II. The legal situation in the country

II.1 The question of the patentability of business methods cannot be isolated from the problem of the protection of intellectual and abstract methods.

The groups are therefore invited first of all to indicate the exclusions from patentability, as provided for by the law of their country, based on the abstract nature of the invention:

- statutory exclusions;
- and exclusions arising from case-law.

If intellectual and abstract methods are excluded from patentability, the groups are invited to give details as to the basis of this exclusion.

Section 6 of the Argentine Patent Law No. 24,481, as amended (hereinafter, the "Argentine Patent Law"), provides:

“For the purposes of this Law, the following items shall not be considered as inventions:

(a) Discoveries, scientific theories, and mathematical methods;
...
(c) Plans, rules, and methods applied in carrying out intellectual activities, for games, or for economic and commercial activities, as well as computer programs;
...”

These prohibitions reflect, in more restrictive wording, a similar one which existed in earlier Argentine Patent law Nº 111, enacted in 1864: "Art. 4.: ...financial schemes,... discoveries or inventions which are purely theoretical, the industrial application of which is not indicated ... are not patentable”. Argentine authors have justified and explained these restrictions on such bases as the absence of material means acting as a cause of a given result, insofar as their effects are caused by human activity, and not that of any external means (Breuer Moreno, Treatise on Patents, 1957, Vol. I, pp. 117/8).

The Argentine Group sees fit to mention here that the underlying reasons for these prohibitions or exclusions in likely patentable matter seem to pivot on the purely human activity involved therein, so that these reasons could not be operative any more whenever
material means supplied by technology which did not exist in the past are applied to the performance of those methods.

On the other hand, Article 17 of the Argentine Constitution provides that:

"...Every author or inventor is the exclusive owner of his work, invention or discovery for the term granted by the law. ..." (emphasis added).

In addition, Article 27 of the TRIPS agreement, provides as a general principle that patents shall be available for any inventions in all fields of technology, as long as the patentability requirements are met. In Argentina treaties such as the TRIPS agreement prevail over internal laws, such as the Argentine Patent Law.

Therefore, it could be argued that Section 6(c) of the Patent Law should be regarded as being unconstitutional.

However, before the TRIPS Agreement entered into force, the Argentine Supreme Court had had declared that certain areas could be excluded from patent protection, such us pharmaceutical products.

In summary, the issue is not clear under Argentine legislation, and there is no recent case-law on this subject.

II.2 Are business methods patentable or, on the contrary, are they excluded from patentability in the legislation of your country?

In light of the foregoing item II.1., business methods are in principle statutorily excluded from the patent protection in Argentina. No patent covering a business method has yet been granted in Argentina.

II.3 If business methods are excluded from patentability, does this exclusion concern only the methods in themselves, or does it also apply to any invention applying business methods?

There is no rule in Argentine legislation similar to that of Article 52(3) of the European Patent Convention providing that business methods are not patentable “as such”. Therefore, the Argentine prohibition seems to be broader than that of the European Patent Convention.

In any event, there exist no precedents in Argentina, either administrative or arising from courts’ decisions, which could clarify whether inventions applying business methods, but not claiming a particular business method in itself, are eligible for patent protection. Nevertheless, it seems likely that the Argentine Patent Office would reject any such application.

II.4 If business methods are not patentable, are there other means of protection of business methods, particularly copyright?

Copyright protection is not available for the idea itself, but only for a particular expression of that idea. Therefore, there is a limited protection available through copyright.
The inquiry contained in the guidelines for this Questions whether copyright or other means of protection of business methods is available in Argentina opens the way for making a succinct account of several closely related court precedents in this country.

In all of them, the copyright deposit as a non-published work of a method or plan for the operation of a certain financial system was used as ground for a number of complaints against financial companies who were performing plans, roughly similar in their principle to the work deposited by the copyright holder. All these complaints were ultimately rejected in the course of the eighties for a number of reasons, among which there was the explicit refusal to allow copyright protection for methods or systems for doing something, be it material or intellectual. Another interesting decision was laid down in a case where a patent application had been rejected by the Argentine Patent Office for a process for reducing the time consumed in the transmission of data or information between two points by encoding the message at the sender and decoding it at the receiver, all this governed by a computer program. Even though at that time (early seventies) there existed no explicit prohibition to patent computer programs, the Argentine Patent Office adopted the concept which was applied in other countries whereby patent protection was not available for computer programs. The rejection was taken to the courts, which -in a leading, and still unique, case in Argentina- decided that if the process was patentable in itself, the use of computer means in its performance did not affect its patentability, even if the particular program itself would not become protected by the concerned patent.

