

# **Minutes MDC 1973**

**Travaux Préparatoires EPC 1973  
Munich Diplomatic Conference**



**SUMMARY**

**OF DOCUMENTS IN ENGLISH :**

**HISTORICAL DOCUMENTATION RELATING TO THE EUROPEAN PATENT CONVENTION**

**MUNICH DIPLOMATIC CONFERENCE**

**MINUTES**

**of the Munich Diplomatic Conference  
for the setting up of a European System for the Grant of Patents**

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**CONVENTION**

**on the Grant of European Patents  
(European Patent Convention)  
and attached annexes  
published by the  
Government of the Federal Republic of Germany**

**1973**

Ref. No.	Title of document
	<p><b>MINUTES</b> of the Munich Diplomatic Conference for the setting up of a European System for the Grant of Patents</p>
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M/PR/V	Minutes of the proceedings of the Credentials Committee
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**MINUTES  
OF THE  
MUNICH DIPLOMATIC CONFERENCE  
FOR THE SETTING  
UP OF A EUROPEAN SYSTEM  
FOR THE GRANT OF PATENTS**

**(Munich, 10 September to 5 October, 1973)**

**published by the  
Government of the Federal Republic of Germany**

2011

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## Introduction

1. This document contains the minutes of the Munich Diplomatic Conference for the setting up of a European System for the Grant of Patents. The Conference was held in Munich from 10 September to 5 October 1973 at the invitation of the Government of the Federal Republic of Germany.

21 States\*, 4 inter-governmental organisations and 13 non-governmental international organisations took part in the Conference.

The purpose of the Conference was to conclude negotiations on the draft of a Convention establishing a European System for the Grant of Patents and Implementing Regulations and a number of Protocols to that Convention. The basis of the negotiations were

- preparatory documents adopted by the Inter-Governmental Conference for the setting up of a European System for the Grant of Patents at its 6th meeting (19–30 June 1972) in Luxembourg, and
- comments on the preparatory documents, submitted by the Governments, inter-governmental and non-governmental international organisations participating in the Inter-Governmental Conference.

All the preparatory documents and a large part of the comments were published by the Government of the Federal Republic of Germany in 1972 and 1973 in two volumes (WILA-Verlag für Wirtschaftswerbung Wilhelm Lampe, 8000 München 21, Landsberger Straße 191a).

The following were the organs of the Conference:

- the Plenary
- Committee of the Whole
- 3 Main Committees
- Steering Committee
- Credentials Committee

2. The draft minutes of the proceedings of the organs of the Conference were drawn up by the Conference Secretariat on the basis of tape recordings. The Conference Secretariat was

composed of officials of the General Secretariat of the Council of the European Communities in Brussels and the EFTA General Secretariat in Geneva. In accordance with Rule 46 of the Rules of Procedure of the Conference, the draft minutes were submitted to the delegations for their comments, which were taken into account in the text given in this document.

3. For the convenience of the reader, the responsibilities of Main Committees I–III are summarised below:

*Main Committee I* was responsible for examining Article 14 Parts 2 to 8, Part 9, with the exception of Articles 143 and 145 to 147, Part 10 and Articles 162, 163 and 175 of the Convention, the relevant provisions of the Implementing Regulations, the Protocol on Jurisdiction and Recognition of Decisions in respect of the Right to the Grant of a European Patent and any recommendations and resolutions of the Conference not within the competence of Main Committees II and III.

*Main Committee II* was responsible for examining Chapters I to IV of Part 1 with the exception of Article 14, Articles 143 and 145, Part 11 of the Convention with the exception of Articles 161 to 163 and Part 12 of the Convention with the exception of Articles 170, 175 and 176, the relevant provisions of the Implementing Regulations to the Convention, the Protocol on the Centralisation of the European Patent System and on its Introduction, the Protocol on Privileges and Immunities of the European Patent Organisation and recommendations and resolutions of the Conference relating to these fields.

*Main Committee III* was responsible for examining Chapter V of Part 1 of the Convention, Articles 146, 147, 161, 170 and 176 of the Convention, resolutions and recommendations of the Conference relating to these fields.

4. The Convention was signed by the following 16 States: Austria, Belgium, Denmark, Federal Republic of Germany, France, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, Netherlands, Norway, Sweden, Switzerland, United Kingdom.

\* Austria, Belgium, Denmark, Finland, France, Federal Republic of Germany, Greece, Ireland, Italy, Liechtenstein, Luxembourg, Monaco, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, Yugoslavia.



## Report on the meeting of the Plenary

(Opening meeting — 10 September 1973)

### *Opening of the Conference by the President of the Luxembourg Inter-Governmental Conference for the setting up of a European System for the Grant of Patents, Dr. Kurt Haertel*

1. Dr. Kurt Haertel, President of the German Patent Office, opened the Conference with the following speech:

"Your Excellencies, Ladies and Gentlemen,

In my capacity as erstwhile President of the Luxembourg Inter-Governmental Conference I have the honour of opening the Munich Diplomatic Conference for the setting up of a European System for the Grant of Patents. I hereby welcome the Government representatives, the representatives of international organisations, the members of the Secretariat and the interpreters kindly provided from Luxembourg. This welcome also goes to the representatives of the press, radio and television, and last but not least, to our guests who are taking part in the opening of the Conference today. A special welcome also to Mr. Rudolf Hanauer, President of the Bavarian State Parliament, who made available the building in which our Conference is taking place; Dr. Gerhard Jahn, the Federal Minister for Justice and Representative of the Federal Government; Dr. Philipp Held, the Bavarian State Minister for Justice and Representative of the Prime Minister of the State of Bavaria, and Mr. Georg Kronawitter, Lord Mayor of the State capital of Munich.

I should now like to give the floor to Mr. Hanauer, the President of the State Parliament."

### *Address of welcome by Mr. Rudolf Hanauer, the President of the Bavarian State Parliament*

2. Mr. Rudolf Hanauer, President of the Bavarian State Parliament, gave the following address of welcome:

"Your Excellencies, Ladies and Gentlemen,

As President of the Bavarian State Parliament and as your host here in the Maximilianeum, a building so steeped in tradition, I should like to extend to you a very cordial welcome, on behalf of the representatives of the Bavarian people and personally. The Bavarian State Parliament fully appreciates the honour of your presence here, and the importance of your Conference and of its results in the context of the construction of a united Europe.

Your meeting place, the Maximilianeum, which dominates Munich like an Acropolis, was built in the middle of the last century by King Maximilian II as a foundation for the Bavarian student élite, who still reside here today and carry out its practical work. When laying the corner-stone of this impressive building the King said the following words, which have since become famous: My people possess qualities of the mind and of the heart such as no other people has. They only need to be given the opportunity of developing them.

It is my hope that this genius loci described by the King will contribute to the complete success of this Diplomatic Conference which is so important for Europe. The growth of Europe and the concomitant thoroughgoing changes in our old continent call for a rejuvenation of our élites. The European common weal is a challenge to our intellectual creativity, and to our ability to transform ideas into realities. The reserves of our European culture lie in our intellectual abilities. We must use to the full man's intellectual and constructive gifts. The seal is set

on our intellectual capacities by our inventive capability and is determined by the current state of research and technology. The creation of a body of European patent law can be of great help in this matter.

This new body of law must, however, also be seen in the context of political developments. West Germany, which is firmly anchored in the European and Atlantic community, is steadily becoming an organic part of greater Europe. This Europe, which from being a political concept is becoming a reality in the organisational sense, assumes the existence of citizens who will expect from the Community more than the material benefits of a larger economic area. The peoples between the Pyrenees, the Thames and the Elbe, between Sicily and the North Sea now have the task of freeing men from their purely national lines of thought and creating a citizenry of Europe. We would then have free citizens of a supranational community of States whose organisational structure and union could be only of a federative nature.

In this context there arises, in addition, the basic requirement in today's politics for new structures which would be in keeping with our form of democracy and the parliamentary system. Whether we be Europeans, or see ourselves in the wider Atlantic context, we belong to the free world. Throughout Germany's history the political situation favoured a federal constitution. Only in those twelve ruinous years, the dreadful effects of which are still fresh in all our memories, was Germany a unified nation without individual state laws and state parliaments. The nation state concept is clearly revealed as Europe's scourge, which we are overcoming together. Our task is not so much to turn away from nation states to true cosmopolitanism as to evolve towards the consolidation of the right to develop individual personality within the union of federal States.

Of course only states which are free of inner constraints can live together in real peace. The integration of this multiplicity of political viewpoints, legal standards and cultural characteristics into one single Europe will require us to overcome contradictions and resistance and to recognise our common interest. The unhampered co-existence of states and peoples in a European community must lead to the fruitful exchange of opinions and knowledge. Federalism is the bond that will bring together this heterogeneous mass of regions and pluralist communities. It is the only viable way of achieving acceptable democracy at social and state levels. Federalism is also the only way of promoting and strengthening co-determination and co-responsibility on the part of free citizens who resist any attempts at manipulating them.

We Bavarians see this in the context of our 150-year old parliamentary history and of the history of our State which stretches back for more than twelve hundred years.

The State of Bavaria, that is to say the State of Bavaria within the Federal Republic of Germany, does not only regard itself as the proponent of democratic and federal government, it is also a bridge in this age of the European and supra-European community. Thanks to its place in history and its geographical situation, Bavaria, with its principle of federal government, has a special rôle to play in the construction of Europe.

In this respect Bavaria and the Bavarian capital are especially pleased and gratified that you are holding this important Diplomatic Conference in the seat of the Bavarian Parliament in Munich. In addition, your meeting is being held in close proximity to the German Patent Office and to the plot of land for the future European Patent Office. The flags of the Federal Republic and those of the States participating in your Conference are a greeting to the Bavarian people, on whose behalf I heartily reciprocate this greeting. In the spirit of European friendship and as spokesman for the Bavarian

Parliament, I should like to wish you all success in your deliberations over the next few weeks."

***Address by Dr. Gerhard Jahn, Federal Minister for Justice***

3. Following this Dr. Gerhard Jahn, Federal Minister for Justice, delivered the following address:

"Your Excellencies, Your Honour the Prime Minister, Your Honour the President of the State Parliament, Your Worship the Lord Mayor, Ladies and Gentlemen,

It is a great pleasure for me to be able to welcome you on behalf of the Government of the Federal Republic of Germany as participants in this Diplomatic Conference.

This Conference is of particular importance to the Federal Republic of Germany for two reasons. It is the first Conference of this kind to be held in the Federal Republic of Germany since the Second World War. In addition it is the first Diplomatic Conference on German territory in the field of the protection of industrial property rights. You will therefore understand that we are especially pleased to have been able to organise this Conference here in Munich and would at the same time thank the other countries of Europe for entrusting the Government of the Federal Republic of Germany with the conduct of this major Conference. In collaboration with the Government of the State of Bavaria and the State capital of Munich we have endeavoured in the past few months and will continue to endeavour throughout the four weeks of the Conference to make the external conditions for your work and negotiations as pleasant as possible and thus contribute to the success of the Conference.

I am sure, Ladies and Gentlemen, that you as well are experiencing feelings of joy and relief at the beginning of this Diplomatic Conference since it also represents for you the conclusion of painstaking and lengthy work, the beginnings of which can be traced back to shortly after the Second World War. A large number, finally no fewer than 21, European Governments have been involved in this work. In addition numerous inter-governmental organisations and international inventors', industrial and patent agents' associations have made a considerable contribution by their counsel and active co-operation. The main point is, however, that all the circles involved in Europe have studied the idea of a European patent law throughout more than two decades with an exceptional degree of commitment. They have helped to bring this idea to fruition to the point where a Diplomatic Conference is able to convene here in Munich today in order to consummate, by the signing of a Convention, the endeavours, so costly in time and effort, made for the creation of a body of European patent law. We would express our gratitude to them all at this point in time.

The first negotiations and discussions were held in the Council of Europe. That was almost 25 years ago, when in 1949 that community of European States, which has served the cause of European unity so well, held discussions on the creation of a European patent. This first exchange of ideas was initiated by a plan submitted by the French Senator Longchambon in September 1949 to the Consultative Assembly of the Council of Europe. Although this plan at first met with little response, it nevertheless had the effect of ensuring that from this point onwards efforts directed at the creation of a body of European patent law were to be continued unceasingly. Soon thereafter work was started with the objective of constituting the first steps towards a body of European patent law and which already partially laid down the foundations for the Convention which we are here to adopt. Here I am particularly referring to the three Conventions by which the Council of Europe started the process of the unification of European patent law.

The first was the European Convention relating to the formalities required for patent applications of 11 December 1953, which was at that time celebrated as a significant step forward on the way towards a uniform body of European patent law. The fact that that Convention will be rendered practically obsolete by the Convention to be adopted here only demonstrates the exceptional progress which it has been possible to make in the 20 years since the time when that first step was taken.

There followed the Convention on the international classification of patents for invention of 19 December 1954 which created the necessary uniform classification system for the European countries concerned. This Convention has meanwhile proved so valuable that it is on the way to being adopted throughout the world. It will be replaced by an international Convention concluded in 1971 in Strasbourg, which is due to enter into force in the near future. The drawing up of this great and extensive system of classification which involved more than 10 years work and comprises several volumes is one of the very great achievements of the Council of Europe in the patents field, without which the work of a European patent office would scarcely be conceivable.

Continued intensive work within the Committee of Experts on Patents of the Council of Europe, to which a great deal of credit is due, then led in 1963 to the signing of the Council of Europe Convention on the unification of certain points of substantive law on patents for invention. This Convention represented the achievement of a large degree of unification of substantive patent law in Europe. A large number of its provisions were taken over literally in the draft Convention which is the subject of this Conference.

After the Council of Europe, the European Economic Community devoted itself energetically to the work on European patent law. The European Economic Community had a special reason for standardising European patent law: by means of a uniform patent it wished to remove the barriers constituted by protective rights within the Community and thus realise a common market with a single economic area in the field of patent law as well. As early as 1959, i. e. directly after the entry into force of the Rome Treaty, the Member States of the Community set up a Working Party which was able to submit a Draft Convention relating to a European Patent Law as early as 1962, which provided for the grant of European patents by a central European patent office. The Working Party was able to rely upon the preliminary work carried out by internationally recognised experts of whom I should particularly like to mention the unforgettable President of the Netherlands Patent Office, Dr. de Haan, and the first President of the German Patent Office, Professor Reimer. The results of this Diplomatic Conference will be a monument to them also, and our work will therefore be carried out in grateful memory of them.

To my great satisfaction I have been informed that another pioneer of European patent law is taking part in this Conference. He is the present President of the International Patent Institute, Mr. Finniss, who as the then Chairman of the Co-ordinating Committee of the six EEC States made a great and lasting contribution to the creation of a body of European patent law.

The Working Party of the six EEC States was at that time also in close contact with the patent law experts of the four Nordic States which were simultaneously working on a Nordic patent law.

The work of the six EEC Member States which had been undertaken with such enthusiasm and was at first accompanied by such rapid success then however suddenly became caught up in the 1963/1964 EEC crisis and had to be interrupted. In particular, the EEC States could not agree on opening the



Convention to accession by non-EEC countries. It was only in 1969 after intensive preparatory work at diplomatic level by the Permanent Representatives of the Member States of the European Communities in Brussels and upon a courageous initiative from the French Government that a formula acceptable to all the States concerned could be found which enabled work to be continued in a now larger circle of European States extending beyond the EEC. Since that time work has continued unrelentingly at expert level for the last three and a half years. The Inter-Governmental Conference set up in 1969 which finally comprised 21 States extending from Finland to Yugoslavia and which, as in the case of the Working Party set up in 1959, was chaired by Dr. Haertel, President of the German Patent Office, finally adopted the Draft Convention establishing a European System for the Grant of Patents which, together with its supplementary drafts, is the subject of this Conference.

The Convention establishing a European System for the Grant of Patents will open a new European phase in patent matters, the importance of which for the general development of international patent law can hardly be over-estimated. It sets up a European Patent Organisation with a European Patent Office which is to grant uniform European patents for an economic area with a population of over 390 million. Nowhere else is there a patent that is valid over a comparable area. The European patent will have the same effect as is at present obtained by taking together over 20 national patents throughout Europe. This in itself clearly demonstrates the extraordinary advantages that the European patent will have for inventors and for the whole of industry. Today an inventor must file over 20 patent applications in various languages, taking account of different provisions governing these applications, if he is to obtain the same effect as he will soon be able to obtain by filing one single European patent application. He will be able to obtain for the States in question an identical patent with the same scope of protection and the same legal term. Patent protection, which is of such great importance for technical and industrial development, will in future be obtainable in the Contracting States to the Convention considerably more rationally and at appreciably less expense.

The lot of a competitor of the patent proprietor will however also be made easier. In future he will no longer have to cope with a multiplicity of national patents for one and the same invention, but merely a single European patent in all the Contracting States.

The European patent is particularly valuable in that it is not a mere recorded right, but an examined patent. In only nine of the States represented here is it possible to date to obtain an examined patent. The European patent will for the first time give the other States equality of opportunity in economic competition with the examining countries of Europe.

What is perhaps even more important is the value of the European patent in contributing to the promotion and diffusion of technical knowledge. The European Patent Office will publish the inventions in respect of which it receives patent applications. Thus all important inventions will be available to the general public in the most common languages of Europe.

A further advantage of central publication will be that the stream of publications in the patents sphere will be substantially reduced. In many cases several national published applications and patent specifications will be replaced by the publication of the application and the publication of the patent specification by the European Patent Office: instead of 20 or more patent specifications in a multitude of languages there will in future be one single European patent specification, which will constitute an inestimable simplification for all who have to deal with patent protection in Europe.

Yet to me, as a layman in patent matters, these advantages are dwarfed by the political importance of the Convention. It paves the way, in a specialist sector that is of paramount importance to the economies of all the States concerned, for co-operation that reaches beyond all previous groups of States. Patent law has the unique distinction of extending beyond the narrower associations of the European Communities and the Council of Europe and even crossing the frontier between different social systems. The Contracting States will not only be highly industrialised countries, but will also include States whose economies depend principally upon the agricultural sector. In spite of these differences and even contrasts, these States, after many years of negotiations which, while being by no means easy, were constantly inspired by a spirit of international co-operation and readiness on all sides to reach the necessary compromises, have succeeded in preparing a Convention which forms a balanced whole and which has not been restricted to seeking the lowest common denominator, but which constitutes a decisive breakthrough in the development of international patent law and at the same time looks steadfastly to the future. The Member States of the European Communities and, of course, other groups of States still have the opportunity, if they so wish, of working unhindered towards even greater unification of patent law. Similarly, the Convention is open to endeavours to promote world-wide co-operation in the patent field: the European patent system is attuned to the world-wide system set up within the World Intellectual Property Organization in Geneva by the Patent Cooperation Treaty — commonly known as the PCT — signed in Washington in 1970. It may even be said that the introduction of the European patent system is a major step towards putting the PCT into effect. We could not have succeeded in combining two international patent systems in this way had it not been for the active co-operation of the World Intellectual Property Organization, whose Director-General, Professor Bodenhausen and Principal Deputy Director-General, Dr. Bogsch, it is my pleasure to welcome here today.

The Convention which it is the purpose of this Conference to adopt is thus an outward expression of the readiness and willingness of all concerned to co-operate on a European and, beyond that, an international scale. This determination to co-operate has overcome, after more than a decade of preparatory work, all the difficulties and obstacles which arose. This to me appears to be the true political significance of this major Convention. I am confident that the co-operation achieved so far will also be a distinguishing feature of this Conference and that it will help us all to overcome the difficulties and problems which are bound to arise during the coming four weeks and to bring this enterprise, which was undertaken so hopefully, to a successful conclusion that is satisfactory to all concerned. Such a success for the imperturbable desire for closer co-operation in the patents field can become a symbol for all who are working for closer co-operation in Europe and thus be an example for other fields too. This is all the more the case since the Convention for the first time creates, in the form of the European Patent Office, a major European authority having extensive contacts with the public. The European Patent Office which this Conference will decide to set up will be a part of the Europe of tomorrow and beyond. Indeed, it is no exaggeration to say that it anticipates the next century. It is of course certain that, at least during the build-up stage, this international authority will have to cope with great difficulties, particularly in respect of languages. But it is precisely by overcoming these difficulties that the European Patent Office will have an unrivalled opportunity to show the way to the solution of the language problem in Europe. Should

it succeed in doing so, the European Patent Office may one day become a model for other parts of the world which wish to integrate on a regional basis. It will become a symbol for international co-operation in general, which is becoming more of a necessity every day.

The fact that the Inter-Governmental Conference has unanimously proposed Munich as the seat for this authority naturally fills those of us who are citizens of the Federal Republic of Germany with great pleasure and satisfaction, but at the same time places a heavy responsibility upon us. This Conference may rest assured that the Government of the Federal Republic of Germany is fully aware of the confidence placed in it by this decision. We shall do all in our power to prove ourselves worthy of this confidence and to lay the foundations for the Federal Republic of Germany to become an exemplary host and a provident home to the European Patent Organisation. In offering Munich, we are offering one of our most attractive cities. Although certain differences of opinion arose between the people of Munich over the European Patent Office, which I am sure were not unknown to many of you, I am firmly convinced that this city will make it its ambition to prove itself to the European Patent Organisation as the irresistible cosmopolitan city with a heart.

Ladies and Gentlemen, four weeks of hard work on the Draft Convention and related drafts are now beginning for you. I wish you all success in this work. But it is also my personal hope and wish that amid the strains of this final round of the negotiations you will still have the time to get to know the beautiful and cosmopolitan city of Munich and the State of Bavaria, which has been so richly endowed by nature and past generations of artists.

And now let us set about completing this great enterprise together."

***Address of welcome by Dr. Philipp Held, Deputy Prime Minister of the State of Bavaria and State Minister for Justice***

4. Following this Dr. Philip Held, Deputy Prime Minister of the State of Bavaria and State Minister for Justice, welcomed those participating in the Conference as follows:

"Your Excellencies, Your Honour the Federal Minister, Your Honour the President of the State Parliament, Your Worship the Lord Mayor, Ladies and Gentlemen,

It is a great honour for me to be able to welcome this Diplomatic Conference to our State capital Munich, on behalf of the Bavarian Prime Minister and the Bavarian State Government. For some time now the Bavarian State Government has been following with the greatest interest the efforts made by European States to realise the European concept of unification and rationalisation by means of a standard system for the grant of patents and by a European Patent Office, in the field of the protection of industrial property rights, which is so important to all of us. The extraordinary increase in contacts between men and States both at industrial and trade levels within the European family of nations is a continuing indication of the major importance of easier and freer relations, the need for which, especially in the legal field, is becoming daily more pressing. I certainly need not stress here that the focal point of interest is an optimal form of protection for the achievement of human ingenuity, which transcends state borders.

The Bavarian State Government was therefore pleased to note that the Inter-Governmental Conference, which has rendered such immense service in introducing a European system for the grant of patents, proposed that the Diplomatic Conference, which is now to go on to fulfil this task, be

convened in the Bavarian State capital. I trust that I am not immodest in saying, like the previous speaker, that I consider the choice of venue a happy one. In saying so I am thinking of the fact that the City houses within its walls the German Patent Office, whose President, Dr. Haertel, is well known to you all. Dr. Haertel has devoted the major part of his life's work to the project which this Conference is to bring considerably nearer to realisation.

But one further point strikes me as important: throughout its long history Bavaria has been a major pole of attraction for great contemporary minds and has afforded them a second home within the walls of its capital city. The great impetus which, I am sure, this Conference will give to the protection of human inventive capacities in the Europe of the future will blend in well with this tradition. I hope that this city will not only be a repair for your many hours of work but will also transmit to you in moments of leisure something of its beauty, its vivacity and that peculiarly Munich quality for which it is so widely renowned. In addition, you will be charmed by the beautiful countryside of upper Bavaria, the nearby lakes and the mountains.

The Bavarian State Government will take great interest in your work and the results to which it leads, and will provide any help, in keeping with the keen interest which it has already evinced in European patent regulation and a European patent authority. It was with particular pleasure that we learnt that the Luxembourg Inter-Governmental Conference had proposed Munich as the seat of the European Patent Office. I might also emphasise yet again that Bavaria will be an excellent host to the European Patent Office.

On behalf of the Bavarian Prime Minister and of the State Government I should like to wish you all success in your work, here in Bavaria, which I hope will occasionally allow of a day of rest."

***Address of welcome by Mr. Georg Kronawitter, Lord Mayor of the State capital of Munich***

5. Finally, Mr. Georg Kronawitter, Lord Mayor of the State capital of Munich, made the following speech to the Plenary:

"Your Excellencies, Your Honour the Federal Minister, Your Honour the President of the State Parliament, Your Honour the Deputy Prime Minister, Ladies and Gentlemen,

In contrast to European capitals such as Brussels or Paris, Munich has no outstanding tradition as a venue for diplomatic conferences. In spite of, and perhaps because of that, I should like to give you a very cordial welcome to our city.

We are very pleased to have here as our guests for almost a month delegates from more than twenty European States, who will be working on the introduction of a European system for the grant of patents. We are sure that Munich will provide an excellent climate for your proceedings and that this beautiful September weather, in which there has been a break today, will return again. Our city has made quite a name for itself over the last few years as a venue for congresses and conferences. The cosmopolitan atmosphere, which has already been mentioned, the interest in all things new and the vitality which are characteristic of Munich certainly contribute to this.

Besides which, as the seat of the German Patent Office and as the future seat of the European Patent Office, Munich is the place where the results of your work will be put into practice. And finally, as a go-ahead industrial city and as an expanding centre of technical and economic development, Munich itself is very interested in a comprehensive European patent law. The economic influence of Munich's industries extends far beyond the confines of our city and our country. Stimuli and knowledge radiate from our city to almost all European countries, and vice

versa from many parts of Europe towards Munich. That is a further reason for Munich's being pleased to become the seat of the European Patent Office. Our reasons are not only the 1,500 or so secure, skilled and well-paid jobs which the Patent Office will add to the Munich labour market nor the boost to Munich's reputation as a scientific and technical centre, but also the knowledge that we are making a contribution to European integration and to closer, trusting and fruitful co-operation between the States and peoples of our continent.

Of course — I may perhaps mention this en passant — it will also be pleasant for Munich's inventors to have close at hand a European Patent Office with a single body of European patent law. Perhaps the extremely complicated control device for draught beers invented in 1908 by a certain Jakob Schuhnagel might now stand a chance of becoming a European patent; this question has once again been mooted during the period of the "Oktoberfest".

As we are just twelve days away from the opening of the "Oktoberfest", I hope you will have enough time off from your very intensive work during the Conference to have a closer look at our beautiful city which, as Lord Mayor, I may qualify as such as it has also been eulogised by others. I also hope that you will discover the delights of our city, of which Professor Werner Heisenberg said: "The name of Munich hardly makes one think of sober scientific study. The name conjures up quite different images: Ludwigstraße from the Triumphal Arch up to the Feldherrenhalle, bathed in sunlight; the view from the Monopteros over the richly flowered English garden towards the Frauenkirche; the Marriage of Figaro in the Residenztheater; Dürer's paintings in the Pinakothek; the train, over-packed with skiers, which goes to Schliersee and Bayrischzell; and finally the beer tent, topped by the Bavarian Lion, at the "Oktoberfest".

Munich is all of this, and even if first-time visitors do on occasion say that Bavarians combine Prussian kindness with Austrian exactitude and accuracy, we would not really wish to have this trait in our character changed.

Accordingly, I wish you all success in this Diplomatic Conference and hope that you will all have a pleasant stay in our city."

#### ***Election of the President of the Munich Diplomatic Conference***

6. The French delegation proposed Dr. Gerhard Jahn, Minister of Justice of the Federal Republic of Germany, as President of the Diplomatic Conference.

7. The Plenary unanimously approved the French delegation's proposal.

8. Dr. Gerhard Jahn thanked the Plenary for the honour it had paid him and said that he was prepared to accept the task entrusted to him.

#### ***Adoption of the agenda***

9. The Plenary unanimously adopted the draft agenda as set out in M/44/K.

#### ***Adoption of the Rules of Procedure***

10. The Plenary unanimously adopted the draft Rules of Procedure of the Conference as set out in M/34.

#### ***Election of the first Vice-President and the five other Vice-Presidents of the Conference***

11. The President noted that, under Rule 43 of the Rules of Procedure, he could propose a list of candidates for all positions

to which election was to be voted upon by the Plenary. For the election of the Vice-Presidents, provided for in Rule 17 of the Rules of Procedure, he proposed the head of the Italian delegation as first Vice-President and the heads of the Belgian, Irish, Luxembourg, Swedish and Yugoslav delegations as the other Vice-Presidents.

12. The Plenary unanimously adopted this proposal.

#### ***Election of the general rapporteur of the Conference***

13. For the election of the general rapporteur, provided for in Rule 3, paragraph 4, of the Rules of Procedure, the President proposed Mr. J.B. van Benthem (Netherlands).

14. The Plenary unanimously adopted this proposal.

#### ***Election of the Secretary-General of the Conference***

15. For the election of the Secretary-General provided for in Rule 20, paragraph 2, of the Rules of Procedure, the President proposed Mr. J.A.U.M. van Grevenstein, Director-General at the General Secretariat of the Council of the European Communities.

16. The Plenary unanimously adopted this proposal.

17. Mr. van Grevenstein accepted the post. He thanked the Plenary for the trust it had placed in him and promised that he and his colleagues would do everything in their power to show themselves worthy of it.

#### ***Designation of the official responsible for protocol and the official responsible for general organisation***

18. The President said that, in accordance with Rule 20, paragraph 3, of the Rules of Procedure, the Government of the Federal Republic of Germany had designated Mr. H. von Vacano as the official responsible for the general organisation of the Conference and Dr. H. Graeve as the official responsible for protocol.

#### ***Election of the Chairmen and Vice-Chairmen of the Main Committees***

19. The President proposed the following list for the election of the Chairman and the three Vice-Chairmen of each of the three Main Committees provided for in Rule 12, paragraph 7, of the Rules of Procedure:

##### ***Main Committee I***

Chairman: Federal Republic of Germany

First Vice-Chairman: Sweden

Other Vice-Chairmen: Austria and Finland

##### ***Main Committee II***

Chairman: France

First Vice-Chairman: Denmark

Other Vice-Chairmen: Liechtenstein and Portugal

##### ***Main Committee III***

Chairman: United Kingdom

First Vice-Chairman: Switzerland

Other Vice-Chairmen: Norway and Turkey

The President also proposed that, as concerned the designation of the rapporteurs of the three Main Committees provided for in Rule 3, paragraph 4, of the Rules of Procedure, each Main Committee should select its rapporteur from among the members of the following delegations:

Main Committee I: Switzerland  
Main Committee II: United Kingdom  
Main Committee III: France

20. The Plenary unanimously adopted all these proposals.

***Election of the Chairman, the three Vice-Chairmen and the members of the Credentials Committee***

21. For the election of the Chairman, the three Vice-Chairmen and the members of the Credentials Committee, provided for in Rule 11, paragraph 2, of the Rules of Procedure, the President proposed the following list:

Chairman: Spain  
First Vice-Chairman: Belgium  
Other Vice-Chairmen: Greece and Monaco  
Other members: France, Federal Republic of Germany, Italy and Norway

22. The Plenary unanimously adopted this proposal.

***Election of the Chairmen, the Vice-Chairman and the members of the General Drafting Committee***

23. For the election of the Chairman, the Vice-Chairman and the members of the General Drafting Committee, provided for in Rule 13, paragraph 3, of the Rules of Procedure, the President proposed the following list:

Chairman: Netherlands  
Vice-Chairman: France  
Other members: Federal Republic of Germany and United Kingdom

24. The Plenary unanimously adopted this proposal.

25. The President thanked the Plenary for the various decisions it had just taken, thus enabling the various Conference bodies to be set up. He requested the delegations concerned to notify the Secretariat as soon as possible as to which of their members would be carrying out the duties in respect of which the Plenary had merely designated the country. He finally noted that the election of the members of the Drafting Committees of the three Main Committees was the responsibility of the Main Committees themselves.

***INCOPOSA's request for admission to the Conference as an observer***

26. The Secretary-General drew the Plenary's attention to the letter from INCOPOSA (International Interim Committee of Patent Office Staff Associations), circulated under reference M/51/K. After reading out the letter, he suggested that the Plenary be called upon to decide on the request made by INCOPOSA for admission to the Conference as an Observer delegation.

27. The delegation of the Federal Republic of Germany said that, although it sympathised with the request made by INCOPOSA, it would abstain if the Plenary were to hold a vote. The reasons for its attitude were as follows: firstly, as emerged from INCOPOSA's letter itself, only six national patent offices were represented in that organisation, whereas twenty-one States were represented at the Conference. Secondly, INCOPOSA did not represent all the staff of the patent offices concerned but only one section, namely the examiners. The question of the organisation of the future European Patent Office and of its service regulations was of interest not only to the examiners at the national offices, but also to all the other categories of staff employed there.

Considering, moreover, that the Munich Diplomatic Conference was not in any way concerned with examining problems concerning the staff of the future Office, the delegation of the Federal Republic of Germany wondered whether it might not be sufficient for INCOPOSA to be admitted as an observer to the proceedings of the Interim Committee, where such problems would be discussed in detail.

28. The CNIPA delegation recognised the validity of the arguments put forward by the delegation of the Federal Republic of Germany. However, since the organisation of the European patent system would be bound to influence the careers of the staff of national patent offices, particularly examiners, it recommended that the Conference should give favourable consideration to the request made by INCOPOSA. The CNIPA delegation said that in expressing this wish it believed it was speaking for a large majority of patent agents.

29. The United Kingdom delegation asked for time to consider INCOPOSA's request, of which it had only just been informed. As regards the procedure to be followed, the United Kingdom delegation recalled that, under Rule 2, paragraph 2, of the Rules of Procedure, the status of an Observer delegation would be granted to those "delegations of the inter-governmental and non-governmental organisations invited to the Conference by the Government of the Federal Republic of Germany". Any decision as to whether or not INCOPOSA should be invited on this basis was therefore the responsibility of the Government of the Federal Republic of Germany although the latter might, of course, wish to have the opinions of the other Government Delegations before taking its decision. Another of the Rules of Procedure could, however, be used to give INCOPOSA at least partial satisfaction. This was Rule 48, paragraph 1, which provided that the Steering Committee could invite certain persons to participate as listeners in the proceedings of the main bodies of the Conference. If the latter possibility were opted for, it might be preferable to postpone discussion of the matter by the Plenary until the Steering Committee had examined it.

With regard to the substance of the matter, the United Kingdom delegation supported the CNIPA delegation's comments on the influence which the creation of the European Patent Office would have on the interests of the staff of national patent offices, particularly those which operated on the basis of the examination procedure.

30. The President supported the proposal on procedure made by the United Kingdom delegation and called on the Plenary to instruct the Steering Committee to examine the matter and to decide under its responsibility how to deal with the wish expressed by INCOPOSA, if necessary submitting recommendations to the Plenary.

31. The Plenary agreed to this proposal.

***General debate***

32. The Head of the French delegation made the following statement:

"It is a source of great satisfaction to the Government of the French Republic that the Draft Convention establishing a European System for the Grant of Patents is being submitted to the Munich Diplomatic Conference after only three years of preparatory work. This is a very short space of time when one considers the importance of the subject. Whilst no one would wish to underestimate the importance of the preparatory work done previously in the context of the European Economic Community, work on the European patent can be said to have begun at the date when seventeen European States were invited to take part in it. I would note that, far from having lost some of our partners on the way, we were joined, to our

pleasure, by four more States. This proves that, however ambitious our initial purpose might have appeared, it came at an appropriate time. You will remember that, originally, we drew up two proposals, one of a limited nature, which seemed to us to be more reasonable, and one of a more general nature, and that it was the latter which was swiftly chosen by the States taking part. We can thus see that it was the more ambitious, wider-ranging project which was best received by the countries of Europe. This is extremely encouraging and at this solemn and extremely moving moment, the opening of the Munich Diplomatic Conference, I should nonetheless like to point out that, if it is to succeed, this Conference will require each of the delegations to continue to show that spirit of international co-operation, that desire to work together and to create something at a European level which was apparent during the preparatory work. We are confident that we shall thus achieve a satisfactory result, not only for all the countries concerned in general, but also for each of our countries individually. I am convinced that the eminent qualities which made it possible to reconcile legitimate national preferences during the experts' discussion will again be shown by the various national delegations during this Diplomatic Conference and the French Government would like to thank the delegations for this in advance.

In the second place, it is necessary for our proceedings to be conducted in the same creative atmosphere, with the same relentless, but calm tenacity as that which obtained at the Inter-Governmental Conference in Luxembourg under the enlightened leadership of Dr. Haertel. We are convinced that, since the Diplomatic Conference has entrusted Dr. Haertel with one of the most difficult posts, it will benefit from the same leadership and creativity.

Finally, if this Convention is to succeed in the long term, inventors, patent proprietors and their agents will have to come to recognise the European patent as being the powerful instrument for protecting innovations and inventions which they need. This brings out the importance we have always attached and continue to attach to the comments, criticisms and wishes voiced by observers since, in the last resort, it is on their decisions that will depend the success of the institutions which we shall be setting up together.

In conclusion, the French delegation is delighted that the Diplomatic Conference should be held in such a beautiful city as Munich, which has mastered the problem of urban growth in an intelligent and enlightened manner, and which manages to combine its traditional charm with the character of a major modern metropolis.

The French delegation thus hopes that, while maintaining the innovatory spirit shown by the various national delegations during the preparatory work, we shall prove able to abide by the impressive work already done and resist any temptation to over-perfect it, to make too many changes in something which, in the view of the French delegation, conferences of experts have already brought to maturity.

The French delegation sincerely hopes that this Conference, which began most auspiciously this morning, will see the continuation of that atmosphere of friendship and European construction which has reigned over past proceedings."

33. The Head of the United Kingdom delegation made the following statement:

"May I first express thanks to our hosts in the shape of the Government of the Federal Republic, the State of Bavaria and the city of Munich for the hospitality which we have seen so far and which it is evident from the programme that we are about to see even more in the future. May I also take this opportunity of paying a tribute to Dr. Haertel who, as the leader of all our preparatory work, has played the major part in the

development of the work which is now coming to fruition. Over the last four years this really has been an enormous enterprise, as Mr. Savignon has said, and I do not think that anybody who has not been involved can ever truly appreciate the magnitude of what has been done. I would also like to express thanks to our Secretariat which is, I am glad to say, still with us and looking after us at this Conference as it has done so well in the past.

Turning to the content of the Convention and its Protocols, Her Majesty's Government is fully in favour of the introduction of a European patent system. A patent which is effective over all Western European countries and which is granted on a single application will be of great benefit to inventors and industry in all countries and should avoid a great deal of the duplication of work which now takes place in national patent offices. The system of law and procedure provided by the Convention is perhaps rather more complicated than we in our pragmatic way would have wished. However, we believe that it will be on the whole a very sound and workable system provided that those responsible for its execution approach it with commonsense, goodwill and a generally flexible attitude.

The institutional arrangements set out in Articles 6 and 7 and in the Protocol on Centralisation are not, I have to confess, in the United Kingdom's view, the optimum ones from the point of view of efficiency and ease of operation. You yourself, Mr. Chairman, in your opening address referred to language problems. We have of course referred to these ourselves many times in the preliminary negotiations. More recently the Conference may be aware that informed public opinion in the United Kingdom has expressed serious doubts as to whether it would be possible to concentrate wholly in Munich, admirable city though it is, an examining staff capable of handling at the required standard the expected large number of applications in the English language. Although these doubts are shared by Her Majesty's Government, it assumes that, in the light of the results of the Conference in Luxembourg in June last year, the arrangements defined in the Protocol on Centralisation represent the wishes of the majority of participating countries and on that understanding it undertakes to do all it can to make these arrangements work.

Nevertheless, it has to state that it would be quite unacceptable to the United Kingdom Government if in the event the quality of examination in the English language were to fall below that obtainable in other working languages or, through a shortage of competent staff, work in the English language were to fall into arrears. The question of arrears of patent examination is a very tender question for all applicants but particularly, I may assure you, for British industry. Her Majesty's Government wishes to make it clear that in these circumstances (and I am now looking will into the future you will understand, Mr. Chairman) it would expect all Contracting States to join it in taking urgent steps, including if necessary amendments of the Protocol or the Treaty, to rectify the situation, whether by the establishment of a branch office or in any other way, since this is, of course, not solely a British problem.

On this understanding I can say that Her Majesty's Government is prepared to accept the institutional arrangements set out in the Convention and Protocol provided there is no substantial change which would make them less palatable. However, we shall do this as an act of faith that the practical arrangements for implementing the system will be acceptable in the United Kingdom.

The success of the European patent will depend on the practical implementation of the system and in this connection I have to say that Her Majesty's Government attaches the greatest importance to a full British participation in the staffing

and control of the European Patent Office. This will be essential if British industry is to have confidence in the competence of the European Patent Office to process large numbers of applications in the English language and if British staff is to exert a fair influence on the development of the system in its formative years. We shall therefore wish to be assured that no unreasonable qualifications, for example in respect of language competence or prior training (and I emphasise the word unreasonable), will be demanded of potential British staff.

I must also mention that Her Majesty's Government does not find the arrangements presently proposed for financing the European system to be entirely acceptable. We shall be looking for a firm understanding that, when the time comes to fix the interest rate to be paid on Government loans, the Administrative Council will ensure that any element of Government subsidy to users of the European system is eliminated or at least minimised.

Failing satisfaction on these points I have to say that early ratification by the United Kingdom cannot be assumed.

Despite these rather solemn words, Mr. Chairman, which I hope that the Conference will take very seriously, Her Majesty's Government wishes the Conference very well in its labours during the coming weeks. It recognises the unique quality of the work which has been accomplished and it is confident that the efforts of this Conference will be crowned with success at the end of the day."

The United Kingdom spokesman requested that this statement be entered in the record of the Conference.

34. The Head of the Austrian delegation made the following statement:

"Mr. President, Ladies and Gentlemen,

To the Austrian delegation, the journey to the Bavarian capital has meant more than a visit to a neighbouring country. The countryside we passed through, the style of architecture en route, the sounds of the language: all this contrived to bring home to us, yet again, the very considerable extent to which the peoples of Europe, irrespective of their nationality or membership of other communities, are connected with one another, not only geographically, but also culturally and socially. We are therefore particularly delighted to be able to spend some time here in Munich.

It is true that one has become accustomed to the idea of diplomatic conferences being held in one of a somewhat limited number of international conference centres which also house the diplomatic representations and offices of the States taking part. It is, however, equally true that those who attend international meetings are always pleased to be able to work in fresh surroundings from time to time. In view of the subject which we have to discuss at this Conference, in view of the intention of setting up a European Patent Office in Munich, we should like to express our pleasure at the rare opportunity of being able to hold this Conference in this city. We owe this opportunity to the Government of the Federal Republic of Germany, to which, through its ministerial representative, we should like to express our most sincere gratitude; to the efforts made by the Bavarian State Government, the municipal authorities of Munich and all the authorities concerned which we should like to thank for all the work they have done to ensure that this Conference runs smoothly; to the existence, here in Munich, of the German Patent Office; to the care with which this Conference has been prepared under the leadership of Dr. Jahn, for which he is assured of our highest esteem.

The purpose of this Conference is to set up a single system for the grant of patents for a large group of European States and, in conjunction therewith, to set up a European Patent Office. As well as this purpose relating directly to the field of patents itself, there is however another aspect of the

Conference which should not be overlooked. It is no mere coincidence that the preparatory work on the foundations of a European system for the grant of patents was resumed in 1969, after a long pause, to be finally completed in 1972. This work falls within the context of the many attempts made during this period gradually to extend European co-operation in the economic field and related sectors to new domains and to a growing number of States. When one recalls how close a link there is between creativity in the field of research and technology, on the one hand, and patents on the other, the importance of there being as widespread a European standardisation as possible in the patents field becomes clear. In view of this link Austria took part with the greatest interest in the preparatory work leading up to this Conference. Its interest was the greater because it is one of the European countries which has a long tradition and excellent service in the field of patents. Mr. President, the setting up of a new system for the grant of patents represents a step forward in co-operation between European States.

We Austrians, despite our acceptance of the principle of centralised authority vested in the European Patent Organisation, find ourselves confronted with the question of whether really none but the Organisation's departments should be competent to carry out the various tasks entailed in the grant of a European patent. The present draft texts of the Convention are based on the assumption that this should in fact be the case. We quite frankly find it somewhat hard to believe that this view is the better, the more European one. We consider that the purpose of co-operation should not be to create something new by ignoring that which is old and proven, but rather by making use of the assets we already possess. We therefore believe that the facilities and knowledge available in the participating States should be used to the benefit of all and that the collaboration of suitably qualified national offices within the framework of the European system should not be excluded. This belief is strengthened by our conviction that only if our Continent exploits and utilises all the intellectual resources available will it be able to accomplish the tasks which it is preparing to carry out in the world of tomorrow.

Mr. President, in your speech this morning, you said that you were confident that it would be possible to overcome the difficulties and problems which were bound to arise in the coming four weeks and to bring this enterprise which had been undertaken so hopefully to a successful conclusion that was satisfactory to all concerned.

Mr. President, we are in agreement with you and thus hope that the Conference will run smoothly and successfully. Thank you."

35. The Head of the Swiss delegation made the following statement:

"Mr. President, Ladies and Gentlemen,

On behalf of the Swiss delegation, I should first like to thank the Government of the Federal Republic of Germany for its invitation to attend this Conference, for the marvellous way in which — as one might have expected — the Conference has been prepared, and for the hospitality which has been extended to all of us in this beautiful city of Munich.

I should also like to say how pleased I am that, with the opening of this Conference, the work on drawing up a Convention on a centralised European system for the grant of patents has now entered into its decisive phase. The purpose of this Convention, namely a revolutionary rationalisation of the system for the grant of patents for invention in Europe and the simultaneous harmonisation of the basic points of substantive patent law, has right from the start aroused the greatest interest not only on the part of the Swiss authorities but also on the part of the interested circles in Switzerland. The Swiss

authorities are therefore very glad that Switzerland should have been able to take part in the preparatory work of the Inter-Governmental Conference from the very beginning. The basic features of the current draft correspond to the wishes and views of the Swiss Government and the interested circles in our country. The Swiss delegation hopes that the essential features of the draft will be approved by the Conference.

The thought that, once the Convention has entered into force, the field of activity of individual national patent offices will be reduced is, at first, somewhat distressing. If, however, one remembers the extent to which national economies are interwoven with one another today, one cannot fail to regard the present situation in the field of patents as anachronistic, particularly when viewed from the standpoint of the inventor, trade and industry. It therefore seems not only sensible but also extremely necessary for the States of Europe to co-operate in this field.

My Government therefore hopes that the Conference will satisfy the high expectations of all the circles interested in patent protection and that, when the Conference ends on 5 October, its results will be positive. Thank you, Mr. President."

36. The Head of the Yugoslav delegation made the following statement:

"Mr. President, Ladies and Gentlemen,

May I, on behalf of the Yugoslav delegation, join those who have spoken before me in thanking the Government of the Federal Republic of Germany, the city of Munich and the State of Bavaria. The Yugoslav delegation accepted the invitation with great pleasure and came to Munich determined to make its contribution to the drawing up of a joint European Patent Convention.

Mr. President, the Yugoslav delegation has always, and in every field, supported the idea of open international co-operation which should be as satisfactory as possible for all concerned. Recognising that current economic and cultural trends demand the internationalisation of patents, the Yugoslav Government has also endeavoured to co-operate in the drafting of the text of the Convention now lying before us. It thus welcomes this Conference as a step forward in the development of international relations in Europe.

To the extreme regret of the Yugoslav Government, its good intentions as regards the setting up of a single system for the grant of patents have been impaired and deflected by two serious considerations to which the Yugoslav delegation referred at the preparatory conferences in Luxembourg.

The first of these relates to the so-called maximum programme, i. e. the substantive legal provisions which will bind the future members of the new European patent community to be set up by this Conference, irrespective of whether or not the level of their economic and social development so allows. Most of the States represented here are highly industrialised, and it is obviously in keeping with their level of development, if, in their national legislation, they decide or have decided to protect chemical and pharmaceutical products as such after many years of having protected the processes for their manufacture. However, a small number of the States represented here, including Yugoslavia, will take years, if not decades, to reach the stage of industrial development which only recently enabled certain of the highly industrialised European States to introduce protection for products as well. The original so-called minimum programme for a Convention solely on procedure would be of use to all parties and suit States at varying stages of development, whereas the present maximum programme unfortunately makes it far more difficult to arrive at a compromise solution acceptable to all those concerned. Mr. President, the Yugoslav delegation will do everything in its power to seek and achieve such a solution. At a time when

political tension in the world, and particularly in Europe, is fortunately diminishing, it would run counter to these tendencies if this Conference and the Convention adopted by it should prove to be an instrument to be used by the already strong industrialised States against the weaker ones.

The other major reservation of the Yugoslav Government relates to the provisions in the Convention to be adopted, whereby accession to the latter is not open to all European States. We consider the openness of the Paris Convention, the basic document for the internationalisation of the legal protection of industrial property rights, to be not only a positive measure but a generally valid principle. The text on which we have to work refers both to the Paris Convention and also stresses, in the Preamble, that it is based on the desire "to strengthen co-operation between the States of Europe in respect of the protection of inventions". It is, however, the firm conviction of the Yugoslav Government that such co-operation will be possible and likely to succeed only if this Conference does not result in discrimination by the economically strong States against weaker ones, or by one group of European States against another.

While the Yugoslav delegation, on behalf of the Yugoslav Government, most sincerely welcomes the Diplomatic Conference which has opened today and hopes that it will be truly successful and satisfactory to all, it would nonetheless like to state its conviction that the views it has outlined do not merely reflect the narrower national interests of Yugoslavia and its international aims, but rather constitute an objective precept of international co-operation, the justice of our era, the scientific and technological revolution and the history of Europe. Thank you, Mr. President."

37. The Head of the Finnish delegation made the following statement:

"Mr. President,

The Finnish delegation would also like to thank the Government of the Federal Republic of Germany most sincerely for the invitation to take part in the Munich Conference for the setting up of a European System for the Grant of Patents. When we took part in the preparatory Inter-Governmental Conference in Luxembourg, we stressed how closely the participating countries were co-operating in the field of patents and the fact that co-operation between the various Nordic countries was so developed that our most recent patent legislation was almost completely harmonised. It is therefore hardly surprising that we want to be present when a new European system for the grant of patents is being worked out.

Since co-operation between States in many other social fields has led to centralised systems, it is only natural that in the development of the system for the grant of patents we should have reached the stage of setting up a joint body to process and decide on patent applications from all the Contracting States. We support this development, in so far as it benefits our country and its citizens.

In principle, however, the realisation of this plan will mean that, to a large extent, the national patent offices of the Contracting States will become superfluous. Since national patent laws will remain in force, the patent offices will be required to deal mainly with national patent applications, and with such foreign patent applications as are in respect of only one or a few States. For these duties, it will not be necessary to employ as large a number of examiners as previously, although if the above applications are to be properly examined, the level of specialist knowledge in all areas of technology will need to be maintained.

The opening of the European Patent Office will thus result in a corresponding reduction in the activities of national offices,



that is, a loss of specialist knowledge, in the smaller Contracting States at least, which can serve the interests of no-one. We should therefore have preferred the European System for the Grant of Patents to involve the national offices to a far greater extent and to result in these offices being given considerable tasks, thus including the possibility of additional examination of foreign and national patent specifications. However, the plans are probably already too far advanced for it to be possible to choose another system.

With regard to the report on the European system for the grant of patents, the fact that at present it is not planned that the examination material of the European Patent Office should include Scandinavian patents — to say nothing of Finnish ones — led us to examine ways in which the patent offices in small countries like Finland could be responsible for conducting an additional examination of the European patent during the opposition period and for starting opposition proceedings, in the event of the examination revealing grounds for such a measure. Industry, inventors and trade in our country generally need support of this kind for, as a rule, they are not in a position to defend their own interests.

Apart from this, the draft Convention is in accordance with the principles of our patent legislation and, as such, is acceptable to us. One cannot deny that, after having been revised at so many preparatory conferences, the text of the Convention is extremely well drafted. Signs of similar care and knowledge of the subject are to be found in the Implementing Regulations which, together with the Convention, constitute a complete administrative system for patents in which it is hard to find any lacunae.

We owe this to the preparatory conferences, their working parties, the Secretariat, and, above all, the Chairman of the preparatory conferences, Dr. Haertel, who displayed great skill, knowledge and patience in reconciling sharply diverging proposals and views and arriving at the unanimous draft we have before us.

Last but not least, may I say how interesting it has been to come to Munich for this Conference. Since the European Patent Office will have its seat in Munich, this has been an opportunity for us to get an idea of the surroundings in which European patent applications will be dealt with in the future. I am convinced that the Bavarian capital, Munich, beautiful, friendly and rich in tradition as it is, will provide an excellent setting for a successful Conference. Thank you, Mr. President."

38. The Head of the Danish delegation made the following statement:

"Mr. President,

I shall be very brief. But I would like, on behalf of the Danish Government and the Danish delegation, to express heartfelt thanks to the Government of the Federal Republic of Germany for the invitation to this Conference.

As you have already mentioned, Mr. President, the question of a comprehensive patent system reaching across frontiers is one to which the Nordic countries have devoted a great amount of work. We worked on the setting up of a Nordic patent over a period of many years and, whilst this resulted in a uniform Nordic patent law, it failed to achieve the real objective, namely the creation of a Nordic patent, due to difficult political problems. Naturally our attitude now to the question of a European patent is a positive one and we are prepared to sign a Convention on such a patent in accordance with the proposal and the protocol before us. Thank you."

39. The Head of the Netherlands delegation made the following statement:

"Mr. President,

The Netherlands Government is also very pleased that the preparatory work for the European patent will be concluded

here in Munich. We agree completely with the view of the Swiss delegation that this Convention will increasingly fulfil a particular need and that national patent systems are likely to gradually become an anachronism. We also share the view that the Draft Convention has now been prepared to a sufficient degree after a large amount of preparatory work carried out in close liaison with the interested circles. Both the Netherlands Government and the interested circles in the Netherlands are of the opinion that the centralisation provided for under this Convention is the best solution, because it alone is capable of creating a uniform procedure. However we also share the view of the United Kingdom delegation that this uniform procedure must be pragmatic and flexible and not too formal in nature. I can inform you, Mr. President, that the Netherlands have already taken measures to ratify this Convention, and also the Second Convention which will be signed some time after the Diplomatic Conference, within a period of two years.

However, we are not only pleased with the fact that it is now possible for this Convention to be concluded but also that this will take place here in Munich at the invitation of the Government of the Federal Republic of Germany. Your Government, Mr. President, has, in the person of Dr. Haertel, the President of the Inter-Governmental Conference, and his colleagues in the German Patent Office and the Federal Ministry of Justice, made a great and incalculable contribution to the genesis of this Convention. All political considerations apart, I think it can be said that this group of first-class German officials has ensured that Germany deserves to be the site of this Diplomatic Conference, which is undoubtedly the most important conference in the history of industrial property rights. We would express our gratitude to the Government of the Federal Republic of Germany for its invitation. Mr. President, thank you."

40. The Head of the Swedish delegation made the following statement:

"Mr. Chairman, Ladies and Gentlemen,

The Swedish delegation wishes to associate itself with the other delegations which have expressed their great pleasure and satisfaction with the positive development of European patent co-operation. This development has made it possible for us to adopt a final position on a unified system for the grant of patents on the basis of the draft European Patent Convention which has been so thoroughly and competently prepared. We feel that there are excellent prospects for reaching a satisfactory final result and that the present circumstances are indeed favourable.

We have the advantage of meeting in the beautiful and very attractive Bavarian capital of Munich and of enjoying the generous hospitality of our German hosts and we shall profit from their renowned organisational talent. We feel most grateful to the Government of the Federal Republic of Germany for having taken on the burden of arranging this Conference.

In its written comments, the Swedish Government has already had the opportunity to state that it views in a positive light the results of the preparatory work for the Conference. The desires of the Swedish Government for amendments to the present proposals are limited to a few points only. It will be no surprise to those here present that the most important one concerns the legal position of the inventor in the patenting procedure.

The preparatory conferences have dealt with various problems connected with the situation of the Nordic countries forming a specific language area. Allow me, Mr. Chairman, to conclude by expressing the general hope entertained in Sweden that future European co-operation based on the European Patent Convention will lead to a better and more



readily accessible patent system which will be of benefit to all countries irrespective of language. Thank you, Mr. Chairman."

41. The Head of the Liechtenstein delegation made the following statement:

"Mr. President, Ladies and Gentlemen,

I would like to apologise from the outset and crave your indulgence if perhaps I am not able to be as brief as my Danish colleague.

On behalf of my delegation I would like to congratulate you, Mr. President, on your election as President of this Diplomatic Conference which, as you yourself stated this morning, is the first Diplomatic Conference of its kind to take place on German territory since the end of the war. It is a special honour for the Munich Diplomatic Conference, the Government Delegations and all participants to be able to carry out their work under such esteemed and able chairmanship and this is the best omen for the successful conclusion of the Conference that is surely desired by all of us.

I would like to express the gratitude of the Liechtenstein Government to the Government of the Federal Republic of Germany as the host Government, to the Government of the State of Bavaria as well as to its unique capital of Munich and its worthy Lord Mayor who gave such a warm welcoming address today, for the generous hospitality and initiative shown in inviting us to participate in this Conference in a location such as Munich. The many delegations who have spoken before me have enthusiastically and warmly confirmed the pleasure with which all those taking part accepted the invitation to the Conference in Germany and more particularly in the city of Munich with all its tradition and charm. As a representative of a German-speaking country which is practically a neighbour of Germany, I would like to firmly associate myself with these statements and also to express Liechtenstein's particular sentiments of friendship and support.

The purpose of our presence here, namely the setting up of a European system for the grant of patents, is, as has already been pointed out from a most competent quarter, of particular importance not only in the specialist sector concerned but also in a much broader economic and general political context. It is therefore no accident that a country of such a small geographical area but as intensively economically developed as Liechtenstein should attach great importance to becoming a Contracting Party to the Convention and to participating in this Diplomatic Conference. The simplification which the system for the grant of patents will achieve, the promotion of technological knowledge and the exchange of information, the future possibilities of technological co-operation and the closer and better economic links which should ensue from all this are also bound, we sincerely hope, to have an effect in the international sphere, as a concrete example of how peoples may be brought more closely together.

Mention has been made of the very long, extensive and exacting preparatory work which has been involved in bringing the idea of a standardisation of European patent law — particularly as concerns the grant procedure — to the present stage of fruition. In this context, without in any way wishing to detract from the great contribution made by the Council of Europe, the European Economic Community, the countries concerned, the interested circles and certain eminent personalities, I would like to mention one particular factor: the substantial help and support and the enormous encouragement given by our host country, i. e. by the Ministry of Justice of the Federal Republic of Germany and the German Patent Office, and the indefatigable, efficient and devoted work of Dr. Haertel, its President, who was also the President of the Luxembourg Inter-Governmental Conference, in bringing this joint European enterprise to fruition.

I think I am speaking on behalf of everyone gathered here in addressing my final words of special thanks to the latter bodies and persons together with the wish that the Munich Diplomatic Conference will progress harmoniously and productively towards a successful conclusion. Mr. President, thank you."

42. The Head of the Norwegian delegation made the following statement:

"Mr. President,

The Norwegian delegation heartily supports the expressions of gratitude already made by the preceding speakers and also wishes to express its thanks for the opportunity of taking part in this historic conference.

The importance of the European patent system can scarcely be overestimated. It constitutes a major step towards the objective of international patents which was doubtless one of the original aims of the Paris Convention for the Protection of Industrial Property. The European patent system will probably make its impact far beyond the borders of the Contracting States which sign the Convention. It has, however, been decided that the national patent offices of the Contracting States will continue to exist both with a view to the needs of national communities and for the benefit of the secure further development of this new European patent system. This means that national patent offices can continue to exist because they will have to preserve and maintain the necessary requirements for the existence of the European patent system in their countries in conjunction with business, industry and inventors.

The Norwegian Government therefore hopes that an efficient European patent system will be set up and wishes this Conference good luck and success in its enterprise. Mr. President, thank you."

43. The Head of the Greek delegation made the following statement:

"I am particularly pleased to have the honour of representing my country at this opening session of the Diplomatic Conference. I address the thanks of my delegation to the Government of the Federal Republic of Germany for organising the Conference, while taking the opportunity of informing the President of the Conference, His Excellency Federal Minister Jahn, of our great satisfaction at the choice of Munich as the seat of the European Patent Office. I would also like to thank the host city of Munich for the welcome which it has given to the Conference. I am also pleased to be able to join in the unanimous expression of thanks of the participants in the Conference for the German Patent Office's contribution to the success of this Conference and I express here my admiration for the masterly way in which Dr. Haertel presided over the work of the Luxembourg Inter-Governmental Conference. There are very few men who manage to accelerate the process of understanding between peoples: Dr. Haertel is one of them and I wish to make a point of this here.

Greece is always ready to participate in the steps dictated by the economic progress of Europe. My country has not been lagging behind in the process of European economic expansion during the last few years. It has made very great progress, especially in the industrial field; it is therefore heedful of anything, such as the European patent, which may promote the sharing of ideas and technologies, which must be, in the final analysis, the reason for our optimism and the foundation of our enthusiasm in the building of Europe.

In closing, I would like to emphasise the importance which my delegation attaches to the Conference's closely examining the important problem of reservations in Article 166 (167) of the Convention, as certain delegations have already requested it to do, bearing in mind the circumstances which are peculiar to certain countries. This should be done in the spirit of understanding which already inspired the discussions on this

point at the sixth meeting of the Luxembourg Inter-Governmental Conference. Finally, I would like to convey the wishes of my delegation for the success of the Conference. Thank you, Mr. President."

44. The Head of the Belgian delegation made the following statement:

"Mr. President, Ladies and Gentlemen,

I subscribe to the statements by the preceding speakers concerning the importance of the Munich Diplomatic Conference and the hope to see successfully completed the work which has already been so well prepared, first of all under the aegis of the European Communities and then under the enlightened conduct of Dr. Haertel. Belgium will also do everything within its power to achieve the aim required. We are aware that this means immediate sacrifices for everybody but we think that the setting up of a European system for the grant of patents is worth the effort. Thank you, Mr. President."

45. The Head of the Spanish delegation made the following statement:

"Mr. President, Ladies and Gentlemen,

I should like to thank the Government of the Federal Republic of Germany for the invitation sent to my country to take part in this Conference for the setting up of a European System for the Grant of Patents. I shall take this opportunity to express my gratitude to Dr. Haertel for the efforts made during a period of four years in the context of the preparatory work. I am gratified at the happy choice of the place in which the Conference is being held, namely this beautiful city of Munich which has recently seen the most important of sporting events taking place on a world scale and will tomorrow be the seat of the European Patent Office which will also have worldwide repercussions in the technological field. As regards the content of the drafts put before the Conference, the Spanish delegation wishes to express its admiration for the effort which has been made in drawing up such complicated texts, which have been submitted to the Conference in three languages and in a very praiseworthy and convenient form for the discussions. Regarding the attitude of the Spanish Government to these drafts, it is sufficient to say that, notwithstanding its great desire to participate in this new European institution, the Government is faced with the difficulty arising from the inclusion in the drafts of certain principles which, the Spanish delegation feels, ought rather to remain in the field of national laws, at least in the case of European countries which are not involved in bodies concerning their economic integration. However, the Spanish delegation hopes that a solution will be found to this difficulty by means of reservations. Thank you, Mr. President."

46. The Head of the Portuguese delegation made the following statement:

"Mr. President, Ladies and Gentlemen,

I should like to thank the Federal Republic of Germany for the invitation sent to my country to participate in the Conference and for the hospitality which has been extended to us. Portugal's participation in the work on the Convention for the setting up of a European System for the Grant of Patents has been guided since the beginning by the desire to give all possible support to the movement of European integration, of which the uniform system for the grant of patents represents one of the most outstanding aspects. It is our attachment to the principle of European co-operation rather than the immediate interest of our country, which has led to Portugal's participation. There are few Portuguese patents whereas, due to the entry into force of the Convention, the number of patents which will be valid on Portuguese territory will increase by leaps and bounds. In practice, from the strictly national point of view, Portugal's participation will therefore signify "giving much and receiving almost nothing". If, moreover, the free

accessibility granted to nationals of non-Member States of the future organisation is considered, it is evident that, for the technologically weaker European countries, the acceptance of the commitments laid down in the Convention represents a sacrifice which could be explained only through these countries' attachment to the principles of European co-operation, to the detriment of their immediate interest. Actually the Portuguese delegation thinks that the principles underlying the Convention are relatively unjust for the European countries which are in a similar position to that of Portugal. In fact, for such countries, from the point of view of their own interest, it would be more beneficial not to accede to the Convention. For the European countries which export patents, Portugal's or other European countries' non-accession to the Convention would mean that it would be impossible to mention these countries in their applications for a European patent and, consequently, a reduction in the geographical area envisaged in the first place. The Portuguese delegation thinks that, in view of the general importance of European co-operation and also the special interest of the countries which have the most developed technologies, the Conference should seriously consider the difficulty encountered by certain European countries in immediately accepting all the commitments in the Convention. This is to enable the largest number of States possible to take part immediately in the Convention. Despite the difference which separates it from other European countries on a scientific and technological level, Portugal would be able to receive immediately European patents for one or more branches of technology; although in other sectors such acceptance will prove impossible in the near future. In order to take into account this state of affairs, a fair solution would be to envisage a progressive system implementing the Convention in each technological sector. When Article 166 (167) of the Draft Convention comes under discussion, the Portuguese delegation will submit a definite, constructive proposal which will represent, firstly, Portugal's desire to participate constantly in the movement of European integration and, secondly, its conviction that its acceptance would enable all European countries to participate immediately, while taking into account the particular situations of those which are less developed. It is therefore in a spirit of collaboration and expectation that the Portuguese delegation intends to take part in the Conference. Thank you, Mr. President."

47. The Head of the Irish delegation made the following statement:

"Mr. President,

When in 1969 my Government was invited to take part in the deliberations of the Inter-Governmental Conference, we were happy to accept the invitation, we wished the deliberations well and we expressed the hope that we would eventually be able to subscribe to the Convention. My Government is now very happy to be represented at this Conference. We should like to join other speakers in expressing thanks to the Government of the Federal Republic, the Land of Bavaria, the City of Munich, the Secretariat and all our hosts for the excellence of the physical arrangements which they have made. I should like especially to be associated with other speakers in their expression of thanks and admiration to Dr. Haertel who has won golden opinions of all who have come across him in his work. We are also very grateful for the programme of hospitality which has been arranged for us. We have heard so much of your beautiful city, of German efficiency and of Bavarian Gemütlichkeit. We know that our expectation in all these directions will not be disappointed and on behalf of my Government I wish every success to this Conference and to the very great European enterprise which will result from it. Thank you, Mr. President."

48. The Head of the Turkish delegation made the following statement:

"Mr. President, Ladies and Gentlemen,

I should like to thank the President for the kind words of welcome which he has expressed to the delegations. My thanks go also to the speakers who have addressed words of welcome to the delegates at the beginning of the session. The Turkish delegation is pleased to be taking a new step forward towards the building of Europe, by participating in the Conference. The less developed countries will certainly encounter some difficulties in adapting to the new system which is going to be set up, but the work already carried out prompts the idea that these problems will be solved and that the success of the Conference will be an additional pledge of the construction of Europe.

I should like to take this opportunity to convey my thanks also to the President of the Luxembourg Inter-Governmental Conference, Dr. Haertel; my thanks go also to the other delegations who took part in that Conference, to the members of the Working Parties, to the rapporteurs and to the Secretariat. Special thanks go to the Luxembourg authorities for the welcome which they accorded the delegations. Thank you, Mr. President."

49. The Head of the Italian delegation made the following statement:

"Mr. President, Ladies and Gentlemen,

My delegation's sentiments are no less sincere nor less warm than those of the delegations which have already spoken in this general discussion. Italy intends to participate in the Conference in a great spirit of collaboration. With regard to the address by Mr. Kronawitter, the Lord Mayor of Munich, who has said that his city does not have the same traditions as cities such as Brussels or Paris as regards the organisation of international conferences, I should like to point out that the material conditions and especially the spirit of friendship with which each delegate has been welcomed, show that there is no reason for such modesty and that everything has been done to enable the Conference to take place in an excellent atmosphere worthy of its importance. I should like to express the thanks of my delegation for this to the Government of the Federal Republic of Germany and the city of Munich. I also extend my thanks to Dr. Haertel, who has presided over the preparatory work of the Conference so competently and in such a spirit of collaboration.

As regards the few problems which confront my country, I hope that they can be solved during the Conference in a spirit of mutual understanding. Thank you, Mr. President."

50. The Head of the delegation of the World Intellectual Property Organization made the following statement:

"Mr. Chairman, Ladies and Gentlemen,

The Conference starting here today is essentially a Conference of Western European States, but it is also of extreme importance to the patent world at large. Looking upon this Conference from the worldwide viewpoint *par excellence* of a worldwide international organisation, the importance of the Convention to be adopted here is that you will facilitate the securing of protection of inventions both for applicants from the European States here represented and for applicants from all other States.

As you know, the World Intellectual Property Organization itself was, and still is, engaged in a similar enterprise with the creation of the Patent Cooperation Treaty. These two enterprises differ, however, in two fundamental aspects. As far as territorial applicability is concerned, the PCT is intended for all the countries — now 80 — of the Patents Union, whereas the Convention on the establishment of a European patent system to be adopted here is intended for some 20, 21 or maybe a few

more European States and the Convention to be adopted next year in Luxembourg is intended for the nine members of the European Common Market. The degree of unification of the three treaties is, and this is natural, in inverse proportion to their territorial applicability. The PCT takes one step in that direction, the Convention and the discussions here will take two steps, and the Common Market Convention will take three steps, and thereby arrive at the goal — complete unification. What is important for the world patent community is that all these steps should not go in different directions but should all go in the same direction. I think they do, and I am pleased to pay homage to the authors of the drafts which will be discussed here in Munich and next year in Luxembourg, for they have never failed to keep in mind the utmost importance of two criteria, namely that the European Conventions should be compatible with the PCT and that the European Conventions should be complementary to the PCT in the sense that they can be used by the PCT. I do hope that the Conventions as adopted will also fully respect these two criteria.

Speaking of the authors of the draft before us, I think it only just, Mr. Chairman, that I also mention specifically the President of the Luxembourg Inter-Governmental Conference, Dr. Kurt Haertel, for his imaginative and patient conduct of the preparatory work which led to this Conference. I extend to you Mr. Chairman of the Conference, to the Secretary-General, to the distinguished delegates of the European States here assembled and to all those who worked on the excellent drafts before this Conference, my best wishes for the work of the Conference and the future of the European Convention. Thank you, Mr. Chairman."

51. The Head of the delegation of the International Patent Institute made the following statement:

"May I perhaps on behalf of the observers thank the authorities of the Federal Republic of Germany, of the Bavarian Government and of the German Patent Office for the incomparable hospitality — consistent with the reputation of this country — which has been accorded us since our arrival. I would also like to take advantage of the freedom of expression which an observer enjoys, to emphasise the technological and political significance of this Conference, without losing sight of my European beliefs, the role which, as the President was kind enough to recall, I played at the time of the Co-ordinating Committee in Brussels, and finally my present responsibility for our inter-governmental organisation, the destiny of which will be merged in a few years' time with that of the European Patent Office.

On no account do I intend to mention what everybody knows, namely the technological and economic advantages to be derived from the introduction of a European patent and from the setting up of the European Patent Office, which will soon be followed, I hope, by the establishment of a European trade mark. However, what seems to me to be important and worthy of mention is the political significance of the success or failure of this Conference. We know the fruits of success. It is enough to refer to the preparatory work of the Inter-Governmental Conference directed by Dr. Haertel. This work demonstrated that where there's a will there's a way. Is it not true that twenty-one Governments with various political systems, different economic situations, extremely well established national offices — some Governments moreover being grouped together under the International Patent Institute — with fundamentally very different interests, have managed to overcome all the obstacles, to cast aside sources of discord and finally to find in such disparities, which might have been reasons for dissension — as for example in the existence of the International Patent Institute — elements of strength?

And today we know what is at stake: the success of this

Conference will be of exemplary value not only in the field of industrial property, which is important, but also for something which is infinitely more important for those who believe in Europe. As a journalist said, success in a European sphere is rather like a locomotive which sets other trains in motion — European energy or European transport, say. Success at this Conference will encourage those who believe that building Europe politically is worthwhile.

In closing, I would like to say that I am absolutely convinced that this Conference will not fail, firstly because of the will of the States participating, and their European conviction, and secondly because — if I may say so — a man with whom I have fraternal and long-standing ties of friendship, Dr. Haertel, will be present, active and watchful here. He was able to inspire an international team in Luxembourg and, as the Greek delegate said, he has that rare, exceptional quality which distinguishes men of merit, namely an ability to accentuate the factors which make for unity and to minimise the sources of division. I am inclined to think, because of all this, that my wishes for success will be confirmed by the event. Thank you, Mr. President."

52. The Head of the delegation of the Council of Europe made the following statement:

"Mr. President, Ladies and Gentlemen,

Your Conference is about to realise an idea of long standing, launched in 1949 by the Assembly of the Council of Europe, which recommended the setting up of a European Patent Office. Today the Council of Europe is gratified to see that this idea has gained ground and that it will become a reality at your Conference, especially as a result of the excellent preparatory work undertaken by the Luxembourg Inter-Governmental Conference, to which my organisation wishes to pay particular tribute. Your President, His Excellency Minister Jahn, has already emphasised this morning the role of the Council of Europe in this matter. I shall therefore be brief and I would like simply to point out that when the proposal of the Assembly concerning the setting up of a European Patent Office was put before the Committee of Ministers, it set up a Committee of Government Experts on which certain delegates present here have sat. This Committee of Experts was already at that time, during the initial years of the Council of Europe's existence, unanimous in asserting that a European Patent Office should be the final aim of a general policy on patents and it recommended that the attainment of this goal should be done in stages.

The European Convention relating to the formalities required for patent applications was thus drawn up. This Convention was open not only to the Member States of the Council of Europe, but also to all the Member States of the Paris Union, and it is at present in force in twenty States. By means of a working party, the Committee of Government Experts subsequently carried out work to improve the provisions of this Convention. We are pleased to note today that this work was used by the Luxembourg Inter-Governmental Conference, and it has also served as a basis for the corresponding provisions of the draft Convention for the setting up of a European System for the Grant of Patents.

The second stage was attained by the signing of the European Convention on the international classification of patents, which is in force in thirteen European States and two States outside Europe. Since then, this international classification has been improved by the Strasbourg Diplomatic Conference, which was held in 1971 and at the end of which an agreement was signed, providing for the transfer of the administration of the classification to WIPO. This international classification is also a necessary factor in the future European patent. There too, the Council of Europe has done some pioneering work since its Convention, which was intended for Europe, will now cover other countries in the world.

Finally, the third stage was the drawing up of the Convention on the unification of certain points of substantive law on patents for invention. This Convention remains, in the field of patents, the most outstanding work of the Council of Europe. The conditions of patentability laid down in this Convention constitute the basis for a common patent law and the unification thus attained has certainly contributed to the realisation of the work which you are in the process of completing.

Since then we have followed with great interest all the work relating to the establishment of a European patent and our organisation has therefore reason to be satisfied in having contributed to the efforts leading to the setting up of a European Patent Office. On behalf of the Council of Europe I therefore wish your Conference every success for the accomplishment of its mission. Thank you, Mr. President."

53. The Head of the delegation of the Commission of the European Communities made the following statement:

"Mr. President, Ladies and Gentlemen,

The Commission of the European Communities congratulates the Diplomatic Conference on this Convention for the setting up of a European System for the Grant of Patents. With the participation of twenty-one European States the Luxembourg Inter-Governmental Conference managed in a very short time to draw up a modern, uniform system for the grant of patents in keeping with the requirements of economic and technological development. This major effort of reform is significant not only in the patent field in Europe, but at the same time bears testimony to the successful co-operation of European States.

The Convention for the setting up of a European System for the Grant of Patents is of particular importance for the European Communities. It represents the necessary basis for a second Convention which will give the European patent in the Community the effect of a uniform patent for the Common Market. The Commission of the European Communities hopes very much that this Diplomatic Conference may bring the work to be undertaken in the forthcoming weeks to a successful conclusion. The thorough preparation of this Conference and its carefully thought-out organisation will contribute substantially to the success of this great project.

On behalf of the Commission of the European Communities I would like to cordially thank the Government of the Federal Republic of Germany for their preparatory work and for the invitation to participate in this Conference. Thank you, Mr. President."

54. The delegation of IFIA emphasised that during the preparatory work, which had led to the present draft texts, much good will had been shown on all sides, for which thanks were due.

Nevertheless, IFIA thought that the interests of inventors had not been sufficiently taken into consideration in the drafts. The basic rights of the Charter of Human Rights and the Paris Convention should have been used in the drafts in respect of the inventor as the originator of technical ideas and the promoter of technology. According to the Charter of Human Rights everyone had the right to protection of moral and material interests, which *inter alia* might result from one's scientific output and, in accordance with the Paris Convention, every inventor had the right to be mentioned as such in the patent. In keeping with these principles, IFIA would, during the Conference, again put forward a number of demands that it had already submitted on several occasions. In short, all provisions which favour the inventor in the national laws of the Contracting States should be unified in the Convention instead of the reverse situation, where the interests of the inventors would be largely pushed to one side out of consideration for the

various national laws. It was extremely important to protect the monopoly right of the inventor, so as not to allow the source of ideas from which Europe lives to run dry.

55. The delegation of UNICE welcomed the present Convention which it described as being of great use to industry in the European Economic Community. It expressed admiration for the preparatory work carried out and hoped that the implementation of the Convention would not be delayed. In conclusion, it expressed thanks for having had this and previous opportunities to make its comments known and heard, and wished the Conference every success.

56. The Head of the IAPIP delegation thanked the authorities of the Government of the Federal Republic of Germany for having welcomed the delegations of non-governmental organisations to the Conference. He also wished to pay tribute to all those who for more than twelve years had worked on the draft concerning the introduction of a European patent and more especially to Dr. Haertel who had inspired the recent work carried out. He finally expressed his gratitude to the Federal Republic of Germany for having organised the

Conference, the outcome of which would no doubt represent a considerable step forward in the history of patent law. Speaking on behalf of all the parties concerned IAPIP warmly commended this undertaking and wished to assure the member delegations that the interested parties would give all their support.

57. Finally, the President thanked all the speakers for their words of praise and recognition in connection with the preparation of the Conference. He subscribed wholeheartedly to the thanks which had been addressed to Dr. Haertel as the indefatigable Chairman of the Luxembourg Inter-Governmental Conference. He also welcomed the will which had become apparent on all sides to co-operate and appreciated the fact that some delegations had frankly named their particular problems; this would certainly enable solutions to be found to the problems during the Conference.

58. The President convened the next Plenary for the afternoon of 4 October.

The meeting closed at 18.30.



## ***Minutes of the Proceedings of the Credentials Committee***

1. The Credentials Committee set up by the Plenary of the Conference (see Rule 11 of the Rules of Procedure of the Conference) was chaired by Mr. Antonio Fernandez Mazarambroz (Spain). Mr. J. Verlinden (Belgium) was first Vice-Chairman, the other Vice-Chairmen being Mr. C. Kyriakidis (Greece) and Mr. Jean-Marie Notari (Monaco). The other members of the Committee were as follows: Dr. Felix Otto Gaerte (Federal Republic of Germany), Mr. Roger Labry (France), Miss Maria Vitali (Italy) and Mr. Terje Alfsen (Norway) (see M/PR/K/1, points 21 and 22; M/55/K, page 3, and M/55/K Corrigendum).

2. The tasks of the Credentials Committee were set out in Rule 10 of the Rules of Procedure (M/34), which stipulated that the Committee should examine the credentials, full powers and letters of appointment and should report to the Committee of the Whole of the Conference.

3. The Credentials Committee met on 19 September, 24 September, 2 October and 5 October 1973.

### ***I. Meetings on 19 and 24 September 1973***

4. The Chairman recalled that under the terms of Rule 6 of the Rules of Procedure, each Government delegation was to present credentials. In addition, full powers were required for signing the Convention adopted by the Conference. Rule 7 stated that each Observer delegation was to present a letter appointing the representatives of the Organisation to the Conference. Furthermore, Rule 8 provided that these documents were to be presented to the Secretariat of the Conference at the time of the opening of the Conference. The Chairman suggested that initially the Committee should confine itself to examining the credentials of the Government delegations and the letters of appointment of the Observer delegations, while full powers could be examined at a subsequent meeting.

5. At the Chairman's request, the Secretariat gave a verbal report on the credentials received by it to date from the Government delegations. The Committee noted that all the Government delegations had forwarded to the Secretariat credentials or documents which the Committee considered could be regarded as equivalent. It therefore decided to propose that the Committee of the Whole admit the 21 Government delegations to the Conference.

6. Following the Secretariat's report on the matter, the Committee noted that it was in possession of letters of appointment for all the Observer delegations or at any rate a document which the Committee considered equivalent. It therefore decided to propose that the Committee of the Whole admit all the Observer delegations to the Conference.

7. The Committee called upon its Chairman to report to the Committee of the Whole on its conclusions, and to inform it on

the same occasion that at a further meeting scheduled for 2 October the Credentials Committee would examine the full powers enabling the various Government delegations to sign the Convention (see M/133/G).

### ***II. Meeting on 2 October 1973***

8. The Chairman pointed out that the sole purpose of this meeting was to examine the full powers enabling the various Government delegations to sign the Convention. Admission to the Conference — and by the same token the possibility of signing the Final Act — had already been dealt with in a report by the Committee following its meetings on 19 and 29 September 1973.

9. Following a report by the Secretariat, the Committee noted that 16 delegations (Denmark, Germany, Greece, Spain, France, Ireland, Yugoslavia, Liechtenstein, Luxembourg, Monaco, the Netherlands, Norway, Portugal, Switzerland, Sweden and the United Kingdom) had presented full powers found in good and due form for the purposes of signing the Convention. The Belgian and Italian members of the Committee indicated that their delegations would present their full powers at the time of signing at the latest. The Secretariat informed the Committee that the Finnish, Austrian and Turkish delegations had apprised it of their intention of not submitting full powers authorising the immediate signing of the Convention, without, of course, prejudicing the possibility of signing within the period laid down in Article 165 of the Convention.

10. The Credentials Committee accordingly decided to recommend that the Committee of the Whole should recognise as valid the full powers of the 16 delegations listed above and that it should not decide on the full powers of the other delegations until the time of signing of the Convention. It instructed its Chairman to report on its conclusions to the Committee of the Whole (see M/156/G).

### ***III. Meeting on 5 October 1973***

11. The Chairman pointed out that further to the conclusions reached by the Committee of the Whole on 3 October 1973 (see M/PR/G, point 134), the Credentials Committee was to submit to the Plenary of the Conference a supplementary report on the full powers of the Belgian and Italian delegations which had not reached the Secretariat by 2 October 1973.

12. The Credentials Committee noted that since that date the Belgian and Italian delegations had presented full powers found in good and due form and therefore decided to recommend that the Plenary of the Conference recognise as valid the full powers of these two delegations, thereby entitling 18 delegations to sign the Convention. It instructed its Chairman to submit a report to this effect (see M/162/K).





## **Minutes of the Proceedings of Main Committee I**

1. Main Committee I (see Rule 12 of the Rules of Procedure\*) set up by the Plenary of the Conference to deal with matters concerning patent law was chaired by Dr. Kurt Haertel, President of the German Patent Office (Federal Republic of Germany). Mr. Göran Borggård, Director-General of the Royal Swedish Patent Office (Sweden), was the first Vice-Chairman; Mr. Erkki Tuuli, Director-General of the Patent and Record Office (Finland), and Dr. Thomas Lorenz, Chairman of the Patent Office (Austria), were the other Vice-Chairmen. The Rapporteur was Lic. jur. Paul Braendli, Vice-Director of the Federal Intellectual Property Office (Switzerland) (see M/PR/K/1, points 19, 20 and 25; M/46/K, page 1 and M/55/K, page 2).

2. The duties of Main Committee I were based on Rule 12 of the Rules of Procedure (M/34) and on a recommendation adopted by the Steering Committee of the Conference (M/56/I/II/III).

On this basis the Main Committee was responsible for Articles 14, 50 – 142, 144, 148 – 157, 161, 162 and 174 of the Draft Convention (M/1), Rules 1 – 7 and 13 – 107 of the Draft Implementing Regulations (M/2), the Draft Protocol on Recognition (M/3), the Recommendation on preparations for the opening of the European Patent Office (M/8) and the Recommendation on training staff for the European Patent Office (M/37).

3. Main Committee I met from 11 to 14 September, 17 to 21 September, 24 to 26 September and on 28 and 29 September 1973.

4. At its first meeting the Main Committee, on a proposal from its Chairman, set up a Drafting Committee. Modelled on the Drafting Committee of the Luxembourg Inter-Governmental Conference, this consisted of the delegations of the Federal Republic of Germany, France and the United Kingdom. The Chairman was Mr. J. B. van Benthem, President of the Octrooiraad and Head of the Netherlands delegation.

5. The Main Committee did not deal with the tasks assigned to it in exactly the same order as the Articles, Rules and other provisions but in the order which seemed most appropriate in the given circumstances. Thus it happened that one and the same provision was discussed on different occasions, for example if the problem in question was first passed to a Working Party and subsequently referred back to the Main Committee.

However, in this report each provision is dealt with only once. The reader should thus be able to obtain, in one place, all the information he wants on the discussion of a particular problem. Within the following Sections the provisions are dealt with in numerical order:

	points
A. General	8–10
B. Convention	11 et seq.
C. Implementing Regulations	2001 et seq.
D. Protocol on Recognition	3001 et seq.
E. Recommendation on preparations for the opening of the European Patent Office	4001 et seq.
F. Recommendation on training staff for the European Patent Office	5001 et seq.

6. If a provision was dealt with again in the Main Committee after being discussed in a Working Party or in the Drafting Committee, special mention is made of this below. On the other hand, if no mention is made, it is to be assumed that the Main Committee adopted the proposal of the Working Party or of the Drafting Committee. Purely drafting amendments which

are not based on written proposals are not mentioned as a general rule.

7. In this report the numbering of the Articles, Rules, paragraphs, etc. follows the text of the draft proposals (M/1 to M/8). Where it seems appropriate, the numbering in the signed text is given in brackets after the number of the provision concerned.

### **A. General**

8. At the beginning of the first meeting the Chairman noted that the Steering Committee had approved two requests at its meeting on 10 September 1973, namely that Mr. Sheehan of the US Patent Office and Mr. van Empel, a former member of the Secretariat, might be admitted as listeners to the meetings of the Main Committees. However, under Rule 48 of the Rules of Procedure Main Committee I's consent was also necessary, before participation in its proceedings was allowed.

Main Committee I agreed that both the gentlemen mentioned could take part in its proceedings as listeners pursuant to Rule 48, paragraph 1.

9. The Chairman pointed out that under Rule 32 of the Rules of Procedure only requests made in writing by the Government delegations could be discussed and voted upon. In principle, written requests had to be submitted by 5 p.m. on the day prior to the discussion.

10. The Chairman also stated that, pursuant to the Rules of Procedure, only Government delegations could make proposals, whereas representatives of any observer delegations could make oral statements under Rule 50 of the Rules of Procedure. If observer delegations made proposals, the latter had to be taken over by a Government delegation and seconded by a second Government delegation. If this was not the case, the proposal was deemed to be rejected.

The Main Committee agreed with this interpretation.

### **B. Draft Convention establishing a European system for the Grant of Patents (M/1)**

#### **Article 14 – Languages of the European Patent Office**

11. The Main Committee forwarded to the Drafting Committee a drafting proposal from the Netherlands delegation concerning *paragraph 2* (M/32, point 2).

12. While discussing Article 122, paragraph 2 (see point 594), the Main Committee decided on a further amendment to paragraph 2.

13. The Main Committee forwarded to the Drafting Committee a drafting proposal from the Luxembourg delegation concerning *paragraph 4* (M/9, point 8).

14. The Main Committee decided that a proposal from the Netherlands delegation concerning *paragraph 17* (M/52/I/II/III, point 2), to the effect that an applicant must submit a translation of the claims in the other two official languages of the European Patent Office, would be discussed in connection with Article 96 (see under point 350). The Committee also adopted paragraph 7.

15. The Turkish delegation proposed amending paragraph 7 so that claims would have to be translated into all the official languages of the designated Contracting States.

It was pointed out to the delegation that the question of the translation of the European patent specification is dealt with in Article 63 (65), so that, for example, Turkey could request that the specification be translated into Turkish, if the European patent was to be effective in Turkey.

The Turkish delegation said it was satisfied with this explanation and withdrew its proposal.

\* The Rules of Procedure (M/34) had been previously adopted unanimously by the Plenary (see M/PR/K/1, point 10).

## Article 50 (52) – Patentable inventions

16. The delegation of the Federal Republic of Germany withdrew a drafting proposal concerning *paragraph 2(a)* (M/11, point 21).

17. The FICPI delegation feared that in *paragraph 2(c)* the term "programs for computers" might be broadly interpreted in the future. There was a danger that the structures or algorithms on which such programs were based would also not be considered an invention. This could give rise to problems for large sections of industry operating in the field of data processing in particular or of communications technology in general. And, in any case the Conference should be on its guard against excluding from being patentable certain technologies which had not even been thought of today.

18. As regards this comment the Chairman recalled that the Luxembourg Inter-Governmental Conference had already tried in vain to define the term "programs for computers".

The European Patent Office would simply have to be relied upon subsequently to interpret this expression unequivocally.

19. The Italian delegation considered that the English expression "computer" denoted a much more complex system than the German term "Datenverarbeitungsanlage" and the French expression "ordinateur". It was therefore perhaps appropriate to choose the phrase "data handling systems" in the English version.

20. The United Kingdom delegation stated in this connection that in its view the expression "computer" should be retained in English, even though linguistically it could mean more than a simple piece of calculating equipment. The definition of such terms could safely be left to the practical work of the European Patent Office.

21. The Austrian delegation proposed examining the German text with a view to ascertaining whether the expression "Datenverarbeitungsanlage" was not too broad a term compared with the English expression "computer" and the French term "ordinateur". Otherwise there was perhaps a danger that this provision would be interpreted too broadly on the basis of the German text.

22. The Main Committee finally agreed to retain the English term "computer" as the appropriate expression. It also requested the Drafting Committee to examine whether a more restrictive term could perhaps be found instead of the German expression "Datenverarbeitungsanlagen".

23. With reference to *paragraph 2, sub-paragraph (d)* (now *paragraph 4, first sentence*), the Main Committee endorsed the United Kingdom delegation's interpretation of the text (see M/10, point 6) whereby "treatment of the animal body by therapy" means the treatment of illness or disease and not, for example, treatment effected with a view to increasing the quality or quantity of the production of an animal product.

24. The delegation of the Federal Republic of Germany proposed (M/11, point 21) making the content of *paragraph 2(d)* into a new first sentence of *paragraph 4*, since in the case of methods for treatment by surgery or therapy actual inventions were involved for which only the industrial application was lacking, whereas the subject-matter or activities referred to in sub-paragraphs (a), (b) and (c) would not in practice be considered as inventions.

25. The IAPIP delegation, supported by the Belgian, French and Netherlands delegations, proposed simplifying the German delegation's proposals still further by deleting *paragraph 3* and including the substance thereof at the beginning of *paragraph 2*. It promised to put forward a written proposal about this.

26. The Main Committee decided to forward the German proposal, along with the IAPIP drafting proposal which would

be submitted later (subsequent M/66/I), to the Drafting Committee.

27. The CNIPA delegation, supported by the United Kingdom and Irish delegations, was in favour of transferring *sub-paragraphs (c), (d) and (e)* to the Implementing Regulations in order to be able to take more account of scientific and technological developments (see M/20, point 10).

The United Kingdom delegation pointed out that the questions about patentability which were dealt with here were also primarily politico-legal matters which were the responsibility of the Administrative Council in its capacity as the political body of the Patent Organisation.

28. The Netherlands delegation considered that, without wishing to take up a position on the problem itself, the same result could be achieved by supplementing Article 31 (33), whereby the Administrative Council was competent to amend certain provisions of the Convention.

29. The delegation of the Federal Republic of Germany thought it was inadmissible, as a matter of principle, for the question of the patentability of such subject-matter or activities to be left to the Administrative Council to settle.

30. The Yugoslav delegation, too, believed there was little likelihood of such an arrangement being accepted for the additional reason of legal certainty.

31. The Swedish and Portuguese delegations also shared the German delegation's views.

32. Furthermore, the French delegation pointed out that Article 50 (52) was a fundamental Article of the Convention. The provisions governing patentability laid down in this Article should not be left to the Administrative Council; the latter ought not to be able, irrespective of the legal and technical means employed, to amend the individual provisions on its own responsibility.

33. The Swiss delegation was also against transferring the three provisions mentioned to the Implementing Regulations. It emphasised that if the CNIPA proposal were adopted, the Administrative Council would also be afforded the possibility, which nobody wanted, of adding new conditions relating to patentability to the Convention and of amending the grounds for revocation connected with Article 50.

34. Consequently, the United Kingdom delegation renounced the idea of transferring *sub-paragraphs (c), (d) and (e)* to the Implementing Regulations.

35. The delegation of the Federal Republic of Germany proposed (M/11, point 21) transferring *paragraph 3*, which at the moment related solely to substances and compositions for use in a method for treatment by surgery or therapy, to the proposed new *paragraph 4* as the second sentence. The proposal was referred to the Drafting Committee.

36. The Netherlands delegation proposed (M/32, point 8) making it clear in *paragraph 3* that a medical instrument for use in a method for treatment by surgery or therapy was patentable.

37. The delegation of the Federal Republic of Germany said that, although it considered the existing text sufficiently clear on this point, it did not wish to oppose the proposal.

38. The Main Committee adopted the proposal which was supported by the United Kingdom and the French delegations.

39. The Main Committee also discussed the proposal by the Netherlands delegation (M/52/I/II/III, point 6) that the words "any substance which can be used for a method" be substituted for "a substance for use in a method".

40. The United Kingdom delegation was not in favour of this wording. It said that the purpose of *paragraph 3* was to make it clear that a claim for a product for use in a method for treatment by surgery or therapy should be patentable, even if the method itself in which such a product was used was not

patentable. The present text of paragraph 3 was sufficiently clear and did not need to be amended.

41. The Netherlands delegation withdrew its proposal at a subsequent meeting.

42. On a proposal from the delegation of the Federal Republic of Germany (M/11, point 21), the Main Committee agreed to specify in paragraph 3 that the patentability of the subject-matter and activities listed in paragraph 2 was excluded only to the extent to which an application or patent related to the subject-matter or activities as such.

43. Finally, the Main Committee referred to the Drafting Committee a drafting proposal from the French delegation concerning paragraph 3 (M/58/I/II).

### **Article 51 (53) – Exceptions to patentability**

44. The Swiss delegation pointed out that under *sub-paragraph (a)* patents could not be granted for inventions, the publication or exploitation of which were contrary to "ordre public" or morality. In most instances this provision would not fulfil its purpose because at the examination on filing and the examination as to formal requirements, no check was made on whether the publication of the invention was contrary to "ordre public" or morality and, consequently, the application would normally be published in full. If, however, such an application had already been published, there would no longer be any point in refusing the patent or even revoking a patent which had already been granted. It therefore requested (M/54/I/II/III, page 7) either the deletion of the words "publication or" in Article 51 (53), sub-paragraph (a) or alternatively changing Rule 34, paragraph 2, into a mandatory provision.

45. The Chairman drew attention to the fact that if the main proposal were accepted, the European Patent Office would be obliged to grant patents the publication of which was contrary to morality and that once patents had been granted it would no longer be possible to revoke them on account of such an infringement.

46. The Swiss delegation withdrew its main proposal. However, it maintained its subsidiary request concerning Rule 34, paragraph 2 (see below points 2226 et seq.).

47. In connection with Article 51 (53) the Turkish delegation said that it proposed to raise the question of the patentability of methods used to obtain medicines, foodstuffs and fertilisers and the question of the patentability of chemical substances when Main Committee II discussed the final provisions.

### **Article 52 (54) – Novelty**

48. The IAIP delegation requested that *paragraph 3* be drafted in such a way that a previous application which was published later did not form part of the state of the art, if filed by the same applicant as filed the later application.

49. The Chairman noted that none of the Government delegations wished at this point to raise the problem of "self-collision".

50. The Belgian delegation asked whether it was clear from *paragraph 4* that paragraph 3 was only to be applied if the Contracting State designated in the later application was also designated in the earlier published application and that paragraph 3 did not apply to a Contracting State which had not been designated in the earlier application.

51. The Main Committee affirmed that this was clear, in agreement with the United Kingdom delegation, which drew attention to Rule 88 (87), according to which differing claims could be presented for different Contracting States.

52. In order to make this situation quite clear, the Main

Committee decided at a subsequent meeting, at the request of the Netherlands delegation, to reword the first words of paragraph 4 as follows: "Paragraph 3 shall be applied only in so far as ...".

53. At the request of the Netherlands delegation, the Main Committee stated that, further to paragraph 4, the words "a Contracting State designated in respect of the later application, was also designated in respect of the earlier application as published" were to be understood as follows: if the designation of a State which appeared in the earlier application as published is later withdrawn, that State may no longer be designated in respect of the later application.

54. The Netherlands delegation proposed that the wording of *paragraph 5* (M/32, point 9) should be improved. It said that on no account did it wish, with its proposal, to break away from the principle that only the first application in respect of the use of a known substance or composition in a method for treatment of a human or animal body by surgery or therapy is patentable, and not the second and subsequent applications.

55. The Main Committee referred the proposal to the Drafting Committee.

56. The Yugoslav delegation also considered that the present text of paragraph 5 was insufficiently clear and asked the meaning of the words "even when the substance or composition in question is disclosed in the state of the art".

57. The Chairman replied to the Yugoslav delegation and said that, in his opinion, the aim in paragraph 5 was to make clear that a known substance (or a known composition) which, since it formed part of the state of the art, was no longer patentable, nevertheless could be patented for the first use in a method for treatment of the human or animal body by surgery or therapy; however, a further patent could not be granted if a second possible use were found for the same substance, irrespective of whether the human or animal body was to be treated with it.

58. The Chairman noted that his views were shared by the Government delegations.

59. The UNICE delegation said that although it also shared these views, it had understood until now that a known substance which was patentable for its first use in a method for treatment of the human body, had also to be patentable for a first use, which was found subsequently, in a method for treatment of the animal body, and vice versa.

60. The Chairman noted that the Main Committee did not wish to endorse this interpretation.

### **Article 53 (55) – Non-prejudicial disclosures**

61. At the Netherlands delegation's request the Chairman noted that the Main Committee was agreed that in the introductory part of *paragraph 1* the "date of filing" should be understood as the actual date on which the patent application was filed. The Drafting Committee subsequently amended paragraph 1 accordingly.

62. The United Kingdom delegation pointed out that the existing text of paragraph 1, which was taken from Article 4, paragraph 4, of the 1963 Strasbourg Convention on the Unification of Certain Points of Substantive Law on Patents for Invention, contained a loophole; it proposed substituting the words "not more than six months preceding the date of filing" for the phrase "within six months preceding the date of filing" (M/10, point 8).

63. In order to illustrate the problem raised by the United Kingdom delegation, the Chairman gave the following two examples: a European patent application is fraudulently filed on 1 January 1980 and published on 1 July 1981. On 1 October 1981 an application relating to the same subject-matter is filed

by the rightful inventor. The first application which was published within 6 months preceding the date of filing of the second application, does not, under the existing text of Article 53, paragraph 1(a), in conjunction with Article 52, form part of the state of the art. In the second, slightly different, example: the first, fraudulent application is filed on 1 January 1981 and published on 1 July 1982. On 1 October 1981 an application relating to the same subject-matter is filed by the rightful inventor. Thus, the wrongly filed application would not, as in the first example, have been published within six months preceding the date of filing of the application by the person rightfully entitled to do so, but afterwards. It would consequently not come under Article 53, paragraph 1(a), and its content would therefore form part of the state of the art. The Chairman continued by saying that the United Kingdom delegation did not seem to consider this result fair. In the cases covered by the second example it did not want the fraudulently filed application to form part of the state of the art.

64. The United Kingdom delegation confirmed that this was the aim of its proposal.

65. The Main Committee adopted the proposal which was seconded by the Netherlands delegation.

66. In this connection, the FICPI delegation raised the question of whether there was a provision in the Convention governing the fate of the earlier, fraudulently filed patent application.

67. The Netherlands delegation referred to Article 59 (61), paragraph 1(c), under the terms of which a person who has been declared the rightful proprietor of a European patent application by judgment of a national court, can request that the European patent application be refused.

68. The FICPI delegation deduced from the above that the person entitled to a European patent must, in any case, institute legal proceedings against the applicant who is not entitled to apply. If he did not do this, no action could be taken against the proprietor of the first application.

69. The Chairman was of the same opinion and considered that if the person entitled to apply did not institute legal proceedings, two patents would have to be granted for the same application.

70. The Finnish and Norwegian delegations suggested adding a new *sub-paragraph (c) in paragraph 1* to the effect that it would be sufficient for the invention to have been displayed at an international exhibition which although it did not come under the 1928 Paris Convention, had been declared by the Government of the country organising the exhibition to be an exhibition to which the provisions of Article 53 (55), paragraph 1(b), were applicable (M/65/1; see also M/12, point 4). Both delegations pointed out that on the basis of the experience of the Scandinavian countries exhibitions which came under the 1928 Paris Convention were rare, so that no account was taken of inventors' interests in their inventions being disclosed in a way which was not prejudicial to novelty. It therefore seemed appropriate to cover a wider range of exhibitions.

71. The French delegation was against this proposal for two reasons. Firstly, Article 53 (55) was an exception to Article 52 (54) which defined the novelty of an invention, and, since it was an exception, should not be extended. Secondly, such an extension would not be in the interests of inventors. Inventors should rather be advised to patent their inventions wherever possible before disclosing them in any way. For example, the law had also been amended in France some years ago so that only the display of inventions at world exhibitions, which admittedly were not very numerous, was non-prejudicial to novelty. This provision was binding as a result of the 1883 Paris Convention.

72. The United Kingdom delegation too did not wish to accept the proposal. It considered that there should be no departure from the definition of novelty and its exceptions found in the 1963 Strasbourg Convention. It was even doubtful whether this exception, which was based on the 1883 Paris Convention, was still appropriate in modern times.

73. The delegation of the Federal Republic of Germany said that, although it sympathised with the Scandinavian proposal, it could not depart from the 1963 Strasbourg Convention which had already been signed, so long as it did not wish to accept different principles for national law and for European law.

74. The Netherlands delegation agreed with the German point of view. It went further and described the proposed extension as being dangerous to the extent that inventors might be encouraged to display their inventions at exhibitions which later would perhaps not be recognised by some countries.

75. The Belgian delegation stated that it, too, would have to reject the proposal for the reasons already mentioned by previous speakers. In addition, the experience gained at the world exhibition of 1958 had shown that virtually none of the inventors had taken advantage of the legal possibilities offered to them.

76. In view of these comments the Finnish and Norwegian delegations withdrew their proposal.

### **Article 54 (56) – Inventive step**

77. The Swiss delegation pointed out that in conformity with the 1963 Convention on the Unification of Certain Points of Substantive Law on Patents for Invention the element of technical progress was not being made a requirement for the grant of a patent. Nor did the delegation want to question this principle. However, if the applicant, of his own accord, furnished proof that technical progress had been made, the delegation wished to see it ensured that this factor was considered in deciding whether there had been an inventive step. To this end, it proposed including a new paragraph 2 (M/31, points 1 and 2).

78. In the opinion of the Netherlands delegation technical progress should be considered in deciding whether an inventive step had been made; however, this was only one of many factors. The delegation therefore said that it was not in favour of the proposed addition.

79. The delegation of the International Chamber of Commerce feared that technical progress might, if specific mention were made of it, assume too much importance in the provision concerning the inventive step: this it did not consider to be right.

80. The UNION delegation saw the danger in the Swiss proposal that technical progress would have to be disclosed in the application, if it was to be considered in deciding whether there had been an inventive step.

81. The United Kingdom delegation was not in favour of the Swiss proposal for reasons similar to those of the Netherlands delegation.

82. The IFIA delegation proposed making the concept of inventive step as objective as possible in the European procedure.

In this connection the Chairman noted that it had not proved possible to find a better definition than that given in Article 54 of the theoretically objective concept of inventive step, in respect of which, however, subjective elements also played a part in practice.

83. Finally, the Chairman noted that the Swiss proposal was supported by none of the Government delegations and was therefore rejected.

### **Article 58 (60) – Right to a European patent**

84. The problems connected with identification of the inventor are dealt with under Article 79 (points 227 et seq.).

85. The Main Committee referred to the Drafting Committee a drafting proposal from the delegation of the Federal Republic of Germany concerning the division of *paragraph 1* into two separate paragraphs (M/11, point 22).

86. At a subsequent meeting the Main Committee discussed, on the basis of a text submitted by the Drafting Committee, whether reference had to be made in the new paragraph 3 (previously paragraph 2) not only to paragraph 1 (previously paragraph 1, first and second sentences) but to paragraph 2 (previously paragraph 1, third sentence) as well.

87. The Swiss delegation considered it appropriate to refer to paragraph 2 (new) as well.

88. In the opinion of the delegation of the Federal Republic of Germany reference definitely had to be made to paragraph 2 (new), since under paragraph 3 (new) the European Patent Office was meant to be freed from the task of verifying entitlement even where there were several applicants.

89. The Netherlands delegation, however, had doubts about the fictitious case mentioned in paragraph 3 (new), but was prepared to refer the matter to the Drafting Committee.

90. The Main Committee accordingly referred the question to the Drafting Committee for examination and for a decision.

### **Article 59 (61) – European patent applications by persons not entitled to apply**

91. The problems connected with the mention of the inventor are dealt with under Article 79 (points 227 et seq.).

92. The Main Committee referred to the Drafting Committee a proposal from the Netherlands delegation concerning an amendment to the *title of Article 59* (M/32, point 10) and a drafting proposal from the Member States of the European Communities concerning *paragraph 1* (M/14, point 3). It also referred to it an oral drafting proposal from the Swiss delegation concerning the French text of the title, the introduction to paragraph 1 and paragraph 1 (b).

93. The Swiss delegation, seconded by the Austrian delegation, requested that in Article 59 (61), *paragraph 2*, reference should also be made to the first paragraph of Article 74 (76) (M/54/I/11/III, page 12). It primarily wanted to ensure that there could be no room for doubt that the person entitled to a European patent could designate only those States which had also been designated in the initial application by the person not entitled to apply.

Secondly, it wanted to ensure that the new divisional application could be filed only in respect of subject-matter contained in the earlier application. Finally, the divisional application should also be filed directly with the European Patent Office and not be made through a national office.

94. After the United Kingdom and Netherlands delegations had pointed out with regard to the main problem that it was already laid down in Article 59, paragraph 1, that no Contracting States could be designated other than those originally designated, the Swiss delegation withdrew its request. It reserved the right to return to its other requests when Article 74 (76), paragraph 2, was discussed (see points 200 et seq.).

### **Article 61 (63) – Term of the European patent**

95. The Main Committee referred to the Drafting Committee a drafting proposal from the United Kingdom delegation concerning *paragraph 2* (M/40, point 13).

### **Article 62 (64) – Rights conferred by a European patent**

96. The delegation of the Federal Republic of Germany withdrew a proposed addition to Article 62 (M/11, point 23).

97. The Main Committee adopted this Article in the version resulting from the discussion of Article 67 (69), paragraphs 3 and 4 (see below, points 121 et seq., 138 et seq.).

### **Article 63 (65) – Translation of the European patent specification**

98. The Main Committee referred to the Drafting Committee two drafting proposals from the United Kingdom delegation concerning *paragraphs 1 and 3* (M/40, points 14 and 15).

### **Article 65 (67) – Rights conferred by a European patent application after publication**

99. At the Irish delegation's request *paragraph 3(b)* was referred to the Drafting Committee for examination whether the words "the person" should be substituted for "any person" in the English text.

### **Article 67 (69) – Extent of protection**

100. The Swedish delegation, seconded by the Finnish delegation, requested that the *note to Article 67* (69) be drafted in such a way that the patentee should on no account be able to profit from any ambiguity in the patent claims (M/53/I/II, point 5; see also M/13, point 7). The present version of the proposed declaration was not quite satisfactory in this respect. It also wished to point out that great importance had been attached to the wording in this respect when drawing up a Scandinavian patent law.

101. The Netherlands delegation opposed the request. In its opinion this addition would not improve the text. It wished, however, to point out above all that the declaration had been very carefully drafted after lengthy discussions.

102. In the considered opinion of the delegation of the Federal Republic of Germany the present text of the statement was very well-balanced. If the Swedish request were granted, a lack of balance, which nobody sought, might be created. It could therefore not support the proposed addition.

103. The United Kingdom delegation considered that the Swedish proposal might well be suitable for most cases of obscure claims but not for all. It was therefore not advisable to become committed to an interpretation of obscure claims in the way proposed. Furthermore, the delegation referred to the lengthy discussions there had been on this very declaration. It was therefore better to retain the present text.

104. The Swiss delegation said that it would be sorry if the present, very well-balanced text were amended.

105. The FICPI delegation stated that it was understandable that the Swedish delegation wanted, with its proposed addition, to afford the greatest possible certainty for competitors of the proprietor of the patent. However, the applicant could simply not be expected to foresee, in drawing up his claims, all the possibilities of infringement. If he did not foresee them, it would be to his disadvantage under the Swedish proposal. Considered in this way, the proposal was even likely to detract to a large extent from the European patent's appeal.

106. The delegation of the International Chamber of Commerce concurred in the statements of the Government delegations. In addition, it considered that the additional

sentence proposed was inconsistent with the first sentence which stated that the description and drawings should be used to resolve any ambiguity.

107. Similarly, the EIRMA delegation stated that it was not in favour of the proposed addition.

108. In the opinion of the delegation of the Standing Conference of the Chambers of Commerce and Industry of the European Economic Community, the Swedish proposal would mean that the claims could no longer be interpreted at all. It thought that this would be regrettable and should be avoided. The European patent and especially its claims must be capable of being interpreted reasonably by the courts in the Contracting States. The Swedish proposal therefore should be rejected.

109. The UNION delegation thought that any amendment would tend to upset the general balance of the declaration, and that would be undesirable.

110. The IFIA delegation stressed the great importance for competitors of claims that are clearly stated, especially for private inventors and for relatively small undertakings. According to the present text of the declaration the claims were not to be taken literally nor merely as guidelines either. This gave rise to major problems especially for the private inventor.

111. Before a vote was taken on the proposed addition, the Swedish delegation stated that industrial and patent agent circles in Sweden attached great importance to the requested addition.

112. When the vote was taken 4 delegations were in favour of the Swedish proposal and 10 delegations against with 3 delegations abstaining.

113. As regards the form the declaration would take the Main Committee agreed that it should be annexed to the Convention — perhaps as a Protocol\*.

114. The Main Committee referred to the Drafting Committee a drafting proposal from the French delegation concerning the note to Article 67 (69) (M/58/I/II).

115. The Swiss delegation proposed substituting the clause "in so far as such protection corresponds with that of the patent" for "in so far as such protection is not thereby extended" at the end of *paragraph 2* (M/54/I/II/III, page 13). This was to make clear that retroactivity would apply only if and to the extent that the claims of the application coincided with those of the patent. A change in the protection consequent upon an amendment of a claim (shifting) should therefore also be excluded.

116. The Netherlands and Austrian delegations supported this proposal.

117. The delegation of the Federal Republic of Germany and that of the United Kingdom did not consider the proposed amendment necessary. In their opinion, a shift in protection would also represent a widening of such protection and therefore retroactivity would be excluded.

118. In the opinion of the UNICE delegation it would not be justified for the provisional protection conferred retroactively by the application to be granted in respect of a new element which was claimed as the result of a shift. If this was the aim of the Swiss proposal, it should be rejected.

Furthermore, it should also be considered whether the term "extension of the extent of protection" could be improved.

119. The FICPI delegation saw a certain amount of danger in the event of shifting being excluded. The applicant would have to try to make all claims as wide-ranging as possible from the outset. Otherwise, he could not receive any provisional protection retrospectively as regards the elements which were not claimed until a later date, even if they were covered by the original disclosure. If the procedure for publication of the

application were encumbered with claims which were in part superfluous this would not be a satisfactory solution for anyone.

120. The Main Committee concluded that, in the event of a shift in protection consequent upon amendment of a claim, provisional protection should not be granted retrospectively as regards the newly-claimed part.

The Committee referred to the Drafting Committee the Swiss proposal for examination whether it was necessary to amend paragraph 2, last sentence, in order to clarify the situation.

121. The Swiss delegation proposed including a new provision in a *paragraph 3* or in a separate Article to the effect that, if the invention concerned a manufacturing process for a product, the protection would also extend to the products directly obtained thereby (M/67/I). It pointed out, for example, that it was often not possible in the field of chemistry to secure protection for a substance because the substance could not be defined independently of the method of manufacture. In such cases the applicant had to choose between a process claim with, if necessary, a further claim for the product and a claim for the product in which the product was defined in terms of its method of manufacture (product by process claim). In both cases the Convention would have to be supplemented in the way proposed, if the applicant was to be afforded protection in all the Contracting States, in particular as regards imports from countries where there was no patent protection. Furthermore, almost all the prospective Contracting States had such a provision in their patent law.

122. At the beginning of the discussion the Chairman pointed out that, in his opinion, Article 67 (69) could be applied only in those States which, under the terms of the Convention, had to grant full protection of a chemical substance on the basis of Article 50 (52).

123. The Italian and Austrian delegations supported the Swiss proposal. The Italian delegation thought that it was in line with the maximum solution as set out in other parts of the Convention.

124. The United Kingdom delegation considered that the proposed rule did not concern the method of formulating the claims as much as the question of patent infringement, which came fully under national law. Indeed the EC States had also settled this matter in the Second Convention (Article 29, sub-paragraph (c) of the Draft Convention for the European Patent for the Common Market) in the way desired by the Swiss delegation. It added that it would abstain from voting on the proposal.

125. For the Netherlands delegation the proposal meant an extension of the maximum solution in so far as the effect of the patent in respect of the States designated was to be more closely defined. It had no hesitations about the proposal since the solution laid down in the Second Convention corresponded exactly to it. In addition, it considered that the Swiss proposal concerned not only the States which would table reservations under Article 166 (167).

126. The Netherlands delegation's view was also shared by the Finnish delegation.

127. The Swiss delegation said, in reply to some speakers' statements, that in its opinion the proposal did not mean an extension of the maximum solution in the sense of laying down in the Convention what constituted an infringement of a patent. The same effect could be achieved by laying down that, in addition to a process claim, a claim for the product obtained thereby was admissible, even if it did not contain any additional features.

128. The Chairman replied that, in his view, the Swiss proposal did in fact mean a widening of the Convention, since the matter had hitherto come under national law. There was

\* It was finally given the form of a Protocol with the title "Protocol on the Interpretation of Article 69 of the Convention".

nothing to prevent the same result from being achieved by the formulation of the claims under the European procedure.

129. The delegation of the International Chamber of Commerce stated that it fully supported the aim which the Swiss delegation was pursuing, namely to harmonise as much as possible national rules. However, it had doubts about the form and place in the Convention of the proposed provision. In particular, it saw a contradiction with the principle laid down in paragraph 1 whereby the extent of protection of the patent was determined by the claims. In order to achieve the desired aim in accordance with the system of the Convention, the claims would, in such cases, have to be formulated in such a way that the products directly obtained by the process were also covered, and the European Patent Office would have to be obliged to allow these claims. Provision could be made for the latter either in the Convention or in the Implementing Regulations.

Furthermore, the delegation had similar doubts about the provision in the Second Convention which had the same content as the proposed paragraph 3.

130. In reply to the last comment the Chairman pointed out that so far none of the nine EC States considered that Article 67 (69), paragraph 1, conflicted with rules on the extent of protection such as the Swiss delegation proposed. No such doubts had been expressed about Article 29, sub-paragraph (c), of the Draft Second Convention.

131. The EIRMA delegation welcomed the Swiss proposal; it was unable to agree with the reservations of the representative of the International Chamber of Commerce. The possibility of being able to make claims, in which the products were defined in terms of their method of manufacture, was of great importance to the chemical and pharmaceutical industry and also, for example, to the electronics industry. If this proposal were adopted, a well-balanced compromise could perhaps also be reached as regards Article 166 (167) in the case of certain Mediterranean countries.

132. The Yugoslav delegation was not in favour of the Swiss proposal. In its opinion, it would mean protection for patents for inventions which were not yet completed since, if the inventor were able to produce further derivatives of the chemical product, he could describe these in the invention and include them in the claims.

133. The UNION delegation did not support this view and drew attention to the fact that under the Swiss proposal only the products obtained directly from the process were to be protected: it was clearly a question of what resulted from the process invented.

The delegation also referred to the origin of the proposed provision: at the end of the last century it had proved necessary in Germany to protect not only processes for manufacturing a product but also — to protect against imports from abroad — the products manufactured by such protected processes.

The UNION delegation approved the proposal as a welcome step towards harmonisation over and above the Second Convention.

134. The CEIF delegation described the Swiss proposal as being very estimable. In its opinion, the International Chamber of Commerce's objections concerning the legal form should not be overestimated. The delegation supported the statements of the EIRMA and the UNION.

135. The delegations of the IAPIP, the COPRICE, the Standing Conference of the Chambers of Commerce and Industry of the European Economic Community, and of the UNICE also supported the Swiss proposal.

136. In the final vote 10 delegations voted in favour of the Swiss proposal and 5 against it with 3 delegations abstaining\*.

137. The Netherlands delegation raised the question of

whether plants and animals should not be excluded from the proposed provision in so far as they were already excluded from protection under Article 51 (53), sub-paragraph (b).

No delegation seconded this proposal.

138. The Swiss delegation, seconded by the Austrian delegation, also wanted a new *paragraph 4* added to Article 67 (69): it described the paragraph as a desirable added protection of the substance provided for in the new paragraph 3 (M/67/I). In order to make the protection of the applicant who opted for a process patent effective, it would be appropriate to oblige the competitor of the applicant to provide proof that a product had not been manufactured under the protected process, in so far as new products were concerned. Such a rule existed in most of the prospective Contracting States and it was desirable and justifiable to make this a binding provision in respect of the European procedure too. In its view the problem of micro-organisms, which still had to be discussed, could also be solved more easily, if provision were made for a kind of reversal of the burden of proof.

139. The Italian delegation agreed with the substance of the proposal, but expressed a reservation regarding its wording.

140. The Spanish delegation said it was opposed to the proposal. No such provision on legal procedure should be included in the Convention, since the latter left provisions of this kind to be laid down by national legislation. It did not, however, wish to deny that a similar provision might well find a place in a Convention such as that which the EC States proposed to conclude.

141. In the view of the United Kingdom delegation, the question here was one of patent infringement, and everything relating thereto came under national law. Such a provision might, furthermore, prove rather dangerous, inasmuch as certain industrial undertakings might try to make use of proceedings against their competitors, who would bear the burden of proof, to engage on a "fishing expedition" into their state of development. There was also the subsidiary point that the proposed provision was worded too generally since, in the last resort, every product was new. The provision was presumably intended to cover compositions only.

142. The Finnish delegation shared the view that such provisions were a matter for the law of the individual Contracting States. It also doubted whether reversal of the burden of proof would be a fair way of dealing with every conceivable case.

143. The Yugoslav delegation had no objections to the actual content of the Swiss proposal. However, it too considered that, legal procedure being an area for national law, it should not be dealt with by the Convention.

144. The Greek delegation felt that the problem of patent infringement which the proposed provision was intended to settle should be left to national law.

145. The French delegation did not deny that the proposed rules would affect the procedures of the Contracting States. It would nonetheless be prepared to agree to the proposal, provided that there were minor drafting changes.

146. The Netherlands delegation pointed out that the Swiss proposal would be of particular significance for those countries which were not envisaging the introduction, within the framework of the Convention, of any protection of substances for chemical and pharmaceutical products. It was doubtful whether the proposed provision would have any significance for countries which imposed absolute protection of substances. In the Netherlands, where protection of substances was certainly not yet absolute, the reversal of the burden of proof had not worked out badly in practice.

Such a rule seemed reasonable and was, in any case, desirable in the context of the Second Convention. The Netherlands

\* The proposed provision became Article 64, paragraph 2, of the Convention.



delegation was, however, also prepared to put on one side any objections it might have as regards the system and to adopt such rules in the First Convention, if this should be the wish of the majority of delegations and of the interested circles. It did not believe that such a detailed provision would make the Convention unacceptable to most of the delegations.

147. The Irish and Swedish delegations said they would oppose the proposal since it related to infringement proceedings, which were a matter for national law.

148. The delegation of the Federal Republic of Germany described the proposed reversal of the burden of proof as valuable for the continuation of the protection afforded by the patent. Nonetheless, it clearly related to law on infringement proceedings and, as such, should be seen as an extension of the maximum solution. If the proposal were put to the vote, it would abstain.

