Article 171 E

Travaux Préparatoires (EPC 1973)

Comment:

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Art. 171
MPÜ
Geltungsdauer des Übereinkommens

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MUNICH DIPLOMATIC CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

- 1973 -

Munich, 30 September 1973
M/ 146/R 7
Original: English/French/German

CONFERENCE DOCUMENT

Drawn up by: General Drafting Committee

Subject: Convention: Articles 167 to 178
Artikel 168
Inkrafttreten


(2) Jede Ratifikation oder jeder Beitritt nach Inkrafttreten dieses Übereinkommens wird am ersten Tag des dritten Monats nach der Hinterlegung der Ratifikations- oder Beitrittsurkunde wirksam.

Artikel 169
Aufnahmebeitrag

(1) Jeder Staat, der nach Inkrafttreten dieses Übereinkommens das Übereinkommen ratifiziert oder ihm beitreitet, hat der Organisation einen Aufnahmebeitrag zu zahlen, der nicht zurückgezahlt wird.

(2) Der Aufnahmebeitrag beträgt 5% des Betrags, der in der Weise errechnet wird, daß die sich für den betreffenden Staat ergebende Prozentezahl des in Artikel 38 Absätze 3 und 5 vorgesehenen Aufbringungsschlüssels, die zu dem Zeitpunkt gilt, zu dem die Ratifikation oder der Beitritt wirksam wird, auf die Summe der von den übrigen Vertragsstaaten bis zum Abschluß des diesem Zeitpunkt vorangehenden Haushaltsjahres geschuldeten besonderen Finanzbeiträge angewendet wird.

(3) Werden besondere Finanzbeiträge für das Haushaltsjahr, das dem in Absatz 2 genannten Zeitpunkt vorausgeht, nicht mehr gefordert, so ist der in Absatz 2 genannte Aufbringungsschlüssel derjenige, der auf den betreffenden Staat auf der Grundlage des letzten Jahres, für das besondere Finanzbeiträge zu zahlen waren, anwendbar gewesen wäre.

Artikel 170
Geltungsdauer des Übereinkommens

Dieses Übereinkommen wird auf unbegrenzte Zeit geschlossen.

Article 168
Entry into force

(1) This Convention shall enter into force three months after the deposit of the last instrument of ratification or accession by six States on whose territory the total number of patent applications filed in 1970 amounted to at least 180,000 for all the said States.

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

Artikel 169
Initial contribution

(1) Any State which ratifies or accedes to this Convention after its entry into force shall pay to the Organisation an initial contribution, which shall not be refunded.

(2) The initial contribution shall be 5% of an amount calculated by applying the percentage obtained for the State in question, on the date on which ratification or accession takes effect, in accordance with the scale provided for in Article 38, paragraphs 3 and 5, to the sum of the special financial contributions due from the other Contracting States in respect of the accounting periods preceding the date referred to above.

(3) In the event that special financial contributions were not required in respect of the accounting period immediately preceding the date referred to in paragraph 2, the scale of contributions referred to in that paragraph shall be the scale that would have been applicable to the State concerned in respect of the last year for which financial contributions were required.

Artikel 170
Duration of the Convention

The present Convention shall be of unlimited duration.

Article 171
Revision

(1) Dieses Übereinkommen kann durch Konferenzen der Vertragsstaaten revidiert werden.


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

(2) The Conference shall be prepared and convened by the Administrative Council. The Conference shall not be deemed to be validly constituted unless at least three-quarters of the Contracting States are represented at it. In order to adopt the revised text there must be a majority of three-quarters of the Contracting States represented and voting at the Conference. Abstentions shall not be considered as votes.
MÜNCHNER DIPLOMATISCHE KONFERENZ
ÜBER DIE EINFÜHRUNG EINES EUROPÄISCHEN PATENTERTEILUNGSVERFAHRENS 1973

(München, 10. September bis 6. Oktober 1973)

MUNICH DIPLOMATIC CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS, 1973

(Munich, 10 September to 6 October 1973)

CONFERENCE DIPLOMATIQUE DE MUNICH
POUR L’INSTITUTION D’UN SYSTÈME EUROPÉEN DE DÉLIVRANCE DE BREVETS

(1973)

(Munich, 10 septembre - 6 octobre 1973)

VORBEREITENDE DOKUMENTE
ausgearbeitet von der
Regierungskonferenz über die Einführung eines europäischen Patenterteilungsverfahrens
erausgegeben von der
Regierung der Bundesrepublik Deutschland

PREPARATORY DOCUMENTS
drawn up by the
Inter-Governmental Conference for the setting up of a European System for the Grant of Patents
and published by the
Government of the Federal Republic of Germany

DOCUMENTS PRÉPARATOIRES
élaborés par la
Conférence intergouvernementale pour l’institution d’un système européen de délivrance de brevets
et publiés par le
Gouvernement de la République fédérale d’Allemagne

1972
and decided to retain the text proposed by Working Party II for paragraph 4(b).

It was stressed in the discussion that, bearing in mind that in accordance with Article 165, paragraph 4, any State which ceases to be a party to the Convention as a result of failure to ratify the revised text in time may accede again to the Convention on less stringent conditions, this solution was not too harsh. A provision was also proposed to the effect that a State acceding again may apply the revised Convention as from the time of its ceasing to be a party, i.e. with retroactive effect. This would close the time-gap. This suggestion was however not pursued.

The special case mentioned in this context of a State which had abandoned its own patent system in favour of the European system for the grant of patents and which would consequently be very hard hit if it ceased to be a party to the Convention, required, in the Conference’s opinion, special provisions to be laid down at a later date.

Article 163 (Reservation of acquired rights)

133. The Conference agreed that the concept of acquired rights, as referred to in paragraph 1, could not be more fully defined in this provision. It noted the definition proposed by the rapporteur for Working Party II (BR/96/71, Annex III, p.9 et seq.). It was said that the main effect of this provision was that the conditions for patentability could not be restricted with effect for patent applications already

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future revisions would enter into force. Such a rigid rule would make it impossible to make urgent amendments to the Convention quickly. For this reason the Conference felt that it would be more appropriate to leave it to each future Revision Conference to determine the time at which the revised text would enter into force. It should also be the responsibility of each Revision Conference to determine how many Contracting States must ratify the revised text before it can enter into force.

