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Orig.: German

Munich, 27.06.2000

SUBJECT: Conference of ministers of the contracting states

DRAWN UP BY: President of the European Patent Office

ADDRESSEES: 1. Committee on Patent Law (for opinion)
2. Administrative Council (for decision)

SUMMARY

In accordance with the outcome of the discussions on modernising EPO decision-making held by the heads of delegation at their 89th meeting in Limassol, the present document looks at the issues associated with establishing a conference of the ministers of the contracting states responsible for intellectual property matters. The draft protocol/resolution contained in this document is intended to be of assistance to the Committee on Patent Law in its discussions and to help the Administrative Council to come to a decision on the matter.

1. At their 89th meeting, held on 5 June 2000, the heads of delegation discussed the mandate to modernise the EPO's decision-making processes issued to the Organisation by the Paris intergovernmental conference held on 24 and 25 June 1999, and concluded that they were in favour of establishing as a permanent body a conference of the ministers of the contracting states responsible for intellectual property.
2. According to Article 4(2) EPC, the organs of the Organisation are
 - (a) the European Patent Office, and
 - (b) the Administrative Council (including any committees or working parties set up by it).

The heads of delegation agreed that the establishment of a conference of ministers should not affect the powers of these bodies. In other words, it could not take decisions which had a legally binding effect on the Organisation. Instead, its functions and significance would be of a purely political nature. Firstly, it could set the Organisation objectives, either by issuing mandates or in some other suitable way, which the Organisation's bodies would endeavour to meet by exercising their respective powers. Secondly, it could initiate co-operation between the contracting states in matters which extend beyond the scope of the EPC. The model for both these forms of political agenda-setting is the intergovernmental conference convened by France in June 1999, which, in addition to drawing up the mandates issued to the Organisation, laid the foundations for the conclusion of agreements between the contracting states on translation requirements and litigation.

3. The importance and effectiveness of a ministerial conference would depend on whether a sufficient majority of the governments of the contracting states was convinced of the need for political action and whether there was a reasonable prospect of this need being met through consensus at government level. There would therefore be little point in deciding to have meetings at fixed intervals (eg every two years) or in laying down other details affecting procedures or the decision-making process (eg the majority required). A further issue to be resolved is whether the agreement of all the contracting states would be required in order to convene a conference, or whether the participation of a three-quarters majority would be enough. In view of the provisions of Article 35 EPC on the voting rules for the Organisation's Administrative Council, a ministerial conference attended by fewer than three-quarters of the contracting states would doubtless be without effect.

4. A further issue is the instrument of international law to be used to establish the ministerial conference. **One option** would be to incorporate an appropriate provision into the Convention itself. A suitable location might be Article 4 EPC, which lays down the organs (paragraph 2) and the task (paragraph 3) of the Organisation. A new paragraph 4 would make it clear that the ministerial conference was not one of the organs of the Organisation, all of which are listed in paragraph 2, but that it operated in the interest of carrying out the tasks of the Organisation. **Article 4(4) EPC** could thus read as follows:

"At the invitation of the government of a contracting state, which must be accepted by the other contracting states, a conference of the ministers of the contracting states responsible for intellectual property (ministerial conference) shall meet to discuss fundamental issues pertaining to the European patent system."

The condition that the invitation must be accepted by all the contracting states is in line with the principle whereby the contracting states may only act collectively within the scope of the Convention.

5. A **second option** would be to adopt a protocol which would be as binding in terms of international law as the (revised) Convention, but would differ from the protocols listed in Article 164(1) EPC in not being an integral part of it. Separating the ministerial conference from the Convention would presumably enable the convening of meetings to be made dependent on the participation of three-quarters of the governments of the contracting states, rather than of all the contracting states. Depending on the extent of the legally binding effect desired by the contracting states, the adoption of a resolution by the Diplomatic Conference for the revision of the EPC could be considered.

Taking the 1999 intergovernmental conference convened by France as a point of reference, the following proposal could provide for the politically effective and flexible institution needed:

**"[Protocol] [Resolution]
on the establishment of
[a ministerial] [an intergovernmental] conference
of the contracting states to the
European Patent Convention**

- (1) A conference of the ministers of the contracting states to the European Patent Convention responsible for intellectual property (ministerial conference) may, by issuing mandates or in some other suitable way, set the European Patent Organisation objectives or establish co-operation between contracting states in patent matters extending beyond the scope of the European Patent Convention.
 - (2) The organs of the European Patent Organisation shall strive to achieve the objectives which the Organisation is set under paragraph (1) in accordance with the powers invested in them by the European Patent Convention.
 - (3) The conference of ministers shall meet at the invitation of the government of a contracting state, provided that the invitation is accepted [by the governments of the other contracting states] [by a majority of three-quarters of the governments of the contracting states, including the contracting state issuing the invitation]."
6. In view of the stage reached in the discussions, the above proposals are not being submitted for decision. However, they may serve as a starting point for the Committee on Patent Law's deliberations and help the Administrative Council to come to a decision.
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