149. The UNICE delegation considered that the proposed reversal of the burden of proof was essential if effective patent protection were to be achieved.

150. The CEIF delegation said that a treaty on the scale of the European Patent Convention should also comprise rules on the reversal of the burden of proof for the enforcement of process claims such as were rightly found in many national laws. A super-regional solution to this localised problem would ease many difficulties as regards proof and would thus represent an important step towards the harmonisation of national legal provisions and judgments in the area of patent infringement.

The Swiss proposal was therefore a very welcome one. It should also be noted that — in view of the provisions on reservations envisaged for Article 166 (167) — proprietors of pharmaceutical patents would, for many years, be dependent on protection of the process. Such protection was far less effective against a third party infringing a patent than was protection of a substance. Irrespective of any objections as regards the system, the proposal should therefore be adopted as a pragmatic solution.

151. The UNION delegation likewise supported the Swiss proposal.

152. The EIRMA delegation described the proposal as an essential complement to the system, which was needed to ensure that the chemical and pharmaceutical industries, and also other branches of industry, received appropriate patent protection. It did not consider that the danger of industrial espionage evoked by the United Kingdom delegation was a real one. Finally, it could not understand why there were certain objections, as regards the system, to the Swiss proposal, since most of the States represented at the Conference had the self-same rules under their own law.

153. The delegation of the International Chamber of Commerce supported the EIRMA's view, adding that, without the proposed paragraph 4, the rules already adopted in paragraph 3 in the interests of the proprietor of the patent would fail to have any real effect.

154. The Austrian delegation considered the Swiss proposal to be the logical consequence and necessary corollary of paragraph 3, which had already been adopted. On the other hand, it recognised that it would entail encroachment on national law, which might cause difficulties for certain States. It suggested that it might be possible to provide for certain derogations for such States.

155. The IAPIP delegation supported the Swiss proposal. It too saw it as an essential complement to paragraph 3. However, it felt that the proposal was worded far too generally, since it covered all new products, including, for example, mechanical ones.

156. The United Kingdom delegation pointed out that, if the proposal were adopted, it would entail amendments to British

law. Such a procedure would be complicated, and would take many months. In view of the fact that the proposal had been put forward only at the very last minute, it could not vote in favour of it.

157. The Swiss delegation countered the objections raised as follows: the question of how the process used by the alleged infringer of the patent was to be kept secret would have to be settled by the national courts. In Switzerland, there were no difficulties in this respect. If the wording of the proposal were too general, it would be prepared to restrict it to substances or compositions. In any case, the wording of its proposal could certainly be improved. Finally, the question of reservations would, if necessary, be dealt with in Main Committee II, whereas Main Committee I was responsible only for settling the fundamental aspects of the problem.

158. Before the vote, the Chairman pointed out that the draft Convention for the European Patent for the Common Market at present contained no provision corresponding to the Swiss proposal and that, like certain national laws, it would therefore have to be supplemented if the said proposal were adopted. The proposal was to be seen as an extension of the "maximum" solution, indeed an extension into the field of procedural law, whereas hitherto, "maximum" solutions had been adopted for substantive legal questions only. Finally, it should be pointed out that the adoption of paragraph 4 might make it rather difficult for certain States to accede to the Convention.

159. In the ensuing ballot, 6 delegations voted in favour of the Swiss proposal and 10 against it. 2 delegations abstained.

#### ***Article 68 (70) — Authentic text of a European patent application or European patent***

160. A United Kingdom drafting proposal for *paragraph 2* (M/40, point 16) was referred to the Drafting Committee\*.

161. The FICPI delegation asked whether the words "in proceedings before the European Patent Office" meant that the rule in paragraph 2 did not apply to revocation proceedings before national patent offices under Article 138.

162. The United Kingdom delegation referred to Article 138, paragraph 1(c), whereby a European patent could be revoked in a Contracting State if its subject-matter extended beyond the content of the application as filed. Any party suing for revocation in national proceedings had, therefore, to be free to demonstrate that, for example, the English version of the text of the patent contained an element not to be found in the original application in Dutch and, conversely, the defendant in revocation proceedings had to be able to demonstrate either that the English version contained no new element or that any new elements it might contain were justifiable.

163. The Chairman pointed out that the organisation of revocation proceedings would be governed by the national law of the individual Contracting States.

164. The Main Committee referred to the Drafting Committee the Swiss delegation's suggestion that the English and French versions of *paragraph 3* should be amended to correspond to the German text (M/54/I/11/III, p. 14).

165. At a subsequent meeting, the Main Committee discussed this point after the Drafting Committee — contrary to the Swiss suggestion — had amended the German to correspond to the English and French versions.

166. The Swiss delegation stressed how, in its view, only the original German version made sense, providing as it did solely for the eventuality of more limited protection of the patent application or patent in the language of the translation than in the language of the proceedings. At present, on the basis of the original English and French texts which it considered erroneous, provision was also made for the eventuality where

\* A further problem relating to paragraph 2 raised by the Belgian delegation is discussed below under points 586–594.



protection of the application or patent in the language of the translation did not extend beyond protection in the language of the proceedings.

167. The Chairman of the Drafting Committee replied that in the latter's view either version would have very much the same effect.

168. The United Kingdom agreed with the Drafting Committee on this point.

169. The Chairman considered that the sole purpose of paragraph 3 was to provide for the eventuality of protection in the translation being narrower than in the language of the proceedings. More extensive protection in the translation could constitute grounds for revocation in accordance with Article 138. If, on the other hand, protection were identical in the translation and in the language of the proceedings, the language of the proceedings would, under Article 68, paragraph 1, be the authentic one should any problems arise.

170. The Swiss delegation agreed, and added the view that the version of paragraph 3 proposed by the Drafting Committee might lead to the temptation to "stretch" translations from the language of the proceedings as far as possible, since, under paragraph 4(a), they could be corrected, and so no harm would be done.

171. The Main Committee finally voted on the Swiss proposal (see point 164 above) that the English and French versions should be amended to correspond to the German version of M/1. 12 delegations voted in favour, one against and there were 6 abstentions.

172. The Main Committee referred to the Drafting Committee a drafting proposal from the Netherlands delegation regarding paragraph 4(a) (M/52/I/II/III, point 9).

173. The Norwegian delegation, seconded by the Swedish delegation, proposed that paragraph 4(a) should clearly lay down that the applicant was himself obliged to pay for the publication of a corrected translation of the patent application or patent. This could be achieved by means of a reference to Article 63(65), paragraph 2 (M/60/I, page 1).

174. The delegations of the Federal Republic of Germany and the Netherlands considered that the Norwegian delegation's aim was already achieved by means of the reference to Article 65 (67), paragraph 3, and that such clarification was therefore superfluous. They could nonetheless accept the Norwegian drafting proposal.

175. The Main Committee adopted the Norwegian drafting proposal.

176. The Norwegian delegation proposed (M/28, point 8, and M/60/I, page 1) that paragraph 4(c) should provide that anyone who had used an invention in good faith should be entitled, in the event of an incorrect translation of the patent, to continue to use it without payment, even if he subsequently established that the invention should not have been used.

177. The Finnish, Netherlands and Swedish delegations supported this proposal.

178. The Swiss delegation said it was opposed to this proposal. The comparison drawn by the Norwegian delegation between this case and that of *restitutio in integrum* (Article 121, paragraph 6) was not convincing, since, in the latter, the proprietor of the patent actually lost his rights until they were re-established, whereas in the former, the proprietor of the patent was accorded protection of which however the third party was unaware, on account of an incorrect translation of the patent.

179. The delegation of the Federal Republic of Germany pointed out that this point had already been turned down at the Luxembourg Inter-Governmental Conference and that there were no grounds for going back on the decision taken on that occasion.

180. The IAIP delegation supported the view of the two previous delegations. It considered that the right to continue to use the patent was, in itself, a positive advantage and that there was no need to grant it free of charge.

181. The United Kingdom delegation considered that circumstances might arise in which the applicant should be entitled to require the user of the invention to pay reasonable compensation, for example, if the latter were aware that the translation was incorrect. On the other hand, there might be other circumstances in which compensation would be out of place. It therefore wondered whether it might not be advisable to elaborate on the words "reasonable compensation", depending on the case.

182. The French delegation likewise considered that, while the present wording would be satisfactory in certain circumstances, it would not be in others. It therefore proposed that the last sentence of sub-paragraph (b) should state that the applicant could, "where appropriate", require the user to pay compensation, to be awarded at the discretion of the courts in the relevant Contracting State.

183. The delegation of the International Chamber of Commerce pointed out that, if the Norwegian proposal were adopted, applicants might be tempted to formulate the translations they had to supply so generally that a situation in which it was possible to continue using the invention without payment would be excluded *a priori*. On the other hand, it considered that the French compromise proposal was reasonable.

184. The CEIF delegation saw no need to amend the present version. It covered all cases inasmuch as "reasonable" compensation could, in specific cases, also be taken to mean "no" compensation.

185. The Norwegian delegation considered the French compromise proposal less felicitous, since elsewhere in the Convention, in Article 65 (67), paragraph 2, for example, "reasonable compensation" meant that some compensation would always be paid.

It called for a vote on its proposal.

186. In the ensuing vote on the Norwegian proposal, 6 delegations voted in favour, 4 against; and there were 5 abstentions.

### **Article 71 (73) – Contractual licensing**

187. The French delegation proposed that it be made clear that a licence could be granted for part of the protected invention, e.g. for a claim for use only, whereas the patent might also cover claims for the product and for the process for its manufacture (M/26, points 13 and 14).

188. This proposal, which was supported by a number of delegations, was adopted by the Main Committee.

### **Article 72 (74) – Law applicable**

189. A drafting proposal made by the United Kingdom delegation (M/40, point 17) was referred to the Drafting Committee.

### **Article 73 (75) – Filing of the European patent application**

190. The Chairman opened by noting that the Steering Committee had agreed that the question of the filing of patent applications should be dealt with under Article 73.

191. The French delegation pointed out that, when paragraph 1(a) was drafted, it had not yet been established that examinations on filing and examinations as to formal requirements could be carried out at the branch at The Hague.

It was necessary to decide whether European patent

applications would have to be filed in Munich or at The Hague, or whether applicants should be left a free choice. For administrative reasons, it would be better to avoid the latter solution (M/26, points 15 and 16).

192. The United Kingdom delegation considered that it should, at all events, be permissible to file the application at the branch which was to carry out the examination on filing and the examination as to formal requirements. It wondered, however, whether it was advisable to make The Hague the sole place of filing, since filings in Munich would then have to be considered void.

193. For the Netherlands delegation, to restrict the place of filing either to Munich or to The Hague was unacceptable, since both sections were intended to be part of one and the same Office. A satisfactory solution could, perhaps, be provided by Article 10, paragraph 2(b), under which the President of the European Patent Office was responsible for prescribing which transactions were to be performed in Munich and which at The Hague.

194. The delegation of the Federal Republic of Germany felt that it was preferable for the applicant to be able to choose whether to file his application in Munich or at The Hague and formally proposed this solution (M/47/I/II/III, point 14). Any other solution would have undesirable consequences for the applicant if he should inadvertently file his application in the wrong place.

195. The French delegation considered that the German proposal satisfied its main preoccupation of clarity and said it was therefore prepared to withdraw its proposal. It hoped that the proceedings would not be held up in any way by the applicant being left free to choose.

196. The Swiss delegation, which supported the German proposal, wondered whether it might not be advisable to state that applications should preferably be filed at The Hague, in order to preclude any unnecessary administrative expenditure.

197. In the Chairman's view, this would of itself subsequently become current practice, since applicants would have every interest in their applications being dealt with quickly.

198. The Main Committee adopted the proposal put forward by the Federal Republic of Germany. It was noted that this proposal would affect the wording of Article 74 (76), paragraph 1, and Article 10, paragraph 2(b) (see M/47/I/II/III, points 14 and 15).

#### **Article 74 (76) — European divisional applications**

199. A drafting proposal concerning the first sentence of *paragraph 1* put forward by the delegation of the Federal Republic of Germany (M/47/I/II/III, point 15) was referred to the Drafting Committee.

200. The Swiss delegation proposed that *paragraph 2*<sup>\*</sup> should clearly specify that divisional applications might contain the date of the filing of the earlier application only if the whole technical content were taken substantively from the earlier application (M/54/I/II/III, page 8). In its view, such clarification was necessitated by the adoption of the so-called whole content approach with regard to the rules on novelty. In theory, if there were back-dating, the whole content of the divisional application would, once published, belong with retroactive effect to the state of the art, within the meaning of Article 52 (54), paragraph 3. However, this did not seem justified for new particulars not included in the earlier application (methods of carrying out the invention, examples, diagrams, etc.).

201. The Chairman thought that a possible solution to this problem would be for divisional applications comprising new disclosures not made in the earlier application to be dealt, with in a different way as regards the state of the art. Those

disclosures already made in the earlier application would belong to the state of the art as from the date of filing of the earlier application, while those added subsequently would belong to the state of the art as from the date on which the divisional application was filed.

202. The United Kingdom delegation agreed with the Swiss delegation in considering that new disclosures in the divisional application should not belong with retroactive effect to the state of the art as from the filing date of the earlier application. It was of the opinion, however, that the present text, in English at least, already made this point quite clear. It was inadvisable to alter the terms used, since they appeared in other provisions in the Convention; a statement in the minutes might be a suitable way of settling this point.

203. The Netherlands delegation referred to the general rule laid down in Article 122 (123) that a patent application might not be amended in such a way that it contained subject-matter which extended beyond the content of the application as filed. Under certain circumstances, however, examples which contained no new disclosures might be added to the application. The same should also hold good for divisional applications, and the addition to divisional applications of examples should be permitted, where these did not comprise anything new as compared with the earlier application. Any applications allowed in this way should, of course, belong with retroactive effect to the state of the art and, to this extent, the Netherlands delegation could not concur with the Swiss proposal.

204. The Chairman noted that opinions differed on this point. In the view of the Netherlands delegation, an example which was not filed until the time of the divisional application should belong with retroactive effect to the state of the art as from the date on which the earlier application was filed. The Swiss and United Kingdom delegations maintained, as he himself also did, that such retroactive effect was not possible, since something of which the European Patent Office was as yet ignorant could not be included in the state of the art.

205. The United Kingdom delegation did not consider that there was any major difference between its own view and that of the Netherlands delegation, since it was all a matter of the nature of the example added. The real test was whether the amendment or the example which was added did or did not extend beyond the state of the art of the original application. If they did not, they were allowable and could both, without hesitation, be considered as belonging to the state of the art as from the date of filing of the earlier application. This was exactly how it had interpreted the views of the Netherlands delegation.

206. The delegation of the International Chamber of Commerce expressed the opinion that an example added to the divisional application should receive the date of filing, not of the earlier application, but of the divisional application. In its view, however, the present text gave the very opposite result. On the other hand, the Swiss proposal failed to offer a satisfactory solution to the problem.

207. In the view of the Chairman, there seemed to be a certain consensus among all the speakers that the Swiss proposal went too far, inasmuch as it also resulted in the exclusion of examples which did not extend beyond the subject-matter of the earlier application. He suggested that a possible solution to the problem would be for such examples to be considered as belonging to the state of the art as from the date on which the divisional application was filed. He therefore asked the Swiss delegation whether it would be prepared to withdraw its proposal for an amendment, if the Main Committee included a statement to the above effect in its minutes.

<sup>\*</sup> In the final version, paragraph 2 and the second sentence of paragraph 1 form a single sentence.

208. The Swiss delegation said it would be prepared to do so. It nonetheless requested that, in the French version, paragraph 2 ("objet d'une demande") should be brought into line with paragraph 1 ("éléments contenus dans une demande"), as was already the case in the English and German versions.

209. The delegation of the Federal Republic of Germany pointed out that, in its view, elements of the divisional application which extended beyond the earlier application could perhaps not be deleted, but should merely receive the date of filing of the divisional application.

210. Summing up, the Chairman noted that the Main Committee was agreed on the following interpretation of paragraph 2\*: where a divisional application comprised new examples not to be found in the earlier application, these examples were allowable if they did not extend beyond the content of the earlier application. They were not, however, deemed to have been filed on the date of the earlier application but belonged to the state of the art only as from the date of filing of the divisional application. Where a divisional application comprised new examples extending beyond the content of the original version of the earlier application, these examples were not allowable. They should not, however, be deleted, but should be dealt with in exactly the same manner as the other category of new examples.

211. The Main Committee referred examination of the French version (see point 208 above) to the Drafting Committee.

#### **Article 75 (77) — Forwarding of European patent applications**

212. The delegation of the International Chamber of Commerce wondered why different time limits were laid down in paragraphs 3 and 5. Under paragraph 3, the national office had either 4 or, in the case of priority applications, 14 months in which to forward to the European Patent Office European applications. Under paragraph 5, however, the European patent application was deemed to be withdrawn if it did not reach the European Patent Office within 14 months of filing or the date of priority. It wondered whether it might not be advisable for a single time limit of 14 months to be set out in paragraph 3, or for the time limit in paragraph 5 to be 4 months.

213. The Chairman replied by pointing out that paragraphs 3 and 5 were designed to deal with two distinct points. Paragraph 3 laid down how much time national patent offices were allowed for forwarding to the European Patent Office applications not liable to secrecy. The applicant's interests did not suffer if his application was forwarded to the European Patent Office more than 4 months after filing, provided no more than 14 months were allowed to elapse. On the other hand, paragraph 5 laid down the sanction to be imposed in the event of the application not being forwarded to the European Patent Office within 14 months. Here, in accordance with the PCT, it made no difference whether applications were filed with or without priority.

214. The CNIPA delegation said it was very surprised that, under paragraph 5 applications which were not forwarded punctually to the European Patent Office were deemed to be withdrawn, despite the fact that the applicant had no influence over the forwarding procedure.

215. The United Kingdom delegation pointed out that, in practice, applicants could make enquiries at the national offices as to the processing of their applications.

216. The EIRMA delegation pointed out that, under Article 135, paragraph 1(a), a European patent application could be converted into a national application if it were not forwarded

punctually to the European Patent Office and that, in such cases, the applicant suffered no loss of rights. Nonetheless, it considered it advisable to review the time limits and sanctions laid down in paragraphs 3 and 5.

217. The Main Committee referred paragraph 5 to the Drafting Committee, with the request that it review its wording in the light of the above remarks.

#### **Article 76 (78) — Requirements of the European patent application**

218. With reference to the proposal it made in M/52/I/II/III, point 10, the Netherlands delegation raised the question of whether it was really necessary to include an abstract in the requirements laid down in paragraph 1. It was true that at the Luxembourg Conference it had already been decided to do so — partly with reference to the PCT, which also prescribed an abstract; nonetheless, there were still some doubts in the Netherlands as to whether an abstract was really essential.

219. The United Kingdom delegation considered that experience in Great Britain had demonstrated that an abstract was of value. It did not want it to be omitted from the procedure from the outset but if, subsequently, it should prove to be an unnecessary complication, it could agree to the Administrative Council being given power to dispense with the abstract in the list of requirements for the application.

220. The Swedish delegation was also in favour of the retention of the abstract, but would likewise be prepared to give the Administrative Council the power to have the abstract deleted.

221. The French delegation was in favour of the retention of the abstract. It would not be prepared to give the Administrative Council the power to decide on the deletion of the abstract.

222. The delegation of the Federal Republic of Germany was in complete agreement with the French delegation. It also drew attention to the difference between the content of patent claims and the content of the abstract. While patent claims delimited the protection of the patent, the purpose of the abstract was to provide a summary of everything set out in the claims, description and diagrams. In many cases, the abstract would thus contain more than the patent claims and it would therefore be regrettable if this source of information were to be relinquished.

223. Following these comments, the Netherlands delegation withdrew its proposal. Paragraph 1, as worded in M/1, was thereby adopted.

224. The Netherlands delegation said it interpreted paragraph 2 as meaning that the filing fee did not necessarily have to be the same for all applications, but that it could vary depending on the length of the description and the number of claims, for example.

225. The Chairman said that he shared this view. Filing fees were, moreover, to be laid down by the Rules relating to Fees, and were, therefore, a matter for the Administrative Council.

#### **Article 77 (79) — Designation of Contracting States**

226. The Chairman noted that no proposals had been put forward regarding Article 77.

#### **Article 79 (81) — Identification of the inventor**

227. The Danish, Finnish, Norwegian and Swedish delegations proposed that the question of the identification of the inventor and related questions, which had already been settled by the Luxembourg Inter-Governmental Conference after

\* See footnote to point 200.

lengthy discussions, should be re-opened. They proposed first and foremost that the inventor should always be identified before the European Patent Office, irrespective of whether or not this was required by the law of a designated Contracting State and, furthermore, that the applicant's right to the invention should be attested to by means of documents, where the applicant and the inventor were not the same person. Adoption of this proposal would entail Articles 58, paragraph 2 (60, paragraph 3), 76 (78), paragraph 1 and 90 (91), paragraphs 1 and 5 being redrafted and Article 79 (81) being deleted (M/69/I, pages 1 to 3).

The Scandinavian delegations proposed the following amendment:

If, where the applicant is not the inventor, it is not proven that the applicant has a right to the invention, the application shall be deemed to have been withdrawn in respect of the designated Contracting States, which prescribe such proof in their national law. This proposed amendment would entail amendment of Articles 58, paragraph 2 (Article 60, paragraph 3), 79 (81) and 90 (91), paragraphs 1 and 5 (M/69/I, pages 3 to 5).

228. The Swedish delegation put forward the following grounds for introducing these proposals.

The Scandinavian countries would not have tried to re-open discussion of the problem of the identification of inventors had it not been of paramount importance to all of them. The Swedish delegation had no wish to dwell on the reasons for the proposals, since they were all sufficiently well-known, but, it did wish to point out yet again that, in the view of the Scandinavian countries, the inventor deserved to play a central role in the procedure for the grant of patents and that this should be duly reflected in the Convention. To do so would in no way weaken but rather strengthen the procedure. Note should also be taken of the current trends in the law in other states, e.g. the USA and the Common Market States, particularly since the latter were considering making the identification of the inventor compulsory in the Second Convention. It would be a great mistake to adopt a solution which would soon be behind the times.

In conclusion, the Swedish delegation appealed both to those delegations which had previously been undecided, and to those which had initially opposed its proposals, to give some further thought to what it had said. The Scandinavian delegations, moreover, were fully prepared to agree to reasonable compromise solutions.

229. The Main Committee decided that it would initially confine its discussions to the principal proposal\*. The Chairman recalled that, as things stood at present, the inventor would have to be identified before the European Patent Office only if the law of at least one of the designated States so required, and that the inventor had the right to be designated as such by the applicant.

230. The Austrian delegation said that, fundamentally, it was ready to agree to any solution which would improve the position of the inventor.

231. The United Kingdom delegation pointed out that it could support compulsory mention of the inventor. However, an incorrect designation of the inventor should not lead to any sanctions.

It had considerable reservations about the second request by the Scandinavian countries. Legal developments in the United Kingdom were following an opposite trend, and above all, the right to a patent did not always arise out of contracts of service, which, if the desired goal were to be attained, would have to be formulated in different legal terms. There were frequently no contracts of service whatsoever, but common law rights applied.

In its opinion, the justified interests of inventors were already met by the introduction of compulsory mention of the inventor. However, should the second part of the Scandinavian proposal also be adopted, the European Patent Office should be able to authorise exceptions to the procedure.

232. The French delegation also said it could support compulsory mention of the inventor, which was already provided for in the draft Second Convention. However, it could not agree to the second part of the Scandinavian proposal since this was closely related to the problem of inventions by employees. In this particular field, steps were currently being undertaken in France to codify hitherto existing jurisprudence in the matter and the outcome could not yet be predicted.

233. The Netherlands delegation also said it was prepared to agree to compulsory mention of the inventor. However, this already constituted a compromise for it, since there was no obligation in the Netherlands to mention the inventor. However, it could not support the second part of the Scandinavian proposal, which had only just been made after lengthy discussions on the problem. In the Netherlands, where the employer was legally entitled to an invention by an employee, this could lead to considerable difficulties.

234. The delegation of the Federal Republic of Germany pointed out that it could also accept compulsory mention of the inventor. However, it could not support the second part of the Scandinavian proposal. This would create considerable difficulties in the Federal Republic since, under German law, inventions by employees could be claimed by the employer and in such cases, the right to the invention would be transferred to the employer without any deed of assignment. Nor could there be any question of the European Patent Office having to examine the question of the validity of the assignment or the problem of the applicant's entitlement in general.

235. The Irish delegation could support the first part of the Scandinavian proposal, but not the second. It explained that under Irish law also, the transfer of an invention by an employee to the employer required no deed of assignment.

236. The Yugoslav delegation welcomed any effort to improve the situation of the inventor. For this reason, it sympathised with the Scandinavian proposal to render mention of the inventor compulsory. However, it should also be considered that there could be cases where the inventor might wish to remain anonymous, just as the right to remain anonymous existed in the case of copyright (see also point 281).

As for the second part of the Scandinavian proposal, it should be noted that a deed of assignment was relatively easy to obtain where a legal assignment of the right was involved. However, it would be practically impossible to obtain such a document in those cases where the right was transferred under law from the inventor to another person. Moreover, the European Patent Office could hardly be expected to examine whether the applicant was also entitled to the application, since this would necessarily involve interference in the civil law affairs of third parties. As regards the problem of employees' inventions in particular, the principle laid down in the Convention that the right to an invention by an employee was governed by national law was correct and should be approved.

237. The Swiss delegation also said it could agree to compulsory mention of the inventor, but not to the second part of the Scandinavian proposal. Under Swiss law also, the employer was legally entitled, in certain cases, to an invention by an employee without any deeds of assignment being required. In such cases no document whatsoever could therefore be submitted. Moreover, there could be no question of giving the European Patent Office the task of examining the substantive content of deeds of assignment.

238. The FICPI delegation stated its opinion that, in principle,

\* See points 248 et seq. for discussion of the proposed amendment.

every effort should be made to strengthen the position of the inventor. However, considerable practical reservations could be made about the Scandinavian proposal that the transfer of rights to the applicant should be established within a certain period. Problems could arise, for instance, where the inventor was an employee and left his firm after a disagreement or where he emigrated or died. In all these cases, the required deed of assignment might not be submitted in due time, which would result in the application being deemed to be withdrawn.

239. The delegation of the International Chamber of Commerce supported the first part of the Scandinavian proposal but rejected the second part.

240. The UNION delegation also supported the first part of the Scandinavian proposal, but not the second part. As regards the latter, it proposed an arrangement according to which, if the applicant and the inventor were not one and the same person, the European Patent Office would notify the person mentioned in the application, as the inventor, of this fact.

241. The IFIA delegation referred to the declaration which it had made at the beginning of the Conference to the effect that the fundamental rights of the inventor should be recognised in the Convention. This had obviously been done in the case of Article 58, paragraph 1, which provided that the right to a European patent shall belong to the inventor or his successor in title. However, the discussions had hitherto shown that there was a lack of readiness to draw the consequences from these principles for other provisions. In order to make these consequences clear, IFIA submitted M/70/I/Corr., which not only contained the desires of the inventors' associations of IFIA, but also reflected the wish of industrial and employers' organisations to obtain clarification of the matter. IFIA, which had hitherto refrained from adopting positions on other matters, felt it had to express its opinion on this question which it considered to be an important one.

IFIA's proposal in M/70/I/Corr. were aimed at resolving the question of the assignment of the right of the inventor in a liberal, flexible and practicable way. Various solutions were possible, but hitherto exceptional cases only had been put forward against IFIA's efforts to secure a fundamental human right. IFIA would welcome any constructive proposal by means of which this fundamental right, which had been recognised by all the delegations present, would be put into effect in the Convention. But this self-evident demand had been opposed by arguing that national laws on this matter could not be harmonised. Inventors in all the national inventors' associations frequently complained of the fact that their rights were often lost without their knowledge. This could be remedied if, as had already been suggested by another observer delegation, a copy of the application were forwarded to the inventor. For this purpose, of course, the inventor would have to be known at a very early stage in the procedure. Such a solution would possibly satisfy the employees' organisations.

IFIA's proposals in M/70/I/Corr. were slightly more advantageous to the inventor than the Scandinavian proposal. IFIA had not, as a rule, put forward precisely formulated proposals because it was aware that their formulation would have to be harmonised with other provisions of the Convention, which would be possible only after their adoption in principle and should best be done by the competent committee of the Conference.

242. The COPRICE delegation felt that the problem of inventions by employees was one the most important and, at the same time, most difficult problems, since it affected not only patent law, but also labour law. However, this problem should not further complicate discussions on the European patent. It should be realised that the European patent would lose its attraction for industry if the application formalities were made

more complicated. This would be the case if, in accordance with the Scandinavian proposal, applicants had to submit documents which were difficult or impossible to obtain. In this connection, it should be noted that in some Contracting States, the employer was legally entitled to inventions by an employee without a deed of assignment being required. The legal situation could become very complicated in cases where the invention was the result of the work of several persons. On the basis of these considerations, the Scandinavian proposal should be rejected.

243. The EIRMA delegation pointed out that the industrial undertakings which were members of its organisation would not welcome a solution according to which documents which were difficult to obtain had to be submitted to the European Patent Office. On the other hand, as had already been suggested, the problem might perhaps be solved by the inventor being notified by the European Patent Office that an application in which he had been mentioned as the inventor had been filed.

244. The FICPI delegation considered IFIA's proposal to notify the inventor more flexible than the Scandinavian proposal and could thus support it. Furthermore, it referred to the fact that in M/48, Part B, FICPI itself had submitted proposals for the formulation of various Articles and Rules with the intention of solving the difficult problem of establishing assignment. Both solutions were equally acceptable to it.

245. The Swedish delegation gave the examples of the Swedish Ball-bearing Factory (SKF) and of Volvo to underline the great importance of inventors in every country for the technological development of the whole country. It was thus in the interests of all States to encourage their nationals to make good inventions. In this sense, the Scandinavian proposal attributed great significance to the rights of the inventor being given a fitting place in the Convention.

246. The Norwegian delegation stated that, according to the Scandinavian proposal, the question as to who was entitled to a patent should be decided under national law. This also applied to the relationship between employers and employees.

Various delegations had objected that it would be difficult or even impossible for the applicant to establish assignment to himself, particularly in the case of inventions by employees to which the employer was legally entitled. In such cases the Norwegian delegation contended that it might be sufficient for it to be proved to the European Patent Office that at the time of the invention, an employee/employer relationship existed between the inventor and the employer according to which the employer was entitled to the application. It should also be possible to find a solution for the other exceptional cases referred to, such as the disappearance or death of the inventor, and in this connection, the possibility of widening Rule 13 concerning the suspension of proceedings had been considered.

Various delegations had also criticised the fact that the European Patent Office would be burdened with too difficult a task if the entitlement of the applicant had to be examined in every case. This criticism could be answered by pointing out that, although, under the Scandinavian proposal, a certain amount of work would be entrusted to the European Patent Office, this would, in most cases, be easy to carry out and would only be of any considerable amount in a very few cases. The European Patent Office would, of course, have to examine the applicant's entitlement to the application on the basis of the law of his country and, clearly, this could also involve the law of a third State. However, many years of experience in the Scandinavian countries had shown that this system was practicable. It was therefore felt that this would not be an unreasonable burden to put on the European Patent Office.

247. Summing up the discussion up to that stage, the Chairman noted that all the delegations recognised the rights of the inventor and wished to protect them to the largest possible extent. He also referred to Article 58 (60), paragraph 1, which established the principle of the right of the inventor to a European patent. As for the difficult problem of inventions by employees, the Luxembourg Inter-Governmental Conference had deliberately made an exception by stipulating that rights arising out of an invention by an employee should be determined according to national law. This exception had been deliberately made in order to avoid a procedural Convention regulating matters of substantive law concerning the right to inventions in the employer/employee relationship, these being less a matter of patent law than a matter of labour and social law.

As regards the first part of the main Scandinavian proposal, the Chairman asked whether there were any objections and then noted that no delegations opposed compulsory mention of the inventor; this item was thus adopted.

The Chairman summed up the discussion on the second part of the main Scandinavian proposal by noting that all the other government delegations as well as some of the observer delegations had rejected any requirement that an applicant who was not the same person as the inventor should prove that rights had been assigned to him. Two major arguments had been put forward in this respect: firstly, it might be difficult in practice, or legally impossible, to obtain a document establishing assignment to the applicant. Secondly, the European Patent Office would have to apply the various laws of the individual States in order to determine whether the document submitted was legally valid and established the assignment. The Chairman asked whether any other government delegation supported the Scandinavian proposal, noted that this was not the case and that this part of the proposal was thus rejected.

248. The Committee then went on to discuss the Scandinavian alternative proposal to the effect that if the applicant was not one and the same person as the inventor, evidence would have to be provided that the applicant was entitled to the invention where this was provided for under the law of one of the designated States, and that the application for the designated Contracting States whose laws required such evidence would accordingly be deemed to be withdrawn if the evidence were not provided.

249. The Swiss delegation raised the question of how the Scandinavian alternative proposal, which was based on the law of the designated Contracting States, could be reconciled with Article 58 (60), paragraph 1, second sentence, under which, in the case of the inventions of employees, the right to the patent is determined in accordance with the law of the State in which the employee is mainly employed.

250. The Swedish delegation replied that the alternative proposal was in no way irreconcilable with Article 58 (60), paragraph 1, second sentence. It was based on whether or not assignment to the applicant should require documentary evidence under the law of a designated State. The question as to whether and under what law the applicant obtained the right to the patent had nothing to do with this. According to the alternative proposal, evidence of assignment should not be provided in all cases, but only in a limited number of cases. If the Scandinavian States were partisans of this solution it was because it had proved its worth in their countries, and to relinquish it would mean a step backwards for these countries.

251. The Netherlands delegation felt that it would be illogical to require a deed of assignment where the invention simply was not transferred to the applicant but the employer was legally entitled to the invention, as under Netherlands law. As an

example, it quoted the case of a Netherlands employer filing a patent application in which both the Netherlands and Sweden were designated.

A further argument against the Scandinavian alternative proposal was that in almost all European patent applications, the nine States of the European Communities, which could only be designated jointly, would also be designated. Since Danish law required evidence of assignment to the applicant, such evidence would therefore always have to be produced if the application for all the States of the Community were not to be deemed as being withdrawn.

252. The Chairman shared the Netherlands delegation's view that if the Scandinavian proposal were adopted, the Second Convention would inevitably have to be supplemented in such a way that wherever an EC State were designated in the European application, evidence would have to be given of assignment to the applicant where the applicant and the inventor were not one and the same person.

253. The Swedish delegation raised the point that the Scandinavian countries' proposal was in no way intended to impose their legal solution on the other States of the Convention.

In the case referred to by the Netherlands delegation where it would be impossible to obtain a deed of assignment since assignment did not exist under Netherlands law, any other document from which this fact of law would be apparent would suffice. Thus, the Scandinavian proposal did not exclusively mention "deeds of assignment", but also "other documents establishing the applicant's right to the invention".

254. The Austrian delegation was prepared to support the Scandinavian proposal in principle, but found withdrawal of the application if the deed of the assignment were not submitted to be too severe a penalty in many cases. It suggested that if the deed of assignment were not submitted within 16 months, it should be possible, in exceptional cases, to submit the deed subsequently up to the end of the granting procedure. It was thinking here of cases in which it would not be possible for the applicant, for excusable reasons, to obtain the deed in due time, e.g. in the case of the death of the inventor.

255. In the United Kingdom delegation's view, the Scandinavian alternative proposal amounted virtually to the same thing as the main proposal which had already been rejected, since in view of the legal arrangements in Denmark, a deed of assignment would have to be submitted for all European applications in which a Community State was designated. The alternative proposal should therefore be rejected also.

256. The Finnish delegation suggested that the difficulties which might arise in the event of legal assignment could be resolved by requiring not "another document establishing the applicant's right to the invention", but any evidence establishing the applicant's right to the application. In the case referred to by the Netherlands delegation, reference to the fact that the employer would be entitled to the invention under Netherlands law would be sufficient evidence.

257. The Chairman considered that in this case also, the European Patent Office would still have to examine whether the national law cited did in fact result in assignment.

258. The Swedish delegation also felt that in the case of assignment, no deed of assignment should be required, but that the description of the content should suffice, and this should perhaps be confirmed by the inventor. However, it was unable to take the reference to the planned Convention between the EC States as an argument against the Scandinavian proposal.

259. In order to clarify the above point, the Chairman pointed out that if the Scandinavian alternative proposal were to be adopted, the Second Convention would have to be supplement-



ted in such a way that in the case of all applications in which the Community States were designated, evidence of assignment by the inventor to the applicant would have to be provided, for the reason that the national law of one Community State, i.e. Denmark, required this evidence.

260. The Italian delegation suggested that evidence of assignment should not be required where this was laid down in the national law of a designated State, but rather where the application originated in a State whose law required this evidence.

261. The delegation of the International Chamber of Commerce referred to the great difficulties which would arise for the European Patent Office if, on the basis of a deed of assignment or of any other document describing the circumstances, it had to examine whether the assignment actually took place. It thus warned against adopting the Scandinavian proposal.

262. At this stage in the discussion, the Chairman pointed to the fact that the Scandinavian proposal was not so much aimed at protecting the rights of the inventor; these rights could, indeed, be protected before the national courts with the aid of Articles 58 and 59 (60 and 61) or, at all events, by means of revocation proceedings under Article 138. However, the Scandinavian proposal had a farther-reaching aim, namely, to introduce evidence of the applicant's right at the stage of the granting procedure.

263. The French delegation pointed out that the Scandinavian alternative proposal led to the same difficulties as the main proposal. There were, indeed, cases in which evidence of assignment was not required, or was even impossible, at least under French law, since there were no authorities which could certify such an assignment. At all events, this might suggest a unilateral declaration by the applicant to the effect that he was entitled to the application under national law.

264. The Austrian delegation raised three points which it saw as problematic in the Scandinavian proposal, although it fundamentally supported the proposal.

Firstly, it considered the 16 month period for submitting a deed of assignment too severe in some cases. Nor was the possibility of the re-establishment of rights under Article 121 (122) satisfactory in every case. It thus reiterated its question as to whether this period should not be extended until the grant of the patent in certain cases.

Secondly, as regards evidence of legal assignment, it should suffice if, in accordance with the Swedish proposal, this evidence could be provided otherwise than by means of a document.

Thirdly, the Austrian delegation expressed doubts about whether the European Patent Office was actually obliged, in accordance with the Scandinavian proposal, to examine, on the basis of the document submitted to it, whether rights had in fact been assigned to the applicant. The basis for this should be that entitlement to file an application was determined by national law, pursuant to Article 58. Under this national law, it should therefore also be examined whether the document established assignment. The Austrian delegation could imagine that it should suffice for such a document to be submitted to the European Patent Office. However, it would like some clarification on this point.

265. The delegation of the Federal Republic of Germany pointed out that it was unable to accept the alternative proposal by the Scandinavian countries for the same reasons for which it was unable to accept the main proposal. However, since it was aware of the significance of the problem for the Scandinavian States, and since, on the other hand, the latter had declared that they did not wish to impose their own system on the other Contracting States, a compromise solution might

perhaps be considered. This could consist in the applicant, who was not the inventor, submitting a declaration to the European Patent Office when filing the application or at the latest within 16 months of its filing on the way in which the right to the European patent was transferred to him. If this declaration were not supplied in due time, the application would be deemed to be withdrawn. The content of the declaration should not be examined by the European Patent Office. There could also be provision for the Office to forward a copy of the declaration to the inventor to notify him that he was mentioned as such and how his right had been transferred to the applicant.

266. Also on behalf of the other Scandinavian delegations, the Swedish delegation said it could accept as a compromise the German proposal, even though it did not take all its desiderata into account. However, it appeared to this delegation to be important that the European Patent Office should notify the inventor that he had been mentioned as such.

267. The French and Swiss delegations supported this compromise proposal. The Swiss delegation explicitly agreed that a copy of the declaration to be submitted should be forwarded to the inventor, and added the hope that this would largely prevent the drawing up of incorrect declarations of assignment.

268. The United Kingdom delegation reserved its position on the compromise proposal until the interested circles had expressed their views on it.

269. In the EIRMA delegation's opinion, the compromise proposal which it supported was very suitable for avoiding excessive bureaucracy in the European Patent Office and in the industrial patent departments, and also for safeguarding the inventor's rights. If the inventor considered that the applicant were not entitled to the application, he could bring charges before a national court under Article 59 (61). Furthermore, the Scandinavian proposal, in its most recent form, would be unable to solve the problem which might arise if several applicants were not to mention as an inventor a person who had been associated with them in the invention. This person would no longer be able to safeguard his right in due time.

270. The UNION delegation was prepared to support the compromise solution even though it was not possible to dispel entirely the fear that the requirement for a declaration concerning assignment might delay the procedure.

271. The IFIA delegation also supported the compromise proposal.

272. The delegation of the International Chamber of Commerce also regarded the compromise proposal as an acceptable solution, which it furthermore took to mean that the requisite declaration on assignment would always have to be submitted, and not merely where the national law of a designated State laid down a similar regulation.

273. The FICPI delegation supported the compromise proposal, since it had made an identical proposal itself in M/48/I.

274. After hearing the statements by the interested circles, the Netherlands delegation pointed out that it could agree to the compromise proposal. It hoped that its practical application would not encounter any great difficulties, despite the fact that the European Patent Office would have to forward an estimated 10,000 declarations on assignment each year to inventors.

275. The United Kingdom delegation fundamentally regretted the fact that such a complicated solution had to be sought for the problem of mentioning the inventor. However, after hearing the interested circles, it was prepared to accept the compromise proposal provided that the following would be assured: the period for submitting the declaration on assignment should amount to 16 months; a simple declaration

should suffice as evidence of assignment, and further documents should not be required; the declaration should be required in all cases and not only where a designated State had corresponding regulations; the inventor should merely be notified of the application and should not receive a copy of the patent application; finally, the legal relationship between the applicant and the inventor or third persons should in no way be impaired by such a declaration.

276. The Chairman pointed out that he had understood the compromise proposal by the delegation of the Federal Republic of Germany as meeting the requirements laid down by the United Kingdom delegation.

He noted that (subject to its wording) no delegation had opposed the proposal, and asked the delegation of the Federal Republic of Germany to submit its proposal in writing so that a formal vote could be taken on it (see points 282 et seq., 321 et seq., 2038 et seq., 2047 et seq., 2090 et seq. and 2245).

277. The Swiss delegation said it was withdrawing its proposal on Article 58, paragraph 3 (M/54/I/II/III, page 11), which was merely intended as an alternative to the Scandinavian proposal.

278. The delegation of the International Chamber of Commerce raised the question of how to deal with a case where an initially correct designation of the inventor were to prove incorrect in the course of the procedure, for example if someone were designated in the application as one of a number of inventors but a claim for that part of the invention with which he had been associated were rejected. This delegation felt that it would be undesirable for this person also to appear in the patent specification as an inventor.

279. The Chairman recalled that in such a case, the designation of the inventor could be rectified in accordance with Rule 19, which would require the consent of the person concerned, however\*.

280. The delegation of the International Chamber of Commerce considered that this could not solve all conceivable problems, but saw no real possibility of improving Rule 19.

281. Regarding the suggestion made by the Yugoslav delegation that the inventor should not be designated if he wished to remain anonymous (see point 236 above), the Main Committee left it up to this delegation to submit an appropriate proposal in writing.

282. At a subsequent meeting, the Main Committee examined the compromise proposal which had been formulated in the meantime by the delegation of the Federal Republic of Germany in M/118/I (see point 276).

283. In this connection, the delegation of the Federal Republic of Germany pointed out that it proposed resolving the fundamental issue of the designation of the inventor in a separate Article. The first sentence of its proposal, whereby the inventor would have to be designated in the European application, had been decided by the Main Committee. The compromise suggested by it was contained in the second sentence, to the effect that if the applicant were not the inventor or not the sole inventor, the designation of the inventor would have to contain a declaration as to how the applicant acquired the right to the European patent.

284. The Chairman pointed to the fact that the wording of the German proposal meant that "identification of the inventor" would comprise identification of the inventor and the statement on the transfer of the right in cases where the applicant was not the inventor.

285. The Swedish delegation, which also spoke on behalf of the other Scandinavian delegations, could accept the compromise proposal subject to certain improvements in the drafting. Its thanks were due to the German delegation for the proposal, the unanimous adoption of which by the Main

Committee and by the Conference would be greatly appreciated.

286. The Yugoslav delegation drew attention to the fact that under Yugoslav law it was possible for a number of persons working in a firm or institute to be responsible for an invention without there being any need to designate the inventor. The questions arose as to whether such cases would be covered by the compromise proposal.

287. The delegation of the Federal Republic of Germany considered that such cases would be covered neither by Article 79 as it stood, nor by the version which it had submitted.

288. The Chairman pointed out that in the case referred to by the Yugoslav delegation, the principle of designation of the inventor as adopted by the Main Committee meant that corporate bodies responsible for inventions would have to be designated by name.

He went on to note that all the delegations were basically in agreement with the compromise proposal.

289. The Swedish delegation pointed out that the German version of the proposal contained in M/118/I differed from the English and French versions. As the proposal stood in German, the identification of the inventor would, under certain circumstances, have to contain a statement on the transfer of the right, whereas according to the other two versions the statement was simply to be attached. This difference could affect the sanction applied in cases where such statements were not provided. It considered that the sanction referred to in Article 90 (91), paragraph 5, i.e. whereby the application would be deemed to be withdrawn, should be applied in such cases. The Swedish delegation therefore suggested that the English and French be brought into line with the German version.

290. The Main Committee referred the matter to the Drafting Committee.

291. The French delegation wondered whether it could not be inferred from the proposal contained in M/118/I that omission of a statement on the transfer of the right implied that the applicant was the sole inventor. This seemed unjustified, and a better method would be to require applicants who were sole inventors to give notice to that effect.

292. The Netherlands delegation contended that applicants who were sole inventors should not be required to furnish a separate document to that effect.

293. The Chairman's opinion was that the Convention gave no grounds for inferring that applicants were in fact the inventors unless they gave some indication to the contrary. Even in cases where the applicant was the inventor, that fact would have to be indicated; such applicants would, however, simply omit the statement on the transfer of the right. Designation of the inventor would then be governed by Article 58 (60).

294. After due reflection the French delegation found the proposed text to be adequate on the premise that if the applicant were the sole inventor, he was bound to give indication to that effect in the application. If he were not the inventor, or not the sole inventor, he would have to include in the application a statement indicating the origin of the right to the European patent.

295. The Main Committee called upon the Drafting Committee to examine whether some clarification of Article 79 was necessary in the light of discussions on the matter (points 291 to 294)\*.

### **Article 81 (83) – Disclosure of the invention**

296. The Main Committee referred to the Drafting Committee a drafting proposal submitted by the French delegation (M/58/I/II).

\* For Rule 19, see points 2047 et seq.

\* No amendments were made to Article 79 by the Drafting Committee.



### **Article 85 (87) – Priority right**

297. The Netherlands delegation proposed (M/52/I/II/III, point 11) that *paragraph 5* be amended to ensure that a filing made in a State which was not a party to the Paris Convention would be recognised as giving right to a priority only if that State acknowledged as having priority effect not only filings made at the European Patent Office but also those made in the Contracting States.

298. The Main Committee adopted the proposal, which was supported by the Belgian, Danish and German delegations.

299. A further drafting proposal (M/32, point 15) concerning *paragraph 5* was submitted by the Netherlands delegation and referred to the Drafting Committee.

### **Article 86 (88) – Claiming priority**

300. The Netherlands delegation pointed out that under *paragraph 1* a translation was required, in the language of the proceedings, of all previous applications which had not been drawn up in one of the official languages of the European Patent Office. The Netherlands delegation considered that this discriminated to a certain degree against those applicants who had not been required to file previous applications in an official language of the European Patent Office, and therefore proposed that applicants be afforded the option of furnishing a translation in any one of such official languages (M/52/I/II/III, point 12).

301. The delegation of the Federal Republic of Germany supported this proposal.

302. The United Kingdom delegation held that this problem was of no great consequence in practical terms, on the grounds that applicants would, as a general rule, draw up initial applications in the language which they would subsequently select as the language of the proceedings. It was, however, prepared to support the proposal made by the Netherlands delegation, even though it should be made clear that where a European application was converted into a national application, the national patent office could require a translation of the previous application in its official language.

303. The FICPI and CNIPA delegations considered that the proposal by the Netherlands delegation embodied a considerable simplification of procedure.

304. The Swiss delegation initially opposed the Netherlands proposal, since the applicant was very likely to have had his earlier application translated into the language of the proceedings he himself had chosen; however, in view of the attitudes of the other delegations, it withdrew its objection.

305. The Main Committee thereupon adopted the proposal.

306. With regard to the problem of the translation of the earlier application in the event of the conversion of a European patent application (see point 302), which was raised by the United Kingdom delegation, the Chairman noted that the latter's view that the national office should be entitled to require a translation into its official language was, in any case, shared by the Netherlands delegation.

307. The Main Committee referred to the Drafting Committee a drafting proposal from the French delegation concerning *paragraph 1* (M/58/I/II).

308. With reference to its comments in M/48/I, Section C, page 7, the FICPI delegation proposed that it should be made clear in *paragraph 3* that, if necessary, multiple priorities could be claimed in respect of any one patent claim. If no such provision were made, the drafting of patent claims could, in certain cases, be extremely complicated.

309. The Danish delegation supported the proposal made by the FICPI delegation.

310. The Netherlands delegation considered the proposed addition to be superfluous since, in its view, Article 86 as it stood at present already provided for multiple priorities being claimed in respect of a single claim. However, it could agree to there being clarification to this effect.

311. The United Kingdom delegation was of the same opinion, but suggested that it should be left to the Drafting Committee to decide whether it would be better to clarify this point in Article 86 or to deal with it in the Implementing Regulations.

312. The delegations of CEIF, UNICE and the International Chamber of Commerce said they felt the same way as the FICPI delegation (see M/22, point 4 and M/19, point 8).

313. The delegation of the Federal Republic of Germany was opposed to the inclusion in Article 86 of a provision whereby multiple priorities could be claimed for any one claim. It thought that this problem should be left to the European Patent Office to settle on the basis of precedents and practice. It also pointed out that no such provision existed under German legal practice with respect to patents.

314. The FICPI delegation said that the question of whether a priority had been justifiably claimed could arise in the context of national revocation proceedings. It was therefore extremely desirable that the Convention should make it clear that multiple priorities could be claimed in respect of a single claim.

315. The CNIPA delegation endorsed this view.

316. The IAPIP and the UNION delegations said that, to their knowledge, multiple priorities for a single claim could, as a rule, also be claimed under German law.

317. The delegation of the Federal Republic of Germany finally withdrew its reservations regarding the amendment proposed by the FICPI delegation, and it was thereupon adopted.

### **Article 87 (89) – Effect of priority right**

318. A suggestion by the IAPIP delegation that Article 87 should refer to Article 74 with regard to divisional applications failed to receive the support of any of the governmental delegations.

319. The Chairman pointed out that the question of how far the divisional application enjoyed the priority right of the earlier application was dealt with explicitly in Article 74, paragraph 2 (Article 76, paragraph 1).

### **Article 90 (91) – Examination as to formal requirements**

320. Following the fundamental decision on the issue of the identification of the inventor which it took at an earlier meeting (see points 247, 265 and 276), the Main Committee discussed drafting amendments to Article 90 on the basis of a proposal put forward by the delegation of the Federal Republic of Germany (M/118/I).

321. The delegation of the Federal Republic of Germany said that the purpose of its proposal concerning *paragraph 1(f)* was to make it clear that identification of the inventor had to comply with Article 79 (81); that is, that the applicant had to identify the inventor and, where he himself was not the inventor or not the sole inventor, also indicate the origin of his right to the European patent. Furthermore, it had been necessary to amend *paragraph 5* to take account of the fact that identification of the inventor was now necessary for all Contracting States. The details relating to the identification of the inventor would continue to be laid down by Rule 17, for which a redraft would also be proposed (see points 2038 et seq.).

322. In reply to a question put by the Swiss delegation regarding *paragraph 5*, namely, what exceptions from the time limit of 16 months were provided for in the Implementing Regulations, the delegation of the Federal Republic of Germany referred to Rule 42, paragraph 2, governing divisional applications, pointing out that, without this provision, divisional applications could, in certain cases, be deemed to be withdrawn before they were filed.

323. In connection with Article 90, paragraph 5, the Austrian delegation raised the question of whether an application also had to be deemed to be withdrawn if, after the time limit of 16 months for correction of the identification of the inventor had expired, it should be ascertained — for example, on the basis of a subsequent court ruling — that in addition to the person A and B designated in the application there was a further joint inventor C.

324. The Chairman thought that such an eventuality would have to be dealt with under Rule 19, which provided for rectification of the designation of an inventor. It considered that this Rule ought to apply not only in the event of incorrect designation — for example where A and B were not the inventors at all — but also in the case of incomplete designation, as described by the Austrian delegation. He maintained that Rule 19 was valid for the whole duration of the proceedings, and therefore if the applicant learnt of the existence of another joint inventor, he would have to file a request for rectification in accordance with Rule 19. He did not consider that Article 90, paragraph 5, applied here, particularly as the European Patent Office did not investigate whether the identification of the inventor was accurate\*.

325. The Austrian delegation said that it was satisfied with this reply.

326. In another connection (see point 2093), the FICPI delegation queried whether identification of the inventor could also be rectified within 16 months in cases where the applicant was himself the inventor.

327. The Chairman could not see any objections to the assumption that the identification of the inventor could also be rectified within 16 months in such a case.

328. The Chairman noted that the Main Committee adopted Article 90 — subject to amendment of the wording.

### **Article 92 (93) — Publication of a European patent application**

329. The delegations of the Federal Republic of Germany and the Netherlands, supported by the Swedish delegation, proposed that the publication of the abstract which, under the original Regulations (Rule 50) was left to the discretion of the President of the European Patent Office, should be made compulsory in *paragraph 2*, in the same way as the publication of the search report was already compulsory (M/47/I/II/III, point 16 and M/32, point 17).

330. The United Kingdom delegation opposed this proposal. It considered that, as publication of the abstract was a purely administrative matter, it was preferable to continue to leave it to the discretion of the President of the European Patent Office.

331. The French delegation was also in favour of keeping the original flexible solution. Above all, it should be left to subsequent practice to show whether the abstract, which was intended merely for documentation, would be best published in the form of an appendix to the published patent application or separately.

332. In the ensuing vote, 10 delegations were in favour of the proposed amendment, 4 delegations against it and there were 2 abstentions.

\* For Rule 19, see points 2047 et seq.

### **Article 93 (94) — Request for examination**

333. The COPRICE delegation said it in no way wished to challenge the basic principle of immediate examination laid down in Article 93, but wondered whether the flexibility given in Article 94 would really prove a sufficient solution should it transpire that the European Patent Office, particularly at the beginning of its activities, were unable to examine European patent applications in due time. In such a case, to extend the Patent Office's activities to all areas of technology only gradually — which would be feasible under Article 161 (162) — was something that should be avoided, if at all possible. It therefore asked for consideration to be given to the possibility of extending from six to twelve months the time limit laid down in *paragraph 2* for the filing of requests for examination.

334. This proposal was endorsed by the Italian delegation, which referred to a similar suggestion made by the delegation of the Standing Conference of the Chambers of Commerce and Industry (M/18, point 10).

335. The proposal failed to receive the support of any of the other Government delegations.

336. The UNION delegation felt that it was difficult for the applicant to ascertain from what point in time the period within which requests for examination could be filed began to run. It would be preferable to lay down that the period for filing a request for examination ended with the publication of the search report, provided 24 months had elapsed since the date of filing or priority.

337. The Chairman pointed out that, under Rule 51 (50), paragraph 1, the European Patent Office had to inform the applicant of the publication of the search report and of the date of expiry of the period for making a request for examination.

338. The FICPI delegation countered that the possibility of the European Patent Office's making a mistake when making this notification could not be ruled out entirely. In this (albeit highly improbable) case, the European Patent Office would, pursuant to Rule 51, paragraph 2, bear no liability. It therefore wholeheartedly supported the UNION delegation's suggestion, having already submitted a similar one itself in writing (M/15, points 43 to 46).

339. The Chairman replied that information under Rule 51 (50) would subsequently be communicated by means of standard forms — possibly using a computer — so that the possibility of errors or omissions by the European Patent Office would be reduced to a minimum. Nonetheless, the procedure for the communication of information to the applicant under Rule 51 could perhaps be further improved\*.

340. The Chairman noted that no Government delegations were in favour of the suggestion put forward by the UNION and FICPI delegations.

### **Article 94 (95) — Extension of the period within which requests for examination may be filed**

341. With reference to its comments in M/16, point 10, the COPRICE delegation suggested that provision should be made in *paragraph 1* for the Administrative Council to extend the time limit for the filing of requests for examination where this was in the general interest.

342. The Italian delegation supported this suggestion, since it too considered it desirable to have greater flexibility as regards extension of the time limit.

343. The delegations of the Federal Republic of Germany and of the Netherlands explained that despite their favouring a system of deferred examination, they no longer considered that there was any point in resuming the discussion of this problem.

\* See also points 2261 et seq.

They were thus in favour of not amending the present wording of paragraph 1.

344. The UNION and IAIP delegations suggested deleting paragraph 1 in order to exclude any extension of the period for filing requests for examination, in the interests of a rapid examination procedure. The UNION suggested as an alternative the possibility of limiting the extension of the period to 18 months.

345. The French and Swedish delegations emphasised that the present version of Article 94, paragraph 1, represented a compromise for them from which no further departures should be made.

346. In conclusion, the Chairman noted in relation to paragraph 1 that COPRICE's suggestion was not supported by a second Government delegation and that the suggestion of the UNION and IAIP was not supported by any of the Government delegations.

347. The Swedish delegation, supported by the Danish and Norwegian delegations, proposed amending *paragraph 2* in such a way that third parties would quite simply be able to request examination if the period for request for examination were to be extended by the Administrative Council (M/54/I/II, point 6).

348. The United Kingdom and Netherlands delegations were opposed to this proposal. They felt that there would be no point in entitling third parties to request examination in every case where the period for requesting examination were extended — including for example only short or temporary extensions. The present solution was preferred since it was more flexible.

349. In the subsequent vote, 5 delegations were in favour of the proposed amendment, 8 delegations were against it and 4 delegations abstained.

#### **Article 96(97) — Refusal or grant**

350. As already mentioned in connection with Article 14, paragraph 7 (see point 14), the Netherlands delegation proposed laying down in Article 96 that the applicant should submit, within a certain period, translations of the claims in the two official languages other than the language of the proceedings (M/52/I/II/III, points 2 and 13). It supported this with the following arguments.

Firstly, it had hitherto been prescribed throughout the Convention that the applicant himself should file translations, whether of the application or of the patent. There were no grounds for making exceptions in the case of the translation of the claims. Secondly, for the Contracting States which were members of the European Communities, a remarkable situation would arise, with regard to the planned Convention for the European Patent for the Common Market, since this provided for the translation of the claims in the five official languages of the Contracting States of the European Communities. It would be a strange situation if the applicant himself had to supply the translations in three of these languages, whereas the translations into two languages, other than the language of the proceedings, would be undertaken by the European Patent Office. Thirdly, for the translation to be carried out by the European Patent Office, a large number of technically qualified translators would be required for all areas of technology, which was hardly necessary, however, since the applicant who would have precise knowledge of the technical context of his invention, could best translate the claims himself. Fourthly, it had been mentioned in the discussions up to that stage that since the patent was involved, the claims should also be drawn up by the European Patent Office, or at least checked by it. Such checks could also be considered if the applicant himself were to submit the translations. However, the Netherlands

delegation felt that these translations were unnecessary since, under Article 68 (70), only the patent in the language of the proceedings was authentic. The translations could attain some significance only in relation to Article 68 (70), i.e. if a Contracting State were to provide that a translation in its official language should be authentic for cases where protection conferred by the patent in that language were narrower than in the language of the proceedings. But then the strange situation would arise where, as far as the claims were concerned, the European Patent Office's version would be decisive, and, as far as the description was concerned, the applicant's version would be decisive.

351. The Swedish and Italian delegations supported the Netherlands proposal.

352. The Main Committee first examined the question of principle, and later discussed the matter of the period for submitting the translation (see point 374).

353. The delegation of the Federal Republic of Germany opposed the proposal by the Netherlands, and referred to its own proposal in M/47/I/II/III, points 5 and 29.

It felt that the solution which was planned by the Member States of the European Communities in the Second Convention could play no part in the arrangements in the First Convention.

It had hitherto never been questioned that very great significance was attributed to the claims translated into the other two official languages. It was not always true that this translation could in every case best be undertaken by the applicant himself. This might perhaps hold true in the case of large industries, but was certainly not valid in the case of individuals or of small firms. The best way of guaranteeing that claims were well translated would be for the European Patent Office to do the translation and for the applicant subsequently to be given an opportunity to examine, and, where appropriate, to improve it. This was what it had proposed in M/47/I/II/III, point 29.

354. The United Kingdom delegation said that its previous very firm convictions on this matter had been shaken by the arguments put forward by the Netherlands delegation. It nonetheless considered that certain aspects of the problem still needed clarification, such as that of the time limit for submitting translations and who was to pay for them. Before it gave its final views, it would like to hear the opinions of the interested circles.

355. The Austrian delegation said it was in principle prepared to accept the Netherlands proposal, but wished to be clear as to how an incorrect translation of patent claims would be dealt with. It thought it might be dangerous if the European Patent Office refused to accept a manifest mistranslation, on the grounds that the requirement for the application was not satisfied, and if the application were consequently deemed to be withdrawn. It did not consider it would be dangerous even if an obvious mistranslation had to be accepted by the Patent Office; but in this case it did seem somewhat contradictory that the Patent Office should be able to exert no influence over the accuracy of the translation.

356. The Netherlands delegation pointed out that only the claims in the language of the proceedings, and not those which had been translated, bore any legal weight. The only possible exception would be in the case of Article 68 (70), paragraph 3: pending rectification, an incorrect translation of the claims together with an incorrect translation of the description supplied by the applicant could determine the protection of the patent. But even so, such a consequence would be ruled out for the States of the European Community under the Second Convention.

357. The Chairman added the comment that, in his view too, incorrect translations of the claims before the European Patent

Office should be recognised as translations. The only question was how much success the applicant would have with these incorrectly translated claims in any subsequent infringement proceedings.

358. The French delegation was inclined to support the Netherlands proposal on the grounds that, in the majority of cases, the applicant would be in a position to supply good translations of patent claims. If he were unable to produce them himself, he would use the services of a patent agent. However, it was not advisable to dispense entirely with examination by the European Patent Office of translations, for it would be a risky matter to grant a European patent on the basis of incorrectly translated claims.

The French delegation therefore wondered whether it might not be advisable for the European Patent Office to be empowered to examine and assess translations of claims.

359. The Chairman pointed out that the checking of translations by the European Patent Office rendered illusory the advantages aimed at by the Netherlands proposal.

360. In the opinion of the Swedish delegation, there was always the danger, if the European Patent Office were to translate claims itself, that such translations would acquire a certain legal status — especially in infringement proceedings before national courts.

361. The WIPO delegation said that for applications under the PCT which specified the European Patent Office as the designated office, Article 22 of the PCT would conflict with Rule 49, paragraph 2, under which the designated office could require a translation of an application in only one of its official languages. If the application already existed in one of these languages, no translation could be required. What held for the application as a whole must hold for one of its most important parts, namely the claims. The result was thus that for such applications under the PCT, the applicants could not be required to provide translations into the two official languages of the European Patent Office which were not languages of the proceedings.

362. The Netherlands delegation said that, for the time being, it could not go along with this interpretation of the said provisions of the PCT. The limitation mentioned might possibly apply to that part of the procedure in which the application under the PCT is forwarded to the designated Office. It could not, however, apply for the entire duration of the procedure up to the grant of the patent. Otherwise not only the whole language system of the Second Convention, but also Article 63 (65) of the First Convention, would be superfluous.

363. The WIPO delegation replied that in its view the aim of the said provisions of the PCT was to protect the applicant from having to supply multiple translations. The limitation must therefore apply for the entire duration of the granting procedure; after the grant of the patent, however, that limitation could no longer obtain.

364. The FICPI delegation said that small and medium-sized firms applying for patents would perhaps not be able to assess correctly the degree of protection afforded by a translated patent claim, especially in view of the implications, as already mentioned, of Article 68 (70), paragraph 3. A far better solution would be for the applicant to be responsible for translating the claims himself or, if he were not in a position to do so, for having the translation done by an experienced translator. It should also be borne in mind that authorities were in general inclined to be narrow rather than broad in their interpretation, and so presumably would be more likely to interpret translated claims in a narrow sense. The German delegation's proposal did at any rate provide a certain remedy. As the FICPI delegation understood it, in cases where the applicant did not agree with the translation made by the European Patent Office,

the patent would have to be published both with the translation of the claims made by the Office itself and the claims as translated by the applicant. If such were the case and it could be ascertained that, under the terms of Article 68, paragraph 3, the applicant would suffer no detriment from the narrower interpretation, the FICPI delegation would support the German delegation's proposal; otherwise, it would support the Netherlands delegation's proposal.

365. The UNICE delegation said that it fully supported the Netherlands delegation's proposal. It did not think it either necessary or even desirable for the European Patent Office to have to check translations of claims submitted by applicants, since it would already have a great deal of work to do.

366. In the opinion of the EIRMA delegation only the applicant or a person appointed by him should be responsible for the translation of claims. Only in this way would it be possible to avoid disputes between applicants and examiners or translators as to the correctness of the translations. Official translations of claims would constitute a risk for the European Patent Office if, in subsequent infringement proceedings, the applicant were to lose his case because the national court relied on the correctness of the translation. The EIRMA delegation therefore supported the Netherlands delegation's proposal.

367. The delegation of the International Chamber of Commerce subscribed to the argument advanced by the Netherlands delegation. It added that in its view the people best qualified to carry out translations of patent claims were not translators but patent agents, who combined, as nobody else could, a thorough technical knowledge with a knowledge of languages. Furthermore the argument that translations by the European Patent Office would be of an official nature was dangerous. The International Chamber of Commerce delegation therefore supported the Netherlands delegation's proposal, with the proviso that adequate time be allowed the applicant for the production of the translation.

As regards the interpretation of the provisions of the PCT referred to by the representative of WIPO (see point 361 above) the following should be noted: in negotiations concerning these provisions it had always been assumed that the limited obligation on the applicant to supply a translation of his application should only apply to the application stage; it had been intended that thereafter each national legal system would make provision for the appropriate measures. If this were not to be so, some provisions of national law would conflict with the PCT.

368. The IAPIP delegation said that translations of patent claims should be precise in the interests both of the applicants and of the public but in the final analysis would have no significance. Only claims in the language of the proceedings were decisive. From the practical point of view, there were three reasons why the applicant himself should supply the translations: he was best placed to be able to do so, he was the best qualified to assess the invention, and he also had an interest in the claim's translations being as precise as possible. Furthermore, because translations of claims had no legal significance they could not be official in any way either. Finally, there was a case for aligning the provisions of the First Convention with those of the Second which provide that translation will be the responsibility of the applicant alone. For these reasons it supported the Netherlands delegation's proposal.

369. In the opinion of the UNION delegation the advantages of the Netherlands delegation's proposal were not only the fact that the translation of claims could be complicated, but also the time factor: it would be deplorable if the processing of an application were to be delayed because the claims were difficult to translate and because no qualified translators were available

for a specific area of technology. Of course the applicant also required a certain time to have translation carried out, but this could be kept relatively short. Furthermore, in order to make it clear to the public that the only valid claims were those in the language of the proceedings, a note to that effect could be added to the patent specification.

370. The Chairman said that in his opinion two further problems deserved attention in connection with deciding the question of translations: the problem arising out of the PCT and the question of the time to be allowed the applicant to produce the translation; the latter was certainly still to be settled. As for the problem arising out of the PCT, no one was in a position to give precise information for the moment; he agreed, however, with the Netherlands and the International Chamber of Commerce delegations that the PCT was not intended to prevent the Contracting States from requiring an applicant to provide a translation in their official languages of a patent which had been granted. Such a solution had inevitably met with resistance not only in the context of the regional patent but also from Contracting States which had more than one official language and wanted to have the patent translated into all of them. Even if one assumed that the solution proposed by the Netherlands delegation was not permissible under the PCT, it would in any case be valid for the purely European application.

371. The delegation of the Federal Republic of Germany did not think that the discussion so far had stressed sufficiently clearly the significance of the translation of the claims into the two other official languages of the European Patent Office. Translations should in the first place give competitors as clear an indication as possible of the extent of the applicant's protection. Competitors could not be assured to have an equally good mastery of all three official languages, although they would probably understand one of them sufficiently well to appreciate the extent of the protection threatening them. If the preparation of translations of claims were left to applicants, there would be no guarantee that they would be even approximately correct. Applicants would in particular try to phrase translations as widely as possible, especially in view of the implications of Article 68 (70). It was no disadvantage to the applicant if the translation were too wide, because he would obtain protection in any case. That would give a false impression of the extent of the protection to those who could not read the application or the claims in the language of the proceedings. As a result competitors would be obliged to have their own translations done from the language of the proceedings; and that would be a further multiplication of translation work.

As regards the problem of who would be best suited to translate the claims, the following should be noted: the applicant himself could only do the translation if he were a linguistic genius. Even if he were a specialist in the field of his invention, he could not be expected to translate the claims into the two other official languages. In the opinion of the German delegation, the best translators would be the examiners from the examining divisions which, as has already been decided, would be composed of three technical specialists who would have to have knowledge of languages. It followed that the translation should be carried out by these examiners, possibly in conjunction with the technical translators of the European Patent Office. The interests of the applicant would therefore be protected, since it would be open to him to provide an even better translation.

The system outlined in the German proposal gave no grounds for the fear that processing might be held up because the Patent Office was producing the translation of the claims. If the applicant did not agree with the translation, he could

provide a corrected version, which would then be published with an indication that it had been produced by the applicant.

The German proposal sought to obviate liability on the part of the European Patent Office for the translation, by giving the applicant the opportunity to inspect it.

The question of the compatibility of the Convention with the PCT should not be considered too lightly. Should it transpire that the amendment proposed by the Netherlands delegation could not be reconciled with the PCT, the greatest difficulty might be encountered in ratifying the two documents. It would be regrettable if the PCT could not be ratified for this reason.

In conclusion, the delegation of the Federal Republic of Germany asked all the other delegations to consider these arguments once more before the ballot.

372. The United Kingdom delegation said that in view of the comments of the Observer delegations it would support the Netherlands delegation's proposal. As regards its compatibility with the PCT, a realistic standpoint — in line with the Chairman's view — should be adopted; if there were any question of having really gone astray, the relevant PCT rules could always be changed later.

373. The CNIPA delegation subscribed to the views of the other delegations and supported the Netherlands delegation's proposal.

374. As to the time to be allowed the applicant for the submission of the translation, the Chairman said that the Netherlands delegation's proposal (M/52/1/II/III, point 13), which made reference to the time allowed by Article 96, paragraph 2 (b), and to Rule 52, paragraph 4, would allow the applicant only one month to do this, and he wondered whether this was really long enough.

With the agreement of the Netherlands delegation, which was prepared to provide the same period for this purpose as allowed by Article 63 (65), paragraph 1, — three months — the Chairman put the question, to the Observer Delegations especially, whether a period of three months seemed adequate for the provision of translations of claims. Furthermore, in his opinion it might be appropriate for this period to be of the same length as that allowed for the payment of the fees for grant and printing (Rule 52 (51), paragraph 4), that is the latter should be extended to three months.

The Chairman noted that the Observer Delegations were in agreement with a period of three months' being allowed for the provision of translations.

375. The United Kingdom delegation pointed out that if the period allowed for the payment of the fees for grant and printing were to be extended from one to three months, the period laid down in Article 96, paragraph 4, would have to be extended from three months to five in order to maintain the two months provided for printing the specification.

376. The Swiss delegation supported the German delegation's proposal. Of course the translations of claims had no legal significance, but many third parties would nevertheless place the greatest reliance on them. If it were left to applicants to provide translations and reference were then made, upon publication, to their non-binding nature, they would no longer have any significance at all. So it would be better to dispense with them altogether. Even in Switzerland, where patents were published in only one of the three national languages, the need had never arisen for translations into the other two. It therefore requested that consideration be given to dispensing completely with the translation of claims.

377. The Chairman pointed out that in debating Article 14, paragraph 7 (see point 14 above), the Main Committee had already decided that claims were to be translated from the language of the proceedings into the two other official languages. For this point to be discussed again, the Rules of

Procedure required a two-thirds majority of the Government Delegations to be in favour of it. Enquiry showed that this was not the case.

378. In the ensuing vote, nine delegations were in favour of and three were opposed to the Netherlands delegation's proposal. Four delegations abstained.

The Chairman noted that the proposal was therefore adopted on condition that the period of three months laid down in Article 96, paragraph 4 (Article 97, paragraph 5), be extended to five and the period of one month laid down in Rule 52 (51), paragraph 4, be extended to three\*.

379. After the discussion had been closed and a vote taken on Article 96 (97), paragraph 2 and Rule 52 (51), paragraph 4, the Swiss delegation made a proposal at a subsequent meeting that the matter be discussed again with the intention of having the provision which hitherto had been in the Convention transposed to the Implementing Regulations (M/92/I). It said that it no longer wished to call into question the decision reached by the Main Committee to the effect that translations of claims into the two other official languages should be provided by applicants and published by the European Patent Office without examination. Its only desire was that this arrangement be laid down in the Implementing Regulations rather than in the Convention.

The Main Committee recommended, by nine votes to two with five abstentions, that this problem be discussed again within the limits proposed by the Swiss delegation.

380. The Swiss delegation based its proposal for the transposition of the accepted requirements to the Implementing Regulations on the contention that the Administrative Council must have the power to amend the regulations now laid down should it emerge that it did not achieve the sought-after goal of reliably informing third parties of the scope of the European patent.

381. The French delegation supported the Swiss delegation's proposal.

382. The Netherlands delegation remarked in this connection that it would be risky also to transfer to the Implementing Regulations, as a corollary to the Swiss proposal, the penalty of deemed withdrawal applicable in cases of failure to supply translations in time. The goal sought after could also be achieved if in Article 31 (33), paragraph 1, the Administrative Council were given the power to amend Article 96 of the Convention in the desired manner, as the Swiss delegation itself had indicated in its document M/92/I.

383. The United Kingdom delegation thought that an attempt should be made to keep the penalty in the Convention itself if it were at all possible.

384. The Main Committee accepted the reasoning behind the Swiss proposal and referred it to the Drafting Committee with the instruction that the penalty of deemed withdrawal of an application in the event of non-provision of translated patent claims in due time was to be provided for in the Convention if possible\*\*.

385. The Swiss delegation asked what was meant by *paragraph 2(c)*: before the grant of a patent could be decided, must renewal fees due and additional fees due be paid, or renewal fees not yet due, plus additional fees?

386. The Chairman understood this provision to mean that only renewal fees and additional fees that were already due had to be paid before the grant of a patent was decided, while fees falling due after the grant of a patent had been decided were payable to national patent offices.

#### **Article 97 (98) — Publication of a European patent**

387. The UNICE and CEIF delegations expressed the wish that on publication of a European patent the documents

referred to by the examiners be cited. This rule, which had moreover proved its worth in many countries, would permit third parties to form their own judgments as to the legal validity of patents and would also help to establish the state of the art. The publication of the search report would not suffice for these purposes since search reports could omit documents which were important in the grant of a patent and adduce others which were unimportant.

388. The Netherlands delegation felt that this wish was justified, but that there was no need to amend Article 97 for it to be fulfilled; under Rules 50 (49) and 54 (53), the President of the European Patent Office could prescribe the inclusion of such data in the specification.

389. The Chairman noted the Main Committee's view that under the Implementing Regulations the President of the European Patent Office should prescribe that documents which were important in the grant of a patent be cited in the publication of a European patent.

#### **Article 98 (99) — Opposition**

390. The Norwegian delegation, supported by the Swedish delegation, requested that the opposition fee be done away with; it wanted the opposition procedure to be regarded as a useful addition to the examination procedure (see M/60/I, page 3).

391. The French delegation opposed this request. It saw a great danger that, if no fee were payable, notice of opposition would all too often be filed which was unfounded. Interested circles in France thought that, on the contrary, the opposition fee had to be fixed high enough to prevent the filing of unfounded opposition.

392. The Swiss delegation supported these comments. It also pointed out that under Article 114 (115) any third party could present observations after the publication of a patent. Furthermore, the opposition procedure was far more than an extension of the examination procedure; it was a procedure in the interest of the patentee's competitors in the same way as revocation proceedings.

393. The United Kingdom delegation supported the arguments of the French and Swiss delegations.

394. In the ensuing vote four delegations were in favour of and ten opposed the Norwegian delegation's request; three delegations abstained.

395. The UNION delegation proposed that the period allowed for filing opposition be shortened from nine months to six. It was in the interest of both the patentee and the public for the legal situation to be ascertained as soon as possible. A period of three months would be too short since the patent had still to be translated into other languages, but nine months was definitely too long.

396. The EIRMA delegation supported these remarks and added that because of the Main Committee's decision regarding Article 96, paragraph 4 (Article 97, paragraph 5) (see point 378 above), the period allowed for filing opposition should start two months later than hitherto provided. And if one took into consideration the fact that appeals could still be filed against the period fixed for filing opposition, it must be admitted that the uncertainty whether a patent held good or not could last far too long.

397. The COPRICE and CEIF delegations also supported the proposal that the period allowed for filing opposition be shortened.

398. The Chairman recalled that the problem of the period allowed for filing opposition had already been debated several times. Nine months had been arrived at as follows: one consideration was that many States whose national languages

\* See points 2273 et seq.

\*\* See Article 97, paragraph 5, of the Convention and Rule 51, paragraph 4, of the Implement Regulations.

were not official languages of the European Patent Office wanted translations of specifications and publication of those translations to be required; three months each had been agreed on for translation and publication. The remaining three months had been considered as time for consideration by the patentee's competitors in that State.

399. The Netherlands and Swiss delegations took up the Observer delegations' point. The Netherlands delegation stressed that as a result of the Main Committee's decision the applicant should provide translations of the patent claims into the two other official languages of the European Patent Office (see point 378), the period of time specified in Article 96, paragraph 4, would probably have to be extended by two months, with the result that that extra time would be gained for translation. It thus seemed justified to shorten the time allowed for filing opposition correspondingly.

400. The United Kingdom delegation did not want the period of nine months allowed for filing opposition to be changed immediately. If it were to emerge later that it was too long, the Administrative Council could always shorten it then. It was also worthy of note that the United Kingdom's experience of shorter time limits had been unfortunate, in that notices of opposition had not been drawn up with sufficient care and had had to be amended later.

401. The delegation of the Federal Republic of Germany thought that competitors should in any case have six months in which to give notice of opposition. Consideration had also to be given, however, to competitors in other countries who would probably require translations of patents in their own languages; in such countries — for example Sweden — the patent would only be available for examination in the national language much later, with the result that even in the event of a nine-month period for filing opposition those competitors would be much worse off than those in countries whose national language was the language of the proceedings. The period should be allowed to stand at least for the present.

402. The Swedish delegation thought that the period of nine months which had been agreed upon hitherto should be used to start with and that it should be left to the Administrative Council to make any reduction in this period on the basis of practical experience.

403. The Netherlands delegation pointed out that the time allowed for providing translations of specifications under Article 63 (65), paragraph 1, started from the moment when an applicant was informed by the European Patent Office of the form which it was intended the grant of a patent would take. Only after these three months, which were to be extended to five, could mention of the grant be made in the European Patent Bulletin. The period allowed for filing opposition only began with the publication of that mention. In all, that amounted to fourteen months and it would therefore be quite justifiable to reduce the period allowed for filing opposition to, for instance, seven months.

404. The Norwegian delegation, taking into account the views of interested circles in Norway, was in favour of retaining the present period.

405. The Irish delegation did not think that the period for filing opposition should be changed for the time being.

406. In the ensuing vote, three delegations were in favour of reducing the period for filing opposition to six months, ten were in favour of retaining the nine-month period, and three delegations abstained.

407. The Member States of the European Communities proposed that a *new paragraph* provide that opposition might still be filed even where the patent had been surrendered or had lapsed for all designated States (see M/14, point 4).

408. The United Kingdom delegation explained this proposal

by pointing out that the effect of a patent's being surrendered or lapsing was immediate, but that there might be residual legal effects which could appropriately be removed subsequently by means of the opposition procedure.

409. The Main Committee adopted this proposal.

410. The Netherlands delegation said that *paragraph 4* constituted an exception to the principle of the uniform treatment of proprietors laid down in Article 117 (118) in that a previous proprietor and the person who replaced him in respect of a designated Contracting State were not treated as joint proprietors. It followed therefore that two separate patents would be involved, which might turn out quite differently as regards claims, descriptions and so on. Because of this fact textual drafting changes would probably have to be made in the Implementing Regulations.

411. The Chairman noted that this was also the view of the Main Committee.

### **Article 99 (100) — Grounds for opposition**

412. The Main Committee referred to the Drafting Committee a proposal for the rewording of *sub-paragraph (b)* of this Article by the delegation of the Federal Republic of Germany (M/11, point 26).

### **Article 100 (101) — Examination of the opposition**

413. The Norwegian delegation withdrew its proposal concerning Article 100 (M/28, point 10).

### **Article 101 (102) — Revocation or maintenance**

414. A proposal by Member States of the European Communities concerning the wording of *paragraph 2* (M/14, point 5) was referred to the Drafting Committee.

415. As regards *paragraph 3*, the Main Committee decided that, in the same way as it had been laid down that the applicant would be required to have the patent claims translated into the two other official languages of the European Patent Office (see point 378 above), the proprietor of the patent would have to supply a translation of any claims changed as a result of opposition proceedings.

### **Article 103 (104) — Costs\***

### **Article 104 (105) — Intervention of the assumed infringer**

416. A proposal by the delegation of the Federal Republic of Germany concerning the wording of *paragraphs 1 and 2* (M/47/I/II/III, point 41) was referred to the Drafting Committee.

417. In connection with *paragraph 1*, the Swiss delegation proposed that a third party should also be allowed to intervene in opposition proceedings if he showed that, after being warned of infringement by the proprietor of the patent, he had instituted proceedings against the proprietor of the patent in order to have a ruling that he was not infringing the patent (see M/54/I/II/III, page 15). This remedy was available under the law of a number of countries and had proved to be of value.

418. The UNICE delegation supported this proposal. It stressed, however, that warning by the proprietor of the patent could not be considered sufficient grounds for intervention, but that a party wanting to intervene would have to have started proceedings for a ruling.

419. The CEIF and UNION delegations, the latter making reference to its own proposal in M/28, point 8, also supported this proposal.

\* For an explanation of these Articles, see points 2012, 2015 and 2016.



420. The EIRMA delegation suggested that Article 104 (105) be completely deleted. Discussion of the length of time to be allowed for filing opposition had shown that nobody wanted to extend this period more than was necessary for legal certainty. There was a danger here in the case of intervention that the opposition procedure might be held up. At the moment, however, there was no need to provide for intervention since the assumed infringer could both file opposition within the permitted period and/or initiate an action for revocation in national courts.

If Article 104 were to be retained, the time limits set for the grant and opposition procedures would have to be reconsidered in the interests of the research-oriented industries.

421. The Chairman replied that no extension proper of these periods was involved since opposition proceedings had to be in progress already. Article 104 was intended to protect third parties, against whom proprietors of patents had not initiated infringement proceedings until after the expiry of the period allowed for filing opposition, from having to initiate revocation proceedings in a number of national courts.

He further noted that the suggestion that Article 104 be deleted had not been taken up by the delegation of any Government.

422. In response to the Swiss delegation's supplementary proposal, the French delegation said that there was no provision in French law for actions intended to produce such negative rulings. It also wondered whether there was not a certain difference between the present provisions of paragraph 1, which the French delegation understood as being in the interest of the proprietor of the patent, and the Swiss delegation's proposal, which might in fact cause the procedure to be more drawn out than before. In the event of a vote on the matter the French delegation would probably abstain.

423. The Chairman concluded by establishing that no Government Delegation opposed the Swiss proposal and that the proposal was therefore adopted.

#### **Article 105 (106) — Decisions subject to appeal**

424. The Main Committee adopted a proposal by the delegation of the Federal Republic of Germany that paragraph 1 be amended to the effect that appeals should also lie from decisions of the Legal Division (M/47/I/II/III, points 6 and 17).

425. The Main Committee noted a proposal by Member States of the European Communities that a *new paragraph* be included (see M/14, point 6).

426. The Main Committee referred to the Drafting Committee a proposal by the Luxembourg delegation (M/9, point 17) and two proposals by the delegation of the Federal Republic of Germany (M/11, points 28 and 29) concerning the wording of *paragraph 2*.

427. With the support of the Netherlands and Austrian delegations, the Swedish delegation suggested that in *paragraph 4*, because of the minimum permitted amount for an appeal against a decision fixing the amount of costs, no reference be made to the Implementing Regulations; the minimum amount should be fixed by the Convention itself or — a second possibility — by the Rules relating to Fees (see M/54/I/II/III, page 16).

As regards the figure for this minimum amount, consideration might be given to fixing it at three times the opposition fee, which had been fixed at present at 20 UA (equal to about DM 140.00). If three times the opposition fee were reached or exceeded, then it would no longer be a question of a small amount, and appeals against decisions fixing the amounts of costs would be in order.

428. The United Kingdom delegation reminded the meeting that the appeal fee would also be high and was expected to be 50 UA. If the minimum payment were fixed at three times the opposition fee, i.e. 60 UA, then nobody would, in practice, make use of the possibility of making an appeal. In its view the best solution was not to allow any appeal at all against decisions fixing the amounts of costs since they were purely discretionary.

429. The French delegation opposed the Swiss delegation's proposal on the grounds that it might not be wise to fix an amount in the Convention; it preferred an amount to be laid down in the Implementing Regulations since then it could be more easily changed. If it were done in this way, the French delegation could agree to three times the amount of the opposition fee.

430. The delegation of the Federal Republic of Germany did not think that the minimum permitted amount for an appeal should be linked to the opposition fee. The opposition fee could be fixed in accordance with widely differing criteria and might perhaps in the course of time undergo changes.

Moreover, it would be preferable not to fix a minimum payment in the Convention so that it might be more easily changed. For these reasons the delegation of the Federal Republic of Germany could not support the Swiss delegation's main proposal.

431. After the Swiss delegation had withdrawn its main proposal in a subsequent meeting, the Main Committee accepted its alternative proposal that the minimum permitted amount for appeals be fixed in the Rules relating to Fees; at the same time it deleted Rule 64 (63), paragraph 5.

#### **Article 106 (107) — Persons entitled to appeal and to be parties to appeal proceedings**

432. The Main Committee referred drafting proposals by the Luxembourg (M/9, point 18) and Swiss (M/54/I/II/III, page 17) delegations to the Drafting Committee.

433. The Member States of the European Communities proposed that in the *second sentence* the words "with the exception of those who have abandoned that right" be deleted (M/14, point 7).

434. The delegation of the Federal Republic of Germany thought that the aim of this proposal was for parties to proceedings of the first instance also to be entitled to take part in the appeal proceedings. Most national regulations governing civil proceedings included provisions embodying this principle. The present draft, on the other hand, could lead to difficulties in the allocation of costs in appeal proceedings. If one of the parties to the proceedings of the first instance were able to drop appeal proceedings, it might well be that the other party would have to bear the full costs in the event of a court's ruling in its favour. Such an outcome was naturally not desirable; the power to drop appeal proceedings should therefore be ruled out.

435. The FICPI delegation asked whether a party to proceedings who was convinced of the hopelessness of an appeal could be compelled to take part in appeal proceedings and thereby run the danger of being required, possibly years later, to contribute to costs.

436. The UNION delegation thought that that would be an unjustifiable burden. By way of illustration it gave the following example: proceedings brought by two opponents has led to the limitation of the patent. One of the opponents is content with that result; the other, however, wants the whole patent to be revoked and starts appeal proceedings. If all parties were bound to be party to the appeal proceedings, it could happen that in the event of an unfavourable ruling the first opponent



might be burdened with the costs of the second proceedings which he had not even wanted. The present draft should not therefore be amended.

437. In reply to the FICPI delegation's question, the United Kingdom delegation expressed the opinion that the unwilling party — even if not actively participating — was a party to the proceedings and should therefore be taken into consideration when costs were awarded; the Board of Appeal and the Enlarged Board of Appeal would naturally bear in mind when awarding costs that his participation had occurred unwillingly. As regards the UNION delegation's example of an unfavourable ruling in appeal proceedings, the partial success in the proceedings of the first instance, i.e. the limitation of the patent, would be forfeit if the Board of Appeal were to decide that the contested patent were to remain in full force. In such a case the inactive party should also have to bear a part of the costs since his contention would also have been rejected by the ruling in the proceedings of the second instance. The awarding of costs in this case should be left to the discretion of the Board of Appeal which would certainly find an appropriate solution.

438. The Chairman admitted that the results described could in fact occur; he pointed out, however, that the substantive decision by the Board of Appeal could also be in the opponent's favour. In that event the decision awarding costs would also have to be changed, naturally also in favour of parties which had not taken part in the appeal proceedings.

439. The Netherlands delegation noted that Article 103 (104) laid down the principle that each party to proceedings should meet the costs he incurred and that only to the extent that reasons of equity demanded it could a different apportionment of costs be ordered. The delegation thought that even if this amendment were accepted the Board of Appeal would decide the award of costs fairly on the basis of this provision.

440. The Austrian delegation asked that a decision on this point be postponed so that it could have the opportunity to examine this problem again in collaboration with its legal experts.

441. Since no other delegation wished to have this matter decided immediately, the Chairman postponed a decision on Article 106.

442. When dealing with this Article at a subsequent meeting the Chairman again brought up the proposal by the Member States of the European Communities (M/14, point 7) and asked for a detailed explanation of it.

443. The representative of the Legal Service of the Council of the European Communities adduced the following in explanation: firstly, as a general principle, a party to the proceedings of the first instance should not be permitted to withdraw from the proceedings of the second instance. An illustration should make this clear: suppose that opposition proceedings ended with the revocation of the patent; the applicant, who has appealed against this decision, manages to have it reversed. It was impossible for the opponent to avoid his rôle as a party to the proceedings of the second instance, since the ruling given in the proceedings of the first instance was not yet conclusive as far as he was concerned, and could, as the illustration showed, be completely reversed. Otherwise the abstaining party could adopt the position that because he had decided not to participate in further proceedings he could not be affected by the reversal of any decision.

Secondly, there were also practical difficulties, particularly as regards costs, as was illustrated by the following example. Suppose there were two opponents. One of them declared himself satisfied with the limitation of the patent, but the appeal lodged by the other opponent or by the proprietor of the patent ended with the restitution of the patent in its original scope, thus naturally entailing a redistribution of costs.

However, in the view of the EEC Member States, there was no justification at all for exempting from these costs that party which had not participated in the appeal proceedings. The possibility of abandoning the right to take part in the appeal proceedings should therefore be excluded.

This obviously did not mean that every party had to take an active part in the proceedings of the second instance; it merely had to be ensured that, if the decision of the first instance were amended, no uncertainty in the law should ensue.

444. The Austrian delegation requested additional information as to whether consideration had been given to the legal implications or the possibility that, under this solution, a party might be forced against its will to take part in proceedings.

445. The Chairman replied that the legal experts on the EC Working Party had examined the proposal and, to his knowledge, had raised no objections.

446. The Main Committee adopted the proposal of the Member States of the European Communities.

### *Article 107 (108) — Time limit and form of appeal*

447. The Main Committee referred to the Drafting Committee a drafting proposal from the Luxembourg delegation (M/9, point 19).

448. The United Kingdom delegation proposed that the original combined time limit of three months for the filing of an appeal and for setting out the grounds on which it was based should be replaced by two separate time limits, that is, two months for the former and three months for the latter, both running from the date of notification of the decision appealed from (M/64/1, page 1). The appeal fee would also have to be paid within the period for filing the appeal. Experience in Great Britain had shown that, with a combined time limit, appeals were frequently filed at the last minute, so that no time remained for setting out the grounds on which they were based.

449. Referring to its comments in M/22 (point 34), the CEIF delegation said that it, too, was in favour of two separate time limits. However, it considered that the period for setting out the grounds of the appeal should be longer, i.e. up to six months after the date of notification.

450. The UNICE delegation was likewise in favour of the two separate time limits but considered that a period of three to four months would be sufficient for setting out the grounds of the appeal. The appeal fee should be paid within the period for filing.

451. Referring to the suggestion it had put forward in M/21 (point 9), the UNION delegation expressed similar views. It favoured a period of two months for filing and of four months for setting out the grounds on which the appeal was based, both of them running from the date of notification. It would be undesirable for the period for setting out the grounds of appeal to run from the date of filing of the appeal, since the European Patent Office would then have to inform the appellant of the date on which the appeal was filed.

452. The CNIPA delegation supported the UNION proposal.

453. The COPRICE delegation, referring to its comments in M/16 (point 12), considered that the period for setting out the grounds of appeal should be longer than a mere three months, and that it should be permissible for the appeal fee to be paid after the expiry of the period for filing.

454. On the latter point, the United Kingdom delegation said that this would mean appeals being filed regardless of the related costs, and found such a solution unacceptable.

455. The FEMIP delegation was in favour of a period of two months for filing and of four months for setting out the grounds of appeal, both to run from the date of notification. Given the possibility of postal delays in Europe, the three months

proposed by the United Kingdom delegation for setting out the grounds of appeal was not, in its view, sufficient.

456. The EIRMA delegation endorsed the views of the UNICE and UNION delegations.

457. At that juncture the French delegation spoke out in favour of the United Kingdom delegation's proposal, considering it to have the advantage of compelling the potential appellant to decide more quickly whether or not to file an appeal and thus leaving him more time for setting out the grounds of appeal. However, it did not consider advisable the suggestion made by some delegations to extend to six months the period for setting out the grounds of the appeal, since this could only prolong the appeal proceedings unduly.

458. The Netherlands delegation welcomed the separation of the time limits for filing and for setting out the grounds of appeal, as suggested by the United Kingdom delegation. However, in view of the attitudes adopted by the interested circles, it would like the period for setting out the grounds of appeal extended to four months, running from the date of notification.

459. The delegation of the Federal Republic of Germany supported the more far-reaching proposal put forward by the Netherlands delegation.

460. While supporting the separation of the two time limits, the Italian delegation considered that the period for setting out the grounds of appeal should not exceed four months. It also wondered whether an appeal would have to be rejected as inadmissible if it were filed, but not substantiated, in due time.

461. After the Finnish and Irish delegations had spoken out in favour of the Netherlands delegation's proposal, the United Kingdom and French delegations said they would be willing to agree to a four-month period for setting out the grounds of appeal.

462. The Chairman noted that the Main Committee had come to an agreement as follows: the period for filing an appeal and for setting out the grounds of appeal should be two and four months respectively, each to run from the notification of the decision. The appeal fee had to be paid during the period for filing the appeal.

463. In reply to the question as to what the legal consequences would be if the grounds of appeal were not set out in due time, the Netherlands delegation expressed the view that the appeal would then have to be rejected as inadmissible.

464. The delegation of the Federal Republic of Germany endorsed this view, drawing attention to Rule 66 (65).

465. The United Kingdom delegation concurred, adding that, in its opinion, the appeal fee should not be refunded in such an eventuality.

466. The Italian delegation wondered whether this solution was totally satisfactory since, by filing an appeal, the appellant did, after all, indicate his dissatisfaction with the contested decision. The appeal should, perhaps, therefore be examined in this case.

#### **Article 108 (109) – Interlocutory revision**

467. The United Kingdom delegation proposed that *paragraphs 2 and 3* should be brought into line with the agreed amendment of Article 107 (see point 462 and M/64/I, page 1). In particular, the one-month period for the interlocutory revision of the appeal should run from the date of filing of the grounds of appeal and not from the date of the filing of the notice of appeal.

468. The Swiss delegation wondered whether this date was the most suitable one to take as a basis since, within the four-month period for setting out the grounds of appeal, further grounds could be submitted, and the first instance would also have to take them into account.

469. The United Kingdom delegation considered that this problem, which also arose under the existing text of Article 108, could be dealt with as a matter of internal administration, i.e. by the Board referring back to the first instance appeals which had been duly remitted to it one month after filing of the grounds on which the appeal was based.

470. The Chairman noted that, in the Main Committee's view, this question of jurisdiction should be left to the European Patent Office, whereupon the amendment proposed by the United Kingdom delegation was adopted.

#### **Article 109 (110) – Examination of appeals**

471. The Main Committee discussed the significance of the existing version of *paragraph 3* on the basis of a Norwegian proposal that this paragraph should clearly specify that the application could be deemed to be withdrawn only if the applicant failed to reply to a request of the Board of Appeal in appeal proceedings before the grant of the patent (M/60/I, page 4).

472. The Austrian delegation said it had always taken *paragraph 3* to mean that, if the appellant failed to reply to a request of the Board, only the appeal which had been filed, and not the whole application, would be deemed to be withdrawn.

473. This view was shared by the Chairman, who based his interpretation on the words "entsprechend" and "mutatis mutandis" in the German and English texts respectively. Thus, in certain circumstances, the appeal would be deemed to be withdrawn, whereas the fate of the application depended on the contested decision.

474. In contrast, the Netherlands delegation said that it had always taken the reference to Article 95, *paragraph 3*, to mean that the legal consequence thereof, i.e. the withdrawal of the application, should ensue in appeal proceedings before the grant of the patent. In opposition proceedings, on the other hand, the application was not deemed to be withdrawn and, consequently, the application should not be deemed to be withdrawn either in appeal proceedings within the opposition proceedings.

475. The United Kingdom delegation concurred with the Netherlands delegation. If the purpose of the provision did not emerge sufficiently clearly from the existing version of *paragraph 3*, then it should be amended.

476. The Austrian delegation pointed out that there was no equivalent in the French text to the words "entsprechend" in the German text and "mutatis mutandis" in the English text.

477. The French delegation replied to this comment by saying that, in French legal terminology, it was not customary to use an expression such as "par analogie" to express the application of a legal consequence to another, similar set of circumstances, but rather to use a formula such as that found here. It maintained, therefore, that there was no discrepancy between the three versions. As for the purpose of *paragraph 3*, it agreed with the views of the United Kingdom and Netherlands delegations.

478. The Netherlands delegation quoted an example in support of its views. Suppose an applicant appealed against the decision of the Examining Division refusing a patent application. The Board of Appeal deemed that a patent would have to be granted if the applicant limited his claims, and so requested him to do so. If the applicant then failed to reply to this request, the application, not the appeal, should be deemed to be withdrawn, for otherwise the Board of Appeal would have to decide on a further refusal.

479. The Chairman replied that the same result would also be achieved if his views and those of the Austrian delegation prevailed. In the example quoted, if the applicant and the

appellant failed to comply with the request of the Board, the appeal would be deemed to be withdrawn and the contested decision of the Examining Division would come into force.

But a slightly different example might be even more conclusive. Suppose the Examining Division granted only half of the patent but refused the remainder of the application. The applicant filed an appeal against this decision, but failed to reply to a request from the Board to file observations. The sensible thing would then be for only the appeal to be deemed to be withdrawn, and not the whole application, part of which had, in fact, already been granted.

The Chairman concluded by saying that, in his view, the same considerations should also hold good with respect to opposition proceedings.

480. The Swiss delegation agreed with the Chairman.

481. The United Kingdom delegation considered the Chairman's views to be erroneous. The Board of Appeal had to examine the facts *ex officio*. If, in the latter example, it came to the conclusion that, contrary to the views of the Examining Division, the patent should not have been granted, even in part, it would be a mistake to regard only the appeal as being withdrawn.

482. The Chairman provided a further example in the context of opposition proceedings. Suppose a third party opposed the grant of a patent and, his opposition having been rejected, filed an appeal. In the appeal proceedings, he failed to reply to a request by the Board for observations. In this eventuality, the appeal should, in the opinion of the Chairman, be deemed to be withdrawn. If, as was suggested by the United Kingdom and Netherlands delegations, the appeal were not deemed to be withdrawn, the opposing third party who had failed to reply would not be penalised in any way.

483. The Austrian delegation, which supported the Chairman's view, said it intended to put forward a fresh proposal taking account of this interpretation, which it considered pertinent.

484. The Netherlands delegation countered by saying that, in the latter case, there was no need for a penalty, since the Board of Appeal could take a decision. Furthermore, if one considered the example quoted by the Chairman at greater length, it would seem to defeat his argument. An applicant filed an appeal against the partial refusal of his application. When examining the facts *ex officio*, the Board of Appeal came to the conclusion that the patent should never have been granted and requested the applicant to file observations. If one assumed, as the Chairman did, that the appeal only should be deemed to be withdrawn where the appellant did not file observations, the latter could choose, by doing nothing, to ensure that the part of the patent which had already been granted entered into force. Such a result could not be correct.

485. The United Kingdom delegation supported the Netherlands delegation, and added that if, in opposition proceedings, the third party failed to file observations in reply to a request by the Opposition Division, it had to assume that he was no longer interested in the further proceedings and give a decision. The same should apply in appeal proceedings against an opposition decision. But this need not be laid down in Article 109. What was more to the point in Article 109, paragraph 3, was that the legal consequence of the applicant's inactivity — namely the assumption that the application was withdrawn — should apply in appeal proceedings.

486. The Chairman admitted that this provision could, and perhaps should, be interpreted in the same way as by the United Kingdom and Netherlands delegations. If this interpretation were unanimously agreed, paragraph 3 would definitely have to be worded more explicitly. It should be noted that, under this interpretation, the Board of Appeal would have

to give a decision in all cases in which the application was not deemed to be withdrawn.

487. The Belgian delegation pointed out that the application should not be deemed to be withdrawn where the appeal had been filed, not by the applicant, but by a third party.

488. The delegation of the Federal Republic of Germany supported the view of the United Kingdom and Netherlands delegations. It therefore suggested the deletion of Article 109, paragraph 3; in this case, under the general Rule 67 (66), paragraph 1, in conjunction with Article 95 (96), paragraph 3, the patent application would be deemed to be withdrawn if the applicant failed to reply to a request from the Board in appeal proceedings.

489. The Netherlands delegation supplemented its remarks by referring to Article 113 (114) which, in its view, precluded an appeal from being deemed to be withdrawn.

490. Referring to an example mentioned in the discussions, the FICPI delegation expressed the view that neither in the proceedings for grant nor in opposition proceedings should it be possible for the European Patent Office to grant the applicant a limited patent against his will.

The Chairman confirmed this view, adding that the same also applied to appeal proceedings. If the applicant found the limited version of the patent unacceptable, the patent could be refused only as a whole.

491. At this point in the discussions, the Main Committee agreed to await any fresh proposals delegations might wish to make regarding paragraph 3 before discussing the matter further.

492. At a later meeting, the Main Committee resumed discussion of paragraph 3 on the basis of proposals by the United Kingdom and Netherlands delegations (M/79/I) and the Austrian delegation (M/100/I).

493. The Austrian delegation explained its proposal in the following way. In the previous discussions it had generally been agreed that, in appeal proceedings against an opposition decision, the application should not be deemed to be withdrawn if the appellant failed to reply to the Board of Appeal's invitation to file observations, but in this case the Board would have to give a decision. On this point, its proposal concurred with the Norwegian delegation's (M/64/I). However, no account had so far been taken of cases in which, for instance, an appeal was filed against a decision, whereby a request to register the transfer of rights with respect to the application had been refused. It was certainly not justified in such a case either for the application to be deemed to be withdrawn if the appellant remained inactive. The Austrian proposal was intended to cover cases of this sort as well.

494. The United Kingdom delegation noted that, under the joint United Kingdom/Netherlands proposal, the application would be deemed to be withdrawn only if the applicant failed to reply to an invitation of the Board in appeal proceedings before the grant of the patent. It considered the Austrian proposal to be too restricted, inasmuch as it related solely to Article 95, whereas the joint proposal also covered appeals against other decisions in the proceedings for grant.

495. The Austrian delegation said that it had not intended to draw this distinction and that it could agree to its proposal being extended accordingly. However, it emphasised yet again that, for example, in the eventuality of a request for the registration of the transfer of rights being refused, the application ought not to be deemed as being withdrawn.

496. The Norwegian delegation suggested the amendment of its own proposal to take greater account of the wording of Article 95 (96), paragraph 3.

497. The FICPI delegation considered that it would be unduly harsh to deem the application to be withdrawn if, for example,

the applicant filed an appeal against the invitation to pay the additional search fee and then failed to observe a time limit. In such a case, only the appeal should be deemed to be withdrawn.

498. Summing up, the Chairman noted the Main Committee's view that Article 109, paragraph 3, should be restricted to appeals in the proceedings for grant which related to the application.

499. At a later meeting, the Main Committee discussed the following redraft of paragraph 3 submitted by the Drafting Committee:

"If the applicant fails to reply in due time to an invitation under paragraph 2, the European patent application shall be deemed to be withdrawn".

500. At the request of the Austrian delegation, the Main Committee noted that paragraph 3 was not intended to cover appeals in opposition proceedings; this should be clear from the use of the word "applicant" as against "proprietor of the patent".

501. So that paragraph 3 should not be applied to cases which, in its view, were unjustified — e.g. the refusal of a request for the entry in the European Patent Register of the transfer of rights with respect to the application, the Austrian delegation proposed that it should be supplemented as follows:

"If, in proceedings against a decision of the Receiving Section or the Examining Division in the proceedings for grant, the applicant fails to reply ..." (otherwise unchanged).

502. The Swiss delegation supported the substance of this proposal and suggested that an explicit reference be made to decisions relating to the grant of the patent.

503. The United Kingdom delegation, while recognising that the Austrian delegation had a point, considered that it would be exceedingly difficult so to draft paragraph 3 as to cover all appeals against decisions in the proceedings for grant, and to exclude appeals against other decisions. It therefore suggested that, since Article 120 (121) laid down the applicant's entitlement — against payment of a fee — to request the further processing of an application deemed to be withdrawn, there was no need for a detailed enumeration of the appeals to which paragraph 3 would not apply.

504. In principle, the Netherlands delegation supported the United Kingdom delegation's view, but suggested that it should be made clear that the application would not be deemed to be withdrawn if the applicant had filed an appeal against a decision of the Legal Division. It considered that, with this exception, many of the cases which the Austrian delegation justifiably wished to exclude could, in this way, be excluded.

505. The Austrian delegation thought that the Netherlands suggestion would certainly help to improve the version of paragraph 3 proposed by the Drafting Committee, but would not exclude all the cases which should be excluded. By contrast, the reference to the possibility of the further processing of the application under Article 120 was inapposite, since in certain cases it was unthinkable to uphold the view, as far as the applicant was concerned, that his application was deemed to be withdrawn, and these cases therefore had to be excluded *a priori*.

506. The Main Committee then put the Austrian proposal to the vote, as the most far-reaching one. 9 delegations voted in favour, 9 against and there were 2 abstentions.

507. The Netherlands delegation now formulated its earlier suggestion (see point 504) as a proposal.

All delegations but one voted in favour of the proposal, whereupon it was adopted by the Main Committee.

#### **Article 110 (111) — Decision in respect of appeals**

508. The FICPI delegation asked whether the applicant could submit an amendment of a statement of claims in appeal

proceedings. This question could be of great significance in practice, as was demonstrated by the following example. Suppose an applicant filed an application with a principal and a secondary claim, and the principal claim were refused by the Examining Division. Could the applicant then base himself on the secondary claim in the appeal body? If so, he would have some chance of success with his amended statement of claim in the appeal body, even if the Board confirmed the rejection of the principal claim. If not, he ought not even to risk an appeal, but would have to limit himself to the secondary claim in the examining procedure.

509. In the view of the delegation of the Federal Republic of Germany, the Convention established that secondary claims could also be submitted to the appeal body. This procedure corresponded, moreover, with practice under German patent law.

510. The Chairman noted that the Main Committee was of the same view.

#### **Article 111 (112) — Decision or opinion of the Enlarged Board of Appeal**

511. The Main Committee referred to the Drafting Committee a United Kingdom drafting proposal for *paragraph 1* (M/40, point 18).

512. The IAPIP delegation expressed the wish that the parties concerned should also be allowed to take part in proceedings before the Enlarged Board of Appeal under *paragraph 1(a)*.

513. The Netherlands delegation, which concurred, nonetheless felt that its wish was already satisfied by virtue of Article 115 (116), paragraph 4, whereby oral proceedings before the Enlarged Board of Appeal were generally public.

514. The Chairman pointed out that Articles 112 et seq. (113 et seq.) applied to all bodies of the European Patent Office and therefore also to the Enlarged Board of Appeal. In his view, this meant that the Enlarged Board of Appeal could not take any decisions without the parties concerned being able to give their views on the matter, and that the Enlarged Board of Appeal was obliged to conduct oral proceedings, if one of the parties concerned so requested.

515. The French delegation considered that, under Article 111 as it stood at present, the applicant for or proprietor of the patent was not entitled to participate in proceedings before the Enlarged Board of Appeal, although he could initiate them, and therefore could not request oral proceedings either. Only the Enlarged Board of Appeal could so order.

516. The Chairman noted that the Inter-Governmental Conference had previously inclined to the view that in proceedings before the Enlarged Board of Appeal under Article 111, paragraph 1(a), all parties concerned should be given the right to be heard and to request oral proceedings.

517. The Main Committee referred this issue to the Drafting Committee, requesting it to examine and if need be clarify it.

At a subsequent meeting, it adopted the version proposed by the Drafting Committee embodying the wish of the IAPIP delegation\*.

518. The Main Committee referred to the Drafting Committee a drafting proposal from the Luxembourg delegation concerning *paragraph 2* (M/9, point 20).

#### **Article 113 (114) — Ex officio examination**

519. The Main Committee referred to the Drafting Committee a drafting proposal from the United Kingdom delegation concerning *paragraph 1* (M/40, point 19).

\* See Article 112, paragraph 2, of the Convention.

520. The IAPIP delegation wondered whether paragraph 1 might be so interpreted that, in taking a decision, the European Patent Office could consider facts or evidence which were unknown to the parties concerned.

In reply, the Chairman referred to Article 112 (113), whereby the European Patent Office could base its decisions only on grounds or evidence on which the parties concerned had had an opportunity to present their comments.

521. The Main Committee referred to the Drafting Committee a drafting proposal from the French delegation concerning *paragraph 2 (M/58/I/II)*.

#### **Article 115 (116) – Oral proceedings**

522. The Main Committee referred to the Drafting Committee a drafting proposal from the Luxembourg delegation concerning this Article (M/9, point 21).

523. The Netherlands delegation, supported by the Italian delegation, proposed that Article 115 should be modified in such a way that the European Patent Office was not required to grant an application for more than one set of oral proceedings on the same question and could refuse to hold further proceedings (M/52/I/II/III, page 28). The present version provided no assurance against abuse of the right of request.

524. The Austrian delegation considered that any amendment of the provision should make clear that the higher body would not be entitled to refuse oral proceedings because, say, they had already been held before the lower body.

525. In the view of the FICPI delegation, it would be better to speak of "proceedings on the same subject-matter" rather than of "proceedings on the same issue", for it ought to remain possible to examine one and the same issue, for example inventive step, on the basis of different facts in several sets of proceedings.

526. The Main Committee adopted the Netherlands proposal and referred it to the Drafting Committee with a request to take account of the comments on drafting.

527. At a subsequent meeting, the Main Committee discussed the draft submitted by the Drafting Committee whereby the European Patent Office would be entitled to refuse a request for further oral proceedings in the same body, if the basic facts on which the proceedings were based remained unchanged.

528. At the request of the United Kingdom delegation, supported by the Netherlands delegation, the Main Committee made it clear that the right so to refuse applied only if the parties concerned also remained unchanged.

#### **Article 116 (117) – Taking of evidence**

529. The Main Committee referred to the Drafting Committee a drafting proposal from the delegation of the Federal Republic of Germany concerning *paragraph 1, sub-paragraph (g) (M/11, point 30)*.

530. The Main Committee also referred to the Drafting Committee a drafting proposal from the Luxembourg delegation concerning *paragraphs 4 to 6 (M/9, point 22)*.

531. The Swiss delegation proposed that *paragraphs 5 and 6* should be so supplemented that the court in the country of residence of the person giving evidence could also be requested to take evidence following a warning by the judge that false statements were punishable (see M/54/I/II/III, page 18). Under Swiss procedural law, there was no oath in certain federal cantons, but instead the judge gave a warning of this nature and it was therefore essential for Switzerland that the Convention should be supplemented to this effect.

532. The Netherlands delegation supported this proposal since, under Netherlands law also, it was not always possible to

demand an oath, and in certain cases an assurance had to suffice instead.

533. The United Kingdom delegation thought that it would be difficult to draft a text which took full account of the varying legal situation in all the Contracting States. It would be satisfied by a statement in the Conference minutes to the effect that persons giving evidence could make their statements in the form prescribed by the Contracting State concerned.

534. The FICPI delegation proposed that this provision should be worded to the effect that evidence could be confirmed either under oath or by means of a written statement comparable to an oath.

535. Finally, the Main Committee referred the Swiss proposal to the Drafting Committee with a request to examine and improve paragraphs 5 and 6 in the light of the discussions.

536. At a subsequent meeting, the Swiss delegation suggested that paragraphs 5 and 6, as formulated in the meantime by the Drafting Committee, should be amended, in German in any case, in order to convey that the form of statement permissible instead of an oath was binding on the person giving evidence.

537. This suggestion was referred to the Drafting Committee.

#### **Article 118 (119) – Notification**

538. The Main Committee referred to the Drafting Committee a drafting proposal from the Luxembourg delegation (M/9, point 23).

#### **Article 120 (121) – Further processing of the European patent application**

539. The Main Committee referred to the Drafting Committee a drafting proposal from the United Kingdom delegation concerning *paragraph 1 (M/64/I, page 1)*.

540. The FICPI delegation said it had taken the German version of paragraph 1 to mean that a patent application could be further processed if it was to be or had been refused following failure to observe a time limit set by the European Patent Office or if – following failure to observe a time limit set by the European Patent Office or a contractual time limit – it was deemed to be withdrawn. It requested confirmation of its interpretation, particularly as the English version seemed to be more restrictive.

541. The Chairman replied that, in his view, it emerged clearly from the German version that further processing was permissible only when there had been failure to observe a time limit set by the European Patent Office. The same was obviously true in the case of an application which was deemed to be withdrawn. He considered that all three versions concurred on this point.

542. The FICPI delegation then suggested that the number of instances in which further processing was permissible where there was failure to observe a time limit should be extended in keeping with the FICPI delegation's understanding thereof.

This would cover only limited cases of time limits, but as regards practice they would be particularly important: e.g. the time limit for filing documents. Not to do so would in practice signify a degree of severity that was surely not intended by the authors of this provision.

543. The Chairman pointed out that it had been the Inter-Governmental Conference's deliberate intention – on the model of Scandinavian law, moreover – to limit this provision to the time limits laid down by the European Patent Office.

He noted that no Government Delegation was prepared to adopt the FICPI suggestion.

544. The United Kingdom delegation proposed that both the

time limits in *paragraph 2* should be uniformly set at two months (M/64/I, page 1), because time limits of differing lengths could only lead to confusion.

545. The Chairman recalled that the reason why the three-month time limit had originally been chosen was to keep it exactly the same length as for the filing of appeals. But since the Main Committee had reduced the time limit for the filing of appeals to two months (see above, point 462), it was only logical to reduce the time limit in Article 120, paragraph 2, to two months as well.

546. The CNIPA delegation suggested that both the time limits mentioned in paragraph 2 should be set at three months.

547. This suggestion was not taken up by any of the Government Delegation.

548. In conclusion, the Main Committee adopted the United Kingdom proposal.

549. The IAPIP delegation, supported by the French delegation, proposed that the concept of "force majeure" in *paragraph 1* should be replaced by a less restrictive one. On the basis of Roman law, "force majeure" was to be interpreted as an external occurrence which the party concerned could neither foresee nor prevent. It might perhaps be better to substitute the concept of "legitimate excuse", which denoted a fortuitous, unintended and undeserved occurrence.

550. The delegation of the Federal Republic of Germany recalled its earlier vain attempts to introduce the concept of an act of God. It would, in certain circumstances, be prepared to reiterate its proposal, but did not know whether it fully reflected the views of the IAPIP delegation.

551. The IAPIP delegation replied that it did not believe that there was always a "legitimate excuse" in the case of an act of God.

552. The COPRICE delegation supported the suggestion made by the IAPIP delegation. It thought that the best rendering in German of the French term "excuse légitime" might perhaps be "unabwendbares Ereignis".

553. In view of the fact that Article 121 would have considerable practical significance, the FICPI delegation called on the Government Delegations to agree to the IAPIP proposal, since the concept "force majeure" was, in any case, too vague.

554. The United Kingdom delegation said it was not completely familiar with the foreign terms based on Roman law which had been used, but it definitely thought that the possibility for "restitutio in integrum" should be closely delimited. The present version had, incidentally, gone unchallenged for several years. It would be prepared to agree to an amendment only if the meaning thereof were clearly apparent.

555. The Austrian delegation, considering that the concept "force majeure" was too restrictive and should be extended, was prepared to support the suggestion made by the delegation of the Federal Republic of Germany.

556. The IFIA delegation pointed out that, on several occasions, it had already spoken up in the interests of inventors along the lines of the IAPIP proposal. It did not mind what term was finally selected, provided it were more flexible than the concept of "force majeure".

557. The UNION delegation supported the proposal put forward by the IAPIP delegation.

558. The Swiss delegation asked the IAPIP delegation whether the concept of "legitimate excuse" more or less corresponded to the concept of "non-liability", which it had itself earlier attempted to introduce.

559. The IAPIP delegation demonstrated its idea in the following way. A competent clerk in a patent agent's office, who was familiar with his work and suitably supervised,

negligently allowed a time limit to expire as a result of which the patent application became void. This was not a case of "force majeure", since the employee's omission was neither unavoidable nor an act of God, although it was indeed fortuitous. The concept "excuse légitime" was apposite for the patent agent, since, if he had selected and supervised the competent clerk with due care, he was in no way liable for the latter's negligence.

560. At this juncture, the Main Committee decided, at the request of several delegations, to postpone discussion of paragraph 1 until the IAPIP delegation and the delegation of the Federal Republic of Germany had formulated their proposals for amendments and illustrated them with examples.

561. It also decided to set up a Working Party to discuss these proposals and to submit the results of its discussions to the Main Committee. This Working Party was to consist of the delegations of Austria, the Federal Republic of Germany, Finland, France, Switzerland, the United Kingdom and the IAPIP\*.

562. The Swiss delegation proposed the deletion from *paragraph 5* of the reference to Article 85 (87), paragraph 1, in order to permit of "restitutio in integrum" in a priority period (M/54/I/II/III, page 19), on the argument that in the version of Rule 86 (85) finally adopted by the Inter-Governmental Conference, *restitutio in integrum* in the priority period was, in certain cases, permissible. Furthermore, in the case of Article 121, *restitutio in integrum* would not take place automatically, but would depend on proof of "force majeure" or the like.

563. With the agreement of the Swiss delegation, this proposal supported by some delegations and rejected by others, was put to the vote without discussion. 4 delegations voted in favour, 9 against and there were 2 abstentions.

564. The Main Committee referred to the Drafting Committee a drafting proposal from the United Kingdom delegation concerning *paragraph 5* (M/40, point 20).

565. The Main Committee referred to the Drafting Committee a drafting proposal made by the Luxembourg delegation concerning *paragraph 7* (M/9, point 25).

566. The Belgian delegation proposed that paragraph 7 should clearly lay down that, in proceedings before courts in the Contracting States, where they relate to a European patent application or patent, national provisions on "restitutio in integrum" should continue to apply (see M/33, point 4).

567. An attempt was made during the discussion to agree that paragraph 7 should apply only to time limits which, under the Convention, were imposed, but not binding, on the national authorities of the Contracting States.

568. The Main Committee referred the Belgian delegation's proposal to the Drafting Committee with a request to examine whether it would represent any improvement on the existing version.

569. At a subsequent meeting, the Main Committee discussed the proposal concerning *paragraph 1* submitted by the delegations of the Federal Republic of Germany and Switzerland, this proposal already having gone through the Working Party on "force majeure" (M/117/I).

570. In explanation of this proposal, the delegation of the Federal Republic of Germany said that, on the basis of the relevant discussions in the Main Committee (see points 549 et seq.), the Working Party had examined whether an alternative concept to that of "force majeure" should be used. It had examined the legal precedents of the States represented on the Working Party regarding the question of conditions for "restitutio in integrum" and had ascertained that practice in these States was very similar. There had therefore been unanimous agreement that the possibility of "restitutio in integrum" in proceedings before the European Patent Office

\* For further discussions on paragraph 1 see points 569 et seq.

should correspond to this practice and that the concept of "force majeure" was not suited for this purpose, since it would cover only the limited number of cases of objective "force majeure". The Working Party had also rejected the idea of using other concepts already applied in one State or another — the concept of an "act of God" or "legitimate excuse", for example — since they would offer the other States no real guide as to an accurate interpretation.

Finally, the Working Party unanimously agreed that the best solution would be to describe the grounds on which the desired "restitutio in integrum" could take place in the following manner:

"The applicant for or proprietor of a European patent who, *in spite of all due care required by the circumstances having been taken*, was unable to observe a time limit *vis-à-vis* the European Patent Office, shall ..."

