

WPL/2/03

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SUBJECT: Draft Agreement on the establishment of a European patent litigation system

DRAWN UP BY: European Patent Office acting on behalf of the sub-group of the Working Party on Litigation

ADDRESSEES: Working Party on Litigation (for opinion)

SUMMARY

The present document contains the Draft Agreement on the establishment of a European patent litigation system (WPL/2/03). The Draft has been revised in the light of the amendments agreed at the 4th meeting of the Working Party on Litigation in December 2002 and the 7th meeting of the sub-group of the Working Party on Litigation in May 2003.

Amendments made to WPL/3/02 at the above-mentioned meetings are indicated in the text by means of grey hatching and strikeout.

SUMMARY OF CONTENTS OF THE DRAFT EUROPEAN PATENT LITIGATION AGREEMENT

Preamble

Sets out the endeavours of the Contracting States and the goals of the Agreement: improve the enforcement of European patents, enhance legal certainty and promote the uniform application and interpretation of European patent law.

Refers to the legal framework which surrounds the Agreement and from which many provisions are drawn: the EPC 2000, the TRIPs Agreement and Community law (in particular, the Agreement relating to Community patents of 1989, the Brussels and Lugano Conventions and Regulation 44/2001).

PART I GENERAL AND INSTITUTIONAL PROVISIONS **Chapter I General provisions (Arts. 1 to 9)**

Set up a new international organisation, the European Patent Judiciary (EPJ), to settle litigation concerning the infringement and validity of European patents effective in the Contracting States which commit themselves to this new integrated judicial system.

List the organs of the EPJ: the European Patent Court and the Administrative Committee.

Set up the Facultative Advisory Council (FAC).

Lay down the autonomy, legal status, seat, privileges and immunities and liability of the EPJ, as well as the judicial independence of the European Patent Court.

Chapter II European Patent Court (Arts. 10 to 12)

Comprises the Court of First Instance, the Court of Appeal and the Registry.

The Central Division of the Court of First Instance, the Court of Appeal and the Registry shall be set up at the seat of the EPJ.

A number of Regional Divisions may be set up in the Contracting States by the Administrative Committee, and a sub-registry shall be set up at the location of any Regional Division.

Chapter III Administrative Committee (Arts. 13 to 19)

Composed of representatives of the Contracting States.

Supervises the European Patent Court, without prejudice to the Court's judicial independence.

Sets up Regional Divisions upon request, appoints judges and the Registrar and exercises legislative and budgetary powers.

PART II FINANCIAL PROVISIONS (Arts. 20 to 31)

Based on the assumption that the EPJ will be financed by its own resources (court fees).

Contributions by the Contracting States are foreseen if the EPJ is unable to balance its budget with its own resources (distribution key: ratio of litigation activity or of number of European patents effective in the Contracting States).

Provisions on advances, budget, authorisation for expenditure, accounting period, auditing of accounts.

PART III SUBSTANTIVE PATENT LAW, JURISDICTION AND EFFECT OF DECISIONS

Chapter I Substantive patent law (Arts. 32 to 37)

Definitions of infringing acts and indirect infringement, rules governing limitations on the effects of European patents and reversal of the burden of proof when the subject-matter of the patent is a process for obtaining a new product, provisions concerning prior use.

Chapter II Jurisdiction and effect of decisions (Arts. 38 to 44)

The European Patent Court will deal with European patents effective in one or more of the Contracting States.

It will have jurisdiction in respect of actions for actual or threatened infringement or for a declaration of non-infringement, actions or counterclaims for revocation, and actions for damages or compensation derived from the provisional protection conferred by a published European patent application.

After a 7-year transitional period, the Court will have exclusive jurisdiction to try actions for revocation and actions for infringement where the alleged infringer is domiciled in a Contracting State or where all parties are in agreement; moreover, it will have non exclusive jurisdiction to try actions for infringement where the alleged infringement occurred in a Contracting State even though the alleged infringer is not domiciled in a Contracting State.

Rules of Procedure will regulate the allocation of cases to the Central or a Regional Division of the Court of First Instance, taking account of the Brussels and Lugano Conventions as well as Regulation 44/2001: ordinary actions for revocation shall be brought before the Central Division; it will be possible to bring actions for infringement before either the Division of the country where the defendant is domiciled or the Division of the country where the alleged infringement occurred.

The application of Community law will be guaranteed by the Court of Justice of the European Communities which on request by the European Patent Court will issue preliminary rulings binding for the latter in so far as its decision takes effect in a Member State of the European Union.

The Contracting States will designate the European Patent Court as their national court for cases concerning the infringement and validity of European patents, so that decisions of the Court will be directly enforceable in all Contracting States without any form of recognition or exequatur.

Chapter III Jurisdiction of national courts (Arts. 45 to 47)

National courts will retain jurisdiction to order provisional and protective measures provided for by their national law and to order provisional seizure of goods as security for any damages, compensation, costs or any other payment resulting from proceedings before the European Patent Court.

PART IV PROCEDURE BEFORE THE EUROPEAN PATENT COURT

Includes a chapter laying down basic procedural principles and two chapters on the powers of the European Patent Court and on provisional and protective measures.

Chapter I General Provisions (Arts. 48 to 59)

Lay down basic procedural provisions concerning case management, publicity, right to be heard, admissibility as a party, oral proceedings, party disposition.

Include a list of means of giving and obtaining evidence and rules on the onus of proof, production of evidence, witnesses, court fees and apportionment of costs (loser pays costs, apportionment when equitable).

Rules of Procedure shall lay down the details of proceedings before the European Patent Court.

Chapter II Powers of the European Patent Court (Arts. 60 to 69)

The Court's power to order measures, securities, sanctions and fines as laid down in the Agreement is provided for in a general provision.

Specific powers are defined: the European Patent Court may order

- astreintes, where a party does not comply with an order of the Court
- injunctions, such as orders to desist from infringing acts
- forfeiture, meaning the destruction or disposal of infringing goods, materials or devices
- damages, which may not be punitive but must be adequate to compensate for the injury suffered and restore the injured party to the position he would have been in if no infringement had taken place.

Chapter III Provisional and protective measures (Arts. 70 to 75)

Finally, the European Patent Court shall have the power to order provisional and protective orders such as inspection of premises and the preservation of evidence ("saisie contrefaçon"), freezing orders and sequestration of allegedly infringing goods.

PART V PROCEDURAL REMEDIES

Two procedural remedies will be available before the European Patent Court: from decisions of the Court of First Instance an appeal shall lie to the Court of Appeal; as an extraordinary remedy any party may file a petition for review.

Chapter I Appeal (Arts. 76 to 81)

The appeal is the ordinary procedural remedy with suspensive effect.

As a general rule, only final decisions shall be appealable.

The appeal may only be based on the grounds that the facts alleged by the parties were not correctly established, or that, based on the established facts, the law was not correctly applied.

New facts or evidence may only be taken into consideration by the Court of Appeal in exceptional cases.

Chapter II Review of decision (Arts. 82 and 83)

As a limited judicial review, any party which is adversely affected by a decision against which an appeal is not or no longer possible may file a petition of review by the Court of Appeal.

A petition may only be filed on the grounds that a criminal act may have had an impact on the decision, or that a fundamental procedural defect has occurred in proceedings before the Court of Appeal.

PART Va FACULTATIVE ADVISORY COUNCIL (Arts. 83a to 83f)

The Court of Appeal shall perform the functions of the Facultative Advisory Council (FAC), i.e. deliver non-binding opinions on any point of law concerning European or harmonised national patent law, at the request of a national court or quasi-judicial authority.

Special provisions deal with the law applicable to the FAC and the procedure regarding the delivery of opinions. A reservation system enables the Contracting States to be bound only by Part Va, and thus to participate in FAC-related matters only (financing, voting rights in the Administrative Committee).

PART VI TRANSITIONAL AND FINAL PROVISIONS (Arts. 85 to 99)

Clarify the application of the Agreement to effective European patents and pending patent applications.

Transitional period of seven years, where national courts of the Contracting States will have a parallel jurisdiction to the European Patent Court.

Provisions on signature, ratification, entry into force and revision.

The following abbreviations are used in the left margins:

Brussels Convention	Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1968
COPAC Statute	Protocol on the Statute of the Common Appeal Court
CPC 1989	Community Patent Convention, as amended by the Agreement relating to Community patents, 1989
EPC	European Patent Convention as revised on 29 November 2000 (new text of the EPC, Special edition No 4 of the OJ EPO 2001)
Lugano Convention	Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 1988
ProtLit 1989	Protocol on the settlement of litigation concerning the infringement and validity of Community patents
Regulation 44/2001	Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
RoP	Rules of Procedure of the European Patent Court (to be adopted by the Administrative Committee)
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994

**DRAFT AGREEMENT ON THE ESTABLISHMENT OF A EUROPEAN PATENT
LITIGATION SYSTEM**

C O N T E N T S

Subject	Page
Preamble	1
PART I GENERAL AND INSTITUTIONAL PROVISIONS	3
CHAPTER I GENERAL PROVISIONS	3
Article 1 Definitions	3
Article 2 System of law for litigation concerning European patents	3
Article 3 European Patent Judiciary	3
Article 4 Facultative Advisory Council	4
Article 5 Judicial independence	4
Article 6 Legal status	4
Article 7 Seat	5
Article 8 Privileges and immunities	5
Article 9 Liability	5
CHAPTER II EUROPEAN PATENT COURT	7
Article 10 Court of First Instance	7
Article 11 Court of Appeal	8
Article 12 Registry	9
CHAPTER III ADMINISTRATIVE COMMITTEE	8
Article 13 Composition	8
Article 14 Chair	8
Article 15 Meetings	9
Article 16 Languages	9
Article 17 Competence of the Administrative Committee in certain cases	9
Article 18 Voting	10
PART II FINANCIAL PROVISIONS	12
Article 19 Budgetary funding	12
Article 20 Own resources of the European Patent Judiciary	12

