Comment:

The collection represents purely an internal research tool for the purpose of Directorate Patent Law of the European Patent Office. No guarantee can be given for its completeness or correctness.
The documents produced before 1969 cannot be provided in English as this was not an official language in the period before that date. These documents therefore are provided in French and German.
MINUTES

of the 3rd meeting of Working Party I Sub-Committee
on "Implementing Regulations"
(Luxembourg, 20-23 October 1970)

I

1. The third working meeting of the Sub-Committee instructed by Working Party I to draw up draft Implementing Regulations to the Convention was held at Luxembourg, from Tuesday 20 to Friday 23 October 1970, with Mr. FRESSONET, Deputy Director, French Industrial Property Institute, in the Chair.

In addition to the national delegations represented in the sub-Committee, the meeting was attended by BIRPI and the International Patents Institute (IIB) (1).

(1) See the list of participants in Annex I.
2. The Chairman submitted the provisional agenda contained in Annex II to the Sub-Committee. This agenda was adopted. The drafting Committee met daily after the meetings of the Sub-Committee. The texts adopted by the Sub-Committee are contained in BR/59/70.

3. The Sub-Committee decided to hold its next meeting from Monday 23 November, beginning at 10.00 a.m., to Friday 27 November 1970. The Chairman stated that during this next meeting the Sub-Committee would have to complete its examination of the proposals contained in BR/GT I/63/70 and discuss those contained in BR/GT I/65/70. Furthermore, the Sub-Committee would have to re-examine certain Articles for which proposals had yet to be drawn up, and re-examine other Articles for which a solution had still to be found. In this connection, the following documents should be examined:

(i) a report by Dr. SINGER, General rapporteur, on dependent claims, and a proposal by the Swiss delegation on the same problem, Re. Article 66, No. 3, paragraph 4;

(ii) a proposal by the German delegation for Re. Article 69, No. 1, on applications deemed to be withdrawn;

(iii) the observations by the United Kingdom and Swedish delegations on Re. Article 70, Nos. 1 and 2, concerning claims in different categories and claims in the same category;
(iv) a proposal drawn up by the IIB concerning the content, form and presentation of reports on the state of the art (1).

The Chairman stated that the Sub-Committee would probably have to hold an additional meeting after that of November in order to complete all its work.

4. In section II of these Minutes, the delegations will find the main comments on the Articles laying down Implementing Regulations to Articles 88 to 159 of the Preliminary Draft Convention, which were examined during this third meeting.

II

5. The Sub-Committee drew up the Articles in question mainly on the basis of the provisions of the draft Implementing Regulations to the Convention on a European Patent Law which had been drawn up in 1964 by the EEC "Patents" Working Party. However, for certain Articles, the Sub-Committee felt it necessary to retain in whole or in part the provisions of the Regulations under the Patent Co-operation Treaty (PCT) signed at Washington on 19 June 1970, as well as certain provisions of the Rules of Procedure of the Court of Justice of the European Communities (see BR/GT I/52/70 and BR/GT I/63/70).

(1) These various documents have been, or will be, sent to the delegations by the Secretariat, or were distributed at the meeting in October. The delegations are requested to bring these documents with them for the November meeting.
6. See under 10.

Re. Article 88, No. 1 - Form of the request for examination

6bis. The Sub-Committee agreed not to insist in paragraph 2(a) that the request should indicate the nationality of the applicant or the State in which he has his residence or registered place of business. See the note to this provision. The Sub-Committee also deleted the reference to the right of a third party making a request to state his objections, such a right being already implicitly recognised in Article 87 of the First Preliminary Draft.

Re. Article 88, No. 2 - Refusal of a request for examination

7. In the event of failure duly to correct the deficiencies noted, the European Patent Office will refuse the request for examination. In this case, the examination fee, although high, will not be refunded, in spite of the fact that examination will not take place. The Sub-Committee considered it ought not to encourage persons making a request to be negligent.

The Sub-Committee also felt that if the European Patent Office failed to note the deficiency and began the examination, this would imply that the deficiency no longer existed. Such an implication would, however, only be valid for deficiencies of form. The following provision governs the question of the irregularity of the request itself.
In connection with the first paragraph, the majority of the Sub-Committee decided that if the third party making the request was legally incapable at the time of the submission of the request and the European Patent Office did not note this until after the beginning of the examination, grant proceedings should continue.