It considered that this form of wording would permit "restitutio in integrum" before the European Patent Office to be dealt with in much the same way as it was at present in the States concerned. It should be particularly stressed that, in the view of the Working Party, the applicant for or the proprietor of the patent were not guilty of negligence, this was not, in most cases, sufficient grounds for "restitutio in integrum": it was also necessary for the applicant to have exercised particular care.

571. The United Kingdom delegation said it welcomed the new formulation, particularly as it had never properly understood what "force majeure" meant.

Nonetheless, it should not be made too easy for applicants and, more particularly, their representatives before the Patent Office to engage unqualified staff. It was therefore in favour of a declaration being added to Article 121, paragraph 1, more or less as follows. Firstly, the provision should be interpreted narrowly. Secondly, no-one should be allowed to rely on a mistake in an official document if he knew perfectly well that he should have complied with other criteria. Thirdly, a high standard of proof should be demanded, either in the form of documents or in the form of testimony which was sworn or in other binding form.

The United Kingdom delegation considered that these precautions were necessary in order to avoid any abuse.

572. The delegation of the Federal Republic of Germany supported the United Kingdom delegation's view. It too desired a narrow interpretation of the newly drafted provision, i.e. that "restitutio in integrum" should be permitted only in exceptional cases in order to avoid undue severity.

573. The FICPI delegation welcomed the redraft of paragraph 1, and pointed out that neither applicants nor representatives were ever totally beyond making mistakes either. The provisions of paragraph 1 should also apply to representatives. Since this did not emerge clearly from the proposal, it called on the Main Committee to confirm that it considered that representatives were also covered by this provision.

574. The Chairman considered that representatives were definitely covered by this provision. The applicant would have to accept liability for any negligence on the part of his representative. If the representative had acted with due care, the applicant could demand "restitutio in integrum"; had he not done so, Article 121 was not applicable.

The Chairman noted that the delegation of the Federal Republic of Germany supported his view.

575. The French delegation questioned whether it was quite clear from the proposed provision that the applicant for or the proprietor of the patent had to accept liability for the acts of his representative or whether this point still had to be clarified. In any event, "restitutio in integrum" should not be granted where, despite the fact that the applicant had taken all due care in

issuing instructions to his representative, the representative had not taken such care himself.

576. The Chairman pointed out that no mention had been made of the representative in the previous version of paragraph 1 either, and that to this extent the Working Party had made no change.

577. The Swiss delegation considered that, for the purposes of this provision, the applicant for or proprietor of the patent and his representative should be considered as one and the same person. It followed from this that "restitutio in integrum" should be ruled out if either the applicant or his representative had not taken all due care. It added that, under Swiss law, the applicant for or proprietor of the patent was liable for the negligence of an assistant and, if the representative was not guilty of negligence, the issue was then whether the applicant himself — e.g. in issuing instructions to the representative — had acted negligently.

578. The IAPIP delegation was in complete agreement with the views of the Swiss delegation. Since the representative represented the applicant, Article 121 had to apply just as much to him as to the applicant if, despite all due care, he failed to observe a time limit. This had, moreover, been the view expressed by all members of the Working Party.

579. The French delegation said that after the other delegation's statements, it did not consider it necessary for the text to be amended.

580. The Netherlands delegation greeted the Working Party's proposal as a suitable solution, which it was prepared to accept. However, it had misgivings regarding the declaration suggested by the United Kingdom delegation. At all events, it too was in favour of a narrow interpretation of the proposed provision, particularly as Article 120 (121) already provided for further processing of an application in certain circumstances. In no case should any such declaration refer to the provision of proof; this question should be left entirely to the jurisprudence of the European Patent Office.

581. The Chairman noted that the Main Committee approved the proposed version of paragraph 1.

As regards the declaration requested by the United Kingdom delegation, the Chairman suggested that both its statement and that made by the Netherlands delegation should be entered in the minutes.

582. The United Kingdom delegation said it could understand the Netherlands delegation's misgivings over the question of proof, but would welcome an entry in the minutes, as the unanimous opinion of the Main Committee, that Article 121, paragraph 1, should be given a narrow interpretation, for no dissenting opinion had been expressed.

583. After consulting the delegations, the Chairman noted that it was the Main Committee's unanimous view that Article 121, paragraph 1, should be given a narrow interpretation.

### **Article 122(123) — Amendments**

584. The Swiss delegation, supported by the Netherlands delegation, proposed that *paragraph 1* should clearly stipulate that the conditions for the amendment of a European patent application or a European patent mentioned in the Implementing Regulations should be valid only for proceedings before the European Patent Office, and not for any proceedings which might be permissible before the national offices (M/54/I/II/III, page 20). For example, it was essential that States which recognised partial revocation of a patent should continue to be able to amend the patent claims of a granted European patent in revocation proceedings.

585. The Main Committee adopted this proposal.

586. The Belgian delegation proposed that *paragraph 1*



should embody the principle that, in proceedings before the European Patent Office, it was the original text of a patent application and not its translation into the language of the proceedings which prevailed. It considered that paragraph 1 should therefore state that throughout the proceedings the translation could be brought into conformity with the original text (M/105/I).

587. The Netherlands delegation could support the Belgian proposal, but pointed out that, under Article 68 (70), paragraph 2, the original text of the European patent application determined whether or not the subject-matter of the application or patent extended beyond the content of the application as filed. This held good in all cases, irrespective of whether the patent application was filed in the language of the proceedings or only translated subsequently.

588. The Italian delegation also supported the Belgian proposal. It pointed out that the applicant could incur a certain amount of expenditure if he decided to bring the translation in the language of the proceedings into conformity with the original text.

589. The delegation of the International Chamber of Commerce wondered whether the eventuality referred to in the Belgian proposal might not be covered by Rule 89 (88), under which linguistic mistakes in documents which had been filed at the European Office could be corrected.

590. The Swiss delegation said that it took Article 68, paragraph 2, to mean that the original text, not the translation, prevailed, where opposition or a revocation action followed from the subject-matter of the patent extending beyond the content of the application as filed.

591. The Chairman and the Netherlands delegation said that they, too, interpreted Article 68, paragraph 2, in this way.

592. Since the translations of patent applications referred to in Article 14, paragraph 2, could be corrected, the United Kingdom delegation wondered whether it should not perhaps also be possible for the documents referred to in Article 14, paragraph 4, to be corrected.

593. The Chairman noted that, in the view of the Main Committee, no particular provision was needed here since, in proceedings before the European Patent Office, the correction of translations of documents other than patent applications (for which alone there must be a special provision, on account of the filing date), had to be allowed at all times.

594. The Main Committee adopted the Belgian proposal\*.

### **Article 123 (124) — Information concerning national patent applications**

595. The Main Committee referred to the Drafting Committee a drafting proposal from the United Kingdom delegation concerning the English version of *paragraph 1*.

596. The Main Committee referred to the Drafting Committee a drafting proposal from the Netherlands delegation concerning *paragraph 2* (M/32, point 20).

### **Article 124\*\* — Supplementary European search report**

597. The Norwegian delegation proposed that *paragraph 2(a)* should be so amended that the applicant bore the cost of the supplementary search report only where he had amended the patent claims to such an extent as to render supplementary searching necessary (M/71/I, page 1). It wished in this way to avoid a situation in which each and every amendment to claims necessarily resulted in a supplementary search report.

598. The Netherlands delegation had no objections to this amendment, since it could scarcely conceive of any other cases in which a supplementary search report would be necessary.

599. The United Kingdom delegation thought there might conceivably be other cases in which a supplementary search report proved necessary, e.g. if the Examining Division wished to use a different priority date for the examination than that decided on by the Search Division, and therefore it would be preferable to retain the present version of sub-paragraph (a).

600. The Norwegian delegation doubted whether the applicant would have to bear the cost of the supplementary search report in the instance referred to by the United Kingdom delegation.

601. The Italian delegation thought that the Norwegian proposal might prove pointless if paragraph 1 were taken to mean that the European Patent Office had to obtain only such supplementary search reports as it deemed necessary.

602. The Netherlands delegation considered that, in the few cases where an amendment to the claims did not necessitate a supplementary search report, the European Patent Office could bear the cost without further ado.

603. The delegation of the Federal Republic of Germany preferred the present version of paragraph 2, sub-paragraph (a), on the grounds that there might conceivably be other cases in which the applicant had occasioned the need for a search report, without actually amending the patent claims. For example, he might delete part of the description. If a supplementary search report were thus rendered necessary, it was reasonable that the applicant should bear the cost thereof.

604. In the ensuing vote on the Norwegian proposal, 5 delegations voted in favour and 5 against, with 4 absentions.

605. With regard to *paragraph 2, sub-paragraph (b)*, the CNIPA delegation queried whether a report could be obtained only to supplement an international search report under Article 156 (157) or also in other cases. If this were so, it would be unfair to exact an additional fee from the applicant.

606. The Chairman considered that Articles 124 and 156 were designed to deal with two distinct cases. Article 156 laid down that, under certain conditions, a supplementary search report should be obtained in respect of every international application, whereas under Article 124, the European Patent Office could, in specific instances, obtain a supplementary search report if it deemed the international search report to be inadequate.

607. This view was endorsed by the United Kingdom delegation\*.

608. The Austrian delegation wondered whether the applicant could appeal against a request made to him by the European Patent Office under *paragraph 3* to pay the additional search fee if he considered that he had not necessitated the obtaining of a search report.

609. The delegations of the Federal Republic of Germany and of Switzerland imagined that the procedure in such a case would be as follows. An applicant failed to pay the fee required of him in due time, so that his application was deemed to be withdrawn, pursuant to the second sentence of paragraph 3. He was informed of this fact by the European Patent Office, in accordance with Rule 70 (69), paragraph 1. Under Rule 70 (69), paragraph 2, the applicant could apply for a decision on this notification. An appeal against this decision was possible.

610. The FICPI delegation thought that if this really was the procedure, the application would run the danger of being deemed to be withdrawn, if the Board of Appeal took the view that the additional search fee should have been paid. This danger had to be avoided at all costs otherwise there would be virtually no possibility of filing an appeal. Therefore the applicant had to be entitled to pay the additional search fee subsequently and should be able to request this by way of an amendment in the notice of appeal.

611. The delegation of the Federal Republic of Germany

\* The content of this proposal was to be finally incorporated in article 14, paragraph 2.

\*\* The Main Committee deleted Article 124 at one of its last meetings.

\* For subsequent discussions on paragraph 2, see points 624 et seq. and 644 et seq.



considered that it would not be feasible for the additional search fee to be paid after the time limit set for its payment had expired. In any case, the applicant could always pay the fee first and then, if the Board of Appeal recognised that its collection had been unwarranted, subsequently request that it be refunded on the grounds of unwarranted gain.

612. The Austrian delegation thought that the nearest solution legally would be for the applicant to pay the fee provisionally, so that the proceedings were not held up, and he could also appeal against a decision that he should be required to pay it. The Austrian delegation was prepared to draw up a proposal to this effect, if so desired by the majority of delegations.

613. The Chairman's opinion was that the present version did not permit of the subsequent payment of the search fee.

614. The FEMIP delegation endorsed the Austrian delegation's suggestion.

615. The French delegation referred to Rule 46, paragraph 2, under which the applicant could request that a search fee be refunded if the IIB had unjustly denied the unity of the application and had therefore demanded further search fees. It thought that a similar solution could perhaps be found for the present case. But the other similar cases would possibly have to be settled in the same way, and this might be going too far.

616. The Netherlands delegation pointed out that Article 124 would have to be thoroughly overhauled if Main Committee II should decide to incorporate the IIB as one of the European Patent Office's administrative units. It said that for the time being it could agree to the present version of Article 124, but reserved the right to return subsequently to this provision in general, but with particular reference to the question of liability to pay fees\*.

617. The Chairman considered that, irrespective of whatever amendments Main Committee II might make to Article 124, Main Committee I should continue to work on the premise that the applicant would have to pay an additional search fee, under certain conditions.

618. The FICPI delegation said it would welcome the idea of the Implementing Regulations making express provision for the filing of qualified applications.

619. The Chairman replied that the point at issue here was a far more limited one, namely whether the applicant had to pay the additional search fee within the specified time limit or could pay it subsequently.

620. Finally, after general consultation, the Chairman noted the Main Committee's view that the applicant had to pay the additional search fee under Article 124, paragraph 3, even if he believed that he had not necessitated the obtaining of supplementary search reports. In this case he could file an appeal and, if successful, could demand a refund of the fee he had paid.

621. The delegation of the Federal Republic of Germany, supported by several other delegations, proposed extension of the time limit for the payment of the additional search fee from one to two months (M/47/I/II/III, point 18).

622. The Swiss delegation did not consider that this time limit should be extended, since the proceedings could be unduly impeded as a result. Furthermore, the time limit for the payment of the main search fee was also one month.

623. 8 delegations voted in favour of the time limit for payment being extended to two months, 2 delegations voted against and there were 3 abstentions.

624. At a subsequent meeting of the Main Committee, the delegations of the Netherlands, Switzerland and the United Kingdom proposed the deletion of *paragraph 2, sub-paragraph (a)* (M/104/I).

625. In support of this proposal, the Netherlands delegation

said that it was not warranted to make the applicant bear the cost of a supplementary search report which he had made it necessary to obtain, unless the report was drawn up by a body other than the European Patent Office. This would no longer be the case since it had more or less been established that, from the very beginning, the IIB would be incorporated in the European Patent Office. In these circumstances, it would only complicate the proceedings for grant unduly to make the applicant pay for searching, the need for which became apparent only during the proceedings themselves. The drop in income which the European Patent Office would sustain as a result of the additional search fee not being paid could be compensated by a slight increase in other fees, particularly the main search fee. Furthermore, the national patent offices also carried out similar supplementary searching without being paid for it.

626. The French delegation emphatically supported this proposal, which it considered would serve to simplify the proceedings before the European Patent Office.

627. The WIPO delegation pointed out that Article 124, paragraph 2, apart from sub-paragraph (a), had to relate solely to international applications for which an international search report had already been drawn up and the corresponding fee paid. General provision for the proceedings for processing international applications was, however, already made in Article 156. If it was a question of simplifying the proceedings by releasing the applicant from the obligation to an additional search fee, the same considerations should also prevail in the case of supplementing the international search report.

628. The Chairman pointed out that a difference could be perceived between the two cases, inasmuch as in the former the original searching was done by the European Patent Office, whereas in the latter, searching originally conducted elsewhere was supplemented.

629. Since no delegation opposed the proposal put forward by the Netherlands, Swiss and United Kingdom delegations for the deletion of sub-paragraph (a), it was adopted.

630. Following this decision of the Main Committee, the Netherlands delegation queried whether there was any point in retaining sub-paragraph (b), considering that in the eventuality of the Administrative Council recognising a specific category of international search reports as the equivalent of European search reports under Article 156, the situation would be the same as in the case of sub-paragraph (a) which had already been deleted, and it would therefore be unfair to collect a supplementary search fee from the applicant.

The Netherlands delegation said it did not intend its statement to be taken as a formal proposal at this stage.

631. The Swedish delegation adopted as its own proposal the Netherlands suggestion, whose main advantage it saw as simplifying proceedings.

632. The Netherlands delegation supported the Swedish proposal.

633. The United Kingdom delegation expressed its readiness to support this proposal as well, but thought that a provision was needed whereby a supplementary search report for which a fee had to be paid could be drawn up if the international search report under Article 17 of the PCT could not be obtained or could be obtained only partially.

634. The Chairman considered that the problem raised by the United Kingdom delegation was settled by Rule 45.

635. The French delegation considered there was a great difference between the case referred to in sub-paragraph (a) and that of sub-paragraph (b), which was now under discussion. The first case referred to searching carried out by the European Patent Office itself which had to be supplemented, whereas the second was a case where searching by an International

\* See below under points 627 et seq

Searching Authority under the PCT had to be supplemented, and there seemed to be no reason why the cost of this should be shifted over to all applicants collectively. On these grounds, Article 124, paragraph 2(b), should be retained.

636. The Swiss delegation was also in favour of sub-paragraph (b) being retained, on the grounds that even if, pursuant to Article 156, the Administrative Council waived supplementary searching for certain categories of international search reports, it must still be possible to draw up a supplementary search report in individual cases.

637. The Netherlands delegation also thought it reasonable for the Administrative Council to forgo the supplementing of certain categories of international search reports pursuant to Article 156, but only if they could be regarded as completely equivalent to a European search report. But once an international search report was deemed as equivalent to a European search report, it would no longer be justified to treat them differently.

638. The French delegation likewise held the view that it would be justifiable not to carry out any further supplementary searching if the Administrative Council recognised the equivalence of certain categories of international search reports, pursuant to Article 156. All the same, it could still see differences between the cases in sub-paragraphs (a) and (b). Those in sub-paragraph (a) were likely to be of little significance numerically, but this was by no means certain in the cases in sub-paragraph (b).

639. The WIPO delegation considered that Article 156 made sufficient provision for all cases in which it proved necessary to supplement international search reports. Furthermore, it should not be forgotten that, even if all international search reports should subsequently be acknowledged to be equivalent to European reports — one of the main purposes of the PCT was, in fact, to achieve this — Article 124 would still be available and could result in fees having to be paid for international search reports, but not for equivalent European reports.

640. The delegation of the International Chamber of Commerce considered that the proceedings would be unduly complicated if the European Patent Office were to carry out subsequent searching for a search report it had itself drawn up and then collected a supplementary fee from the applicant. On the other hand, in the perhaps not infrequent cases where an international searching authority drew up the report, the possibility of drawing up a supplementary search report, requiring a fee, did seem justified.

641. The Chairman thought that conceivable cases should be differentiated according to whether the original search report was incomplete or complete. If the International Searching Authority's original report was incomplete and therefore needed supplementing, he considered it justified to make the applicant bear the costs thus incurred, for there was no perceivable reason why the European Patent Office should have to make amends for an error committed by the International Searching Authority. On the other hand, if the original search report was complete but the applicant had subsequently occasioned the need for a supplement, it should be immaterial whether the original report had been drawn up by the European Patent Office or the International Searching Authority.

642. The Netherlands delegation emphasised its view that the European Patent Office should undertake supplementary searching — whether for a European or an international search report — only in exceptional circumstances and, in principle, after the patent claims had been amended, because otherwise the procedure would never be concluded.

643. In the ensuing vote on the Swedish delegation's oral

proposal also to delete sub-paragraph (b) from Article 124, paragraph 2, 2 delegations voted in favour, 8 against and there were 4 abstentions.

644. At the final meeting of the Main Committee, the delegations of the Federal Republic of Germany, the Netherlands, Sweden and the United Kingdom proposed resuming the discussion of *paragraph 2(b)* with a view to deleting it, and also deleting the amended version of paragraph 3 (see point 623 and M/128/I Rev.).

645. In support of this proposal, the Netherlands delegation pointed out that pursuant to the version of paragraph 2 recently decided by the Main Committee, the applicant had to bear the cost of a search report which supplemented an international search report. This provision did not seem very felicitous in view of the fact that Article 156 (157) also laid down that a supplementary European search report could be obtained for an international application in return for the payment of a fee. But since, pursuant to Article 156, the Administrative Council had recognised certain categories of international search reports as being equivalent to search reports of the European Patent Office, there remained only isolated instances in which it would be justifiable to obtain a supplementary search report; after all, the Examining Divisions could examine all categories of search reports which had already been recognised to ascertain whether they were adequate for the European proceedings. However, for those few isolated instances, it was completely tenable that the supplementary search reports should be drawn up free of charge and the costs thereof borne by all applicants collectively.

To retain this latest version of paragraph 2 would be to risk an adverse influence on other countries and future conventions. Furthermore, one might well wonder whether paragraph 1 should not also be deleted, if paragraphs 2 and 3 were.

646. The French delegation was opposed to any resumption of discussions on paragraph 2; it considered that the Netherlands delegation's comments went beyond a mere justification of the proposal on procedure.

647. The Belgian and Swiss delegations also opposed the proposal for resuming discussions.

648. The Main Committee finally decided by 11 votes to 3 to resume discussion of Article 124, paragraph 2.

649. The United Kingdom delegation, supported by other delegations, proposed that the whole of Article 124 should be deleted.

650. The Italian delegation said it could agree to the deletion of paragraphs 2 and 3, but not to the deletion of the whole Article, on the grounds that it should be possible to obtain a supplementary search report during a transitional period at least.

651. The French delegation considered that, even if Article 124 were deleted, the European Patent Office could have a supplementary search report drawn up. In this event, it felt that it would not be right to exempt the applicant from payment of fees by making all the applicants and in particular the European applicants bear the resulting increase in costs. In any case, the search fee, which is meant to cover search costs in full, will be quite considerable, probably greater than all the other fees. Consequently, at least in this case, a person submitting an international application in respect of which an inadequate search report has been drawn up, should have to bear the cost of the supplementary search report. The French delegation therefore favoured retention of the most recently adopted version of Article 124, paragraph 2.

652. The Swiss delegation supported the French delegation. It felt that the case in question differed from the case in paragraph 2(a) which the Main Committee had already decided

to delete (see point 629) since the resulting loss of fees should in its opinion be made up for by a flat-rate increase in the search fee so that in effect the applicant would indirectly pay for such loss.

However, the procedure for PCT applications was different: in this case, if, in accordance with Article 156, the Administrative Council has in certain cases waived the requirement for a supplementary search report, an additional search fee can no longer be charged. Nevertheless, special cases could arise where, although a general decision had been taken not to require a supplementary search, such a search might become necessary; it would then be only fair and reasonable to let the PCT applicant bear the resultant cost. The same would also have to apply should the PCT applicant make changes in the patent claims in the course of completing the procedure. In this case also it would be unreasonable if all European applicants had to bear the cost of such supplementary searches.

Finally, the Swiss delegation stressed that it regarded this problem as being purely financial and not a matter of discriminating against PCT applications; it feared that without Article 124, paragraph 2, an excessive strain might be placed on the budget of the European Patent Office.

653. The United Kingdom delegation considered that the vast majority of cases of inadequate international search reports were sufficiently covered by Article 156; this was so where the search report was drawn up by an International Searching Authority whose reports had not yet reached European standard; where the International Searching Authority declared, in accordance with Article 17 of the Patent Cooperation Treaty, that it was unable to make an adequate search; or where the applicant had changed the claims in the international application in accordance with Article 19 of the Patent Cooperation Treaty. The only case in which Article 124 could conceivably be applied would be where the International Searching Authority had drawn up a bad report which just did not make sense. This would give rise to disputes between the applicant and the European Patent Office as to whether a further search fee was called for. Such cases were so rare that it was not worth while bothering about them.

The United Kingdom delegation was therefore in favour of deleting, not only paragraph 2, but all of Article 124 since, were paragraph 1 retained on its own, it would only make the obvious statement that the European Patent Office could at any time call for additions to the search report.

654. It was equally the opinion of the German delegation that there was no justification for retaining Article 124, paragraph 2, at the same time as Article 156; Article 156 was severe on PCT applicants in that in addition to each PCT search report, a supplementary search report — subject to a fee — was required. Of course the Administrative Council could decide to waive the requirements for a supplementary report or to reduce the search fee. However, it would only do so when the reports of a given PCT Searching Authority reached the same standard as the European search reports and when furthermore the relevant PCT Searching Authorities fully recognised the European reports. When this stage was reached, it would hardly be justified to charge a supplementary search fee for the few cases in which a supplementary search was necessary. It might also be expected that other PCT States would waive payment of supplementary fees when calling for a supplementary search to a European search report. It was above all a matter of observing the spirit of the Patent Cooperation Treaty which promoted international co-operation on patents; this would be infringed by any petty-minded charging of supplementary search fees.

Article 124, paragraph 2, should accordingly be deleted;

paragraph 1 would then cease to have any meaning since the European Patent Office, which would itself be responsible for carrying out the search, could of course supplement the search at any time.

655. The Netherlands delegation asked the Swiss delegation whether its doubts would be removed if the search fee — although reduced by the Administrative Council — were still fixed at such a level as to cover by means of a flat-rate fee the cost of all supplementary searches necessary for PCT applications. In its opinion Article 156 (157), paragraph 3, would permit such a flat-rate fee to be fixed.

656. The Swiss delegation replied that it did not interpret Article 156 (157), paragraph 3, in this way. It considered that paragraph 3 was a derogation from paragraph 2 and that it did not give a blanket authorisation to fix a flat-rate search fee. But the Swiss delegation was in no way opposed to Article 156, paragraph 3, being amended to give such authorisation.

657. The United Kingdom delegation maintained that, according to Article 156, paragraph 3, a supplementary search fee could be fixed at a flat-rate for PCT applications. After all, the European Patent Office would have to carry out some sort of search in respect of each PCT application on account of Article 52 (54), paragraph 3. In this event, a complete remission of fees would be out of the question unless the European Patent Office itself was acting as a PCT Searching Authority.

658. The Chairman stated that it was quite clear to him that, in accordance with Article 156, paragraph 3, the Administrative Council could make a general reduction in the search fees for PCT applications. Should it so decide, all PCT applicants would have to pay this fee irrespective of any subsequent searches in individual cases. Were Article 124 to be retained, however, a supplementary search fee could only be charged in individual cases where a subsequent search was actually carried out.

659. Moreover, the question should be asked, if Article 124 were completely deleted, as to whether Rule 67, paragraph 2, should also be dropped. This states that the Board of Appeal could ask an Examining Division and a Searching Division for further information concerning the state of the art (see point 2316a).

660. The Swiss delegation stated that it would re-examine its attitude to the question of the deletion of Article 124 in case the Committee in general considered that the Administrative Council — irrespective of whether it waived the requirement for supplementary European search reports in accordance with Article 156, paragraph 3(a) — could fix a flat-rate search fee for PCT applications.

661. After inquiring all round, the Chairman ascertained that it was the unanimous opinion of the Main Committee that the Administrative Council could, in accordance with Article 156, paragraph 3, decide to charge a small search fee for PCT applications which would cover the cost of the supplementary search reports.

662. The German delegation pointed out that the cost of the supplementary search reports could be covered in other ways, e. g. by an overall increase in the application fee. Whichever option the Administrative Council were to choose in future would probably depend on what other PCT Searching Authorities did later; in any case it should keep its options open.

663. The French delegation stated that even if the Main Committee had interpreted Article 156, paragraph 3, in this way, there was no assurance that the Administrative Council would subsequently endorse this interpretation. This was why the French delegation advocated retention of Article 124.

664. Finally, the Main Committee voted on the most far-reaching proposal, namely, that Article 124 be completely deleted.

This proposal was adopted by 8 votes to 2 with 3 abstentions.

## Article 125 – Reference to general principles

665. In connection with Article 125, it was established at the request of the United Kingdom delegation that there was majority agreement in the Main Committee on the following: that it was a generally recognised principle of procedural law in the Contracting States that a person can be granted only one European patent for the same invention in respect of which there are several applications with the same date of filing.

666. The Norwegian delegation stated that it could not agree to this principle in its present general form since under Scandinavian law it was possible in theory to grant two patents to an applicant for the same invention.

667. The FICPI delegation wondered what was meant in this instance by the same application or the same patent; did it mean that the content was substantially the same or that the patent claims were substantially the same?

668. The United Kingdom delegation interpreted it as meaning that the patent claims were the same.

669. It was furthermore established, at the request of the United Kingdom delegation, that it was the unanimous opinion of the Main Committee that the European Patent Office had the right to correct any inadvertent errors on its part.

## Article 126 – Termination of financial obligations

670. At the suggestion of the Belgian delegation, the Main Committee referred Article 126 to the Drafting Committee to see whether a more suitable heading could be found.

## Article 127 – Register of European Patents

671. The Austrian delegation proposed that it should be made clear that entries in the Register of Patents could be made, not only on the basis of the Convention, but also on the basis of the Implementing Regulations (M/41, point 5).

672. The German and Netherlands delegations considered such clarification superfluous in view of Article 163 (164).

673. The Austrian delegation accordingly withdrew the proposal.

674. The Austrian delegation further proposed that Article 127 be so worded that legal amendments concerning the European patent made during the opposition proceedings which, in any case, were entered in the relevant national patent registers, should also be entered in the European Register of Patents. Awareness of such entries could be of particular importance for opponents. The Austrian delegation also felt that it should be made clear that no entry could be made in the Register of European Patents once the opposition proceedings had been concluded (M/41, points 6-8).

675. The German delegation maintained that the Austrian delegation's request was already covered since Rule 62 (61) together with Rule 20 laid down that the transfer of the European patent during the opposition period or during opposition proceedings had to be entered in the Register of European Patents at the request of an interested party.

It did not consider it worthwhile fixing the final deadline for entries in the Register of European Patents in the Convention: the German delegation felt that it would be preferable to leave the matter as it now stood in Rule 62 (61) which could be more easily amended if the need arose.

676. The Swiss delegation came to the conclusion that the present flexible arrangement governing entries in the Register of European Patents was more expedient than a rigid provision in the Convention.

677. The Austrian delegation pointed out that its reason for proposing that a final deadline for entries in the Register of

European Patents be fixed in the first place was that under Austrian law, entries in the register had legal effect and consequently, contradictory entries in the national register on the one hand, and in the European Register on the other, could give rise to problems.

678. The Chairman replied that entries in the Register of European Patents created no rights or obligations towards third parties but only *vis-à-vis* the European Patent Office. Accordingly, differences between entries in the Register of European Patents and those in national registers should have no adverse consequences.

679. In view of the outcome of the discussion, the Austrian delegation withdrew its proposal even though this might cause it some difficulty.

## Article 128 – Inspection of files

680. The Swedish delegation proposed that Article 128 and in particular *paragraphs 1 and 4* be amended so that instead of having to wait for the patent application to be published the files would be made available for unrestricted inspection 18 months after either the date of filing or the priority date (M/53/I/II, point 7).

681. The Netherlands delegation wondered whether this would mean that copies of all patent applications would, after 18 months, have to be made available for inspection of the files.

682. The Swedish delegation considered that this would certainly not be necessary for all patent applications but only for those which competitors of the applicant wished to inspect.

683. The United Kingdom delegation pointed out that patent applications would probably be published very shortly after expiry of the 18-month period from the date of filing or priority date. If only a short period – about 1 month – was going to elapse before publication, it would not be worthwhile setting up a special section in the European Patent Office for inspection (with its own staff and a special library). Moreover, it would not be right to allow the files to be inspected before the provisional protection deriving from the application had begun; this would be afforded only on publication.

684. The German delegation also drew attention to this point. It furthermore pointed out that practice of making as yet unpublished applications available to third parties could detract from novelty. For these reasons it had no alternative but to reject the Swedish proposal.

685. The Swiss delegation opposed the Swedish proposal mainly on the grounds that during the period between the date of making available the files for inspection and the publication of the application, the applicant would have no provisional legal protection.

686. The IAPIP delegation agreed with the German delegation's views.

687. Having considered these objections, the Swedish delegation withdrew its proposal.

688. The Main Committee referred to the Drafting Committee a drafting proposal from the German delegation relating to *paragraph 4* (M/47/I/II/III, point 42).

689. The Swiss delegation proposed that *paragraph 5(b)* be supplemented to the effect that the date of any priority claim concerning third parties could also be given or published since if this date were not given, third parties could draw false conclusions (M/31, point 5, and M/54/I/II/III, page 21).

690. The United Kingdom delegation pointed out that publication of the priority date could, in some cases, conflict with Article 30, paragraph 2, of the Patent Cooperation Treaty. This problem could be overcome by including, among the information which could be given, in addition to the priority

date, the State and the reference number of the priority application.

691. The Italian delegation supported the Swiss proposal.

692. The WIPO delegation seemed to recall that when Article 30, paragraph 2, of the Patent Cooperation Treaty was being discussed, the details mentioned in this paragraph (which did not include the priority date) were considered sufficient to identify the international application. In its opinion, the priority date of a published PCT application should not be revealed to third parties or published.

693. The Netherlands delegation was unable to support the Swiss proposal since it would not feel happy if two different procedures were introduced for European applications and PCT applications respectively.

694. The Austrian delegation, however, wished to support the Swiss proposal and the extension of its scope proposed by the United Kingdom delegation.

695. The Swiss delegation did not consider that there was anything to prevent the Contracting States to the European Patent Convention from laying down better arrangements than had been possible for PCT applications. It certainly had not wanted to go so far as to make it possible for the reference number of the priority application to be revealed because this basically amounted to revealing the contents of the application.

696. The United Kingdom delegation shared the opinion of the Swiss delegation that anyone who knew the reference number of the priority application could also find out about its content: however, this would only apply if the application had already been published. There would then be no further need to keep this information secret. It might also be convenient for documentation centres such as INPADOC to receive certain information as quickly as possible.

The United Kingdom delegation, supported by the Austrian delegation, therefore proposed that the Swiss proposal be extended so as to allow the States and reference numbers of the priority applications to be revealed.

697. The UNICE delegation welcomed the proposal in its extended form. It felt that it would be in the best interests of industry if the date, State and reference number of the priority application could also be revealed. It did not think that such an addition to the Convention conflicted with the Patent Cooperation Treaty.

698. The Chairman maintained that an arrangement which did not comply with the Patent Cooperation Treaty could only be introduced for European applications which did not have to be processed in accordance with this Treaty.

699. The Netherlands delegation pointed out that the reference number of the priority application would, in any case, be published together with the European patent application, in other words about 18 months after the priority date. Only then would it become important for documentation centres to know the reference number of an application which could be withdrawn up until the time of publication.

700. The WIPO delegation considered that, in general, bibliographic data on priority only became important after the publication of the patent applications. The particular problem of exchanging data with other patent offices or documentation centres had better be dealt with in Article 130.

701. The EIRMA, International Chamber of Commerce and European Centre for Public Enterprise (CEEP) delegations supported the United Kingdom proposal.

702. The IAPIP delegation also supported it; it pointed out that under the terms of the Paris Convention, if based on priority, an application was considered to have been submitted on the priority date. This proposal was therefore only the logical consequence.

703. The German delegation considered that the giving of

the priority date of a PCT application was more of a theoretical problem since by the time it reached the European Patent Office a PCT application would normally have already been published. This would only have practical implications if the application were submitted to the European Patent Office earlier at the request of the applicant.

704. The WIPO delegation thought that this would only apply to PCT applications in the case of which the European Patent Office was the identification office but not to those where the European Patent Office was acting as the filing office.

705. When a vote was finally taken, 8 delegations were in favour of the United Kingdom proposal while 5 delegations abstained.

706. The Italian delegation wondered how the permissive provision in paragraph 5 should be interpreted: could the European Patent Office publish this bibliographic data only where it had been communicated to third parties on request or could it also publish it irrespective of whether it had been so communicated? Could the European Patent Office refuse a request for information? Where and how would such data be communicated or published?

707. The United Kingdom delegation felt that it was envisaged that the European Patent Office would have absolute freedom to decide whether such data should be communicated to third parties or published before the application was published.

708. The German delegation drew attention to Rule 97 (96), paragraph 1, which laid down that the President of the European Patent Office could decide whether, and in what form, such data should be communicated to third parties or published.

709. The EIRMA delegation advocated that the permissive provision in paragraph 5 be made mandatory.

710. The Italian and Swedish delegations adopted this suggestion as a proposal.

711. The United Kingdom delegation maintained that such an obligation would not be expedient, particularly in view of the fact that there were differences as regards the Patent Cooperation Treaty which had already been discussed. Moreover, there need be no doubt that the European Patent Office would use its discretion in a reasonable manner.

712. The Netherlands delegation was also in favour of maintaining the permissive provision which would give a large measure of discretion to the European Patent Office.

713. When the vote was finally taken, 4 delegations were in favour and 7 against the change to a mandatory provision; 3 delegations abstained.

### **Article 130 — Exchanges of information**

714. The United Kingdom delegation, supported by several others, proposed that *paragraph 2* be aligned with the arrangement in paragraph 1 so as to make it clear that in contacts between the European Patent Office and the central industrial property offices of non-contracting States too, only information on the filing of European or national patent applications and related proceedings would be given, to the exclusion of any information as to the content of the applications (M/64/I, page 2).

715. The Main Committee adopted this proposal.

716. The Austrian delegation proposed that paragraph 2 in its amended form be extended so as to allow information on the filing of European or national patent applications and related proceedings to be exchanged, not only between the European Patent Office and the central industrial property offices of non-contracting States but also between the European Patent

Office and international organisations in the patent field and documentation centres set up by agreement with such international organisations; this exchange would take place on the basis of working agreements (see M/81/I).

717. The Netherlands delegation asked what was the practical importance of the suggested provision since the European Patent Office could, according to Article 128, paragraph 5, communicate certain data to any third party, such as a documentation centre, and in accordance with the already amended Article 132, paragraph 2 (see point 756), it could conclude agreements with documentation centres on the exchange of publications.

718. The United Kingdom delegation had the same doubts and before adopting any position on the Austrian proposal it wished to know what information, say, a documentation centre such as INPADOC needed in addition to that mentioned in Article 128, paragraph 5, before the publication of the European patent application.

719. The Austrian delegation replied that INPADOC would, in any case, require details of the patent classification, for the communication of which Article 128, paragraph 5, made no provision, and probably further data in addition.

720. In the opinion of the WIPO delegation Article 130 as it now stood was a general provision since it affected both published and unpublished patent applications as well as the patent already granted. It could be useful for national offices and documentation centres to receive the relevant data direct from the European Patent Office without having to wait for publication of the application. Conversely, it might be in the interest of the European Patent Office to receive similar information direct from national patent offices.

The Austrian proposal affected WIPO as an international organisation which would be processing international applications once the Patent Cooperation Treaty entered into force. Consequently, WIPO was interested in exchanging data on patent applications with the European Patent Office, that is not just information such as number, date of filing etc., but also statistics which would not be published. Article 128, paragraph 5, was inadequate in this respect.

It also felt that the possibility of co-operation should be extended to regional patent offices such as the African-Malagasy Organisation for Intellectual Property (OAMPI), which could only grow in importance in the future. Article 130 as it now stood and also according to the Austrian proposal seemed to exclude this.

721. In reply to this last point the Chairman stated his opinion that central industrial property offices in non-contracting States also included regional industrial property offices.

722. The United Kingdom delegation agreed with the WIPO delegation that Article 130 covered the stages before and after publication of the European patent application. It furthermore asked what data WIPO required before the publication of the European patent application, apart from the information available pursuant to Article 128, paragraph 5.

723. The Austrian delegation pointed out that INPADOC had been set up at the suggestion of WIPO in the interests of the Contracting States and in particular their central industrial property offices, so as to make possible or easier the exchange of data through a central office. It therefore seemed reasonable to include not just WIPO but also INPADOC in Article 130.

724. The Chairman thought the question was whether the European Patent Office could communicate information, before publication, to third parties such as INPADOC, concerning not only the number, the date of filing etc. of a European patent application, but also information on the state of the proceedings.

725. The WIPO delegation considered that only in

exceptional cases would the possibility of communicating information before publication of the patent application arise. Normally it would only be a question of exchanging data on already published applications.

The answer to the United Kingdom delegation's question was that a documentation centre would usually only require information from already published documents. But exceptions could arise, for instance where an important publication was imminent. Central industrial property offices in the Contracting States and regional patent offices might also be interested in exchanging research results. In addition, as the Austrian delegation had stated, patent classification data might be required.

726. The EIRMA delegation thought it important that the European Patent Office should not be allowed to communicate information to third parties before the European patent application was published, other than that permitted under Article 128, paragraph 5.

727. The CNIPA delegation was of the same opinion and stressed that not even information about the patent classification should be given to third parties.

728. The Chairman did not understand why the European Patent Office should reveal information before publication of the patent application whereas national patent offices did not do so. Accordingly, he personally was not convinced that WIPO and INPADOC had to be included in Article 130, paragraph 2.

729. The Netherlands delegation stated that it had not been convinced by the arguments put forward in favour of communication of data before publication of the European patent application. On the other hand, it had no objection to information being exchanged between the European Patent Office and documentation centres after publication.

730. The Austrian delegation once again pointed out that INPADOC had been set up at the wish of the WIPO Contracting States to meet their needs. It had been considered at that time that a documentation centre for the exchange of bibliographic data between national patent offices could only be of value if such data were processed with all possible speed. Provision could be made for data to be circulated at the preparation stage and only made freely available after publication; the details could be dealt with in working agreements the content of which the Contracting States could freely decide.

731. The Yugoslav and Swedish delegations supported the Austrian proposal.

732. So as to overcome the problems of some delegations, the Chairman proposed a compromise whereby data could be exchanged between the European Patent Office and international organisations in the patent field or documentation centres set up under agreements with such organisations, but that the restrictions governing such exchanges under Article 128 would remain.

733. The United Kingdom delegation further proposed that in certain circumstances the Administrative Council be empowered to lift the restrictions on such exchanges in Article 128.

734. The Austrian delegation stated that it could lend its support to this compromise in the last resort if the WIPO delegation considered that the interests of INPADOC had been accommodated.

735. The WIPO delegation considered it absolutely essential for certain information on patent applications to be made available to INPADOC — even if only shortly before publication. This seemed to be covered by the United Kingdom's supplementary proposal. A formula would also have to be found which clearly included regional patent authorities.

736. The Chairman repeated his proposal, as supplemented

by the United Kingdom delegation (points 732 and 733), and further proposed that in the case of documentation centres, no distinction should be made as to whether they had been set up on the basis of agreements with international organisations in the patent field or not.

737. The Swedish delegation supported this proposal which it felt enabled INPADOC to work efficiently.

738. The Main Committee agreed to this proposal.

739. At a later session, the Main Committee agreed that, in the wording of paragraph 2(c) proposed by the Drafting Committee\*, "organisation" meant both institutions such as INPADOC as well as private undertakings.

### **Article 131 — Legal and administrative co-operation**

740. The Main Committee referred to the Drafting Committee a drafting proposal submitted orally by the French delegation for the heading of this Article.

741. The Main Committee referred to the Drafting Committee a drafting proposal from the Luxembourg delegation for *paragraph 1* (M/9, point 26) and a drafting proposal from the United Kingdom delegation (M/40, point 21).

742. The Austrian delegation, supported by the Swiss delegation, proposed that provision be made in a *new paragraph* that, where notifications were made in national proceedings in respect of a claim to the right to the grant of a European patent or in respect of the revocation of a European patent, the courts or other authorities should assist each other on request even where the requesting authority was not a court (M/41, point 12). Experience had shown that, without such a requirement, national authorities which were not courts and which could not therefore claim that they were covered by the normal provisions governing legal co-operation, would have difficulties as regards notification.

743. The German delegation opposed this proposal since, as regards notification, it would interfere in national proceedings in the Contracting States. This would be an infringement of the principle which had so far been observed whereby national proceedings were only to be standardised to the extent that it was absolutely necessary for the purposes of the Convention.

744. The Netherlands delegation shared this opinion and added that the proposal went beyond the aim of Article 131 inasmuch as it sought to regulate legal co-operation not only between the European Patent Office and courts and authorities in the Contracting States but also that between the courts and authorities of the Contracting States.

745. The United Kingdom delegation felt that the proposed addition to Article 131 was unnecessary.

746. In the subsequent voting, 2 delegations were in favour and 9 against the Austrian proposal; 3 delegations abstained.

747. The Austrian delegation proposed that provision be made in a *new paragraph* that, in proceedings in respect of a claim to the right to the grant of a European patent or in respect of the revocation of a European patent, courts and other authorities in the Contracting States could request the European Patent Office to notify the claim or request (M/41, point 13).

748. This proposal was supported by no other delegation.

### **Article 132 — Exchange of publications**

749. The Austrian delegation advocated the extension of the scope of *paragraph 2* so that the European Patent Office could conclude agreements on the exchange of publications with, or the supply to, not just international organisations, but also documentation centres set up on the basis of agreements (M/78/I). The present wording, it might be claimed, gave an

exhaustive list of the bodies with which the European Patent Office could conclude such agreements.

750. The Swedish delegation was sympathetic to the Austrian proposal but wondered whether paragraph 2 should not be completely deleted since it was self-evident that the European Patent Office could conclude such agreements.

751. This was also the view of the United Kingdom delegation which, supported by the Irish delegation, accordingly proposed that paragraph 2 be deleted. If, on the other hand, the scope of this requirement were extended as desired by the Austrian delegation, the opposite inference could be drawn, namely that the European Patent Office could not conclude other agreements; this would not be desirable.

752. The Chairman pointed out that paragraph 2 could be so generally worded that the European Patent Office could conclude any kind of agreement on the exchange or supply of publications.

753. The WIPO delegation considered a more general wording as suggested by the Chair to be the best solution.

754. The Chairman's suggestion was adopted as a proposal by the German, French and Netherlands delegations.

755. The United Kingdom and Swedish delegations, and the Austrian delegation withdrew their proposals in favour of the German/French/Netherlands proposal.

756. The Main Committee adopted the more general wording of paragraph 2 suggested by the Chairman.

### **Article 133 — Representation**

757. The Committee directed the Drafting Committee to examine whether the *heading* of this Article should be amended to read "General principles of representation", as proposed by the French delegation.

758. The Committee examined the amendment proposed by the Member States of the European Communities concerning *paragraph 2* (see M/14, point 8) whereby the word "établissement" would be replaced by the word "siège" in the French text, with the term "seat" being substituted for "registered place of business" in the English text.

759. The United Kingdom delegation stated that it would prefer the term "registered place of business" to be replaced by "principal place of business" in the English version (see M/64, page 2).

760. The Committee directed the Drafting Committee to examine the matter.

761. The Committee agreed to refer the proposal by the Member States of the European Communities concerning *paragraph 3* (see M/4, point 8) to the Drafting Committee for examination.

762. The Chairman noted that the Committee concurred with the French delegation's viewpoint that paragraph 3 should also apply during the transitional period.

763. In reply to a comment by the COPRICE delegation, the Committee signified its agreement to the following interpretation of paragraph 3: the use of the term "employee" did not preclude a company from being represented by one of its bodies, for example an administrator. The Committee held that this problem was covered by paragraph 1, whereby a natural person could represent himself and a legal person could be represented by one of its bodies. Paragraph 3 added that a legal person could also be represented by or act through its employees. The Committee further agreed that the word "employee" as used in paragraph 3 was to be taken in its widest meaning.

### **Article 134 — Professional representatives**

764. The Swedish delegation elucidated its proposed amendment to *paragraph 2* (M/53, page 4), to the effect that

\* This is identical with the final wording of Article 130, paragraph 2(c).



professional representatives should not be required to be nationals of one of the Contracting States to be entered on the list. It felt that such a requirement would be rather out of place within the context of an international patent convention. It would, however, be prepared to have the nationality requirement replaced by the requirement that representatives must be resident in one of the Contracting States.

765. None of the delegations supported this proposal.

766. The French delegation explained the reasons which induced it to propose that *paragraph 3* (see M/112) be amended to stipulate that persons whose names appeared on the list of professional representatives would be entitled to act before all departments of "and in all proceedings" before the European Patent Office. The purpose of this addition was to take account of the possibility under the Protocol on Centralisation (Section IV) of transferring examination tasks to certain national offices.

767. The Chairman noted that the French delegation's proposal was supported by several delegations.

768. The Netherlands delegation was totally in agreement with the principle underlying the French delegation's proposal and wondered whether it should not in fact be embodied in the Protocol itself.

769. The United Kingdom delegation suggested that this paragraph be amended by stipulating that professional representatives were entitled to act "in all proceedings established by this Convention".

770. The Committee agreed to the French delegation's proposal and instructed the Drafting Committee to examine whether this provision should be incorporated in the Convention or in the Protocol on Centralisation.

771. In the course of the examination of the results of the Drafting Committee's work (see M/141, pages 3 and 4), the Irish delegation pointed out that it interpreted this provision as meaning that "proceedings established by this Convention" did not apply to the proceedings referred to in Article 73, paragraph 1(b), concerning the filing of applications with national authorities. The Irish delegation asked the Committee if it concurred with this interpretation.

772. The Committee indicated its agreement to this interpretation and decided that this fact should be noted in the Minutes.

773. The Committee examined the French delegation's proposal concerning *paragraph 4* as set out in M/112, page 2.

774. The French delegation pointed out that its proposal consisted of two separate parts. The first part related to a provision similar to that just adopted by the Committee with regard to paragraph 3, inasmuch as its aim was to extend the scope of the measure under consideration. The intention was to extend the obligation upon Contracting States within whose territory the European Patent Office would be located (Federal Republic of Germany and the Netherlands) to those Contracting States whose national offices would engage in work on behalf of the European Patent Office. The objective of the second part of the proposal was to enable professional representatives not only to have a place of business within the territory of the States concerned, but also to reside there and in addition to enable members of their families and their associates to have a place of residence and to exercise their profession within the territory of the States concerned.

775. The Chairman suggested that the Committee examine the two parts of the French delegation's proposal separately. He also called upon the French delegation to specify whether the first part of its proposal was intended to cover only those circumstances referred to under Section IV of the Protocol on Centralisation or also the possibility created by Main Committee II's decision on the interpretation of Article 31, paragraph 3, whereby tasks could be entrusted to national

offices by the Administrative Council even after the expiry of the transitional period.

776. The French delegation stated that its proposal covered both cases.

777. The Committee agreed to the first part of the French delegation's proposal.

778. The delegation of the Federal Republic of Germany called upon the Committee to express an opinion on the following problem: was the obligation upon Contracting States to permit professional representatives to have a place of business within their territory to apply to all the territory in question or was it to be confined to the town (and its suburbs) in which the European Patent Office was to be located?

779. The United Kingdom delegation felt that there was no case for a restriction of the nature proposed by the delegation of the Federal Republic of Germany. The Finnish delegation concurred with this viewpoint.

780. The UNION, FICPI, CEIF and CNIPA delegations were also opposed to this restriction.

781. The Chairman called upon the Committee to examine the second part of the French delegation's proposal, which appeared to give rise to certain difficulties in view of restrictions on foreigners in the Contracting States as regards freedom of residence and freedom to engage in employment. He therefore wondered whether the French delegation's proposal should not be restricted by adding a clause which would ensure that national provisions in these fields were complied with.

782. The Swiss delegation contended that a provision of this nature would be out of place in this Convention on the grounds that it impinged upon the matter of the right of establishment, which had been dealt with in a number of bilateral and multilateral agreements. The Swiss delegation was therefore unable to support this proposal.

783. The Netherlands delegation shared the viewpoint expressed by the Swiss delegation and went on to state that the Governments would certainly interpret paragraph 4 in a reasonable manner, with the result that the problems underlying the French delegation's proposal would not arise in practice.

784. The Luxembourg delegation considered that the French delegation's proposal could perhaps be adopted if the following rider were added: "subject to national provisions on the right of establishment".

785. The United Kingdom delegation expressed objections with regard to the French delegation's proposal for the same reasons as those voiced by the Swiss delegation.

786. The delegation of the Federal Republic of Germany was also opposed to this proposal on the grounds that its content went beyond normal practice in such cases. It drew the attention of the Committee to the fact that the right to exercise their profession was not granted to members of the families of European Patent Office employees. It would be the responsibility of the President of the European Patent Office to ensure in the agreement to be concluded with the host country that the usual facilities were granted not only to professional representatives but also to members of their families and their associates.

787. The Belgian delegation endorsed the opinion expressed by the Luxembourg delegation.

788. The UNION delegation was in favour of the French delegation's proposal, which it interpreted as referring solely to the right of residence and not to the right of members of the families of professional representatives to exercise their profession.

789. The CEIF delegation felt that it was essential that professional representatives enjoy reasonable opportunities



for setting up house and working. Such reasonable possibilities comprised the right to a private residence for the representative and his family and the right to a work permit for those assistants which the representative required for the purposes of his profession. To this extent the CEIF delegation could endorse the compromise solution put forward by the Chair.

790. The FICPI delegation endorsed the comments made by the UNION delegation and suggested that the following phrase be added to the end of the text proposed by the French delegation: "their profession within the context of this Convention".

791. The French delegation pointed out that it had endeavoured to take account of a number of aspects in its proposal. The first of these was to ensure that professional representatives and their assistants were entitled to have a residence and exercise their profession. The second related to members of the families of such persons. It was clear that national laws on the right of establishment would have to be taken into account. The French delegation was therefore prepared to amend its original proposal using two sentences. The first sentence would cover professional representatives, their associates and assistants, who should be entitled to reside and exercise their profession within the territory of the Contracting States. The second of these sentences would deal with the situation of members of the families of these persons by granting them the right to reside and exercise their profession subject to national law, and in particular national provisions governing the right of establishment.

792. The Luxembourg delegation pointed out that if the French delegation's proposal were accompanied by a reference to national laws on the right of establishment, the proposal would find no practical application, inasmuch as the first part of the provision would grant the right to exercise the profession whereas the next sentence would stipulate that national laws on establishment would prevail.

793. The French delegation first of all pointed out that the text of this Article as it now stood already included a provision on the right of establishment and it was therefore unable to understand why certain delegations considered that a provision of this nature was out of place in the Convention. Secondly, with reference to the comments made by the Luxembourg delegation, the French delegation held that the provision was certainly not self-defeating in view of the fact that the first part of its proposal was intended to make provision for the right to reside and exercise the profession, but did not state that such right was subject to national laws on the right of establishment. The reference to national law occurred in the second sentence and concerned only the members of the families of professional representatives. The French delegation added that it might be prepared to relinquish the second part of the proposal provided that the discussions on the matter were explicitly mentioned in the Minutes of the Conference.

794. The Chairman noted that the French delegation's proposal as it now stood following the amendments read as follows: "professional representatives, their associates and employees shall have the unrestricted right to reside and exercise their profession within the said States".

795. The United Kingdom delegation suggested that this proposal be amended by adding the following phrase at the end: "exercise their profession in industrial property matters".

796. The Swedish delegation, speaking on behalf of the four Nordic countries, stated that these countries would prefer the matter not to be dealt with under this Convention but to be determined by the President of the European Patent Office in the headquarters' agreement. The Swedish delegation made it clear that this view was not dictated by any opposition in

principle to the idea underlying the French delegation's proposal, but was due quite simply to the fact that these four countries were parties to international agreements on this matter.

797. The delegation of the Federal Republic of Germany, while agreeing in principle with the purport of the French delegation's proposal, stated that the presence of express provisions to that effect within the text of the Convention induced it to express a number of objections. As had been pointed out by the Netherlands delegation, the provisions governing the case in point were of a very technical nature and great care would have to be exercised to ensure that this did not give rise to arrangements which were incompatible with national legislation. At the very most, the delegation of the Federal Republic of Germany could agree to a statement written into the Minutes to the effect that this problem would be dealt with in later provisions and in particular in the headquarters agreement.

798. The Netherlands delegation endorsed this viewpoint.

799. The French delegation submitted the following compromise proposal: "Professional representatives, their assistants and employees shall have the unrestricted right to exercise their profession for the purposes of implementing this Convention within the said States; these persons shall have the right to reside there with their families."

800. The Luxembourg delegation suggested that the matter of residence be dealt with subsequently and that only the first part of the French proposal be put to the vote.

801. The French delegation agreed to this suggestion.

802. The Committee voted against the French delegation's proposal by a majority of eight to six, with two abstentions. The Chairman noted that the Committee agreed that the discussion on this point should be set out in detail in the Minutes and that it should be recorded that the headquarters agreement between the Contracting States concerned and the President of the Office should settle the problems examined by the Committee.

803. The Committee referred the French delegation's proposal concerning *paragraph 6* (see M/112, page 2) to the Drafting Committee for examination.

804. As regards *paragraph 6*, the Committee also instructed the Drafting Committee to examine the French delegation's proposal concerning Article 162, paragraphs 2, 3 and 6 that the word "agr  " be deleted.

805. In the course of the examination of the outcome of the Drafting Committee's work (see M/141, pages 3 and 4), the United Kingdom delegation pointed out that the insertion of the phrase "in the same way as by a professional representative" at the beginning of *paragraph 6* would pose certain problems in the United Kingdom, where the profession of solicitor and barrister was not subject to any written rules but was exercised in accordance with practices dating from time immemorial. The United Kingdom delegation therefore asked the Committee whether it could agree that this *paragraph* was to be interpreted as referring to these two categories of representatives.

806. The Committee agreed to this interpretation and decided that it should be noted in the Minutes.

807. The Committee agreed to instruct the Drafting Committee to elaborate an appropriate wording for *paragraph 7*, whereby persons entered on the list during the transitional period who retained this right even after expiry of that period would be included in the concept of professional representatives.

808. The Committee examined the proposal by the delegation of the Federal Republic of Germany that a *new paragraph 8* be added to this Article (see M/11, point 6).

809. The delegation of the Federal Republic of Germany

pointed out that the purpose of its proposal was to introduce a provision which would very probably apply only in a very limited number of cases. The provisions as they stood at present afforded not only patent agents but also lawyers the possibility of representing their clients before the European Patent Office. Since cases of misconduct, and, in certain instances, infringement of national laws could be ruled out, it should be possible to deprive the person concerned of the right to establish a place of business. The original proposal by the delegation of the Federal Republic of Germany as contained in M/11 provided that the competent authorities of the State concerned should be authorised, after consulting the President of the European Patent Office, to withdraw the right to establish a place of business within its territory. After due consideration the delegation of the Federal Republic of Germany now felt that it was preferable that this power be vested in the President of the Office himself. In addition, the German delegation felt that it should be possible to appeal to the Board of Appeal against decisions by the President of the European Patent Office.

810. The Chairman noted that the proposal submitted by the delegation of the Federal Republic of Germany now ran as follows: "If a person whose name appears on the list of professional representatives or a person referred to in paragraph 6 repeatedly or seriously infringes the laws of one of the States in which European proceedings take place, the President of the European Patent Office shall be empowered to deprive such person of the right to establish a place of business in accordance with paragraph 4 or paragraph 6. An appeal shall lie to the Board of Appeal from decisions by the President of the European Patent Office."

The Chairman felt that in view of the amendments made to the original proposal, the delegation of the Federal Republic of Germany should be asked to submit a written proposal and that the Committee's work on the matter should be adjourned.

811. At a later meeting the Committee examined the proposal for a new paragraph 8 submitted by the delegation of the Federal Republic of Germany (see M/122). This proposal stated that: "If a person who has established a place of business in another Contracting State in accordance with paragraph 4 or paragraph 6 repeatedly or seriously infringes the laws of the host State, the President of the European Office shall be authorised to deprive such person, at the request of the authorities of the host State, of the right to establish a place of business in that State."

812. The Swiss delegation could agree with the principle of this proposal, but felt that as in the majority of such cases the actions involved would be subject to criminal law, it would be preferable for the national authorities, rather than the President of the European Patent Office, to be authorised to withdraw the right to establish a place of business. For this reason the Swiss delegation proposed an amendment whereby the President of the European Patent Office would be bound to withdraw such rights if so requested by the competent authorities of the host State.

813. The Netherlands delegation failed to see the need for such a provision as each Member State had its own corpus of criminal law, and as the relevant professional organisations in the Member States had their own disciplinary measures.

814. The French and Belgian delegations endorsed the opinion expressed by the Netherlands delegation.

815. The United Kingdom delegation considered that a provision of this nature would in all likelihood be superfluous, but that if it were adopted, the amendment proposed by the Swiss delegation should be incorporated as these problems involved considerations of national sovereignty.

816. The delegation of the Federal Republic of Germany

re-emphasised that it should be borne in mind that the rules under consideration would affect a quite considerable number of persons, that is to say not only patent agents but lawyers as well. All these persons would be granted the right to establish themselves in those States where the departments of the European Patent Office would be located. While not wishing in any way to malign these professional groups, experience had shown that misconduct was always possible. Accordingly, it was essential that a State be empowered to take action in such cases. This possibility was not afforded by the texts as they stood at present, inasmuch as representatives would be granted an absolute right to establish a place of business. It was therefore indispensable that a provision of the type proposed authorising the State to take the necessary measures be incorporated in the text. As regards the question of who should be empowered to withdraw the right, the delegation of the Federal Republic of Germany had considered that the Committee would favour the President of the European Patent Office. If this were not so, the German delegation was prepared to take up again its original proposal that this power be invested in the authorities of the host State.

817. The French delegation put it to the German delegation that perhaps Article 134, paragraph 7, already contained the provisions desired. The disciplinary power exercised by the bodies referred to in that paragraph should also comprise the possibility of deleting representatives from the list of professional representatives if they repeatedly or seriously infringed the laws of the State in question.

818. The delegation of the Federal Republic of Germany had intended to lay down less stringent measures to cover such cases. Whereas the French delegation favoured deletion from the list, the German delegation had taken as its premise that where the law of the State concerned had been infringed, the sole action taken would be to withdraw the right to establish a place of business, without involving the question of deletion from the list.

819. The Italian delegation concurred with the views expressed by the French delegation.

820. The delegation of the Federal Republic of Germany drew the attention of the Committee to the fact that Article 48 (3) of the Treaty of Rome provided for limitations justified on grounds of public policy, public security or public health. The German delegation had not called for similar provisions to be incorporated in the Convention on the grounds that professional representatives should not be faced with excessive difficulty in establishing a place of business in the host State. This did not, however, mean that the host State was to be deprived of all possibility of withdrawing the right to set up a place of business in cases of misconduct.

821. The Swiss delegation asked whether the delegation of the Federal Republic of Germany could agree to a provision authorising the Contracting States to lay down provisions under national law governing the withdrawal of the right to set up a place of business in the circumstances referred to in the German delegation's proposal. Although it would be a mere affirmation of fact, this provision, which could be incorporated in Article 134, would have the advantage of making it clear that the right to have a place of business within the meaning of Article 134 was not absolute.

822. The Netherlands delegation preferred a solution of this nature to the proposal made by the delegation of the Federal Republic of Germany.

823. The Chairman called upon the delegation of the Federal Republic of Germany to submit a new proposal which would take account of the Committee's discussions.

824. At a later meeting the Committee examined the new proposal by the delegation of the Federal Republic of Germany

(M/125), whereby the new paragraph 8 would be removed and the following two sentences added to paragraph 4:

"The powers of the authorities of the host State to close a place of business pursuant to the legal provisions relating to public safety and 'ordre public', shall not be affected. Before such a measure is taken, the President of the European Patent Office shall be consulted".

825. This proposal was supported by the Swiss and Swedish delegations.

826. The United Kingdom delegation was favourably inclined to the principle underlying this proposal as it felt that provision must be made to authorise the Member States concerned to withdraw the right to set up a place of business within their territory in the event of misconduct. However, as regards the actual draft submitted by the delegation of the Federal Republic of Germany, the United Kingdom delegation said that it preferred the original text submitted by that delegation, whereby the authorities of the host State would be empowered to withdraw the right after consulting the President of the European Patent Office.

827. The Chairman pointed out that these two texts differed in that the United Kingdom delegation's proposal made no reference to national law but incorporated in the Convention a provision entitling the host country to withdraw the right to set up a place of business if certain conditions were fulfilled.

828. The French delegation evinced certain misgivings as regards the proposal by the delegation of the Federal Republic of Germany on the grounds that it appeared to introduce a form of discrimination between nationals of the host country and nationals from other Contracting States. Its misgivings were even more marked as regards the United Kingdom delegation's proposal, as the sanction involved would follow directly from the Convention.

829. The Netherlands delegation pointed out that its objections to the initial proposal by the delegation of the Federal Republic of Germany had been serious, and that consequently it was obliged to come out against the proposal by the United Kingdom delegation. There seemed to be no case for embodying in the Convention special provisions governing the withdrawal of the right to set up a place of business, as such provisions could prove to be at variance with extant national or international regulations on the matter. This delegation was, however, able to agree to the latest proposal by the delegation of the Federal Republic of Germany.

830. The FICPI delegation pointed out that, at least so far as the initial period was concerned, most professional representatives would have only very limited possibilities of setting up a place of business elsewhere than in their country of origin, inasmuch as a number of national regulations stipulated that if they did so they would lose their status under national law. Accordingly, it felt that there was a shortcoming in the Convention, which should afford professional representatives every possibility of moving within the Contracting States without thereby incurring the risk of losing their national status.

831. In reply to these comments, the Chairman pointed out that the Convention could only offer professional representatives the possibility of setting up a place of business in a Contracting State in which proceedings took place before the European Patent Office. It was not for the Convention to interfere in national law in those cases where States placed certain restrictions on setting up a place of business elsewhere than within their territory. It would be incumbent upon the various States, once the Convention had been ratified, to amend national regulations which militated against the establishment of a place of business in another Contracting State.

832. The Committee agreed to the proposal by the

delegation of the Federal Republic of Germany by a majority of ten to one, with two abstentions.

### **Article 135 — Request for the application of national procedure**

833. The Main Committee referred to the Drafting Committee a drafting proposal by the Netherlands delegation concerning the first sentence of *paragraph 1* (M/32, point 21).

834. The CEIF delegation suggested that it be made clear in the first sentence that the applicant could convert his European application into several parallel national applications (see M/22, point 7).

835. This proposal, which was supported by the French and Belgian delegations, was referred to the Drafting Committee for examination.

836. The CEIF delegation also proposed that it should be made clear in *paragraph 1(a)* that in case of conversions reference should be made to the stage reached in the procedure on the date of the request for conversion as opposed to the date of filing of the application (See M/22, point 8).

837. The Netherlands delegation assumed that national patent offices would have at their disposal all the documents relating to the European procedure so that the CEIF request would naturally be satisfied; it thus felt that it was not necessary to amend *paragraph 1(a)*.

838. The French delegation, supported by the Belgian delegation, requested the deletion of *paragraph 1(b)*, which gave the applicant for or proprietor of a European patent the option of applying a national grant procedure where a European patent application was refused or withdrawn or was deemed to be withdrawn in cases other than those specified in *paragraph 1(a)*, or where the European patent was revoked (M/26, points 17 and 18). It argued that such a provision was unnecessary since Articles 120 and 121 (121 and 122) could provide a remedy where there had been an failure to observe a time limit either as a result of negligence or of *force majeure*. Where, however, a European patent application was refused or a European patent was revoked on grounds based on the application of European substantive law, it would be pointless to apply a national procedure. In States which granted examined patents the patent would presumably be refused on the same grounds as in the case of the European Patent Office, whilst in States which granted registered patents a patent would have to be granted and this could only be disadvantageous.

839. The delegation of the Federal Republic of Germany opposed this request. It pointed out that the application of a national procedure should be possible not only in cases in which the applicant suffered a loss of rights as a result of the omission of an act but also where the European Patent Office had given a negative decision. It was in precisely these cases that there was a constitutional problem in the Federal Republic of Germany. The Basic Law required that every administrative act should be capable of being examined by a court. The Boards of Appeal of the European Patent Office, although similar to courts of law, were not in fact courts proper so that the possibility of recourse to a German Court had to be maintained. It should, however, be borne in mind that the Federal Republic did not at present intend to avail itself of the option available under *paragraph 1(b)*. However, even if this option were applied, there would be little danger of any delay in the procedure since it was unlikely that proceedings would be initiated before the German patent authorities and the German Court after the European procedure had been concluded.

840. The United Kingdom delegation was also in favour of retaining the option provided for in *paragraph 1(b)*. It wished

this possibility to be retained mainly in case it proved impossible to bring British law into line with the Convention in time.

841. The delegation of the International Chamber of Commerce welcomed the request made by the French delegation. It considered that the amendment proposed was not only logical but also necessary if a clear legal situation were to be created within a feasible period of time, and that it would make for uniform legal protection in all the designated Contracting States.

842. The CEIF delegation supported the French delegation's request in so far as it was intended to exclude the option of conversion in the case of withdrawn or refused applications and revoked patents. It would not be desirable for a procedure which had already been concluded in the European Patent Office to be renewed before the national authorities. However, conversion should remain possible where the application was deemed to be withdrawn due to negligence on the part of the applicant (see M/22, point 9).

843. The Swiss delegation was in favour of maintaining paragraph 1(b) as it stood. It considered that it was solely for the Contracting States to decide whether applications which were unsuccessful in the European procedure could be pursued at national level. An exception to this principle had, up until now, only been made for the cases mentioned in paragraph 1(a). It concluded by pointing out that Switzerland did not intend, at least initially, to make use of the powers available under paragraph 1(b).

844. For much the same reasons as those of the German delegation, the Austrian delegation was in favour of maintaining paragraph 1(b).

845. The UNION delegation felt that the possibility of conversion should not be dropped. It regarded paragraph 1(b) as a kind of fall-back provision which could be very useful for applicants as long as there was uncertainty as to how the European procedure would function. The possibility of conversion could be advantageous not only where the patent failed for formal reasons but also where it did so on grounds of substantive law.

846. The CNIPA delegation was in favour of maintaining paragraph 1(b). If it were retained, an applicant who could foresee that he would be unsuccessful in the European Patent Office procedure would be able to apply one or more national procedures in due course without losing too much time. It would otherwise be necessary to continue the European procedure right to the end, and this would have the effect of leaving competitors, in a state of uncertainty for a longer period of time.

847. The EIRMA delegation was in favour of deleting paragraph 1(b) since the legal situation might otherwise remain uncertain for too long. It felt that it should be possible to find some solution to the constitutional problems encountered by certain States.

848. In the subsequent vote 3 delegations were in favour of and 10 delegations were against deleting paragraph 1(b); there were 5 abstentions.

849. After the vote the Netherlands delegation stated that it had voted in favour of the French proposal because it felt that the option of conversion referred to in Article 135, paragraph 1(b), was contrary to the principle of a uniform European System for the Grant of Patents. It was therefore very pleased that the delegation of the Federal Republic of Germany, of whose constitutional problems it was well aware, had stated that Germany did not at present intend to make use of the option available under this provision.

850. After the vote the delegation of the International Chamber of Commerce suggested that the powers granted to

the Contracting States to provide for conversion pursuant to Article 135, paragraph 1(b), should be in the form of a reservation — as in the case of the reservations under Article 166 (167) — but without a time limit being applied. This would make the legal situation with regard to the European procedure clear and no Contracting State would be able to change its legal provisions unilaterally.

851. The Chairman, however, pointed out that this solution would not be logical since, under paragraph 1(b), the Contracting States would not be making reservations with respect to the Convention but would only be empowered to provide for a subsequent national procedure.

### **Article 138 — Grounds for revocation**

852. The Committee referred the comments by the delegation of the Federal Republic of Germany concerning paragraph 1(b) (see M/11, point 34) to the Drafting Committee for examination.

853. The Committee then examined a proposal by the Member States of the European Communities concerning paragraph 1(d).

On behalf of these States the German delegation explained that it was proposed to delete from the existing text of paragraph 1(d) the words "contrary to Article 122, paragraph 3" and "during opposition proceedings". The protection conferred by the European patent might also be extended during national revocation or limitation proceedings or during limitation proceedings as provided for in the Draft Community Patent Convention. The Member States of the European Communities wished extension of protection in such cases to constitute possible grounds for revocation and therefore wanted Article 138 to give them legal authority to do so as regards Community patents.

The Austrian delegation stated that it could support this proposal. However, it wondered whether the Drafting Committee should not mention the criterion for deciding whether protection had been extended or not, as had been done in Article 99, sub-paragraph (c).

The Netherlands delegation considered that there was a difference between sub-paragraph (c) and (d) of paragraph 1 of Article 138. Sub-paragraph (c) was intended to deal with the situation where the subject-matter of the European patent extended beyond the content of the application as filed. Sub-paragraph (d) stipulated an additional condition in that a patent once granted could not subsequently be extended. The protection conferred could thus not extend beyond that conferred by the patent as granted.

The Chairman noted that no delegation was opposed to this proposal by the Member States of the European Communities and it was therefore adopted.

854. The Committee agreed to refer the Luxembourg comment on paragraph 2 to the Drafting Committee for examination (see M/9, point 27).

855. The Swedish delegation explained the reasons behind its proposed amendment to paragraph 2 as set forth in M/53, page 3. The present wording of the second sentence of this paragraph stipulated that if the national law so allowed, the limitation of the European patent could be effected in the form of an amendment to the claims. It therefore appeared that the claims of a European patent could be replaced by new claims based on the content of the description and the drawings. However, such new claims would not have been examined by the European Patent Office nor would such examination be within the competence of national courts. Furthermore, to limit a patent in this way would lead to inadequate security for third parties regarding the scope of patents. The Swedish delegation

therefore proposed that the last sentence of paragraph 2 be replaced by the following: "Such a limitation shall as regards the patent claims be restricted to the deletion of one or more claims".

The United Kingdom and Netherlands delegations could not agree to this proposed amendment. The Draft Community Patent Convention allowed the applicant to re-submit his claims provided that they were not broader than the claims originally filed. It was essential that an applicant should be able to submit more limited claims in any form he wished and that he should not be bound by the terms of the claims as originally filed and based on an assessment of the state of the art as it stood at the time the application was filed.

The UNEPA and FICPI representatives were opposed to the Swedish proposal. They pointed out that if it were accepted, applicants would submit a large number of claims from the outset in order to be in a position subsequently to withdraw a number of them.

The Swedish delegation stated that its proposals reflected the opinions of the interested circles in Sweden but agreed to withdraw its proposal.

856. The Belgian delegation wondered whether the grounds for revocation listed in Article 138 should not also include the case provided for in Article 63, paragraph 3, i.e. failure to supply a translation of the European patent specification.

It was pointed out by the Netherlands delegation that in cases where a translation had not been filed it would not be necessary to declare the patent void since it would automatically be deemed ineffective.

The Chairman noted that the Belgian delegation was satisfied with this interpretation.

#### **Article 139 — Rights of earlier date or the same date**

857. The Norwegian delegation explained its proposed amendment to *paragraph 3* as set forth in M/71. The present wording of this paragraph left the Contracting States free to prescribe whether and on what terms an invention disclosed in both a European patent application or patent and a national application or patent having the same date of filing or, where priority is claimed, the same date of priority, could be protected simultaneously by both applications or patents. The Norwegian proposal was intended to achieve two objectives. Firstly, it was aimed at clarifying this provision which did not deal with the case where Contracting States made no arrangements on the matter. Since the Convention had adopted the "whole day" principle, it would seem logical for the invention to be protected simultaneously by both applications or patents. This would be the general rule. However, the Contracting States would remain free to prohibit simultaneous protection. But in this case only the national application or patent could be revoked.

858. The Netherlands delegation considered that two distinct situations could arise. The first was one where a European patent application and a national patent application were filed on the same date by two completely different inventors. In this case it should be possible for both applications or patents to be effective. The same applied in the case of two European patent applications having the same date of filing submitted by two different inventors. The second situation was that of a European patent application and a national patent application having the same date of filing submitted by one and the same inventor. In this case the Norwegian proposal followed the same principles as those which had induced the Member States of the European Communities to provide in Article 77 of the Community Patent Convention that the Community patent should remain in force and that the national patent should be

ineffective. The Netherlands delegation could therefore support the Norwegian proposal but wondered whether its adoption would not tend to overcomplicate Article 139 and whether it would not therefore be preferable to leave this point to be dealt with under national law on the assumption that non-member States of the EEC would probably choose an arrangement similar to that laid down in Article 77 of the Community Patent Convention.

859. The United Kingdom delegation was opposed to the Norwegian proposal, which it considered to be unnecessary. The text as it stood allowed the Contracting States complete discretion on this point and it was desirable that, apart from the Community Patent Convention, there should be the least possible interference with countries' patents sovereignty.

860. The Finnish delegation supported the amendment proposed by the Norwegian delegation.

861. The Chairman pointed out that the text submitted by the Norwegian delegation appeared to go beyond the second objective which that delegation sought to achieve in that, as noted by the Netherlands delegation, it was not intended to revoke either of two applications or two patents where they were filed by different inventors.

862. The United Kingdom delegation wondered whether acceptance of the Norwegian proposal, even in amended form in the light of the last comment made by the Chairman, would not give rise to difficulties in applying Article 77, paragraph 4, of the Community Patent Convention. If, for instance, a European patent application were filed on the same date as a national patent application a situation might arise where it was impossible to grant a European patent whilst the national patent application was still being examined. Under the proposal by the Norwegian delegation the State in question could decide either that both applications should remain valid or that the European patent application should become ineffective. On the other hand Article 77, paragraph 4, of the Community Patent Convention left the Contracting States free to decide how the national patent application should be dealt with in such cases.

863. The Swedish delegation pointed out that in spite of the option of a European patent, there would still be a number of applicants seeking national patents. The Norwegian proposal would, however, have the effect of making a national patent a less viable proposition than a European patent. The Swedish delegation would prefer the two possibilities to be treated on an equal footing.

864. The Chairman requested the Committee to vote on whether the flexible arrangements at present contained in paragraph 3, which left the question of simultaneous protection to be dealt with entirely under national law, should be retained or whether a more rigid provision should be introduced requiring the Contracting States to follow one particular policy, as proposed by the Norwegian delegation.

865. The Committee voted in favour of retaining the present text by eleven votes against 2 with 3 abstentions.

866. The Committee decided to refer to the Drafting Committee the drafting comment by the Netherlands delegation concerning the English title of this Article.

867. The United Kingdom delegation withdrew its proposed amendment contained in M/40, point 22.

#### **Article 141 — Renewal fees for European patents**

868. The delegation of the Federal Republic of Germany explained to the Committee the proposal submitted by the Member States of the European Communities for a *second paragraph* to be added to this Article (see M/14, point 10).

Situations might arise where the renewal fees for the European patent were payable by the proprietor very soon after the date of the mention of the grant of the patent. This would give rise to difficulties for the proprietor. The Member States of the European Communities therefore proposed a solution which would in any event allow a minimum of two months for payment as from the date of the mention of the grant of the patent.

869. The Committee agreed to this proposal.

#### **Article 142 — Unitary patents**

870. The Committee referred the comment by the Swiss delegation concerning the *title* of this Article to the Drafting Committee for examination (see M/54, page 22).

871. The Netherlands delegation wondered whether Article 35 of the Community Patent Convention pursuant to which the applicant was required to file at the European Patent Office a translation of the claims in one of the official languages of each of the Contracting States to that Convention which did not have English, French or German as an official language was covered by Article 63 of the European Patent Convention, which provided that any Contracting State may prescribe that the applicant for or proprietor of the patent must supply a translation of the text in which the European Patent Office intends to grant a European patent. If Article 63 were considered as not authorising the Member States of the European Communities to lay down a requirement such as that contained in Article 35 of the Community Patent Convention, an appropriate provision would have to be inserted, if necessary, in Article 142 of the European Patent Convention. This delegation also wondered if the words "supply to its central industrial property office" could be interpreted under the Community Patent Convention as covering the "central department" set up by the Contracting States by a special agreement.

872. The Committee considered that Article 63 of the Convention did in fact authorise the Contracting States of the Community Patent Convention to stipulate the requirement laid down in Article 35 thereof and also gave an affirmative reply to the question of interpretation raised.

873. The Netherlands delegation finally wondered whether Article 63 covered Article 35, paragraph 4, of the Community Patent Convention, which provided that translations of the claims were to be published by the European Patent Office.

874. The United Kingdom delegation considered that this provision was covered by Article 143, paragraph 1, which stated that the group of Contracting States could give additional tasks to the European Patent Office.

875. The Committee agreed with the United Kingdom delegation's opinion.

#### **Article 143 — Special departments of the European Patent Office**

876. The delegation of the Federal Republic of Germany explained to the Committee the proposal submitted by the Member States of the European Communities for an addition to be made to *paragraph 2* of this Article (see M/14, point 11). This proposal was intended to ensure that, for the running of the special Departments set up under a special agreement, the President of the European Patent Office had all the powers provided under Article 10 for the general conduct of the Office's operations.

877. The Committee agreed to this proposal.

#### **Article 144 — Professional representation before special departments**

878. The Chairman noted that a proposal had been put forward as regards this Article by the delegation of the Federal Republic of Germany (see M/47, point 19), and another by the United Kingdom delegation (M/64, page 3). If the German proposal were adopted it would not be necessary to examine the United Kingdom proposal, the substance of which was contained in the German proposal.

879. The delegation of the Federal Republic of Germany suggested that this Article be simplified in order to make it as flexible and comprehensive as possible. It therefore proposed that the provision in question be confined to stating that the group of Contracting States could lay down special arrangements to govern representation of parties before the special departments without any limitations being applied.

880. The Netherlands delegation supported this proposal.

881. The United Kingdom delegation was prepared to support the German proposal and withdraw its own. It wondered whether the *title* of the Article should not be amended by deleting the word "professional" in order to broaden its scope and render it applicable also to representation by employees.

882. The Committee agreed to the German proposal and the amendment suggested by the United Kingdom delegation.

#### **Article 149 — Joint designation**

883. The Committee referred the proposals of the Netherlands delegation (see M/52, page 14) and of the delegation of the Federal Republic of Germany (see M/47, point 44) to the Drafting Committee, for examination.

#### **Article 150 - Application of the Patent Co-operation Treaty**

884. The Committee referred the proposal by the Luxembourg delegation (see M/9, point 28) to the Drafting Committee for examination.

#### **Article 153 — The European Patent Office as a designated Office**

885. The Committee examined the Norwegian delegation's proposal (see M/71, page 3) concerning *paragraph 2* of the Article, to the effect that the reference to Article 39, paragraph 1, of the Co-operation Treaty, should be deleted.

886. The Chairman said that if the Committee subscribed to the Norwegian delegation's opinion that Article 153 should refer only to Chapter I of the PCT, whereas the fee referred to in Article 39 related to Chapter II, it would have to be considered whether another provision, the content corresponding to that of Article 153, paragraph 2, with a reference to Article 39 of the PCT, should not be included, possibly in Article 155. Failing such a provision the Convention would contain no stipulation regarding the national fee for the procedure under Chapter II of the PCT.

887. The WIPO delegation considered that this problem could be resolved in one of two ways: either by adopting the Norwegian delegation's proposal and adding a provision to Article 155, as mentioned by the Chairman, or else keeping Article 153, paragraph 2, as it stood — which would have the advantage of making superfluous one part of the Norwegian delegation's proposal on Article 155, paragraph 2, first sentence, i.e. the addition of a sentence regarding the periods of time laid down in Article 39 of the PCT.



888. The Chairman noted the Committee's agreement to the Norwegian delegation's proposal on the grounds that Article 153 referred to the European Patent Office in its capacity as a designated Office and that it was therefore not appropriate for there to be a provision referring to the European Patent Office as an elected office.

### ***Article 153a (154) — The European Patent Office as an International Searching Authority***

889. The Committee examined the proposal for a new Article 153a submitted by the French delegation in M/101.

890. The French delegation stated that following the decisions taken by Main Committee II a new Article ought to be included to cover the eventuality of the European Patent Office acting as an International Searching Authority.

891. The Chairman noted that the French delegation's proposal met with support.

892. After congratulating the French delegation on this proposal, the WIPO delegation made two comments. Firstly, it wondered whether this provision should not be made clearer so that it would also apply in an eventuality which did not appear to be covered in paragraph 2 of this new Article. Paragraph 1 covered the eventuality of the European Patent Office acting as a PCT searching authority on behalf of nationals and residents of Contracting States to the Convention and paragraph 2 enabled the European Patent Office also to act as a searching authority for applicants who were nationals or residents of States other than PCT Contracting States. However there was an intermediate group, namely those States (and their nationals and residents) which were not Contracting States to the European Convention, although they were Contracting States to the PCT. It should be possible to cover this case as well by a suitable provision. The WIPO delegation's second remark was on the wording of paragraph 2 of this Article, which made reference to the Office being appointed as a competent International Searching Authority by the Assembly of the International Patent Co-operation Union. In the sort of case referred to in Rule 19.1 of the PCT, it seemed more appropriate to speak of a receiving Office.

893. The French delegation was in favour of the first suggestion put forward by the WIPO delegation.

894. The Committee agreed to the French delegation's proposal as amended in the manner suggested by the WIPO delegation. This Article was referred to the Drafting Committee.

### ***Article 155 (156) — The European Patent Office as an elected Office***

895. The Committee examined the Norwegian delegation's proposal (see M/71, page 3) for the addition of a *new paragraph 2* to this Article.

896. The Norwegian delegation said that its proposal was the logical corollary to the proposal adopted by the Committee with regard to Article 153, paragraph 2. The final sentence in this new paragraph was designed to meet the eventuality of an "elected" State making use of the option of making a reservation, as provided for in Article 64, paragraph 2, of the PCT.

897. The Chairman proposed that the Committee approach these two problems separately. The first problem was the inclusion in Article 155 of a provision corresponding to Article 153, paragraph 2, laying down that the application must be filed in one of the official languages of the European Patent Office and that the national fee specified in Article 39, paragraph 1, of the PCT must be paid. The second problem was where one of

the elected States had availed itself of the reservation provided for in Article 64, paragraph 2, of the PCT.

898. The WIPO delegation said that, with regard to Chapter II of the PCT, the effect of the Norwegian proposal would be to do away with the uniformity of treatment between European patent applications based on a PCT application. Under the new wording proposed by the Norwegian delegation, the European States would be given the opportunity to decide, each on their own account, whether or not to avail themselves of the reservation provided for in Article 64, paragraph 2. If a State availed itself of this option, the practical consequence would be that even under Chapter II the applicant would have to produce the translations after twenty months and not after twenty-five months as laid down in Chapter II. Thus, if a European State so decided, the European Patent Office would receive the translations after twenty months and would examine the application at that time; this would mean that a decision by one State would automatically apply to all the other States. The WIPO delegation pointed out that although compatible with the PCT, this measure represented an important decision on which the Committee ought to conduct a searching examination.

899. The Norwegian delegation pointed out that the problem had a much broader scope, since the present text of the Convention did not prevent a Contracting State from making use of the right to enter reservations as provided for in Article 64, paragraph 2. Furthermore, a State could also avail itself of the option to make a reservation under Article 64, paragraph 1, and declare that it was not bound by the provisions of Chapter II of the PCT. As for the more specific problem mentioned by the WIPO delegation, the Norwegian delegation thought it was correct that if a PCT international application designated the European Patent Office and a European State which had only accepted Chapter I of the PCT the translation of the international application would have to be submitted within twenty months, in order to obtain a European patent for that State. However, if the applicant submitted the translation of his application four months afterwards, he could nevertheless obtain a European patent in respect of the other States which had accepted both Chapter I and Chapter II of the PCT.

900. The delegation of the Federal Republic of Germany considered that this problem was rather theoretical and wished the existing wording to be maintained. Bearing in mind the fact that Chapter II was designed to facilitate the work of the offices in the elected States, by making provision for a preliminary international examination, it was hardly likely that the European Patent Office or a number of European States would forgo the advantages conferred upon them by Chapter II. The German delegation was of the opinion that even if a State availed itself of the reservation under Article 64, paragraph 2, this would not have any effect either upon the other States or the European Patent Office since a reservation under Article 64, paragraph 2, merely implied that the national office was not obliged to wait before proceeding with the examination of the international application; it did not mean that the national office of an elected State was obliged to start examination straight away.

901. The United Kingdom delegation shared the point of view of the delegation of the Federal Republic of Germany. The new paragraph proposed by the Norwegian delegation was not acceptable, in that it was not advisable to lay down a provision the effect of which would be that translations of an international application would be sent at two different times. If, in order to take account of the fact that certain States had acceded to Chapter II of the PCT, examination of international applications had to be postponed until expiry of the twenty-five month period, examination should also be deferred in the case

of the other States as well. Furthermore, if the application were forwarded on two different dates the question would arise of whether it should be published twice in one of the official languages of the European Patent Office, because provisional protection began to take effect as from the date of publication in one of these languages. In conclusion, the only reasonable solution seemed to be to consider that Chapter II of the PCT took precedence.

902. The WIPO delegation subscribed to the point of view expressed by the United Kingdom delegation. The provision suggested by the Norwegian delegation appeared not only superfluous but also dangerous in that, where Chapter II of the PCT applied, the fact of receiving the translation of an international application after only twenty months, whereas the procedure would not commence until after twenty-five months, could amount to a sizeable administrative burden.

903. The Chairman said that two different situations were possible. The first hypothesis was that all the Contracting States to the present Convention had accepted Chapter I of the PCT, and one State, Norway for example, had in addition also accepted Chapter II. The consequence of accepting Chapter II was to extend the period for forwarding the translation of the international application from twenty to twenty-five months. If a European application filed via the PCT specified Norway as an elected State within the meaning of the PCT, the provisions of the PCT would prevail pursuant to Article 150, paragraph 2, third sentence. This would mean that, notwithstanding the fact that only one of the Contracting States had accepted Chapter II, the entire procedure before the European Patent Office would have to be geared to the procedure applicable to the State which had accepted Chapter II. This solution did not necessitate any amendment to the present wording. The second hypothesis was that not only Norway but other States as well had accepted Chapter II and that one State, Norway for example, had availed itself of the reservation option provided for in Article 64, paragraph 2, whereby the application would have to be forwarded after twenty and not after twenty-five months. In this case, since the procedure could not be other than unitary, the effect of the reservation would be that the applicant would have to forward the application to the European Patent Office after twenty months. This conclusion would however be arrived at on the basis of the existing text, without there being any need to include a specific provision in Article 155.

904. The WIPO delegation could only agree with the Chairman's arguments if the proposal put forward by the Norwegian delegation were adopted in the text of the Convention. As long as a provision of this sort did not appear in the Convention, Article 150, paragraph 3, last sentence, quoted by the Chairman, meant that the period laid down in Article 39 of the PCT would be applicable in the procedure before the European Patent Office, even if one of the States which had accepted Chapter II of the PCT had availed itself of the reservation under Article 64, paragraph 2. The reservations made by a State are to be considered as applicable only under its national legislation and not as far as the European Convention was concerned.

905. The Chairman announced that following the WIPO delegation's latest remark he was constrained to rethink his argument, in the sense that a reservation based on Article 64, paragraph 2, of the PCT could affect the national procedure only, and not the procedure before the European Patent Office. He then went on to summarise the discussion so far for the Committee's benefit. On the basis of Article 155 as currently worded, for a PCT application specifying the European Patent Office both as a designated Office and as an elected Office, Chapter II of the PCT would apply irrespective of the fact that

the national office elected in the application was that of a State which had made use of the reservation option provided for in Article 64, paragraph 2. The Norwegian delegation's proposal was intended to extend the scope of this reservation to the procedure before the European Patent Office, with the result that the time allowed for forwarding the translation of the application would be reduced from twenty-five to twenty months. The Chairman expressed misgivings on whether this proposal would be such as to arrive at what seemed to be the aim of the Norwegian delegation, namely to obtain a Norwegian translation of the international application in a shorter space of time. Pursuant to the European Patent Convention, the applicant was not obliged to submit a translation of his application in Norwegian, but only in one of the official languages. It was only for the purposes of provisional protection that a State could request a translation of the claims in its national language.

906. The WIPO delegation made the point that as the European Patent Convention was the first convention that could be considered as a sort of instrument for implementing the PCT, it would set an example for other similar conventions. Accepting the Norwegian delegation's proposal would deprive the applicant of one of the few advantages afforded him by Chapter II of the PCT, namely the possibility of having a further five months in which to submit the translation of his application.

907. The Norwegian delegation, concurring with the Chairman's remark on the problem of the translation of the application in Norwegian, said that it was able to accept the interpretation which seemed to emerge from the discussion, namely that the consequence of just one State having accepted Chapter II of the PCT would be to extend to all the other Contracting States the procedure laid down in that Chapter and in particular the longer time allowed — twenty-five instead of twenty months — for supplying the translation of the application.

908. The Netherlands delegation subscribed to the interpretation that if just one of the Contracting States accepted PCT Chapter II, this would be enough to extend the period for providing the translation of the application from twenty to twenty-five months for all the other Contracting States. Extending this period by five months did not seem too detrimental to the speed of the procedure, and it also meant that the European Patent Office would be able to have the international search report. On the other hand, the Netherlands delegation was not in favour of the Norwegian delegation's proposal, which would mean that if one Contracting State accepted Chapter II, but with the reservation provided for in Article 64, paragraph 2, the period would once more be reduced to twenty months, notwithstanding the unqualified acceptance of this Chapter by other Contracting States.

909. The Norwegian delegation stated that in view of the Committee's discussions, it withdrew its proposal.

910. The Belgian delegation said that if Main Committee II agreed to the French delegation's proposal for the incorporation of the IIB in the European Patent Organisation, the necessary inferences would have to be drawn as regards the wording of Article 154 and 155, by allocating to the European Patent Organisation the tasks originally envisaged for the IIB.

911. The French delegation and the WIPO delegation agreed with this comment by the Belgian delegation.

912. The Chairman proposed that the Committee should await the outcome of Main Committee II's discussions before considering whether a new provision was required on this point.

At a subsequent meeting the Chairman drew the Committee's attention to the fact that as Main Committee II



had agreed on the French delegation's proposal in M/59 for the inclusion in the Convention of a provision covering the Directorate-General for Searching, Main Committee I was now faced with the problem of what this implied for certain other Articles in the Convention. He held that as the basic issue had already been decided, the Committee could confine itself to referring to the Drafting Committee the problem of how to word the relevant provisions.

The Chairman noted that the Committee agreed to refer this problem to the Drafting Committee.

### **Article 156 (157) – International search report**

913. The Committee agreed to instruct the Drafting Committee to make the appropriate amendments to this Article, following the decision to delete Article 124 (see point 664) and the decision by Main Committee II on the incorporation of the IIB in the European Patent Organisation, in the form of the Directorate-General for Searching.

914. While the results of the Drafting Committee's work (see M/136/I/R, p. 23) were being examined, the FICPI delegation wished to know from which date the time allowed for filing a request for examination would run in the case of international applications for which an international search report had been drawn up.

915. After the matter had been discussed, the Chairman noted that the Committee was unanimously of the opinion that in the case of the international applications referred to in this Article the time allowed for submitting a request for examination started to run from the day on which the international application was published by WIPO.

### **Article 157 (158) – Publication of the international application**

916. The Committee examined the proposed amendments to this Article: a proposal by the Norwegian delegation (see M/71, page 4), a proposal by the Netherlands delegation (see M/52, page 15) and a proposal by the Member States of the European Communities (see M/14, point 13).

917. The Chairman pointed out that the proposal of the Norwegian delegation concerning *paragraph 1* was in two parts. He considered the first of these, whereby the words "or elected" would be inserted between the words "designated" and "Office", superfluous since under the last sentence in Article 31, paragraph 4(a), of the Patent Co-operation Treaty: "Election may relate only to Contracting States already designated under Article 4".

918. The Norwegian delegation agreed with the Chairman and accordingly withdrew the first part of its proposal.

919. The Norwegian delegation stated that it attached much greater importance to its second proposal whereby paragraph 1 would be supplemented by a provision excluding the content of international applications which were not maintained as European patent applications from the state of the art referred to in Article 52, paragraph 3.

920. The Chairman did not consider that this proposal coincided with the intentions of the authors of the preparatory work. According to Article 157, paragraph 1, as it stood, an international application, published by WIPO under Article 21 of the PCT, which was deemed to be an application for a European patent, became part of the state of the art from the date of filing or the date of priority, regardless of whether it had been forwarded to the European Patent Office or the national fee had been paid.

921. The Netherlands delegation pointed out that this

question depended on the interpretation given to Article 24 of the PCT on the possible loss of effect in designated States. This Article stipulated that the effect of the international application ceased in any designated State with the same consequences as the withdrawal of a national application. This would appear to mean that the application would be deemed to have been withdrawn and that the effects provided for in Article 52, paragraph 3, would apply.

922. The Chairman said that the situation seemed to him to be exactly the same as that of a European patent application withdrawn after publication. In such a case the effects described in Article 52, paragraph 3, would apply in spite of the withdrawal of the application.

923. The United Kingdom delegation agreed with the Chairman's interpretation but pointed to the disadvantages of such a situation.

924. The WIPO delegation did not think that this question could be settled on the basis of Article 24 of the PCT, since that Article referred to the loss of effect, referred to in Article 11, paragraph 3, of the PCT, of the international application. This effect was "the effect of a regular national application". The situation was different for regional patent applications. The system adopted in the present Convention was that even if a European patent application was withdrawn, the effects on the state of the art would continue to apply. Applying this system to Article 24 of the PCT, the loss of effect provided for in Article 11, paragraph 3, of the PCT would certainly not mean that the content of the application would cease to be part of the state of the art since the withdrawal of the application would not have any effect as regards regional patent applications either.

925. The Netherlands delegation felt that the Norwegian delegation's proposal would counter the disadvantages of an excessively rigorous interpretation to the effect that an international application for which no translation in an official language of the European Patent Office was produced or for which no fee had been paid would be considered to form part of the state of the art. This delegation then asked whether the provisions of the PCT would allow the insertion in this Convention of a provision taking account of its wishes and those of the Norwegian delegation. Article 24 of the PCT did not in fact say that the application was deemed not to have been filed but that it ceased to have effect.

926. The WIPO delegation confirmed that Article 24 did not support the Norwegian delegation's proposal but rather the contrary.

927. The United Kingdom delegation asked the WIPO delegation whether, for the purposes of the application of Article 52, paragraph 3, it would be possible to have access to the priority documents of an international application.

928. The Swedish delegation pointed out that the problem being discussed had been debated at length during the preparatory proceedings for the Washington Conference because of the importance attributed to it by the Scandinavian countries. The Swedish delegation thought that the minutes of the preparatory proceedings would show that it had been agreed that the arrangement now being requested by the Norwegian delegation was not incompatible with the PCT.

929. In reply to the question raised by the United Kingdom delegation, the WIPO delegation pointed out that Rule 17, paragraph 2, of the PCT stipulated that "the International Bureau shall, at the specific request of the designated Office ... furnish a copy of the priority document to that Office". Offices also had the right to request translations of priority documents from the applicant after expiry of the twenty month period. Before the expiry of that period, access was therefore possible to priority documents only in the original language.

930. As regards the Swedish delegation's statement, the

WIPO delegation said that it could not tell without consulting the relevant documents whether such a statement appeared in the minutes of the Washington Conference or not.

931. The Swedish delegation, supported by the Netherlands delegation, said that a reference to this question would not appear in the minutes of the Washington Conference itself but in those of the preparatory proceedings.

932. The Chairman asked the WIPO delegation whether it could possibly search the minutes of the preparatory proceedings for the passage to which the Swedish and Netherlands delegations had referred.

933. The WIPO delegation declared its willingness to carry out this search. It stressed however that it did not think that the conclusions to be drawn from it would be likely to affect present discussion of the matter. It was in fact true, as the Netherlands delegation had pointed out, that a State which did not recognise the effect on the state of the art of a withdrawn application could apply this principle to international applications made under the PCT. This point had been raised during the PCT negotiations and had been confirmed. The situation here however was different. If the Norwegian delegation's proposal were to be adopted, different treatment would be given to applications made under the European procedure from that given to applications made under the PCT procedure. If this were to be so, the situation would not be in accordance with Article 11, paragraph 3, and Article 24 of the PCT.

934. The Netherlands delegation said that during the Washington Conference it had attached importance to the question of whether, since Netherlands law attributed effect on the state of the art to earlier applications, the Netherlands would be obliged to attribute the same effect to international applications which were not maintained for the Netherlands on the grounds of failure to supply translations or to pay fees. Furthermore, the Netherlands delegation asked what the situation would be if no translation were supplied in view of the proposal made by the Member States of the European Communities concerning paragraph 2 of Article 157, to the effect that international applications in languages which were not official languages of the European Patent Office would have to be published in one of the EPO official languages. Would an application, which had not been published in one of the official languages of the European Patent Office, nevertheless have effect on the state of the art?

935. The Chairman said that at first sight the answer to this question would appear to be in the affirmative. He asked the WIPO delegation whether it was now able to adopt a position on the preparatory proceedings.

936. The WIPO delegation said that having examined certain preparatory documents it was now able to state its views more clearly. It recalled that in December 1968, during the Geneva discussions of the draft PCT, a statement had been made concerning Article 29. In that statement the Danish and Australian delegations had said that if the whole issue were not to be left within the competence of national legislation, they wished to be assured that this Article did not involve effects on the state of the art which national legislations attributed to published national applications. These two delegations concluded their statement by saying that in their opinion such effects should not apply as long as the international application had not been received by the national offices concerned. In this sense, the view expressed by the Swedish and Netherlands delegations was in accordance with the true state of affairs. This statement was not, however, followed up by practical conclusions. Subsequently a document examining the fundamental differences between the 1968 and 1969 drafts, contained in the minutes of the Washington Conference (page 180, point

47), stated: "Consequently, no State will be obliged to consider internationally published applications as part of the prior art already from the priority or the filing date (rather than only from the publication date), even if such a State were a designated State when the publication was effected and even if, for national application, its law so provided". During the preparatory proceedings for the Washington Conference in 1970 amendments were made to Article 24, in particular the insertion in the first paragraph of the stipulation "in any designated State" on the basis of a proposal by the Japanese delegation. In the minutes of the Washington Conference there was no mention of any discussion of Article 24, which had therefore been adopted in the amended version proposed by the Japanese delegation. In these circumstances no precise information could be gleaned from the minutes of the Washington Conference concerning the problem under discussion. It was therefore for the Contracting States to interpret the PCT bearing in mind the abovementioned historical background.

937. The Chairman thanked the WIPO delegation for its very full account of the origins of Article 24 of the PCT and shared its opinion that the admissibility or otherwise of the Norwegian delegation's request depended on the interpretation which the various Contracting States gave to Article 24 of the PCT.

938. The Netherlands delegation wished to put a further question to the WIPO delegation. It asked what significance should be attributed to the fact that Article 24, paragraph 2, of the PCT began with the words: "Notwithstanding the provisions of paragraph (1), any designated Office may maintain the effect provided for in Article 11 (3)". The effect provided for in Article 11 (3) was in fact the effect on the state of the art. The question therefore arose of whether, on the basis of the second paragraph, the first paragraph could not be interpreted as referring to the effect provided for in Article 11, paragraph 3.

939. The WIPO delegation pointed out that in the first place the case covered by the second paragraph was the exact opposite of that which was being discussed. In fact that paragraph allowed of the possibility of going beyond the obligations of the PCT by maintaining the effect on the state of the art as regards national applications even where under the first paragraph of Article 24 of the PCT the effect provided for in Article 11, paragraph 3, in the event of international filing had ceased. Both provisions dealt with the same broad concept of the effect of an international application. The WIPO delegation did not therefore consider that the interpretation of the second paragraph could have any effect on the interpretation of the first paragraph.

940. The Netherlands delegation repeated that it was in favour of acceptance of the Norwegian delegation's proposal. It did not think it justifiable for the European procedure to take account, for the purposes of the state of the art, of international applications which had not been confirmed. This approach was not used even for national applications in the Contracting States. Considerable difficulties could be encountered, for example where applications were in Russian or Japanese and no translations were supplied.

941. The Norwegian delegation agreed that a literal interpretation of Article 24 of the PCT could lead to the view that its proposal was inadmissible. This Article should however be interpreted in the light of the historical considerations adduced by the WIPO delegation. It was clear that during the preparatory proceedings some delegations had adopted well-defined positions on the question under discussion and that no objections had been expressed. It was true that the text had in fact been changed as a result of the Japanese delegation's proposal for an amendment. The aim of this amendment

however had been very limited and did not directly concern the question under discussion. In the second place it did not seem logical to restrict discussion to Article 29 alone and forget the basic philosophy of the PCT. The PCT was intended to help applicants at national offices who also wished to file their applications at other national offices. From this point of view the PCT's scope should not extend to applicants who did not maintain their applications. Furthermore an over-strict interpretation of Article 24 which excluded the admissibility of the Norwegian delegation's proposal did not appear to take due account of the principle embodied in Article 27, paragraph 5, of the PCT, which provided that "Nothing in this Treaty and the Regulations is intended to be construed as prescribing anything that would limit the freedom of each Contracting State to prescribe such substantive conditions of patentability as it desires".

942. In connection with this last point the WIPO delegation said that it emerged very clearly from the conclusions of the Washington Conference that Article 27, paragraph 5, itself constituted no restriction on the principle expressed in Article 11, paragraph 3. It had in fact been considered necessary to lay down an express provision in Article 64, paragraph 4.

943. The United Kingdom delegation thought that account should be taken of the basic philosophy of the PCT rather than of the details of certain of its provisions; the intention of the PCT was to make international publication equivalent in all respects to national publication, except that rights under it became effective only when the application existed in a language understood in the States concerned.

Furthermore, the philosophy of the "whole contents approach" was that of enabling the applicant to have his disclosures included in the state of the art of retroactive effect to the date of filing for designated States, with the option before publication, of withdrawing the designation in which he did not wish his disclosure to be included in the state of the art.

The result of combining these two philosophies was not compatible with the Norwegian proposal. Clearly, PCT applications which designated European States and which were filed in one of the official languages of the European Patent Office sought protection before publication and were in a language understood in the States concerned. Moreover, the European Patent Office would be able to examine such applications on the basis of the "whole contents approach". The existing text should therefore be retained, bearing in mind the fact that the obscurity of the PCT allowed of a certain flexibility.

944. The Chairman considered that the matter had been sufficiently debated and that a vote could be taken. However, in order to clarify the situation, he pointed out that the Norwegian proposal did not refer only to international applications in Russian or Japanese but to all international applications submitted via the PCT route. It would mean that an international application published by WIPO in any of the five official languages of the PCT would only have effect on the state of the art as from the date of filing or of priority if a translation were supplied to the European Patent Office in due time and the European fee were paid.

The Chairman noted that the Committee was in favour of the Norwegian delegation's proposal by eleven votes for, two against and one abstention, and the proposal was therefore referred to the Drafting Committee.

945. The Committee examined the Netherlands delegation's proposal as given in M/52, page 15.

The Netherlands delegation explained that its proposal was that an addition be made to the end of the first paragraph which would provide that the European Patent Bureau should mention publication under Article 21 of an international

application for which the European Patent Office was a designated Office. The Netherlands delegation stated that its proposal was supported by the interested circles on the grounds of the importance to the public of such a mention.

946. The delegation of the Federal Republic of Germany could accept the principle underlying the Netherlands delegation's proposal, but wondered whether the result it was intended to achieve had not already been achieved by Article 129 (a) in conjunction with the first paragraph of Rule 93.

The Chairman pointed out that the proposal by the Netherlands delegation went further than the current situation, since it made mention of publication obligatory. The current text, however, merely gave the President the possibility of publishing such a mention.

The Committee agreed to the proposal by the Netherlands delegation.

947. The Committee then examined the proposal for an amendment to Article 157, paragraph 2, submitted by the Member States of the European Communities (see M/14, point 13).

The United Kingdom delegation presented this proposal to the Committee; it was to the effect that if the international application were published in a language other than one of the official languages of the European Patent Office, that Office should publish the international application supplied as specified in Article 153, paragraph 2. This wording would make it possible to simplify the situation as regards the problem of provisional protection, since the latter could be effective from the date of publication by the European Patent Office, thereby relieving each Contracting State of the need to apply corresponding provisions to this end.

948. The Committee agreed to this proposal.

### ***Article 161 (162) – Progressive expansion of the field of activity of the European Patent Office***

949. The Committee examined the proposals for amendments submitted by the French delegation (see M/26, points 19 and 20).

950. The French delegation pointed out that it felt that its proposals really concerned drafting changes. The current text of *paragraph 1* specified that European patent applications could be filed with the European Patent Office in all areas of technology from a date fixed by the Administrative Council. However, the second sentence of this paragraph stipulated that the examination of applications might be restricted to certain areas of technology. Paragraph 2 enabled the Administrative Council to "further restrict" the processing of a patent application affected by the restrictions provided for in paragraph 1. The further restrictions on processing could therefore apply subsequently to the decisions taken by the Administrative Council pursuant to paragraph 1. For example, in certain areas of technology the Administrative Council could suspend the procedure for the drawing up of the European search report. The authors of the text had never intended to provide such a possibility. The French delegation's proposed amendments were aimed at ensuring, more explicitly than in the present text, that there was no question of reversing the decision of the Administrative Council.

The Netherlands delegation supported the French delegation's proposal.

951. The United Kingdom delegation had doubts about making an amendment along the lines suggested by the French delegation. It might so happen that in a certain situation the Administrative Council would be obliged to reverse a previous decision. The delegation was therefore in favour of retaining

the present text which had the advantage of a certain degree of flexibility.

952. The Chairman felt that the French delegation's proposal went beyond a mere drafting proposal, inasmuch as Article 161, paragraph 2, of the present text seemed to authorise the Administrative Council to suspend searches during a transitional period and simply to proceed with the formal examination followed by transmission of the application to the national offices. The aim of the French delegation's proposal was precisely to prevent the Administrative Council from doing this, by stipulating that in all cases formal examination shall be carried out and European search reports should be drawn up from the outset.

953. The French delegation saw no reason why it should not be possible to draw up European search reports from the outset, since the statements made by the IIB representatives had indicated that the IIB would be capable of drawing up such reports as soon as the European Patent Office opened. The French delegation feared that under the present text the Administrative Council would be able, on a proposal from the President of the European Patent Office, to annul its previous decision. It should be clear that as soon as the Administrative Council had decided to search in all areas, it could not reverse this decision.

954. The Chairman stated that as he understood it the French delegation had no objection to the Administrative Council progressively extending the search activity of the European Patent Office. What the French delegation wished was that once the Administrative Council had decided to commence searching or processing, it should not be able to reverse that decision.

955. The United Kingdom delegation had a different view of the matter. In its opinion, the European Patent Office should in principle try to carry out searches for all applications from the outset. Only in the case of genuine difficulty might the Administrative Council decide not to carry out searches for certain applications. The French delegation's proposal raised difficulties inasmuch as it meant that the Administrative Council would at the outset have to take a gamble in choosing areas of technology since it would not afterwards be able to reverse its decision. This would inevitably make for very cautious beginnings with possible expansion later. Such a state of affairs would be regrettable in the light of the French delegation's basic idea, which was that search reports should be drawn up for all applications.

956. The Swiss delegation shared the French delegation's view. It considered that the Administrative Council should not be able to reverse a decision to draw up a European search report, particularly in view of the fact that in certain cases the Directorate-General for Searching would be the office responsible for searches under the PCT.

957. The Belgian delegation supported the opinion of the French and Swiss delegations.

958. The delegation of the International Chamber of Commerce stated that it would much prefer a solution whereby all applications filed were the subject of a European search. However, it realised that in certain cases an escape clause might be necessary. This was the sense in which it had interpreted paragraph 2. If there was any doubt on the matter the text should be clarified.

959. The CEIF delegation expressed certain anxieties. It had understood that the intention of the Inter-Governmental Conference was that examination should be undertaken in successive stages, but that a European search report would be drawn up in any event. Although the CEIF could accept the idea of undertaking examination in successive stages, which had distinct disadvantages, it could not understand how there

could be any doubt that European search reports would be drawn up in all areas of technology as from the opening of the European Patent Office. If the Administrative Council were to be able to reverse a previous decision on this matter, there would be considerable uncertainty for the applicant. This might well discourage applicants from filing applications for European patents until the situation was clarified. The delegation therefore wished to know what new factors there were which justified an alteration of the attitude previously taken on the matter. If there were no new factors, it felt that the French delegation's proposal must be accepted.

960. The delegations of IAPIP, UNICE, COPRICE and FEMIP supported the French delegation's proposal.

961. The Chairman announced that there were three different positions. Firstly, there was the present text which allowed both searching and examination to be undertaken in stages and the Administrative Council to reverse a previous decision. Secondly, there was the French proposal, which was based on the same principle (i.e. undertaking searching and examination in stages) but which did not allow the Administrative Council to reverse a previous decision. Thirdly, there was the suggestion by certain observer delegations that searches should be carried out in all areas of technology from the outset — the Administrative Council not being allowed to reverse its decision — while examination could be undertaken in stages. The Chairman proposed to put the French delegation's proposal to the vote: if it were accepted, there would then be a vote on the proposal by the Observer delegations, provided that their suggestion was taken up by two Government delegations.

962. The Committee voted in favour of the French delegation's proposal by twelve votes to one with two abstentions.

963. The Chairman noted that the French and Swiss delegations were prepared to take up the suggestion made by the Observer delegations and put it forward for discussion.

964. The IIB representative, replying to certain remarks concerning the capacity of the IIB to effect European search reports at the time of opening of the European Patent Office, stated that the Institute was already capable of carrying out 40,000 searches, and that with the gradual application of the French law on patents its capacity would exceed the above figure by 10,000. Moreover, with the additional contribution of the Berlin Annex of the German Patent Office, which could be estimated at about 6,000, the IIB delegation felt that there was no need to doubt the search capacity of the two bodies put together.

965. The Chairman thought that no delegation was querying the IIB's capacity. The problem was quite a different one, and concerned more specifically the question of whether a guarantee could be given that at the time of opening of the European Patent Office it would be possible to draw up European search reports for the estimated 40,000 applications. Although no one disputed the IIB's capacity to deal with this work at present, there might still be doubts as to whether all the staff of the IIB would agree to transfer to the European Patent Office when the IIB was integrated into it. There was therefore uncertainty about the Institute's capacity to deal with its future tasks.

While this uncertainty persisted it might be preferable not to adopt the proposal now under consideration but to make a statement to the effect that it was desirable that full searching should be carried out from the outset.

966. The Netherlands delegation felt that in view of the arguments put forward by the Chairman, particularly the fact that there were a number of unknown factors, it would be very dangerous to prejudge the issue. Therefore, although the

Netherlands delegation had been able to agree to the French delegation's proposal, it could not accept the proposal now under consideration.

967. The Chairman added a further argument concerning the consequences of accepting the proposal under consideration. If, when the European Patent Office opened, it was not possible to make searches in all areas of technology, the Administrative Council would have to decide that no searches be made, since it would only have a choice between drawing up search reports in all areas or none at all. This solution would be far from satisfactory.

968. The United Kingdom delegation supported the Netherlands delegation's view.

969. The French delegation stated that it could not share the view expressed by the United Kingdom and Netherlands delegation. It was convinced that the IIB would be able to deal with all requests for a European search report. Moreover, it was not realistic to assess the number of European patent applications filed with the European Patent Office in the first year at 40,000.

970. The CEIF delegation requested that the statements which had just been made should be recorded in the minutes of the Conference, for the attention of the Administrative Council, and that the Government delegations present should solemnly affirm their desire that every effort should be made to ensure that, as far as possible, as soon as the European Patent Office opened, documentary search reports could be drawn up in all areas of technology.

971. The Netherlands delegation proffered another argument. Some Contracting States would probably be obliged to adapt their national legislation to the provisions of the European Patent Convention. It was possible that when doing this certain countries which at present did not carry out prior examination might wish to introduce such a system. If this happened, there might be grave doubts as to the IIB's ability to deal with requests for search reports. The Netherlands delegation could however support the CEIF delegation's suggestion that a statement be recorded in the Conference minutes.

972. The delegation of the Federal Republic of Germany hoped and believed that it would be possible to draw up search reports for all areas of technology as from the opening of the European Patent Office. However, it shared the Netherlands delegation's objections and supported the suggestion made by the interested circles that a suitable statement be recorded in the Conference minutes.

973. The French delegation stated that if the Swiss delegation agreed to withdraw the proposal which the two delegations had made jointly, it could support the CEIF delegation's suggestion that a statement be recorded in the Conference minutes.

974. The Swiss delegation stated that it withdrew its proposal and was prepared to agree to a statement expressing a formal intention to implement Article 161 in such a way that the European Patent Office was able to draw up search reports for all European patent applications.

975. The Chairman noted the Committee's agreement on the insertion of this statement in the minutes.

#### **Article 162 (163) — Professional representatives during a transitional period**

976. The Committee examined the French delegation's proposed amendment to *paragraph 1* and *paragraph 4*, given in M/112, page 2.

The French delegation stated that the aim of its proposal was

that Article 162 should contain the same provision as currently appeared in Article 134 with regard to the requirement of being a national of one of the Contracting States. To this end, it proposed adding a further requirement to Article 162, paragraph 1, (that of being a national of one of the Contracting States) and, in paragraph 4, giving the President of the European Patent Office the right to grant exemptions from this requirement. The French delegation intended that such exemption should be automatic for persons fulfilling the other conditions for entry on the list on the date of the signing of the Convention.

977. The Chairman noted that the French delegation's proposal was supported by several delegations.

978. The Swedish delegation stated that, although it had no specific objections to this proposal, it preferred the current text.

979. The Committee approved the French delegation's proposal for the first paragraph by seven votes to two, with four abstentions. It then examined the amendment to *paragraph 4*, which was the second aspect of the French delegation's proposal.

980. The United Kingdom delegation stated that it did not seem appropriate to refer to the date of the signing of the Convention, since Article 164 stipulated that the Convention was open for signature until a certain date.

981. The Chairman shared this view and stated that he thought it preferable to determine a precise point in time rather than a period as proposed by the French delegation. He asked the French delegation if it could agree to amend its proposal by referring to the date of the signing of the Convention in Munich on 5 October 1973.

982. The French delegation agreed to this amendment.

983. The delegation of the Federal Republic of Germany asked the French delegation whether it was possible for the two persons concerned to have exercised their profession outside the Contracting States or whether it was necessary for them to have done so within a Contracting State.

984. The French delegation stated that its intention was that the profession should have been exercised in one of the Contracting States.

985. The Chairman noted that the Committee also agreed to the French delegation's second proposal.

986. The Committee then examined proposed amendments to *paragraph 2*, namely a proposal from the French delegation, given in M/112, and a proposal from the delegation of the Federal Republic of Germany, given in M/147, page 7.

987. The French delegation felt that the two proposals were closely allied. The present text was rather ambiguous, particularly in its use of the expression "the extent of the entitlement to act as a professional representative before this authority". Article 134, paragraph 3, entitled representatives to act before all the departments of the European Patent Office and in all its proceedings. The limitations referred to in Article 162, paragraph 2, could only concern the persons which the applicant was entitled to represent. It therefore seemed preferable to make explicit reference to "the persons which the applicant is entitled to represent".

988. The delegation of the Federal Republic of Germany was prepared to agree to the French delegation's proposal and therefore withdrew its own proposal.

989. The Committee agreed to this proposal.

990. The Committee referred the French delegation's proposal given in point 22 of M/26 to the Drafting Committee for examination.

991. The FEMIP delegation wondered whether the limitations regarding persons represented laid down in paragraph 2 were merely those resulting from the laws of the

Federal Republic of Germany with regard to representation before the German Patent Office, or whether this text also concerned other limitations.

992. The Chairman noted that the Committee was of the opinion that the only limitation in question was that contained in the laws of the Federal Republic of Germany.

993. The Italian delegation wondered whether this limitation was only applicable within the State concerned or whether it also applied in the other Contracting States.

994. The Chairman stated that on the basis of paragraph 2, taken in conjunction with paragraph 6, it seemed that the persons subject to a limitation under German law were subject to the same limitation with regard to European proceedings, both under the first and second Conventions.

995. The CEIF delegation asked the Committee for an interpretation with regard to the expression "representatives" in *paragraph 3*. Referring in particular to the problem of representatives acting on behalf of industry, the CEIF wished the Committee to confirm that, provided that the person concerned could furnish proof of having habitually acted as a representative for at least five years and provided that the national administration could confirm this by means of documentary proof on file, namely an authorisation repeatedly designating the person concerned by name, that person should be considered as a representative for the purpose of Article 162, paragraph 3.

996. The French delegation thought that the answer to this question should be positive: the text of paragraph 3 should be interpreted to the effect that all persons who had habitually acted as professional representatives for at least five years, either independently or on behalf of industry, should, provided that the national office had proof on file, be considered as representatives within the meaning of Article 162, paragraph 3.

997. The Italian delegation, supporting the French delegation's interpretation, wondered whether it might not be preferable to make it clearer in this Article that the provision in question also applied to the persons referred to by the CEIF delegation.

998. The Committee agreed to instruct the Drafting Committee to examine whether the clarification suggested by the Italian delegation could be made.

999. During examination of the Drafting Committee's work on paragraph 2 (see M/142, page 3) the FICPI delegation asked the Committee what the position would be if a national patent office closed down after the entry into force of the Convention. In such an event, would representatives previously entitled to act before that Office be able to obtain a certificate from a national office of another Contracting State?

The Committee thought that this highly unlikely situation did not make any amendment to the text necessary, especially since the certificate would not be issued by the national patent offices, but by the national industrial property offices of the Contracting States.

None of the delegations supported the FICPI suggestion that this paragraph should be amended so that each national office could be entitled to issue certificates irrespective of the nationality of the representative and of whether or not he had his place of business or employment in the territory of the State concerned.

1000. The Committee then examined the French delegation's proposed amendment to *paragraph 6* (M/112, page 3).

The French delegation stated that its proposal was to delete the reference at the end of paragraph 6 to the exercise of the profession "in the Contracting States" and to replace it by a reference to the exercise of the profession "before the central industrial property office". The aim of this amendment was to take account of the situation in certain Contracting States

where the representatives referred to in the present Convention could not act before judicial bodies, since this was the prerogative of lawyers.

1001. In reply to a request for clarification from the United Kingdom delegation, the Chairman stated that the aim of the French delegation's proposal was to ensure that if, under national law, a representative was only entitled to act before the national office (actions before judicial bodies being confined to lawyers) he should be entitled to act before the European Patent Office in all proceedings. Without such a provision, applicants would be obliged to change representatives during the proceedings.

1002. The Committee agreed to the French delegation's proposal.

1003. The Committee then examined the proposed amendment to *paragraph 7* submitted by the delegation of the Federal Republic of Germany (see M/11, point 7).