Subject	Page
Article 21	Level of fees, financial contributions from Contracting States 12
Article 21a	Financing of Regional Divisions 13
Article 22	Advances 15
Article 23	Budget 15
Article 24	Authorisation for expenditure 16
Article 25	Appropriations for unforeseeable expenditure 16
Article 26	Accounting period 16
Article 27	Preparation and adoption of the budget 16
Article 28	Provisional budget 17
Article 29	Budget implementation 17
Article 30	Auditing of accounts 18
Article 31	Financial Regulations 18
PART III	SUBSTANTIVE PATENT LAW, JURISDICTION AND EFFECT OF DECISIONS 20
CHAPTER I	SUBSTANTIVE PATENT LAW 20
Article 32	Substantive patent law to be applied by the European Patent Court 20
Article 33	Infringing acts 20
Article 34	Indirect infringement 21
Article 35	Limitations to the effects of the European patent 21
Article 36	Reversal of burden of proof 22
Article 37	Prior use 23
CHAPTER II	JURISDICTION OF THE EUROPEAN PATENT COURT AND EFFECT OF DECISIONS 23
Article 38	Application of the Brussels and Lugano Conventions 23
Article 39	Application of Regulation 44/2001 24
Article 40	Preliminary rulings of the Court of Justice of the European Communities 24
Article 41	Jurisdiction in respect of infringement and validity 25
Article 42	Decisions on validity 26
Article 43	Effect of decisions 27
Article 44	Jurisdiction of the Court of Appeal 28

Subject	Page
CHAPTER III JURISDICTION OF NATIONAL COURTS	29
Article 45 Provisional and protective measures	29
Article 46 Provisional seizure	29
PART IV PROCEDURE BEFORE THE EUROPEAN PATENT COURT	31
CHAPTER I GENERAL PROVISIONS	31
Article 48 Case management	31
Article 49 Public	31
Article 50 Right to be heard	31
Article 51 Parties	31
Article 51a Oral proceedings	32
Article 52 Basis for decisions	32
Article 53 Evidence	32
Article 54 Production of evidence by other or third parties	33
Article 55 Witnesses	34
Article 56 Statements by parties, witnesses and experts	34
Article 57 Court fees	34
Article 58 Costs	35
Article 59 Rules of Procedure	35
CHAPTER II POWERS OF THE EUROPEAN PATENT COURT	35
Article 60 General	35
Article 61 Astreinte	35
Article 62 Injunction	36
Article 63 Forfeiture	36
Article 64 Damages	37
Article 65 Kinds of damages	38
Article 66 Indemnification of a party	38
Article 67 Limitation of right to claim damages	39
Article 68 Right of information	39
Article 69 Power to replace an act of a party by a decision of the European Patent Court	39

Subject	Page
CHAPTER III PROVISIONAL AND PROTECTIVE MEASURES	40
Article 70 General	40
Article 71 Preliminary injunctions	40
Article 72 Orders for inspection of property	41
Article 73 Freezing orders	41
Article 74 Sequestration	42
Article 75 Other protective orders	42
PART V PROCEDURAL REMEDIES	43
CHAPTER I APPEAL	43
Article 76 Appeal	43
Article 77 Persons entitled to appeal	43
Article 78 Time limit and form	44
Article 79 Grounds for appeal	44
Article 80 New facts or evidence	44
Article 81 Effect	44
CHAPTER II REVIEW OF DECISIONS	45
Article 82 Petition for review	45
Article 83 Procedure and decision on review	46
PART Va FACULTATIVE ADVISORY COUNCIL	47
Article 83a Court of Appeal functioning as Facultative Advisory Council	47
Article 83b Opinions delivered by the Facultative Advisory Council	47
Article 83c Procedure regarding the delivery of opinions	47
Article 83d Reservations	49
Article 83e Financing	49
Article 83f Voting rights in the Administrative Committee of Contracting States which have entered a reservation	51
PART VI TRANSITIONAL AND FINAL PROVISIONS	52
CHAPTER I TRANSITIONAL PROVISIONS	52
Article 84 Scope	52
Article 85 Jurisdiction of national courts during a transitional period	52
Article 86 Evaluation	53

Subject	Page
CHAPTER II FINAL PROVISIONS	53
Article 87 Texts supplementing the Agreement	53
Article 88 Signature, ratification	53
Article 89 Accession	54
Article 89a Reservations	54
Article 90 Entry into force	54
Article 91 Initial contributions	55
Article 92 Duration of the Agreement	56
Article 93 Revision	56
Article 94 Denunciation	57
Article 95 Preservation of acquired rights	57
Article 96 Financial rights and obligations of a former Contracting State	57
Article 97 Languages of the Agreement	57
Article 98 Disputes between Contracting States	57
Article 99 Transmission and notifications	58

DRAFT AGREEMENT ON THE ESTABLISHMENT OF A EUROPEAN PATENT LITIGATION SYSTEM

Preamble

THE CONTRACTING STATES,

Preamble EPC 2000, Recital 1

CONSIDERING that co-operation among the countries of Europe in the field of patents renders a significant contribution to the legal and economic integration of Europe,

Mandate of Paris Inter-governmental Conference 1999

WISHING to promote the uniform application and interpretation of European patent law, to improve the enforcement of European patents and to enhance legal certainty by setting up a European Patent Judiciary to settle litigation concerning the infringement and validity of European patents effective in one or more of the Contracting States,

WISHING additionally to promote the uniform application and interpretation of European patent law as well as of harmonised national patent law by enabling the European Patent Judiciary to deliver non-binding opinions on any point of law concerning European or harmonised national patent law,

Preamble EPC, Recital 3
Preamble CPC 1989, Recital 6

DESIRING, for this purpose, to conclude an Agreement on the Establishment of a European Patent Litigation System which constitutes a special agreement within the meaning of Article 149a of the European Patent Convention as revised on 29 November 2000, and within the meaning of Article 19 of the Paris Convention for the Protection of Industrial Property as revised on 14 July 1967,

Preamble CPC 1989,
Recital 11

CONSIDERING that it is essential for this Agreement not to conflict with the Treaty establishing the European Economic Community and that the Court of Justice of the European Communities must be able to ensure the uniformity of the Community legal order,

CONSIDERING that it is also essential for this Agreement to take into account the Agreement on Trade-related Aspects of Intellectual Property Rights, annexed to the Agreement Establishing the World Trade Organization of 15 April 1994,

MINDFUL that the European Patent Judiciary should have an international character and represent equitably the different legal cultures of Europe,

HAVE AGREED AS FOLLOWS

PART I GENERAL AND INSTITUTIONAL PROVISIONS

CHAPTER I GENERAL PROVISIONS

Article 1 Definitions

- (a) "Contracting State" means a State party to this Agreement.
- (b) "Statute" means the Statute of the European Patent Court.
- (c) "European Patent Convention" means the Convention on the Grant of European Patents of 5 October 1973, as last revised on 29 November 2000.
- (d) "European patent" means a patent granted under the European Patent Convention.
- (e) "Court of First Instance" means the European Patent Court of First Instance.
- (f) "Court of Appeal" means the European Patent Court of Appeal.
- (g) "European Patent Court" means the Court of First Instance, the Court of Appeal and the Registry.
- (h) "Facultative Advisory Council" means the entity delivering non-binding opinions on points of law concerning European or harmonised national patent law.

Article 2 System of law for litigation concerning European patents

A system of law, common to the Contracting States, for the settlement of litigation concerning the infringement and validity of European patents is hereby established.

Article 3 European Patent Judiciary

(1) A European Patent Judiciary is hereby set up to settle litigation concerning the infringement and validity of European patents effective in one or more of the Contracting States. The European Patent Judiciary shall have judicial, administrative and financial autonomy.

(2) The organs of the European Patent Judiciary shall be:

Sub-paragraph h added at the suggestion of the French delegation
DK: reservation against FAC opinions on points of harmonised national patent law

Title of ProtLit 1989

Art. 4(1) EPC

ProtLit 1989 Arts. 1(1) and 2(1)

(a) the European Patent Court, comprising the Court of First Instance, the Court of Appeal and a Registry

(b) the Administrative Committee.

(3) The European Patent Court shall perform the functions assigned to it by this Agreement.

(4) Subject to Article 5, the European Patent Court shall be supervised by the Administrative Committee.

Article 4 Facultative Advisory Council

Within the European Patent Judiciary, a Facultative Advisory Council shall be set up, functioning under the provisions of Part Va of this Agreement.

Article 5 Judicial independence

Art. 23(3) EPC; the Registrar is included because of his important functions in and for the judicial procedure

The European Patent Court, its judges and the Registrar shall enjoy judicial independence. In their decisions, the judges shall not be bound by any instructions and shall comply only with the provisions of this Agreement.

Article 6 Legal status

Art. 5(1) and (2) EPC

(1) The European Patent Judiciary shall have legal personality.

(2) In each of the Contracting States, the European Patent Judiciary shall enjoy the most extensive legal capacity accorded to legal persons under the national law of that State; it may in particular acquire or dispose of movable and immovable property and may be a party to legal proceedings.

Art. 5(3) EPC

(3) The European Patent Judiciary shall be represented by the President of the Court of Appeal.

ProtLit 1989 Art. 2(2)

Art. 8 EPC;
ProtLit 1989 Art. 4

See Art. 9(1) EPC 2000; Art. 39(1) Europol Agreement. Provision re-introduced following comments by delegations at WPL meeting on 3-5 December 2002

See Art. 9(2) EPC 2000, Brussels Convention Art. 5 No. 3, Art. 5 No. 3 EU-Regulation 44/2001

Although it is conceivable that the courts of the state in which the European Patent Judiciary has its seat will be exclusively

Article 7 Seat

(1) The European Patent Judiciary shall have its seat in ***.

