THE DRAFT EUROPEAN PATENT CONVENTION, A Commentary with English and French Texts. By G. Oudemans. [London: Stevens. 1963. xxix + 247 pp. £2 10s. 0d.]

The French veto of British entry into the Common Market catalyzed pessimistic predictions regarding the future progress of integration among the six member states. In fact economic and legal integration of the Contracting States has proceeded in certain significant fields. The so-called "Anti-trust" provisions of the Treaty of Rome have been developing with recent regularity since the publication of Regulation 17, the *Practical Guide,* and relevant provisional materials. The Draft European Patent Convention is another very significant accomplishment.

This draft, which was published in order to elicit comment from various affected states and international bodies, will probably provide the core of a future patent agreement among the Six. The painstaking negotiation required to accomplish so comprehensive a draft is the real criterion upon which the success or failure of European integration should be evaluated. Integration of sovereign states, if merely the result of grandiose pronouncements of political leaders, and not the gradual, careful modification and construction of political, economic and legal institutions, can only be a temporary expedient. On the basis of this criteria, at present the Common Market, contrary to various newspaper pronouncements, is proceeding successfully.

The Draft European Patent Convention "....has been described as the most important single step in the history of Industrial Property". The British Government, among others, has expressed its admiration for the thorough methods used by the Working Group for Patents. The President of the Board of Trade indicated that it seemed likely that Britain could subscribe to the final form. He suggested that it might be valuable to have British experts at future group meetings.

The Draft Convention, which may be said to go somewhat beyond the limits of the Treaty of Rome, envisions the establishment of a European or supranational patent system which will co-exist with the national patent system of the Contracting States (Article 6). It does not provide for elimination or substantial modification of the national patent laws. As Mr. Oudemans notes in his useful commentary, the ability of the European patent system to supersede the national patent system will depend upon its ability to satisfy the interest groups, *e.g.* inventors, industry and lawyers. This scheme is a very reasonable method of both testing the European Patent proposal and gradually integrating it with the legal institutions of the Contracting States. This method also provides time to establish the elaborate machinery necessary to handle patent applications. The power to fragment or establish barriers between various subsections of the Common Market by use of territorial restrictions upon patent licences would thereby be eliminated. This could not be accomplished with equal certainty by harmonizing diversified national legislation under Article 100 of the Treaty of Rome.

Regarding the participation of countries other than the Contracting States, Article 211 permits accession by any state which is a party to the International Convention for the protection of Industrial Property [Paris Convention] of 1883, as revised 1958, to which most of the states in the world are signatories. Accession requires the unanimous approval of the Administrative Council and thereafter ratification of the terms of admission by all the Contracting States. The provision for accession is therefore rather cumbersome, but perhaps necessary to ensure the precise legal harmony required to facilitate the Draft Convention. Article 211 is somewhat unclear in that it begins by talking of the need for unanimity of the Administrative Council to ensure accession (Section 1) and ends by indicating that the Administrative Council shall merely perform the preparatory work for the agreement (Section 3). If the Administrative Council should fail to agree unanimously, it is not at all clear what effect this would have upon the ability of the Contracting States legally to ratify the special agreement. A minority of the study group felt that accession should be restricted to European states. It might be hard to reconcile both the minority position and a negative decision on an application for accession with the obligation of the Common Market countries under Article 2 of the Paris Convention, *viz:* "Nationals of each of the countries of the Union shall....enjoy in all the other countries of the Union the advantages that their respective laws now

grant, or may hereafter grant, to their own nationals....". Perhaps a rather limited interpretation of "their respective laws" might exclude application to laws of the type envisioned in the Draft Convention, in that it contemplates a supranational agreement. Such an interpretation, however, is somewhat dubious and free accessibility would seem to be required by obligations under the Paris Convention.

Franz Froschmaier, of the General Directorate of Competition, has noted the conflict between a minority group that believes "....the purpose of the Convention should be the creation of a genuine international patent accessible for every Member State of the Paris [Convention]", and the majority group that has as their main purpose "....the creation of a patent particularly adapted to the conditions of the Common Market". The final decision will of necessity be determined by the political organs of the Contracting States. At least for the immediate present it would appear doubtful that the well-intentioned proposal of the minority group would be acceptable. Indeed one wonders whether it would be either wise or realistic at this stage of economic and legal integration to attempt to make the European patent proposal acceptable to all the members of the Paris Convention (which seems to be the intent of the minority). It should be accessible to members of the Paris Convention but should nevertheless be a European Patent. There must be some delay in permitting international accessibility in view of the physical problem involved in the establishment of the European Patent Office. It will be some time before this office can handle the patent applications of the member states, and certainly a longer period will be required in order to handle the applications from other nations. This however is not to suggest that the Contracting States can indefinitely avoid their obligations under the Paris Convention, nor to suggest that there should not be future expectation of a broadened provision for accessibility. There must be time to establish a genuinely effective European patent before larger, grandiose schemes can be accomplished. The binding of the Six into a unified economic, political and legal unit is beneficial in terms of the balance of power, the prevention of European conflict, and in facilitating the economic development of Western Europe. Let us not raise the expectation that the European Common Market will solve many of mankind's problems and thereby obscure its genuine accomplishments.

It should be noted that the Patent Convention also provides for Association (Article 212) to the Patent Convention by members of the Paris Convention. Association will be accomplished by the formulation of a special agreement with the Contracting States. Association may be the means whereby outside states can initially adhere to the convention, and accession could become the final stage in this process. Indeed some states may prefer association in order not to submit to the jurisdiction of various E.E.C. organs, which would undoubtedly be required if they were to accede to membership.