1004. The delegation of the Federal Republic of Germany stated that the aim of its proposal was to take account of the special situation of two categories of representatives in the Federal Republic of Germany: the "Patentassessoren", and the "Erlaubnisscheininhaber". German law stipulated that a "Patentassessor" could not be authorised as a patent agent if he devoted most of his time and energies in industrial property matters to working for one company. On the basis of the present text of paragraph 7, "Patentassessoren" could be entered on the list of professional representatives subject to the limitation applicable to them under their national legislation. The German delegation did not wish to alter this state of affairs, but simply to request that if, before the end of the transitional period, a "Patentassessor" changed his professional status and became a patent agent, he should not be obliged to take the European qualifying examination in order to be entered on the list of professional representatives without limitations. A similar problem arose for "Erlaubnisscheininhaber". These were representatives on a slightly lower level than patent agents, with the result that German law permitted them to represent only German nationals before the German Patent Office. It was possible for such representatives to take an examination enabling them to become patent agents. Therefore, in this case also, the delegation of the Federal Republic of Germany proposed that the limitation on the exercise of the profession, contained in the present text of paragraph 7, should be deleted, if the person concerned became a patent agent before the end of the transitional period.

1005. The proposal by the delegation of the Federal Republic of Germany was supported by several delegations.

1006. The FEMIP delegation asked the Committee if it could agree to the proposal submitted by UNICE (see M/19, point 40) that persons entered on the list during the transitional period should remain on the list without any restrictions on their entitlement to act after the expiry of the transitional period.

1007. The Chairman noted that the UNICE proposal went further than that of the delegation of the Federal Republic of Germany and asked the Committee whether any of the Government delegations were prepared to put forward the UNICE proposal.

1008. The Italian, French and Swedish delegations were prepared to do so.

1009. The delegation of the Federal Republic of Germany stated that although it had not proposed such a solution itself, it was prepared to support it.

1010. The Swiss delegation said it would favour an even more radical solution, namely deletion of the second sentence of paragraph 2 and the whole of paragraph 7. It considered that the matter at present under discussion concerned peculiarities of national law and that there was nothing to prevent the



Contracting States from laying down less restrictive provisions within the framework of the Convention.

1011. The Netherlands delegation supported this proposal.

1012. The Committee agreed to the proposal.

### C. Implementing Regulations\* (M/2)

2001. The Main Committee, acting on a proposal by its Chairman, set up a Working Party on Implementing Regulations to deal with those Rules which, on account (for example) of the complicated nature of the questions involved, did not allow of an immediate decision by the Main Committee.

The Working Party was composed of the French, German, Netherlands, Swedish, Swiss and United Kingdom delegations, which had previously elaborated the Draft Implementing Regulations. Other delegations which might make proposals concerning any of the Rules would take part in the Working Party's discussions on the matter.

#### ***Rule 2 — Derogations from the provisions concerning the language of the proceedings in oral proceedings***

2002. With regard to *paragraph 1*, the CEIF delegation suggested that any party to proceedings who wished to use an official language other than the language of the proceedings should be bound to inform the European Patent Office to that effect one month before proceedings were initiated.

Furthermore, the CEIF delegation held that in such cases the European Patent Office should make provision for interpretation into the language of the proceedings and that costs incurred on that score should be borne by the party concerned (see M/22, points 28 and 29).

2003. The IAPIP delegation contended that in cases where a party to proceedings wished to use an official language other than the language of the proceedings, not only the European Patent Office but also the other parties to the proceedings should be notified.

2004. The UNICE delegation supported the CEIF and IAPIP delegations (see M/19, points 29 and 30).

2005. The FICPI delegation also considered that a party to proceedings should be obliged, one month before proceedings were initiated, to indicate to the European Patent Office that he intended to use a language other than the language of the proceedings (see M/15, point 53).

2006. The Chairman pointed out that the purpose of paragraph 1 was to ensure that the European Patent Office was informed in good time prior to the proceedings of the intention to use a language other than the language of the proceedings and to enable it to make provision for official interpretation. On the other hand, what the proposals put forward by the various organisations sought to ensure was that the other parties would also be informed, and this would require an extension of the time limit.

2007. The French delegation drew attention to the fact that paragraph 1 governed only the use of, but not changes in, the language of the proceedings. This meant that as a general rule the parties concerned would have to continue using the language of the proceedings and that only parties to oral proceedings would merely have the option of using a different official language. Any party wishing to do so was obliged to give 2 weeks' notice to the European Patent Office to allow it to make provision for interpretation into the language of the proceedings. Even if the party concerned failed to give due notice, he could still make provision himself for interpretation into the language of the proceedings subject to his defraying the costs involved. On the basis of this interpretation of paragraph 1 the French delegation failed to comprehend the

purport of the proposals put forward by the observer delegations, inasmuch as the time limit of two weeks was of concern only to the European Patent Office.

2008. The Chairman considered that the French delegation's interpretation was correct. He was, however, also sensible of the doubts expressed by the various Observer delegations, which wished to go one step further than the provision by the European Patent Office for interpretation of oral proceedings into the language of the proceedings and ensure that the other parties had prior cognizance of the other language to be used in proceedings.

2009. The Italian delegation supported the proposals made by the above-mentioned Observer delegations with regard to paragraph 1.

2010. The Chairman stated that in the absence of support from a second Government delegation the proposals by the Observer delegations could not be taken into account.

He further considered that there was no danger attendant upon the retention of Rule 2, paragraph 1, in its present form, on the grounds that it could be adjusted to practical needs by the Administrative Council should it prove to be inadequate. The President of the European Patent Office could, moreover, issue administrative instructions to the effect that a copy of the notice referred to in paragraph 1 was to be forwarded to all parties to proceedings to enable them to adapt to the new situation.

2011. The French delegation wondered what procedure was to be adopted in cases where the interpretation into the language of the proceedings by one of the parties was unsatisfactory.

2012. The delegation of the Federal Republic of Germany stated in reply that incompetent interpretation should be deemed tantamount to a failure to provide interpretation, with the result that in cases of this nature the party concerned would have failed to comply with the obligation under the first sentence of paragraph 1. The oral proceedings would then either have to be adjourned, or the European Patent Office could intervene and provide an interpreter. Any additional costs incurred as a result of adjournment would have to be borne by the party concerned. The above procedure could be justified by reference to Article 103 (104), paragraph 1, of the Convention.

2013. The United Kingdom delegation endorsed the views expressed by the German delegation.

2014. The French delegation was satisfied with the above interpretation.

2015. The Swiss delegation claimed that Article 103 (104), paragraph 1, governed only costs incurred in proceedings before the Office, but not costs incurred by the parties.

2016. The delegation of the Federal Republic of Germany held that Article 103 (104), paragraph 1, and Rule 64 (63) clearly applied to costs incurred by the parties. This would mean that the travelling costs incurred by parties which had appeared to no avail at oral proceedings would be reimbursed by the other party in all cases where it had been necessary to conduct new oral proceedings on account of faulty interpretation.

2017. The Main Committee referred to the Drafting Committee a drafting proposal on paragraph 1 submitted by the United Kingdom delegation (M/40, point 27).

2018. With regard to *paragraph 2*, the COPRICE delegation considered that it should be expressly laid down that statements made by employees of the European Patent Office in the course of oral proceedings must perforce be translated into the language of the proceedings (see M/16, point 14).

2019. The Chairman replied that such a provision was not needed under paragraph 2, as the legal consequence called for by COPRICE was available under paragraph 5.

\* All provisions under the Implementing Regulations prior to Rules 8—12 fall within the purview of Main Committee I (see M/34 and M/56/1/11/III).

2020. The COPRICE delegation, however, felt that paragraph 5 covered only the matter of costs, but not the obligation on the part of the European Patent Office to make provision *ex officio* for interpretation into the language of the proceedings in cases where an employee of the Office changed to another official language.

2021. The Chairman observed that the Government delegations subscribed to his contention that paragraph 5 governed both the matter of costs and the obligation to make provision for interpretation into the language of the proceedings.

2022. With regard to paragraph 6, the Norwegian delegation proposed (M/60/I, page 5) a new second sentence reading as follows: "Statements made in any other language shall be entered in the official language into which they have been translated". The intention of this was to prevent statements which had not been made in the language of the proceedings from being translated anew when it came to entering them in the minutes.

2023. The Main Committee adopted the proposal, which was supported by the German and Netherlands delegations.

### **Rule 13 – Suspension of proceedings**

2024. The Main Committee referred Rule 13 to the Working Party for examination in the light of the proposals made in particular by the French, German and Netherlands delegations (M/26, points 23 - 26, M/32, points 24 and 25, M/47/I/II/III, point 23 and M/52/I/II/III, point 16).

2025. In reply to a question put by the delegation of the International Chamber of Commerce, the French delegation pointed out that in principle the first sentence of *paragraph 2*, as worded in the Working Party's proposal\*, covered final decisions in favour of the applicant as well as final decisions in favour of third parties. It was, however, clear that the last part of the sentence referred only to the latter of the two cases.

2026. The Main Committee adopted the version prepared by the Working Party.

### **Rule 14 – Limitation of the option to withdraw the European patent application**

2027. The Main Committee referred Rule 14 to the Working Party for examination in the light of the proposals made in particular by the German and Netherlands delegations and by the other Member States of the European Communities (M/14, point 14, M/32, point 26, M/47/I/II/III, point 23 and M/52/I/II/III, point 17).

2028. The Main Committee subsequently adopted the text drawn up by the Working Party.

2029. The Main Committee referred to the Drafting Committee a drafting proposal by the French delegation concerning Rule 14 (M/58/I/II).

### **Rule 16 – Right to the grant of a European patent for a part of the subject-matter of the invention**

2030. The Main Committee referred Rule 16 to the Working Party with the request that it examine the proposal (see M/47/I/II/III, point 23) by the delegation of the Federal Republic of Germany concerning *paragraph 1*.

The Working Party was also instructed to examine whether Rule 16 should not cover cases where different proprietors were involved in opposition proceedings in different Contracting States (see points 410 and 411).

2031. The Main Committee subsequently adopted *paragraph 1* as prepared by the Working Party.

\* This is identical to paragraph 2 of the final version.

2032. With regard to *paragraph 2*, the version of which in M/2 was left unchanged by the Working Party, the United Kingdom delegation pointed to the anomalous situation whereby new proprietors involved in opposition proceedings under Article 98 (99), paragraph 4 (5), in conjunction with Article 117 (118), were entitled (albeit subject to compliance with Article 122 (123)) to amend claims, descriptions and drawings of the patent, whereas this possibility would be available under Rule 16, paragraph 2, only if the European Patent Office considered it necessary.

2033. The Netherlands delegation endorsed this view.

2034. The delegation of the Federal Republic of Germany agreed to the deletion from Rule 16 of the restrictive clause "if the European Patent Office considers it necessary", even though it did not subscribe to the United Kingdom delegation's contention that different claims and descriptions could be filed under the terms of Article 98, paragraph 4.

2035. The Main Committee, acting on a proposal by the Chairman, decided that the phrase "if the European Patent Office considers it necessary" was to be deleted from paragraph 2.

2036. Following a proposal by the Netherlands delegation, the Main Committee directed the Drafting Committee to draw up a provision on the lines of paragraph 2 to cover cases where, in the course of opposition proceedings, a third party replaced the proprietor for one or some of the designated States\*.

### **Rule 17 – Designation of the inventor**

2037. The Main Committee, acting on a proposal by the Netherlands delegation (M/52/I/II/III, point 18), decided to delete the second sentence of *paragraph 1*, in order to bring it into line with the decision taken on the compulsory designation of the inventor (point 247).

2038. The Main Committee had already taken, decision in principle on the question of designation of the inventor at an earlier sitting (see points 247, 265 and 276), and was therefore in a position to look into the matter of the resultant adjustments to Rule 17 on the basis of a proposal by the delegation of the Federal Republic of Germany (M/118/I).

2039. With reference to paragraph 2 of its proposal, the delegation of the Federal Republic of Germany stated its view that a distinction should be drawn between the following two cases: If the applicant were the sole inventor, he was bound to identify himself as the inventor in the application itself; if, on the other hand, the applicant was not the inventor or the sole inventor, he was obliged to designate the inventor or inventors in a separate document containing the name and address of the inventor and a statement indicating the origin of the right to the patent. A separate document seemed particularly suited to the requirements of the second case, as otherwise there would always be the possibility that the person designated as the inventor would have access to the data given by the applicant in the request for grant. The introduction of a new paragraph 4 meant that in the second of these two cases the European Patent Office would notify to the inventor a copy of the document designating the inventor together with the data mentioned in Article 128, paragraph 5 (which would include the file number and date of the application, the title of the invention and the Contracting States designated). This procedure would enable the inventor to take cognizance of the application. Under the terms of the new paragraph 5, which had been modelled on other provisions of the Convention, the inventor was, however, unable to invoke either the omission of the notification under paragraph 4 or any errors contained therein.

2040. The Main Committee first of all adopted *paragraph 1* as proposed. At a subsequent sitting, however, the decision was

\* See Rule 16, paragraph 3, of the Implementing Regulations.



taken to delete the paragraph in accordance with a proposal by the Drafting Committee.

2041. The Swiss delegation wondered whether any purpose was served by citing in the proposed *paragraph 2* the statement referred to in Article 79 (81), as this could give rise to the fallacious assumption that the statement in question was not the chief constituent of the designation of the inventor but rather a mere incidental.

2042. The delegation of the Federal Republic of Germany considered that in view of Article 90 (91), paragraph 5, the statement indicating the origin of the right to the patent should be referred to in paragraph 2.

2043. The Main Committee referred the matter to the Drafting Committee and adopted paragraph 2\*.

2044. The Main Committee adopted *paragraph 4* as proposed.

2045. The Austrian delegation asked what action could be taken by an inventor in the absence of *paragraph 5*.

2046. The Chairman replied that inventors who had not received the notification under paragraph 4 as a result of an oversight on the part of the European Patent Office might be tempted to lodge a claim for damages against the European Patent Office. Paragraph 5 was intended to forestall that eventuality.

The Chairman noted that the Main Committee shared his point of view and that it accordingly adopted paragraph 5.

### ***Rule 19 — Rectification or cancellation of the designation of an inventor***

2047. A proposal by the delegation of the Federal Republic of Germany (M/118/I) formed the basis for the Main Committee's discussions on the adjustments to be made to Rule 19 consequent upon the decision taken concerning the designation of inventors (see point 2038 *supra*).

2048. The delegation of the Federal Republic of Germany pointed out that a new sentence embodying a reference to Rule 17, paragraphs 2 to 5, was to be added to *paragraph 1*; in particular, the relevant data concerning the application should be communicated to the new inventor designated in the rectification.

2049. The Chairman pointed out that the proposed reference to Rule 17 would apply only to cases where a person who had not previously been mentioned was designated as the inventor. If, on the other hand, a person had previously been wrongly designated as the inventor and this were rectified, there would then be no further need for him to be notified in accordance with Rule 17 if he had consented to the rectification.

2050. The Netherlands delegation considered that the person wrongly designated as the inventor should be required to give his consent to any rectification. Such consent would perhaps be unnecessary in cases where a final decision under Article 59 (61) was taken in favour of the real inventor.

2051. The Chairman held that in such cases the final decision would, as a matter of general legal principle, be deemed to have replaced the consent of the person wrongly designated as the inventor.

2052. The UNICE delegation wondered if it interpreted the second half of the first sentence correctly in assuming that a third party could — albeit with the consent of the applicant or proprietor — file a request for the rectification of the designation of an inventor.

2053. The Chairman considered that the provision in question did not mean that just anybody was entitled to file a request for the rectification of the designation of an inventor. Such requests could be filed only by the inventor, the applicant

or the proprietor, and any request by the inventor would require the consent of the applicant or the proprietor.

The Chairman noted that the Main Committee was in agreement with this interpretation.

2054. The UNICE delegation subsequently proposed that this provision be simplified along the lines of Rule 17 by stipulating that only the applicant or the proprietor had the right to file such requests.

2055. The delegation of the Federal Republic of Germany failed to see why a designated inventor should be debarred from making rectifications, with the consent of the applicant or the proprietor, for example in cases where the information given concerning him was incorrect.

2056. None of the delegations supported the proposal by the UNICE delegation.

2057. The UNICE delegation also wondered why provision had been made for the cancellation of an incorrect designation, as cancellation would require a new inventor to be designated and was therefore tantamount to rectification.

2058. The Main Committee referred the matter to the Drafting Committee for examination.

2059. With the present wording of paragraph 1, at least as it stood in English, the EIRMA delegation doubted whether it would be possible, for example, for a third person who had been wrongly omitted to be added to two persons correctly designated as inventors, as there would be no person wrongly designated as an inventor who would be entitled to consent to the rectification.

2060. The delegation of the Federal Republic of Germany pointed out that, at least so far as the German version was concerned, such a procedure presented no problem, inasmuch as an addition to an incomplete designation constituted a rectification.

2061. The EIRMA delegation stated that it would be satisfied if the Main Committee made it clear that in the case which it had just referred to additions could be made to the designation of the inventor.

2062. Thereupon, the Main Committee proceeded accordingly.

2063. The delegation of IFIA recorded the provisional agreement of its member associations to the compromise solution to the whole problem of the designation of the inventor set out in M/118/I, and approved by the Main Committee.

2064. Further statements with regard to Rule 19 are set out under points 278 — 280 and 323 — 325.

### ***Rule 23 — Certificate of exhibition***

2065. The Norwegian delegation withdrew its proposal concerning Rule 23 (M/28, point 18).

2066. The Swiss delegation proposed supplementing Rule 23 in such a way that the opening date of the exhibition and, where the first disclosure of the invention did not coincide with the opening date, the date of the disclosure should also be stated in the certificate of exhibition (M/54/I/II/III, page 23). It pointed out in support of this that without such a statement, it would be exceptionally difficult, if not altogether impossible, to ascertain whether an invention had been disclosed within the period of six months laid down in Article 53 (55), paragraph 1.

2067. The Main Committee adopted this proposal, which was supported by the French and Portuguese delegations.

2068. The Swiss delegation also proposed, in connection with Rule 23, the inclusion of a new provision whereby the President of the European Patent Office would have to keep a list of recognised exhibitions and publish it in the Official Journal of the European Patent Office (M/54/I/II/III, page 9).

\* See point 2097.

2069. The Chairman pointed out that under the Convention on international exhibitions of 22 November 1928, the International Exhibition Bureau had to notify recognised exhibitions to the World Intellectual Property Organization in Geneva (WIPO). He felt that the proposed provision was not required, since the President of the European Patent Office could, on his own initiative, request WIPO to forward these notifications, for publication in the Official Journal of the European Patent Office.

2070. The Swiss delegation thus felt that under these circumstances, it could be left to the President of the European Patent Office to clear up this matter, and withdrew its proposal.

#### **Rule 24 – General provisions**

2071. The delegation of the Federal Republic of Germany proposed supplementing *paragraph 2* by laying down that at least the nature and number of the documents submitted should also be recorded in the receipt (M/47/I/II/III, point 24).

2072. The Main Committee adopted this proposal, which was supported by the Netherlands delegation.

2073. With regard to a proposal from the French delegation to insert “or other competent authority of that State” in *paragraph 4* (M/26, point 27), the Chairman drew attention to the fact that even where, pursuant to Article 75 (77), paragraph 1, the patent application is filed with any other competent authority, it must in any case be forwarded by the central authority of the State in question to the European Patent Office. He thus felt that the wording of *paragraph 4* was in fact correct.

The French delegation did not contradict this view.

2074. With regard to *paragraph 4*, the Netherlands delegation proposed that the European Patent Office should also be able to inform the applicant of the date on which it received the application from the central authority of a Contracting State, since this information would be important for him in view of Article 75 (77), paragraph 5.

2075. The Main Committee adopted this proposal.

#### **Rule 25 – Provisions for European divisional applications**

2076. The French delegation proposed that, instead of referring to the date of receipt by the European Patent Office of the earlier application, the *first clause of paragraph 1(a)* should refer to the date upon which the applicant was informed that the Office had received the application (M/26, point 28).

2077. The Chairman pointed out that this would place the applicant in a worse position than would the original proposal, which provided that the divisional application could be filed at almost any time after the despatch of the earlier application.

2078. The United Kingdom delegation agreed with the Chairman’s comments, particularly for cases where the earlier application was filed directly with the European Patent Office.

2079. The French delegation explained that its proposal was intended to cover only cases where the earlier application was filed not directly with the European Patent Office but with the central industrial property office of a Contracting State.

The delegation would submit an appropriate drafting proposal.

2080. At a later meeting of the Main Committee the French delegation withdrew the proposal it had submitted in the meantime (M/110/I).

2081. The Main Committee referred to the Drafting Committee a drafting proposal by the French delegation concerning *paragraph 1(a)* (M/26, points 29 and 30).

2082. The CEIF delegation, referring to Article 49,

*paragraph 2*, of the Convention of the Union of Paris (Lisbon revision), suggested that divisional applications on the initiative of the applicant should also be allowed after the first communication from the Examining Division (see M/22, point 2).

2083. This suggestion was not taken up by any Government delegation.

2084. The IAPIP delegation raised the question of whether a divisional application could also be filed in appeal proceedings; this seemed to be precluded by *paragraph 1(a)*.

2085. The Chairman referred to Rule 67 (66), paragraph 1, which laid down that the provisions relating to proceedings before the department which had made the decision from which the appeal was brought were to be applicable to appeal proceedings *mutatis mutandis*. He felt that in the course of appeal proceedings an applicant could still divide an application on which the Examining Division had not yet taken a final decision, provided the Board of Appeal considered this to be justified.

2086. The IAPIP delegation suggested replacing the word “justified” at the end of *paragraph 1(a)* by a more flexible word.

2087. This suggestion was not taken up by any Government delegation.

#### **Rule 26 – Request for grant**

2088. The Main Committee referred to the Drafting Committee a drafting proposal by the Member States of the European Communities concerning *paragraph 2(c)* (see M/14, point 8).

2089. The Main Committee referred to the Drafting Committee a drafting proposal by the Netherlands delegation concerning *paragraph 2(g)* (see M/32, point 29).

2090. With reference to a proposal by the delegation of the Federal Republic of Germany (M/118/I), the Main Committee discussed a drafting amendment to Rule 26 consequent upon its decision on the question of the designation of the inventor (see point 2038).

2091. The delegation of the Federal Republic of Germany said that the only amendment would be that the designation of the inventor in the request for grant was compulsory if the applicant was also the inventor. The present *paragraph 3(b)* should accordingly be deleted.

2092. The Chairman pointed out that the French version of *paragraph 2(k)* in M/118/I was incorrect and should perhaps be worded as follows:

“la désignation de l’inventeur, si le demandeur est l’inventeur”.

2093. With reference to *paragraph 2(i)* and the newly proposed (k), the FICPI delegation asked whether, when the applicant and inventor were one and the same and designation of the inventor in the request for grant was thus compulsory, the request could also be signed by the representative of the applicant. For foreign applications in particular this possibility ought really to exist in practice\*.

2094. The Chairman said there was no doubt that the representative had just as much right to sign the request as the applicant.

2095. The delegation of the International Chamber of Commerce suggested that where the applicant was also the inventor a statement to that effect should be required of the applicant.

2096. The Main Committee referred this suggestion to the Drafting Committee for examination.

2097. Referring to Rule 17, *paragraph 2* (see point 2043), the Chairman raised the question of whether the designation of the inventor should also be contained in a separate document – rather than in the request for grant – in the case where the

\* See also point 326.

applicant was also the inventor. In this connection it should be borne in mind that the request could be signed by the representative and that the designation of the inventor could be corrected within 16 months after the date of filing or the date of priority.

2098. The Netherlands delegation said it considered the present solution, whereby no separate document was required if the applicant was also the inventor, to be simpler, although it would be prepared to accept a different interpretation by the interested circles.

2099. The Chairman said that since it was not wished to amend Rule 26, the latter was adopted by the Main Committee.

### **Rule 27 – Content of the description**

2100. The UNICE delegation suggested wording *paragraph 1(d)* in such a way that not all the advantageous effects of the invention would have to be stated.

2101. The Main Committee accepted this suggestion, which was supported by the delegations of several Governments.

### **Rule 28 – Requirements of applications relating to micro-organisms**

2102. The Member States of the European Communities proposed that, instead of referring to Article 81 in *paragraph 1*, the requirements of that Article should be repeated (M/14, point 15).

2103. The United Kingdom delegation explained that this wording should ensure that non-compliance with the requirements of Rule 28 was not merely a ground for refusing the patent but also a ground for opposition and revocation.

2104. The Main Committee accepted this proposal.

2105. As regards the main problems raised by Rule 28, the Chairman established that delegations agreed on the following points:

1. A sample of the micro-organism used in the invention must be deposited in an authorised culture collection not later than the date of filing the application.
2. The description must contain sufficient information concerning the micro-organism.
3. Within two months of the application date the culture collection must be named and more specific details given of the deposited sample.

(See M/11, point 9; M/31, points 7 and 8; M/35, points 5 and 6; M/47/I/II/III, point 25; M/54/I/II/III, page 24; M/57/I; M/19, points 42 to 51; M/21, points 27 and 28; M/22, points 47 to 56; M/62/I/II, pages 6 and 7).

The Chairman further noted that there were wide differences of opinion as to the date on which the sample was to be made available to the public. One view was that this should — on certain conditions, however — be the date on which the application was published, while the alternative view favoured the date of the grant of the patent.

The Chairman requested that the discussion be initially restricted to the question of this date.

2106. The French delegation was in favour of not making the sample available to the public until the date of the grant of the patent (M/57). It advanced the following arguments for this position:

In the first place, Rule 28 required more of the applicant for an invention involving the use of a micro-organism than of applicants for other inventions. The micro-organism was in fact often the object of the invention or at least essential to its

realisation and normally it was not necessary to make available the invention itself or the means of realising it. Secondly, in many cases the sample would give away the know-how for the production of the micro-organism. Thirdly, these two reasons showed that it would be very easy for a competitor to imitate the invention. Fourthly, in the event of the patent being finally refused, the applicant would have disclosed the micro-organism, which might represent a genuine invention, without having received any protection for it.

In this connection, the French delegation felt that Article 65 (67) should also be amended as far as micro-organisms were concerned and temporary protection under this Article should begin only when the applicant had made the micro-organism available to the public, which may be at any time from the publication of the application until the grant of the patent.

2107. The Chairman replied to the first argument by saying that in the case of an invention involving the use of a micro-organism, it was in the nature of things that the applicant should have to disclose more than usual, precisely because such inventions could not be described without a sample.

2108. The Danish delegation supported the French suggestion (see M/35, points 5 and 6).

2109. The delegation of the Federal Republic of Germany felt that the sample should be made available to the public when the application was published (see M/11, point 9 and M/47, point 25). On the other hand, an applicant having deposited a sample of a micro-organism should be protected against being placed at a disadvantage as compared with applicants for other types of invention.

In the same delegation's view, there were objections of general and patent law to making the sample available only at the date of the grant of the patent. From a general legal point of view it was important not to break the rule stipulating publication of the application 18 months after the priority date, which had been laid down in the interests of informing the public. The published application must give sufficient information concerning the invention and in the case of inventions involving the use of a micro-organism this may be done only by making a culture of the micro-organism available to the public. As regards patent law, there would be extreme difficulties over the question of the date from which the description should be considered as comprised in the state of the art if no culture of the micro-organism were made available to the public. In the opinion of the German delegation, based on German legal precedents, an invention involving a description of a micro-organism could not be regarded as comprised in the state of the art until a culture of the micro-organism had been made available to the public. If this did not take place until the date of the grant of the patent, the invention would be comprised in the state of the art only from that date and it would not be possible to invoke Article 52 (54), paragraph 3, with the result that double-patenting could occur.

Both in Contracting and non-Contracting States the problem would arise of whether an invention applied for under the Convention and involving the description of a micro-organism of which the culture had not yet been made available to the public would prejudice the novelty of national patent applications. In general, national patent laws prescribed that a patent application became prejudicial to novelty only when it was sufficiently publicised, and the German delegation felt that this provision would not apply in the majority of cases.

2110. The United Kingdom delegation was in favour of making the sample of the micro-organism available to the public when the patent application was published. The delegation supported the arguments put forward by the German delegation and stressed that the publication of the application must be complete, i.e. a sample of the

micro-organism must be available to the public. It was possible, however, that a rule of this sort could put the European chemico-pharmaceutical industry at a disadvantage as compared with the industry outside Europe, although it was by no means certain. If a thorough study should indicate that complete publication was impractical in the case of micro-organism, the Implementing Regulations could be amended in this respect, even before the European Patent Office considered the first applications. Furthermore, not all cases were the same and there would often be no objection to making the sample available at an early date. There did not, therefore, appear to be any reason for making an exception for certain categories of invention at that stage.

2111. The Belgian and Netherlands delegations supported the French proposal.

2112. The Swiss delegation was in favour of making the sample of the micro-organism available when the patent application was published. It would be necessary, though, to take specific steps to avoid misuse at the expense of the applicant (see M/31, points 7 and 8 and M/54, page 24).

This delegation felt that the following three rules of the Convention should not be broken for micro-organisms: firstly, that the state of the art included only what had been sufficiently publicised. In this connection, the delegation endorsed the clear explanation given by the German delegation. The second rule stipulated that third parties should be informed of probable protective rights as soon as possible, i.e. 18 months after the priority date. Applied to the present case, this would mean that in respect of published applications, third parties would have to be able to obtain reliable information on the scope of probable protective rights which, in the opinion of the Swiss delegation, would be possible only if the sample of the micro-organism were also made available to the public. The third rule mentioned was that the publication of unexamined inventions afforded temporary protection, and this would not be guaranteed by the French proposal.

2113. The Italian delegation supported the French proposal, which in its view best satisfied the applicant's desire for temporary and definitive protection.

2114. The Yugoslav, Austrian and Portuguese delegations favoured the German proposal. The first-mentioned said that measures would have to be taken to protect the applicant with regard to the use of the sample of the micro-organism.

2115. In reply to the remarks of the United Kingdom delegation, the French delegation said that it did not think it was possible to introduce the rule proposed by the United Kingdom delegation simply by amending the Implementing Regulations. The French delegation subscribed to the legal principles adduced by other delegations, particularly the publication of applications after 18 months, but this did not mean that a whole branch of industry had to be sacrificed for the sake of these principles.

2116. The Chairman pointed out that the delegations which advocated this principle wanted to protect applicants in a different manner against the risk of loss that might arise from early disclosure of the micro-organism.

2117. The FICPI delegation thought that inventions involving micro-organisms were definitely different from other inventions. In the case of other inventions, for example in the field of mechanics, it was only the method of putting the invention to the practical use that was disclosed. A micro-organism, however, was used either to produce a new molecule or to transform an existing one. Micro-organisms could be used not only for the practical application of inventions, but also for other purposes of which there were many practical examples. Third parties could thus apply micro-organisms to other purposes than those of the inventor;

and if a patent application were not successful, the benefit of the secret would be completely lost to the applicant. Furthermore, a micro-organism which had been made available to the public could be subjected to certain modifications; third parties could modify the strain of the micro-organism to which they had been given access and thereby discover totally new possibilities for its application.

For these reasons the question of how third parties were to be given access to micro-organisms had to be covered specifically in the Convention. The French delegation's proposal took complete account of this special situation.

2118. The UNICE delegation welcomed the French delegation's proposal, especially with regard to the contemplated provision to allow the applicant to give third parties access to a sample of the micro-organism only on the grant of a patent or else to give provisional protection before then — but only against release of the sample (see M/19, points 42 et seq., especially point 51).

2119. The UNION delegation brought up the question whether — with reference both to Article 51 (53) and the French delegation's proposal — micro-organisms as such should be afforded protection. It also said that it did not think that micro-organisms should have to be described as precisely as possible in applications, since this could be given too narrow an interpretation by the European Patent Office.

As to the main issue of the time of release of the sample, the UNION was in favour of release on the day of publication of an application, but subject to very strict conditions designed to fully protect the interests of the inventor. In fact the case of micro-organisms was special inasmuch as micro-organisms could reproduce themselves; a third party who gained possession of only one cell of a micro-organism could breed the substance himself within a very short time. The UNION proposed that release of a micro-organism should be made conditional upon the consent of the applicant or at least that the European Patent Office should be given the power to decide. Consideration should also be given to requiring the applicant to hand the strain of a micro-organism over to an independent expert (see M/21, points 27 and 28).

2120. The Chairman said in reply to the UNION delegation's question that in the event of conflict between the Implementing Regulations and the Convention the latter was to prevail and consequently Rule 28 could not affect the operation of Article 51 (53), sub-paragraph (b). A micro-organism as such would only enjoy protection if Article 51 applied.

2121. The EIRMA delegation declared its wholehearted support for the French proposal on the grounds advanced by the French delegation. The measures envisaged by other delegations would certainly not suffice to prevent misuse to the applicant's disadvantage; in any case that was what the Swiss pharmaceutical industry feared. In the event of accessibility to a sample of the micro-organism being required as soon as the application were published, the possibility of inventions appertaining thereto not being disclosed but rather kept secret as long as possible, could not be discounted.

It should suffice to give the public access to a sample of the micro-organism on the grant of a patent, since it was still open to third parties to initiate opposition proceedings. If, however, access to the sample were to be given before the grant of the patent, free use might be made of it if the patent were subsequently refused.

Finally, it was still to be ascertained whether no rule similar to that contained in the draft existed yet in any country in the world.

2122. The FEMIP delegation supported the French delegation's proposal and agreed with the arguments of the delegations which had spoken in favour of it.

2123. The CEIF delegation said with reference to its own proposal (see M/22, points 47 et seq., in particular point 56) that it wholly supported the French delegation's proposal. Its own proposal did of course represent a good compromise, in that a sample of the micro-organism had to be lodged no later than the day of application, but the applicant would not benefit from provisional protection under Article 65 unless the sample were made accessible to the public.

It was of course proper that certain legal principles be observed. On the other hand, however, the rules as they then stood required more of applicants for patents concerning micro-organisms than of other applicants. A balance had to be struck between the applicant's and the general interest. It was not true that nothing could be deduced from a particular patent application if the public were not at the same time given access to a sample of the micro-organism, for a specialist could by means of data concerning the distinctive characteristics of the micro-organism very well build up an adequate picture of the nature of the invention.

The disadvantages of the rules laid down as against those of overseas countries, in which many applications in the field of micro-biology would be filed, were obvious, since those countries had laid down rules of a different nature. In Japan, for example, only the Japanese public had to be given access to the strain of a micro-organism. Furthermore, in line with the findings of the Banks Report, the strain of a micro-organism was only to be made available to the public in the United Kingdom.

Extraordinarily difficult problems would in any case arise for the relevant branches of industry in the Contracting States. In short, this meant that — contrary to the purpose of the Convention — it was quite possible that many relevant inventions would be kept secret for fear that the interests of applicants for patents concerning micro-organisms would not be adequately protected.

2124. The Chairman did not think that more would be required of applicants for patents in the micro-biological field than of other applicants. Inventions always had to be so described in applications that an expert could put them into practice. If he had correctly understood the relevant literature, a description alone was not enough to make it possible to copy a micro-organism; a sample was essential. It was merely easier to copy a micro-organism by using such a sample than it was to copy other types of inventions using their descriptions.

2125. The IAPIP delegation supported the French delegation's proposal on two counts. Firstly, earlier described disadvantages entailed for the inventor in the obligation to make the micro-organism immediately available would be too great. Special measures were therefore needed to protect applicants. Secondly, as had already been pointed out, there was a danger that applications for patents of invention would not be made; this would be bound to entail the direst consequences not only for inventors, who would thus remain unprotected to some extent, but also for the public at large and for progress in general.

2126. The IFIA delegation supported the positions adopted by the other non-governmental organisations, since it thought that the principle of early disclosure should be applied as little as possible.

2127. The COPRICE delegation likewise supported the French delegation's proposal. Inventions in the field of micro-organisms were in fact different from those in other fields, and a balance had to be found between the inventor's and the general interests. It did not think, however, that the French delegation's proposal conflicted with the principle of early disclosure, since with the publication of the application experts would be adequately informed as to the state of the art. It would

suffice for third parties if, from the time of grant of a patent, an expert could use the micro-organism himself, for example by putting the invention into practice afterwards, for experimental purposes, as he would then still be able to initiate opposition proceedings.

2128. The Chairman remarked that according to the French delegation's proposal temporary protection for applicants should start only from the time that samples of micro-organisms were made available to the general public, and not from the time of publication of applications. There must therefore be a distinction between these two events in the minds of the advocates of this proposal.

Furthermore, it had not yet been worked out sufficiently clearly in the discussion what the effects of the French delegation's proposal would be on the provisions concerning the state of the art. A consequence of the proposal would be that micro-organisms would not become a part of the state of the art until the grant of patents, and there could not therefore be any retroactive effect under the provisions of Article 52 (54), paragraph 3. In this the proposal would run counter to the system laid down in the Convention.

It was true that in this case different interests had to be balanced and that micro-organisms presented a special problem. The creation of a special law governing the grant of such patents was not, however, the only possible way of solving this problem; it could also be solved by retaining the general procedure and introducing additional safeguards for applicants.

Accordingly, a vote on the exact point in time at which samples of micro-organisms were to be made accessible to the public could only reasonably be taken if it were known what conditions the delegations in favour of early disclosure contemplated for the surrender of samples.

2129. Referring to its own proposal in M/47 (point 25), the delegation of the Federal Republic of Germany said that access to a deposited micro-organism culture should be granted only on request. Persons requesting access would have to give their names and addresses and undertake not to let other persons have access to the culture. Consideration could also be given to an undertaking to use the culture only for specific purposes (experiments, examination of patentability, vetting the extent of patent protection).

2130. The Swiss delegation supported the arguments of the German delegation. It added that agreement would have to be reached between the European Patent Office and the recognised culture collections clearly specifying the conditions on which access was to be granted. The Swiss delegation was ready to support any other measures that could be put through to prevent the misuse of micro-organism samples.

Furthermore, in the Swiss delegation's view, most inventions in the field of micro-biology were to be understood as combinations of invention and discovery. The invention consisted in the process (synthesis of new chemical compounds or transformation of known chemical compounds under the action of micro-organisms), while the discovery consisted in the use of micro-organisms as a means of carrying out the process. There was nothing special about micro-biological inventions, in that there were examples in other fields where only the invention stemming from a discovery was protected, whereas the discovery as such had to be surrendered with the publication of the application.

2131. The United Kingdom delegation commented on the German delegation's proposal as follows: for a specific branch of industry a sort of register of infringers should be set up, recording the names and addresses of persons making use of cultures. If the same sort of system were to be introduced for other technical fields, the European Patent Office would have to record details of every purchaser of a patent specification

and inform the proprietor of the patent accordingly. In addition, although the German delegation's proposal made no specific mention of it, a penalty would have to be provided for in cases where third parties did not respect their undertakings not to give other persons access to cultures; it would also have to be open to the applicant to proceed against a third party for breach of contract. This would amount to a special rule for the benefit of applicants. Finally, it would not be advisable to deny third parties every use to which samples could be put; uses should be forbidden only to the extent covered by subsequent legal protection.

2132. The Chairman said that it was a question of choosing between two evils: either principle of the procedure for the grant of patents was breached for the sake of micro-biological inventions, or, if it were to be preserved, special conditions for dealing with such inventions had to be set up. The German delegation's proposal sought, by means of the conditions set out therein, to achieve a certain compromise in order to allay the fears of the industry concerned about the unrestricted use of micro-organism samples.

2133. The Yugoslav delegation thought it would be sufficient if, in accordance with paragraph 3 of the French delegation's proposal, third parties who sought access to samples that had been lodged had to apply for this in writing, giving their names and addresses and undertaking on oath to use samples only for test purposes and not to pass them on to any other persons.

2134. The French delegation said that paragraph 3 of its proposal suggested conditions for access to deposited samples of micro-organisms; the question of these conditions had nothing to do with the point in time at which the public was to be given access to samples and was to that extent a secondary consideration. It thought therefore that it would be a mistake to qualify the German delegation's proposal as a compromise.

2135. The Chairman was still of the opinion that the conditions for the surrender of samples also played a part in the decision on the basic issue.

2136. The CEIF delegation agreed as to the conditions suggested by the French delegation for the surrender of samples, but wondered how a third party could be compelled to abide by his undertaking to use samples only for test purposes and not to pass them on to any other persons. Such an undertaking could be enforced only by the Contracting States, and so it followed that only persons from Contracting States ought to be given access to samples.

It thought that the burden of proof should therefore be reversed (see M/22, point 56, paragraph 5): if a third party received a deposited sample and made or sold a product which could be made by using the deposited sample, the product should be deemed to have been made by means of the deposited sample until proof to the contrary was adduced. Otherwise, if a new product appeared, or if a known product were produced by means of the deposited sample, the patentee would have the greatest difficulty in furnishing proof. The rule that the CEIF delegation had suggested would also give the patentee the necessary security in cases where the micro-organism was produced by means of the deposited sample in foreign countries where such an eventuality was not covered by patents and the products manufactured in that manner were re-imported into the Contracting States.

2137. The Chairman replied that the question of protection against re-imported products manufactured in foreign countries where patents would not apply in such a case also arose in the case of inventions other than micro-biological ones. In that connection he would like to ask a specialist in the field of micro-organisms whether, in the eventuality of a specimen having been taken from a deposited sample, proof of first appearance was evidence that a micro-organism of the same

species turning up somewhere else could only have originated from that specimen.

2138. The CEIF delegation said that such an argument was not conclusive, since, for example, intermediate derivative cultures could have developed from the strain of the micro-organism.

2139. The UNICE delegation supported the CEIF delegation's arguments concerning the reversal of the burden of proof (see point 2136).

2140. On the question of whether in the case of micro-biological inventions the applicant's difficulties of proof justified putting the burden of proof on the alleged infringer, the Chairman noted in conclusion that this issue was quite independent of whether access to a micro-organism should be granted at the time of publication of the application or on the grant of a patent, and thought that consideration of it should therefore be put off until later (see points 2191 et seq.).

2141. The UNION delegation thought that the applicant should immediately be told who had requested access to a sample of a micro-organism.

2142. The delegation of the Federal Republic of Germany said that it was prepared to supplement its proposal to that effect.

2143. The FICPI delegation felt that the requirements laid down in the German proposal were insufficient. Even if a third party were to undertake not to make the culture available to any other persons, it could not be ruled out that the culture might be used by other persons without his knowledge. The applicant could be offered complete security only if he were not to make the sample available to the public until the patent was granted.

2144. The Main Committee subsequently took a vote on whether, in accordance with the French proposal (see point 2106 above), the sample of the micro-organism should not be made available to the public until the patent was granted. 6 delegations supported this proposal, and 9 delegations opposed it, whereupon the proposal was rejected.

2145. Following its decision in principle, the Main Committee examined the detailed wording of Rule 28 on the basis of the German proposal (M/47, point 25).

2146. With regard to the *beginning of paragraph 1*, in the version already decided upon by the Working Party (see point 2104), the Swiss delegation proposed that the emphasis should not be on the use of a micro-organism in the invention, but rather that a somewhat broader wording should be sought than that in the draft proposal (M/1), i.e. somewhat similar to the wording of the German or French proposals (M/57).

2147. The Main Committee approved this proposal and referred it to the Working Party on the Implementing Regulations for consideration.

2148. The delegation of the Federal Republic of Germany withdrew its proposal for the wording of *paragraph 1(b)*, to the effect that the micro-organism should be described as precisely as possible.

2149. The Main Committee decided to adapt the provision to the draft proposal, and referred this matter to the Working Party.

2150. After discussion by the Working Party, the Main Committee re-examined paragraph 1(b) at a later sitting.

It agreed upon a wording to the effect that the application need not contain all the relevant information on the characteristics of the micro-organism, but only such relevant information as was known to the applicant.

2151. With regard to *paragraph 2*, the United Kingdom delegation asked what sanctions should be laid down in the eventuality of the required information on the deposit of the culture not being supplied in due time.

2152. The delegation of the Federal Republic of Germany felt that in such a case the application should be deemed to have been withdrawn.

2153. The United Kingdom delegation opposed *paragraph 3(a)* of the German proposal since it felt that the fixing of such administrative fees could not be a matter for the Convention.

2154. The delegation of the Federal Republic of Germany withdrew its proposal relating to *paragraph 3(a)*.

2155. With regard to *paragraph 3(c)* of the German proposal, the United Kingdom delegation wondered whether a new concept for the protection of industrial property would not be created if the person filing the request were to undertake not to make deposited cultures available to any other persons for any purpose whatsoever.

2156. The WIPO delegation mentioned that, according to the provisions valid for WIPO, it could not be ruled out that a new concept for the protection of industrial property might be developed. At all events, the protection of industrial property was defined conclusively in Article 1 of the Union of Paris.

2157. The delegation of the Federal Republic of Germany that *paragraph 3(c)* was merely intended to prevent improper use of the deposited culture of the micro-organism. Thus, inventions would not be protected in any particular way and consequently no new type of protection of industrial property would be created either.

2158. Finally, the United Kingdom delegation pointed out that the present wording of sub-paragraph (c) meant the stipulation that the person making the request should undertake not to make the culture available to any other persons would continue to apply even after the grant of the patent; this was going too far, because after that date the proprietor of the patent should exercise his rights solely on the basis of the patent. The undertaking should be restricted to the period from the publication of the application to the grant of the patent.

2159. The UNION delegation referred to its proposal in M/62 (page 6), whereby the obligation for the petitioner not to make the culture available to other persons would continue to apply after the grant of the patent as long as one of the patents of the Contracting States was in force; before the grant, the petitioner should also undertake not to use the culture for industrial purposes.

2160. The delegation of the Federal Republic of Germany supported the opinion of the UNION. It felt that the applicant should be able to exercise his rights without excessive difficulties and it would help in this respect if it were possible to establish to whom the culture of the micro-organism had been made available.

2161. The CEIF and UNICE delegations concurred with these statements. The second of these delegations stressed that notification of the name of the person making the request would be significant only of his undertaking not to make the culture available to any other person were also valid for the period after the grant of the patent.

2162. The Chairman pointed out that he had hitherto viewed the problem differently. He felt that the undertaking by the person making the request not to make the culture of the micro-organism available to third parties should be valid only for the period up to the grant of the patent, since up to that moment, the applicant would not be entitled to ask any third party to refrain from using the subject-matter of the application, but only to payment of a suitable fee for its use. After grant of the patent, the applicant could enforce his rights arising out of the patent, in which case the information which the person making the request would have to supply when removing the culture would be useful. On the other hand, the

right of the applicant to prohibit the person making the request from passing on the culture after grant of the patent would be alien to patent law.

2163. The UNICE delegation felt that the proprietor of the patent would be faced with insuperable difficulties in providing proof if the person making the request were to be allowed to make the culture available to any third parties after the grant of the patent.

2164. The UNION delegation considered that notification of the name of the person making the request would be of use only if the culture of the micro-organism were not allowed to be passed on by that person to a third party even after the grant of the patent. Otherwise anybody could be given access to the culture forthwith, without any indication of his name. Furthermore, it should be borne in mind that anybody could file a request for access.

2165. The French delegation emphasised that its proposal also stipulated that the undertaking not to pass on the culture of the micro-organism should be valid for the period after the grant of the patent.

2166. The United Kingdom delegation expressed no reservations with regard to this. However, it opposed the fact that the undertaking by the person making the request to use the culture of the micro-organism for experimental purposes only should also be valid after the grant of the patent, since this could prevent him from developing a new use for the micro-organism which would not be covered by the claim, and possibly also from applying it industrially.

2167. The Main Committee agreed to word *paragraph 3(c)* by analogy as follows: The person making the request undertakes to use the culture of the micro-organism for experimental purposes only until the grant of the patent and not to make it available to any third parties either before or after the grant of the patent\*.

2168. The Main Committee also agreed that a copy of the request for access to the culture deposited would be forwarded by the culture collection to the European Patent Office, which would then communicate it to the applicant for or the proprietor of the patent. This should take place not only in the period between the publication of the application and the grant of the patent, but also after the grant of the patent\*\*.

2169. The United Kingdom delegation said, in connection with *paragraph 3(c)* of the German delegation's proposal, that it thought that failure on the part of a person who had requested access to respect his undertaking not to give other persons access to a deposited sample should be penalised in accordance with the provisions of the law of the country in which that person had his place of residence.

2170. The Main Committee referred this problem to the Working Party.

2171. In connection with the relevant provision worked out by the Working Party the United Kingdom delegation remarked at a later meeting of the Main Committee that in its opinion it would be more correct to preserve the general principle that the consequences of a breach of contract were governed by the law that applied to the contract itself. It based its argument on the ground that an undertaking by an applicant for access not to give other persons access to the deposited sample gave rise to a contract between the person requesting access and the applicant, in the course of which the culture collection functioned as an agent for the applicant.

The United Kingdom delegation added that this principle should also apply when both the applicant and the person requesting access belonged to non-Contracting States; nor were there any grounds in that case for applying the law of the Federal Republic of Germany, as the Working Party had suggested.

\* See *paragraph 3(b)* and (c), as well as *paragraphs 5* and *6* of the final version.

\*\* See *paragraph 4* of the final version.



2172. The Irish and Netherlands delegations shared the opinion of the United Kingdom delegation.

2173. The Main Committee decided to amend the draft provision accordingly and referred the matter to the Drafting Committee.

2174. In a final meeting the Main Committee decided, at the request of the Austrian delegation supported by the French delegation, to drop the relevant provision proposed by the Drafting Committee completely since what it said was self-evident and therefore superfluous.

2175. When *paragraph 3* was first discussed by the Main Committee, the United Kingdom delegation further remarked that the German proposal (see M/47/I/II/III) raised doubts in its mind whether this provision would not impair the Contracting States' right to grant compulsory licences. This could not in any case be allowed to happen in the United Kingdom where the right of Crown Use had to be preserved.

2176. The Austrian delegation shared these doubts voiced by the United Kingdom delegation. It was in favour of so drafting Rule 28 as to preserve Contracting States' right to grant compulsory licences.

2177. The delegation of the Federal Republic of Germany explained that it had based its proposal on the principle that the right of the Contracting States to grant compulsory licences would not be prejudiced.

2178. The Main Committee referred the problem of compulsory licences to the Working Party for examination.

2179. In relation to the provision concerning compulsory licences\* evolved by the Working Party, the French delegation pointed out in reply to a question from the Austrian delegation at a later meeting of the Main Committee that under French law, "ex officio" licences ("licences d'office") should be construed to include "ex officio" licences in the interests of national defence, licences for the manufacture of pharmaceutical products and licences in the interests of the economy ("licences concernant l'intérêt économique").

2180. In reply to a question from the Austrian delegation, the Chairman pointed out that, as compulsory licences were subject to conditions, they were not covered by the concept of "ex officio" licences.

2181. The delegation of the Federal Republic of Germany wished to point out that the person making the request would not be bound by his undertaking to use the culture of the micro-organism only for experimental purposes if he himself were the proprietor of the compulsory licence.

2182. In reply to the question from FEMIP, the Chairman said in this connection that such an exemption from the undertaking would be valid only in the Contracting State in which the compulsory licence were granted.

2183. A comment on the wording, made by the UNION delegation, was referred by the Main Committee to the Drafting Committee.

2184. In examining the problem of compulsory licences, the EIRMA delegation raised the question as to whether it would be correct to interpret *paragraph 3(c)* as meaning that the proprietor of the right to prior use who was given access to part of a culture of the micro-organism should use this part of the culture for experimental purposes only, but that he could continue to use the same culture which was already in his possession without restrictions.

2185. The Chairman replied that he considered this interpretation to be correct; however, this problem of prior use need not be governed in the Convention, since national laws governed the right to prior use.

2186. The Main Committee had no objections to the content of *paragraph 4* of the German proposal and referred it to the Working Party for consideration\*\*.

\* See *paragraph 7* of the final version.

\*\* See *paragraphs 5 and 6* of the final version.

2187. Commenting on *paragraph 5* of the German proposal, the French delegation said that its own proposal (see M/57, page 3, *paragraph 2*) fundamentally attempted to attain the same goal, but perhaps by a simpler method.

2188. The Swiss delegation referred to its proposal contained in M/54 (page 24), to the effect that the President of the European Patent Office should conclude agreements with the culture collections on the deposit, storage and availability of micro-organisms. If this proposal were adopted, it considered that *paragraph 5* of the German proposal could be omitted since all the details could be governed by such agreements with the culture collections.

2189. The Main Committee said it agreed to this\*.

2190. The Main Committee adopted *paragraph 6* of the German proposal in the version given in the Swiss proposal (see point 2188) and referred it to the Working Party\*\*.

2191. The Main Committee subsequently examined the proposal submitted by the CEIF and the UNICE delegations relating to the reversal of the burden of evidence (see points 2136 and 2139).

2192. This proposal was supported by the Netherlands and Swiss delegations.

2193. The Chairman pointed out that in the current context of micro-biological inventions, this proposal should be understood in a similar way to the proposal as it resulted from the general proposal by the Swiss delegation relating to Article 67, *paragraph 4* (see points 138 et seq.).

2194. The United Kingdom delegation said that, just as in the case of Article 67, it was impossible for it now to approve precipitately of such a solution. If it were to transpire later that the present solution was unsuitable, it could still be amended at short notice. In the discussions on Article 67, *paragraph 4*, it wished to add that until 1949, provisions governing the reversal of the burden of evidence had existed in the United Kingdom for chemical products, but that they had been abolished subsequently (see points 141 and 156).

2195. In the Swedish delegation's view, the burden of evidence should lie with the applicant for the patent (see point 147), as in the case of Article 67.

2196. The delegation of the Federal Republic of Germany recalled that in the vote on Article 67, *paragraph 4* (see point 148), it had been unable to vote for the Swiss proposal. However, if a culture of the micro-organism were procured, it would be particularly difficult for the proprietor of the patent to have his rights upheld, especially in the case of exports from non-Contracting States of products which might have been prepared by means of a micro-organism. It could thus support a reversal of the burden of evidence in this specific case.

2197. The French delegation also said it was in favour of a reversal of the burden of evidence, but did not think that the rightful place for such a provision should be in the Implementing Regulations (see point 145).

2198. According to the Yugoslav delegation, it would be inappropriate to deviate from the decision adopted on Article 67 in this particular case. It reiterated its view that these were provisions which concerned proceedings before the courts of the Contracting States and which should not be governed in the Convention or in the Implementing Regulations (see point 143).

2199. The Chairman drew attention to the fact that in introducing provisions on the reversal of the burden of evidence, the maximum solution would be extended to include procedural law and that the planned Convention between the Member States of the European Communities would have to be amended.

2200. The Swiss delegation pointed out that the reversal of the burden of evidence should apply to cases of new micro-organisms only.

\* In the final version, *paragraph 5* of the German proposal was omitted.

\*\* See *paragraph 8* of the final version.



2201. The Main Committee subsequently held a vote on the following question: If a person who has obtained a sample of a deposited culture were to prepare or sell a product which could have been prepared by means of that sample, should the product thus prepared be deemed to have been prepared by using that sample, until evidence to the contrary has been provided?

6 delegations answered this question in the affirmative, and 10 delegations in the negative.

### **Rule 29 — Form and content of claims**

2202. The Main Committee referred to the Drafting Committee a form of wording proposed by the delegation of the Federal Republic of Germany for the beginning of *paragraph 1* (M/11, point 35).

2203. The Netherlands delegation suggested making an exception in *paragraph 6* for chemical and mathematical formulae and for tables (M/52/I/11/III, page 28, point 5).

2204. The Main Committee referred this proposal for examination to the Working Party, which did not approve it however.

### **Rule 30 — Claims in different categories**

2205. The UNICE delegation suggested deleting the words "specially adapted" under (a) and (c). It would be difficult for a person skilled in chemistry to understand these words and they could lead to unnecessary discussions with the examining division.

2206. The Austrian and Swiss delegations supported this suggestion.

2207. The delegations of the Federal Republic of Germany, Sweden and the United Kingdom opposed such an amendment.

The Swedish delegation drew attention to the fact that the present wording was in line with the PCT and the words objected to were intended to express the idea that both the claims should be based on a unitary inventive concept.

2208. In the Swiss delegation's view, the corresponding rule in the PCT could be deviated from in the Implementing Regulations inasmuch as that rule represented only a minimum requirement. It considered that difficulties of interpretation could arise out of the words objected to, since the German wording appeared to suggest that the process should be modified in order to make it possible to manufacture the product, while the French version seemed to suggest that the process for manufacturing the product would have to be created for the first time.

The Swiss delegation also proposed the deletion of the words "specifically designed" ("besonders entwickelt" — "spécialement conçu") under (b) and (c).

2209. The Austrian delegation supported the Swiss supplementary proposal. In its view, the words objected to under (a), (b) and (c) would be superfluous if they were intended to express the requirement of unity of invention, since this had already been done in Article 80 (82). Nor was it clear to this delegation what significance these words could otherwise have.

2210. According to the explanations of the United Kingdom delegation, the present wording should be understood to be a carefully evolved compromise solution which gave the applicant the opportunity to draw up separate claims in a single application without having to pay more than one search fee. In the wording now proposed, even more claims could be contained in one application, which would inevitably lead to lower receipts from search fees and could perhaps even result in a loss in renewal fees. The proposal should therefore be rejected. Furthermore, the European Patent Office could also

permit combinations of claims other than those expressly referred to in Rule 30 as being unitary.

2211. The UNION delegation supported the Swiss delegation's proposal. It explained that particular significance would be attributed to the possibility of conferring protection on claims for processes in cases where protection of the substances were excluded, as authorised in the case of pharmaceutical or food products under Article 166 (167). Furthermore, the question of the unity of the invention would be examined in every case by the European Patent Office, and division of the application could still be required if the words "specially adapted" were deleted.

2212. In this connection, the Chairman pointed out that in accordance with the interpretative provision of Rule 30, the European Patent Office must regard an invention as being unitary if the circumstances referred to in that provision arose. However, it could also accept unity in further cases. If, therefore, the words objected to were to be deleted, the European Patent Office would have to regard an invention as being unitary if, besides an independent claim to the product, an independent claim to any process for manufacturing this product were to be drawn up.

2213. The French delegation, referring to the fact that this Rule had come into being by way of a compromise, emphasised that it should not be amended.

2214. The Main Committee subsequently took a vote on whether the words "specially adapted" under (a) and (c) and the words "specifically designed" under (b) and (c) should be deleted.

4 delegations voted in favour of this, 10 delegations against it and 1 delegation abstained.

### **Rule 32 — Form of the drawings**

2215. The Netherlands delegation, supported by the Swiss delegation, proposed supplementing *paragraph 2(h)* by adding a new sentence (M/52/I/11/III, page 28, point 2). It based this proposal on the fact that a similar rule had proved its practical worth in the Netherlands.

2216. The delegations of the Federal Republic of Germany, France and the United Kingdom opposed the proposal.

2217. In the subsequent vote, 4 delegations supported the proposal and 3 delegations opposed it; 8 delegations abstained.

2218. The Netherlands delegation, supported by the Swiss delegation, proposed amending *paragraph 2(i)* (M/52/I/11/III, page 28, point 3).

2219. The delegations of the Federal Republic of Germany, France and the United Kingdom opposed this.

2220. In the ensuing vote, 3 delegations supported the proposal, 3 delegations opposed it and 7 abstained.

2221. The Netherlands delegation, supported by the Swiss delegation, proposed the inclusion of a special provision in *paragraph 3* for chemical and mathematical formulae and tables (M/52/I/11/III, page 28, point 4).

2222. The WIPO delegation pointed out that the proposed provision would represent a departure from the corresponding Rule in the PCT.

2223. The delegations of the Federal Republic of Germany, France and the United Kingdom opposed the proposal.

2224. In the ensuing vote, 3 delegations supported the proposal and 4 delegations opposed it; 7 delegations abstained.

### **Rule 34 — Prohibited matter**

2225. A suggestion by the Netherlands delegation to align the terminology of *paragraph 1(a)* on that of *paragraph 1(c)* was referred to the Drafting Committee.

2226. The Swiss delegation adopted the position that as inventions whose publication was contrary to "ordre public" or

morality should not be patentable, then if applications containing statements contrary to "ordre public" or morality should not be published either. It thus requested the rewording of *paragraph 2* to read as an obligation and omission of the possibility of furnishing upon request a copy of the passages objected to (M/54/I/II/III, page 7 — see also points 44 — 46 above).

2227. The Netherlands delegation supported this request. With reference to Article 51 (53) (a), it considered it logical that the Receiving Section should examine whether the publication would be contrary to "ordre public" or morality.

2228. The Austrian delegation also supported the request. However, it wondered what should happen if, in the procedure up to grant, the European Patent Office did not object to the invention as being contrary to "ordre public" or morality and thus authorised its publication, but objected to its publication later in the procedure up to grant. In this case, to revoke the patent would be too severe a penalty.

2229. The United Kingdom delegation was, at that stage, in favour of retaining the present wording unchanged, since it would be difficult to oblige the European Patent Office to carry out such an examination. Rather, the Receiving Section should be relied upon to discover any objectionable passages in the course of a rapid examination of the application and to exclude them from the publication.

2230. The delegation of the International Chamber of Commerce raised the point that the Swiss delegation's request that the European Patent Office should not have to furnish a copy of the passage objected to could apply only to statements contrary to "ordre public" and morality within the meaning of *paragraph 1(a)*, and not to disparaging statements within the meaning of (b).

2231. The delegation of the Federal Republic of Germany felt that only such statements as were contrary to "ordre public" or morality should be excluded compulsorily from the publication, but not disparaging statements.

2232. The Swiss delegation thereupon limited its request to the effect that only such statements or other matter contrary to "ordre public" or morality would have to be excluded from the publication; and only insofar as this were the case could the European Patent Office furnish no copies of the words omitted. As for disparaging statements, they should continue to be covered by the present optional provision.

2233. The United Kingdom waived its original reservation on this request. However, it pointed out that Rule 34 was based on Article 21, *paragraph 6*, of the PCT. Furthermore, it felt that the statements excluded from the publication in this way should also form part of the state of the art, pursuant to Article 52 (54), *paragraph 3*.

2234. The Chairman opposed this delegation over the last point, on the grounds that only statements actually published could be prejudicial to novelty within the meaning of the said provision.

2235. The Swiss delegation's request, thus limited, was accepted by the Main Committee.

2236. In this connection, the Chairman pointed out that in the Main Committee's view, the Receiving Section had to examine whether the application was in keeping with Rule 34, *paragraph 1(a)*, although if this were not so, it should not refuse the application, but merely omit from the application the statements to which it objected.

### **Rule 35 — General provisions governing the presentation of the application documents**

2237. The Main Committee referred the proposals by the United Kingdom delegation for the wording of *paragraphs 8 and 12* (M/40, points 28 and 29) to the Drafting Committee.

### **Rule 38 — Declaration of priority and priority documents**

2238. The Main Committee referred a proposal by the Netherlands delegation for the wording of *paragraph 1* (M/32, point 30 and M/52/I/II/III, point 20) to the Drafting Committee.

2239. The Main Committee adopted a proposal by the Netherlands delegation with regard to *paragraph 4* (M/52/I/II/III, point 20) which was related to the amendment to Article 86 (88), *paragraph 1* (see point 305), which had already been decided.

### **Rule 40 — Examination for certain physical requirements**

2240. The delegation of the Federal Republic of Germany, supported by the Swiss delegation, proposed deleting the reference to Rule 36, *paragraph 1*, on the grounds that it was incorrect (M/47/I/II/III, point 26).

2241. The Main Committee agreed to this proposal.

### **Rule 41 — Rectification of deficiencies in the application documents**

2242. With reference to *paragraph 2*, the FICPI delegation asked whether an incorrect indication of the date or State of the first filing could be rectified.

2243. The Chairman replied that an incorrect indication (e. g. the 32nd day of a month or indication of a State in an unrecognisable form) could be rectified pursuant to Rule 89 (88). He pointed out that the Main Committee shared this view.

2244. The Main Committee referred a proposal by the Norwegian delegation for the wording of *paragraph 3* (M/60/I, page 6) to the Drafting Committee.

### **Rule 42 — Subsequent identification of the inventor**

2245. Following its decision on the matter of identifying the inventor, the Main Committee amended Rule 42, *paragraph 1* (see point 2038) in accordance with the proposal by the Federal Republic of Germany (M/118/I).

### **Rule 43 — Late-filed or missing drawings**

2246. The delegation of the Federal Republic of Germany, supported by the United Kingdom delegation, proposed amending *paragraph 1* to the effect that where drawings were filed late the Receiving Section would not re-date the application to the date on which the drawings were filed if the applicant did not delete the references to the drawings, but that late-filed drawings and the references to them would be deemed to be deleted, unless the applicant himself requested that the application be re-dated (M/47/I/II/III, point 27, and M/64/I, page 3).

2247. The Main Committee adopted this proposal.

2248. The Swiss delegation suggested that if drawings and references to them were deemed to be deleted, the European Patent Office could also publish them in full, but indicate on them that the relevant parts were deemed to be deleted.

2249. This suggestion was supported by the delegation of the Federal Republic of Germany.

2250. The United Kingdom delegation made the point that in such cases the references to a drawing which were deemed to be deleted should be published, but not the drawing itself.

2251. The Chairman confirmed that he also felt that the drawing itself should not be published, but rather the reference to it, with the indication that it was deemed to be deleted.

2252. The FICPI delegation emphasised that if the reference to a drawing was deemed to be deleted, this ought to apply only to the reference signs, but not to a more extensive description of the drawing which, even if the drawing as such were missing, could still be understandable to some extent at least. This Rule should in no event be so interpreted as to mean that something which was actually disclosed in the application should be deemed to be deleted.

2253. In conclusion, the Chairman pointed out that in publishing the application, the European Patent Office should delete nothing from the application, but merely indicate that the references to the drawings which were not available were deemed to be deleted. If the application were to contain references which were understandable on their own without the drawing, he felt that these should also continue to be the subject of the application.

#### **Rule 46 — European search report where the invention lacks unity**

2254. The Netherlands delegation proposed making it clear in the *first half of paragraph 1, first sentence*, that if the invention were to belong to a group of inventions within the meaning of Article 80 (82), the search report would be drawn up on those parts of the application which relate to the group of inventions first mentioned in the claims (M/52/I/II/III, point 21).

2255. The Main Committee adopted this proposal.

2256. The Netherlands delegation proposed fixing the period for payment of the search fee at no less than two months and no more than three months in the *second half of paragraph 1, first sentence* (M/52/I/II/III, point 21).

2257. None of the national delegations supported this proposal.

#### **Rule 48 — Time limit for forwarding the European search report to the European Patent Office\***

2258. The Main Committee adopted a proposal by the Netherlands delegation, which was supported by several other delegations (M/52/I/II/III, point 22).

#### **Rule 50 (49) — Form of the publication of European patent applications and European search reports**

2259. The delegation of the Federal Republic of Germany proposed taking into account in *paragraph 1* the fact that the abstract must be published (M/47/I/II/III, point 28), as was decided with regard to Article 92 (93) (see point 332).

2260. The Main Committee adopted this proposal.

#### **Rule 51 (50) — Information about publication**

2261. The Netherlands delegation proposed wording *paragraph 1* to the effect that the European Patent Office would not communicate to the applicant the date on which the period for filing the request for examination expires, but would draw his attention to the fact that this period expires six months after the date on which the publication of the search report is mentioned in the European Patent Bulletin and that after expiry of this period, the application is deemed to be withdrawn (M/52/I/II/III, point 23).

2262. The French, Austrian and Swiss delegations supported this proposal.

2263. The United Kingdom delegation expressed a reservation on this solution if the date on which the period began, i. e. the date on which publication of the search report

was mentioned, were not to be communicated to the applicant.

2264. The Chairman considered that according to the present wording of paragraph 1, in the German version at least, the European Patent Office had to notify the applicant of the date on which the publication of the search report was mentioned in the European Patent Bulletin. The purpose of the Netherlands proposal was merely to make this clear. The advantage of this solution would be that the European Patent Office itself would not need to calculate the end of the period.

2265. The Main Committee adopted the Netherlands proposal with the proviso that the date of the beginning of the period would have to be communicated to the applicant.

2266. At a later sitting, the Main Committee examined *paragraph 2* after the Drafting Committee had amended paragraph 1 in accordance with the Netherlands proposal (point 2261), but had left paragraph 2 unchanged.

2267. The Austrian delegation emphasised that with the solution adopted by the Main Committee for paragraph 1, whereby the applicant would not be notified of the end of the period for filing the request for examination, it would be even more unsatisfactory than before to allow the applicant to run the risk of an incorrect communication. It thus proposed that paragraph 2 be so worded that an error on the part of the European Patent Office would not set the applicant at a disadvantage, unless the error were immediately obvious to him (M/145/I).

2268. The United Kingdom delegation supported the Austrian proposal with a proviso as to its wording.

2269. The Netherlands delegation asked when, in the Austrian delegation's view, an error on the part of the European Patent Office would be immediately obvious to the applicant. It felt that this should always be the case, since the applicant could consult the European Patent Bulletin to see when the publication of the search report was mentioned.

2270. In the Austrian delegation's view, an immediately obvious error would arise only if it were to be apparent as such from the communication by the European Patent Office. The applicant should not be expected to consult the European Patent Bulletin.

2271. The Chairman drew attention to the fact that the Austrian proposal could, in certain cases, lead to an extension of the period for filing requests for examination.

2272. The Main Committee adopted the proposal, which was also supported by the Swiss delegation, with a proviso as to the revision of its wording.

#### **Rule 58 (57) — Preparation of the examination of the opposition**

2273. The Committee examined the Netherlands delegation's proposal (M/52, page 24) that the last sentence of *paragraph 1* be deleted.

2274. The Netherlands delegation considered that this sentence introduced an unjustified restriction on the rights of the proprietor of a patent. In view of paragraph 4 of Rule 58, which provided that in the case of a notice of intervention in opposition proceedings the Opposition Division need not communicate the intervention to the proprietor of the patent, it did not seem appropriate to limit the amendments which the proprietor could make to what was necessary to meet the opposition.

2275. The Austrian delegation supported the Netherlands delegation's proposal.

2276. The delegation of the Federal Republic of Germany said that it could support this proposal provided that the delegations of the interested parties professed interest along these lines.

\* Rule 48 was subsequently omitted on the basis of the decision of Main Committee II on the proposal by the French delegation relating to Article 6 (see M/26, points 9 et seq.).

2277. The UNICE, FICPI and EIRMA delegations said that they were in favour of the Netherlands delegation's proposal.

2278. The Committee recorded its agreement to this proposal.

### ***Rule 59 (58) – Examination of the opposition***

2279. Referring to paragraph 7 of this Rule, the Finnish delegation asked whether it would not be more advisable to deliver a patent specification only when the opposition procedure was completed, since then it was no longer possible for third parties to take part in the procedure.

2280. The Swiss delegation expressed sympathy with the Finnish delegation's concern, particularly its fears of possible abuses, but did not think that this problem could be resolved by the means the Finnish delegation had proposed. In fact, when a patent was granted, it was provisionally valid and its proprietor was entitled as against third parties to be mentioned as the proprietor of the patent. Furthermore, abuses involving patent specifications could also arise later, for example where an annual fee was not paid and the patent lost its effect.

2281. The delegation of the Federal Republic of Germany said that nowhere in the Convention was there a provision empowering the European Patent Office to demand the return of a patent specification. The problem of the penalty for non-compliance with this obligation would arise immediately. This problem had already been examined at an earlier stage and the conclusion reached that there was no course open to third parties but to inspect the Register of Patents. If the patents were revoked as a result of the opposition proceedings, the date of the loss of effect would be mentioned in the Register in accordance with Rule 93, paragraph 1(p).

2282. The Finnish delegation was satisfied by this interpretation.

### ***Rule 61 (60) – Continuation ex officio of the opposition proceedings***

2283. The Committee examined a proposal submitted by the Member States of the European Communities, as given in M/14, point 16.

2284. Speaking on behalf of those States, the delegation of the Federal Republic of Germany said that this amendment was merely the consequence of the acceptance of the proposal by the Member States of the European Communities concerning Article 98. It would therefore appear logical to recognise an opponent's right to have opposition proceedings continued where a European patent had been surrendered or had lapsed while opposition proceedings were still in progress.

2285. Without disputing that this was a logical consequence of the amendment made to Article 98, the Swiss delegation was anxious to point out that as a result the opposition procedure resembled the revocation procedure more and more.

2286. The Committee recorded its agreement to this proposal.

### ***Rule 63 (62) – Particulars to be included in the new specification***

2287. The Committee agreed to entrust the Drafting Committee with the task of examining the proposal by the Member States of the European Communities as set down in M/14, point 17.

### ***Rule 64 (63) – Costs***

2288. The Committee examined the Swiss delegation's proposal concerning paragraph 5 of this Rule, that the amount

provided for in Article 105, paragraph 4, be fixed at three times the amount of the opposition fee.

2289. The Swiss delegation said that during the discussion of Article 105, paragraph 4, it had noted that its proposal did not meet with the unanimous agreement of the other delegations, and it would be prepared to submit an alternative proposal that Article 105, paragraph 4, provide that the amount would be laid down in the Rules relating to Fees. This solution would have the advantage of a certain degree of flexibility and would empower the Administrative Council to fix the amount in question.

2290. The delegation of the Federal Republic of Germany said that it could agree to the Swiss delegation's second proposal.

2291. The Chairman submitted the Swiss delegation's alternative proposal to the Committee; that paragraph 5 of Rule 64 be deleted and that in Article 105, paragraph 4, reference be made to the Rules relating to Fees rather than to the Implementing Regulations.

2292. The Committee recorded its agreement to this proposal.

### ***Rule 65 (64) – Content of the appeal***

2293. The United Kingdom delegation said that its proposal, as given in M/64, page 3, had already been examined by the Drafting Committee and that it would therefore be unnecessary for the Main Committee to discuss it.

### ***Rule 66 (65) – Rejection of the appeal as inadmissible***

2294. The Committee examined the Norwegian delegation's proposal as given in M/71, page 5.

2295. The Norwegian delegation said that as it stood, Rule 66 appeared to be very hard on the appellant, since it stipulated that if the appeal did not comply with certain requirements, the Board of Appeal should reject it as inadmissible. The Norwegian delegation considered that the appellant should always be permitted to make good any deficiencies, always provided that this could be done within the time limits applicable to the appeal. For all these reasons, the Norwegian delegation considered that the appellant should be granted the same opportunities to remedy deficiencies under Rule 66 as were granted to the opponent in the opposition procedure under Rule 57, paragraph 1.

2296. The Chairman wondered what the deficiencies were that could be remedied during the course of the appeal. He did not think that the deficiencies referred in Articles 105 and 106 could be so remedied; and as regards the time limit laid down in Article 107, there was no justification for providing that acts which should have been accomplished within those time limits could be accomplished after they had expired. The Norwegian delegation's proposal seemed therefore to refer to Rule 65 alone, and here it would appear that only deficiencies as regards the requirements of (a) could be remedied as requested by the Norwegian delegation.

2297. The Netherlands delegation considered the Norwegian delegation was right to raise the problem of the relationship between this Rule and Rule 57. The present situation did not seem very logical, in that Rule 57 permitted the remedying of deficiencies while Rule 60 did not.

2298. The Chairman wondered whether it would be possible to find a solution to this problem by instructing the Drafting Committee to harmonise Rule 66 with Rule 57 as far as possible.

2299. The Committee recorded its agreement to this suggestion by the Chairman and invited the Drafting

Committee to examine Rules 57 and 66 with a view to achieving more uniformity.

### **Rule 67 (66) – Examination of appeals**

2300. The Committee considered the Norwegian delegation's proposal, as given in M/71, page 6, that a provision be added to *paragraph 3(g)* to the effect that if the Appeal Board's decision were not unanimous, the names of the members of the Board who did not support the majority and the reasons for their position should be disclosed in the decision.

2301. The Norwegian delegation said that such a provision would correspond to legal practice in Nordic countries.

2302. The Finnish and Swedish delegations supported the Norwegian delegation's proposal.

2303. The Swiss delegation said that it could not accept this proposal; it was not in accordance with Swiss legal principles which required collective decisions. Once a result was achieved, everything which had led to it ceased to be of any consequence. The Swiss delegation also stated its opposition to the disclosure of the names of the dissenting members. It was concerned that if the names of those members who did not subscribe to the majority view were to be disclosed in the decision, there would be far fewer majority decisions, as certain members would be reluctant to be included with the minority.

2304. The delegations of the Federal Republic of Germany, the Netherlands and Yugoslavia supported the view of the Swiss delegation.

2305. By a majority of eight to five, with two abstentions, the Committee rejected the Norwegian delegation's proposal.

2306. The Swiss delegation wished to put a question concerning *paragraph 2* of this Rule. It wondered why the Board of Appeal should be required to approach an Examining Division for further information concerning the state of the art, and it also wondered whether, bearing in mind Main Committee II's deliberations, the reference made here should not be to a Search Division rather than to an Examining Division.

2307. The Chairman wondered whether, in view of Main Committee II's decisions, this provision still had any purpose.

2308. The delegation of the Federal Republic of Germany said that the purpose of this provision was to indicate clearly that an Examining Division could also be requested to provide further information concerning the state of the art. In this way, this provision was a means of accelerating the procedure in that it enabled the Board of Appeal to approach an Examining Division directly rather than have to follow the more complex procedure of requesting an additional report on the state of the art from the International Patent Institute.

2309. The Netherlands delegation thought that this paragraph should be worded in more general terms, so that no possibility was excluded: it might in fact be useful if the Board of Appeal could approach either an Examining Division or a Search Division.

2310. The Chairman did not think it necessary to expand paragraph 2, in view of the wording of Article 124, which provided that the European Patent Office could request an additional European search report at any time. Accordingly, the only point still at issue seemed to be whether to delete paragraph 2 or retain it in its present form with the consequence that Boards of Appeal would be authorised to request two different types of search report, one from the Directorate General for Searching and the other from the Examining Division.

2311. The UNEPA delegation requested clarification as to who should pay for this additional search.

2312. The Chairman said that the European Patent Office would pay for this additional report, and not the applicant.

2313. The CCI delegation expressed concern that in its present form, this provision might be worded too vaguely. It was important to avoid any possibility of an interpretation which would authorise a Board of Appeal to request an Examining Division to give its views on the state of the art as described in the search report or in an additional report, after all parties to the proceedings had indicated their positions. This would be tantamount to the Board of Appeal requesting the opinion of a subordinate body on a case under consideration by the Board of Appeal itself.

2314. The Chairman pointed out that it was certainly not the intention of the authors of Rule 67, paragraph 2, that an Examining Division should be called upon to express opinions on technical or legal problems. Paragraph 2 was merely intended to accelerate the procedure by making it possible to obtain information concerning, for example, certain details of the international classification.

2315. The French delegation considered that it might be advisable for paragraph 2 to refer to the possibility of requesting additional information, not only from Examining Divisions, but also from Search Divisions.

2316. The Committee recorded its agreement to the French delegation's suggestion that the Search Division also be mentioned in *paragraph 2*.

2316a. At a subsequent meeting, the Main Committee deleted paragraph 2 further to the deletion of Article 124 (see point 659).

### **Rule 68 (67) – Reimbursement of appeal fees**

2317. The Swiss delegation wondered whether this Rule should not be amended to stipulate that the reimbursement of appeal fees would be made in any case in the event of interlocutory revision, and that a substantial breach of procedure was a necessary condition only in the second eventuality covered by this Rule.

2318. No delegation supported this suggestion.

### **Rule 69 (68) – Form of decisions**

2319. In view of the outcome of the deliberations concerning Rule 67, the Norwegian delegation withdrew its proposal as given in M/71, page 6.

2320. The Chairman said that the Committee had before it three proposals for amendments submitted by the Austrian, Netherlands and Swiss delegations (M/41, page 85; M/52, page 2; and M/54, page 26 respectively).

2321. Since the Swiss delegation's proposal concerning *paragraph 2* was the furthest from the present wording, the Chairman submitted it to the Committee for discussion.

2322. The Swiss delegation confirmed that its proposal was further from the present wording than was the Austrian delegation's proposal, in that it referred not only to information as to legal means, but also incorrect indications concerning, for example, the form of the appeal and appeal fees. In Swiss law, an appellant could rely on being informed of time limits, the form of appeals and appeal fees given in communications; this fact was a fundamental principle of procedural law, to his benefit. Respect of the principle of good faith, which was applicable in every administrative procedure, required that if a communication included incorrect indications, the appellant should not thereby suffer any loss. The Swiss delegation said that it could support the Austrian delegation's proposal concerning paragraph 4. On the other hand, paragraph 5 of the Austrian proposal seemed superfluous, since the Swiss delegation did not think that the Board of Appeal could alter any time limit in the appellant's favour.

2323. The Chairman invited the Committee to express its views on the Swiss proposal that the person concerned should not be able to invoke the omission of the communication but that in the event of an incorrect communication he should not suffer any detriment as a result.

2324. The Austrian delegation supported the Swiss proposal.

2325. The Netherlands delegation did not think it could be the responsibility of the European Patent Office to calculate the time limits for appellants or for any other parties. It thought it would suffice if the European Patent Office drew parties' attention to the provisions of Article 107. If such an arrangement were to be adopted, the Swiss and Austrian delegations' proposals would be superfluous, since in practical terms there could not be any incorrect indications.

2326. The Chairman thought that the Committee should first decide on this proposal by the Netherlands delegation which involved an appreciable amendment of the present text. If this proposal were adopted, there would be no further need to examine the Swiss delegation's proposal.

2327. The Belgian delegation supported the Netherlands delegation's proposal.

2328. The Yugoslav delegation was in favour of the Netherlands delegation's proposal, provided that the form bore a clear reference to Articles 105 to 107.

2329. Referring to the Committee's decision on Rule 51, the United Kingdom delegation declared its support for the Netherlands delegation's proposal.

2330. The Swiss delegation said that if the Netherlands delegation's proposal were to be understood to mean that the form would not only bear a reference to Articles 105 to 107 but also quote the texts of those Articles, it could support it.

2331. The Netherlands delegation stated that its proposal should be understood in the sense just indicated by the Swiss delegation.

2332. The Austrian delegation asked whether adoption of the Netherlands delegation's proposal would render meaningless the last sentence of paragraph 2, which dealt with the omission of communication.

2333. The Chairman considered that this was a purely hypothetical question, since the formal communication envisaged by the Netherlands delegation would be by way of indications on a form, and any omissions would be extremely hard to imagine.

2334. The Committee agreed to the Netherlands delegation's proposal.

#### **Rule 70 (69) — Noting of loss of rights**

2335. The Committee examined the Netherlands delegation's proposal as given in M/52, page 26.

2336. The Netherlands delegation found the present text inadequate and proposed to add a stipulation at the end of *paragraph 2* that where the European Patent Office shared the view of an appellant it should inform that appellant accordingly in writing.

2337. The Chairman noted that the Netherlands delegation's proposal was supported by a number of delegations and that it was shared by at least four of the delegations of the interested circles.

2338. The Committee recorded its agreement to this proposal by the Netherlands delegation.

2339. The Austrian delegation withdrew its proposal for an amendment given in M/89.

#### **Rule 73 (72) — Taking of evidence by the European Patent Office**

2340. The delegation of the Federal Republic of Germany explained the reasons for its proposed amendment to

*paragraph 4* as given in M/47, page 15, point 30. The present text seemed incomplete and the delegation proposed adding a provision stipulating that relevant questions might be put to the testifying parties, witnesses and experts. The effect of the amendment was firstly to increase the number of persons who could be heard by including the parties, and secondly to stipulate that questions could only be put to persons giving evidence.

2341. The Committee agreed to this proposal.

#### **Rule 77 (76) — Minutes of oral proceedings and taking of evidence**

2342. The Committee examined the proposed amendment submitted by the delegation of the Federal Republic of Germany in M/47, page 15, point 31.

2343. The delegation of the Federal Republic of Germany felt it advisable to stipulate in *paragraph 1* that the minutes should also contain details of the place and date of the proceedings and the names of those taking part.

2344. The Netherlands and French delegations, while they had no objection to this proposal, wondered whether the problem might not be settled administratively.

2345. The Chairman asked the delegation of the Federal Republic of Germany whether it could agree to an entry in the Conference minutes recording the Committee's agreement on the substance of the proposal, without the text as such being included in the Convention.

2346. The delegation of the Federal Republic of Germany agreed to this solution.

2347. The Chairman noted that the Committee agreed on the substance of the proposal made by the delegation of the Federal Republic of Germany but that it thought that it should be left to the President of the European Patent Office to take the appropriate administrative measures.

#### **Rule 82 (81) — Notification to representatives**

2348. The FICPI delegation asked whether the Committee shared its interpretation of this Rule, whereby notification directly to the applicant and not to the representative (assuming a representative had been appointed) could be a procedural error and should not therefore be taken into consideration for the start of any time limits.

2349. The Committee shared the FICPI delegation's interpretation.

#### **Rule 85 (84) — Duration of time limits**

2350. The Committee examined the Swedish delegation's proposal given in M/53, page 2, point 10.

2351. The Swedish delegation stated that the four month time limit laid down in this Rule as the maximum seemed much too short, particularly if allowance were to be made for translation for those countries whose official language was not one of the three official languages of the European Patent Office. The delegation therefore proposed that the upper limit should be six months.

2352. The Finnish, Netherlands, Norwegian and Italian delegations supported this proposal.

2353. The United Kingdom delegation had doubts about accepting the Swedish delegation's proposal with regard to proceedings after publication of the application. Extension of the time limit to six months should only be possible for the examination proceedings.

2354. The Swedish delegation felt that it was unnecessary to amend its proposal, since the European Patent Office would be free to fix time limits within the margin laid down.

2355. The Chairman wondered whether, in order to take account of the opinions expressed, the Committee might not agree to the Swedish delegation's proposal while also stating in the minutes that it considered that in proceedings prior to publication the upper time limit should only be used in exceptional cases.

2356. The EIRMA delegation was in favour of a fairly short time limit and felt that four months with the possibility of an extension should be sufficient.

2357. The Swiss delegation strongly endorsed the EIRMA delegation's suggestion. If the Implementing Regulations contained a Rule stipulating an upper limit of six months, there was a danger that this six month time limit would become the general rule. The Swiss delegation thought that a maximum of four months would be reasonable in most instances and that a six month time limit could be applied, if necessary, in exceptional cases.

2358. The French delegation thought that the Swedish delegation's proposal was already covered by Rule 85 in its present wording, since the last sentence of that Rule stipulated that in certain special cases the period might be extended upon request presented before the expiry of such period. The French delegation would be prepared to agree to an amendment to this sentence so that in cases which so warranted this time limit could be fixed at six months. Generally speaking, it felt that the upper limit should be four months, and should only be six months in exceptional cases.

This solution seemed to be best in line with the provision of Article 75 concerning the time limit in which national authorities had to forward the European patent application.

2359. The Netherlands delegation was opposed to any arrangement which provided for a more or less general possibility of extension.

2360. The Chairman stated that the difference between the Swedish delegation's proposal, the EIRMA delegation's proposal, and the present text seemed to be that under the present text the four month time limit could only be extended at the request of the applicant, while under the Swedish delegation's proposal the European Patent Office would be authorised from the outset to fix a time limit of six months if special circumstances made this necessary.

2361. The United Kingdom delegation asked whether under the Swedish delegations's proposal the last sentence of the present text would be retained. The United Kingdom delegation was in favour of its retention.

2362. The Chairman stated that he had understood the Swedish delegation's proposal as retaining the last sentence.

2363. The Swedish delegation confirmed this.

2364. The Committee agreed to the Swedish delegation's proposal, amended to the effect that whilst the upper limit would in general be four months, the European Patent Office could, in special circumstances, extend it to six months.

2365. The Committee then examined the proposal submitted by the delegation of the Federal Republic of Germany, in M/47, page 16, point 32, for inserting a new *paragraph 2*.

2366. The delegation of the Federal Republic of Germany stated that the aim of its proposal was to take account of a problem of particular concern to future representatives before the European Patent Office. There was a special difficulty because of the language arrangements and their implications with regard to the time limits before the European Patent Office. The Convention and the Implementing Regulations laid down several time limits within which the representative had to receive information from his client and forward it to the European Patent Office. There were considerable translation problems. Very probably, representatives would not immediately have the necessary staff to cope with work in the three

official languages. For this reason the delegation of the Federal Republic of Germany proposed that if difficulties were to arise in forwarding documents to the European Patent Office because of the use of the various official languages, the time limit should be automatically extended by one month upon request. This would cover cases in which a representative had his place of business in a Contracting State in which the official language was not the language of the proceedings which he had chosen for the patent application or for opposition. As an example, the delegation of the Federal Republic of Germany quoted the case of a French representative with his place of business in Paris representing a Japanese applicant who had chosen English as the language of the proceedings for his European patent application. The French representative would have to submit documents to the European Patent Office in English. Difficulties might arise because of this, and the aim of the proposal was to provide that where the representative anticipated difficulties in forwarding documents to the European Patent Office he could ask the Office to grant him an extension of the time limits and that such extension should be granted automatically for one month.

The delegation of the Federal Republic of Germany stated that in such a case the representative would not be able to benefit from the provisions of Article 14, paragraphs 2 and 4, since his client would have neither his residence nor principal place of business within a Contracting State.

2367. The FICPI delegation stated that the proposal of the delegation of the Federal Republic of Germany dealt with a real problem facing representatives. The delegation therefore requested the Committee to give serious consideration to whether it was really necessary to limit the provision suggested by the delegation of the Federal Republic of Germany to a transitional period, or whether it would not be preferable to make it a permanent rule.

2368. The Chairman noted that the proposal of the delegation of the Federal Republic of Germany was supported by one delegation.

2369. The United Kingdom delegation, while appreciating the reasons for the proposal made by the delegation of the Federal Republic of Germany, was unable to support it. The most appropriate method of dealing with these difficulties was that which the Committee had followed in increasing the time limit laid down in Rule 85. It was difficult to agree with the position of the delegation of the Federal Republic of Germany bearing in mind the fact that two-thirds of all applications filed would probably be dealt with by English-speaking representatives. Practically all these representatives would have their place of business in London or Munich, and there seemed to be no justification for granting a general extension of the time limits to an English representative with his place of business in London carrying out the proceedings in English. The proposal made by the delegation of the Federal Republic of Germany was likely to cause difficulties, particularly with regard to representatives with two places of business. The best solution would therefore appear to be to proceed on the basis of the provision at the end of Rule 85.

2370. The French delegation asked whether, in order for an extension of a time limit to be granted, the representative would have to make a formal application or simply a request. It considered that, in order not to complicate matters, a simple request would be preferable, which would mean that extension would be automatic.

2371. The delegation of the Federal Republic of Germany confirmed this view. A request would have to be made and the one month extension would be granted automatically without the European Patent Office having to take any particular action.



2372. The Swiss delegation thought that the case raised by the delegation of the Federal Republic of Germany was a special one, which could not be dealt with under paragraph 1. It wondered whether it might not suffice to state in the minutes that the case in question fell, or could fall, within the scope of paragraph 1. The Swiss delegation had reservations about the automatic system suggested by the delegation of the Federal Republic of Germany. Under the arrangement for extending time limits laid down in Rule 85, proceedings could be prolonged considerably and experience had shown that the longer the time limit allowed the less they were respected.

2373. The Netherlands delegation, referring to what the United Kingdom delegation had said, asked the delegation of the Federal Republic of Germany if it shared the United Kingdom delegation's views.

2374. The delegation of the Federal Republic of Germany pointed out first of all that not all representatives would have two places of business. However, it was prepared to amend its proposal by stipulating that the provision should only apply if the representative had his sole place of business in a Contracting State with an official language which was not the language of the proceedings.

2375. The FICPI delegation was in favour of introducing this limitation into the proposal made by the delegation of the Federal Republic of Germany.

2376. The United Kingdom delegation was unable to support the proposal made by the delegation of the Federal Republic of Germany even in the amended form suggested by the Netherlands delegation.

2377. The French delegation stated that it would abstain in the vote. It considered that although this proposal was intended to settle certain problems, it raised others. It wondered in particular what the situation would be if a representative, having requested an extension to which, in good faith, he considered himself entitled, did not fulfil the necessary conditions and could not therefore be granted it.

2378. The Committee agreed to the proposal made by the delegation of the Federal Republic of Germany as amended by the Netherlands delegation by a majority of eight votes to three, with four abstentions.

2379. The Committee then examined whether this arrangement should apply only for a transitional period.

2380. The Austrian delegation proposed that it should not just be limited to a transitional period.

2381. The delegation of the Federal Republic of Germany supported the proposal.

2382. The French delegation stated that it was unable to agree to the proposal.

2383. The Committee voted in favour of application during a transitional period by a majority of seven votes to five, with two abstentions.

2384. At a subsequent meeting, the United Kingdom delegation stated that the amendment proposed by the delegation of the Federal Republic of Germany and approved by the Committee was likely to cause considerable difficulties from a political point of view; besides this aspect, the provision also contained technical anomalies which had presumably not been intended by the authors of the proposal. The implications of the proposal had obviously not been properly considered. This was particularly the case in relation to the amendments which had in the meantime been made to paragraph 1 of Rule 85 and which had considerably extended the time limits by giving the European Patent Office discretionary powers to deal with difficulties which might arise in special cases. The United Kingdom delegation announced that it would be submitting a written proposal and would request that the debate on this point be reopened.

2385. When the results of the proceedings of the Drafting Committee were being examined (M/142/I/R 13, page 9), the Chairman informed the Committee that two amendments to this Rule had been proposed. The United Kingdom delegation had submitted a proposal to delete paragraph 2 (M/137/I), and the CNIPA delegation had proposed a new wording for the same paragraph (M/139/I). The Chairman stated that since the Committee had already discussed this Rule there would have to be a two-thirds majority in favour in order to re-open the discussion. He noted that none of the delegations opposed a re-opening of the discussion and therefore invited the United Kingdom delegation to explain its proposal.

2386. The United Kingdom delegation stated that it was well aware that representatives might face difficulties, particularly linguistic ones, in their dealings with the European Patent Office. It was therefore in favour of flexible application of the provisions concerning time limits. However, it felt that the provisions of paragraph 1 of this Rule were sufficient for this purpose, especially with the amendments made by the Committee, and it could not agree to the second paragraph, which it considered both superfluous and a source of discrimination. For these and other reasons, set out more fully in M/137/I, the United Kingdom delegation requested the deletion of paragraph 2.

2387. The Irish, Netherlands and Belgian delegations shared the United Kingdom delegation's opinion.

2388. The French delegation, supported by the Italian delegation, wondered whether, as a compromise, it might be possible to delete paragraph 2 and stipulate in paragraph 1 that the "special cases" referred to in the last sentence in particular included instances where the linguistic difficulties arose which the German proposal had been intended to cover. The French and Netherlands delegations also wished to have the opinions of the nongovernmental organisations concerned.

2389. The delegation of the Federal Republic of Germany did not share the United Kingdom delegation's view. Firstly, this provision was only intended to apply in very precise and limited cases and only during a transitional period. With regard to the claim that the provision was discriminatory, it pointed out that the very purpose of its proposal was to counteract certain inherent distortions in the situation, namely differences as regards the language position.

2390. The Austrian delegation stated that it had understood the purport of the proposal made by the delegation of the Federal Republic of Germany as being that paragraph 2 merely specified one of the "special cases" referred to in the last sentence of paragraph 1. It was therefore prepared to accept a compromise solution such as that outlined by the French delegation.

2391. The CEIF, EIRMA and COPRICE delegations shared the United Kingdom delegation's view.

2392. The FICPI, UNEPA and CNIPA delegations stated that although they preferred to retain paragraph 2, they would also be prepared to accept a compromise solution such as that suggested by the French delegation.

2393. The United Kingdom delegation stated that in view of the Committee's discussions it could agree that its proposal to delete paragraph 2 should be accompanied by an entry in the Conference minutes of a statement to the effect that during an initial period the last sentence of paragraph 1 of Rule 85 should be interpreted as applying to cases where it had not been possible to comply with time limits due to linguistic problems, provided that the necessary precautions had been taken.

2394. The Committee agreed to the United Kingdom delegation's proposals by a majority of ten votes to five, with three abstentions. It was agreed that there should also be an entry in the minutes to the effect that the second sentence of



paragraph 1 of this Rule provided the necessary flexibility to allow for other difficulties which representatives might encounter during the initial period of operation of the European Patent Office.

#### **Rule 86 (85) – Extension of time limits**

2395. The Italian delegation wondered whether the text of this Rule in fact achieved the desired aim. In the event of it being impossible for documents to be delivered on the day on which the time limit had expired, the Rule extended the deadline to the first day thereafter on which the European Patent Office was open for receipt of documents. However, it was highly unlikely that in the event of a strike the mail would be delivered immediately on the day the strike ended. The Italian delegation therefore thought that the text should be amended.

2396. The Chairman stated that *paragraph 1* did not cover the case of a strike, but the case where a time limit expired on a day on which the European Patent Office was not open for reasons other than a strike. In such a case the time limit was extended automatically to the next day. The problem raised by the Italian delegation only applied with regard to paragraph 2.

2397. The United Kingdom delegation pointed out that *paragraph 2* was drafted to cover the case with which the Italian delegation was concerned. This paragraph stipulated that the President of the European Patent Office should determine the end of the period in which there was a general interruption in the delivery of mail and he would therefore be able to take into account the time necessary for normalising the situation after the interruption of work.

2398. The Italian delegation was satisfied with this interpretation.

2399. The Committee agreed to instruct the Drafting Committee to harmonise the German language version with the English and French versions.

#### **Rule 87 (86) – Amendment of the European patent application**

2400. The German delegation withdrew its proposal as given in M/47, page 16, since it referred to a proposal made by the Belgian delegation concerning Article 64, and this matter had been settled by an amendment to Article 122.

2401. The CEIF delegation suggested that the following sentence should be added to the end of *paragraph 3*: "except where such amendments will bring restrictions to the scope of the application which are borne out by the description and/or the drawings" (M/22, point 12). The intention of this provision was to permit the applicant to amend the claims and the drawings not just once but more than once.

2402. No Governmental delegation supported this suggestion by the CEIF.

#### **Rule 88 (87) – Different claims, description and drawings for different States**

2403. The Norwegian delegation wondered what the situation would be should the European Patent Office discover the existence of a prior national right in a given Contracting State. In such a case, would not the European Patent Office be obliged to disregard this national application, and leave the problem to the national legislation concerned?

2404. The Chairman replied to this question in the affirmative. The European Patent Office would take account only of prior European rights and not of prior national rights. During the Luxembourg Conference, it had been clearly stated

that the European Patent Office could inform the applicant of the existence of a prior national right in a certain State, but that it could not itself take such a prior national right into account since it was only in the event of subsequent national proceedings that such a prior national right could form the basis for any claim.

#### **Rule 89 (88) – Correction of errors in documents filed with the European Patent Office**

2405. The Irish delegation owned that this provision corresponded to Rule 91, paragraph 1(b) of the PCT, but wondered whether it was really necessary to stipulate that "anyone" would immediately realise that nothing else would have been intended than what was offered as the correction. In view of the complexity of some chemical formulae, a general rule of this nature seemed extremely harsh.

2406. The Swiss delegation thought that in practical terms this provision was hardly likely to apply. Patent applications were in fact prepared with a man skilled in the art in mind and should be comprehensible to a man skilled in the art. For that reason the Swiss delegation thought that the word "anyone" should be deleted and replaced by a reference to the knowledge of a man skilled in the art.

2407. The Committee agreed to refer this point to the Drafting Committee for more satisfactory wording.

#### **Rule 94 (93) – Parts of the file not for inspection**

2408. The UNICE delegation wondered whether the name of the inventor should be included in the communicable documents where he had expressed the wish not to be mentioned by name.

2409. The delegation of the Federal Republic of Germany recalled that this problem had already been discussed, and the conclusions reached had been that the mention of the inventor by name could be omitted from the parts of the file for inspection if the inventor expressed such a wish. The President of the European Patent Office should therefore have the power to exclude reference to the inventor by name from the parts of the file for inspection.

2410. The UNICE delegation declared itself satisfied by this reply.

#### **Rule 95 (94) – Procedures for the inspection of files**

2411. The Finnish delegation observed that Rule 99 provided that no administrative fee was payable where files were communicated to third parties by Courts or Public Prosecutors' Offices of the Contracting States. It wondered whether it would not be advisable to apply the same principle in Rule 95 by deleting the last sentence of *paragraph 1*.

2412. The Swedish and Norwegian delegations supported this proposal.

2413. The delegation of the Federal Republic of Germany believed that to do away with the administrative fee would cause a significant increase in the number of requests to inspect files. In view of the unavoidable administrative costs involved in the organisation of this service it seemed only reasonable to charge an administrative fee for it.

2414. The French delegation also opposed this proposal, on the grounds that it did not seem fair that applicants as a body should bear financial costs incurred for the benefit of an individual.

2415. The Committee rejected the Finnish delegation's proposal by eight votes to five, with one abstention.

**Rule 96 (95) — Communication of information contained in the files**

2416. The Committee referred to the Drafting Committee the examination of the proposal made by the delegation of the Federal Republic of Germany, as given in M/47, point 48.

**Rule 97 (96) — Additional publications by the European Patent Office**

2417. The Committee referred to the Drafting Committee the examination of the proposal concerning *paragraph 2* made by the Norwegian delegation, as given in M/71, page 7.

**Rule 99 (98) — Inspection of files by or via courts or authorities of the Contracting States**

2418. The UNICE delegation recalled the suggestion, given in M/19, point 39, that the Convention should include a provision to the effect that all bodies concerned should be obliged to observe secrecy, so that the applicant would be able to withdraw his application within the time limit of eighteen months without the invention being published.

2419. The Chairman pointed out that under Rule 99, *paragraph 2* the communication of files to third parties by Courts and Public Prosecutors' Offices of the Contracting States must be effected in accordance with the conditions laid down in Article 128, namely with the consent of the applicant.

2420. The UNICE delegation was satisfied by this reply.

**Rule 100 (99) — Procedure for letters rogatory**

2421. The Italian delegation wondered whether *paragraph 4* should not be made clearer. It would appear necessary to stipulate that, where the authority to which the letters rogatory were transmitted was not competent to execute them, they should automatically be transmitted to the central authority provided for in *paragraph 1*. The present wording provided for transmission to the authority in the same State which was competent. Under *paragraph 1*, the Member States must designate a central authority which would undertake to receive letters rogatory. It would be preferable for an authority which was not competent to return the letters rogatory to the central authority, which would then instruct the authority which was competent.

2422. The FICPI delegation, referring to *paragraph 6*, asked whether the parties as well as members of the departments concerned would be permitted to attend enquiries.

2423. The Chairman was of the opinion that this *paragraph* provided merely for the attendance of members of the department concerned, since parties' right of attendance followed from general principles of law.

2424. The Committee agreed to request the Drafting Committee to examine the wording of *paragraph 4* with a view to taking account of the remarks made by the Italian delegation. It also instructed the Drafting Committee to delete from the French language text the word "judiciare", the equivalent of which did not appear in the other two language versions.

2425. When the results of the Drafting Committee's proceedings were being examined (see M/142/I R 13), the Italian delegation thought that this Rule should include a provision governing the possibility of there being no territorial competence at all. It quite frequently occurred in international practice that letters rogatory were incorrectly transmitted to an authority of a State which was not competent to execute them. In the absence of a provision specifying what was to be

done with such letters rogatory, certain States could encounter difficulties.

2426. The French delegation supported this proposal.

2427. The Committee approved this proposal and agreed to instruct the Drafting Committee to incorporate an appropriate provision in this Rule.

**Rule 102 (101) — Authorisations**

2428. The United Kingdom delegation expounded the amendment it proposed in M/10, point 10. It thought that as it stood *paragraph 8* appeared to sanction a breach of an authorisation given by the applicant to his representatives. The intention was to give the European Patent Office complete freedom in its dealings with representatives, and the United Kingdom delegation proposed that this *paragraph* be worded as follows: "If several representatives are appointed by the same party, the European Patent Office shall not be bound by any provision in their authorisations as to whether they shall act singly or jointly".

2429. The Netherlands delegation supported this proposal.

2430. In reply to an observation by the Austrian delegation, the Chairman said that the principal difference between the text as it stood at present and the version proposed by the United Kingdom delegation was as follows: the present wording provided that if a number of representatives was appointed, each of them was empowered to act, even if the authorisation provided otherwise. Under the United Kingdom delegation's proposal, it would be a matter for the discretion of the European Patent Office to determine whether, in such a case, it would require all the representatives to act jointly or whether it would suffice if they acted separately.

2431. The delegation of the Federal Republic of Germany expressed its preference for the present version, since it sought to protect third parties in cases where more than one representative was appointed. Moreover, since the PCT included a similar provision, it would be regrettable if different rules were to apply in this matter.

2432. The Committee rejected the United Kingdom delegation's proposal by seven votes to three, with two abstentions.

**Rule 103 (102) — Deletion of the professional representative from the list**

2433. The Chairman disclosed that two proposals for amendments had been submitted: one was by the delegation of the Federal Republic of Germany, given in M/47, point 34, and the other by the French delegation, given in M/112, page 4. Since the proposal by the Federal Republic of Germany involved greater changes in the present text, the Chairman proposed that it be discussed first.

2434. The delegation of the Federal Republic of Germany explained that its proposal was for a new *paragraph 2*, the purpose of which was to permit the deletion of professional representatives from the list provided for in Article 134, *paragraph 1*, in circumstances other than those at present specified by Rule 103. Such deletion would be carried out in the three circumstances specified in (a), (b) and (c) of the proposal by the delegation of the Federal Republic of Germany, namely death or legal incapacity of the representative, his failure to satisfy the nationality requirement, and no longer having his place of business or employment within the territory of a Contracting State.

2435. One delegation supported the proposal by the delegation of the Federal Republic of Germany.

2436. The Chairman indicated that the third ground for

deletion in the proposal by the delegation of the Federal Republic of Germany overlapped partly with the proposal by the French delegation, given in M/112.

2437. The French delegation stressed that this overlap was only partial, since its own proposal sought to provide that the representative could request that his deletion from the list of professional representatives be only temporary. This possibility was open, since for one reason or another a professional representative might no longer have his place of business within the territory of one Contracting State, although he intended to resume the exercise of his profession at a later date. The French delegation also stressed that its proposal for an amendment to this Rule was comprehensible only if it were examined in conjunction with the proposal for the deletion of Rule 107.

2438. The Chairman wondered whether it was really advisable to provide for temporary deletion as proposed by the French delegation. If a professional representative were to change his place of business, it could not be foreseen if he would return to his previous place of business, and if so when. It seemed more appropriate to reinstate him on the list if he did return. Furthermore, the arrangement proposed by the French delegation did not seem to be totally in accordance with the systematic basis of the Implementing Regulations, the various parts of which corresponded to the respective parts of the Convention. From this point of view, it would not be in accordance with the system to insert in Rule 103 a provision relating to Article 162 when its proper place was in Rule 107.

2439. The Chairman asked the Committee whether there were any objections to the principle of the proposal by the delegation of the Federal Republic of Germany.

2440. The French delegation said that as a result of the Chairman's explanation that even after deletion from the list the representative could be re-entered simply by request, it had no further objection to the proposal by the delegation of the Federal Republic of Germany.

2441. In reply, the Chairman said that, to take account of the French delegation's proposal, a new paragraph 3 could be added to Rule 103, to read as follows: "A professional representative who has been deleted from the list in accordance with paragraph 2 shall be re-entered thereon upon his request if the grounds for his deletion no longer exist."

2442. The French delegation declared its agreement to this proposal.

2443. The CEIF delegation pointed out that in the French language version of the proposal by the delegation of the Federal Republic of Germany the expression "incapacité professionnelle" did not appear to translate the corresponding German expression exactly.

2444. The Chairman considered that this point could be entrusted to the Drafting Committee which would be responsible for harmonising terminology of the three languages, and would take account of the wording of Rule 91 among other things.

2445. The UNION delegation wanted to know whether the expression "legal incapacity" also covered cases where the professional representative acting before the European Patent Office lost the right to act before his own national office.

2446. The Chairman said that the hypothesis postulated by the UNION delegation came within the scope of Article 162 and not of Article 134, namely professional representatives who had passed the European qualifying examination. It was therefore Rule 107 that should govern this eventuality and not Rule 103, which dealt with the deletion of professional representatives entered on the list after the end of the transitional period.

2447. The Finnish delegation declared its support for the

proposal by the delegation of the Federal Republic of Germany, subject to the addition of a further condition for being struck off the list, which should also be possible in cases where the representative had been deprived of the right to act as a professional representative before the European Patent Office as a result of a court ruling or where as a result of such a ruling he had been deleted from the register kept by the central industrial property office of a Contracting State.

2448. The Chairman suggested that this proposal by the Finnish delegation be laid aside for the time being and that the proposal by the delegation of the Federal Republic of Germany be examined first.

2449. The UNION delegation wondered whether the problem the Committee was discussing might have some bearing on that of the addition of a new paragraph 8 to Article 134, which had been examined but not settled by the Committee.

2450. The Chairman said that these were two different things. The proposal by the delegation of the Federal Republic of Germany for a new paragraph 8 in Article 134 was not related to the question of the deletion of a professional representative from the list. The delegation of the Federal Republic of Germany proposed that the President of the European Patent Office be empowered to withdraw an authorisation to establish a place of business in a Contracting State. If such an authorisation were withdrawn, that did not mean, however, that the person concerned would be deleted from the list. He remained on the list, but could not exercise his profession as from a place of business in that Contracting State.

2451. Referring to the Chairman's observations that Rule 103 only concerned deletion from the list of professional representatives who had been entered on it after the end of the transitional period, the Swiss delegation wondered whether this list referred only to professional representatives who had passed the European qualifying examination. Since it was extremely unlikely that two lists would be provided for, one for professional representatives entered during the transitional period and the other for professional representatives entered after the end of that period, it followed that representatives entered on the list during the transitional period who, under Article 162, would be able to continue to act before the European Patent Office without having to pass the qualifying examination, would appear on the list. The question therefore arose whether there was not some conflict, at least in the drafting, between point (b) of the proposal by the delegation of the Federal Republic of Germany which sought to provide that the loss of nationality of one of the Contracting States constituted a ground for deletion, and Article 162, paragraph 7, which provided that professional representatives entered on the list during the transitional period would remain on that list even if they did not have the nationality of one of the Contracting States.

2452. The Chairman confirmed that the European Patent Office would have only one list. It would comprise two categories of persons: representatives provided for by Article 134, namely those who had passed the European qualifying examination, and those who had been entered in accordance with Article 162. The grounds for deletion for these two categories were not the same.

2453. The French delegation expressed some doubts as to the interpretation of the relationship between the transitional period and the definitive period. To judge by its content, the first phrase of Rule 103 as contained in the proposal by the delegation of the Federal Republic of Germany did not seem to refer to the transitional period. The content of such a provision should however apply during both the transitional period and the definitive period.

refer in so many words to national law in connection with deletion, and it was hard to see why representatives who had benefited from the transitional provisions should be treated differently from those approved under Article 134.

2487. The UNION delegation saw no justification for adopting a system which discriminated between representatives entered on the list as a result of a qualifying examination and those entered on the basis of national certificates. The purpose of such national certificates was, in fact, to compensate for the fact that no examinations would be sat during the transitional period. If national offices declared that certain persons were professionally competent, there was no reason why there should be any grounds for their deletion other than those adopted by the institution provided for on a European rather than national basis in Article 134, paragraph 7.

2488. The Irish delegation declared that it shared the view expressed by the United Kingdom and French delegations.

2489. The FICPI delegation agreed with the remarks made by the UNION delegation, and drew the Committee's attention to the following possibility: during the definitive period, a German national might take the examination for patent agents laid down by German law. Subsequently, he might take the European qualifying examination. Supposing that, in certain circumstances, the qualification to act before the German Patent Office were withdrawn, it was inconceivable that this should also affect the qualification to act before the European Patent Office. Since in this case there were no repercussions for the European qualification, the question arose why there should be a link with the national qualification in the other case. The restrictive interpretation advocated by the Chairman would result in the creation of two categories of patent agents, which would be hard for the professional organisations to accept.

2490. The Austrian delegation would be able to agree with an arrangement based on the principles enunciated by the French delegation.

2491. The UNICE delegation drew the Committee's attention to the fact that after the end of the transitional period there would be numerous changes of place of business. The Committee had just agreed that a change of place of business within the Contracting States should not constitute a ground for deletion. One was therefore entitled to ask how national central offices would be able to exercise any control over representatives who had received certificates from them.

2492. The Chairman suggested that the Committee first of all settle the problem raised by the United Kingdom delegation, on the grounds that it gave rise to the least difficulty. He noted that the Committee had agreed that an addition be made to Rule 107, whereby professional representatives who had been entered on the list during the transitional period and subsequently deleted as a result of the withdrawal of the certificate from the national authorities, could be re-instated. If the conditions for withdrawal did not apply during the definitive period, it should be possible to restore representatives to the list without obliging them to take the qualifying examination. The Chairman proposed that discussion on the point of principle be held over.

2493. At a later meeting, the Chairman stated that on the basis of the arguments put forward by the UNION and FICPI delegations, he had reached the conclusion that the view that the certificate furnished by the national authorities should be of no further consequence following the transitional period so far as entry on the European list of professional representatives was concerned appeared to be justified. Accordingly, it was his opinion that during the definitive period deletion from the list could be based on the grounds laid down in Article 134 or Rule 103.

2494. The Committee agreed to this interpretation and

delegated the responsibility for finding an appropriate wording to the Drafting Committee.

2495. The FICPI delegation asked the Committee whether it felt that it was really necessary that provision should be made during the transitional period for such a strict link between the national certificate and entry on the European list of professional representatives. In this connection the FICPI delegation pointed out that difficulties would arise as a result of variations in national rules on the matter, to the extent that during the transitional period professional representatives would be subject to different obligations if they wished to remain on the European list.

The FICPI delegation asked whether these difficulties could not be alleviated by stipulating that the link between the national certificate and entry on the European list would cease to apply prior to the expiry of the transitional period as soon as the institute referred to in Article 134, paragraph 7, had been set up.

2496. In reply to those comments the Chairman pointed to the fact that it had been the intention to apply the national provisions of individual Contracting States during the transitional period with the very aim of providing an interim solution pending the adoption of common European rules. It was therefore self-evident that as soon as the measures under Article 134, paragraph 7, had been implemented, national provisions on the matter need no longer be applied.

2497. In the course of the examination of the outcome of the Drafting Committee's discussions (M/142, page 16), the Irish delegation raised a problem as regards the interpretation of paragraph 1(b). This sub-paragraph referred to "further requirements of the national law ... in respect of the grant of the certificate". Irish law however stipulated that professional representatives were obliged to have their place of business and their residence in Ireland. The Irish delegation therefore wished to have the assurance that where professional representatives with a place of business in Ireland established themselves for example in Munich, there was no obligation under this rule to withdraw the certificate furnished by the Irish central industrial property office. The Irish delegation considered that the scope of paragraph 1(b) was confined to circumstances other than changes of residence or place of business.

2498. The French delegation concurred with this interpretation, and went on to point out that Rule 107, paragraph 1(a), referred to the cases covered by Rule 103, paragraph 2. The latter provision did in fact refer expressly to a representative being a national of one of the Contracting States and not of *the* Contracting State in which he had obtained his certificate. Rule 103, paragraph 2, also referred to a place of business or employment within the territory of *one* of the Contracting States and not within the territory of *the* Contracting State which furnished the certificate. Consequently, the French delegation considered that where a French professional representative changed his place of business by establishing himself in another Contracting State, he would continue to fulfil the conditions referred to in Rule 103 even though the certificate furnished by the French authorities would be withdrawn upon his acquiring a place of business in another Contracting State.

2499. The Chairman pointed out that the Committee was now faced with the question of principle which it had been unable to settle when examining Rule 103. With reference to the example adduced by the Irish delegation, the basic question in point was whether or not the Irish authorities were obliged to withdraw the certificate. Under Rule 103 it should not be possible to withdraw the certificate since the professional representative would retain his place of business or

employment in one of the Contracting States. However, account also had to be taken of Rule 107, paragraph 1(b), which stated that the central industrial property office was bound to withdraw the certificate if any further requirements of the national law of the Contracting State concerned in respect of the grant of the certificates were no longer fulfilled. The Chairman felt that in the specific example referred to by the Irish delegation, the Irish Office should inform the European Patent Office that it had withdrawn the certificate. The question in point was the situation of the professional representative in such cases. If, under German law, he was entitled to establish himself in Germany, he would be granted a certificate by the competent German authorities. If this were not the case, authorisation to act as a representative before the European Patent Office would have to be withdrawn. To sum up, any change in place of business from one Contracting State to another during the transitional period could, under certain circumstances, entail deletion from the list of professional representatives.

2500. The Austrian delegation said that it had understood Rules 103 and 107 as meaning that where there had been a change of place of business or nationality within the Contracting States, the certificate furnished by the original State should continue to constitute a basis for entitlement to act as a professional representative before the European Patent Office. The Austrian delegation therefore felt that Rule 107, paragraph 1(b), should specify that the arrangements set out under sub-paragraph (a) were in no way prejudiced by the provisions of sub-paragraph (b).

2501. The Chairman did not agree with this interpretation on the grounds that a person who changed his place of business and was not entered on the list of professional representatives within the new State would cease to be subject to any supervision by a disciplinary authority. It had been the very aim of Article 162 to make provision for supervision of professional representatives by a national authority: should such supervision cease to exist, it seemed logical that the authorisation to act as a representative should likewise cease to exist.

2502. The Netherlands delegation shared the opinion expressed by the Chairman.

2503. The French delegation pointed out that under the arrangements adopted by the Committee, the professional representative would be dependent during the transitional period upon the certificate furnished by the central industrial property office of his own country.

2504. The FICPI delegation considered it highly important that a solution be adopted whereby professional representatives could not lose their authorisation to act before the European Patent Office by the simple fact of changing their place of business. Accordingly, it called upon the Committee to amend the current text by stipulating that the State in which the professional representative established his new place of business should automatically recognise the certificate furnished by the country of origin as being adequate for the purposes of acting as a representative before the European Patent Office.

2505. The delegation of the Federal Republic of Germany was in favour of maintaining the text as it stood, on the grounds that professional representatives would be obliged to retain their place of business in their country of origin during the transitional period if they wished to establish a second place of business in another Contracting State. Contact would have to be maintained with the authorities in the country of origin during the transitional period, as otherwise the professional representative would totally escape any supervision by any authority.

2506. The Chairman contended that the problem was of a

somewhat theoretical nature, inasmuch as the Interim Committee would presumably draw up the provisions referred to in Article 134, paragraph 7, as quickly as possible in order to enable the institute mentioned in that Article to come into operation immediately after the entry into force of the Convention.

2507. The United Kingdom delegation concurred with the viewpoint expressed by the Austrian and French delegations, on the premise that a professional representative who changed his place of business continued to fulfil the conditions set out in Rule 103, paragraph 2. It interpreted the words "any further requirements" in Rule 107, paragraph 1(b) as referring to the conditions laid down in paragraph 1(a).

2508. The Chairman considered that the Committee should first of all decide on the content of the arrangements to be adopted and should leave aside the matter of drafting for the moment. His understanding of the situation was that the Austrian, French and United Kingdom delegations were in favour of the certificate being maintained even where there had been a change of place of business, whereas the German and Netherlands delegations held the opposite view.

2509. The Austrian delegation said that its initial intention was to remove any possibility of ambiguity in the text. Article 152 only laid down the conditions under which a professional representative could be entered on the list during the transitional period. It did not, however, stipulate what was to happen subsequently in the course of the transitional period, which meant that the Implementing Regulations would have to be very precisely formulated. The Austrian delegation felt that Rule 107 as it now stood was not very clear. Furthermore, it shared the Chairman's opinion as regards the theoretical nature of the matter.

2510. In reply to a point made by the Netherlands delegation, the French delegation stated that it did not feel that there was any incompatibility between Article 162 and Rule 107. Article 162, paragraph 1(b), stipulated that for a professional representative to be entered on the list, he must be entitled to act as a representative in patent matters within the territory of the State in which he had his place of business or employment. Rule 107 dealt with the withdrawal of authorisation; authorisation could not be withdrawn if the representative continued to have a place of business in any one of the Contracting States.

2511. The delegation of the Federal Republic of Germany drew the Committee's attention to the implications of the interpretation put forward by the United Kingdom and French delegations. For instance a German patent agent who had misappropriated his client's funds and had been deleted from the list in the Federal Republic of Germany, would be free to establish his place of business, for example in London, and would no longer be subject to any supervision by a disciplinary organisation for his profession. There would be no possibility of withdrawing authorisation for him to act as a representative before the European Patent Office, at least so far as the transitional period was concerned.

The German delegation's interpretation of the words "any further" in paragraph 1(b) differed from that of the United Kingdom and French delegations, in that it did not feel that the requirements laid down by national law were restricted by Rule 103, paragraph 2. On the basis of Rule 107, paragraph 1(b), and Rule 103, paragraph 3, a professional representative was required to have a place of business in one of the Contracting States and the delegation of the Federal Republic of Germany considered that on the basis of Rule 107, paragraph 1(b), he could also be required, by virtue of national law, to have a place of business in a specific Contracting State.

2512. The United Kingdom delegation felt that there was no

case for treating this matter as though it were a question of principle. The basic matter in hand was to determine whether a State which had furnished a certificate could withdraw it if the representative in question changed residence by establishing himself in another Contracting State. The United Kingdom delegation considered that the certificate should not be withdrawn in cases of this nature. This in no way pre-empted any decisions which might be taken as regards other cases. Accordingly, with reference to the example given by the delegation of the Federal Republic of Germany it shared the view that the State should be at liberty to withdraw the certificate. This was a general matter of disciplinary rules. The problem currently being examined was, however, not one of disciplinary measures but a straightforward formal question concerning a change of residence.

