In that context, the SCP should try to explore ways on how the patent system could contribute to the promotion of technological innovation and to the transfer and dissemination of technology in a manner conducive to social and economic welfare of Member States. Thirdly, the SCP was the pertinent committee to address all aspects of patent law. Therefore, it could contribute and complement discussions in other WIPO Committees or other international fora, for instance, the implementation of recommendations under the WIPO Development Agenda. The Delegation observed that the issues related to norm-setting flexibilities, public policy and public domain could be discussed in the SCP from the patent law perspective. Further, it stated that limitations and exceptions to patent rights and exclusions from patentable subject matter would be examined with a view to alleviate global challenges.

34. The Delegation of the United States of America offered to submit comments on each of the working documents and on suggestions for the future work by the Committee. It sought to forge a consensus so as to achieve concrete and tangible results. A recent example of such a consensus was the progress achieved last December in the Standing Committee on Copyright and Related Rights (SCCR) on the issue of access to copyrighted material by the blind and visually impaired. The Delegation expressed its hope that such a solution would be possible with respect to the issues addressed by the SCP.
35. The Delegation of India associated itself with the statement made by the Delegation of Yemen on behalf of the Asian Group. The Delegation expressed its hope that the deliberations in the coming days would help the Secretariat to improve on the present studies and make them more comprehensive. From a developing countries' perspective, the preliminary studies on standards and patents, exclusions from patentable subject matter and technology transfer were of considerable importance. The Delegation noted, however, that while said documents were positive in their descriptive part, they should also include the development aspects and address the concerns of developing countries. Mainstreaming of the Development Agenda in all aspects of WIPO's work was an essential guiding principle. WIPO's expertise in the area of promoting intellectual property, in the sense of promoting social and economic development, was important to address the matter. Such a holistic approach would facilitate a balanced, inclusive and consistent work program in which all Member States had a stake. Referring to the revised study on client-attorney privilege, the Delegation noted that there was no provision on a client-attorney privilege in India's Patent Act of 1970 with respect to patent agents who were required to be science graduates. The Delegation also stated that the study did not clearly define "patent attorney", and suggested that a clear definition of what a patent attorney was and in what respect he would be different from a lawyer, be considered in a revised study, including the implications of any harmonization in this area. The Delegation welcomed the proposal made by the Delegation of Brazil for a study on exceptions and limitations to patent rights and joined other delegations in extending its support to that initiative, which was considered extremely important for all intellectual property regimes. While recalling that the issue had been discussed in great detail in the SCCR, the Delegation proposed that WIPO carry out an extended study, including mapping the provisions that existed in different countries, and their impact. The Delegation expressed its satisfaction of the progress made by the SCP in presenting the

preliminary studies giving clear pictures of the existing situation across countries. It stated, however, that important issues, such as non-patentable subject matter, patents and standards and technology transfer, were vital for developing countries and needed greater attention. The Delegation stressed its readiness to participate constructively in the Committee's discussions.

36. The Delegation of Guatemala supported the statement made by the Delegation of El Salvador on the Conference on Intellectual Property and Public Policy Issues. It believed that there should be a follow-up to the outcome of that Conference, and hoped that the Committee would reach an agreement under agenda item 8. The Delegation expressed its expectation that the SCP continue its efforts to develop a work program that was balanced and inclusive to support the work of the international patent system. In that effort, it believed that the SCP should take into account the results of its previous work. The Delegation was pleased to see that the discussions in the Committee had covered a broad number of issues of interest to developing countries, for example, dissemination of patent information and exceptions and limitations to patent rights. In its view, it was very important that the new SCP work program reflect the development dimension and take into account the recommendations of the Development Agenda. It also believed that it was pertinent to take into account the complementary nature of the work of other committees within WIPO to benefit from them and avoid duplication of work. The Delegation further supported the proposal of the Delegation of Brazil that would be presented to the Committee. The Delegation observed that Annex II of document SCP/14/2 Rev.2 was very helpful, and suggested that delegations collaborate with the Secretariat to update the Annex.
37. The Delegation of Angola, speaking on behalf of the African Group, stated that the preliminary studies must take into account not only social and economic realities and disparities between the different levels of development of countries, but also differences between their national legal systems. The African Group looked forward to a quick conclusion of the comprehensive study on exceptions and limitations. The Delegation believed that the patent system should play a major role in some areas of general interest and public policy issues related to development, such as education, health, environment, climate change and food security. The patent system should also facilitate technology transfer and access to knowledge. In recalling the Committee's request that the Secretariat produce cost estimates of translating the studies into all official UN languages, the Delegation looked forward to receiving that information well in advance of the following session of the Program and Budget Committee.
38. The Delegation of Brazil associated itself with the statement made by the Delegation of El Salvador on behalf of GRULAC. The Delegation stated that the SCP had a special role within WIPO's intergovernmental machinery, as the law of patents was certainly a key chapter within the whole area of intellectual property rights. In its view, the law of patents was based on one essential trade off – the granting of temporary and exclusive rights in exchange for the dissemination of technological progress to the benefit of society as a whole. That trade-off aimed to draw a delicate balance between private and public interests. The Delegation hoped that the needs to keep that balance would be kept in mind in the discussions during the week. For that to happen, the Delegation considered it important to adopt a systemic approach leading to the mainstreaming of the recommendations of the Development Agenda into the work of the Committee. This would ensure a broad perspective that took into account the impact of patent protection on a broad range of social, economic and legal issues. The preliminary studies undertaken by the Secretariat should take into consideration such broad perspectives as well as contributions provided by other agencies of the UN system. The Delegation hoped that discussions would proceed together on each specific topic such as, patent information, sufficiency of disclosure and exceptions and limitations since they were all

interconnected. The Delegation believed that it was in the best interest of all Member States to preserve the role of WIPO in setting intellectual property rules, principles and procedures. Initiatives outside WIPO would lack legitimacy and support of most countries. That was why in this key Committee within WIPO it wished progress to be made in line with the Development Agenda. The Delegation reiterated its willingness to enhance its contribution to WIPO as it had stated during the General Assemblies in September 2009. The Delegation further informed the Committee that at the current session of the SCP, it would be presenting a concrete contribution under item 7(b) of the agenda concerning exceptions and limitations. In addition, at the following session, it would be presenting a proposal on sufficiency of disclosure.

39. The Delegation of Japan referred to some of the working documents which stated that the patent system was intended to promote and support innovation. The system was also considered as a tool for the diffusion of technology. In view of the complicated and accelerated advancements in certain areas, the need to establish a well-functioning patent system was bigger more than ever. In that context, it was beneficial for the members of the Committee to enhance their understanding of the issues addressed in the working documents for the sake of structured deliberations. The Delegation expressed its hope that discussions would lead to establishing common ground that would allow a well-balanced work program.
40. The Delegation of the Syrian Arab Republic stated that the preliminary studies, particularly the study on exclusions and exceptions, was important in the framework of the Development Agenda, and therefore stated its agreement with the proposal of the Delegation of Brazil. With respect to the dissemination of patent information, it was very important to provide databases, digital services and information centers to help the national offices in that area. While underlining the importance of technical standards and patent information for development, the Delegation stated that those issues were a big challenge for developing countries. With regard to the attorney-client privilege, the Delegation observed that national legislations should be studied and disseminated. In its opinion, countries should be able to decide those matters taking into consideration their social and economic situation. The Delegation also stressed the importance of providing studies in the Arabic language which would allow delegations to properly prepare before the meetings and to share their contributions.
41. The Delegation of the Republic of Korea stated that the documents would provide an excellent basis for enhancing Member States' common understanding on complex questions regarding the international patent system. The Delegation particularly welcomed the opportunity to discuss the issues of client-attorney privilege and opposition systems. In relation to the first issue, the Delegation stated that leakage of confidential information by a patent advisor would discourage an inventor from filing a patent application. To promote innovation and utilize the patent system further, the Delegation believed that Member States should share more information regarding their national laws on client-attorney privilege and possibly, find an international common practice in that area. The Delegation also stated that the sharing of information on the opposition system of each Member State would be helpful to patent applicants and practitioners. It also highlighted the importance of patent information dissemination that might meet developing countries' need for technology information and might contribute to reducing the backlog of patent applications in many offices. That agenda item was one of those that all Member States could benefit from through developing further studies and discussions. The Delegation emphasized the importance of the intellectual property system for technology transfer, most of which was made through foreign investments. The Delegation believed that, without an IP protection system, it was difficult to attract foreign investment. The Delegation observed that when the Republic of Korea had experienced a financial crisis in 1997, it had actively and successfully promoted the IP

protection system to attract more foreign investments. It further noted that the issue on exceptions and limitations to IP rights was the most frequently suggested agenda item in all WIPO Standing Committees. While agreeing that the IP system touched many aspects of the society and the economy, the Delegation noted, however, that limiting the right of the individual right holder was not a solution to solve global social and economic public policy issues. In its view, the public sector had to take a more important role in that regard, and transferring the responsibilities to individual innovators or patent right holders was not the solution. The Delegation reiterated that the IP system was not only an incentive for innovation, but that it also benefitted people by promoting the utilization of innovation. It emphasized therefore that limitations and exceptions to IP rights should not discourage innovation which might provide ultimate solutions for resolving various public policy issues. The Delegation stressed the importance of the SCP for the development of a balanced international patent system and expressed its wish that a consensus be reached on an organized future work program.

42. The Delegation of the Russian Federation stated that it had already expressed a very positive opinion on the preliminary studies conducted at the previous session and recalled that, given the importance of all of those studies, not only the patent offices were interested in the contents of those studies. The Delegation requested information on the translation of the studies into the other working languages of the UN. Further, the Delegation noted the particular importance of the studies on dissemination of patent information and transfer of technology. In relation to the issue of dissemination of patent information, it stated that it constituted the foundation for further transfer of technology to take place. In relation to the proposal from the Delegation of Brazil, the Delegation stated that it was not yet acquainted with the contents of the proposal and, therefore, it would study the proposal carefully and provide its views at a later stage. The Delegation expressed its willingness to have an open and constructive dialogue so that productive work on the harmonization of patent laws could be undertaken.
43. The Delegation of Pakistan made two general comments. Firstly, the development dimension of the international patent system should be given due consideration. The WIPO Development Agenda recommendations had a direct bearing on the WIPO work program on international patent law. Secondly, the international patent system should be aware of the differences between discovery and innovation, and in that regard, all efforts should be made to avoid the patent system being misused by the industry. The Delegation appreciated the efforts made for organizing the Conference on Intellectual Property and Public Policy Issues, but would have liked to see a more focused and comprehensive discussion at the Conference. The Delegation, however, expressed its hope that that issue could be managed in a follow-up conference as proposed by some delegates.
44. The Delegation of Morocco supported the statement made by the Delegation of Angola on behalf of the African Group with respect to the preliminary studies on selected issues. The Delegation stated that it would like the development concerns to be the center of all the work of the Committee. In its view, public health issues, food security, environment, climate change, all of those issues should be taken on board. It believed that a well-balanced patent system was to the benefit of all. The Delegation expressed its support for the statement made by the Delegation of the Syrian Arab Republic on the subject of the translation of all the studies into Arabic.
45. The Delegation of Chile fully supported the successful outcome of the SCP. The Delegation stated that the documents prepared for the SCP on client-attorney privilege, technical solutions to improve access to information on patents and its greater dissemination, transfer of technology, opposition procedures and the Report on the International Patent System were steps forward in the development of the work of the Committee. It was pleased to see that preliminary studies had been developed in two

new areas contained in the non-exhaustive list. In relation to the study on technology transfer, the Delegation stated that the issue was fundamental in the development of innovation. Referring to the Conference on Intellectual Property and Public Policy Issues, the Delegation believed that, as already mentioned by the Delegation of El Salvador, such initiative should be maintained and continued, focusing on enriching the discussion. While stating that the agenda of the Committee should not just follow the recommendations of the Development Agenda, the Delegation stressed that developing a well balanced agenda was also directly linked to the strategic objectives of WIPO. In its opinion, that should guide the work of the Committee. The Delegation expressed its belief that the SCP now had established the basis to move forward with substantive discussions on all of the relevant issues, in order to gradually progress in a well-balanced manner in all areas of interest to Member States.

46. The Delegation of Panama supported the statement made by the Delegation of El Salvador on behalf of GRULAC and its proposal for a follow-up Conference on Intellectual Property and Public Policy Issues. It was the first time that it was participating in the work of the Committee and it was very enthusiastic about all of the items on the agenda, representing various challenges. The Delegation stated that the Committee's topics did cost lives in countries where the issue of patents was a huge challenge to be resolved. That was why the Delegation wished to record its support for all of those projects. The themes of the studies treated during the week were extremely valuable for the undertakings that the country wished to develop. Panama was working on developing a project called "network of opportunities for poor families", and the Delegation hoped that the project could benefit from the knowledge and the work discussed by the Committee. Of particular interest were issues related to the dissemination of patent information and transfer of technology, as the Delegation was convinced that, by using the opportunities and the advantages of the intellectual property system, successful outcomes could be achieved.
47. The Delegation of Indonesia supported the statement of the Delegation of Yemen made on behalf of the Asian Group, and noted that the working documents constituted a good reference for further substantive deliberations. The Delegation also welcomed the two new studies produced by the Secretariat, namely, "Transfer of Technology" and "Opposition Systems". The Delegation was of the view that the document on transfer of technology described comprehensively the state of play of the issue, including challenges faced by developing countries. However, some other issues like public domain, the linkages between foreign direct investment (FDI) and technology spillover as well as the absorptive capacity of developing countries could be further explored. The Delegation expressed the view that the obligations of developed countries to fulfill their commitment as mandated by the TRIPS Agreement had still not been sufficiently analyzed. The document had, for example, not enough analyzed how the patent system might impede transfer of technology or how to utilize public domain patents for the purpose of technological advancement of developing countries. In relation to the document on opposition systems, the Delegation appreciated the explanations provided in Chapter III, stating the objectives of opposition systems and their role in the patent system. It further acknowledged that, as indicated in Chapter II, the number of patent applications or patents in respect of which oppositions had been filed, was not very high. The Delegation also commended the explanations in Chapter V, which provided a concise description of national and regional practices in Brazil, Egypt and India, as well as in the EPO and in the EAPO. The Delegation found that all the differences in opposition systems, such as pre-grant or post-grant opposition or the grounds for opposition, were worth noting. The Delegation commended WIPO on the successful organization of the Conference on Intellectual Property and Public Policy Issues. It noted that the Conference had attracted a number of distinguished speakers and a large number of participants. The Delegation hoped that, at following similar conferences, more time

would be devoted to discussions and more involvement of speakers from the civil society would be considered. On the study on the client-attorney privilege, including its revised version, the Delegation was of the view that it still needed sufficient analyses, particularly on the possible adverse implications of having uniform legal standards on client-attorney privilege. The Delegation supported the submission of the Delegation of Brazil on the issue of exceptions and limitations to patent rights. Besides some crucial points raised in the submission, the Delegation appreciated three phases suggested for the work of the SCP in guiding the Committee to achieve concrete results. The Delegation expressed its hope that the comments made by Member States during the deliberation of the SCP could be incorporated in the existing studies, either in the text or in the annexes. In its view, such comments would enrich the studies and ensure their quality and balance, and adequately reflect development considerations. In conclusion, the Delegation welcomed and appreciated the work of the SCP in particular, since Indonesia was in the process of revising its patent law. It considered that the documents produced by the Secretariat, as well as the comments expressed by Member States, would become valuable references and would contribute to achieving meaningful results that addressed the common concerns of Member States.

48. The Delegation of Malaysia stated that the study on the exclusions from patentable subject matter and exceptions and limitations to patent rights could be useful for strengthening the patent system, and provided a platform to learn from the experiences of other countries. The Delegation supported the statement made by the Delegation of Yemen on behalf of the Asian Group regarding considering a more interactive and focused panel discussion at the Conference in respect of the issues of public health, environment, climate change and food security. It also looked forward to further discussions on the issues of the opposition system which had its advantages and disadvantages, described in document SCP/14/5. In relation to the document on transfer of technology, the Delegation stated that it provided many avenues where transfer of technology could take place. It also had illustrated how a good patent system could help the promotion of technology transfer which could be useful for developing countries like Malaysia.
49. The Delegation of Algeria stated that while it was true that dissemination of information encouraged innovation, for a good number of developing countries, access still remained limited. Therefore, an effort must be made by WIPO to train staff dealing with that issue. Regarding exclusions from patentable subject matter and exception and limitations, the Delegation noted that the study should take into account the interests of developing countries and in that line, the Delegation supported the proposal by the Delegation of Brazil. The Delegation was of the view that the proposal contained several matters of great interest to developing countries, in particular, in the area of health.
50. The Delegation of Cameroon fully endorsed the statement made by the Delegation of Angola speaking on behalf of the African Group. Its government was following the work of the Committee with special attention. The issues discussed in the SCP were of great interest to its Government because they were important in resolving certain development problems. The Delegation was of the opinion that intellectual property rights could constitute an obstacle to the well-being of the population of the different States, if the development aspect in the applicability of those rights was not taken into account. The Delegation expressed its hope that the continuation of the consideration of issues, such as exceptions and limitations, transfer of technology and dissemination of patent information, would prove to be relevant to a better future of the patent system in an ever-changing world. Making reference to the Chair's report on the Conference on Intellectual Property and Public Policy Issues, the Delegation also stated that it would be very useful for that work to be continued in the form of more targeted and constructive

discussions, taking into account the real circumstances in the countries, and giving particular importance to development aspects.

51. The Delegation of Costa Rica supported the statement made by the Delegation of El Salvador on behalf of GRULAC with respect to the priorities mentioned. The Delegation stated that the gaps that separated the interests and necessities of the various delegations should not be forgotten, and should be dealt with in-depth in a constructive manner in order to use them as an enrichment flowing from such differences. The Delegation lauded the quality of the documents which were a valuable basis for the work of the Committee. The Delegation joined other delegations who had already expressed their interests in having a balanced work program for the SCP. It supported the proposal by the Delegation of Brazil on exceptions and limitations and believed that that was a positive alternative that would represent a step forward and create positive results.
52. The Delegation of Egypt supported the statement made by the Delegation of Angola on behalf of the African Group. The Delegation noted that the work of the Committee concerned many important preliminary studies related to patents and standards, client-attorney privilege, the dissemination of patent information as well as two new preliminary studies on transfer of technology and opposition systems. Although all those preliminary studies were important, there was no doubt that his Delegation was particularly attentive to the questions on exclusions from patentable subject matter, exceptions and limitations to the rights and transfer of technology, given the importance for developing countries of those issues and the fact that they were directly linked to the Development Agenda. The Delegation supported the proposal made by the Delegation of Brazil as far as limitations and exceptions were concerned, for its objective treatment of all the topics concerning the issue which were of importance to the developing countries, and to the community of consumers regardless whether they were in developing or developed countries. That approach was close to the Delegation's viewpoint on the question of exceptions and limitations, according to which the issue should be dealt with as a whole, without limitation to one particular item. The Delegation stated that it would very carefully examine the preliminary study on transfer of technology, because it could represent, for developing countries, substantial benefits from international patent protection, as had been stressed by the Delegation at the Committee on Development and Intellectual Property (CDIP). While welcoming the preliminary studies prepared since the previous session, the Delegation noted that they were not complete because they had been presented in only three languages rather than in the six UN languages, and particularly noted the missing translations into the Arabic language. That meant that the national authorities in its country and other Arab countries would not be able to directly react to those studies, or studying them would take a longer period of time. Therefore, it expressed its hope that the International Bureau would provide those studies and the other studies to be submitted in the future in all the official languages of the UN, as unavailability of studies in the various UN official languages would limit the Delegation's desire to ask for further studies to be presented. The Delegation was looking forward to a fruitful session of the Committee and to in-depth discussions of the preliminary studies, which would be one of the best methods to achieve progress in setting up the work program of the Committee.
53. The Delegation of the Bolivarian Republic of Venezuela wished to emphasize the need for all documents to be translated into all the official UN languages and, as had been repeatedly requested by the Delegation of Angola, it was also necessary to introduce translation into Portuguese. The Delegation welcomed the document submitted by the Delegation of Brazil. The Delegation fully supported what had been said about the need for a balance between private rights and public interest, as this was fundamental for the credibility of WIPO, especially from the standpoint of the developing countries. Referring

to paragraphs 13 and 14 of the Brazilian proposal concerning the WTO and the Doha Declaration on TRIPS and Public Health (Doha Declaration), the Delegation stated that it was important to review the system, as to date there was only one such case, namely the one involving Rwanda and Canada. In its opinion, that was not the reason the system had been set up for. While stressing the need to comply with what had been agreed, the Delegation recalled the situation involving allegations of violation of patent rights by the European Union concerning medicines in transit destined to Brazil and Colombia. In its view, that action could constitute a violation of the TRIPS Agreement, therefore the issue of medicines in transit had to be taken up. The Delegation expressed concern that the elaboration of a manual, as described in paragraph 27 of the proposal, could lead to further limitations. While supporting the proposal in general, the Delegation stated that the mentioned points should be discussed in greater depth.

