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ORGANIZATIONAL MATTERS

Report of the UN/CEFACT Task Team on Intellectual Property Rights and Related Issues

Note by the Bureau*

Summary

The twelfth session of UN/CEFACT approved an Intellectual Property Rights policy and established a Task Team to review current issues related to intellectual property rights in UN/CEFACT and to prepare a report on issues relevant to UN/CEFACT's stakeholders.

This note expresses the views of the Task Team and do not necessarily reflect the views of the United Nations secretariat and is submitted for discussion.

*This document was submitted late due to resource constraints.

INTRODUCTION

1. In today's commercial environment of ever-accelerating information and communications technology (ICT) developments, the need for common and open standards is more critical than ever, while the process for creating them is more complex. Innovators and inventors must, at the same time, participate in the development of standards and ensure protection for their own creations, marks, and inventions under national and international intellectual property (IP) regimes.

2. All major standards development organizations (SDOs) today recognize the importance of having participants work on the basis of a clear IP policy to ensure that the resulting standards are available on reasonable terms to all potential users and implementers. At the same time, participants expect to have some assurance that the codes of conduct for the SDO will help to ensure that participants will act in a reasonably transparent and fair manner. Although commercial competitors may not always completely trust each other, they can agree to cooperate if there is some assurance that the playing field is level and the resulting standards will be free of legal entanglements or IP traps set by the participants (inadvertently or otherwise). Public and non-profit participants also need these assurances for their stakeholders.

3. In this context, UN/CEFACT adopted its Intellectual Property Rights policy (IPR policy) in May 2006¹ as well as its revised Open Development Process (ODP) in May 2007² and its Code of Conduct in May 2006.³ Unlike most SDOs, UN/CEFACT's policy is based not on common licensing requirements such as RAND (i.e. "reasonable and non-discriminatory") or FRAND (i.e. "fair, reasonable and non-discriminatory"), but on a strict waiver – all participants in the standards development process are deemed to have waived their right to enforce against future users of the standard any IPR they own that is essential to the implementation of that standard. If participants do not want to waive their essential IPR then they must declare this during the development process. After such a declaration, decisions can be made in the SDO about how to avoid use of the IPR in the standard.

4. Under United Nations policy, all UN/CEFACT products will be made available to users worldwide free of charge. During the last year, a number of questions were raised about the UN/CEFACT standards development process and the implementation of the IPR policy in connection with specific patents that had been obtained or for which applications had been filed, where these patents appeared to be closely related to UN/CEFACT standards. Questions were raised, for instance, about: whether a participant could take out patents on a standard that would make it impossible to implement the standard without infringing that patent; whether patents could be taken out that would include information contributed by other participants during the standards development process; and whether the UN/CEFACT leadership and secretariat should take additional steps to address concerns in a timely manner and to protect themselves and UN/CEFACT from even the perception of undue outside influence and self-dealing.

¹ http://www.unece.org/cefact/cf_plenary/plenary06/trd_cf_06_11e.pdf.

² http://www.unece.org/cefact/cf_plenary/plenary07/trd_R650_Rev4_A1E.pdf. ODP is often known as "R650."

³ http://www.unece.org/cefact/cf_plenary/plenary06/trd_r650_rev4_a2e.pdf.

5. In response, the UN/CEFACT Bureau appointed an IPR Task Team to review these questions thoroughly and prepare a report. The Task Team members include UN/CEFACT participants from the private and public sectors, distinguished academics, and representatives of other SDOs, as well as of the United Nations. The Task Team announced that it would be looking at the issues from a generic standpoint, keeping in mind that the issues were relevant to all participants and all standards organizations, and would not entertain questions regarding specific individuals, companies, or IP rights. The Task Team began its work with a public colloquium on IPR at the September 2007 UN/CEFACT Forum in Stockholm. In the course of the colloquium, numerous questions were received in writing and orally, and were discussed.

6. The IPR Task Team consisted of the following names:

Mr. Philippe Baechtold (WIPO)
Mr. Michael Bechauf (SAP)
Mr. William Coats (White & Case law firm)
Ms. Virginia Cram-Martos (UNECE)
Mr. Eduardo Gutentag (OASIS),
Mr. William Luddy (Lally School of Management & Technology, Rensselaer Polytechnic Institute)
Ms. Pamela Samuelson (University of California at Berkeley)
Pat Toufar (UN/CEFACT International Trade and Processes Group)
Mr. Thomas Vinje (Clifford Chance law firm).
Mr. Jeffrey Kovar (United States)
Mr. Bart Schermer (University of Leiden).

