November 7, 2008

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

Re: *Supplement to* ITSSD Response to the
WIPO Report on the International Patent System
Paragraph 104 *
(Document SCP/12/3)

Dear Mr. Baechtold,

The Institute for Trade, Standards and Sustainable Development (ITSSD) would like to share with the SCP its additional research in respect to the subject matter discussed in Paragraph 104 of document SCP12/3. The ITSSD believes that its research would help explain for SCP Members important issues that go to the core of the debate over the nature, scope and treatment of patents within the international patent system. The ITSSD appreciates the opportunity to have this *Supplement* incorporated along with its previously submitted documents (ITSSD *Response*; ITSSD *Summary* [Revised] -- to the WIPO Report on the International Patent System).

Thank you once again for your understanding and serious consideration.

Sincerely,

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INSTITUTE FOR TRADE, STANDARDS, AND SUSTAINABLE DEVELOPMENT

Supplement to
ITSSD Response to the WIPO Report on the International Patent System
Paragraph 104
(Document SCP/12/3)

Paragraph 104 of the WIPO Report on the International Standards System provides, in part: "…*many governments, sometimes for constitutional reasons, may not be in a position to dictate the conditions at which their companies have to give away their technologies…"*

Introduction:

The ITSSD wishes to expand upon the brief discussion in Paragraph 104 of the WIPO Report on the International Patent System (document SCP/12/3) ('the WIPO Report'), in particular, concerning the important role that national constitutions play in defining the nature, scope and treatment of private property, including patents and other forms of intellectual property (IP), vis-à-vis societal interests. International legal experts have concluded that the recognition and protection of private property rights, including IP, largely depends on whether a nation is a common law or civil law jurisdiction, and also, on whether it has adopted a Continental or an Anglo-American form of capitalism as its national economic system.

A review of the analyses set forth below can be quite helpful in understanding why U.S. patent holders, in particular, continue to rely on the United States Constitution and its accompanying Bill of Rights as providing the legal bulwark that requires U.S. political leaders to ensure against the actual or implied 'taking' by foreign governments of U.S. patent and other IP rights on public interest grounds without payment of full, adequate and 'just' compensation. It also elucidates why all national patent rights are *not* created equal.

As a matter of fact, there are relatively few nations and/or regions in the world that are common law jurisdictions which have also adopted the Anglo-American form of capitalism. And, it is also true that there are a growing number of foreign political leaders, national governments, industry competitors and nongovernmental organizations based in and/or operating within civil law jurisdictions that have adopted, embrace or otherwise champion the Continental form of capitalism, or even socialism, and which seek to establish a new international paradigm of universal access to knowledge (A2K). This proposed paradigm calls for a more liberal interpretation of the international agreements the primary purpose of which is to facilitate the greater recognition, protection and enforcement of private IP rights (e.g., the WTO TRIPS Agreement and the WIPO conventions). The ITSSD believes that such paradigm threatens to seriously weaken hard-earned private property rights in inventions and innovations, and along with it, the opportunity for economic and technological advancement in many nations.

The ITSSD wishes to share with the SCP the research that it has assembled below. The ITSSD

strongly believes that any updating of the international patent system must recognize and respect the institutional differences that exist between nations. It should also seek to harness from them the most successful forms of economic incentive, consistent with the strong protection of exclusive private property rights that can generate the greatest opportunities for economic, social and technological advancement. The ITSSD requests that this research be seriously considered by the SCP and incorporated within the WIPO Report.

Discussion:

The important role played by national constitutions as setting forth national 'social organizing systems' that determine the nature, scope and treatment of private property rights, including IP, should not be underestimated. In the words of one international legal expert,

> In a rule of law country the constitution serves three major objectives, all of them having specific and predictable economic consequences. *The constitution has to be the benchmark for all formal laws and regulations; that is, ordinary laws and other rules must be in tune with the basic constitutional principles. The constitution has to protect the rights of individuals from a majority rule. Finally, the constitution has to eliminate or at least substantially contain the discretionary use of power by legislators, bureaucrats and all other public decision-makers. To accomplish these objectives, the constitution has to be both credible and stable.*
>
> While the concept of the rule of law is rather firmly embedded in the history of Western civilization, different legal systems as well as cultural differences among Western countries have produced different constitutions. And different constitutions have created different behavioral incentives, different transaction costs, and hence the varying attainments of three major objectives. *Ed Meese (2005, pp. 2-3), former United States attorney general, explained a major dissimilarity between Anglo-American and Continental legal traditions as follows: 'The consent of the governed stands in contrast to the will of the majority, a view more current in European democracies. The consent of the governed describes a situation where the people are self-governing in their communities, religions, and social institutions, and into which the government may intrude only with the people's consent... Thus, the limited government is the essential bedrock of the American polity' (emphasis added).* [1]

In addition, this same expert discusses how these different conceptions of *rule of law* have manifested themselves within the formal political institutions of different civil law and common law jurisdictions generally, and in the treatment of private property rights specifically.