54. The Delegation of Oman supported what had been stated by the Delegation of Egypt on the importance of providing the preliminary studies in the other UN official languages, including Arabic, since the absence of such translations prevented many countries from participating practically and constructively in the negotiations and discussions.
55. The Representative of the ICC stated that he represented small and large businesses from all sectors in over 120 countries worldwide, which were both users and producers of intellectual property, including patents, and had an interest in a well-functioning, efficient and effective patent system that provided legal certainty, transparency and predictability. The SCP had addressed several issues of great interest to the business community, including client-patent advisor privilege, standards and technology transfer. Businesses were directly impacted by those issues in their daily operations, and were keen to contribute their experiences and views on the practical implications of the proposals being discussed. On the issue of client-patent advisor privilege, the Representative noted that the owners of IPRs and those confronted by IPRs needed the best and most complete advice that they could obtain to clearly understand those rights and guide their actions regarding them. That meant that the governments, companies or individuals, as the case might be, faced with an IP issue should be able to have full and frank exchanges of information with their respective IP advisors. In order to achieve full and frank exchanges of information, the Representative considered that those involved should know that exchanges of communications were confidential and would be protected from forcible disclosure, even in court. In his opinion, such fundamental requirement for complete and well grounded advice was not available broadly on an international scale. The Representative believed that an international framework for the mutual respect of communications with legal advisors on intellectual property matters was needed to help both owners in enforcing their rights, as well as defendants accused of infringement. That would also facilitate international trade and development, and contribute to making the IP system more effective, clear and transparent. He therefore invited the SCP to begin considering possible detailed options at the international level to resolve problems identified by the Secretariat. With respect to the issue of standards, the Representative observed that companies sought to both harmonize the way in which goods and services were designed through standards, and to gain part of the return on investments through patent protection. He believed that neither the international patent system nor its national implementation required changes to address concerns about patents and standards. As noted in the preliminary study on that topic, the scope of the exclusive patent right was carefully designed under national patent laws in order to strike a balance between the legitimate interests of right holders and third parties, and no national legislation included a specific provision limiting the right conferred by a patent, the exploitation of which was essential for the implementation of a standard. On the issue of technology transfer, the Representative expressed his belief that the availability of economically feasible options to address global challenges, including health, the environment, and food security, would depend on the development, commercialization and widespread dissemination of

effective existing technologies and new non-commercial technologies. The private sector had been, and would continue to be, responsible for the vast majority of investments and the development and diffusion of the new and improved technologies that would be essential to meet those challenges. The Representative observed that the ability to amortize those investments and assure a return to those who supplied the necessary capital was secured by intellectual property protection of the inventions that would result from the private sector research and development effort. The patent system was intended to correct the underprovision of innovation due to free-rider effects by providing innovators with limited exclusive rights to prevent others from exploiting their invention, and thereby enabling the innovators to appropriate the returns on their investment. At the same time, the patent system required innovators to disclose fully their inventions to the public. The Representative noted that those fundamental elements of the patent system played an important role in the dissemination of knowledge and the transfer of technology. In addition, the Representative noted that open innovation was becoming an increasingly popular model for organizations working in complex technological fields. In its view, intellectual property played a critical role in supporting open innovation, because it provided the legal certainty necessary for broader sharing of technical information and know-how. The Representative stated that, in particular, patents played an essential role in supporting collaborations and partnerships between different organizations involved in developing such technologies. When the SCP contemplated potential mechanisms to foster transfer of technology, the Representative was of the opinion that it should consider carefully the practical impact of its decisions on innovative activity and not resort to solutions that might jeopardize the essential role of patents by creating additional uncertainties for intellectual property owners.

56. The Representative of FICPI stated that, since his Federation's members did not only represent right owners, but also third parties, he had a good understanding of both sides of the coin, namely of the interests and needs of the patent owners, as well as of the interests of the public and all those who did not possess patent protection for their products. FICPI was closely following the progress in the harmonization of patent laws, since that was to the benefit of all users of the system. FICPI was also prepared to assist any study or work relating to the client-attorney privilege. The Representative confirmed that, from a practical point of view, the dissemination of patent information was important for all users, including patent offices dealing with the examination of patents.
57. The Representative of AIPPI stated that his association represented more than 8,000 IP professionals with more than 60 national and regional groups and concentrated on studying IP laws for their improvement. The Representative, as Chairman of the AIPPI Committee on Privilege, stated that the subject dealt with was protection of clients from the forcible disclosure of their IP advice, which was broader than "privilege". He observed that documents SCP13/4 and SCP14/2 identified what the problems were: lack of protection and loss of protection, in which lack of protection assumed a more minor position, and loss of protection was the more serious, almost universal issue. The Representative also agreed that the protection served the public interests foremost. Loss of protection meant that national laws providing protection were frustrated. In his view, the SCP was wise not to study solutions to those problems, because such a study was not justified until the SCP was on top of the problems. The Representative noted that AIPPI had contributed three major efforts to assist in defining the problems: the WIPO-AIPPI Conference on Client Privilege in IP Professional Advice in May 2008, and two AIPPI submissions, in October 2008 and in August 2009. Anticipating the completion of the first phase of studying client-attorney privilege in the SCP, i.e., defining the problems, AIPPI had commenced to study the options for remedies based, in part, on the work done by the SCP. The Representative stated that AIPPI had issued working guidelines to all national and regional groups to ascertain the options for remedies through a questionnaire, referring to what were the limitations, exceptions and other

details of national protection for which provision needed to be made if any agreement was to be reached to solve the problems. The answers from AIPPI members were requested by March 31, 2010, and the analysis would be presented at the AIPPI Congress in October 2010 in Paris. The Representative stressed that, in his view, the work had reached the point where help from Member States was needed to study options for remedies. The issues to be taken into account for any viable agreement to be reached were: existing limitations and exceptions, issues relating to the qualifications of IP professionals, the preservation of judicial discretion, the necessity of disclosure that was needed for justice, and the limits of the scope of protection, i.e., to the third parties and lawyers transacting with third parties, and non-lawyers doing likewise in order to give advice. Moreover, the Representative stated that the questions as to whether the dominant purpose test, which had been well explained in the documents, be part of the international regime and how waiver of privilege was determined should be addressed. The Representative hoped that AIPPI would be able to present its further analysis of the issue by the SCP's following session.

58. The Representative of ALIFAR stated that her Association represented more than 400 pharmaceutical laboratories in 15 countries of Latin America. Referring to one of the conclusions of a recent WIPO symposium that had found that backlogs in terms of processing patent applications had reached an unsustainable record level in 2007, the Representative observed that it might be useful to discuss some of the reasons that had led to that situation, which might have resulted from some defects in the patent system. Standards of patentability used by patent offices of some countries might well be one of the causes. As the requirements for novelty, inventive step and industrial applicability appeared to be diffused with respect to patent applications and granted patents, there was more incentive to file patent applications that did not represent genuine innovation, but rather were filed to obstruct competition. In a report on the pharmaceutical sector published in July 2009, the European Commission had identified some difficulties in industrialized countries in the way the patent system was used and which slowed down the access of competitive products onto the market. The European Commission's inquiry noted that a generally applied strategy was to submit many patent applications for the same medicine which could reach up to 1,300 patents and applications in Member States. In her view, that could lead to legal uncertainties and high cost for the patent system, and the same scenario started to occur in developing countries. The Representative therefore considered that the work of the SCP could explore mechanisms to avoid the patent system being used for reasons that were not intended and to provide incentives for innovation. The Representative stated that any initiative to harmonize substantive aspects of patent law could be viewed with concern as it could reduce the room for maneuver for the patent offices from Latin America in determining their own standards and criteria for patentability and to keep the patent system from producing effects such as those described by the report of the European Commission. She was of the opinion that the Committee had explored the difficulties encountered in the patent system from the standpoint of the impact that it had on matters of public interest, such as health, and its work would facilitate the linkage of various issues under discussion with the 45 recommendations of the Development Agenda. The Representative expressed her hope that the Committee's work would overcome the difficulties without weakening the TRIPS flexibilities in areas such as novelty, inventive step and industrial applicability, patentable subject matter and the definition of prior art, among other matters.
59. The Representative of KEI indicated that his comments would focus on the proposal by the Delegation of Brazil on patent limitations and exceptions, as set out in document SCP/14/7. The Representative supported all of the elements of work set out in paragraphs 25 to 27 of document SCP/14/7, which he considered as logical and useful steps to begin an empirically based discussion of patent limitations and exceptions, focused on practical concerns. To that end, and considering also the several reports

already prepared by the Secretariat, the Representative raised four issues: firstly, with respect to access to medicines, the Delegation of Brazil had called attention to the lack of policy coherence in a world where at one moment countries endorsed the use of compulsory licensing to promote access to medicines for all, and in separate fora criticized developing countries for actually considering or issuing such compulsory licenses. If compulsory licensing of medicines was truly supported, it should not be subject to bilateral and unilateral trade pressures. In that regard, the Representative questioned the role of WIPO in addressing such lack of policy coherence. He suggested that the countries most committed to bilateral and unilateral trade pressures could be asked to elaborate the rationale and criteria they used to reprimand countries that simply tried to implement paragraph 4 of the Doha Declaration, and to explain why they believed such pressures were consistent with the said Declaration and the WHO Global Strategy on Public Health, Innovation and Intellectual Property, as set out in WHA 61/21. The Representative also agreed with the Delegation of the Bolivarian Republic of Venezuela that the SCP should consider issues such as the treatment of goods in transit, for cases where products with different patent landscapes moved in international trade. Secondly, the Representative suggested that in elaborating information on State practices, the SCP would focus on the way that some countries, such as the United States of America, implemented limitations and exceptions to remedies associated with the exclusive rights of patents, with a focus on the flexibilities found in Articles 44.1 and 44.2 of the TRIPS Agreement, including cases where non-voluntary authorizations to use patents replaced injunctions to enforce exclusive rights (for example, the U.S. Supreme Court decision *eBay v MercExchange*, or 28 USC 1498). Thirdly, the Representative informed the SCP that negotiators from 38 countries were meeting in secret sessions in Mexico that week to consider a new trade agreement on the enforcement of intellectual property rights. Although it was not known if that secret agreement would address the issue of enforcement of patents, if so, the Representative was of the opinion that the SCP should request the countries involved to make the negotiating text of the Anti Counterfeiting Trade Agreement (ACTA) public, so its ramification for the patent system could be discussed at the following meeting of the SCP. His organization also strongly objected to the lack of transparency in the ACTA negotiations, and the degree to which consumer interests and voices of developing countries had been marginalized in the ACTA negotiation. Fourthly, with respect to patents on standards, the Representative proposed that WIPO consider a protocol on disclosures of assertions of patent rights relating to proposed standards. He suggested that a failure to constructively disclose assertions of patent rights in a standard eliminate remedies to enforce the patent against relevant implementations of that standard. He considered that such a protocol, either within the PCT or a stand-alone instrument, would make it easier to develop standards, including the open standards, increasingly important for innovation.

60. The Representative of the TWN observed that during the last 15 years, developing countries had been coping with an inequitable international patent regime as a follow up to the TRIPS Agreement, and that it involved a great amount of resources to cope with its implementation. Developing countries were yet to come to terms with the challenges posed by patents for pharmaceutical products, as well as compulsory patent protection for life forms. Developing countries were incorporating flexibilities to safeguard the critical public policy consensus coming out of the TRIPS patent regime. The Representative felt that, against that background, it was not the right time to discuss harmonization of patent laws. In its view, the call for harmonization of patent laws ignored the development disparity existing among WIPO Member States, and harmonization would take away the policy space enjoyed by many developed countries in the past and now being denied to developing countries. The Representative observed that there were a lot of assumptions surrounding the patent system, which was being challenged, one of which was related to the role of patent in stimulating inventions. The Commission on Intellectual Property,

Innovation and Public Health (CIPIH) had emphasized that the inability of patent regimes to stimulate research and development in the area of the disease conditions relevant to developing countries, especially of types II and III. Consequently, one could infer from the conclusions that patents were not stimulating any research and development to meet the public health needs of developing countries. The WHO Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property, an outcome of the CIPIH process, recommended the need for new incentives for research and development in dealing with the cost of research and development (R&D) from the prices of the product. The CIPIH report also had found a mismatch between the number of patents on pharmaceutical products and the number of new molecules obtaining marketing approval. The Representative observed that there was also evidence available on the abuse of patent rights to prevent competition as well as innovation. According to the European Competition Commission's report on the pharmaceutical sector in 2009, in recent years, originator companies had changed their patents strategies. In particular, strategy documents of originator companies confirmed that some of them aimed at developing strategies to extend the breadth and duration of patent protection. The report further said that individual medicines were protected by up to nearly 100 patent families which could lead up to 1,300 patents or pending patent applications across Member States. The Representative noted that such a real situation challenged the assumption of patents as a tool for stimulating R&D. Similarly, the Representative considered that there was little evidence on the role of patents as a tool for facilitating technology transfer and FDI. The Representative suggested that the SCP examine the truth behind some of those assumptions and to provide an opportunity for developed countries to present an empirical evidence showing whether those assumptions were true in their countries' situation. In his view, such a review was important, because most of the preliminary studies stated those assumptions that did not reflect the real situation, especially in developing countries.

61. The Representative of GRUR was pleased to note that the Committee had moved forward from the former impasse and had performed a good and promising new start. The Representative expressed his hope that such productive deliberations would continue. He stated that he attached great importance to further discussions on the subject of exclusions from patentability of certain types of inventions and the limitations to the exclusive rights conferred by the patent. He observed that it was also of particular interest to study and define the proper objectives and merits of post-grant opposition procedures introduced into the German law on the model of the European Patent Convention (EPC). The Representative stated that GRUR would continue to support all efforts to find a viable solution for the international problems caused by the divergent types of protection for patent attorneys as regards the confidentiality of their relationship to their clients. In that regard, the Representative supported the statements made by the Representatives of AIPPI and ICC, as well as the statement made by the Representative of KEI on the transparency of the ACTA negotiations.
62. The Representative of FSF-Europe noted that the Report on the International Patent System stated a clear economic rationale for the patent system, describing it as one among several to promote innovation and development. The Report invited to consider where that particular tool could be productively applied, but also to think about where other regulations would achieve more to promote innovation and development. In light of those considerations, the Representative strongly supported the proposal made by the Delegation of Brazil to create a work program for the Committee to discuss limitations and exceptions and the effectiveness in addressing development concerns. He further observed that getting the relationship between patents and standards right would be the key to safeguarding and promoting innovation in the technology sector. In order to make use of the broad selection of tools available to promote innovation, he believed that the Committee's work program should include discussions on open and collaborative

approaches to innovation, and the support of organizations such as the ICC. The Committee would also be enriched by discussions on open standards as an approach to enabling innovation and lowering the bar to market and trade. With regard to ACTA, the Representative urged the SCP to call on negotiating countries to disclose the draft of that Agreement so that its consequences for the patent system could be discussed and duplication of work could be avoided. The Representative expressed his strong objection to the non-transparent manner and secrecy in which the negotiations for ACTA had been conducted.

Agenda item 7: preliminary studies on selected issues

63. With respect to the translation of documents, the Secretariat noted that the Program and Budget Committee would deliver to the membership a document on the implications of having translations of documents for WIPO meetings in the three additional UN languages. In the meantime, the Secretariat gave preliminary figures on an estimation of translation cost for SCP documents. For example, the translation into three additional languages of four SCP documents with 30 pages each, and assuming that there were two sessions of the SCP per year, would cost around 150,000 Swiss francs per year. Was the SCP to consider four documents having 50 pages each, then the cost would be around 250,000 Swiss francs per year.

- (a) *Patents and standards***
64. Discussions were based on document SCP/13/2.
65. The Delegation of Spain, speaking on behalf of the European Union and its 27 Member States, stated that the preliminary study regarding standards and patents provided a clear description of standards and standard-setting processes. The study referred to the need to clarify the relationship between the standardization system and the patent system, and provided information on possible mechanisms for preventing conflicts. The study tackled a large number of important issues, including the patent policies of standard-setting organizations, patent pools, legal mechanisms within the patent system, competition law aspects, dispute settlement and technical and patent information available under the patent system and the standardization system. The Delegation emphasized that the European Union and its 27 Member States attached great importance to those issues. For example, the question of “Industrial Property Rights and Competition” was one of the challenges identified in the European Commission’s document, “An industrial property rights strategy for Europe”, published in July 2008. The Delegation stated that within the framework of that strategy, the Commission intended to make an assessment of the interplay between intellectual property rights and standards, particularly in relation to information and communication technologies. The Delegation supported further debate on those matters.
66. The Representative of the ICC observed that companies sought both to harmonize the way in which goods and services were designed through standards and to gain part of the return on investments through patent protection. Companies owning patents essential to the standard might seek to get a return on their investments through patent licenses, charging royalties in exchange for agreeing to share their proprietary technology with all implementers. Without that possibility, patent owners might be reluctant to participate in standard-setting activities and contribute with their technologies to new standards. He noted that while companies’ viewpoints on the inclusion of patented technology into standards might vary depending on whether the company was a patent holder, an implementer of the standard, or potentially both, they generally were concerned about the costs associated with implementing the standard. The existence of

many patent holders owning essential patents on a single standard might increase that concern. There was also a concern in respect of patent holders who might not be willing to license their essential patented technology to all implementers on reasonable terms. The Representative acknowledged that to ensure a wide dissemination of standardized technologies while maintaining incentives for innovation, several approaches were pursued to prevent possible conflicts. He noted that most standard-setting organizations sought an early disclosure of the existence of essential patents, and had requested that the patent holders declare their willingness to offer licenses to all implementers on fair, reasonable and non-discriminatory terms and conditions. Potential implementers could then contact the patent holder and discuss details of the licensing terms, which often would be customized to address all of the implementer's specific needs. There was a possibility that, once the standard was finalized, the patent holder might seek unreasonable licensing terms and the implementer would be pressured to accept them. That scenario was called "patent hold-up" or "patent ambush". The Representative, however, noted that patent hold-ups rarely occurred, in part because most participants who were interested in the standard's success and widespread implementation were motivated to act reasonably. More recently, some participants had required more transparency early in the standardization process ("*ex ante*" or before the standard was completed) of the maximum amount of patent royalties that might be charged on standard compliant products and/or services in connection with the patent holder's essential patent claims. He stated that, due to a number of reasons, the "*ex ante*" approach had not succeeded in some technology areas, e.g., telecommunication. Most standard-setting bodies that had considered the "*ex ante*" approach had permitted a voluntary *ex ante* disclosure of licensing terms to the standard-setting body, but had not required it. He explained that some companies preferred to negotiate a customized license that might address issues beyond just the essential patent claims, and that some patent holders did not actively seek licenses from implementers. The Representative believed that the scope of the exclusive patent rights was carefully designed under national patent laws in order to strike a balance between the legitimate interests of right holders and third parties. While noting that there had been some suggestions to exclude subject matter from patent protection or provide broad exceptions and limitations to the enforcement of patent rights to address concerns about patents and standards, the Representative disagreed with those suggestions and believed that neither the international patent system nor its national implementation required changes to address those concerns. In his view, the support for that position was found in the observation made in the preliminary study prepared by the Secretariat that "no national legislation includes a specific provision limiting the right conferred by a patent the exploitation of which is essential for the implementation of a standard." He further observed that some had suggested more aggressive use of commercial and competition law as a legal mechanism to challenge the abusive or otherwise illegal conduct of any patent holder or of any collective group of implementers. In this vein, he agreed with the statement in the document that "collaborative standard-setting activities, if properly conducted, may have competitive advantages to society at large" but that "if a standard-setting process is manipulated or disguised so that the participants, who are often competitors, could gain unfair competitive advantages *vis-à-vis* other competitors, such a process is likely to fall under the scrutiny of a competition authority."

67. The Representative of KEI complemented the Representative of the ICC for providing an explanation of issues that could go wrong within standard-setting processes when patents were involved. In his view, consumers encountered two different kinds of problems involving patents and standards; the first one was the case where the standard itself created market power, i.e., a patent that might not have had any monopoly power created a monopoly power through the standard itself. This might be the case where the standard was legally mandated, such as the case of reformulated gas in California, or

where it was very important so that everyone would likely use it. He considered that when excessive royalties were charged in the above cases, it could result in a high price of the products. The Representative stated that another problem that patents could create was a barrier to innovation. He disagreed with those who stated that there were not too many abuses like patent ambushes, and stated that, in reality, businesses complained about their difficulty in some areas in developing standards and were concerned about the problem of investing in products and bringing them to the market. In addition, since the existing mechanisms did not effectively deal with parties external to the standard-setting process, businesses were concerned about finding out about relevant patents later. He stated that some businesses acquired patent rights only for the purpose of enforcing them. Therefore, where abuses of patents came from parties that were not part of the standard-setting process, he suggested that a possible role for WIPO be to deal with those cases through the disclosure of essential patents by patent holders who had not participated in the standard-setting process. He considered that such a disclosure mechanism would allow standard developers to make a sound decision. The Representative wondered whether there was enough global thinking about the control of allied competitors' practices or abusive behavior. He noted that a broader collective effort to come up with a common understanding or some kind of open standard could be envisaged. The Representative expressed the hope that the Committee could bring forward specific concrete proposals in that area. He reiterated that the easiest first step would be to address the disclosure issue associated with those who stayed outside the standard-setting process and to try and develop global norms on it, as well as to study the effectiveness of ways of dealing with excessive royalty demands by patent holders for technologies associated with standards.

