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المنظمة العالمية للملكية الفكرية

ВСЕМИРНАЯ ОРГАНИЗАЦИЯ
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The International Bureau of the World Intellectual Property Organization
./ (WIPO) presents its compliments and has the honor to transmit herewith the
report (document PCT/R/WG/8/9), adopted by the Working Group, for the eighth
session of the *Working Group on Reform of the Patent Cooperation Treaty*
(*PCT*), which was held in Geneva from May 8 to 11, 2006.

The working documents are also available on WIPO's Web site
(see <http://www.wipo.int/pct/en/meetings>).

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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

INTERNATIONAL PATENT COOPERATION UNION
(PCT UNION)

WORKING GROUP ON REFORM OF THE PATENT
COOPERATION TREATY (PCT)

Eighth Session
Geneva, May 8 to 12, 2006

REPORT

adopted by the Working Group

INTRODUCTION

1. The Working Group on Reform of the PCT held its eighth session in Geneva from May 8 to 11, 2006.
2. The following members of the Working Group were represented at the session:
(i) the following Member States of the International Patent Cooperation Union (PCT Union): Algeria, Australia, Austria, Belgium, Brazil, Cameroon, Canada, China, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Denmark, Ecuador, Egypt, Finland, France, Germany, Hungary, Indonesia, Ireland, Israel, Italy, Japan, Kenya, Latvia, Lithuania, Madagascar, Mexico, Morocco, Netherlands, Nigeria, Norway, Philippines, Poland, Portugal, Republic of Korea, Romania, Russian Federation, Serbia and Montenegro, Singapore, Slovakia, Slovenia, Spain, Sri Lanka, Sudan, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Trinidad and Tobago, Turkey, Ukraine, United Kingdom, United States of America; (ii) the European Patent Office (EPO).
3. The following Member States of the International Union for the Protection of Industrial Property (Paris Union) participated in the session as observers: Democratic Republic of the Congo, Qatar.

4. The following intergovernmental organizations were represented by observers: African Intellectual Property Organization (OAPI), African Regional Intellectual Property Organization (ARIPO), Eurasian Patent Organization (EAPO), World Trade Organization (WTO).

5. The following international non-governmental organizations were represented by observers: Asian Patent Attorneys Association (APAA), Centre for International Industrial Property Studies (CEIPI), International Association for the Protection of Intellectual Property (AIPPI), International Federation of Industrial Property Attorneys (FICPI), International Federation of Pharmaceutical Manufacturers Associations (IFPMA), Union of European Practitioners in Industrial Property (UNION).

6. The following national non-governmental organizations were represented by observers: American Intellectual Property Law Association (AIPLA), Brazilian Association of Industrial Property Agents (ABAPI), Japan Intellectual Property Association (JIPA), Japan Patent Attorneys Association (JPAA).

7. The list of participants is contained in the Annex to this report.

OPENING OF THE SESSION

8. Mr. Francis Gurry, Deputy Director General of WIPO, on behalf of the Director General, opened the session and welcomed the participants. Mr. Claus Matthes (WIPO) acted as Secretary to the Working Group.

ELECTION OF A CHAIR AND TWO VICE-CHAIRS

9. The Working Group unanimously elected Mr. Alan Troicuk (Canada) as Chair for the session, and Ms. Isabel Chng Mui Lin (Singapore) and Mr. Gennady Negulyaev (Russian Federation) as Vice-Chairs.

ADOPTION OF THE AGENDA

10. The Delegation of Brazil, noting the ongoing discussions of the issue of the declaration of the source of genetic resources and traditional knowledge in patent applications in other fora, such as the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), the Doha round of negotiations in the context of the World Trade Organisation (WTO), and the Conference of the Parties to the Convention on Biological Diversity (CBD), expressed its concern about possible duplication of effort and proposed that the proposals submitted by Switzerland concerning this issue (see document PCT/R/WG/8/7) not be included in the agenda of the Working Group or, alternatively, be postponed to the next session of the Working Group, pending the outcome of the discussions in the other fora.

11. The Delegation of Switzerland opposed the proposal made by the Delegation of Brazil, noting that this issue was expressly included within the work program of the Working Group that was approved by the PCT Union Assembly (“the Assembly”) at its last session in October 2005 (see document PCT/A/34/6, paragraph 8(ii), referring to document PCT/A/34/1, paragraph 22). Furthermore, the Delegation noted that the Working Group would be the only body with a mandate to discuss the issue relating specifically to a proposed amendment of the

PCT Regulations, that there would not be further discussions in 2006 in the context of the CBD, and that the Delegation of Brazil had itself requested in the last session of the IGC that the issue be taken off the IGC's agenda.

12. The Delegation of the United States of America reiterated its view, as expressed at previous sessions of the Working Group, that the IGC was the most appropriate forum to discuss the proposals submitted by Switzerland, and supported the proposal that discussion be postponed to the next session of the Working Group. The Delegations of Indonesia and Japan also supported the proposal for postponement.

13. The Chair concluded that a majority of delegations were in favor of including the item in the Working Group's agenda but that discussions should be postponed to the next session.

