

Testimony of James Pooley
“Establishing Accountability at the World Intellectual Property
Organization: Illicit Technology Transfers, Whistleblowing, and Reform”
U.S. House of Representatives Committee on Foreign Affairs
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Good morning Chairman Royce, Ranking Member Engel, and Members of the Committee. Thank you for inviting me to address you today. My name is James Pooley. I started as a lawyer in Silicon Valley in 1973, and soon became deeply involved in intellectual property law and public policy. This led to law school teaching, writing, and service on various committees and leadership of professional organizations. Currently I am in independent private practice and serve as Chairman of the Board of the National Inventors Hall of Fame.

In 2009 I was asked by the White House to join the World Intellectual Property Organization in Geneva, where I served for five years as a Deputy Director General and was the senior American official at the agency. My main job was to manage the international patent system under the Patent Cooperation Treaty. The PCT system is critically important to U.S. industry and innovators. Our country always produces more international patent applications than any other, and our inventors' application fees represent WIPO's largest single source of income. So the U.S. has a unique and compelling interest to make sure that those fees are well spent and that WIPO's systems are well managed.

Based on my experience I can report to you that the vast majority of the people at WIPO are competent, dedicated and deliver as required, many of them well beyond that. But this belies a profoundly serious problem with governance. The agency, in my opinion, is run by a single person who is not accountable for his behavior. He is able to rule as he does only with the tacit cooperation of member countries who are supposed to act as WIPO's board of directors. And he is ultimately protected by an anachronistic shield of diplomatic immunity.

The current Director General, Francis Gurry, is an Australian who started working at WIPO over thirty years ago and knows the system well. During my tenure I witnessed how a lack of any effective oversight frequently led to reckless decisions, often reflecting a disregard for the legitimate interests of the U.S. There are many examples I could provide, but here I will focus on three: his gift of high-end computer equipment to North Korea, his secret agreements with Russia and China to open satellite WIPO offices, and his relentless retaliation against whistleblowers who dared to come forward with the truth.

By March of 2012 I had been at WIPO for over two years, and had developed some understanding of his secretive management style. But I wasn't ready for what I learned from Dr. Miranda Brown, his senior advisor. She told me that a WIPO international wire payment had been intercepted and halted by the Bank of America because it was to reimburse the purchase and shipment to North Korea of high end Hewlett Packard computers and a printer, as well as a state of the art electronic firewall made by SonicWall, another Silicon Valley company.

I should point out that none of this equipment was necessary for the operation of the North Korean patent office. Over the entire 33 year span of its membership in WIPO, North Korea submitted a grand total of 25 international patent applications. And I knew that the computers were "dual-use" technology that could easily have been applied to telemetry calculations or other military use. But I was also alarmed by the firewall, which had only one purpose: to keep North Korean citizens from gaining access to the Internet.

This project had been going on for some time but had not been revealed in WIPO's high-level budget reporting, and so was unknown to the member states. And it had been kept secret from almost all of us on the senior management team. As a result, there had been no chance to discuss the wisdom of the activity, and no one had even considered the impact of U.N. or U.S. sanctions.

Once the bank transfer was halted, WIPO's senior counsel and head of administration advised cancelling the project, but Mr. Gurry insisted on proceeding with it. I went to speak with him privately and urged him to reconsider. I explained that regardless of whether this was a technical violation of Security Council sanctions, there were some very practical considerations relating to other sanctions that had been imposed on North Korea by various countries, including the U.S. I told him that in the U.S., where anyone caught doing this would go to federal prison, it would be seen as unacceptable for a UN agency to be doing the same thing. This was especially true because WIPO in effect was spending the patent application fees paid by U.S. inventors to help a rogue government oppress its people. He said basically that I should shut up, that I didn't know what I was talking about, and that he didn't care what the U.S. thought, because WIPO was an independent agency of the UN and was not required to follow U.S. law.

Not long after that conversation, this Committee launched an investigation into how these shipments possibly could have happened. I was asked to come and testify at a hearing in July 2012. I told Mr. Gurry that I would go on my own time and pay for travel myself, but he refused to allow me to attend. His resistance to the process prompted some strong correspondence from the Committee's Chair. But Mr. Gurry played for time, and he hired a U.S. lobbying firm, paying them almost \$200,000, to help him avoid an investigation. Again, that was WIPO's money that came in significant part from U.S. inventors. Even when he chose some experts to do a "review" of the incident, they concluded that they "could not fathom" how he possibly could have thought that proceeding in secret this way, without ever consulting with countries like the U.S. who had their own sanctions in place, would have been acceptable.¹

Time went on and, overtaken by the 2012 presidential election and other geopolitical events, ultimately there was no investigation, but I learned of another secret project that Mr. Gurry was planning. This one would involve opening one

or more WIPO offices in China, where some confidential patent applications would be processed outside of Geneva for the first time. Naturally, this involved serious operational risks, and so I organized a team to analyze and report to him on what could go wrong with that project. But early in 2013 he sent me a short handwritten memo directing me to “desist work” on the risk analysis.

