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**Economic Commission for Europe**

Committee on Trade

**Centre for Trade Facilitation and Electronic Business**

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Item 6 of the provisional agenda

**The way forward and UN/CEFACT's structure, mandate, terms of reference and procedures****Draft revised UN/CEFACT Intellectual Property Rights Policy****Submitted by the UN/CEFACT Bureau for approval***Summary*

This draft revised intellectual property policy for UN/CEFACT is submitted to the UN/CEFACT Plenary for review and approval. It constitutes a draft revision of the document UN/CEFACT Intellectual Property Rights Policy, ECE/CEFACT/2006/11. This revision reflects proposed organizational changes, including changes to names of steps and stages in the Open Development Process, which have been submitted for approval to the Plenary.

For ease of reference, changes to the original document have been underlined. This revised document is presented in the United Nations standard format.

The original document ECE/CEFACT/2006/11 remains in effect until the implementation date of the approved organizational changes.

## Note by the UN/CEFACT Bureau

At its 2005 session, the UN/CEFACT Plenary approved the principles of its Intellectual Property Rights Policy (as found in document TRADE/CEFACT/2005/MISC.3). The Plenary also asked the Special Contact Group, in cooperation with the Bureau, to prepare a document for clearance with the United Nations Office of Legal Affairs (OLA) (see Decision 05-12 in document TRADE/CEFACT/2005/37). The Bureau and the Special Contact Group, with the UNECE secretariat, have followed these instructions and clearance for the attached document was received from OLA on 15 May 2006 after several exchanges of information on the wording. This document reflects and adheres to the principles approved at the 2005 Plenary. OLA has also requested the inclusion of a disclaimer “in the publication, on the website and in connection with any other presentation” of UN/CEFACT outputs covered by the IPR policy. The text of this disclaimer can be found in annex to this document.

### I. Royalty-free goals for UN/CEFACT specifications

1. In order to promote the widest adoption of Specifications, UN/CEFACT seeks to issue Specifications that can generally be implemented without fees or restrictions. Subject to the conditions of this IPR Policy (the “Policy”), UN/CEFACT will generally not approve a Specification if it is aware that Essential Intellectual Property Rights (IPR) exist that are not available without fees or restrictions.

### II. Definitions

2. A “**Participant**” is an individual, association, organization, corporation, other entity or Affiliate of such an entity, or an agency of government, that is part of a UN/CEFACT working group in any capacity and has formally agreed to the terms of this Policy and the rules of UN/CEFACT in general.

3. “**Affiliate**” is any entity other than a government, which directly or indirectly controls, is controlled by, or is under common control with, another entity, so long as such control exists. In the event that such control ceases to exist, such Affiliate will be deemed to have withdrawn from UN/CEFACT, and the withdrawal implications set forth in section 3(b)(ii) of this Policy will apply. For purposes of this definition, with respect to a business entity, control means direct or indirect beneficial ownership of or the right to exercise (a) greater than fifty per cent of the voting stock or equity in an entity or (b) greater than fifty per cent of the ownership interest representing the right to make the decisions for the subject entity in the event that there is no voting stock or equity.

4. An “**Authorized Individual**” is an individual designated by a Participant to represent and bind that Participant with respect to the obligations set forth by UN/CEFACT's policies, such as this Policy, the Open Development Process and TRADE/R.650/Rev.4.

5. “**IPR**” or “**Intellectual Property Rights**” includes patents, copyrights, trademarks, utility models, invention registrations, database rights, moral rights and data rights.

6. “**Essential IPR**” means any and all IPR in any jurisdiction in the world that would necessarily be infringed by implementation of a Specification because there are no commercially acceptable, non-infringing alternatives for implementing the Specification. The availability of a commercially acceptable non-infringing alternative shall be judged

according to the state of the art when a “development milestone” (set forth in section IV(d)) relating to the IPR occurs. Essential IPR shall not include rights in any enabling technologies that may be necessary to implement or use a Specification, such as technology related to the underlying hardware, operating system, middleware, or business processes.

7. “**Specification**”, as used in this Policy encompasses all documents and drafts that are developed or are being developed under the Open Development Process as part of a Project’s deliverables.