(2) The Court of First Instance shall comprise Regional Divisions located in those Contracting States in which such Divisions are set up in accordance with the Statute.

(3) Any Contracting State shall designate at least one national court which, if the European Patent Court wishes to conduct parts of the proceedings in that State, shall provide the facilities necessary for that purpose.

Article 8 Privileges and immunities

The Protocol on Privileges and Immunities of the European Patent Judiciary, annexed to this Agreement, shall define the conditions under which the employees of the European Patent Judiciary and such other persons specified in that Protocol as take part in the work of the European Patent Judiciary, shall enjoy, in each Contracting State, the privileges and immunities necessary for the performance of their duties.

Article 9 Liability

(1) The contractual liability of the European Patent Judiciary shall be governed by the law applicable to the contract in question.

(2) In matters relating to tort, delict or quasi-delict the liability of the European Patent Judiciary in respect of any damage caused by it or its employees in the performance of their duties shall be governed by the law of *[state of seat of European Patent Judiciary]*. Where such damage is caused by a Regional Division, the members of a panel of this Regional Division or its employees, the law of the Contracting State in which this Regional Division is located shall apply.

competent to deal with claims for damages, sentence 2 of paragraph 2 further underlines the concept of regionalisation. Moreover the liability of the judges from abroad participating in cases before the Regional Division shall be governed by the law of the Contracting State in which the Regional Division is located.

The third sentence has been drafted in the light of § 839(2) German Civil Code (BGB) and the interpretation of this provision by the courts. Such provisions have traditionally been considered a safeguard for judicial independence; in modern legal literature they are regarded as a safeguard for the *res judicata* effect of judicial decisions.

Cf. Art. 9 (3) EPC 2000

If such damage occurs in connection with a judicial decision terminating proceedings before the European Patent Court, the European Patent Judiciary shall be liable only if this decision involved a criminal breach of duty and there is no legal remedy against it.

(3) The personal liability of the employees of the European Patent Court towards the European Patent Judiciary shall be laid down in their Service Regulations or conditions of employment.

CHAPTER II EUROPEAN PATENT COURT

Article 10 Court of First Instance

(1) The Court of First Instance shall comprise a Central Division set up at the seat of the European Patent Judiciary.

(2) The Administrative Committee shall have the power to set up or discontinue Regional Divisions of the Court of First Instance in accordance with the Statute.

Maximum 3 Regional Divisions
per Contracting State / group
of Contracting States (see
Draft Statute Arts. 19 and
20(1))

Article 11 Court of Appeal

The Court of Appeal shall be set up at the seat of the European Patent Judiciary.

Article 12 Registry

(1) The Registry shall be set up at the seat of the European Patent Judiciary. It shall be managed by the Registrar and perform the functions assigned to it by the Statute.

(2) A sub-registry shall be set up at the location of any Regional Division.

CHAPTER III ADMINISTRATIVE COMMITTEE

Article 13 Composition

The Administrative Committee shall be composed of the representatives and alternate representatives of the Contracting States. Each Contracting State shall be entitled to appoint one representative and one alternate representative.

Article 14 Chair

(1) The Administrative Committee shall elect a chairman and a deputy chairman from among the representatives and alternate representatives of the Contracting States. The deputy chairman shall replace the chairman ex officio if the latter is prevented from carrying out his duties.

(2) The chairman and deputy chairman shall hold office for three years. They may be re-elected.

Art. 26(1) EPC

Art. 27 EPC

Article 15 Meetings

- Art. 29(1) EPC (1) Meetings of the Administrative Committee shall be convened by its chairman.
- Art. 29(2) EPC (2) The members of the Executive Committee, as established under the Statute, or their substitutes, may take part in the deliberations of the Administrative Committee.
- (3) Representatives of any other Contracting State to the European Patent Convention and of States entitled to accede to that Convention shall, on reasoned request, be admitted as observers.
- Art. 30(3) EPC (4) The Administrative Committee may allow any intergovernmental and international non-governmental organisation to be represented by observers.
- Art. 29(3) EPC (5) The Administrative Committee shall meet at least once a year. It shall also meet on the initiative of its chairman or at the request of at least three Contracting States or of the Executive Committee.

Article 16 Languages

- Art. 31(1) EPC The languages used in the deliberations of the Administrative Committee shall be English, French and German.

Article 17 Competence of the Administrative Committee in certain cases

- Art. 33 EPC (1) The Administrative Committee shall be competent to amend:
- Letter (a): aiming at greater flexibility; see Art.18(2) (a) the provisions of the Statute
- (b) the time limits laid down in this Agreement or the Statute.

WPL: Some delegations expressed general reservations concerning Art. 17 and 18, especially in view of financial implications of the EPJ

Art. 34(1) EPC

Already laid down in Article 86, second sentence

(2) In conformity with this Agreement and the Statute, the Administrative Committee shall be competent to adopt or amend:

(a) the Rules of Procedure of the European Patent Court on a proposal from the Executive Committee, or from a Contracting State after hearing the Executive Committee

(b) its own Rules of Procedure

(c) the Financial Regulations

(d) the Service Regulations setting out the conditions of employment of judges and other staff of the European Patent Judiciary

(e) the Rules relating to Fees and the amounts of fees to be charged in proceedings before the European Patent Court.

(3) The Administrative Committee shall, in accordance with the Statute, appoint, re-appoint or remove from office, the judges and the Registrar of the European Patent Court.

(4) The Administrative Committee shall also perform any other duties assigned to it by this Agreement or the Statute.

Article 18 Voting

(1) The right to vote in the Administrative Committee shall be restricted to the Contracting States. Each Contracting State shall have one vote.

(2) A unanimous vote by the Contracting States represented and voting shall be required for the decisions which the Administrative Committee is empowered to take under Article 17, paragraph 1(a) and Article 86.

Art. 35 EPC

(3) A majority of three quarters of the votes of the Contracting States represented and voting shall be required for the decisions which the Administrative Committee is empowered to take under Article 17, paragraphs 1(b) and 2, Article 21, paragraph 2, Article 22, paragraph 1, Article 27, paragraph 2, Article 30, paragraph 4, and Article 91.

(4) Decisions other than those referred to in paragraphs 2 and 3 shall be taken by a simple majority of the Contracting States represented and voting.

(5) Abstentions shall not be considered as votes.

Art. 37(a) and (c) EPC

Second sentence based on suggestions by CH, DE, DK, MC, NL, SE.

Art. 38(a) EPC

It is envisaged that the Contracting States should contribute to the budget of the European Patent Court in order to keep fees at a fair level. Court fees shall not be prohibitive and shall not constitute a serious obstacle for litigation before the Court, thus the provision should leave some flexibility as regards the principle of 100% self-financing of the European Patent Judiciary.

Art. 40(2) EPC

PART II FINANCIAL PROVISIONS

Article 19 Budgetary funding

The budget of the European Patent Judiciary shall be financed from its own resources and, where necessary, from contributions made by the Contracting States. Regional Divisions shall be financed as laid down in Article 21a.

Article 20 Own resources of the European Patent Judiciary

The European Patent Judiciary's own resources shall consist of all its income from court fees and other sources.

Article 21 Level of fees, financial contributions from Contracting States

(1) The court fees charged by the European Patent Court shall be fixed at such a level as to ensure a balance between the parties' right to fair access to the European Patent Court and the principle that the European Patent Judiciary's own resources should cover its costs.

(2) If the European Patent Judiciary is unable to balance its budget out of its own resources, the Contracting States shall remit to it financial contributions whose level shall be determined by the Administrative Committee in accordance with the distribution key laid down in paragraphs 3 and 4.

The distribution key now proposed is based on three elements, following suggestions by CH, DE, FI, MC, SE:

- (a) number of European patents in force in a Contracting State (theoretical probability of patent litigation);
- (b) European patents in force in a Contracting State and the subject of litigation before the European Patent Court (actual patent litigation);
- (c) equal distribution of part of the costs.

$x = 40, y = 20$?

The distribution key should be stable for a specified period, but updated regularly.

First distribution key and initial contributions, see Article 91

Covering the cost of Regional Divisions centrally out of the European Patent Judiciary budget would mean that States with small Regional Divisions or none at all would also be indirectly financing other Contracting States' Regional Divisions through their contributions under Article 21(2). On the other hand, if States setting up a Regional Division were

(3) Each Contracting State shall contribute as follows to the amount needed to balance the budget of the European Patent Judiciary:

(a) For x per cent of this amount, the Contracting State shall pay a proportion determined by the ratio of the number of European patents in force in that State to the number of European patents in force in all the Contracting States.

(b) For x per cent of this amount, the Contracting State shall pay a proportion determined by the ratio of the number of European patents in force in that State and the subject of litigation before the European Patent Court to the number of all European patents which are the subject of litigation before the European Patent Court.

(c) y per cent of this amount shall be borne by the Contracting States in equal parts.

(4) The ratios referred to in paragraph 3(a) and (b) shall be re-calculated every [five] years after the entry into force of this Agreement on the basis of the sum of the figures for the last three years preceding the year in which the re-calculation is to be made.

Article 21a Financing of Regional Divisions

(1) A Regional Division shall be financed by the Contracting State which sets it up, and, subject to Article 21, paragraph 2, out of income from court fees.

prepared to bear the cost but then claim a reduction in their financial contributions, the other Contracting States would also participate indirectly in the financing of Regional Divisions. It is therefore proposed that a Contracting State setting up a Regional Division staffed and equipped in accordance with its own needs bear all the costs, which thus will have no impact on the European Patent Judiciary budget.

With regard to salaries, all judges at the European Patent Court should be treated equally, irrespective of the Contracting State in which they work. The salary scheme to be adopted by the Administrative Committee should take account of the fact that, at least in the initial phase, there might be only a small number of judges working full time, some working part time, and some dealing only with single cases. Expenses, in particular travelling expenses for judges, should be dealt with in the financial regulations. A Regional Division's support staff, in particular the registrars, must also be adequately qualified, for example in respect of language skills, and should therefore be appropriately paid.