Although I didn’t know it at the time, his secret plans for opening satellite WIPO offices also included a promise he had apparently made to Russia in advance of his first election to Director General, that WIPO would open an office in Moscow. On the merits, it made no sense to me, since Russia produces fewer international patent applications each year than Belgium. But I learned after the fact that Mr. Gurry had negotiated secret agreements with both China and Russia, which were first announced not by WIPO but by the China Daily News and The Voice of Russia, respectively. I remember very well going to lunch with one of my senior colleagues, when he surprised me with the news of the Moscow office, while I was the one to first inform him about the Beijing office.

These secretive deals provoked a storm of controversy among the member states of WIPO, and as a result at their annual meeting in October 2013 they could not agree on a budget for the organization. At about the same time, other information had emerged about possible misconduct by Mr. Gurry in connection with his election in 2008. It was at this point that twelve Members of Congress wrote an open letter to Secretary Kerry asking that the U.S. find some alternative candidate for the upcoming election at which Mr. Gurry was expected to stand for a renewed six-year term. The letter recited Mr. Gurry’s secret program to “ship high-end computers and other electronic gear to North Korea and Iran” and his refusal to cooperate with this Committee’s investigation. It noted his secret agreements to open satellite offices in China and Russia. It also referred to information that had just been leaked about Mr. Gurry’s apparent role in illegal acquisition of staff members’ DNA and his efforts to suppress the incident – an issue that would later become a subject of my Report of Misconduct.

There was no immediate response to this letter from the State Department. Instead, a reply came from Australia's Ambassador to the U.S., Kim Beazley, who denied that the shipments to North Korea were secret and referred to the material as "standard office equipment." While not directly denying the secrecy of the satellite office agreements, he said that Mr. Gurry had "foreshadowed" the proposal in an earlier briefing to Ambassadors. And he flatly denied that Mr. Gurry had any role in the DNA collection. All of these issues, he said, were "old claims," and the "Australian Government stands behind his candidacy." Follow-up letters from Congress challenging Mr. Beazley's assertions were either waved away or just not answered.² In any event, it was made very clear that this was important to Australia, and the U.S. agreed to remain on the sidelines during the election process, resulting in Mr. Gurry's return for another six year term despite the controversies and unanswered questions about the propriety of his actions.³

This leads me to my third and final example of serious wrongdoing inside WIPO. As you know, whistleblower protection is a core principle for the U.S., which recognizes that evidence of institutional corruption normally is only discovered when insiders are guaranteed safety in coming forward with what they know. In early 2014 I was approached by a trusted colleague for advice about an external competitive procurement for a major IT contract. Mr. Gurry had ordered the team first to add to the list of invited bids a company run by a friend of his in Australia. Then when the bids came in and that company was 40% higher than the others, he ordered that the bidding process be canceled and the contract awarded directly to his friend's company. I asked my colleague to report what had happened, but he was not prepared to take that step. So I did, and at the same time reported on a separate and earlier incident of apparent corruption. All of the relevant information and supporting documents were contained in my Report of Misconduct by Director General, submitted to the Chair of WIPO's relevant governing committees on April 2, 2014 (and amended on April 11).⁴

The retaliation for my report was swift and hard. A U.S. journalist had posted an article about my complaint, along with a copy of it. (He did not get it from me; I provided it only to official channels.) Within days the chief legal officer of WIPO sent me a memo implying that I would be held liable for any resulting claims made by Mr. Gurry's Australian friend. Even worse, he wrote to the U.S. journalist, asserting as fact that my complaint was "insulting," "false" and "defamatory" of Mr. Gurry, and demanding that he take down from his website all relevant information and "publish an apology to the Director General." The demand was reinforced with a threat to invoke criminal proceedings in Switzerland or "any jurisdiction to which you may be subject." The journalist, who was then going into the hospital for an operation, took down the material and in its place posted the lawyer's threatening notice.⁵

There was public condemnation from the press of the international IP community, but the U.S. State Department issued no statement about it. Three weeks later the member states of WIPO gathered and re-elected Mr. Gurry by consensus to another six-year term.