14. The Working Group adopted the agenda as appearing in document PCT/R/WG/8/1, subject to the addition of references to document PCT/R/WG/8/2 Add.1 in connection with item 4(a) and to document PCT/R/WG/8/8 in connection with item 5.

CLARIFICATIONS AND CONSEQUENTIAL AMENDMENTS

15. Discussions were based on documents PCT/R/WG/8/2 and 2 Add.1, which set out proposed clarifications and consequential amendments relating to amendments of the Regulations¹ that had already been adopted by the Assembly.

16. The Working Group approved the proposed amendments of the Regulations set out in the Annexes to documents PCT/R/WG/8/2 and 2 Add.1 with a view to their submission to the PCT Assembly for consideration at its next session, in September-October 2006, subject to the comments and clarifications appearing in the following paragraphs and to possible further drafting changes to be made by the Secretariat.

Rule 20.8 (c)

17. One delegation raised a query as to the applicable time limit under Article 22 or Article 39 for national phase entry in a case where an element or part was considered to have been incorporated by reference in the international application by virtue of a finding of the receiving Office under Rule 20.6(b), but that incorporation by reference did not apply to the international application for the purposes of the procedure before a particular designated Office because it had sent a notification of incompatibility under Rule 20.8(b). The Secretariat suggested, and the Working Group agreed that the Assembly be invited to express an understanding, in adopting Rule 20.8(c), such that the applicable time limit would be both clear for applicants to understand and simple for designated Offices to apply. The Secretariat

¹ References in this document to "Articles" and "Rules" are to those of the Patent Cooperation Treaty (PCT) and the Regulations under the PCT ("the Regulations"), or to such provisions as proposed to be amended or added, as the case may be. References to "national laws", "national applications", "the national phase", etc., include reference to regional laws, regional applications, the regional phase, etc.

would post a draft text on the PCT reform electronic forum on WIPO's website (www.wipo.int/pct/reform/en/comments.html) for comments and suggestions by delegations and representatives prior to finalization of the proposal for submission to the Assembly.

18. Another delegation noted that, in the same case as that referred to in paragraph 17, above, the requirement under Rule 20.8(c), read together with Rule 82^{ter}.1(c) and (d), for the designated Office to give the applicant the opportunity to make observations may not serve any useful purpose and indeed may be misleading for the applicant, since the Office would be obliged, regardless of any observations submitted by the applicant, to proceed with according or correcting the international filing date in compliance with Rule 20.8(c). The Working Group agreed that it was not necessary to complicate the drafting of Rule 20.8(c) to deal with this matter, but invited the Secretariat to include a suitable explanation with the final proposals to be submitted to the Assembly.

PUBLICATION OF INTERNATIONAL APPLICATIONS IN MULTIPLE LANGUAGES

19. Discussions were based on document PCT/R/WG/8/3.

20. In introducing the proposals contained in the document, the Secretariat noted that the main aim underlying them was to ensure the full effect of international publication of international applications under various provisions of national laws of designated States which are dependent on the language in which an international application is published. In particular, the proposals would establish a mechanism for international publication, at the applicant's option, of international applications in multiple languages whereby the applicant could: ensure prior art effect in designated States where such effect depended on the publication of the international application in a particular language (particularly in the United States of America in cases where the international application was not filed in English—see the reservation under Article 64(4)); ensure provisional protection in countries which required publication of the international application in a particular language as a condition for affording provisional protection (see Article 29); and ensure that a designated Office would not require the furnishing of a further translation for the purpose of national phase processing where the international application had already been published in a language accepted by the Office (see Articles 22 and 39(1)).

21. Given the difficulties which had arisen at the previous session of the Working Group (see document PCT/R/WG/7/13, paragraphs 109 and 114, reproduced in document PCT/R/WG/8/3, paragraph 5), and noting that proposals were designed to achieve a package of related objectives, the Secretariat had proposed the inclusion of Rules 12.5(h) and 49.2(c) which would, if adopted, enable a State whose national law was incompatible with the proposals to, in effect, opt out of the proposed system for a period of five years, with the result that, during that period, such a State need not provide for the third effect mentioned in paragraph 20, above (that is, it could continue to require the furnishing of a (further) translation for the purpose of national phase processing), and applicants who were residents or nationals of that State would not be entitled to request publication of international applications in additional languages under the new provisions.

General Comments

22. One delegation, while it did not oppose the proposals' intended effect of enabling prior art effect to be established on the basis of a published translation, noted that this would only be achieved at significant expense for applicants, who would, in order to take advantage of the

new provisions, have to furnish a translation at a very early stage. The delegation stated that it would continue to seek the abolition of the distinctions based on the language of the international application which resulted in prior art effect being denied by virtue of a reservation under Article 64.

23. One delegation expressed the view that the proposals, if adopted, could not be implemented under its national law without amending the latter. The delegation opposed the proposed five-year opt-out provisions mentioned in paragraph 21, above, noting that such a provision would be without precedent and without legal basis in the Treaty and the Regulations, and that it would add to the complexity of the PCT system. It stated that the system must accommodate differences under the national laws of Contracting States. It furthermore expressed the opinion that the aspect of the proposals which denied the use of the new system to nationals and residents of a State that used the opt-out provisions would be contrary to the principle of national treatment embodied in the Paris Convention for the Protection of Industrial Property and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).