68. The Representative of TWN stated that the functioning of many standard-setting organizations had been criticized. Academicians, society organizations and developing country governments had pointed out the absence of effective participation, non-transparency and corporate capture in standard-setting processes of many standard-setting organizations. He noted that the intellectual property protection of standards, especially patenting of standards, was a matter of concern for developing countries, because of its potential and actual use as an obstacle to frustrate competition with developing country enterprises. He was of the view that such practices had adverse implications for the industrialization of developing countries. He stated that there were well-documented cases of misuse of IPRs, especially in relation to patent protection of standards. Often patent protection of standards resulted in patent hold-ups, royalty stacking and refusal to license. In his opinion, mechanisms envisaged by many standard-setting organizations like disclosure requirement, royalty-free licenses, or reasonable and non-discriminatory terms did not offer an effective solution. As an example, the Representative quoted a study with respect to patent searches in the database of the ITU and in the patent pools by the South Center, which found that the patents listed for the implementation of the international standard MPEG-2 in ITU were far less comprehensive and important compared to those listed by MPEG LA for commercial licensing in implementing that standard. The same study also showed that often patent holders refused to license on a royalty-free basis and demanded high royalty rates. Similarly, the enforcement mechanism provided by the patent policies of standard-setting organizations were either not-existing or ineffective. Therefore, the Representative was of the view that there was an urgent need to change the current scenario in order to facilitate access to patent protected standards to developing country enterprises on an equitable basis. He noted that, in the long run, the governments should take steps at the international and domestic levels to eliminate proprietary standards and promote open standards. The Representative urged the Member States to take a pro-active role in regulating the standard-setting processes, instead of leaving it to the self-regulation of concerned stakeholders. Against that background, he urged the SCP to

look at how far the flexibilities available within and outside the patent regime, including compulsory licenses, could be used to facilitate access to patented standards. In relation to the preliminary study on standards and patents, the Representative stated that the issue had great implications on the policy space for developing countries. In his view, the preliminary study did not make any analysis of the implications of patent protection of standards on the industrial development of developing countries. Further, he stated that the preliminary study needed to provide a few case studies wherein patent protection on standards resulted in problems related to access, as well as competition law. In his opinion, that type of study would help to enhance the understanding on the implications of patent protection of standards and facilitate an informed discussion. In addition, he considered that the study fell short of providing a critical analysis of the policies of listed standard-setting organizations. In his opinion, the study should outline the positive and negative aspects of harmonized patent policies and of the implementation of common guidelines of the ITU's Telecommunication Standardization Sector (ITU-T), the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC). In conclusion, the Representative reiterated that the study also needed to look at the use of flexibilities available in patent law, including compulsory licenses to address concerns relating to the patent protection of standards. He was also of the opinion that the study should add information on the details of patented standards, in the form of, for example, a non-exhaustive list of patented standards, which would enhance the understanding of Member States on the critical nature of the issue.

69. The Representative of ECIS stated that he focused on IP issues concerning interoperability and competition. The Representative stated that the SCP's focus on standards and patents had captured the attention of ECIS, since the issue was an extremely important one in which WIPO could play a constructive role, both in pursuing concrete measures and in competence-building. In his opinion, the latter was especially important in the developing world, which was heavily affected by those issues, but not involved in or necessarily aware of the relevant standardization processes and consequences. While noting that patents and standards were intended to achieve similar goals to encourage innovation and the development of new products, benefiting consumers and economic development, the Representative stated that their interplay was generating greater problems. For example, failure to disclose patents essential to the implementation of standards and excessive royalty demands threatened the viability of standards and the consumer welfare. The Representative believed that WIPO could play a crucial role in understanding and devising solutions to those problems, and encouraged the Committee to pursue them.
70. The Delegation of Uruguay stressed the need to continue studying the issue. It particularly emphasized the need to further analyze the cases involving conflicts between standards and patents with a view to finding possible solutions at the multilateral level.

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

71. Discussions were based on documents SCP/13/3 and SCP/14/7.
72. Referring to the study relating to exclusions, exceptions and limitations commissioned to external experts, the Secretariat informed the Committee that it had identified a renowned academician, Professor Lionel Bently from the University of Cambridge, who would be coordinating the study and had been given all the instructions received from the Committee. Further, Professor Bently had been asked to identify five experts from five different regions of the world renowned for their knowledge in the field of intellectual property. Consequently, in addition to Professor Bently, the following experts would be involved in preparing the study: Professor Denis Barbosa (Brazil); Professor Shamnad

Basheer (India); Professor Richard Gold (Canada); Professor Brad Sherman (Australia); and Professor Coenraad Visser (South Africa). The Secretariat further noted that the study would be submitted to the Committee at its following session.

73. The Delegation of Brazil presented its proposal on exceptions and limitations to patent rights (document SCP/14/7). The Delegation emphasized that the law of patents was essentially a trade-off between the granting of temporary and exclusive rights as a *quid pro quo* for the dissemination of technological progress to the benefit of the entire society. The patent system must therefore strive for a balance of rights among all its users. Accordingly, the interests of not only IP title holders, but also the society as a whole should be taken into account. The Delegation stated that exceptions and limitations were intrinsic elements of every law, and that that was also applicable to the various patent systems. The Delegation observed that exceptions and limitations of patent rights served a number of purposes by allowing both for the necessary flexibility to guarantee national security, for example, and for a space to shape public policies to meet development, competition policy and health policy goals. While noting that the proposal was of a straightforward nature, the Delegation clarified that it was not attempting to create new legislation. The first and foremost goal of the proposal was to introduce a three-phase work program on exceptions and limitations into the SCP. What it aimed at was an empirically-based exercise of sharing concrete national experiences and, in that sense, it was not a substitute for, but rather a complement to, the study that had been commissioned by the Secretariat and which would be ready by the following session. The Delegation welcomed that study, and especially the fact that it was going to take on board the views and experiences of different parts of the world. In presenting the proposal, the Delegation wished to provide for a different knowledge on how the system worked in practice as far as exceptions and limitations were concerned. The Delegation noted that the result of the exercise might be, for example, a compilation of a non-exhaustive handbook. It was of the view that such a handbook might form the basis for capacity building activities in developing countries in line with the Development Agenda. While emphasizing the importance of the start of the project, the Delegation concluded that there was a gap between the existing legal framework on exceptions and limitations and its effective use by developing countries. Therefore, the main goal of the proposal was to bridge that gap.
74. The Delegation of Ecuador supported the statement made by the Delegation of El Salvador on behalf of GRULAC. The Delegation supported the agenda of the SCP which, in its view, benefited all Member States and took into consideration the Development Agenda. The Delegation supported the Delegation of Brazil's proposal on the future work of the SCP as regards exceptions and limitations, which would include a process for identifying the exceptions and limitations in different legislations, an assessment as to their effectiveness in relation to development, and carrying out a non-exhaustive analysis of those flexibilities. The Delegation stated that Ecuador had analyzed and would continue analyzing the proposal which it endorsed. Furthermore, the Delegation offered its support in developing the proposal of the Delegation of Brazil, because the proposal was fully in line with Ecuador's IPR policy that considered IPR as a tool for development. As an initial step, the Delegation suggested that the proposal of the Delegation of Brazil include a description of experiences of countries with exceptions and limitations and the identification of case law in that area. Furthermore, the Delegation considered it important that the final result should be a reference document, advising ways on how not to restrict exceptions and limitations and not exclude other possibilities which could benefit the development of countries.
75. The Delegation of Argentina endorsed the statement made by the Delegation of El Salvador on behalf of GRULAC. The Delegation stated that Argentina was particularly interested in the issue of exceptions and limitations which was closely related to the

general principles of the WIPO Development Agenda. In particular, the Delegation welcomed the Delegation of Brazil's proposal in paragraphs 25 to 28 of document SCP/14/7. The Delegation was of the view that establishing a work program on exceptions and limitations would contribute to the effective implementation of the Development Agenda.

76. The Delegation of El Salvador, speaking in its national capacity, was of the view that the proposal of the Delegation of Brazil was extremely valuable and therefore should continue being part of the basic working document in order to continue promoting and strengthening the mobility of the work carried out in the Committee.
77. The Delegation of Spain, speaking on behalf of the European Union and its 27 Member States, thanked the Delegation of Brazil for preparing the document, which would contribute to enriching the discussions. Without considering the merits of the document, the Delegation expressed its surprise for the submission of the document on the first day of the Committee in one language and without it being available on WIPO's website. While noting that the European Union and its 27 Member States were ready to participate in the discussion, the Delegation expressed its concern about that kind of procedure which made it difficult for countries to participate in the process. The Delegation reminded the Committee that the document which was being prepared by the group of external experts for the following meeting would deal specifically with that issue. In its view, the discussion of both issues at the following meeting would give a complete overview of the situation and avoid duplication of work.
78. The Delegation of Guatemala supported the statement made by the Delegation of El Salvador on behalf of GRULAC. The Delegation noted that exceptions and limitations were part of the checks and balances of the international patent system, since they guaranteed the dissemination of technology embodied in the invention. It considered that developing countries should use those policies in a sensible way, draw the maximum benefit from intellectual property, and be able to adapt patent policies to their particular circumstances and realities. In its view, the Delegation of Brazil's proposal would assist developing countries in designing and implementing their public policies, particularly, as regards health and competitiveness. The Delegation stated that Guatemala supported the three-phase work program proposed by the Delegation of Brazil and hoped that it would be able to participate in the exercise in order to share its national experiences. Furthermore, the Delegation requested the Secretariat for clarification as regards the study that had been commissioned to external experts. In particular, the Delegation questioned whether the Committee had given the Secretariat a mandate to commission the study to a group of external experts, and whether the study would take into account the economic aspect of the issue. The Delegation hoped that the study would not just analyze the legal aspect of the issue, but would also focus on economic aspects which would enable the evaluation of the economic consequences of exceptions and limitations in various countries.
79. The Delegation of Germany thanked the Delegation of Brazil for the presentation of its proposal. The Delegation noted that it had expected the study by the external experts agreed upon on the previous session of the SCP to be presented in the current session. While the Delegation appreciated the explanation by the Secretariat on the issue, it nevertheless expressed its concern about the level of information Member States had enjoyed during the process of selecting and commissioning the external experts. The Delegation stated that Germany was looking forward to a constructive and fruitful debate on the issue of exceptions and limitations to patent rights once all relevant information became available in the forum. The Delegation concluded by saying that it fully supported the statement made by the Delegation of Spain on behalf of the European Union and its 27 Member States.

80. The Delegation of Sudan stated that technology transfer as well as exceptions and limitations represented a great interest for its country. With respect to technology transfer, the Delegation believed that it was very important to establish a patent system which was equitable and efficient. The Delegation underlined the importance of the issue of technology transfer to developing countries especially in the area of health, communication and information transfer.
81. The Delegation of Oman thanked the Delegation of Brazil for its proposal. The Delegation paid tribute to the proposal which outlined a three-phase process in order to establish a plan of action for the SCP, aiming at creating an effective strategy with respect to exceptions and limitations. The Delegation was of the view that, up to that time, the use of exceptions and limitations to patent rights had remained rather limited, especially in developing countries. The Delegation therefore supported the idea of further studies in that area.
82. In reply to the query from the Delegation of Guatemala concerning the scope of the study commissioned to external experts, the Chair stated that the study would include the economic aspects of the issue, and it would also reflect on the comments made by the Members of the Committee.
83. The Delegation of Switzerland thanked the Delegation of Brazil for the proposal and the presentation which further clarified the goal of the initiative. The Delegation however noted that, due to the late submission of the proposal, it required further time to study it in detail in order to provide comments. The Delegation expressed its interest in looking at how the proposal could be integrated into the further work of the SCP. The Delegation was of the view that it was important to wait for the results of the study commissioned to external experts on exceptions and exclusions to have a complete overview of the situation before any determination of the future work program on the issue was made. While the Delegation reaffirmed its commitment to the discussion and active participation in the debate, it however observed that it was premature to take a decision on the proposal made by the Delegation of Brazil at the present session of the SCP.
84. The Delegation of India thanked the Delegation of Brazil for the very positive proposal and noted that exceptions and limitations to IP rights were an extremely important issue for India, since they related directly to access to knowledge, access to educational resources, transfer of technology, etc. Therefore, the Delegation expressed its full support for the steps proposed in paragraphs 25, 26 and 27 of document SCP/14/7, and viewed the suggestions as a productive manner of taking forward the deliberations on that issue in the Committee. The Delegation urged for the work in that area to be undertaken along the lines proposed in that document. Further, the Delegation requested the Secretariat to clarify the terms of reference for the study commissioned to external experts in order to shed light on what to anticipate from the study. In addition, the Delegation advised that constraints in implementing the limitations and exceptions in the patent law should be included in the Brazilian proposal. While noting that the document was very exhaustive, the Delegation thought that the proposal shed little light on the rule of exceptions and limitations. Therefore, the Delegation considered that the rule of exceptions and limitations should be highlighted in more detail, particularly with reference to implementing the policies by the governments with regard to public health and other issues. Further, the Delegation noted that there were certain inaccuracies in the document prepared by the Secretariat in relation to provisions on compulsory licenses in the Indian patent law. In particular, the Delegation noted that apart from the general provisions on compulsory licenses that were mentioned in the document, there were some special provisions on the grant of compulsory license when there was immediate urgency in the case of a public health crisis. The Delegation requested those provisions to be reflected in the preliminary study.

85. The Delegation of China stated that exceptions and limitations as well as exclusions from patentable subject matter were an extremely important subject in patent law. Noting the current crisis in the area of public health, as well as food security, the Delegation emphasized the importance of carrying out a detailed study on exceptions and limitations. The Delegation, therefore, supported the Brazilian proposal and noted that the three phases mentioned in paragraphs 25, 26 and 27 of document SCP/14/7 would be simple to implement.
86. The Delegation of the United States of America thanked the Delegation of Brazil for its proposal on exceptions and limitations. The Delegation recalled its intervention at the SCCR in December 2009. The Delegation expressed its belief that strong intellectual property rights and enforcement provisions were not inconsistent with exceptions and limitations, and pointed out that exceptions and limitations complemented strong intellectual property rights and enforcement. Therefore, the Delegation noted that it was pleased that the Secretariat had commissioned a study on exceptions and limitations to be conducted by academic experts from various countries. The Delegation observed, however, that the issue should be studied systematically, and that therefore, the study should be the first deliverable that it wished to consider on exceptions and limitations. The Delegation was of the view that the rationale and systematic evaluation of whether more work was needed in the area could be made after that deliverable had been produced.
87. The Delegation of the Plurinational State of Bolivia supported the proposal of the Delegation of Brazil on exceptions and limitation to patent rights. Referring to document SCP/13/3, the Delegation stated that some of the elements in that document needed to be developed further. The Delegation stated that the Government of the Plurinational State of Bolivia had been following the Committee's work with great interest, because patentable subject matter, when it related to life, was very important. The Delegation recalled that the Committee had decided in its last meeting to commission a study to external experts which would include the issue of patentability of life forms. The Delegation wished to transmit to the group of experts and the Secretariat certain elements to be taken into account upon analyzing the study, including the current trends in patentability of life forms. The Delegation observed that, since the adoption of the TRIPS Agreement, there had been a great proliferation of patents and patent applications for life forms, such as plants, animals, genes and other living organisms. The Delegation stated that according to a recent report from the Action Group on Erosion, Technology and Concentration on Patents and Climate Change, a big number of major plant companies were filing patent applications on plant seeds that could withstand natural disasters. The Delegation further reported that there were ten companies that owned more than two-thirds of intellectual property on seeds. The Delegation emphasized the fact that in many countries, patent claims were not just covering genetically modified organisms (GMOs), but also plants and animals which had been bred by traditional means. The Delegation believed that the study should focus on the trends on patentability of life forms, the sectors where such patentability had the greatest impact, the type and the nature of patent protection with regard to life forms and the countries of origin of patent applications relating to life forms. Further, the Delegation was of the opinion that the study should include an analysis of the ethical and moral aspect of patentability of life forms. The Delegation considered that the patentability of life forms had negatively affected many cultures. Therefore, in the Plurinational State of Bolivia, there was a prohibition on the patentability of plants, animals, microorganisms and all other life forms. Moreover, the Delegation was of the view that the study should take into account the economic, social and cultural impact of patentability of life forms in developing countries, particularly the impact on public policies, indigenous people, agricultural producers and their traditional practices, as well as the right to keep and exchange their seeds and sell their harvest. The study should also take into account

anti-competitive practices which stem from the patentability of life forms. The Delegation stated that it was very important to deal with the subject from a historical perspective focusing, for example, on developing countries and the impact of GMOs on their culture, food security and public policy. In conclusion, the Delegation reiterated that the study should focus on the patentability of life forms, socio-economic development and public policy. The Delegation expressed the hope that the contents of the study would be objective, evidence based, adequately referenced and include the analysis of the issues that it had raised in its statement, particularly because of the importance that they held for developing countries. The Delegation requested information on the external experts, including their biographies.

88. The Delegation of Angola, speaking on behalf of the African Group, welcomed the proposal made by the Delegation of Brazil which, in its view, represented a way to set up a three-phase working plan on exceptions and limitations of the patent system. The Delegation stated that the African Group reserved its right to revert to the issue during the course of the current session after having had further consultations with the Delegations of Brazil and GRULAC. In principle, the African Group did not have any objection to the proposal, and therefore, wished to contribute to supporting the proposal in a constructive manner.
89. The Delegation of Egypt supported the proposal of the Delegation of Brazil on the issue of exceptions and limitations to patent rights. The Delegation believed that the proposal pertained to some very important issues, primarily because it analyzed and offered a diagnosis of a current ailment in the international patent system. Referring to paragraph 6 of the proposal, which stated that the current IP system was heavily characterized by ensuring rights to the IP title holders, while those claims were undoubtedly legitimate, they were certainly incomplete from the public policy perspective. Paragraph 10 of the proposal further pertained to the possibility of a way out which was delving into the fundamentals of the patent system, particularly, a need to revisit and revise old assumptions and to recover the essentials of the patent system. The Delegation noted that while the proposal pertained directly to issues of development and of particular concerns raised by developing countries, it was undoubtedly an issue that was cross-cutting in terms of the interest of the membership across the spectrum in the organization, because it essentially entailed to consumers and users of the patent system *vis-à-vis* the owners. The Delegation expressed the opinion that the three-phase approach proposed by the Delegation of Brazil would enable the Committee to learn from the developed countries who had developed systems that protected consumers through exceptions and limitations in the patent system. The Delegation stated that the three-phase approach elaborated in paragraphs 25 to 27 was a solid way forward, and supported the links between the proposal and the Development Agenda as reflected in paragraph 28 of the document. In addition, the Delegation appreciated the global approach that the proposal offered to the issue of exceptions and limitations. In its opinion, only through a global approach would the Committee be able to develop proper policies and strategies in relation to exceptions and limitations, rather than adopting a piece-meal approach to the issue. Further, referring to the study commissioned to external experts, the Delegation noted that there was no expert from the Arab Region. In its view, the group of experts should include an expert from the Arab Region, as such expert would be able to elaborate and would have a better grasp of the issue in relation to that region.
90. The Delegation of the Islamic Republic of Iran stated that exceptions and limitations played an essential role in creating a balanced IP system and could provide an important policy space for policy makers in managing their development process. The Delegation was of the view that the second and third phases of the Brazilian proposal were of great importance to developing countries, as it represented a valuable effort to bridge the gap

between existing provisions on exceptions and limitations and their actual implementation, and proposed new possible areas for transfer of technology and public policy issues. The Delegation stated that the fact that the study by external experts had not yet been submitted to the Committee should not hinder Member States from proposing a work program. In conclusion, the Delegation expressed its appreciation to the Delegation of Brazil for its valuable proposal and supported its inclusion into the work of the Committee.