132. Various proposals, including one from the Netherlands delegation, were submitted to the Conference for paragraph 4(b). Whereas the text submitted by Working Party II provided that a Contracting State would cease to be party to the Convention if it did not ratify the revised text within the time specified, the Netherlands delegation wanted such a Contracting State to become party to the revised text of the Convention automatically, provided that it had not given notice of its denunciation of the Convention before the new version came into force. This would avoid States being expelled from the Convention because, for example, the necessary domestic procedures had not been completed in time. Several delegations raised the objection that States would be bound by a new text, even though they had not agreed to it, and regarded such a situation as unacceptable. Although it was true that such a State would have the opportunity to denounce the Convention, if for any reason the denouncement were not made, the State would be bound under international law by the new text, even though it might not be valid within the State itself. The Conference endorsed this objection.
event be necessary to have recourse to the traditional procedure in international law of revision by all the Contracting States.

129. The Conference considered it unnecessary to indicate in paragraph 2 the majority required by the Administrative Council to convene a Revision Conference, as in fact this majority is already determined by the provisions governing the Administrative Council (Article 35m).

130. As requested by the United Kingdom delegation, the Conference laid down in paragraph 3 that the revised text of the Convention is to be adopted by a majority of three-quarters of the Contracting States represented and voting at the Conference, abstentions not being counted as votes. It was objected that this would mean that a revision could be adopted by a minority of the Contracting States, but the reply was given that the Revision Conference would only have a quorum when at least three-quarters of the Contracting States were represented at it.

131. With reference to paragraph 4(a) the Austrian delegation proposed that it should be provided that the revised text could not enter into force until three years after the end of the Revision Conference. This would give each Contracting State ample time to decide whether it wished to ratify the revised text or to cease to be party to the Convention in accordance with sub-paragraph (b). The Conference did not agree to this proposal, as it saw a great risk in determining once and for all the time at which
B. Final Provisions (Articles 162 to 173) (1)


Article 161a (Implementing Regulations) (2)

127. The Conference inserted this Article into the Preliminary Draft in order to clarify the relationship between the Convention and the Implementing Regulations (cf. point 96, Article 35a).

Article 162 (Revision)

128. In connection with paragraph 1, the German delegation proposed that the procedure for revision should not be governed by definite conditions. The large majority required in the Administrative Council to convene a Revision Conference should prevent any danger of such conferences taking place too frequently. The Conference agreed to this request. It wished to make it clear in this way that the simplified revision procedure provided for in Article 162 was to be applicable whenever it was intended to revise the Convention, so that it would in no

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(1) Articles 160 and 161, which also belong to the Final Provisions, were drawn up by Working Party I and were therefore discussed by the Conference under item 4(a) of the agenda (see point 90 and 91 of these minutes)

(2) BR/121/71, page 5

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.../...
MINUTES
of the
4th Meeting of the Inter-Governmental Conference
for the setting up of a European System
for the Grant of Patents
(Luxembourg, 20 to 28 April 1971)
Article 152
Revision

(1) This Convention may be reviewed with a view to the introduction of amendments having in practice proved to be essential for the correct working of the European system for the grant of patents or of amendments such as to make for the greater efficiency of that system.

(2) For this purpose, Conferences may be convened by a decision of the Administrative Council, upon the request, under the terms laid down in Article 35h of a majority of three-quarters of the members present.

(3) A Conference shall not be deemed to be validly constituted unless at least three-quarters of the Contracting States to the Convention are represented at it.

A majority of three-quarters of the Contracting States represented at the Conference shall be required for the adoption of a revised text of the Convention.

(4) (a) The revised text shall enter into force one year after the deposit of the last instrument of ratification or accession by three-quarters of the Contracting States to this Convention.

(b) Such States as have not ratified or acceded to the revised text shall cease to be parties to the Convention as from the entry into force of the revised text.
FIRST PRELIMINARY DRAFT OF A CONVENTION

ESTABLISHING

A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

- Stage reached on 29 January 1971 -
Thus the Conference took into account the fact that a collegiate body such as the Administrative Council which, moreover only meets at certain intervals, might hardly be in a position to conclude such agreements itself.

103. The Conference also added further powers for the Administrative Council to those contained in paragraphs 1, 2 and 3, as Working Party II had not been able to consider them when drafting Article 35a. For purposes of simplification, the Conference divided the now completed Article 35a into three separate Articles (35a, 35ab, and 35cc; BR/118/71, pages 3 to 6).

Article 35b (Preparatory duties of the Administrative Council)

104. The Conference deleted this Article. The power to prepare revision conferences, together with the power to convene such conferences, is already covered in the previous Article. The power to prepare such adaptations to the Convention as may be rendered necessary by the accession of third countries did not, in the opinion of the Conference, need to be laid down expressly. Should the necessity for such adaptations arise a revision conference would have to be convened, as in the case of other amendments.

Article 35c (Representation of Contracting States)

105. The Conference decided that only the representatives of the Contracting States could be members of the Administrative Council, and worded paragraph 1 accordingly. The representatives of the inter-governmental organisations
MINUTES

of the

4th Meeting of the Inter-Governmental Conference
for the setting up of a European System
for the Grant of Patents
(Luxembourg, 20 to 28 April 1971)
Article 35b

Preparatory duties of the Administrative Council

The Administrative Council shall be empowered:

(a) to prepare Conferences for the revision of this Convention;

(b) to prepare such adaptations to this Convention as may be rendered necessary by the accession of third countries.
Thus the Conference took into account the fact that a collegial body such as the Administrative Council which, moreover only meets at certain intervals, might hardly be in a position to conclude such agreements itself.

103. The Conference also added further powers for the Administrative Council to those contained in paragraphs 1, 2 and 3, as Working Party II had not been able to consider them when drafting Article 35a. For purposes of simplification, the Conference divided the now completed Article 35a into three separate Articles (35ac, 35ab and 35bc, BR/118/71, pages 3 to 6).

Article 35b (Preparatory duties of the Administrative Council)

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Article 35c (Representation of Contracting States)

105. The Conference decided that only the representatives of the Contracting States could be members of the Administrative Council, and worded paragraph 1 accordingly. The representatives of the inter-governmental organisations
Council for not acting without its approval in certain cases (see point 97 above). The Conference accordingly deleted sub-paragraph (f).