(2) The judges in the Regional Divisions shall be paid in accordance with the salary scheme for judges at the European Patent Court adopted by the Administrative Committee.

As the Regional Division collects the court fees for the European Patent Court, an appropriate portion (z = 50?) of this European Patent Judiciary income should be used to finance the European Patent Judiciary's central institutions.

Art. 39(2) EPC 2000

Art. 41(1) EPC

Art. 42 EPC

(3) The European Patent Judiciary shall receive a proportion of the court fees collected by the Regional Division; the proportion, to be fixed by the Administrative Committee, shall not be less than z per cent. Each Contracting State shall communicate to the European Patent Judiciary such information as the Administrative Committee considers necessary to determine the amount of these payments.

Article 22 Advances

(1) Where appropriate, the Contracting States shall grant advances to the European Patent Judiciary on their contributions under Article 21, paragraph 2, the amount to be fixed by the Administrative Committee.

(2) Such advances shall be proportionate to the amounts due from the Contracting State for the accounting period in question.

Article 23 Budget

(1) The budget of the European Patent Judiciary shall be balanced. It shall be drawn up in accordance with the generally accepted accounting principles laid down in the Financial Regulations. If necessary, there may be amending or supplementary budgets.

(2) The budget shall be drawn up in the unit of account fixed in the Financial Regulations.

Article 24 Authorisation for expenditure

Art. 43 EPC

(1) The expenditure entered in the budget shall be authorised for the duration of one accounting period unless the Financial Regulations provide otherwise.

(2) In accordance with the Financial Regulations, any appropriations, other than those relating to staff costs, which are unexpended at the end of the accounting period may be carried forward, but not beyond the end of the following accounting period.

(3) Appropriations shall be set out under different headings according to type and purpose of the expenditure, and subdivided, as far as necessary, in accordance with the Financial Regulations.

Article 25 Appropriations for unforeseeable expenditure

Art. 44 EPC

(1) The budget of the European Patent Judiciary may contain appropriations for unforeseeable expenditure.

(2) The employment of these appropriations by the European Patent Judiciary shall be subject to the prior approval of the Administrative Committee.

Article 26 Accounting period

Art. 45 EPC

The accounting period shall commence on 1 January and end on 31 December.

Article 27 Preparation and adoption of the budget

Art. 46 EPC

(1) The Executive Committee shall submit the draft budget of the European Patent Judiciary to the

Administrative Committee no later than the date prescribed in the Financial Regulations.

(2) The budget and any amending or supplementary budget shall be adopted by the Administrative Committee.

Article 28 Provisional budget

(1) If, at the beginning of the accounting period, the budget has not been adopted by the Administrative Committee, expenditures may be effected on a monthly basis per heading or other division of the budget, in accordance with the Financial Regulations, up to one-twelfth of the budget appropriations for the preceding accounting period, provided that the appropriations thus made available to the Executive Committee do not exceed one-twelfth of those provided for in the draft budget.

(2) The Administrative Committee may, subject to the observance of the other provisions laid down in paragraph 1, authorise expenditure in excess of one-twelfth of the appropriations.

(3) The Contracting States shall pay each month, on a provisional basis and in accordance with the amounts referred to in Article 21, any financial contributions needed to ensure the implementation of paragraphs 1 and 2.

Article 29 Budget implementation

(1) The Executive Committee shall implement the budget and any amending or supplementary budget on its own responsibility and within the limits of the allocated appropriations.

(2) Within the budget, the Executive Committee may, in accordance with the Financial Regulations, transfer funds between the various headings or sub-headings.

Art. 47 EPC

Art. 48 EPC

Art. 49 EPC; drafted as
proposed in CA/F 9/01

Article 30 Auditing of accounts

(1) The annual financial statements of the European Patent Judiciary shall be examined by independent auditors. The auditors shall be appointed and if necessary dismissed by the Administrative Committee.

(2) The audit, which shall be based on professional auditing standards and shall take place, if necessary, *in situ*, shall ascertain that the budget has been implemented in a lawful and proper manner and that the financial administration of the European Patent Judiciary has been conducted in accordance with the principles of economy and sound financial management. The auditors shall draw up a report after the end of each accounting period containing a signed audit opinion.

(3) The Executive Committee shall submit to the Administrative Committee the annual financial statements of the European Patent Judiciary and the annual budget implementation statement for the preceding accounting period, together with the auditors' report.

(4) The Administrative Committee shall approve the annual accounts together with the auditors' report and shall discharge the Executive Committee in respect of the implementation of the budget.

Article 31 Financial Regulations

Art. 50 EPC

The Financial Regulations shall lay down in particular:

(a) arrangements relating to the establishment and implementation of the budget and for the rendering and auditing of accounts

(b) the method and procedure whereby the payments and contributions provided for in Article 21, paragraph 2, and the advances provided for in

Article 22 are to be made available to the European Patent Judiciary by the Contracting States

(c) the rules concerning the responsibilities of authorising and accounting officers and the arrangements for their supervision

(d) the composition of and the duties to be assigned to a Budget and Finance Committee if the Administrative Committee sets one up

(e) the generally accepted accounting principles on which the budget and the annual financial statements are to be based.

**PART III SUBSTANTIVE PATENT LAW,
JURISDICTION AND EFFECT OF
DECISIONS**

CHAPTER I SUBSTANTIVE PATENT LAW

**Article 32 Substantive patent law to be applied
by the European Patent Court**

For the purposes of litigation under this Agreement,
European patents shall be subject to:

- (a) the provisions of this chapter,
- (b) those provisions of the European Patent Convention which apply to every European patent and which are consequently deemed to be provisions of this Agreement, and
- (c) those provisions of national law which have been enacted by the Contracting States to implement Article 65, Article 67, paragraphs 2 and 3, and Article 70, paragraphs 3 and 4, of the European Patent Convention.

Article 33 Infringing acts

A European patent shall confer on its proprietor the right to prevent any third party not having his consent:

- (a) from making, offering, putting on the market or using a product which is the subject-matter of the patent, or importing or stocking the product for these purposes
- (b) from using a process which is the subject-matter of the patent or, when the third party knows, or it is obvious in the circumstances, that the use of the process is prohibited without the consent of the proprietor of the patent, from offering the process for use

See Art. 25 CPC 1989

(c) from offering, putting on the market, using, importing or stocking for these purposes a product obtained directly by a process which is the subject-matter of the patent.

See Art. 26 CPC 1989

Article 34 Indirect infringement

(1) A European patent shall also confer on its proprietor the right to prevent any third party not having his consent from supplying or offering to supply any person, other than a party entitled to exploit the patented invention, with means, relating to an essential element of that invention, for putting it into effect therein, when the third party knows, or it is obvious in the circumstances, that these means are suitable and intended for putting that invention into effect.

(2) Paragraph 1 shall not apply when the means are staple commercial products, except where the third party induces the person supplied to commit acts prohibited by Article 33.

(3) Persons performing the acts referred to in Article 35(a) to (c) shall not be considered to be parties entitled to exploit the invention within the meaning of paragraph 1.

See Art. 27 CPC 1989

Article 35 Limitations to the effects of the European patent

The rights conferred by a European patent shall not extend to:

(a) acts done privately and for non-commercial purposes

(b) acts done for experimental purposes relating to the subject-matter of the patented invention

(c) the extemporaneous preparation for individual cases in a pharmacy of a medicine in accordance with a medical prescription or acts concerning the medicine so prepared

(d) the use on board vessels of the countries of the Union of Paris for the Protection of Industrial Property, other than the Contracting States, of the patented invention, in the body of the vessel, in the machinery, tackle, gear and other accessories, when such vessels temporarily or accidentally enter the waters of the Contracting States, provided that the invention is used there exclusively for the needs of the vessel

(e) the use of the patented invention in the construction or operation of aircraft or land vehicles of the countries of the Union of Paris for the Protection of Industrial Property, other than the Contracting States, or of accessories of such aircraft or land vehicles, when these temporarily or accidentally enter the territory of the Contracting States

(f) the acts specified in Article 27 of the Convention on International Civil Aviation of 7 December 1944, where these acts concern the aircraft of a State, other than a Contracting State, benefiting from that Article.

Article 36 Reversal of burden of proof

(1) If the subject-matter of a European patent is a process for obtaining a new product, the same product when produced by any other person shall, in the absence of proof to the contrary, be deemed to have been obtained by the patented process.

(2) The same shall apply if there is a substantial likelihood that an identical product was made by a patented process for obtaining a product and the proprietor of the patent has been unable despite reasonable efforts to determine the process actually used.

See Art. 35 CPC 1989 and Art. 34 TRIPs

UK: reservation against cumulating the provisions of paragraphs (1) and (2) since they are alternatives under Art. 34 TRIPs

(3) In the adduction of proof to the contrary, the legitimate interests of the defendant in protecting his manufacturing and business secrets shall be taken into account.

Article 37 Prior use

Any person who, if a national patent had been granted in respect of an invention, would have had, in a Contracting State, a right based on prior use of that invention or a right of personal possession of that invention, shall enjoy, in that State, the same rights in respect of a European patent for the same invention.

CHAPTER II JURISDICTION OF THE EUROPEAN PATENT COURT AND EFFECT OF DECISIONS

Article 38 Application of the Brussels and Lugano Conventions

(1) Those Contracting States which are also party to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Brussels on 27 September 1968, as amended by the Conventions on the Accession to that Convention of the States acceding to the European Communities, and to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed in Lugano on 16 September 1988, hereinafter referred to respectively as "the Brussels Convention" and "the Lugano Convention", hereby designate the European Patent Court as their national court within the meaning of those conventions.