7. This report represents the analysis, conclusions, and recommendations of the Task Team. Summary answers to the specific questions received are contained in the annex.⁴

I. CONCLUSIONS AND RECOMMENDATIONS

8. The Task Team concludes that the UN/CEFACT IPR policy is adequate, effective, meets or exceeds the protections of other SDOs, and is well tailored to the requirements of UN/CEFACT. The Task Team offers a number of specific recommendations, including:

- (a) Extend the Code of Conduct to all participants, and strengthen it in important areas, particularly with respect to the duties of working group chairs and others in leadership positions;
- (b) Review and, where useful, re-issue specifications issued before the IPR policy was promulgated for the purpose of ensuring application of the policy;
- (c) Disseminate information about the IPR policy and Code of Conduct to participants at every UN/CEFACT Forum;
- (d) Consider promulgating additional guidelines for the implementation of the IPR policy;
- (e) Amend the Open Development Process (ODP) to include the specific milestones applicable to IPR disclosure and waiver under the IPR Policy;

⁴ The views expressed in this report are solely those of the Task Team and do not necessarily reflect those of the United Nations or of any member state of the United Nations or of any UN/CEFACT participant, whether an individual, company, or other entity.

- (f) Establish a standing IPR Task team to be available to examine on an ongoing basis questions related to IPR and to organize discussions with participants and invited experts;
- (g) Establish guidelines for the Bureau for handling the consideration of IPR-related inquiries and concerns in a timely manner;
- (h) Consider making available information about dispute resolution mechanisms to address legal disputes between participants.

II. BACKGROUND: A COMPLEX LEGAL ENVIRONMENT FOR STANDARDS DEVELOPMENT

9. IPR and management issues that arise from UN/CEFACT standards development work must be understood in a legal framework that is complex and not always clear. Standards setting by UN/CEFACT, as well as by many SDOs, takes place in an international context, but most IPR is governed primarily by national laws and by national courts and administrative bodies. Moreover, for many types of IPR – particularly patents – there are significant differences in how national laws apply to computer business standards.

10. First, with the significant exception of the United States, electronic business processes such as those developed by UN/CEFACT specifications are generally not patentable in most countries, although technical applications of those specifications may be. The fact that the processes as such are patentable in the United States, however, must be borne in mind. While there is much public debate in many countries about whether or not to support such business-process patents, individuals and companies innovating in this area must proceed with full knowledge of the legal frameworks in which they do business and participate in the work of SDOs.

11. Second, the basis for applying for patent protection for an invention varies considerably. In most countries, patent protection is available to the first to file an application and is not limited to the actual inventor. In the United States, however, where business-process patent applications have become more common, and are now regularly granted by national patent authorities, the inventor must apply for a patent. In the United States it would be difficult for a participant in an SDO or an outside party to take innovations introduced by others and to present them as his/her own to the U.S. patent office. To do so with knowledge that they are not his/her ideas would constitute fraud.⁵ Lawyers preparing such fraudulent filings may be subject to sanctions. In other countries, there are also rules against appropriating another's invention in a patent filing.

12. Finally, it is only the national patent authorities and courts that can resolve questions about whether or not a claim forming the basis of a patent application is new and inventive. UN/CEFACT cannot play a role in resolving such legal and technical questions. In fact, the UN/CEFACT IPR policy waiver approach is specifically designed to ensure the free availability of UN/CEFACT Specifications without the need for the United Nations to become involved in resolving legal issues related to IPR rights.

⁵ Title 18, United States Code, section 1001.

III. UN/CEFACT INTELLECTUAL PROPERTY RIGHTS POLICY

How does it work?

13. The UN/CEFACT IPR policy is mandatory for all participants in UN/CEFACT forum groups. Each individual participant must agree in writing (which may be electronic) to be bound by the policy before participating in UN/CEFACT work. The Policy also covers companies, Governments, and other entities that stand behind individual participants. Invited experts are also required to agree to the policy before they may participate.