When this paragraph was discussed, the Sub-Committee wondered whether the text might be formulated in more general terms laying down that once examination had begun, it should continue under all circumstances unless the applicant withdrew his application. The Swiss delegation also raised the question of whether it might be necessary to include in the Preliminary Draft Convention a general provision governing all the problems relating to dealings between legally incapable persons and the European Patent Office. The attention of the Chairman of Working Party I is to be drawn to this problem, which should be examined with government legal experts. In this connection, it should be noted that other provisions of the Implementing Regulations Re. Articles 101 and 159 also deal with such problems.

The Sub-Committee also adopted the second paragraph of this Article, which is intended to safeguard the interests of the applicant in two cases where the request submitted by a third party is not valid.
Article 97 - Grant of the European patent

9. The Sub-Committee did not adopt a proposed Article governing summons of the applicant by the Examining Division. It considered that a general provision should be included in the Convention combining all the provisions relating to hearings and oral proceedings.

A note has been attached to the Article in question in the Implementing Regulations, to draw the attention of Working Party I to this problem.

Article 98 - Publication of a European patent

10. The Sub-Committee agreed first of all that the Implementing Regulations need not list the particulars to be entered on the specification, but should entrust the task to the President of the European Patent Office as had been done for particulars to be given in the publication of the application (Re. Article 85, No. 1).

The Sub-Committee then decided to combine the two provisions in one single Article. This text has been numbered Re. Article 85, No. 1, for the sake of convenience and is accompanied by a note.

Re. Article 99, No. 1 - Certification of copies of the European patent certificate

11. No comments.

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12. As examination of the provisions relating to Articles 101 to 107 dealing with opposition proceedings was temporarily postponed, (see under 24), the Sub-Committee next discussed the Implementing Regulations to the Articles of the Preliminary Draft relating to appeals.

Re. Article 111, No. 1 - Content of the appeal

13. No comments.

Re. Article 112, No. 1 - Reimbursement of appeal fees

14. The Sub-Committee made provision for the reimbursement of the appeal fee in the event of an interlocutory revision. In this case, the relevant department would not have made a decision on the appeal. This reimbursement is also provided for when the Board of Appeal allows the claims of the appellant, but on condition that the reimbursement is equitable by reason of a substantial procedural violation.

Re. Article 113, No. 1 - Observations by the parties

15. This provision deals with appeals made during opposition proceedings. Under the system set out in the Preliminary Draft, these are the only proceedings involving "other parties".

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In the opinion of the Sub-Committee, opponents who waive the right to participate in appeal proceedings should no longer be kept informed of amendments to the specification which are made subsequent to the exercise of the waiver. The interests of such opponents do not have to be taken into consideration, and this solution allows rapid opposition proceedings and the avoidance of new appeals.

Procedural fees arising after the exercise of a waiver, will be charged to the person waiving his right to the extent that he is responsible for them.

Subject to any provision to the contrary, the rules of procedure applied before the department which has made the decision are to be applicable mutatis mutandis to the appeal proceedings against this decision. The Sub-Committee considered that this principle should also apply to appeals in opposition proceedings. It decided to draw the attention of Working Party I to this problem by inserting a note which is attached to Re. Article 115, No. 1.
The Sub-Committee did not consider it necessary to draw up an Implementing Regulation to Article 114 on summoning the parties to oral proceedings before the Board of Appeal, in view of the fact that it had advocated a general provision governing oral proceedings (see under 9).

Re. Article 114, No. 1 - Conduct of oral proceedings

This Article, which is based on the Rules of Procedure of the Court of Justice of the European Communities, was placed between square brackets and two notes were attached. It will have to be re-examined with government legal experts.

Some members of the Sub-Committee thought that the provision should be included in the Implementing Regulations, while others advocated a different solution, which is set out in the notes. It consists essentially in setting out the procedural details in a document which could be revised more easily.

