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Philippe Baechtold
Head, Patent Law Section
Sector of PCT and Patents, Arbitration and Mediation Center
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World Intellectual Property Organization
34, chemin des Colombettes,
1211 Geneva, Switzerland

Re: *Summary of* ITSSD Response to the
WIPO Report on the International Patent System
(Document SCP/12/3)

Dear Mr. Baechtold,

The Institute for Trade, Standards and Sustainable Development (ITSSD) appreciates the opportunity to include, for clarification purposes, a brief *Summary of* its previously submitted comments to the WIPO Report on the International Patent System. Please find our summary attached hereto.

Thank you once again for your understanding and consideration.

Sincerely,

Lawrence A. Kogan

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President/CEO

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Summary of
ITSSD Response to the WIPO Report on the International Patent System
(Document SCP/12/3)

The Institute for Trade, Standards and Sustainable Development (ITSSD) appreciates the opportunity to include, for clarification purposes, a brief *Summary of* its previously submitted comments to the WIPO Report on the International Patent System.

The ITSSD Response emphasizes the following main themes:

1. To best develop a 21st century knowledge society, emerging and developing countries should create a 'rule of law' enabling environment that emphasizes strong recognition and protection of private property rights, including IP, encourages entrepreneurial risk-taking and promotes the transfer of publicly funded research to those private hands most capable of commercializing that basic research into market-relevant technology-based products and processes.

2. Governments and academicians must work to overcome their ideological opposition to establishing legal frameworks that permit, subject to conditions, the granting of exclusive rights in publicly funded research to private companies most capable of commercializing such research into market-relevant technology-based products and processes.

3. A survey of various national innovation systems reveals that the most successful systems are those which provide for (*in law*) and actually enforce (*in practice*) strong protection of exclusive private property rights, including patents and licensing contracts. The U.S. Bayh-Dole Act provides such an example.

4. Many developing country governments are prudently working towards strengthening their national patent systems to attract greater innovative rather than adaptive FDI, securing the spillover benefits accompanying innovative FDI, and showing a good faith effort in complying with their WTO TRIPS obligations.

5. The level of protection afforded by national governments to domestic and foreign patents and copyrights is closely related to how national constitutions define the role of government vis-à-vis individuals and society at large, as well as, the character ('negative' versus 'positive') and scope (exclusive versus nonexclusive) of private property rights.

6. Emerging and developing countries should not rely upon the sordid history of industrial opportunism among nations to justify their establishment of a national innovation and technology policy/legal framework premised upon the stealing of ideas and technologies from other nations.

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7. The primary objective of technical standards related to information and communications technologies (ICT) is *to promote data exchange*, not the cloning and/or substitutability of competing product components.

8. It is misleading to imply that technical standards can guarantee interoperability all of the time, since the use of different technological approaches to implementing particular elements of a standard can and often does lead to conflicts and/or inconsistencies between different and within even individual implementations.

9. The narrowness of the definition of 'de facto' standard as compared to 'de jure' standard seemingly reflects certain WIPO member countries' longstanding preference for creating standards in a "'de jure' sphere" to satisfy stated public policy goals, strengthen local industry competitiveness and to gain influence in global standard-setting fora.

10. The repeated use of the term 'balance' appears to create two presumptions: a) that each of the 'interests' identified (those of patent holders, prospective and actual licensees, and ultimate consumers) are somehow coequal in significance to achieve the public good of knowledge dissemination, technology transfer and innovation; b) that any action by a patent holder that disturbs or possibly threatens the maintenance of such coequal 'balance' must be countered and/or penalized. The WIPO Report fails to consider that there exist different types of 'balance' other than 'static' balance, and that 'balance' need not always be coequal/ egalitarian. For example, there is also 'dynamic' and 'precarious' 'balance'. One can easily envision a pile (stack) of rocks of different sizes, shapes, weights and densities that precariously remains standing. Also, one may conceive of the front half of an auto precariously overhanging a cliff. Without a dynamic shift in the occupant weight to the rear of the vehicle, the auto would likely fall and severely harm all of those within the auto as well as those below.

11. While helpful in certain instances, SSO self-regulatory mechanisms may also be expensive and drive down SSO member participation in standards development. The application of outside mechanisms such as competition law is largely unnecessary to ensure compliance with a RAND/FRAND SSO policy commitment, which is fundamentally instead a matter of contract law.

12. The new definitions of 'open standards' promoted by various SSOs that mandate or include reference to 'royalty-free' licenses have already confused standards developers and implementers as well as the licensing public about a well known concept that has historically been defined and practiced instead in terms of *process*. Open does not imply free.

13. Despite efforts made by various organizations to conflate the otherwise distinct concepts of 'open source' and 'open standards' for the purpose of establishing a legal and equitable parity between royalty-free copyrights and patents, there are good policy reasons why, in the context of ICT, these notions should remain separate. Ultimately, the WIPO Report should identify and discuss such reasons. For example, it is possible that royalty-free copyrighted OSS can operate at the same time as and not conflict with royalty-based patents that may underlie the OSS.

14. Any discussion of network industries should be broadened to include, besides computer

software, communications, the Internet, computer hardware, commercial intermediaries, payment systems, and financial markets. At least one recent study concludes that by employing antitrust (anti-competition) policies to correct 'network externalities' regulators will adversely impact both competition and innovation.