14. The policy covers all “essential IPR” of any kind owned by a Forum Group participant that would necessarily be infringed by the implementation of Specifications produced by that Forum Group, without regard to whether or not this IPR is known at the time the Specification is developed or adopted. This includes Technical Specifications (working draft or final version), Business Standards, Recommendations and Final Recommendations, and “any other formal documents and drafts that are materially involved in the Specification development process.”⁶

15. By agreeing to the policy, each participant waives his/her rights to enforce his/her “essential IPR” against any party anywhere in the world that is implementing the UN/CEFACT Specification. There is no deadline or expiration date for this waiver. At the same time, participants do not lose ownership of their IPR: for instance, they do not lose the ability to enforce their rights by bringing an action, counterclaim or other legal assertion of rights against any party that would infringe this IPR through some use that is not implementation of the UN/CEFACT Specification. In the same way, the waiver does not prevent participants from defending their IPR where another party asserts that implementation of a Specification is infringing that other party’s IP.

16. If a participant does not want to be subject to the mandatory waiver, he/she is obliged to disclose his/her IPR in writing to the Chair of the Forum Group and the Forum Management Group at the appropriate milestone in the development process, as described in the IPR policy. Upon disclosure, which prevents the waiver from taking effect, the UN/CEFACT Plenary Bureau will convene an Intellectual Property Advisory Group (IPAG) in order to determine whether a conflict with the essential IPR in question can be avoided, if it exists. The IPAG may ultimately conclude: that there is no conflict; that the Forum Group should consider designing around the identified IPR; that the Forum Group should terminate work on the subject; that a Specification should be rescinded; or any other appropriate solution. The solution agreed upon would need to take into account the requirement that the United Nations be able to make the outputs from its work available free of charge.

17. It is useful to highlight two key characteristics of this process:

(a) If a participant has essential IPR that he/she has patented or plans to patent, but wishes to waive that IPR in the case of its use in a UN/CEFACT Specification, he/she does not

⁶ IPR policy, para 8, ECE/TRADE/CEFACT/2006/11 (17 May 2006).

have to inform UN/CEFACT of the existence of the patent or of the intention to obtain a patent. UN/CEFACT Specification users are fully protected because the waiver permitting free use of the IPR in the Specification is automatic;

(b) Information circulated by a participant that he/she has essential IPR does not in itself qualify as disclosure under the UN/CEFACT IPR policy. In accordance with the policy, the participant must provide specific information, and submit it to designated individuals.

Is it adequate?

18. The waiver-based UN/CEFACT IPR policy is different from that of most SDOs, which follow a mandatory licensing approach. It is nonetheless well tailored to the needs of UN/CEFACT and its participants. First, UN/CEFACT does not have the staff or the competence to oversee compliance for a large number of licenses. Second, many licensing-based IPR policies provide for some level of reasonable royalties, whereas UN/CEFACT specifications are always royalty free. UN/CEFACT, as part of the United Nations, is under strict policy direction that all of its specifications and standards must be made available royalty free everywhere in the world. There is no exception to this policy.

19. Moreover, the policy has significant advantages over the IPR policies of other SDOs in terms of simplicity of operation and clarity of result. These advantages become apparent, for example, if an undisclosed IP claim, mark, or creation is discovered that belongs to a participant in the development of a Specification or to his or her company. In such an event, it is not necessary to look for applicable licenses or scrutinize their terms, consider the validity of that IPR under local law, or even reach a legal conclusion whether the IPR would be infringed by implementation of the Specification. Because of the UN/CEFACT waiver, it is clear that such IPR cannot interfere with the royalty-free implementation of the Specification.

20. The UN/CEFACT IPR policy does not, however, provide a wider scope of application than the policies of other SDOs, and therefore only applies to IPR that is “essential” to implementation of the Specification. Even if it were potentially desirable to cover non-essential IPR, it would probably not be feasible because of the difficulty inherent in defining what other IPR should be covered by an IPR policy. Determining whether IPR is “essential” is already a legal judgement requiring close analysis by technical and legal experts.

21. Questions about the scope of the IPR policy may raise issues about certain uses of a Specification. Sometimes, for example, a patent claim may cover a particular use or application of the Specification. Nevertheless, whether or not that use or application is a desirable or preferred one, the IPR policy does not cover it and the waiver does not apply if the Specification can still be implemented in other ways without necessarily infringing the patent (i.e. the IPR is not “essential”). This situation arises in other SDOs as well as UN/CEFACT, and reflects the nature of the standards development process. On the one hand, users of standards must have confidence that they will not be subject to infringement actions from participants in the development of those standards. On the other hand, the purpose of creating the standards is to establish the basis for new applications, including commercial applications. Software companies and other inventors may certainly be expected to look for ways to innovate based on standards

and to take steps to protect their intellectual property, in the light of the different law applicable from country to country.