101. The Austrian delegation proposed that a new sub-paragraph (g) in paragraph 2 should lay down that it is the responsibility of the Administrative Council to instruct the President of the European Patent Office, at the request of a Contracting State, to make a report. The Conference did not agree to this request, because the Administrative Council's power to instruct the President to make a report is already implicit in its general supervisory rights. The Conference did not however see the expediency of obliging the Administrative Council to comply with the request of a single Contracting State.

102. In connection with paragraph 3B the Conference noted that the necessity might arise for the European Patent Office to conclude agreements other than those listed in this provision. It therefore replaced this list with a provision drawn up in general terms. Acting on a request made by the Netherlands delegation and endorsed by the Austrian delegation, the Conference also laid down the respective responsibilities of the Administrative Council and the President of the European Patent Office for the conclusion of agreements with States or international organisations, making the President responsible for the actual negotiations and the conclusion of the agreements, although he must obtain the approval of the Administrative Council before opening the negotiations and concluding the agreements.
President and the Administrative Council. This does not mean that dealings undertaken by the President without the required approval are to be invalidated because approval was not obtained, but that the President is to be responsible to the Administrative Council for them (cf. point 100).

98. The Conference did not endorse the United Kingdom delegation's proposal that in paragraph 1(e) the Administrative Council should be empowered to amend the time-limit laid down in Article 88, paragraph 2. It was the Conference's opinion that this time limit constituted such an essential feature of the deferred examination system that, except in the case referred to in Article 159, amendment should only be possible by means of a revision of the Convention.

99. In order to make a clear distinction between the duties of the Administrative Council (supervision of the activities of the European Patent Office) and those of the President (direction of the European Patent Office), the Conference deleted sub-paragraph (a) from paragraph 2.

100. In connection with paragraph 2(f) it was agreed that the Administrative Council must be empowered to specify the cases in which the President of the European Patent Office must obtain the prior approval of the Administrative Council before he undertakes actions at law. The Conference was however of the opinion that it was not necessary to restrict the President's powers of representation in respect of third parties. The desired aim would also be achieved just as satisfactorily if the President were to be responsible to the Administrative
CHAPTER I a

Powers and Functions of the Administrative Council

Article 35a (Powers of decision of the Administrative Council)

96. The Conference noted in connection with paragraph 1 A that this provision only says down that the Administrative Council is competent to amend the Implementing Regulations, whereas the Diplomatic Conference is to adopt them. It therefore considered that it would be expedient to specify in a final provision that the Implementing Regulations form an integral part of the Convention (see point 127 under Article 161a) (BR/121/71, Page 5).

97. The Conference deleted from paragraph 1 B(a) the power of the Administrative Council to adopt Administrative Regulations, as all the administrative regulations required are either contained in the Implementing Regulations or may be adopted by the President of the European Patent Office as part of his task of directing its business, in which he is supervised by the Administrative Council.

The power provided for in sub-paragraph (d) to adopt any other rules necessary for the implementation of the Convention allows the Administrative Council, in the Conference's opinion, to determine the cases in which the President of the European Patent Office will require the approval of the Administrative Council to exercise the legal capacity of the European Patent Office internally. This condition of approval is not however to restrict the President's power to represent the European Patent Office externally but is to apply only to the internal relations between the

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MINUTES

of the

4th Meeting of the Inter-Governmental Conference
for the setting up of a European System
for the Grant of Patents
(Luxembourg, 20 to 28 April 1971)
79. Article 138 : Notification of the grounds

The adoption of this new provision, which deals with prior notification of the grounds on which a decision of the Office is to be based, enabled the Working Party to delete Articles 78, paragraph 5, 96, paragraph 2, 105, paragraph 4, 115, paragraph 5

80. Article 139 : Oral proceedings

The adoption of this provision, concerning oral proceedings before the European Patent Office, enabled the Working Party to delete Articles 84, 106 and 114.

81. Article 35a, paragraph 1, sub-paragraph E : Powers of decision of the Administrative Council

Following a previous decision, the Working Party decided to add a sub-paragraph E, authorising the Administrative Council to amend the time limits laid down in the Convention independently of any revision under Article 162 and subject to the provisions of Article 159. The Working Party reserved the right to study whether other time limits in the Convention should be excluded from the simplified procedure for amendment contained in sub-paragraph E.

82. Article 68, paragraph (c) : Date of the application

At the request of the Swiss delegation, the Working Party agreed to examine at one of its next meetings a note in which the Swiss delegation will explain the reasons which in its opinion justify mentioning drawings, as well as description and claims, in paragraph (c).
INTER-GOVERNMENTAL CONFERENCE
FOR THE SETTING UP OF A EUROPEAN
SYSTEM FOR THE GRANT OF PATENTS

- Secretariat -

BRussels, 28 February 1971
BR/87/71

MINUTES
of the meeting of Working Party I
held at Luxembourg from 30 November to 2 December 1970
and of the meeting held on 3 December 1970 by that Working
Party, acting in its capacity as Co-ordinating Committee

**Item 1 on the agenda (1) : Opening of the meeting and adoption
of the provisional agenda**

1. The Working Party held its sixth meeting at
Luxembourg from Monday, 30 November to Wednesday,
2 December 1970, with Dr. HAERTEL, President of the German
Patent Office, in the Chair.

Representatives of the Commission of the European
Communities, WIPO-BIRPI and the International Patent
Institute took part in the meeting (2). The representative
of the General Secretariat of the Council of Europe sent
his apologies for being unable to attend.

2. The Drafting Committee, under the chairmanship of
the President of the Netherlands Octrooiraad (Patent Office),
Mr. J. B. van BENTHEM, held its meetings directly after the
deliberations of the Working Party.

(1) For the provisional agenda (BR/GT I/62/70), see Annex I.
(2) For the list of participants, see Annex II.

BR/87 e/71 ght/BS/prk .../...
Article 35a continued:

(c) the agreements with Contracting States to the Patent Co-operation Treaty which are not Contracting States to this Convention referred to in Article 119, paragraph 2;

(d) any agreement with any other inter-governmental organisation exercising an activity in which the European Patent Office has an interest;

C. decide as to the possibility of the European Patent Office acting as a receiving Office within the meaning of Chapter I of the Patent Co-operation Treaty, in the case provided for in Article 119, paragraph 3;

D. decide upon the creation of branches for information and liaison purposes in the Contracting States or with the International Patent Institute at The Hague or other inter-governmental organisations in the field of industrial property, subject to the approval of the Contracting State or the organisation concerned.