(2) For the purposes of applying the Brussels and Lugano Conventions to proceedings governed by this Agreement, the provisions of Title II of those Conventions, applicable to persons domiciled in a

See Art. 37 CPC 1989

See Art. 13 ProtLit 1989

To the best of delegations' knowledge the provisions of Arts. 38 - 40 as proposed in this draft are compatible with Community Law (Reg. 44/2001) as well as with the Brussels and Lugano Conventions. The sub-group is aware, though, that this question is still under scrutiny by the legal services of the Commission and of several member states.

SE: Doubts about the provision of paragraph (2) since this might be interpreted as to expand the competence

of the EPJ beyond the Brussels and Lugano Conventions.

WPL: for the discussion on Art. 39 and 40 see WPL/8/02

see Art. 68(1) Reg. 44/2001

Contracting State, shall also apply to persons who do not have a domicile in any Contracting State but have an establishment therein.

(3) In the case of conflict between the provisions of the Brussels or Lugano Conventions and the provisions of this Agreement, the former shall prevail.

Article 39 Application of Regulation 44/2001

(1) Those Contracting States which are also Member States of the European Community and bound by Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, hereinafter referred to as "Regulation 44/2001", hereby designate the European Patent Court as their national court within the meaning of that Regulation.

(2) Article 38, paragraphs 2 and 3, shall apply mutatis mutandis.

Article 40 Preliminary rulings of the Court of Justice of the European Communities

(1) Those Contracting States which are also Member States of the European Community hereby designate the European Patent Court as their national court for the purposes of Article 234 of the Treaty establishing the European Community.

(2) The preliminary rulings of the Court of Justice of the European Communities shall be binding on the European Patent Court in so far as the latter's decisions take effect in one or more of the Contracting States which are also Member States of the European Community.

See Art. 15 ProtLit 1989

Art. 35 CPC 1989; Art. 34 TRIPs

**Article 41 Jurisdiction in respect of
infringement and validity**

(1) The Court of First Instance shall have civil jurisdiction in respect of

(a) any action for actual or threatened infringement or for a declaration of non-infringement of a European patent effective in one or more of the Contracting States

(b) any action or counterclaim for revocation of a European patent effective in one or more of the Contracting States, and

(c) any action for damages or compensation in respect of the protection conferred by a published European patent application in accordance with Article 67 of the European Patent Convention, and

(d) any other action concerning a European patent if and to the extent the parties have so agreed.

(2) Any action under paragraph 1 shall be brought before the Central or competent Regional Division in accordance with the Rules of Procedure, which shall take account of the provisions of the Brussels and Lugano Conventions and of Regulation 44/2001. However, any direct action for revocation shall be brought before the Central Division.

(3) The jurisdiction of the Court of First Instance under paragraph 1 shall be exclusive as regards any action for revocation of a European patent with effect for one or more of the Contracting States and for any actions against a defendant domiciled in one of the Contracting States.

See Art. 15(2) ProtLit 1989

The matter of how the defendant may present his defence is left to the RoP

See Art. 16 ProtLit 1989

See Art. 19 ProtLit. 1989 and Arts. 101 and 138 EPC

(4) The Court of First Instance shall treat the European patent as valid unless its validity is contested by the defendant ~~[with a counterclaim for revocation]~~.

(5) The Court of First Instance shall inform the national patent office of any Contracting State concerned, and the European Patent Office, of the date on which an action or counterclaim for revocation of a European patent was filed.

Article 42 Decisions on validity

(1) Where the validity of a European patent has been contested, the European Patent Court shall

(a) revoke the patent if at least one ground for revocation under Article 138, paragraph 1, of the European Patent Convention prejudices its maintenance; otherwise it shall dismiss the action or counterclaim for revocation

(b) limit the patent by a corresponding amendment of the claims and revoke the patent in part if the grounds for revocation under Article 138, paragraph 1, of the European Patent Convention affect the patent only in part.

(2) Where the European Patent Court, in a final decision, has revoked a European patent for one or more of the Contracting States, it shall send a copy of the decision to the national patent office of any Contracting State concerned and to the European Patent Office.

WPL: delegations did not reach agreement as to the territorial effect of EPJ decisions. The present proposal follows the so-called "bundle approach", supported by DE, NL, SE. A number of delegations (CH, FI, UK) preferred the alternative wording in square brackets.

WPL referred Art. 43(2) to the sub-group for further examination. The sub-group was unable to reach agreement on this.

See Art. 33(1) CPC 1989 and Art. 68 EPC

CH: "Contested" in this context can only mean a defense of invalidity raised by the licensee and not a counterclaim.

See Art. 33(2) CPC 1989

(3) Where the European Patent Court, in a final decision, has maintained a European patent as amended, paragraph 2 above and Article 65 of the European Patent Convention shall apply *mutatis mutandis*.

Article 43 Effect of decisions

(1) Decisions of the European Patent Court shall be regarded, in any Contracting State, as decisions of a national court of that State.

(2) Decisions of the European Patent Court revoking a European patent or maintaining it as amended shall take effect in any Contracting States for which revocation has been requested and pronounced [or: in all Contracting States].

(3) The European patent shall be deemed not to have had, from the outset, the effects specified in Articles 33 and 34 to the extent that the patent has been revoked.

(4) If the validity of a European patent has been contested in proceedings initiated by the holder of an exclusive licence under this patent in which the proprietor of the patent did not take part, the decision of the European Patent Court shall only take effect between the parties to those proceedings.

(5) Subject to the national law relating either to claims for damages caused by negligence or lack of good faith on the part of the proprietor of the patent, or to unjust enrichment, the retroactive effect of the revocation of a European patent under paragraph 3 shall not affect any final decision on infringement enforced prior to the revocation of the patent.

Article 44 Jurisdiction of the Court of Appeal

The Court of Appeal shall have exclusive jurisdiction to decide on appeals against decisions of the Court of First Instance and on petitions for review.

See Art. 21 ProtLit 1989 and
Art. 112a EPC

CHAPTER III JURISDICTION OF NATIONAL COURTS

Article 45 Provisional and protective measures

(1) Without prejudice to the jurisdiction of the European Patent Court, the national courts of any Contracting State shall retain jurisdiction to order such provisional or protective measures as are provided for by their national law.

(2) The party who has filed a request for such an order with a national court shall notify the Registry of this fact within 31 calendar days of filing the request if proceedings on the merits are pending before the European Patent Court. If the Registry is not notified in due time, the order by the national court shall cease to have effect from the day after this time limit expires, without prejudice to the right of the party against whom the order was directed to claim damages arising out of that order or its execution.

(3) If no proceedings on the merits are pending before the European Patent Court and if such proceedings are not brought before that Court within 31 calendar days of the date of the order by the national court, or such other period as the national court specifies, the order by the national court shall cease to have effect from the day after this time limit expires, without prejudice to the right of the party against whom the order was directed to claim damages arising out of that order or its execution.

Article 46 Provisional seizure

(1) Without prejudice to the jurisdiction of the European Patent Court, the national courts of any Contracting State shall retain jurisdiction in respect of the provisional seizure of goods as security for any damages, compensation, costs or any other payment resulting from proceedings before the European Patent Court.

(2) Article 45, paragraphs 2 and 3, shall apply mutatis mutandis.

[Article 47 — No cross-border effect]

~~[Decisions of a national court of a Contracting State under Article 45 or 46 shall have effect only in that Contracting State.]~~

**PART IV PROCEDURE BEFORE THE
EUROPEAN PATENT COURT**

CHAPTER I GENERAL PROVISIONS

Article 48 Case management

The European Patent Court shall actively manage the cases before it in accordance with the Rules of Procedure.

Article 49 Public proceedings

Proceedings before the European Patent Court shall be public unless and in so far as the ~~European Patent~~ Court decides otherwise for reasons of public order or any other compelling reason, particularly in order to protect the trade secrets of one of the parties or any other interested person.

Article 50 Right to be heard

Decisions on the merits of the European Patent Court may only be based on grounds or evidence on which the parties have had an opportunity to present their comments.

Article 51 Parties

(1) The right of a natural or legal person, or any body equivalent to a legal person, to be party to the proceedings shall be determined by the applicable national law.

(2) The holder of an exclusive licence under a European patent may initiate litigation before the European Patent Court in the same way as the proprietor of the patent unless the licensing agreement provides otherwise.

See Art. 116(4) EPC

See Art. 113(1) EPC and
Art. 41(3) TRIPs

(3) The Rules of Procedure shall govern

(a) the participation in the proceedings of a plurality of parties and of third parties

(b) changes in the legal identity of parties

(c) the removal of parties from the proceedings, or their inclusion in them, and

(d) cases in which parties go bankrupt or cease to exist.

See Art. 116 EPC

Article 51a Oral proceedings

Oral proceedings shall take place either at the instance of the European Patent Court if it considers this to be expedient or at the request of any party to the proceedings, in accordance with the Rules of Procedure.

Article 52 Basis for decisions

(1) The European Patent Court shall decide in accordance with the requests submitted by the parties. The Court shall not award more than is requested.

(2) Apart from well-known facts, decisions on the merits may only be based on the grounds, facts and evidence put forward by the parties to the proceedings.

(3) The European Patent Court shall evaluate evidence freely and independently.

Article 53 Evidence

(1) In proceedings before the European Patent Court, the means of giving or obtaining evidence shall include the following:

(a) hearing the parties

(b) requests for information

See Art. 117 EPC

- (c) production of documents
 - (d) hearing witnesses
 - (e) opinions by experts
 - (f) inspection
 - (g) comparative tests or experiments
 - (h) sworn statements in writing (affidavits).
- (2) The Rules of Procedure shall govern the procedure for taking such evidence.
- (3) The onus of proof of any facts shall be on the party relying on such facts, unless the European Patent Court decides otherwise.
- (4) The European Patent Court shall be regarded as a competent national court within the meaning of Article 25 of the European Patent Convention.