2513. The FEMIP delegation concurred with the interpretation put forward by the Austrian and United Kingdom delegations.

2514. The UNION delegation pointed out that authorisation to act as a representative before the European Patent Office should basically be governed by the following two principles: the representative must be competent and he must be able to perform his duties. It was quite clear that a representative did not become less competent merely by changing his residence from one Contracting State to another. The UNION delegation therefore felt that in such circumstances the national certificate should not be withdrawn and that moreover this problem would be resolved by applying Article 134, paragraph 7.

2515. The IAPIP delegation endorsed the point of view put forward by the UNION delegation.

2516. The Netherlands delegation said that, on reflection, it would have to side with the opinion held by the United Kingdom delegation, which it understood as meaning that no State could withdraw a certificate merely on account of a change in the representative's place of business. In such circumstances the representative in question would remain subject to his national offices and to its disciplinary rules.

2517. The Chairman considered that on the basis of this interpretation Rule 107, paragraph 1, would constitute an amendment to national law. One example of this would be where a German representative who had lost his nationality would still be entitled to act as a representative before the German Patent Office even though this was at variance with German law.

2518. The delegation of the Federal Republic of Germany considered that the words "any further" would have to be deleted from Rule 107, paragraph 1(b). This would mean that it would be for the national law of the State of origin to deal with this situation. If, for example, there were no requirements as regards residence or place of business under United Kingdom law, British patent agents who, for instance, established themselves at Munich or The Hague would not be affected by subparagraph (b). If, on the other hand, as was the case under German law, authorisation to act before the German Patent Office was conditional upon the requirement that the representative have a place of business within the territory of the Federal Republic of Germany, a German patent agent who established a place of business in London would no longer be entitled to act as a representative before the German Patent Office and would *ipso facto* lose the right to be entered on the European list of professional representatives.

2519. The Chairman felt that the Committee should now decide on this matter. He called for a vote on the viewpoint put forward by the United Kingdom, French, Austrian and Swedish delegations whereby Rule 107, paragraph 1(b), would not apply where one of the requirements referred to in sub-paragraph (a) was satisfied. This meant that a professional representative

who changed his place of business would remain on the list even if he were no longer entitled to act before his national office. The central industrial property office of the host State would therefore not furnish a certificate.

The Chairman noted that the Committee voted in favour of this interpretation by a majority of eleven votes to seven, with one abstention. The Chairman considered that the text need not be amended and that it was sufficient to record in the Minutes that the words "any further"\* meant other than the cases referred to in subparagraph (a).

### ***Draft Protocol on Jurisdiction and the Recognition of Decisions in respect of the Right to the Grant of a European Patent***

3001. The Committee examined this draft Protocol.

#### ***Article 1***

3002. The Austrian delegation withdrew its proposed amendment to Article 1 (see M/41).

#### ***Article 3***

3003. The Committee agreed to refer to the Drafting Committee, for examination, the proposal by the delegation of the Federal Republic of Germany contained in M/11, point 13.

3004. The Swiss delegation asked why the delegation of the Federal Republic of Germany wanted to change "right to the grant of the European Patent" to "right to the European patent". The delegation felt that the whole of the Protocol in question covered only the right to the grant of the patent.

3005. The delegation of the Federal Republic of Germany shared the Swiss delegation's view that the Protocol covered only the right to the grant of the European patent. However, Article 3 covered a special case i.e. the legal competence referred to by the second sentence of Article 58, paragraph 1, which referred to the right to the European patent. There was therefore some justification for referring in Article 3 to the "right to the European patent", which had a wider sense than the expression "right to the grant of a European patent". The reference merely meant that the court competent to hear a case relating to a European patent under Article 58 of the Convention was also competent with regard to the right to the grant of a European patent.

#### ***Article 5***

3006. The IAPIP delegation wondered whether the rules laid down in this Article, which stipulated the circumstances in which the courts of the Federal Republic of Germany would have jurisdiction, might not be replaced by a provision which drew finer distinctions. A distinction should be made between two eventualities. Firstly, there might be a dispute between two parties not resident in Europe, in which case the jurisdiction of the German courts seemed justified. The second possibility was that of a dispute between a European claimant and a patentee not resident in Europe. In such a case there seemed to be no justification for giving the German courts jurisdiction; it should rather be given to the court of the place of residence of the European plaintiff. Although, as a general rule of procedure, the competent court in a dispute should be that of the defendant's place of residence, in cases where the defendant was not resident in the territory, the competent court should be that in the place of residence of the plaintiff. There was no reason to give jurisdiction to a court which was not of the plaintiff's State, any more than to give it to a court of the defendant's State.

\* Translator's note: In the first text of the Convention the English wording is "any other".

3007. The French, Belgian and Italian delegations supported this suggestion by the IAPIP delegation.

3008. The Swiss delegation was prepared to accept this proposal, particularly since Article 10, paragraph 2, of the Protocol stipulated that the Protocol did not affect the implementation of any agreement between a Contracting State and a State which was not bound by the Protocol.

3009. The United Kingdom delegation pointed out that the present wording was the outcome of long discussions by the experts and it did not consider it advisable to make a last-minute amendment to an Article on which the experts had agreed.

3010. The delegation of the Federal Republic of Germany considered that the proposal under discussion did not completely upset the existing system and that, although it understood the United Kingdom delegation's misgivings, it could support the proposal. However, it wondered whether it might not be advisable to adjourn discussion of this point, so that the relevant experts could be contacted.

3011. The United Kingdom delegation requested that a written proposal be submitted in accordance with the Rules of Procedure.

3012. The Chairman asked the delegations in favour of the proposal to submit it in writing.

3013. At a subsequent meeting, the Committee examined a joint proposal from the Belgian, French and Italian delegations (see M/134/I) for a new paragraph 1 containing the provision desired by the IAPIP delegation.

3014. The Committee approved this proposal.

## **Article 7**

3015. The Italian delegation supported the FICPI delegation's suggestion (see M/15, point 69) for the insertion of a provision covering the eventuality of proceedings based on the same claim and between the same parties being brought simultaneously before the courts of different Contracting States.

Although the Italian delegation agreed with the FICPI comment, it did not agree with the FICPI solution to the problem, which would allow the defendant to choose which claim should be considered as the earlier. The Italian delegation proposed that in such cases, the claim filed in the State of which the defendants were nationals should be considered as the earlier one.

3016. The delegation of the Federal Republic of Germany was against this suggestion, on the grounds that all this was purely theoretical: it was highly improbable that proceedings would be initiated on the same day in two different States on the same claim.

3017. The Italian delegation did not think that the question was purely theoretical. It was a matter of the simultaneous jurisdiction of two courts and was a situation likely to occur more often than the successive filing of claims before courts in different Contracting States.

3018. The United Kingdom and French delegations shared the view expressed by the delegation of the Federal Republic of Germany.

3019. The Swiss delegation also supported the view expressed by the delegation of the Federal Republic of Germany; it pointed out that matters pending at law were dealt with differently from one Member State to another and that even partial harmonisation would be difficult.

3020. The Italian delegation withdrew its proposal.

3021. The Committee agreed not to adopt a proposal from the Italian delegation to include a provision on "ordre public" in the Protocol.

## **Article 8**

3022. The Italian delegation wondered whether this Article should stipulate that in this part the Protocol referred to no more than the matter of recognition, but on the understanding that the term "recognition" included the possibility of making amendments to the European Patent Registers or to national registers.

3023. The Netherlands delegation pointed out that entries in the European Patent Register formed the sole point which could be raised here, as the particulars of entitlement to the grant of a European patent obviously could not be entered in a national register. The Netherlands delegation drew the Italian delegation's attention to Article 59, which governed the enforcement of final decisions.

3024. The United Kingdom delegation felt that the present forms of wording already covered the matter raised by the Italian delegation. The first possibility was that of a European patent application being refused pursuant to a national judgment: in this case there was no need to amend the register. The second possibility was that of a new applicant being named a joint applicant: in this case, it was obvious that he had the right to be entered in the register as such. The third possibility was that of a new applicant prosecuting the initial application as his own: in this case also he could request entry in the patent register. All these possibilities were already covered by Article 59 of the Convention.

3025. The French and Swedish delegations supported the view expressed by the Netherlands and United Kingdom delegations.

3026. The Italian delegation withdrew its proposal.

3027. The Chairman noted that the Committee approved the draft Protocol, including the new amendments.

## **Recommendation on preparations for the opening of the European Patent Office**

4001. The Committee examined this Recommendation.

### **Paragraph 2**

4002. The French delegation proposed to supplement this paragraph by the phrase "and the five-year plan gradually extending the competence of the European Patent Office to all areas of technology". The purpose of this amendment was to make it unequivocally plain that the preparation of this plan was a task for the Interim Committee.

4003. The Committee agreed to this proposal.

4004. The Committee instructed the Drafting Committee to amend the wording of paragraph 2 in order to take account of Main Committee II's decision to instruct the Interim Committee to prepare a study on the problem of extending documentation.

### **Paragraph 4**

4005. The delegation of the Federal Republic of Germany proposed an additional sentence to this paragraph stipulating that the delegations of the Federal Republic of Germany and the Netherlands might take part as observers in meetings of Working Parties of which they were not members. This might be a help in discussion, as these were the two delegations from the States in whose territory the European Patent Office and its Hague branch would be situated.

4006. The Italian delegation requested the same arrangements for the Italian delegation when there were discussions relating to the Italian branch of the IIB.



4007. The United Kingdom delegation also wished to have observer status in discussions in which it had an interest.

4008. The Belgian delegation supported these two proposals.

4009. The Chairman felt that excessive expansion of the Working Parties would impair efficiency.

4010. As a compromise, the Swedish delegation proposed that participation in the Working Parties be confined to the delegations of the Federal Republic of Germany and the Netherlands.

4011. The Italian delegation suggested the following compromise: that each Working Party could, if it saw fit, invite representatives of States not on the Working Party to discussions on problems concerning the territory of those States.

4012. The Chairman proposed that the Committee agree on the following arrangement: States not on the Working Party might be invited as observers when problems of particular interest to them were being discussed.

4013. The Committee agreed to this proposal.

### **Paragraph 5**

4014. The Chairman proposed that this paragraph be amplified to allow for the participation of non-governmental international organisations such as INCOPOSA.

4015. The Netherlands delegation thought it would be wise and desirable to provide for the possibility of inviting organisations representing staff to participate in discussions.

4016. The delegation of the Federal Republic of Germany supported the Chairman's proposal, and thought it was also advisable to invite organisations catering for the interests of representatives, particularly when it came to discussing the setting up of the institute referred to in Article 134, paragraph 7.

4017. The United Kingdom delegation supported the Chairman's proposal. It felt that it was absolutely essential that the future staff should be kept up-to-date on decisions concerning them.

### ***Recommendation of the Working Party on Training Staff for the European Patent Office***

5001. The Chairman of the Working Party on Training Staff for the European Patent Office stated that, at its last meeting, the Inter-Governmental Conference had decided that the problems of training staff for the European Patent Office should be studied by a special Working Party, which was to meet in the interval between the last meeting of the Inter-Governmental Conference and the Diplomatic Conference (see M/36). After holding three meetings, this special Working Party had produced various documents: first a report, then an annex dealing more specifically with the staff training programme (but this had not been discussed in as much detail as the report), and thirdly a draft Decision, submitted direct to the Diplomatic Conference. Point 4 of this draft Decision contained a provision to the effect that the Interim Committee was instructed to draw up the plans for centralised training and the co-ordination of national training programmes: to this end, it should in principle follow the guidelines contained in the report submitted to the Diplomatic Conference, and when preparing the detailed training programme, it should base its discussions on the annex to the report. It did not seem necessary for the Diplomatic Conference to discuss the matter point by point, since the Interim Committee was not bound by these documents, the first of which was simply intended to serve as a general guide, and the second as a basis for discussion.

5002. The Committee examined M/37.

5003. The Norwegian delegation suggested altering the order of the paragraphs and putting paragraph 3 after paragraph 5, in order to emphasise that training at national level was subject to directives to be drawn up by the Interim Committee.

5004. The Committee agreed to these suggestions and approved the draft Recommendation.



## ***Minutes of the Proceedings of Main Committee II***

### **General**

1. Main Committee II, set up by the Plenary of the Conference, was chaired by Mr. F. Savignon, Director of the National Industrial Property Office (France). Mr. E. Tuxen, Director of the Danish Patent Office, was the first Vice-Chairman;

Count A. F. von Gerliczy-Burian (Liechtenstein), Head of the Department for International Relations, and Dr. Luis Alberto de Vasconcelos Gois Fernandes Figueira (Portugal), Assistant Director-General for Economic Affairs, were the other Vice-Chairmen. Mr. Bowen (United Kingdom) was appointed rapporteur.

2. The duties of Main Committee II were based upon Rule 12 of the Rules of Procedure (M/34) and on a recommendation adopted by the Steering Committee of the Conference (M/56/I/II/III).

On this basis Main Committee II was responsible for Chapters I to IV of Part I, with the exception of Articles 14, 143 and 145, Part XI, with the exception of Articles 160 to 162, Part XII of the Convention, with the exception of Articles 169, 174 and 175, the corresponding provisions under the Implementing Regulations to the Convention, the Protocol on the Centralisation of the European Patent System and on its Introduction, the Protocol on the Privileges and Immunities of the European Patent Organisation, the Conference Recommendations and Resolutions on these matters, the Recommendation on documentation for patent search and the Recommendation regarding the status and remuneration of the employees referred to in Article 159, paragraph 2, of the Convention.

3. Main Committee II met on 13 and 14 September, from 17 to 22 September and on 25 September 1973. At its first meeting the Main Committee set up a Drafting Committee consisting of the Austrian, French, Irish and Swiss delegations and chaired by Mr. Jenö Staehelin, member of the Swiss delegation. Mr. R. Bowen (United Kingdom), Rapporteur of Main Committee II, also attended.

4. At the opening of the first meeting, the Chairman noted that the Steering Committee had approved two requests at its meeting on 10 September 1973, namely that Mr. Sheehan of the US Patent Office and Mr. van Empel be admitted as listeners to the meetings of the Main Committees. At a subsequent meeting Main Committee II also authorised Mr. Otani of the Japanese Patent Office to attend Committee meetings as a listener.

Main Committee II agreed that the aforementioned gentlemen could take part in its proceedings as listeners pursuant to Rule 48, paragraph 1, of the Rules of Procedure.

5. The Chairman pointed out that under Rule 32 of the Rules of Procedure only proposals made in writing by the Government delegations could be discussed and voted upon. In principle, written proposals had to be submitted by 17.00 on the day prior to the discussion.

6. The numbering of Articles, Rules and paragraphs in these minutes follows the text of the draft proposals (M/1 to M/6). The numbering in the text signed in Munich is given in brackets after the number of the provision under consideration.

### **A. Draft Convention Establishing a European System for the Grant of Patents (M/1)**

#### ***Title***

7. The delegations of the Member States of the European Communities submitted their proposal in M/14, point 1, for the

use of an abbreviated title after the title of the Convention.

8. The Committee signified its agreement to the proposal.

### ***Article 4 – European Patent Organisation***

9. The United Kingdom delegation proposed that Article 4 be recast along the lines of its suggestion in M/40, point 3.

10. The Austrian, German and Swiss delegations endorsed the proposal subject to the deletion of the word "principal" in paragraph 2 of the draft on the grounds that the list of organs of the Organisation given there was exhaustive.

11. The United Kingdom delegation agreed to amend its proposal accordingly.

12. The Committee adopted the United Kingdom proposal as amended.

### ***Article 5 – Legal status***

#### ***(a) Paragraph 1***

13. The Luxembourg delegation submitted the proposal contained in M/9, point 1.

14. The French, German and United Kingdom delegations voiced objections to the proposal. The incorporation of a provision to the effect that the legal personality of the Organisation would be recognised automatically in each of the Contracting States could give rise to difficulties of interpretation, whereas there was a solidly established tradition whereby the conferral of legal personality by a convention on an international organisation followed automatically under a given legal system from the act of ratification and the entry into force of the convention in the State concerned.

15. The Committee noted that a vote could not be taken on the Luxembourg delegation's proposal as it had failed to gain support from any of the delegations.

#### ***(b) Paragraph 2***

16. The Committee did not adopt a proposal by the Luxembourg delegation set out in M/9, point 2.

17. The Committee then turned to the United Kingdom delegation's proposed amendment in M/40, point 4, whereby paragraphs 2 and 3 were to be aligned on Article 211 of the Treaty of Rome, which had been taken as a basis for Article 5 of the Draft Convention. This would also involve combining paragraphs 2 and 3 of the draft in a single provision.

18. As the Italian, Netherlands and Swiss delegations were dubious as to the wisdom of combining paragraphs 2 and 3, the United Kingdom delegation withdrew this particular drafting item of its proposal.

19. The Committee agreed to adapt paragraph 2 in line with the first sentence of the United Kingdom delegation's proposal.

#### ***(c) Paragraph 3***

20. Following the referral to the Drafting Committee of a proposal submitted by the Luxembourg delegation in M/9, point 3, the Committee addressed itself to the proposal by the United Kingdom delegation as set out in M/40, point 4.

21. The United Kingdom delegation pointed out that the text of the Draft Convention was too limited and failed, for instance, to make provision for the representation of the Organisation by the President at meetings of international bodies. It therefore proposed that a more comprehensive form of words be used to the effect that the President of the Office represented the Organisation.

22. The Austrian and German delegations endorsed the United Kingdom delegation's proposal.

23. The French and Luxembourg delegations, on the other hand, expressed a measure of doubt. For reasons of consistency, they considered it preferable to refrain from associating the exercise by the Organisation of its legal capacity, which was strictly a matter for paragraph 2, with the completely different question of the conferral upon the President of authority to represent the legal person constituted by the Organisation in its dealings with the outside world.

24. The IIB delegation pointed out that the United Kingdom delegation's intention was precisely that of extending the scope of paragraph 3 which, as it stood in the draft form, was confined to the exercise of legal capacity, to embrace the wider concept of representation.

25. In view of these additional clarifications the Committee adopted the United Kingdom delegation's proposal unanimously with one abstention.

### **Article 6 – Seat**

26. When presenting its proposal as set out in M/59/I/II, the French delegation pointed out that Section I of the draft Protocol on Centralisation stipulated that the Member States of the IIB undertook to take all necessary steps to incorporate into the European Patent Office upon the opening of the latter all assets and liabilities and all staff members of the IIB. This would require the Administrative Council to decide upon amendments to the Convention and the Implementing Regulations thereto prior to the opening of the European Patent Office, in order to make allowance for the transfer of tasks from the IIB to the Directorate-General for Searching at the European Patent Office. The French delegation proposed that provision be made in the Convention itself for the incorporation of the IIB into the European Patent Office. A decision in principle along these lines would necessitate amending Article 6, paragraph 2, as follows:

"(2) The European Patent Office shall be set up at Munich. It shall have a branch at The Hague comprising the Receiving Section and the Search Divisions."

27. The Austrian, Belgian, German, Netherlands and United Kingdom delegations supported the French proposal.

28. The Chairman noted that none of the delegations had expressed any objection to the decision in principle on placing the incorporation of the IIB in the Convention itself.

29. With reference to Article 6, paragraph 2, second sentence, the French delegation stated that the proposed wording would not involve any substantive alteration, as the text stipulated that the Receiving Section would be situated at The Hague and thus took account of the fact that the entire procedure up to the request for examination would be conducted there.

30. The Netherlands delegation concurred with this view.

31. The United Kingdom delegation supported the proposal in principle, although it wondered whether the Receiving Section would also be competent to deal with divisional applications submitted in the course of the procedure. In this context it referred to Articles 73 (75) and 74 (76) of the Convention.

32. The German delegation drew attention to the decisions taken by Main Committee I with regard to Articles 73 (75) and 74 (76), whereby it would be possible to file European patent applications either in Munich or at the branch at The Hague.

33. The Chairman noted that this part of the French delegation's proposal as contained in M/59/I/II was also adopted by the Committee and referred it to the Drafting Committee.

### **Article 7 – Sub-offices of the European Patent Office**

34. The French delegation submitted in M/59/I/II a minor drafting change involving the deletion of the reference to the IIB from Article 7.

35. The Chairman noted that this amendment followed from the decision taken as regards the incorporation of the IIB and referred the proposal to the Drafting Committee.

### **Article 9 – Liability**

#### **(a) Paragraph 2**

36. The Luxembourg delegation presented its proposal contained in M/9, point 4.

37. The German delegation had no substantive objections to the proposal, although it considered that the clarification requested by the Luxembourg delegation was superfluous. Under German law, for example, it was quite clear that the legislation of the State concerned was applicable not only for determining the extent but also the principle itself of liability.

38. The Luxembourg delegation withdrew its proposal in view of the statement by the delegation of the Federal Republic of Germany.

#### **(b) Paragraph 4**

39. The United Kingdom delegation further proposed that paragraph 4(a) should specify that jurisdiction would fall to the courts of the Federal Republic of Germany unless another court or national law were designated. The aim of this supplementary qualification was to ensure not only that the court with jurisdiction could be accurately identified, but also that the parties concerned would be free to determine the law applicable in their contract.

40. The Austrian and French delegations expressed reservations with regard to the proposal on the grounds of the structure of the Article, pointing out that the provisions establishing the law applicable were set forth in paragraphs 1 and 2.

41. In view of these comments the United Kingdom delegation withdrew its proposal.

42. The Committee called upon the Rapporteur to provide an explanation of the purport of this provision in his report to the Plenary in order to take account of the comments submitted by the Luxembourg delegation in M/9, point 5.

43. The Committee referred to the Drafting Committee the German delegation's proposal contained in M/47, point 37.

### **Article 10 – Direction**

#### **(a) Paragraph 2(a)**

44. The Committee recorded its agreement to the proposal by the German delegation in M/47/I/II/III, point 14, in view of the fact that Main Committee I had accepted corresponding proposals by the same delegation on Articles 73 (75) paragraph 1(a), and 74 (76), paragraph 1 (see M/PR/I, point 198).

#### **(b) Paragraph 3**

45. The Committee agreed to the Luxembourg delegation's proposal in M/9, point 6, that in addition to the term "absence" express mention be made of indisposition of the President.

46. The Belgian delegation then submitted its proposal in M/33, point 1, whereby in his absence or in the event of his being indisposed, one of the Vice-Presidents would take the

place of the President in accordance with the procedure laid down by the Administrative Council.

47. The Austrian, French, German, Luxembourg, Netherlands and Swiss delegations endorsed the proposal by the Belgian delegation

48. While not opposed to the Belgian delegation's proposal, the United Kingdom delegation considered that it was superfluous to incorporate in the Convention an explicit obligation upon the Administrative Council to lay down a procedure to cover this case.

49. In conclusion the Committee signified its agreement to the Belgian delegation's proposal.

50. As regards the proposal by the Swedish delegation in M/53/I/II, point 1, see point 106 below with reference to Article 21.

## **Article 11 – Appointment of senior employees**

### **(a) Paragraph 3**

51. COPRICE submitted its proposal in M/16, point 4 in favour of the deletion of the phrase "on the proposal of the President of the European Patent Office". It took the view that as the Board members, and in particular the members of the Enlarged Board of Appeal, had to be completely independent, it would be preferable to remove from the President of the European Patent Office any powers of initiative in their appointment procedure.

52. The COPRICE proposal failed to gain the support of any of the Government delegations and was therefore not considered by the Committee.

### **(b) Paragraph 4**

53. The Swedish delegation proposed that the Convention lay down the disciplinary measures to be taken by the Administrative Council.

54. The German and Netherlands delegations were of the opinion that such measures would be consigned to the Service Regulations for permanent employees of the European Patent Office. The Netherlands delegation wondered whether paragraph 4 should not be confined to the President and Vice-Presidents of the office, since Article 21 (23), paragraph 1 already made provision for removal from office (see points 105 and 106 below).

55. In view of the arguments set out above the Swedish delegation retracted its proposal.

56. As regards the restriction proposed by the Netherlands delegation, the Committee did not feel that it should adopt it on the grounds that the provision embodied in Article 21 (23), paragraph 1, constituted a special rule which should not prevent recourse to normal disciplinary proceedings in other instances.

## **Article 12 – Duties of office**

57. The Committee referred to the Drafting Committee the United Kingdom delegation's proposal contained in M/40, point 7.

58. The Committee examined the two proposals submitted by the Netherlands delegation in M/52/I/II/III, point 1, and by the Swedish delegation in M/53/I/II, point 2.

59. The Swedish delegation proposed that employees of the Office be entitled to file patent applications on their own behalf subject to the permission of the President of the office. It pointed out that this arrangement functioned satisfactorily in Sweden and went on to state that it was prepared to extend the

scope of this provision to drawings and utility models as proposed by the German delegation in M/47/I/II/III, point 3. Finally, the Swedish delegation stated that it was willing to agree to any applications filed without the President's permission being considered invalid.

60. The Danish, Finnish, French and Portuguese delegations supported the Swedish delegation's proposal.

61. The Italian delegation would prefer paragraph 2 to be deleted as it placed restrictions upon the freedom to file applications and created discrimination among employees of the Office. However, it was prepared to accede to the Swedish delegation's proposal.

62. While sharing in principle the views put forward by the Italian delegation, the Norwegian delegation felt that the prohibition could be restricted to examiner staff.

63. The CEIF, CNIPA, EIRMA, FEMIP, FICPI, IAPIP and UNEPA delegations were opposed to the proposal by the Swedish delegation.

64. The German, Netherlands and United Kingdom delegations were opposed to the Swedish delegation's proposal on the grounds that the President would be subjected to pressure to grant authorisation and that the practice of Office employees engaging in the filing of applications would produce an unfavourable effect upon the public. The three delegations were therefore in favour of the substance of the Netherlands delegation's proposal as set out in M/52/I/II/III, point 1.

65. The UNEPA delegation endorsed the viewpoint of these three delegations.

66. The Swiss delegation submitted a compromise proposal (M/73/II) providing that the President of the European Patent Office could grant exceptions from the prohibition on making use of information in the nature of a professional secret where there was no conflict of interests.

67. The German delegation could agree to the proposal provided that it were amended along the lines of the Norwegian delegation's proposal, with exceptions from the prohibition being granted only to non-examining staff.

68. The IIB representative suggested that this problem could be resolved within the context of the Service Regulations for permanent employees of the future European Patent Office. So far as Article 12 was concerned, paragraph 2 should be deleted and only the principles embodied in paragraph 1 maintained while extending to actual use the prohibition on the disclosure of information in the nature of a professional secret. The proposal was based upon a similar provision in the IIB Staff Regulations.

69. The Netherlands delegation strongly urged that Article 12 be so framed as to inspire the public with the greatest degree of confidence. Accordingly, it wished to be appraised of the opinion of the interested circles on the Swiss delegation's proposal.

70. The UNEPA representative emphasised that the confidence placed in patent office employees was an extremely important matter and that it would therefore prefer Article 12, paragraph 2, to be retained as it originally stood. In the event of this solution not being adopted, it favoured the proposed amendment put forward by the Swiss delegation as supplemented by the German delegation.

71. The Austrian delegation pointed out that if very specific provisions were not adopted with regard to the filing of patent applications by the employees of the future European Patent Office, it would be practically impossible to prevent such practices being carried on through the intermediary of third parties. It considered that the proposal put forward by the IIB representative constituted the most effective means of combating any attempts at circumventing the prohibition.

72. The IFIA delegate made the point that even examiners with the European Patent Office should in certain cases be entitled to submit patent applications and acquire protection for their inventions. He therefore lent his support to the proposal made by the Swiss delegation in M/73/II.

73. The ICC representative noted the suggestion put forward during the discussion that the problem should be settled in the context of the Service Regulations for permanent employees of the European Patent Office and stated his dissatisfaction with this arrangement in so far as the matter in hand was of particular importance to private industry.

He therefore took the view that the matter should be settled in Article 12 itself. If an examiner were to file a patent application through the intermediary of a third party, he would thereby place himself in a situation which, if it were discovered, could give rise to doubt as regards the objectivity of his work on the part of the undertakings in the sector of activities in respect of which he filed the application. Nonetheless, it was true that in certain instances an across-the-board veto could bring about an unfair situation. It should therefore be possible to maintain paragraph 2 of the draft with such amendments as were necessary to cover such special cases without impairing the industry's trust in the integrity of the employees of the Office.

74. The Irish delegation concurred with the opinion of the ICC representative. The principle embodied in paragraph 2 should of course be supplemented by specific provisions governing exceptions, which could be written into the Service Regulations.

75. While acknowledging that the German delegation's proposal was attractive, the IAPIP representative felt that it should be approved as it would give rise to discrimination among employees of the Office.

76. The Swedish delegation was in favour of the Swiss delegation's proposal, if possible without the addition proposed by the German delegation. It was self-evident that the President of the Office would be particularly cautious when it came to granting a derogation in respect of the right to file patent applications to an examiner employed with his institution. It also felt that the dimension of the problem should not be exaggerated in that employees of the European Patent Office would not tend to avail themselves of the possibility open to them merely on account of their position.

77. The French delegation noted that the discussion had shown that problems would only arise in exceptional cases, that the rules as envisaged were not such as to prevent every single instance of fraud and finally that for the prohibition to be effective, it would have to be applicable not only to European but also to national patent applications. In view of the foregoing, the French delegation was prepared to accept the compromise proposal put forward by the Swiss delegation.

78. The UNICE representative expressed his preference for paragraph 2 of the original draft. The concept of the conflict of interests embodied in the Swiss proposal would inevitably give rise to problems of interpretation and should therefore be avoided.

79. The United Kingdom delegation pointed out that a balance had to be struck between the trust which it was desirable for private industry to place in the European Patent Office, and a measure of individual liberty on the part of employees of the office. From this point of view, the Swiss delegation's proposal did not afford entire satisfaction in that it invested the President of the Office with discretionary powers the implementation of which must needs give rise to difficulties with staff. The addition proposed by the German delegation could possibly be envisaged as a compromise solution.

However, the absolute veto should not be confined to

examiners and should also be extended to members of the Boards of Appeal.

80. In conclusion to this discussion, the Italian and Yugoslav delegations endorsed the position adopted by the IIB representative that Article 12 should comprise a single paragraph stipulating that even after termination of their duties, EPO staff would be bound not to disclose or make use of information which, by its nature, was a professional secret. When adopting the text the Conference would express the opinion that detailed rules for the implementation of this Article should be incorporated in the Service Regulations for permanent employees of the European Patent Office.

81. The Committee adopted the proposal by a majority and referred the text to the Drafting Committee.

### ***Article 13 — Disputes between the Organisation and the employees of the European Patent Office***

82. The Committee examined the German delegation's proposal (M/11, point 2, and M/47/I/II/III, point 4) that the Administrative Tribunal of the International Labour Organisation be replaced by a separate tribunal within the European Patent Office.

83. In support of its proposal, the German delegation pointed to three factors: first the constantly increasing number of appeals lodged by international civil servants, second the distance separating Munich and the headquarters of the Administrative Tribunal of the International Labour Organisation and finally, the existence of such bodies in organisations such as the Council of Europe.

84. The IIB representative recalled that the IIB had conferred jurisdiction in disputes between it and its staff on the Administrative Tribunal of the International Labour Organisation and pointed out that the number of appeals which would reach this stage would certainly be very limited if they were preceded by an internal appeals procedure to be written into the Service Regulations.

85. The Luxembourg, Netherlands, Norwegian and Swiss delegations, together with the French delegation, concurred with the points put forward by the IIB representative.

86. In conclusion, the Committee noted that the German delegation's proposal was not supported by any other delegation. It confirmed its agreement to the content of Article 13 as set out in the original draft, on the understanding that the Service Regulations for permanent employees of the European Patent Office would incorporate provisions setting up an internal appeals body for such disputes prior to the matter being brought before the Administrative Tribunal of the International Labour Organisation.

87. The Committee referred Article 13 to the Drafting Committee with instructions to examine at the same time the drafting proposals submitted by the Luxembourg delegation in M/9.

### ***Article 15 — The departments charged with the procedure***

88. In this connection see the discussions on Article 22a (20).

### ***Article 16 — Receiving Section***

89. The Committee examined the Belgian delegation's proposal contained in M/33, point 2, and the UNICE proposal along similar lines as given in M/19, point 1, which specified the date up to which the Receiving Section would remain responsible for the application, particularly where a request for examination was made before the search report had been

forwarded. The Committee signified its agreement to the content of the Belgian delegation's proposal and referred it for examination to the Drafting Committee.

90. The Committee also recorded its agreement to the German delegation's proposal in M/47/I/II/III, point 1, which detailed the responsibilities of the Receiving Section as regards publication of the application and the search report.

91. The Committee also referred the FEMIP delegation's proposal (M/23, point 16) to the Drafting Committee in order for it to specify at an appropriate point in the Convention that the branch at The Hague was empowered to receive European patent applications.

92. The French delegation proposed that the text of Article 16 be amended to indicate clearly that even in cases where the request for examination was lodged before the search report was drawn up, the Receiving Section retained responsibility for the file and would continue with the formalities examination up to the date of publication of the search report.

93. The Committee agreed to this proposal, which it referred to the Drafting Committee.

#### **Article 16a (17) – Search Divisions**

94. In view of the decision to integrate the IIB into the European Patent Office as the Directorate-General for Searching, the Committee decided to determine in a new Article 16a the responsibilities of the body responsible for drawing up European search reports, namely the Search Divisions.

#### **Article 17 (18) – Examining Divisions**

95. Since the proposals from CNIPA (M/20, point 5), CEIF (M/22, point 14) and FEMIP (M/23, point 17) were not taken up by the Government delegations, they were not considered by the Committee.

96. The Committee referred the drafting proposals submitted by the Luxembourg delegation in M/9, point 9, to the Drafting Committee.

#### **Article 18 (19) – Opposition Divisions**

97. The Committee had before it several proposals from the Observer delegations (IAPIP M/24, point 4, CEEP M/30, point 3, CNIPA M/20, point 6, FEMIP M/23, point 7 and UNICE M/19, point 2) which were primarily aimed at precluding (although the emphasis differed somewhat in certain proposals) a member of an Examining Division from participating in the work of an Opposition Division considering a case relating to a patent where he had been involved in examining the application for that patent.

98. The Portuguese delegation, supported by the Danish and Norwegian delegations, backed a proposal by UNEPA (M/62/I/II, point 2) to the effect that a member of an Examining Division who had taken part in the procedure at the examination stage could on no account act as Chairman of an Opposition Division dealing with the same case.

99. The IAPIP representative suggested that the office of rapporteur should also be subject to such provisions governing incompatibility.

100. The German, Austrian, French and Swiss delegations supported the Portuguese delegation's proposal but felt that the member of the Examining Division in question should not be precluded from acting as rapporteur in view of the advantages of his knowledge of the case.

101. Finally, the Committee accepted the Portuguese

delegation's proposal and referred it to the Drafting Committee.

#### **Article 19 (21) – Boards of Appeal**

102. The Netherlands delegation presented the proposal in M/32, point 4, that the references in paragraphs 3 and 4 to technically qualified members who would act as rapporteurs and would not take part in the decision be deleted.

103. This proposal, which was supported by the UNEPA representative, was approved by the Committee and referred to the Drafting Committee.

#### **Article 21 (23) – Independence of the members of the Boards**

104. The Committee went on to consider proposed amendments from the Luxembourg delegation (M/9, point 12), the United Kingdom delegation (M/10, point 3 and M/40, point 8) and a proposal from the Netherlands delegation (M/52/I/II/III, point 3).

105. Apart from some minor drafting amendments referred to the Drafting Committee, the amendments proposed by the United Kingdom, Luxembourg and Netherlands delegations were all concerned with providing for the removal from office of members of the Boards during their term if there were "serious grounds" for so doing. However the proposal of the Netherlands delegation differed slightly from that of the United Kingdom in that such removal could only be effected by a decision of the Administrative Council of the European Patent Organisation on a proposal from the Enlarged Board of Appeal.

106. The United Kingdom delegation, supported by the Swedish delegation, considered that since the power of appointment lay with the Administrative Council, the power of removal should, of course, be conferred upon the same body. However, since the existence of serious grounds had to be established, the decision to remove a member from office should require a three-quarters majority.

107. However, most delegations opted for the Netherlands proposal, which provided for the Administrative Council's decision to be taken by a simple majority.

#### **Article 22 (24) – Exclusion and objection**

##### **(a) Paragraphs 1 to 3**

108. The Committee referred the observations from the Luxembourg delegation in M/9, point 13, and from the German delegation in M/11, points 3 to 17, to the Drafting Committee.

##### **(b) Paragraph 3a (3)**

109. The German delegation submitted a proposal for a new paragraph 3a (M/47/I/II/III, point 18) which would limit the right of objection to a member of a Board where the party in question had already taken a procedural step while being aware of a reason for objection.

110. The Committee agreed on this proposal and referred it to the Drafting Committee.

##### **(c) Paragraph 4**

111. This paragraph was the subject of proposals from the Swiss (M/54/I/II/III) and Norwegian delegations (M/61/II).

112. The Swiss proposal provided that the Board member objected to could not take part in the vote on the objection.

Where the voting resulted in a tie, the objection would be deemed upheld.

113. The Norwegian delegation's proposal provided for a procedure whereby the Boards of Appeal could take a decision on the objection even if the absence of the member objected to were to prevent the attainment of a quorum. This proposal was designed to avoid prejudging the content of the Rules of Procedure to be adopted by the Board pursuant to Article 21 (23), paragraph 4.

114. The French, German and United Kingdom delegations pointed out that this situation was covered by Rule 10 which provided for alternate members of the Boards of Appeal.

115. The Swiss delegation wondered whether Rule 10 would be sufficient to meet all eventualities; it could be argued that the alternate member could not be called until the decision on removal had been taken. Referring to its proposal in M/54/I/II/III, it wondered whether paragraph 4 should not be supplemented by a sentence providing for a procedure for automatically replacing a member objected to by his alternate.

116. To overcome this difficulty, the Austrian delegation proposed that paragraph 4 be supplemented by the following sentence: "For the purpose of taking decisions in such cases, the member objected to shall be replaced by his alternate".

117. This proposal, which was seconded by the German delegation, was approved by the Committee and referred to the Drafting Committee.

#### ***Article 22a (20) – Legal Division***

118. The Committee agreed on the German delegation's proposal in M/47/I/II/III, point 6, and agreed to the setting up of a further department to be known as the "Legal Division". The Committee referred the proposal to the Drafting Committee which was also instructed to make the necessary changes to Articles 15 and 105 (106).

#### ***Article 23 (25) – Technical opinion***

119. The Committee considered the proposals for amendments to this Article comprising a proposal from the Netherlands delegation (M/52/I/II/III) which would enable the parties concerned to state their point of view before the European Patent Office gave its technical opinion and proposals from certain observer organisations that there should be no reference to a technical opinion (COPRICE M/16, point 5, CNIPA M/20, point 9, and UNEPA M/21, point 2).

120. The Belgian delegation supported the Netherlands delegation's proposal.

121. The German delegation opposed the proposal. This provision concerned technical assistance to private individuals and should not involve the office in two-party proceedings, the latter being the province of legal actions concerning the validity of the patent.

122. The United Kingdom delegation also expressed objections and argued that the Netherlands delegation's proposal would tend to create confusion between the competence of national courts and that of the European Patent Office, which latter was not entitled to give preliminary rulings.

123. The IAPIP delegate stated that disputes relating to infringement were the exclusive preserve of national courts. If they felt that a technical opinion should be sought from the European Patent Office, the opinion would certainly have a considerable bearing on the court's decision. The only options available therefore were to delete Article 23 or to retain the technical opinion clause while providing for the holding of proceedings involving the parties concerned before the office.

124. The FICPI delegation was in favour of giving the

European Patent Office power to deliver technical opinions and proposed that the procedural details be left to the Administrative Council.

125. The Swiss delegation wanted Article 23 maintained but could not accept the Netherlands delegation's proposal which might result in a substantial increase in the incidence of proceedings before the Office.

126. The CNIPA representative was prepared to agree to the Netherlands proposal.

127. The COPRICE delegation was not convinced of the need for Article 23. It also drew attention to differences in terminology between the three languages: the term "Gutachten" did not appear to have the same scope as the corresponding English and French terms.

128. The French delegation considered that the opinion provided for in Article 23 might be useful for national courts and in no way constituted an encroachment upon their powers. The European Patent Office would not have to decide on a dispute between parties but simply deliver a technical opinion. It was prepared to support the Netherlands proposal but pointed out that, if provision for proceedings to hear opposing arguments were to be made, the opinion delivered would have to be notified, not only to the competent national court, but also to the parties who would thus be enabled to submit further written memoranda before the court.

129. The United Kingdom delegation was somewhat concerned by the importance being accorded to technical opinions which could be delivered by the European Patent Office. If Article 23 were to be maintained incorporating the amendment proposed by the Netherlands delegation, there was a danger that in a considerable proportion of infringement proceedings, the parties would want to have a technical opinion from the Office thus considerably augmenting the incidence of proceedings before the Office. The United Kingdom delegation, supported by the Irish delegation, therefore proposed that Article 23 be deleted.

130. The Committee held a vote on this proposal to delete Article 23 which failed to obtain a majority in favour.

131. The Committee then voted on the Netherlands proposal which likewise failed to obtain a majority in favour.

132. The Chairman drew the Committee's attention to two other proposals: that of the Swedish delegation in M/53/I/II, point 3, and that of the Swiss delegation in M/54/I/II/III, under both of which the power to deliver technical opinions would be conferred upon the Boards of Appeal rather than the Examining Divisions.

133. The Finnish delegation supported the Swedish delegation.

134. The Netherlands delegation and the IIB representative questioned the wisdom of providing for technical opinions to be delivered by a judicial body.

135. The French delegation also opposed such a proposal.

136. The Committee then voted on the Swedish delegation's proposal, which failed to obtain a majority.

137. The Chairman noted that as the Swiss delegation's proposal had not been seconded by any other delegation, it could not be considered by the Committee.

138. The Committee went on to examine the German delegation's proposal (M/47/I/II/III, point 10) that competence to deliver technical opinions be conferred upon the members of the Examining Divisions rather than upon the collegiate body itself; the technical opinion could thus be drawn up by a single member.

139. The Netherlands delegation pointed out that this proposal would not resolve the difficulties in question should the Administrative Council avail itself of the option open to it under Article 31 (33), paragraph 1 (a) (3), of reducing the

composition of the Examining Divisions to a single technical examiner.

140. The Committee voted to reject the German delegation's proposal.

141. The Committee examined the Finnish delegation's proposal (M/12, point 3) reiterated in M/68/II that the phrase "against payment of an appropriate fee" be deleted.

142. The Norwegian and Swedish delegations supported this proposal.

143. The German, United Kingdom and Netherlands delegation's raised objections to the provision of technical opinions free of charge and stated that the costs should be borne by the applicants.

144. The Committee voted to reject the Finnish proposal.

145. The Committee concluded by agreeing to maintain Article 23 as it stood in the basic draft and referred it for final editing to the Drafting Committee.

### **Article 25 (27) – Chairmanship**

146. The Committee referred the United Kingdom delegation's proposal on paragraph 2, contained in M/40, point 9, to the Drafting Committee.

### **Article 26 (28) – Board**

#### **Paragraph 3**

147. In M/10, point 5, the United Kingdom delegation proposed that the sentence "This term of office shall not be renewable" be deleted. It felt that such a provision might result in the exclusion of a Board member of proven professional worth.

148. The Netherlands delegation, supported by the Danish delegation, felt, in contrast to the view expressed by the United Kingdom representative, that the deletion of the last sentence in paragraph 3 might have repercussions which certainly would not reflect the wishes of the United Kingdom delegation.

149. The United Kingdom delegation withdrew its proposal and the Committee agreed to refer Article 26 as it stood to the Drafting Committee.

### **Article 28 (30) – Attendance of observers**

#### **(a) Paragraph 1**

150. In view of the Committee's decision on the integration of the IIB into the EPO, paragraph 1 was deleted.

#### **(b) Paragraph 2 (1)**

151. The WIPO representative welcomed the Committee's adoption of this paragraph which provided for attendance by WIPO at meetings of the Administrative Council of the European Patent Organisation. He was convinced that co-operation between the two institutions would be most productive.

#### **(c) Paragraph 4 (3)**

152. The UNEPA delegation (M/62/I/II) proposed that the term "inter-governmental" be deleted.

153. The United Kingdom and Netherlands delegations objected to this proposal on the grounds that it would allow for participation by national organisations.

154. The ICC representative proposed that it be explicitly stipulated that inter-governmental and international nongov-

ernmental organisations exercising an activity of interest to the Organisation could be invited.

155. The United Kingdom and Netherlands delegations espoused this proposal which was accepted by the Committee.

### **Article 31 (33) – Competence of the Administrative Council in certain cases**

#### **(a) Paragraph 1 (a), (3)**

156. The Swedish delegation presented a proposal (M/53/I/II) whereby the introduction of Examining Divisions comprising a single examiner would be subject to a guarantee that the application could only be refused by a collegiate body.

157. The Austrian, Danish, Italian, Norwegian and Yugoslav delegations supported the Swedish proposal in the light of experience acquired using a similar system at national level and of the flexibility which such an arrangement would lend to the functioning of the Office.

158. The German delegation and the ICC representative opposed the Swedish proposal on the grounds that a decision in favour of the granting of a patent might affect the public interest just as much as a refusal. Moreover, bearing in mind that approximately 10,000 out of 40,000 applications per year were expected to be refused, acceptance of the Swedish delegation's proposal would not result in such staff savings as might be desired by the Administrative Council.

159. The United Kingdom delegation likewise opposed this proposal mainly for practical reasons.

160. The French delegation wondered if an intermediate solution might not be found by providing that the Chairman could entrust the examination of an application to a one-member or collegiate body depending on the nature of the case.

161. This proposal was supported by the Belgian delegation.

162. In conclusion, the Committee voted on the Swedish proposal which failed to obtain a majority.

163. The Committee then examined the Swiss delegation's proposal in M/54/I/II/III aimed at ensuring that the Administrative Council's decision to set up Examining Divisions comprising a single technical examiner could be rescinded if such action were warranted in the light of experience.

164. The Committee instructed the Drafting Committee to determine whether such elucidation – in its view implicit in the text – were necessary.

165. The Drafting Committee was also asked to find a wording which would cover the concern of certain delegations that it should be possible for the Administrative Council's decision to be limited to certain categories of application, e. g. clearly defined areas of technology.

#### **(b) Paragraph 3 (4)**

166. The Chairman opened the discussion on the Austrian delegation's proposal in M/78/I/II whereby the agreements which the President could be authorised to conclude on behalf of the Organisation would include agreements with documentation centres.

167. The Spanish, French, Italian and Swedish delegations declared their support for the Austrian proposal.

168. While supporting the Austrian proposal in principle, the German delegation was not convinced of the need for such an amendment. It was of the opinion that agreements with documentation centres such as INPADOC in Vienna would come under private law.

169. The United Kingdom delegation wondered whether the proposed wording excluded documentation services not set up



under agreements concluded with inter-governmental organisations. It also considered that an agreement with INPADOC would come under private law.

170. The Austrian delegation stated that its proposal would not result in the exclusion of other information centres.

171. The United Kingdom delegation felt that the present text of Article 10 together with Article 31 (30), paragraph 3, clearly defined the respective powers of the President and the Administrative Council to conclude agreements. If the proposal were accepted, the interpretation given to the scope of Article 10 would no longer be valid.

172. The Committee voted on the Austrian proposal in M/78/I/II which was accepted and referred to the Drafting Committee.

173. The United Kingdom delegation pointed out that in Article 28 (30) there was an explicit reference to an intergovernmental organisation; Article 31 (33), paragraph 3, should therefore be amended to include such a reference as well. The Article under examination dealt with agreements to be concluded by the President on behalf of the Organisation with international organisations. Obviously this was limited to fairly important agreements and excluded agreements with non-governmental organisations. The President of the Office would be competent to conclude such agreements under Article 10.

174. The German, French and Netherlands delegations shared the view expressed by the United Kingdom delegation.

175. The Committee accepted the United Kingdom proposal on Article 31 (33) and referred it to the Drafting Committee.

#### **Article 33 (35) – Voting rules**

176. The Committee referred this Article to the Drafting Committee and asked it to examine also the German delegation's proposals in M/11, point 4 and M/47, point 11.

#### **Article 143 – Special departments of the European Patent Office**

177. The Committee referred the proposal from the Member States of the European Communities in M/14 to the Drafting Committee for examination.

#### **Article 145 – Select committee of the Administrative Council**

##### **Paragraph 1**

178. The United Kingdom delegation feared that this proposal might be interpreted in conjunction with Article 30 (32) as meaning that the select committee would be considered as a body set up by the Administrative Council of the European Patent Organisation and proposed that this paragraph be supplemented by the words: "At the request of the group of Contracting States".

179. The Committee understood the concern expressed by the United Kingdom delegation and referred the provision in question to the Drafting Committee so that an unambiguous wording could be found.

#### **Article 159 (160) – Appointment of employees during a transitional period**

##### **Paragraph 2**

180. The Committee did not adopt a proposal from UNEPA (M/62/I/II, point 8) that the words "for example" be inserted before the words "national courts".

#### **Article 165 (166) – Accession**

##### **Paragraph 2 (j (b))**

181. The Yugoslav delegation proposed in M/77/II that the words "at the invitation of the Administrative Council" be deleted to enable States which did not take part in the preparatory work to accede freely to the Convention.

182. The Swiss delegation considered that the text of the basic draft provided for all the desired options and should not therefore be amended.

183. The Yugoslav delegation then withdrew its proposal.

184. The Committee referred Article 165 to the Drafting Committee and asked it to consider the drafting proposal submitted by the United Kingdom delegation in M/40, point 25.

#### **Article 167 (168) – Territorial field of application**

185. The Committee recorded its agreement on a proposal from the United Kingdom delegation in M/40, point 26, to the effect that the words "unless the State concerned has earlier ceased to be a party to the Convention, pursuant to Article 171 paragraph 4" be deleted.

#### **Article 173 (174) – Denunciation**

186. The Committee recorded its agreement on a proposal by the German delegation that the last part of the second sentence be deleted in line with the amendment to Article 167 paragraph 3.

#### **Article 176 (177) – Languages of the Convention**

##### **Paragraph 2**

187. The Committee established that this provision did not in any way detract from the right of States to prepare and publish translations of the Convention in their official languages. However, only translations approved by the Administrative Council could be considered official texts within the meaning of this Article.

#### **B. Article 166 (167) of the Convention**

##### **1. Positions of the Delegations**

1001. The Committee began by holding a general exchange of views on the problems raised by the provisions relating to reservations.

1002. The Spanish delegation pointed out that it had submitted a proposal for an amendment to Article 166 which was set out in M/29. The Spanish proposal was based on a position which had already been stated during the discussions of the Luxembourg Inter-Governmental Conference. The reason for the proposal was that some countries would be unable to agree immediately to the incorporation of certain rules of the Convention in their legal systems without seriously weakening the present structure of some sectors of industry whose economic development was not yet sufficiently advanced. It was for this reason that, when the Luxembourg Inter-Governmental Conference opted for the maximum solution, provision had had to be made for the entry of reservations in certain cases and Article 166 of the draft Convention had been drafted. However, from the outset, the Spanish delegation had maintained that the scope for reservations provided was inadequate. The Spanish Government felt that the provision should chiefly be extended in two respects: chemical products should be included and provision should be made for the possibility of extending the ten-year



period for reservations if the economic circumstances which had prompted the entry of reservations still obtained in the country in question after the period had expired.

The Spanish delegation maintained that reservations should be extended to cover chemical products for the same reasons as those which had led to reservations being provided for pharmaceutical and food products. It also pointed out that some highly developed countries had only very recently decided that chemical products as such could be patented. With regard to the possible extension of the ten-year time limit, the Spanish delegation considered that it was impossible to forecast future developments in the economic situation at present. It would be essential to have flexible time limits to avoid causing serious disruption in industries in the countries concerned. While the principle contained in the present paragraph 3 of Article 166 that any Contracting State that entered a reservation should withdraw it as soon as circumstances permitted should be maintained, the determination of what economic conditions permitted a reservation to be withdrawn should be left to the State in question.

1003. Recalling that it had submitted a proposal for a new wording of Article 166 in M/72/II, the Portuguese delegation stated that while it was true that the harmonisation of laws in the field of intellectual property and particularly in that of patents, constituted one of the most effective means of progress in international co-operation, it was no less a fact that this was a long-term undertaking which could only be accomplished in stages. The trend was one which had lately become world-wide but which progressed most effectively in the context of regional initiatives such as the European patent. However, if the progress which such achievements promised was actually to be accomplished, these initiatives, even on a regional scale, would have to be sufficiently flexible to enable all countries belonging to the regional group to participate even if their particular economic circumstances did not allow them to become fully integrated from the outset. At present, if Portugal were to participate in the European patent it would be giving all and receiving nothing in return. Accordingly, inclusion of the principle of progressive integration in the Convention would be the most appropriate solution for Portugal and other States in a similar situation which nonetheless wished to join the European Patent Organisation.

1004. The Yugoslav delegation supported the arguments put forward by the Spanish and Portuguese delegations and, as it had pointed out in M/77/II, it endorsed the principle underlying the Spanish Government's proposal submitted in M/29. Although the Yugoslav delegation would have preferred the Convention to be based on the minimum solution, it recognised that it was politically impossible to obtain a majority of the delegations in favour of that solution and therefore the arrangement proposed by the Spanish delegation was as far as the Yugoslav delegation was willing to go to accede to the Convention.

The Yugoslav delegation recalled that, in the highly developed countries, the chemical, pharmaceutical and foodstuff industries had existed and been expanding for over a century. In Europe at least, it had only been possible to grant patents in respect of processes: far from limiting industrial growth, this had considerably assisted it. With regard to the duration of the period for which reservations could be entered, the Yugoslav delegation considered it impossible to state at this stage whether, even in 20 or 25 years hence, industry in certain countries would be in a position to adopt and benefit from the protection for products provided under the Convention. Development would certainly not come to a standstill in the highly industrialised countries where the sectors of industry in question would advance at a much faster pace than their

counterparts in other countries such as Yugoslavia even under the most optimistic projections of industrial development. The Yugoslav delegation appreciated that those countries which had a particularly high level of industrial development should also wish to introduce protection for chemical, pharmaceutical and food products as such. They had reached a sufficiently high level of economic, historical and social development to do so. However, other countries such as Yugoslavia could not accept a system of protection which was too inflexible and, by the same token, unsuited to their level of industrial development. The problem was not just economic, it was also political, for the most powerful instrument of international politics at the present day was the ability to create new sources of wealth. Consequently, countries which had fallen behind for known historical reasons should not be put in a position of weakness from the outset.

1005. The Turkish delegation shared the concern expressed by the preceding delegations and supported the Spanish delegation's proposal in principle.

1006. The Greek delegation pointed out that its position on Article 166 had already been outlined during the general discussion in the plenary (see M/PR/K1, point 43). It had expressed its concern on this matter ever since the Luxembourg Inter-Governmental Conference had opted for the maximum solution. However, it had never been its wish to oppose the majority. It simply wanted reservation clauses to be included enabling States, whose economy was not yet ready for such integration, to contribute to the construction of the system. To this end, the reservation clauses would have to be sufficiently flexible and take into account the political aspect of the problem with regard to those States which had shown understanding for the more progressive solution agreed by the majority. In view of these political considerations, the Greek delegation hoped that the reservation clauses would be drafted along the lines suggested by the Spanish delegation.

1007. The delegation of the Chambers of Commerce and Industry considered that Article 166 represented a failure to understand the function of a patent system in a modern economy. Article 166 was mainly intended to take into account the position of certain European States which were less developed than the rest of Europe. It did not deny that the situation of these States called for special consideration. However, it was a moot point whether Article 166 was really in the interests of those States. None of the States which intended to take advantage of Article 166 had a good patent system. Because they had so far been unable to improve their system, these States wished to bar patentability in the most sensitive areas of their national economies and social structures. In actual fact, a good patent system would promote development in these sensitive areas. The Convention offered these States a good patent system but if Article 166 were invoked, the system would not apply to those areas where it would be most needed. It had been argued that the less developed countries feared the influence of industries in the highly industrialised countries and considered that they could organise and develop their creative potential before the establishment of an industrial base. This notion was unfounded since a good patent system first promoted industrial development and it was only at a later stage that creative potential could be developed. The delegation of the Chambers of Commerce and Industry recognised that it would not succeed in inducing the member delegations to change their position on an issue which had assumed political overtones but it urged that the scope of Article 166 be limited as far as possible in the very interests of those countries which wished to invoke it.

1008. The United Kingdom delegation maintained that it was impossible to find an ideal solution to the problem under

discussion and that a happy medium would have to be sought between the fullest possible harmonisation of laws governing patentability and the accession of the greatest possible number of States to the Convention. This middle way had been sought for years and Article 166 of the draft Convention was a compromise which ought to be acceptable. As regards the extension of the period for which reservations could be maintained, the United Kingdom delegation felt that any arrangement involving an indefinite period would not be acceptable since it would exempt a State indefinitely from complying with some requirements of the Convention. Even an extension of 10 years would be difficult to accept since, if a country really intended to align on the European system, the 10-year period at present provided for should be sufficient. A number of observer delegations had requested in the preparatory documents that this period be reduced to 5 years. This request, however, was too restrictive; it confirmed the balance achieved in the 10-year solution envisaged at present.

With regard to the scope of Article 166, the United Kingdom delegation pointed out that it had always been difficult for governments, for political and social reasons, to consider the advantages afforded by the patentability of pharmaceutical and food products. These reasons did not apply to chemical products. The United Kingdom delegation also felt that it would not be in a country's interests to exclude as large and important an industrial sector as chemical products as such from protection while the processes for manufacturing such products could be patented. Countries which, for social reasons, wished to protect the public both as regards the price of such products and manufacture of an adequate proportion of them by local undertakings could solve the problem by compulsory licencing.

Finally, the United Kingdom delegation felt that Article 166, as it stood, took sufficient account of the legitimate interests of those countries which were not yet able to fully accept the system established by the Convention.

1009. The EIRMA delegation broadly supported the arguments presented by the United Kingdom delegation. It wished to make a number of practical comments reflecting the viewpoint of research-based industries. Firstly it pointed out that it was not the level of industrialisation of certain countries which, historically speaking, had resulted in only the processes for the manufacture of chemical products and not the products themselves being patentable, but the wishes of the chemical industry itself. The reasons for such limitation no longer existed and it was difficult to argue that patents issued to foreign companies for chemical products could slow down the economic progress of less advanced countries. This was further underlined if account were taken of the ever increasing degree of industrial co-operation within Europe and the possibility of preventing abuses by means of compulsory licencing. The EIRMA delegation also pointed to the distortions of competition which would result from an extension of the scope of Article 166, particularly in view of the discriminatory effect which it would have on research-based industries, or at any rate, those located outside the territory of the Member States of the Communities. As regards the duration of the period for entering reservations, the EIRMA delegation recalled that the Diplomatic Conference held in Lisbon in 1958 under the Paris Union had unanimously adopted an arrangement which favoured the introduction of patentability for chemical products as such. This had resulted in revised legislation to that effect in various European States.

Finally, the EIRMA delegation stated that, while Article 166 should be retained, it should not be extended to chemical products and the period for reservations should be reduced to 5 years.

1010. The IAPIP delegation pointed out that IAPIP had always been in favour of the maximum solution and could not therefore approve the principle of reservations. Nonetheless, it agreed that, for political reasons, some reservations could be accepted, although it felt that those contained in Article 166, paragraph 2, sub-paragraphs (a) and (b), as they now stood should be considered an absolute maximum. The 10-year period should be reduced since reservations would create disparities in the effects of a European patent from one country to another.

The IAPIP delegation could not agree to the proposal submitted by the Portuguese delegation for gradual area-by-area implementation since it would transform the Convention into a jumble of national laws.

1011. The French delegation recalled that the purpose for which European patents were to be created was the harmonisation of laws leading to a unitary patent having the same effect in all the countries concerned and facilitating the establishment of an economic unit. The problem of Article 166 had been examined at length and its importance had been recognised with the result that the States which had participated in the Luxembourg Inter-Governmental Conference had each made concessions to arrive at a text which would take into account the various stages of economic development of the States parties to the Convention. Research was conducive to the acquisition of new wealth and protection was a strong incentive for research. Consequently, patents were obviously the most effective instrument of economic development and integration. The French delegation did not believe that the absence of patentability in certain sectors in any way aided the economic development of a country.

It did not feel that the various amendments to Article 166 submitted by some member delegations could be taken as a sound basis for discussion. In particular, the absence of a time limit for the duration of reservations or the option whereby States could themselves choose the moment for the withdrawal of reservations ran counter to the very principle of the patent system which the French delegation wished to have established. Finally, the French delegation concurred with the United Kingdom delegation in considering that a happy medium between the various aspirations would have to be found, while bearing in mind the realities of the situation.

1012. The UNEPA delegation endorsed the views of the French delegation. It noted that the governments of some States viewed the granting of patents in some areas, such as pharmaceutical, food and chemical products, as containing disadvantages for their economies. This concern was ill-founded. One of the requirements for industrial development in any particular country was the existence of patent protection in these specific sectors. Until such protection was granted research-based industries, whose role in economic development was evident, would not be established in that country. This applied to food and pharmaceutical products, but even more so to chemical products. The UNEPA delegation therefore ideally wished Article 166 to be deleted. However, it recognised that for political reasons, this could not be done; accordingly, it urged the member delegations to extend the duration of the period for reservations beyond 10 years and to have chemical products excluded from the Article in question.

1013. The UNICE delegation recalled that in preparatory document M/19, point 28, it had expressed the wish that the period during which reservations could be made should not exceed 5 years. However, in view of the turn which the discussion had taken, the UNICE delegation fully supported the statements made by the United Kingdom delegation. The UNICE delegation had given a great deal of thought to the advisability of deleting Article 166. It had however come to the conclusion that there were good reasons why certain countries

should be able to enter reservations. The UNICE delegation also considered that the reservations contained in Article 166 as it now stood were adequate and well-balanced in view of the objective sought.

1014. The CEIF delegation considered that the concern of some European countries was without foundation. The reference to the economic conditions which had influenced the patentability of chemical products in the past was no longer relevant. Although some countries were not as advanced as others in certain sectors of industry, their gross national product was nonetheless growing very rapidly. This was particularly true for Spain which at present had one of the highest rates of growth in the world. The development of international trade in general and of European trade in particular was extremely important for these countries and the other States of Europe. The introduction of reservations raised grave difficulties on the economic level. Today it was, in fact, very difficult to deliberately introduce technical barriers to trade in an area as vast as Europe, especially since this was an area where the importance of inventions was particularly great. Patentable inventions in chemicals accounted for between 35 and 40 % of all inventions: if exceptions to patentability were extended to cover all chemical products, the exclusion of these products as well as food and pharmaceutical products would account for nearly half of the patentable field. The cost of chemical research and development was extremely high, which explained the great number of patented chemical inventions; the cost of research and development in electricity, for example, amounted to 3 % of a company's turnover, in electronics to 5 %, in chemicals to 6 or 7 % and in pharmaceuticals to 10 to 20%. In developing countries, therefore, real industrial investment in research and development would only be encouraged if inventions could be patented in these fields in which the potential gains from research and development were the greatest.

On the basis of these considerations, the CEIF delegation considered that reservations should only be permitted for short, precisely defined periods of time for strictly delimited industrial sectors. CEIF's position on this issue was given in preparatory document M/22, point 10.

The CEIF delegation also commented on the effective length of the period during which reservations would be effective. If account were also taken of the time necessary for the Convention to enter into force after it had been signed, a period of 10 years would in practice mean 13 or 14 years from today. For those reasons CEIF requested that the period be reduced to 5 years.

1015. The Danish delegation supported the comments of the United Kingdom and French delegations. It also stressed the importance of the chemicals sector in patents. In Denmark, at least 40% of patent applications concerned chemicals.

The Danish delegation cited its own experience as regards the length of the reservation period. When discussions were taking place in the Council of Europe concerning the negotiation of the Strasbourg Convention on the unification of certain points of substantive law on patents for invention, Denmark had itself requested that reservations be permitted for pharmaceutical and food products and it could therefore understand the concern expressed by certain other participating countries. Ten years later, however, the situation had so changed that Danish industry and agriculture no longer had any need to make use of reservations: the period of 10 years provided for in Article 166 might therefore be considered to be a valid compromise between the reduction sought by a number of organisations and the extension advocated by certain delegations.

1016. The Italian delegation stated that, even if as a future

Contracting State of the Community Patent Convention it was not directly concerned by the possible use of reservations, it was closely acquainted with the anxieties and problems described by the Spanish, Portuguese, Yugoslav, Greek and Turkish delegations. Noting that the problem of reservations affected these five countries alone, the Italian delegation wondered whether an effort should not be made to take account of their requests in such a way that they too could accede to the Convention. It ought to be possible to find a compromise on the following two points: firstly, the scope of the Article should be extended to include chemical products as well. Secondly, as regards the duration of the period, a solution could be found by laying down periods of different lengths for different products. By way of example, a period longer than 10 years should be laid down for pharmaceutical products.

1017. The Swiss delegation supported the views expressed by the French and Danish delegations. It was particularly anxious to stress the close link between economic development, research and patent protection.

As regards the Italian delegation's suggestion, the Swiss delegation pointed out that, as it stood, Article 166 already represented a compromise. It could not accept that this text should now be regarded as an expression of the attitude of the more developed countries nor as the basis for a search for a further compromise.

In order to demonstrate the exaggeration in the fears of those States which sought an extension of the reservation, the Swiss delegation took an example from the Paris Convention. At the time of the first conference in 1883, it had been proposed that use of a patent in one country of the Union should be deemed equivalent to use of it in all countries of the Union. The Swiss delegation had been unable to accept such an arrangement because it feared that the Swiss economy would not be able to survive competition with German industry. Some years later, however, in 1898, Switzerland had signed an agreement with Germany which provided that use of a patent in one of the two countries was equivalent to use of it in the other country. Accepting competition from German industry had not had any untoward consequences for the development of Swiss industry but rather the contrary. The same considerations should hold today for the countries which sought an extension of reservations. All patent protection in the last resort encouraged research and thus led to economic growth.

1018. The CNIPA delegation drew attention to the problem of the drafting of claims for European patent applications if reservations affecting numerous fields were permitted. When drafting his claims, an applicant would have to take account of their possible invalidity in part or in whole in certain States. This would complicate considerably the work of the European Patent Office, the applicant and the applicant's patent agent.

The CNIPA delegation then expressed its views on Article 166 as such. In view of the fact that that Article was the result of lengthy negotiations, it wished that the present text would be allowed to stand.

1019. The COPRICE delegation restated its proposal, given in M/16, point 13, that the period be shortened from 10 to 5 years. It stressed that in any case COPRICE considered it important that the end of the period laid down in Article 166 should be fixed there definitively. The COPRICE delegation was also opposed to the extension of that Article to cover chemical products. Its reasons were the same as those expressed by the various observer delegations and by certain member delegations.

The COPRICE delegation also wished to stress, as EIRMA and CEIF had done, that the lack of protection for chemical or pharmaceutical products in certain highly industrialised

countries should be considered in the context of industrial development. The example of German legislation was particularly instructive in this respect. When German patent legislation entered into force, in the eighties of the last century, in the chemical field, there was a very large number of inventions of processes, while today the development of science and technology had produced a predominance of inventions in the field of the search for new substances. Countries which at present wished to develop their chemical industries should bear in mind the fact that the protection of products was a *sine qua non* of modern science and technology. As regards the economic aspects of the problem, the COPRICE delegation recalled that the rules applicable during the first half of this century had been designed for closed markets. This was no longer the situation today; countries which intended to take part in this Convention had to accept the existence of open markets. States which wanted to make use of reservations should therefore be guided by these economic considerations and eschew erroneous historical examples.

1020. The Netherlands delegation expressed its doubts as to the value of reservations, and considered that Article 166 already represented a compromise. The Portuguese proposal (M/72/II) was unacceptable and could not therefore serve as the basis for any fruitful discussion.

1021. The Belgian delegation supported the arguments of the United Kingdom and French delegations, opposing any extension of reservations.

1022. The Swedish delegation recalled Sweden's successful development of industry from almost nothing under the protection of a strict patent system, and stated that its position was very close to the principles expressed by the French and Danish delegations. If it appeared desirable to seek a new compromise which went further than the present version of Article 166, itself the result of long discussions, it might be found in a possible extension of the transitional period but certainly not in an extension of the technical fields covered by the reservations.

1023. The FEMIP delegation opposed the extension of the reservations to chemical products, and wanted the duration of the transitional period to be reduced from 10 years to 5.

1024. Although Austrian legislation only provided for the protection of processes, and not of products, in the chemical, pharmaceutical and food fields, the Austrian delegation agreed that products should be given protection. It was however sensible to the anxieties expressed by those States which were alarmed by the consequences of a provision to this effect and it therefore preferred to seek a compromise — the Swedish delegation's proposal was in the right direction — which would avoid the risk of eliminating a number of States from the Convention. The value of the Convention would in fact be a function of the number of States acceding: this fact should be borne in mind when a compromise was being sought.

1025. The German delegation considered that the discussion prompted by Article 166 presented a number of aspects. Firstly, the desire to create an extensive, secure and modern system of protection in Europe implied the existence of rules governing chemical and pharmaceutical products. Although a system of protection in this respect had been instituted only recently in Germany, it could not be claimed that no protection had been provided previously. In fact, apart from protection for processes, identical to that of certain countries which wished to amend Article 166, there had also been protection for products directly prepared by those processes, the law even going so far as to presume the identity of a similar product and the product prepared by means of the process in question. However, in spite of fears expressed in various quarters, protection of products in the chemical field had been introduced into the

legislation four years ago. The fears expressed had been shown to be unfounded; for that reason the German delegation wished to see such protection included in the Convention. Furthermore, it favoured the maximum solution which was a necessary condition for a secure, attractive European patent.

There was another principle on which the Convention was based: that of very extensive territorial protection. For that reason, the German delegation had accepted Article 166, which took into consideration the difficulties encountered by certain States in order to enable them to accede to the Convention. Although the German delegation thought that Article 166 was extremely important, it considered that its present extent should be sufficient. The period of 10 years provided for at present meant that in practice reservations might be made until 1985–1986. Although it was prepared to consider a compromise, always provided that it included a definite time limit, the German delegation thought that a period of 10 years was sufficient: it could not therefore agree to any extension. As regards the extension of the scope of reservations, the German delegation subscribed to the arguments put forward by the United Kingdom delegation. Such an extension would run counter to the Convention, the European patent, and even the interests of the countries which planned to make use of it. In conclusion, the German delegation stressed that Article 166 was a satisfactory compromise; its scope should not therefore be extended.

1026. The Luxembourg delegation supported the idea of a minimum compromise expressed by the Swedish and Austrian delegations.

1027. The Finnish delegation was opposed to any fundamental amendment of Article 166; it agreed, however, to discuss a possible extension of the transitional period while upholding the principle of a fixed time limit.

1028. After these observations had been made, the Yugoslav delegation stated its position and stressed that it did not exclude all patentability for chemical and pharmaceutical inventions. For political and economic reasons it had to refuse to grant protection for products, although it was not opposed to other means of protecting inventions, as its legislation provided.

1029. The Chairman concluded that it was possible to group all these reactions in three basic positions: firstly, there were those countries which had made or supported proposals for the extension of reservations; secondly, there were those countries which wished to retain Article 166 as it stood; thirdly, there were those countries which had rejected all amendments proposed so far for discussion, but which were prepared to seek a compromise on certain points. Noting that the Main Committee would inevitably reject the proposals made so far, the Chairman suggested that one delegation or a working party should draw up a new proposal likely to satisfy the Committee as a whole, along the lines of the observations which had provided some hope of a compromise.

1030. Approving the Chairman's suggestion, the Greek delegation requested that a working party be set up, and was supported in this request by the Portuguese delegation.

1031. The Netherlands delegation was not opposed to the drafting of new proposals by one or more delegations, although it hoped that this would not delay proceedings unduly; it was not, however, in favour of setting up a working party.

1032. In support of the Netherlands delegation's position the United Kingdom delegation said that there was no point in setting up a working party since, strictly speaking, there was no problem to be resolved as most delegations were in favour of the present version of Article 166. It was therefore up to the delegations which wished to effect amendments to attempt to rally sufficient support by drawing up new proposals.

1033. The German delegation agreed with the Netherlands delegation that there was no point in setting up a working party. On the other hand, it would be desirable for the delegations in favour of amending Article 166 to get together to draw up a solution which, in the light of the discussions, would be likely to gain the support of a vast majority. It might be possible to set up a working party on the basis of such a proposal.

1034. The IAPIP delegation pointed out that the compromise envisaged by the Swedish and Austrian delegations concerned only the extension of the period, and was against extending the scope of the reservations to include chemicals; it therefore suggested finding out whether a majority of the Main Committee was likely to agree to an extension of the period: if this were so, one delegation could draw up a concrete proposal along those lines.

1035. The French delegation expressed its agreement with the Netherlands, United Kingdom and German delegations: the setting up of a working party could only be considered on the basis of proposals which had first been amended by the delegations concerned.

1036. The Luxembourg delegation supported the procedural proposal made by the IAPIP delegation and suggested that the principle of a compromise on that basis be put up for discussion.

1037. In the absence of any concrete proposal, the Chairman did not think it would be useful to discuss the question of extension of the period. Since reservations had been expressed regarding the setting up of a working party, it would be preferable for the five countries which had made or supported proposals for amendments to Article 166 to meet to prepare an improved version of that Article along the lines of the amendments suggested by certain delegations. It would then be possible to take a decision on extension of the period on the basis of a concrete proposal.

## ***II. Additional Interpretation of Article 166***

### **A. Origination of rights**

1038. When discussions resumed, the French delegation drew attention to a problem already raised by the Netherlands delegation (M/93): i. e. whether, in a Contracting-State making use of the reservations provided for in Article 166, the rights corresponding to patents had not arisen or whether, on the contrary, these rights existed but their exercise was temporarily suspended. The first case, which corresponded to the Netherlands proposal, meant that no patent application filed during the reservation period would result in any protection for the products in the country concerned. Consequently, no protection could ever be afforded. In the second case, the right corresponding to a patent application filed during the reservation period could be exercised as soon as that period had ended, account also being taken of any acquired rights. In the face of this alternative, the period of ten years at present provided for in Article 166 could correspond either to an actual period of from ten to thirty years, or to an actual period of ten years. On the basis of these considerations, the French delegation stressed the need to determine which should be the case.

1039. The Chairman recalled the link between the French delegation's observations and the problem as set out by the Netherlands delegation in M/93. The Netherlands delegation confirmed this viewpoint and endorsed the explanations given by the French delegation, without specifying any further details. The Chairman pointed out that a choice had to be made

between the two hypotheses put forward as regards the legal significance of reservations.

1040. The Yugoslav delegation considered that the only valid interpretation was that no right could come into existence during the reservation period. This position was in line with that put forward by the delegation of the Federal Republic of Germany in M/116, paragraph 3.

1041. The Spanish delegation endorsed the opinion of the Yugoslav delegation and emphasised that this interpretation was in line with Article 166 as it now stood.

1042. As it had already specifically indicated in M/116, the German delegation held that no rights could come into existence in those countries which had entered reservations. As the present text was not explicit on the matter, the proposal in hand was an attempt at achieving a compromise acceptable to those States which wished the scope of reservations to be extended.

1043. The Portuguese delegation concurred with the statement made by the Yugoslav delegation, which had already been supported by the Spanish delegation.

1044. The Greek delegation recalled that the proposal which it had tabled jointly with the Turkish delegation (M/99) contained a paragraph along the lines of the proposal by the German delegation.

1045. The United Kingdom delegation was of the opinion that the principle underlying the proposal by the delegation of the Federal Republic of Germany could be accepted only if accompanied by a reasonably short reservation period. As the French delegation had pointed out, on the basis of the ten-year period as laid down at present, protection could in certain cases extend over a period of twenty years with result that in certain countries there would be a sort of cumulative effect which would extend over an even longer period. In this connection the United Kingdom delegation stressed that any final position adopted in the matter would have to take account of the other proposals which had already been put forward.

1046. The Netherlands delegation recalled that it had made a proposal on the matter (in M/93), whereby Article 166, paragraph 4, would be amplified. Moreover, it noted that the German delegation's proposal contained a paragraph 3 along the same lines: it should therefore be ascertained that there was no contradiction between paragraph 3 of the German proposal and Article 166, paragraph 4, which had become paragraph 6 of the proposal.

1047. The delegation of the Federal Republic of Germany felt that on the basis of its interpretation Article 166, paragraph 4, as it now stood did not conflict with its own proposal. The aim of paragraph 4 was to prevent any explicit intervention by the States concerned when the reservations were terminated: thus, all the reservations would automatically cease to have effect at the end of the transitional period, and there was no contradiction with M/116.

1048. Despite the additional information furnished by the German delegation, the Netherlands delegation pointed out that there still remained some doubt as to whether the two paragraphs in question were entirely consistent with one another and called for a slight amendment to Article 166, paragraph 4, to ensure that it did not restrict the scope of paragraph 3 of the German proposal. It felt that the matter could be referred to the Drafting Committee.

1049. The United Kingdom delegation was totally in agreement with the Netherlands delegation's view that slight amendments would have to be made to align paragraphs 3 and 6 of the German proposal. The appropriate amendments were, however, a matter for the Drafting Committee.

1050. In reply to a question put by the Belgian delegation, the Chairman confirmed that the ten-year period laid down in the

Article under discussion could not make allowance for priority rights based on a national application filed in the previous year. However, the Danish delegation thought that there was a case for taking the priority date into account.

1051. The Greek delegation pointed out that paragraph 5 of the proposal which it had submitted jointly with Turkey did in fact resolve the inconsistency shown to be inherent in the German proposal.

1052. The Chairman noted that as regards the problem originally raised by the French delegation, all the opinions expressed were in concordance with the principle underlying paragraph 3 of the German proposal, and noted that the Committee had unanimously agreed on the matter.

1053. The UNICE delegation drew the Committee's attention to a point which had previously been made by the French delegation. Proceedings to date had turned solely on reservations concerning patents granted in respect of products. A patent could contain a number of claims, some of which might relate to a product and some to a process. Reservations could not be applied in the latter case, with the result that certain amendments should be made to the wording to ensure that only claims relating to products — but not the entire patent — would be deemed not to have arisen.

1054. The CEIF delegation pointed to the consequences inherent in the opinion put forward by most of the Governmental delegations. The current interpretation of Article 166 would mean that for a period of at least 21 years, two sets of arrangements with extremely varied economic features would co-exist, the one affording normal protection and the other no protection at all. Allowing for the priority year, this period would be a minimum of twenty-one years and could extend to thirty-one years, always assuming that the reservation period did not exceed ten years. In view of the rapid changes in economic conditions, any attempt at legislation on the basis of such distant horizons could well prove to be rash. While it was necessary to take into account the interests of the less-developed countries, it would be unfortunate if such action were to favour firms from other countries which would not fail to exploit the possibilities afforded by the simultaneous existence of two different sets of protection arrangements. Accordingly, the CEIF delegation maintained its original position which favoured a cut in the reservation period. The correlation between industrial development and the existence of a solid system of protection had been clearly demonstrated, and it was therefore desirable that such countries adopt a system of this nature in order to move rapidly towards a satisfactory level of development.

1055. As to the legal aspects of the problem, the IAPIP delegation contended that a reservation did not negate the right conferred by a patent, but merely suspended use of the right which had arisen. This contention was upheld by two lines of argument. Firstly, a patent could be granted during the reservation period: this therefore meant that rights had indeed come into existence but that they had simply been suspended by certain countries for a given period. Secondly, as reservations left intact the system for the grant of patents and all resultant rights, the legal effect of reservations was merely to suspend the effects of such rights for a strictly limited period. The IAPIP delegation then turned to the problem of the rights of those persons who had begun putting an invention to use in countries which had entered reservations. It felt that a solution should be found which would respect any acquired rights and not infringe the fundamental principle that reservations were not to jeopardise any of the arrangements enshrined in the Convention.

1056. The CPCCI delegation held that it was essential that the protection arrangements currently under discussion be

aligned and put into practice as quickly as possible. Although it had called for the reservation period to be cut back to five years, it found it difficult to believe that the period could be as long as previously indicated.

1057. The Netherlands delegation pointed out that the concept of reservations had no intrinsic legal character and that its scope could only be defined on the basis of an interpretation of the texts in which it was set forth. A clear definition should therefore be given of the significance which was to be assigned to reservations.

1058. The Turkish delegation indicated that the original request for clarification made by the French delegation was in fact attributable to the ambiguous nature of paragraph 3 of the German delegation's proposal.

1059. The Yugoslav delegation pointed to the old saying of Roman law that "*quod ab initio non valet in tractu temporis non convalescet*". The same applied to reservations which, once withdrawn, could no longer give rise to any rights. As regards the economic aspects of the matter in hand, the Yugoslav delegation claimed that the arguments put forward to date had no basis in fact, inasmuch as protection in respect of processes would exist despite any reservations (accordingly, at the end of the reservation period, protection in respect of products, which did not exist in the countries concerned, could not enter into force. Protection in respect of processes would be valid *ab initio* and would continue to protect the proprietor of the patent from all forms of infringement).

1060. The CCI delegation wished to pay particular attention in the course of these discussions to the interests of developing countries. It was considerations such as these which had underpinned the CCI position as regards Article 166, despite the fact that the countries in question did not in every case hold to this point of view. The CCI delegation went on to point out that the national committees of its organisation had supported this viewpoint in the countries in question. In view of these considerations, any extension to Article 166 would be at variance with the real interests of these countries.

1061. The Chairman noted that none of the Governmental delegations subscribed to the opinion which had been generally supported by the interested circles and consequently declared the discussions closed; the withdrawal of reservations was to be interpreted as in paragraph 3 of the document submitted by the Federal Republic of Germany (M/116/II).

## **B. Revocation of independent claims in categories subject to reservations; maintenance of the patent**

1062. The UNEPA delegation called for clarification as regards Article 166, paragraph 2(a), which stipulated as a possible reservation that European Patents in respect of food and pharmaceutical products would "be ineffective or revocable". Together with Rule 30 which made provision for independent claims for a process, apparatus or means designed for carrying out the process or for a product, paragraph 2(a) meant that claims in the food and pharmaceutical areas would be ineffective or revocable. Consequently, the patent would not be revocable *in toto*. This point should in any case be clarified, and any necessary instructions should be given to the Drafting Committee.

1063. The United Kingdom delegation subscribed to the proposal outlined by the UNEPA delegation, whereby the words "Claims in" should be added to the beginning of paragraphs 2 and 3 of Article 166.

1064. The French delegation endorsed the UNEPA proposal on the grounds that only claims relating to a product were without effect in those categories subject to reservations.



### III. Discussion of the proposal

1065. The Chairman noted that the UNEPA proposal satisfied the necessary requirements and could therefore be considered by the Committee. He then listed the various proposals which had been made: proposals by Portugal (M/72), Spain (M/29), joint proposal by Greece and Turkey (M/99), proposals by Yugoslavia (M/102), UNEPA (M/83), the Federal Republic of Germany (M/116) and the Netherlands (M/93). These proposals would be discussed in the reverse order of their proximity to the current wording of Article 166. The Portuguese proposal, being the furthest removed, would be discussed first.

#### A. Proposal by Portugal

1066. The Portuguese delegation, which had taken part in the preparatory discussions with the aim of including Portugal in the European patent system, maintained its proposal which, without wishing to go to extremes, constituted a prerequisite for accession by Portugal. Furthermore, the principle of progressive agreement referred to in its proposal had been based on Article 161 of the Draft Convention. The Portuguese delegation asked the Committee to give an opinion in the light of these considerations before giving its support to any proposal along lines similar to those indicated by Portugal.

1067. The Netherlands delegation deplored the maintenance in its entirety of the Portuguese proposal, which the majority of the Committee had implicitly deemed unacceptable. It felt that the countries in question might well have done better to draw up a potentially acceptable joint proposal, and maintained its original views as regards the Portuguese proposal.

1068. The Chairman pointed out that proposals could not be put to the vote unless they were seconded by another delegation, whereupon the Spanish delegation lent its support to the Portuguese delegation. Following a question put by the Austrian delegation, the Chairman indicated a preference for a vote on the whole of the Portuguese proposal rather than on individual parts thereof.

1069. The Portuguese delegation once again outlined the rationale of its proposal. In view of the fact that a number of countries were unable to shoulder all the various obligations under the Convention immediately, the Portuguese proposal had been based on the principle of gradual integration: rather than reject all obligations or even permit their nationals to take advantage of the facilities offered by the European Patent Office, the countries concerned by this problem were ready to accept a certain number of constraints immediately. Quite irrespective of the examples and arguments adduced by certain delegations with reference to the interests of developing countries, the Portuguese delegation wondered whether the so-called compromise offered by Article 166 had been achieved to their advantage. Gradual integration would, on the contrary, facilitate total accession, as the development of the fields of technology covered by the Convention would induce calls for protection in other fields. The Portuguese delegation was sensible of the difficulty of the cause which it had pleaded, and concluded by emphasising the drawbacks which would ensue if a large number of countries did not accede to the Convention.

In reply to a question put by the Chairman, the Portuguese delegation evinced no objections to a vote on its proposal as a whole, while stressing the basic importance of paragraph 3 as contained therein.

1070. The Portuguese proposal was put to the vote on a proposal by the Chairman. The Committee voted against the Portuguese proposal by 11 votes to 6, with 3 abstentions.

1071. The Portuguese delegation continued to support the

principle of gradual integration, to which it attached special importance. The Chairman noted that the Portuguese proposal had been rejected as a whole, and declared the debate closed on this matter, which the Portuguese delegation was at liberty to bring before the Committee of the Whole. The Portuguese delegation stated that it wished to retain paragraph 3 of its proposal and was supported in this procedural decision by the Greek delegation.

#### B. Proposal by Spain

1072. The Chairman noted that on the basis of the order in which proposals were to be discussed, it was now the turn of the Spanish proposal, in view of the position adopted therein with regard to the reservation period. The Netherlands delegation pointed out that the Spanish proposal merely contained principles for amending Article 166, and was not framed in the form of actual amendments. The Spanish delegation considered that the principles underlying its statement were sufficiently explicit to constitute amendments and that the precise wording of the proposals could be referred to the Drafting Committee subsequently. The Chairman accepted this point on the grounds that it was not basically contrary to the Committee's working methods. In reply to a question put by the Netherlands delegation, which expressed concern as regards the effect which the rejection of the principles underlying the Spanish proposal would have on other proposals of similar scope relating to certain fields, the Chairman pointed out that no opinion expressed by the Committee in the form of a vote could affect any part of another proposal; while it might be feasible to have a vote paragraph by paragraph, such a procedure would, at least for the time being, only jeopardise the harmony of proposals.

1073. The United Kingdom delegation, speaking in support of the Chairman's opinion, considered that it was preferable to express an opinion on a proposal as a whole, on the grounds that if the proposal were rejected in its entirety, this did not automatically mean that the various parts contained in it had also been rejected. Each proposal was a coherent whole and it would therefore be ill-advised to express an opinion on one of these parts in isolation, as would be the case in taking a decision out of context solely on the principle of extending reservations to chemical products.

1074. The Yugoslav delegation recalled that it had supported the Spanish proposal as set out in M/67. Despite the slight amendments which had since been made to the document, the Yugoslav delegation wholly concurred with the Spanish proposal. The Portuguese and Turkish delegations subscribed to the same opinion, as did the Greek delegation despite the differences between its own proposal and that submitted by the Spanish delegation.

1075. Before the vote, the Spanish delegation briefly recalled the reasons underlying its proposal: the lengthening of the reservation period and the extension of reservations to take in chemical products was intended to allow accession to the Convention by countries which would otherwise be faced by considerable economic difficulties.

1076. In reply to the question put by the Netherlands delegation, the Spanish delegation pointed out that the reservation period given in its proposal was to be considered as indefinite and was to be left to the discretion of the Governments concerned.

1077. The Committee voted against the Spanish proposal by a majority of 11 to 6, with 3 abstentions. The Chairman then called upon the Committee to turn to the proposal submitted by Yugoslavia.



### C. Proposal by Yugoslavia

1078. The Yugoslav delegation stated that countries faced with the need for industrial development could not be expected to give up the efforts which they had made in this direction nor to surrender their sovereignty under a Convention the scope of which had been enlarged by the adoption of the maximum solution. It would take several decades and considerable sacrifices would have to be made before a level of development was achieved which would make it possible to accept an integrated patent system. As it stood at present, the Convention imposed a system for protecting chemical, pharmaceutical and food products on all the Contracting States which would have implications in all spheres of commercial life: both small- and large-scale industries, consumers and even social welfare services would be affected. Since it was no longer possible to question the adoption of the maximum solution with all the consequences this involved, the Yugoslav delegation had attempted to draw up a proposal (M/102) embodying a compromise which would extend to 15 years the period for which reservations could be made and enable them to cover chemical products as well. In acceding to a European patent system, Yugoslavia would encounter considerable difficulties in various fields, but it was its very desire to be party to such a system that made the Yugoslav delegation adopt so firm a position.

1079. The Spanish and Portuguese delegations supported the Yugoslav proposal. It was also seconded by the Greek delegation which pointed to the aim of achieving a compromise solution. The Turkish delegation shared this view.

1080. The Netherlands delegation considered that Article 166 as it stood was the outcome of a satisfactory compromise and that, although it might be possible to arrive at a better compromise, it considered the Yugoslav proposal to be unacceptable in view of the Committee's interpretation of paragraph 4.

1081. The Committee rejected the Yugoslav proposal (M/102) by 9 votes to 7, with 4 abstentions.

### D. Joint proposal by Greece and Turkey

1082. The Turkish delegation stated that whilst this proposal was not very satisfactory for Turkey, it constituted the minimum compromise acceptable to the five States which objected to Article 166 in its present form and would enable the common desire expressed in the Preamble to the Convention to be realised.

1083. The Greek delegation stated that the aim of the proposal which it had submitted jointly with the Turkish delegation was to achieve unanimity on a serious political problem whilst taking account of the difficulties previously described. The proposal was to extend the period for which reservations could be made in the fields at present specified to 15 years and to include the possibility of making reservations in respect of chemical products for a period of only 10 years. The last paragraph of the proposal embodied the Committee's interpretation on the question of the point at which rights arose and gave it a precise legal formulation. In contrast to the procedure for earlier proposals it would be possible to deal separately with the two major points of the joint proposal put forward by the Greek and Turkish delegations. If the first point concerning the introduction of two separate periods for reservations, depending on the product, was accepted, the Greek delegation thought that the second point could be merged with a paragraph in the German proposal which reflected an identical viewpoint.

1084. The Chairman asked the Committee whether the points contained in the joint proposal by Greece and Turkey

should be voted on separately, and pointed out that a negative vote on the proposal as a whole would not necessarily mean that all its individual parts would be rejected.

1085. On this question of procedure the Netherlands delegation considered that all proposals should be dealt with in the same manner.

1086. The Yugoslav delegation supported the view of the Netherlands delegation. It also expressed its astonishment at the advice given here and elsewhere to those countries which wished to amend Article 166; the content and tone of such advice were not usual at a Diplomatic Conference. The Yugoslav delegation furthermore considered that the criticism made of the patent system at present in force in Yugoslavia was the result of mistaken assumptions. It would be advising its Government to request official confirmation of the point of view put forward by one organisation. Yugoslavia had been one of the founder members of the Paris Union and in fact had a protection system identical to that of many other European countries.

1087. The Turkish delegation confirmed the point of view previously put forward by the Greek delegation. The Spanish delegation suggested that the German proposal be dealt with at the same time but the Greek delegation repeated its view on the procedure to be followed. This was that only after the proposal for a two-fold system of reservations had been dealt with might it be appropriate to link the German proposal (M/116) to the second point of the joint proposal submitted by Greece and Turkey (paragraph 5 of M/99).

1088. The Chairman suggested that any vote on the individual parts of the proposal should be preceded by a vote on the whole.

1089. Whilst agreeing to a vote on the proposal as a whole, the German delegation pointed out that it would have been able to accept certain provisions contained in proposals already submitted, in particular the principle of progressive integration embodied in paragraph 3 of the Portuguese proposal. However, each proposal should be considered as a balanced whole which might be destroyed by voting Article by Article. However, once agreement had been reached on a proposal, the provisions proposed by certain delegations should be re-examined.

1090. The Greek delegation clarified one procedural matter. If a proposal was voted upon as a whole it would be impossible to take certain provisions from it, but it should remain possible to add other parts of provisions to the text in question even if these were drawn from a proposal which had been rejected as a whole.

1091. The United Kingdom delegation suggested that the joint proposal by Greece and Turkey be voted on as a whole since certain provisions could always be taken over from it in the form of an amendment to the German proposal to be dealt with subsequently.

1092. The Greek delegation pointed out that the first provision in the proposal which it had submitted jointly with Turkey, for two periods for reservations, was not contained in the German proposal. The principle of this provision could therefore be taken over in the form of an amendment after the proposal had been voted upon.

1093. The Committee rejected the joint proposal submitted by the Greek and Turkish delegations by 11 to 8, with 1 abstention.

### E. Proposal by the Federal Republic of Germany

#### (a) discussions on the original proposal

1094. The delegation of the Federal Republic of Germany submitted its proposal (M/116) which was an overall

compromise intended to enable as many States as possible to accede to the Convention. The German delegation proposed to extend the reservations to chemical products. It also suggested that the burden of proof should be reversed in those fields in which the reservations applied, so as to facilitate the exercise of rights attached to a patent. It was true that Main Committee I had rejected a provision of this nature as a whole, but the circumstances of the discussion had now changed, since the reservations made it possible to exclude protection conferred in respect of a product. The German delegation therefore felt that, to compensate for the extension of reservations to cover chemical products, where a State availed itself of the reservations the burden of proof should be reversed in order to strengthen the rights attaching to a patent for a process; this would also ensure, indirectly, a certain degree of protection for products.

1095. The United Kingdom delegation supported the German proposal but wished it to be supplemented by the provisions contained in M/83 which would entail replacing the words "European patents" by "claims in European patents" in paragraph 2(a) of the present text of Article 166. Extending reservations to cover chemical products and prolonging their application beyond 10 years in respect of patents filed in the period during which the reservations had effect would enable States which so wished to progressively establish the protection system over a period of more 20 years. This constituted a very considerable amendment of the present text which went towards meeting the legitimate demands of certain countries. The United Kingdom delegation pointed out that the possibility of making reservations would not be confined solely to those countries which had expressly stated their need for them. Apart from the countries of the Common Market, which were bound by other commitments, other countries might also be interested in availing themselves of the reservations. The importance of the proposed provision would clearly be even greater for countries which intended to apply reservation clauses to chemical products. The United Kingdom delegation supported the German proposal, in the conviction that it satisfied the legitimate interests of the countries concerned.

1096. The Yugoslav delegation disagreed with the German proposal to reverse the burden of proof. Whilst Article 101 did refer to this principle, during the discussions on Article 67 and Rule 28 in Main Committee I the principle of reversal of the burden of proof had been twice rejected and it had been stressed that this was a matter for national legal procedures and not for the Convention. This principle should therefore not be re-introduced as regards processes. The Yugoslav delegation also felt that the reservations should only relate to claims concerning a product; processes would therefore continue to be protected and it would not be necessary for the burden of proof to be reversed.

1097. Whilst the Netherlands delegation had no objections to the German proposal, it wondered on what arguments it was based. The delegations of certain countries had claimed that only their proposal could make the Convention acceptable to them and it was therefore important to establish whether the provisions set forth in the German proposal would enable those countries to accede to the Convention.

1098. The Greek delegation pointed out that it reserved the right to request that the period for which reservations could be made be extended from 10 years to 15 years for pharmaceutical products. Furthermore, it found it rather difficult to understand how the principle of reversal of the burden of proof could now be re-discussed since it had already been expressly rejected. It would reject the German proposal as a whole if the burden of proof were reversed.

1099. The German delegation stated that its proposal was a

real attempt to arrive at a compromise with those States which had difficulty in accepting Article 166 in its present form. As the Netherlands delegation had pointed out, it was important to establish the views of the States concerned. If they did not intend to accept its proposal the German delegation might withdraw it after consulting the United Kingdom delegation, which had supported it.

1100. The Yugoslav delegation agreed that it could accept many of the provisions contained in the German proposal. However it considered the period for which reservations could be made to be too short. The aim of the exercise was not to haggle over time periods but to take account of each country's respective capabilities.

1101. The Portuguese delegation could support paragraph 1 of the German proposal but not paragraph 4. It might be possible to find a sound basis for a compromise by using paragraph 4 of the German proposal and paragraph 3 of the Portuguese proposal. The Portuguese delegation finally wondered whether the German proposal should be voted on as a whole, since it contained certain provisions which were unacceptable to the States mainly concerned.

1102. The Spanish delegation did not consider that the German proposal constituted an acceptable compromise formula and was surprised that the principle of reversal of the burden of proof, which had already been rejected, had been brought up again in a compromise proposal.

1103. The Greek delegation considered that certain provisions in the German proposal were dangerous. The implementation of reservations would mean that the Convention would not apply in a given sector and in a given State, and to introduce procedural elements into the Convention would therefore mean no certainty as to the principle of the legal enforceability of reservations, although it was essential to have this certainty. For similar reasons the Greek delegation could not support the proposal by UNEPA and suggested that the German delegation take out the principle of reversal of the burden of proof from its proposal.

1104. The Turkish delegation shared the Greek delegation's misgivings, and subscribed to its suggestions concerning paragraph 4 of the German proposal.

1105. The Netherlands delegation noted that countries intending to avail themselves of reservations could accept the German proposal, apart from paragraph 4, as a basis for compromise. It asked the Greek delegation to restate its position on the UNEPA proposal. The Greek delegation replied that it wanted that proposal to be withdrawn.

1106. The Yugoslav delegation, whilst accepting the German proposal as a basis for discussion, wished the period for which reservations could be made to be extended beyond 10 years and supported the views of those delegations which objected to paragraph 4 of the German proposal.

1107. The German delegation noted that the arguments concerning its proposal centred mainly on paragraph 4, which dealt with the reversal of the burden of proof. The circumstances under which Main Committee I had rejected this principle had changed considerably now that reservations were to be extended to cover chemical products, and the decision of Main Committee I could not therefore be binding on the present discussion. The problem of reservations was crucial in the context of the original aims. When preparatory work had been split, further to a proposal by the French Government, with the aim of drawing up two Conventions, it had been intended that the first should, in the context of a minimum solution and in order to obtain the support of the greatest possible number of countries, provide for the setting up of a uniform procedure up to the grant of the European patent with national law applying thereafter. Under such a system

reservations would not be required. However, the transition during the Luxembourg negotiations from the minimum solution to the maximum solution had made it necessary to provide for the possibility of reservations on the part of those States which could not accept the latter solution. As regards legal procedure, paragraph 4 of the German proposal in practice incorporated certain aspects of the maximum solution in the minimum solution, which was what the reservations in fact were.

The aim of the German proposal was to establish a point of connection between those States which supported the maximum solution and those which could not fully do so. However, if the latter could not support the German proposal, its basic objectives, which were in the spirit of the First Convention, would not be realised. There would then remain two possibilities: either the German proposal would have to be amended in order to achieve the aim set or the reservation provided for under sub-paragraph (a) would have to be deleted so that options would not be granted to States which had not expressed the need for them. Faced with this alternative the German delegation would, in a final compromise effort, agree to withdraw paragraph 4 of its proposal in the hope that those States which had expressed anxieties on that paragraph would sign the Convention and do all in their power to ratify it. The German delegation was well aware of the importance which the observer delegations attached to this paragraph but pointed out that given the choice between a certain number of States not signing the Convention or abandoning the principle of reversal of the burden of proof, the latter was the lesser evil. Although it had not envisaged the possibility of extending the period laid down in Article 166, the German delegation was in favour of this period being extended by the Administrative Council from 10 to 15 years. However, the inclusion of the original suggestion by the Netherlands delegation in paragraph 3 of the German proposal would already in practice constitute a compromise, since all the periods concerned would thereby be extended up to 13 years and even longer in the case of patents granted only after 5, 6 or 7 years. The German delegation supported the UNEPA proposal to the effect that a patent should not lose all effect in those spheres not covered by the reservations, in accordance with the original principles and intentions underlying reservations. In conclusion the German delegation stated that it would withdraw paragraph 4 of its proposal in order to enable as many States as possible to accede to the Convention.

1108. In view of the importance of the German delegation's statement, the Chairman invited the other delegations to express their views.

1109. The Greek delegation thanked the German delegation for its attempts to reach a compromise. However, it wished the Administrative Council to be empowered to extend the period for which reservations could be made from 10 to 15 years if the (as yet unforeseeable) needs or interests of a State so required.

Commenting on the UNEPA proposal, the Greek delegation re-iterated its opposition to the reservation clauses containing provisions which interfered with procedural matters.

1110. The United Kingdom delegation fully supported the statement by the German delegation. It hoped that a period of ten years would be sufficient to enable changes to be made in the laws of the countries concerned, and understood the need for paragraph 4 to be withdrawn, although it was essentially justified. However, as regards the extension of the periods, it pointed out that the joint proposal by Greece and Turkey (M/99) had provided for an extension from ten to fifteen years in only the case of chemical products, and stressed the important concession made in paragraph 3 of the German proposal. In contrast to the original text, which provided that

rights should take effect after the ten years of the reservation period, this paragraph provided that reservations should be effective throughout the currency of the patents concerned, which meant that in addition to an actual period of thirteen years, there would be a period the cumulative effect of which might extend beyond the next twenty years. The United Kingdom delegation could therefore not accept the possibility of a further extension of five years on top of a double extension of the periods.

1111. The Yugoslav delegation was grateful for the German delegation's willingness to arrive at a compromise. It would be all the more prepared to agree to paragraph 4 being withdrawn since Yugoslav laws already contained a provision of this nature. It would have liked to accept a patent system subject to no reservations if the economic and social development of Yugoslavia had placed it in a position to do so. However this problem, which had been raised at the beginning of the Conference, led it to fear that the reservation period was too short. Whilst the Greek proposal empowered the Administrative Council to grant an extension of five years or more at the justified request of a State, it also enabled each State concerned to withdraw its reservations as soon as circumstances permitted. The Yugoslav delegation stated that the very fact that it had taken part in the preparatory work of the Conference was an indication of Yugoslavia's desire to establish a sophisticated patent system similar to that of other European States and asked the Conference to consider, for the reasons already stated, the possibility of extending the reservation periods by 5 years.

1112. The Portuguese delegation supported the German delegation's statement and, in a similar spirit of compromise, wished the principle of progressive participation in the Convention contained in paragraph 3 of its proposal to be combined with the German proposal in its present form.

1113. The French delegation also concurred with the German delegation's statement. It suggested that the real scope of the reservation periods be examined in greater detail in order to establish whether the Administrative Council should be empowered to grant an additional extension of 5 years. In conclusion it drew attention to the effect of reservations on patents covering processes or products, a problem which the UNEPA proposal, taken up by the United Kingdom delegation, was intended to resolve.

1114. The Greek delegation stated that the Administrative Council's power to extend the reservation period should be strictly limited to five years and should be applied only in cases of *force majeure*. In this way, when the time came for reservations to be withdrawn, there would still be a way out for any State encountering difficulties in a particular sector, such as pharmaceutical products.

1115. The Spanish delegation thanked the German delegation for its attempts to achieve a compromise and stated that it could in principle accept the German proposal, although it had not received any specific instructions enabling it to give a formal decision.

1116. The German delegation noted that the five States concerned still wished the reservation period to be extended beyond ten years but that its proposal did not provide for such an extension. On the optimistic assumption that the Convention would be implemented in 1976, the first patent for a chemical or a pharmaceutical product would enter into force at the earliest in 1989 for those States which wished to make reservations. This would give a total period of sixteen years within which the States concerned should be able to make adjustments to their economic systems and industrial protection laws. Progress made by Yugoslavia during the last sixteen years gave grounds for optimism on this point. However, if certain States which

made reservations still experienced serious difficulties in 1989, they could denounce the Convention in accordance with Article 173.

The German delegation was not totally opposed to the Portuguese proposal for progressive integration (M/72, paragraph 3) and could agree to discuss it subject to three conditions: firstly, accession by stages would have to take place within the time limits at present laid down; secondly, the stages of accession must not be decided arbitrarily but would have to be determined in advance on the basis of the International Patent Classification, which was divided into eight fields, meaning that there would presumably be eight stages; thirdly, a choice would have to be made between progressive accession as proposed by the Portuguese delegation and the application of the reservations at present provided for, since these two possibilities could not be combined. If these conditions were accepted the German delegation would be prepared to discuss the Portuguese proposal.

***(b) discussions on the amended German proposal and on the proposed amendments submitted***

1117. The United Kingdom delegation was broadly in agreement with the German delegation's statement. A compromise must be found since it considered that the essential point was to persuade and enable those countries which wished to make reservations to sign the Convention, failing which the present discussions would be a waste of time.

1118. The UNICE delegation considered that the wording of the original draft was a reasonable compromise and was prepared to support the German proposal, although it regretted the sacrifices which had had to be made in order to arrive at a consensus. It well understood the adjustment difficulties which would be encountered by countries which intended to avail themselves of reservations but considered that two of the conditions laid down by them were unacceptable, namely extension of the reservation period beyond the ten-year period and extension of their scope beyond chemical and pharmaceutical products. If these two conditions were accepted, the European system might well turn out to be less sophisticated than present national systems.

1119. The CEIF delegation supported the UNICE statement and stressed the harmful effects on markets of an interpretation whereby no rights could arise in the countries which had made reservations.

1120. Taking up the arguments put forward by the two preceding delegations, the EIRMA delegation re-affirmed its desire to reach a balanced compromise enabling the greatest possible number of States to accede to the Convention.

1121. The delegation from the Council of Europe felt that the term "product" could be interpreted in various ways in the field of chemistry and asked whether in practice chemicals should include all mixtures.

1122. The Chairman noted that the German proposal, minus paragraph 4, seemed to be an appropriate basis for a satisfactory compromise. He stated that there were still three problems to be settled: the principle of progressive accession, the periods for reservations and, finally, the UNEPA proposal. Agreeing with the German delegation's statement, the Portuguese delegation announced that it would submit a further proposal for introducing the principle of progressive accession.

***(i) Principle of progressive accession***

1123. The German delegation was prepared to adopt this proposal, provided that it fell within the stipulated ten-year

period. This solution, which deserved careful examination, would enable areas to be extended in step with the progressive opening of the Office.

1124. The French delegation thought that, leaving aside the problems of time limits and procedure, the difference between the minimum and maximum positions lay in the extent of the range of patentability and wondered whether the extension of areas of technology in the provisions covering reservations might not jeopardise the minimum solution.

1125. The United Kingdom delegation noted that the Portuguese proposal was wide-ranging and stressed that it would only be possible to consider it in the context of the stipulated ten-year period. It stated that the proposal raised a problem in connection with voting rights: it was hardly possible to imagine that a State applying the protection provided for in the Convention to an extremely limited field would be allowed to vote. Furthermore, accession to the Convention involved financial obligations: it seemed unlikely that a State only applying the Convention to a limited field would be prepared to accept both the financial obligations and the restrictions of its right to vote. This proposal therefore raised complex problems which should be studied in greater depth; such a study would be a waste of time, however, if Portugal, which seemed to be the only country concerned, did not then accede to the Convention.

1126. The WIPO delegation noted that the Portuguese proposal, in its new version, provided a general solution to the problem of reservations which meant that it would no longer be necessary to mention in Article 166, paragraph 2, the fields in which reservations could be made. If the approach proposed by the Portuguese delegation were adopted, Article 166, paragraph 2, would be superfluous.

1127. Recalling that its proposal was an amendment to the German delegation's proposal accepted by the latter, the Portuguese delegation stated that limiting the principle of progressive extension to a fixed period would deprive its original proposal of much of its substance. It seemed impossible to properly define such a period: a period of ten years might just as well be too long as too short, it therefore urged acceptance of the principle of progressive extension without any time limit.

1128. The Netherlands delegation found it hard to accept this proposal which, in its view, departed too much from the original intentions with regard to reservations.

1129. The United Kingdom delegation also found the Portuguese proposal hard to accept: it was difficult to see how a country availing itself of such reservations could still remain a member of the Convention. If the Portuguese delegation's text were adopted, it would have to be studied in detail, particularly with regard to the wording: it would be particularly important to lay down an obligation to give prior notice of the exact extent of the fields in respect of which reservations were made and of the extension timetable planned by a country since otherwise applicants would be placed in an impossible situation.

1130. After several points on procedural matters, the Chairman asked the Committee to take a decision on the Portuguese proposal. First of all a vote was taken on the proposal without the words between square brackets "for a period of ten years from entry into force of this Convention"; the Committee voted against the Portuguese proposal by 13 votes to 6 with no abstentions. The Committee then voted on the same text this time with the words between square brackets.

The Committee rejected the Portuguese proposal to introduce into the provisions governing reservations the principle of progressive extension of the field of patentability by 9 votes to 6, with 5 abstentions.

## ***(ii) Extension of the period for reservations***

1131. The United Kingdom delegation said that it would be unfortunate if a State having made the necessary efforts to adjust was faced with great difficulties after the ten year period. In such circumstances, it would be desirable for the Administrative Council to have the power to extend this period for a strictly limited time in the light of the situation: for this purpose two years and not five should be sufficient. Moreover, the United Kingdom delegation considered that the grounds on which such a decision could be based should also be specified: it was particularly important that the country making the request should prove that it had undertaken the internal adaptation procedures necessary to enable it to withdraw the reservations. Whilst the United Kingdom delegation would prefer a maximum extension of two years, it was prepared to accept a longer period or to agree that the matter be left to the Administrative Council. The Netherlands delegation expressed a similar view.

1132. The French delegation was prepared to agree to reservation periods being extended pursuant to a decision of the Administrative Council taken by a qualified majority, provided that the extension could not be more than five years. The German and Italian delegations took the same position.

1133. The Yugoslav delegation favoured the possibility of extension for a maximum of five years and felt that the country in question should be obliged to give reasons for its request. The Yugoslav delegation considered that the possibility of denouncing the Convention after the ten-year period, a point put forward by the German delegation to oppose any extension of this period, in fact argued in favour of extension in exceptional cases, since it would be a serious matter to oblige a State which had made every effort to make the necessary adaptations to withdraw from the Convention. It was therefore desirable that the Administrative Council should have the possibility of extending the period for reservations upon receipt of a reasoned request.

1134. The Netherlands delegation stressed the need to set a maximum limit for any extensions of the period for reservations which the Administrative Council might grant.

1135. After this initial exchange of views, the Chairman summarised the views expressed as follows: firstly, there was a consensus in favour of a five-year period of extension. The request for extension should be made, as the Greek delegation had suggested, on year before expiry of the ten-year period; secondly, there was the problem of the grounds on which such a request could be made: most of the delegations thought that the request should be accompanied by clear reasons; thirdly, with regard to the way in which the Administrative Council should take its decision, it seemed that, in view of the importance of the matter, the Committee might be in favour of a vote by qualified majority.

1136. The Committee was asked to vote on the French delegation's proposal, that an exceptional extension of the period for reservations for a maximum of five years should be granted by the Administrative Council, acting by a qualified majority, i.e. a 3/4 majority. The Committee adopted this proposal by 11 votes to 4, with 3 abstentions.

1137. The German delegation stated that the matter of the reasons for the request for extension of the period should be properly clarified since the Committee had the choice between two positions: it could either be stipulated that valid reasons must be given, without however specifying such reasons, or, more precisely, a country making a request could be required to supply proof of the adaptations it had made so that reservations could be finally withdrawn at some later date.

1138. The French and Greek delegations stated that these

positions were not at all incompatible, the main point being that the country making the request should supply information in support of its case. The Yugoslav delegation supported this view, considering that the request should simply be accompanied by reasons.

The French delegation proposed that the Committee take a decision on the following text which embodied this position: "The request for an extension, for a period not exceeding five years, must be accompanied by evidence that the State making the request is unable to withdraw the reservations, either in whole or in part, at the end of the ten-year period; the request must be submitted one year before the end of the ten-year period." The Swedish delegation supported this proposal, referred to under point 1131 considering that the United Kingdom delegation's proposal lacked clarity.

1139. The United Kingdom delegation stated that its proposal was more precise on this point, as the German delegation had pointed out; it therefore wished the Committee to express its views on its content.

1140. The Swiss delegation stated that the choice would be clearer if the countries which intended to make use of reservations could undertake to sign the Convention in the event of adoption of one of these two proposals.

1141. The German delegation explained that the United Kingdom proposal was in fact included in the French proposal and that a vote should therefore first be taken on the latter proposal. The Netherlands delegation expressed a similar view.

1142. Subject to subsequent drafting amendments, the French proposal was put to the vote. The Committee approved the proposal by 16 votes to 0, with 3 abstentions.

1143. The German delegation raised a point concerning the period within which the request for extension of the reservations could be made. If the request was only made one year before the end of the period for reservations, the State concerned would not have time to denounce the Convention should its request be refused, since denunciation was subject to one year's notice. The German delegation would prefer the request for extension to be made two years before the end of the normal period for reservations, and proposed that this matter should be examined by the Drafting Committee.

## ***(iii) UNEPA proposal (see M/83/II)***

1144. The United Kingdom delegation re-iterated its support for the UNEPA proposal, while acknowledging the difficulties it could cause for some delegations. The principle of the proposal was in strict accordance with the requirements of countries used to the system of claims and examination; on the other hand it was obvious that other countries might meet with certain difficulties. In fact, the UNEPA proposal did not make any change, it merely clarified the problem of reservations with regard to patents containing differing claims: only claims relating to the fields covered by the reservations would be ineffective. The United Kingdom delegation pointed out that it would accept changes in wording and repeated its desire for clarification of the principle that a patent could not be revoked when a minor portion of its claims related to fields covered by reservations. The aim was not to interfere with procedure, but to limit the scope of reservations to the fields for which they were stipulated.

1145. The Greek delegation repeated its opposition to any procedural interference in the provisions concerning reservations; it could not therefore support the UNEPA proposal submitted by the United Kingdom delegation.

1146. The Netherlands delegation queried the Greek delegation's objection. Rejection of the proposal would mean calling into question a provision of the Convention which

allowed the possibility of grouping together, in one and the same patent application, claims concerning respectively a product and a process: in States making reservations, such a patent would be revoked, not only for the product but also for the process. The UNEPA proposal was aimed at avoiding such a situation, and the Netherlands delegation was surprised that anyone should object to it.

1147. The Spanish delegation, considering that only claims covered by the reservations could be revoked and not the whole patent, supported the UNEPA proposal.

1148. The delegation of the Chambers of Commerce and Industry raised a matter linked with the problem dealt with in the UNEPA proposal; the proposed amendment to paragraph (a) excluded the protection of processes from the reservations; however, the inventive value of a process generally lay in the end product. There was therefore the question of whether a court in a State making reservations might not decide to revoke claims relating to a chemical process on the grounds that the inventive step lay basically in the product and that the process as such did not have any particular inventive merit. It was necessary for this question to be settled in order to determine the full implications of extending reservations to chemicals. The Chairman stated that this point could not be cleared up until the wording had been finalised.

1149. The Greek delegation stated that it did not object to the basic principle of the UNEPA proposal; however, for the reasons already stated, this principle should not be embodied in the provisions on reservations: any problems in this area should clearly be dealt with by national law.

The Greek delegation considered that the phrasing of the original version of Article 166, particularly the words "as such" was adequate. In order to reach a compromise it would be possible to supplement or clarify the meaning of these words in a statement.

1150. The Yugoslav delegation considered that the essence of the problem was clear. It was satisfied with the UNEPA proposal and could therefore support it.

1151. The Chairman noted that the Committee was unanimously agreed on the principle under discussion and therefore proposed that the Drafting Committee be instructed to find an acceptable wording to be included either in the Article itself or in a statement of interpretation.

1152. The United Kingdom delegation, supported by the Netherlands delegation, wished the Committee to decide on the amended version of the German proposal, in order to establish the attitudes of the countries concerned by the reservations to the Article in its amended form.

1153. The Committee unanimously approved the amended proposal submitted by the Federal Republic of Germany.

#### **IV. Examination of the results of the Drafting Committee**

1154. The Greek delegation proposed that a drafting amendment be made to the French text: the words "dans la mesure où" should be replaced by "dès lors que" and "indépendamment de ..." by "sans tenir compte de leur procédé de fabrication" in order to align the text on the English version. The Chairman stated that this proposal would be forwarded to the General Drafting Committee and, at the suggestion of the United Kingdom delegation, he proposed that discussions should be based on the English texts of this Article.

1155. The CEIF delegation drew the Committee's attention to an omission in the present wording of the Article. Rule 30, sub-paragraph (a) stipulated that one and the same application

could include in addition to an independent claim for a product, an independent claim for a process and an independent claim for a use of the product. This last possibility should therefore be referred to in Article 166 by adding the following "... irrespective of their process of manufacture or of *their use*".

1156. The Greek delegation felt that this point was more than a simple matter of drafting since the distinction referred to might not exist under national law. It therefore requested an opportunity to consider the inclusion of this concept properly before expressing its opinion. The Spanish delegation expressed a similar view.

1157. The Yugoslav delegation considered that the present text of paragraph 2 (a) was not in conflict with Rule 30. On the contrary there was a danger that inclusion of the provision of Rule 30, which was referred to in Article 166, might cause misunderstandings. The Committee's position was clear: reservations were to be confined to chemical, pharmaceutical or food products *as such*. In order to avoid any ambiguity it would therefore be simpler to delete the words "irrespective of their process of manufacture" from the present draft.

1158. The Swiss delegation explained that the Drafting Committee had made an involuntary omission and that Article 166 should mention all the possibilities offered by Rule 30, subparagraph (a). The attention of the General Drafting Committee should be drawn to this drafting omission. The Netherlands delegation expressed a similar view and stressed that there was no need to re-open discussions on this point.

1159. The United Kingdom delegation pointed out that the Committee had taken a clear decision on this question: only claims relating to a product could be covered by reservations and in all other cases Article 166 would not apply. For the sake of clarity it might well be preferable to add the words "or of their use" but it was highly unlikely that a State would refuse to grant protection for a means of using a product on the basis of paragraph 2 (a). In any event the point under discussion was strictly a drafting matter. The French delegation shared the opinion of the United Kingdom delegation.

1160. The German delegation considered that the present text was not incorrect but that the drafting should be improved. It also pointed out that the Committee's previous decision on this point was perfectly clear: an independent claim for a use of a chemical product could not be covered by reservations; unless the use was a pharmaceutical one and the claim therefore equalled a claim for a pharmaceutical product.

1161. The Netherlands delegation considered that it would be preferable for this problem to be referred to the General Drafting Committee which should at the same time be informed of the Committee's wishes as regards the substance of the matter, which were perfectly clear. The General Drafting Committee could then either supplement the text as proposed by the CEIF delegation, or delete the words "irrespective of their process of manufacture", or make a more fundamental re-draft of this Article.

The Greek delegation supported this point of view and wished the scope of the reservations to be strictly defined.

1162. The Chairman noted the consensus which had emerged in the Committee and stated that the Article would be forwarded to the General Drafting Committee which would quite simply be instructed that reservations should only relate to products as such.

1163. The EIRMA delegation suggested that paragraph 6 of the French version should begin with the words "Sans préjudice des dispositions" rather than "Réserve faite", in order to avoid any confusion.

1164. The German delegation considered that the German version should make it clearer that the extension of the



reservation period provided for in paragraph 3 applied to Contracting States individually.

### **C. Draft Implementing Regulations to the Convention Establishing a European System for the Grant of Patents (M/2)**

#### ***Rule 8 – Patent classification***

2001. The Chairman drew the Committee's attention to the proposed amendment submitted by the German delegation in M/47/I/II/III, point 21.

2002. The WIPO representative welcomed the proposed text. However, he pointed out that since the Strasbourg Agreement of 1971 was not yet in force, provision should be made for the international classification based on the European Convention of 1954 to apply in the meantime.

2003. The Council of Europe representative supported the WIPO representative's proposal.

2004. The Committee was in favour of the adoption of the proposed amendment and referred it to the Drafting Committee.

#### ***Rule 9 – Allocation of duties to the departments of the first instance***

2005. The Chairman drew the Committee's attention to the proposed amendment from the German delegation in M/47/I/II/III, point 22, which would add the Legal Division to the departments mentioned in paragraph 2; he pointed out that this was a logical consequence of the amendment to Article 15.

2006. The Committee agreed to this proposal and referred it to the Drafting Committee.

2007. The Chairman noted that the Swiss delegation's proposal in M/54/I/II/III that the last sentence in Article 23 (25) be replaced by a new paragraph 5 in Rule 9 should be considered rejected on account of the Committee's decision to retain Article 23 (25) as it stood.

### **D. Draft Protocol on the Centralisation of the European Patent System and on its Introduction (Protocol on Centralisation)**

3001. The Committee discussed the Draft Protocol on the Centralisation of the European Patent System and on its Introduction (M/5), together with the Declaration concerning Section VI of the Protocol and the Recommendation on Documentation for Patent Search (M/6).