1. Note to Article 35a, paragraph 1 (E):

   It should be re-examined whether provision should be made for an exception, as provided for in E 2nd sentence, to be made for other time-limits.

2. Note to Article 35a, paragraph 2 (f):

   Adoption of the provision contained in (f) would necessitate an amendment of Article 32 (3), which should be completed as follows: "in accordance with the provisions laid down in Article 35a, paragraph 2 (f)".
Article 35 continued:

(2) In addition, the Administrative Council shall:

(a) take any necessary measures for the purpose of ensuring the smooth functioning of the European Patent Office;

(b) adopt each year the budget of the European Patent Office and such amending or supplementary budgets as may be submitted to it by the President of the European Patent Office, and supervise the implementation thereof;

(c) audit and approve each year the accounts and inventories and the balance sheet;

(d) approve the annual management reports of the President of the European Patent Office;

(e) appoint the senior officials referred to in Article 37, subject to the conditions laid down in that Article, and may, on the proposal of the President of the European Patent Office, take disciplinary action in regard to those officials referred to in paragraph 3 of the said Article, while observing the provisions of the Service Regulations applicable to them;

(f) give, in each particular case, to the President of the European Patent Office, to whom the President of the Administrative Council shall to this end address a written communication, an authorisation to exercise the legal capacity of the European Patent Office for the purposes of:

- actions at law with the exception of those of an urgent or protective nature, or those in which the European Patent Office has been made a defendant,

- acts relating to the disposal of immovable property, or relating to the disposal of movable property when the sum involved exceeds the exchange value of 20 kilograms of fine gold, as well as acts affecting, in the two cases referred to above, the ownership of such property.

(3) Furthermore, the Administrative Council shall:

A. give its decision on requests for accession to this Convention formulated by third countries;

b. conclude or amend on behalf of the European Patent Office:

(a) the agreement with the International Patent Institute at The Hague laying down the procedures for its collaboration with the European Patent Office;

(b) any agreement with the International Bureau provided for in the Patent Co-operation Treaty, for the purposes of applying Articles 117 to 123 of this Convention;

BR/88 e/71 gc
CHAPTER Ia (1)

Powers and functions of the Administrative Council

Article 35a

Powers of decision of the Administrative Council

(1) The Administrative Council shall be competent to:

A. amend the Implementing Regulations to this Convention;

B. adopt or amend:

(a) the Administrative and Financial Regulations of the European Patent Office;

(b) the Service Regulations for officials and the conditions of employment of other employees of the European Patent Office, the salary scales of the said officials and other employees, and also the nature and the rules for the grant of the supplementary benefits which may be accorded to them;

(c) the Rules relating to fees;

(d) any other rules necessary for the implementation of this Convention;

C. take the decisions referred to in Article 159;

D. amend Articles 54 and 55 so as to re-allocate in the light of experience the responsibilities entrusted to the Examining Sections and Examining Divisions;

E. amend the time limits laid down in this Convention independently of any revision under Article 162. This shall not apply to the time limit laid down in Article 88, paragraph 2, subject to the provisions of Article 159.

(1) The provisions of Chapters Ia, Ib and Ic will require to be harmonised with the other provisions of the Convention at a later date.

The position of these Chapters in the Convention is provisional.

BR/88 e/71 gc
FIRST PRELIMINARY DRAFT OF A CONVENTION

ESTABLISHING

A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

- Stage reached on 29 January 1971 -
15. The Working Party finally agreed that a solution totally reconciling the three requirements set out under (i), (ii) and (iii) was hardly possible. It felt that, under these circumstances, the least objectionable course would perhaps be to accept a solution which would involve practical difficulties for the European Patent Office, but which would safeguard both the rights acquired by applicants and the interests of States which had not ratified the revised text. It therefore decided in favour of the first solution (1). However, the Working Party did not feel that it could by itself assess the seriousness of the practical difficulties entailed by this solution as regards the working of the European Patent Office, such an assessment lying more within the scope of Working Party I. For this reason, it was decided to adopt this solution, on the understanding that it would be submitted to Working Party I, which was to be asked whether it was compatible with the smooth operation of the European Patent Office.

Article c - Signature - Ratification

16. In this provision, the intention of the Working Party was to limit signature of the Convention to the States taking part in the Inter-Governmental Conference (17 countries) or which had been offered the option of taking part in it (Malta and Monaco).

For subsequent accession by other European States, see Article d(2) below.

Article d - Accession

17. The Working Party pointed out that the accession of States able to be parties to the Convention from the time the latter was open for signature should be effected automatically as soon as such State expressed the wish to

(1) Set out under point 62.
feel it was in his interest to delay the examination procedure, as he was allowed to do by the Convention. One delegation pointed out the drawbacks that would be entailed in obliging the applicant to transfer his application, even if the amendment of the provisions of the Convention affected his application only to an insignificant extent.

14. The Working Party also examined a proposal by the French delegation. The system advocated concerned all the applications under consideration, making no distinction between applications designating one or more States which had not ratified and the rest. They should, as a matter of principle, be examined on the basis of the law previously in force, unless the nature of the amendments to the Convention affected the applicant's acquired right to the grant of a European Patent. As for applications which designated States which had not ratified, the applicant was free to request transfer to the national authorities if he did not want the European Patent Office to continue with the examination of his application.

In opposition to this proposal, the Working Party reaffirmed the principle that reviewing Conferences should not be circumscribed by present rulings and that all that was needed was to adopt rules for applications designating States which had not ratified the revised text, in so far as those States were concerned. One delegation, moreover, pointed out that this proposal dealt with the acquired rights of the applicant, without there being any agreement as to the substance of these rights. This delegation added that the choice allowed the applicant was superfluous since his rights were sufficiently protected by the first and second considerations of the French delegation's proposal.
13. The Working Party thereupon applied itself to seeking a formula which would avoid these disadvantages and the Danish delegation put forward a number of suggestions to this end:

(i) The first suggestion drew a distinction according to whether or not the revised text provided for applications under consideration to be subject to the former provisions. If so the EPO would apply the same rules when examining applications in respect of a State which had not ratified. If not, applications relating to that State would be transferred to the competent national authorities.