Article 54 Production of evidence by other or third parties

- (1) Where a party has sufficiently substantiated a claim and specified evidence relevant to such claim which is in the possession of another party, the European Patent Court may order the other party to produce such evidence.
- (2) Where a party has sufficiently substantiated a claim and specified evidence relevant to such claim which is likely to be in the possession of a third party due to its relationship to another party, the European Patent Court may order that third party to produce such evidence. The Court shall take due account of the interests of that third party and shall, before making such order, give that party an opportunity to present its interests unless this is incompatible with an effective enforcement of such order.

See Art. 43 TRIPs

Article 55 Witnesses

(1) In accordance with the Rules of Procedure, the European Patent Court may order that a fine be paid by a witness who,

(a) duly summoned and in the absence of force majeure or any other good cause refuses to appear or does not appear before the Court, or

(b) refuses to answer questions asked by the Court without having a right to do so.

(2) An absent witness shall be given the opportunity to be heard before such order is made.

(3) The fine may not exceed the amount determined in the Rules of Procedure. ~~[and shall not be credited to the European Patent Judiciary].~~

Article 56 Statements by parties, witnesses and experts

Any statement made by a party, witness or expert in proceedings before the European Patent Court shall be treated in any Contracting State as if it had been made before a competent national court or authority.

Article 57 Court fees

(1) Parties to proceedings before the European Patent Court shall pay court fees in accordance with the provisions laid down by the Administrative Committee.

(2) Court fees shall be paid in advance. Any party which has not paid a prescribed court fee may be excluded from further participation in the proceedings.

See Art. 21 COPAC Statute

Article 58 Costs

(1) In accordance with the Rules of Procedure, the unsuccessful party shall bear the cost of litigation before the European Patent Court incurred by the other party and the Court.

(2) Where a party succeeds only in part, or where the circumstances are exceptional, the European Patent Court may order that costs be apportioned equitably or that the parties bear their own costs.

(3) Notwithstanding paragraph 2, the European Patent Court may order a party to bear any costs it has unnecessarily caused the Court or another party.

Article 59 Rules of Procedure

The Rules of Procedure shall lay down the details of proceedings before the European Patent Court.

CHAPTER II POWERS OF THE EUROPEAN PATENT COURT

Article 60 General

The European Patent Court may impose such measures, securities, sanctions and fines as are laid down in this Agreement and may make its orders subject to other conditions, in accordance with the Rules of Procedure.

Article 61 Astreinte

(1) The European Patent Court may order any non-compliance with an order of the Court to be sanctioned by an astreinte, payable to the party mentioned in the order, without prejudice to that party's right to claim damages.

Any non-compliance with an order of the Court whether it concerns a party or another person such as a counsel, may be sanctioned by an astreinte

(2) An astreinte shall not be payable

(a) before the order is served on the party concerned in accordance with the law governing service

(b) while the party concerned is bankrupt or after it ceases to exist.

(3) If the party concerned is permanently or temporarily, totally or partially, unable to comply with the order of the European Patent Court, the Court may, at the party's request and in accordance with the Rules of Procedure, direct that the astreinte

(a) be cancelled,

(b) be temporarily suspended, or

(c) be reduced.

(4) Any cancellation, suspension or reduction shall not apply as long as the party concerned is able to comply with the order.

(5) An astreinte shall not be deducted from any damages awarded.

Article 62 Injunction

The European Patent Court may order a party infringing or threatening to infringe a European patent to cease and desist from any act infringing the patent under Articles 33 or 34.

Article 63 Forfeiture

(1) The European Patent Court may order that goods found to be infringing be destroyed or otherwise disposed of, without compensation of any sort, outside the commercial channels and in such a manner as to prevent any harm to the injured party.

See Art. 44 TRIPs

See Art. 46 TRIPs

(2) The European Patent Court may also order that materials and devices used mainly to manufacture infringing goods or carry out an infringing process be destroyed or otherwise disposed of, without compensation of any sort, outside the commercial channels and in such a manner as to prevent any harm to the injured party.

(3) Due account shall be taken of the need for proportionality between the seriousness of the infringing act and the remedies ordered, the willingness of the party concerned to convert the materials into a non-infringing state, and the interests of third parties.

Article 64 Damages

(1) The European Patent Court may order the party who knowingly, or with reasonable grounds to know, infringes the European patent, to pay the injured party damages adequate to compensate for the injury suffered.

(2) The European Patent Court shall have the same power in respect of a party who caused or tolerated such infringement, on the basis of his relationship with the party infringing the European patent, while it was in his power to stop it.

(3) Regarding the assessment and awarding of damages, the injured party shall, as far as possible, be restored to the position he would have been in if no infringement had taken place, and the party infringing the European patent shall not benefit from the infringement.

(4) Damages shall not be punitive.

(5) Damages not reasonably foreseeable at the time of infringement may only be awarded on cogent grounds of equity.

See Art. 45(1) TRIPs

DE/UK: Reservation as regards paragraph 5

See Art. 45 TRIPs

Article 65 Kinds of damages

(1) Damages shall compensate for any loss suffered by the injured party because of any infringing act. They shall include, without necessarily being confined to,

(a) the profits the injured party would have made if no such act had taken place, or

(b) any profits actually made or likely to have been made by the party infringing the **European patent**.

(2) The European Patent Court may order the party infringing the European patent to lay open his books to the injured party or to such expert as the Court may designate.

(3) If it is impossible or disproportionately difficult or costly to establish the real extent of any damages under paragraph 1, the European Patent Court may freely determine the amount of damages to be awarded, which shall in any event exceed the amount of the customary licence fee.

(4) In awarding damages, the European Patent Court may also order the party infringing the European patent to perform, or refrain from, certain acts.

Article 66 Indemnification of a party

See Art. 48 TRIPs

The European Patent Court may order a party, at whose request measures ordered by the Court were enforced, to provide the other party wrongfully enjoined or restrained with adequate compensation for the injury suffered as a result of such enforcement, and to pay his expenses. Article 65 shall apply *mutatis mutandis*.

Article 67 Limitation of right to claim damages

(1) The right to claim damages shall expire five years from the date on which the injured person became, or had reasonable grounds to become, aware of the infringing act.

(2) Notwithstanding paragraph 1, the right to claim damages shall expire five years after proceedings for damages were terminated without a decision or a settlement.

(3) The parties may agree in writing to another period of limitation.

Article 68 Right of information

The European Patent Court may order a party infringing the European patent to inform the injured party of the identity of any third person involved in the production or distribution of infringing goods or in the use of an infringing process, and of their channels of distribution.

Article 69 Power to replace an act of a party by a decision of the European Patent Court

The European Patent Court may order that its decision is substituted for any declaration or other act by a party in order to comply with certain legal requirements.

See Art. 47 TRIPs

This provision ensures that the Court has the power to decide that the decision replaces a necessary declaration a party was ordered to make, or an act a party was ordered to perform, e.g. handing out certain infringing goods.

CHAPTER III PROVISIONAL AND PROTECTIVE MEASURES

Article 70 General

(1) The European Patent Court may order such provisional and protective measures as are laid down in this Agreement and may make its orders subject to other conditions, in accordance with the Rules of Procedure.

(2) The European Patent Court shall take due account of the likely outcome of the proceedings as to the merits and the proportionality of the measure requested.

(3) Any such measure may be ordered even *inaudita altera parte* in case of exceptional urgency or if the measure could not otherwise be implemented effectively.

(4) If no proceedings as to the merits are pending before the European Patent Court at the date on which a provisional or protective measure is ordered and if such proceedings are not brought before the Court within 31 calendar days of notification of the order or such other period as the Court specifies, the order shall cease to have effect from the day after this time limit expires.

(5) Article 66 shall apply *mutatis mutandis*.

Article 71 Preliminary injunctions

Where there is an immediate need to protect and safeguard a party's interests, the European Patent Court may, in accordance with the Rules of Procedure, issue a preliminary injunction under Article 62.

Art. 50 TRIPs

DK/SE: would prefer to have a list of such other conditions in the Agreement rather than in the RoP.

See also WPL/8/02 as regards review of national decisions by the EPCT.

This measure concerns what is known as "saisie contrefaçon".

Article 72 Orders for inspection of property

(1) The European Patent Court may order the inspection of premises and the preservation of evidence that is or may be relevant in pending or future proceedings before it.

(2) The order may instruct any person to permit someone specified in the order, or to ensure that someone so described, hereinafter referred to as "the executing person", is permitted, to enter commercial premises in any Contracting State.

(3) In accordance with the terms of the order, the executing person may in respect of any goods, materials or devices described in the order

(a) inspect the premises

(b) search for such articles

(c) make or obtain a copy, photograph, sample or other record of such articles, and

(d) request any information or article and retain for safe keeping anything described in the order.

Article 73 Freezing orders

The European Patent Court may order a party to refrain

(a) from removing from its jurisdiction any assets located there, or

(b) from dealing in any assets, whether located within its jurisdiction or not.

See Art. 46 TRIPs

Article 74 Sequestration

(1) The European Patent Court may order the sequestration of allegedly infringing goods or of materials or devices used mainly to manufacture allegedly infringing goods or carry out an allegedly infringing process, to prevent them from entering commercial channels.

(2) The order may instruct any person to permit someone specified in the order, or to ensure that someone so described, hereinafter referred to as "the executing person", is permitted, to enter commercial premises in any Contracting State.

(3) In accordance with the terms of the order, the executing person may in respect of any goods, materials or devices described in the order:

(a) inspect the premises

(b) search for and remove such articles.

(4) The executing person shall convey and hand over the articles thus removed to the person mentioned in the order, who shall act as sequestrator.

(5) Sequestration may be ordered for the duration of the proceedings as to the merits.

Article 75 Other protective orders

To safeguard a party's or a third person's trade secrets or other confidential information, or to prevent an abuse of evidence, the European Patent Court may order that the use of evidence in proceedings before it be restricted or prohibited or that access to such evidence be restricted to certain persons.