24. Another delegation expressed its concern about the proposed opt-out provisions, noting that its national law would need to be amended in order to implement the main proposals, and that this would take time. The delegation believed that the proposed opt-out provisions were unnecessarily restrictive of the rights of applicants from a Contracting State which needed to make use of a transitional reservation provision for that purpose.

25. One delegation stated that it generally supported the proposals but pointed out that, as a designated Office, it wished to continue to be able to require the applicant to furnish a translation under Rule 49.2, even where the application had been published in an additional language which was accepted by that Office for the purposes of the national phase procedure.

26. One delegation stated that, while it had supported earlier proposals for publication of the international application in multiple languages, it was not in a position to support the present proposals, noting that, since the proposals permitted Contracting States to opt out of the new system, they no longer provided that the effects ensuing from international publication in an additional language would be exactly the same as the effects ensuing from international publication in the main language of publication, with regard to all international applications published under that system and in all designated States.

27. One representative of users suggested that the proposals would fail to achieve their main objective, namely, prior art effect in a particular designated State, since the proposed system of publication in multiple languages would put an additional burden on applicants in terms of costs and would thus not be widely used. The representative suggested that, instead, the issue of prior art effect for international applications published in different languages should be addressed by dealing with the issue of reservations under Article 64(4).

28. In response to an observation by one delegation that the contents of an international application had a prior art effect from the date of international publication irrespective of the language in which it was published, the Secretariat clarified that the purpose of the proposed system was rather to achieve prior art effect from the international filing date or, where applicable, the priority date of the international application.

Further Consideration, Adoption, Entry into Force and Transitional Arrangements

29. The Working Group, noting the importance of the proposals for Offices and users of the PCT system but also the divergence of opinion among its members as outlined in paragraphs 22 to 28, above, upon the suggestion of the Chair:

(a) approved the proposed amendments of the Regulations set out in the Annex to document PCT/R/WG/8/3, subject to omission of proposed Rules 12.5(h) and 49.2(c) and omission of the proposed reference to Rule 12.5(h) in Rule 76.5, to other changes, comments and clarifications as set out in paragraph 32, below, and to possible further drafting changes to be made by the International Bureau;

(b) agreed that the proposed amendments should, provided that no delegation sends to the Secretariat a communication expressing the contrary view within two months from the date of adoption of this report, be submitted to the Assembly for consideration at its next session, in September-October 2006;

(c) agreed to recommend to the Assembly that, in adopting the amendments, it adopt decisions to the following effect concerning entry into force and transitional arrangements:

(i) any designated Office may, within three months from the adoption of the amendments, notify the International Bureau of the incompatibility of any of the Rules concerned with the national law applied by that Office;

(ii) the amendments should enter into force allowing a sufficient interval after their adoption to enable convenient implementation, except if there are any notifications referred to in item (i), in which case the amendments should enter into force only after all such notifications have been withdrawn;

(iii) if the amendments have not entered into force within five years from the date on which they are adopted, the Secretariat should resubmit the matter to the Assembly for review and further consideration.

30. The Working Group invited the Secretariat to prepare a draft text of the decisions referred to in paragraph 29(c), above, and to seek comment from members of the Working Group via the PCT reform electronic forum prior to finalization of a document for submission to the Assembly.

31. The Working Group agreed that, if any delegation sends the Secretariat a communication referred to in paragraph 29(b), above, the matter should not be submitted to the Assembly in 2006 but rather that revised proposals should be prepared by the Secretariat, subject to further discussion via the PCT reform electronic forum, and submitted to the Working Group for consideration at its next session.

Changes, Comments and Clarifications

32. The following changes, comments and clarifications would be taken into account by the Secretariat in preparing revised proposals:

(a) *Rules 12.1ter and 12.5(b)(iv)* should be reviewed with a view to whether the reference to “Rule 13ter.4” should be corrected to a reference to “Rule 13ter.3”.

(b) *Rule 12.2(b)(i) and (ii)* should be revised to read as follows:

“(i) where a translation of the international application is required under Rule 12.3(a), 12.4(a) or 55.2(a), a rectification referred to in Rule 91.1(b)(ii) or (iii) shall be furnished in both the language in which the application is filed and the language of that translation;

“(ii) where a request under Rule 12.5(a) has been made that the international application be published, or where the international application has been published, in an additional language under Rule 48.3(b-bis), a rectification referred to in Rule 91.1(b)(ii) or (iii) relevant to the international application in the additional language shall also be furnished in that additional language, unless already furnished in that additional language under item (i) of this paragraph;”.

(c) *Rule 12.5(a)* should be revised to read as follows:

“(a) The applicant may, within the applicable time limit under paragraph (g), make a request to the International Bureau that the international application be published, in addition to the language in which it is to be published under Rule 48.3(a) or (b), in an additional language under Rule 48.3(b-bis). Such requests may be made in respect of more than one additional language in relation to the same international application.”.

(d) *Rule 12.5(b)(iii)* should be revised to read as follows:

“(iii) any rectification of an obvious mistake referred to in Rule 91.1(b)(ii) or (iii) relevant to the international application in the additional language, unless such rectification has already been furnished in the additional language under Rule 12.2(b)(i);”.