(ii) A second suggestion laid down that the EPO should examine the applications in question, unless States which had not ratified called for the transfer of applications relating to them to their national authorities.

(iii) The third suggestion, finally, was that the applications in question should be examined by the EPO in accordance with the law previously in force only if the applicants had asked for them to be examined within two months following the entry into force of the amendment. Otherwise the transfer to the national authorities would follow automatically.

The main objection put forward to these different systems was that they did not take the interests of the applicant sufficiently into account. The Working Party felt that although the third solution did not totally rule out the right of the applicant to choose the system to be applied and would not cause any lasting difficulties for the European Patent Office, it constituted an infringement of the rights of the applicant, who might
Some delegations were, however, of the opinion that patents could continue to be granted for some time in respect of those States, on the basis of the Convention to which they were parties, without this constituting an infringement of their rights.

(iii) The Working Party realised that the first two requirements could be met only by ensuring the continuation of the unrevised text, for a limited period. It recognised that, depending on the nature and scope of the amendments the simultaneous existence of two legal systems could create problems of implementation for the European Patent Office and that it would be desirable to avoid such difficulties as far as possible.

12. The first solution submitted to the Working Party made provision for applications under consideration at the date of entry into force of the revised text to be examined by the European Patent Office in accordance with the law applicable before the entry into force of the revised text. It was pointed out that this provision applied to patent applications designating States which had not ratified the new text, only in so far as these States were concerned. This system reconciled the first two requirements described under (i) and (ii) but failed to take account of the interests of the European Patent Office, which would be compelled to apply two different legal systems for a period of anything up to seven years, depending on the solution adopted by the Convention on the matter of deferred examination. Moreover, applications designating both States which had agreed to the revised text and other States, would have to be kept separate for examination according to the different provisions. One delegation, whose national law makes provision for the patent examination procedure, stressed the practical difficulties of such a solution.
Examination of the problems relating to such applications revealed that the issue at stake was to reconcile three not altogether compatible requirements:

(i) to protect the acquired rights of applicants;
(ii) to respect the wishes of States which had not ratified the revised text;
(iii) to avoid the European Patent Office running into operational difficulties.

(i) The Working Party agreed that an applicant held certain rights which ought to be protected, whatever subsequent amendments might be made to the Convention under whose rules he filed his application. The Working Party did not, however, come to an agreement as to the nature of the rights acquired by the applicant, since their content varied considerably according to the different national legal systems. Some delegations felt that an applicant was entitled to have his application examined under the system in force at the time of filing. Another delegation, however, felt that the applicant's only right was to obtain a patent in accordance with the regulations in force at the time of its granting. The Working Party was of the opinion, nevertheless, that it did not seem indispensable for the wording of this provision to specify this concept of acquired right.

(ii) The Working Party agreed that there could be no question of adopting any solution which took no account of the wishes of the States; one that would, in other words, have the effect of imposing on them a legal system to which they were not parties.
moment, its intention to ratify the revised text, could not, in the event, suspend the time limit following which the said State would cease to be a party to the Convention.

9. The Working Party agreed to draw the attention of its "Supplementing Regulations" sub-Committee to the need to provide for publication in the Official journal of the European Patent Office, both of the amendments referred to in Article a and of the situation of the States in relation to the revised text, in order to ensure that private individuals were kept informed. It was pointed out that this note was also relevant to accessions to the Convention, to denunciations, and to the various declarations relating to the territorial field of application.

Article b - Reservation of acquired rights in cases of non-ratification

10. As the principle of acquired rights for patents granted before the revision raised no problems, the Working Party examined the case of applications under consideration by the European Patent Office at the time of entry into force of the revised text. It considered that it would be up to each reviewing Conference to decide what should be done about these applications as regards the States which had agreed to the revised text. Since, however, the rules drawn up by the reviewing Conference could not be imposed on any States which abstained from ratifying the new text - because, on this assumption, these States would be excluded from the new legal system - it would be advisable to lay down a ruling in the Convention itself on what was to be done about applications, which designated one or more such States, in so far as these States were concerned.
MINUTES
of the Meeting of Working Party II
(Luxembourg, 1-4 September 1970 - 2nd meeting)

I

1. The second meeting of Working Party II was held at Luxembourg, from Tuesday 1 to Friday 4 September 1970 under the Chairmanship of Mr. R. LABRY, Counsellor at the Ministry of Foreign Affairs (France).

The Commission of the European Communities and the International Patent Institute attended the meeting as observers. (1).

2. The Working Party would draw attention to the provisional nature of the wording of the texts it adopted.

Bearing in mind the timetable laid down for the meetings of the other Working Parties, the outcome of which might lead the Working Party to revise some of the provisions which it had previously adopted, in particular those relating to the Administrative Council.

(1) The list of those attending the meeting is given in the Annex.

BR 53 e/70 son/PB/prk
Article b

Preparatory duties of the Administrative Council

The Administrative Council shall be empowered:

(a) to prepare Conferences for the revision of this Convention;

(b) to prepare such adaptations to this Convention as may be rendered necessary by the accession of third countries.
FIRST PRELIMINARY DRAFT CONVENTION
ESTABLISHING A EUROPEAN SYSTEM
FOR THE GRANT OF PATENTS

Provisions relating to the Administrative Council
Text drawn up by Working Party II
(4 to 6 March 1970)
moment, its intention to ratify the revised text, could not, in the event, suspend the time limit following which the said State would cease to be a party to the Convention.

9. The Working Party agreed to draw the attention of its "Supplementing Regulations" sub-Committee to the need to provide for publication in the Official journal of the European Patent Office, both of the amendments referred to in Article 4 and of the situation of the States in relation to the revised text, in order to ensure that private individuals were kept informed. It was pointed out that this note was also relevant to accessions to the Convention, to denunciations, and to the various declarations relating to the territorial field of application.

Article 6 - Reservation of acquired rights in cases of non-ratification

10. As the principle of acquired rights for patents granted before the revision raised no problems, the Working Party examined the case of applications under consideration by the European Patent Office at the time of entry into force of the revised text. It considered that it would be up to each reviewing Conference to decide what should be done about these applications as regards the States which had agreed to the revised text. Since, however, the rules drawn up by the reviewing Conference could not be imposed on any States which abstained from ratifying the new text - because, on this assumption, these States would be excluded from the new legal system - it would be advisable to lay down a ruling in the Convention itself on what was to be done about applications, which designated one or more such States, in so far as these States were concerned.
gratification of the revised text, this being the same majority as had been adopted in the decision on accession (See Article d).