91. The Delegation of Sri Lanka noted that the issue of exceptions and limitations was at the heart of the Development Agenda and that the Brazilian proposal captured that aspect. In its view, the proposal facilitated the SCP to be more supportive of development. Therefore, the Delegation supported the proposal by the Delegation of Brazil and commended the Brazilian government for its pro-active role. The Delegation hoped that the discussions would take into consideration the interests of technologically less advanced countries, like Sri Lanka, with small domestic markets, particularly in applying exceptions until they achieve the required level of technological development.
92. The Delegation of Pakistan expressed its full support to the proposal made by the Delegation of Brazil on exceptions and limitations to patent rights. It pointed out that exceptions and limitations and their correlation with the development perspective was actually inherent in nature. The Delegation further stated that the three-phase approach mentioned in the Brazilian proposal, on paragraphs 25 to 27 of document SCP/14/7, was a very systematic approach, and therefore, represented a very clear way forward.
93. The Delegation of Australia acknowledged the scale and importance of the topic on exceptions and limitations to patent rights which were at the heart of the balance inherent in the patent system. The Delegation noted that sufficient time was needed for consideration of the issue, and stated that the study by external experts would be a significant piece of work which would provide valuable information that could form the foundation of the future work on that topic. Noting that the study commissioned to external experts would not be available to Members until the next session of the SCP, the Delegation preferred discussions on the Brazilian proposal to be deferred until October 2010. The Delegation was of the opinion that that would enable the SCP to have a more complete view of the issue and to consider the proposal in detail.
94. The Delegation of Japan informed the Committee on the updates that took place in Japan since the previous session of the SCP with regard to the exclusions from patentable subject matter. Inventions related to medical activities had not been considered as patentable subject matter on humanitarian grounds in Japan. Accordingly, under the Japanese Patent Law, it had been interpreted that medical practices had not fallen under the category of industry, and thus medical method inventions had been excluded from patentable subject matter in the sense that they had been considered to be lacking industrial applicability. However, the Delegation noted that there had been some opinions that medical method inventions should be protected in order to develop medical technologies. Aiming at a further development of those technologies in the medical science, the examination standards had been revised in November 2009 by expanding the range of patentable subject matter to those inventions concerning novel dosage and administration of medicines, as well as methods of gathering data for diagnosis. While thanking the Delegation of Brazil for the efforts to submit a new document, the Delegation noted that it had received it the previous day, and therefore needed some time to study it. The Delegation was of the view that it was premature to decide on the work program based on document SCP/14/7, in view of the forthcoming study commissioned to the external experts.
95. The Delegation of Kyrgyzstan expressed its gratitude to the Delegation of Brazil for its proposal which it believed was a good basis for discussions within the framework of the Committee. However, the Delegation noted that, given the insufficient time for

consideration of the document, it was unable to state its view on the proposal at that session. Therefore, the Delegation requested the discussion on the proposal to be deferred until the following session of the Committee when the study by the external experts would also be available.

96. The Delegation of the Russian Federation thanked the Delegation of Brazil for its valuable proposal on exceptions and limitations to patent rights. The Delegation stated that practical action was needed in order to achieve results in that area. Nevertheless, the Delegation was in agreement with the views expressed by the Delegation of Spain on behalf of the European Union and its 27 Member States and the Delegation of Kyrgyzstan on behalf of the Regional Group of Certain States of Eastern Europe, Caucasus and Central Asia, who stated that the consideration of that document should be made at the following session of the SCP, together with the study submitted by the external experts. In addition, the Delegation stressed the importance of the group of external experts being composed by representatives of all main regions. Further, the Delegation noted that the proposal by the Delegation of Brazil could constitute one of the new issues for analysis as the list of issues was not exhaustive and open for new topics.
97. The Delegation of Algeria supported the statement made by the Delegation of Angola on behalf of the African Group and thanked the Delegation of Brazil for its proposal on exceptions and limitations to patent rights. The Delegation was of the view that the proposal correctly analyzed the obstacles which impeded the implementation of flexibilities that were foreseen in international arrangements. Therefore, in its view, the discussions within the SCP should contribute to finding solutions for the effective realization of exceptions and limitations in the patent system in order to respond to the needs of developing countries as regards development and public policy. The Delegation expressed the wish that the work program mentioned in the proposal be taken up in the future work of the Committee. Nevertheless, in order to avoid duplication, the Delegation expressed the view that the proposal should be discussed together with the study to be submitted by external experts at the following session. In relation to the study commissioned to external experts, the Delegation supported the proposal of the Delegation of Egypt that an expert from the Arab region should be included so as to reflect the expertise of that region.
98. The Delegation of Panama joined the other delegations who had supported the proposal put forward by the Delegation of Brazil which included a reference to the balance in the patent system. The Delegation agreed with the statement made by the Delegation of Brazil that its proposal would contribute to the review of the issue on exceptions and limitations to the rights conferred by patents. The Delegation noted that the topic was of great importance within the Committee, as it was directly related to the Development Agenda.
99. The Delegation of Indonesia recalled its statement made at the previous session of the SCP according to which the preliminary study on exclusions from patentable subject matter and exceptions and limitations to the rights had not sufficiently explored the experiences of developing countries in approaching the issue. The Delegation thus supported the Brazilian proposal, as it suggested a constructive three-phase work program on how to enrich and follow-up the preliminary study carried out by the Secretariat. While expressing its understanding that other delegations had not had sufficient time to study the proposal, the Delegation suggested to focus on the last part of the proposal which provided a simple but concise idea on the future work program for the SCP on the issue.
100. The Delegation of Norway considered the issue of exclusions from patentable subject matter and exceptions and limitations to the rights to be an important one. The Delegation looked forward to the study commissioned to external experts to be presented at the following session of the SCP. While welcoming document SCP/14/7 from the

Delegation of Brazil as a contribution to the upcoming discussions, the Delegation expressed its concern about the sequence on how the different items were being handled. For instance, it would be advantageous to look at exceptions and limitations in context with the substantive standards for protection. Such substantive standards could be national, regional or international. The Delegation was of the view that without discussing those items in context, the picture would be incomplete. In conclusion, the Delegation of Norway agreed with the statement made by the Delegation of Spain on behalf of the European Union and its 27 Member States and other delegations speaking in favor of postponing the discussion on document SCP/14/7 to the following session of the SCP. The Delegation believed that the consideration of that document, together with the study provided by external experts, would provide a broader basis for discussions.

101. The Delegation of Chile stated that exclusions and limitations to patent rights should not be considered as an impediment or a barrier to innovation and to the process of creation in general. On the contrary, in its view, they were essential flexibilities in the intellectual property system in which they represented a balance in the system. The Delegation noted that there was a need to facilitate access to information and transfer of technology through those tools. In its view, that approach would make it possible to have greater innovation to invigorate the development of knowledge and access to technology which was considered as being a fundamental topic of public interest at a global scale. Along those lines, the Delegation considered the proposal submitted by the Delegation of Brazil to be a starting point for delving into that topic. The Delegation welcomed the fact that a number of countries had supported the proposal, and no one had opposed it. The Delegation stated that it was necessary to complement the existing studies with information and specific materials on the implementation of flexibilities which existed in the national and international legal systems. The Delegation further invited members of the SCP to share any relevant information on the practical national situation on exclusions, exceptions and limitations with the objective to make specific headway in that field and to improve the understanding on the worldwide application of those flexibilities. Those contributions could be shared with the external experts who would develop the study by October 2010, in order to make it as comprehensive as possible. The Delegation considered that the topic was directly linked to the strategic objectives of WIPO to develop a well-balanced agenda, and therefore, it should be given the greatest importance in the Committee.
102. The Delegation of Uruguay joined other delegations who were members of GRULAC in supporting the Brazilian proposal. It stated that the proposal should become part of the discussions in the Committee. The Delegation observed that the proposal was not incompatible with what had already been decided by the Committee, particularly with the study being carried out by the external experts. The Delegation noted that the proposal was needed in the Committee as it would give it a meaning to its future work as regards limitations and exceptions. It expressed the view that the topic on exceptions and limitations should be given intensive and extensive treatment, not only for the benefit of producers of technologies, but also for the benefit of consumers who should use those technologies to meet their basic needs. The Delegation also supported the interventions of other delegations regarding the way of moving forward and the selection of external experts. In that regard, the Delegation noted that it was informed only about the composition of the group of external experts to whom it wished to provide comments at a later stage. Further, the Delegation considered that the Committee should think about other possible contributions to the work of the external experts in drawing up the study. Along that line, the Delegation emphasized that the proposal made by the Delegation of Brazil and supported by other delegations should be an important element to be considered in the study.

103. The Delegation of Guatemala supported the proposal made by the Delegation of the Plurinational State of Bolivia that the study should look into bioethics and patentability of life forms. The Delegation recalled that those requirements had been expressed by the Delegation of the Plurinational State of Bolivia in the previous meeting and had been supported by its Delegation as recorded in paragraph 102 of the report of the 13th session of the SCP (document SCP/13/8). The Delegation also supported the proposal made by the Delegation of Sri Lanka that the study should reflect the effects of exceptions and limitations on small developing countries, so that those countries could benefit from some guidelines on those issues. The Delegation observed that exceptions and limitations were closely related to production and access to pharmaceutical products and medicines in many countries. The Delegation noted that the current mechanism did not stimulate innovation in the field of medicines in a manner that enabled developing countries to negotiate with patent holders and meet the needs of all stakeholders. The Delegation was of the view that it was necessary to add studies on the return on investment and the development of new medicines. The Delegation stated that, thus, the Committee could evaluate mechanisms in order to make better use of exceptions and limitations and safeguard access to medicines for the public. The Delegation proposed that such information be included in the third phase of the Brazilian proposal.
104. The Delegation of the Bolivarian Republic of Venezuela supported the statement made by the Delegation of the Plurinational State of Bolivia, which had a strong link to human rights, such as the right to life, the right to food, the right to health, as well as to the Development Agenda. The Delegation observed that WIPO was part of the United Nations system, and therefore could not stand aside from what was agreed to in its agreements on human rights. Further, the Delegation suggested that the terms of reference of the external experts be made available to the Committee. The Delegation also welcomed the proposal made by the Delegation of Brazil as a first step in the discussion on that topic. Further, it agreed with the Delegation of Brazil regarding the TRIPS Agreement and the Declaration on the TRIPS Agreement and Public Health, contained in paragraphs 13 and 14 of document SCP/14/7. In relation to paragraph 27 on the elaboration of an exceptions and limitations manual, the Delegation stated that such an approach should not limit existing flexibilities.
105. The Delegation of the United Kingdom thanked the Delegation of Brazil for the proposal on exceptions and limitations to patent rights. The Delegation observed that it was an interesting and complex issue, and that even countries with long-standing compulsory licensing provisions in their laws might find it not really necessary or even useful to invoke them. In its view, that fact made it even more important to have the full picture of the issues which the Delegation believed would get from the external experts. The Delegation reiterated that it was willing to participate in a constructive debate on the issue. However, given the short period of time that it had had to consider the Brazilian proposal, and noting that the experts' study which had been mandated by the Committee was due in October 2010, the Delegation believed that it was premature to come to a conclusion on the issue at the current session. Therefore, it supported the statement made by the Delegation of Spain on behalf of the European Union and its 27 Member States to postpone the discussion on the document until the following session.
106. The Representative of ALIFAR noted that the proposal made by the Delegation of Brazil was clear and pragmatic, as it proposed to understand not only the national legislations, but also how they operated, in practice, in a particular country. In her view, it was a valuable contribution. The Representative stated that some academic works, including WHO documents, which provided regulations on compulsory licensing of many countries could contribute to the Brazilian proposal. The Representative observed that compulsory licenses were tools which must be at the disposal of governments to be used when they saw fit, for example, in order to meet some demands or ensure affordability. Therefore,

the Representative believed that it was essential for a country to have flexibilities as provided for in Articles 30 and 31 of the TRIPS Agreement and the Doha Declaration. As regards public health and the pharmaceutical sector, she attached special importance to maintain the freedom of countries to regulate patentable subject matter as prescribed in the TRIPS Agreement and other agreements.

107. The Representative of KEI supported the proposal made by the Delegation of Brazil on a work program on limitations and exceptions to patent rights. While observing that the flexibilities found in Part 3 of the TRIPS Agreement on the enforcement of intellectual property rights were implicit in the Brazilian proposal, the Representative suggested making that explicit. He further recalled that the US Supreme Court decision *eBay v. MercExchange* had set a precedent requiring US courts to consider the grant of non-voluntary authorizations to use patents as an alternative to granting injunctive relief. In light of the flexibilities contained in Article 44 of the TRIPS Agreement and the *eBay vs. MercExchange* decision, the Representative was of the opinion that it remained to be seen how other countries would effectively rely upon limitations on damages and injunctions to address a variety of public interest and access to knowledge issues. The Representative observed that the flexibilities contained in Article 44 provided countries the policy space allowing them to set the contours for enforcing intellectual property rights tailored to their national needs. In his view, the ability of countries to employ the Article 44 flexibilities on injunctive relief might be limited by proposals in the ACTA negotiations. The Representative reported that negotiators from 38 countries were holding a closed meeting in Mexico that week to consider a new trade agreement on the enforcement of intellectual property rights. While the Representative could not confirm whether that agreement would address the issue of enforcement of patents, in case it did, he suggested that the SCP request countries involved in that negotiation to make the negotiating text of ACTA public, so that its ramifications for the patent system could be discussed at the following session of the SCP.
108. The Representative of GRUR stated that the proposal by the Delegation of Brazil represented a huge package of different subjects. In his view, the subject of compulsory licensing should be dealt with separately and should not be included in the normal limitations, because a compulsory license was a tool in itself which had a separate legal basis in Article 31 of the TRIPS Agreement and, therefore, had different ground than the use of patented subject matter for private, non-commercial use which fell under Article 30 of the Agreement. In relation to certain uses concerning foreign means of transportation temporarily entering the national territories, the Representative stated that such exception was already regulated in the Paris Convention and in the Chicago Convention on the International Civil Aviation. He therefore considered that there was no controversy, although a question of interpretation might arise. The Representative however noted that, since the *bona fide* prior use was in itself a highly controversial subject, it should also be dealt with separately and not considered together with the ordinary limitations. Therefore, the Representative suggested that paragraph 22 of the proposal be divided into sub-topics in order to separate the ordinary limitations from the right of prior use and the compulsory licensing.
109. The Representative of TWN highlighted two developments which had implications on limiting the flexibilities available in the patent regime. In relation to the first development, the Representative stated that the European Union was negotiating or planning to negotiate with more than 80 developing countries free trade agreements in which, according to publicly available texts, it was likely to recur to limitations on exceptions for goods in transits, possible restrictions on parallel importations, possible weakening of effectiveness of compulsory licenses by data exclusivity and other provisions that would reduce remaining exceptions and limitations. The Representative further stated that the free trade agreements with the European Free Trade Association might also limit the

effectiveness of exceptions and limitations, such as compulsory licenses, by recurring data exclusivity. The Representative further stated that the Free Trade Agreements of the United States of America provided limited flexibilities in the past, for example, by removing the ability to exclude plants, animals or new uses from patentable subject matter and appearing to render some exceptions and limitations less effective, limiting the grounds for compulsory licenses and restricting parallel importations. Similarly, Japan's Free Trade Agreement, in particular the investment chapter, might also significantly limit the ability to exercise exceptions and limitations to patent rights. The Representative stated that another development was the enhanced enforcement initiatives mainly from the Member States of the European Union resulting in seizure of medicines which were in transit, compromising access to medicines in various developing countries, especially in Latin America and Africa.

110. The Delegation of Angola, speaking on behalf of the African Group, thanked the Delegation of Brazil for the valuable proposal. In order to build a consensus among Member States in a constructive manner, the Delegation requested that that item be maintained on the agenda of the following session in order to be able to have further discussions and take action on the issue.
111. The Delegation of Brazil, referring to the level of support expressed by other delegations, stated that its proposal was no longer the proposal of Brazil, but of several Member States. As had been noted by the Delegation of Chile, the Delegation recalled that nobody had spoken against the proposal. The Delegation said that there were some objections to the late submission of the proposal, but no objection to the content of the document. In relation to the comments made by the Delegation of Spain on behalf of the European Union and its 27 Member States, while the Delegation understood the difficulty that Member States were experiencing in examining the document given the short period of time, the Delegation stated that the proposal had been presented on the date indicated in document SCP/14/7, and that it was detrimental to the discussions that the document had not been translated accordingly and not been ready for the discussion at the current session. Further, the Delegation informed the Committee that the proposal had been submitted for the fourteenth session of the SCP because of the expectation that the study commissioned to external experts would be available at the same session in order to be able to discuss both issues at the same time, even though they were of different nature and dealt with different aspects of the same question. The Delegation underlined that the issue, as had been seen during the discussions, was a priority for several countries. Therefore, it expressed the hope that the study commissioned to external experts would be available at the following session and that its proposal be discussed again in conjunction with that study, but at the same time, as a separate issue. The Delegation pointed out that it did not wish to link the two documents, because the external experts' study would adopt a theoretical, academic approach which could expand on the existing framework, whereas its proposal had chosen a pragmatic approach which was based on experiences of countries in accordance with their national legislations. Against this backdrop, the Delegation agreed that its proposal be taken up at the following session of the Committee.
112. The Chair, noting that there had been some delegations who had requested more time to study the proposal by the Delegation of Brazil, suggested that the discussion on that document be postponed to the following session of the Committee.
113. An information document containing the names and CVs of the external experts preparing the study, as well as their terms of reference, was made available to the Committee (document SCP/14/INF/2).
114. The Chair clarified that Member States could send comments as regards the issues dealt within the external experts' study on exceptions and limitations, and that they would be

requested to take those comments into account in preparing the study. The Chair proposed to set a date to receive such comments.

(c) *The client-attorney privilege*

115. Discussions were based on documents SCP/13/4 and SCP/14/2.
116. The Delegation of Morocco noted that its country was modifying the current legislation in order to standardize the patent profession in its country, taking into account the professional privilege. It further noted that national and regional patent offices were bound by professional secrecy, and explained that the Moroccan Industrial and Intellectual Property Office was bound by provisions requiring secrecy. The relevant statute prohibited disseminating, using or publishing documents that the Office received through its services. The Delegation clarified that such a treatment gave reassurance to patent applicants while the Office was examining their applications.
117. The Delegation of Argentina was of the view that the client-patent advisor privilege was a matter of private law which belonged to national jurisdiction. As a result, the Delegation considered it appropriate to continue relying on Article 2(3) of the Paris Convention and Article 1.1 of the TRIPS Agreement.
118. The Delegation of Australia stated that the topic of the client-patent advisor privilege had recently received considerable attention in its country, and legislative changes in that area were currently considered. The Delegation, however, believed that international development was necessary to adequately address the issue. For that reason, it supported further discussion about the client-attorney privilege and professional secrecy in the Committee with the view to identifying common objectives and potential solutions.
119. The Delegation of India stated that the client-attorney privilege was regulated neither under the Paris Convention nor in the TRIPS Agreement. Therefore, it considered that each country should be allowed to set its level of privilege and extent of disclosure that suited its social or economic circumstances and its particular level of development. The Delegation was of the opinion that harmonizing the client-attorney privilege implied harmonizing the exceptions to the disclosure. It observed that, since the disclosure was a substantive element of the patent system, harmonization of the client-attorney privilege could have substantive implications and involve elements regarding substantive harmonization. It concluded that such harmonization would also keep more information out of the public domain, adversely affecting the quality of patents and access to information and innovation, especially for developing countries.
120. The Delegation of Spain, speaking on behalf of the European Union and its 27 Member States, stated that, in the framework of industrial property, freedom of communication between professional representatives and their clients was needed to apply for patent rights, prosecute patent applications to grant and when an opinion was requested regarding infringement or annulment of rights. In its view, the freedom of communication required necessarily that confidentiality of the communications was granted to them both with respect to third parties and particularly in the event of judicial proceedings. As a conclusion, the Delegation endorsed the recommendation for the next steps consisting of a detailed study on the treatment of the confidential information revealed to the professional representatives as granted by the different States. It noted that the questions that could be addressed were how confidentiality of communications between professional representatives and their clients in one country was recognized in other jurisdictions and what were possible options for a better recognition of the confidentiality of communications between the representatives and their clients beyond national borders. In addition, the Delegation was of the view that the detailed study to be prepared by the Secretariat should also be focused on the feasibility of international

regulations in that field. The Delegation considered that such prerogative was crucial to enable an appropriate communication, without reservation, between the client and his representative, enabling for the best defense of the client's interests.