> Common law judges make formal rules. Some are made to adjust the rules to changes in the game; those are spontaneous rules, for which the transaction costs of integrating into the system are low. Common law judges also have the power to contribute to the making of new precedents. Those rules could be in conflict with prevailing informal institutions; that is, they could attenuate the rule of law. However, credible constraints, competitive market for litigation and the independence of judges from other branches of government exert pressures on common law judges to refrain from making rules that are not in tune with prevailing precedents and /or informal institutions. In consequence, the power of common law judges to engage in discretionary law-making, while not eliminated, is constrained. The result is a significant predictability for common law.

[1] *See* Svetozar Pejovich and Enrico Colombatto, The Rule of Law and the Economic Functions of the Constitution, Chap. 6, at p. 100, in Law, Informal Rules and Economic Performance: The Case for Common Law, Edward Elgar Pub (August 30, 2008) (permission for citation obtained), Editorial Review on Amazon.com website, at: http://www.amazon.com/Law-Informal-Rules-Economic-Performance/dp/1845428730/ref=sr_1_1?ie=UTF8&s=books&qid=1226081580&sr=1-1 .

> Laws made by parliaments in civil law (and common law) countries have fewer efficiency-friendly constraints. The median voter is an important constraint who often provides legislators with incentives to make inefficient rules. Moreover, the preferences of the median voter translate into majority rule that give more power to the ruling party to impose its concept of social justice on the society as a whole. And those discretionary powers have consequences.
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> *While common law emphasizes individualism and private property rights, which translates into an emphasis on the equality of opportunity, civil law stresses social justice and the public interest, which emphasizes desired outcomes*. Thus, the advantage of common law over civil law comes from the predictability (i.e., consistency) of formal rules arising from the linkage with the hand of the past. And that predictability should translate into better economic performance. Let us look into some empirical evidence (emphasis in original). [2]

Thus, it would seem that, within Europe, private property rights are largely viewed as being consistent with national and regional societal interests. Consequently, private property rights would arguably be more susceptible to override by social interest-prone national and regional parliaments and to reinterpretation by progressive European national and regional courts legislating from the bench.

And, Western economic history, as well, seems to bear this out. Indeed, distinctions in the national treatment of private property rights have been linked to differences between the two forms of classical liberalism that evolved within civil and common law jurisdictions in Europe during and following the Enlightenment era.

> Classical liberalism in England and classical liberalism in Western Europe gave birth to two different legal systems, common law and civil law. And the incentive effects of those two systems are arguably responsible that the institutionalization of classical liberalism into capitalism has taken different paths in England and continental Europe…Anglo-American capitalism is the institutionalized version of the classical liberalism of England.
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> …Classical liberalism in England harbors a strong dose of skepticism about the rulers' foresight and their goodwill. It considers that the primary function of laws and regulations is to support the objectives of interacting individuals rather than to seek specific outcomes.
>
> Classical Liberalism in Western Europe rests on two assumptions: (1) there exists a just society, and (2) human reason is capable of discovering the formal rules required to bring about such society. These two assumptions of the Continental tradition provided both the philosophical raison d'être for the academic community to support social engineering, and the political justification for governments to pursue it. Contrary to the English and American experiences, the role of a powerful state has never been seriously questioned on the European continent. The French Revolution was carried out in the name of a new concept of legitimate centralism enforced by "enlightened" ruling elite. Even two most prominent classical liberals in Europe accepted the state as the watchdog of all individual actions, including those in the economic domain: 'The economic system cannot be left to organize itself' (Eucken 1951, p.93), for 'undiluted capitalism is intolerable' (Roepke 1958, p.119). [3]

[2] Pejovich, *On Liberalism, Capitalism, The Rule of Law, and the Rule of Men*, supra, at p. 17.