7. The Working Party agreed to extend to one year the period provided for in Paragraph 4(e). Thus, the entry into force of the revised text, on the expiry of this period, would mark the point at which those States which had not ratified the revised text would cease to be parties to the Convention. The Working Party felt it necessary to leave each State sufficient time, in view of the necessary internal procedures, to decide whether it would be expedient to ratify the revised text or to be excluded from the Convention, with effect from the time when the State could be sure that the revision would come into force, by reason of the deposit of a sufficient number of instruments of ratification.

8. This set of safeguards enabled the Working Party to rule that any States having failed to ratify the revised text or to abide by it would cease to be parties to the Convention with effect from the entry into force of the revised text (Paragraph 4(h)). One delegation suggested providing for each proposed amendment to be accompanied by a vote on the issue of whether, in each particular case, refusal to ratify the revised text should entail exclusion from the Convention. This system was found to be too complicated and liable to give rise to scarcely acceptable consequences, since it would result either in the application of two different texts of the Convention, or in imposing a new legal system on States which had not agreed to it.

In this same context, it was agreed that a declaration by a Contracting State, making known, at a given
MAIN COMMENTS MADE ON THE FINAL AND GENERAL PROVISIONS

Part VI bis of the Convention
Final and general provisions

Article a - Revision

5. The overriding preoccupation of the Working Party was, in the event of an amendment not being accepted by all the States, to avoid two different texts being in force simultaneously. The solution adopted by the Working Party was to lay down that all States which had not ratified the revised text would cease to be parties to the Convention. Nevertheless, in order to avoid, as far as possible, such situations as might arise as consequence of these provisions, the Working Party adopted certain adjustments (See points 6, 7 and 8 below).

6. The Working Party was at pains to avoid a proliferation of amendments, bearing in mind the serious consequences of the entry into force of a revised text for any States which might be unable to ratify or abide by the revised Convention once the revised text came into force. The Working Party accordingly decided against the principle of a reviewing Conference, meeting periodically, and preferred to leave it to the Administrative Council to decide when such meetings would be appropriate. The Working Party also agreed to fix a rather high quorum for deliberations at any reviewing conference which might be held. This enabled it to agree to a reduction, in relation to the Chairman's initial proposal, in the majorities required both for the adoption and for the
MINUTES
of the Meeting of Working Party II
(Luxembourg, 1-4 September 1970 - 2nd meeting)

I

1. The second meeting of Working Party II was held in Luxembourg, from Tuesday 1 to Friday 4 September 1970, under the Chairmanship of Mr. R. LABRY, Counsellor at the Ministry of Foreign Affairs (France).

The Commission of the European Communities and the International Patent Institute attended the meeting as observers. (1).

2. The Working Party would draw attention to the provisional nature of the wording of the texts it adopted.

Bearing in mind the timetable laid down for the meetings of the other Working Parties, the outcome of which might lead the Working Party to revise some of the provisions which it had previously adopted, in particular those relating to the Administrative Council,

.../...

(1) The list of those attending the meeting is given in the Annex.
already imposed by the budget, whose adoption falls to the Administrative Council. The Working Party, while recognizing the existence of these limitations, believed that they would not apply to every case where a special authorisation from the Administrative Council to the President would seem desirable to it. The Working Party accordingly adopted the text contained in paragraph 2 (f), it being understood that the adoption of this provision would require the amendment of Article 32 (3) of the Draft Convention.

The Working Party agreed to re-examine, where appropriate, the limit of 20 kilograms of fine gold, laid down in the second sub-section of (f), in the light of the financial provisions of the Convention, to be drawn up by Working Party IV.

16. As regards paragraph 3 (4) the Working Party agreed that this provision could, where appropriate, be re-examined once the final provisions of the Convention had been drawn up.

It was further noted that this paragraph, which deals with the "International functions" of the Administrative Council, could be incorporated as a separate Article.

Article b - Preparatory duties of the Administrative Council

17. No comment.
13. The question was raised of whether the power of the Council to appoint auditors should be specifically mentioned in paragraph 2. Subject to the financial provisions for the Convention, to be drawn up by Working Party IV, the Working Party believed it was not essential to provide for the appointments of auditors in the body of the Convention itself. This could indeed come under certain rules to be included in the Financial Regulations.

14. As regards paragraph 2(e), the Working Party, while providing that disciplinary action may be taken in regard to the members of the Boards of Appeal and of the Enlarged Board of Appeal, believed it necessary to stipulate that in taking any such disciplinary action, the independence of the members of the said Boards must be respected. For this reason, it laid down that such disciplinary action may only be taken if the provisions of the Service Regulations applicable to the members in question are observed. The Service Regulations must therefore define the guarantees enjoyed by the members of the Boards of Appeal and of the Enlarged Board of Appeal.

The Working Party agreed not to make specific mention of the possibility allowed the Council to take disciplinary action in regard to the President and the Vice-President of the European Patent Office.

15. As regards paragraph 2(f), the Working Party noted that Article 32 (3) of the Draft Convention, in the version drawn up by Working Party I and adopted by the Conference, gives power to the President of the European Patent Office to exercise the legal capacity of that Office. The Working Party wondered whether this power entrusted to the President should not, for certain important acts, be subject to an authorisation to be granted to the latter by the Council for each case. In this context, mention was made of the limitations
On the other hand, the Working Party did provisionally adopt (while waiting to know the final contents of the Implementing Regulations) a solution to be applied only to those cases where unanimity is required. This solution consists in allowing any Contracting State to declare, upon the adoption of a decision, that its entry into force requires, by virtue of that State's national constitution, the completion of certain formalities of internal law. Under this system, such a decision would only enter into force when the State concerned had notified the Administrative Council of the completion of such formalities. The text adopted to this end has been incorporated in Article m (2) by the Working Party.

12. The Working Party wondered whether the list of decisions contained in paragraph 1 (b) should be completed by reference to:

(i) the list of posts

(ii) the staff complement

(iii) the establishment plan of the European Patent Office.