#### ***Section I of the Protocol on Centralisation***

3002. The Committee discussed Section I of the Protocol on Centralisation, on which the following proposals for amendments had been submitted: M/38 (by the Italian delegation) M/47 (by the German delegation), M/95/II (by the United Kingdom delegation) and M/97/II (by the Turkish delegation). The Committee agreed to discuss at its meeting on the same day the proposal by the Turkish delegation which had been circulated on 18 September.

3003. The French delegation stated its agreement in principle with the United Kingdom proposal in M/95/II, but pointed out that this proposal referred to denunciation of the Hague Agreement. Provision was made for denunciation both in the 1947 and 1961 Agreements, but the conditions governing it differed in that, whilst the 1961 Agreement provided for

denunciation to take effect on 31 December of the second year following that in which it was notified, the 1947 Agreement provided for denunciation to take effect one year after notification had been received by a Contracting State. The French delegation therefore proposed a broader wording, namely "terminate the Hague Agreement". Denunciation was primarily intended to cover cases where one or more Contracting States intended to withdraw from an agreement. However, the Contracting States to the Hague Agreement were agreed that it should be terminated. The French delegation also pointed out that the expression used in the second sub-paragraph of the United Kingdom proposal "... the tasks at present incumbent upon the International Patent Institute ..." should be clarified particularly as concerned the operative date.

3004. The Netherlands delegation considered that the United Kingdom proposal only involved drafting changes and could therefore support it unreservedly, just as it could support the additional amendments sought by the French delegation. It also proposed that after the date of conclusion of the Hague Agreement (1947) reference should be made to the revision of the Agreement in 1961.

3005. The Italian delegation supported the proposals by the United Kingdom, French and Netherlands delegations.

3006. The German delegation did not consider that the new version of Section I of the Protocol as proposed by the United Kingdom delegation involved any substantive changes. However, the date on which the agreement referred to in paragraph 1 was "implemented" would have to be clarified. The same wording had been used in paragraph 2 with respect to the renunciation of activities under the PCT. This expression was vague and the German delegation would therefore prefer reference to be made to the date of entry into force of the agreement. If this date were considered to be too early, the date stipulated in Article 161, paragraph 1, could be referred to.

3007. The Austrian delegation shared the misgivings of the delegation of the Federal Republic of Germany over the date of implementation of the agreement. It also wondered whether the sentence in the second sub-paragraph of paragraph 1: "After the implementation of the said agreement, the tasks at present incumbent upon the International Patent Institute, and in particular those contracted *vis-à-vis* the Member States of the International Patent Institute, shall be assumed by that Directorate-General" took into account the fact that the intention was that European search reports would be only gradually extended over the various areas of technology and that European searching would not immediately cover all areas. This would mean that on the basis of the present Agreement a commitment would continue to exist *vis-à-vis* the IIB Member States to carry out comprehensive searching activities, whilst the other Contracting States of the Convention would be subject to restrictions in this respect. This would lead to discrimination between the Contracting States of the Convention and there would also be the related question of costs which would have to be clarified.

3008. The United Kingdom delegation stated its agreement to the proposed amendments to its own proposal put forward by the French delegation. It was to be hoped that entry into force and implementation of the agreement would occur simultaneously. If this were not the case difficulties would arise from the 1947 Hague Agreement, particularly as regards Article 13. However, the United Kingdom delegation considered that this was purely a drafting matter which should be referred to the Drafting Committee.

3009. The French delegation pointed out that, instead of referring to an agreement between the IIB and the European Patent Organisation, reference should be made to a special



agreement which the Administrative Council would empower the President of the European Patent Office to conclude.

3010. The United Kingdom delegation considered that the agreement between the IIB and the European Patent Organisation would be concluded by the Director-General or the President. However, the internal procedures for concluding the agreement between the two organisations did not necessarily have to be dealt with expressly in Section I. The United Kingdom delegation felt that there was no need to refer to the 1961 revision of the Hague Agreement as proposed by the Netherlands delegation.

3011. The Chairman noted that there were no objections to the substance of the United Kingdom proposal, which was therefore referred to the Drafting Committee. The French proposal to replace the reference to denunciation of the Hague Agreement by a reference to termination of participation in the Hague Agreement was likewise referred to the Drafting Committee. The Austrian delegation agreed that its question concerning the progressive expansion of the searching activities of the EPO and the related problem of discrimination between the Member States of the IIB and the other Contracting States of the Convention should be dealt with in connection with the provisions on searching in the Protocol on Centralisation.

3012. The Italian delegation felt that the fact that some States were bound only by the 1947 Agreement and others, such as Italy itself, only by the 1961 version, should be reflected by mentioning the 1961 revision after the reference to the 1947 Agreement.

As regards its proposal to add a fourth sub-paragraph in Section I (M/38), the Italian delegation explained that the existing agreement between the Italian Government and the International Patent Institute would have to be reviewed as a result of the integration of the IIB into the European Patent Organisation.

3013. The Italian proposal was supported by the German, Austrian, Spanish and Portuguese delegations.

3014. The Italian delegation's proposal (M/38) was referred to the Drafting Committee.

3015. The Turkish delegation referred to the concern it had expressed in M/97/II as to what the position would be if Turkey did not accede to the Convention but nevertheless wished to avail itself of the services of the European Patent Office in its capacity as successor to the International Patent Institute.

3016. Whilst the German delegation had no reservations on meeting the wishes of the Turkish delegation in this respect, it foresaw that legal difficulties would arise in practice. The United Kingdom proposal ensured that the European Patent Office would continue to carry out the tasks of the IIB after it had been integrated into the EPO. However, the Protocol was binding only between the Contracting States of the Convention, so that if the European Patent Organisation were to carry out activities for Turkey, a legal basis for doing so would have to be created in the form of an agreement with Turkey.

3017. The Netherlands delegation considered that the second sub-paragraph of paragraph 1 of the United Kingdom proposal laid down an obligation on the part of the Contracting States of the European Patent Convention to take over the present commitments of the International Patent Institute. This obligation did not operate only between the Contracting States of the European Patent Convention but also *vis-à-vis* the other Member States of the International Patent Institute.

3018. The Belgian delegation in principle shared the Netherlands delegation's interpretation of the proposed text, but would welcome a more precise definition of the expression "tasks at present incumbent", since Belgium intended to make

expert opinions compulsory but the legislative amendment to this effect might not become applicable until after the Convention had entered into force.

3019. The French delegation agreed with the interpretation of the Netherlands delegation as opposed to that of the German delegation.

3020. The Luxembourg delegation shared the view of the German delegation.

3021. The Swedish delegation wondered whether the searches as to novelty at present carried out by the IIB directly on behalf of industrial undertakings in the Member States of the Hague Agreement at favourable rates would continue to be carried out by the European Patent Office.

3022. The CNIPA delegation proposed that the second sentence in the second sub-paragraph of the United Kingdom proposal be supplemented by the following phrase: "... *vis-à-vis* the Member States of the International Patent Institute, even if such States are not Contracting States of the Convention ..."

3023. The Netherlands delegation was against introducing this phrase. The United Kingdom proposal in M/95/II followed the Draft Protocol on this point and any deviation might be misunderstood as involving a substantive amendment.

3024. The Italian delegation considered that the present text, which referred to the tasks at present incumbent upon the International Patent Institute should be improved by referring expressly to the tasks incumbent upon the IIB pursuant to the 1947 Agreement as revised in 1961.

3025. The United Kingdom delegation considered that "tasks at present incumbent upon the International Patent Institute" was not the same as "the obligations of the International Patent Institute *vis-à-vis* its Member States". If it was therefore the intention to transfer the obligations of the IIB *vis-à-vis* its Member States to the European Patent Office, this should be expressly stated in the text. There were two different points here: firstly, whether obligations *vis-à-vis* the Member States meant that there would be a commitment to carry out any amount of search work for any IIB Member State and secondly, whether such obligations also applied *vis-à-vis* States becoming members of the IIB at a later date. The first question particularly concerned Belgium which had not yet introduced searching, whilst the second would be of particular relevance for Italy once a sub-office of the IIB had been set up there. In order to avoid the danger of unlimited obligations being imposed on the International Patent Institute, its commitments should be confined to States participating in the Conference. A further possibility would be to restrict the IIB's legal obligations to its present Member States and to accept a moral obligation *vis-à-vis* any Member States acceding to the Hague Agreement between the present time and the entry into force of the Convention. Since this would, however, involve difficult legal problems, the United Kingdom delegation considered that a decision in principle should be taken as to whether the operative date as regards legal obligations should be that of the signing of the Convention or that of its entry into force. The United Kingdom view was that at the very most those obligations existing on the date of entry into force of the Convention could be accepted, but only *vis-à-vis* those States taking part in the Diplomatic Conference.

3026. In conclusion, the Chairman noted that three different cases would have to be covered by the Protocol: firstly, that of Belgium, which was a member of the International Patent Institute and would in all probability also become a Contracting Party to the Convention; secondly, the case of Italy, which was not yet a member of the IIB but intended to become a member and also a Contracting Party to the Convention; thirdly, the case of Turkey, which was a member of the International

Patent Institute but might not become a Contracting Party to the Convention. Any reference to the obligations of the International Patent Institute as regards the tasks at present incumbent upon it would relate to the tasks incumbent upon it at the date of signing of the Convention. This would cover Turkey but not Belgium and Italy. In the case of these two countries there would have to be a reference to States which were both members of the International Patent Institute and Contracting Parties to the Convention, and to tasks which the IIB had agreed to carry out on their behalf between the date of signing of the Convention and its entry into force. The Chairman therefore proposed that a Working Party should be set up comprising those delegations concerned by this problem. This proposal was adopted by the Main Committee.

3027. The German delegation withdrew the proposed amendment contained in M/47, point 3.

3028. The delegation of the World Intellectual Property Organization (WIPO) raised the question of the European Patent Office in its future capacity as a Searching Authority under the PCT. This point did not appear to have been dealt with at all, or at least not expressly, either in the Convention or in the Protocol on Centralisation. As regards Chapter II of the Patent Cooperation Treaty, this problem had been dealt with expressly in Article 154 of the Convention which stated that the European Patent Office would act as an International Preliminary Examining Authority within the meaning of Chapter II of the Treaty subject to the conclusion of an agreement between the European Patent Organisation and WIPO. The present text of the Protocol might, however, lead one to conclude that, whilst the EPO was empowered to carry out tasks under Chapter II of the PCT, it was not empowered to do so under Chapter I. This problem could be dealt with in one of two ways. Firstly, if it were decided to include the provisions of the Protocol in the Convention itself, there would have to be a new Article 153a which referred to searching within the meaning of Chapter I of the PCT in much the same terms as Article 154, paragraph 1, referred to Chapter II. If, however, it were decided that the Convention and the Protocol should remain separate, a provision would have to be inserted in Section I of the Protocol expressly laying down the possibility for the European Patent Office to act as an International Searching Authority subject to the conclusion of an agreement between the European Patent Organisation and WIPO.

3029. The Netherlands delegation wholeheartedly subscribed to the proposal made by the WIPO representative. It had originally been intended that the IIB should assume the duties of an International Searching Authority, but as the intention now was to include a number of provisions on centralisation in the Protocol itself, an appropriate provision would have to be inserted in the Convention.

3030. The Chairman pointed out that Section I, paragraph 2, of the Protocol provided that the States parties to the Convention would undertake on behalf of their central industrial property offices to renounce any activities as International Searching Authorities under the Patent Cooperation Treaty. This provision was admittedly not merely a simple reference and would have to be made more explicit.

3031. The German delegation supported the comments made by the WIPO representative, but considered that the question of express reference to the EPO acting as an International Searching Authority could not be settled until agreement had been reached on whether the Protocol should be maintained *in toto* or whether a part of it should be taken over into the Convention.

3032. The French delegation shared the views of the WIPO representative and of the German delegation and proposed that a decision on this point should be postponed until it was

clear whether parts of the Protocol were to be taken over into the Convention or not.

## ***Section II of the Protocol on Centralisation***

3033. Section II of the Protocol on Centralisation was referred to the Drafting Committee without discussion.

## ***Sections III and IV of the Protocol on Centralisation***

3034. The Committee discussed Sections III and IV of the Protocol on Centralisation, on which the following proposals for amendments had been submitted: M/84/II (by the Austrian delegation), M/87/II (by the Norwegian and Finnish delegations; this document replaced the earlier M/28) and M/94/II (by the Italian delegation; this document replaced the earlier M/38 on this point).

3035. The Netherlands delegation stated that in principle it supported the proposal contained in the Italian delegation's paper and in that of the Finnish and Norwegian delegations that searches carried out by the International Patent Institute should be extended to documentation in languages other than the official languages of the European Patent Office.

3036. The French delegation also favoured in principle the extension of documentation to languages other than the official languages of the European Patent Office.

3037. These proposals were also supported by the German delegation on the grounds that extension of documentation would improve the quality of European examination, since Italian and Scandinavian material might be of relevance in many cases.

3038. The Spanish, Portuguese, Austrian and Yugoslav delegations supported the proposals by the Italian, Finnish and Norwegian delegations.

3039. The United Kingdom delegation in principle shared the view that reference material for searching should be extended to documentation not at present in the possession of the IIB; however, there was still the question of costs to be settled. The first sentence of the Finnish and Norwegian proposal simply authorised the Administrative Council to decide under what conditions searches should be extended to the documentation of Contracting States which the International Patent Institute did not at present have in its possession. This proposal implied a transitional arrangement and it was doubtless intended that the International Patent Institute should subsequently obtain such documentation. The Italian proposal on the other hand provided that searches in respect of all European patent applications should be extended to documentation in the possession of the sub-offices mentioned in the third sub-paragraph of Section I, paragraph 1. This presumably meant that searches would have to be carried out on the spot in the sub-offices holding the documentation. The United Kingdom delegation felt that it was clearly desirable that the International Patent Institute should after all have this material in its possession. In order to obtain the greatest possible degree of accuracy in searches, the reference material would have to comprise all the documents necessary to ensure that the best results were achieved in proportion to the costs. The United Kingdom delegation therefore asked the Italian delegation whether it was for example its intention in due course to transfer Italian specifications to the documentation of the European Patent Office. Paragraph 1 of the Finnish/Norwegian proposal merely seemed to repeat what was already stated in Recommendation M/6, to which the United Kingdom delegation had no objections.

3040. In reply to the United Kingdom delegation's question the Italian delegation stated that there were only two basic

differences between the Italian and the joint Finnish/Norwegian proposal. The Finnish/Norwegian proposal provided that the Administrative Council would be competent to decide whether documentation should be extended to other languages, i.e. Italian, Finnish etc. whilst the Italian proposal simply contained a statement in principle that documentation must be extended. The second difference was that, whilst under the Italian proposal the additional search work involved would be entrusted to sub-offices of the European Patent Office, under the Finnish/Norwegian proposal this work would be entrusted directly to the relevant national patent offices. For the rest, the two proposals overlapped completely, since the Administrative Council retained authority to have such searches carried out either by national patent offices or directly by the Directorate-General at The Hague. The Italian delegation repeated that its proposal contained a statement in principle as regards extension of searches whilst the Finnish/Norwegian proposal simply stated that searches could be extended.

3041. The Swiss delegation was able to support the basic principle proposed by the Italian, Finnish and Norwegian delegations. In its view, even under the Italian proposal the date on which extension was to take place would not be determined by the Administrative Council until the study mentioned in the Recommendation was available. The Swiss delegation would, however, prefer to await the results of this study before taking any decision on whether searches should in fact be extended to cover all languages.

3042. The Swedish delegation would also prefer the alternative proposed by the Swiss delegation and furthermore shared the views of the United Kingdom delegation in this matter. It considered that it was right for the Administrative Council to be empowered to extend documentation without any restrictions being applied. It did, however, wonder whether it was appropriate for the documentation to be confined to that of the Contracting States. The Administrative Council could also be empowered to align the minimum documentation of the European Patent Office on the PCT documentation.

3043. The United Kingdom delegation thanked the Italian delegation for answering its question and shared the misgivings of the Swiss and Swedish delegations, who wished the matter to be dealt with in a more flexible manner. It was understandable that all Contracting States were anxious to have their patents included in the reference material. But this was already ensured by the availability of duplicates. The problem could therefore be reduced to the small number of applications for which there were no duplicates. In practice a central searching authority could hardly be expected to carry out searches in as many as twelve languages and it was just as unlikely that searches in respect of a single application would be carried out in a number of sub-offices or national searching authorities. The United Kingdom delegation therefore supported the general principle but was opposed to any too strict a system or to any rigid conclusions being drawn at this juncture. For the same reasons it supported the Finnish/Norwegian proposal, which was in accordance with Recommendation M/6.

3044. The Italian delegation stressed that all it was concerned with was a solution of a general nature. The details for extending documentation were to be the subject of a study on the basis of which the Administrative Council would be able to determine when and how searches were to be extended. The Italian proposal contained a decision of principle that extension must take place, whilst the Norwegian/Finnish proposal merely referred to the possibility of extension; this was the basic difference between the two proposals.

3045. The delegation of the Council of Europe considered it desirable for documentation to be extended as far as possible, but pointed out firstly that extension was entirely a question of

costs since more staff would obviously be required, and secondly, if a study of this sort were embarked upon, it would have to be determined just how far this would produce better search results. Examination of the period to be covered by documentation had for instance revealed that even further back in time documentation extending back over 50 years covered 80 to 85 % of all relevant documents. To extend documentation would therefore achieve an additional improvement of 1 to 2 % at the most. This again underlined the cost aspect of extension.

3046. The Luxembourg delegation was in favour of the Finnish/Norwegian proposal since it left the Administrative Council a larger degree of discretion.

3047. The Chairman considered that the majority of the Committee therefore held that it would not be appropriate to provide for a multiplicity of systems and that it accordingly preferred the solution proposed by the Norwegian and Finnish delegations.

3048. In the opinion of the Italian delegation there was no difference between the Finnish/Norwegian proposal and the Italian proposal, at least as concerned the system as such. The only difference lay in the way the principle as such was embodied. The Italian delegation requested that its proposal be put to the vote.

3049. The United Kingdom delegation wished various questions to be clarified before a vote was taken. In particular there was the question of what the wording of paragraph 1 of the Italian proposal meant: "The search ... shall ... be extended to the documentation which is at the disposal of the sub-offices referred to in the third subparagraph of Section I,1 of the Protocol on the Centralisation of the European Patent System and on its Introduction, ..." It must be clearly established whether searching was to be extended to documentation actually located in the sub-offices, i.e. whether it would actually be carried out there, or whether the intention was that, whilst searching should be carried out in documentation held by the sub-offices, i.e. Italian specifications, the actual searches themselves should be carried out at The Hague.

3050. The German delegation re-iterated its agreement in principle to the extension of reference material for searching. It felt that the problem involved was not in any way like that of the inclusion of Russian and Japanese documents in reference material and searches, but that Finland and Norway for example were countries which today had patent offices which were in a position to examine Finnish and Norwegian material. Italy for its part was in the position of wishing to develop a patent examination system. The German delegation felt that the difference between the Italian and Finnish/Norwegian alternatives was probably not so important. It could hardly be the intention to bind the Administrative Council; it was surely intended that searches should not be extended in certain areas of technology where doing so would serve no useful purpose. It should be possible to re-draft the Italian proposal so as to bring it more closely in line with the Finnish/Norwegian proposal, by making it somewhat clearer that the Administrative Council would obviously not be forced to decide on measures which were clearly futile and indefensible from the point of view of costs.

3051. The Netherlands delegation considered that the part of the first paragraph of the Italian proposal which referred to documentation at the disposal of the sub-offices was only intended to define the documentation to be covered in searches and was not intended in any way to determine where searches were to be carried out. Secondly, the Netherlands delegation felt that a single common text covering both countries without sub-offices and those with sub-offices would be preferable. However, if a general text were decided upon the expression:

"documentation which is at the disposal of the sub-offices" would have to be avoided, since only one country would have a sub-office.

3052. The Norwegian delegation considered that the Italian proposal only covered countries with sub-offices and did not therefore meet the requirements of the Nordic countries. For this reason it was unable to support the Italian proposal.

3053. The Chairman considered that it should be possible and would certainly be desirable to arrive at a common text which took into account both the interests of the Italian delegation and those of the Finnish and Norwegian delegations. The main obstacle standing in the way of a uniform solution was firstly the different position of principle of the Italian delegation, namely that searching must be extended as from a specific date, and secondly the fact that the documentation to which searches were to be extended was to be that in the possession of the sub-offices.

3054. The Finnish delegation, which had followed the discussion on the possibility of reconciling the two positions with great interest, considered the Italian proposal to be unacceptable on the grounds that it took account only of Italian wishes in the matter.

3055. The Netherlands delegation did not think that it would be possible to find a form of wording which would take account of the interests of the Italian delegation at the same time as those of the Finnish and Norwegian delegations. It might be possible to replace the wording in the Italian proposal: "documentation which is at the disposal of the sub-offices" by a reference to "documentation in the official language of a Contracting State which is not one of the official languages of the European Patent Office". This proposal could under certain circumstances be accepted by the Norwegian and Finnish delegations.

3056. The Italian delegation completely supported the proposed amendment to its proposal put forward by the Netherlands delegation. It was mainly concerned with that part of the sentence which laid down the principle. For the rest it could give its complete agreement to combining the two proposals.

3057. The Spanish delegation endorsed the proposal by the Netherlands delegation on the condition that the principle contained in the Italian proposal be retained.

3058. The CNIPA delegation pointed to two factors: firstly, any extension of the scope of searching to take in additional material would entail greater costs which would ultimately have to be borne by the applicant; secondly, the Italian proposal could in certain circumstances have negative effects, for example if it meant that from a given date all applications were to be subject to further search, always assuming that such was the conclusion reached in the study. Such a situation could, however, never be attained, inasmuch as an extension of the search to take in all applications would be unworkable in practice.

3059. The EIRMA representative could concur with the statements made by the German delegation to the extent that the Administrative Council could decide that certain areas of technology were not adequately covered and that searches in these fields should be carried out by other offices.

3060. The French delegation considered that the sole aim should be to extend documentation, but this objective should all the same be realised in progressive stages. There was, however, basically no doubt that it was preferable to opt for a single system.

3061. The Swiss delegation was likewise concerned as to the financial implications of a compulsory extension of searching to take in all documents from those States whose material was not contained in the IIB reference material. No examination as to

the financial implications involved had been carried out to date. The Swiss delegation therefore asked whether an IIB representative could give an approximate estimate of the cost which would be involved in the incorporation of this documentation in the IIB reference material.

3062. The Finnish delegation submitted the following compromise proposal which had been drawn up by the various countries concerned: paragraph 1 of the Italian proposal as set out in M/94/II was to be amended as follows: "The documentary search provided for in Article 91 of the Convention setting up a European System for the Grant of Patents shall, in principle, in respect of all European patent applications, be extended to documentation in languages other than the official languages of the European Patent Office, as from a date to be fixed by the Administrative Council of the Organisation on the basis of the results of the study which the latter will have carried out for this purpose."

3063. The International Patent Institute delegation outlined the costs involved in extending documentation to take in new languages. A distinction was to be drawn between two aspects of the matter: firstly there was the question of the cost of integrating the documentation of a number of countries into the central reference material held by the International Patent Institute and secondly, the cost of using this documentation for search purposes. The second category of costs could be further subdivided depending on whether the searches were carried out centrally by the Directorate-General for Searching or whether the central search would be accompanied by a series of searches carried out on a decentralised basis. The category of costs involved in integrating documentation was to be further subdivided according to origin. In this connection a distinction was to be made between documentation from the Scandinavian countries and Finland, as against Italian material. Documentation from Scandinavian countries and Finland was already classified in accordance with a method which was very similar to the classification employed by the International Patent Institute, which meant that there would be no major problems involved in integrating such documentation into the central reference material store. Italian documentation, however, had not yet been organised in accordance with any specific classification. The working agreement between the IIB and the Italian Government would settle the details of this classification. The IIB was naturally quite prepared to use this documentation, but the problems involved would be different depending on whether the IIB examiners were called upon to deal with languages which were readily understandable, as against languages which did not form part of the Indo-European and therefore one of the Latin or Germanic linguistic families. Material in Italian and in the Scandinavian languages fell within the first group, but the situation was different as regards Finnish documentation, as Finnish did not belong to the Indo-Germanic branch. The IIB did, however, feel that it should point out that Finnish documentation was for the most part available in Swedish. Quite apart from these considerations, the estimated cost of using this material would obviously depend on the amount involved.

The IIB observer delegation estimated that the integration of Italian documentation into the reference material held by the IIB would involve 800,000 files. Some 31,000 applications were filed each year, including 7,000 by organisations or private persons who were resident in Italy and did not claim priority in any other countries. The documentation available to the IIB included 1,000 patent applications granted priority in Italy each year, with the result that the number of Italian applications to be incorporated was reduced to 6,000 per year. Integration would of necessity entail classification of such documents which could be tackled in two different ways. Either some

200,000 first filings could be classified in reverse chronological order, which would cost approximately 2.5 million Dutch guilders (fl), viz. approximately 12.5 fl per patent, or alternatively a reference period could be selected in 1969 (date of computerised classification of patent families), which would involve classifying 30,000 first applications, at a cost of some 360,000 fl, i. e. 12 fl per application. In addition, adjustments would have to be made in the form of some 6,000 patents to be incorporated each year, at an annual cost of approximately 70,000 fl, thus giving an average of less than 11 or 12 fl per application. To this would be added expenditure on language training for examiners, but this would be a relatively insignificant sum. At a rough estimate, 500,000 fl would be required for Italian courses covering 50 persons. One further point made was that at present the Italian authorities were publishing granted patents with considerable delay, which had reached five years in recent times. Accordingly, when the European Patent Office opened it would be faced with a considerable backlog which would require 7 or 8 years to eliminate at an annual average of some 6,000 patents. The amount of expenditure involved would therefore be in the neighbourhood of 600,000 to 700,000 fl.

The Agreement concluded between the Italian Government and the IIB stipulated that the costs incurred in classifying Italian patents granted up to the date of the incorporation of Italian documentation was to be borne by the Italian Government, which meant that the IIB would only defray expenditure incurred in subsequent use of this documentation.

3064. The United Kingdom delegation thanked the IIB Observer delegation for its explanation of the matter and went on to inquire as to the approximate average cost of a search in respect of an Italian application among this documentation. Some indication of the figure involved could be gained by making a comparison with United Kingdom statistics. Approximately 31,000 applications were filed each year in the United Kingdom, with the average cost per search totalling some £ 30. Searches carried out by the Rome sub-office among Italian reference material would probably involve approximately the same costs. On the credit side, searches among duplicated material were not necessary, with the result that in some cases the sum of £ 30 could well be undercut.

3065. The Chairman then asked the IIB delegation whether the costs involved in carrying out a simultaneous search at the International Patent Institute (or at the Directorate-General for Searching) and in a sub-office would be the same as those involved in carrying out a supplementors search. It was clear that the length of the waiting period would be reduced if the simultaneous procedure were adopted, but that the search itself would be rendered more complex.

3066. In reply to the Chairman's question the IIB delegation pointed out that an additional search would involve less expenditure than a search in a particular field which had not been covered by the earlier search. In response to the question put by the United Kingdom delegation, the IIB delegation stated that it was difficult to give a precise and comprehensive answer. In the course of the negotiations on the setting up of the Rome sub-office the Italian Government stated quite clearly that it would bear the costs incurred in setting up the sub-office, together with the necessary operational expenditure, provided that the sub-office's work were financed out of fees. However, as the whole range of calculations concerning price levels and salaries could not be determined with any degree of certitude, it would be extremely difficult to give any estimated calculation of the cost involved.

3067. The Netherlands delegation thanked the IIB for the documents and information which it had made available and said that it would deliver a detailed opinion on the matter at a

later date. It considered that a distinction should be drawn between the transitional period and the situation obtaining thereafter by regarding the decision by the Administrative Council to employ Italian documentation as the watershed between the two periods. Once the decision had been taken searches among Italian documentation would in the main be conducted at The Hague and not at the Rome sub-office. There was no need to lay down any express provision on this, as the Italian delegation itself had left the matter open. The Netherlands delegation considered that it would be easier to have such searches carried out at The Hague, where a group of examiners examined the entire range of documentation contained at any given moment in the reference material held by the Institute. The situation prevailing during the transitional period was, however, completely different in that all searches among Italian documentation would be carried out by the Rome sub-office. If the Netherlands delegation had rightly understood what had been said, the relevant costs were to be borne by the Italian Government or by the applicant who had requested the search.

3068. The Chairman pointed out that the Working Party was concerned with different categories of countries. The first category included those obligations which the IIB had assumed *vis-à-vis* its present Member States, in particular towards the general public and applicants, which were indispensable for the functioning of the patent systems of a number of Member States. This category would also cover the situation indicated by the Turkish delegate, i. e. that in given circumstances Turkey might not accede to the Convention since the International Patent Institute had assumed obligations concerning the functioning of the Turkish patent system. As regards Belgium — for which the IIB did not at present provide services — and Italy, which had not yet become a member of the International Patent Institute, both of which countries were already or would shortly be parties to the Hague Agreement and intended to sign the European Patent Convention, it would be necessary to stipulate that the services provided to these States by the IIB would subsequently be assumed by the European Patent Office. The text under examination was aimed at obviating an automatic transfer to the EPO of IIB services to third countries which, although parties to the Hague Agreement, would not accede to the European Patent Convention.

3069. The IIB delegation pointed out once again that as regards the extension of IIB reference material, the costs incurred in classifying Italian documentation would doubtless be borne by the Italian Government. The only figure which needed to be determined with any certainty was the cost of language training for IIB staff, which would amount to approximately 480,000 guilders.

3070. With reference to M/103/II, the Swiss delegation, in its capacity as a member of the Drafting Committee, enquired what was the exact import of the phrase "those at present carried out *vis-à-vis* its Member States" — i. e. was this to be taken as indicating the date as from which the Agreement would apply or the date of signing of the Protocol.

3071. In reply to this point the Chairman, speaking in his capacity as Chairman of the Working Party, stated that this was to be interpreted as the date of signing, which could in exceptional circumstances be delayed until 5 April 1974.

3072. The Chairman presented the proposal drawn up jointly by the Finnish, Italian and Norwegian delegations (M/107/II) and had the following revised draft of the Italian proposal read aloud:

"Paragraph 1: The documentary search provided for in Article 91 of the Convention setting up a European System for the Grant of Patents shall, in principle, in respect of all

European patent applications, be extended to documentation of Contracting States in languages other than the official languages of the European Patent Office, as from a date to be fixed by the Administrative Council of the Organisation on the basis of the results of the study which the latter will have carried out for this purpose."

3073. The Netherlands delegation considered that although the proposal set forth in M/107/II took into consideration the interests and intentions of the delegation concerned, it might well be insufficiently flexible. The Administrative Council should for example be able to decide that documentation relating to specific areas of technology was to be incorporated in the reference material held by the IIB only at a later date. A provision should therefore be written into the text empowering the Administrative Council to decide upon the date, conditions and exact details concerning the extension of the search material.

3074. The Luxembourg delegation endorsed the comments made by the Netherlands delegation.

3075. The Austrian delegation felt that M/107/II as it was now worded provided a true reflection of the discussions held on the previous day. It should, however, be pointed out that the present wording might well give rise to one unintentional side-effect, namely that it might not cover Austrian documentation, because it referred solely to documentation in languages other than the official languages of the European Patent Office. One further consideration was that so far Austrian documentation had not been used for the purposes of searching by the IIB. The simplest course would be to make the relevant amendments to include Austrian reference material, and the Austrian delegation proposed that this matter be referred once again to the Drafting Committee.

3076. The United Kingdom delegation, which subscribed to the views expressed by the Netherlands, Luxembourg and Austrian delegations, contended that the text as submitted required a further measure of drafting improvements. The term "documentation of Contracting States" should, for example, be replaced by the term "patent documentation of Contracting States". The United Kingdom delegation considered that the aim should be to reach a flexible solution which would allow of a possible extension to take in search material at a date to be fixed by the Administrative Council. When coming to its decision the Administrative Council was to take as its basis the study referred to in paragraph 1, and in particular various factors such as the importance of a specific range of reference material, the language problem, the availability of abstracts etc. and the economic viability of the project. This could be achieved by re-casting the paragraph in question or by having a statement written into the Minutes to the effect that it had been agreed that the study would take account of all these factors.

The United Kingdom delegation further indicated that the relevant paragraph ought to be followed up by incorporating the additional material into the central documentation held by the European Patent Office. With this proviso the United Kingdom delegation could approve the draft proposal as a statement of principle.

3077. The German delegation shared the doubts voiced by the Netherlands, United Kingdom and Luxembourg delegations, who thought that the clause contained in the proposal might be going too far and might not be flexible enough. The provision in question could perhaps be taken as meaning that as from a given date the documentation of all Contracting States with certain official languages was to be included in the documentation held by the Directorate-General for Searching. This would, however, considerably exceed the minimum documentation in the future official languages of the European Patent Office as currently employed by the IIB, and in this the

proposal probably went too far. Furthermore, it was readily conceivable, as had already been pointed out by the Netherlands delegation, that for economic and other reasons it might be pointless to carry out specific searches in given areas where practical experience or the study had shown that there was nothing to be gained by carrying out an additional search in that language and in that particular branch. Finally, the German delegation concurred with the Austrian delegation's view that it was probably incorrect to refer solely to the official languages of the European Patent Office. The German delegation concluded by stating that these restrictions could be overcome by making the clause more flexible and stipulating that in particular cases the study could rule that there was no case for covering certain reference material.

3078. The French delegation endorsed the proposals put forward by the Finnish, Italian and Norwegian delegations; it further supported the German delegation's view that it would be regrettable to exclude Austrian reference material. The French delegation also stated that it was desirable to afford the Administrative Council adequate powers and freedom to decide when to have any additional material included, and the procedures for doing so.

3079. The Italian delegation was in agreement with the comments made by the Austrian delegation and the views expressed by the other delegations. It held that any decision on the date and conditions of the extension of searches fell outside the purview of Main Committee II. Responsibility for such decisions rested quite clearly with the Administrative Council. It therefore proposed that the following phrase be added to the sixth line of its proposal as set out in M/107/II: "...as from a date and in accordance with the other conditions of any such extension as determined by the Administrative Council..."

3080. The Swiss delegation supported the view of the Austrian delegation, and indeed of all the parties to the discussion, that the present proposal was insufficiently flexible. The Swiss delegation considered that the proposal should be drawn up in such a way as not to impose a categorical obligation upon the Administrative Council to include documentation from all those Contracting States whose reference material had not yet been placed in the material held by the IIB. One course would be to take as a basis Rule 34 of the PCT, which read as follows: "patents... and ... patent applications ... in the English, French or German language and in which no priority is claimed", may still be accepted "provided that the national office of the interested country sorts out these documents and places them at the disposal of each International Searching Authority." On the basis of this wording, any office which wished to have its documentation included in the reference material held by the IIB could decide which documents it considered should be included, i.e. exclusively those documents in which no priority was claimed.

3081. The Swiss delegation further considered that this would also make for considerable cost savings. The Swiss delegation therefore proposed the following text: "the documentary search provided for in Article 91 of the Convention setting up a European System for the Grant of Patents shall, in principle, in respect of all European patent applications, be extended to documentation of Contracting States whose documentation is not already kept among the reference material held by the Directorate-General for Searching, as from a date to be fixed by the Administrative Council and provided that such extension is judged expedient and feasible on the basis of the study which the Administrative Council will have carried out for this purpose."

3082. The Finnish delegation, which shared the views put forward by the German and many of the other delegations, considered that the Administrative Council should be afforded



sufficient liberty to decide on the case of including other reference material.

3083. The Belgian delegation supported the Swiss proposal.

3084. The CNIPA delegation referred once again to the matter of costs, for which it felt full allowance had been made in the Swiss proposal. The CNIPA delegation seconded the Belgian delegation in its support for the Swiss proposal.

3085. The IAPIP delegation likewise supported the Swiss proposal.

3086. The Italian delegation endorsed the first part of the Swiss proposal for an amendment, but did not approve of the second part on the grounds that the powers of the Administrative Council should not be restricted.

3087. The delegation of the International Patent Institute proposed that the Finnish, Italian and Norwegian proposal be amended by making the following addition to the sixth line: "... and under the conditions to be determined by the Administrative Council ...".

3088. The Chairman summed up by noting that the text under examination confined any possible extension of searching to documents of Contracting States drawn up in official languages which were not official languages of the European Patent Office. The discussions had also shown that all the delegations — including those directly concerned — could countenance a modification of the text to the effect that the Administrative Council should be empowered to determine the exact conditions and scope of use of such documentation, for instance by stipulating that the extension was to be effected by stages depending on the relevant areas of technology.

A number of delegations proposed that definite rules governing the use of documentation in these languages should be adopted at that stage. The Chairman replied by pointing out that not all documentation already included in the stock held by the International Patent Institute had formed the subject of an exhaustive search. It had already been pointed out that there was little point in duplicating searches, and the same applied to the stock of documentation currently held. The International Patent Institute employed methods aimed at eliminating any duplication of searches on the same subject-matter. There was ample justification for such measures, which formed part of the policy adopted by the Directorate-General for Searching.

3089. With reference to the inclusion of Austrian material, the United Kingdom delegation proposed that the text be amended as follows: "...The documentary search... shall ... be extended to documentation of Contracting States which is not at present contained in the search material held by the International Patent Institute."

3090. The Norwegian delegation stated that it was unable to vote in favour of the proposal on the grounds that it referred solely to patent documentation and excluded all other forms of reference material.

3091. The Netherlands delegation shared similar doubts to those expressed by the Norwegian delegation on the grounds that no definition had been given of the term "patent documentation", which it felt should also include relevant technical literature.

3092. In reply to this question the Chairman pointed to Rule 34 of the PCT, which gave a definition of minimum documentation. Patent documentation (PCT: patent documents) included both published patent specifications and various other items of relevant literature, a list of which had been drawn up by the World Intellectual Property Organization (WIPO).

3093. The United Kingdom delegation contended that the term "patent documents" was sufficiently explicit, on the grounds that it had been defined in the PCT. By way of contrast the term "documentation of Contracting States" could prove to

be too general and imprecise. It felt that no hard and fast rules should be laid down as regards far-reaching obligations such as the manner in which patent documents were to be employed.

3094. The Norwegian delegation concurred with the opinion expressed by the United Kingdom delegation, with the proviso that such patent documents should also include patent applications which had not yet been published but were accessible to the public.

3095. The Danish delegation endorsed the comments made by the Chairman and the United Kingdom delegation regarding non-patent literature. To its mind the Patent Cooperation Treaty left individual countries at liberty to determine what was to be taken as non-patent literature. Non-patent literature was the exact equivalent of standard minimum reference material as defined under the Patent Cooperation Treaty. Rule 34 of the Patent Cooperation Treaty stipulated that minimum documentation was to include such patents issued by, and such patent applications published in, any country after 1920 as were in the English, French or German language and in which no priority was claimed, provided that the national office of the interested country sorted out these documents and placed them at the disposal of each International Searching Authority. The Danish delegation considered that this constituted a solution to the Austrian problem, inasmuch as the Austrian Patent Office would be able to place its patents and patent applications at the disposal of all International Authorities — and by the same token the European Patent Office — as coming under minimum documentation.

3096. The Chairman was of the opinion that Rule 34 of the Patent Cooperation Treaty did not apply automatically. The European Patent Office could quite conceivably begin operations at a time when the Patent Cooperation Treaty had not yet entered into force. The definitions embodied in the Convention included documentation currently available at the International Patent Institute and were not subject to entry into force of the Patent Cooperation Treaty. Accordingly, the European Patent Office was under no obligation to define its documentation in accordance with Rule 34 of the PCT. While it was desirable that the Patent Cooperation Treaty and the European Patent Convention enter into force on the same date, such an event was to be regarded as anything but certain.

3097. The Italian delegation considered that Rule 34 of the Patent Cooperation Treaty should not be taken as a basis. It was the responsibility of the Administrative Council or the Working Party engaged in drawing up the study to determine whether the documentation in question was identical with the definition set forth in Rule 34 of the Patent Cooperation Treaty, or whether it also included documentation of third countries already held by the International Patent Institute.

3098. The CNIPA delegation felt that it was possible to reconcile the views expressed by the United Kingdom and Netherlands delegations, and at the same time make allowance for the Austrian request, by having recourse to national authorities and their material wherever possible. Any proposal that extension should cover documentation of patent offices in Contracting States whose documentation was not contained in the reference material held by the IIB would perforce imply that the material held by the patent offices of the Contracting States concerned would be classified.

3099. The Finnish delegation supported the proposal put forward by the CNIPA delegation.

3100. The German delegation adverted once again to the additional proposal made by the Swiss delegation that documents should be sorted out by the national offices of the States concerned and then placed at the disposal of the European Patent Office in line with Rule 34 of the PCT. The



German delegation felt that this provision would constitute a solution to the problems in hand.

3101. The Belgian delegation said that it had understood the Swiss delegation's statement as meaning that the conditions laid down in Rule 34 of the Patent Cooperation Treaty would also apply. The Belgian delegation felt that the patent documentation of all the Contracting States should be included. The present situation was that the International Patent Institute was entitled to receive any documents free of charge from the Member States.

3102. The CEIF delegation thought that the Swiss proposal was a felicitous reply to the various requests put forward in the course of discussions to date, in that on the one hand it took account in paragraph 1 of the Austrian request while at the same time retaining the underlying principle upon which there was clearly unanimous agreement. The second paragraph went on to lay down a number of provisions enabling the Administrative Council to make any necessary adjustments to the Agreement.

3103. The Netherlands delegation proposed that the reference in the Swiss proposal to the International Patent Institute be replaced by a reference to the European Patent Office, on the grounds that this provision would not give rise to any responsibilities until after the Agreement on the integration of the International Patent Institute had come into force.

3104. The Norwegian delegation was in agreement with the Swiss proposal, which indeed seemed to cover the material that the Norwegian delegation would like to see included. On the other hand the Norwegian delegation was not convinced of the need to refer to published patent documents, as the United Kingdom delegation had proposed.

3105. Referring to the amendments made to its original proposal in M/87/II, the Finnish delegation stated that although the text as it now stood did contain the principle of the original proposal, it was not its intention to drop the second and third sentence of the rest of its proposal, and therefore made it clear that it continued to uphold the remaining part of its proposal in M/87/II.

3106. Commenting on the Swiss delegation's proposal, the United Kingdom delegation said that the expression "documentation", which was ambiguous in English and too far-ranging in some respects, should be replaced by the expression "published patent documents", or "patent applications and published patents". Secondly, with regard to the expression "...is not already kept among the reference material held by the European Patent Office", it had to be said that the expression "not already" ought to be related to a specific point in time. It would be possible to say "...is not, at the time of entry into force of the Convention, contained in the reference material of the European Patent Office". If however one were to refer to the European Patent Office, the proposed wording would entail a permanent obligation to update the reference material. The United Kingdom delegation therefore preferred a form of wording based on the state of IIB documentation as at the date of signing of the Convention.

3107. The Norwegian delegation was not very happy about the last two lines in the proposal and would prefer the following wording: "...is not contained in the minimum documentation, pursuant to Rule 34 of the PCT implementing regulations", the point being not that the documentation material was to hand, but that it was to be used.

3108. Summarising, the Chairman noted that different sets of comments had been made on the Swiss proposal: For the concept of "documentation" there was a restrictive wording from the United Kingdom delegation defining it as "patents and published patent applications". This expressly excluded

"non-patent literature" within the meaning of Rule 34 of the Patent Cooperation Treaty. A further proposal referred to the minimum documentation within the meaning of Rule 34 of the Cooperation Treaty. A third proposal was to the effect that the expression "documentation" should be regarded as sufficiently precise to enable the competent authorities to ascertain what it meant.

3109. The German delegation supported the United Kingdom proposal, which it considered did not mean that documents which did not form part of patent literature could not be taken into account in individual cases.

3110. The Swiss delegation also supported the United Kingdom proposal, for the same reasons adduced by the German delegation.

3111. The Italian delegation rejected the United Kingdom proposal categorically.

3112. The French delegation sought to dispel the Italian delegation's misgivings by the following wording: "at least patents and published patent applications".

3113. The Swiss delegation announced that it could not subscribe to this proposal, on the grounds that it believed the wording "at least this documentation" would not enable any subsequent limitation to be made. It could not be said that these documents should be taken into account only if no priority was claimed.

3114. In the United Kingdom delegation's view, the wording "published patents and patent applications" should be kept too, and it ought to be set down in the Committee's Minutes that it was agreed that there was no intention of restricting the powers of the Administrative Council to include any "non-patent literature" in the reference material, should this appear necessary and expedient.

3115. The Netherlands delegation proposed the following compromise wording: "... shall be extended to patents and published patent applications and any other relevant documentation ...".

3116. In the United Kingdom delegation's view, the wording proposed by the Netherlands delegation would not dispose of the difficulties which had arisen. This wording would once again mean that the Contracting Parties assumed an unlimited obligation to transfer documentation of a completely unspecified nature to the IIB reference material. The United Kingdom delegation held that the sole possibility was to use the wording "published patents and patent applications".

3117. The Chairman was of the opinion that the Committee was unanimously agreed that the possibility of the Administrative Council's deciding to extend reference material to include documents other than patent applications and published patents should not be ruled out.

3118. The Italian delegation stated that it could subscribe to the solution proposed by the Chairman. There were, in its view, three proposals under discussion at present. The first proposal was to keep to the text as originally proposed, the second was the Netherlands delegation's proposal, and, finally, there was the United Kingdom delegation's rather more elegant proposal.

3119. The Netherlands delegation once more emphasised the wording proposed by it, comprising the expression "relevant documentation". The first part of the wording, which referred to patent specifications and published patent applications, was clear; the expression "other documentation" was however dubious, and this was why the Netherlands delegation proposed the expression "relevant documentation".

3120. In the Austrian delegation's opinion, the wording "as from a specified date and under the conditions..." in the second part of the proposal was based on the aim of ensuring that the Administrative Council would have full freedom to

assess what was and was not to the point, and what could be justified in terms of cost. With this wording it would moreover be possible to define the documentation exactly.

3121. The Chairman noted that no delegation had spoken in favour of the Swiss delegation's proposal to use the expression "documentation" so now there merely remained the United Kingdom proposal and the Netherlands proposal.

3122. The Yugoslav delegation proposed a vote on the Netherlands and United Kingdom versions.

3123. The Chairman thereupon called for a vote on the Netherlands proposed amendment, the result of which was 15 delegations in favour, none against and 5 abstentions. The Netherlands delegation's proposed amendment was accordingly adopted and referred to the Drafting Committee.

3124. The Chairman pointed out that a further point to be settled was the question raised by the United Kingdom delegation, namely the reference date for the definition of documentation. The United Kingdom delegation was of the opinion that this date could be the one on which the Convention entered into force, the time of signing the Convention or the date when the European Patent Office started its activities.

3125. The Yugoslav delegation supported the United Kingdom proposal for adopting as the reference date the date on which the Convention came into force.

3126. The Italian delegation said it could agree to any conceivable date.

3127. The Chairman noted that the proposal could be regarded as accepted and referred it to the Drafting Committee.

3128. The Chairman pointed out a difference between the Swiss and Italian proposals. Under the Swiss proposal, the Administrative Council would be responsible for drawing up the study, while under the Italian proposal this would be a matter for the Interim Committee.

3129. The CEIF delegation proposed the following wording: "The Administrative Council shall decide how far extension is expedient and appears feasible on the basis of a study which it or possibly the Interim Committee will have carried out... it shall determine the date or dates upon which such extension is to enter into force."

3130. The Italian delegation thought that the content of this proposal was nearer the mark, but it was still firmly opposed to any reference being made to the financial feasibility of extension.

3131. The alternatives — i. e. whether the study should be arranged for by the Interim Committee or by the Administrative Council — were put to the vote by the Chairman. The voting was as follows: 13 delegations for the Interim Committee proposal, none against and 3 abstentions. The recommendations in M/8 concerning the Interim Committee came within the purview of Main Committee I, so the decision was referred to it.

3132. The Netherlands delegation announced that its abstention in the vote did not mean that it was opposed to the Interim Committee's being given this task. The Administrative Council could entrust studies to be carried out pursuant to this provision to a sub-committee.

3133. The United Kingdom delegation subscribed to the Netherlands delegation's view. It also urged that the Interim Committee should begin preparations for this study. The Interim Committee would of course not be set up under the Convention, but by the recommendation concerning the Interim Committee.

3134. The Chairman then called for a discussion of the issue of the expediency and feasibility of extension.

3135. The United Kingdom delegation pointed out that this

study should embrace both the technical and financial aspects.

3136. The delegation of the Federal Republic of Germany stated that its preference went to the Swiss proposal, which was designed to give the Administrative Council a set of guidelines for its decision on the extension of search documentation, rather than to the Italian version, which would allow the Administrative Council absolute freedom in this decision. The German delegation felt that it would doubtless be desirable if search activity could be extended to the documentation of practically all the Member States as soon as possible. However, as the IIB delegation had pointed out, this would involve quite considerable costs, which would be borne not so much by the States as by patent applicants. The German delegation held that it ought to be possible for the Administrative Council to determine, when making its decision, that in specific cases extension would not be an economic proposition.

3137. The Netherlands delegation subscribed to the United Kingdom delegation's proposal concerning the technical and financial aspects.

3138. The United Kingdom delegation explained that its proposal was not to be understood as an alternative to the Swiss proposal; it was merely intended to elucidate one aspect of the latter. As the United Kingdom delegation saw it, there were two possible solutions: it could be stated that there should be an extension only if it appeared expedient and feasible, or it could be stipulated that the scope and conditions of extension, and when it was to be carried out, should be determined by the Administrative Council in the light of the technical and financial study to be conducted.

3139. The view taken by the delegation of the International Patent Institute was that the Administrative Council would be independent in taking a decision on extension, but it would base its decision on the technical and financial aspects of the study. There was therefore no need to make express reference in the text to the financial feasibility of any extension.

3140. As a compromise, the Italian delegation proposed the following wording: "as from the date and under the conditions specified by the Administrative Council of the European Patent Organisation on the basis of the results of the study commissioned by the Organisation, with particular reference to the technical and financial aspects of the extension".

3141. By and large, the United Kingdom delegation was in agreement with the Italian proposed amendment, but wished to express the idea that this extension of search material would not take place all at once but in stages. The Administrative Council should have sufficient discretion as to the areas in which such extension should take place, when it should take place and under what conditions. A further sentence should therefore be added, laying down that the scope, conditions and time of the extension should be decided by the Administrative Council on the basis of the results of the technical and financial study. The Italian proposal was therefore acceptable to the United Kingdom delegation, provided that it implied more than one stage in extension and that the scale of any extension should be determined by the Administrative Council together with the relevant conditions and the point in time.

3142. The Italian delegation was in agreement with the United Kingdom proposed amendment.

3143. The Secretariat read out the text, which ran as follows: "The scope, conditions and time of such extension and the time of implementation thereof shall be determined by the Administrative Council on the basis of a study dealing, *inter alia*, with the technical and financial aspects."

3144. This proposal was supported by the Netherlands, French and Italian delegations.

3145. The United Kingdom delegation pointed to the

circumstance that through this provision the Administrative Council would be vested with powers not laid down in the Convention itself. Article 33 would have to be amended accordingly, and reference would have to be made to these powers in paragraph 2, which provided for a majority decision of three-quarters.

3146. In the opinion of the Netherlands delegation, the solution to the problem just mentioned was to be found in Section VIII of the Protocol on Centralisation.

3147. The Chairman put forward for discussion the still outstanding question of whether the final system for extension should take the form of extending the documentation of the Directorate-General for Searching, i. e. a centralised system, or, as in the proposals from the countries concerned, namely Italy and Finland/Norway, be effected through the intermediary of a sub-office or with the aid of the national patent offices in the countries involved.

3148. The Netherlands delegation was entirely in agreement with the second paragraph of the Italian delegation's proposal, because it did not go beyond the text of Section VI of the Protocol on Centralisation.

At the same time the Netherlands delegation thought it would no longer be possible to think in terms of transferring certain search activities to national patent offices, once the European Patent Office's documentation had been extended to cover that of other Contracting States. The Protocol on Centralisation was geared to European searches being completely centralised at the EPO; the Berlin sub-office was to be regarded as the sole exception, which would, however, come administratively under the Directorate-General for Searching at The Hague.

3149. In the Norwegian delegation's view, European searches, which covered a more extensive field, should be carried out either by the International Patent Institute itself or by a national patent office, where the latter was in a position to do so. This should particularly apply in cases where, on grounds of language, the International Patent Institute was not in a position to conduct the search. A solution of this sort would in the first place have the advantage that it would be possible as from the time the European Patent Office opened to grant secure European patents on the basis of comprehensive documentation. As far as the Nordic countries were concerned, all the additional patent documents were arranged in accordance with the International Patent Classification or the German patent classification. In addition, co-operation of this sort between the European Patent Organisation and certain national patent offices would help to alleviate the staffing difficulties arising for these offices out of the European patent system. Under the Finnish/Norwegian proposal the question of whether extended search activity would be limited to the transitional period or be on a lasting basis remained open.

3150. The Italian delegation pointed out a difference between its own proposal and that of the Finnish and Norwegian delegations. The Italian proposal envisaged search centralisation as early as possible. The primary task of the Rome sub-office was to classify Italian reference material; once this task was dispensed with the Rome sub-office could without further ado be merged with the Directorate-General for Searching. Activities in the national context would be gradually cut down in the course of time and might even be phased out altogether.

The Swedish delegation drew attention to the circumstance — already pointed out by the Swiss delegation — that the Administrative Council was entirely at liberty, pursuant to Article 31 of the Convention, to commission an agency or a national patent office to carry out a search on behalf of the European Patent Organisation, provided such an agency or

national patent office seemed in a position to do so. This ensued from Article 10, which laid down the powers of the President.

3151. The Belgian delegation agreed wholeheartedly with the Netherlands delegation's remarks, and thought that only one solution could be found for the transitional period.

3152. The United Kingdom delegation briefly expressed its views on the problem of decentralisation in general. As it had already stressed in its opening speech at the opening session of the Conference, it was no advocate of complete centralisation. The only part that the United Kingdom and its patent office would have to play would be in the application and implementation of the Convention during a transitional period, and then only at the discretion of the Administrative Council. If however decentralisation were to be contemplated for other countries as regards search activities or other important matters, by transferring without a time limit some sort of role to certain national patent offices or agencies in other countries, the United Kingdom would have to review its position regarding the time limit governing the transfer of examination work. The United Kingdom delegation was not adopting a negative attitude towards the Italian, Norwegian/Finnish and Austrian proposals as such; it was merely expressing its views on the consequences of these proposals, not on the matter itself. The Swedish delegation had stated that, irrespective of any provisions in the Protocol on Centralisation covering the transfer of tasks to national patent offices, powers or certain functions which, pursuant to the European Patent Convention, were to be exercised by the European Patent Office, could be transferred to national patent offices or agencies by the Administrative Council (Article 10 and Article 31, paragraph 3). This opinion had not been put forward before. If it were confirmed, the United Kingdom delegation would be forced to the conclusion that the powers vested in the Administrative Council pursuant to Articles 10 and 31 covered examining activity just as much as search activity. In other words the time limit laid down in Section IV of the Protocol would be subordinate to the powers of the Administrative Council in the matter. The United Kingdom delegation thought it would be very appropriate to provide for powers of this sort to ensure the smooth running of the European Patent Office by continuing to transfer examining work even after the end of the transitional period. It recognised that this might involve important consequences, but felt obliged to advocate parallel solutions for examining and search activities.

3153. The Austrian delegation had some general comments to make on the principle of centralisation. Of all the documents on the Conference agenda, it was the issue of centralisation that raised the greatest problems for the Austrian delegation. It had recently been said in various quarters that this Protocol represented a compromise, which had been reached only after protracted and difficult discussions. The Austrian delegation fully understood that some countries or groups of States which had entered into special commitments among one another would wish to realise certain aspects of a form of organisation. If, however, it was desired to establish the activities in question on a broader geographical basis, the Austrian delegation considered that the legitimate interests of other States ought to be taken into account, if there was to be any compromise. As it now stood, the Protocol on Centralisation required Contracting States directly to relinquish patent searches as regards examination of patentability after a transitional period in favour of the European Patent Office. But it also required that a country like Austria for example, whose patent office had recently been recognised in a world-wide agreement as being one of the small number of the most highly qualified patent offices, should also relinquish its qualified international role without having any opportunity in the European context to

take part in European work, as had been provided for a number of other countries which were in a similar situation. In the Austrian delegation's view, it was precisely on this point that the compromise, which should be generally recognised and acceptable, was not balanced. The Austrian authorities had thoroughly considered and examined the present situation. They were not averse to the principle of centralisation as such, they were certainly not unaware of the importance that certain countries ascribed to the Protocol, and in no way wished to jeopardise the efforts and amount of work put into the preparatory Conference. For this reason the Austrian delegation had limited itself to putting forward a proposal in M/84 to the effect that the Organisation should be given the possibility of making provision for co-operation. Under the Austrian proposal the Administrative Council would be free to transfer certain activities to a particular country or to a particular national patent office under certain conditions. The Austrian delegation did not consider that a proposal of this sort could undermine the idea and philosophy of centralisation.

3154. The Swedish delegation announced that it accepted the principle of centralising the grant of patents. Its proposal was not intended to bring about any form of decentralisation. Sweden did not want to take over a particular part of the European Patent Office's search activity, but it did want a flexible solution, one that would be feasible in practice and facilitate the transfer of work to national patent offices acting in an ancillary capacity to the European Patent Office, in the sort of cases, for example, where the central body was overburdened or there were no staff to cover certain technical areas. Apart from this, consideration should also be given to the possibility of carrying out searching for the purpose of checking in certain cases. For this reason the Swedish delegation wanted to leave open the possibility of a suitable patent office being authorised by the Administrative Council to carry out search activities on behalf of the European Patent Office.

3155. Referring to the United Kingdom delegation's comments, the Italian delegation said that with regard to the definitive system it was making no demands either for any national patent office or for the Rome sub-office. It would remain completely within the purview of the Administrative Council to decide whether searching should continue to be carried out in Rome or whether this should be done at The Hague. As to the principle of centralisation, the Italian delegation was fully in agreement with the stand taken by the Austrian delegation. It was only logical that if the interests of certain delegations, such as the United Kingdom and other delegations, were taken into account in the Protocol, the interests of the Governments of Norway, Finland and Austria should likewise be taken into account on an equal footing.

3156. The Netherlands delegation thought that it could not justifiably be claimed that certain advantages were accorded to the United Kingdom but not to Austria and other countries by the Protocol. Section IV of the Protocol dealt with examining activities in general. All countries which fulfilled the requisite conditions could exercise the same rights as the United Kingdom during the first fifteen years. The Netherlands delegation maintained that there was a fundamental difference between searching and examination. Section IV of the Protocol on Centralisation only mentioned the examination of patent applications. Yet no exception was made for searching. This notion did not concern the Berlin sub-office as it would be decentralised only as far as the conduct of work was concerned, but would have work delegated to it since, administratively, it would be part of the European Patent Office. It was correct to say that agreements between the European Patent Office and certain States were mentioned in Articles 31 and 10. However,

the Netherlands delegation considered that these Articles should not be interpreted as meaning that when the transitional period had expired, the Administrative Council could transfer certain tasks to other national patent offices, by agreement, since the application of Section IV was expressly limited to a transitional period of fifteen years.

3157. The Chairman pointed out that the text of Articles 10 and 31 had already been adopted by Main Committee II; in accordance with the rules of procedure, any further amendment would require a two-thirds majority; interpretative statements relating to Articles 10 and 31 could not bind the Administrative Council.

3158. The German delegation stated that it had consistently stressed during the preparatory work that it was in favour of a centralised system for the grant of patents. However, centralisation should not be carried to absurd lengths. The German delegation considered that on the conclusion of the preparatory work there should be a centralised European Patent Office with a centralised search department. In the meantime, however, until this objective had been attained, consideration would have to be shown for States which would find it difficult for the time being to get used to this idea of a centralised European Patent Office. This circumstance had already been taken into account in Section IV of the Protocol on Centralisation, should difficulties arise from the introduction of a European examination procedure. Consideration should likewise be shown for States which experienced similar difficulties from the centralisation of searching. Consequently, the German delegation felt that the proposal made by the Austrian delegation was worthy of consideration. Point 2 of the Austrian proposal stated that the European Patent Organisation could, during the transitional period laid down in the Protocol on Centralisation, transfer tasks to assist offices which encountered difficulties on account of the centralisation of searching. This proposal concerned the transitional period only; in addition, such difficulties might arise not only for the national patent offices but for the Directorate-General for Searching as well. The German delegation therefore supported the Austrian proposal and wished furthermore to state that the Austrian Patent Office was amply qualified to become a searching office pursuant to the PCT. Consideration should also be given, as advocated in Section I of the Austrian proposal, to enabling the Administrative Council or the European Patent Organisation to entrust tasks to national offices in individual cases where this was advisable in the interests of the European Patent Organisation. Such a possibility could also arise temporarily at the final stage, and the German delegation would have no misgivings about the Administrative Council's being empowered to transfer tasks in the interests of the Organisation itself, even after the end of the transitional period. However, a transfer of this sort would have to be limited to offices which possessed the minimum documentation under the PCT, and so would be in a position to assist the European Patent Office. The German delegation accordingly proposed that the Austrian proposal be slightly amended, to refer not to suitably qualified central industrial property offices but to central industrial property offices which possessed the minimum documentation laid down by the PCT. Summarising, the German delegation concluded that the Austrian proposal advocated centralisation while requesting, in the event of teething troubles, some assistance of the sort which had been granted to other offices in respect of searching under Section IV; the Austrian proposal also advocated fostering the interests of the Organisation itself rather than the interests of the national patent offices. In the German delegation's view, the Austrian proposal was the correct line of compromise to pursue.

3159. The Swiss delegation wanted searches to be carried out and search reports to be subsequently published in respect of European patent applications filed at the European Patent Office from the outset. In Main Committee I, doubts had been expressed whether the International Patent Institute or the Directorate-General for Searching would be in a position to cope with all the tasks arising from the very first day. If this were so, the Swiss delegation would also be interested in the adoption of the Austrian proposal, since it was a matter of importance to the Swiss delegation that European patent applications be searched and published at the European Patent Office right from the start, and that searching should not be confined to certain areas, if the Directorate-General for Searching were unable to cope.

3160. The delegation of the International Patent Institute considered that it would be useful to provide information about the IIB's working capacity at the time it was integrated into the European Patent Office as the Directorate-General for Searching. Subject to the application of relevant French legislation, the present capacity of the International Patent Institute would rise from 40,000 to 48,000 searches. From an internal survey which was being carried out at the International Patent Institute into the demands which the European Patent Office would make on the Directorate-General for Searching, in addition to the obligations which the Institute would continue to fulfil towards its Member States, it may be concluded that this figure of 48,000 searches would not be exceeded, because the Berlin sub-office would provide a further search capacity of about 6,000 applications, thus further raising the figure to 54,000 searches. From this, it could be correctly concluded that, as regards search reports, the European Patent Office would be able to cope with the demands made upon it.

3161. The United Kingdom delegation observed that a number of delegations had come out in favour of the Austrian proposal. Since the proposal was likely to receive majority support, the United Kingdom delegation proposed an amendment to the Austrian proposal whereby the words "or examination work" would be added in the third line of paragraph 1 of the Austrian proposal. The text would then read as follows: "the carrying out of searches or examination work". The United Kingdom delegation was aware that further drafting amendments would have to be made as a result of this proposed amendment.

3162. The Turkish delegation endorsed the Austrian proposal for an amendment.

3163. The Spanish delegation also expressed its support for the Austrian proposal.

3164. The French delegation set great store by the concept of centralisation in the field of searching, just as in the case of examination.

3165. The French delegation had acknowledged at the first Luxembourg Conference that an exception might be made as regards examination work during a transitional period and that a similar solution in the case of search activity might also be appropriate for certain national patent offices during a transitional period but not thereafter, since the IIB had made it clear that it could cope with the work required of it. The French delegation was accordingly against paragraph 1 of the Austrian and Italian proposal, but might be able to accept paragraph 2 of the Austrian proposal.

3166. The Norwegian delegation felt that Finnish and Norwegian interests were taken into account by the Austrian proposal and these delegations therefore lent their support to the Austrian proposal.

3167. The Chairman pointed out that the German proposal implied that certain tasks could only be entrusted to national patent offices which possessed the minimum documentation

within the meaning of the Patent Cooperation Treaty. That Treaty further provided that such offices should employ a certain minimum number of examiners. It was open to question whether the Norwegian or Finnish Patent Offices fulfilled this condition.

3168. The Norwegian delegation stated that the Norwegian Patent Office possessed the minimum documentation and employed about 75 examiners.

3169. The United Kingdom delegation considered that a vote should first be taken on the proposed amendment to the Austrian proposal. If its own amendment were then rejected, and the Austrian proposal adopted, the resulting arrangement would be unacceptable to the United Kingdom delegation — in which case it did not expect to receive instructions for the signing of the Protocol; The Austrian delegation argued that if there was to be a vote, its own proposal should be put to the vote first of all, since it referred to "suitable qualifications" and was therefore to be regarded as more far-reaching.

3170. The Netherlands delegation considered that the United Kingdom proposal broadened the scope of the Austrian proposal and therefore a vote should first of all be taken on the United Kingdom amendment before the Austrian proposal. The Netherlands delegation basically considered that even if the Austrian proposal was accepted, there ought to be a vote on the United Kingdom proposal first. The Netherlands delegation considered the issue of the centralisation of searching to be of much greater consequence than the centralisation of examination, so if it was intended to decentralise searching in a certain way, the same would perforce have to be done for examination.

3171. The Swiss delegation requested some further explanation. If it had correctly understood, point 1 of the Austrian proposal referred only to a transitional period and not to a period extending beyond fifteen years. The Swiss delegation's agreement was based on a discussion in Main Committee I where it had also been explained that the Swiss delegation was concerned that searches could be carried out for all applications from the outset. If at the time of integration the International Patent Institute had a certain number of examiners at its disposal who would be able to carry out all the searches, then the Swiss delegation felt that there could be no question of transferring work to other offices with the result that employees of the Directorate-General for Searching would have to be dismissed, solely in order to provide national patent searching departments with work.

3172. The German delegation pointed out that its most recent contribution to the discussion had been made before the International Patent Institute's Observer delegation spoke of the IIB's workload position. From what the IIB delegation had said, the IIB would, after a short transitional period, be in a position to deal with the full load of search work allocated to it. For the German delegation, this meant a completely new situation. When supporting the Austrian proposal it had assumed that the IIB would have considerable difficulties. But if this meant that, on account of the preparatory measures taken by the IIB, the IIB was really in danger of being faced with a surplus of staff, then it certainly would be dangerous for the work of the IIB to be transferred to other offices. But anyway, the first paragraph of the Austrian proposal would preclude this eventuality since it merely stated that tasks could be transferred, if this were considered desirable in the interests of the IIB or the European Patent Organisation. The situation was different where the second paragraph of the Austrian proposal was concerned.

With regard to the United Kingdom delegation's proposal whereby examination activities could also be transferred to national patent offices during a particular transitional period in

addition to searching work, the German delegation stated that there were nonetheless certain differences between searching and examination and pointed out that Section IV, and also the transfer of examination activities during a transitional period, entailed certain restrictions.

3173. The Austrian delegation dealt with the statement by the IIB Observer delegation. It felt that the spectre of unemployment for IIB employees which had been conjured up showed a complete misunderstanding of the Austrian proposal. The proposal was a permissive provision subject to the fact that the Administrative Council would assess the situation and examine all the factors which might lead to tasks being transferred to national patent offices. Consequently, if the need for searches to be farmed out to external bodies did not arise, the Administrative Council would be unlikely to take a decision to that effect.

3174. The IIB delegation pointed out that paragraph 1 of the Austrian proposal was based on the interests of the EPO whereas paragraph 2 was based on the interests of the various national patent offices.

3175. The Finnish delegation signified its agreement to the Austrian delegation's proposal in M/84/II, which had the same aim as its own proposal in M/87/II. It confirmed the statement by the Norwegian delegation that its proposal could be considered withdrawn if the Austrian proposal were accepted in a form which was compatible with the Finnish proposal. The object of the Finnish proposal was to enable central patent offices to carry out searches in special cases arising from the use of different official languages or from the special nature of documentation which the European Patent Office did not have. This would ensure that the documentation of countries with different official languages and a different pattern of trade and industry would be taken into account. The Austrian proposal was worded to the effect that search work should be transferred to national patent offices which were capable of undertaking it. The Finnish delegation supported this proposal since it allowed the Organisation greater flexibility. It was not directed against centralisation but was intended to make it easier for European countries to take part in the European patent system, because the resulting changes in the social system would have a considerable influence on trade and industry in general in the countries affected. In point 1 of Section IV an exception had been conceded for a large industrial country to facilitate its accession to the European patent system. Surely it was no less justified for small countries such as Finland and Norway, and Austria as well, also to be granted exemptions as provided in the Austrian proposal. The centralisation process would in this way be considerably simplified for these countries and the European patent system and its implementation would in no way be jeopardised.

3176. The Netherlands delegation regarded the draft of the Protocol on Centralisation which had been laid before the Diplomatic Conference as a well-balanced compromise for the centralisation of searching and of examination. The Luxembourg Inter-Governmental Conference had already sought to settle the question of the headquarters of the European Patent Office, together with the question of the centralisation of searching and examination, before the Diplomatic Conference began. Discussions to date on Main Committee II had shown that if amendments to the Protocol on Centralisation were allowed, the entire system might be at risk, and so the Netherlands delegation was against any alteration of the Protocol along the lines of the Austrian proposal. As to the difficulties in connection with searching which the European Patent Office might have to cope with, the reason why the Netherlands delegation said that the European Patent Office might not be able to carry out the necessary number of

searches was because the French delegation had proposed that the European Patent Office should be obliged to carry out all the searches for European patent applications from the very beginning. In view of this demand, the Netherlands delegation considered that it could not be taken for granted that the European Patent Office would be capable of undertaking the necessary work. The Netherlands delegation wholeheartedly supported the statement of the IIB delegation. The Netherlands delegation contended that if the European Patent Office were faced with difficulties in meeting these obligations in the future, it ought to be possible to resolve them by means of working agreements pursuant to Article 31 of the Convention, i.e. outside the framework of the Protocol on Centralisation.

3177. The Austrian delegation had the impression that a number of delegations found it difficult to accept the Austrian proposal because no time limit was set in paragraph 1. It pointed out once more that it saw no difficulty here, because the Organisation itself could decide when and under what conditions there might be a need for certain activities to be carried out outside the European Patent Office in its own interest. This need might also be present when the transitional period had expired. However, in a spirit of compromise, the Austrian delegation proposed that a time limit be included in paragraph 1 of its proposal, which would then read as follows:

"(1) During the transitional period laid down in Section IV of this Protocol, the Organisation may entrust suitably qualified central industrial property offices..." Paragraph 2 of the Austrian proposal would remain unchanged.

3178. The Swedish delegation thought that the purpose of the Protocol on Centralisation was to centralise tasks carried out under the Patent Cooperation Treaty in the European Patent Office while at the same time making special arrangements during a transitional period to help national patent offices to adjust to the European patent system. The possibility was now being discussed of extending such arrangements to counteract the difficulties arising for national patent offices. As for the difficulties likely to arise for the European Patent Office, there was no doubt that the Administrative Council and the European Patent Office should be given powers to overcome them, as the Netherlands delegation had already stated. The Swedish delegation would welcome a general statement that additional search activities could be carried out on the basis of working agreements.

3179. The Luxembourg delegation espoused two ideas expressed by the Netherlands and Swedish delegations and proposed that if the Administrative Council of the European Patent Office came to the conclusion that the workload of Directorate-General for Searching was beyond its capacity, it would empower national patent offices to carry out decentralised searches.

3180. With regard to the Luxembourg proposal, the Chairman observed that the requirement that national patent offices should be suitably qualified continued to apply.

3181. The International Chambers of Commerce delegation had studied the advantages and disadvantages of centralisation in detail in the preparatory work for the Patent Cooperation Treaty and had come to the conclusion that maximum centralisation should be sought for the benefit of applicants. The question of checking the results of searches carried out for the EPO required more detailed study.

3182. The Danish delegation, which subscribed to the opinion of the Netherlands, Swedish and Luxembourg delegations, saw a fundamental difference between the requirements of the Protocol on Centralisation and paragraph 1 of the Austrian proposal. Under Articles 10 and 31, the President and the Administrative Council of the European Patent Organisation were enabled to conclude agreements; this power was not



confined to searching but also included examination. However, the Protocol provided for the possibility of certain countries undertaking search activities under certain circumstances, but only if European interests and those of the European Patent Organisation so required.

3183. The German delegation emphasised that it considered centralisation to be very important and emphasised the statements of the Netherlands and Swedish delegations. On the other hand, it was aware that some of the prospective Contracting States would have difficulties in adopting the European patent system, and it was prepared to support the proposals of these delegations where appropriate. It considered that the proposal from the Austrian delegation, which now referred to a transitional period, came within the framework of centralisation and therefore firmly supported the proposal. Moreover, the German delegation did not feel that the Austrian proposal was superfluous in view of Article 31. The German delegation also withdrew its proposal concerning central industrial property offices possessing minimum documentation pursuant to Rule 34 of the Patent Cooperation Treaty.

3184. The United Kingdom delegation considered that there were three questions to be decided. Firstly, with reference to the transfer of tasks to national patent offices, should examination work be treated in the same way as searching? The United Kingdom delegation saw no reason why the two activities should be dealt with in a different way. Secondly, if the Protocol was to be amended anyway, should tasks be transferred on the basis of the interests of the patent office performing the activity or those of the European Patent Office? Then there was a further question of whether additional possibilities and powers should be conferred on the European Patent Office outside the framework of the Protocol on Centralisation. Did Article 31 of the Convention provide the necessary powers for the Administrative Council or the President of the European Patent Office to have certain search or examination activities carried out by national patent offices? The United Kingdom delegation felt that a very flexible solution should be sought for this problem within the framework of the Protocol on Centralisation. The United Kingdom delegation considered the third question to be of lesser importance: the transfer of tasks in the interests of the Member States during the transitional period. The United Kingdom delegation endorsed the view of the International Chambers of Commerce that search activities were undoubtedly much more difficult to check than examination work. The United Kingdom delegation availed itself of the opportunity to bring up a further point: were the Netherlands and German delegations prepared to state that, as was the case with regard to examination work, they would not request the transfer of search activities either?

3185. The Norwegian delegation supported the Austrian proposal and shared the view of the German delegation. It furthermore stated with regard to the remarks of the United Kingdom delegation that it was just as difficult to keep a check on search activities within a single office as within two or three equally well equipped national offices.

3186. The Netherlands delegation considered that the Administrative Council was responsible for the orderly functioning of the European Patent Office. If, in order to ensure that the Office functioned properly, it appeared necessary and appropriate to conclude working agreements with national patent offices, the Administrative Council would have the necessary powers to do so by virtue of Article 31. Such agreements could concern both searching and examination activities; the only criterion involved was the proper functioning of the EPO. However, in referring to the transfer of

tasks to national patent offices, the Protocol on Centralisation was not concerned with the interests of the EPO but with measures to counteract transitional difficulties experienced by national patent offices. The compromise worked out in the Protocol on Centralisation had been obtained after lengthy negotiations and represented a balanced solution. The Netherlands delegation was therefore opposed to any amendment of the Protocol on Centralisation.

3187. The delegation of the International Patent Institute drew attention to a possible logical contradiction if it were intended that in the event of the EPO being unable to carry out the searches entrusted to it, such work should be transferred to national patent offices; if this occurred, it would not be possible for the IIB to exercise any control over the work transferred thus giving rise to a number of difficulties.

3188. The Swedish delegation supported the view of the United Kingdom delegation that agreement would have to be found on the fundamental question of the powers of the Administrative Council. It shared the contention of the Netherlands delegation and the Chairman that Article 31 definitely empowered the Administrative Council to take all the necessary steps to ensure the proper functioning of the European Patent Office. As regards the reservations of the IIB delegation, the Swedish delegation stated that searches could only be delegated to national patent offices on the basis of working agreements and that such agreements would include the necessary guarantees concerning controls.

3189. The French delegation considered that the Austrian proposal as amended was covered by Article 31, paragraph 3, of the Convention as it now stood. The Austrian proposal was superfluous and perhaps even dangerous, in that any enumeration implied that items not mentioned were excluded. The French delegation furthermore supported the reservations of the IIB Observer delegation regarding the possibilities of checking agency search work.

3190. The Italian delegation supported the Austrian delegation's compromise proposal which demonstrated the degree of understanding which the latter was prepared to bring to bear on the matter.

3191. The Belgian delegation wholeheartedly supported the remarks of the French delegation.

3192. In response to the French delegation's statement, the Austrian delegation explained that Section IV of the Protocol on Centralisation did not deal with the same problems as those dealt with in paragraph 2 of the Austrian proposal. Section IV of the Protocol on Centralisation stated that a special exception could be made for examination during the transitional period. It could be concluded from this that, because the Protocol did not mention searching, it had been excluded in this context. It was this deficiency in the Protocol which, in the Austrian delegation's opinion, restricted the scope and meaning of Article 31. The Austrian delegation consequently considered that it was very important to amend the Protocol as suggested in the Austrian proposal and in accordance with the German delegation's understanding of the matter.

3193. The Swiss delegation re-iterated its position and stated that it wanted searches to be carried out in respect of all European patent applications and the search report to be subsequently published together with the application. Doubts had been expressed in Main Committee I as to whether the Directorate-General for Searching would be able to do this. In view of these doubts, the Swiss delegation had been prepared to support the Austrian proposal as set out in paragraph 1. If it was however correct that Article 31 enabled the Organisation to transfer work, this Article should stand as it was and the Protocol should not be amended. The Swiss delegation also



drew attention to the following point: The Protocol was intended to achieve centralisation and to assist certain national patent offices in certain teething troubles during the initial period. There was an essential difference between examination and searching. The examination departments of the European Patent Office would first of all have to be built up and during the build-up period there would be no problem whatever, under the terms of the Protocol, in delegating certain tasks to external agencies without in any way adversely affecting the available capacity of the European Patent Office.

A quite different situation obtained as regards searching; upon the entry into force of the agreement, an organisation would already be in existence which could deal with the tasks entrusted to it, as the Director-General of the IIB had already confirmed. Should difficulties nevertheless arise, the powers granted under Article 31 should suffice.

3194. The Yugoslav delegation supported the centralisation of the European patent system in principle; however, it was in favour of the Austrian proposal as amended for the reasons stated by the Finnish and Norwegian delegations and, in particular, the German delegation.

3195. The Swedish delegation was grateful to those delegations which had also spoken in favour of an interpretation of Article 31 whereby the Administrative Council had the power to take the necessary steps including, if necessary, the transfer of search work. It supported the proposal of the Swiss delegation that an interpretative statement concerning Article 31 should be drawn up. Such a statement would not however solve the problem of the Austrian, Finnish and Norwegian delegations since the main concern of the Austrian proposal was the interests of certain Contracting States qualified under the PCT and this question should be settled separately from an interpretative statement concerning Article 31.

3196. The Chairman noted that two bodies of opinion had emerged in the Committee. There was the view that Article 31 as such was sufficient to empower the President or the Administrative Council to conclude working agreements on the transfer of searches, particularly with national patent offices. An interpretative statement to this effect would, however, go further than the Austrian proposal since it would contain no time limit. On the other hand there was general support for the Austrian proposal.

3197. The United Kingdom delegation considered that the Conference would have to make a Statement on the scope of Article 31 since the Article itself was not sufficiently clear and could be interpreted restrictively since the Protocol only referred to a transfer under certain conditions. Any statement would firstly have to make it clear that the Conference interpreted Article 31 as meaning that searches or examination work could be transferred to suitable national patent offices in the interests of the European Patent Organisation.

3198. The Austrian delegation contended that the United Kingdom delegation's view confirmed the reservations which had been expressed by the Austrian delegation concerning the inter-relationship between Article 31 and the Protocol on Centralisation as it now stood. It pointed once again to Section VII of the Protocol from which it could be concluded that the question of delegating agency work was conclusively settled in the Protocol on Centralisation and that Article 31 of the Convention did not therefore apply.

3199. The Chairman considered that a vote should be taken in the Main Committee to record that such an interpretation was not in accordance with the Committee's view.

3200. The Netherlands delegation stated that the Administrative Council was empowered to conclude agreements in the interests of the proper functioning of the European Patent

Office. It considered that Article 31 was unambiguous but would not oppose an interpretative statement.

3201. The Austrian delegation re-iterated that Article 31, paragraph 3, did not mention the interests of the Organisation. It was simply a formal clause without any qualifying provisions.

3202. The United Kingdom delegation also considered that an interpretative statement was required. Such a statement would definitely have to contain the words "in the interests of the European Patent Office".

3203. The German delegation's view of the legal position was that the transfer of examination work during the transitional period was conclusively dealt with in Section IV of the Protocol on Centralisation and that the scope of Article 31, paragraph 3, was accordingly limited.

3204. The United Kingdom delegation regretted the legal opinion of the German delegation. It considered that two totally different problems were involved in the Protocol on Centralisation and Article 31. It was generally recognised that Article 31 applied to search work. This should also be the case for examination work.

3205. In the opinion of Turkish delegation, the discussion had so far shown that Article 31 as such was not sufficient. However, an interpretative statement concerning Article 31 would not render a vote on the Austrian proposal superfluous. The Turkish delegation proposed that a vote be taken first of all on the Austrian proposal.

3206. The Spanish delegation supported this proposal.

3207. The Chairman drew attention to the rules of procedure which provided that amendments to proposed drafts could be put to the vote if they were supported at least by the Government delegations.

3208. The United Kingdom delegation opposed the Austrian proposal being voted first. A vote should first be taken on the broader proposal since if the interpretative statement was adopted, the Austrian proposal would become superfluous.

3209. The Netherlands delegation opposed the Turkish proposal and gave its wholehearted support to the United Kingdom proposal.

3210. The Austrian delegation supported the views of the Swedish delegation, and considered that Article 31 was really outside the scope of this discussion. On the other hand, if a statement were to be adopted, paragraph 1 of the Austrian proposal would not necessarily be irrelevant, since it would include a further safeguard in the Protocol on Centralisation considered necessary by the Austrian delegation.

3211. The Chairman noted that the Turkish and Spanish delegations did not insist on their proposals being put to a vote. In view of the variety of views concerning the content of any interpretative statement, the Chairman proposed that a Working Party be set up to examine the matter.

3212. The Netherlands delegation repeated its point that in its opinion an interpretative statement was not necessary, but that it would not oppose its adoption. It proposed that a vote be taken to determine whether the Committee considered that an interpretative statement was necessary or whether it felt that the present version of Article 31 was clear.

3213. The Swedish delegation subscribed to the view of the Netherlands delegation that it would be sufficient if reference were made to the discussion which had taken place, which showed that the Committee was predominantly in agreement on this point.

3214. The United Kingdom delegation said that it would much prefer a statement concerning Article 31 to be drawn up. The concern of some delegations that this would create a long-term possibility for transferring examination tasks was unfounded. The United Kingdom delegation declared, on behalf of Her Majesty's Government, that the latter would do

all within its power to contribute to the proper operation of the Protocol on Centralisation, as it had already stated at the opening session of the Conference. In its view the provisions of Article 31 should only be applicable in exceptional circumstances.

3215. The German delegation greatly welcomed the statement by the United Kingdom delegation and said that as a result it was in complete agreement with that delegation.

3216. The Chairman noted that two delegations had spoken in favour a vote to confirm that Article 31 did not give rise to any differences of interpretation, that it was clear and therefore need not be supplemented by a statement.

3217. As a result of the statements by the United Kingdom and German delegations, the French delegation declared its support for the Netherlands delegation's proposal.

3218. At the request of the Chairman the Netherlands delegation repeated its proposal which was to the effect that Article 31 of the Draft Convention was to be understood in the light of the Committee's discussions and required no amendment.

3219. The Austrian delegation also supported the Netherlands proposal, but insisted that at the same time a vote should be taken on paragraph 1 of the Austrian proposal.

3220. The United Kingdom delegation did not think it was possible to close the debate on the interpretation of Article 31 by referring to the discussions which had taken place. The view of the Austrian delegation showed that it thought that its proposal should be discussed further. Since an unequivocal position had been reached on the question of searching, the United Kingdom delegation felt itself obliged to insist that a position likewise be adopted on examination.

3221. The Chairman did not share the view that it was necessary for the Committee to give an interpretation of Article 31.

On the other hand a vote had already been taken on Article 31 and further discussion of it would require a majority of 2/3 of the delegations. The Netherlands delegation had proposed that it be noted that Article 31 was to be understood in the light of the discussions which had taken place. Two delegations had supported this proposal and the Chairman therefore proposed that it be put to the vote.

3222. The German delegation briefly re-stated its interpretation of Article 31, paragraph 3. Firstly it was to be noted that the principal purpose of Article 31, paragraph 3, was to cover cases other than those under discussion. As a result of the discussions which had taken place however, the German delegation had come to the conclusion that the wording of this provision was broad enough to cover other cases as well, in particular the possibility that the European Patent Office might exceptionally require the help of other institutions. The German delegation considered that this interpretation would cover the Austrian case as described in paragraph 1 of the Austrian proposal. At present, it was nevertheless hardly conceivable that Article 31, paragraph 3, would have to be applied in the period after the expiry of the transitional period. The German delegation proposed that a statement on Article 31 be expressly avoided, on the grounds that the statements made on the Protocol should suffice.

3223. The United Kingdom delegation said that, whilst the possibility of applying Article 31 to examination work could not be excluded, such application was unlikely.

3224. The Chairman took a vote on the Netherlands proposal, which was adopted by 13 votes to 1, with 4 abstentions. The Chairman said that a vote should then be taken on paragraph 1 of the Austrian proposal, which was itself the subject of a Luxembourg proposal for an amendment. The Luxembourg delegation restated its proposal amendment to

the Austrian proposal, worded as follows: "During a transitional period of ... years the Organisation may entrust suitably qualified national patent offices of the Contracting States with the carrying out of searches in respect of European patent applications. A decision to this effect may be taken by the Administrative Council of the European Patent Office if it considers that the work capacity of the Directorate-General for Searching is insufficient".

3225. The United Kingdom delegation pointed out that the Committee had before it firstly paragraph 1 of the Austrian proposal in its amended form, i.e. restricted to a transitional period within the meaning of Section IV of the Protocol on Centralisation, secondly the United Kingdom proposal that the words "or examination work" be added, and finally the Luxembourg proposal for supplementing the last part of paragraph 1 of the Austrian proposal.

3226. The Netherlands delegation considered that the vote on the interpretation of Article 31 had shown that the provision contained in paragraph 1 of the Austrian proposal was already contained in Article 31. A vote on this paragraph was therefore unnecessary.

3227. The German delegation declared, in connection with the vote that was to be taken, that it would vote against all the proposals, not because it opposed the proposals themselves, but because it considered that on the basis of the interpretation of Article 31, paragraph 1, these proposals had become superfluous.

3228. The United Kingdom delegation considered that it must be clearly established that the Austrian proposal, including the United Kingdom amendment, was already covered by the wording of paragraph 1 of Article 31, as the German and Netherlands delegations had already stated.

3229. The Swedish delegation supported the views of the United Kingdom, German and Netherlands delegations.

3230. The Italian delegation observed that it did not think it was possible to extend the Austrian proposal to examination work.

3231. The Chairman pointed out that it followed from the statements made in connection with the scope of Article 31 that the concern of the Austrian delegation, as reflected in M/84/II, paragraph 1, was without foundation.

3232. The United Kingdom delegation requested that its proposed amendment to the Austrian proposal relating to examination work also be taken into account.

3233. The Austrian delegation said that in the discussions which had taken place it had gained the impression that a large number of delegations appeared to agree that Article 31, paragraph 3, of the Draft Convention also covered the situations which were the subject of paragraph 1 of the Austrian proposal, which meant that this paragraph was superfluous. It requested the Chairman to establish whether there was a general opinion within the Committee on this point.

3234. The Chairman noted that no delegation opposed this view. In connection with the United Kingdom proposal, the Chairman said that the views expressed by delegations on this matter would be put on record in the minutes.

3235. The United Kingdom delegation stated that paragraph 1 of the Austrian proposal only referred to search work while the United Kingdom delegation on the other hand had proposed an extension to cover examination as well. The United Kingdom delegation insisted that, if it was now possible to establish that the Committee was agreed that paragraph 1 was covered by Article 31 as regards search work, the same agreement be established as regards examination work. The United Kingdom delegation requested that the Committee adopt a specific position on this matter.

3236. The Chairman considered that the situation was clear

The Austrian delegation was prepared to withdraw its proposal if there were general agreement that it was superfluous because Article 31 covered this problem. A large number of delegations also considered that Article 31 permitted the transfer of examination work under the same conditions.

3237. The Netherlands delegation referred once more to its position, that in its opinion paragraph 1 of the Austrian proposal was superfluous in view of the positions adopted on the interpretation of Article 31. It considered that discussions had shown that this applied both to searching and to examination. For this reason the Netherlands delegation shared the view of the United Kingdom delegation.

3238. The United Kingdom delegation said that the same interpretation of Article 31 of the Draft Convention must apply to both searching and examination since a consistent solution must be found.

3239. The Austrian delegation considered it important that the statements and interpretations expressed so far by various delegations and last repeated by the Netherlands delegation should be included in the Minutes of the Conference. Under these circumstances it would be prepared to withdraw its proposal concerning paragraph 1. In doing so it however hoped that its understanding attitude *vis-à-vis* certain other delegations would make it possible for those delegations to support more readily paragraph 2 of the Austrian proposal and the transitional solution which it contained.

The Chairman noted that no delegation opposed the view that, in the light of the results of the Committee's discussions, paragraph 1 of the Austrian proposal as given in M/84/II and incorporating the United Kingdom amendment was covered by Article 31. He also noted that under these circumstances the Austrian delegation withdrew paragraph 1 of its proposal. Finally, he noted that the position of the Norwegian and Finnish delegations, which had supported the Austrian proposal, was also taken into account by this interpretation.

3240. The Chairman accordingly directed the discussion to paragraph 2 of the Austrian proposal.

3241. The Netherlands delegation considered that the second paragraph of the Austrian proposal lay outside the scope of the Protocol on Centralisation. It viewed the draft Protocol on Centralisation as a balanced compromise. It regretted that the setting up of a European Patent Office might have adverse effects on certain national patent offices but considered that this was unavoidable in creating a central body of this kind. The Austrian patent office was not the only one to be so affected. There were practical as well as political reasons for retaining the proposed text of the Protocol on Centralisation. The International Patent Institute, which was to be integrated into the European Patent Office as the Directorate-General for Searching, would experience considerable practical difficulties if the Austrian proposal were to be adopted. The Netherlands delegation was therefore unable to support the Austrian proposal although it regretted the situation in which Austria was placed.

3242. The Austrian delegation did not consider that, as it stood, the draft Protocol on Centralisation represented a balanced compromise, as it had not been able to participate in producing this compromise. The sacrifices being required of the Austrian patent office could in no way be compared with those which might be required of national patent offices which were to accommodate branches or sub-offices of the European Patent Office. The Austrian patent office had invested a great deal and would have to invest more to achieve and keep its PCT qualification, and it was now required to relinquish this.

3243. The Belgian delegation fully endorsed the Netherlands delegation's remarks.

3244. The delegation of the International Patent Institute

stated that in 1976 the capacity of the Directorate-General for Searching would reach 48,000 reports per annum, and this figure would be increased by 8,000 to 56,000 by the inclusion of the Berlin sub-office. The entry into force of the Cooperation Treaty would probably bring about a slight decline in this figure; the IIB delegation indicated that a reduction in the work of national patent offices was necessarily linked with the success of the European Patent Organisation.

3245. The IAPIP delegation supported the remarks of the Netherlands delegation and further said that the Protocol on Centralisation, which provided for a number of exceptions to centralisation, had been discussed in detail at the time of the 6th Luxembourg Inter-Governmental Conference in which non-governmental organisations had not been able to participate. Until the 5th meeting of the Inter-Governmental Conference, in which non-governmental organisations had still been able to participate, it had been generally accepted that comprehensive and complete centralisation would be instituted. The user organisations expected this centralisation to bring the clear and far-reaching advantage of their having to apply to only one central organisation for the grant of a patent.

3246. The Norwegian delegation supported the remarks of the Austrian delegation.

3247. Adding to its previous remarks, the Netherlands delegation said that the Protocol on Centralisation concerned both searching and examination, but that for searching as opposed to examination no exceptions were provided for. Furthermore, with regard to the Austrian delegation's position, it was correct that when the draft Protocol on Centralisation was drawn up the countries affected by it had not all been consulted. The solution adopted was not however restricted to certain countries which had participated in the preceding consultations but was open to all countries which fulfilled the conditions laid down in Section IV, namely countries whose national patent offices were in a position to carry out a procedure in an official language of the European Patent Office. That obviously applied to the United Kingdom patent office and also the Austrian patent office and those of a number of other countries. It was not therefore a disadvantageous decision for the Austrian patent office alone but also for a number of other national patent offices.

3248. The Swedish delegation declared that it could accept the present draft as a balanced compromise. The draft sought, by appropriate means, to transfer examination work to patent offices which might experience difficulties with their staff policies and recruitment. The Swedish delegation considered that it was now recognised that search tasks could be distributed more widely than had been thought hitherto. It could surely now be taken for granted that countries which had difficulties in this field were entitled to have search activities transferred to them so that they might adapt themselves to the European patent system in the appropriate manner. On the other hand there should be sufficient possibilities of supervising and controlling tasks so transferred. For this reason the Swedish delegation supported the Austrian delegation's proposal, as the Finnish and Norwegian delegations had done.

3249. The United Kingdom delegation said that more than 12 months previously they had voted in favour of the proposed arrangement in the Protocol on Centralisation, as the Swedish delegation had done, although with some hesitation. The Austrian proposal in paragraph 2 of M/87/II was unacceptable to the United Kingdom delegation. The United Kingdom delegation pointed out that there were fundamental differences between examination and searching tasks; it was possible in present circumstances that examination work could be transferred to Member States during the transitional period on the basis of working agreements, that this work could be

planned taking into account the recruitment of staff for the European Patent Office — in short, this work could be controlled centrally. This did not necessarily apply to searching, since during the build-up period of the European Patent Office a large number of employees engaged in searching would be taken over by the European Patent Office. The United Kingdom delegation supported in principle the points made in paragraph 2 of the Austrian proposal with the proviso that such transfers should be organised so as to avoid any adverse effects on the functioning of the European Patent Office itself. A further difficulty arose from the fact that searching was more difficult to control; on the other hand the United Kingdom delegation did not doubt the capacity or the competence of the searching authorities in question to prepare appropriate search reports.

3250. The French delegation understood the Swedish and United Kingdom delegation's statements to mean that those delegations considered that the Austrian text provided for the possibility of a large number of national patent offices participating from the start in the preparation of European search reports. The French delegation stressed that, as it stood, the Protocol on Centralisation was a compromise produced after much hard bargaining and Section IV of that Protocol should only cover the eventuality of there being no practical provision for examination at the time of opening of the European Patent Office. The objective situation regarding searching was however completely different. On the one hand there was the International Patent Institute which would probably be able to deal with most if not all of the applications, and on the other hand the technical aspect of searching was completely different from that of examination. For this reason the French delegation considered it inconceivable that European searches could be transferred to a large number of offices from the start.

3251. The Irish delegation expressed sympathy with the Austrian position. On the other hand the success of the European Patent Office undoubtedly depended on the complete centralisation of the whole system. After the last Luxembourg Conference the Irish delegation too had regarded the Protocol on Centralisation as a compromise and as the balanced result of weighing the interests of the participating countries. In view of the discussion so far, however, the Irish delegation was prepared to vote in favour of the Austrian proposal, but at the same time requested some explanation of the wording of the Austrian proposal. Paragraph 2 of the proposal specifically referred to the transitional period within the meaning of Section IV of the Protocol on Centralisation, but the question remained whether a similar upper level of 40 % was intended as in Section IV of the Protocol on Centralisation.

The Chairman felt that paragraph 2 of the Austrian proposal would in any case have to be amended slightly as follows: "The Organisation may entrust suitably qualified central industrial property offices of the Contracting States with the carrying out of searches in respect of European patent applications, in order to counteract the difficulties arising for these States during the transitional period laid down in Section IV of this Protocol."

3252. The German delegation pointed out that it had supported paragraph 2 of the Austrian proposal in discussions to date, because it had a considerable measure of understanding for the Austrian situation. It was aware that for a considerable number of years Austria had been preparing to become a PCT Searching Authority and that the obligation under the Protocol to renounce such a role under the PCT was particularly hard on Austria. On the basis of discussions to date, however, aid would not be restricted solely to the Austrian patent office. The German delegation consequently feared that the centralisation

of the European patent system would be jeopardised by any derogation made in the case of Austria, and was therefore unable to support the Austrian proposal.

3253. The Netherlands delegation considered that the Protocol was a compromise which had been arrived at with great difficulty and that it should not be called into question at the Diplomatic Conference. The Netherlands delegation did, however, feel that the integration of the International Patent Institute into the European Patent Office was a matter of prime importance. The Netherlands delegation — as the German delegation before it — stated that it would not avail itself of the provisions of Section IV of the Protocol on Centralisation even though the Netherlands patent office was in the same situation as the Austrian patent office. If, however, the Conference concluded that allowance was to be made to the wishes of each individual national patent office as regards the transitional period, the Netherlands delegation would reserve its position concerning Section IV of the Protocol on Centralisation.

3254. The United Kingdom delegation considered that there was no need to include the question of examining activities in paragraph 2 of the Austrian proposal, on the grounds that an adequate solution had already been found in Section IV of the Protocol on Centralisation. As regards the question put by the Irish delegation concerning the percentage distribution, the United Kingdom delegation considered that this arrangement had been elaborated specifically only for examining activities. An extended transfer of search activities to national patent offices would not be compatible with the proper functioning of the European Patent Office. It would be absurd if the work capacity of the European Patent Office were not used to the full only to offset the difficulties of national patent offices during the transitional period.

3255. The Austrian delegation pointed out that its proposal consisted of two parts. Firstly, it was necessary that any transfer should be in the interests of the Organisation's activities. In addition, paragraph 3 of the Austrian proposal incorporated the obligation to adhere to the guidelines or rules laid down at the European Patent Office by the Directorate-General for Searching for the drawing up of the European search report. It was therefore not possible to talk in terms of random distribution of tasks. It regretted that the Netherlands delegation was under instructions to insist that no amendments be made to the Protocol and that the compromise should not be called into question. The Austrian delegation pointed out that only discussions at expert level had taken place at Luxembourg, whereas the current meeting was part of a Diplomatic Conference, which was clearly entitled to make amendments to the original decisions taken at expert level. The Austrian delegation further pointed out that it had indicated its reservations at the last Luxembourg Conference of Experts, when the Protocol on Centralisation was discussed, and that throughout the entire Conference it had endeavoured to make clear that the compromise would be unacceptable to Austria. It had given its approval finally only on condition that ways and means were found by the time of the Munich Conference of taking into account the difficulties faced by Austria. Finally, the Austrian delegation failed to understand how the wording of paragraph 2 had been a source of misunderstanding. A number of delegations had voiced fears that a considerable number of States would avail themselves of this provision, thereby overlooking the fact that this was only possible for offices which were qualified under the PCT.

3256. The Norwegian delegation stated that on the previous day it had withdrawn its proposed amendments as put forward jointly with the Finnish delegation on condition that another proposal would take the place of the Finnish/Norwegian joint proposal. It was on this condition that it had supported the

Austrian proposal. As was clear from the last statement by the Austrian delegation, its proposal was confined to national patent offices which qualified under the PCT, i. e. those offices which employed at least 100 examiners. The Norwegian delegation called for this supposition to be confirmed.

3257. The Chairman pointed out that the Austrian proposal had always been restricted to this category of patent office. The Norwegian and Finnish patent offices were covered by the original paragraph 1 of the Austrian proposal.

3258. Under these conditions the Norwegian delegation was unable to support the Austrian proposal.

3259. The Austrian delegation stated that its original proposal had contained two paragraphs. The first paragraph had been supported by the Norwegian and Finnish delegations on the grounds that their own interests were taken into account. The general opinion now prevailed that there was no need to retain this first paragraph, on the grounds that Article 31 covered the same ground. No change had, however, been made to paragraph 2 of the Austrian proposal in the course of the discussions.

3260. The Swedish delegation felt that there had been some misunderstanding on the matter. It was correct that Austrian, Finnish and Norwegian interests had been taken into account when paragraph 1 of the Austrian proposal had been regarded as superfluous since it was covered by Article 31. This would cover the transfer of search activities in the interests of the European Patent Office. The difference between paragraph 1 and paragraph 2 did not lie in the qualifications of the national patent offices. What was involved was the availability of PCT documentation and not the number of employees. If paragraph 2 were accepted, all those national patent offices which held PCT documentation would be included.

3261. The Chairman did not concur with this interpretation, nor indeed with that put forward by the Austrian delegation. In his opinion the States concerned were only those which would be subject to restrictions pursuant to Section I, paragraph 2, of the Protocol on Centralisation.

The Chairman proposed that an informal working party be formed outside the Committee meeting to draw up the Austrian proposal in an amended form which would be acceptable to most delegations. This proposal was adopted.

3262. The Swedish delegation returned to paragraph 2 of the Austrian proposal and repeated that it was unable to support it. A text should be drafted to cover the same States as in paragraph 1. There was no reason why the Scandinavian patent offices should not be afforded the same possibilities as currently provided for under paragraph 2. Admittedly, the Swedish patent office did have the possibility under the Protocol on Centralisation of setting up a PCT office. This was, however, due to the fact that its applicants were supposed to enjoy the same rights as applicants in Austria, viz. the ability to file applications in their own language.

3263. The French delegation pointed out that its proposal as set out in M/120/II — which was to be inserted at the end of Section IV of the Protocol — fell within the context of the derogation for which provision had already been made under Section IV. The proposal related to those countries which would be obliged, under the terms of Section I, paragraph 2, of the Protocol, to renounce their activities under the Patent Cooperation Treaty and which employed one of the three working languages of the European Patent Office. In order to facilitate the adaptation of these countries to the European patent system, the Administrative Council could entrust certain search activities to them provided that such action were compatible with the proper functioning of the European Patent Office. Such tasks were to be carried out under the responsibility of the European Patent Office. The last part of

the proposal re-iterated the provisions of Section IV, paragraph 1, second sub-paragraph. The French delegation pointed out in this connection that the compromise proposal under examination had been discussed in detail and had been arrived at only with some difficulty.

3264. The Swedish delegation felt that the French proposal did not constitute a compromise as it failed to take account of the objections evinced on the previous day by the Scandinavian countries. The new criterion which had been introduced was that the countries concerned should employ one of the working languages of the European Patent Office — a proposal which constituted a clear discrimination against the Scandinavian patent offices. The present proposal on search activities would in fact mean that agency work relating to searches would be allocated to a specific patent office outside the Nordic countries. If the proposal reflected majority opinion within the Committee, the Swedish delegation would be in a situation completely different to that at the end of the Luxembourg Conference. The transfer of search activities was a matter of some consequence which had been settled in a totally unsatisfactory manner in the present draft so far as Scandinavian interests were concerned. The Swedish delegation therefore urged that the proposal be recast in order to eliminate any discrimination.

3265. The Austrian delegation pointed out that in its endeavours to make an active contribution to the European Convention, Austria had achieved no success to date, not even at the Luxembourg Conference. It was of the opinion that consideration should have been given from the very inception of discussion on such activities to the fact that the Austrian patent office was qualified under the PCT. Section III of the Protocol on Centralisation stipulated that offices which possessed PCT qualifications would be authorised, under certain conditions, to continue their activities under the PCT. However, the Protocol on Centralisation should be regarded as a whole, particularly as regards its internal balance. The Austrian delegation would be gratified if the Swedish delegation, whose requests had always been supported by the Austrian delegation, could come out in support of the Austrian request. The Austrian delegation therefore endorsed the French proposal.

3266. The Finnish delegation considered that the present French draft was quite clearly discriminatory. In order to prevent such discrimination the Finnish delegation felt itself obliged to put forward a proposal for an amendment which would make the French proposal applicable — at least theoretically — so far as the other Contracting States were concerned. It therefore proposed that the words "if the official language of these offices is one of the official languages of the European Patent Office and" be deleted and the term "necessary qualifications" be replaced by the words "minimum documentation".

3267. The French delegation could not countenance any amendment to Section IV of the Protocol on Centralisation which would affect a number of countries. This attitude was prompted by two reasons: firstly, all the proposals made to date were to be seen in the context of renunciation of PCT activities. This would apply to Austria but not to the Nordic countries, which did not possess the necessary qualifications. Secondly, those countries not currently carrying out search activities employed a considerable number of staff at their national patent offices. The centralisation arrangements would be rendered totally meaningless if it were intended to take account of the difficulties which these offices would have to face. In view of these considerations the French delegation was unable to approve the Finnish proposal for an amendment.

3268. The Finnish delegation, while basically in favour of

centralisation, went on to point to the drawbacks and difficulties attendant upon such arrangements. Admittedly, the number of examiners employed at the Finnish and Norwegian patent offices did not amount to the minimum number required under the Patent Cooperation Treaty. However, these countries should be able, at least during the transitional period, to carry out search work for the European Patent Office. The Administrative Council should be able to decide under what conditions and to what extent such searches should be transferred. It should also have final control over the manner in which such search work was carried out.

3269. The Netherlands delegation re-affirmed the statements made by the Austrian delegation. The Scandinavian delegations, and in particular the Swedish delegation, had participated in the discussions on the Protocol on Centralisation. The conclusions reached in the course of these discussions had been enshrined in Section III of the Protocol, which guaranteed the Scandinavian countries — and in particular the Swedish patent office — the possibility of carrying out activities under the Patent Cooperation Treaty.

The authorisation thus accorded to the Swedish patent office would thus entail co-operation between that office and the Search Divisions of the EPO, at least as regards the procurement of reference material, aimed at avoiding duplication of searches in the same areas. Various other possibilities of co-operation might subsequently ensue. The proposal under discussion would in no way diminish the rights enjoyed by the Swedish patent office. All that had been done was to take into account the difficulties faced by the Austrian office, which had been afforded somewhat less consideration in the previous arrangements. The Netherlands delegation could therefore endorse the French proposal, although not exactly with enthusiasm. If, however, this possibility were also extended to other offices, this would open up the way to complete decentralisation, while at the same time jeopardising the position of the International Patent Institute, for which the Netherlands delegation felt special responsibility. The Netherlands delegation had a measure of sympathy for the difficulties of the Scandinavian offices, but the same could also be said of other offices. The setting up of a European Patent Office would inevitably involve difficulties of this nature.

3270. The Norwegian delegation supported the Finnish proposal for an amendment.

3271. The Austrian delegation voiced its thanks to the Netherlands delegation for having delivered such a lucid exposition of the difference between the situation of the Austrian patent office and that of the other offices. It emphasised yet again that paragraph 2 of its proposal concerned only those offices which renounced activities under the Patent Cooperation Treaty. Section III of the Protocol on Centralisation took account of the interests of the Swedish office by granting it the right to carry out search activities under the PCT for an indefinite period. For these reasons the Austrian delegation was unable to support the Finnish proposal for an amendment.

3272. The Danish delegation considered that the decision would in any event rest entirely with the Administrative Council. In this respect the Finnish proposal was somewhat more flexible than the French. In addition, the Finnish proposal should favour the interests of the Austrian office, inasmuch as the number of examiners employed there was only marginally more than 100, with the result that it was in some danger of losing its PCT qualification.

3273. In reply to the arguments advanced against the Swedish view that the Swedish patent office had been granted the possibility of acting as a PCT Authority, the Swedish delegation pointed out that this had occurred because the

European Patent Office was unable to deal with Scandinavian applications in Swedish, Danish or Norwegian, although it was fully competent to deal with applications filed in their own languages by Austrian, German, United Kingdom or French applicants. Moreover, this possibility on the part of the Swedish patent office would not involve any increase in the number of applications — rather it would mean that Swedish applications would be filed as PCT applications. This would admittedly involve a minor increase as a result of applications coming from other Scandinavian countries, but this was immaterial. The Swedish delegation pointed out that under the terms of paragraph 2 of the Austrian proposal, the Administrative Council could proceed in a similar manner in order to counteract the difficulties arising for these States during the transitional period from the application of Section I. This Section also concerned the Swedish patent office, which would be debarred from freely availing itself of its PCT qualification. Under Section III the Swedish Patent Office was entitled to act as a PCT Authority for the Scandinavian offices. If an amendment were made to the Protocol, which had been elaborated by the major countries, the effect should not be discriminatory. The present proposal, however, would force the Swedish patent office, the other Scandinavian offices and all countries speaking Scandinavian languages into a position which was completely different from that obtaining at the Luxembourg Conference.

3274. With regard to the statement by the Netherlands delegation indicating that the Netherlands patent office would have to face difficulties similar to those of the Scandinavian offices, the Norwegian delegation pointed out that the International Patent Institute was located at The Hague and would continue to exercise a considerable influence on the development of the European system of patent law in its role as an extremely important body in this particular field, whereas the Nordic patent offices would have to accept a considerable loss in their importance as a result of the new system.

3275. The Swiss delegation pointed out that Switzerland was quite clearly one of those countries whose offices would be faced with difficulties arising from the application of the Protocol. While it had a measure of sympathy for those countries which felt that they were adversely affected by the Protocol, it nevertheless claimed that the same considerations applied to its own office. The Swiss delegation endorsed the French proposal for an amendment for the same reasons as those adduced by the French and Netherlands delegations. Referring to the statement by the United Kingdom delegation to the effect that it would stipulate no further requirements as regards the Protocol on Centralisation after the expiry of the 15-year transitional period, it called upon the Austrian delegation to make a similar statement, should the French proposal be adopted.

3276. The Swedish delegation proposed that a vote be taken first of all on the French proposal as amended by the Finnish and Norwegian delegations, followed by a vote on the possibility of restricting the transfer of search activities to offices which possessed PCT qualifications. A third vote could then be taken on the French proposal itself.

3277. The Chairman held that this particular order was not consonant with the rules of procedure. A vote should first of all be taken on the Finnish/Norwegian joint proposal. If the proposal were adopted the Swedish delegation would then be at liberty to present its proposal anew.

3278. The Observer delegation of the International Patent Institute emphasised that the fundamental aim of the Protocol on Centralisation, so far as searching was concerned, was to eliminate any decentralisation effect by the Patent Cooperation Treaty on the European system. If a derogation were made, it



could apply only to those countries which possessed PCT qualifications. Any other course would go beyond the decisions taken at the Inter-Governmental Conference.

3279. The CNIPA observer delegation pointed out that in the course of discussions to date the overriding consideration had been the interests of the patent offices, but that very little had been said regarding the interests of patent applicants. It felt that the main consideration would be the effect of the compromise proposal on the cost of applications. The transfer of search activities to other offices would doubtless involve additional costs, since at the very least the administrative divisions would have to be increased in size.

3280. The result of the vote on the amendments to the French proposal as put forward by the Finnish and Norwegian delegations was as follows: four delegations for, sixteen against, with one abstention. The Chairman noted that the proposal had been rejected.

3281. The Swedish delegation presented its proposed amendments as set out in M/123/II. The Swedish delegation pointed out that its proposal did not refer to a language criterion but was based entirely on the PCT qualifications of the offices concerned. The Committee agreed to examine this proposal.

3282. The French delegation was unable to support the Swedish proposal for an amendment on the premise that it made no provision for a genuine recommendation of activities under the PCT. The Norwegian delegation supported the Swedish proposal.

3283. The result of the vote on the Swedish proposal (M/123/II) was as follows: four delegations for, sixteen against, with two abstentions. The proposal was therefore declared rejected.

3284. The United Kingdom delegation stated that in its intervention the Swiss delegation appeared not to have understood the United Kingdom's statement quite correctly. It had never been the intention of the United Kingdom delegation — and in this it was sure that its own opinion coincided with that of the Swiss delegation — to require that any examining activities be transferred following the expiry of the transitional period. However, it was not for the United Kingdom delegation to decide upon whether the European Patent Office would be in a position to renounce this option completely.

3285. The Swiss delegation fully concurred with the view of the United Kingdom delegation that it would no longer be possible following the expiry of the 15-year transitional period for any State to call upon the Organisation to transfer work. The Swiss delegation would be extremely gratified were the Austrian delegation to make a statement to this effect.

3286. The Austrian delegation stated that Austria did not intend to make any claims following the expiry of the transitional period on the basis of Section IV as amended by the French proposal.

3287. The result of the vote on the French proposal for an amendment (M/120/II) was as follows: sixteen delegations for, four against, with no abstentions.

3288. The Swedish delegation reserved the right to return to this matter in the Committee of the Whole.

3289. The German delegation pointed out that it had already stated in the course of the Luxembourg Inter-Governmental Conference that it was not the intention of the Federal Republic of Germany to avail itself of the option afforded under the present Section IV of the Protocol on Centralisation. This statement had referred to the transfer of examining activities to national offices. The German delegation stated that this undertaking now extended to search activities and it presumed that the other countries to whom this option was

open would not — with the exception of the Austrian delegation — avail themselves thereof.

3290. The Netherlands delegation likewise declared that it did not intend to avail itself of this option and requested the United Kingdom delegation to make a statement to that effect.

3291. The United Kingdom delegation was willing to make such a statement should the possibility ever arise of the United Kingdom Patent Office carrying out search activities.

3292. The Main Committee referred Sections III and V, together with the adopted proposals for amendments, to the Drafting Committee.

### ***Section V of the Protocol on Centralisation***

3293. Section V of the Protocol on Centralisation was referred to the Drafting Committee without discussion.

### ***Section VI of the Protocol on Centralisation***

3294. The Chairman brought before the Committee for discussion point 2 of the Italian proposal set out in M/94/II, with reference to Section VI of the Protocol on Centralisation. This proposal stipulated that until the date from which search documentation would be extended to include Italian reference material, the Rome sub-office would be authorised to carry out searches among Italian documentation.

3295. The Netherlands delegation expressed its wholehearted agreement with the Italian proposal, which was in the main identical to Section VI of the Protocol on Centralisation as it now stood.

3296. The Chairman considered that the difference as against the present wording of Section VI resided in the fact that at the moment only applications filed by Italian citizens would be processed, whereas point 2 of the Italian proposal included all persons entitled to apply for a European patent. This extension was partly based on the Recommendation on Documentation for Patent Search. The Italian proposal was referred to the Drafting Committee as it was opposed by none of the delegations.

3297. The Chairman drew attention to the UNEPA proposal as set out in M/21, point 41, which dealt with the problem relating to representation which was under discussion by Main Committee I. The Chairman proposed that Main Committee II discuss the matter only once Main Committee I had delivered its opinion.

3298. The UNEPA Observer delegation concurred with this proposal as the French delegation had submitted a similar proposal for an amendment to Main Committee I.

3299. The Chairman further drew attention to a drafting proposal submitted by the Austrian delegation in M/41. This proposal was referred to the Drafting Committee.

### ***Section VII of the Protocol on Centralisation***

3300. The Chairman referred to the comments by the French delegation in M/26, point 10. This proposal was dependant upon the decision to be taken on Article 6 and would therefore be dealt with only when Article 6 had been discussed. In addition, the Committee had before it a proposal by the Austrian delegation in M/41, point 19, which was also closely bound up with the French proposal on the incorporation of certain parts of the Protocol into the Convention. It would therefore be preferable to discuss this proposal once the French proposal had been dealt with. In addition, there were also the CEEP comments to the effect that the purport of Section VII was such that the powers to review the Protocol would not be covered by the special rules governing the review



of the Convention. These comments would likewise be discussed once the French proposal had been dealt with.

3301. The Chairman proposed that the Italian proposal regarding Article 7 be discussed. This proposal was aimed at conferring upon the Rome sub-office the role of a liaison and information office.

3302. The Italian delegation asked whether the transfer of such tasks to the Rome sub-office could be effected by Italian legislation or not. If this were in fact the case there would be no need to amend Article 7.

3303. The Netherlands delegation considered that there was no need to amend Article 7 to this effect.

3304. The Chairman noted that none of the delegations was opposed to this view and referred the proposal to the Drafting Committee.

### ***Results of the proceedings of the Drafting Committee***

3305. At its meeting on 25 September 1973 the Main Committee turned its attention to the results of the discussions by the Drafting Committee concerning the Protocol on Centralisation (M/130/II/R 6).

3306. The French delegation pointed out that the term "Erfüllung" (French: *exécution*, English: *implementation*) was not suitable, as it implied total consummation of the agreement. The term "mise en application" would be better French.

3307. The German delegation proposed that the following expression be used in German: "sobald der Vertrag anwendbar geworden ist."

3308. The Main Committee referred the matter to the General Drafting Committee.

3309. At the instigation of the Netherlands delegation the matter of whether reference should be made to the termination of participation in the Hague Agreement or termination of the Agreement itself was referred to the General Drafting Committee.

3310. The German delegation suggested that its original proposal to refer to Berlin in all cases as Berlin (West) be referred to the General Drafting Committee.

3311. The Netherlands delegation indicated that in its discussions the Main Committee had not specifically dealt with the Declaration on the Protocol on Centralisation. It therefore asked whether, in view of the fact that Section IV now contained two paragraphs, the Declaration should not also apply to this second paragraph. It proposed to submit specific comments on this matter, possibly to the Committee of the Whole.

3312. The Main Committee subsequently referred the draft of the Protocol on Centralisation together with the amendments as adopted to the General Drafting Committee.

## **E. Draft Protocol on Privileges and Immunities of the European Patent Organisation (M/4)**

### ***Article 3***

4001. The Committee considered that the two proposals from the United Kingdom delegation in M/40, points 35 and 36, concerned drafting and referred them to the Drafting Committee.

### ***Article 4***

#### ***(a) Paragraph 1***

4002. The Committee examined the United Kingdom delegation's proposal in M/40, point 37.

4003. The United Kingdom delegation, supported by the German, Netherlands, Swedish and Swiss delegations, stated that its proposal was intended to align the terminology used in this Protocol with that in Article 5 of the Protocol on Privileges and Immunities of ESRO. In any event, the wording of the beginning of Article 4, paragraph 1, should be identical to that of the beginning of Article 3, paragraph 1.

4004. The Belgian, French and Italian delegations preferred the terms "in the exercise of its official activities" which they considered less extensive than "within the scope of" proposed by the United Kingdom delegation.

4005. Finally, the Committee decided by a majority to adopt the United Kingdom delegation's proposal and to amend Article 3, paragraph 1, similarly.

#### ***(b) Paragraph 2***

4006. The Committee considered that the United Kingdom delegation's proposal in M/40, point 38, concerned drafting and accordingly referred it to the Drafting Committee.

### ***Article 5***

4007. The Austrian delegation presented its proposal in M/41, point 17, pointing out that the expression "other than fees or taxes representing services rendered" was too general and that it would undoubtedly reflect the spirit of this provision to refer expressly to the exclusion of charges for particular services performed by the customs authorities.

4008. The German, United Kingdom and French delegations raised objections to such a proposal which might excessively limit the scope of the provision.

4009. The Committee found that the Austrian delegation's proposal was not supported by any Member delegation and could not therefore be considered.

### ***Article 6 (Article 3, paragraph 4)***

4010. The Committee considered the United Kingdom delegation's proposal in M/40, point 39, to have this provision included elsewhere.

4011. The German, Austrian and French delegations supported the United Kingdom proposal.

4012. The Committee recorded its agreement on this proposal and instructed the Drafting Committee to find a more appropriate place in the text of the Protocol for the content of Article 6.

4013. On a proposal from the Drafting Committee, the Committee approved the inclusion of the content of this provision as Article 3, paragraph 4.

### ***Article 8(7)***

#### ***Paragraph 1***

4014. The Committee agreed that the Drafting Committee be asked to consider a drafting proposal presented at the meeting by the Austrian delegation for an amendment to the German text.

### ***Article 10(9)***

4015. The Committee recorded its agreement on the proposal from the United Kingdom delegation in M/40, point 40, which was supported by the German delegation.

## **Article 11 (10)**

### **Paragraph 1**

4016. The Committee examined the United Kingdom delegation's proposal in M/40, point 41, for aligning the wording of the clause referring to the treatment to be accorded to the Organisation on that in Article 12, paragraph 1, of the Protocol on Privileges and Immunities of ESRO (treatment not less favourable than that accorded by the State concerned to other international organisations).

4017. The German delegation also considered that the wording of this clause should be improved but wondered if the following formulation might not be more suitable: "treatment as favourable as that accorded by each Contracting State to any other international organisation."

4018. The Committee instructed the Drafting Committee to seek a solution taking into account the two proposals.

## **Article 13 (12)**

### **Paragraph 1 (a)**

4019. The French delegation presented its proposal in M/26, point 32, that this provision be aligned on the text of Article 7 of the Protocol on Privileges and Immunities of the University Institute in Florence.

4020. The German, Austrian and United Kingdom delegations supported the French delegation's proposal.

4021. The Committee agreed on this proposal with the proviso that the word "personnelle" in the French version be deleted as it was superfluous.

## **Article 14 (13)**

### **Paragraph 1**

4022. Referring to its observations in M/11, point 16, the German delegation submitted its proposal in M/47/I/II/III, point 35, that it be stated that Article 14 (13), paragraph 1, applied subject to Articles 7 (6) and 17 (16) of the Protocol.