II.5 If business methods are patentable, is there a distinction in the grant of protection between business methods used in the context of tradition at business and business methods used in the context of the Internet?

Inasmuch as no patent on business methods has been granted, such distinction has not been made at the Administration or at the Courts yet.

II.6 If business methods are patentable in the country, have the national courts already had the occasion to decide on the extent of the protection conferred by patents concerning such methods? In the affirmative, have the Courts applied specific rules or, on the contrary, the normal rules governing the patent system?

There exist no decisions either in Argentina on the extent of the protection conferred by patents concerning business methods.

III. Opinion of the groups

After having set out the legal situation in their country, the groups are invited to give their opinion on the following questions, giving reasons for their point of view each time.

III.1 Do the groups consider that business methods, as defined above (see I (f)), taken in themselves, constitute inventions?

The Argentine Group is of the opinion that as long as the requirements of novelty, inventive step (or non-obviousness) and capability of industrial application (or utility) are met, a patent should be granted, regardless of the field in which the invention occurs.

In that connection, Section 4 of the Argentine Patent Law defines "Industry" broadly, including also services within such concept.
Therefore, it is the opinion of the Argentine Group that patents should be granted for business methods.

The reasons for this position taken by the Argentine Group may be stated as follows.

A) The evolution of technology over the last century, rightly described in the Introduction of the Guidelines for this Question, makes it that most of the reasons for which business methods were considered unsuitable for patent protection do not apply any more. Many business methods existing today -and the others which conceivably are yet to come- have clearly surpassed the boundaries of “mental processes” or “purely theoretical or abstract concepts or ideas”, to become closely intermingled with computer hard and software and communication’s technical resources (Internet et al.) to a degree that makes them depict a totally different reality with respect to that which presided over the drafting of exclusions from patentable subject matter even in rules and statutes still in force, or not so far away in time.

B) While some countries like the US adopt the concept of “usefulness” as a parameter for evaluating a patentable invention -which explains the recent evolution allowing patents for businesses methods there- many other countries maintain the concept of “industrial application” for such purposes. But this makes not great difference in the substance, apart from that which the words just seem to convey, because the semantic of “industry” has without hesitation expanded today to encompass such activities as entertainment, finance and banking, tourism, merchandising, and so many others.

C) In addition to the above, it should be remembered the situation of computer programs. After as initial attempt in the late sixties and early seventies to seek protection as patentable matter, with at least partial success in the most deserving cases, they later sought, and attained, shelter in the field of copyright, and over the last decade their admission was again acknowledged in significant cases as patentable inventions whenever they contain an industrial application. In general terms this winding road followed over the years by computer programs as likely, or not likely, subject matter of patentable inventions shows that their admission in that field was justified and granted in at least some of those cases where an industrial result was there for everyone to see, as clearly different from a purely theoretical or abstract conception of the mind. Insofar as the concept of “industry” is maintained broad enough to make it congenial with the contents of the foregoing paragraph, it becomes immediately apparent that the legal status of business methods -and particularly those served by the resources of today’s technology- should not be treated differently with respect to computer programs vis-a-vis the patent system.

III.2 In the opinion of the groups, is the exclusion of patentability for business methods in conformity with the provisions of Article 27 of the TRIPS agreement?

The Argentine group believes that the exclusion of patentability for business methods contradicts Article 27 of the TRIPS agreement, insofar as such Article provides, as a general principle, that patents shall be available for any inventions in all fields of technology, as long as the patentability requirements are met. Business methods are not
included among the limited number of inventions listed in Article 27(3) of the TRIPS agreement which the member countries may exclude from patentability. Even the refusals of patents on medical methods (art. 27.2.a) and of plants, animals and natural (biological) processes (art. 27.2.b) that are allowed to Member countries do not amount to usable basis for inferring a similar exclusion of business methods. This is so firstly because the exclusions are clearly contemplated as exceptions to the general principle in said art. 27.1., while it is a universally accepted rule in the construction of legal provisions that particular exceptions to acknowledged rights should not be extended by analogy or otherwise. Secondly, because these admissible exclusions in TRIPS are again explicitly not operative against the patentability of pharmaceutical products and processes, utensils, machines, etc., usable for medical or veterinary purposes, microorganisms and non-biological or microbiological processes for the production of plants or animals. It is to be noted also that even exclusions in art. 27.2.b of TRIPS are subject to an early review in the last sentence of same.