[3] See Svetozar (Steve) Pejovich, *On Liberalism, Capitalism, The Rule of Law, and the Rule of Men*, Discussion Paper Prepared for CRCE Conference on the Rule of Law in the Market Economy Slovenia (October 2-4, 2008), at pp. 2-4; Svetozar (Steve) Pejovich, *Capitalism and the Rule of Law: The Case for Common Law* 5 (2007) http://economics.gmu.edu/pboettke/Boettke/workshop/fall07/Pejovich.pdf (permission for citation obtained).

In other words, the 'negative'- 'positive' private property right differential can be expressed in terms of *competing visions* of capitalism: Continental capitalism and Anglo-American capitalism.

> *The political-scientific elite* in the West accept capitalism but not classical capitalism. They argue that a just society could exists [sic] in which people lived in peace and harmony, and that human reason is capable of discovering the institutions and policies required to bring such a society about. *The contrast between their version of capitalism (hereafter: continental capitalism) and Anglo-American capitalism is striking.* Reflecting its skepticism about rulers' foresight and goodwill, classical capitalism considers any outcome to be fair and just as long as it emerges from the process of voluntary interactions under the umbrella of negative rights. In contrast, continental capitalism believes in rulers' foresight and goodwill. It means that continental capitalism does not view the government as a predator requiring the rule of law to tame it. On the contrary, it wants the government to be an active factor in running the economy.
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> *Continental capitalism is then more concerned with the desired outcome of economic activities than with the process of voluntary interactions leading to unanticipated results. Terms such as public interest, social justice and other grand-sounding names are used to justify the desired outcome of economic activities.* Whatever term is used to explicate the desired outcome, it is a façade hiding subjective preferences of the political-scientific elite. For example, *German law protects property rights only to the extent that they serve "human dignity" (as if free markets were not doing precisely that) and the German welfare state. Property rights in Italy are also attenuated; the Italian Constitution allows protection of private property insofar as it serves a social function*. Thus, property rights in Germany and Italy neither protect the subjective preferences of their owners nor block legislative and regulatory redistributive measures.
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> *The attenuation of private property rights is a mechanism that enables the government to interfere with the right of individuals to seek the best use for the goods they own.* And government's interference with the freedom of choice in competitive markets creates (or recreates) differences between private and social costs. Clearly, the pursuit of subjective preferences of the political scientific elite is costly. And they know it. However, the political scientific elite consider the pursuit of "their concept" of social justice worth the costs. [4]

At least one international law expert has shown how these historical and philosophical differences have manifested themselves in law. He has concluded that the constitutional rights of German citizens in private property are, for historical and political reasons, 'positive rights' granted by the state, rather than *a priori* natural 'negative rights' of the people recognized and protected by the state.

> A brief review of German legal and political history is quite revealing. According to Humboldt University law professor Dieter Grimm, the constitutions and bills of rights previously enacted by successive German monarchs were intended to preserve the legitimacy and survival of their dynasties, and little more. As a result, they created "positive" rather than "negative" rights that subsequently failed to endure the political whims of national parliaments and to secure consent from short-term-minded monarchs and unelected bureaucracies. [5]

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[4] Svetozar (Steve) Pejovich, *Private Property—A Prerequisite for Classical Capitalism* 12 (2005), http://www.easibulgaria.org/docs/Pejovic.doc (emphasis added).

[5] *See* Lawrence A. Kogan, ITSSD, *Europe's Warnings on Climate Change Belie More Nuanced Concerns* (2007) at: http://www.itssd.org/White%Papers/Europe_sWarningsonClimateChangeBelieMoreNuancedConcerns.pdf , referenced in Lawrence A. Kogan, *The Extra-WTO Precautionary Principle: One European 'Fashion' Export the United States Can Do Without*, 17 Temple Political & Civil Rights Law Review 2, 491, 598-604 (Spring 2008), at: http://www.itssd.org/Kogan%2017%5B1%5D.2.pdf (discussing how different national and regional conceptions of private property and government authority can lead to extraterritorial promulgations that strain transnational legal, economic and

Germany's legal and political experience with private property rights can be contrasted with America's.

> ...One purpose of the American Revolution, therefore, was to strengthen and protect the people's fundamental rights. Consequently, fundamental rights "could from the very beginning be negative rights" that served primarily to protect individuals from the government...*In contrast…the inclusion of positive rights in German law can be traced to the fact that European constitutions, unlike the U.S. Constitution, did not establish an entirely new political entity because the nation-state existed before the constitutions emerged. This meant "they never changed the tradition of the state," and part of this saved tradition, especially in Germany, was that "the state always retained the role of being the representative of the higher aspirations of society*" (emphasis added). [6]

Italy's various constitutions also reflect a similar preference for treating private property rights as 'positive' conditional rights subject to state override.

