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ICC Statement on Attorney-Client privilege

January 28, 2010, at the WIPO Standing Committee on the Law on Patents, (SCP), Fourteenth Session, Geneva

Thank you. Mr. Chairman

In most countries, communications between clients and their legal advisers are withheld from the other side when the clients are in litigation locally. This is good for trade because it encourages clients to seek full legal advice, which in general means they are more likely to act lawfully and to avoid litigation.

On the international scale, however, this good situation does not exist, specifically in the area of intellectual property.

At present, judges in common-law countries are required to apply complex and expensive rules on whether communications with foreign advisers are privileged, in the sense not to be disclosed. Repeatedly, they have ordered disclosure of communications with foreign advisers which would not have been disclosed in the local courts of those advisers, for example of advisers in UK, France, Netherlands, South Africa, Pakistan, Australia, and Japan. Even between two common-law countries, there is remarkably little mutual respect! This has occurred above all in intellectual property litigation, because, for instance, patent owners may have taken advice on patentability in many countries, and trade mark owners and those launching new products and brands may have taken advice on infringement risks in many countries.

An international framework for mutual respect of communications with legal advisers on intellectual property matters is needed. We believe that achievement of such mutual respect is supportive of businesses engaging in international trade, regardless of the state of development of their home country, and is also consistent with the mission of WIPO. ICC has itself devised a framework which it believes will work, paragraphs 22 and 23 of its paper dated October 9, 2008, an extract of which is available on the table outside this room. Moreover, after careful consideration, see our paper dated August 27, 2009, also available on the table outside this room, ICC has concluded that its proposed framework will work notwithstanding potential

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difficulties raised by delegates at the SCP in March 2009. In addition, ICC believes that its own proposal does not need the underpinning of further research or study of existing national laws on privilege or professional secrecy.

ICC respectfully urges the SCP to begin to consider detailed possible solutions to the privilege problem, along the lines of the ICC proposal and along other lines. It respectfully urges WIPO to evaluate the advantages and disadvantages of possible solutions, and to do only such further research or study as is necessary for such evaluation.

Thank you.