The Netherlands and United Kingdom delegations agreed that paragraph 2 should lay down that the Chairman shall argue the case on the basis of the facts and of the law with the parties and their representatives, on condition that the other members of the Board of Appeal, who are very often best acquainted with the matter in question, should not be excluded from having an equal say in the course of this discussion.
Re. Article 115, former No. 1 - Pronouncement of the decision on the appeal

20. This provision laid down that the decision on the appeal might be given at the hearing. In this connection, the Swiss and German delegations stressed that this should not be interpreted as an exception. In their opinion, it expressed, on the contrary, a general principle that at oral proceedings the decision must normally be given at the end of the hearing.

The Sub-Committee added a provision to the effect that in any event the decision must subsequently be set down in writing and notified to the parties. It also decided to add the note mentioned under 17 at the end of this text.

Finally, the Sub-Committee decided that this provision should be combined with the provision governing the form of decisions taken by the European Patent Office (see under 52).

Re. Article 115, No. 1 - Form of the decision of the Board of Appeal

21. During the discussion on this Article it was specified that the decisions of the Boards of Appeal are to be taken by a majority and not unanimously. This is the reason why the Boards are to be composed of an odd number of members. It was also pointed out that the fact that decisions must be signed not only by the Chairman but also by all the members of the Board would constitute a guarantee for the person concerned by the decision. Indeed, the judge who had examined the file and would be the most familiar with it from the technical angle would be one of the members of the Board.

BR/60 e/70 ley/KM/prk
22. No comments.

23. See the note addressed to Working Party I below the text of the provision. This concerns the payment of renewal fees, which must be made in advance.

24. Having concluded their examination of the Chairman's proposals contained in BR/GT I/52/70, the Sub-Committee turned to the proposals contained in BR/GT I/63/70, beginning with the Implementing Regulations to the Articles relating to opposition procedure.

25. It was stressed that the opponent must base his opposition on at least one of the grounds listed in Article 101a (new) of the Preliminary Draft. See also the note under the provision as to whether a certain rule should appear in the Convention or in the Implementing Regulations.

BR/60 e/70 ley/KM/prk
Re. Article 101, No. 2 - Requests for documents

26. This Article lays down firstly that the person lodging the opposition must supply the European Patent Office with the documents that he is citing in support of his case, if the Office is not in possession of them and asks him for them. In opposition proceedings the European Patent Office is obliged to examine all relevant documents. Working Party I has not in fact ruled against the opponent producing, during the course of opposition proceedings, any document which might cast doubts on the novelty of the invention.

After an observation on the part of the United Kingdom delegation, the Sub-Committee subsequently decided that the provision should not be limited to the opponent alone, but should be extended to apply to all the parties involved in opposition proceedings. The European Patent Office may also find it very useful to obtain from the proprietor of the patent supplementary documents regarding the novelty of the invention.

Re. Article 101, No. 3 - Rejection of the Notice of Opposition as inadmissible

27. During its discussion on this Article, the Sub-Committee decided in connection with the requirements for the admissibility of the notice of opposition (paragraph 1), that in spite of the importance of the matter, it was not necessary to oblige the European Patent Office to ask the opponent to rectify within the time-limit laid down deficiencies in the notice of opposition. The consequences of such an obligation would put the European Patent Office in too difficult a position in the event of a delay on its part. The term of nine months laid down in the Preliminary Draft for lodging opposition will be fully binding, and the European Patent Office will not be able to grant periods of grace.

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This does not alter the fact that as soon as the European Patent Office finds a deficiency of this nature, it will be morally obliged to bring it to the attention of the opponent so that the latter may rectify it in due time. This is the meaning that the Sub-Committee intended to give to the words: "unless these deficiencies have been remedied before expiry of the opposition period."

Paragraph 2 lists the deficiencies which do not affect the validity of the notice of opposition and which may be rectified even after the opposition period has expired. The text lays down that the European Patent Office is obliged to inform the opponent of the deficiency as the liability of the European Patent Office is not involved in this case.

Re. Article 1C1, No. 4 - Continuation ex officio of the opposition proceedings

28. The majority of the Sub-Committee considered it necessary to lay down that the European Patent Office has the right to continue the opposition proceedings in the event of death, legal incapacity or even withdrawal. It may in fact be necessary to withdraw or amend a patent in the public interest. The right - and not the obligation - provided will enable the European Patent Office to assess whether or not the public interest is concerned.

The United Kingdom delegation expressed a provisional reservation on the actual principle of the continuation ex officio of the opposition proceedings.