It did not eventually complete the said provision in this manner, for the following reasons:

As regards the list of posts, where this is understood as an abstract description of the duties of each grade, it was of the opinion that such a list would be contained in the Service Regulations; and, where this is understood as an establishment plan of the Office, it would be contained in the provisions of the Administrative Regulations provided for in B (a). Finally, the numbers of officials and other employees would be laid down for each Class in the budget of the European Patent Office, to be adopted by the Administrative Council under paragraph 2 (b).
Working Parties, between the Convention itself and the Implementing Regulations remained completely open, as had been pointed out by Working Party I. Accordingly, the Working Party noted that the provision relating to the power of the Administrative Council to amend the Implementing Regulations could be re-examined at a later stage, in the light of the contents of the Implementing Regulations. Since it was not yet certain what the contents of the Implementing Regulations would be, the Working Party was not able to affirm immediately that the Administrative Council will be able to exercise its power to amend the Implementing Regulations without this in certain (admittedly limited) cases entailing recourse by any given Contracting State to certain procedures of internal law (such as parliamentary approval) before the latter could finally approve the amendments in question.

At this stage in the proceedings, the Working Party considered it expedient to examine the means allowing any difficulties which might face the Administrative Council to be solved, in view of the problems brought forward above. To this end, it considered a first proposal consisting in delaying the entry into force of the decisions of the Council for a fixed period, during which any State faced with such problems should be able to complete the required formalities. After thorough examination, the Working Party rejected this proposal. It did indeed appear difficult to the Working Party to fix a priori a standard period for entry into force for all future decisions of the Council, when the administrative requirements of the European Patent Office could call for the immediate or early entry into force of such decisions.
9. It was further agreed that the order of the various provisions contained in Part III bis and examined by the Working Party was provisional and could be reconsidered at a later stage.

III

MAIN COMMENTS ON THE VARIOUS ARTICLES RELATING TO THE ADMINISTRATIVE COUNCIL

PART III bis OF THE CONVENTION

The Administrative Council of the European Patent Office

CHAPTER I

Article a - Powers of decision of the Administrative Council

10. In paragraph 1(a), the Working Party provided that the Administrative Council shall have the power to amend the Implementing Regulations to the Convention. It was of the opinion that the responsibilities of the Administrative Council did not extend to the adoption of these Regulations, which should indeed be drawn up at the same time as the Convention itself. The Working Party therefore assumed that it would be for the diplomatic Conference to decide on the manner in which the Implementing Regulations were to be adopted.

11. The Working Party further noted that the question of the distribution of the various provisions drawn up by Working Party I, and of those to be drawn up by the other
MINUTES

of the meeting of Working Party II
(Luxembourg, 4-6 March 1970)

I

1. The first working meeting of Working Party II, set up by the Conference at the latter's meeting of 13-16 January 1970, was held at Luxembourg from Wednesday 4 to Friday 6 March 1970.

In accordance with the decision taken by the Working Party at its inaugural meeting held at Luxembourg on 16 January 1970, the Chair was taken by Mr. LABRY, Counsellor at the Ministry of Foreign Affairs (France).

The Commission of the European Communities, BIRPI and the International Patent Institute (IIB) took part in the meeting as observers. The representative of the General Secretariat of the Council of Europe, who had also been invited to take part in the meeting, apologized for being unable to attend (1).

(1) See list of participants in the meeting of the Working Party given in Annex II. As regards Annex I, see point 38 on page 16.

BR/34 e/70 kel/RT/mrk
Article a contd.

(3) Furthermore, the Administrative Council shall:

A. give its decision on requests for accession to this Convention formulated by third countries;

B. conclude or amend on behalf of the European Patent Office:

(a) the agreement with the International Patent Institute laying down the procedures for its collaboration with the European Patent Office;

(b) any agreement with the International Bureau provided for in the Patent Co-operation Treaty, for the purposes of applying Articles 117 to 123 of this Convention;

(c) the agreements with Contracting States to the Co-operation Treaty which are not Contracting States to this Convention referred to in Article 119, paragraph 2;

(d) any agreement with any other inter-governmental organisation exercising an activity in which the European Patent Office has an interest;

C. decide as to the possibility of the European Patent Office acting as a receiving Office within the meaning of Chapter I of the Co-operation Treaty, in the case provided for in Article 119, paragraph 3;

D. decide upon the creation of branches for information and liaison purposes in the Contracting States or with the International Patent Institute or other inter-governmental organisations in the field of industrial property, subject to the approval of the Contracting State or the organisation concerned.
Article a contd.

(f) give, in each particular case, to the President of the European Patent Office, to whom the President of the Administrative Council shall to this end address a written communication, an authorisation to exercise the legal capacity of the European Patent Office for the purposes of:

- actions at law with the exception of those of an urgent or protective nature, or those in which the European Patent Office has been made a defendant,

- acts relating to the disposal of immovable property, or relating to the disposal of movable property when the sum involved exceeds the exchange value of 20 kilograms of fine gold, as well as acts affecting, in the two cases referred to above, the ownership of such property.

Note:
Adoption of the provision contained in (f) would necessitate an amendment of Article 32 (3), which should be completed as follows: "in accordance with the provisions laid down in Article a, paragraph 3 (f)".
Article 8 contd.

C. amend the procedure for requests for examination, in accordance with the provisions of Article 89, paragraphs 1 to 3.

--- Note: ---

The Working Party, to take into account the note to Articles 54 and 55, proposes to introduce a new paragraph D as follows:

D. amendment of Articles 54 and 55 so as to re-allocate in the light of experience the responsibilities entrusted to the Examining Sections and Examining Divisions.