III.3 If national legislation does not currently provide for the possibility of protecting business methods, taken by themselves, by invention patents, do the groups think that their patentability is desirable?

Even though its national legislation does not currently provide for the possibility of protecting business methods by invention patents, the Argentine Group belives that such protection is desirable, in the conditions stated in III.1. above.

III.4 If the answer to III.3 is in the affirmative, can the groups specify whether patentability should solely cover business methods used on the Internet, that is to say which directly implement technical means present on this network or, on the contrary, whether patentability should be accepted for all business methods without distinction?

The Argentine Group believes that patents should be granted for all business methods without distinction. Patentability of business methods should not be restricted to uses in Internet, if only because such restriction would collide with reality and with art. 27.1. in the TRIPS Agreement.

III.5 If the answer to III.3 is in the negative, the groups are invited to express their opinion on other means of protection of business methods, such as copyright. In this case, it is requested that the groups present the respective advantages and disadvantages of patents and other means of protection of business methods. On this point, the groups may also refer to the aforementioned resolution (see I (c)) on computer programs.

In the view of the Argentine Group the protection of business methods by copyright collides with the universally accepted principle that copyright does not protect ideas, but only the material expression of ideas. It is noted that copyright coverage for computer programs -currently accepted worldwide- represents an apparent exception to this principle, but said protection is actually restricted to the unauthorized reproduction of said programs, and not -or not so much- to their perfomance or application to practical use. This reasoning implicitly contains the reasons for preferring patent protection instead of copyright protection, as requested in the guidelines for this Question.
Additionally, the Argentine Group adheres to the concept that under given circumstances computer programs may be patented as such, which mainly applies to those programs governing processes that have an industrial application, in the broad sense of the world on which in Argentina there exists one favorable precedent from the courts (see II.4 above, last paragraph). The Resolution of the Executive Committee of AIPPI adopted in Vienna, 1997, is found pertinent for these purposes by the Argentine Group.

III.6 If the business methods are the subject of invention patents, the question arises as to the scope of the protection conferred by a patent concerning such methods.

Would this be protection limited to the method itself, or would it be necessary, following the example of the process patent, to provide for protection in addition for products or services marketed through such methods?

The Argentine Group feels that the scope of protection of business method patents, as a matter of principle, should not be treated differently with regard to other process patents, because they would not amount to a different kind of intellectual property with respect to regular patents. It should be noted, however, that the extension of patent protection to products marketed through such methods may not be appropriate, at least in all cases because the business method itself does not impart its properties to those products in themselves. Thus, the protection should either address only the performance of services, and just to the extent that they may be influenced by the performance on the concerned business method, or said protection should be limited to the performance of the business method, whenever same is detachable from the ensuing effects on products and/or services.

III.7 Should the rules for assessment of the scope of patents covering business methods be the same as for traditional method or process patents or, on the contrary, should specific rules be applied by the courts, and in this latter case, which rules?

For example, if the courts of a country generally apply the theory of equivalents, should this theory also apply to business methods patents?

In principle the rules should be the same, including the application of the theory of equivalents. In any event, each particular case should be carefully analysed considering that infringement of business method patents is a relatively new matter world-wide.

III.8 Do the Groups consider that the inventive activity of an invention concerning a business method may arise as a result of the simple fact of adapting a known method to new means of communication, such as the Internet?

The Argentine Group believes that would depend on each particular case. Simple and apparently obvious ideas can be great inventions. Although it seems obvious to adapt a known method to Internet, the possibility should not be disregarded that in some particular cases there is an inventive step in applying such method in the Internet.

III.9 With respect to acts of infringement, should the usual rules in patent law be applied: direct or indirect infringement, infringement by incitement, supply of means etc., or on the contrary should special rules be applied to patents covering business methods?
Thus, the US Act of 29 November 1999 provided a new defence in the event of alleged infringement of a patent with process claims. And the question arises in interested circles as to whether these new legislative provisions apply to all patents including process claims or only those where the claims concern business methods.

In general terms, the Argentine Group believes that with respect to acts of infringement, the usual rules in patent law should apply. While on the one hand it would seem an overdoing of this issue to promote particularly broad standards for assessing infringement of business method patents, the opposite may also be detrimental to the explicit insertion of business methods as patentable matter. The Argentine Group particularly insists in not establishing business method patents as a separate entity in the field of patentable inventions.