BR/60 e/70 ley/АК/prk
29. No comments.

30. The Sub-Committee continued their examination of the Chairman's proposals (BR/GT I/63/70) with a discussion of the Implementing Regulations to the common procedural provisions before the European Patent Office. These provisions, which are partly based on the Rules of Procedure of the Court of Justice, begin with rules relating to Article 154 on measures for taking evidence. Particular emphasis was placed on the point that this Article and its Implementing Regulations are to be further examined with government legal experts.

31. The Sub-Committee adopted this provision, of which the sole aim is to lay down that that the European Patent Office must keep the parties informed when it takes measures for obtaining evidence involving the appearance of witnesses and experts or the inspection of premises.

32. At the request of the United Kingdom delegation, the Sub-Committee formally noted that this provision does not in any way prejudice the fundamental decision which must still be reached as to whether, in this matter, the European Patent Office is to be bound by the statements made by the parties or whether it may act ex officio and summon the witnesses and experts on its own initiative.
This question, which involves conflicting concepts of procedure, is to be settled by Working Party I at one of its next meetings. In the opinion of the United Kingdom delegation, it will also have to be examined closely by the government legal experts.

Re. Article 154, No. 2 - Party payment of the costs of taking evidence

33. The provision in question lays down that the European Patent Office may make the execution of a measure for taking evidence conditional upon the payment of a deposit if one of the parties has requested the measure. In this respect the Sub-Committee adopted wording which does not in any way prejudice the fundamental decisions referred to under 32.

The United Kingdom delegation did not see the necessity of intervention by the European Patent Office in order to settle questions of this nature. It was stated in reply that this system has the advantage of providing a uniform tariff as regards the refunding of costs, and also of respecting the principle that each party must bear his own costs (see under 40).

Re. Article 154, No. 3 - Summons to give evidence

34. The wording adopted for this provision does not prejudice the solution of the question referred to under 32.
35. This provision was adopted subject to a reservation on the part of the United Kingdom delegation regarding the problem referred to under 32. It also considered that the experts should not be called upon unless asked to do so by the parties, and not by the European Patent Office, as the latter will employ a sufficient number of specialists.

36. This Article refers to the oath to be taken by the witnesses and experts. The majority of the Sub-Committee decided that the oath should be taken in the manner laid down by the national law of the witness or expert concerned and that this may be either before or after their testimony, according to the requirements of the national law in question.

37. The German delegation was unable to adopt the view of the majority and reserved its position. It said that such a provision would greatly complicate the work of the European Patent Office, which would be obliged to apply a large number of widely diverging national laws.

38. The Netherlands delegation reserved the right to reconsider the question but was able to agree with the majority, provided that the word "oath" could be interpreted in a wide sense, to cover less stringent forms, such as a solemn sworn statement.
39. At the request of the Swiss delegation, an addition was made to this article to the effect that the witness or expert be informed, prior to his being heard, that perjury may incur sanctions. This last provision has been placed between brackets. On this subject, see the footnote to the text of the article.

Re. Article 154, No. 6 - Payment of expenses of witnesses and experts

40. This article conforms to the principle that each party bears the costs caused by him. It will be remembered that a possibility of derogating from this principle has been provided for in the new Article 164 of the Preliminary Draft Convention concerning the costs of opposition proceedings. In this respect, the Subcommittee wondered whether the principle itself should also be contained in an article of the Convention. This point must be decided by Working Party I.

In addition, it should be noted that the principle of the Administrative Council laying down the rates will offer the advantage of uniformity and equity in reimbursements.

Re. Article 154, No. 7 - Conservation of evidence

41. The purpose of this article is to allow a third party, who is not a party to the proceedings, to present to the European Patent Office evidence which he will later substantiate when he initiates opposition proceedings. To have this done, the third party need only make a
request; it is not even necessary that such a request be published. In this way all contingencies are covered. With a view to avoiding frivolous requests, provision is made for the payment of a fee, as well as the necessity of giving a clear indication of the evidence to be taken. Finally, in the case of oral evidence being taken, the parties may attend the hearing, in accordance with the rule Re. Article 154, No. 1.