E. in addition, the Administrative Council shall:

(a) take any necessary measures for the purpose of ensuring the smooth functioning of the European Patent Office;

(b) adopt each year the budget of the European Patent Office and such amending or supplementary budgets as may be submitted to it by the President of the European Patent Office, and supervise the implementation thereof;

(c) audit and approve each year the accounts and inventories and the balance sheet;

(d) approve the annual management reports of the President of the European Patent Office;

(e) appoint the senior officials referred to in Article 37, subject to the conditions laid down in that Article, and may, on the proposal of the President of the European Patent Office, take disciplinary action in regard to those officials referred to in paragraph 3 of the said Article, while observing the provisions of the Service Regulations applicable to them;

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.../...
ARTICLE 1

Powers of decision of the Administrative Council

1. The Administrative Council shall be competent to:

A. amend the Implementing Regulations to this Convention;

B. adopt or amend:

(a) the Administrative and Financial Regulations of the European Patent Office;

(b) the Service Regulations for officials and the conditions of employment of other employees of the European Patent Office, the salary scales of the said officials and other employees, and also the nature and the rules for the grant of the supplementary benefits which may be accorded to them;

(c) the Rules relating to fees;

(d) any other rules necessary for the implementation of this Convention;

BR/33 e/70 bm
INTER-GOVERNMENTAL CONFERENCE
FOR THE SETTING UP OF A EUROPEAN
SYSTEM FOR THE GRANT OF PATENTS

Brussels, 13 March 1970
BR/33/70

- Secretariat -

FIRST PRELIMINARY DRAFT CONVENTION
ESTABLISHING A EUROPEAN SYSTEM
FOR THE GRANT OF PATENTS

Provisions relating to the Administrative Council
Text drawn up by Working Party II
(4 to 6 March 1970)

BR/33 e/70 m rk
D'autres protocoles ont été envisagés au sujet de la proposition allemande concernant l'article 230 et l'extension de l'effet territorial à Berlin.

L'article est adopté sans discussion.

Discussion de l'article 280 de l'avant-projet

Le Président souligne que l'importance de cet article repose surtout dans ce qu'on n'exprime pas. En effet, il correspond aux clauses généralement utilisées dans les accords internationaux mais il se fait au sujet de la résiliation de la Convention. Le Président pense que la Convention ne peut pas être résiliée par un Etat contractant.

À la demande de M. de Mayser, il précise que l'article 280 ne s'applique pas aux États associés. Pour ceux-ci ces questions seront réglées dans les Traités d'association qui sont normalement résiliables.

Toutefois, l'absence d'une clause de résiliation ne signifie pas que cette Convention ne pourrait pas prendre fin sur la base d'un accord entre tous les États contractants. Il serait également possible qu'un seul État en sorte si tous les autres États contractants l'admettent.

Une telle règle se justifie par le fait que l'établissement de toutes les institutions a des conséquences d'ordre personnel et financier si importantes qu'il serait difficile de l'entreprendre sans la certitude que tous les États contractants n'y participent.

En outre, le développement des droits nationaux conformément à la Convention serait difficilement réversible.

Le groupe adopte l'article 280 et le transmet au Comité de rédaction.

Discussion de l'article 281 de l'avant-projet

Il est entendu qu'il est prévu que cet article ferait l'objet d'un examen de la part des experts des ministères des affaires étrangères.
Résultats de la cinquième séance du groupe de travail "Brevets" qui s'est tenue à Bruxelles du 2 au 18 avril 1962
Andere Protokolle seien bezüglich des deutschen Vorschlags zu Artikel 230 und zur Erstreckung des territorialen Geltungsbereichs auf Berlin vorgesehen.

Der Artikel wird ohne Diskussion angenommen.

Beratung von Artikel 280 des Vorentwurfs

Der Vorsitzende hebt hervor, die Bedeutung dieses Artikels liege vor allem darin, was man nicht sage. Er entspreche den in internationalen Abkommen allgemein gebrauchten Klauseln, enthalte jedoch nichts über die Kündigung des Abkommens. Das Abkommen könne also nicht von einem Vertragsrat gekündigt werden.

Auf eine Frage von Herrn de Muyser erklärt der Vorsitzende, Artikel 280 gelte nicht für die assoziierten Staaten. Diese Fragen würden in den Assoziierungsverträgen geregelt, die normalerweise kündbar seien.


Eine solche Regelung finde ihre Rechtfertigung in der Tatsache, daß die Gründung all dieser Institutionen so bedeutende Folgen im Personal- und Finanzwesen habe, daß es schwierig sei, etwas zu unternehmen, ohne sicher zu sein, daß alle Vertragsstaaten daran teilnehmen.

Ferner sei die mit der Entwicklung des Abkommens gleichlaufende Entwicklung der nationalen Gesetze schwer wieder rückerständig zu machen.

Die Arbeitsgruppe nimmt den Artikel 280 an und überweist ihn dem Redaktionsausschuß.

Beratung von Artikel 281 des Vorentwurfs

Es liegt auf der Hand, daß dieser Artikel von den Außenministern überprüft werden wird.
Erster Teil : TEXTENTWÜRFE

Arbeitsentwurf eines Abkommens über ein europäisches Patentrecht
Ad article 280

Durée de la Convention

1. Documents de base :

2. Remarques :

La durée de la Convention dépend également de la réponse qui sera donnée à la question examinée en détail dans les remarques relatives à l'article 277 et consistant à déterminer si la Convention relative à un droit européen des brevets doit être une convention ouverte ou si, en tout état de cause, la qualité de membre de cette convention doit être réservée aux États qui sont ou deviendront en même temps membres du Marché commun.

L'article 280 est fondé sur la seconde possibilité. Le texte de l'article 280 correspond à l'article 240 du Traité de la CEE.
Article 280
Durée de la Convention

La présente Convention est conclue pour une durée illimitée.

Benjamin
Kurt Haertel

Bonn, le 28 février 1962

CONFIDENTIEL!
Zu Artikel 280
Dauer des Abkommens

1. Materialien:
   --

2. Bemerkungen:

Die Frage der Dauer des Abkommens ist ebenfalls von der in den Bemerkungen zu Artikel 277 näher erörterten Frage abhängig, ob das Abkommen über ein europäisches Patentrecht ein offenes Abkommen sein soll oder ob jedenfalls die Mitgliedschaft zu diesem Abkommen auf diejenigen Staaten beschränkt bleiben soll, die zugleich Mitglieder des Gemeinsamen Markts sind oder in Zukunft sein werden.

Artikel 280

Dauer des Abkommens

Dieses Abkommen gilt auf unbegrenzte Zeit.
Erster Arbeitsentwurf

eines Abkommens

über ein europäisches Patentrecht

Artikel 271 ff.

(Artikel 271 bis 282
nebst Artikel 48a Abs. 4 und 48 b)

Schlussbestimmungen
Article 171
Duration of the Convention

The present Convention shall be of unlimited duration.