III.10 Should rules concerning compensation for loss as applied to the infringement of patents covering business methods be the same as are applied to patents covering inventions in traditional fields, or should these rules be modified for the infringement of patents covering business methods, taking account of the fact that these methods are not used, in principle, for the manufacture of products but solely for the sale of products and services?

Insofar as the infringement of business method patents in a given case results in damages either fully supported by evidence, or if the inference of such damages appears clearly admissible, the compensation should be admitted. The use of these methods in the sale of products, and not in their manufacture, should not -in the view of Argentine Group- be taken as a reason for a restrictive approach in the issue of compensating damages.

The Argentine Group again submits the concept of not making distinctions in this field with respect to other inventions.

III.11 Should the rules of evidence concerning the infringement of a patent covering business methods be the same as those concerning process patents or patents for traditional methods? In particular, do the groups consider that the provisions of Article 34 of the TRIPS agreement concerning the burden of proof should apply to patents covering business methods?

In cases in which it is difficult for patentee to prove what method the infringer is using, and in addition it is a relatively simple matter for the infringer to produce such evidence, the provisions of Article 34 of the TRIPS agreement should apply.

Summary

The Argentine Group reports, in the first place, that business methods appear explicitly excluded from patentability under the national statute in its country.

However, business methods are not expressly excluded from patentability in the TRIPS Agreement. On the contrary, in the opinion of the Group, that treaty establishes that as a principle there should be no limits on patentable subject matter, regardless of the field to which the invention belongs.
Therefore, economic or commercial methods of doing business should be patentable, as long as they fulfill the requirements of novelty, inventive step and industrial application.

The Argentine Group feels that patents for business methods should not depart from the general patent system, or be treated as a particular category of inventions.

The underlying concept of the position taken by the Argentine Group on this Question 158 is that methods eligible for patent protection should come from whatever human activity that in other respects falls within a broad concept of "industry".

Résumé

Le Groupe Argentin rapporte dans un premier temps que les méthodes commerciales apparaissent explicitement exclues de toute brevetabilité sous l'empire de la loi nationale de son pays.

Cependant, les méthodes commerciales ne sont pas expressément exclues de toute brevetabilité dans le cadre de l'ADPIC. Au contraire, selon l'opinion du Groupe, cet Accord établit comme principe qu'il ne doit pas exister de limites à la brevetabilité d'une invention, quelque soit le domaine auquel cette invention appartient.

Des lors, les méthodes économiques ou commerciales devraient être brevetable, à partir du moment où elles satisfont aux critères de nouveauté, d'inventivité, et d'application industrielle.

Le Groupe Argentin considère que les brevets de méthodes commerciales ne devrait pas différer du système général des brevets ou être traité comme une catégorie particulière d'invention.

Le concept souligné à travers la position adoptée par le Groupe Argentin sur cette Question 158 est que les méthodes susceptibles d'être brevetées devraient pouvoir provenir de n'importe quelle activité humaine qui d'un certain point est compris dans le large concept d'"industrie".

Zusammenfassung

Die Argentinische Gruppe erklärt als Erstes, dass Geschäftsmethoden durch die nationale Gesetzgebung ausdrücklich von der Erteilung von Patenten ausgeschlossen erscheinen.

Im TRIPS-Abkommen sind die Geschäftsmethoden jedoch nicht ausdrücklich von der Patentierbarkeit ausgeschlossen. Im Gegenteil, nach Auffassung der Gruppe, legt dieses Abkommen fest, dass im Prinzip keine Begrenzung der patentierbaren Erfindungsgegenstände existieren sollte unabhängig vom Fachgebiet der Erfindung.
Daher sollten Handels- oder Wirtschaftsmethoden zur Durchführung von Geschäften patentierbar sein, vorausgesetzt sie erfüllen die Bedingungen von Neuheit, erfinderischer Tätigkeit und industrieller Anwendung.

Die Argentinische Gruppe ist der Meinung, dass Patente für Geschäftsmethoden nicht vom allgemeinen Patentsystem abweichen sollten, und sie sollten auch nicht als eine besondere Klasse von Patenten behandelt werden.

Das der Position der Argentinischen Gruppe zugrundeliegende Konzept bezüglich der Frage 158 ist, dass für den Patentschutz wählbare Methoden von einer wie auch immer gearteten menschlichen Aktivität herrühren sollten, die andererseits auch unter das weit zu fassende Konzept von "Industrie" fallen sollten.