(e) *Rule 12.5(c)(iv)* should be revised to read as follows:

“(iv) any part of the description (other than any sequence listing part of the description), claims or drawings which is considered to have been contained in the international application under Rule 20.6(b); and”.

- (f) *Rule 48.2(i)* should be revised to read as follows:

“(i) If the authorization of a rectification of an obvious mistake in the international application referred to in Rule 91.1 is received by or, where applicable, given by the International Bureau after completion of the technical preparations for international publication, the International Bureau shall:

“(i) publish a statement reflecting all the rectifications and the sheets containing the rectifications, or the replacement sheets and the letter furnished under Rule 91.2, as the case may be; and

“(ii) republish the front page.

“Where the international application is to be or has been published in an additional language under Rule 48.3(b-*bis*), the said statement and sheets, or the said replacement sheets and letter, shall also be published in that additional language.”.

- (g) *Rule 48.2(l)(iii)* should be revised to read as follows:

“(iii) the description (other than any sequence listing part of the description), the claims, the drawings (if any) and the data referred to in paragraph (a)(viii) of this Rule, in the additional language;”.

- (h) *Rule 49.2(a)* should be revised to read as follows:

“(a) The language into which translation may be required must be an official language of the designated Office, provided that no translation may be required:

“(i) if the international application was filed in any such language;
or

“(ii) if the international application was published under Rule 48.3(a), (b) or (b-*bis*) in any such language.

“If there are several official languages and a translation must be furnished, the applicant may choose any of those languages.”.

(i) It should be recommended to the Assembly that, in adopting the proposed amendments of *Rule 49.2(a)*, the Assembly express the understanding that the applicant would be entitled to furnish a further or replacement translation to a designated Office even where the international application had been published in an additional language which was an official language of that designated Office.

(j) Further drafting changes set out in the report of the 13th session of the Meeting of International Authorities under the PCT should also be taken into account (see document PCT/MIA/13/8, paragraph 37).

Proposed Amendments Recommended for Consideration by the Assembly in 2006

33. The Secretariat noted that certain proposed amendments set out in the Annex to document PCT/R/WG/8/3 were not subject to the considerations set out in paragraphs 22 to 31, above, namely, amendments appearing in Rules 12.1*ter*, 12.2(c), 43.4, 48.3(c), and 55.2(a-*ter*), (c) and (d) (but excluding certain text in those provisions relating to international publication in multiple languages). Rather, they addressed language-related problems that had been found in connection with the Regulations currently in force.

34. The Working Group approved the proposed amendments of the Regulations referred to in paragraph 33, above, with a view to their submission to the PCT Assembly for consideration at its next session, in September-October 2006, subject to possible further drafting changes to be made by the Secretariat, with a recommendation for entry into force from an early date.

SUPPLEMENTARY INTERNATIONAL SEARCHES

35. Discussions were based on document PCT/R/WG/8/4.

General

36. A number of delegations emphasized that the international search was a central feature of the PCT system of great importance to national Offices, applicants and third parties, and stated that the proposed introduction of supplementary international searches should not be seen as an alternative to ensuring the quality and timing of the main international search.

37. A few delegations were opposed to the introduction of a system of supplementary international searches.

38. One delegation considered that the proposal would result in more complication and reduction in legal certainty than would be justified by the benefit.

39. Another delegation considered that the proposal would result in duplication of work and an increase in workload and that ways should be sought to encourage acceptance of the results of the main search undertaken by a single International Searching Authority. In connection with language-related aspects of the proposals, the delegation made the observation that the Japan Patent Office now provided machine translation of all Japanese patent applications into English to facilitate searching. Furthermore, it suggested that in case of difficulties with documents in particular languages, International Authorities might partially outsource searches to other bodies with the necessary linguistic skills. However, a further delegation observed that translations were not available for all documents and that there were legal difficulties involved in outsourcing, for example, relating to the confidentiality of international applications.

40. Another delegation, while considering a system of supplementary searches to be a good idea in principle, was concerned at the effect on the current workload of the International Authorities and on the timeliness and quality of search reports and international preliminary reports on patentability. This could add further strain to the current problem before some International Authorities and would be of concern to all those who relied on those reports.

Consequently, the delegation considered that it was not an appropriate time to introduce such a system. Instead, the delegation felt that the Working Group should focus first on quality and having one good international search report for now.

41. One representative of an intergovernmental organization suggested that search services for applicants would be better provided by the private sector than by introducing further complications in the PCT system itself.

42. On the other hand, while many delegations sympathized with the desire for a single comprehensive search in principle, a large majority of delegations agreed that there was a practical difficulty in providing such a search. In view of the importance to users of an opportunity to gain a better knowledge of the prior art during the international phase, before it was necessary to make decisions and incur substantial costs associated with entry into the national phase, they considered that some form of system of supplementary international search was appropriate. Certain delegations representing smaller Offices indicated that the additional information from supplementary searches would increase the confidence of such Offices as designated Offices in the completeness of the search and thus foster greater acceptance of the results of the international phase. It was observed that the system would be optional for International Authorities as well as applicants, and so need not affect the workloads of Authorities suffering from large backlogs of work.