8. “**Open Development Process**” or “**ODP**” is the process followed for the development, approval, publication and maintenance of UN/CEFACT projects in the field of trade facilitation and electronic business.

9. “**Contribution**” is any material submitted to a UN/CEFACT working group by a Participant or Authorized Individual. This material must be submitted in writing or by electronic means, whether through a physical meeting or through any electronic conference or mailing list maintained by UN/CEFACT and which is or was proposed for inclusion in a UN/CEFACT Recommendation as defined in this Policy. This definition includes general feedback from Participants and Authorized Individuals.

10. “**Working group**” is a generic term used in this document to designate any team working on the development of UN/CEFACT Specifications.

### III. Participant waiver obligations

11. The following obligations apply to all Participants.

#### A. Waiver obligation

12. Subject to section III(b), as a condition of participating in UN/CEFACT, each Participant agrees to waive its rights to enforce its Essential IPR against any party implementing a Specification from any working group of which Participant was a member or made a Contribution. The Participant’s waiver of its rights to enforce Essential IPR against any party implementing the Specification extends only to the actual implementation of the Specification; a participant does not waive its rights to enforce its Essential IPR as to any applications or uses of its Essential IPR other than the actual implementation of a Specification.

13. If a Specification requires an implementation in its entirety, then the waiver extends only to such implementations, but if the Specification allows implementations in part, then the waiver extends to such portions.

#### B. Waiver exception

14. The Waiver Obligation of this Policy does not apply to either:

(a) Participant’s Essential IPR that is properly and timely disclosed in accordance with the requirements of this Policy and the Open Development Process, provided that the Participant disclosing such Essential IPR expressly and timely elects not to waive its rights, again in accordance with the requirements of this Policy and the Open Development Process; or

(b) Any new material added to a Specification after a Participant formally withdraws from that Specification’s working group in writing to the Chair of the Plenary.

The Waiver Obligation will continue to apply to any Contributions made to the Specification by the Participant after withdrawal.

### **C. Waiver term**

15. With respect to patents or any other IPR with a limited term, the term of such waiver shall be for the life of the patent or other IPR in question. With respect to any other IPR, the waiver shall be perpetual. Notwithstanding any other terms of this Policy, the waiver obligation applicable to a particular Specification does not apply to any Participant with respect to any party that is asserting a claim that an implementation of that Specification infringes that party's IPR.

## **IV. Disclosure**

### **A. Disclosure obligations**

16. Disclosure is required only where the Participant elects not to waive its right to enforce its Essential IPR under the Waiver Obligations of this Policy and instead elects to follow the Exception Handling procedures of this Policy. In order not to waive the Participant's rights to enforce its Essential IPR, the Authorized Individual must disclose the Essential IPR on or prior to the first development milestone that arises after the Authorized Individual first has actual knowledge of the Essential IPR. This disclosure obligation applies to Participants only with respect to working groups in which the Participant is a member or to which the Participant provides a Contribution.

17. An Authorized Individual's failure to disclose in accordance with section IV of this Policy automatically results in the Participant's waiver of its right to enforce the applicable Essential IPR as set forth in section III. The waiver extends to the enforcement of all future Essential IPR that originates from its waived Essential IPR. For example, should an Authorized Individual fail to disclose a known Essential pending patent claim prior to a first development milestone, the Authorized Individual may not then disclose a patent claim that originated from the undisclosed pending claim prior to a future development milestone.

18. There is no requirement that the Authorized Individual perform a patent search or any analysis of the relationship between the patents that the Participant holds and the Specification in question. However, notwithstanding any other terms of this Policy, the right to enforce any Essential IPR that has not been disclosed prior to five days after the final technical specification release development milestone (section IV(d)(vi)) will be waived by the Participant pursuant to section III of this Policy, whether or not the Authorized Individual has actual knowledge of that Essential IPR.

19. Once the Authorized Individual discloses specific Essential IPR with respect to a Specification following the rules laid out in this Policy, the Participant is relieved from its obligation to continue to disclose that Essential IPR at additional development milestones unless the nature of the Essential IPR has changed (e.g. a claim is approved or a patent application has issued).