22. As a practical matter, then, UN/CEFACT's IPR policy does not prevent a participant from patenting both essential and non-essential IPR either during or after the development of a Specification, if national law authorizes the creation of those rights. However, where the waiver is applicable, the IPR policy would ensure that such patents could not be used to prevent implementation of the standard. It can be expected that IPR related to a Specification will be asserted by those who contributed it, as well as by those who developed innovations resulting from gaps in the Specification or new applications of it. Because of the competitive nature of innovation and the commercial advantage that might accrue, as well as differences in national law about who may file for patent protection, this situation understandably creates tensions – particularly where some participants are better positioned to pursue patent applications. For UN/CEFACT to address these issues, which fall outside the area to which the IPR policy reasonably applies, it must look beyond the policy to the UN/CEFACT Code of Conduct.

IV. CODE OF CONDUCT

Scope and application

23. UN/CEFACT's Code of Conduct⁷ addresses issues about which the Task Team heard concerns raised. The Code, for example, calls for Bureau members to:

(a) “observe the highest standards of propriety involving impartiality, integrity and objectivity in relation to the management of the Centre;

(b) “avoid promoting our individual companies, organizations or affiliations during UN/CEFACT meetings and communications;

(c) “respect the rights of all parties for freedom of access to information and communication;

(d) “respect legitimate intellectual property rights, refrain from plagiarizing the work of others, and acknowledge the contributions of other parties;

(e) “conduct all communications within the generally accepted framework of courtesy and civility”.

24. Members are also required to “declare any personal, professional, or financial interest, which may conflict with their responsibilities as Bureau members,” and they should not be present during discussions of matters for which such an interest has been declared.

⁷ UN/CEFACT code of conduct version 1.2 approved by UN/CEFACT steering group 29 April 2003 (www.UN/ECE.ORG/CEFACT).

25. Currently, however, the Code of Conduct does not apply to all UN/CEFACT participants, or even to all office holders (it does not include leaders of the Permanent Groups). The Code is part of the Rules of Procedure for the UN/CEFACT Bureau, which consists of the Chair and vice-chairs of UN/CEFACT, the Chair and Vice-Chair of the Forum Management Group, and a representative of the UNECE secretariat. The Code requires Bureau members to “encourage UN/CEFACT Forum members to follow this code of conduct,” but it does not directly apply to those Forum members.

26. It is recommended that UN/CEFACT take immediate steps to extend the Code of Conduct to all participants in its work. This is essential in order to ensure that all participants have trust in the organization. The IPR policy alone is not sufficient to provide the environment for such trust.

V. STRENGTHENING GOOD PRACTICES

27. The Bureau is encouraged to consider ways in which it might further strengthen the Code so as to promote confidence in UN/CEFACT. For example, in order to address concerns heard by the Task Team that participants may be in a position to steer the development of standards in such a way that they increase the value of specific applications for which IPR are already registered, the Code might require participants in the development of a Specification, or at least office holders, to inform other participants about essential IPR of which they are aware. While the IPR policy assures that this kind of IPR, when waived, cannot impede the free implementation of the Specification, greater transparency may be desirable as a way to increase mutual confidence and trust among participants.

28. The consequences for not adhering to the Code of Conduct also need to be clearly described. While no legal measures would be involved for failure to comply, repeated or very serious failures might lead to the participant being asked to give up a leadership role or to a request being made to the national delegation to discharge the person from further participation in UN/CEFACT.

29. The Task Team recommends that the UN/CEFACT Bureau consider developing specific guidelines for addressing in a fair, timely and transparent manner any complaint that UN/CEFACT leadership or participants have failed to comply with the Code of Conduct. The Bureau should also establish a standing body, such as a permanent IPR Task Team, to examine on a continuing basis issues related to IPR and to organize discussions with other participants and invited experts. Such a standing body would report to the Bureau. The Bureau might also consider providing information to participants about the possibilities for recourse to voluntary mediation or arbitration if necessary to resolve any legal disputes that may arise between them. There are many formal models available, including the World Intellectual Property Organization (WIPO) Arbitration and Mediation Centre.⁸ WIPO provides the possibility of arbitration, mediation, and expert determination.⁹ The WIPO Mediation Rules are available at

⁸ Up-to-date information on the caseload of the WIPO Arbitration and Mediation Center and examples of the cases administered can be found at <http://www.wipo.int/amc/en/center/caseload.html>.