121. The Delegation of France stressed the importance of the subject of the client-attorney privilege, and recalling the interest of users, renewed its commitment to continue working on that subject. The Delegation associated itself with the statement made by the Delegation of Spain on behalf of the European Union and its 27 Member States. In order to move forward, the Delegation requested the Secretariat to further study the treatment of confidential information across borders. In view of the importance of the issue for companies, the Delegation suggested that the Secretariat work on the possibility of setting up international rules in the patent-advisor privilege area.
122. The Delegation of Nigeria stressed the importance of clarifying the practices relating to the client-attorney privilege in different countries and their implications. Noting the differences between common law countries and civil law countries, the Delegation wondered whether the countries that had introduced such privilege with respect to legal professionals had based themselves on their own legal system or judicial system. Due to the territorial nature of patents, the Delegation was of the view that the privilege issue regarding patents was a matter to be addressed at the national level. He was of the opinion that possible actions at the international level were to bring ideas and institute a dialogue so that national activities could be strengthened. In that light, the Delegation supported the idea that the Secretariat engage in further studies that would provide more analysis on the issue.
123. The Delegation of the United Kingdom associated itself with the statement made by the Delegation of Spain on behalf of the European Union and its 27 Member States, and reiterated the importance of the issue for the users of the patent system. The Delegation informed the Committee that, in relation to paragraph 91 of document SCP/14/2, as of January 1, 2010, responsibility for the register of patent attorneys in the United Kingdom had been transferred from the Intellectual Property Office (IPO) to a separate regulating body, known as IPReg.
124. The Delegation of the Islamic Republic of Iran noted that, although there was an overall common practice on the issue of confidentiality of communication between a client and an attorney in both common law and civil law countries, the concept in civil law countries stemmed from professional secrecy obligation and there was no privilege in the common law sense in a number of countries. Therefore, the Delegation felt that the use of the term "privilege" in the preliminary study was problematic, and wondered why a word which was used for the exceptional situation in common law was selected for describing the concept in all countries. The Delegation suggested that the Secretariat elaborate further on the interplay between the extension of the concept and the transparency of the patent system, in particular, whether it would affect the transparency in patent law, and what would be the possible result of harmonizing the existing procedures on the enforcement of IP as well as the legal procedures of Member States. In addition, the Delegation requested the Secretariat to add existing case law regarding the acceptance and denial of that concept in different Member States, which would provide an invaluable means for understanding the real and ongoing status of such concept.
125. The Delegation of Pakistan considered that privilege in respect of communications between a lawyer and a client was not based on the legal nature of a lawyer's work as such, but on the relationship between the lawyer and the code. It explained that the privilege was extended to lawyers in some jurisdictions because they had a strict duty to the code enforced by strong professional codes of conduct. Abusing such privilege had serious consequences for the lawyers, and therefore, in its view, extending such a privilege to other actors, such as patent attorneys and patent agents, who were not lawyers and did not have such duty to the code was more likely to be abused. The

Delegation noted that, in many countries, lawyers could no longer be at the bar once when they joined a firm as in-house legal advisers, hence they lost the privilege. The Delegation further stated that the preliminary study did not sufficiently analyze what could be the possible adverse implications of having uniform legal standards on client-attorney privilege. It considered that there were already problems with the current level of privilege despite strong professional codes of conduct in industrialized countries. As the client-attorney privilege was an exception to the general duty to disclose, the Delegation observed that broadening the scope of privilege might conceal information crucial to the discovery of truth, which could have adverse implications with regard to ensuring patent quality in the examination process, particularly for developing countries where patent offices were burdened with a gigantic backlog of patent applications. The Delegation reiterated that the client-attorney privilege should be treated as an exception to the law of disclosure, and hence harmonizing the standards on client-attorney privilege would have substantive implications as it harmonized the law of exceptions to disclosure. The Delegation, therefore, was of the opinion that countries should be left free to set their own level of privilege and the issue, which was a private law matter, should be left to be dealt with under the national legislation in accordance with Article 2(3) of the Paris Convention. Moreover, the Delegation expressed the wish to focus on the balance between public and private rights, as well as on the implication of the client-attorney privilege on public interest, including its impact on patent quality, competition and other aspects of development.

126. The Delegation of Switzerland informed the Committee that the Swiss law provided for strong protection of confidential information because of the high value attributed to the constitutional right of privacy. Nevertheless, the professional secrecy guaranteed in the Swiss Criminal Code referred to clergymen, attorneys, defense counsels, notaries, and medical professionals only. Owing to the fact that there was no recognition of a separate patent attorney profession in Switzerland at the moment, patent attorneys were not bound by such obligation yet. The Delegation, however, noted that the situation would change in a few months. In March 2009, the Swiss Parliament adopted the Swiss Patent Attorney Act, which would come into force in January 2011. Under the new Act, only persons with proven expertise would be allowed to carry the professional title of patent attorney in Switzerland. It would enable inventors and patent holders to choose a professional and competent advisor in patent-related matters. The Delegation further noted that the new Act also aimed at meeting the non-disclosure concerns of the person being advised by imposing an obligation of secrecy on the patent attorney. The person advised must be able to rely on the non-disclosure of his or her confidential information in all patent related matters in order to communicate freely with his/her patent attorney. According to the Delegation, the newly imposed secrecy obligation for patent attorneys would be guaranteed in two ways: first, the secrecy obligation for patent attorneys in Switzerland would be imposed in the new Swiss Patent Attorney Act and violations would be prosecuted by criminal law. In addition, the professional secrecy guaranteed in the Swiss Criminal Code would be extended explicitly to patent attorneys. The secrecy obligation would apply to any information that a patent attorney had become aware of while exercising his or her professional duties. The obligation would continue even after the patent attorney and his or her client had terminated their contractual relationship. Second, as a procedural counterpart, patent attorneys would enjoy the right to refuse to provide evidence that was subject to professional secrecy in both criminal and civil cases. As for exceptions, the Delegation explained that clients would be able to waive the privilege and the waiver would bind patent attorneys. The Delegation considered that, although such regulations could not guarantee an equal privilege being conferred to Swiss patent attorneys in foreign jurisdictions, it would still improve the situation for patent attorneys in Switzerland by adapting the professional secrecy obligation, as was already the case in most European countries. The Delegation stated that the above

complementary information to document SCP/14/2 regarding the forthcoming changes in its national legislation could explain the importance of the topic to the Delegation. Concerning future work, the Delegation supported continuing the work in potential areas mentioned in document SCP/14/2 for further consideration by the SCP. In its view, additional information on the question of how confidentiality of communication between a patent advisor and his client in one country was recognized in different jurisdictions would be of strong interest for all SCP Member States. The Delegation therefore suggested that the Secretariat prepare a questionnaire for Member States in order to collect information on that important subject for the following session of the Committee.

127. The Delegation of Japan was of the view that the issue should be examined from a technical and legal standpoint. Noting that the treatment of client-patent advisor privilege varied considerably from country to country, the Delegation considered it useful to conduct further studies and clarify those issues that needed further in-depth examination. The Delegation noted that comments with regard to the description of its domestic legislation in document SCP/14/2 would be submitted to the Secretariat in writing.
128. The Delegation of China stated that, while it fully understood that many international non-governmental organizations in the patent area had a special interest in the client-attorney privilege, because it was important in ensuring the quality of the law and in safeguarding public interest, the privilege was not unique to the patent area. The Delegation considered that the problems might not be solved by amending patent laws, as they actually touched upon the essential litigation system and even the legal culture of different countries. Since there was no disclosure system or corresponding privilege system under the legal system in some countries, the Delegation was of the opinion that it was not the right time to formulate internationally uniform standards, and that the discussion of the issue should take full account of the intrinsic differences between legal cultures or systems. The Delegation observed that extensive surveys and studies, without rushing to draw any conclusion, would be beneficial for the Committee.
129. The Delegation of Guatemala expressed its reservation as far as the convenience of discussing the issue at the international level was concerned. Nevertheless, the Delegation believed that a constructive way to move forward would be to find out more about national legislations and practices. To that end, delegations would have to submit more information to the Committee and complement the work of the Secretariat. The Delegation informed the Committee that the professional secrecy in Guatemala was protected both legally and ethically. From the ethical perspective, the Delegation explained that the professionals in Guatemala had to meet a certain level of moral duties. For example, the Bar Association was submitted to rules requiring loyalty. A lawyer must remain faithful to the justice of his client, which included the rigorous observance of professional secrecy. The Delegation further explained that Article 5 of such rules stated that maintaining professional secrecy was a duty and a right of lawyers, which extended beyond the time when the lawyer had stopped providing services before the judges. Furthermore, Guatemala criminalized the violation of professional secrecy. According to Article 23, anyone who revealed a secret that they had learned as a result of their professional function, and that revelation consequently caused damage, would be sanctioned under the criminal law. The Delegation expressed its preference for a general provision relating to certain professional function which could be extended to patent advisors. At the same time, the Delegation expressed its willingness to know more about the practices and experiences of other countries.
130. The Delegation of the Bolivarian Republic of Venezuela stated that the professional secrecy obligation had a serious ethical component in its country in a more general sense. It noted that the privacy between a lawyer and his client was recognized in the law and the lawyer's code of ethics. The Delegation considered that that obligation did not exist for economic reasons, but for protecting the interests of the client. The

Delegation further noted that similar professional secrecy applied to journalists who had to protect the source of their information, as well as religious leaders, such as catholic priests. The Delegation stated that professional secrecy was further extended to certain professional positions related to the ethical and personal behavior of people and not the economic subject, as in the case of patents. Therefore, the Delegation supported the view that the issue should remain a subject to be dealt with under national laws.

131. The Delegation of Germany associated itself with the statement made by the Delegation of Spain on behalf of the European Union and its 27 Member States. The Delegation supported those delegations who had requested further study on the issue, especially with respect to the recognition of professional secrecy and privilege in foreign jurisdictions.
132. The Representative of the EPO associated herself with the statement made by the Delegation of Spain on behalf of the European Union and its 27 Member States. The Representative noted that, as mentioned on page 19 of document SCP/14/2, the EPC 2000 contained a mechanism in Rule 153 aiming to safeguard the obligation of confidentiality and the privilege from disclosure of communications between professional representatives and their clients.
133. The Delegation of Argentina reiterated that the client-patent advisor privilege or professional secrecy was a private law matter which was to be left to national legislation. Therefore, the Delegation did not understand the inclusion of the issue in the discussion in the SCP, particularly given the competencies of WIPO. The Delegation stated that it would not therefore support any future work on the subject.
134. The Representative of AIPPI stated that, in relation to the argument that the issue of client-attorney privilege should not be debated in the SCP because it was a private law matter, national laws were inadequate to solve international problems. AIPPI was very interested in solving the international problems with minimal intervention in national laws, and it considered that national laws needed to be protected and individual countries should look after their own interest. The Representative noted, however, that national laws did not contribute to solving the international problem of the loss of their own nationals' advice privilege in another territory. The Representative stated that AIPPI was starting the process of studying those and related matters in parallel with the SCP, and would share its findings and recommendations at the following session of the SCP.
135. The Representative of FICPI was of the opinion that the client-attorney privilege was a very important aspect in the cooperation between a counsel and a client. In his view, the client should be free to discuss IP related matters with his IP advisor without running the risk that such communication would later become public against the client's will. The Representative considered that that should be true for both legal counsels and other IP advisors. FICPI was of the opinion that a secrecy obligation for IP advisors was insufficient, since that did not protect the client against disclosure in litigation. Furthermore, he observed that parties in litigation should have the same rights irrespective of the country they resided in, the country in which they litigated and the IP advisors they had consulted, which was not necessarily the case at present. According to a recent survey conducted by FICPI, only a limited number of countries accepted a client-attorney privilege between the client and a non-lawyer IP advisor. The Representative considered that, since privilege for clients of IP advisors would enable clients to seek advice on, for example, technical aspects of circumventing or invalidating IP rights without running the risk of the advice becoming public, it was not only relevant for IP right holders, but also for third parties. As patents were generally not easy to understand, clients should be able to freely seek advice about, for example, the scope of protection provided by those patents in their country or other countries and the possibility of protecting their own inventions. The Representative observed that understanding the scope of patents would promote technical progress and transfer of technology, and IP

advisors, especially patent and trademark attorneys, were trained to give such technical and legal advice. In addition, the Representative stated that client-attorney privilege for IP advisors might further reduce costs for clients in seeking technical advice, because a lawyer would no longer needed to be involved. In his view, that was important especially for developing countries and small- and medium-sized enterprises. In summary, FICPI was of the opinion that the client-attorney privilege for communications between clients and their IP advisors was essential in international practice involving IP rights. He considered that it would facilitate the understanding of inventions disclosed in patents and of transfer of technology, and increase cost effectiveness of IP advice essential to a proper working of the IP system, both for right holders and for third parties.

136. The Representative of APAA stated that it had adopted Resolutions in 2008 and in 2009, expressing an international consensus on setting minimum international standards for a client privilege against the forcible disclosure of confidential communications between clients and intellectual property professionals. He explained that the Resolutions were adopted in consideration of the fact that, due to the international character of intellectual property, a client needed to have a full and frank communication not only with domestic IP professionals, but also with IP professionals in other countries. However, confidential communications between clients and IP professionals which were protected in their own country were sometimes forced to be disclosed in another country during litigation. In his view, an increasing number of international litigations had exposed the clients to a higher risk of forcible disclosure, thereby undermining the clients' ability to obtain professional legal advice on intellectual property related matters. The Representative further stated that, for example, in one discovery motion before a United States judicial court, the US judge had reviewed the communication between the plaintiff and the foreign patent professionals in relation to the filing and prosecution of a patent in 47 patent offices around the world. The US judge found that communications relating to some of the jurisdictions were privileged, but the others were not. The document would have been protected against such a forcible disclosure if the IP professionals involved in the communications were United States lawyers. The Representative was of the view that, as noted in paragraph 256 of document SCP/14/2, the client-attorney privilege in common law countries and the professional secrecy obligation in civil law countries aimed at a very similar practical result, i.e., non-disclosure of confidential information exchanged between a client and an attorney. Nevertheless in reality, the Representative observed that the privilege in one country was not properly respected by courts in other countries. The Representative believed that the SCP was the right forum to address such a rapidly growing and complicated international concern involving intellectual property, in particular, patents. The Representative noted that the two WIPO documents, namely SCP/13/4 and SCP/14/2, were excellent summaries of the current status in the area and of the related international concerns. In view of the increasing international concerns, he suggested that the issue be studied within a WIPO working group dedicated to client-attorney privilege issues concerning confidential communications between clients and IP professionals. The Representative further stated that the working group should assess current and future problems under the various legal systems, and study the feasibility of setting minimum international standards for the mutual recognition of the client privilege in an accelerated manner.
137. The Representative of CEIPI recognized the importance of the problem of secrecy of communications among clients and patent advisors. He noted that the problem, due to the international nature of the issue, was part of the competences of WIPO. The Representative considered that the discussion taking place in the Committee well demonstrated the need to delve into certain aspects of the problem. For example, it would be useful that the Secretariat clarified the scope of Article 2(3) of the Paris Convention and the TRIPS Agreement, which referred to that provision. In his view, that provision did not prevent the Paris Union to agree on issues which were reserved for

national law, and created neither obligation nor obstacles in that respect. The Representative further noted that the disclosure of communications between the client and his advisor and the disclosure of an invention in a patent application were two different issues, and all they had in common was the word “disclosure”. In conclusion, the Representative supported the follow-up of the studies by the Secretariat.

138. The Representative of ICC noted that, in most countries, communications between clients and their legal advisors were withheld from the other party when the clients were in litigation locally. In his view, this was good for trade because it encouraged clients to seek full legal advice, which, in general, meant that they were more likely to act lawfully and to avoid litigation. On the international scale, however, the Representative was of the view that such situation did not exist, specifically in the area of intellectual property. He explained that, at present, judges in common law countries were required to apply complex and expensive rules on whether communications with foreign advisers were privileged. Repeatedly, they had ordered disclosure of communications with foreign advisers which would not have been disclosed in the local courts of those advisers, for example, of advisers in Australia, France, Japan, the Netherlands, Pakistan, South Africa and the United Kingdom. The Representative observed that, even between two common law countries, there was remarkably little mutual respect. He said that the above problem had occurred in intellectual property litigation, because, for instance, patent owners might have taken advice on patentability in many countries, and trade mark owners and those launching new products and brands might have taken advice on infringement risks in many countries. The Representative therefore believed that an international framework for mutual respect of communications with legal advisers on intellectual property matters was needed. He believed that achievement of such mutual respect was supportive of businesses engaging in international trade, regardless of the state of development of their home country, and was also consistent with the mission of WIPO. The Representative suggested a workable framework as described in paragraphs 22 and 23 of its position paper dated October 9, 2008. Moreover, after careful consideration, as articulated in its position paper dated August 27, 2009, the ICC had concluded that its proposed framework would work notwithstanding potential difficulties raised by the delegations at the SCP in March 2009. In addition, the ICC believed that its proposal did not need further research or study of existing national laws on privilege or professional secrecy. The Representative urged the Committee to start considering possible solutions to the privilege problem, along the lines of its proposal. He also urged WIPO to evaluate the advantages and disadvantages of possible solutions, and to do only such further research or study as was necessary for such evaluation.
139. The Representative of IPIC stated that the issue of client privilege for IP advisors was an issue of great interest and importance to IPIC. The Representative considered that mutual recognition would be of great benefit to users of the IP system in Canada, particularly as its courts had failed to recognize privilege for non-lawyer agents, be they Canadian or foreign agents. Since there had also been a Canadian court decision which did not recognize the common law privilege of lawyers when acting as patent agents, she was of the view that mutual recognition might lead the Canadian Government to take steps to provide for privilege for agents regardless of their legal qualification so that their Canadian clients would benefit from mutual recognition when obtaining and enforcing rights outside of Canada. The Representative urged WIPO to begin devising suitable solutions for the problem, such as those that had been proposed by the ICC, and conduct the required research and study for their evaluation.
140. The Representative of JPAA noted that his organization had submitted its position paper recognizing the necessity of establishing solutions to the issue of client-patent attorney privilege at the international level. In his view, due to the lack of international or mutual recognition of privilege for a client, be it an IP owner or a third party, in each and every

country, the client still faced a risk of losing confidentiality in communications with IP advisors. The Representative observed that that would be significantly detrimental to the interests of clients, the quality of IP rights and any associated cost. Acknowledging the fruitful work that had been conducted in the SCP, the Representative considered it necessary to move to the next stage for further elaboration of possible remedies and solutions from a practical standpoint. For that purpose, he encouraged the SCP to continue studying and discussing the issue as suggested in Section 5 of document SCP/14/2, especially in paragraph 263. In parallel, the Representative strongly encouraged the establishment of a working group for investigating and analyzing the experiences of various countries, thereby seeking the best solution that would be beneficial to the stakeholders of all Member States. The Representative expressed his organization's willingness to assist the SCP and the Secretariat in any possible way, based on its experience as a body of legal professionals.

141. The Representative of GRUR stated that GRUR was always ready to defend and improve the international recognition of the legal status of the patent attorneys' profession. He further informed the Committee that, in Germany, the status of patent attorneys were in many respects identical with that of lawyers, with a few exceptions as contained in document SCP/14/2. German patent attorneys could represent their clients directly before the German Patent and Trademark Office, the German Patents Court and, in nullity proceedings, even before the Federal Supreme Court. In proceedings before the ordinary courts, for example in infringement litigation, they might appear before courts of ordinary jurisdiction together with an attorney-at-law only, but they had an important role in the preparation and control of such litigation, not to speak about the preparation and prosecution of patent applications. Referring to paragraph 148 of document SCP/14/2, the Representative questioned the clarity of the text. In particular, the Representative clarified that the professional training period of approximately three years comprised also eight months of training at the German Patent and Trademark Office and the German Federal Patents Court. The Representative stressed the high quality standards of the final qualifying examination that the candidates had to pass. The Representative observed that the confidentiality from professional communications and the professional advice given by attorneys protected under Article 6 of the European Human Rights Convention were an essential element of fair proceedings, due process of law and the right of the defense. The Representative expressed the view that that protection should also be applicable to patent attorneys having qualifications similar to those of lawyers and other professional advisors. The Representative considered that the view referred to in paragraph 244 of the document was irreconcilable with that approach. From that point of view, the Representative stated that there was a justified interest for the profession to enjoy in the United States of America, or in other common law countries, the same privilege for their confidential communication as was accorded to lawyers of the general legal profession. While noting that no acute problems had been reported affecting German patent attorneys by that time, the Representative raised the question of how judges in common law countries would decide in the future. The more transnational litigation was expected in globalized markets, the more acute the question would become for patent attorneys and agents in foreign countries who had close commercial relations with the United States of America or other common law countries that applied the legal privilege approach in pre-trial discovery proceedings. Therefore, the Representative supported the efforts by AIPPI and the ICC to resolve problems caused by the legal uncertainties which were created by the case law of, for instance, the US courts. The Representative suggested that the work forward should be guided by making a distinction between the professional secrecy obligation and the evidentiary privilege for legal advisors. Referring to a matter of international comity, where the court looked at the national law of the home country of the foreign patent attorney concerned, the Representative stated that the result was sometimes a matter of good luck. In that

regard, the Representative referred to paragraph 233 of document SCP/14/2 which made a reference to Article 43 of the TRIPS Agreement, and agreed with the statement of the Secretariat that that reference might be relevant to the issue of the client-attorney privilege. While observing that the language of the provision was very vague, and therefore, the Members of WTO might have a wide discretion to set the conditions of such protection, the Representative noted that further analysis of the potential of the provision would be worthwhile and interesting. Against that background, the Representative believed that the legal certainty for patent owners and their patent attorneys could only be achieved through some sort of a legally binding international instrument obliging the Contracting Parties to protect the confidentiality of written or oral communications between patent or trademark attorneys and their clients made in the context of, or dealing with, actual or future proceedings in the field of intellectual property rights before national or regional courts and authorities, in particular in trans-border actions. In conclusion, the Representative urged the Committee to maintain the issue on the agenda.