4023. The Austrian delegation supported the German delegation's proposal.

4024. The United Kingdom and French delegations felt that the elucidation sought by the German delegation was unnecessary since it was clear from the text of Article 11, paragraph 4, of the Convention that the President of the European Patent Office was an employee of the Office. Article 14 (13), paragraph 1, formed part of the provisions applicable to all employees and could not therefore be construed as a derogation from Articles 7 (6) and 17 (16).

4025. The Swedish delegation supported the German delegation's proposal as regards the explicit reference to Article 7 (6). However, it thought the reference to Article 17 (16) totally superfluous in view of the wording of that Article which explicitly specified "The persons referred to in Articles 14 (13) and 15 (14)".

4026. The German delegation stated that it was prepared to accept the amendment to its proposal suggested by the Swedish delegation.

4027. The Austrian and Danish delegations supported the amended proposal.

4028. The Italian delegation opposed the proposal. It did not see any grounds for imposing a restriction such as that in Article 7 (6) on the President of the Office; such a restriction would entail a curtailment in this case of the benefits conferred upon diplomatic agents in general under the Vienna Convention on Diplomatic Relations of 18 April 1961.

4029. The Swiss delegation sympathised with the Italian delegation's position. The restriction implicit in the reference to Article 7 (6) was not imposed by the Swiss authorities on top officials of international organisations which had their headquarters in Switzerland. However, since this problem was principally the concern of the authorities of the Federal Republic of Germany on whose territory the European Patent Organisation's headquarters was to be located, the Swiss delegation was prepared to agree to the German proposal.

4030. The German delegation stated that its proposal did not stem from a desire to restrict the privileges enjoyed by the President of an Organisation which would have its headquarters on its territory. It was in keeping with the strict line followed by the Federal German Government on the privileges and immunities accorded to officials of international organisations as a result of the increasing number of such organisations. Similar restrictions to those proposed were laid down in the Protocols on Privileges and Immunities of the University Institute in Florence and of the European Centre for Medium-Range Weather Forecasts.

4031. The Committee adopted the amended proposal from the German delegation by a majority.

4032. The Committee also recorded its agreement on the United Kingdom delegation's proposal in M/40, point 42.

## **Article 15 (14)**

### **Sub-paragraph (g)**

4033. Having presented its observations set forth in M/26, points 33 and 34, the French delegation stated its preference for the first alternative which corresponded to the text of Article 9 (d) of the Protocol on Privileges and Immunities of the University Institute in Florence.

4034. The United Kingdom delegation expressed objections to the first alternative proposed by the French delegation on the grounds that the reference to the national law of the State where the right is exercised was too restrictive and liable to exclude, for example, administrative rules which should be covered. However, the United Kingdom delegation could, subject to certain drafting improvements, accept the second alternative proposed by the French delegation based on Article 13 (12) (f), of the Draft Protocol on Privileges and Immunities of the European Centre for Medium-Range Weather Forecasts.

4035. While it had no objections to Article 15 (14) (g) as it appeared in the draft, the German delegation was quite prepared also to accept the second alternative proposed by the French delegation.

4036. The Committee concluded by recording its agreement on the second alternative proposed by the French delegation and instructed the Drafting Committee to examine the drafting comments which the United Kingdom delegation intended to submit.

## **Article 19 (18)**

4037. The Committee considered that the proposal from the Federal Republic of Germany in M/11, point 38, concerned drafting and instructed the Drafting Committee to examine it.

## **Article 23 (22)**

4038. The Committee examined the United Kingdom delegation's proposals in M/10, point 11.

4039. The French and Swiss delegations supported the United Kingdom delegation's proposal that the words "who are

not nationals of another Contracting State" be deleted agreeing that they were superfluous. However, they objected to the second proposal from the United Kingdom delegation for the inclusion of a reference to the concept of "customary residence".

4040. The Committee recorded its agreement on the first part of the United Kingdom proposal. It did not endorse the second part in view of the difficulties of interpretation which the term "customary residence" appeared to involve.

4041. The IIB delegation pointed out that the legal situation of IIB staff which, in accordance with the Protocol on Centralisation, would be integrated into the European Patent Office would on no account be affected by this provision; the present wording of the text might give rise to doubts and it suggested that this matter be referred to the Drafting Committee.

4042. The Chairman of the Drafting Committee informed the Committee that, having considered the question, the Drafting Committee shared the reservations expressed by the IIB delegation.

4043. The Belgian delegation submitted a proposal to amend Article 22 (23) in M/91/II which was aimed at clarifying the position of IIB staff by providing that employees of another

inter-governmental organisation integrated into the European Patent Office would not be affected by this Article.

4044. The German, Austrian, United Kingdom, French, Italian and Swiss delegations supported this amendment which was accepted by the Committee and referred to the Drafting Committee.

## **Article 25 (24)**

### **Paragraph 1**

4045. The Committee considered that the United Kingdom delegation's proposal in M/40, point 43, concerned drafting and instructed the Drafting Committee to examine it.

## **F. Recommendation on Documentation for Patent Search (M/6)**

5001. The Italian delegation drew the Committee's attention to the fact that the Draft Recommendation was rendered superfluous by the adoption of its proposal in M/94/II concerning Section VI of the Protocol on Centralisation which incorporated the substance of the Recommendation.

5002. The Committee shared the Italian delegation's view.

### **Minutes of the proceedings of Main Committee III**

1. Main Committee III, which was set up by the Plenary of the Conference to deal with finance matters (Rule 12 of the Rules of Procedure)\*, was chaired by Mr. Edward Armitage, Comptroller-General of the Patent Office (United Kingdom). Dr. Walter Stamm, Director of the Federal Intellectual Property Office (Switzerland), was first Vice-Chairman; the other Vice-Chairmen were Mr. Leif Nordstrand, Director of the Central Industrial Property Office (Norway), and Mr. Yavuz Akdag, legal adviser to the Turkish Permanent Delegation to the European Communities (Turkey). Mr. Pierre Fressonnet, Deputy Director of the Institut National de la Propriété Industrielle (France), was the rapporteur (see M/PR/K/1, points 19, 20 and 25; M/46/K, page 2 and M/55/K, page 3).

2. The tasks of Main Committee III were defined in Rule 12 of the Rules of Procedure (M/34) and in a recommendation adopted by the Steering Committee of the Conference (M/56/I/II/III).

In accordance with the above, the Main Committee was responsible for Chapter V (Financial provisions) of Part 1 of the Draft Convention (Articles 35 - 49), for Articles 146, 147, 160, 169 and 175 and for the Recommendation regarding the status and remuneration of the employees referred to in Article 159, paragraph 2, of the Convention (M/7).

3. Main Committee III met under its Chairman on 24 September 1973 and the afternoon of 25 September 1973.

4. The Main Committee opened its meeting on 24 September 1973 by appointing its Drafting Committee, which, in the same way as the Drafting Committee of the Working Party on Finance of the Luxembourg Inter-Governmental Conference, consisted of the delegations of the Federal Republic of Germany, France and the United Kingdom; its Chairman was Dr. Otto Bossung, judge at the Federal Patent Court and adviser to the delegation of the Federal Republic of Germany.

5. At its meeting on 24 September 1973 the Main Committee discussed the provisions of the Draft Convention which had been referred to it for examination, and made a basic study of the Recommendation regarding the status and remuneration of the employees referred to in Article 159, paragraph 2, of the Convention. The discussions on these points are summarised in part I below.

At its meeting on 25 September 1973 the Committee discussed the results of the proceedings of the Drafting Committee of the previous day, as well as the document submitted by the United Kingdom delegation (M/85/III). These discussions are given in part II below.

### **I. Meeting on 24 September 1973**

#### **A. Financial Provisions**

6. Except where otherwise specified below, the Main Committee approved Articles 35 to 49 (37 to 51)\*\*, 146, 147, 160 (161) and 175 (176) of the Draft Convention (M/1) and agreed to forward them to the Committee of the Whole.

### **Article 35 (37) — Cover for expenditure**

7. The Main Committee referred a drafting proposal by the United Kingdom delegation on *sub-paragraphs (b) and (c)* (M/40, point 11) to the Drafting Committee.

\* The Rules of Procedure (M/34) had previously been adopted unanimously by the Plenary (see M/PR/K/1, point 10).

### **Article 38 (40) — Level of fees and payments — Special financial contributions**

8. The Spanish delegation, supported by the Portuguese delegation, proposed that the two factors given in paragraph 3(a) and (b) for calculating the financial contributions should be applied in a ratio of 1 : 3 and not 1 : 1; the basis used for calculating the contributions by any Contracting State should be one quarter in proportion to the number of patent applications filed in that Contracting State and three quarters in proportion to the second highest number of patent applications filed in all other Contracting States by natural or legal persons having their residence or principal place of business in that Contracting State (M/127/III).

9. The Main Committee agreed to discuss the proposal, which was distributed on 24 September 1973, at its meeting on the same day.

10. The Chairman pointed out that the scale of financial contributions by the Contracting States had already been discussed in detail at the Luxembourg Inter-Governmental Conference. The current wording of the Draft had finally been adopted as a compromise between the method whereby only applications filed in each Contracting State were used as a basis and the method which had just been proposed by the Spanish delegation.

11. In support of its proposal the Spanish delegation stated that it was still convinced that the current weighting of the two factors used in calculating the scale of contributions was unfair in view of the fact that those Contracting States from which most of the patent applications came would derive greater benefit from the system for the grant of patents than those Contracting States for which patents were requested; the former would therefore have to make a proportionately higher contribution to the provisional financing of the European Patent Office.

12. The Italian delegation supported the main contention of the Spanish proposal — viz. that the determining factor should be the use made of the European Patent Office by the nationals of the individual Contracting States; the use made of the European Patent Office would be reflected above all in the number of patent applications likely to be filed by the nationals of the individual Contracting States.

13. The Chairman pointed out that paragraph 3(b) took account of the future use of the European Patent Office by the nationals of the individual Contracting States.

14. In view of the lengthy discussions at the Inter-Governmental Conference, the Netherlands delegation was in favour of adopting paragraph 3 as it stood as a compromise solution, even though the Spanish proposal would have been more advantageous to the Netherlands.

15. The Yugoslav delegation supported the Spanish proposal on the grounds that it was more equitable than the solution currently envisaged.

16. The Luxembourg delegation was also sympathetic to the Spanish proposal, as it felt that the current method provided for in paragraph 3 was not quite fair; it had, however, been necessary to overcome considerable difficulties in reaching the compromise solution, and it would be dangerous to tamper with it now. The Luxembourg delegation would therefore abstain in the event of a vote on the matter.

17. The delegation of the Federal Republic of Germany considered that it would be an appropriate solution for equal account to be taken of the degree to which a country used the European patent system and the total number of applications. A country's interest in the European patent system was not simply reflected in the degree to which its own nationals filed European patent applications, but rather in the total number of

\*\* The numbers in brackets refer to the numbering of the Articles in the final version of the Convention.

patent applications filed in that country at the present time. This figure would show the requirement of both national and international industry for patent protection in a particular country. It would therefore be in the latter's interest for patent protection to be made available by means of a modern examination system.

Furthermore, the financial contributions had been calculated for more than ten years on the basis of statistics which reflected the situation in the penultimate year before the entry into force of the Convention. It was however likely that the less developed countries would catch up with the others. Thus it could hardly be claimed that the (at present) less developed countries were being treated unfairly. If this were however exceptionally the case, the rates of interest envisaged for the financial contributions would constitute some degree of compensation. Once the final stage had been reached a just system of financing would be assured by means of financing on the basis of renewal fees.

Finally, it should be borne in mind that the current method was a compromise proposed by two of the Scandinavian delegations and adopted by a majority at the Inter-Governmental Conference. It would be ill-advised to call the compromise into question again.

18. The Chairman again pointed out that the present wording of paragraph 3 was a compromise solution which had been arrived at following arduous negotiation. The Spanish delegation was doubtless correct in maintaining that the benefit to be derived from the Convention by the individual Contracting States would depend on the use made of the system for the grant of patents by their own nationals. It should, however, not be forgotten that under the system those States which did not have examined patents would obtain examined patents of a high quality.

19. The Irish delegation also sympathised with the Spanish proposal, but was unwilling to jeopardise the hard-won compromise solution.

20. The Swiss delegation was unable to accept the Spanish proposal under any circumstances, as the present compromise solution contained in paragraph 3 was at the very limit of what could be accepted by Switzerland. The competent Swiss authorities had expressed extreme reservations before agreeing to it. If the compromise were called into question at this stage, Switzerland would probably be unable to sign the Convention. It would have preferred a method whereby the financial contributions were calculated on the basis of actual rather than hypothetical figures.

21. The French delegation felt that the compromise solution, which it had already advocated in the case of the Luxembourg Inter-Governmental Conference, should not be called into question.

22. The Portuguese delegation considered the Spanish proposal to be fairer than the present method proposed, on the grounds that the number of patent applications filed in one Contracting State and originating in the other Contracting States should be the prime factor in determining the financial contributions.

23. The Turkish delegation supported the Spanish proposal, which it felt would favour certain Contracting States, while not incurring too great a disadvantage for the others.

24. The Swiss delegation requested that the scale of contributions be re-calculated on the basis of the Spanish proposal and submitted to the Main Committee before any vote on the matter be taken.

25. The Secretariat representative said that it was technically impossible for the Secretariat to re-calculate the contributions on the basis of the latest available WIPO statistics (for 1971) in time for the Main Committee meeting now in progress. The

Secretariat could however draw up a comparative table on the basis of the WIPO statistics for 1970, showing the percentage applicable to each Contracting State on the basis of the present text of paragraph 3 as against that applicable on the basis of the Spanish proposal and submit it to the Main Committee within a matter of hours.

26. The Main Committee requested the Secretariat to prepare a comparative table for the afternoon session.

27. At the end of the meeting the Main Committee resumed its discussion of the matter on the basis of the comparative table submitted by the Secretariat.

28. The United Kingdom delegation pointed to the fact that for an amendment which would entail considerable alterations to the financial burdens of certain Contracting States, the Spanish proposal had been submitted rather late in the day. All the delegations would presumably have consulted their competent financial authorities on the basis of the reasonable compromise embodied in Article 38 of the Draft Convention, and nobody could have expected any further proposals to be made. In view of the above considerations the United Kingdom delegation could give its support only to Article 38 as it now stood.

29. The German and Netherlands delegations endorsed the comments made by the United Kingdom delegation.

30. The Danish delegation held that the compromise reached at the instigation of two of the Scandinavian States was a fair solution to the matter. It therefore regretted that it would have to oppose the Spanish proposal.

31. The Spanish delegation pointed out that at the Luxembourg Inter-Governmental Conference certain States had been unable to accept the compromise solution and therefore felt they were justified in bringing the matter up once again at the Diplomatic Conference. It still contended that its proposal constituted an equitable solution, as it took adequate account of the number of patent applications filed in each Contracting State.

32. The Italian delegation said that after due consideration of all the points involved it would abstain from any vote taken.

33. The subsequent vote on the Spanish proposal showed four delegations in favour, with thirteen against; three delegations abstained.

34. The Netherlands delegation proposed that the term "residents" be substituted for "nationals" in paragraph 3(b) (M/32, point 6 and M/52/I/II/III, point 5). It pointed out in support of its proposal that it was much more difficult to establish the nationality of applicants than the fact that they were resident in a specific Contracting State.

35. The Chairman felt that any decision on the matter would have to be based on the relevant type of statistics which WIPO could make available to the European Patent Organisation.

36. The WIPO delegation said that, at present, WIPO annual statistics were based on information on the country of origin of the applicant and took both nationality and residence into consideration. In future WIPO intended to base its statistics solely on the applicant's residence.

37. The French delegation considered that for French purposes Article 38, paragraph 3(b), should include French nationals and all persons who would be bound under French law to file their applications in France, as well as natural and legal persons having their residence or principal place of business in France. In view of the WIPO delegation's remarks and the fact that the term "nationals" did not occur elsewhere in the Convention, it would support the Netherlands proposal, with the proviso that it must include both natural and legal persons having their residence or principal place of business in a Contracting State.

38. The delegation of the Federal Republic of Germany

subscribed to the Netherlands proposal subject to the rider proposed by the French delegation (see M/47/I/II/III, point 12).

39. The Netherlands delegation agreed that its proposal be supplemented as suggested by the French and German delegations.

40. The Belgian delegation drew attention to the fact that if a parent company filed a priority application in a Contracting State and a subsidiary subsequently filed an identical application in another Contracting State, the application would appear in the statistics twice.

41. The Yugoslav delegation was also in favour of the combined French - Netherlands proposal.

42. The Main Committee adopted the Netherlands proposal with the addition suggested by the French delegation; in this connection it was agreed that the normal Convention terminology be used to refer to natural or legal persons resident in a Contracting State.

43. With regard to *paragraph 3(b)*, the Netherlands delegation asked why the second highest number of patent applications filed by natural or legal persons having their residence or principal place of business in a Contracting State in the other Contracting States had been taken as a basis for calculation.

44. The French delegation pointed out that the three States theory had served as a basis for estimating the future use to be made of the European Patent Organisation by the nationals of the Contracting States to the Convention. According to this theory, applicants from Contracting States would seek a European patent if they applied for a national patent in at least two other Contracting States in addition to their State of origin when filing national patents. The second highest number of applications from a given Contracting State X was statistically quantifiable; it could be calculated by taking as a basis the number of applications filed in the last year but one prior to that of entry into force of the Convention by persons from Contracting State X, not just in that State nor in Contracting States X and Y, but in Contracting States X, Y and Z; the aggregate of all the applications filed in Contracting State Z in the above combination represented the "second highest number" for Contracting State X.

45. At the request of the Netherlands delegation, the Main Committee noted with reference to *the last sub-paragraph of paragraph 3* that the contributions from States in which the number of patent applications filed in the last year but one prior to that of entry into force of the Convention exceeded 25,000 should be taken as a whole and a new scale drawn up.

46. The Swiss delegation proposed deleting *paragraph 4* (M/54/I/II/III, page 4). It thought that these provisions could have no practical significance since contributions would be based on the figures for 1974 or 1975 and in these years there would still be no applications under the PCT which, at any rate as far as the States represented at this Conference were concerned, would not enter into force before the European Patent Convention.

47. The delegation of the Federal Republic of Germany said it could agree with the Swiss proposal and the reasons for it. However, since in theory it was not out of the question that the PCT would enter into force earlier, the minutes of the meeting should record that the Main Committee considered that, in this event, for the purpose of paragraph 3, international applications in respect of which a Contracting State was designated should be regarded as applications filed in that State.

48. The Netherlands delegation felt that its drafting proposal for paragraph 4 (M/52/I/II/III, point 5) offered an equally simple solution.

49. The French delegation supported the proposal to delete paragraph 4 and to record in the minutes of the meeting that

the Main Committee considered that, in the event of the early entry into force of the PCT, international applications should be regarded as national applications for the purpose of paragraph 3.

50. The Netherlands delegation said that whilst it did not wish to oppose the deletion of paragraph 4 and a note on this point being included in the minutes of the meeting, it was not quite certain whether the Main Committee's hypothetical interpretation of paragraph 3 would necessarily be binding on all the Contracting States.

51. The WIPO delegation thought that it was useful to cover PCT applications even if it was not likely that the PCT would enter into force, in respect of the Contracting States of the Convention, before the entry into force of the Convention; it was not unusual in legal texts to lay down provisions for cases which were not likely to arise.

52. The Main Committee decided to delete paragraph 4.

It considered that, in the unlikely event of the PCT entering into force before the Convention in respect of the Contracting States to the latter, international applications in respect of which a Contracting State was designated, should, for the purpose of paragraph 3, be regarded as applications filed in that State. The Main Committee noted in this connection that, if it should become necessary to interpret paragraph 3, the interpretation should be in accordance with the deleted paragraph 4 in the text of M/1 and should not be based on the Netherlands delegation's proposal (M/52/I/II/III, Point 5).

53. The Main Committee referred a drafting proposal from the United Kingdom delegation concerning *paragraph 7* (M/40, point 12) to the Drafting Committee.

#### **Article 41 (43) — Authorisation for expenditure**

54. The delegation of the Federal Republic of Germany proposed that the German text of paragraph 2 should make it clear that appropriations relating to staff costs could not be carried forward to a subsequent accounting period (M/11, point 20 and M/47/I/II/III, point 40).

55. The Main Committee referred this proposal to the Drafting Committee.

#### **Article 45 (47) — Provisional budget**

56. The Swiss delegation proposed that *paragraph 2* should specify that the Administrative Council could, in respect of specific headings or other divisions of the budget, authorise expenditure in excess on one-twelfth of the budget appropriations for the preceding accounting period, but not in excess of one-twelfth of the appropriations provided for in the draft budget (M/54/I/II/III, page 5).

57. The Netherlands delegation supported this proposal which it considered to be of a purely drafting nature.

58. The United Kingdom delegation pointed out that the Working Party on Finance of the Luxembourg Inter-Governmental Conference had considered that the text of paragraph 2, which was modelled on Article 204, paragraph 2, of the EEC Treaty, should not be amended despite a certain degree of unclarity.

59. In the Luxembourg delegation's opinion the "one-twelfth" in paragraph 2 should be taken to mean one-twelfth of the budget appropriations for the preceding accounting period.

60. The Chairman said that he interpreted paragraphs 1 and 2 of Article 45 in the following way. If, at the beginning of an accounting period, the budget had not been adopted, expenditures could be effected on a monthly basis per heading up to one-twelfth of the budget appropriations for the

preceding accounting period, provided that they were not in excess of one-twelfth of those provided for in the draft budget. Notwithstanding this rule of paragraph 1, the Administrative Council could authorise an exception to be made pursuant to paragraph 2 permitting expenditure in excess of one-twelfth of the budget appropriations for the preceding accounting period; however, even in this case, expenditure could not be in excess of one-twelfth of the appropriations provided for in the draft budget. In his opinion the aim of the Swiss proposal was to clarify this point and he did not see any reason not to do so.

61. The delegation of the Federal Republic of Germany remarked that although Article 45, paragraph 2, of the draft was based on the EEC Treaty, even the EEC Treaty — at least in the German version — was not completely clear on this point. Furthermore, the relevant provision of the EEC Treaty was also now interpreted as meaning what the Swiss delegation and the Chairman thought it meant. It had no hesitation about clarifying paragraph 2 to this effect; this point would then no longer need to be clarified in the Financial Regulations.

62. The French delegation's financial expert said that paragraphs 1 and 2 were, in his view, to be understood as follows. In the new accounting period one-twelfth of the budget appropriations for the preceding accounting period could be made available, provided that the amount did not exceed one-twelfth of the appropriations provided for in the draft budget. This restriction was contained in paragraph 1. Since paragraph 2 referred to the "other provisions laid down in paragraph 1", the restriction remained valid even if the Administrative Council authorised greater expenditure.

63. The Chairman pointed out that the provision in paragraph 1 could have far-reaching consequences, in particular during the build-up period of the European Patent Office, unless exceptions were provided for in paragraph 2. He also repeated his interpretation of paragraphs 1 and 2.

64. The French delegation's patent expert wondered whether paragraphs 1 and 2 should not be interpreted differently as follows. Under paragraph 1, one-twelfth of the appropriations for the preceding accounting period could be made available to the President of the European Patent Office on a monthly basis, per heading or other division of the budget without an authorisation of the Administrative Council, provided that such appropriations did not exceed one-twelfth of those provided for in the draft budget. If paragraph 2 was to be meaningful, it would have to state more than what was already stated in paragraph 1. This additional factor could be that the Administrative Council could authorise expenditure in excess of one-twelfth of the appropriations provided for in the draft budget. Such an interpretation was quite reasonable; at the beginning of the accounting period substantial expenditure could be incurred in excess of one-twelfth of the appropriations provided for in the draft budget without, however, exceeding the overall estimate of appropriations under the heading concerned. If, however, this interpretation of paragraphs 1 and 2 were correct, then the Swiss proposal for paragraph 2 was wrong as it did not contribute anything new in relation to paragraph 1, apart from the requirement concerning the authorisation of the Administrative Council.

65. The Chairman thought that paragraph 2 did not necessarily lead to this interpretation since that paragraph nevertheless required that the other provisions laid down in paragraph 1 be observed.

66. The United Kingdom delegation said that, as far as it remembered, the Working Party on Finance of the Luxembourg Inter-Governmental Conference had wished to ensure in paragraph 2 that where the Administrative Council had not agreed on the total budget, it could authorise the President of the European Patent Office to effect expenditure

in excess of one-twelfth of the appropriations under the preceding budget and also in excess of one-twelfth of the appropriations provided for in the draft budget. Such a situation could occur, for example, if large purchases had to be made at the beginning of the year. It thought that the "other provisions laid down in paragraph 1" which were to be observed pursuant to paragraph 2 referred to the provisions of the Financial Regulations mentioned in paragraph 1.

67. The Chairman considered that a provision under which the Administrative Council could authorise the President of the European Patent Office to effect expenditure in excess of one-twelfth of the appropriations under the preceding budget and also in excess of one-twelfth of the appropriations provided for in the draft budget would deviate considerably from the corresponding provision in the EEC Treaty.

68. The French delegation's financial expert thought the following interpretation of paragraphs 1 and 2 was correct, at least according to the French text: paragraph 1 set an absolute limit on appropriations made available on a monthly basis under a budget which had not been finally adopted; this limit amounted to one-twelfth, per heading or other division of the budget, of the budget appropriations for the preceding accounting period. Even if, pursuant to paragraph 2, the Administrative Council authorised expenditure in excess of one-twelfth of the appropriations provided for in the draft budget, this absolute limit must not be exceeded. This interpretation also corresponded, in his opinion, to the customary practice in France.

69. The delegation of the Federal Republic of Germany stated that the latter interpretation given by the French delegation as far as the French text was concerned also seemed to be completely acceptable. Ultimately, it could also follow this interpretation for the German text, which would however in that case have to be drafted more precisely. It nevertheless wished to point out a danger which it felt would be particularly pronounced if a wide interpretation were given to paragraph 2. The budget would have to be adopted by a qualified majority or even by a special qualified majority. If the Administrative Council were authorised to decide by a simple majority on expenditure in excess of one-twelfth of a particular sum, the provisions requiring a qualified majority could be undermined.

The adviser to the delegation of the Federal Republic of Germany added that, as far as he remembered, the Working Party on Finance of the Luxembourg Inter-Governmental Conference had wished in paragraph 2 to give the Administrative Council the possibility of authorising large acquisitions, e.g. the purchase of a computer, at the beginning of an accounting period in respect of which the budget had not been adopted. This would of course mean that the Administrative Council could authorise expenditure in excess both of one-twelfth of the appropriations under the preceding budget and of one-twelfth of the appropriations provided for in the draft budget.

70. In the opinion of the Swiss delegation the discussion of paragraph 2 had shown that the provision had to be clarified. Following the statements of those speakers who, with particular reference to the discussions of the Working Party on Finance, wished a wide interpretation to be given to this provision, it realised that its proposal was too narrow. It could endorse the wider interpretation of the provision but would welcome a clarification of the text to this effect.

71. The Luxembourg delegation thought that it was doubtful whether, where smaller appropriations were provided for in respect of a particular item in the draft budget than in the preceding budget, appropriations should be authorised in excess of one-twelfth of those for the preceding period. A large acquisition such as, for example, a computer, should not in an



event be made without the authorisation of the Administrative Council.

72. The French delegation's patent expert admitted that the statement of his colleague responsible for financial matters had led him to reconsider his position. Paragraphs 1 and 2 had to be interpreted as meaning that one-twelfth of the budget appropriations per heading or other division for the preceding accounting period was the limit, in excess of which the Administrative Council could on no account authorise appropriations. This was what was meant by the words "subject to the observance of the other provisions laid down in paragraph 1". The Administrative Council could only authorise expenditure in excess of one-twelfth of the appropriations provided for in the draft budget. This interpretation was not inapt as Article 45 applied not only to the build-up period of the European Patent Office but permanently, and would therefore cover cases in which the estimates of appropriations for a particular heading in the draft budget were smaller than in the preceding budget. Furthermore, the Working Party on Finance had probably been less concerned with the possibility of large purchases than with current expenditure which might be incurred at the beginning of an accounting period.

73. The Chairman noted that this interpretation of paragraph 2 was precisely the opposite of the one on which the Swiss delegation had based its proposed amendment. At the present stage of the discussions there seemed to be no other solution than to take a vote on the Swiss proposal for clarifying paragraph 2. If the proposal was rejected, paragraph 2 would remain in its present form which evidently allowed of several interpretations. Each delegation would then be at liberty to submit a new proposal for clarifying the present text.

74. In the subsequent vote 2 delegations were in favour of and 5 delegations against the Swiss proposal; 13 delegations abstained.

75. The Swiss delegation proposed that in *paragraph 3* "shall, on a provisional basis", be substituted for "shall continue to". It considered that the payments referred to in paragraph 3 were just as provisional as those in paragraph 4, i. e. subject to the final calculation of payments (M/54/I/II/III, page 5).

76. The Main Committee referred this proposal, which it considered was of a purely drafting nature, to the Drafting Committee.

#### **Article 46 (48) – Budget implementation**

77. The Italian delegation proposed specifying in *paragraph 2* that the President of the European Patent Office could only transfer appropriations from one heading to another similar heading.

78. The Netherlands delegation felt that it would be difficult to determine which headings were similar.

79. The United Kingdom delegation said that the intention of this provision was to give the President of the European Patent Office a certain degree of discretion in the use of appropriations. It would be for the Financial Regulations, to be adopted by the Administrative Council, to lay down the details governing the transfer of appropriations.

80. The Italian delegation thought that it would be sufficient if the Financial Regulations were clarified in the way it had proposed.

#### **Article 47 (49) – Auditing of accounts**

81. The Main Committee referred a drafting proposal from the Swiss delegation concerning *paragraph 4* (M/54/I/II/III, page 6) to the Drafting Committee.

#### **Article 48 (50) – Financial Regulations**

82. The delegation of the Federal Republic of Germany thought that there was no need to state in *sub-paragraph (f)* that the Administrative Council had powers to set up a Budget and Finance Committee and therefore proposed that the sub-paragraph be amended accordingly (M/11, point 5). It explained that it assumed that the Administrative Council would have to set up such a Committee and that its composition and duties would be laid down in the Financial Regulations.

83. The Main Committee referred this proposal to the Drafting Committee and requested the latter to examine whether the text proposed by the delegation of the Federal Republic of Germany was preferable to the present text.

84. At the request of the delegation of the Federal Republic of Germany, the Chairman noted that the Main Committee thought that the present list in Article 48 (50) did not preclude financial estimates of an indicative nature covering several years being provided for in the Financial Regulations.

#### **Article 146 – Cover for expenditure for carrying out special tasks**

85. The Main Committee referred two drafting proposals concerning *paragraph 1*, submitted by the United Kingdom delegation (M/40, point 23) and the delegation of the Federal Republic of Germany (M/47/I/II/III, point 19) respectively, to the Drafting Committee.

#### **B. Recommendation regarding the status and remuneration of the employees referred to in article 159, paragraph 2, of the Convention (M/7)**

86. The delegation of the Federal Republic of Germany proposed that the remuneration and allowances paid to the persons referred to in the *second and third paragraphs of point 2* should not be based on the remuneration of an employee in Grade A 1, step 6 (M/11, point 14).

It put forward the following arguments in support of its proposal: in drafting this provision, the Working Party on Personnel Matters of the Luxembourg Inter-Governmental Conference had held the view that persons employed during a transitional period on a daily basis and in a subsidiary capacity as members of the Boards of Appeal or of the Enlarged Board of Appeal of the European Patent Office should receive higher pay than persons subsequently employed full-time and permanently as members of the Boards of Appeal. Thus Grade A 1, step 6, had been chosen as the basis for calculating the remuneration and allowances of such persons. The German delegation agreed with the principle that these persons should be comparatively well paid; however the Recommendation as it now stood would be prejudicial to their subsequent grading. It therefore felt that the basis for calculating the remuneration and allowances of part-time members of the Boards of Appeal and of the Enlarged Board of Appeal should be the grade in which they would subsequently be recruited full-time, i. e. A 3, and that they should receive an additional payment to compensate for the fact that they would only be employed at the European Patent Office on a daily basis.

87. The United Kingdom delegation felt that the considerations put forward by the Federal Republic of Germany might be valid for some countries but not for all. Comparing it with the situation in the United Kingdom, it was better to leave the Recommendation in its present form.

88. The Chairman wondered whether calculating the remuneration and allowances of the members of the Boards of Appeal on a higher basis or alternatively on a lower basis with

the difference being compensated by an additional payment would not come to the same thing.

89. The delegation of the Federal Republic of Germany considered that there was a psychological difference even if both methods led to the same result as far as the actual amount of money was concerned. It was important that full-time members of the Boards should not feel themselves to be less favourably placed than persons carrying out the same activities on a part-time basis. This might well be the case if different criteria were applied for calculating remuneration and allowances. Moreover, the assumption that the members of the Boards would be employed at Grade A 3 should be accepted as valid since the whole projected pay structure might otherwise be upset.

The delegation of the Federal Republic of Germany then proposed that the remuneration and allowances of the persons referred to in Article 159, paragraph 2, should be based on the highest step of Grade A 3 and that the daily rate thus arrived at should be supplemented by an additional payment to be fixed by the Administrative Council in the light of individual circumstances.

90. This proposal was supported by the Swiss delegation.

91. The Netherlands delegation wondered whether it would not be better to allow the Administrative Council complete discretion in fixing the amount of remuneration and allowances since it was this body which would be drawing up the provisions governing the categories and incremental steps in question.

92. This matter was then put to the vote, in which there were three delegations for and four delegations against the German proposal, and thirteen abstentions.

93. The delegation of the Federal Republic of Germany thereupon withdrew its proposal on the *last paragraph of point 2* of the Recommendation (M/11, point 15).

94. The delegation of the Federal Republic of Germany then raised the question of the legal form of the Recommendation and the parties to which it should be addressed. It felt that it would not be proper for the Conference to adopt a decision concerning, *inter alia*, the remuneration of part-time members of Boards of Appeal, since this would be binding not only on the Interim Committee to be set up now but also on the Administrative Council to be set up at a later date. The correct procedure would be for the Conference to recommend the Interim Committee to prepare an Administrative Council decision which would, *inter alia*, settle the question of the remuneration and allowances of the persons referred to in Article 159, paragraph 2, in the manner desired by the Main Committee.

95. The Netherlands delegation considered that it would be odd if such a recommendation dealt only with the remuneration and allowances of part-time members of the Boards of Appeal, and not those of the rest of the staff. It would perhaps be more correct to incorporate the present Recommendation in the Recommendation on preparations for the opening of the European Patent Office (M/8) or to deal with it in the same way as the draft Service Regulations.

96. The United Kingdom delegation was of the opinion that the content of the Recommendation in question was of great psychological importance in that it would demonstrate to those using the patent grant procedure that part-time members of the Boards of Appeal were highly qualified. The Boards of Appeal would have an important role to play in the future development of European patent law. This was also particularly true of the Revocation Boards under the Community Patent Convention, which would consistently be staffed by the same persons, and the Recommendation as such — though not in the form of a decision — must therefore be retained.

97. The delegation of the Federal Republic of Germany was

against incorporating the content of the Recommendation in M/8, because if this was done it would have to be considerably shortened. The Conference should simply note the Recommendation and refer it to the Interim Committee for consideration at a later date. The content of the Recommendation would thus remain as it stood and future users of the European Patent Office could go by Article 159 of the Convention, which gave an important indication of the professional qualifications of future members of the Boards of Appeal. The Conference documents would indicate what arrangements the Main Committee felt should be made as regards the remuneration and allowances of part-time members of the Boards.

98. In the opinion of the French delegation the Recommendation on preparations for the opening of the European Patent Office (M/8) was so broadly drafted as to enable the Interim Committee to prepare both general provisions for the Service Regulations and special provisions for the persons referred to in Article 159 of the Convention. The Recommendation under discussion should be adopted by the Conference and be addressed to the relevant body, i.e. probably the Administrative Council.

99. Upon a proposal by the Netherlands delegation the Main Committee finally agreed as follows:

The Main Committee approved the content of the Recommendation regarding the status and remuneration of the employees referred to in Article 159, paragraph 2, of the Convention and expressed the wish that the Interim Committee and the Administrative Council would act upon it when the time came.

## II. Meeting on 25 September 1973

### A. Discussion of the results of the proceedings of the Drafting Committee

100. Except where otherwise specified below, the Main Committee approved the financial provisions re-examined the day before by its Drafting Committee, as contained in M/132/III/R 1, and agreed to forward them to the Committee of the Whole.

#### **Article 38 (40) — Level of fees and payments — Special financial contributions**

101. The Danish delegation wondered whether the end of *paragraph 3(b)* should not be worded as follows: "applications filed in *another* Contracting State by natural or legal persons having their residence or principal place of business in that Contracting State".

102. The Chairman stated that it was more correct to use the plural here, since the object was to compare the number of applications filed by persons from a particular Contracting State in each of the other Contracting States and to take the second highest number of such applications.

103. The French delegation supported this view.

104. The Main Committee agreed to leave all three versions of *paragraph 3(b)* unchanged.

105. The Main Committee also noted that the reference in *paragraph 3(b)* to the "residence" or "principal place of business" of natural or legal persons corresponded in all three languages with the terminology used by Main Committee I in similar contexts in other parts of the Convention and in particular in the provisions concerning representation.

106. At the request of the Luxembourg delegation, supported by the Belgian and French delegations, the Main Committee decided that in the French text of *paragraph 7* the word "versées" should be replaced by "remboursées".

## **Article 48 (50) — Financial Regulations**

107. The Netherlands delegation noted that the German text of *sub-paragraph (f)* was not the same as the two other versions, which it proposed should be adapted to the former.

108. The Main Committee decided to request the General Drafting Committee to examine whether the three versions of Article 48, sub-paragraph (f), corresponded with one another and, if not, to align them.

## **Article 146 — Cover for expenditure for carrying out special tasks**

109. The Netherlands delegation remarked that in the new version of *paragraph 1*, the reference to Article 37 (39), paragraphs 3 and 4, seemed to be superfluous, since these provisions were referred to in Article 39 (41), which was also cited.

110. In reply to this point it was observed that Article 146 referred both to the payments by the Contracting States dealt with in Article 37 (39) and to the advances dealt with in Article 39 (41). It was therefore desirable to leave both references in the text.

111. In conclusion, the Chairman of the Drafting Committee explained why his Committee had deleted *paragraph 2*. Since paragraph 1 now also referred back to Article 46 (47) which laid down general rules on provisional budgets in respect of all the Contracting States, paragraph 2, which had been concerned with provisional budgets in respect of a group of Contracting States, could be omitted.

112. The Main Committee recorded its agreement to this drafting amendment of Article 146.

## **B. Discussion of M/85/III submitted by the United Kingdom delegation**

113. The United Kingdom delegation referred to its document M/85/III and set forth its views on how the special financial contributions should be repaid by the European Patent Office to the Contracting States and in particular on how the relevant interest rate should be determined. The interest rate which, pursuant to Article 38 (40), paragraph 7, of the Convention was to be the same for all Contracting States and which, pursuant to Article 43 (50), was to be laid down in the Financial Regulations by the Administrative Council, should not be 4% as previously assumed by the Working Party on Finance of the Luxembourg Inter-Governmental Conference. The interest rate should be the weighted average of the operative government bank rates or minimum lending rates and be reviewed annually by the Administrative Council. At the same time the fees of the European Patent Office should be fixed so as to ensure that repayment of the special financial contributions would — as envisaged in Final Document No. 10 — begin no later than 11 years after and be completed no later than 26 years after the opening of the European Patent Office. When the annual review of the interest rate was carried out the fees should also be adjusted as necessary.

Under the financial model which had been used as a basis up until the present time some Contracting States would — at an interest rate of 4% which was completely out of line with present realities — be subsidising the users of the European Patent Office, i. e. industry in particular, and this, at least in the view of the United Kingdom delegation, was unacceptable.

The United Kingdom delegation stated that it would be grateful if the other delegations would express their views on its proposals.

114. The French delegation agreed with the United Kingdom delegation's view that the interest rate should be more closely

aligned to the rates operative in the Contracting States and that fees should be fixed at such a level that the European Patent Office would not need to be temporarily subsidised by the Contracting States.

115. The delegation of the Federal Republic of Germany considered that the views put forward in M/85/III were basically correct. The United Kingdom delegation's proposals on the level of interest rates were unquestionably based on correct assumptions. However, the fees should not be fixed at such a high level as to have a deterrent effect, since this would not be in the interests of the European Patent Office. This delegation was also of the opinion that sub-paragraph (ii) of M/85/III should read to the effect that "if possible" repayments should begin in year 11 and "if possible" be completed in year 26.

116. The Netherlands delegation stated that it agreed in principle with the United Kingdom delegation's views; in particular the interest rate would under present circumstances have to be considerably higher than 4%. It would, however, be somewhat hazardous to create any firm commitment, for example as regards the repayment period. It felt that in general, the principles put forward by the United Kingdom delegation should be applied flexibly.

117. The Swiss delegation also favoured a flexible application of the principles proposed by the United Kingdom delegation.

118. The UNION delegation sympathised with the United Kingdom proposals but wondered whether any calculations had been made on the effects which increasing the interest rate from 4% to, for example, 12% would have on the expenditure, fees, etc. of the European Patent Office.

119. The United Kingdom delegation replied that it had once drawn up rough estimates on the effects that an increase in the procedural and renewal fees would have on the special financial contributions of the Contracting States. It felt however that there was not much point in making more precise calculations at the present time since conditions might have completely changed in three or five years.

120. The Chairman confirmed that as yet no calculation had been made on the effects of repaying the financial contributions of the Contracting States at realistic market rates of interest. This would simply not be feasible since it was impossible to predict at the present time the level of market interest rates in the future. Doubtless, to increase the interest rate would have an effect on the financial contributions or on the procedural fees or on both; a further factor which would have to be considered was the length of the repayment period. All these points would have to be taken into account in drawing up a financial model, and above all it would have to be borne in mind that the fees might be so high as to render the whole operation unprofitable.

Referring to the reactions to M/85/III, submitted by the United Kingdom delegation, the Chairman noted that, whilst all delegations were in agreement with the principles which it contained, those delegations which had expressed a view were in favour of applying these principles flexibly, in particular as regards the level of fees.

121. The Chairman noted that all the items on the agenda had been discussed, thanked all those who had taken part for contributing towards such a speedy and successful conclusion to the proceedings of Main Committee III and declared the meeting closed.

122. Finally, on behalf of all the delegations, the French delegation thanked the Chairman for the objective, impartial and often forbearing way in which he had conducted proceedings throughout, both in Main Committee III and in the Working Party on Finance of the Luxembourg Inter-Governmental Conference.



## ***Minutes of the proceedings of the Committee of the Whole***

1. The Committee of the Whole, which was established by the Plenary of the Conference and comprised all the Government delegations (see Rule 14 of the Rules of Procedure)\*, was, pursuant to paragraph 4 of Rule 14, chaired by Dr. Kurt Haertel (Federal Republic of Germany), President of the German Patent Office and Chairman of Main Committee I. Mr. François Savignon (France), Director of the French Industrial Property Office and Chairman of Main Committee II, was First Vice-Chairman; Mr. Edward Armitage (United Kingdom), Comptroller-General of the United Kingdom Patent Office and Chairman of Main Committee III was Second Vice-Chairman.

2. In accordance with Rule 14 of the Rules of Procedure, the terms of reference of the Committee of the Whole were to take decisions on proposals from the General Drafting Committee on drafts established by Main Committees I, II and III and on proposals submitted to it directly and to forward the drafts approved by it to the Plenary of the Conference for adoption.

3. The Committee of the Whole met under the direction of the Chairman from 1 to 4 October 1973.

4. At the meeting on 1 October 1973, the Committee of the Whole received the reports of Main Committees I and II. Main Committee I's report was approved without debate (see Section I below).

5. At its meeting on 2 October 1973, the Committee of the Whole discussed Main Committee II's report. The discussion and subsequent approval of the report are dealt with below in Section II.

At the same meeting, it heard and approved Main Committee III's report (see Section III below); it also discussed the results of the proceedings of the General Drafting Committee (M/146 R/1 to R/15 and M/151 R/16). These discussions are covered in Section IV below.

6. On 3 October 1973, the Committee of the Whole received and approved the report of the Credentials Committee (see Section V below). The problems of a European School and the European Patent Office building in Munich were then dealt with (see Sections VI and VII).

7. At its last meeting on the morning of 4 October 1973, the Committee of the Whole discussed the organisation and work programme of the Interim Committee. These discussions are presented in Section VIII below. It finally considered a proposal from the Yugoslav delegation for a Resolution on technical assistance (Section IX) and a Recommendation regarding the status and remuneration of certain employees (Section X).

### ***I. Report of the discussions and decisions of Main Committee I***

8. The rapporteur of this Main Committee, Mr. Paul Braendli, Vice-Director of the Federal Intellectual Property Office (Switzerland), presented the report on the work of Main Committee I to the Committee of the Whole. The text of this report is given in *Annex I*.

The report was unanimously adopted by the Committee of the Whole.

### ***II. Report on the work of Main Committee II***

9. Subject to a few minor amendments, the Committee of the Whole unanimously approved the report presented by the rapporteur of Main Committee II, Mr. R. Bowen (United Kingdom), Assistant Comptroller of the United Kingdom

\* The Rules of Procedure (M/34) had previously been adopted unanimously by the Plenary (see M/PR/K/1, point 10).

Patent Office. The text of the report as adopted by the Committee of the Whole is given in *Annex II*. The discussions concerning the proposals for amendments to the report are summarised in the following paragraphs.

10. As regards the section of the report concerning the Protocol on Centralisation, the Netherlands delegation, commenting on the first sentence in point 16, stated that the obligations of the European Patent Office towards the Member States of the International Patent Institute had simply been clarified rather than extended. However, the French and United Kingdom delegations maintained that the obligations had in fact been extended since the original text had only referred to tasks at present incumbent upon the Institute whereas now tasks entrusted to the IIB after the signing of the Protocol were expressly covered. While disagreeing with this view, the Netherlands delegation did not insist on an amendment.

11. The Netherlands delegation proposed, also with regard to point 16, that the last sentence should state that the EPO would also undertake searches for Member States of the IIB which had not submitted any applications for search before the entry into force of the Convention. This would make provision for those States which, up to the time in question, had submitted no applications for search to the IIB although they were entitled to do so.

The Committee of the Whole agreed to amend the part of the report concerned as follows: "... the Office will also assume this responsibility in respect of a Member State of the Institute which prior to the entry into force of the Convention, has agreed to submit national applications to the Institute for search."

12. The Committee of the Whole adopted a proposal from the Swedish delegation that the idea proposed by the Scandinavian countries at the beginning of point 22 be worded as follows: "Consideration was given to the idea, proposed by the Scandinavian countries, that such work might be entrusted to national offices, possessing the minimum documentation, whether or not they possessed the other qualifications, required of an International Searching Authority under the Patent Cooperation Treaty." It also approved an addition at the end of the third sentence in this point to the effect that national offices would have to "fully" qualify as Searching Authorities.

13. The Austrian delegation suggested that in the English version of point 22, in the middle of page 14, the words "some search work" be used so as not to prejudge the question of the amount of such search work, which had deliberately been left open. The text would therefore read: "difficulties resulting from a renunciation under Section I.2, to entrust some search work to national offices whose language is ..."

The Committee of the Whole accepted this suggestion. The German and French texts remained unaltered.

14. With regard to the part of the report dealing with Article 166 (Article 167 of the signed version) of the Convention, the Greek delegation proposed that point 11 be amended at the top of page 7 so as to state, not that Main Committee II had accepted the view as to the effects of a reservation, but that it had considered such a possibility. The rapporteur and the Netherlands delegation stated that this view had been generally accepted in Main Committee II.

The Committee of the Whole accordingly decided not to amend the draft which had been submitted.

### ***III. Report on the results of Main Committee III's proceedings***

15. Main Committee III's rapporteur, Mr. Fressonnet, Deputy Director of the National Industrial Property Office

(France), submitted the report on the results of Main Committee III's proceedings to the Committee of the Whole. The text of the report is given in *Annex III*.

The United Kingdom delegation especially welcomed the fundamental observations relating to financial questions contained in the report.

The report was unanimously approved by the Committee of the Whole.

#### ***IV. Results of the proceedings of the General Drafting Committee (M/146 R/1 - R/15, M/151 R/16)***

16. The Committee of the Whole agreed to request the Chairman of the General Drafting Committee only to deal with those drafts in respect of which his Committee had made new proposals.

17. The Chairman of the General Drafting Committee, Mr. van Benthem (Netherlands), stated that in his presentation of the Drafting Committee's work, he would not deal with simple drafting amendments which had been made when the texts were being co-ordinated and the terminology checked. He did however point out to the Committee of the Whole that the title of the Convention had been altered by the Drafting Committee.

The Committee of the Whole approved the new title which reads as follows in the three languages:

- Übereinkommen über die Erteilung europäischer Patente
- Convention on the Grant of European Patents
- Convention sur la délivrance de brevets européens.

18. Chapters A to F below deal with the proposals for amendments submitted to the Committee of the Whole by the Chairman of the General Drafting Committee or the delegations.

#### **A. Convention**

##### ***Article 10 and Article 33 (R/1 and R/2) — Direction of the EPO and competence of the Administrative Council in certain cases***

19. The General Drafting Committee requested the Committee of the Whole to confirm that the term "inter-governmental organisations" in Article 33, paragraph 4, also covered organisations such as the Commission of the European Communities.

20. The French delegation thought that this was the case. The term would have to include all inter-governmental organisations including bodies which, although not actually inter-governmental, were set up by governments.

21. The Committee of the Whole confirmed the General Drafting Committee's interpretation whereby the term "inter-governmental organisations" as used in Article 33 also included the Commission of the European Communities.

22. In this connection and in response to a further request from the Drafting Committee for clarification, the Committee of the Whole confirmed that the President of the European Patent Office only required the authorisation of the Administrative Council for negotiations concerning the conclusion of agreements with States or inter-governmental organisations and that he was empowered to conclude agreements with private organisations or other international organisations under Article 10 without requiring special authorisation from the Administrative Council.

##### ***Article 20 — Legal Division***

23. The United Kingdom delegation pointed out that in Article 20, Main Committee I had made registration on, and

deletion from, the list of professional representatives the prerogative of the Legal Division and that in accordance with the conclusions of Main Committee II, decisions on these matters were to be taken by one legally qualified member. However, in Article 134, paragraph 8(c), all questions relating to disciplinary matters had been left open as it had been considered premature to lay down provisions of this nature at this stage. The United Kingdom delegation accordingly felt that a general clause should be inserted in Article 20 enabling the Legal Division to take further decisions concerning registration on the list of professional representatives.

24. The German delegation stated that Article 134 had been drafted on the assumption that disciplinary powers would not necessarily be exercised by the European Patent Office but that a European disciplinary board might be created to exercise such powers.

25. The Netherlands delegation argued that the above-mentioned questions might not in every case fall within the purview of the Legal Division. Situations could arise where the Boards of Appeal and perhaps even a body outside the European Patent Office would have to give decisions. Consequently, any new wording should be very flexible.

26. The Chairman suggested that any proposed amendment to cover the eventuality of the European Patent Office being able to implement disciplinary measures in addition to deciding on entries on and deletions from the list should be drawn up with reference to all measures relating to professional representatives.

27. The Committee of the Whole instructed the General Drafting Committee to examine any proposal which the United Kingdom delegation might submit and to refer the matter back to it only if difficulties were encountered.

##### ***Article 70 (R/3) — Authentic text of a European patent application or European patent***

28. The Committee of the Whole approved the action taken by the Drafting Committee which, on the basis of a majority decision of Main Committee I (see M/PR/I, point 171), had aligned the English and French versions of paragraph 3, as regards the protection conferred by translations, on the German text.

##### ***Article 76 (R/3) — European divisional applications***

29. For greater clarity, the General Drafting Committee had condensed the prerequisites for the filing of a divisional application — previously set out in two separate paragraphs — into paragraph 1 of Article 76.

The Committee of the Whole agreed to this change.

##### ***Article 110 (R/4) — Examination of appeals***

30. The Committee of the Whole approved the extension made by the Drafting Committee in response to a majority decision of Main Committee I (see M/PR/I, point 507), whereby in the case of this Article, the application would not be deemed to be withdrawn if the decision under appeal was taken by the Legal Division.

##### ***Article 116 (R/5) — Oral proceedings***

31. In this case also, the Committee of the Whole accepted the amendment made by the Drafting Committee in response to a suggestion made by the United Kingdom and Netherlands delegations in Main Committee I (see M/PR/I, point 528). Under the new text of paragraph 1 a request for further oral

proceedings before the same department could be rejected if, in addition to the subject of the proceedings being the same, the parties are also the same.

### **Article 117 (R/5) – Taking of evidence**

32. The Chairman of the General Drafting Committee pointed out that in paragraphs 5 and 6 the words “on oath or in an equally binding form” had been chosen further to the deliberations of Main Committee I (M/PR/I, point 535).

The Committee of the Whole endorsed this wording in the English and French version. Further to an objection by the German delegation the following proposal from the Austrian delegation for a new wording of the German text was accepted: “...unter Eid oder in gleichermaßen verbindlicher Form”.

### **Article 130 (R/5) – Exchanges of information**

33. After detailed discussion in Main Committee I (M/PR/I, points 716 to 739), the General Drafting Committee had put forward a very broad wording for paragraph 2(c) whereby the provisions of paragraph 1 would apply to the communication of information by virtue of working agreements between the EPO and “any other organisation”.

34. The French delegation stated that an inter-governmental organisation had considered the earlier wording unsuitable and that the Drafting Committee had sought a better solution. However, the new wording implied a somewhat unfortunate extension since it covered almost every private establishment. The narrow limits which had been drawn in sub-paragraphs (a) and (b) had been excessively widened in sub-paragraph (c).

35. The Chairman of the Committee of the Whole pointed out that sub-paragraph (c) had been intentionally broadly worded by Main Committee I so that working agreements on exchanges of information which were in any way desirable could be concluded with any organisation – e.g. INPADOC, or even private undertakings. A distinction was made between sub-paragraphs (a), (b) and (c) in paragraph 3: whereas no restrictions were imposed on communications between the EPO and the other two types of organisation, communications with organisations covered by sub-paragraph (c) were subject to restrictions which could only be relaxed by the Administrative Council.

36. Article 130 was accordingly approved as it stood by the Committee of the Whole.

### **Article 163 (R/6) – Professional representatives during a transitional period**

37. The General Drafting Committee had replaced “may” by “shall” in the English version of paragraph 7, thereby making it clear in all three texts that all persons entered on the list of professional representatives during the transitional period would remain on the list. It was also made clear that the persons concerned must also be restored to the list in the cases stipulated, subject to the Drafting Committee’s proviso that restoration must be at the request of the person concerned.

The Committee of the Whole approved these amendments.

### **Article 164 (R/6) – Implementing Regulations and Protocols**

38. The German delegation wondered whether the Declaration concerning Article 69 should not be mentioned in Article 164 as an integral part of the Convention, since it was intended to be binding on the courts.

39. The Chairman of the General Drafting Committee stated that his Committee had discussed this possibility but had preferred to leave a decision on the matter to the Committee of the Whole.

40. At the request of the Chairman of the Committee of the Whole, the representative of the Secretariat’s Legal Department stated that whilst it would be somewhat unusual to make a Declaration an integral part of the Convention, such an arrangement would not be impossible in view of the fact that national laws, and indeed international agreements, contained rules on interpretation which were binding on the courts. It did not basically matter whether a rule on interpretation of this type were included as a separate paragraph in an Article of the Convention, i.e. as paragraph 3 of Article 69, or attached to the Convention in the form of a Declaration. There were a number of other alternatives apart from these two possibilities, such as an appendix to the Final Acts or simply mentioning the matter in the Minutes. Such solutions would however not be binding on the courts, which was the aim desired.

41. The Chairman of the Committee of the Whole noted that the Legal Department saw no objections on legal grounds to following the German proposal and making a separate Declaration an integral part of the Convention by specifically mentioning it in Article 164. He also noted that the Netherlands and French delegations supported the German proposal.

42. The United Kingdom delegation pointed out that when the text of the Declaration had been drafted no thought had been given to the possibility of its being in the form of a paragraph in an Article, thereby making it into a legal provision. Before such a solution was adopted the text would therefore have to be re-examined in detail. All in all, it would prefer one of the other alternatives mentioned by the representative of the Legal Department, such as a clear reference to the Declaration in the Minutes.

The French delegation considered that it had hitherto been agreed that the Declaration should not be incorporated in full in an Article but that there should be a separate Declaration (and not simply a mention in the Minutes) which could not be ignored by the courts. The point in question was therefore whether the title of the Declaration should be listed in Article 164, paragraph 1, together with the other texts which were defined as being integral parts of the Convention. Whilst it would be relatively easy to do this, it would perhaps have been better if the text had been drawn up in the form of a Protocol on Interpretation instead of a Declaration, if this were at all possible.

43. The Chairman of the Committee of the Whole confirmed the French view that the only point in question was the proposal that the Declaration be referred to in Article 164.

44. The representative of the Legal Department of the Secretariat pointed out that to mention the Declaration in Article 164 would be to make it a Declaration by the Contracting States, and hence subject to their respective ratification procedures. If the United Kingdom proposal were followed and the Declaration were merely included in the Minutes of the Conference, it would simply constitute a Declaration by the Government representatives participating in the Conference. In reply to the French delegation’s suggestion, he explained that the term “Declaration” might lead a court to conclude that the text in question was not binding upon it. In order to ensure that the text would be binding on the courts it would be better to replace the term “Declaration” by “Protocol on the Interpretation of Article 69”.

45. The Committee of the Whole agreed to this solution, with no votes against and nine abstentions. Article 164, paragraph 1, was therefore to read as follows:

“(1) The Implementing Regulations, the Protocol on



Recognition, the Protocol on Privileges and Immunities, the Protocol on Centralisation and the Protocol on the Interpretation of Article 69 shall be integral parts of this Convention."

### **Article 167 (R/7 and M/149) — Reservations**

46. Further to the General Drafting Committee's explanation of the drafting amendments it had made to clarify the scope of this Article, the Chairman of the Committee of the Whole pointed out that the Greek delegation had submitted a proposal in M/149 which would entail a resumption of discussions on the matter. If a matter which had already been discussed were to be re-examined, this would require a two-thirds majority in the Committee of the Whole.

47. The Greek delegation made the following points in support of its proposal: after the text had been clarified by the General Drafting Committee, the Greek delegation had realised that the words "or use" should be deleted in paragraph 2 (a), since it would have the greatest difficulty in accepting the exclusion of use from the reservations. It recognised the great efforts which had been made by the other delegations, and in particular the German delegation, to meet its requirements on this matter but hoped that it would meet with understanding in now asking that these efforts should not be abandoned when a generally acceptable solution was imminent. The reference to use had presumably been incorporated in the text of the Article at a comparatively late stage in the proceedings because right from the start it had been clear that there would be practical difficulties in distinguishing between protection of a product and its use.

#### **(a) Resumption of discussions**

48. The Chairman of the Committee of the Whole asked which delegations were in favour of resuming discussions on this point.

49. The Netherlands delegation was against doing so on the grounds that this question had already been fully discussed by Main Committee II and no new factors relevant to the examination of the problem were raised by the text as submitted by the General Drafting Committee.

50. The Chairman felt that the difficulty experienced by the Greek delegation in agreeing to Article 167 as it stood at present might be a new factor.

51. The French delegation shared the view of the Netherlands delegation that no new factors had arisen on this question but was not opposed to resuming discussions which might result in new points emerging.

52. The United Kingdom delegation feared that to re-open discussions without knowing the reasons which would warrant such a course might simply lead to a repetition of arguments which had already been put forward. It was therefore against resuming discussions on this point.

53. The German delegation was in favour of continuing discussions on this matter for the following reasons: Article 167 had been drawn up in order to enable certain States which had not yet reached a very high technological level of development in the field of patent law to sign, ratify and at a later date apply the Convention. These States were not in a position to include product protection in their laws. If Article 167 were so drafted as to make it impossible for these States to sign and implement the Convention, the Article would become completely pointless. Greece feared that including a reference to the use of chemical products would undermine the purpose of the reservation, because under the present text products themselves would not be protected, but their use would. This could in some cases

mean that perhaps the only reasonable use of a product would be protected thereby rendering the reservation option irrelevant. Article 167 was of no importance for the technologically developed States but only for the small number of countries which would have difficulty in signing the Convention if it were not possible to make reservations in this respect.

54. The Austrian delegation agreed with the German view and was also in favour of resuming discussions.

55. The Committee of the Whole voted on the matter. Of the 17 votes cast 13 were in favour and 4 against, thereby giving the required 2/3 majority for resuming discussions.

#### **(b) Decision on the proposal by the Greek delegation**

56. At the beginning of the discussions the Greek delegation stressed that difficulties would undoubtedly arise in applying a clause distinguishing between protection of a product and protection of the use of a product. Greece would have great difficulty in signing the Convention if the ill-defined concept of use were included, with the ensuing risk that the distinction between product protection and protection of use would be impossible to apply in practice. This Article posed no difficulties for a large number of States and therefore the danger of Greece being unable to ratify the Convention should be avoided by taking a small step towards meeting the wishes of those States which needed to be able to make the reservations in question.

57. The Portuguese and Spanish delegations supported the Greek proposal.

58. The French delegation was firmly opposed to deleting the term "use" in relation to chemical products but could consider deleting it in relation to pharmaceutical or food products, which would by their very description contain an indication of their use, and there was therefore a certain identity between the product itself and its use.

59. The United Kingdom delegation expressed a similar view, but emphasised that there could be no abandonment of protection of the use of a chemical product.

60. The Swiss delegation supported the statements of the two preceding delegations and stated that the inclusion of the word "use" at the end of this paragraph really related to chemical products only. If there was agreement on this point the present text could remain unchanged.

61. The EIRMA delegation pointed out that what was involved here was not simply a minor detail and that exclusion of use in relation not only to food and pharmaceutical products but also to chemical products would be greatly to the detriment of European industry, since it could well prove impossible to protect an invention which was essentially based on a particular feature of a new product.

62. The CEIF delegation agreed with this statement.

63. The German delegation was well aware of the objections which had been raised against deleting the reference to use, but considered that the issue was not so much a provision that would be applied without further ado, but rather a reservation of which countries would not necessarily avail themselves to the full. The purpose of this clause was to leave some latitude to national legislation, so that countries such as Greece would be in a position to sign and ratify the Convention without immediately having to amend their national law in certain specific respects. Reservations would furthermore apply only for a limited period of time. For these reasons the German delegation supported the Greek proposal.

64. The Chairman of the Committee of the Whole called for a vote on the Greek proposal that the term "use" should be deleted in relation to all three categories of products, i.e.

chemical, food and pharmaceutical products. He pointed out, however, that if its proposal were rejected, the Greek delegation would remain free to submit another proposal, narrower in scope and entailing deletion of use in relation to food and pharmaceutical products only.

The Greek proposal was rejected by 9 votes against, 8 in favour and 1 abstention.

65. The Greek delegation announced a new proposal along the lines mentioned by the Chairman, although it went further than suggested by some delegations, because it did not mention food and pharmaceutical products in the second half of the sentence.

66. The French delegation stated that it would have to reject this proposal because processes of manufacture of food and pharmaceutical products must at all events be protected.

67. At a subsequent meeting the Greek delegation submitted the following compromise proposal for the second half of paragraph 2 (a) of Article 167 (M/154 G):

“...; this reservation shall not affect protection conferred by the patent in so far as it involves a process of manufacture or use of chemical products or a process of manufacture of pharmaceutical or food products.”

68. This proposal was adopted by the Committee of the Whole, which instructed the General Drafting Committee to include it in the existing text of the Article.

## **B. Implementing Regulations**

### ***Rule 28 (R/9) – Requirements of European patent applications relating to micro-organisms***

69. The Committee of the Whole adopted the revised version of this Rule drawn up by the General Drafting Committee on the basis of the conclusions reached by Main Committee I.

### ***Rule 50 (R/9) – Information about publication***

70. The Committee of the Whole adopted the version of this Rule as submitted by the Drafting Committee, paragraph 2 of which was based on the proposal put forward by the Austrian delegation in Main Committee I (M/PR/I, point 2272).

### ***Rule 65 (R/10 and M/151 R/16) – Rejection of the appeal as inadmissible***

71. The Chairman of the General Drafting Committee stated that, further to a proposal by the Norwegian delegation that the procedure for remedying deficiencies in the case of appeals should be the same as that applicable in the case of opposition, Main Committee I had instructed the Drafting Committee to examine the possibility of more closely aligning Rules 65 and 56 (M/PR/I, point 2299). Bearing in mind the fact that in Article 108 Main Committee I had divided the time limit for appeal into the period within which notice of appeal must be filed (two months) and that within which a written statement setting out the grounds of appeal must be filed (four months) (M/PR/I, point 462), the General Drafting Committee proposed the following wording, which it did not however consider to be absolutely essential:

“... rejected as inadmissible, unless each deficiency has been remedied before the relevant time limit laid down in Article 108 has expired.”

72. The Norwegian delegation still found this solution somewhat harsh compared with the possibilities laid down in Rule 56. It suggested that a paragraph corresponding to paragraph 2 of Rule 56 be included in Rule 65.

73. The Austrian delegation shared this view.

74. The Netherlands delegation feared that because of the shorter time limits applicable to appeals, there would not be sufficient time for arrangements along the lines of the proposed paragraph 2.

75. The Norwegian delegation considered that even in the case of appeals there would be sufficient time for remedying those minor deficiencies with which paragraph 2 was concerned.

At a subsequent meeting the Committee of the Whole first of all approved the abovementioned proposal by the General Drafting Committee for supplementing paragraph 1 of Rule 65, subject to the proviso that this provision only related to deficiencies resulting from failure to comply with the requirements of Rule 64 (b). Notwithstanding the objections of the German delegation, which considered that there should be stricter rules for appeals proceedings, it also adopted a proposal which had been submitted in the meantime by the Norwegian delegation (M/155/G) for the inclusion of a new paragraph 2 corresponding to paragraph 2 of Rule 56.

### ***Rule 84 (R/11) – Duration of time limits***

76. The Committee of the Whole approved the deletion of paragraph 2 made by the General Drafting Committee on the basis of the conclusions of Main Committee I (M/PR/I, point 2394).

### ***Rule 93 (R/11) – Parts of the file not for inspection***

77. In accordance with the discussions in Main Committee I (M/PR/I, point 2409) the General Drafting Committee specifically provided in sub-paragraph (c) that the designation of the inventor should not be disclosed where he had renounced his title as inventor.

The Committee of the Whole adopted this solution.

### ***Rule 99 (R/11) – Procedure for letters rogatory***

78. Further to a proposal by the Italian delegation (M/PR/I, point 2427) referred to it by Main Committee I, the General Drafting Committee submitted an amended version of paragraph 4 of this Rule.

This version was adopted by the Committee of the Whole.

### ***Rule 106 (R/11) – Amendment of the list of professional representatives during a transitional period***

79. The Chairman of the General Drafting Committee referred to the lengthy discussions which had been held on this Rule in Main Committee I. Although, after clarifying the interpretation to be given to this Rule, Main Committee I had concluded that the text need not be amended (M/PR/I, point 2519), the Drafting Committee had decided to refer to “other” requirements in paragraph 1 (b) instead of “further” requirements, in order to make the interpretation agreed by Main Committee I quite clear.

80. The Chairman of the Committee of the Whole confirmed that the other requirements referred to in paragraph 1 (b) were requirements other than those mentioned in paragraph 1 (a).

81. The Committee of the Whole approved the amendment submitted by the General Drafting Committee.

## **C. Protocol on Recognition (M/146 R/12)**

82. Further to a proposal made by the IAPIP delegation in Main Committee I and the Committee's decision in this

connection (M/PR/I, point 3014), the General Drafting Committee had included a new provision in this Protocol which stipulated that in certain cases the courts of the country of residence or principal place of business of the plaintiff should have jurisdiction. This provision was however not included in Article 5 of the Protocol as originally intended but appeared as a new Article 3.

83. The Committee of the Whole adopted this proposal.

#### **D. Protocol on Privileges and Immunities (M/146 R/13)**

84. The Austrian delegation requested clarification on whether in the German text the word "Immunität" should be used in all cases instead of "Befreiung".

85. The Chairman of the Committee of the Whole referred to the conclusions reached by Main Committee II, to the effect that in the German text of the Protocol the term "Immunität" was to be used instead of "Befreiung" in all places where the French text used "immunité" and the English "immunity".

86. The Committee of the Whole agreed with this view, and requested the German delegation to have another look at this point in the draft of the Protocol and inform the General Drafting Committee of any amendments.

87. The United Kingdom delegation stated that it interpreted the expression "the most favourable treatment accorded by that State to any other international organisation" in Article 10, paragraph 1, as meaning that the European Patent Organisation was not entitled to government privileges with regard to its communications.

#### **E. Protocol on Centralisation (M/146 R/14)**

88. The Chairman of the General Drafting Committee stated in his introduction that the various sections of the Protocol had been sub-divided into paragraphs and sub-paragraphs and that, in accordance with the terminology used in the Convention, reference had been made to the "branch" at The Hague instead of the "Directorate-General for Searching".

#### **Section I**

89. The IIB delegation pointed out that the proposed wording of paragraph 1 (b) "... assets and liabilities ... are taken into ... as part of the branch located at The Hague" was legally contestable in that the assets and liabilities of the IIB would form an inseparable whole together with those of the EPO. Accordingly the phrase "as part of the branch located at The Hague" could be deleted, all the more so as it was clearly indicated in other parts of the Convention that this branch was to be located at The Hague.

90. The Committee of the Whole endorsed this proposal and decided that this Section of the Protocol be amended accordingly.

#### **Section III**

91. The Committee of the Whole had before it a proposal by the Swedish delegation that a new paragraph 2 be added to this Section (M/147/G).

92. The Swedish delegation stated that it had put forward its proposal in the light of the change in the situation following the majority vote by Main Committee II in favour of an Austrian/French proposal which the Scandinavian countries had opposed (see M/PR/II: reservation entered by the Swedish delegation at the conclusion of the discussions on Sections III and IV of the Protocol on Centralisation).

93. The Committee of the Whole decided in favour of resuming discussions on Section III.

94. In support of its proposal the Swedish delegation pointed out that it was concerned with the harmonisation of search activities at the Swedish Patent Office and the EPO. The situation was that the Swedish Patent Office could carry out PCT searches for Scandinavian countries only if such searches were fully recognised by the EPO. This would, however, require a measure of control and supervision by the EPO.

With regard to the text of its proposal as circulated, the Swedish delegation pointed out that the French text — in contrast to both the other languages — presumably erroneously referred to the exchange of information between offices carrying out searches and not to "the exchange of search ... services".

95. The French delegation was basically in favour of the Swedish delegation's request. However, so far as the textual difference was concerned, it considered that an acceptable solution should be arrived at by aligning the other languages on the French version.

96. The United Kingdom delegation followed the French delegation in approving the objectives pursued by the Swedish proposal. It also endorsed the second part of the French delegation's statement. It felt that it would be preferable not to give too narrow a definition of the content of the special agreements provided for under paragraph 2. If it were the Swedish delegation's wish to retain the wording "exchange of search ... services", a more precise indication should be given of the scope of this passage. If it were to be interpreted as meaning that such exchanges were to be carried out solely in the interests of ensuring a supervision of quality as regards PCT activities, then an approach of this nature was feasible.

97. The Swedish delegation had no objections to expanding the definition given of the content of the special agreements. It emphasised that this new paragraph 2 had been entirely dictated by the wish to achieve harmonisation, which was a valid objective in view of the Swedish Patent Office's role as a Searching Authority under the PCT. It had always considered it an important factor in harmonisation that a certain proportion — however small — of searches should be entrusted to the Swedish Patent Office. This explained the great interest in control and supervision by the EPO. If it were agreed that in the interest of harmonisation and the quality of work search tasks should be transferred to the Scandinavian PCT Authority as part of a harmonisation scheme, there was no reason why this should not be stated in the Protocol.

98. The Chairman concluded from the Swedish delegation's comments that it was prepared to have the phrase "and cover ..." in paragraph 2 of its proposal replaced by the phrase "... could cover ...".

99. The French delegation stated that to date it had assumed that the exchange of search services was to serve as a means of controlling the quality of search work carried out. However, it had now become clear from what the Swedish delegation had said that the intention was actually to transfer search tasks from the EPO to the Swedish Patent Office. The French delegation could not countenance such a course of action.

100. The Netherlands delegation likewise favoured the Swedish proposal in principle, on the grounds that the desire to harmonise work was justified. In order to resolve the difficulties which had arisen in connection with the transfer of search tasks it proposed that the phrase "proper functioning" (of PCT activities within the framework of the European Patent System) at the beginning of the new paragraph 2 be deleted and that the opening sentence be recast as follows: "For the purpose of harmonising procedures in connection with PCT activities and ensuring the quality of such activities within the

framework...". The reference to the exchange of search services in paragraph 2 could then be considered within this framework.

While it had a measure of sympathy for the objections voiced by the French delegation, the Netherlands delegation nevertheless felt that it should be borne in mind that the Swedish delegation had clearly stated that its suggestions had been made solely in the interests of harmonisation.

101. The United Kingdom delegation considered that a re-casting of the opening sentence of paragraph 2 along the lines proposed by the Netherlands delegation combined with the amendment "could cover" would constitute a substantial improvement to the text. The only remaining difficulties concerned the phrase "exchange of search ... services". It could also agree on this point if it were made unequivocally clear that any measures of this nature were to be taken solely on condition that they appeared justified in the interests of harmonisation. Admittedly, it was difficult at the present moment in time to picture what such an exchange of search services would imply in practice.

102. The Swedish delegation endorsed the Netherlands proposal on the opening sentence of paragraph 2 and concurred with the comments made by the Netherlands and United Kingdom delegations.

103. The Committee of the Whole adopted the new paragraph 2 of this Section on the basis of a working document submitted later in the meeting by the Swedish delegation, which took account of the various points dealt with in the course of the discussion. The General Drafting Committee was directed to revise the final text in the three languages.

#### **Section IV**

104. The Austrian delegation pointed out that tasks transferred in accordance with paragraph 2 of this Section would also require an agreement between the European Patent Organisation and the central industrial property office concerned, and proposed that paragraph 2(c) should make reference to paragraph 1(c) in addition to the reference to paragraph 1(b), second sentence.

The Committee of the Whole adopted this proposal.

#### **Section V (of the Draft — M/5)**

105. The General Drafting Committee considered that this Section on EPO activities as an International Preliminary Examining Authority merely reiterated the content of Article 155 of the Convention and accordingly proposed that it be deleted.

The Committee of the Whole endorsed this proposal and decided that the Section in question was to be deleted.

#### **Sections V and VI (of the signed version)**

106. The Committee of the Whole had before it a proposal (M/153/G) by the Finnish and Norwegian delegations for the addition of a new paragraph 2 to Section VII (viz. Section VI of the text signed subsequently).

107. The Finnish delegation pointed out that it had earlier withdrawn its own proposal in Main Committee II in the hope that the solution which had been found for Austria as regards searching could also be extended to Finland. Now that this hope had proved to be vain and following Main Committee II's failure to take into consideration an amendment which it had proposed, it now wished, together with the Norwegian delegation, to submit to the Committee of the Whole this new proposal which was aimed at providing for co-operation under

certain conditions between the European Patent Office and the Finnish and Norwegian Patent Offices on search matters.

108. The Chairman of the Committee of the Whole pointed out that if the proposal were to be examined, the discussions on the relevant Section of the Protocol would have to be re-opened and that consequently this matter of procedure would have to be decided upon beforehand.

109. While sympathetic towards the request made by the Finnish and Norwegian delegations, the United Kingdom delegation was obliged on grounds of principle to oppose any re-opening of discussions. The proposal put forward by these two delegations would jeopardise the arrangements embodied in the Protocol on Centralisation, which had been arrived at after lengthy discussions, in that — in contrast to the Swedish proposal adopted by the Committee of the Whole — it would entail making radical changes to the European search system. The Finnish-Norwegian proposal expressly stipulated that searches carried out in certain Contracting States must not delay the European procedure nor give rise to any additional costs. Even accepting that no delays would in fact arise, such a solution would in any event render the entire procedure more complicated. One such example would be the matter of co-ordination of the search reports drawn up by the various offices. Furthermore, the matter of costs would have to be looked into: even if the European searching fee were not increased in such cases, it was nevertheless likely that the applicant would be obliged to pay additional fees as the offices involved would quite clearly not carry out additional searches free of charge.

The only possible solution would be to opt for a procedure along the lines of that adopted for Italy: viz. that an applicant could request an additional search among the documentation of the country concerned, but that in such cases he would bear the costs involved himself. The United Kingdom delegation could support the proposal if amendments were made to this effect.

110. Before any further discussion of the substantive aspects of the matter the Chairman called upon the Committee of the Whole to vote on the re-opening of discussions.

The proposal that discussions be re-opened was rejected by 9 votes to 6 with 5 abstentions.

111. The Norwegian delegation pointed out that under these circumstances, if the Protocol were retained as it now stood and Norway and Finland acceded to the European system, there would be no transitional period and patents would be granted for both these States without any search having been carried out among their documentation. This constituted a considerable draw back for countries which had a long tradition of patent examination and could — at least in the case of Norway — furnish grist to the mills of those opposed to participation in the European system.

112. The Finnish delegation returned to the suggestion made by the United Kingdom delegation and went on to ask whether it could submit an alternative proposal for Section VI (Section V of the text signed subsequently).

113. The Chairman of the Committee of the Whole asked whether there was any support for re-opening discussions on this Section.

The Committee of the Whole agreed that discussions be re-opened.

114. The Finnish delegation submitted the following joint proposal together with the Norwegian delegation for a new paragraph 3 of the Section relating to Italy:

"The Administrative Council may also extend the authorisations provided for in paragraphs 1 and 2 to the central industrial property office of a Contracting State which does not have as an official language one of the official languages of the European Patent Office."

115. The French delegation feared that the effect of the proposal which had not been discussed and of the new proposal would be substantially the same. Indeed the new proposal went even further in that the conditions set out in the original proposal governing the manner in which search work was to be carried out had been removed, with the result that the Administrative Council could in principle transfer such work to all Contracting States with such languages.

116. The Chairman of the Committee of the Whole explained the difference as he saw it between the original proposal submitted by the Finnish and Norwegian delegations and the second proposal. On the basis of the original proposal it would have been possible to subject all European patent applications to a compulsory additional search in Finnish or Norwegian. By way of contrast, the new proposal referred solely to Section V, paragraphs 1 and 2, and would mean that only Finnish or Norwegian applicants could request an additional search. The costs incurred in such additional searches would in any case be borne by the applicant.

The scope of this proposal was therefore considerably less than that of the original proposal, all the more so as there was the condition that the Administrative Council had to give prior authorisation for such additional searches to be carried out. The Chairman of the Committee of the Whole therefore considered that the misgivings expressed by the French delegation were unfounded. If a national office wished to be entrusted with search work but failed to meet the requisite conditions, the Administrative Council would exercise its powers by refusing authorisation.

117. The Italian delegation had no difficulty in agreeing to the new proposal.

118. The Swiss delegation likewise supported the Finnish-Norwegian proposal. In the interests of greater clarity it proposed that the new paragraph be amplified as follows: the Administrative Council may also extend the authorisations provided for in paragraphs 1 and 2, "under the conditions of those paragraphs", to the central industrial property office, etc.

119. The Chairman of the Committee of the Whole stated that this suggestion would be referred to the Drafting Committee if the proposal were adopted.

120. The IIB delegation voiced doubts as to whether it would be possible to carry out an additional search in a foreign language without giving rise to costs on the part of the EPO. Upon receipt of such search reports the EPO examiner responsible for the search would in each case be obliged to apprise himself of the content and check whether the priorities indicated were correct in the event of any reference which was prejudicial to novelty. Under such a system additional costs would be unavoidable, always assuming that such a system was at all workable.

121. The Chairman of the Committee of the Whole pointed out that such misgivings applied not only to the new paragraph 3 but also to paragraphs 1 and 2 as already adopted.

122. The French delegation was of the opinion that whatever the circumstances the quality of such additional searches ought to be guaranteed, as the good repute of European searches might otherwise be compromised. Paragraphs 1 and 2 of this Section provided a guarantee in that the additional searches concerned would be carried out by sub-offices of the European Patent Office. Such was not the case with paragraph 3. Without wishing in any way to support the two delegations which had made this proposal, it should be made clear that the central industrial property offices entrusted with such work would have to be suitably qualified and that the search activities in question were to be co-ordinated. If these conditions were referred to in the Minutes, the French delegation would be prepared to accept the proposal under discussion.

123. The Committee of the Whole concluded by adopting the proposal for the addition of a new paragraph 3 to this Section and referred it to the Drafting Committee.

### ***Application of the Protocol on Centralisation in conjunction with Article 162, paragraph 2, of the Convention***

124. The WIPO delegation raised the question of the processing of international applications for which the EPO would act as a receiving Office in cases where the EPO restricted the processing of applications in respect of certain areas of technology in accordance with Article 162, paragraph 2, of the Convention. In such cases the international application could of course be converted into a national application. However, there still remained the matter of the drawing up of the international search report, inasmuch as the Protocol on Centralisation stipulated that following the opening of the EPO, central industrial property offices — with the exception of those referred to in Section III of the Protocol — would not be allowed to carry out PCT searches. This problem could be resolved by interpreting Article 162, paragraph 2, as not applying to international applications for which the EPO acted as a receiving Office. If this solution proved unworkable, appropriate measures would have to be adopted by the Administrative Council. As it was at present intended that the Directorate-General for Searching would operate in all areas of technology from the very beginning, this question was probably of purely theoretical importance. However, if for any reason the Administrative Council were to restrict the processing of applications, it would have to be stipulated that the EPO could in any event carry out searches in all areas of technology in its capacity as an International Searching Authority.

125. The Chairman of the Committee of the Whole pointed out that in the course of discussions on Article 162 the intention had been recorded in the Minutes of having search reports for all areas of technology drawn up as from the opening of the EPO (see M/PR/1, points 970 *et seq.*).

126. The Committee of the Whole took note of WIPO's statements concerning the possibility of difficulties in this connection, but considered that as it was unlikely that such difficulties would in fact arise, there was no need to attempt to meet them at this stage.

### **F. Final Act (M/11/G)**

127. The Chairman of the Committee of the Whole raised the question of comments on the draft of the final document, which was to be signed by all delegations irrespective of which delegations would subsequently sign the Convention itself.

128. The Committee of the Whole adopted the draft and instructed the General Drafting Committee to re-examine the text with regard to the date of signing and the title of the Convention.

129. At a subsequent meeting the Turkish delegation asked to be informed of the importance which was to be attached to the signing of the Final Act. It called in particular for clarification as to whether the signing of the Final Act implied adoption of the Convention by the Turkish Government or whether this would simply be taken as an indication that the Turkish delegation had taken part in the Conference.

130. The representative of the Council Legal Department gave the following exposition of the situation: the signing of the Final Act did not mean that the Governments were in any way bound by the Convention or that they were in agreement with the text of the Convention, either in part or in its entirety. The

Final Act was a record of those delegations which had attended the Conference and of the fact that the text of the Convention had been adopted by the Conference by the majorities stipulated in the Rules of Procedure. Accordingly, it could never be inferred from the signing of the Final Act that any given delegation approved the content of the Convention, as the Final Act was to serve merely as an authentic record of proceedings.

131. The Chairman of the Committee of the Whole emphasised once again that the signatures on the Final Act were an indication that the delegations concerned had taken part in the Conference. While they showed that the Conference as such had adopted a Convention, this did not imply that all delegations had approved it. It was also for this reason that no special full powers were required. The Final Act could be signed entirely on the basis of the negotiating powers presented in the course of the meetings.

132. The Turkish delegation expressed its thanks for these explanations, and requested that they be written into the Minutes.

133. The Committee of the Whole adopted the texts submitted by the General Drafting Committee, subject to the amendments decided upon in the course of its examination thereof and authorised the Drafting Committee to finalise the Convention on the basis of these amendments without referring back to it, in order to ensure that the texts would be printed and available for signing in good time.

#### ***V. Report by the Credentials Committee (M/156/G)***

134. The rapporteur of the Credentials Committee, Mr. Antonio Fernandez-Mazarambroz, Head of the Spanish Patent Office, submitted a further report to the Committee of the Whole from the Credentials Committee dealing with the full powers to sign the Convention, after the Committee of the Whole had adopted the report of the Credentials Committee, dated 25 September 1973, on the admission of the delegations to the Conference (see M/133/G). The text of the report dealing with the full powers is given in *Annex IV*. The Committee of the Whole adopted this report and agreed with its recommendation that the full powers of the 16 delegations listed should be recognised as valid. At the proposal of its Chairman the Committee of the Whole instructed the Credentials Committee to submit at the end of the forthcoming meeting of the Plenary a supplementary report on the full powers which had not yet been presented by two countries (M/PR/K/2, point 100).

135. Referring to the observation in the report that Austria did not intend to present full powers authorising it to sign the Convention forthwith, the Austrian delegation pointed out that, in accordance with the current practice of the Austrian Government, Austrian Government delegations in negotiations on international treaties were not authorised immediately after the end of the Conference to sign the texts adopted there. This was purely a constitutional matter. The Austrian delegation could in no way prejudice any decision to be taken by the Austrian legislative authorities, but wished at all costs to avoid giving the impression that Austria in any way desired to disassociate itself from the Convention. This was not at all the case.

136. The Chairman of the Committee of the Whole observed that the Austrian delegation's statement had been noted by the Committee. He suggested that the Austrian delegation should repeat its statement in the Plenary, so that the press in particular would not gain any erroneous impressions about Austria not signing the Convention.

137. The Turkish delegation explained that, as stated in the report, it could not sign the Convention straight away either,

since its Government reserved the right to examine the whole Convention once more in detail. The Turkish Government would take a decision as regards signing within the period stipulated in Article 165, in accordance with the relevant national procedure.

#### ***VI. European School***

138. The Chairman welcomed Mr. Levarlet, Mr. Heumann, Dr. Reimers and Mr. Holzheimer, all from the Board of Governors of the European Schools.

139. The floor was first given to Mr. Levarlet, who gave a description of the existing European Schools.

Mr. Levarlet explained that at the time of the ECSC, the first European School in Luxembourg was ruled by an inter-governmental protocol and a Convention on the European Baccalaureat, both signed in 1957. When the EEC and Euratom were established, a new protocol was signed in 1962. This protocol extends the application of the inter-governmental protocol and the European Baccalaureat Convention.

At present, 6 European Schools are established: in Luxembourg, Brussels, Ispra, Mol, Karlsruhe and Petten.

The basic instruction in the European Schools is now given in five of the official languages of the Communities — Dutch, English, French, German and Italian. Accordingly, there are five linguistic sections.

In order to obtain a cultural exchange among the pupils, certain lessons are held in common. From the beginning, a certain number of lessons are given in a "working language", for instance, for the French/Belgian section the working language is German. Apart from the working language, there are compulsory lessons in English from the 3rd year on in the secondary school.

The primary school curriculum extends over a period of 5 years, the secondary over a period of 7 years. Pupils are admitted to the primary school at 6 years of age, and to the secondary school at 11. The children admitted are those of EEC employees, but the European School may, under certain circumstances, also admit other children.

The secondary school is divided into a 3-year common phase and a 4-year specialisation phase, the first year and first term of the second year of the 3-year common phase being considered as an observation period.

The 5 linguistic sections are maintained during the whole period.

At present, the 4-year specialisation phase has a Latin-Greek section, a Latin-modern languages section, a Latin mathematical-scientific section, a modern languages mathematical-scientific section and a scientific-economic and social section.

The European Baccalaureat examinations conclude the secondary period. For pupils who are not interested in obtaining the Baccalaureat, a shorter training period is provided for. The European Baccalaureat is recognised by the 6 original member countries and also several non-member countries, and is due to be recognised by the 3 new member countries as a university entrance qualification.

The administrative section of the European Schools is directed by "The Board of Governors", which is composed of educational ministers from the 9 member countries or their representatives. The Board of Governors is the highest authority — competent regarding educational, administrative and budgetary questions.

Between sessions, the Board of Governors is represented by a representative of the Board of Governors.

The educational supervision is ensured by two inspection councils composed of two members for each country — one council for the primary and one for the secondary schools.

At the head of every school there is an Administrative Board, composed of the representative of the Board of Governors, the headmaster, representatives elected by the teaching staff and representatives elected by the parents' association.

The Commission of the European Communities, and also organisations with which the European Schools have an agreement, can obtain a seat on the Administrative Board. The latter takes decisions on administration, prepares the budget and supervises its execution.

The headmaster of the European School is elected by the Board of Governors for a term of 7 to 11 years. He is assisted by an assistant master for the primary school and an assistant master for the secondary school.

140. The floor was then given to Mr. Heumann, who spoke on the financial and legal aspects of the planned European School in Munich.

Mr. Heumann quoted Article 1 of the 1962 protocol, which states that European Schools may be established on the territories of member countries for the common education and instruction of children of European Communities employees.

As the school was planned to be built in Munich, the territorial question would not create any problems.

The question of whether the children to be sent to the European School in Munich could be considered as children of European Communities employees had a legal as well as a political aspect. It was the opinion of Mr. Heumann that this question could be solved if the different states concerned so desired.

As to the financial aspect, Mr. Heumann said that the existing European Schools are mainly financed by the salaries of the teaching staff being paid by the national authorities and by a contribution from the Commission. The direct contributions from member countries amount to around 35%, while the contribution by the Commission is 65%. As to the planned European School in Munich, one could envisage the contribution by the Commission being replaced by a contribution by the EPO.

Regarding the education of children from non-member countries of the European Communities with a language different from those of the language sections of the present 6 European Schools, a solution could be envisaged similar to that adopted for the Danish and Irish children, who receive a certain number of Danish or Irish lessons.

141. The IIB drew attention to the difficulties which might arise when children of 13 - 14 years of age were transferred from a school where they had only been taught in their national language to a European School where they would have certain lessons, e. g. history, in a working language. The IIB asked if it would be possible to establish special transitional classes for these children.

142. Mr. Levarlet replied that these children could, for a period of 2 years, take such lessons in their national languages.

The Chairman then asked Mr. Heumann to enlighten the delegations on Article 4 of the protocol.

143. Mr. Heumann stated that Article 4 of the protocol was the basis for all the functions of the existing European Schools.

According to Article 4, the Board of Governors can conclude agreements concerning a European School, with the European Communities and any other organisations or inter-governmental institutions interested. Article 4 would undoubtedly cover the planned school in Munich.

An agreement concluded with an institution would give that institution the right to send children of its employees to the European School, the right to be represented on the Board of Governors, and the obligation to make a financial contribution.

144. The Swiss delegation wanted to know the position of countries which were not members of the European

Communities.

145. Mr. Heumann answered that, regarding the financial aspect, the non-member countries of the European Communities would contribute indirectly through the European Patent Organisation.

The decision to establish a European School would be taken by the Board of Governors. However, once the School had been established, the European Patent Organisation would be represented on the Board of Governors. The European Patent Organisation representative would represent member countries of the European Patent Organisation.

146. In answer to a question put by the Greek delegation, the Chairman said that the agreement provided for in Article 4 of the protocol would be concluded between the European Patent Organisation and the Board of Governors. All preparatory work could be done between now and the time the Convention comes into force.

147. The Liechtenstein delegation asked if the member countries of the European Patent Organisation were obliged to recognise the European Baccalaureat.

148. Mr. Levarlet answered that no such obligation existed legally, but that recognition would be natural and logical.

149. The United Kingdom delegation wanted some additional information on the situation as regards foreign language schools at The Hague.

150. The Netherlands delegation stated that at present there is an English, a German, a French, an American and an Indonesian school at The Hague.

As to examinations in the English school, there are facilities for middle division pupils to take any eleven-plus examination which local education authorities would wish to set. Senior division students are prepared for the General Certificate of Education of the Oxford and Cambridge advanced and special levels. The subjects offered at A level are a choice of either English, French, German, history, geography, biology and art, or pure mathematics, applied mathematics, physics, chemistry, biology and geography. The annual fee is approximately 1,500 guilders.

The French school provides a kindergarten, primary school and secondary school, and prepares students for the BEPC (Brevet d'études du premier cycle) as well as the Baccalaureat. The examinations are recognised by the French Government and give access to all French universities and equivalent higher educational institutions.

The German school caters for pupils from kindergarten level up to final examinations for universities. The examinations give access to all German universities and similar types of high schools.

151. The floor was then given to the German delegation which stated that the Federal Republic of Germany would put a site at the disposal of the European School. On the site, the Federal Republic of Germany would erect a building which would meet the requirements of the European Patent Office staff. Details could be negotiated in the Interim Committee. The initial equipment would also be supplied by the Federal Republic of Germany.

The use of the site, building and equipment would be free of charge. However, the Federal Republic of Germany assumed that the expenditure for maintenance would be undertaken by the European Patent Organisation.

Once the European School had been established, plans regarding the taking over of the site and building by the European Patent Organisation would be negotiated.

It was the opinion of the German delegation that such detailed discussions should be left to the Interim Committee. An eventual take-over by the European Patent Organisation would be free of charge.



## VII. European Patent Office building in Munich

152. The Chairman specially welcomed Mr. Roppelt, Oberbaudirektor at the Oberfinanzdirektion, Munich, Mr. Ulli Zech, Stadtbaurat of the City of Munich, and Mr. Marg and Mr. Sacks from the architect association von Gerkan, Marg and Partners.

153. The floor was first given to Mr. Roppelt who stated that the City Council had now granted final planning permission for the site of the European Patent Office next to the German Patent Office.

The city of Munich and the Free State of Bavaria would contribute to the establishment of a European Patent Office by putting the site at its disposal on which the European Patent Office building would be constructed by the Federal Republic of Germany.

The planning of the building was based on the first prize project from the 1970 competition. The prizewinners — the architects from von Gerkan, Marg and Partners — had in the meantime — in co-operation with the city of Munich, der Finanzbauverwaltung and the German Patent Office — developed the plans further.

154. Mr. Zech was grateful for the opportunity to enlighten the delegations on the town planning aspect of the project.

The site chosen for the European Patent Office building was excellent in the central part of Munich. Road access was ensured by the existing road network and transport by the existing and working S-Bahn (high-speed suburban railway). The distance from the nearest S-Bahn station to the European Patent Office would be 420 metres. Furthermore, a U-Bahn (underground railway) station was being built at Gärtnerplatz, at about the same distance.

As for the layout of the site, Mr. Zech said that it was of great importance that the European Patent Office had agreed to permit free access to the area of the European Patent Office, thus enabling the establishment of a shopping area and a kindergarten. The planned site would also contribute to establishing open spaces in Munich and along the Isar.

With reference to the procedure for taking possession of parts of the site which did not belong to the Free State of Bavaria, Mr. Zech said that most of the plots had already been evacuated by the tenants, for whom proper housing had been provided. Mr. Zech stressed the fact that the evacuation of the site had been conducted in such a manner as not to create any hardship.

Furthermore, Mr. Zech said that it would be to everyone's advantage to avoid unnecessary car traffic in the city. The number of parking places had therefore been limited to 300. This number should be sufficient, bearing in mind the excellent means of public transport.

Finally, Mr. Zech stated that the site proposed for the European School was situated in München Perlach, near the very centre of Perlach, having the advantage of expansion possibilities and excellent S-Bahn connections. Furthermore, a U-Bahn was being built.

155. After Mr. Zech's exposition, the floor was given to the architects from von Gerkan, Marg and Partners, Mr. Marg and Mr. Sacks. They stated that the task for the architects had not only been to provide the office space required for making a room function, but also to create a milieu in which it would be possible to work and to relax.

When arriving at the European Patent Office, the visitor or employee will enter a hall which will be provided with an information stand. This hall will be connected to a restaurant and a library.

Escalators will lead to the upper floors from the hall. Although lifts are also planned, escalators will be the main

internal means of transport from one floor to another the advantage being that no time will be lost in waiting.

Those participating in a conference or in patent negotiations will leave the escalator on the first floor. This floor is the conference floor and contains 29 rooms. The largest will be able to seat over 220 and will have facilities for simultaneous translation into six languages. The smaller rooms will have facilities for translation into 3 languages, whereas a larger room intended for the meetings of the Administrative Council can provide translation into four languages.

Before the detailed planning of the conference floor had been decided, other European conference arrangements had been inspected. The International Interpreters' Association had been consulted and had in particular contributed to the actual planning of the interpreters' equipment.

The offices on the next floors will, in accordance with the latest developments, be equipped with air conditioning, movable wall partitions and under-floor installations enabling the setting up of a computer system. The flexibility of the wall system will allow the examiners to keep their reference material in their own offices or to centralise the material of several examiners in a larger office.

The office for the registration of patents will be situated between the upper and lower floors. This floor will, to a large extent, have no wall partitions.

In the basement there will be a store for patents and books. The store will be connected to the store of the German Patent Office by an underground passage. The rest of this basement floor will be used by the cleaning personnel, storage and for printing and photographic equipment.

The cellar floor below will contain further technical arrangements and parking lots.

As to the surroundings of the European Patent Office building, they will have the character of an open park, and the roofs of the lower floors will be planted corresponding to the different colours of the year.

156. Finally, Mr. Roppelt took the floor and made a contribution on the present state of the plan of the building.

Mr. Roppelt referred to the two conditions for commencing the building of the European Patent Office:

1. Having already pulled down a number of houses, the rest of the site should be cleared, and the part of the site owned by the city of Munich or by the Free State of Bavaria should be transferred to the Federal Republic of Germany;
2. The piling should be commissioned.

Further progress would then be left to the planning parties concerned.

157. The Chairman then invited delegations who had any questions to take the floor.

158. With reference to the planned air-conditioning system for the EPO building, the Netherlands delegation stated that experience in high buildings in the Netherlands had not always been positive. Therefore, when the new IIB building had been constructed in The Hague, it had been insisted that it should be without an air-conditioning system. This had at first seemed difficult, but the results had been most satisfactory.

159. Mr. Sacks replied that account had to be taken not only of the fact that The Hague was subject to different climatic conditions than Munich, but also that the IIB building was situated on the outskirts of the town and was thus subject to other acoustic conditions.

Mr. Sacks added that the experience gained in Munich from air conditioning systems similar to the one planned for the European Patent Office was good. The induction system would enable everyone to adjust the temperature in his office according to his wishes.

160. The French delegation wished to know how many people the building was planned to hold and whether the higher-grade employee would have his own office.

161. Mr. Marg replied that it had been calculated that 1,500 persons would be able to work in the building, and that there would be a 40% extension possibility.

As to the higher-grade employee, the flexibility of the building should enable each to have his own office.

162. The United Kingdom delegation wished to know whether any recreational facilities had been provided for in the building, and also requested some exact information as to why the underground passage from the German Patent Office was thought to be necessary.

163. The first question was answered by Mr. Marg, who referred to the coffee room, canteen and restaurant facilities. Recreational facilities, in the sense of rooms for sport, had not been planned.

164. The question relating to the underground passage to the present German Patent Office was answered by the Chairman.

The purpose of the underground passage was to procure, in the shortest time possible, books and periodicals from the library of the German Patent Office, taking into account the fact that, initially, the European Patent Office would not have a sufficiently extensive library.

165. The United Kingdom delegation stated that the question of flexibility was most important. As it would be some time before the European Patent Office was up to anything like full strength, this delegation suggested that suites of rooms could be let out to patent agents from the contracting countries. They would have some difficulty finding accommodation in Munich, and this seemed a useful transitional measure.

166. The Swiss delegation wished to know whether there were any plans for the part of the European Patent Office building which would not be used during the period of expansion, and whether any shelters had been planned.

167. The first question was answered by the Chairman who said that the elaboration of exact plans would be left to the Interim Committee; he also pointed out that this Committee could consider the suggestion of the United Kingdom delegation.

168. The second question was answered by Mr. Marg who said that actual shelters had not been planned but that the two basements would give a certain amount of safety.

169. The IIB delegation wished to know:

- (a) the exact measurements of the building in square metres and cubic metres;
- (b) the number of square metres of actual working space;
- (c) the number of square metres set aside for parking;
- (d) how many offices of the minimum size could be set up.

170. The architects replied that the planned number of square metres and cubic metres was 80,000 and 330,000 respectively. There would be 50,000 square metres of actual working space and 9,000 square metres were set aside for parking.

The exact number of offices of the minimum size could not be given. The number of square metres available for offices was, however, 33,000 and the average size of the smallest rooms would be 12 square metres.

171. The floor was then given to the German delegation, which stated that the site at the Isar and Erhardtstraße would be leased free of charge (by Erbbaurecht) to the German Government by the Free State of Bavaria and the city of Munich. The German Government would then build the European Patent Office building on the site. The building was planned to be ready by 1976. The fittings would also be undertaken by the German Government.

The capital sum for the European Patent Office building would be charged interest at a rate of 3½%. The amortisation

period would be 25 - 30 years. Further financial details should be settled in an agreement between the German Government and the European Patent Organisation, for which preparations should be made by the Interim Committee. The German delegation considered that the building and its fittings would then pass to the European Patent Organisation as its property, the latter becoming the lease holder of the site.

172. The United Kingdom delegation wished to know the capital sum involved as this could be a very variable factor.

173. The German delegation replied that the starting point was the price level in May 1972. The capital sum would be 201,635,000 DM.

### ***VIII. Organisation and Work Programme of the Interim Committee***

174. The Committee began its discussions on the organisation and work programme of the Interim Committee on the basis of the three following documents: M/119/I + Corr. 1 submitted by the German delegation, M/157/G submitted by the International Patent Institute and M/159/G submitted by the United Kingdom and Netherlands delegations.

#### ***Resolution on the Secretariat***

175. The Committee first of all dealt with the problem of the Secretariat of the Interim Committee on the basis of the Draft Resolution contained in Annex I to M/119/I Corr. 1.

176. The delegation of the Federal Republic of Germany proposed that the Diplomatic Conference express its gratitude to the Council of the European Communities and the Secretary-General of EFTA for having placed the General Secretariat of the Council of Ministers of the European Communities, including its Legal Department, and the EFTA Secretariat, respectively at the disposal of the Munich Diplomatic Conference, as had also been done previously for the Luxembourg Inter-Governmental Conference. The delegation of the Federal Republic of Germany considered it was necessary to have a competent Secretariat to ensure that the work for the opening of the European Patent Office could be completed by 1976 and therefore proposed that the Conference should convey the wish to the President of the Council of Ministers of the European Communities and to the Secretary-General of EFTA that the two Secretariats should remain at the disposal of the States which signed the Convention for the work of the Interim Committee, until the opening of the European Patent Office envisaged for 1976. This expression of gratitude and the above wish were contained in a draft Resolution on the Secretariat (M/119/I Corr. 1) which the delegation of the Federal Republic of Germany proposed should be adopted.

177. The Austrian delegation supported the proposal of the delegation of the Federal Republic of Germany.

178. Since no delegation opposed the Resolution proposed by the Federal Republic of Germany, it was approved by the Committee of the Whole which decided to forward it for adoption to the Plenary together with a proposal that the President of the Diplomatic Conference should communicate it to the President of the Council of the European Communities and to the Secretary-General of EFTA.

#### ***Organisation of the tasks of the Interim Committee***

179. The Committee then proceeded to discuss the problem of the organisation of the Interim Committee's tasks.

180. The delegation of the Federal Republic of Germany

pointed out that it had attempted to summarise, in a list contained in Annexes 2 and 2a to M/119/I, the most important tasks to be carried out between the conclusion of the Diplomatic Conference and the opening of the European Patent Office. In its opinion there were two alternative ways of carrying out this work in the time available. The first alternative would be to set up a committee consisting of approximately 20 officials from the signatory States. These officials would be seconded to Munich and would draw up the proposals for the Interim Committee on the spot. The second alternative would be to continue to use the system of working parties. In view of the amount of work to be done, it would however be necessary to set up several working parties, which would in turn mean setting up a planning and co-ordinating committee, consisting of five or six seconded officials responsible for co-ordinating the work of the various working parties. It was evident that, whilst the system of working parties would be more time-consuming, a committee responsible for drawing up proposals would require more officials to be seconded than in the case of a planning and co-ordinating committee. Whichever solution were chosen by the Interim Committee, the Federal Republic of Germany was prepared to make staff and equipment available as laid down in the draft Decision on Preparations for the Opening of the European Patent Office (M/146/R 15, point 7), i. e. in the form of advances which would be reimbursed to the Federal Republic of Germany under the first budget of the European Patent Office. A final decision on this point need not necessarily be taken during the Diplomatic Conference but could be taken at the inaugural meeting of the Interim Committee in January 1974; the aim of the delegation of the Federal Republic of Germany in submitting these two alternatives was to enable this point to be discussed.

181. The United Kingdom delegation first of all examined the choice between the system of working parties assisted by a small unit and the setting up of a large unit responsible for preparing the major part of the work of the Interim Committee which would only leave the latter with the responsibility of approving or rejecting its conclusions. In this delegation's opinion, as expounded in M/159/G, it would not be desirable to set up a large central unit consisting of experienced officials from national offices. If this were done, the signatory States would in the first place be confronted with the problem of choosing the people to be sent since they would have to be very experienced. In addition, if a fairly large unit were set up it would assume a representational character, which would lead to all the States asking to be represented on the unit. Under this system the unit would probably not be able to act with the necessary consistency in carrying out the task entrusted to it. On the other hand if a small unit were set up, this would avoid the danger of its becoming a formal committee taking majority decisions. The United Kingdom delegation was therefore in favour of the idea of setting up a small unit, consisting of experts from the national offices who were familiar with the practical problems of running these offices, to assist the Secretariat. The major part of the work would however have to be carried out in working parties, and the preparation could be entrusted to the various delegations of which such working parties were composed. However, the real problem as regards a small central unit would appear to be continuity of work. It would be possible to send appropriately qualified people only if the staff seconded to Munich during the work of the Interim Committee could be certain of continued employment in the European Patent Office. Since an assurance on this should be given to such officials, it would be very desirable to know the intentions of the Contracting States as regards ratification of the Convention. The United Kingdom delegation therefore wished to know from the other delegations if they could ratify

the Convention so that the European Patent Office could open in 1976 or 1977.

182. Without wishing to take up any final position on the choice between the two alternatives, the French delegation felt that a small permanent unit of five or six persons would be preferable, at least initially. It would, however, be possible to start with a very small unit and then, if necessary, set up a larger permanent unit in the second part of the preparatory period. As to the question raised by the United Kingdom delegation, the French delegation considered that it would be able to start the procedures for ratifying the European Patent Convention, the Community Patent Convention and the Patent Cooperation Treaty so that the European Patent Office could start operating in 1976.

183. The delegation of the Federal Republic of Germany noted that the two solutions under discussion did not completely exclude one another since they could be combined as proposed by the French delegation. At the present stage of its study of the matter, and whilst reserving its final position, the German delegation would prefer the system of working parties assisted by a small unit of five or six officials; it could subsequently be examined whether the unit should be expanded. As regards ratification, in order to enable this to take place before the parliamentary elections which were due to be held in 1976, the Government of the Federal Republic of Germany would commence the procedure for ratifying the present Convention and the Community Patent Convention immediately after the latter, the text of which would be adopted at the close of the Luxembourg Conference in May 1974, had been signed. Without wishing to prejudge the final decision to be taken by the German parliament, it was probable that both the Munich and the Luxembourg Conventions would be ratified by the Federal Republic of Germany before 1976.

184. The Netherlands delegation pointed out that it supported the position of the United Kingdom delegation but stated that it could also accept the solution suggested by the French delegation for a progressive expansion of the unit responsible for co-ordination and planning of work. As regards the question of ratification of the Convention, preparatory work for amending Dutch law in order to bring it into conformity with the European Patent Convention had already been commenced. It was intended to submit the European Patent Convention and the Community Patent Convention together with the draft bill amending Dutch law to Parliament at the end of 1974. The Netherlands delegation hoped that the two Conventions would be ratified about the middle of 1976.

185. The Luxembourg delegation was in favour of setting up a small central unit with a major portion of the work necessarily being carried out by working parties. As regards ratification, it considered that, notwithstanding the time which would be necessary for amending national law, also bearing in mind the PCT, there should not be any insurmountable difficulties preventing Luxembourg from ratifying in good time so as to enable the timetable proposed for the opening of the Office to be followed.

186. The Danish delegation stated that it preferred a small central unit of five or six persons at least during an initial stage. As regards the question of ratification, notwithstanding the amendments which would have to be made to national law, there was no reason to doubt that Denmark would be able to ratify during 1975 or 1976.

187. The Swedish delegation stated that it also preferred a small unit. As regards the question of ratification, preparatory work had already been commenced and it was planned to ratify in Autumn 1975 or at the beginning of 1976.

188. The Belgian delegation stated that it could support the point of view put forward by the United Kingdom and

Netherlands delegations with regard to a small central unit. As regards the problem of ratification, Belgium should be able, barring any unforeseen circumstances, to deposit its instruments of ratification in 1976.

189. The Irish delegation preferred a small unit which it would be possible to enlarge at a later date. As to the problem of ratification, the Irish delegation considered that, although there were certain problems due to legislative amendments which would have to be made to conform not only to the European Patent Convention but also to the Community Patent Convention and the PCT, it would be possible in principle to ratify in good time to enable the proposed time limits to be followed.

190. The Italian delegation supported the setting up of a small unit which could be expanded at a later date, if need be. As regards the question of ratification, the Italian delegation could merely estimate that its parliament would be able to ratify the European Patent Convention and the other related Conventions within a period of two years of the submission of the relevant parliamentary bills, which would be submitted by the appropriate departments before the end of 1974.

191. The Swiss delegation stated its preference for a small unit which could be subsequently enlarged. As to the problem of ratifying the Convention, Switzerland would make every effort to do this as soon as possible. The Swiss delegation was however faced with the problem of availability of staff, since the same officials who would be responsible for amending national law would also take part in the work of the Interim Committee. Switzerland nevertheless hoped to be able to ratify in 1976.

192. The United Kingdom delegation drew the attention of the Committee of the Whole to the fact that in its statement at the opening of the Conference it had referred to certain problems concerning ratification. These were problems of a political nature, since elections were due to be held sometime between the end of 1974 and early 1975. If the plans for amending national law could be followed (adoption at the end of 1975) it was probable that ratification would take place at the beginning of 1976. In any event the delegation hoped that the United Kingdom would be able to ratify not later than the other Member States.

193. The Chairman noted that all the delegations who had spoken were in favour of a small central unit, which it would be possible to expand if required, and the setting up of working parties. As regards the problem of ratification, all the delegations, naturally subject to the decision to be taken by their respective parliaments, had indicated that they would do their best to ensure that ratification took place in 1976 at the latest, so that the proposed timetable could be adhered to.

### ***Place of meetings***

194. On a proposal by the United Kingdom delegation, the Committee then discussed the problem of where meetings should be held. The Chairman requested the delegations to express their views on this point and to draw a distinction between the place of work of the small central unit and the place where the working parties would meet. He pointed out that a final decision on this matter largely depended on the response to the request to be sent by the Conference to the President of the Council of the European Communities and to the Secretary-General of EFTA asking them to make their Secretariat services available.

195. The delegation of the Federal Republic of Germany stated that it had started from the assumption that the work for setting up the European Patent Office should be carried out mainly at the place of the future Office. It was however fully

aware that a part of the work would have to be carried out in Brussels or elsewhere. It therefore felt that a flexible solution should be adopted. The small unit should in principle operate in Munich, whilst the working parties could operate in Brussels or in Luxembourg, so as to make efficient use of the Secretariat.

196. The United Kingdom delegation shared the view of the delegation of the Federal Republic of Germany as to a flexible solution based on a central unit operating in Munich and working parties meeting in Brussels or in Luxembourg. It pointed out however that meetings of working parties or sub-committees in other places could be envisaged where this was justified by the subject of the discussions. In this order of ideas, meetings could very well be arranged at The Hague, particularly for the preparation of the procedural stage which would take place at the branch at The Hague.

197. The delegation of the International Patent Institute considered it advisable not to take any decision at this stage on the place of meetings and the composition of the small central unit. Such a decision could only properly be taken at a subsequent date by the Interim Committee once the full complexity of the problems to be dealt with had become apparent.

198. It seemed preferable to the Luxembourg delegation not to take any decision at present on the place of work since such a decision would depend to a large extent on the Council of the European Communities' response to the request to make its Secretariat services available.

### ***Financial questions connected with the operation of the co-ordination unit***

199. The Norwegian delegation wanted to have some points cleared up as regards the financial arrangements for the operation of the central unit. It wondered whether the salaries of the officials seconded to Munich would be paid and borne by the national governments from which the officials in question came or whether, after these salaries had been paid, they would be charged to the budget of the European Patent Office and reimbursed to the governments, as in the case of other expenditure incurred in preparatory work with the exception of the expenditure provided for in point 6 of the Decision on Preparations for the Opening of the European Patent Office (M/146/R 15). In the Norwegian delegations' view, this second interpretation would be more in line with the spirit of the Decision.

200. The delegation of the Federal Republic of Germany stated that in considering this point it had started from the assumption that all the expenditure incurred by the Secretariat of the central unit, i. e. for typists, translators, if necessary, and office equipment would be advanced by the Federal Republic of Germany and subsequently charged to the first budget of the European Patent Office. As to expenditure for the salaries of the officials comprising the small unit, this should be borne directly by the signatory States from which the officials came. The same applied to travel and mission expenses of officials seconded to Munich.

201. The United Kingdom delegation, whilst not adopting any final position on this point, stated that the solution envisaged by the delegation of the Federal Republic of Germany, i. e. for the travel and mission expenses of seconded officials to be borne by the governments, was causing it some difficulty. Although it appeared a fair solution for the salaries of the members of the co-ordination unit to be paid by the national administrations from which they came, since the work which they carried out would otherwise have had to be carried out by staff of national offices attending working parties, the same could not be said of travel and mission expenses, since

these expenses did not arise in the case of officials seconded by the State where the co-ordination unit was based. It would be fairer to centralise all of this expenditure and charge it to the first budget of the European Patent Office.

202. The Netherlands delegation, whilst also reserving its final position until its competent authorities had been consulted, expressed certain doubts as to the desirability of embarking upon a course which would appreciably increase the expenditure charged to the first budget of the European Patent Office. In its first years of operation, the expenditure of the Office would in the main be borne by exceptional financial contributions by the signatory States. The Netherlands delegation therefore wished this point to be dealt with in greater detail at a later date.

203. The delegation of the Federal Republic of Germany considered that three distinct problems were involved. The first concerned expenditure arising from the operation of the co-ordination unit, in particular Secretariat expenses. The amount of these expenses would be advanced by the Federal Republic of Germany and subsequently charged to the first budget of the European Patent Office. The second problem concerned expenditure for the salaries of officials seconded to Munich. In the view of the delegation of the Federal Republic of Germany the only solution which could be contemplated was for this expenditure to be borne directly by the States from which the officials came. There were legal grounds, and in particular the absence of any regulations which would be applicable to these officials other than those of the national public service from which they came, which precluded any other solution, such as the expenditure being borne by the Government of the Federal Republic of Germany and subsequently charged to the budget of the European Patent Office. The third problem concerned travel and mission expenses. These expenses for officials should be borne by the respective States which seconded them. The delegation of the Federal Republic of Germany concurred with the opinion of the Netherlands delegation to the effect that the first budget of the European Patent Office should not be over-burdened. Although it was true that this solution would entail more substantial costs for the other States than for the Federal Republic of Germany, it was also true that the Federal Republic had undertaken to finance in advance the expenditure incurred in the work in Munich and, secondly, there seemed to be a general consensus that meetings of working parties would also take place elsewhere; this should have some effect of balancing out the overall cost to individual countries of travel and mission expenses involved in the work of the Interim Committee taken as a whole.

204. The United Kingdom delegation accepted the soundness of the argument put forward by the delegation of the Federal Republic of Germany as to the evening out effect of holding meetings in the various places proposed, but reserved its position on the whole of the problem of financing the central unit based in Munich.

205. The Chairman wondered whether the solution to be adopted could not be to make a distinction between the travel expenses for the first journey to Munich and the other journeys made in carrying out the tasks for which the small co-ordination unit was responsible. In this way the expenses for the first journey could be assumed by the State from which the official came and other expenditure would be charged to the budget of the European Patent Office.

### *Allocation of tasks to the working parties*

206. The Committee then examined Annexes 2 and 2a in M/119/I which contained a list of the interim tasks to be carried

out and a proposal as to their allocation to various working parties.

207. The delegation of the Federal Republic of Germany stated that in its view all the tasks to be carried out could suitably be allocated to six working parties. A first Working Party on organisation would be responsible for preparing the overall plan for the organisation of the European Patent Office and, on this basis, detailed plans for the organisation of its various departments. A second Working Party on searching would study problems entailed in drawing up European search reports, draw up guidelines for searching and in particular study the problems relating to the procurement of reference material. A third Working Party on the examination, opposition and appeals procedure would be responsible for drawing up details of those stages of the grant procedure. If it were considered desirable, this Working Party could be divided into three sub-committees each responsible for one of the three stages of the procedure. This would, however, be exclusively a matter to be decided by the Working Party itself and should in no event detract from the overall consistency of the results. A fourth Working Party on staff and finance would be responsible for preparing the final draft of the Service Regulations and the implementing regulations thereto and the final draft of the Pension Scheme Regulations. This Working Party would also establish training programmes. Finally it would prepare the final draft of the Rules relating to Fees and the draft of the Financial Regulations. A fifth Working Party on legal matters would be responsible for preparing all the drafts of the international agreements which the European Patent Organisation would have to conclude with various States and inter-governmental organisations. This work would in the first place involve the preparation of the agreement for integrating the International Patent Institute into the European Patent Organisation; this Working Party would also be responsible for preparing the headquarters agreements and the agreements to be concluded with various States allocating to certain national patent offices the tasks laid down in the Protocol on Centralisation. A sixth Working Party would deal with problems relating to the construction of the European Patent Office buildings and of the European School as well as problems which would arise in the provision of housing for future employees of the Office. The list of tasks in the document under discussion should not be considered to be exhaustive and was only an attempt to give a general picture of the questions which the Interim Committee would have to examine.

208. Without prejudice to any comments it might make in the Interim Committee when the time came to take decisions on this matter, the Netherlands delegation confined itself for the present to submitting the three following comments. Firstly, it expressed doubts as to the usefulness of a Working Party on searching. In its view studies in this field should be carried out by the IIB in conjunction with the German Patent Office and the sub-office in Berlin (West). Secondly, in view of the similarities in several points of the three stages of the procedure, it did not consider it desirable to sub-divide the third Working Party into various sub-committees. Thirdly, the Working Parties would have to be composed of highly qualified and experienced experts. Since the number of such experts was necessarily limited and the persons in question would also have to carry out important work in the national patent offices, the number of working parties and the sub-committees into which they were divided should be limited as far as possible so as to ensure continuity and consistency in the work as a whole.

209. The Swedish delegation, referring to the tasks allocated to the Working Party on legal matters, wondered whether this Working Party would be the most suitable one for drawing up the special agreement provided for in Section III, paragraph 2,

of the Protocol on Centralisation, since the content of that agreement necessarily touched on highly technical problems in the field of searching. The Working Party on searching therefore appeared to be better suited to carrying out this task.

210. The United Kingdom delegation, whilst reserving the right to submit proposals for supplementing the list at a later date, wished to put forward some preliminary comments. It pointed out that, for example, the first Working Party on organisation could also be made responsible for examining the problems of the forwarding of documents by the national offices to the European Patent Office when the application was filed, also bearing in mind the tasks falling to the branch at The Hague in this respect. Similarly, in the case of the Working Party on staff and finance, point 4.13 of Annex 2 to M/119/I should be supplemented by a reference to the need to take account of the fact that a part of the searching and examination work would initially be entrusted to certain national offices. The preparation of many of the draft agreements which, in the document submitted by the delegation of the Federal Republic of Germany was entrusted to the Working Party on legal matters, could usefully be entrusted to the governments and inter-governmental organisations concerned who could subsequently submit drafts to the Working Party.

211. The Austrian delegation supported the comment made by the Netherlands delegation to the effect that work should be concentrated as much as possible without setting up too large a number of working parties. As the work proceeded, it was bound to produce a series of basic points requiring attention in greater detail, in which case enlargement or sub-division of working parties might prove necessary. As to the tasks allocated to the Working Party on searching, the Austrian delegation considered that these should be entrusted to the bodies which would have to work in close conjunction under the European procedure, i. e. the IIB, the German Patent Office and the sub-office in Berlin (West). Austria's willingness to co-operate in this field should also be taken into account by associating the Austrian Patent Office in the work, particularly in view of the possibility referred to in Section IV, paragraph 2, of the Protocol on Centralisation. Participation in the work would make it easier for the Austrian Patent Office to comply with the requirement laid down in this provision that central industrial property offices to which searching could be entrusted must adhere to the guidelines applicable to the drawing up of the European search report.

212. With reference to the last comment by the Austrian delegation, the Chairman wondered whether these wishes could not be realised if the Working Party on searching were composed of the following delegations: Federal Republic of Germany, Italy, the Netherlands, Austria and Sweden, thereby including all the national patent offices which would be directly concerned in searching in the future. The delegation of the IIB would of course take part in this Working Party as an observer.