42. The Sub-Committee discussed at length the expediency of this provision. The delegations were divided equally on the question. The German, Dutch and Swiss delegations were in favour of maintaining the provision. They stressed the fact that such a provision is essential in a system according to which third parties may only assert their rights after the patent has been granted. It is not impossible that during this time, the only witness favourable to the third parties and fully acquainted with the necessary technical information may be deceased or have left for a distant country. It would be unfair that third parties should suffer thereby.

43. The United Kingdom, French and Swedish delegations considered this procedure unnecessary. They stressed that no such procedure is found in the Rules of Procedure of the Court of Justice. They pointed out that Article 87 of the First Preliminary Draft Convention already allows third parties to submit their observations in writing and that the hearing of witnesses is therefore unnecessary. In reply, it was observed that evidence by witnesses is more forceful, but this argument did not convince these delegations.
44. In the circumstances, the Chairman decided to maintain this provision in order that those delegations not members of the Sub-Committee should have the opportunity to give their opinion with all the relevant information available.

Re. Article 155, No. 1 - Calculation of the time limits

45. In respect of the calculation of time limits, the Sub-Committee adopted the corresponding rules of the Regulations under the Patent Co-operation Treaty, but slightly modified their wording and added that the time limits may also be calculated in weeks.

Re. Article 155, No. 2 - Extension of time limits

46. No comments.

Re. Article 156, No. 1 - Re-establishment of the rights of an applicant

47. The majority of the members of the Sub-Committee decided to provide for payment of a fee on applications for re-establishment of the rights of an applicant, partly with a view to limiting the number of these applications and partly so that the applicant would bear some of the costs of proceedings.

The German delegation expressed a reservation on this point, considering that it would be inequitable that a party who had been victim of a case of "force majeure" should have to pay a fee. Furthermore, this delegation wondered whether the decision under discussion exceeded the intentions of Working Party I.

Finally, the two notes contained in the Chairman's proposals on this Article were retained.

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48. The Sub-Committee rejected as inadequate the system of affixing such notice on a public notice board. It was agreed to leave to the appreciation of the President of the European Patent Office how public notice is to be given.

49. Before beginning examination of the Implementing Regulations to Article 159 of the Preliminary Draft Convention, the Sub-Committee thought it useful to indicate in the text of the Draft Implementing Regulations that at the present stage of preparation, the provisions in question have been grouped under Article 159 for the sake of convenience only.

Re. Article 159, No. 1 - Term and form of the summons

50. When this Article was adopted, it was specified that its text does not preclude postponements. The Sub-Committee also considered that notice given in a summons could only be shortened with the agreement of the parties.

Re. Article 159, No. 2 - Minutes of hearings and preliminary investigations

51. No comments.

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.../...
During the discussion of this Article, the Sub-Committee thought that it would be opportune to formulate here a general provision laying down the form of the decisions taken by the various departments of the European Patent Office and determining particularly when these decisions should be in writing and when they should state the reasons on which they have been based.

To this end, the Sub-Committee agreed to include in this Article the rule set down in Re. Article 115, which prescribes that decisions concerning appeals may be given orally at the hearing, and that they are later put in writing and notified to the parties (see under 20). See also the Drafting Committee's footnote to the text.

It should be noted that the decision to grant a European patent does not have to state the reasons on which it is based. However, if a patent is granted as a result of a decision from the Board of Appeal, such decision must indicate its motivation and set forth the reasons which led the Board of Appeal to take a different decision from that adopted by the Examining Division.

This provision is concerned with errors contained in published documents, and does not duplicate the new Article 159a of the Preliminary Draft Convention, which is concerned with rectification of procedural errors.
55. The Sub-Committee discussed the question of whether an appealable decision should or should not be accompanied by a notification to the parties informing them of the possibility of appeal and giving them all the information necessary for drawing up a valid appeal.

There were two conflicting concepts on this subject. Certain delegations felt that such notification was not necessary, on the principle that no-one can plead ignorance of the law. Other delegations, on the other hand, stated that it was indispensable to inform the parties of such a serious matter, this principle being sometimes found in their Constitutions.

The majority of the members of the Sub-Committee finally came to the conclusion that from the point of view of international law, it was preferable to require the European Patent Office to make such notification (first paragraph).

56. Following this conclusion, however, a new discussion arose concerning paragraph 2 which deals with the legal consequences resulting from omission of such communication by the Patent Office.