142. The Delegation of Indonesia reiterated that the issue of the client-attorney privilege needed sufficient analysis particularly on the possible adverse implications of having uniform legal standards internationally. While noting that under the legal system of Indonesia, the term "privilege" was not recognized, the Delegation stated that that was one of the predicted adverse impacts in further going with the subject matter. The Delegation noticed from the study that there were no uniform laws on the application of privilege to communications between IP advisors and their clients even within the same legal system. The Delegation was pleased that the study acknowledged that absolute privilege for client-attorney communications might be detrimental to the public interest of ensuring that all relevant information was made available to the responsible authorities for investigating truth for the sake of justice. The Delegation stated that more information and clarification on the subject matter was needed, in particular concerning the adverse implications of having such uniform legal standards.
143. The Representative of EPI and CIPA stated that both organizations were strongly supportive of a worldwide unified client-IP advisor privilege, which should include advice given by patent attorneys qualified to act before regional offices, such as European patent attorneys entitled to represent before the European Patent Office, and suitably qualified in-house patent advisors. The Representative urged the Committee to continue working on the subject matter and to allow the Secretariat to progress matters as was suggested in the last chapter of document SCP/14/2.
144. The Representative of AIPPI clarified two points which came up in the discussion. In relation to the first point, the Representative stated that "privilege" meant to be protection against forcible disclosure. Referring to concerns raised by some delegations that the protection might be used to disguise information and thus be detrimental to public information, the Representative noted that one should be aware of the fact that privilege, in the sense of protection against forcible disclosure, had been globally accepted for lawyers a long time ago. The Representative observed that there had been no dispute over the problem of disguising information which might arise in the context of privilege for lawyers. He noted that there was a sufficient regulatory framework around that protection, which guaranteed that the privilege was balanced with all the public interest that was raised in that context. In relation to IP advisors, the Representative stated that legal advice was no longer a pure domain for lawyers. The complexity of technical and legal advice in connection with IP and, in particular, with patents, made it necessary to spread the work from lawyers to other IP advisors, and it had been globally accepted that IP advisors also gave legal advice in the context of their work. The legal advice was necessarily intertwined with technical advice. In this situation, the question arose whether the application of protection against forcible disclosure to non-lawyer patent

advisors was an expansion of the privilege. The Representative was of the view that the answer to that question was negative for countries which already had protection for lawyers, because the patent attorneys were offering in effect the same legal advice which formerly came from lawyers only. The Representative stated that in modern economies, the profession of patent attorneys had been developed to provide the best legal and technical advice to clients, which had been formerly given by lawyers in cooperation with technical experts. The Representative stated that thus one could not speak of an expansion of privilege, since it was simply the application of the same matter done by other people. The Representative believed that the studies being discussed were not aiming at creating new, but accepting the same matter which had been accepted for lawyers and was undisputed for other advisors who were allowed to give legal advice. The second point was in relation to the Paris Convention and to the TRIPS Agreement, in particular on the issue whether those Agreements would support the view that the issue of privilege and protection belonged to national law only. In that regard, while noting that the TRIPS Agreement as well as the Paris Convention did not affect national laws relating to judicial and administrative procedures and jurisdiction, the Representative, however, observed that the issue at stake was not raising or questioning the right of national jurisdictions or national legislations to make their laws nationally. What it did raise, according to his view, was the question of how the effect of national laws regarding the existing protection against forcible disclosure could be maintained internationally. That was a purely international dimension, which national solutions could not sufficiently cover. The Representative therefore believed that the SCP was the right forum for dealing with the matter. He further stated that the problem of loss of the existing protection could not be resolved purely by national law and that the need for the discussion about the issue had become evident in the studies prepared by the Secretariat. He further informed the Committee that AIPPI was conducting studies by looking at various aspects of the issue, such as remedies, limitations, exceptions and effects that the privilege on IP advisors might have on the entire system.

145. The Representative of TWN stated that one of the fundamental principles of patent law was the disclosure of information on technology, and non-disclosure or partial disclosure was a ground for refusing to grant, or revocation of, a patent. In his view, the extension of client-attorney privilege to patent advisors went against that fundamental principle of disclosure. Patent specifications were public documents and therefore any related records which were used in the preparation of the patent specification should also be made available to public scrutiny in order to find or verify the truth about the claims made in the specification. The Representative underlined that considering the public policy concerns associated with patent law, it was important to maintain absolute transparency around the granting of patents and litigation around patents. Society could not afford any kind of opaque layer around the patent specifications. He further stated that extension of privilege to patent advisors would compromise the transparency requirement in the administration of patents which included both patent prosecution procedures as well as litigation of patents. The Representative was of the view that there was enough documentation regarding the misuse of attorney-client privilege by corporate clients. As one of the most distinct examples of such misuse, the Representative mentioned the case of tobacco companies where they had commissioned studies to attorneys on disputes against the tobacco industry. Another cited example of such misuse was the Novelpharma case where the inventors gave their Swedish patent agent a draft patent specification which included a citation to a book written by the inventors describing the use of the invention more than two years earlier. That book was eventually held to anticipate the patent, although the patent agent had deleted all references to the 1977 book from the patent application, which was ultimately filed in Sweden and the USA. The Representative further continued that the court had found that the evidence of actual deletion by the patent agent had given the jury reasonable ground to find intent to fraud

by the patentee. The Representative noted that if that communication with the patent agent had been privileged, the patent office and court would never have known about it. In his opinion, the example clearly showed that extension of privilege would legitimize withholding of information to obtain patents, including facilitation of evergreening of patents. Extension of the attorney privilege to cover patent advisors would incapacitate patent offices and courts in developing countries from safeguarding public interest following the grant of patents. The Representative expressed his deep concern about the extension of privilege to patent advisors due to the unintended consequences of such extension and its effect on patent applications, on the TRIPS flexibilities, on patent opposition systems, and on the transparency of patent procedures.

(d) *Dissemination of patent information*

146. Discussions were based on documents SCP/13/5 and SCP/14/3.
147. The Delegation of Spain, speaking on behalf of the European Union and its 27 Member States, stated that patent documents constituted a valuable source of information from a technical, commercial and legal perspective. The technological data contained in such documents allowed innovators to learn about existing solutions to specific technical problems. This rich body of technical information constituted a strategic tool in research planning and management, contributing to a more efficient allocation of human and material resources. Patent documents accumulated technical information that translated into innovation and progress for the benefit of society as a whole. The Delegation stressed the importance of the dissemination and accessibility of patent documents as a source of relevant technological, commercial and legal information. Patent documents needed to be accessible to the greatest number of possible users in order to maximize their role in scientific and technical development. The Delegation was of the opinion that the international system for the dissemination of patent information should be guided by the objective of its benefit to the users. The system should therefore aim to offer structured data, safeguard consistency and operability of systems and avoid duplication of work between institutions publishing patent information. In its view, the future work to be carried out by the Secretariat in that field should focus on access to patent information in digital format, particularly accessibility of full-text data, along with the availability of the information on the legal status of patents. The improvement would offer a standard presentation of legal information for better comprehension. In this regard, the Delegation stated that the European Union and its 27 Member States acknowledged the great effort carried out by WIPO concerning the standardization of norms of bibliographic data in patent documents and the development of electronic documents in a user-friendly format enabling the easy recovery of documents by users. The use of classification systems had a particular impact on the accessibility to and dissemination of patent information. Therefore, the Delegation recalled the need to join efforts for the improvement and harmonization of the different patent classification systems. In conclusion, the Delegation made a call to strengthen international cooperation in order to make the information included in national and regional patent documents accessible in an easy and centralized way.
148. The Delegation of France supported the statement made by the Delegation of Spain on behalf of the European Union and its 27 Member States. The Delegation wished to stress the importance of dissemination of information on patents, as it was an important part in determining policies and strategies in industry. In its view, the technical solutions indicated in the document prepared by the Secretariat on standardizing patent information and making legal information available, as well as extending cooperation between member countries and WIPO to centralize patent information, had to be supported, because it would make it possible to have better legal and technical information on patents. The Delegation also supported the idea of making available to

the public search and examination reports. In this connection, the Delegation informed the Committee that, as of October 1, 2009, France made available its patent information on-line. The Delegation underlined the need to consider working on harmonizing documents, as it would allow the dissemination of patent information on a broad scale.

149. The Delegation of Mexico joined the statements made by the Delegations of France and Spain as to the importance of the dissemination of patent information for the patent system. The Delegation informed the members of the Committee that Mexico had created a mechanism for the exchange of patent information which had been created in cooperation with WIPO, the EPO and with the support of the Spanish Patent and Trademarks Office. The Delegation explained that the project aimed at exchanging certain search and examination reports, and that it allowed Central American and other countries to review them.
150. The Delegation of Bulgaria noted that document SCP/14/3 showed the different facets and problems relating to patent information, and focused on several technical issues which constituted obstacles to the dissemination of patent information. It also answered some questions on the exchange of information among patent offices for improving their work. However, the Delegation's concern was mainly how to bring the patent information to the users and those who would benefit from it. The Delegation stated that patent information was an underused information resource and, unfortunately, the patent offices worldwide had not managed to bring the information to the actual users. The Delegation expressed the opinion that one of the tasks of patent offices was to make the information attractive and bring it to the users. The Delegation reiterated its suggestion made at the previous session of the SCP that WIPO could be the host of an IP information portal where all the patent offices could have a link to their patent information, which would provide users a one-stop entry into the world of patent information. It also suggested that such kind of portal contain information on different databases, such as the one in the Annex of document SCP/14/3, which could be useful for inexperienced users. The Delegation further suggested that such type of portal also provide some educational tools on databases for easy access to their content. The Delegation was of the view that WIPO should encourage, through that portal, the exchange of experiences of Member States as regards dissemination of patent information. In addition, the Delegation stated that the library system which existed in many countries was also an underused resource, and therefore, patent offices could use the network of libraries to bring out information to the users. In its view, all those tasks were suitable for WIPO, namely, to focus and combine efforts on the dissemination of information and positive experience on how national patent offices and patent information providers could better reach the community of those who would be benefiting from the use of patent information. While noting that users, such as research and university communities, relied on traditional information sources, such as scientific publications, the Delegation urged the international community to promote patent information for the benefit of all users and advancement of innovation in all countries.
151. The Delegation of Guatemala supported the views of other delegations on the subject matter. The Delegation noted that the dissemination of information was an element which was essential to the patent system, and was one of the most important resources as regards technical knowledge. The Delegation stated that Guatemala was making great efforts to have more access to patent information through services provided by the Internet. The Delegation expressed its appreciation to WIPO for providing free public access to patent information through the PATENTSCOPE[®] Search Service, and for starting the aRDi system at the service of the Member States, the objective of which was to increase the availability of non-patent literature in favor of developing countries. In relation to its experience, the Delegation stated that, with the support of WIPO, Guatemala had undertaken specific activities to cooperate with other patent offices. The

Delegation took the opportunity to mention that they were cooperating with LATIPAT. In addition, the Delegation informed the SCP that Guatemala had requested WIPO's support in the optimization of its procedures and that it was also on its way to develop a project to assist small- and medium-sized enterprises (SMEs).

152. The Delegation of Chile considered that the dissemination of patent information was of a paramount importance, because it clearly defined what the subject of protection was and identified what was in the public domain. The Delegation noted that that was in line with its proposals submitted in the framework of the Development Agenda. The Delegation stated that the issue was of great practical importance in two ways: on the one hand, for national offices and examiners, it aimed at avoiding duplication of work in the different offices, thereby making the examination work more efficient. On the other hand, it brought relevant information to various users, such as the academic world, students, and specifically to the SMEs, enabling them to have a better analysis of their investments. The Delegation stated that that should lead to better examination standards which would improve the quality of patents. Therefore, the Delegation considered that the preliminary study carried out by the Secretariat was an important basis in making headway in the improvement of the patent system and accessing patent information, which was an important public interest aspect.
153. The Delegation of El Salvador stated that its national office was benefiting from patent databases and appreciated WIPO for making them available in traditional format and through the Internet. The Delegation informed the Committee about the cooperation of its national office with other offices, such as the EPO, the Spanish Patent and Trademark Office and the Mexican Institute of Industrial Property, which facilitated the work carried out by its national office. The Delegation stated that it would continue working on that topic with the government authorities and the Secretariat. Further, in relation to paragraph 25 of document SCP/14/3, the Delegation sought clarification on the role of the Committee on WIPO Standards in increasing the accessibility of patent information.
154. The Delegation of Uruguay stated that the preliminary study was a pioneering work which dealt generally with the issue and suggested that WIPO continue making progress in that area. The Delegation stated that it was necessary to assess the capacity of developing countries in meeting the objective of generating the patent information. The Delegation also believed that the work of WIPO should include an analysis and an evaluation of important experiences carried out at the regional level, such as the LATIPAT project and other projects with the participation of WIPO, the EPO, the Spanish Patent Office and of the Iberian-American offices. In its view, since the final objective was shared by the Committee, it would be necessary to work on the need to design strategies to achieve that objective. In that regard, the Delegation was of the opinion that the preliminary study contained a new feature, because it was not only dedicated to describing the importance of sharing patent information, but it also looked into other issues. The Delegation underlined that the topic had a direct impact on the work of the Development Agenda, and that therefore, WIPO should deliver specific results where it was possible. In relation to the idea of transforming PATENTSCOPE[®] into a portal for patents, the Delegation thought it might represent an important challenge for WIPO. The Delegation noted the leading role that WIPO should take in that issue, since it was a multilateral body of the UN system which had the necessary means to advance that topic.
155. The Delegation of India stated that patent information constituted a unique source of technological, business and legal information. The Delegation noted that the access to patent information of various countries was very important in improving the quality of examination. Many of the developing countries, in its view, did not have access to various patent databases, in particular, to databases which were not free of charge. Observing that the PATENTSCOPE[®] Search Service of WIPO was limited to PCT

applications, the Delegation suggested that it be expanded to non-patent literature and other patents, which were beyond the PCT applications.

156. The Delegation of China stated that the dissemination of patent information was very important for stimulating innovation, reducing redundant work and promoting technological and social progress. Therefore, the provisions on the publication and release of patent information of the Chinese Patent Law had been amended recently. In order to improve the dissemination of patent information, the Delegation considered that increasing the digitization level, improving the extent of services and intensifying the international cooperation were all concrete, practical and pragmatic measures. The Delegation expressed its readiness to work actively and share its experiences with other countries in that area.
157. The Delegation of Cambodia stated that patent offices of all Member States should work together to improve the quality of patent information. The Delegation requested the assistance of WIPO in building the infrastructure for improving access to, and dissemination of, patent information in Cambodia by setting up an Innovation Center and providing the necessary equipment. The Delegation informed the Committee about the difficulties Cambodia faced on that matter, in particular, its limited resources to facilitate the dissemination of patent information. Further, the Delegation stated that another challenge in the process of dissemination of patent information was the language barrier, as most people in Cambodia had poor command of the English language. In concluding, the Delegation expressed its willingness to cooperate with all Member States on the issue at stake for the technological development of all countries.
158. The Delegation of the Russian Federation stated that patent information was a big collection of technical information and was one of the most reliable types of information, and that it was easily accessible on the Internet due to harmonized classification. The Delegation noted that the issue of improvement of the access to patent information for all users was one of the main tasks on the agenda. In that regard, the Delegation supported the proposal made by the Delegation of Bulgaria concerning the creation of a global portal under the auspices of WIPO, and requested further study on that issue. The Delegation was of the view that such a global database of patent information should be free of charge, and reiterated that the issue deserved the full attention of the SCP and the Secretariat.
159. The Representative of the EPO stated that dissemination of information on published patent applications and patent documents was an important source of technical and legal knowledge for the public in general and the users of the patent system. She further stated that the timely and comprehensive dissemination of patent information was a catalyst for filing high-quality patent applications. Furthermore, the Representative welcomed the exploration of avenues towards the alignment and simplification of the existing technical environment and tools of the patent offices. Such technical harmonization would be a key step towards further cooperation between patent offices. While reiterating the commitment of the EPO towards the dissemination of patent information, the Representative drew the attention of the Committee to the continued efforts of the EPO in improving worldwide accessibility to patent information through its esp@cenet® search service and the EPO Global Patent Index. The Representative also stated that the EPO had submitted a number of technical contributions to the Secretariat for consideration on possible integration into the final version of the document.
160. In response to the question posed by the Delegation of El Salvador with regard to paragraph 25 of document SCP/14/3, the Secretariat stated that that paragraph referred to the work of the newly established Committee on WIPO Standards (CWS), which was a body specifically dealing with the standards associated with patent information and other forms of intellectual property information. While noting that some of the relevant standards were listed in paragraph 14 of the document, the Secretariat clarified that those

were just the foundations on which the technical work for digitization and dissemination of patent information could take place. Therefore, in its view, there was no duplication of work between the different Committees of WIPO in that respect. The reference to various WIPO Committees was intended to be a reference to other Committees which could be established in the future, such as the Committee on Global Infrastructure that had been discussed at the previous General Assembly, but had not been actually established.

161. The Delegation of Brazil stressed that facilitating access to available patent information did not necessarily guarantee the transfer and the dissemination of technology. The Delegation noted that a challenge in making effective use of the information, posed to both developing and developed countries, was related not only to the technological capacities and gaps, but also to insufficient disclosure of information in patent applications. The Delegation was of the view that, on the one hand, the existence of a global one-stop shop mechanism to access patent information might be a valid step in order to improve the processing of patent applications in a timely manner. On the other hand, such mechanisms would not be useful unless the quality of the information provided was good and useful. The Delegation, therefore, expressed the view that the creation of any multilateral database must be preceded by a follow-up study on sufficiency of disclosure, which must include, among other aspects, (i) the refusal to grant, or the revocation of, patents on the grounds of insufficient disclosure; (ii) the disclosure requirements themselves; and (iii) the use of databases by developing countries. With regard to the use of databases by developing countries, the Delegation was of the view that, if they were not freely accessible, that might be an obstacle to the international cooperation and a risk to the balance of the system, and recalled Recommendations 8 and 9 of the Development Agenda. The Delegation stated that the exchange of search and examination reports *per se* would not reduce the problem of backlogs, which needed to be assessed with a broader perspective, considering that the number of patent applications had considerably increased over the past two decades, while at the same time, the quality of granted patents was increasingly subject to criticism in terms of both novelty and inventive step. The Delegation further noted that the exchange of search and examination reports must be considered with a note of caution, as it might result in either the export of patents of questionable quality or in an indirect and undesirable harmonization of patent rights. The Delegation, therefore, was of the view that the exchange of search and examination reports must comply with a minimum set of rules, be on a voluntary basis, and should be organized under a common standard for the presentation of information. The Delegation emphasized that any work on the unification of search and examination systems should be carried out within the SCP, rather than within the PCT.
162. The Delegation of Argentina stated that the subject of dissemination of patent information, which was also part of the Development Agenda, was very important. The Delegation was interested in the proposal on the WIPO portal, and requested additional information concerning the status of granted patents.
163. The Delegation of Angola, speaking on behalf of the African Group, acknowledged statistics indicating that 30% of patent offices did not have digitized information. The Delegation considered that technical assistance and capacity building for patent offices were necessary in order to facilitate access and dissemination of patent information and to make that available to the public. The African Group stated that capacity building, especially in the area of human resources, was needed in order to be able to make patent information available. The Delegation also referred to the need to carry out further analysis on this topic.
164. The Delegation of Morocco, supporting the statement made by the Delegation of Angola on behalf of the African Group, noted that regular consultation of patent information resources would allow the promotion of research and development in businesses and

increase awareness of the technological environment at the global level by following its trends and evolution. The Delegation stated that, as the published patent documents were a key source of information on recent technological developments, access to such information could also help stimulating national inventions, which could be transposed into increased investment in technology. The Delegation noted that Morocco had been trying to improve the quality of issued patents by amending its law to provide opinions on patentability. The Delegation further stated that, in cooperation with WIPO, Morocco had been digitalizing its patent information in the PATENTSCOPE[®] portal. The Delegation, therefore, proposed improving the dissemination of patent information and the creation of a search and examination reports' database, which would play a key role in the internationalization of patents.

165. The Delegation of the Bolivarian Republic of Venezuela supported the statement made by the Delegation of Brazil that the transmission of information was not just a requirement for meeting national legislation, such as a form to be filled in when a patent was registered. The Delegation pointed out that mere dissemination of low quality patent information would not ensure transfer of technology.
166. The Delegation of the Republic of Korea noted that it would submit corrections to document SCP/14/3 concerning the dissemination of Korean patent information.

(e) *Transfer of technology*

167. Discussions were based on document SCP/14/4.
168. The Delegation of Spain, speaking on behalf of the European Union and its 27 Member States noted with satisfaction the systematic approach and objectivity shown in document SCP/14/4. The Delegation acknowledged that development and diffusion of new technologies were of fundamental importance to face global challenges such as climate change, health and food security. The Delegation also stated that facilitating technology transfer was an essential element if the Millennium Development Goals were to be achieved. The Delegation noted that the preliminary study also highlighted that the capacity to absorb and apply the technology on the part of the recipient was fundamental to the successful completion of the transfer of technology. The Delegation further observed that the preliminary study noted that both the connection between intellectual property rights and technology transfer, as well as the impact of such technology on innovation and development, were complex issues that might adopt different parameters in each country. Some countries would be better placed than others to absorb and further develop the technologies received, while other countries would require substantive investment and capacity building before reaching that point. The European Union and its 27 Member States agreed that it was not possible to draft a single policy or law which would maximize technology transfer and its positive impact on every country. The Delegation further noted that the study included several examples that illustrated possible mechanisms and strategies to facilitate technology transfer responding to issues of common concern, such as the unclear definition of the property rights; the asymmetry of information between the patent holder and the potential licensee and the role that an intellectual property expert might exercise in such case; the need to reduce the transaction costs; or the need to prevent abuses by right holders. The Delegation was of the view that a suitable choice of the mechanisms would enable each country to establish the policy and legislation that better fit their particular needs within the framework of the current international commitments. The European Union and its 27 Member States expressed their willingness to contribute to the development of policies designed to facilitate an effective technology transfer, and to that end, reiterated their commitment to work towards the creation of new models to promote innovation based on the close collaboration between the private and public sector. They welcomed and encouraged

voluntary initiatives to facilitate the flow of technological knowledge on a global scale, and committed to participate actively and constructively in the debate in order to contribute to the fulfillment of the Committee's objectives.