43. Amongst the delegations supporting a system of supplementary international searches, it was common ground that the system should allow for "sequential" supplementary searches, whereby the applicant could request an Authority to perform a search which took into account, at least to some extent, the results of the main international search which would already have been established. However, some delegations considered that sequential searches should be the only option permitted, whereas others considered that Authorities should have the option of offering "concurrent" supplementary searches to be performed before the main international search had been established, as an alternative to or in addition to sequential searches.

44. In favor of sequential supplementary searches, some delegations suggested that these involved less complicated processes than concurrent searches and minimized the duplication of work in processing requests for them and in performing the searches. Furthermore, the fact that the main international search could be taken into account could promote work sharing and reduce the risk of conflicting reports on novelty, inventive step and unity of invention. The fact that the applicant would be able to see the main international search report before requesting a supplementary search would mean that supplementary searches would not be requested when the main international search report showed the claims to lack novelty or inventive step. It would be possible to focus the search on overcoming possible deficiencies in the main international search rather than repeating a search of material that had already been adequately considered. It was hoped that this might reduce the cost of supplementary searches compared to a more complete search. The knowledge of the prior art listed in the main international search report would minimize the risk that both the main and the supplementary search reports would list documents as category "A" (documents defining the general state of the art which are not considered to be of particular relevance) whereas if viewed together they might be seen to be category "Y" documents (documents relevant to inventive step when combined with one or more other such documents). While the relevance of the category "A" documents might later be discovered by large Offices conducting a thorough examination, this might well be missed by small and medium-sized Offices which relied more heavily on the international search reports.

45. The main disadvantages of sequential searches were felt to be the reduced amount of time available to Authorities for establishing the supplementary search report compared to concurrent searches, and the risk that supplementary search reports might only be available very late indeed if, as was frequently the case at the present, the main international search report itself was delayed.

46. In favor of concurrent supplementary searches, it was argued that the time pressures on Authorities would be significantly less than in sequential searches, potentially permitting more Authorities to participate if concurrent searches were an option. Furthermore, the supplementary search report would be available in time to be taken into account in deciding whether or not to make a demand for international preliminary examination. With respect to concerns about conflicts between reports from Authorities, it was observed that such conflicts would occur in any case during the national phase, and that it was better for the applicant to be aware of potential difficulties and alternative viewpoints at an earlier stage before the costs of national phase entry had been incurred. Furthermore, since it was only proposed that a system of concurrent searches be introduced as part of a system which also permitted sequential searches, it would provide additional options to applicants, who could tailor their choices to their particular application strategy.

47. With respect to the patent claims for which supplementary international searches could be requested, one delegation suggested that it might be desirable if the Authority performing a supplementary search could provide a full search of claims which had not been searched by the main Authority, for example because the subject matter was excluded by the main Authority but not by the supplementary Authority.

48. A number of representatives of users urged the introduction of a system of supplementary international searches as soon as possible. Applicants had different needs and there were different views on what would be the ideal system. Sometimes applicants wanted as much information as possible as soon as possible. In other cases, additional searches would only be requested where a particular need was seen. Nevertheless, it was stated that the greatest costs and duplications occurred when new prior art was discovered in the national phase, resulting in multiple examinations raising unexpected objections. It was not seen as a duplication of work to request a search from a second Authority during the international phase if a corresponding search would in any case be carried out during the national phase, when the results would be of less benefit to the applicant. How matters of unity of invention were dealt with in respect of supplementary searches was seen by users as less of a concern. It was suggested that applicants might be permitted to request the targeting of particular supplementary searches towards particular matters, for example, on documents in a specified language. It was also suggested that Authorities performing supplementary searches might all be made aware of all the supplementary searches which had been requested, so that a collaborative search might be effected. Greater benefits were also seen for third parties if prior art was identified in the international phase.

49. The Working Group agreed that the proposals relating to supplementary international searches be further developed and invited the Secretariat to prepare revised proposals for consideration at its next session, taking into account the discussion at the present session and particularly the comments and suggestions set out in the following paragraphs, as well as any further factors which may come to its attention in the meantime. Delegations and representatives were invited to make further observations and suggestions via the PCT reform electronic forum.

50. In response to a question from a delegation, the Secretariat stated that, as presently drafted, the proposals would not allow applicants an additional opportunity to file amendments to the claims under Article 19 following the establishment of a supplementary international search report.

51. One delegation emphasized the importance of making information concerning any supplementary searches easily available, including through the PatentScope website and on the International Application Status Form (Form PCT/IB/399).

Detailed Comments and Suggestions

– *Annex I of Document PCT/R/WG/8/4*

52. The International Bureau indicated a number of minor changes that should be made to the proposals, including:

(a) clarification in *Rule 45bis.5* of the result of a request for supplementary search being made outside of the permitted time or not indicating a participating Authority;

(b) provision in *Rule 45bis.5(d)* for the case where the applicant did not provide sufficient supplementary search fees for the number of Authorities from which supplementary search had been requested, in addition to the case of insufficient additional supplementary search fees in cases of lack of unity of invention;

(c) provision in *Rule 45bis.6* for the case where some, but not all, of the claims were excluded from supplementary search by a limitation made under *Rule 45bis.11(b)*;

(d) the drafting in *Rule 45bis.10(b)* regarding how the supplementary international search report would be treated compared to a normal international search report.