> Until 1947 the Italian Basic Law was the Statuto…In theory the Statuto was aimed at transferring legislative power from the monarch to Parliament (and safeguard the interests of the bourgeoisie). To compensate for the drive to curb royal discretionary rule-making, *it was acknowledged that the throne would encompass the executive and judicial powers, and act as the guarantor of both law-and-order and individual freedoms*.
>
> …*Accountability to the people was not part of the game*. Similarly, the Statuto did not aim at uniting the country but rather at shaping a new role for the monarchy, and *providing an attractive institutional framework to lure the elites* of the new regions that the Sardinian king was eager to annex (emphasis added).[7]
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> … As early as October 1943 the leaders of most anti-fascist parties formally declared the need for a new constitution…[T]he Republican Constitution was conceived as an instrument through which a partially new ruling elite could obtain, hold and share power…Despite acute tensions among the various factions, the elites of those political parties – including the communists – agreed to remove the king and to share power *more or less following democratic rules*…
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> … *True enough, these new rules were not going to be submitted to the people for approval*, possibly to save 'the Assembly from the possible embarrassment of having the voters reject the Constitution it had approved, as had occurred in France shortly before.' (Adams and Barile 1953, p.63). Still, leaders across the political spectrum went a long way to persuade the population that such rules were 'just and anti-fascist' and therefore to be shared with no need for further debates or consultation.
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> …[This] *explains why this constitution devoted little attention to the protection of the individual against abuse by politicians and bureaucrats*, but made a deliberate effort to fragment power across different layers and jurisdictions, so as to enhance more rent-seeking opportunities for the party members and disperse individual responsibilities.
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> …[F]rom a classical-liberal standpoint the Republican Constitution was a partial success as regards the

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political relations).

[6] *See* Press Release, Elizabeth Katz, University of Virginia School of Law, *German High Court Has More Power Over Legislature*, Grimm Says (Mar. 9, 2006), http://www.law.virginia.edu/html/news/2006_spr/grimm.htm .

[7] *See* Svetozar Pejovich and Enrico Colombatto, The Rule of Law and the Economic Functions of the Constitution, Chap. 6, supra at pp. 113-114 (citations omitted).

> packaging, but a failure in terms of substance. It was a success since it turned out to be a fairly stable super-law…In addition, its rather complex system of checks and balances made sure that nobody could concentrate much power. *On the other hand, success was partial, for it offered only weak protection to individual liberty (freedom from coercion and encroachment by the state)* (emphasis added). [8]

France has similarly treated private property rights as positive conditional rights. Such treatment is currently reflected in recent changes made to the French Constitution that are intended to promote consistency with Europe's regional Aarhus Convention.

> A review of France's constitution is also instructive since it reveals the *current* status of private property rights in Europe. The French Constitution was recently amended in 2005 (for the 19th time since 2000) to include a new environment charter that provides French citizens with the 'positive' "right to live in a balanced healthy environment". The charter contains a series of environmental rights and responsibilities that are consistent with those already found in European regional law. For example, the charter's right of access to environmental information is similar to that provided under the UN's regional Aarhus Convention. The Environment Charter is therefore likely to suspend the requirement of legal 'standing' to enable any member of the public "affected or likely affected by, or having an interest in environmental decision-making" to demand an assessment, and then challenge the potential environmental impacts, of proposed economic activities to be undertaken on privately owned property. [9]

On a broader European regional level, the distinction between 'positive' and 'negative' rights is currently reflected in the European Convention on Human Rights, which apparently provides only an implied right to compensation for the expropriation of property:

> [T]he First Protocol (P1-1) to the European Convention on Human Rights…declares that everyone is "entitled to the peaceful enjoyment of his possessions," and that the state can only take property in the public interest and according to the law, but it fails to tell us what we really want to know: if the state authorizes the taking of our property, how much money will we get? The Protocol itself appears to say nothing on this crucial point… European Court of Human Rights[']s decisions…on compensation [however,] provide a particularly valuable insight into its views on the right to property…[W]e can now say that *the Protocol contains an implied right to compensation*. [10]

In addition, as this scholar has noted, the lack of an express guarantee of compensation was intentional:

> One of the [European] Council's first tasks was the preparation of a treaty on human rights. It took more time than anticipated, partly due to disagreements over the content of a right to property. In principle, the delegates agreed that the treaty should include a right to property, but they rejected every proposal that

[8] *Id*., at pp. 116-117.