Various other acts of retaliation were taken against me, and as required by WIPO's Whistleblower policy, I notified WIPO's Chief Ethics Officer, Avarad Bishop, of what was going on, and he agreed that there was nothing he could do about it. Coincidentally, a week before I filed my complaint Mr. Bishop had approached me in confidence to share his personal distress at continuing to do what he thought was an impossible job. Although at his request he no longer reported to Mr. Gurry but instead to his Chief of Staff, most of the serious complaints to the Ethics Office involved Mr. Gurry himself, and Mr. Bishop knew that nothing could be done about them. I encouraged him to carry on, because people at least had someplace they could go and he gave them hope. Just over three months later, at the end of a week in which I understand he was told he should leave WIPO, Mr. Bishop committed suicide. Orders were immediately

issued to secure his office, and even his widow was denied access to his emails. I am not aware of any investigation into these events.

In the meantime, a “preliminary investigation” had begun into the allegations contained in my report. Ultimately, two independent investigation firms were engaged, because it turned out that one of them had a conflict of interest concerning the procurement corruption allegations. Their reports were apparently finished by September 2014, because I received word that a “full investigation” was underway, something that under the rules would not happen unless the preliminary work had found good cause to believe that misconduct had occurred. However, in November that investigation was abruptly terminated. I am informed that this happened because Mr. Gurry made certain unrelated allegations against WIPO’s Director of Investigation, who was providing office support to the external investigation. I understand that the U.S. made private interventions with the Chairs of the relevant WIPO governance committees, but it took until May of 2015 for any investigation to begin again, and this time it was undertaken not by a private firm, but by OIOS, the UN’s own internal investigation group. I have heard that that investigation has been completed and the report submitted, but I have received no official confirmation.

My term at WIPO ran from December 1, 2009 to November 30, 2014. On October 8, while I still had almost two months to serve, I filed a complaint for whistleblower retaliation, in accordance with WIPO’s policy that required this to be done within six months from the first act of retaliation. It was submitted to the Acting Chief Ethics Officer, a staff member in Mr. Gurry’s office who had been given these duties in addition to his existing job. For the next six months, I exchanged a series of emails with this person, who claimed variously that he couldn’t understand what I wanted, that he needed to confer, or that it wasn’t clear what he was to do. I repeated that I wanted him to do what the rules required, and perform a preliminary evaluation of the issues raised in my complaint. Finally, on March 31, 2015 I received an official WIPO memorandum

informing me that there was nothing to be done because by that time I was no longer a WIPO employee. Perhaps needless to say, this position was not justifiable, and indeed could be used to encourage managers to fire staff once they had filed retaliation complaints.⁶

In any event, the next month WIPO's position turned from merely untenable to completely inconsistent, when on April 29 I received an official notice that I was being placed under investigation for an alleged false and defamatory statement made by me as part of my report that had been filed more than a year earlier. I cooperated in this investigation, which was completed externally and quickly. On June 17, I received a notice that the case against me was being closed for "insufficient evidence."

To this day, WIPO has taken no action on the merits of my complaint for retaliation, and it has refused to provide me with access to external arbitration, as required by the Congressional Consolidated Appropriations Act of 2014.⁷

What we see in these three examples is an agency suffering from a lack of effective oversight. The first incident showed a flippant disregard for U.S. sanctions against a rogue regime. The second showed secret politics run amok, contrary to transparency and common sense management of the international IP system. And the third showed a defiant self-interest in sabotaging a legitimate whistleblower complaint, contrary to a core U.S. policy.

In any private company or public institution, where boards of directors or trustees serve as a check on executive misbehavior, any one of these – or of the other behaviors you will hear about today, including the summary firing of the WIPO staff union president, who had been the first to blow the whistle publicly on the North Korea shipments – would result in dismissal of the executive, at least for astonishingly bad judgment. That the person responsible here was re-elected in the midst of all of this turmoil would be inexplicable to anyone unfamiliar with the

intense national politics that drives the UN. Now that I have become familiar with it, I understand how it happens, but that makes it no more excusable.

We can accept that countries act in their national interests, but we should not accept the U.S. standing down or standing by while its interests are flouted or ignored, especially when those interests are grounded in our existential principles of transparency, fairness and good governance.

I appreciate that we live in a complicated world, and that compromise is often necessary in order to move ahead on matters of great international import. But I suggest that it is not necessary to give in to another country's demand just because they are a close ally. One important personal lesson we all learn from life is just as applicable to international relations: friends help their friends and themselves by not going along, and by advocating for the truth and what is right. That is especially true where the stakes are as high as they are here: this is not about a single person and his misbehavior. It is instead about a practice of going along to get along that enables that behavior.