⁹ The WIPO Arbitration and WIPO Expedited Arbitration Rules are available at <http://www.wipo.int/amc/en/arbitration/rules/>.

<http://www.wipo.int/amc/en/mediation/rules/>. New WIPO Expert Determination Rules are available at <http://www.wipo.int/amc/en/expertdetermination/rules/index.html>. Expert Determination may be particularly appropriate to resolve disputes requiring a determination of what technology is part of a standard.

30. Some participants also expressed concern about the possibility of a company or organization exercising undue influence where participants who work for that entity chair more than one permanent group. UN/CEFACT should revise its procedures to permit participants from one company or organization to hold only one chairmanship at a time among the seven most prominent leadership positions: Chair of the Plenary, Chair of the Forum Management Group, and the chairs of the five Permanent Groups.

VI. IMPLEMENTATION OF THE IPR POLICY AND CODE OF CONDUCT

Are there areas for improvement?

31. Specifications issued by UN/CEFACT prior to the coming into effect of the IPR policy in May 2006 are not covered by the policy. To ensure that such pre-IPR policy Specifications benefit from the assurance that participants may not assert their essential IPR against users implementing those Specifications, UN/CEFACT should identify Specifications not covered by the policy, and ensure that the most important of these are fully covered. This may require reopening the Specifications, and reissuing them. As part of such a review, Forum Groups should also consider whether Specifications should be extended to cover some applications that have become the most practical and widely used methods of implementing those Specifications. UN/CEFACT should call upon the Legal Working Group, as necessary, to assist the IPR Task Team and the Bureau in these efforts.

32. It became apparent to the Task Team during its review and participation in discussions at the public colloquium at the 2007 Stockholm Forum that some participants who had signed the IPR policy did not understand it well or how it would work in practice. It would be useful to provide additional information about the IPR policy and briefing/training sessions at all UN/CEFACT Forums to all participants and leadership.

33. Because the policy was adopted after the Open Development Process (ODP), the latter document does not contain specific references to it, and particularly to the milestones for disclosing essential IPR, which are linked to steps in the ODP process.¹⁰ Therefore, the ODP document should be revised to incorporate the specific deadlines and procedures for IPR disclosure contained in the policy, as well as any other appropriate points from the policy.

VII. NEXT STEPS

34. The Task Team recommends that the Bureau take steps as soon as possible, in cooperation with the Task Team and the Legal Working Group, to:

¹⁰ http://www.unece.org/cefact/cf_plenary/plenary07/trd_R650_Rev4_A1E.pdf

(a) Consider ways to strengthen good practices and transparency in UN/CEFACT, by focusing on expanding the application of the Code of Conduct to all participants, and increasing the scope of its provisions to take into account areas in which the IPR policy alone cannot provide adequate transparency;

(b) Examine ways to strengthen the ability of UN/CEFACT management to deal in a timely and effective way with questions about the conduct of participants and leadership under UN/CEFACT rules and good practices;

(c) Consider the Task Team's additional recommendations for improved implementation (see paragraph 7).

Annex

SUMMARY ANSWERS TO QUESTIONS RECEIVED

I. IP LAW

1. What is the relationship between a person named on a patent and the person's employer with respect to patent ownership? Who owns the patent? How is this determined? Does ownership imply that an individual invented every aspect of the patent?

Answers to these questions should be sought in the patent law of the country in which the patent application was filed. In many cases, while the named individual is the owner of the patent, where that individual has developed the patent as part of his employment, it is typically assigned to that employer under an employment agreement.

Ownership of a patent provides protection to those aspects of it that are explicitly included in the "claims" stated in the final grant of the patent. How far those "claims" reach, in terms of covering similar implementation of processes or inventions, is a matter that depends to a large extent on national law. These legal determinations are ones that experts make based on knowledge of the law and relevant factors.

2. Would it be possible for a UN/CEFACT participant to take information from UN/CEFACT work and use it as the basis of a patent application?