53. A number of delegations observed that the proposed *time limits for requesting and performing sequential supplementary searches* were based on the assumption that the main international search report would be established within, or at least close to the time limit set out in Rule 42, which was frequently not the case. Other delegations and representatives of users stated their hope that the large proportion of late international searches would be a temporary situation and considered that it was undesirable to complicate the proposal in response, though the latest statistics clearly indicated that the incidence of late international search reports had in some cases been rising in recent years, rather than declining. One delegation considered that the proposed time limits seemed a fair balance in any case since Rule 42 allowed (in most cases) three months for the establishment of a complete international search report, so this ought to be sufficient for a supplementary search which might be of reduced scope.

54. Several representatives of users reiterated that, usually, the most important issue would be to receive the supplementary international search report in time to make decisions relating to entry into the national phase, for example, by around 26 months from the priority date. It was less important to receive the information before the time limit for demanding international preliminary examination. As a result, a number of delegations considered that it might be appropriate to review the proposed time limit for establishing a supplementary international search, which could be as late as 28 months from the priority date.

A representative of users also suggested that if Authorities were not capable of providing a supplementary search report within a time limit useful to applicants, the service would simply not be requested.

55. In response to a query from a delegation, the Secretariat confirmed that, under the proposal in Annex I of document PCT/R/WG/8/4 (and similarly for sequential searches under the proposal in Annex II), a *protest* before the main International Searching Authority might result in a need for the supplementary Authority to refund fees to the applicant even if it had already started the supplementary search.

56. One delegation considered that, despite any administrative convenience, it would be strange for an Authority to follow the opinion of another Authority concerning *unity of invention* for the purpose of supplementary search, only to take a different view at a later stage, for example as a designated Office. The delegation considered that each Authority should be permitted to examine the matter of unity of invention independently and should not be bound by any decision which it would not have made itself.

57. It was observed that there was a contradiction between *Rules 45bis.5(d)* and *45bis.8(a)* with regard to how it should be decided which inventions should be searched in certain cases.

58. One delegation considered that a supplementary search report would be more useful if it was not limited as proposed in *Rule 45bis.9(c)* so as to preclude, in most cases, the inclusion of documents which had been cited in the main international search report. It was observed that the supplementary Authority would in any case need to consider the documents cited by the main Authority in order to determine their relevance to inventive step and so it would not be a considerable burden to the examiner to cite the document fully if a further relevant, or even more relevant, passage was found or a different interpretation was given to the document.

59. One representative of users expressed the hope that *fees* would not be set in such a manner that the cost of supplementary searches would be carried by applicants who did not choose to use the service.

60. It was observed that several of the observations in paragraphs 52 to 59, above, were also applicable to equivalent provisions in Annex II of document PCT/R/WG/8/4.

– *Annex II of Document PCT/R/WG/8/4*

61. Further drafting changes set out in the report of the 13th session of the Meeting of International Authorities under the PCT should also be taken into account (see document PCT/MIA/13/8, paragraph 33(f) to (i)).

62. One delegation recognized the reasons for which it had been proposed that requests under the proposals in Annex II of document PCT/R/WG/8/4 should be made to the individual supplementary Authorities, but considered that this emphasized the disadvantages of concurrent searches, since it would remove the benefit of the PCT system where, in general, requests and fees for a particular action could be provided by an applicant once, to a single point. To make requests to different Authorities would require more requests to be made, payments to be made in multiple currencies, and the requests to be checked for defects by each Authority, with different times for response. The International Bureau would also need to deal with requests for documents individually from different Authorities instead of

preparing all the documents at the same time. As a consequence, a number of delegations considered that it might also be appropriate for requests to be made to the International Bureau in the proposals in Annex II. One delegation suggested that requests for concurrent search could be included in the request and requests for sequential searches be made to the International Bureau, though it was observed that a number of receiving Offices had previously indicated that they would not wish to handle requests for supplementary search.

63. In relation to *Rule 45bis.8(a)*, two delegations considered that a protest procedure in relation to any assessment of unity of invention by a Supplementary International Searching Authority would be a necessary safeguard, while one considered that it would be unnecessary.

64. In relation to *Rule 45bis.9(a)*, two delegations were concerned that the same time limit had been proposed for the establishment of concurrent searches as for sequential searches. It was observed that one of the main perceived benefits of concurrent searches was that the supplementary search report could be received quickly, but this provision would permit that advantage to be lost. In order to ensure that applicants obtained this advantage, one delegation proposed that the time limit for establishment of a supplementary international search report be the same as the time limit under Rule 42.1 for establishment of the primary international search report.

MINIMUM REQUIREMENTS FOR INTERNATIONAL SEARCHING AND PRELIMINARY EXAMINING AUTHORITIES

65. Discussions were based on document PCT/R/WG/8/5.

66. A number of delegations stressed the importance to Offices, both large and small, as well as applicants and third parties, of ensuring international search and preliminary examination of high quality. In response to a query by one delegation as to the need for express provisions in the Regulations themselves, others expressed the view that it was appropriate to recognize the growing importance of quality systems by including specific references in Rules 36.1 and 63.1, which set out the minimum requirements for International Searching and Preliminary Examining Authorities.