### **B. Disclosure statement contents**

20. Disclosure statements must be sent to the Chair of the Plenary and include in writing:

- (a) an identification of the portion of the Specification that the Participant believes infringes the Participant's Essential IPR;
- (b) a specific identification of the Participant's Essential IPR as specified in Section 4(c);
- (c) a signed statement from the Authorized Individual, binding on the Participant, indicating that the Participant does not agree to waive its rights to enforce the disclosed Essential IPR, and elects to implicate the Exception Handling procedures of this Policy.

### **C. Specific identification of Essential IPR**

- (a) For copyrights, the specific identification includes a disclosure of any formal registration numbers or information; or in the case of an unregistered copyright, a copy of the copyrighted material and an explanation of Participant's entitlement to legal rights in the material;
- (b) For trademarks, such specific identification includes a disclosure of any formal registration numbers or information; or in the case of an unregistered trademark, a description of the mark and an explanation of Participant's entitlement to legal rights in the mark;
- (c) For issued patents, the specific identification includes the patent number and an identification of specific claims. Any patent claims not specifically identified, even if included in otherwise disclosed patents, are waived pursuant to the Waiver Obligations of this Policy;
- (d) For laid-open or published patent applications, or for allowed claims in any patent application, the specific identification includes the disclosure and identification of specific claims. Any patent claims originating from published or allowed claims that are not specifically identified, even if included in otherwise disclosed patents, are waived pursuant to the Waiver Obligations of this Policy;
- (e) For any pending claims in an unpublished patent application, the specific identification includes only the disclosure of the existence of such claims. Any patent claims originating from pending claims not specifically identified, even if included in otherwise disclosed patents, are waived pursuant to the Waiver Obligations of this Policy.

### **D. Timing of disclosure: development milestones**

21. Authorized Individuals are obliged to disclose IPR in accordance with this Policy at the following times ("development milestones"):
- (a) the time of making a Contribution containing the Essential IPR;
  - (b) within 30 days after joining a newly established or operating working group;
  - (c) 30 days after the circulation of the first Interim Draft\*;
  - (d) 30 days after the publication of the first Public Draft\*;
  - (e) 30 days after the end of the public review period\*;
  - (f) 30 days after the publication of the Proposed Final Draft\*;

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\* As defined in the draft revised open development process, ECE/TRADE/C/CEFACT/2010/24/Rev.1.

(g) 5 days after the publication of the Final Draft as a UN/CEFACT Specification\*.

## **E. Disclosures to be publicly available**

22. Essential IPR disclosure information for each Specification will be made public along with each public Working Draft issued by the working group. No later than 10 days following each development milestone, the Working Draft will be updated to include a list of all specifically identified Essential IPR disclosed, and all Exception Handling procedures implicated, by any and all Participants pursuant to this Policy.

## **V. Intellectual property ownership**

23. No right related to IPR of a Participant will be deemed waived except as expressly set forth in this Policy. Further, each Participant in each UN/CEFACT working group approved by the UN/CEFACT Plenary will retain ownership of all rights in IPR that such entity owned prior to participation and may vest in the course of participation. Except as specifically set forth in this Policy, Participants do not grant any waivers, or otherwise limit their rights in or to, their Contributions, Essential IPR, or any other IPR.

## **VI. Exception handling**

### **A. Intellectual Property Advisory Group formation**

24. In the event that an Authorized Individual or Participant, following the disclosure and waiver exception procedures outlined in this Policy, informs UN/CEFACT that they will not waive their rights to enforce particular Essential IPR, an Intellectual Property Advisory Group (IPAG) will be launched by the Plenary Bureau, in coordination with the appropriate working group(s), to resolve the conflict. The IPAG is an ad-hoc group constituted specifically in relation to the working group with the IPR conflict. An IPAG may also be formed without such a disclosure if the Plenary Bureau determines that an IPAG could help avoid anticipated IPR problems. During the time that the IPAG is operating, the working group may continue its technical work within the bounds of its charter.

### **B. IPAG composition**

25. The IPAG is composed of:

- two vice-chairs of the Plenary;
- Chair and Vice-chair(s) of the affected working group;
- other relevant working group Chair(s); and
- others suggested by the Plenary Bureau.