169. The Delegation of Angola, speaking on behalf of the African Group, expressed the view that it was of great importance to study document SCP/14/4 on transfer of technology, which described and examined the details of the patent system, specifically the aspects of how the patent system could face hindrances in development policies. The Delegation suggested that the preliminary study be updated and include information on how developing countries could overcome those impediments in order to facilitate transfer of patented technology. The African Group also believed that capacity building was needed in order to benefit further from transfer of technology. Moreover, the Delegation hoped to see a study on transfer of technology in least-developed countries (LDCs) in Africa, based on the implementation of Article 66.2 of the TRIPS Agreement, which required countries to provide incentives to their enterprises for the purpose of promoting transfer of technologies to LDC Members of the WTO in that Agreement. The Delegation considered that transfer of technology could take place through joint ventures, investments, personnel reinforcement and collaboration with academia in order to train personnel and to digitalize patent data. The Delegation suggested that the preliminary study be revised in a manner that a link be established between transfer of technology, development and intellectual property, and that the role of the patent system in transfer of technology be defined. The Delegation also stated that multilateral and bilateral agreements on transfer of technology should be examined. The African Group recommended that the preliminary study be discussed in the following session of the SCP in order to examine how the patent system could affect and support transfer of technology. The Delegation hoped that the Secretariat would be able to present a revised study at the following session.
170. The Delegation of the Islamic Republic of Iran requested the Secretariat to further develop the preliminary study and provide concrete and action-oriented solutions for overcoming challenges which impeded transfer of technology to developing countries. The Delegation also requested the Secretariat to further focus on the role of patents in technology transfer for developing countries and to particularly analyze the adverse implication of patents on transfer of technology, including the implications of the TRIPS Agreement. The Delegation pointed out that the preliminary study lacked providing any actual statistics on current technology transfer to developing countries. Finally, the Delegation observed that, in order to have a balanced work program in the Committee, the issue of transfer of technology should be incorporated in the work program of the SCP, since there was a direct link between patents and transfer of technology to developing countries. The Delegation, therefore, considered that the Committee could identify a plan of action to address the major challenges to transfer of technology in relation to patent law and to propose concrete solution from an international law perspective.
171. The Delegation of Sri Lanka aligned its statement with the statement made by the Delegation of Yemen on behalf of the Asian Group, and stated that the preliminary study set the scene at the SCP to initiate meaningful discussions on the subject. The Delegation noted that, according to the preliminary study, the effects of globalization had helped to enhance the technological capabilities in developing countries but that the reality proved otherwise. The Delegation noted that most foreign industrial enterprises in its country did not transfer technology or know-how for the purpose of local development. The Delegation identified two main reasons, namely, that all the skilled workers and the equipment were imported from the country of origin and that most of the highly skilled staff and the senior management were not from the invested country. Therefore, globalization had not fully contributed to the industrial development in developing

countries. The Delegation considered that the elements mentioned in paragraph 34 of document SCP/14/4 needed to be further explored to find reasons why the normative development in UNCTAD and the revisions of the Paris Convention in WIPO had not delivered the expected results. The Delegation stated that better policy coherence could be built with respect to foreign direct investment *vis-à-vis* the poverty alleviation and technological advancement in developing countries through transfer of technology. The Delegation was of the view that, instead of alluding to the fact that transfer of technology might not be possible because of the lack of absorbing capacity in developing countries, the right approach would be to analyze why developing countries could not ascertain absorbing capacity despite many forms of development assistance through multilateral, plurilateral and bilateral agreements. The Delegation considered that such information could lead to identifying the implications of patents on transfer of technology. In the area of other conventions relating to transfer of technology, the Delegation stated that the preliminary study should not be limited to environmental agreements. The Delegation appreciated the fact that the preliminary study reflected the WIPO Development Agenda and its projects concerning transfer of technology. The Delegation noted that such a holistic approach towards development concerns in developing countries was a positive step taken by WIPO. With respect to paragraph 33, which indicated the royalty income collected from the OECD countries by developing countries in the year 2001, the Delegation considered that it would only be fair if the preliminary study indicated the royalty income collected by the OECD countries from the developing world, as the problem laid in the disparity. The Delegation noted that stating the facts would facilitate the countries to have a logical and meaningful debate on the subject under consideration.

172. The Delegation of Burundi associated itself with the statement made by the Delegation of Angola on behalf of the African Group, and stated that transfer of technology should take into account the peculiarities of developing countries regarding their absorptive capacity of technologies. Recalling the Development Agenda and the Ministerial Declaration in July 2009, the Delegation stated that transfer of technology had become an important element with respect to the cooperation between WIPO and the developing world, in particular, LDCs, and that transfer of technology should be user-friendly and development-oriented.
173. The Delegation of Indonesia, in general, welcomed the document, especially the parts on the challenges faced by countries, in particular, developing countries. In relation to paragraph 19, concerning the investment in knowledge creation as a priority under national economies, technological and development policy and strategy in many countries, the Delegation requested further elaboration on that issue in order to obtain a comprehensive picture in the historical context. The Delegation considered that a joint report by the United Nations, UNCTAD and WIPO on patents and transfer of technology published in 1964 could also be mentioned as one of the references in the preliminary study. As regards paragraph 22, which stated that “if the exploitation of the patented invention infringes another valid patent that claims a broader scope of technology covering the said invention, the consent by the owner of such broader patent is required in order to exploit the off-patent invention”, the Delegation sought further clarification as to the invention or innovation that fell into the category of public domain. Concerning paragraph 28, the Delegation requested further clarification on the linkage between FDI and technology spill-over, because technological dissemination by developed countries through FDI was mandated by the TRIPS Agreement. Regarding Chapter IV on policy challenges, paragraphs 39 to 47, the Delegation was of the view that it was a good reference especially for developing countries. On paragraph 40, the Delegation requested further elaboration regarding the difficulty of quantifying the flows of technology transfer, since it had been said by many that transfer of technology was always linked to IPRs and global investment. The Delegation considered that it was a necessity to get a broader picture based on the comprehensive data on trade in technology and the

investment on global research and development. The Delegation, therefore, suggested that WIPO prepare a collaborative study in cooperation with other related organizations such as WHO, UNIDO and UNCTAD. In relation to paragraphs 67 to 72 concerning the challenges faced by developing countries, the Delegation was of the view that technology transfer had two sides: one was that developing countries should improve their absorptive capacity, but the other related to developed countries and how they could facilitate the transfer of their technologies to developing countries.

174. The Delegation of Brazil noted that paragraph 110 of document SCP/14/4, which related to the concerning pros and cons of the *ex-ante* control of technology contracts as opposed to *ex post* control, suggested that there might be advantages in the *ex-post* control or the control after the contract had been signed and come into effect. The Delegation stated that its experience on that issue was different. It explained that its law required the national patent authority to review all intellectual property contracts before they entered into force in order to protect the local recipient of technology against possible abuse of provisions and clauses in the contract, and stated that it did not seem to indicate any problem in the inflow of technology to Brazil. The Delegation, therefore, expressed the view that, at least according to its national experience, such *ex-ante* control was quite successful. The Delegation recalled that, in relation to transfer of technology and technical training, it had been trying, together with several developing countries, to implement Articles 66 and 67 of the TRIPS Agreement and the recommendations of Cluster A of the Development Agenda.
175. The Delegation of the Bolivarian Republic of Venezuela supported the statement of the Delegation of the Islamic Republic of Iran, requesting the Secretariat to focus on the question of how patents affected transfer of technology and recommending the inclusion of the issue in the future work program of the SCP. The Delegation considered that the issue of transfer of technology needed to be related to the TRIPS Agreement and public health. In that regard, it noted that only 28 Members had signed a Protocol amending the TRIPS Agreement, and therefore it requested the Chair to informally undertake consultations to find out why the compulsory license system available under the TRIPS Agreement had been used only by Rwanda and Canada and why transfer of technology to developing countries did not proceed as had been originally planned.
176. The Delegation of Egypt stated that the issue of technology transfer was an issue of a high level of importance. The Delegation expressed its satisfaction with the inclusion of the issue in the agenda of the SCP and delivering a preliminary study on the topic, as the issue had not been discussed at WIPO over the previous years. The Delegation was of the view that, historically, WIPO had done a limited amount of work on the issue, despite the fact that international instruments, particularly the WIPO-UN Agreement, referred specifically to technology transfer. Article 1 of that Agreement stated that the United Nations recognized the World Intellectual Property Organization as a specialized agency, and listed WIPO's responsibilities, one of which was to facilitate the transfer of technology related to industrial property to developing countries in order to accelerate economic, social and cultural development. The Delegation, therefore, considered that WIPO had an institutional role to play on the issue. The Delegation noted that, on the other hand, with regard to the subject matter of intellectual property, Article 7 of the TRIPS Agreement pertained directly to the windfall that should arise from the protection and enforcement of intellectual property, namely, diffusion, transfer and dissemination of technology. In that light, the Delegation appreciated the preliminary study which carried forward a degree of objectivity and set new grounds in terms of WIPO publications. Referring to paragraph 60 of document SCP/14/4 acknowledging that there was no conclusive evidence or limited conclusive evidence with regard to the impact of the patent system on flows of FDI, the Delegation welcomed such observation, as it reflected the objective academic assessments that had been undertaken in that area. The Delegation,

however, pointed out some drawbacks to the preliminary study, and suggested a revised version or an Annex to the document for the consideration of the Committee. As regards the lack of definition of the term “transfer of technology” in the document, the Delegation believed that the revision of the preliminary study could be guided by the draft Code of Conduct on the transfer of technology (1985), which had done considerable work with regard to defining that concept. As regards Section 3 of the document, the Delegation was of the opinion that it failed to take into account the historical background. In its view, the preliminary study had not made legitimate reference to the work undertaken by the United Nations since the publication of the UNCTAD report on technology transfer in 1964. As regards Section 5, the Delegation was of the view that the document did not fully describe the criticism of the patent system with regard to barriers that particular levels of patentability or of protection might represent for technology transfer. While those were contributions that were acknowledged, the Delegation considered that paragraph 56 could be further elaborated with respect to some of the negative impacts on the patent system. Concerning Section 6, the Delegation stressed the importance of the international regulatory framework, and noted that the international regulatory framework should be a key concern. As there had been considerable discussions on the impact of free-trade agreements, economic partnership agreements and plurilateral agreements on appropriate transfer of technology, the Delegation pointed out that these should be reflected in the preliminary study. Further, the Delegation noted that, although the issue of climate change was very important, there was too much focus on that issue. The Delegation hoped that the treatment of technology transfer in WIPO should be more systematic, aiming at broader discussions on what was sometimes referred to as the classical issues of technology transfer, i.e., the classical industries that would have a direct impact on economic development in large parts of the membership. Noting the considerable work done by UNCTAD on international arrangements of technology transfer, the Delegation felt that there should be more collaboration between the two organizations. As regards public-private partnerships in Section 8, the Delegation was of the opinion that the issues of concern in the setting of a multilateral organization were primarily geared to trans-boundary transfer of technology. It noted that, although public-private partnerships could entail a foreign element, the Bayh-Dole Act, for example, essentially geared towards mobilizing national resources in order to promote innovation and transfer of technology, but had less impact on the possibility of developing private-public partnerships in a trans-boundary context. The Delegation further noted that, while it could be interesting to look into the successful models of highly advanced market economies, simulating such a model would be problematic in view of different levels of development. The Delegation recalled that, according to some US officials, implanting the Bayh-Dole Act in a foreign country might cause more problems than benefits. Concerning Section 10, the Delegation requested further expansion of that Section and moving that part to the beginning of the document. The Delegation observed that requests by developing countries in the UN system over the past four decades had been geared towards a transfer of technology that should contribute to development. While the Delegation was pleased with the reference to the Development Agenda, it noted that no analysis on how those recommendations pertained to the issues raised in the document was made. The Delegation was of the opinion that there would be further discussions on that particular issue with regard to future work. The Delegation recommended more collaboration with other UN Agencies, for example, by organizing a briefing session with leading UN Agencies on the issue of technology transfer. It further suggested that setting up an independent commission to consider the issue of technology transfer would be a good way forward, given that the issue of technology transfer was a cross-sectoral issue in WIPO, such as in the SCP and the CDIP. In its view, it would undoubtedly arise in other committees and bodies of WIPO. Finally, the Delegation noted that, following the discussion at the fourth session of the CDIP, a proposal concerning a project to implement the recommendations on technology transfer had been submitted by

a like-minded group of developing countries earlier in January 2010. The Delegation believed that such a proposal would contribute to streamlining a broad task that concerned more than one committee. The Delegation stressed the important role the SCP and other committees, most importantly the CDIP, could play on the issue of technology transfer.

177. The Delegation of Guinea associated itself with the statement made by the Delegation of Angola on behalf of the African Group. The Delegation was of the view that the preliminary study should focus more on FDI and the role of intellectual property in that process, since transfer of technology could contribute to capacity building, both in infrastructure and human resources, through mergers and acquisition. The Delegation encouraged developed countries to review their activities concerning transfer of technology in developing countries, as it would allow a better understanding of the impact of the patent system at the multilateral and bilateral levels and its effect on different economies.
178. The Delegation of Guatemala stated that, despite the efforts that had been made in the preliminary study, there was still a gap between theory and practice on the subject of transfer of technology. The Delegation noted its difficulties in implementing public policies and involving private enterprises in its country to facilitate transfer of technology with a view to stimulate local innovation and development of marketable products. The Delegation, therefore, believed that such issues should be discussed by the Committee or by an independent committee as suggested by the Delegation of Egypt. It further considered that the preliminary study could be enriched by documents from other organizations and by adopting practical guidelines. The Delegation noted that, in analyzing the capacity of small developing countries in making use of R&D cooperation agreements or licensing agreements, Guatemala could be a useful example.
179. The Delegation of India stated that a sufficient disclosure of patented inventions played an important role in the processes of dissemination and transfer of technology. However, in its view, the right holders often did not disclose the required information in a clear and succinct manner, which directly affected not only the quality of patents, but also the dissemination and transfer of technology. Further, it considered that patent trolls and patent thickets, which had been a strategy steadily used by right holders, also affected a seamless transfer of technology. Therefore, the Delegation suggested that the document further examine how the patent system could better contribute to a seamless transfer of technology in order to narrow that gap. The Delegation further recommended that a special study be undertaken as to how the patent system might be dealt with in a positive way to allow transfer of technology, in particular, in the areas of climate change, food security and other complex topics. As other delegations had pointed out, the Delegation noted that the issue of transfer of technology, which was a cross-cutting issue in WIPO, was at the center of the Development Agenda. The Delegation supported the creation of an independent commission that would examine the issue of transfer of technology in greater detail and suggest implementable recommendations.
180. The Delegation of Chile stated that transfer of technology was a critical issue, since it was a source of innovation that allowed a third party to make use of the existing technology and to further develop new solutions as the result of the knowledge gained through the transfer of technology. From that standpoint, the Delegation appreciated the document that set out the various dimensions relating to transfer of technology. The Delegation recalled that the incorporation of the issue of technology transfer into the agenda was consistent with the first strategic objective of WIPO and with Recommendation No. 8 and Cluster C of the Development Agenda. As the issue was a matter of great relevance to all Member States, the Delegation stated that the preliminary study should remain open for comments.

181. The Delegation of Pakistan noted that the preliminary study could provide an effective basis for future deliberations of the issue in the Committee. The Delegation believed that the crux of the issue at hand had been handled under paragraph 56 of document SCP/14/4, where it was said that even if patent protection was not an obstacle to the transfer of technology, that did not necessarily mean that the current patent system fully contributed to the promotion of transfer of technology. In its view, those two assumptions could be the starting point for future discussions, and the Delegation suggested further elaboration by the Secretariat. Further, the Delegation was of the opinion that the preliminary study did not discuss the key questions of whether the patent system was functioning effectively and efficiently, and whether the patent system could improve transfer of technology. According to the Delegation, provision of any answers or suggestions on how the patent system could better contribute to technology transfer and narrow the technological capacity gap would add value to the preliminary study. The Delegation further noted that the preliminary study should have acknowledged and analyzed the constraints by developing countries to use the tools for technology transfer, including voluntary and commercial licenses, and referred to paragraphs 14, 18 and 30 of the document. Finally, the Delegation suggested that: (i) a revised version of the preliminary study should identify constraints and adverse implications of patents on transfer of technology within WIPO's framework; (ii) in the light of an enhanced understanding of the adverse implications of patents on transfer of technology, developing countries could identify a plan of action to address the major challenges, which included policy changes, technical assistance, information exchange, norm-setting, etc., covering domestic and international actions; (iii) in order to develop a thorough understanding of the issue, the following session of the SCP could invite various UN agencies, such as UNCTAD, WHO and UNIDO, to make presentations on the past and present work on technology transfer; and (iv) an independent panel of experts could be established to deal with the question of technology transfer and patents.
182. The Delegation of Bulgaria disagreed with many who believed that the patent system was an obstacle to transfer of technology. The Delegation noted that while it might be an obstacle, patents played, in fact, a minor role in transfer of technology. It stated that a licensing agreement involving goodwill and a wish from the side of both transferor and transferee was always a success. The Delegation considered that WIPO could devise ways in facilitating transfer of technology and removing obstacles by providing relevant information to consenting parties who wished to transfer technology. As examples, the Delegation noted the IBM database, which indicated technologies that were ready for licensing, and the German Patent Law that provided for special reduction of fees for companies who filed patent applications and indicated that they were ready to license their technology. On the other hand, the Delegation did not believe that WIPO could, by shaping the patent system, overcome the issue of the goodwill of the parties involved in the process of transfer of technology. The Delegation considered that one important element which was missing in the document was statistics. While, for many years, statistics on transfer of technology had been discussed, the Delegation observed that there were very few countries that had provided official statistics in the past, for example, some reports in the United States of America, the regular publication of National Center for Intellectual Property in France and statistics on technology transfer and on intangible transfer published every two years in Germany. In its view, that was a matter which should be regulated at the national level and WIPO could provide advice on statistics comprising intellectual property rights and how to oblige companies to report on transfer of technology. The Delegation was of the opinion that such statistics would show where the obstacles were, and would allow developing countries to analyze their own situation. The Delegation further noted that, often, the statistical data on transfer of technology included royalties for copyright, and stressed the need to separate such information from patents. As regards one of the recommendations of the Code of Conduct that developing

countries should establish a licensing regime for transfer of technology and each technology transaction should be recorded at the national level, although the Delegation felt positive about the abandonment of such a recommendation in general, it however considered that information for statistical purposes should be integrated into the national system to provide reliable data for further analysis. On the question as to whether a country, not a private enterprise, could be an obstacle to transfer of technology, the Delegation noted that, despite some examples in the past, such as the Coordinating Committee for Multilateral Export Controls (CoCom), no such obstacle existed in the free-trade world. The Delegation concluded that WIPO could be a facilitator by providing tools and means to evaluate the flow of technology, to identify obstacles, and to eventually find remedies to those obstacles.

183. The Delegation of Senegal associated itself with the statement made by the Delegation of Angola on behalf of the African Group. With regard to the definition of the term “transfer of technology”, the Delegation suggested that the document properly define that term, as that would be the basis for defining the scope of the issue. The Delegation sought clarification as to whether, with due respect to the flexibilities in the international patent law, there was a possibility of having rules of procedure which would facilitate transfer of technology, make it more efficient and effective and render it more responsive to key developing needs. Further, the Delegation suggested that the Committee consider cases of transfer of technology which had led to the resolution of a public policy issue, thus illustrating experiences from the past. The Delegation concluded by stressing the importance of having an overview of the problem and its background in order to have a clear idea about future actions in reaching the goals with respect to transfer of technology.
184. The Delegation of the Bolivarian Republic of Venezuela stated that the question of patents should not be considered in terms of business. The Delegation was of the view that traditional knowledge, energy and other facets also needed to be considered and, therefore, the best way to regulate transfer of technology should be examined. In addition, it noted that questions to be analyzed were how transfer of technology could be made effective and how it could be brought in line with ethics and morality.
185. The Delegation of Germany supported the statement made by the Delegation of Bulgaria. It agreed with the analysis provided in paragraphs 53, 56 and 57 of the preliminary study that the IP system *per se* was not to be considered a barrier to technology transfer. The Delegation also supported the idea of collecting more factual evidence on possible barriers to technology transfer which might well lie outside IP. It considered that WIPO should play a leading role in exploring how to facilitate technology transfer.
186. The Delegation of El Salvador, supporting the Delegation of Guatemala, stated that the Committee should develop modalities for transfer of technology. Noting the importance of the issue for developing countries, it also supported some further ideas suggested by the Delegations of Egypt and Indonesia.
187. The Delegation of Algeria aligned itself with the statement made by the Delegation of Angola on behalf of the African Group. The Delegation was of the view that the preliminary study did not sufficiently focus on how the patent system could facilitate transfer of technology. Moreover, looking at the flexibilities allowed under international law, it considered that the preliminary study did not address the hindrances which countries were facing in order to use those flexibilities. The Delegation was of the opinion that the current work in WIPO, specifically the proposal concerning the project on transfer of technology presented by like-minded countries, should be taken into account. It also suggested that a revised version of the preliminary study reflect experiences in transfer of technology in developing countries.