67. In response to a query by one delegation, the Secretariat explained that the reference in proposed Rule 36.1(iv) to “the common rules” of international search derived from the wording of Article 16(3)(b) of the Treaty, which required, as a condition of appointment of International Searching Authorities, the conclusion of an agreement between the Authority and the International Bureau, which must be approved by the PCT Assembly, specifying the rights and obligations of the parties, and in particular, “the formal undertaking by the said Office or organization to apply and observe all the common rules of international search” (see also proposed Rule 63.1(iv) and Article 32(3) as to international preliminary examination). Requirements concerning quality management systems are set out in Chapter 21 of the PCT International Search and Preliminary Examination Guidelines which, under the terms of the existing agreements between Authorities and the International Bureau (see Article 3(1) of the Agreements, in each case) and of the Guidelines themselves (see paragraph 1.03), form a part of those common rules.

68. The Working Group approved the proposed amendments of the Regulations set out in the Annex to document PCT/R/WG/8/5 with a view to their submission to the PCT Assembly for consideration at its next session, in September-October 2006, subject to possible further drafting changes to be made by the International Bureau.

PHYSICAL REQUIREMENTS OF THE INTERNATIONAL APPLICATION

69. Discussions were based on document PCT/R/WG/8/6, containing proposals by the United States of America.

Text Size Requirements; Procedure for Making Corrections

70. The Working Group approved the proposed amendments of the Regulations set out in the Annex to document PCT/R/WG/8/6 with a view to their submission to the PCT Assembly for consideration at its next session, in September-October 2006, subject to the comments and clarifications appearing in the following paragraphs and to possible further drafting changes to be made by the International Bureau.

71. One delegation suggested that, since the mandatory increase in text size effected by the proposed amendment of Rule 11.9(d) would result in an increase in the number of sheets in international applications, the fee payable for each sheet in excess of 30 sheets should be reduced to avoid placing an extra cost burden on applicants. A representative of users suggested that, in order to discourage the filing on paper of international applications containing a very large number of sheets, the excess sheet fee should be reduced for international applications filed in electronic form, which would also have the result of encouraging the filing of international applications in electronic form.

72. In response to those suggestions, the Secretariat noted that a large majority of international applications already complied with the proposed text size requirements so that only very rarely would additional excess sheet fees be payable. The Secretariat also informed the Working Group that, in the context of preparations for WIPO's Program and Budget for the 2008/2009 biennium, it would be carrying out a review of the current PCT fee structure, including a review of the general justification to charge an excess sheet fee and a study of other possible mechanisms for discouraging applicants from filing very large international applications. Those proposals would, of course, be the subject of consultations with member States.

73. One delegation encouraged the International Bureau to further promote the filing of international applications in fully electronic form in XML format, noting the advantages of such format compared to image formats such as PDF and TIFF. The delegation also noted that, in the context of electronic filing, it was more appropriate to treat text as being arranged in paragraphs than on sheets. The Secretariat noted that requirements specific to electronically filed applications were dealt with (pursuant to Rule 89*bis*) in the Administrative Instructions rather than in the Regulations themselves.

74. In response to a question by a delegation, the Secretariat explained that changes to the physical requirements for international applications under the PCT would become applicable to national applications covered by the Patent Law Treaty (PLT) once those changes had been incorporated into the PLT context by a decision of the PLT Assembly, but that PLT Contracting Parties were free, if they so wished, to apply requirements that were more favorable to applicants (such as by not insisting on strict compliance with text sizes).

75. One delegation noted that the new correction procedures under Rule 26.4 would apply to corrections made both in the body of the text and in the margins.

76. The Secretariat noted that certain difficulties may arise in that the new text sizes under Rule 11.9(d) would not be immediately compatible with the computer generated forms made available by the International Bureau (both editable PDF and PCT-SAFE (EASY) formats). The Secretariat also pointed out that it may not be appropriate to apply the new correction requirements under Rule 26.4 to the making by receiving Offices of *ex officio* corrections in the request.

Photographs and Color Drawings; Other Aspects of Rule 11

77. The Delegation of the United States of America suggested that the task force that it had proposed to provide recommendations with regard to photographs and color drawings (see document PCT/R/WG/8/6, paragraphs 11 to 16) should operate via the PCT reform electronic forum, and offered to coordinate the work of the task force. It was expected that relevant recommendations by the Standing Committee on Information Technologies (SCIT) Standards and Documentation Working Group would be available shortly and should be taken into account by the task force.

78. One delegation outlined some details of its national requirements and experience in relation to color drawings, and offered to make the information available to the task force. That and another delegation emphasized that the reasons for making the proposed changes should be carefully considered, particularly having regard to the practices, IT environments and legal frameworks of national Offices.