[9] Kogan, *supra*, at p.4. *See also* French Constitution, Environment Charter, Art. 1; *The Need to Act*, Ministere Des Affaires Etrangeres, Republique Francaise Government Portal at: http://www.diplomatie.gouv.fr/en/article-imprim.php3?id_article=4596 ; David Case, *Liberte, Egalite, Environment? French Constitution Gets a Dash of Green*, Grist Environmental News and Commentary (July 14, 2005) at: http://www.grist.org/news/maindish/2005/07/14/case-france ; French Constitution, Environment Charter, Art. 7; United Nations Economic Commission for Europe (UN/ECE) "Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters", done at Aarhus Denmark ('Aarhus Convention') (6/25/98) at: http://www.unece.org/env/pp/documents/cep43e.pdf ; Aarhus Convention, Articles 2.4-2.5, 5.3-5.5, and 6.

[10] *See* Tom Allen, *Compensation for Property Under the European Convention on Human Rights*, 28 MICH. J. INT'L. L. 287, 288 (2007) (emphasis added) (citation omitted).

> contained a reference to compensation, no matter how weakly drawn. They even rejected a prohibition on the "*arbitrary confiscation*" *of property at one point, as some governments feared that it would be interpreted as a guarantee of compensation*. Eventually, the delegates agreed to sign the Convention *without a right to property* but committed themselves to continue negotiations with a view to including such a right in a later treaty. The delegates who opposed a compensation guarantee were concerned that it might compromise plans for ambitious economic and social policies. [11]

Also, the text of Article I of the First Protocol to the European Convention for the Protection of Human Rights establishes that the 'positive' conditional nature of private property rights in Europe is, for political as well as historical reasons, highly subject to and consistent with 'collective power' and the 'public interest' – i.e., the 'general will'.

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions *except in the public interest and subject to the conditions provided for by law and by the general principles of international law*. *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest* or to secure the payment of taxes or other contributions or penalties. [12]

Furthermore, Article 17 of the EU Charter of Fundamental Rights reflects that the scope and extent of individuals' rights to private property are expressly subject to societal interests.

> No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. [13]

Moreover, such different histories, political institutions and legal instruments also define how "fair compensation" is to be calculated in the event governmental action results in a "taking" of private property. According to at least one scholar, the American and European conceptions of private property rights may be distinguished in judicial terms as follows:

> The case law reveals that the Court applies three different conceptions of the P1-1 interest…the legal, economic, and social models…the legal model conceives of the *human rights interest in property in terms of the existing law of the relevant member state*…[T]he legal model does not fit with the integrated theory [of] [t]he economic and the social models [which] concentrate on the *social function of property*...The economic model focuses on *the objective value of the property*; in most cases, the Court assumes that this is *the market value*...the social model reflects the integrated view, as it seeks to identify the values of individual autonomy, dignity, and equality that underpin other Convention rights, but specifically as they relate to *access and control over resources*. [14]

According to one European legal scholar, the collective interest model may be contrasted with the legalist conception model of property rights adopted in the U.S., which may be determined *without* reference to social context:

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[11] *Id.* at 291 (emphasis added).
[12] *See* Convention for the Protection of Human Rights and Fundamental Freedoms, art.1 protocol 1 (March 20, 1952), Europe T.S. No. 9 (emphasis added).
[13] *See* Charter of Fundamental Rights of the European Union, art.17, 2000 I.J. (C364) 12.
[14] Allen, supra, at 305-306 (emphasis added).

[A] *liberal/legalist conception of property puts private interests in opposition to collective power and the public interest:* "Collective forces, under this conception, are clearly external to the protection that property, as an entity, affords." Moreover, *the liberal idea of rights assumes equal stringency for all rights of property, in the sense that all are equally worthy of protection against collective power.* This is what distinguishes it from the conceptual framework of the integrated view, as *it holds that one can determine the content of property without reference to the social context.* The possibility that collective interests exert pressure for a redrawing of the boundaries of individual autonomy does not mean that collective interests define those boundaries. [15]

[15] *Id.* at 307 (emphasis added) (internal citations omitted).