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Comment:

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- Secretariat -

PROPOSAL BY THE FRENCH DELEGATION

concerning Article 5 of the Preliminary Draft Convention
for a European System for the Grant of Patents

N O T E

1. During the meetings held at Luxembourg by the Working Party responsible for preparing the above-mentioned Preliminary Draft, the French delegation reserved the possibility of proposing a new wording for Article 5 of this text (Persons entitled to apply for a European patent).

During the meeting in July 1969 the Working Party was given new information, the importance of which should not be underestimated.

This information related to the new Patent Bill (provisions concerning interference) laid before the U.S. Congress on 1 August last by Senator McClellan, to the explanations which he gave before the Senate, and to the statements made

by the Commissioner of Patents before the "Nominations Sub-Committee" of the "Judicature Committee" of that body.

Senator McClellan's statements show that the U.S. Administration is fully aware of the discriminatory character of the interference procedure, as set out in sections 102 (5) and 104 of the Bill, in as far as these provisions relate to the submission of the evidence which determines the outcome of the procedure in question.

The Commissioner of Patents considered, however, that it would for the time being be premature to change the draft provisions on this point, and that it would be better, on the contrary, to wait and see what position the European States would adopt as regards the accessibility of the European patent to nationals of States not parties to the Convention. If accessibility was to be made subject to conditions implying an amendment to the U.S. Law, the question could then be re-examined.

2. The following draft, which is based on the text of Article 5 prepared by the Working Party at its meeting in July 1969, has as its main object, taking the above considerations into account, to set out in more detail the conditions which must be met by the laws of non-Contracting States in order that their nationals and persons assimilated to such nationals may have access to the European patent.

This is achieved by inserting the words "and in particular in so far as it does not subject the enjoyment in the territory of the State in question" as a final phrase in the first sentence of paragraph (2).

This new provision would apply to third States whose legislation subjected the enjoyment of industrial property rights to conditions which introduce a territorial criterion. Although the scope of this provision is very wide, it may in particular be applied to the interference procedure under U.S. Law.

In addition to this fundamental amendment, and to various changes of form in the existing text of Article 5, the chief of which is to divide it into two paragraphs, the proposed text introduces a further substantial amendment. It now refers only to the "protection of inventions", and no longer to "industrial property" in general.

Article 5

(1) Any natural or legal person, or any body equivalent to a legal person by virtue of the law governing it, possessing the nationality of one of the Contracting States or who is domiciled in or who has a real and effective industrial or commercial establishment in the territory of one of the Contracting States may apply for a European patent.

(2) An application for a European patent may also be made by any natural or legal person or any body equivalent to a legal person by virtue of the law governing it, possessing the nationality of a non-Contracting State, or who is domiciled in or who has a real and effective industrial or commercial establishment in the territory of a non-Contracting State, in so far as the legislation of such State grants to nationals

of the Contracting States the same advantages as regards the protection of inventions as it grants to nationals of the said State, and in particular in so far as it does not subject the enjoyment of any right to conditions which can only be met in the territory of the State in question. Provided that this shall not apply to the provisions of the legislation of non-Contracting States relating to judicial and administrative procedure and to jurisdiction, and to the designation of an address for service or the appointment of an agent, which may be required by the laws on industrial property.