Yes, but this does not mean the patent is valid. Resolving disputes over who the actual inventor is and whether the patent is valid would be handled differently under different legal systems (see paragraphs 8-11).

3. What is the significance of a copyright statement? What does it mean?

A copyright statement serves to alert the reader to the fact that the originator of the work considers it to be copyrighted. The actual existence and scope of that copyright, however, will depend on national and international law. The right itself is not affected by the presence or absence of the statement.

4. Does the IPR policy or Open Development Process prohibit a participant from submitting a contribution with the name of his or her company or organization on the page?

No. Acceptance of the contribution in no way means that the UN/CEFACT Standard would have to continue to show the origin of the contribution. Nor does the participant's name or a copyright statement on the submission constitute disclosure of IPR as defined in the IPR policy. The requirements for a valid disclosure are set out in section 4 of the policy.

5. Does the IPR policy protect anyone from a lawsuit? Does it protect anyone from losing a lawsuit?

No, it does not protect anyone from a lawsuit or guarantee the outcome of any process in national courts. However, where application of the policy leads under its specific terms to waiver of the right to enforce essential IPR, the waiver should be enforceable in national courts. By increasing the predictability of the outcome of any lawsuit, the UN/CEFACT IPR policy – like that of other SDOs – should reduce the incentive of parties to pursue legal action.

6. Is a participant that has waived his or her IPR prevented from defending himself or herself, including by counter-claiming, if a third party challenges the participant's implementation of the Specification, claiming the participant has infringed the third party's IPR?

No. The IPR policy is clear that participants are free to defend their IPR rights in such circumstances.

7. Are there any online resources for the beginner on IP law?

Yes, they are numerous. The World Intellectual Property Organization (WIPO) provides general IP law information on its website (<http://www.wipo.int/about-ip/en/>). For patents, in particular, one can start with WIPO's "Patentscope" (<http://www.wipo.int/patentscope/en/patents.html>). A random sample from a commercial search engine also found the following web links and a reference book. No representation is made about the accuracy or reliability of information contained in these sites. As mentioned above, the law can vary considerably from jurisdiction to jurisdiction.

http://www.cric.or.jp/cric_e/beginner/begin.html

<http://www.ipo.gov.uk/whatis.htm>

<http://www.ige.ch/E/marke/m1.shtm>

<http://www.ige.ch/E/patent/p1.shtm>

Nolo's Patents for Beginners, by David Pressman and Richard Stim

II. UN/CEFACT INTELLECTUAL PROPERTY RIGHTS POLICY

8. What if I contribute to a project and a patent is applied for on this work by another participant?

If another participant files an application or patents your contribution to a UN/CEFACT Specification, he/she must disclose that patent in a timely fashion and remove it from the standard, or the right to assert the patent against implementation of the Specification will be waived. Use of that patent outside the Specification will not be subject to the waiver. However, if you believe that you are the lawful inventor and the application is false or the patent wrongfully obtained, you are responsible for taking the necessary steps under relevant national law to protect your rights in your invention or innovation.

9. How would a patent taken out by another participant affect my ability to implement?

If that patent is subject to waiver under the IPR policy it will have no effect on the ability to implement the Specification. If it has been disclosed in a timely fashion for purposes of preventing waiver, steps will be needed to remove it from the Specification (see paragraph 15).

10. How will participants be guaranteed that the project work they contribute will be publicly available free of charge?

It is a fundamental policy of the United Nations that UN/CEFACT Specifications must be made available by the United Nations free of charge.

11. What processes are in place to prevent work items from being undertaken primarily to advance the interests of one organization?

The UN/CEFACT management structure, the Open Development Process, and review and approval of all work by the Member States attending the UN/CEFACT Plenary session, all aim to produce Specifications that meet the best interests of the United Nations and not the interests of any one organization or company.

12. Does the IPR policy affect the underlying ownership of IPR contributed during the creation of standards?

No.

13. Does the IPR policy apply retroactively to work in the Permanent Groups?

Not at this stage. This is, however, the subject of one of the recommendations of the Task Team (see paragraph 7).

14. When does the IPR policy waiver apply is it only when the standard is published or is it applicable prior to that?

The IPR policy specifies certain milestones in the Open Development Process after which the waiver would apply to draft as well as final Specifications.

15. TBG groups are using tools, developing add-ons and developing their own tools. Is there a risk that what they have done will be limited in use due to any patents?