79. Some delegations suggested further changes to Rule 11 as worthy of consideration. One such change would review the margin requirements under Rule 11.6. Another concerned a possible restriction of the possibilities for providing hand-drawn chemical formulae under Rule 11.9(b). The Secretariat offered to cooperate with delegations in developing such suggestions, noting particularly that the issues were particularly relevant to the processing in electronic form of international applications filed on paper.

80. The Working Group agreed that a task force be established with a view particularly to making recommendations providing for the inclusion of photographs and color drawings in international applications. The task force should operate via the PCT reform electronic forum, its work being coordinated by the Delegation of the United States of America. Participation in the task force would be open to all participants in the Working Group. The task force would also examine other proposals related to the physical requirements of international applications that participants might suggest. Proposed amendments of the Regulations designed to implement recommendations of the task force could, as appropriate, be submitted to the Assembly for consideration at its next session, in September-October 2006 or submitted to the Working Group for consideration at its next session.

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

81. Consideration of the proposals by Switzerland in document PCT/R/WG/8/7 was postponed to the next session of the Working Group (see paragraphs 10 to 13, above).

ENTRY INTO FORCE; TRANSITIONAL ARRANGEMENTS

82. The Working Group agreed that proposals concerning entry into force and transitional arrangements in respect of those amendments of the Regulations which had been approved by the Working Group with a view to their submission to the Assembly for consideration at its next session, in September-October 2006, should be posted by the Secretariat on the PCT reform electronic forum on WIPO's website for comments and suggestions by delegations and representatives, with a view to submitting detailed proposals to the Assembly.

EMERGENCY PREPAREDNESS MEASURES

83. Discussions were based on document PCT/R/WG/8/8.

84. One delegation applauded the initiative of the Secretariat to begin to plan for emergencies such as a possible future avian flu pandemic, and suggested that consideration be given to providing remote access to internal computer systems in order to allow staff members to continue to work from their homes during an emergency. The delegation noted the experience of its Patent Office in providing such remote access to its employees. The Secretariat confirmed that it was in the process of developing such a capability.

85. Another delegation expressed support for the proposed exchange of information on this subject, noting that not only a possible future avian flu pandemic but a variety of other emergency situations ought to be considered. The delegation referred to information provided by various offices in the context of the Standing Committee on the Law of Patents, which had been made available on the WIPO website, concerning relief for patent applicants and patentees in light of "*force majeure*"-type circumstances².

86. The Working Group welcomed the offer of the Secretariat to collect, to the extent available, relevant legal provisions and emergency preparedness plans from Offices of PCT Contracting States and to make such information available centrally via the PatentScope website. The Working Group agreed that the Secretariat should continue to study the possible need for amendments to the PCT Regulations in order to provide the International Bureau with enhanced flexibility to respond to emergency situations in the near term, and that any such proposed amendments should be posted on the PCT reform electronic forum for comment by members of the Working Group, with a view to their submission to the PCT Assembly for consideration at its next session, in September-October 2006.

OTHER MATTERS

87. One delegation congratulated the International Bureau on the introduction of its PatentScope PCT Online File Inspection database, which its Office now used for direct online access to published PCT applications entering the national phase, as well as to check the status of PCT applications entering the national phase. The delegation reported that use of the database had reduced the need to order copies of PCT applications on CD or DVD under the

² See www.wipo.int/scp/en/force_majeure/ and document SCP/6/9, paragraph 215.

International Bureau's Communication on Request (COR) system, and had facilitated the inspection of applications by examiners, and recommended use of PatentScope by other Offices.

FURTHER WORK

88. Noting that, following the present session, there would be few PCT reform-related items remaining on the agenda of the Working Group, the Secretariat stated that the next meeting of the Working Group would most likely be the last in the present reform exercise. However, member States would have the opportunity to consider the possibility of further work on PCT reform in the context of its preparations for WIPO's Program and Budget for the 2008/2009 biennium.

89. The Working Group agreed that the present report should be submitted to the Assembly for consideration at its next session, in September-October 2006, to inform the Assembly of the progress that had been made on the matters referred to the Working Group by the Assembly at its previous session, in September-October 2005 (see document PCT/A/34/6, paragraph 8).

90. The Working Group agreed to recommend to the Assembly that, subject to the availability of sufficient funds:

(i) one session of the Working Group should be convened between the September 2006 and September 2007 sessions of the Assembly to consider proposals for reform of the PCT including, in particular, the outstanding matters mentioned above in paragraphs 35 to 64 (supplementary international searches) and paragraph 81 (declaration of the source of genetic resources and traditional knowledge in patent applications), and possibly also paragraphs 19 to 34 (international publication in multiple languages), on the understanding that the Committee on Reform of the PCT could also be convened during that period if the Working Group felt it to be necessary; and

(ii) financial assistance allocated to enable certain delegations to attend sessions of the Committee should, exceptionally, also be made available, in the measure possible, in respect of participation in the Working Group.

Next Session

91. The International Bureau indicated that the ninth session of the Working Group was tentatively scheduled to be held in Geneva in April or May 2007.

ADOPTION OF THE REPORT OF THE SESSION

92. The Working Group unanimously adopted this report on May 11, 2006.

[Annex follows]

ANNEXE/ANNEX

LISTE DES PARTICIPANTS/
LIST OF PARTICIPANTS

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