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\* As defined in the draft revised open development process, ECE/TRADE/C/CEFACT/2010/24/Rev.1.

26. Members of the IPAG should be authorized to represent their organization's views on IPR licensing issues. Any member of the IPAG may also be represented by legal counsel, though this is not required.

### **C. IPAG procedures**

#### *IPAG formation timing*

27. Within 30 days after being launched by the Plenary, an IPAG will be convened by the working group Chair, in coordination with the Plenary Bureau and based on a charter developed initially by this group and following the requirements listed in this Policy.

#### *IPAG charter requirements*

28. The charter should include:

- clear goals for the IPAG, especially a statement of the question(s) the IPAG is to answer.
- Duration.
- confidentiality obligations.
- determination of the publication of the IPAG charter, IPAG deliberations, and IPAG conclusions.

29. The IPAG charter must specify deadlines for completion of individual work items it takes on. The IPAG, once convened, may propose changes to its charter as appropriate, to be accepted based on consensus of the IPAG participants. The Plenary Bureau will choose a member of the IPAG to serve as Chair.

### **D. IPAG conclusion**

#### **Possible IPAG conclusions**

30. After appropriate consultation, the IPAG may conclude that:

- (a) the initial concern has been resolved with no need to change the Specification;
- (b) the Working group should be instructed to consider designing around the identified Essential IPR;
- (c) the IPAG needs further information;
- (d) the Working group should terminate its activity on this subject;
- (e) the Specification, if issued, should be rescinded; or
- (f) alternative solutions should be considered. In such a case, the IPAG shall consult with the United Nations in relation to such alternative solutions, concerning any relevant United Nations regulations, rules and policies.

## **VII. Warranties and indemnities**

- (a) Every Participant warrants that to the best of its Authorized Individual's knowledge, and without investigation, no third party contends that the Participant's Contributions infringe that third party's intellectual property;

(b) THERE ARE NO OTHER WARRANTIES OR INDEMNITIES MADE BY THE PARTICIPANTS OR UN/CEFACT, AND UN/CEFACT AND PARTICIPANTS HEREBY DISCLAIM ANY IMPLIED OR EXPRESS WARRANTIES;

(c) UN/CEFACT does not take a position as to the validity or scope of any Essential IPR or any other rights that might be claimed to relate to the implementation of a Specification. UN/CEFACT makes no representation that it has made any independent investigation or effort to identify or evaluate any such rights.

## **VIII. Confidentiality**

31. UN/CEFACT and the Participant have no duty of confidentiality with respect to any information transferred between them. No Contribution that is subject to any requirement of confidentiality or any restriction on its dissemination will be considered in any part of the UN/CEFACT Open Development Process, and there must be no assumption of any confidentiality obligation with respect to any such Contribution. No submission of any kind should be made on the basis of an assumed confidentiality obligation or restriction on dissolution.

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## **Annex**

1. This following disclaimer shall be included in the publication, on the website and in any other form of presentation, of UN/CEFACT outputs covered by the IPR policy.

### **Disclaimer**

2. "UN/CEFACT draws attention to the possibility that the practice or implementation of its outputs (which include but are not limited to Recommendations, norms, standards, guidelines and technical specifications) may involve the use of a claimed intellectual property right.

3. "Each output is based on the contributions of participants in the UN/CEFACT process, who have agreed to waive enforcement of their intellectual property rights pursuant to the UN/CEFACT IPR Policy (document ECE/TRADE/C/CEFACT/2010/20/Rev.1 available at <http://www.unece.org/cefact/> or from the UNECE secretariat). UN/CEFACT takes no position concerning the evidence, validity or applicability of any claimed intellectual property right or any other right that might be claimed by any third parties related to the implementation of its outputs. UN/CEFACT makes no representation that it has made any investigation or effort to evaluate any such rights.

4. "Implementers of UN/CEFACT outputs are cautioned that any third party intellectual property rights claims related to their use of a UN/CEFACT output will be their responsibility and are urged to ensure that their use of UN/CEFACT outputs does not infringe on an intellectual property right of a third party."

5. "UN/CEFACT does not accept any liability for any possible infringement of a claimed intellectual property right or any other right that might be claimed to relate to the implementation of any of its outputs."

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