UN/CEFACT cannot prevent non-participant outside parties from attempting to claim IPR in tools and other add-ons developed by permanent groups. As for patents taken out by other participants, the IPR policy applies only to Specifications and may not cover some tools (e.g. those that are not “formal documents and drafts that are materially involved in the Specification development process”).

16. Should participants be able to patent their contributions to standards as a defensive measure against third parties not covered by the IPR policy?

Yes. In some cases this might be desirable in order to preventing outside parties from blocking the free implementation of some standards.

17. Is it possible to identify what patents are essential for implementing a standard?

Yes, but this is a highly specialized exercise. It would be necessary to analyse the claims in the published patent in relation to the implementation of the Specification. As an example, the Arbitration and Mediation Centre of WIPO has a procedure called “expert determination” that could possibly be used for this purpose.

18. How can Governments ensure that their interests in trade and customs measures will not be compromised by IPR rights derived from participation with private parties in UN/CEFACT working groups?

Governments that are full participants in the standards development process are treated the same as all other participants. Their right to implement is protected by the IPR policy and its waiver. At the same time, any government-owned IPR that is contributed to the development of UN/CEFACT Specifications will be subject to the same benefits and limitations as those of private individuals and companies. The Government must weigh the benefits of participating in an SDO with all known risks, either large or small.

19. Can the waiver terms under the IPR policy be modified?

No.

20. For the purpose of allowing a participant to engage in litigation to defend his or her IPR, there is an exception to the waiver obligation (paragraph 17 of the IPR policy). Could this clause be construed to consequently release other participants from their waivers in order to bring an action against that participant?

No. The purpose of the waiver undertaking in the IPR policy is to ensure that a Specification can always be implemented without cost or licensing obligation. The exception in paragraph 17 must be narrowly construed.

III. CODE OF CONDUCT

21. Does the Code of Conduct for the UN/CEFACT Bureau apply to all UN/CEFACT participants?

No, not at present. The Task Team recommends that it be strengthened and extended to all participants, including all leadership.

22. What are the rules and process for addressing questions related to conflict of interest?

The Code of Conduct establishes the rules but no mechanism for considering questions about implementation. The Task Team recommends that a mechanism be established to do so.

23. Do disclosure requirements in the IPR policy and Code of Conduct apply to all elected officials?

Yes, they apply to all participants, including elected officials. The requirements in the Code of Conduct do not (see answer to question 1 above).

24. Does UN/CEFACT have any constraints on how users implement the standards and what claims they can make about being UN/CEFACT compliant?

No. The question of what constitutes being “UN/CEFACT Compliant” is something currently under study.

25. Has the Code of Conduct ever been breached?

No process exists to consider and make such a determination.

26. What is the best way to raise and address questions about specific conflicts of interest?

The Task Team recommends that a fair, effective, and transparent mechanism be established to consider such questions.

27. Can neutral examples be drawn up to provide guidance for application of the IPR policy and Code of Conduct?

Yes, this could be done if participants thought it would be useful.

IV. USE OF STANDARDS

28. Can national standards organizations, intergovernmental organizations, associations, companies, or business sectors that adopt UN/CEFACT Specifications republish them? Can they sell them as part of other products or packages provided to users? Can they develop implementation guidelines?

Yes. They can republish UN/CEFACT Specifications. They can also charge for the value they have added to their publication. This added value may take many different forms, including translation into a national language, implementation guidelines, explanatory material, implementation software, additional specifications, etc. In all such publications acknowledgement must be given to UN/CEFACT as the source of the Specification. Attribution to UN/CEFACT as the origin of a Specification should always be clear and unambiguous. If participants believe that it would be useful, attribution guidelines could be developed.

29. Is there any group in UN/CEFACT that can provide advice on whether or not a patent is waived under the IPR Policy?

The Task Team recommends that a fair, effective, and transparent mechanism be established under a standing IPR Task Team to consider such questions and provide advice to Forum Groups and the Bureau. However, it should be clearly stated that such advice could not be considered definitive or legally binding. If legal disputes arise between participants, they may be encouraged to seek the services of an outside expert determination, such as that provided by WIPO’s Arbitration and Mediation Centre (see paragraph 29).

30. Will UN/CEFACT identify all specifications that are covered by the current IPR policy, and suggest the re-issuance of standards that are not covered, where that would be useful?

The Task Team has recommended that this be done (see paragraph 7).