When I served in Geneva I was constantly told by ambassadors from other countries that their governments would act, if only they got a positive signal from the U.S. They constantly asked me: "what is the U.S. going to do?" We have much more soft power than we apparently think, but in the many smaller decisions not to use it, we have instilled a powerful and pernicious conclusion in the diplomatic community: the U.S. is afraid or unwilling to act on certain issues where anyone would expect us to be leading the pack. So the irony is that in what some may think is a prudent decision to stay our hand, we risk reducing ourselves in the eyes of others, and with it our future power to influence important outcomes.

I do not believe that the problem lies with the majority of career civil servants within the State Department. In my experience they see the issues clearly and

have been as helpful as they can. Rather, the problem is with competing geopolitical considerations that weigh on the most senior leaders and political appointees. These come in at least two types. First, there is the general concern that the U.S. “keep our powder dry” or “pick our battles,” resulting in a hesitation to take on issues that are deemed insufficiently important for the commitment of our power. And then there are specific transactions in which other countries tell us what they want us to do, saying that it’s very important to them.

It is this second kind of situation that I believe has been at work in the U.S. response to the problems at WIPO. Mr. Gurry is the highest-ranking Australian in the UN system, and at every point where it mattered, Australia made it abundantly clear to the U.S. that it wanted him to stay where he was and wanted the U.S. to back off or stand down. While there are many examples of this, all of which are presumably well known to the State Department, the most public case in point resulted from the open letter of November 21, 2013 to which I have already referred.

What lessons should be drawn from this experience, and what can this Committee do to improve the situation at WIPO and the other UN agencies? It’s no surprise that when you create a political structure owned by a group of sovereign countries, governance is going to be a challenge. Individual countries will try to influence decisions on budgets, programs, office locations and even individual hiring and firing of personnel. And the U.S. can’t be the self-appointed referee or decider on all of these questions. But it seems to me that there is an important role for Congress and this Committee, as elected representatives of the American people, to insist that those who act on behalf of the U.S. consistently and powerfully project its position on questions that truly matter to us, even when that means standing up to one of our friends and pointing out that they are wrong.

I don't mean to suggest that Congress should micromanage the State Department, which as I have said is filled with some of the smartest and most dedicated professionals in the world. But those professionals could benefit from the cover that comes with a strong public expression of priorities by Congress. We need to recognize that they operate in a dynamic environment with many competing concerns. But we can't afford to let them ever forget the mandate of this body and the constituency it represents. If this Committee thinks it's wrong that U.S. inventor fees help pay for illicit gifts of computers to North Korea, that WIPO should make secret agreements to locate new offices around the world, and that whistleblowers should be ignored and persecuted with impunity, then it should communicate those priorities publicly and insist on prompt and substantive action from the executive branch.

I respectfully request that this Committee consider the following reforms:

First, establish an independent board to oversee the executive at WIPO, and ensure that it is beyond the power of the Director General to influence its composition.

Second, insist on better financial and operational reporting to ensure that all agency activities are identified and open to detailed inspection.

Third, establish a meaningful procedure to receive and investigate complaints of wrongdoing by agency executives, ensuring that the process will always be handled by a professional organization that is independent of the UN.

Fourth, establish and enforce a UN-wide requirement that whistleblower retaliation complaints be subject to external arbitration.

Fifth, reconsider the grant of traditional, near absolute diplomatic immunity to UN agency executives.

Thank you again for the opportunity to appear before you today. As President Reagan once said, “There are no easy answers, but there are simple answers. We must have the courage to do what we know is morally right.”

¹ See Report of the “Review”, page 4, available at http://www.wipo.int/export/sites/www/about-wipo/en/oversight/pdf/wipo_external_review_2012.pdf.

² See Exhibit A, letter exchange with Congress.

³ At one point in the summer of 2013 I indicated to the State Department that I would be willing to stand for the election, but they responded that they did not wish to run any Americans for such a post, and the issue was dropped.

⁴ A full copy of my Report of Misconduct and its exhibits is available at http://regmedia.co.uk/2014/07/08/wipo_report_james_pooley.pdf.

⁵ See the April 8, 2014 issue of IP Watchdog, available at <http://www.ipwatchdog.com/2014/04/08/wipo-deputy-director-alleges-gurry-misconduct/id=49010/>.

⁶ See Exhibit B, copies of retaliation complaint correspondence and ultimately refusing access to external arbitration. (The complaint of October 8 is not included because it includes confidential information.)

⁷ See Exhibit B, emails of June 27, July 2, July 10, July 19 and August 6.