PART V PROCEDURAL REMEDIES

CHAPTER I APPEAL

Article 76 Appeal

See Art. 106 EPC

(1) In accordance with this Agreement and the Rules of Procedure, an appeal shall lie to the Court of Appeal from decisions of the Court of First Instance.

(2) An immediate appeal shall lie from

(a) any decision terminating proceedings as regards one of the parties

(b) any decision in which the Court of First Instance has assumed jurisdiction which was unsuccessfully contested

(c) any decision in which a Regional Division has assumed its competence which was unsuccessfully contested, and

(d) any decision ordering provisional or protective measures.

(3) Any other decision shall only be appealable together with the final decision, unless the decision appealed against or the Court of Appeal grants leave to appeal.

(4) Any decision not appealed against earlier shall be appealable together with the final decision.

Article 77 Persons entitled to appeal

See Art. 107 EPC

Any party to proceedings adversely affected by a decision may appeal.

See Art. 108 EPC

Such an exceptional case may occur e.g. when facts or evidence are not available at the beginning of the proceedings or when it cannot reasonably be required from the party concerned to provide them.

See Art. 106(1) EPC

Article 78 Time limit and form

(1) Notice of appeal setting out the grounds shall be filed within three months of notification of the decision ~~in accordance with the Rules of Procedure.~~

(2) Notwithstanding paragraph 1, notice of appeal may still be filed by way of cross-appeal after an appeal has been filed by another party.

(3) Notice of appeal or cross-appeal shall be filed in accordance with the Rules of Procedure.

Article 79 Grounds for appeal

An appeal may only be based on the grounds

(a) that the facts alleged by the parties were not correctly established, or

(b) that, given the established facts, the law was not correctly applied.

Article 80 New facts or evidence

In exceptional cases, new facts or evidence may be taken into consideration by the Court of Appeal in accordance with the Rules of Procedure.

Article 81 Effect

(1) An appeal shall have suspensive effect unless the Court of First Instance or the Court of Appeal decides otherwise.

(2) Where a decision not terminating the proceedings is appealed against, the proceedings shall be stayed until the Court of Appeal has taken a decision unless the Court of First Instance or the Court of Appeal decides otherwise.

CHAPTER II REVIEW OF DECISIONS

Article 82 Petition for review

See Art. 112a(1) EPC

(1) Any party to proceedings before the European Patent Court which is adversely affected by a decision against which an appeal is not or no longer possible may file a petition for review of that decision by the Court of Appeal.

(2) The petition for review may only be filed on the grounds that

(a) a criminal act may have had an impact on the decision, or,

(b) if it concerns a decision of the Court of Appeal, a fundamental procedural defect has occurred in the proceedings.

(3) A petition for review may only be based on paragraph 2(a) if a competent court or authority has finally established that a criminal act occurred; a conviction is not necessary.

(4) The petition for review shall be filed in accordance with the Rules of Procedure.

See Art. 112a(4) EPC

(5) If based on paragraph 2(b), the petition shall be filed within two months of notification of the decision. If based on paragraph 2(a), the petition shall be filed within two months of the date of the decision establishing the criminal act and in any event no later than five years from notification of the decision of the European Patent Court.

See Art. 112a(3) EPC

(6) The petition for review shall not have suspensive effect unless the Court of Appeal decides otherwise.

See Art. 112a(5) EPC

Article 83 Procedure and decision on review

(1) The Court of Appeal shall examine the petition for review in accordance with the Rules of Procedure.

(2) If the petition for review is admissible and allowable, the Court of Appeal shall set aside the decision under review in whole or in part and shall re-open the proceedings for a new trial and decision.

(3) If the decision set aside was taken by the Court of First Instance, the Court of Appeal shall remit the case to that Court unless the parties and the Court of Appeal agree that the case should be decided by the Court of Appeal.

See Art. 112a(6) EPC

(4) Any person who, in a Contracting State, has in good faith used or made effective and serious preparations for using an invention which is the subject of a published European patent application or a European patent in the period between the decision under review and the publication of the decision of the Court of Appeal on the petition, may without payment continue such use in the course of his business or for the needs thereof.

Concept of the FAC expounded in WPL/6/02, option 2, and amended in the light of discussions at the WPL meeting in December 2002 and the sub-group meeting in May 2003.

Possibility of requesting opinions restricted to courts or quasi-judicial authorities of EPLA Contracting States.

Art. 149a(1)(b) EPC 2000

DK: reservation against FAC opinions on points of harmonised national patent law.

The principles enshrined in a number of provisions designed for the judicial function of the European Patent Court must also apply to the delivery of opinions by the FAC, namely

provisions on judicial independence, substantive patent law

provisions on impartiality, composition of the Court of Appeal panel and selection of competent judges according to

PART Va FACULTATIVE ADVISORY COUNCIL

Article 83a Court of Appeal functioning as Facultative Advisory Council

The functions of the Facultative Advisory Council referred to in Article 4 shall be performed by the Court of Appeal.

Article 83b Opinions delivered by the Facultative Advisory Council

~~(1)~~ At the request of a national court or quasi-judicial authority of a Contracting State ~~to the European Patent Convention~~ trying an infringement or revocation action, the Facultative Advisory Council shall deliver an opinion on any point of law concerning European or harmonised national patent law referred to it.

~~(2)~~ The opinion shall not be binding on the referring court or quasi-judicial authority. ~~Contracting States may determine the role of opinions delivered by the Facultative Advisory Council in national proceedings.~~

Article 83c Procedure regarding the delivery of opinions

(1) The following provisions shall apply mutatis mutandis to the procedure before the Facultative Advisory Council:

- Articles 5, 32 to 37 and
- Articles 10, 27, 34 to 38 and 40 of the Statute.

predetermined criteria ("gesetzlicher Richter"), representation before the FAC, possible membership of both the Court of First Instance and the Court of Appeal

See Art. 14(1) EPC

The right to be heard should primarily be observed in the proceedings before the national court referring the point of law. However, as in the case of preliminary rulings of the European Court Justice, parties could be given a single opportunity to present comments in writing; it would not seem appropriate, though, to hold oral proceedings (which are possible before the ECJ) before the FAC.

Inserted at the suggestion of the French delegation.

(2) The official languages in proceedings before of the Facultative Advisory Council shall be English, French and German.

(3) The language of proceedings shall be that official language of the Facultative Advisory Council in which the request under Article 83b is submitted to it. A Contracting State may prescribe the official language or languages of the Facultative Advisory Council in which its courts or quasi-judicial authorities may submit a request under Article 83b.

(4) The parties to a case which gives rise to a referral under Article 83b may present in writing their arguments and submissions relating to the point of law in question within a period to be specified by the Facultative Advisory Council and in accordance with the Rules of Procedure of the Facultative Advisory Council.

(5) The reasoned opinion shall be given in writing, in the language of the proceedings, by a majority of the panel of the Facultative Advisory Council.

Under Art. 18(3) a three-quarters majority is necessary.

Contracting States participating only under Part Va (FAC) will be bound by the special provisions concerning the FAC and by most institutional, financial, transitional and final provisions except those which relate specifically to judicial aspects of the European Patent Judiciary. Part Va contains provisions which take precedence over the general provisions, in particular with regard to financing the FAC and voting rights.

Financing by the EPO may raise problems as not all EPO member states will be party to the EPLA.

(6) Proceedings under this Part shall be governed by the Rules of Procedure of the Facultative Advisory Council, to be adopted by the Administrative Committee. Article 18, paragraph 3 shall apply.

Article 83d Reservations

(1) Any Contracting State may, at the time of signature or when depositing its instrument of ratification or accession, declare that it ~~shall only be~~ is bound by this Agreement only as far as it relates to the Facultative Advisory Council.

(2) Contracting States which have made a declaration under paragraph 1 shall be bound by this Part of the Agreement and, subject to the provisions of this Part, which take precedence, by Articles 1, 3, 4, 6, Article 7, paragraph 1, Articles 8, 9, 11, Article 12, paragraph 1, Articles 13 to 21, Articles 22 to 31, Article 84, and Articles 87 to 99.

(3) Any declaration made under paragraph 1 may be withdrawn at any time by notification to the Government of ***. The withdrawal shall take effect on the first day of the third month after the date of receipt of such a notification.

Article 83e Financing

(1) The expenses incurred by the European Patent Judiciary with regard to the Facultative Advisory Council shall be covered by

(a) contributions of the European Patent Organisation if its Administrative Council so decides under Article 149a, paragraph 2(b), in conjunction with Article 35, paragraph 2, of the European Patent Convention;

It could be argued that FAC opinions should be free of charge for the parties (a non-binding opinion does not justify fees, or only very modest fees). However, consideration should be given to the possibility of covering at least some of the FAC's costs by fees to be charged to the parties.

If the income under (a) and (b) did not cover the costs of the FAC's work, the Contracting States would have to pay the difference.

(b) fees for delivering an opinion if such a fee is provided for in the Rules of Procedure of the Facultative Advisory Council; or

(c) contributions of the Contracting States the amount of which shall be determined by the Administrative Committee; Article 21, paragraphs 3 and 4, shall apply with the proviso that the relevant ratio under Article 21, paragraph 3(b), shall be the ratio of the number of opinions requested by courts or quasi-judicial authorities of the Contracting State to the number of all opinions requested from the Facultative Advisory Council.

(2) Income and expenditure of the European Patent Judiciary relating to the Facultative Advisory Council shall form the subject of estimates in respect of each accounting period and shall be shown in a separate part of the budget of the European Patent Judiciary. This part of the budget shall be balanced in its own right.

(3) Contracting States having made a declaration under Article 83d, paragraph 1, may limit their contributions to the budget of the European Patent Judiciary to the contributions under paragraph 1(c).

UK, FR: Voting rights should be attractive enough to encourage participation at least under Part Va (FAC) of the EPLA.

CH, FI, MC: Reservations against the extent of voting rights, in particular paragraph (1)(a) and (b).