213. The delegation of the International Patent Institute stated that the Institute was prepared to make all the means at its disposal available to the working parties, so the Interim Committee could count on very active co-operation from the IIB. This delegation suggested that the wording of point 5.1 in Annex 2 to M/119/I should be corrected as follows: "Preparation of the draft of the agreement between the International Patent Institute and the European Patent Organisation", to align it with the wording contained in Section I, paragraph 1, of the Protocol on Centralisation.

214. The UNEPA delegation noted that document M/119/I did not include among the tasks of the Interim Committee the drawing up of the list of professional representatives provided for in Article 134, paragraph 1, of the Convention, although the conditions for entry on the list during the transitional period

were laid down in Article 162 (Article 163). This list should be drawn up as soon as possible and should be as complete as possible when the Convention entered into force, to make sure that all representatives had an equal opportunity of obtaining European work and also to enable persons entered on the list to inform their clients in good time of the fact that they were authorised to represent them before the European Patent Office. There would probably not be any problem in drawing up the list for those States in which there was a professional qualifying examination system. On the other hand problems requiring a large amount of time to resolve in the national context could arise in other countries. For example, one might wonder how many national patent applications a representative would have to file in the course of a year before he could be said to have acted habitually, or even whether a numerical criterion was the most appropriate for this purpose. If these problems were to be examined and settled as soon as possible, the Interim Committee's tasks ought to include drawing up the list of professional representatives. In the view of the UNEPA delegation the Interim Committee should also study the problem of introducing the European qualifying examination so that the decisions in this field, which would have to be preceded by consultations with the non-governmental organisations concerned, could be taken within a reasonable period of time, to ensure that the transitional period laid down in Article 162 (Article 163) was as short as possible.

215. The delegation of the Federal Republic of Germany pointed out that the second comment by the UNEPA delegation was already covered in M/119/I in that, under point 5.8, the Working Party on legal matters would be responsible for preparing the drafts on the use by the President of the European Patent Office and the Administrative Council of the powers conferred upon them by the Convention. This text referred to Annex 2a which contained a list of these powers and mentioned the European qualifying examination under point 7.

216. The Chairman noted that the second comment by the UNEPA delegation had been satisfactorily dealt with, but pointed out that it would be desirable to take the first comment into account as well. To draw up the list of professional representatives would require a certain amount of preparation, and without such a list the Office would be confronted with practically insurmountable operational difficulties.

### ***Attendance of observers***

217. The UNICE delegation, certain that it was also speaking on behalf of the other Observer delegations, expressed the wish that observers should not only be kept informed of developments in the Interim Committee but should also be able to take part in the working parties with a right to speak, at least where the latter discussed problems of direct concern to the interested circles.

218. The Chairman noted that this wish had already been taken into account under point 5 of the Decision on Preparations for the Opening of the European Patent Office (M/146/R 15).

219. The United Kingdom delegation, referring to the comment under point 7 of M/159/G, wondered whether there was any objection to observer status being accorded to INCOPOSA.

220. The Chairman noted that there were no objections and stated that this question would have to be raised again in the Plenary since the Steering Committee which had been instructed by the Conference to examine the request for the admission of INCOPOSA had to report on this matter. The Steering Committee would propose that the Plenary adopt a

decision, to be recorded officially, whereby the Conference recommended the Interim Committee to admit INCOPOSA as an observer to its meetings and to the meetings of the working parties where INCOPOSA was concerned with the problems under discussion.

221. With reference to M/157/G submitted by the IIB, the Chairman noted that this organisation basically wished to participate in the working parties, submit proposals and carry out specific functions. These questions would have to be examined and decided by the Interim Committee since they basically fell within the ambit of its Rules of Procedure.

222. The Committee recorded its agreement to this conclusion.

### ***IX. Proposal by the Yugoslav delegation for a Resolution a technical assistance***

223. Taking into account

- that in the future technological development cannot be restricted to national or regional frameworks;
- that industrialised countries with their economic structure are best able to promote technological progress;
- that not all countries in the world are able to promote technological progress to the same extent;
- that the efforts of developing countries to reduce the technological gap in relation to the developed countries should be promoted;

- that it is necessary to ensure that all countries are able to benefit from the results of technological progress;

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to make use of all the possibilities available to it to help the developing countries, irrespective of their geographical location, in particular as concerns documentation, the training of staff and all other means likely to bring these countries increasingly closer to the highly developed countries.

224. In support of its proposal for a Resolution, the Yugoslav delegation argued that the future European Patent Organisation would be of great importance not only for the Contracting States but also for all other states as well, including the developing countries. The role played by the Organisation in co-operating with all countries as regards technological progress would depend mainly on the extent to which the technologically less developed countries were able to benefit from the technological knowledge of the technologically highly developed countries.

The Yugoslav delegation therefore considered that, in the same way as numerous other international organisations, the European Patent Organisation in co-operating with the developing countries should endeavour to reduce the technological gap between the developed and the developing countries. It would therefore be appropriate for the Conference to adopt a Resolution requesting the European Patent Organisation to help the technologically less developed countries in their efforts.

225. The German delegation supported the Yugoslav delegation's proposal. Although by its very nature the European Patent Organisation would be confined to European States, this did not mean that it should operate in isolation from other countries. In fact it would be one of the essential duties of the new European Patent Organisation to co-operate closely with all other countries concerned and all other international organisations, so that it would play its part in promoting the spread of technological knowledge throughout the world. The Yugoslav delegation's proposal constituted a suitable basis for

this purpose, and the German delegation would therefore be very glad if the Committee of the Whole and the Plenary of the Conference were to adopt this proposal.

226. The Netherlands delegation also supported the Yugoslav proposal. However, in order to avoid any duplication of the activities of the various organisations concerned, it proposed that the beginning of the request to the European Patent Organisation be worded as follows: "to make use, taking due account of the efforts already made by other international organisations, of all the possibilities available to it...".

227. The United Kingdom delegation shared the view of the Netherlands delegation, but pointed out that this Resolution should not be considered as terminating international co-operation as at present undertaken by national patent offices in the form of aid in training and the communication of documents. It should also be borne in mind that the expression "all the possibilities available to it" also meant that this type of assistance could only be granted within the limits of the resources available to the European Patent Organisation under its budget.

228. The French delegation also supported the Yugoslav proposal since the major importance of the future Organisation would make it essential for it to carry out this kind of task. It was fairly obvious that the European Patent Office would have to co-ordinate with other international organisations, and the French delegation could therefore support the Netherlands proposed amendment and the draft in its original form.

229. The Italian, Greek and Austrian delegations also supported the Yugoslav proposal and the amendment put forward by the Netherlands delegation.

230. The Committee of the Whole unanimously adopted the draft Resolution as amended by the proposal from the Netherlands delegation.

### ***X. Recommendation regarding the status and remuneration of the employees referred to in Article 159, paragraph 2, of the Convention (M/7)***

231. The Chairman of the Committee of the Whole stated that Main Committee III had adopted the draft Resolution but had decided not to submit it to the Conference. It had expressed the wish that the Interim Committee and the Administrative Council should comply with this Recommendation at the appropriate time (M/PR/III, point 99).

232. The Committee of the Whole agreed to this procedure.

233. In conclusion the Chairman of the Committee of the Whole claimed that it could be stated without exaggeration that the Convention now being adopted and its subsequent entry into force represented a monumental achievement in the field of European patent law.

The Chairman expressed his warm thanks to all the delegations on the Committee of the Whole, the General Drafting Committee together with its Chairman, Mr. van Ben-them and the Secretariat for their efforts which had enabled the extensive amount of work involved to be completed at the proper time.

234. Finally, on behalf of the delegations, the United Kingdom delegation expressed its warmest thanks to the Chairman of the Committee of the Whole for the manner in which he had chaired what were often very difficult discussions. The fact that the work had been brought to a successful conclusion was in the first place due to the circumspection and tact with which Dr. Haertel had guided the creation of the Convention step by step to its completion.





## **ANNEX I**

### **REPORT**

by Mr. Paul Braendli, Lic. iur.

Vice-Director of the Federal Intellectual Property Office (Switzerland)

**on the results of Main Committee I's proceedings**

## **ANNEX II**

### **REPORT**

by Mr. R. Bowen

Assistant Comptroller, British Patent Office

**on the results of Main Committee II's proceedings**

## **ANNEX III**

### **REPORT**

by Mr. Fressonnet

Deputy Director of the Institut National de la Propriété Industrielle (France)

**on the results of Main Committee III's proceedings**

## **ANNEX IV**

### **REPORT**

by Mr. A. Fernandez Mazarambroz

Head of the Spanish Patent Office

**on the results of the Credentials Committee's proceedings**  
**with regard to full powers for signing the Convention**



## Annex I

### Report

by **Paul Braendli, Lic. iur., Vice-Director of the Federal Intellectual Property Office (Switzerland)**

on the results of Main Committee I's proceedings

#### A Organisation of the Negotiations

Main Committee I conducted its discussions from 11 to 29 September 1973 under the chairmanship of Dr. Kurt Haertel, President of the German Patent Office. The first Vice-Chairman was Mr. Göran Borggård, President of the Swedish Patent Office and the other Vice-Chairmen were Mr. Erkki Tuuli, President of the Finnish Patent Office, and Dr. Thomas Lorenz, Chairman of the Austrian Patent Office. The person drawing up this report was appointed rapporteur.

The Drafting Committee, composed of representatives from the Federal Republic of Germany, France and the United Kingdom, was chaired by Mr. van Benthem, President of the Netherlands Patent Office.

The Main Committee also set up two sub-committees, namely a working party to deal with the special problem of "*force majeure*" in connection with Article 121 of the Convention, and a working party on the Implementing Regulations.

#### B Subject-matter of the Negotiations

In accordance with the recommendations of the Steering Committee the following points were referred to Main Committee I for discussion and decisions:

- Articles 14, 50-142, 144, 148-157, 161-162, and 174 of the Draft Convention establishing a European System for the Grant of Patents;
- Rules 1-7 and 13-107 of the Draft Implementing Regulations;
- the Protocol on Recognition;
- the Recommendation on preparations for the opening of the European Patent Office;
- the Recommendation on training staff for the EPO.

As the basis of its negotiations Main Committee I used the printed draft texts (M/1-M/8), the printed and mimeographed proposals and comments from the delegations (M/9-M/29, M/30-M/41), M/37 (Recommendation on training staff) and proposals submitted in writing by the delegations in the course of the Conference. At its first meeting the Committee decided, by way of derogation from the Rules of Procedure, that it would not be necessary for proposals submitted in writing before the Conference to be re-submitted in writing.

#### C Results of the Negotiations

##### I Preliminary Remark

The present rapporteur considered it his duty to give the Committee of the Whole as comprehensive a survey as possible of the discussions of Main Committee I and the decisions which resulted therefrom. With this in mind items of discussion which were of lesser importance or which were more of a drafting nature have been deliberately ignored even where they led to amendments to the text. This report does not adhere strictly to the sequence of Articles and Rules in the Convention and the

Implementing Regulations respectively; instead groups of related questions have been dealt with together according to the Chapters of the Convention with important corresponding amendments to the Implementing Regulations being dealt with at the same time.

## II Convention and Implementing Regulations

### 1. Language questions (Articles 14, 68 et. al./Rules 1-7)

As in preceding stages of the negotiations, the Main Committee dealt with some important language questions.

The Main Committee discussed in detail the provision of Article 14, paragraph 7, of the Draft Convention which requires the claims to be translated from the language of the proceedings into each of the other official languages of the European Patent Office. The requirement for the publication of these translations as part of the specification of a European patent was never in dispute but there was the question of whether the translation should be prepared by the applicant without any control being exercised by the European Patent Office or whether it should be prepared by the Office itself. This controversy, which was by no means new, was resolved by the Committee with a majority in favour of the first solution, which was also completely supported by the interested circles, mainly due to the consideration that it would avoid overburdening the administrative machinery, that the applicant should be assumed to have the necessary specialist knowledge and that this procedure would avoid the translation, which has no legal effect, receiving any official character. This solution, which entailed amendments to Articles 96 and 101, was transferred to the Implementing Regulations (Rule 52, paragraph 4). In doing this the Committee's aim was to make it easier to change the procedure if it is found that it does not fulfil the requirements of information in accordance with expectations or if it is found to lead to abuse. The period of one month which had previously been prescribed only for the payment of the fees for grant and printing was, in the interest of the applicant, fixed at three months and the same period was laid down for the submission of the translation (Rule 52, paragraph 4, and Rule 59, paragraph 5). At the same time the period laid down in Article 96, paragraph 4a, for the publication of the mention of the grant of the patent was as a logical consequence extended from three to five months. This system of time limits should to a large extent ensure that translations of the specification required by a Contracting State into its official language (Article 63) are available to the public at the time of the entry into force of the legal effects of the European patent and that the full opposition period will thus be available to any opponents.

There was a further language problem concerning the provision of Article 68, paragraph 3, of the Draft, the German text of which covers the case where a Contracting State requires a translation of the specification and the translation of the specification confers protection narrower than that conferred by the specification in the language of the proceedings. The Main Committee agreed that the translation could be authentic under these circumstances only and decided to align the French and English texts, which did not convey this idea correctly, on the German text.

In discussing Article 86, paragraph 1, the Committee also decided to reduce the requirement imposed on applicants claiming priority which provided for a translation of the previous application where the latter was not in one of the official languages of the European Patent Office and to permit such proofs of priority to be submitted in any of the three

official languages instead of only the language of the proceedings.

## **2. Patentability (Articles 50-55)**

The provisions of substantive law on patentability were not amended as to substance. The exceptions listed in Article 50, paragraph 2, were confirmed by the Main Committee as basic principles of the Convention. Certain drafting improvements however now make it completely clear that the various types of subject-matter, acts and activities listed are only excluded as such from patentability and that therapeutic and diagnostic methods are not patentable on the grounds that they lack industrial application.

The exception to patentability laid down in Article 51 in respect of inventions the publication of which would be contrary to "ordre public" or morality was reinforced by a duty to examine on the part of the European Patent Office (see Rule 34).

An improved wording of Article 52, paragraph 5, now ensures the patentability of known chemicals for such uses in therapeutic and diagnostic methods as do not form part of the state of the art. In this connection the Main Committee was also of the opinion that only a first use, irrespective of whether it is with regard to humans or animals, fulfils the requirements of this provision.

With respect to non-prejudicial disclosure the Main Committee amended Article 53 to provide that an abusive disclosure in relation to the person entitled shall not be prejudicial if it occurred no earlier than six months before the filing of the application. This amendment means that, taking into account the concept of novelty contained in Article 52, paragraphs 3 and 4, cases of abusive disclosure after the date of filing of the application by the person entitled are dealt with in the same way as a disclosure within six months preceding the date of filing of the European patent application. The Main Committee decided not to extend the definition of the international exhibitions referred to in Article 53 not only because such an amendment would diverge from the Strasbourg Convention but also because exhibition priorities as such are a dangerous instrument for the applicant.

In discussing Article 54 a proposal for supplementing this provision to the effect that any technological advance proven by the applicant should be taken into account in deciding whether there has been an inventive step was rejected, mainly because it was feared that too much weight might be given to this factor.

## **3. Position of the inventor (Articles 58, 59, 60, 79, 90 and Rules 17, 19, 26, 42)**

The Main Committee gave detailed consideration to a proposal to give the inventor a better and stronger legal position in the system set up by the Convention than that afforded by the drafts. The main proposal sought to compel the applicant to designate the inventor at the time of filing the application and at the same time to prove his entitlement to the invention by producing a certificate of transfer drawn up by the inventor or some other conclusive document.

It was not contested that the rights of the inventor should be adequately protected in the Convention. The Main Committee therefore decided unanimously that in respect of all European patent applications, irrespective of which States were designated in them, the filing of a statement identifying the inventor should be a compulsory requirement, with the result that if it were not complied with, the application would be

deemed to be withdrawn. However, the Main Committee rejected the proposal to require the production of proof that the applicant was the inventor's successor in title for three main reasons: there would be difficulties in obtaining such a document in individual cases; it could not be produced where the transfer took place in the due course of law; and finally it would put the European Patent Office in the extremely difficult situation of having to apply the national law of the Contracting States in examining such documents. Similarly, an alternative proposal, to require proof of being the inventor's successor in title only where the national law of at least one of the designated Contracting States required such proof in respect of national patent applications, could not be adopted as this would have caused the same difficulties. In order that the rights of the inventor should nevertheless be protected, the Main Committee finally adopted a compromise solution whereby, if the applicant were not the inventor or not the sole inventor, he would be obliged to file a statement, which would be an integral part of the designation of the inventor indicating the legal basis of his acquisition of the invention. In addition, this designation of the inventor by the applicant would be notified to the inventor, thus allowing him where necessary to invoke his rights in due time. Corresponding amendments were made to Articles 79 and 90 and to Rules 17, 19, 26 and 42.

## **4. Effects of the European patent and the European patent application (Articles 61-68)**

The main subject of discussion in this respect was Article 67 which defines the protection conferred by the European patent and the European patent application.

The Main Committee adopted by a majority a provision which also occurs in the Draft of the Second Convention for the Community patent, whereby the protection conferred on a process is extended to the products directly obtained by that process. This provision, which was inserted in Article 62 and which is already known in the laws of several Contracting States, takes account of the fact that in certain branches of industry, such as the plastics industry, it is not always possible to define a material without reference to its means of production. At the same time, a similar majority of the Main Committee rejected a proposal that this extended protection be reinforced in the case of an invention relating to the manufacture of a new product by assuming, to the benefit of the proprietor of the patent, that any product of the same nature would be considered to be obtained by the protected process. This proposal to reverse the burden of proof was countered by the argument that it would constitute too great an inroad into the national law of the Contracting States.

Main Committee I also considered, in respect of Article 67, paragraph 2, that the concept of extending the protection conferred by the European patent application included the case of a shift in the protection as a result of an amendment to the claims. With regard to the interpretative statement proposed by the Inter-Governmental Conference in respect of Article 67, it considered that this should be officially adopted unamended by the Diplomatic Conference and should be annexed to the Convention in the form of a declaration.

As regards the right to continue to use the invention, which a third party who has been operating in good faith may invoke under Article 68, paragraph 4(b), where the proprietor of the patent has corrected the translation of the specification, the Main Committee decided by a majority to depart from the draft by providing that this right could be exercised without payment, by analogy with the comparable situation dealt with in Article 121, paragraph 6.

## **5. Filing and requirements of the European patent application (Articles 73-84 and Rules 24-37)**

During its discussion of Article 73, the Main Committee was faced with the question of which office of the European Patent Office the European patent application should be filed at. In the interests of the applicant, it gave him the choice of Munich or The Hague and amended Article 73, paragraph 1(a) and Article 74, paragraph 1, accordingly.

In connection with the requirements of the application under Article 76, the Main Committee examined the need to file the abstract. It considered that if this were not done, there would be a loss of information and therefore maintained this requirement. It also decided to prescribe the compulsory publication of the abstract with the search report under Article 92.

Closely connected with the substantive requirement of disclosing the invention under Article 81 was the problem of making special provisions for European patent applications covering micro-organisms. It was not contested that the relevant provision, Rule 28, should lay down that micro-organisms which are not available to the public should be deposited with a recognised culture collection no later than at the time of filing the application, that the micro-organism should be adequately described in the application, and that the culture collection should be identified either in the application itself or within a short time thereafter. It was also agreed that the disclosure of the micro-organism should be subject to certain measures to protect the applicant. Views differed, however, on the latest time at which the micro-organism should be made available to the public. Contrary to the draft of Rule 28, which provided for this to be not later than the date of publication of the application, it was proposed that the applicant should not be obliged to make the micro-organism available to the public until the time of the grant of the patent, at which point the provisional protection would be lost. The main arguments put forward in defence of this standpoint were that the approach contained in the draft laid an unfair burden on such applicants in comparison to inventors in other fields of technology by requiring the subject-matter of the invention to be deposited, and that the applicant was forced to reveal know-how, thus making it easier for his invention to be copied at a time when it was not yet definite whether or not the application would lead to the grant of a patent.

Those who advocated the approach set out in the draft argued that the public could be considered to be sufficiently informed about the subject-matter of the invention only if the micro-organism were made available to the public at the time of the publication of the application; furthermore, it was only by such a disclosure that the micro-organism could be comprised in the state of the art under Article 52, paragraph 3, with the result that this was the only means whereby duplication of patents could be avoided and legal uncertainty in relation to national patent applications could be removed.

After detailed consideration of the various arguments for and against the two approaches, the Main Committee decided by a majority to retain the solution proposed in the draft and to lay down that the micro-organism should be made available to the public at the latest at the date of publication of the European patent application. At the same time, it added provisions to Rule 28 which gave the applicant far-reaching guarantees against misuse of the disclosed micro-organism during the existence of the provisional protection conferred by the application and the definitive protection of the European patent. These guarantees consisted in requiring that any third party who had access to a sample of the culture would have to make certain undertakings *vis-à-vis* the culture collection or

the applicant for or proprietor of the patent in respect of the ways in which he used the culture. On the other hand, the Main Committee decided, in the same way as in respect of Article 67, not to adopt a procedural rule which would have obliged a third party who used a micro-organism disclosed by the applicant to prove that the culture concerned was not that described in the application, even though the reversal of the burden of proof would have reinforced the legal position of the applicant even further. It was also made clear in Rule 28 that the built-in safety clauses in favour of the applicant did not prejudice any national provisions concerning compulsory licences or uses in the interest of the State. The details governing the deposit, storage and availability of cultures were left to agreements to be concluded between the President of the European Patent Office and the recognised culture collections.

## **6. Questions of priority (Articles 85-87/Rule 38)**

Apart from the amendment to Article 85, paragraph 5, already dealt with above in the chapter on "language questions", the provisions of Articles 85-87 concerning priority led to few amendments. It may be mentioned that the extension of the priority right to States which are not members of the Paris Convention, in accordance with an amendment decided upon by the Committee in the interests of the Contracting States, will apply only if international reciprocity is granted not only in relation to European but also in relation to national applications by Contracting States.

## **7. Procedure up to grant (Articles 88-97/Rules 39-55)**

In so far as individual provisions of Articles 88-97 and the corresponding Rules 39-55 concerning the procedure up to grant have already been discussed in connection with language questions, identification of the inventor and the abstract, reference should be made to the appropriate Chapters 1, 3 and 5.

During the discussion of Articles 93/94 the Committee confirmed the specified period within which requests for examination may be filed and also the possibilities for extending the time limits, both of which are the result of well thought out compromises. The Committee refused in particular to lay down in Article 94 an absolute right for third parties to request examination in the event of the Administrative Council extending a time limit. The need for such a right for third parties depends largely on the length of time by which the period is extended.

## **8. Opposition procedure (Articles 98-104/Rules 56-64)**

The provisions concerning opposition procedure gave rise to very little discussion. A proposal to delete the opposition fee in Article 98, paragraph 1, on the ground that the opponent was to be considered as a person helping to establish the legal facts of the matter, was rejected by the majority. If the fee were to be dispensed with, dilatory opposition would be encouraged. Furthermore, the interests of the opponent are his main incentive and lastly, pursuant to Article 114, any person who wishes to help to establish the legal facts of the matter may present, free of charge, observations concerning the patentability of an invention in respect of which an application has been filed. By a vast majority the Committee also refused to shorten to six months the nine-month opposition period laid down in Article 98, paragraph 1, which had been adopted as a compromise solution at an earlier stage in the negotiations.

In Article 98 and in Rule 61 the Committee added new provisions which also make possible the filing of notice of opposition and consequently the continuation of opposition proceedings when the proprietor has completely surrendered the European patent or when it has lapsed for all the

designated Contracting States. The valid interests of an assumed infringer in the retroactive revocation of the patent may thus be upheld. In this connection it may be noted that this amendment has raised the opposition proceedings another step towards the level of actual revocation proceedings.

A further procedural amendment was made to Article 104 whereby any person who has been given notice by the proprietor as a result of a claimed patent infringement may also intervene in the opposition proceedings, if he proves that he has instituted proceedings to establish that the act in question did not infringe the patent. This text takes into account the fact that national laws of Contracting States allow such actions for negative declaratory judgments.

### **9. Appeals procedure (Articles 105-111/Rules 65-68)**

Corresponding to the amendment to Article 98 with reference to the possibility of continuing the opposition proceedings despite the lapse of the patent, the Committee decided also to allow an appeal against a decision of the Opposition Division in such cases and to amend Article 105 accordingly. It was consequently made clear in Article 106 that all parties to proceedings of the first instance are also parties to appeal proceedings, even if they do not actively participate in the proceedings, so that for example a decision concerning costs by the Boards of Appeal which differs from the decision of the lower department will be binding for all parties.

The discussions during the earlier stages of the negotiations concerning the length of the time limit for filing an appeal were — as was to be expected — resumed in the Main Committee. An exchange of opinions showed that the division of the time limit for filing an appeal, as provided for in Article 107, into a time limit for filing the appeal and a time limit for filing the grounds for appeal, was generally welcomed. In the interests of the applicants and especially of their representatives who have such a multiplicity of time limits to observe, the Main Committee divided the time limits into one of two months for the notice of appeal, which also applies to the payment of the fee for appeal, and one of four months for filing the grounds for appeal; both time limits are to commence from the time when notification is given of the contested decision. This amendment made it necessary to adjust the one-month time limit for interlocutory revision, which now begins from the receipt of the grounds for appeal (Article 108). If the potential appellant waits until the end of each time limit — which experience leads us to expect — an appeal which is not immediately allowed will not reach the Board of Appeal earlier than five months after the contested decision has been taken! Whether this is compatible with the previously defended principle of streamlining the proceedings, remains to be seen.

In Article 109, paragraph 3, it was specified in respect of the appeals procedure that the deemed withdrawal of a European patent application in the event of failure to reply to an invitation from the Board of Appeal is not valid in proceedings against decisions of the Legal Division. In Article 111 the Committee expressly maintained in the interests of clear legal relationships that the parties to appeal proceedings should also be parties to any proceedings before the Enlarged Board of Appeal. Such a principle could easily be derived from Articles 112/115.

### **10. General principles governing procedure (Articles 112-126/Rules 69-92)**

Some points of the general rules governing procedure were discussed in the Main Committee. In order to avoid improper delays in proceedings an assurance was given in Article 115 that repeated requests for oral proceedings could be refused by

the European Patent Office under certain conditions. In Article 116 and in Rule 73 the peculiarities of the national laws of Contracting States were taken into account in respect of the taking of evidence, on the basis of letters rogatory, by authorities in the Contracting States and, in addition to the giving of evidence under oath by a party, witness or expert, provisions were made for other binding forms of evidence which enable the truth to be established. With reference to the communication of the possibility of appeal in accordance with Rule 69, paragraph 2, the principle that parties may invoke errors in the communication was abandoned; errors are however almost entirely excluded because reference must always be made in the communication to the relevant provisions of Articles 105-107, the text of which must be attached.

The rules governing time limits and the arrangements for dealing with unobserved time limits were adopted by the Committee with the following amendments. In Article 120 the time limit concerning the request for further processing of the European patent application was adapted to the new time limit for filing appeals and was therefore quite rightly reduced from three to two months. There was a detailed discussion on the concept of “*force majeure*” required in accordance with Article 121 for the re-establishment of rights. This condition was generally felt to be too strict because it would justify re-establishment only in the rarest of cases. The Committee also considered conditions such as those of the “unavoidable event” or of the “legitimate excuse” which are based on national laws of Contracting States. After comparing the laws of various States, the Committee finally agreed, in accordance with the conclusions of the Working Party which it had set up, that the justification for the re-establishment of rights was an impediment which, in spite of all due care required by the circumstances having been taken, had led to the non-observance of the time limit. The Committee also endorsed the general opinion that in reality justice is done to this obligation to take all due care only if the applicant or proprietor and his assistants, especially his representatives, have complied with it. In addition, the Committee considered that Article 121 was to be interpreted in a restrictive manner.

The Main Committee extended the maximum duration of time limits to be set by the European Patent Office under Rule 85 from four to six months for certain special circumstances. However, a proposal was not accepted which aimed to make provision for a one-month extension, on request, of any time limit for representatives who in the proceedings had to draw up documents to the European Patent Office in a language other than the official language of their State or residence. The Committee recognised unanimously that during a transitional period such translation difficulties should be deemed to be “certain special circumstances” within the meaning of paragraph 1 of Rule 85, in so far as the parties complied with their obligation to take due care in obtaining translations.

The provision in Article 124 concerning the procedure for drawing up supplementary search reports provided a large amount of material for discussion. This Article was deleted. The Committee considered it unnecessary to impose search costs on the applicant in the event of his making necessary an additional search due to an amendment to the claims. This financial problem could be settled by slightly increasing the standard amount of the main search fee. After lengthy discussions the Committee reached the majority decision that additional fees for additional searches which were drawn up outside the procedure for international search reports under Article 156, could be dispensed with, especially since such an additional cost would have an unfavourable visual effect in the Convention. At the same time the Committee stated expressly



that Article 156, paragraph 3, was to be interpreted as an authorisation for the Administrative Council to provide for the levy of a search fee for each and every international patent application, irrespective of whether additional searches within the meaning of this provision should be carried out in the individual cases.

### **11. Information to the public of official authorities, legal and administrative co-operation (Articles 127-132, Rules 93-100)**

Only a few amendments were made to these provisions. The inspection of files under Article 128 was supplemented so as to provide more precise information for the general public; thus, before the publication of the European patent application, not only the date of filing may be made known to third parties, but also the date, State and file number of any application of which the priority is claimed. The provisions of Articles 130/132 were drafted more generally so that the European Patent Office could make agreements concerning exchanges of information and exchanges of publications not only with States which were not a party to the Convention and with international patent granting authorities, such as WIPO, but also with any other organisations, especially documentation centres such as INPADOC. It was also specified at the same time that the substantive content of applications which had not yet been published could not be the subject of such exchanges of information. In addition, the Administrative Council was authorised in Article 130, paragraph 3, to make provisions in respect of exchanges of information with the last-named organisations which derogated from the restrictions on the inspection of files, in so far as the confidential treatment of the information was guaranteed.

While dealing with the provisions of Article 131, the Main Committee discussed a proposal which, in the light of the procedure laid down in the Protocol on Recognition, aimed to supplement the prescribed legal co-operation between the European Patent Office and the Contracting States by an obligation for the Contracting States to provide legal assistance amongst themselves. This interesting idea was rejected generally because the proposed extension was considered to be an intrusion into international legal aid between Contracting States and also an obligation which far exceeded the purpose of the Convention. A further idea to allow the European Patent Office to intervene as an international notification authority in certain proceedings concerning European patents, also found little approval.

### **12. Representation (Articles 133-134, 162/Rules 101-103, 107)**

The provisions of the Convention and the Implementing Regulations concerning representation before the European Patent Office were already discussed with the organisations concerned during the earlier stages of the negotiations and were, as far as possible adapted to their proposals and wishes. Fortunately this situation meant that the principles established by the Inter-Governmental Conference were no longer questioned as to their substance. In particular, the principle that during a transitional period the representatives' status would basically be controlled by the national law of Contracting States and afterwards by European law, remained uncontested. The general principles concerning representation in Article 133 were also unchanged. The Main Committee generally considered that these principles should also be valid for the transitional period. The Committee also specified that legal persons could be represented not only by their employees — as

laid down in paragraph 3 of Article 133 — but also by their departments. Such representation by their departments is regarded as a matter of course, is understood from paragraph 1 of Article 133 and does not need to be expressly laid down.

However, material for discussion was provided by the following points: the uninterrupted change from the transitional period to the permanent arrangements, in particular with reference to the continued effects of national requirements, the reasons for the deletion of professional representatives from the list, questions concerning place of business and other individual problems. The following is a report on the main questions:

#### **(a) Conditions of admission**

The Main Committee again discussed the question raised in the earlier negotiations concerning possession of the nationality of a Contracting State as a condition of entry on the list of professional representatives. The majority concluded that this condition should be laid down in Article 162 not only in respect of the permanent solution, but also in respect of the transitional period, in order to avoid the improper acquisition of representation rights after the publication of the Convention. The status quo was taken into account in so far that failure to have the nationality of a Contracting State would not prevent entry on the list, if the representative had a place of business or employment and the right of representation in a Contracting State on 5 October 1973, i. e. at the time of the signing of the Convention.

#### **(b) Restrictions on authorisation to represent**

The question arose as to whether restrictions on representation arising from national law should also be valid in respect of proceedings before the European Patent Office during the transitional period. The Committee unanimously considered that such restrictions based on specific rules of national law, in particular on the legislation of the Federal Republic of Germany, are not justified in respect of European proceedings. The corresponding provisions of Article 162, paragraphs 2 and 6, were therefore deleted.

#### **(c) Questions concerning place of business**

Article 134 provided that the representatives entered on the list were entitled to establish a place of business in the Federal Republic of Germany and the Netherlands for the purpose of practising their profession before the European Patent Office. In view of proceedings before national authorities carrying out duties on behalf of the European Patent Office, as provided for in the Protocol on Centralisation, the Main Committee supplemented Article 134 accordingly. Professional representatives should consequently also be able to establish a place of business in the Contracting States concerned. There was also discussion of a provision which would have expressly granted the right to practise a profession to a professional representative, his associates, employees and colleagues and the right of establishment to these persons including their families. It was said in reply to the advocates of such a provision, who considered it to be a necessary adjunct to the right of residence, that this would be to bring a "foreign body" into the Convention and might possibly conflict with existing agreements in the field of public law. The Committee thereupon rejected the proposed supplement, but noted on the other hand that the stipulated right to a place of business in accordance with Article 134, paragraphs 3 and 4, would be meaningful only if its recognition were dealt with sensibly. A

provision was also adopted to authorise the national authorities of the host country to withdraw the right to a place of business for reasons of "ordre public".

#### ***(d) Deletion from the list of professional representatives***

The Main Committee examined the grounds for deletion of professional representatives from the list and re-arranged them in Rules 103 (permanent solution) and 107 (transitional period). No difficulties were presented by the three grounds for deletion which apply both in the transitional period and in the permanent solution, namely, death or legal incapacity of the representative, his ceasing to be a national of one of the Contracting States, where the President does not grant or is not required to grant exemption from this requirement, or his ceasing to have a place of business or employment in any of the Contracting States. There was unanimous agreement that, in respect of representatives during a transitional period, the national central industrial property office in question must, in these three cases, withdraw the certificate which it has issued and the representative must be deleted from the list. There was, however, disagreement as to whether the mere surrender of the place of business in the State in which the certificate was granted should result in the withdrawal of the certificate, if the representative establishes another place of business in another Contracting State. The Committee's answer was in the negative. The majority adopted the viewpoint that it would be unfair and unjustifiable to make representation before the European Patent Office during a transitional period dependent on a merely national requirement of any State that the place of business should be within its territory. This restriction on the national central industrial property offices was incorporated in Rule 107 relating to the transitional period, while at the same time it was laid down that the national offices could withdraw the certificate, apart from on one of the three above-mentioned grounds, pursuant to other conditions of national law and, in particular, on disciplinary grounds.

Subject to these limitations, representatives entered on the list during the transitional period will, throughout this period, be required to have a certificate issued by the national central industrial property office of a Contracting State. This requirement will, however, cease to apply on the expiry of the transitional period after which the certificate will be devoid of all effect. Thus, representatives during the transitional period and representatives newly authorised after having taken the European qualifying examination will have equal status under the permanent solution. Both kinds of representative will therefore be subject to the disciplinary power decided upon by the Administrative Council pursuant to Article 134, paragraph 7(c); in order to avoid a situation where there would be no disciplinary supervision, the disciplinary power should begin to apply not later than on the expiry of the transitional period.

The Main Committee also remedied other defects in Rules 103 and 107 by including in them provisions laying down that, when the ground for deletion no longer obtains, a representative deleted from the list may be re-entered on it.

#### ***13. Conversion procedure (Articles 135-137/Rule 104)***

Article 135, paragraph 1, sets out the grounds for the conversion of a forfeited European patent application into a national application. It was proposed to delete the possibilities for conversion under the national laws of the Contracting States in paragraph 1(b). It was maintained that, firstly, Articles 120 and 121 protected the applicant sufficiently against the consequences of omissions and, secondly, that there were no

grounds to justify pursuit at national level of European patent applications refused or European patents revoked on material grounds. The principal objection raised against this proposal for deletion was that it was a matter for the national laws whether conversion should be permissible in cases other than those compulsorily prescribed, i. e. in cases where national law provided for forms of protection such as utility models, the grant of which was conditional on less exacting requirements than those applicable to the grant of patents for invention. The great majority of the Committee subsequently rejected the proposal, so that the existing solution was retained.

#### ***14. Revocation and prior rights (Articles 138-139)***

With regard to the grounds on which, pursuant to Article 138, a European patent may be revoked, the Main Committee made it clear that extension of the protection conferred can be a ground for revocation, irrespective of whether the extension occurs during opposition proceedings or national proceedings. This clarification takes account of the fact that a change in the claims of a European patent during national revocation proceedings or during national proceedings for partial surrender may result in an inadmissible extension of protection. Moreover, the Committee refused to impose, in paragraph 2 of the same Article, any restrictions on national laws in respect of the form in which limitations of European patent claims can be made in cases of partial revocation.

A further proposal, in connection with the rules laid down in Article 139 governing the relationship between European and national patents, to provide that, in cases of collision, the European patent should always take precedence was also unsuccessful. The Committee, by a great majority, rejected this solution which would have been a further step towards adopting a maximum solution, principally in the belief that, in the interests of flexibility, the national laws of the Contracting States should be left to adopt such collision rules as they considered justified.

#### ***15. Relationship between the Convention and the PCT (Articles 150-157/Rules 105-106)***

The Main Committee re-examined the provisions of Articles 150-157, linking the Convention and the Patent Cooperation Treaty/PCT, i. e., the provisions governing the procedure for international applications which are the subject of proceedings before the European Patent Office. In the course of this examination, it remedied the remaining defects and, where necessary, removed discrepancies between the provisions of the Convention and those of the PCT.

With regard to material content, the amendment made by the Main Committee to Article 157 concerning the effects of the publication of the international application on proceedings before the European Patent Office should be noted. A consequence of the previous text of paragraph 1, according to which publication of the international application by the International Bureau of WIPO takes the place of the publication of a European patent application, would have been that, in each case, the published international application would have formed part of the state of the art, pursuant to Article 52, paragraph 3. This legal consequence was regarded as unjustified where an application, which has not been published in an official language of the European Patent Office, is withdrawn before its communication to the European Patent Office. Therefore, the Committee, after a thorough examination of the relevant provisions of the PCT, decided by a large majority to take account of this case by providing that an international application published pursuant to Article 21 of the

PCT, for which the European Patent Office is a designated Office, shall be deemed to form part of the state of the art only if it is confirmed, i. e. if it is communicated to the European Patent Office in one of its official languages and the national fee prescribed is paid. In order to create better information facilities for third parties, the Committee provided for a mention to be made in the European Patent Bulletin of the publication by the International Bureau of WIPO of the international application, and, where the publication by the International Bureau is not in one of the official languages of the European Patent Office, for the compulsory publication of the international application communicated to the European Patent Office.

The Committee then inserted a new Article 153a, which empowers the European Patent Office to act as an International Searching Authority within the meaning of the PCT, pursuant to an agreement to be concluded with WIPO at the appropriate time.

### ***16. Activities of the European Patent Office during a transitional period (Article 161/Rule 106)***

The principle, laid down in Article 161, that the European Patent Office will, after opening, only be able to assume its activities progressively was not questioned. The Main Committee was also of the unanimous opinion that, during the transitional period, searches should be carried out in all areas of technology, a task which the European Patent Office should easily be in a position to perform after taking over the capacity of the IIB and the Berlin sub-office. This unequivocal declaration of intent was, like other general opinions expressed by the Main Committee, included in the Minutes. Nevertheless, in order to be able to meet difficulties, at present unforeseeable, which might subsequently arise, the Committee decided not to incorporate this principle in any binding form in Article 161. On the other hand, it was considered a firm principle that the Administrative Council should not be able to rescind decisions on the extension of the system once they had been adopted. Article 161 was re-worded accordingly.

### ***17. Adjustment of the Convention to take account of the decisions of Main Committees II and III***

The textual amendments adopted by Main Committee III did not affect the provisions dealt with by Main Committee I. Adjustments were, however, necessary in respect of two decisions of Main Committee II, relating to the inclusion of Search Divisions as departments in the proceedings (Article 15), a measure by which the Convention was adjusted to take account of the integration of the IIB provided for in the Protocol on Centralisation, and to the setting up of a Legal Division as a further department in the proceedings (Article 15) competent for certain decisions. These adjustments entailed purely drafting amendments (Articles 91, 105, paragraph 1, 109, paragraph 3, Rules 44-47), deletion of provisions which had become superfluous (Article 124, Rules 48, 67, paragraph 2) and new provisions such as the Article 153a referred to under point 15 above.

### ***III Protocol on Recognition***

The Protocol on Recognition, which lays down rules governing jurisdiction and the recognition of decisions of courts and other authorities of the Contracting States in respect of the right to the grant of a European patent required an amendment as to substance only in one point. With respect to the provision on jurisdiction in the Draft Protocol (Article 5),

it was pointed out that a plaintiff residing in a Contracting State claiming the right to the grant of a European patent vis-à-vis an applicant not residing within the territory of a Contracting State would always have to bring proceedings before the German courts and not, as would be desirable, before the courts of his place of residence. The Main Committee agreed that this was a valid point and supplemented Article 5 to the effect that the courts of the plaintiff's place of residence shall also have jurisdiction in such cases, with, however, the subsidiary jurisdiction of the courts of the Federal Republic of Germany being retained.

### ***IV Recommendation on Preparations for the Opening of the European Patent Office***

The Main Committee approved the Recommendation which provides for the setting up of an Interim Committee responsible for preparatory work for the opening of the European Patent Office. In addition, in the interests of a clear delimitation of responsibilities the preparation both of the five-year plan mentioned in the Protocol on Centralisation and of the study on the extension of searches to the documentation of the Contracting States, introduced into that Protocol by Main Committee II, was assigned to the Interim Committee. With regard to the point that the Working Parties of the Interim Committee should, as a general rule, each be composed of six signatory States, the Committee decided that the Federal Republic of Germany and the Netherlands, as the countries in which the European Patent Office was based, should always be admitted as observers at meetings of Working Parties of which they were not members, and that other States should be admitted as observers at meetings where problems of special interest to them were dealt with. Furthermore, it was made clear that not only inter-governmental but also private international organisations could be invited as observers.

### ***V Resolution on training staff for the European Patent Office***

Finally, as the last item of the negotiations the Main Committee approved without discussion the draft Resolution on training staff for the European Patent Office contained in M/37 which essentially provides for the formation of an Interim Committee responsible for the training and recruiting of examiners.

### ***D Final remarks***

Here a report closes which has, perhaps, been too detailed, but which has attempted to summarise in the space of scarcely one hour the results of three weeks of extensive negotiations. The report may also have succeeded in showing that, in spite of the multitude of individual problems, which were usually resolved, those parts of the Draft Convention and the Draft Implementing Regulations which were the subject of the Main Committee's deliberations have been retained without any substantial changes. This is a happy state of affairs and demonstrates how thoroughly the Drafts were prepared.

The rapporteur feels he should not finish without paying tribute to the Chairman of the Main Committee, Dr. Kurt Haertel, for the efficient but gentle manner in which he has guided the negotiations, thus enabling the Main Committee to deal with such a multitude of problems. Main Committee I is also indebted to Mr. van Benthem, the indefatigable Chairman of Drafting Committee I, and his colleagues on that Committee, to the Secretariat staff, the interpreters and all the silent helpers whose selfless work has enabled the newly completed Drafts to be submitted today to the Committee of the Whole.



## Annex II

### Report

by R. Bowen, Assistant Comptroller, British Patent Office

### on the results of Main Committee II's proceedings

#### Introduction

1. In accordance with Rule 12 (3) of the Rules of Procedure, Main Committee II, meeting under the Chairmanship of M. Francois Savignon, Director of the French Industrial Property Office, examined Chapters I to IV of Part I of the Convention with the exception of Article 14, Articles 143 and 145, Part 11 of the Convention with the exception of Articles 160 to 162 and Part 12 of the Convention with the exception of Articles 169, 174 and 175, the relevant provisions of the Implementing Regulations, the Protocol on the Centralisation of the European Patent System and on its Introduction, the Protocol on the Privileges and Immunities of the European Patent Organisation, and Recommendations and Resolutions of the Conference relating to these various fields.

2. Most of the amendments made by the Committee concerned points of detail. This report seeks to highlight only those changes which affect the substance of the several provisions considered by the Committee.

#### *The Convention and Implementing Regulations*

3. The Protocol on the Centralisation of the European Patent System and on its Introduction is an integral part of the Convention and its provisions take precedence over conflicting provisions of the Convention. The Protocol provides for absorption of the International Patent Institute into the European Patent Office, and the Committee adopted a French proposal to amend the Convention throughout so as to take this into account now, rather than to leave the necessary amendments to be made by the Administrative Council after entry into force, as was envisaged by Section VII of the 1972 draft of the Protocol. This required the amendment of several Articles and Rules. In particular, provision has now been made for Search Divisions within the European Patent Office itself; these Divisions, together with the Receiving Section, which is to be responsible for the examination on filing and as to formal requirements as well as for the publication of European patent applications and search reports, are to be in the Hague branch.

4. There was much debate in the Committee on Article 12 of the Convention. The basic rule, provided for in former paragraph 1, has been extended so that an employee should not profit from information obtained by reason of his employment. However, paragraph 2 of the 1972 draft, which precluded all employees of the European Patent Office from filing patent applications, has been deleted. On this question, views were sharply divided between those who held that the overriding consideration should be that the public should have absolute confidence in the integrity of the employees of the Office, and those who believed that considerations of individual freedom should be overriding, and that rigid constraints were either inappropriate or unnecessary. This matter can perhaps be dealt with more flexibly and in more detail in the Service Regulations, as is the case in the International Patent Institute.

5. Article 17 defines the composition of an Examining Division. Under Article 31 of the 1972 draft the Administrative

Council could amend Article 17, in the light of experience, so as to provide that an Examining Division shall consist of one technical examiner. The majority of the Committee considered that a higher degree of flexibility was needed to ensure the smooth, efficient running of the European Patent Office; in addition, it was necessary to make clear that the Council was empowered to reverse any decision it took on this matter. These points have been met by amending Article 31 so as to delete paragraph 1 (a) and include a new paragraph 2 (a).

6. Under Article 18, an Opposition Division dealing with an opposition on a particular patent can include an examiner who dealt with the case before grant. Recognising that this arrangement could improve efficiency, the Committee has retained this possibility, but with a view to giving the users of the European system greater confidence in the European Patent Office, it is now provided that in such cases the examiner in question may not be the Chairman of the Opposition Division.

7. A new Article 18a provides for a Legal Division which is to be responsible for decisions concerning entries in the Register of European Patents and the registration of professional representatives on the list referred to in Article 134.

8. Some changes have been made in the Articles dealing with the Boards of Appeal and the Enlarged Board of Appeal. As regards the composition of a Board of Appeal, as defined in Article 19, the Committee decided that it was unnecessary to provide for a technically qualified member who would act as rapporteur but would take no part in the Board's decision. Article 21, paragraph 1, of the 1972 draft contained no provision for the removal from office of members of the Boards of Appeal and the Enlarged Board of Appeal before the expiry of their term, although Article 11, paragraph 4, contains disciplinary powers. The Committee considered that specific powers for removal were required, and Article 21 now enables the Administrative Council to decide on removal from office on serious grounds on a proposal from the Enlarged Board of Appeal. Article 22 of the 1972 draft enabled a party to an appeal to object to members of the Board of Appeal or the Enlarged Board of Appeal, as the case may be, at any time. In order to avoid unjustifiable delays, this has been revised to stipulate that, if a party is aware of a reason for objection, he must make it before he proceeds any further.

9. Article 31, paragraph 3, has been extended so as to empower the President of the European Patent Office with the authorisation of the Administrative Council to enter into agreements with documentation centres set up as a result of agreements with inter-governmental organisations. The Committee recognised that this was without prejudice to the powers of the President to enter into commercial contracts on behalf of the European Patent Office, in accordance with the provisions of Article 10, paragraph 2 (a).

10. Finally, in this section dealing with the Convention, it is necessary to refer to Article 166. This Article, which concerns reservations, has a long history stretching back to the negotiations at the Strasbourg Convention of 1963 on the unification of certain points of patent law. It provoked a great deal of discussion in the Committee. There was general agreement that it was highly desirable for the Convention to embrace as many European countries as possible. It was also recognised that, particularly because of the maximum solution that has been adopted, some reservations should be permissible for a transitional period so as to enable certain countries to make the necessary adjustments. However, there was considerable disagreement as to the extent to which any State might make a reservation, and as to the time during which such a reservation should have effect; various proposals were tabled on these points by Greece, Portugal, Spain, Turkey and

Yugoslavia. The Committee, by a majority, rejected these proposals as going too far, but ultimately elaborated a generally acceptable compromise on the basis of a German proposal, as amended in discussion.

11. The amended Article 166 goes further than the 1972 draft in that it extends the possibility of making reservations to new chemical products. It also clarifies the position as regards the effect of a reservation in respect of chemical, pharmaceutical or food products. The Committee accepted the view that such a reservation makes a European patent ineffective or revocable in the reserving country only insofar as the patent confers protection on products, which are not defined by reference to a process of manufacture or use of that product also covered by the patent.

12. It is also now provided in Article 166 that a reservation, other than one in connection with the Protocol on the Recognition of Decisions in respect of the Right to the Grant of a European Patent, not only applies to all European Patents granted on applications filed during the period in which the reservation has effect, but also continues for the whole term of such patents. This means that, in the fields of technology in which a reservation has been entered, the impact of European patents on the economy of the reserving country will be gradual.

13. Mainly for this reason, the majority of the Committee considered that there were insufficient grounds for extending the ten year reservation period to fifteen years or, as had also been suggested, until such time as the reserving country considered itself to be in a position to lift its reservation. However, the majority felt that a degree of flexibility in the reservation period was appropriate, since a country intending to make the necessary change may nevertheless find it impossible to meet the ten year deadline. Accordingly, Article 166 now admits of a single extension of no more than five years if the Administrative Council decides, in the light of a reasoned submission made by the reserving country, that the latter is not in a position to dispense with its reservation by the expiry of the ten year period.

### ***Protocol on Privileges and Immunities***

14. The Committee has made a few changes in the provisions of this Protocol, mainly in order to improve their clarity. One point worth mentioning here concerns Article 22, which provides that a Contracting State need not extend certain privileges and immunities to its own nationals or permanent residents. The Committee decided that this derogation should not apply to any person, other than a national of that State, who, at the time of taking up his functions with the European Patent Office, has his permanent residence in that State and is an employee of any other organisation whose staff are to be incorporated into the European Patent Office. This has been done in order to avoid any unfairness towards the staff of the International Patent Institute resulting from their transfer to the European Patent Office.

### ***Protocol on the Centralisation of the European Patent System and on its Introduction***

15. Section I.1 of the Protocol provides for the transfer of the assets, liabilities and staff of the International Patent Institute to the European Patent Organisation. This is to be effected by an agreement between the Institute and the Organisation which is to be implemented prior to the opening of the European Patent Office for the receipt of patent applications.

16. In order to meet the wishes of Belgium, Italy and Turkey, the obligations of the European Patent Office towards Member

States of the Institute have been extended. As provided for in the 1972 draft, the Office will assume responsibility for carrying out searches for any Member State of the Institute which now submits its national applications to the Institute for this purpose, even though that State does not become party to the Convention. As redrafted, the text now provides that the Office will also assume this responsibility in respect of a Member State of the Institute which, prior to the entry into force of the Convention, has agreed to submit national applications to the Institute for search, provided this State is also a party to the Convention when it enters into force.

17. So far as concerns the Italian sub-office referred to in the third sub-paragraph of Section I.1 of the Protocol, it is now provided that the Italian Government shall enter into an agreement with the European Patent Organisation which, consistently with the terms of the Protocol, will put the sub-office in the same situation vis-à-vis the Organisation as it is now vis-à-vis the Institute.

18. Due to language problems and other practical difficulties, the search currently carried out by the International Patent Institute, extensive though it is, does not cover published patent specifications of all the States eligible to become parties to the Convention pursuant to Articles 164 and 165. Many of these specifications are duplicated in other languages which the staff of the Institute can cope with, and to this extent the search is sufficiently wide. It is clear, however, that some specifications, especially those relating to applications which are not used as the basis for filing applications in other countries under the Paris Convention, are not duplicated. The possibility therefore arises of a European Patent being revocable because of a prior specification in the language of a Member State which is not among the search material of the Institute. Moreover, it is possible that specifications and other technical literature, which are of considerable relevance in certain fields of technology, are available only in the language of one State. Mainly for these reasons, the Committee decided on the basis of proposals made by Finland, Italy and Norway that following the absorption of the Institute by the Office, the search should in principle be extended to published patent specifications and other technical literature not contained in the search material of the European Patent Office when it opens for receipt of European patent applications. This is now stated in Section VIa of the Protocol. The Committee recognised, however, that any such extension of the search would be likely to have an appreciable impact on costs and on the level of staffing of the Search Department of the European Patent Office. In view of this, it is also provided in Section VIa that the Administrative Council shall decide, in the light of a study concerning particularly the financial and technical aspects, as to the scope, conditions and timing of any extension of the search.

19. Section VI.1 of the Protocol authorises the Italian sub-office to carry out searches among the search material which is in its possession and in its own language. This authority extends to carrying out searches on European applications filed by Italian nationals or residents, it being understood that the procedure for grant will not thereby be delayed and that the European Patent Organisation will not incur any additional costs. This provision, which was contained in the 1972 draft of the Protocol, has now been supplemented by a Section VI.2 authorising the sub-office also to carry out searches among the same documentation on any European patent application at the option of the applicant and at his expense. The authorisation so provided for is effective until the date when the search on all European patent applications is extended to cover this same search material, as envisaged by Section VIa.

20. The Austrian delegation proposed that the search on European applications be entrusted to "suitably qualified"

national offices insofar as this would be desirable in the interests of the European Patent Office itself. This suggestion was discussed at length but the Committee decided ultimately not to adopt it. It was generally understood that the Administrative Council was empowered under Article 31, paragraph 3, of the Convention to entrust national offices with searches on European patent applications if it was at any time considered desirable to do so in the interests of the European Patent Office. In view of this, the Committee considered that it would be superfluous to include a provision stating this expressly. It is to be noted that the general understanding applies also to entrusting examination work on European patent applications to national offices.

21. Further proposals were made in the Committee so as to enable the Administrative Council to allocate some of the searches on European patent applications to certain national offices during the period of fifteen years from entry into force of the Convention. These proposals were designed to alleviate the difficulties of the national offices consequent upon the introduction of a centralised European system for the grant of patents.

22. Consideration was given to the idea, proposed by the Scandinavian countries, that such work might be entrusted to national offices, possessing the minimum documentation, whether or not they possessed the other qualifications, required of an International Searching Authority under the Patent Cooperation Treaty. The majority of the Committee, while readily appreciating and sympathising with the difficulties which will doubtless be experienced by national offices, rejected this idea as contrary to the concept of centralisation enshrined in the Protocol. Neither could it agree to a more limited Swedish proposal under which the Administrative Council would have been empowered to entrust searches to national offices which fully qualify as Searching Authorities under the Patent Cooperation Treaty. Under this proposal,

which contained no limitation as to the official languages of the national offices, both the Austrian and the Swedish patent offices would have benefited. However, it was observed that the Swedish patent office was authorised by Section III of the Protocol to act as a Searching Authority under the Patent Cooperation Treaty in respect of nationals or residents of Sweden and other Scandinavian countries. On the other hand, the Austrian office could not benefit from Section III and, because of Section I.2, would have to renounce in favour of the European Patent Office its role as a Searching Authority under the Patent Cooperation Treaty. Largely because of this, the majority of the Committee felt that, as regards Austria, there was some degree of imbalance in the compromise defined by the Protocol. The Committee therefore accepted the need to empower the Administrative Council, with a view to alleviating difficulties resulting from a renunciation under Section I.2, to entrust some search work to national offices whose language is one of the official languages of the European Patent Office and which meet the conditions required for appointment as Searching Authorities under the Patent Cooperation Treaty. Section IV of the Protocol has therefore been amended accordingly by the insertion of a second paragraph. In this connection, it is to be noted that the German delegation extended the declaration, previously made by its government, to the effect that examination work on an agency basis would not be sought for the benefit of the German patent office, so that it now applies also to search work.

23. Throughout the long and difficult debate on all these proposals concerning search work, there was a clear indication of a general desire to ensure that any allocation of search work to national offices would not create difficulties within the Search Department of the European Patent Office itself. Moreover, it was accepted that there should be some degree of control over the searches effected by national offices. These conditions are now contained in Section IV.2.





## Annex III

### Report

by Mr. Fressonnet, Deputy Director of the Institut National de la propriété Industrielle (France)

#### on the results of Main Committee III's proceedings

1. The terms of reference of Main Committee III, chaired by Mr. Armitage, Comptroller-General of the United Kingdom Patents Office, covered all the financial provisions contained in the Draft Convention submitted to the Munich Diplomatic Conference, i.e. 20 Articles, together with the Draft Recommendation on the Status and Remuneration of members of the Enlarged Board of Appeal and of the Boards of Appeal appointed during a transitional period.

The importance of these Articles as regards the operation of the European Patents Organisation cannot fail to be apparent. On the other hand it is not so easy to acquire a full awareness of the extent and complexity of the preparatory work which they have necessitated. It has been necessary to ascertain that the proposed financial arrangements would be workable in a satisfactory manner and, for this purpose, to ascertain the long-term budget prospects. This concern led to a consideration, on the expenditure side, of staffing requirements and staff remuneration, supplies of material and equipment, reimbursement of sums paid in by the Contracting States during the initial years; and on the revenue side, the fees charged directly by the European Patents Office during the procedure of granting patents and sums paid in by Contracting States, either definitively in the case of the levy on the national fees for maintaining in force European patents granted in these States, or in the form of loans in the case of what are termed "special" contributions. It was inevitable of course that during the first ten years the latter contributions are likely to be the rule rather than the exception, to enable the European system for the grant of patents to get under way. However, the preparatory work to which it seemed useful to refer in this report has shown that it was probable, if not possible, that by the end of its tenth year, the European Patent Office would be in a position to balance its budget with its own resources — a factor which forms the underlying principle of the financial arrangements submitted to the Munich Diplomatic Conference for approval.

2. A number of proposals were submitted by national delegations for amendments to 7 of the 20 Articles of the Draft Convention which cover the financial provisions. Following the discussions of Main Committee III, 9 Articles were slightly amended; there were no really substantial amendments.

3. Among the Articles to which attention should be drawn there is, first and foremost, Article 38 concerning special financial contributions from the Contracting States. Paragraph 3 of this Article lays down the financial contributions from the States on the basis of the number of patent applications filed in the last year but one prior to that of entry into force of the Convention, calculated as follows: one half in proportion to the number of patent applications filed in the Contracting State concerned; and the other half in proportion to the second highest number of patent applications filed in the other Contracting States by natural or legal persons in that State.

The first number measures the volume of patent-grant activity by the national industrial property service of each Contracting State; this activity, which is the source of

expenditure at the national level, should be reduced in proportion to the success of the European system. The second number reflects the work load which will be imposed directly upon the European Patent Office by the national offices of each Contracting State.

A proposal was made to amend the percentages as formulated above, by reducing the first percentage from 50 to 25% and increasing the second from 50 to 75%.

Having referred to the calculations made in the course of the preparatory work, indicating the contributions of each of the Contracting States under both systems, Main Committee II considered, by a majority, that the existing text of Article 38, paragraph 3, was more equitable and should be retained, subject to a few drafting improvements.

4. Paragraph 4 of the same Article in the 1972 published text provides that, when determining the special contributions of the Contracting States, as recalled above, international applications filed pursuant to the Patent Cooperation Treaty (PCT) which designate a Contracting State are to be regarded as applications filed in that State. It is already known that these contributions are determined on the basis of the number of patent applications filed in the last year but one prior to that of entry into force of the Convention. One national delegation pointed out that, if it were generally agreed that the Convention would enter into force in 1976 or 1977, the reference year for determining the contributions would be 1974 or 1975. The PCT would probably not have entered into force by that time, at least for the States which are parties to the European Convention, particularly since the Member States of the European Economic Community have announced that they will not ratify the PCT before the Convention on the Grant of European Patents. Thus, Article 38, paragraph 4, would have no effect and could therefore be deleted. However, after making this deletion, Main Committee III agreed unanimously that if in respect of some States which are parties to the European Convention the PCT entered into force two years before the former, international applications having effect in those States would as a matter of course be regarded as national applications.

5. If the budget has not been adopted at the beginning of the accounting period, the President of the European Patent Office is authorised, under Article 45, paragraph 1, to effect expenditures on a monthly basis per heading or other division of the budget, up to one-twelfth of the budget appropriations for the preceding accounting period, provided that these appropriations shall not exceed one-twelfth of those provided for in the draft budget.

Paragraph 2 of the same Article provides that the Administrative Council may, subject to the observance of the other conditions laid down in paragraph 1, authorise expenditure in excess of one-twelfth of the appropriations.

Following a proposal from a national delegation, the question was raised whether the one-twelfth referred to in paragraph 2 was one-twelfth of the appropriations of the preceding accounting period or one-twelfth of those of the draft budget, or of either, depending on the situations with which the Administrative Council was presented.

Main Committee III considered that the text of paragraphs 1 and 2 should not be amended and that the limit of one-twelfth of the appropriations for the preceding accounting period would have to be complied with, whereas the limit on one-twelfth of the appropriations provided for in the draft budget could be exceeded, on authorisation by the Administrative Council.

6. Article 47, paragraph 4, was amended to specify that the Administrative Council must approve the annual accounts and the report of the auditors.

7. Article 146 concerns cover for expenditure for carrying out special tasks assigned to the European Patent Office by a group of Contracting States, as will be the case for Member States of the European Economic Community. Paragraph 2 of this Article was deleted but its substance was included in paragraph 1 by inserting new references to preceding Articles.

8. Main Committee III approved the terms of the Recommendation concerning the Status and Remuneration of members of the Enlarged Board of Appeal and of the Boards of Appeal appointed during a transitional period. This Recommendation, which is neither restrictive nor strictly binding, was made for the sake of the Interim Committee and subsequently for the Administrative Council and the President of the European Patent Office. Its substance did not seem to be sufficiently important to warrant it being published in a separate document. It is therefore proposed that it be included in the Minutes of the discussions of Main Committee III.

9. Finally, Main Committee III recorded its general agreement on the principles which might be followed as regards finances:

1. the rate of interest paid to Contracting States on their special contributions should be equivalent to the weighted average of the official discount rates or the minimum lending rates in force in the Contracting States;
2. the amounts of the fees should be determined in such a way that repayments to Contracting States of their special contributions begin not later than the 11th year of operation of the European Patent Organisation and finish not later than the 26th year, as was provided for in the preparatory work;
3. the rate of interest and the determination of fees should be re-examined every year.

Main Committee III hopes that the Administrative Council will follow its guidelines in so far as is compatible with the development of the European system for the grant of patents.

These are the results of the work of Main Committee III which are submitted for the approval of the Committee of the Whole.

## Annex IV

### Report

by Mr. A. Fernandez Mazarambroz, Head of the Spanish Patent Office

on the results of the Credentials Committee's proceedings with regard to full powers for signing the Convention

Mr. Chairman,

You will recall that the Credentials Committee submitted an initial report on 25 September 1973 and that pursuant to this report the Committee of the Whole admitted all the Governmental delegations to the Conference. All these delegations are therefore in a position to sign the Final Act.

The second report which I have the honour of submitting to you today consequently concerns solely the full powers enabling the various delegations to sign the Convention.

The Credentials Committee has noted that 16 delegations have presented full powers in good and due form. 2 delegations (Belgium, Italy) have given notice that they will present full powers not later than the time of the Signing Ceremony; lastly, 3 delegations (Finland, Austria, Turkey) have informed the Secretariat that although they do not intend to present full powers authorising the signature of the Convention forthwith, this will naturally be without prejudice to the possibility of signing within the period laid down in Article 165 of the Convention.

In these circumstances the Credentials Committee recommends the Committee of the Whole to recognise as valid the full powers of the following 16 delegations:

*Denmark, Germany, Greece, Spain, France, Ireland, Yugoslavia, Liechtenstein, Luxembourg, Monaco, Netherlands, Norway, Portugal, Switzerland, Sweden, United Kingdom.*

Secondly, the Credentials Committee recommends the Committee of the Whole not to take a decision on the full powers of the other delegations until the time of the Signing Ceremony.

If you will kindly authorise me to do so, I shall at that time submit a supplementary report on behalf of the Credentials Committee.



## ***Report on the meeting of the Plenary***

(Final meeting — 4 and 5 October 1973)

### ***Opening of the session***

1. The President of the Conference began the final session of the Plenary by establishing its programme of work.

### ***Presentation of the General Report***

2. The General Rapporteur, Mr. van Benthem, presented the General Report as set out in M/165/K. The President of the Conference thanked Mr. van Benthem on behalf of the Plenary for his General Report.

### ***Adoption of the Convention, Implementing Regulations and Protocols***

3. The President of the Conference presented to the Plenary the texts submitted to it by the Committee of the Whole for signature: the drafts of the Convention on the Grant of European Patents, the Implementing Regulations, the Protocol on Jurisdiction and the Recognition of Decisions in respect of the Right to the Grant of a European Patent, the Protocol on Privileges and Immunities of the European Patent Organisation, the Protocol on the Centralisation of the European Patent System and on its Introduction and the Protocol on the Interpretation of Article 69 of the Convention, contained in M/146/R 1 to 14, as amended by M/160/K.

In accordance with Rule 36, paragraph 1, of the Rules of Procedure of the Conference, these six drafts were put to the vote combined as one, and adopted unanimously with one abstention.

### ***Adoption of the Decision on Preparations for the Opening of the European Patent Office***

4. The President called upon the Plenary to adopt the Decision on Preparations for the Opening of the European Patent Office, contained in M/146/R 15, as amended by M/160/K, which had been submitted to it by the Committee of the Whole.

The Decision was adopted unanimously with one abstention.

### ***Adoption of the Decision on Training Staff for the European Patent Office***

5. The President called upon the Plenary to adopt the Decision on Training Staff for the European Patent Office, contained in M/146/R 15, as amended by M/160/K, which had been submitted by the Committee of the Whole.

The Decision was adopted unanimously with one abstention.

### ***Adoption of the Declaration concerning Section IV, paragraph 1, of the Protocol on Centralisation***

6. The President called upon the Plenary to adopt the Declaration concerning Section IV, paragraph 1, of the Protocol on Centralisation, contained in M/146/R 14, which had been submitted to it by the Committee of the Whole.

The Declaration was adopted unanimously with one abstention.

### ***Declaration by the Turkish delegation***

7. The Turkish delegation made a declaration on behalf of the Turkish Government with regard to the votes which had been

taken. The Turkish delegation explained that the fact that it had abstained in no way meant that the Turkish Government was against the Convention, or that it would not eventually participate in it. The Turkish Government wished to examine the whole of the Convention once more and this was the sole reason why the Turkish delegation had abstained. The Turkish delegation felt that in due time, after a detailed study of the procedure set up and all the documents, the Turkish Government would decide to become a party to the Convention, as provided for in the Convention itself. The Turkish delegation confirmed that this statement covered all the votes taken so far and was intended to explain its general position. It requested that these observations be recorded.

The President of the Conference thanked the Turkish delegation for this statement and agreed that it was in the general interest that it should be recorded in the minutes.

### ***Recommendation on documentation for patent search***

8. The President of the Conference pointed out that the content of the Recommendation by the Inter-Governmental Conference on documentation for patent search, contained in Preparatory Document M/6, had been incorporated into the Protocol on Centralisation and had therefore already been dealt with by the Plenary.

### ***Recommendation regarding the status and remuneration of the employees referred to in Article 159 (160), paragraph 2***

9. The President informed the Plenary that the Committee of the Whole had proposed that the Recommendation by the Inter-Governmental Conference regarding the status and remuneration of the employees referred to in Article 159 (160), paragraph 2, of the Convention, contained in Preparatory Document M/7, should not be dealt with by the Conference but should be referred to the Interim Committee set up by the Decision on preparations for the opening of the European Patent Office, which had just been adopted. The President suggested that the Plenary act in accordance with this proposal, since the Interim Committee would be responsible for other staff matters.

This was approved by the Plenary.

### ***Request for admission by INCOPOSA***

10. The Chairman of the Steering Committee reminded the Plenary that at its opening meeting it had been presented with a request by INCOPOSA, an international organisation representing the staff of a number of patent offices, for admission to the Conference as an observer organisation. The Conference had taken no decision on this request at its opening meeting, but had referred it to the Steering Committee for further examination. The Steering Committee had examined the request, but as it was not competent to take a decision on the admittance of this organisation to the Conference, it had decided to grant some members of INCOPOSA permission under Rule 48 of the Rules of Procedure of the Conference to attend meetings of the Committees of the Conference. INCOPOSA had in fact made use of this authorisation by sending several of its members to the meetings of the Main Committees. The request for admission as an observer organisation could be considered to be settled in that the Conference was now in its final stage and it did not appear reasonable to admit a further organisation now that the substantial work had been completed.

On the other hand, the Steering Committee had decided to suggest to the Conference that it recommend that the Interim Committee which would meet after the Conference should allow INCOPOSA to take part in all the work of the Interim Committee and its working parties which covered matters of interest to INCOPOSA, such as the Service Regulations and Pension Scheme Regulations for employees of the future European Patent Organisation. Such participation should be as an observer delegation in accordance with the Decision on preparations for the opening of the European Patent Office. The Steering Committee did not consider that it was necessary for a recommendation by the Conference to this effect to be set out in a separate document, but felt that it would be sufficient for it to be included in the records of the Conference.

The President of the Conference considered that the proposed recommendation would take due account of the interests of INCOPOSA.

It was adopted by the Conference.

### ***Final Act***

11. The President informed the Conference that the Final Act would also be open for signing, as contained in M/160/K.

### ***Resolution on the Secretariat***

12. The President of the Conference presented to the Plenary the Resolution on the Secretariat, as contained in M/164/K, which had been submitted by the Committee of the Whole.

This was adopted unanimously by the Conference.

### ***Resolution on technical assistance***

13. The President presented to the Conference the Resolution on technical assistance, contained in M/163/K, which had been submitted by the Committee of the Whole.

The Austrian delegation pointed out that although this was a request addressed to the European Patent Organisation, the last paragraph made no mention of patent matters. It suggested that such a reference should be inserted, so that the text would read: "... to help the developing countries *in the field of patent law*, irrespective...". There were no objections to this proposed insertion.

The Conference adopted unanimously the text of the Resolution with the above amendment.

### ***Declaration on the simultaneous entry into force of the European Patent Convention and the Convention for the European Patent for the Common Market***

14. The French delegation, speaking on behalf of the delegations of the Member States of the European Communities, informed the Plenary of a declaration of intent by these delegations on the simultaneous entry into force of the European Patent Convention and the Convention for the European Patent for the Common Market, reading as follows:

"On signing the Convention on the Grant of European Patents, the Governments of the Member States of the European Communities state their intention of depositing their instruments of ratification of this Convention in such a way that it enters into force with respect to them simultaneously with the Convention for the European Patent for the Common Market."

The French delegation then explained this Declaration for the benefit of the delegations of the States which were not members of the European Communities. The Draft Convention

for the European Patent for the Common Market supplemented, for the Member States of the Common Market, the Convention which had just been adopted. Instead of the effects of a European patent being governed by national laws, as would be the case in the other States, this Convention ensured unitary and autonomous effects for a European patent throughout the territory of the Communities. It was therefore essential for the Member States of the Communities that the two Conventions should enter into force simultaneously to avoid the anomalous situation of the European patent being governed by national law in respect of the Community States during a short period.

### ***Final declarations***

15. The Head of the Finnish delegation stated that now that the long and far-reaching work on the preparation of a European patent system had been completed, it might be right and proper to explain the position of the Finnish delegation, as it appeared from the report by the Credentials Committee that Finland was not among the countries which would sign the Convention the next day.

As a member of the Paris Union and of WIPO, Finland had worked in close co-operation with the other countries of Europe in developing its patent law, which dated back to the middle of the last century, and had taken into account contemporary developments in Europe, both in countries which had advanced patent examination and countries where there was very little patent examination. Finland had therefore found co-operation with the corresponding authorities in the countries taking part in this Conference most rewarding. Moreover, the largest number of Finnish patent applications for foreign countries were for these very countries. It was therefore understandable that Finland had been most interested in what was being done in respect of centralising and modernising the patent system in Europe. Finland was grateful for the opportunity it had had to participate in the work in Luxembourg and that the Federal Republic of Germany had invited it to participate in this Conference on a European patent system. It hoped that the co-operation to which it referred would continue and would be further extended to comprise all the countries of Europe.

When Finland had signed the PCT in Washington, it had recognised the need to centralise patent examination, a principle which was even more strongly underlined in this European Convention. This corresponded to a trend that could also be seen in other fields of international society. The patent law included in the Draft Convention on which the work of the Conference had been based corresponded to Finnish patent legislation, but also included certain new aspects which would be bound to influence this legislation, whether Finland became a party to the Convention or not.

However, the European patent system as set out in the Draft Convention would not have been satisfactory for Finland because its introduction would have caused too many difficulties to such a small, remote and linguistically separate country as Finland. This was the reason why the Finnish delegation had not been given Full Powers to sign the Convention.

During the Conference many improvements had been made to the text of the Draft Convention, among which the Finnish delegation would like to mention especially the improvement of the position of the inventor. Certain other improvements had also been made to the Protocol on Centralisation. However, as these improvements would not substantially remove or alleviate the difficulties which would arise and which the country, industry and citizens of Finland would have to face



in the event of Finland becoming a party to the European Patent Convention, Finland was not in a position to sign the Convention at this stage.

Nevertheless, the Finnish delegation wished to assure the Conference that it would consider any factor which would make it possible for Finland to sign the Convention in accordance with Article 165, and that any such factors would be submitted to the Finnish Government for consideration.

In this connection, the Finnish delegation wished to express its thanks to the Conference for the understanding which had been shown to its proposals, most of which had been made jointly with other Nordic countries. The Finnish delegation had appreciated the expert chairmanship shown by the Chairmen of the Committees of the Conference, and wished especially to express its gratitude to Dr. Haertel for his understanding of the difficulties of smaller countries. It also thanked the Secretariat for its work and the host country and the city of Munich for their hospitality.

16. The Head of the Danish delegation first of all thanked the Federal Government, the Government of the State of Bavaria and the authorities of the city of Munich for the invitation to the Conference and to the other events and activities which had taken place concurrently. He then went on to convey to the Chairmen of the three Main Committees his admiration at the manner in which discussions had been conducted.

With regard to the outcome of the Conference, his delegation had already found the Draft Convention to be very satisfactory and considered the amendments which had now been made to be generally acceptable; it would therefore have no hesitation in signing the Convention.

17. The Head of the United Kingdom delegation welcomed the fact that both the working and social programmes had been adhered to and the Conference had finished in good order. He expressed his astonishment at and appreciation of the hospitality of the Government and private organisations of the Federal Republic, the State of Bavaria and the city of Munich.

The work of the Conference by contrast had been unrelentingly hard. By its nature a project like this could not leave all parties equally pleased, but it was hoped that the Conference had got as near to that as was possible. The United Kingdom delegation was very conscious that this was an historic moment holding far-reaching changes for all concerned.

In his opening speech, he had emphasised that Her Majesty's Government could support the arrangement provided its balance was not shifted to the United Kingdom's disadvantage. He was glad to say that this had not happened. He had also said that he considered it essential that the practical arrangements should be such as to enable British staff amongst others to play a full part, and would like to reiterate this.

It was easy at times like this to be carried away on a wave of euphoria, but in one sense it was only now that troubles were starting. The United Kingdom delegation hoped that all could now recognise that they had a common aim. But all would need to exert themselves to see and understand each other's problems because even though their aim was the same, some of their individual problems could be very different. One of their common difficulties lay in the uncertainty as to the time of the opening of the European Patent Office which, in turn, depended on a certain number of ratifications of the Convention. All had just subscribed to the Resolution on the Secretariat, which stated that the opening of the European Patent Office was envisaged for 1976. The United Kingdom delegation hoped that this would not just be taken to be a wholly pious hope and that it did mean that all delegations undertook to do what they could to achieve that target. In conclusion, it was sure that, provided all pulled together and did not underestimate the

practical problems ahead, they would succeed in transforming the European patent from an impressive design to an equally impressive reality.

18. The Head of the French delegation was sure that all those who were to take part in the Conference had expected it to be perfectly organised when they learnt that it was to be held in Munich. These expectations had been fully realised, as the discussions held in the course of the Conference had indeed been organised and conducted to a point of perfection. Everyone had had sufficient opportunity to appreciate Dr. Haertel's outstanding chairmanship during the preparatory work to expect him to show the same deft touch in conducting proceedings on this occasion, for which thanks were once again due to him. However, what those persons who did not know Munich or who had had an all too fleeting glimpse of the city in the course of previous visits might not perhaps have foreseen was that the general atmosphere of the Diplomatic Conference would be so agreeable. Thanks were therefore due to all those who had been instrumental in making the stay in Munich so pleasant in spite of the arduous work programme, indeed so pleasant that a further stay in Munich, for example on the occasion of the opening of the European Patent Office, was a prospect much to be relished.

The Head of the French delegation took great pleasure in conveying to the President of the Conference the satisfaction of his delegation at the results which had been achieved on a basis of joint effort, and in emphasising the great importance attached by the French Republic to the setting up of a European System for the Grant of Patents. The final achievement embodied a number of the chief ideas of which the French delegation had been a consistent exponent ever since the decision had been taken approximately five years ago to send out the invitations which had led to the resumption, on a new basis, of work on the temporarily abandoned project of a European patent.

The European Patent Convention first of all represented an effort at achieving the broadest and most open grouping of countries which could reasonably be hoped for in the field of patent protection and within the confines of the European economic area. There were evident limitations both as regards the geographical situation of the countries participating and the basic concept of any system of patent protection, but within these limitations there was just cause for satisfaction in this meeting of delegations from countries, both great and small, whose patent protection systems and degree of technological and industrial development varied to such a considerable extent. Obviously the future could not be prejudged and not all the countries taking part in the Conference would sign the Convention immediately, but it was quite remarkable that all those States which had participated in the preparatory work were represented at the Conference and had persevered to the very end of negotiations. This was one good reason for hoping that all the States present would one day come together once more within the European Patent Organisation. France had always held that this wide-ranging agreement on the grant of the European patent would make an effective contribution in protecting European countries, particularly those which, like France itself, did not have a system involving the complete examination of applications, against the risk of having their economy swamped by patents of dubious and unreliable value. All those States which participated in the European Patent Organisation would therefore have in the European patent an instrument of independence and technological progress.

There was a second cause for satisfaction in the fact that the unitary character of the European patent had been maintained. Admittedly, this character had had to be modified to a considerable degree in order to take into account the legitimate

concerns expressed by a number of the countries taking part in the Conference. France was convinced that the unitary character of the European patent would have widespread effects on national law and that the European patent would help to bring about the approximation of law which it was so difficult to attain by direct methods, thereby opening the way to a genuinely technological Europe. This was why the French delegation had consistently been in favour of the principle of centralisation both during the discussions leading up to the Patent Cooperation Treaty and during the European negotiations. The accusation could not be levelled at France of having called for centralisation for reasons of national interest or of being guided by a species of Jacobinic dogmatism. France had sought centralisation because it considered that a centralised authority and centralised facilities were the sole way of creating a viable European patent which would be genuinely the same for every one of the participating countries, whose historical backgrounds differed to such a great extent.

Moreover, the French delegation was firm in its conviction that the fear, which had been voiced on frequent occasions during the Conference, that certain patent facilities of individual European countries would no longer be used following the introduction of the European patent was premature and that such a situation would probably never become a reality. The French delegation was convinced that all the human and institutional resources of the participating States in the field of industrial property not only could be put to use, but indeed would have to be put to use, and that in addition it might even be necessary to create new ones, such as the training centre which France intended to set up at the University of Strasbourg.

The task was, in point of fact, far from being completed. Now that the preparatory work had been carried out there was another demanding task to be dealt with — that of making the European System for the Grant of Patents a reality. The realism and determination shown by all the delegations throughout the negotiations augured well for the earliest possible opening of the European Patent Office which France had always desired. The satisfaction generated by great achievements, though understandable, should not be a curb to future ambitions and efforts. The amount of work which was to devolve upon the Interim Committee was considerable, and the success of the European patent hinged on how those tasks were performed. It should be borne in mind that while a number of ingenious, and on occasion complicated, plans had been devised, they would now have to be put into practice and that in the final analysis it would be the applicants themselves who of their own free choosing would make a success of the European patent. A large measure of flexibility and of seasoned political adroitness would have to be deployed in order to ensure that the undisputed advantages of the European patent system were not nullified by problems of detail or by excessive running costs.

But that was only part of the picture. The French delegation contended that the world would find in the European System for the Grant of Patents not only its contemporary but also its future ideal and that it would be seen as one of the most important archetypal systems for the protection of inventions. The very magnitude of this undertaking would oblige its authors to ensure that it always kept its place in the van of systems for the protection of inventions with regard to theory, the functioning of its institutions and the dissemination of knowledge throughout the world. The French delegation was therefore confident that the resources of the European Patent Office would be put to good use, not only for the benefit of those countries which were taking part, but also for the development of industrial property rights throughout the world.

19. The Head of the Norwegian delegation extended his thanks to the Federal Government for its excellent organisation of the Conference and for the social occasions incidental to the Conference, which had also been a great success. His delegation regarded the substantive provisions of the Convention as drawn up in the course of the Conference as a major advance for all those concerned with industrial property rights. The Norwegian delegation, however, found the solution to the problem of searching less satisfactory. Although the relevant provision of the Protocol on Centralisation was basically along the right lines, the aim of the provision could have been more effectively attained by the proposal by the Norwegian and Finnish delegations, which had been rejected. The Norwegian delegation nevertheless hoped that the present Convention would enjoy every success when put into practice and extended its special thanks to Dr. Haertel, who had been one of its main advocates, adding that it would sign the Convention at the Conference.

20. The Head of the Swiss delegation thanked all those who had contributed to making a success of the Conference: the Federal Government, the Government of the State of Bavaria and the authorities of the city of Munich. The hospitality extended to him in the city over the last few weeks served to confirm his conviction that the choice of Munich as the seat of the European Patent Organisation had been a happy one.

On behalf of his delegation he went on to thank the Chairmen of the three Main Committees for the smooth manner in which the discussions had been conducted; the Chairmen and members of the Drafting Committees for their unstinting work; the general rapporteur and the rapporteurs of the three Main Committees for their informative reports; the Secretariat, including the interpreters and translators, for their efficient assistance throughout the Conference and the persons responsible for the irreproachable organisation of the entire programme of activities.

In accordance with the hopes of the Swiss delegation, the Conference had adopted the cardinal points of the Convention which had been laid before it. The Swiss delegation would therefore sign the Convention in the conviction that it represented a balanced compromise between the interests of the various countries, and hoped that Switzerland would ratify the Convention as soon as possible.

Although there had been international co-operation in the field of industrial property rights for some considerable time, it had been no easy matter to bring about the present Convention, which was an important innovation. That this had nevertheless materialised was an encouraging sign for possible European co-operation in other fields outside the framework of the European Communities. It was in such possibilities that the Swiss delegation saw the major political import of this joint achievement.

Switzerland was indeed aware of the importance of this matter and was convinced that it would be to the advantage of inventors and European industry alike if the European Patent Organisation were set up quickly. In view of these considerations Switzerland was willing to participate to the utmost of its abilities in any tasks which would have to be dealt with prior to the opening of the European Patent Office.

21. The Head of the Luxembourg delegation expressed his country's satisfaction at having been able to take part in the Munich Conference on the European patent. Even though its contribution to this joint achievement had been modest, Luxembourg had always, from the very inception of work on the matter, been strongly in favour of the idea of the European patent. It was for that reason that Luxembourg had been especially pleased to have been host in its capital city over a number of years to the Inter-Governmental Conference and

the many working parties of experts who were responsible for drawing up the Draft Convention and studying the problems relating thereto.

With the signing of the Convention a decisive step had been taken towards setting up in Europe a system for the protection of inventions which was at once more rational, more effective and better suited to the requirements of a modern and constantly changing economy. The future European patent would be of particular benefit to small countries who, without assistance, would not have been in a position to vouchsafe their nationals the same advantages in the field of industrial property rights as those enjoyed by the nationals of large industrialised countries.

The Head of the Luxembourg delegation joined in thanking all those who, in whatever their capacity, had contributed to making a success of the Conference. Special thanks for the perfect organisation of the Conference went to the German authorities which had taken such great pains to ensure that their guests' stay in Munich was as pleasant and interesting as possible. As for the Conference *per se*, he wished to pay tribute to the good will evidenced by all the delegations on more than one occasion in accepting necessary compromise solutions.

In conclusion, he hoped that the same spirit of co-operation would continue after the Conference and that it would contribute to rapid ratification of the Convention by the various national parliaments.

22. The Head of the Portuguese delegation said that his delegation wished to join in the thanks which had been extended to the Government and the authorities of the Federal Republic of Germany and to the people of Bavaria for their so warm and friendly welcome.

The Portuguese delegation was well aware of the importance of the work completed. Although it had not been possible to settle some questions as it would have wished, the work as a whole had nevertheless been fruitful.

The Portuguese delegation would be unable to sign the Convention immediately. There were points in the text which affected the fundamental interests of Portuguese industry which had not been adequately protected. However, it wished to assure all the participants that the necessary studies would be undertaken in Lisbon to enable the Portuguese authorities to take the most appropriate decisions in full awareness of the facts. Portugal would be very pleased if in the near future it were to find itself able to play its part in the new phase which was now being initiated in Europe in the patents field. It was fully aware of the general political importance of the Convention which had been drawn up and which represented a further step on the road towards a closer and more harmonious understanding in Europe.

The Portuguese delegation wished to thank all those who had assisted it during the proceedings and in particular the German delegation to which it was grateful for the efforts it had made to reach compromise solutions on problems which were of particular importance to Portugal.

The Portuguese delegation congratulated all the delegations and the Secretariat for the quality of their work. The sessions of the Conference had been busy and sometimes difficult, but the spirit which had presided over the proceedings could be described as exemplary.

Finally, the Portuguese delegation wished to express its gratitude to the President of the Conference for the enthusiasm which he himself and the Chairmen of the various meetings had managed so well to instil into the delegates, for the influence he had brought to bear on the proceedings and for the sense of dignity which he had conferred on them.

23. The Head of the Swedish delegation welcomed the successful conclusion of the Conference and regarded it as the

result of co-operation, characterised by mutual understanding, on the part of all the participants. He thanked the Federal Government, the Bavarian State Government and the City of Munich for having provided such favourable conditions for the success of the Conference. He extended particular thanks to the President of the Conference and the Chairmen of the Main Committees for their conduct of the negotiations. He closed with the assurance that the Swedish delegation would now keenly set about transforming the outcome of the Conference into practical reality.

24. The Head of the Netherlands delegation said that the Netherlands delegation was very pleased with the way in which the Conference had been conducted and its results. The Convention was of particular interest to the Netherlands in view of the incorporation of the International Patent Institute into the European Patent Office. He therefore wished to thank all the countries taking part for the confidence they had shown in the Institute which had been operating at The Hague for many years.

The Netherlands would sign the Convention immediately and hoped to ratify it during 1976, following approval by parliament. The Head of the Netherlands delegation said he wished to make one specific point in this connection. When an international convention was placed before the Netherlands parliament, the latter was entitled only to approve or reject the legislative acts concerned, and could therefore not play the role it usually played in the drafting of national legislation. For this reason, the Netherlands delegation was delighted that it had proved possible to overcome this difficulty at least partially by consulting the circles interested in this international instrument from the very beginning. This had helped to ensure that a due and balanced account was taken of the interests involved and a real and necessary democratic act had thus been carried out.

In conclusion, the Netherlands delegation thanked the Government of the Federal Republic of Germany for its hospitality and for the excellent and flexible manner in which the Conference had been organised, which, however, had not omitted the all-important human aspect, and which had given delegates an opportunity to become familiar with the atmosphere and charm of Munich and its surroundings. The Netherlands delegation was confident that there would be no shortage of Netherlands nationals willing to go to Munich to work in the European Patent Office and to assist in making it truly European.

25. The Deputy Head of the Italian delegation said how moved he felt at the honour of speaking for the Italian delegation at the end of the Conference. This emotion was due not only to the fact that he had already had an opportunity, in various capacities, to participate in the preparatory work of which the Convention was the culmination, but it was also due mainly to a deep awareness of the importance of what had just been accomplished. He was sure that he was right to emphasise the historical effect of the Conference which would definitely constitute the event of the century as regards industrial property. As a result of the Convention which represented the first fruits of sixteen years of effort and work in the legal and political contexts, Europe had finally acquired a valuable instrument in the field of industrial property. The very mention of such facts was sufficient to highlight the importance of this Conference. If the industrial power of many European countries were taken into account, it was easy to understand the value of having a single procedure for obtaining a patent for an invention.

The efforts of all the participants had to be acknowledged for having made it possible to achieve these results, which would prove to be worthwhile in the years to come. A genuine manifestation of the European spirit had been observed in the

proceedings. There had been in the Conference proceedings a mutual understanding and a will to succeed, and this had made it possible to surmount the inevitable difficulties. Naturally, each party had had to forgo some of the things it wanted, but this was what formed the spirit of co-operation: the sacrifice of vested interests was recompensed in unity. These considerations and its true European spirit had enabled Italy to overcome the few difficulties which arose from the fact that the financial burden which it would have to bear had been set somewhat too high in relation to the recognition accorded to it. However, Italy had been able to overcome the obstacles arising from the present economic difficulties, and the day would come when it could not but express satisfaction at having participated in this great joint undertaking from the beginning.

The organisation of the Conference had been excellent. The organisers had been fortunate indeed to have been favoured by the ambiance of a city which was particularly easy on the eye because of its situation and the aesthetic grace of its monuments. But that alone would not have sufficed, had it not been for the constant endeavours of all those who had worked for the Conference, and the generous assistance of the Government of the Federal Republic of Germany and the Bavarian authorities. It had been possible for the proceedings to take place without any hitches, and in all due conditions of comfort. The social side of the Conference had been of an exceptional quality.

In conclusion, the Italian delegation expressed its most sincere wishes to the Interim Committee which in a few months would undertake the necessary work for the entry into force of the Convention. The Italian delegation was convinced that the same spirit of collaboration which the Conference had experienced would reign over the work of the Interim Committee, because this spirit had now become a viable reality, and would not end with the Conference.

26. In looking back at the work carried out by the Conference, the Head of the Austrian delegation emphasised the comprehensive nature of the subject-matter which had had to be included in the now completed Convention and the great number of considerations which had been required in drawing up the Convention. It was therefore also appropriate to thank once again all those people who had prepared this work over many years; and here, Dr. Haertel in particular deserved mention personally, and also on behalf of many others.

The fears expressed by the Austrian delegation at the beginning of the Conference that it could not subscribe to certain trains of thought in the Luxembourg drafts had fortunately proved groundless. It was gratified that in Main Committee II it had been possible to arrive at a solution which was acceptable to all the delegations and even made room for co-operation between the European Patent Office and the national patent offices. It also thanked all the delegations for their support or their understanding.

The Head of the Austrian delegation then expressed thanks to the Chairmen of the three Main Committees for their skilful conduct of the negotiations, their patience and the way in which they had reconciled differences. He then went on to thank the rapporteurs, the Chairmen and members of the Drafting Committees, the Steering Committee and the other Committees as well as the members of the Secretariat for the work they had done. Finally, he extended words of thanks to the Federal Government, the Bavarian State Government, the City of Munich, the German Patent Office and to the organisations and consulates which had made the stay in Munich so pleasant for all the participants at the Conference.

The Austrian delegation was convinced that what had been achieved so far was only a beginning. The setting up of the European Patent Organisation, with which a start would now

have to be made, would be all the more successful, the closer the contacts established between the representatives of the Contracting States. In this order of ideas it welcomed the fact that the Interim Committee would soon have the opportunity to make such contacts. The work on setting up the Organisation would definitely be made easier through the generous offers made by the Federal Government.

For reasons to do with its national legal system, the Austrian delegation could not yet sign the Convention. However, Austria's interest in questions concerning the re-organisation of patent procedures in Europe was clearly indicated not only by its collaboration in the Conference, but would also be apparent in future, in view of the positive outcome of the Conference. In conclusion, the Head of the Austrian delegation expressed the hope that the spirit of co-operation, which had been so gratifyingly manifest during the Conference, might also characterise the activity of the future European Patent Organisation.

27. The Head of the Belgian delegation said he was pleased to be able to join the other Heads of delegations in thanking all those who had contributed to the success of the Diplomatic Conference: the President of the Conference, the Bavarian Government, the City of Munich and, especially within the Conference, all those who had worked and laboured so much during the past four weeks.

As to the work carried out, it was sufficient to say how much the good will of one and all, the spirit of compromise and sheer determination had been the underlying factor in the satisfactory outcome of the proceedings.

The City of Munich which had been such a lively and charming host to the Conference was certainly the most obvious place to accommodate the future European Patent Office.

In closing, the Head of the Belgian delegation made a point of saying that the progress made was not only valid in itself, but was a further step forward along the road towards the unification of Europe and the identification of the European personality which people were endeavouring to identify at that time. There were times when progress in the construction of Europe was made in leaps and bounds, but there was also the kind of progress made from day to day in technical fields that were always difficult and sometimes unrewarding. This was the sort of progress which had just been made and was, for Belgium, perhaps the greatest source of satisfaction.

28. The Head of the Greek delegation thanked the German Government for its hospitality and its contribution to the success of this important Conference. He also thanked the Bavarian Government and the authorities of Munich, and more particularly the President for his personal contribution to the work of the Conference and for the distinguished way in which he had presided over the discussions. He expressed his thanks to Dr. Haertel, the President of the German Patent Office, for his efforts in reaching a compromise solution as well as for his general contribution to the whole work of the Conference.

The Greek delegation believed that the Convention constituted a further extension of the desire of the European nations to contribute to the advancement of science and technology and was a testimony of success in their efforts to collaborate. Greece, as an associate member of the European Economic Community, faced the future with confidence and had decided to participate as much as it was able in all the efforts to achieve the ideal of a united Europe and to sign the Convention.

29. The Head of the Irish delegation thanked the Federal Government for inviting his Government to participate in this Conference. He was happy to have participated in the development and launching of this great and historic European

venture, which he wished well and hoped that it would represent a step in leading the way to a brave new European world. Although the Convention would create problems, and serious problems for Ireland, the Irish delegation would sign the Convention immediately. The Irish delegation associated itself with the tributes and thanks expressed by other speakers to the Federal Government, to the Land of Bavaria and the city of Munich, to the other German and international bodies which had been so very hospitable, to the Secretariat and to the auxiliary staff including all those who had worked for the Conference.

30. The Head of the Turkish delegation emphasised that the Turkish Government fully endorsed the political aim of the Convention, that is the promotion of the integration of Europe. Turkey's association with the European Economic Community also bore witness to its readiness to support with its own efforts the endeavours towards European integration. At the same time the other delegations should appreciate that the Turkish delegation had withheld its vote on the text of the Convention for internal reasons. This was merely for domestic reasons and concerned only the substantive and technical content of the Convention and not its purpose. Finally, it wished to thank the Federal Government, the State of Bavaria and the city of Munich for the hospitality extended to it.

31. The Head of the Spanish delegation joined all the delegations which had already expressed their thanks to the Government of the Federal Republic of Germany and to the President of the Conference for the excellent material conditions in which the proceedings had taken place, for the kind welcome extended to them and for the perfect organisation of the Conference. His thanks also went to the Federal and local authorities and to the German cultural and industrial bodies which had organised numerous receptions, visits and excursions.

It should be acknowledged as regards the outcome of the Conference that the Convention with its attached annexes constituted an excellent instrument for European co-operation on patents; this instrument would make its effects felt on several aspects of this co-operation. However, the Spanish delegation felt bound to state quite clearly that in the Convention Spain had not obtained an adequate solution to its main problem of reservations which constituted a *quid pro quo* in respect of the maximum solution adopted by the Luxembourg Inter-Governmental Conference, as confirmed by the Diplomatic Conference. It was not possible to make economic forecasts on whether or not, at the end of a certain period of time, there would be a change in circumstances which would make it possible to waive the reservations on the patentability of chemical, pharmaceutical and food products. Despite its relative weakness, Spanish industry in those sectors represented a large percentage of Spanish industry overall. The early application of the principle of patentability of these products could place it in a very delicate situation and even jeopardise its existence by thus raising serious economic and social, and hence political problems, which any government should set out to avoid, and should in any case foresee. It was for this reason that, on the basis of specific instructions from its Government, the Spanish delegation had not been able to agree to the fixed expiry period for reservations which had been retained in Article 167 of the Convention, and therefore the Spanish delegation, to its regret, could sign only the Final Act.

However, in view of the improvements which had been made to the Article as compared with the initial text, thanks to the efforts of the German delegation and particularly those of Dr. Haertel, the Spanish delegation hoped that these improvements would enable the Spanish authorities and the

industry concerned to study and reconsider the problem of reservations and the possibility of joining the other States which had signed the Convention.

In closing, the Spanish delegation expressed its gratitude to the Chairmen of the three Main Committees, Dr. Haertel, Mr. Savignon and Mr. Armitage, for the opportunities which they had provided for the Spanish delegation to raise and explain its problems. Its thanks were extended to the Secretariat.

32. The Head of the Liechtenstein delegation said that his Government welcomed the successful conclusion of the Conference which it considered as an essential step on the road to a European Patent Organisation. Praise was due to all those people who had contributed to the success of this work with conviction and unselfish resolution. It was with gratitude and admiration that the merits of Dr. Haertel should be recognised for the contribution he had made to the Convention.

If all the delegations were not satisfied in equal measure with the outcome of the Conference, this was by no means surprising in view of the various interests of the individual participating States; however, the compromise solutions which had finally been reached after careful consideration were a sign of the understanding which all participants had shown towards each other.

Much productive activity in connection with the setting up of the European Patent Organisation now lay before them; the Liechtenstein Government hoped and was convinced that this Organisation would be completely successful.

Finally, the Head of the Liechtenstein delegation stated that he would sign the text of the Convention, and extended words of thanks to the Federal Government, the authorities of the Free State of Bavaria and the State Capital of Munich.

33. The Head of the Yugoslav delegation too wished to express his thanks to the Government of the Federal Republic of Germany and to all other institutions and their individual representatives, particularly to Dr. Haertel who had contributed to this Conference being organised in such an excellent manner. He shared the opinion of the other delegations as to the importance of the Conference and the results that had been achieved. He also considered that the Conference was a turning point not only in the history of industrial property but also in the history of innovations and inventions, as it was already possible to estimate how broad and far-reaching the influence of the new European patent system and the European Patent Organisation would be in the future.

For these reasons, many of the delegations present might be perfectly satisfied with the amendments, drafts and compromises found by this Conference which enabled them to sign the Convention. However, for the same reasons, some delegations were faced with the very difficult task of studying the possible consequences of the compromises that had been adopted. This was particularly true of the small and less industrialised countries, including Yugoslavia. That was why Yugoslavia unfortunately would not be able to sign the Convention immediately, but on its return to Yugoslavia the Yugoslav delegation would do its best to study the new situations and to present the problems and dilemmas to its Government, which would take the final decision.

34. The Head of the delegation of the Council of Europe congratulated the Conference on bringing its proceedings to a successful close. He pointed out that the spadework done by the Council of Europe on the protection of industrial property rights had been of considerable help in the materialisation of the Convention. Not only was this work of great significance in its own field, but above all its signing meant a large step forward towards close co-operation in a broad European framework and the Council of Europe would participate in this

co-operation to the best of its ability, with the means available. He subscribed to the words of thanks extended by the previous speaker.

35. The Head of the delegation of the Commission of the European Communities also congratulated the Conference on the successful conclusion of the Convention. He recalled that the preparations had been begun within the European Communities in 1959 on the initiative of the Commission and 10 years later the work had been resumed with a new purpose. In the present Convention the result of the determination of all the participating States to co-operate effectively in the patent field was to be perceived. The special significance of the Convention for the Member States of the European Communities was that it formed the basis for the Second Convention, as it was known, by means of which the effect of a uniform patent would be conferred upon the European patent. This uniform patent would considerably strengthen economic integration within the European Communities. It was accordingly to be hoped also, that the European Patent Organisation would materialise as rapidly as possible.

In conclusion, the Head of the Commission delegation thanked the Federal Government for having invited the delegation to the Conference and for having contributed so much to the successful running of the Conference through the organisation of the work and also by its generous hospitality.

36. The Head of the WIPO delegation associated his organisation with the thanks expressed by many others for the reception given by the Federal authorities, the State authorities and the authorities of the town of Munich and for the excellent organisation of the Conference. WIPO, which had had some experience in this field, admired the way the Conference was run and was convinced that it had been an excellent Conference in every respect.

The subject of the Convention to be signed presented considerable interest to WIPO because it was aware of the close links between this Convention and the Patent Cooperation Treaty on which it had worked very hard and which it still hoped would materialise in the not too distant future by ratification in the necessary number of countries. WIPO considered that a sufficient degree of harmonisation had been achieved between the two Treaties to allow them to exist side by side without harming each other and for this reason WIPO could wholeheartedly offer its congratulations on the successful conclusion of the Conference.

WIPO felt that this was an historic Conference because this was the first instance of administrative collaboration in depth on an important part of the patent system. WIPO also considered that the future would show that the conclusion of this Convention made the need to supplement the PCT even clearer. WIPO hoped that in the future the collaboration between the many authorities responsible for this Convention and the World Intellectual Property Organization would remain as excellent as in the past.

37. The Deputy Head of the delegation from the International Patent Institute described the signing of the Convention as the most significant occurrence for the IIB since its foundation in 1947 since with the entry into force of the Convention, the Institute would cease to exist. This was no reason for regret on the Institute's part because as a branch of the European Patent Office it would arise more glorious and steadfast than ever. The IIB was proud to be the first visible manifestation of the future European Patent Office.

38. The IFIA delegation once again expressed its gratitude for the invitation to the Conference and for the hospitality extended to it.

It was glad that the appeal made to the participants at the beginning of the Conference to ensure that the Convention

would protect human rights and the rights of the inventor had met with a response. It experienced particular satisfaction at the fact that the decision concerning the mention of the inventor had been adopted unanimously. Only the future could tell whether the compromise adopted by the Conference in respect of the right of transfer from the inventor to the applicant would stand up in practice.

Some problems of inventors remained unsolved by this Convention which IFIA had hoped would open its portals to all technically-minded and creative people. Many of its provisions would force development-intensive industries and inventors to seek other paths which would present less obstacles having regard to the financial resources and the stage reached in their growth and the development of ideas. In this connection it referred to the level of the fees which were intended to make the European Patent Office self-supporting; in its opinion, a patent office supported from the public purse would be among the happiest and most profitable of investments. It furthermore considered that a system for the grant of patents should not aim solely at granting protection rights but should also and above all become a stimulus to technology in Europe. It would also have preferred a single language for the proceedings in order to avoid the cumbersome and costly language problem arising from the present solution with its attendant sources of imperfection. It had furthermore envisaged a more flexible and liberal system better able to meet all requirements as regards the disclosure, encouragement, development and protection of creative ideas.

Nonetheless, despite all the criticism with regard to details, IFIA considered the outcome as a whole to be positive and looked forward to a successful future.

39. Speaking on behalf of the various European industrial organisations represented, the CEIF delegation wished first of all to extend the profound gratitude of European industry to the government delegations. Throughout the negotiations, the Conference had shown considerable good will to European industrial circles by involving them closely in its discussions, a great degree of objectivity by giving its closest attention to each of their remarks, suggestions and observations, many of which had been followed, in other words an open mind in allowing European industrial circles to voice their opinions whenever they so wished, even when this involved criticism. The continuous dialogue between the States entrusted with the difficult mission of creating a uniform European system for the grant of patents and the representatives of their industries had undoubtedly been one of the vital factors which had contributed to the success of the Conference.

Most sincere thanks were due to the Government of the Federal Republic of Germany, to the President of the Conference, to Dr. Haertel and his colleagues, to the State of Bavaria and the City of Munich for the hospitality and the succession of receptions and social activities which had been lavished upon the delegates.

The CEIF delegation wished finally to express three desires.

Firstly, it expressed the urgent desire that the non-governmental international organisations would continue to be as closely involved in setting up the European patent system in the future as they had been until now. The stage which had just been reached constituted a considerable success. The fact that it had taken several years of negotiation to arrive at this point and that the happy conclusion now reached by this Conference had been foreseeable for several months should not erase from the memory the considerable difficulties which had gradually been overcome. European industry had contributed to this success by giving clear, vigorous, steadfast and constant support to the government delegations from the moment of the adoption of the new basis on which the European patent had



been re-examined in 1969 and which had moreover resulted from suggestions submitted by the interested circles. Although the solutions to be definitively approved by the signature of the Convention had had, for political reasons, to depart on several points from the strictly unitary system which the industrial circles would have preferred, they sincerely wished to express their very great satisfaction at the setting up of a European System for the Grant of Patents which had been their heartfelt wish for many years. The success and the satisfaction experienced should not however be allowed to mask the great efforts which still had to be made in order to implement the Convention.

The second desire of the CEIF delegation was for the mobilisation of good will on all sides to reduce the period required for such implementation to the minimum technically necessary. European industry was, of course, quite aware of the magnificent work which had been done over a period of many months by officials in the principal national patent offices; it was aware that time was needed to prepare for parliamentary ratification, to erect a building for the European Patent Office and to recruit and train staff. But it nonetheless considered that a period of at least seven or eight years, at an optimistic estimate, between now and the grant of the first European patent was a considerable length of time. Any extension of this period would jeopardise the launching of the new system. There was tremendous pressure on industry to provide full employment for workers and continuous growth in their real purchasing power and to make ever-increasing contributions to social welfare payments. The productivity of undertakings would have to show a constant increase for this to be possible. The standardisation of systems for granting patents, which was a very important factor for productivity, should therefore not be too long delayed. Industry was becoming less and less able to accommodate itself to parallel and distinct systems of protection. Therefore, the governments concerned should do all in their power to hasten parliamentary ratification and the future administration of the European Patent Office should do all they could so as not to delay for too long the time when the Office would be fully operational.

The final desire of the CEIF delegation was that the work of the Interim Committee should progress in the same spirit of compromise as that which had characterised the work of the Conference and which, as all the previous speakers had commented, had made such a forceful contribution to its success. The legitimate interests of the individual Contracting States and especially of their national patent offices must not impose excessive burdens on the fragile infant which the European Patent Office would be.

40. The FICPI delegation expressed its gratitude for the frequent opportunities it had had of expressing its views and was pleased to note that it had been able to make useful contributions to the discussion of certain questions. The delegation pointed out that FICPI had always dealt with and resolved problems concerning the protection of industrial property rights at a European level. With respect to the future, which would involve a large amount of work in connection with the implementation of the Convention, FICPI would always, within the limits of its modest resources, be willing as an observer delegation to be of service to those responsible for setting up the European Patent Organisation.

41. The UNION delegation added its thanks to the organisers for this Conference and expressed its pleasure at its outcome. As an Organisation representing European patent agents both in private practice and in company practice, it assured the Interim Committee and the eventual European Patent Office that it would do everything possible to assist the successful implementation of the European patent.

### ***Third report of the Credentials Committee***

42. The Plenary approved the third report submitted by the Credentials Committee, as set out in M/162/K.

### ***Inaugural meeting of the Interim Committee***

43. The German delegation announced that the inaugural meeting of the Interim Committee would be held in Munich on 15 and 16 January 1974, beginning at 10.00.

### ***Final address by the President of the Conference***

44. The President of the Conference gave the following address:

"Your Excellencies, Ladies and Gentlemen,

When, not quite four weeks ago, I had the honour to welcome you to Munich as participants in the Diplomatic Conference, I saw fit to refer to the unmistakable spirit of co-operation which had marked the long preparations for this Diplomatic Conference and had overcome all the difficulties and obstacles. On that occasion I expressed the wish that the same spirit of international co-operation would inspire the final stages of the work relating to the European patent.

Today I am very glad to confirm that this wish and hope have been fulfilled beyond all our expectations. Your determination to establish definitively at this Conference a body of European patent law and a European Patent Organisation comprising a European Patent Office has surmounted all the difficulties which faced you. You may, therefore, feel proud today that, in spite of all difficulties, dangers and hazards, you have achieved in the best possible way an objective which twenty years ago seemed scarcely more than a dream.

Moreover, the work of this Diplomatic Conference at Munich during the last four weeks has not been easy. As you all know, there have been numerous differences of opinion, certainly more than we had expected, bound as we were to be optimistic, at the beginning of the Conference. But this is not surprising and is really to the credit of this Conference. More than twenty States with different legal traditions and economic structures have at this Conference striven to reach common solutions, not to mention the numerous organisations represented at the Conference, with their frequently difficult conflict of interests. It is only natural to expect that such a Conference would not agree *a priori* on all the issues discussed. Indeed, it is to the credit of the Conference that it did not attempt to over-simplify the task of reconciling the various opinions expressed but discussed each difference of opinion openly and fairly and did not take refuge in easy compromises. Finally, the task of this Conference was to establish a body of patent law which would determine, in the long term, the manner in which protection would be provided in the coming decades for inventions not only in Europe but also — by reason of the external influence of the European patent — in other parts of the world. In view of this great responsibility of the Conference for the future development of a field of law that is so important for the industries and inventors of all the participant States, it is perfectly understandable that very often individual sentences, phrases and words were the subject of argument and debate. Coming generations will be grateful to you that you have not complacently accepted the universal compliments paid you before completion of your work, but have once more critically and scientifically scrutinised in detail the work of the past decades, which had been largely your own. Your critical evaluation has been progressive: it has been informed by new ideas and proposals, so that today we can sign a forward-looking Convention which, I am fully convinced, will



easily bear critical examination by those parts of the public concerned and by our countries' Parliaments.

Of course all this was only possible through a series of compromises. Since it was in the interest of all participants that as many European States as possible should adopt the Convention, a middle course often had to be taken between diverging opinions. It was therefore inevitable that the States and organisations represented here would in certain instances have preferred other solutions to those finally adopted, often only after hard discussions, in this Conference. If we support international co-operation and are seriously prepared to reject national interests for the sake of greater union, we cannot expect to have our particular wishes fully adopted in every instance since they will often conflict with those of our partners. An international convention without compromises is quite simply impossible.

I am all the more impressed that none of the necessary compromises has taken away from the negotiations the original drive to achieve really European solutions. The progressive aspect which was contained in the Convention from the beginning has not been impaired. In particular, future development has not been impeded by only half-solved problems. The great aim to create a uniform patent law for Europe has indeed been achieved by this Convention.

When opening the Conference I spoke of a happy hour for us all. Today at the close of the Conference this remark is justified to an even greater extent. Today we are taking a decisive step forward in the field of the protection of industrial property, the step from the national patent to the European patent. I am certain that you are experiencing this moment with the feeling of relief and satisfaction which everybody experiences when he has finally completed the work of many years and knows that it is secure. This feeling of pleasure and satisfaction will be a sufficient reward for many of you for the efforts made during the past four weeks and the preceding long years of hard work. I sincerely hope that you will still remember this great work with the same satisfaction and confidence and the continuing knowledge of having achieved something worthwhile in the future, when it comes to fruition and takes on a concrete form, when a Community of European civil servants sets up the European patent authority and when the first European patents are granted. It is my duty as President of this Conference to thank you for your hard and selfless work both here and in the "altogether" 45 intensive weeks of work of previous years. I know that the efforts which were demanded of you often approached the limits of your physical endurance and involved sacrifices on the part of many of you including forgoing here at the Conference many of the nice things which we wanted to offer you here in the framework of the Conference programme in this charming city of Munich and its pleasant surroundings. I am convinced that I also speak on behalf of all the public circles concerned when I thank you for what you have achieved for future European patent law and consequently for an important part of a living, forward-looking Europe. At the same time we should remember that this achievement has not been brought about by us alone. We, the ones who have completed it, are indebted to a large number of people who prepared the way towards the European patent. Many of them are no longer with us; their ideas and their endeavours will live on in this work.

My expressions of gratitude to this Conference would be incomplete if they did not include all those who have contributed to its preparation and organisation. Without their participation it would not have been possible to conclude this Conference today. I am thinking especially of our interpreters, the ladies and gentlemen in the glass boxes who make it at all possible for us to understand one another. I know how trying the work of a conference interpreter is and how important the

quality of the interpretation is for our technical discussions. I am sure that I speak on behalf of all the members of the Conference when I say that we have had the extraordinarily good fortune during this Conference of being able to rely on the co-operation and help of interpreters who have dealt expertly with this awesome specialised sector and the numerous complicated technical terms it entails.

I would also thank the translators and secretaries who have again and again worked long into the night to maintain the pace of this Conference. Thanks are also due to all others concerned who, in their various ways, have made it possible for this Conference to run smoothly and without interruption, and last but not least to our graceful hostesses whose friendliness and charm have guided us through the labyrinths of this building.

The institutions of the Federal Republic of Germany, especially the German Patent Office, which has made an outstanding contribution to this Conference, could not have prepared and conducted this Conference unaided. We have been ably assisted by the Free State of Bavaria and the State capital of Munich, while numerous organisations in the private sector have helped to make our extra-mural activities possible. Their assistance has not been negligible in contributing to the success of this Conference and my thanks go to them too now that it is drawing to a close.

I hope that Munich has confirmed its reputation as a cosmopolitan and hospitable city and has convinced all those taking part in the Conference that it will provide a good home for the European Patent Office. If this assumption is correct, I should also like to thank the citizens of Munich.

A striking feature of this Diplomatic Conference has been the enormous amount of work involved. It has also been instrumental in enabling a large number of patent experts from government departments, private industry and the liberal professions to meet, work together and get to understand each other over a period of almost four weeks. At the opening of the second session of the Plenary of the Conference yesterday I noted with great pleasure the friendly and intimate relationship which had been established between the participants in the Conference. This relationship, Ladies and Gentlemen, is a further success of this Conference and promises well for the smooth build-up of the European patent system, a difficult task which will require a great deal of goodwill on the part of all those concerned.

Of course some delegations from the States represented here will not be in a position to sign the Convention immediately. This is partly due to the constitutional situation in their countries but also partly due to the fact that some delegations consider that they should subject the Convention to a detailed general assessment at home in the light of the special positions of their respective countries and perhaps also with regard to certain of their wishes which have remained unfulfilled. The positions of these delegations deserve understanding on our part. It must not be forgotten that it is indeed an extraordinary, exceptional, not to say a sensational achievement that 20 States, starting from completely different initial positions — and against the background of relatively slow development in European law in general — should proceed, in such an economically important specialist field as that of patent law, resolutely and practically in a single stroke to take a step forward towards the next century. I am convinced that the Convention as a whole, and particularly in the compromise solutions which it contains, is so clearly characterised by a truly European spirit that it will only be a question of time before all the States represented at this Conference, and perhaps other European countries as well, will be able to take their part in this magnificent project which

looks to the Europe of the future. In this respect also I believe that we can face future developments with confidence. Even now we may note with satisfaction that European patent law is well on the way to setting the pace for co-operation in Europe. Of course we should at the same time not forget the great responsibility and commitment that this implies for us.

The 1973 Munich Diplomatic Conference is now drawing to its close. It has been a great, interesting and, with its accent on European co-operation, eminently political conference. Both on your behalf and on ours I hope that it will survive the test of time in the context of the history of the protection of industrial property and the history of Europe.

I would now like to wish you a safe journey home. I hope that you will always remember this Conference with pleasure in the knowledge that, in addition to the very important work in which you have been involved, you have also experienced pleasant moments of human contact irrespective of boundaries and frontiers.

Ladies and Gentlemen, thank you."

### ***Telegram from the President in Office of the Council of the European Communities***

45. The Secretary-General of the Conference read out the following telegram from the President in Office of the Council of the European Communities:

"In my capacity as President in Office of the Council of the European Communities, I would express my sincere gratitude to the Government of the Federal Republic of Germany for the excellent way in which it organised the Munich Diplomatic Conference on the European Patent. I would especially like to congratulate the Minister of Justice, Mr. Gerhard Jahn, whose skilful chairmanship enabled the Conference to reach the successful conclusion which you are celebrating today. I would also like in particular to thank Dr. Haertel who was responsible for the preparations for the Inter-Governmental Conference and whose skill and expertise helped to ensure the success of the Conference which has resulted in the Convention which you are signing today. Finally, I would like to stress the particular importance of the agreements being concluded today which constitute the necessary basis for the Second Convention to be concluded next spring.

Nørgaard, President of the Council"

46. On behalf of the Conference, the Head of the French delegation addressed the following words of thanks to the President of the Conference:

"Mr. President, I have asked leave to speak to make up for an omission, or rather an injustice, in your most interesting speech. Can one deny that it is extraordinary for a Minister of Justice to commit an injustice? This injustice concerns the foremost figure at this Diplomatic Conference, namely its President, Mr. Gerhard Jahn, Minister of Justice of the Federal Republic of Germany.

The Federal Republic of Germany paid this Diplomatic Conference a signal honour by choosing you to represent it and to chair this Conference. Yet I wish to thank you above all for the personal commitment you have shown. We already knew that you were a lawyer and in view of this thought that you would understand our essentially legal problems. We also already knew of your eminent reputation as a politician. In the event, however, we first discovered a President who, from the very beginning at our first meeting, was calm, smiling, authoritative, but also flexible, and then, on various subsequent occasions, we discovered your other qualities. I have only one regret, Mr. President, and that is that the Conference should end so soon because every day we have discovered a new aspect of your personality. You seem to have become integrated into that close circle of trusting friendship which is one of the most striking features of the ties we have established during all these years of work and collaboration.

Mr. President, while naturally being very satisfied with the results of this Conference, we also feel that, over and above technical considerations, there is something else we should like to say to you. I am prompted to broach this matter by a passing reference you made in your speech yesterday at the closing dinner of the Diplomatic Conference. For people of my generation, in particular, the words "Munich Conference" have always conjured up one of the darkest hours of our history. It is symbolic that we should now also describe as a "Munich Conference" one which has given birth to a work of progress and we are grateful to you for showing us the peaceable face of Germany, which has bravely overcome its past without trying to forget it, and which is now in the forefront of the architects of this peaceable Europe we desire to bequeath to our children."

47. The President closed the Conference with a reminder that the signing ceremony would take place at 13.00.



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## DELEGATIONS OBSERVATEURS

Organisations non gouvernementales

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VEREINIGUNG  
FÜR  
GEWERBLICHEN SCHUTZ

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INTERNATIONAL  
ASSOCIATION  
FOR THE  
PROTECTION OF  
INDUSTRIAL PROPERTY

—

ASSOCIATION  
INTERNATIONALE  
POUR LA  
PROTECTION DE LA  
PROPRIÉTÉ INDUSTRIELLE

(AIPPI)

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*Head of Delegation*  
*Chef de délégation*

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— INTERNATIONAL  
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INDUSTRIEVERBÄNDE**

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**CONSEIL DES  
FEDERATIONS  
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**STÄNDIGE KONFERENZ  
DER INDUSTRIE- UND  
HANDELSKAMMERN DER  
EUROPÄISCHEN  
WIRTSCHAFTS-  
GEMEINSCHAFT**

— **STANDING CONFERENCE  
OF CHAMBERS OF  
COMMERCE AND  
INDUSTRY OF THE  
EUROPEAN ECONOMIC  
COMMUNITY** —

**CONFERENCE  
PERMANENTE DES  
CHAMBRES DE  
COMMERCE ET  
D'INDUSTRIE DE LA  
COMMUNAUTE  
ECONOMIQUE  
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**ASSOCIATION EUROPEENNE POUR  
L'ADMINISTRATION DE LA  
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**EUROPEAN INDUSTRIAL RESEARCH  
MANAGEMENT ASSOCIATION**

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**ASSOCIATION EUROPEENNE POUR  
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RECHERCHE INDUSTRIELLE**

(EIRMA)

(Fortsetzung)  
(continued)  
(suite)

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**EUROPÄISCHER VERBAND  
DER INDUSTRIE-PATENT-  
INGENIEURE**

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**EUROPEAN FEDERATION  
OF AGENTS OF INDUSTRY  
IN INDUSTRIAL PROPERTY**

—

**FEDERATION  
EUROPEENNE DES  
MANDATAIRES  
DE L'INDUSTRIE  
EN PROPRIÉTÉ  
INDUSTRIELLE**

(FEMIP)

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EUROPÄISCHER VERBAND  
DER INDUSTRIE-PATENT-  
INGENIEURE

— EUROPEAN FEDERATION  
OF AGENTS OF INDUSTRY  
IN INDUSTRIAL PROPERTY —

FEDERATION  
EUROPEENNE DES  
MANDATAIRES  
DE L'INDUSTRIE  
EN PROPRIÉTÉ  
INDUSTRIELLE

(FEMIP)

(Fortsetzung)  
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UNION OF EUROPEAN  
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UNION DES CONSEILS  
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