The drafters of the Patent Convention were unable to decide upon the eligibility of persons to apply for a European patent and therefore offered two variants of Article 5. The first variant would allow application by any person desiring patent protection for his invention in the entire E.E.C. area. The second variant would permit application only by those natural or legal persons having the nationality of one of the Contracting States. It also would require filing for a national patent in one of the Contracting States as a basis for a European patent application. Similar problems arise regarding the eligibility of individuals to apply for a European patent as arise with regard to the question of accession or association of states to the Convention. A compromise between these two variants recognising the need to fulfill the obligations under the Paris Convention should be expected. If accession to the Patent Convention by other states is limited, and the second variant of Article five adopted, then there will be a clear violation of the Paris Convention. This is not expected. Perhaps adoption of the first variant, with temporary restrictions permitting the establishment of the European Patent Office to the degree necessary to handle foreign applications, might be a reasonable solution. To channel patent applications from non-Contracting States into national patent offices, rather than to the European Patent Office, would merely serve to undermine the entire purpose of the Patent Convention, i.e. the eventual elimination of territorial restrictions upon industrial property. This would be the result of adopting the second variant.

The Patent Convention envisions the creation of a European Patent Office

(Article 3) which will perform quasi-judicial and administrative tasks. The Patent Office will be expected to produce technical opinions regarding European patents for national courts, make information available regarding the scope of protection afforded by a European patent to those with lawful interests, and to arbitrate questions between parties regarding the extent of protection afforded by a particular patent.

There is also provision for a European Patent Court (Article 4), the organisation, functions, and procedure of which shall be prescribed by another text. Whether this Court will become part of the Common Market Court or be a separate entity has not yet been determined. The tasks of the Court will include hearing appeals as a final Court of Appeal regarding the granting of compulsory licences, revocation of patents, violation of the rules of procedure or form, and violation of some Convention provisions.

The establishment of the Patent Office will be a substantial undertaking, and the English Government suggested in a House of Commons discussion, July 25, that it might be sensible to have the patent examination conducted in areas where there exist substantial numbers of trained examiners. Thereby the time by which the European office could begin accepting applications would be shortened. In order to prevent divergent practices, a frequent interchange of supervisory personnel was envisioned. This suggestion by the British, a government only remotely concerned with the E.E.C at this time, might be a reasonable temporary approach to the problem. The disadvantages of this approach are that the patent examiners in each country would undoubtedly be influenced by their traditional divergent practice. Also once substantial offices were established in various countries, the entrenched interest and expenses of moving may be detrimental to the goal of uniform practice under supervision of a central office. Nevertheless, as a temporary measure, this could indeed facilitate the establishment of the European Patent Office.

The European Patent Office is expected to be administratively and financially autonomous, subject only to the control of the Administrative Council of the E.E.C. (Article 31). The location of the Office or the means of choosing its location has yet to be determined (Article 33). It will conduct a very strict examination before granting a final European patent. A provisional patent will first be granted after a brief novelty examination by the International Patents Institute in the Hague (Article 78 (2)). Once this search is completed the invention will become publicly available, and if this simple test is passed there will be no compulsion upon the patentee to amend his specifications. There is no provision for initial opposition and a canvassing of novelty and lack of invention as there is in England. Therefore the interested public is informed of the patent with little delay, unlike the prolonged delay that may occur in the United Kingdom There is, however, the danger that the specifications may be presented by the patentee without sufficient knowledge of the prior Art. It would seem that some of the primary objects of the Common Market, i.e. to facilitate the free and rapid flow of commerce and to stimulate economic development by removing barriers which now exist, would be more adequately served by the system of the Patent Convention.

Thereafter the owner of the provisional patent has five years in which to decide whether or not to initiate confirmation procedures in order to obtain a final patent (Articles 88-90). Any other person, during this five year period, may also request such an examination of the provisional patent.

In general it has been found that new patents tend to lapse after a short period of time, and therefore the less expensive method of providing provisional patents would have the effect of reducing the cost and technical problems involved in conducting a full examination including opposition proceedings. The European Patent Court shall be the final court of appeal regarding questions involved in confirmation of the final patent.

For those who scrutinize every new E.E.C. program in order to determine whether the Common Market will be "inward looking" or "outward looking" there is little evidence for either prognosis in the Patent Convention. Technical problems require a gradual approach which initially may appear restrictive. A European Patent Office as noted *supra* could not be expected initially to handle patent application from nationals of all the members of the Paris Convention. At the same time third country nationals own a substantial number of patents in the E.E.C. and preventing

them from appying for a European patent woud defeat the very purpose of the Convention. While initially such restrictions may be necessary they will not be adequate grounds for characterising the Convention as protectionist. They will merely reflect the initial problems involved in establishing a supranational patent system.

There are various provisions in the Patent Convention that will require clarification. Important political decisions by the Contracting States will determine questions of policy that have not yet been resolved. This comprehensive draft, however, will undoubtedly provide the core of the final patent agreement in the E.E.C.

Mr. Oudemans' book is a useful introduction to the subject. A complete text of the Convention in French, and an unofficial English translation thereof, is included. A useful and comprehensive internal critique of the provisions of the Convention is provided by Mr. Oudemans. Unfortunately there is little discussion of comparative practices in the United Kingdom, United States or even Europe, which might have been useful in evaluating the Convention. Nor is there discussion of the earlier proposals of the Council of Europe regarding harmonisation of national patent laws. Nevertheless, Mr. Oudemans, a well-known Dutch patent expert, has provided us with an incisive internal commentary on the Draft Convention. In view of the pressure of time this is perhaps quite adequate and this will undoubtedly be a first text for those interested in the developments of the Patent Convention.

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