Decisions on

(re-)appointment and removal from office of judges of Court of Appeal and the Registrar

adoption of the Rules of Procedure of the FAC

financial contributions made in respect of the FAC by Contracting States

financial matters, in particular the budget of the European Patent Judiciary, and Financial Regulations

adoption of Service Regulations

chairperson of and observers to the Administrative Committee

Under the proposed Article 83f, no voting rights for FAC States in the two cases where unanimity is required: Art. 18(2) and Art. 86.

Article 83f Voting rights in the Administrative Committee of Contracting States which have entered a reservation

(1) Any Contracting State having made a declaration under Article 83d, paragraph 1, shall have the right to vote on decisions being taken by the Administrative Committee

(a) under Articles 4, 8, 11, 12 of the Statute if the decision concerns a judge of the Court of Appeal or the Registrar;

(b) under Article 83c, paragraph 6;

(c) under Article 83e, paragraph 1(c);

(d) relating to the adoption of that part of the budget of the European Patent Judiciary concerning the Facultative Advisory Council and decisions under Article 17, paragraph 2(c), Article 21, paragraph 2, Article 22, paragraph 1, Article 27, paragraph 2, and Article 30, paragraph 4, as far as they concern the Facultative Advisory Council;

(e) under Article 17, paragraph 2(d);

(f) under Articles 14 and 15, paragraphs 3 and 4.

(2) For decisions under paragraph 1(b) to (f), Article 18, paragraph 3 shall apply mutatis mutandis. The procedure for decisions under paragraph 1(d) shall be governed by the Financial Regulations.

**PART VI TRANSITIONAL AND FINAL
PROVISIONS**

CHAPTER I TRANSITIONAL PROVISIONS

Article 84 Scope

This Agreement shall apply to

(a) any European patent which at the time of its entry into force was already effective in one or more Contracting States, or was granted for and became effective in one or more Contracting States after that date

(b) any European patent application pending at the time of its entry into force, or filed on or after that date, unless proceedings on such European patent or patent application were initiated before a national court or other competent authority of a Contracting State prior to that date.

**Article 85 Jurisdiction of national courts
during a transitional period**

(1) During the first seven calendar years after this Agreement has entered into force, proceedings for infringement or revocation of a European patent may still be initiated before the national court or other competent authority of a Contracting State having jurisdiction under national law which for that purpose shall continue to apply to European patents effective in the Contracting States. This Agreement shall not apply to such proceedings.

The Agreement shall cover
- all European patents which are effective when it enters into force,
- all European patents granted in respect of applications filed before the entry into force of the Agreement, and which became effective after that date, and, of course,
- European patents resulting from applications filed on or after its entry into force.

Letter (b) is necessary since the European Patent Court would be competent to decide also on provisional protection of European patent applications.

~~[(2) Any decision by a national court under paragraph 1 shall have effect only in the Contracting State of that court.]~~

(2) Any proceedings pending before a national court at the end of the transitional period shall continue to be subject to the transitional regime.

Article 86 Evaluation

Five years after this Agreement has entered into force, the Administrative Committee shall evaluate the situation and may decide to extend the transitional period under Article 85, paragraph 1. If no unanimous decision to that effect is taken, the transitional period shall expire at the end of the seventh calendar year after this Agreement has entered into force.

CHAPTER II FINAL PROVISIONS

Article 87 Texts supplementing the Agreement

Integral parts of this Agreement shall be:

- the Statute,
- the Protocol on Privileges and Immunities of the European Patent Judiciary,
- the Rules of Procedure once adopted by the Administrative Committee.

Article 88 Signature, ratification

(1) This Agreement shall be open for signature until *** for all Contracting States to the European Patent Convention which participated in the Diplomatic Conference on the Establishment of a European Patent Litigation System.

(2) This Agreement shall be subject to ratification. Instruments of ratification shall be deposited with the Government of ***.

Art. 164 EPC

*** indication of date, e.g. for a period of six months after a Diplomatic Conference

If the EPLA is to be open to accession by the European Community, it is not sufficient merely to add a clause in Article 89. The possibility of accession by the EC has further implications. Appropriate solutions must be found for the definition of the contracting parties to the EPLA, the composition of the Administrative Committee and delegates' voting rights, and for the provisions on financing the European Patent Judiciary. In-depth study may reveal further issues.

Provision necessary because of the inclusion in the EPLA of the rules governing the FAC.

The values for "n" mentioned during the discussion within the Working Party on Litigation in December 2002 were 2, 5 and 6. No decision was taken on this. According to the UK delegation, the cost of setting up the system must be taken into account in this context as it has to be borne by those States whose ratification or accession leads to the entry into force of the Agreement.

Article 89 Accession

(1) This Agreement shall be open to accession by any Contracting State to the European Patent Convention [and to the European Community].

(2) Instruments of accession shall be deposited with the Government of ***.

Article 89a Reservations

A Contracting State may enter no other reservation than that specified in Article 83d.

Article 90 Entry into force

(1) This Agreement shall enter into force [***] months after the deposit of the last instrument of ratification or accession by [n] Contracting States to the European Patent Convention which have not entered a reservation under Article 83d, including at least one of the three States in which the highest number of European patents was in force in the year preceding the year in which the Diplomatic Conference took place.

Reservation by SE as to the choice of three for the number of States in which the highest number of European patents was in force.

The requirements listed in Art. 21(3) and (4) shall also apply to the first distribution key. However, the relevant figures must, of course, be those relating to the situation before entry into force of the EPLA. After [five] years, Art. 21(4) will apply.

This way of fixing the initial contributions can also apply to FAC States.

For States joining the EPLA after its entry into force, participation in the distribution key valid at the time in question should be acceptable, given that the key will be regularly updated. The percentages for all the Contracting States will be re-calculated with effect from the date of entry into force of the EPLA in the new State.

(2) Any ratification or accession after the entry into force of this Agreement shall take effect on the first day of the third month after the deposit of the instrument of ratification or accession.

Article 91 First distribution key, initial contributions

(1) On the entry into force of this Agreement the Contracting States shall provide initial financial contributions necessary for actually setting up the European Patent Judiciary and in particular the European Patent Court. The level of such contributions shall be determined by the Administrative Committee. Article 21, paragraphs 3 and 4, shall apply, with the proviso that the relevant years shall be the last three years preceding the year of entry into force of this Agreement, and the relevant number of European patents which are the subject of litigation shall be the number of European patents which are the subject of litigation before the national courts.

(2) Initial contributions of States ratifying this Agreement or acceding to it after its entry into force shall be calculated on the basis of the figures for the years relevant to the distribution key valid at the time of their ratification or accession.

Art. 91 also applies to Contracting States participating only in the FAC system; these states too are interested in setting up the European Patent Judiciary and, in particular, the Court of Appeal of the European Patent Court, as this is a prerequisite for the functioning of the FAC.

Art. 171 EPC

Art. 172 EPC

Article 92 Duration of the Agreement

This Agreement shall be of unlimited duration.

Article 93 Revision

(1) This Agreement may be revised by a Conference of the Contracting States.

(2) The Conference shall be prepared and convened by the Administrative Committee. The Conference shall not be validly constituted unless at least three-quarters of the Contracting States are represented at it. Adoption of the revised text shall require a majority of three-quarters of the Contracting States represented and voting at the Conference. Abstentions shall not be considered as votes.

(3) The revised text shall enter into force when it has been ratified or acceded to by the number of Contracting States specified by the Conference, and at the time specified by that Conference.

(4) Such States as have not ratified or acceded to the revised text of the Agreement at the time of its entry into force shall cease to be parties to this Agreement as from that time.

Art. 174 EPC

Article 94 Denunciation

Any Contracting State may at any time denounce this Agreement. Denunciation shall be notified to the Government of ***. It shall take effect one year after the date of receipt of such notification.

Art. 175 EPC

Article 95 Preservation of acquired rights

If a State ceases to be party to this Agreement, the Agreement shall continue to apply to any proceedings pending before the European Patent Court at the date on which denunciation takes effect, and to the resulting decisions.

Art. 176 EPC

Article 96 Financial rights and obligations of a former Contracting State

Any State which has ceased to be a party to this Agreement in accordance with Article 93, paragraph 4, or Article 94 shall have the financial contributions paid under Article 21, paragraph 2, or Article 22 refunded to it by the European Patent Judiciary only when the European Patent Judiciary refunds financial contributions paid by other States during the same accounting period, and under the same conditions.

Art. 177 EPC

Article 97 Languages of the Agreement

This Agreement, drawn up in a single original, in the English, French and German languages, shall be deposited in the archives of ***, the three texts being equally authentic.

Art. 173 EPC

Article 98 Disputes between Contracting States

(1) Any dispute between Contracting States concerning the interpretation or application of this Agreement which is not settled by negotiation shall be submitted, at the request of one of the States concerned, to the Administrative Committee, which shall endeavour to bring about agreement between the States concerned.

Art. 178 EPC

Consequence of insertion of
Part Va into the Agreement

(2) If such agreement is not reached ~~[within six months from the date when the dispute was referred to the Administrative Committee]~~, any one of the States concerned may submit the dispute to the International Court of Justice for a binding decision.

Article 99 Transmission and notifications

(1) The Government of *** shall draw up certified true copies of this Agreement and shall transmit them to the Governments of all signatory or acceding States.

(2) The Government of *** shall notify to the Governments of the States referred to in paragraph 1:

(a) any signature;

(b) the deposit of any instrument of ratification or accession;

(c) any reservation or withdrawal of reservation pursuant to Article 83d;

(d) the date of entry into force of this Agreement;

(e) any denunciation under Article 94 and the date on which such denunciation comes into force.

(3) The Government of *** shall register this Agreement with the Secretariat of the United Nations.

IN WITNESS WHEREOF, the Plenipotentiaries authorised thereto, having presented their Full Powers, found to be in good and due form, have signed this Agreement.

Done at *** this *** day of *** two thousand ***