Again, there were two conflicting concepts. Certain delegations felt that the European Patent Office is merely rendering a service to the parties who, consequently, should not be able to take advantage of an error or omission on the part of the Patent Office. Others, on the contrary, asserted that the European Patent Office's obligation to make the notification constitutes a right of the parties. Hence, the omission of such communication should imply suspension of the time-limits for appeal.
There should however be a time limit on this suspension, so as to take the interests of third parties into account. The majority of the members of the Sub-Committee did not agree with this concept, and decided that the parties should have no rights in the case of error omission by the European Patent Office in this matter.

57. Following this decision, the German delegation reserved its position on paragraph 2, stating that it was not logical to create an obligation for the European Patent Office without creating the necessary counterpart in the form of a right for the parties, it being understood that such right would have a limited duration of six months.

Re. Article 159, No. 6 - Issue of certified copies

58. No comments.

Advance payment of fees

59. The Sub-Committee considered that the provision on page 53 of the Chairman's proposal's Re. Article 159, No. 7, falls within the competence of the Sub-Committee on Rules relating to Fees.

Re. Article 159, No. 7 - Interruption of proceedings

60. The first paragraph makes provision for the interruption of proceedings in the case of the death of the applicant for or proprietor of the patent. The Sub-Committee agreed to adopt a broad formulation for the resumption of proceedings, by including not only the intervention of heirs, but also that of executors of a will, of joint heirs or holders of claims on the estate.
During the discussion of this entire article, it was stressed that interruption of proceedings could have repercussions on time limits only in so far as the parties and not third parties, were concerned. Thus the interruption would have no effect on the nine-month opposition period. If a third party lodges opposition within this time limit, such opposition will be valid. Nevertheless, proceedings may only begin after the cause of the interruption has ceased to exist. The same will apply to a request for examination submitted by a third party. It was also stated that the 18-month period laid down for publication of the application could not be suspended. The text of the provision will state this explicitly.

In addition, the Sub-Committee considered that when the cause of the interruption had ceased to exist, time limits should come into full force again. The text in this respect should be reviewed, for it sometimes uses the term "interruption" and sometimes the term "suspension". Finally, the Sub-Committee agreed on the necessity of drawing the close attention of the government legal experts to paragraph 4, which deals with interruption in the case of bankruptcy. This paragraph has been drawn up in very general terms in order to take into account the differences between national legislations on this matter. Certain delegations however feared that drafting this provision in such broad terms would have the effect of causing delays which would adversely affect the resumption of proceedings.

Re. Article 159, No. 8 - Belated Observations

No comments.

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INTER-GOVERNMENTAL CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM
FOR THE GRANT OF PATENTS

- Secretariat -

"IMPLEMENTING REGULATIONS" SUB-COMMITTEE
OF WORKING PARTY I

(Luxembourg, 20 to 23 October 1970)

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DU GROUPE DE TRAVAIL I

(Luxembourg, 20 au 23 octobre 1970)

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INTER-GOVERNMENTAL CONFERENCE
FOR THE SETTING UP OF A EUROPEAN SYSTEM FOR THE GRANT OF PATENTS

Brussels, 12 October, 1970

ANNEX II

to doc. BR/60/70

"Implementing Regulations" Sub-Committee
of Working Party I

PROVISIONAL AGENDA

for the 3rd meeting from 20 to 23 October 1970

1. Opening of the meeting and adoption of the agenda.

2. Articles not examined during the 2nd meeting (15 to 18 September 1970):
   Re. Article 88, No. 1
   to Re. Article 130, No. 2.

   Working documents:
   Proposals: BR/GT I/52/70 of 23 July 1970
   Results: BR/50/70
   Minutes: BR/51/70

3. Articles: Re. Article 101 to Re. Article 198

   Working documents:
   Proposals: BR/GT I/63/70
   +BR/GT I/65/70

4. Form and content of the report on the state of the art.
   Proposals submitted by the International Patents Institute. (A working document has been forwarded directly to the members of the sub-Committee).

BR/GT I/66e/70 lor/PB/prk
5. Article: Re. Article 69, No. 1

Proposals submitted by the German delegation on 18 September 1970. (Annex IV to BR/51/70).

6. Other business.