188. The Delegation of Switzerland stressed the importance of focusing on transfer of technology and its links with patents in the Committee. In that connection, the Delegation supported the position stated, and the proposals made, by the Delegation of Bulgaria as a way to move forward on the subject of transfer of technology.
189. The Representative of GRUR stated that the preliminary study was comprehensive and touched upon all important factors which were relevant for the political, economic, social and legal questions arising in the context of transfer of technology policy on a national and international scale, and had no doubt that the role of patent protection was clearly defined in that regard. He further noted that the document was up-to-date and comprehensive in respect of the most recent developments concerning topics ranking high on the agenda of world leaders, namely, the Copenhagen Conference on climate change. The Representative raised the question of why the question of IPRs related to green house technology on the transfer of technology had disappeared from the agenda of that Conference and suggested that WIPO study those developments. Referring to the strong engagement of the Director General demonstrated in his opening report at the previous session of the WIPO Assemblies, the Representative was of the view that that field of technology was particularly fit for a detailed scrutiny and further study, contrary to what had been said by the Delegation of Egypt. The Representative, however, pointed out that the important role of the PCT was missing from the document. According to the preamble of the PCT, as it had been referred to in previous meetings of the Working Group under the PCT, there was a clear reference on the obligation under the PCT legal framework to direct the PCT towards making the legal systems of developing countries more efficient, by providing easily accessible information on the availability of technological solutions applicable to their special needs and by facilitating access to the ever expanding volume of modern technology. In the Representative's view, this was a transfer of technology aspect that was clearly provided in the preamble of the PCT, and he suggested that a chapter on the role of the PCT and its contribution to the international transfer of technology be added, or a special study on that matter be mandated.
190. The Representative of ALIFAR noted that while the document analyzed the relationship between patents and transfer of technology, in reality, the feedback did not always take place in that manner. Referring to paragraph 52 of the document, the Representative agreed that a patent system could make positive contributions to the efficient transfer of technology only where the system functioned in a way for which it was intended. She stated that the document showed that the exclusive right could be used to promote the exchange of knowledge and collaboration between researchers, and that the patent system aimed to improve the efficiency of the flow of knowledge and facilitate the transfer of technology. In addition, it was stated in the document that the disclosure of inventions also played an important role in the effectiveness of the transfer of technology. However, the Representative further noted that that vision could appear theoretical, at least in some technological areas. She explained that, in general, in the pharmaceutical industry once a patent had been obtained, patent rights were used for exclusivity in the market and that innovative companies were rarely willing to exchange knowledge. The Representative noted that the future of some recent initiatives that promoted patent pools could highlight the ways for exchanging the knowledge and transferring of technology. In her view, quite often, patents were not disclosed in a clear and complete manner, and not all offices sufficiently respected the requirement for clear and sufficient disclosure of inventions so that a person skilled in the art could carry out those inventions. While proper disclosure partly balanced out exclusive patent rights, she noted that such disclosure did not always occur. Referring to paragraph 48 of the document, the Representative clarified that in the pharmaceutical industry, if a product were to be manufactured or sold without the patent holder's consent, but developed and approved in accordance with international standards, it could be considered a case of patent infringement but not of counterfeit medicines. She further stated that counterfeiting medicines was a crime against public

health which was not in any way linked to an infringement of intellectual property rights. She felt that the confusion between the two led national systems in some countries, including some countries in Latin America, to prevent the importation of certain materials required for the manufacture of legitimate drugs. The Representative also shared the view expressed in the document regarding the issue that even when patent protection was not an obstacle to the transfer of technology, it did not mean that the current patent system contributed fully to its promotion. The Representative stressed the importance of finding the best way for the patent system to effectively promote transfer of technology and reduce asymmetries in the technological capacities of various countries. She was of the view that the Committee's discussions should be further developed in that regard.

191. The Representative of TWN stated that technology transfer in the context of patents was particularly relevant to the conduct of industrial development of developing countries, and patents had received renewed attention in the context of public health, climate change and food security. Along the history of international deliberations on patents and transfer of technology during the last 50 years, the Representative referred to a report entitled "The Role of the Patent System in the Transfer of Technology to Developing Countries" prepared jointly by WIPO, the United Nations Department of Economic and Social Affairs (UNDESA) and UNCTAD in 1975. The Representative explained that that publication had established some of the basic legal principles on international technology transfer, which essentially had been captured in many multilateral conventions or treaties, and quoted Article 144, paragraph 2 of the Law of the Sea Convention, which casted an obligation on the authority established under the Convention to carry out programs for the transfer of technology to enterprises in developing countries with regard to activities in the area, including *inter alia* facilitating enterprises of developing countries to access the relevant technologies under fair and reasonable terms and conditions. The Representative further noted that the UNCTAD Compendium of International Arrangements on Technology Transfer listed technology transfer provisions in 28 multilateral agreements, including the TRIPS Agreement. The Representative, however, considered that there was little movement to translate such legal obligations into practice. One of the recent studies published by the ICTSD showed that, out of 292 programs reported by developed countries under the obligation under Article 66.2 of the TRIPS Agreement, only 54 programs, that was roughly around 22% of the programs, met the targeting LDCs and WTO member with the program or policy that encouraged technology transfer. The Representative was of the view that the only change since 1975 was the more relentless expansion of the scope of patent protection and carving up of the safeguard, including tools for technology transfer, through the TRIPS Agreement, bilateral and plurilateral treaties and other agreements. He believed that the TRIPS Agreement had taken away one of the most important tools of technology transfer by recognizing the right to import as the exclusive right of the patent holder, and that developing countries were left with only limited options for venturing technology transfer which included compulsory licensing on local working. The Representative expressed the opinion that the preliminary study fell short of giving a clear picture on the current state of play with regard to technology transfer. He suggested a revision of the preliminary study by including the following: (i) a summary of the history of international deliberations with regard to technology transfer, especially the major findings of the WIPO co-authored report on technology transfer; (ii) inclusion of a robust analysis of technology transfer and its implications for development, precisely at the beginning of the study rather than as a last chapter, providing all the relevant statistics to develop a correct understanding regarding international technology transfer; (iii) analysis of the adverse impact of patents on transfer of technology; (iv) an overview of the licensing provisions which might adversely affect the further transfer of technology or diffusion of technology in developing countries; and (v) an analysis of the international legal obligations on transfer of technology.

192. The Delegation of Thailand stressed the importance of technology transfer in relation to the industrial development of countries. The Delegation, supporting the statement made by the Delegation of Bulgaria, requested the Secretariat to elaborate statistics on the trend of technology transfer in order to grasp the real impact of patents on technology trade.
193. The Delegation of the Dominican Republic stressed the importance of transfer of technology, as it was a tool which supported advancing technological knowledge, and endorsed the promotion of transfer of knowledge and technology in order to meet development goals.
194. The Representative of FSF-Europe agreed with the statement made by the Delegation of Spain on behalf of the European Union and its 27 Member States that efforts to transfer technology must be complemented by the capacity of the recipient to absorb that technology. He also concurred with the European Union and its 27 Member States that businesses and individuals would have a central role to play in increasing the flow of knowledge around the world. He believed that businesses and individuals which formed the global free software development community provided an example which should be studied in more depth. As for topics which were not addressed in the present preliminary study in detail, he considered that the two ways to obtain new technology described in paragraph 19 of the document should be complemented by a third possibility, i.e., to develop a new technology in cooperation with others, which had the advantage that soon all participants in the process would have an equal level of expertise. The Representative agreed with the views of those delegations which considered the patent system as only one tool among others available to encourage technology transfer. He explained that, in the field of free software, also known as open source, recent studies demonstrated that the process of developing and adapting software helped users to make technology truly their own. They became creators of knowledge rather than merely passive consumers of proprietary technologies. He expressed the view that, as many free software projects were developed in open and collaborative processes, that increased the absorptive capacity as discussed in paragraph 42 of the document. He emphasized that, as described in the FLOSS impact report prepared by the United Nations University MERIT Institute in 2007 on behalf of the European Commission, free software works were a free of charge, high quality training environment, and that developers benefited from a type of informal apprenticeship, which was in effect a form of technology transfer between those who paid for formal training and those who did or could not. In his view, knowledge flew from big companies to small ones and from rich countries to poorer ones, and as the necessary skills spread, business activity increased. He considered that the earning capacity of participating developers grew demonstrably even without an explicit investment in formal training and referred to paragraph 22 of the document that gave brief consideration to technologies not covered by patents. Since the Representative believed that those points highlighted the importance and the potential of innovative approaches to put patents and copyright into the service of social and economic development, he encouraged the Committee to consider the enabling effect of those approaches in more depth.
195. The Delegation of Malaysia noted that, as stated by the Delegation of India, insufficient and ambiguous disclosure of patented inventions were deterrent to the success of transfer of technology. Furthermore, the Delegation supported the suggestion made by the Delegation of Algeria that WIPO played a key role in removing obstacles so as to make transfer of technology successful. In that context, the Delegation was of the view that transfer of technology should also include the precise processes and products for the benefits of the transferees. Referring to paragraph 17 of the document, the Delegation was of the opinion that the element of intellectual asset management on the part of the transferee would play an important role in ensuring success of the transfer of technology.

Therefore, bearing in mind that technology transfer was ever evolving, the Delegation suggested the inclusion of intellectual asset management in the discussion at the Committee.

(f) Opposition systems

196. Discussions were based on document SCP/14/5.
197. The Delegation of Spain, speaking on behalf of the European Union and its 27 Member States, noted that opposition procedures ensured patent quality and constituted a rapid, easy and economical mechanism, by which third parties might challenge the grant of a patent. It further noted that the preliminary study offered a general overview of the various opposition systems which were included in current patent granting procedures, and were provided, although not specifically referred to, in the international applicable legislation. This general overview was complemented with references to regulations and practices, both national and regional, providing concrete examples of opposition procedures. Finally, the Delegation pointed out the inclusion of issues related to other procedures in the document, which were not exactly opposition procedures, but enabled the intervention of third parties in the patent processing, thus contributing to improve the quality of granted patents. The Delegation welcomed more details on such procedures, including whether the applicant was entitled to comment on third party observations. The European Union and its 27 Member States recognized the role that the opposition procedure had to play when it came to increase the credibility of granted patents. In spite of the lack of an international treaty specifically dealing with the regulation of opposition procedures, considering what had been set forth on procedural matters in general in the TRIPS Agreement and the Patent Law Treaty (PLT), the Delegation pointed out that Member States, in the regulation of their procedures for granting patents, should attempt to design all procedures in a fair and equitable manner in order to avoid any excessively complicated procedures or procedures causing unjustified delays as regards the grant of patents. Moreover, the European Union and its 27 Member States highlighted that the PCT Working Group at its second session held in May 2009, had explored the possibility of introducing third party observations in the Patent Cooperation Treaty (PCT) system. The Delegation expressed its willingness to preserve the freedom of Member States whether or not to include an opposition mechanism in their national legislation. The Delegation expressed its commitment to participating actively and constructively in the debate in order to contribute towards fulfilling the Committee's objectives.
198. The Delegation of France stated that there was no opposition system for patents in France. While a third party observation system had been implemented in its country, the Delegation observed that it had not yet been widely used. Given the interest in opposition systems and in improving the validity of patents, the Delegation appreciated the inclusion of statistics in different Member States as well as a better understanding of the efficiency of the third party observation systems in order to incorporate them into the PCT Guidelines.
199. The Delegation of Japan noted that, since there was some inaccuracy in the description concerning its domestic system, including the year when the pre-grant opposition system was replaced by the post-grant opposition system, it would submit suggestions for modifications in writing to the Secretariat.
200. The Delegation of Brazil noted that, as regards paragraph 39, the decision of the President of the National Institute of Industrial Property of Brazil could be challenged in court, although it was final at the administration level.
201. The Delegation of the United Kingdom associated itself with the statement made by the Delegation of Spain on behalf of the European Union and its 27 Member States. The

Delegation explained that the United Kingdom had no opposition system, but it was possible for anyone to apply for revocation of a patent. Quasi-judicial *inter partes* proceedings, which were conducted by a senior official, were very similar to post-grant opposition proceedings, but without any time limit on when the proceedings might start. Those proceedings had all the advantages that were listed in paragraph 19 of document SCP/14/5: they were relatively quick, cheap, open to any party, and utilized the technical knowledge and experience of examiners. According to the experience of the Delegation, a revocation system was the route more commonly used when a party wished to make a pre-empt of strike against a patent before it was used against him. Thus, it observed that revocation in the United Kingdom courts occurred more often when a party had been sued for infringement and argued, as a defense, that the patent was invalid.

202. The Delegation of El Salvador sought clarification as to the mechanisms of opposition systems and opposition procedures in civil law countries, and sought any suggestion by the Secretariat as to how the experiences of Member States could best contribute to moving the issue forward.
203. The Delegation of Guatemala noted that the patent system had to be agile and reliable. The Delegation stated that observations or opposition systems allowed third parties to offer their opinions and would allow for improvements in finding relevant prior art, which benefited the process by reducing delays and allowing a higher validity of granted patents, although the number of cases were relatively small in many countries. The Delegation was of the view that the third party observation system could be further discussed in the SCP, and wondered whether the third party observation system could be incorporated in the search projects mentioned in document SCP/14/3.
204. In response to the question raised by the Delegation of El Salvador as to whether delegations could send comments about their own legislation, the Chair noted that, given that the document would probably be modified, the revised document could also include submissions from other Member States. The Chair suggested that the document be kept open so that any delegation wishing to submit their comments could do so within a reasonable period of time. The Chair expressed the interest of having comparative information.
205. The Representative of the EPO associated herself with the statement made by the Delegation of Spain on behalf of the European Union and its 27 Member States. The EPO was of the opinion that the opposition procedure played an important role as an additional layer of review to further ensure the quality of patents. Furthermore, with regard to the related mechanism aiming at taking into account the wider knowledge of the general public, the Representative encouraged the submission of observations by third parties during the examination phase. As provided for in Article 115 of the EPC and as outlined in paragraph 112 of document SCP/14/5, in her view, such additional information would certainly provide assistance to further enhancing the quality of granted patents. Concerning the framework of related mechanisms of opposition procedure, the Representative referred to the central limitation and revocation procedure introduced in Article 105a of the EPC 2000, which enabled the proprietor of a granted European patent to request the limitation or revocation of the European patent in a centralized procedure before the EPO. The Representative explained that such a central limitation and revocation procedure had been introduced in the EPC with a view to achieving further regional harmonization in the patent field.
206. The Delegation of India stated that, in relation to paragraph 20 of the document, the grounds for pre-grant opposition under the Indian law included insufficient disclosure of the invention in the patent document and insufficient disclosure of the source and origin of biological material where the invention was related to such biological material. Further, the Delegation requested corrections, which it would submit in writing, in paragraph 45

concerning the grounds for opposition under the Indian law and in paragraph 50 concerning the possibility of appeal to the Appellate Board. As regards the latter, the Delegation explained that only post-grant opposition could be appealed to the Appellate Board, while the appeal of pre-grant opposition fell under another jurisdiction.

207. The Representative of KEI stated that the SCP should conduct studies on the costs of resolving disputes over patent validity, both through litigation before a court, or through pre- or post-grant opposition proceedings. In his view, the cost of resolving disputes over patent validity was an often overlooked issue, and the SCP would benefit from a much deeper understanding of what those costs were, and how they differed from country to country. The Representative further noted that the SCP should also examine new ways to share information obtained in various proceedings that examined the validity of patent, such as a database of judicial and non-judicial opposition proceedings in the area of patents.
208. The Representative of FSF-Europe observed that those jurisdictions which allowed the patenting of software frequently received patent applications relating to technology in which substantial prior art already existed. He noted that too often patents were granted on such inventions, for example, in November 2009, the United States Patent and Trademark Office had granted a patent on a procedure to temporarily grant normal computer users administrative rights. In his view, such technology had been in the UNIX system since 1980, and it formed an integral part of Linux and the Mac OS X operating system. Another such example was a patent on one-click ordering which had been granted to the online bookseller Amazon in 1999. Illustrating the fundamental difficulties of granting patents in such a complex and dynamic field as software, the Representative pointed out that such incidents had negatively affected all concerned, as a monopoly right had been granted where it should not have been, and as a consequence, the patent holder, licensees and third parties would have less faith in the quality and reliability of patents in the future. The Representative felt that, most importantly, numerous parties who had based their business around those technologies would be negatively affected. He therefore stated that it was crucial that third parties were given an easy means to stay informed about recent patent applications and that there was a well-defined low-cost process for third parties to submit information which might affect the grant of a patent. The Representative considered that, to be effective, such process should be available also to groups with few financial or legal resources. He considered it highly beneficial for WIPO to develop or update guidelines on the participation of third parties in the patent granting process, and suggested that such guidance could form part of the Organization's technical assistance efforts which were key to raising patent quality around the world.
209. The Representative of ALIFAR stressed the importance of introducing a mechanism in the legislation that allowed third parties to submit information to revoke patents when they should not have been granted. She observed that such patents affected the public domain, unjustifiably curtailed competition and undermined innovative processes. The Representative noted that the above mechanism would prevent resources of industrial property offices being wasted and avoid legal costs of revoking patents that should not have been granted.
210. The Representative of TWN noted that the opposition system was an important flexibility available in the patent system. He stated that patents effectively operated at a monopoly rate and therefore utmost care should be taken before granting any monopoly which might create particular public policy concerns. In his view, from an operational angle, patent opposition systems provided a chance for public scrutiny of patent applications and complemented the scrutiny of patent offices which often suffered from financial and/or human resource constraints. The experience of India during the last five years showed that many life-saving drugs had been able to be introduced in the market through pre-grant opposition. The Representative observed that the preliminary study should

provide clear and exhaustive information regarding how many WIPO Member States' patent laws provided pre-grant opposition and how many provided post-grant opposition or sometimes both. Similar information with regard to regional patent offices should also be provided. The Representative criticized the descriptions in paragraphs 16, 22, 23 etc. which, in his view, were subjective and without empirical data. He also noted that the preliminary study did not provide clear data, such as the number of accepted and rejected oppositions in various patent offices (although it provided the percentage of oppositions instead of the number of oppositions), break-up of oppositions found in various technology areas, such as in the pharmaceutical, electrical, mechanical, software-related and biotechnological fields. He further noted that the preliminary study also needed to provide an analysis of the positive role played by opposition systems in many countries, including Japan.

Agenda item 8: Work program and future work of the Standing Committee on the Law of Patents (SCP)

211. Following a proposal by the Chair, the Committee agreed to carry on discussions at its next session on the basis of the agenda of its fourteenth session. Item 7(b) of that agenda will include the study by external experts on exclusions, exceptions and limitations, as well as the proposal by the Delegation of Brazil on exceptions and limitations to patent rights contained in document SCP/14/7. Member States may submit proposals on the work of the Committee prior to its next session.
212. The International Bureau informed the SCP that its fifteenth session was tentatively scheduled to be held from October 11 to 15, 2010, in Geneva.

Agenda item 9: Summary by the Chair

213. The Chair introduced the Summary by the Chair (document SCP/14/9) with some modifications.
214. The Delegations of Egypt and France proposed some further modifications to the text of document SCP/14/9.
215. The Delegation of the Plurinational State of Bolivia requested that, with respect to document SCP/14/INF/2, the external group of experts be informed about an error in paragraph 4(b)(ii) referring to "higher life form". In his view, it should read "life forms", as contained in paragraph (a).
216. The Revised Summary by the Chair (document SCP/14/9 Rev.) was noted and agreed.
217. The SCP further noted that the official record of the session would be contained in the report of the session. The report would reflect all the interventions made during the meeting, and would be adopted in accordance with the procedure agreed by the SCP at its fourth session (see document SCP/4/6, paragraph 11), which provided for the members of the SCP to comment on the draft report made available on the SCP Electronic Forum. The Committee would then be invited to adopt the draft report, including the comments received, at its following session.

Agenda item 10: Closing of the session

218. The Chair closed the session.

219. *The SCP unanimously adopted this report, during its fifteenth session, on October 11, 2010.*

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