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ADMINISTRATIVE PROTOCOLS (DRAFT TEXT AND COMMENTARY)

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Protocols:

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INTRODUCTION

The present document contains, in parallel columns, the text of the five draft Administrative Protocols and a commentary on such text.

In view of the fact that most of the provisions in each of the five Administrative Protocols would be identical, the text of each is not separately reproduced, and no separate commentary is given for each. The few differences are, however, indicated both in the text and the commentary.

The five Administrative Protocols would be annexed to the Stockholm Acts of the Paris and Berne Conventions, and the Madrid (Trademarks), the Hague and the Nice Agreements, respectively.

Each Protocol would be an integral part of the Act to which it is annexed (see proposed Art. 13 of the Paris Convention, Art. 20ter of the Berne Convention, Art. 12(1)(c) of the Madrid (Trademarks) Agreement, Art. 22(1)(c) of the Hague Agreement, and Art. 6(1)(c) of the Nice Agreement). Ratification of, or accession to, the Stockholm Act of the Paris and Berne Conventions, by countries of the Paris or Berne Unions, would constitute also ratification of or accession to the Administrative Protocols, unless expressly excluded by a declaration included in the instrument of ratification or accession. Ratification of, or accession to, the Stockholm Acts of the three Agreements would always constitute ratification of or accession to the respective Administrative Protocols. The same would apply for countries outside the Paris or Berne Unions which become members of these Unions after the entry into force of their Stockholm Acts.

All five Administrative Protocols would contain the Articles dealing with the Assembly, with the International Bureau, with Finances, and with Amendments. The Article on the Executive Committee would be included only in the Administrative Protocols annexed to the Paris and Berne Conventions.

PROTOCOL, ARTICLE A: ASSEMBLY

Draft Text

Commentary

Paragraph (1)

(1)(a) The Union shall have an Assembly consisting of the States Members of the Union.

(b) The Government of each Member State shall be represented by one or more delegates who may be assisted by alternate delegates and by advisors.

Each of the five Unions would have an Assembly of its own, consisting only of the States members of the Union.

At the present time, only the Paris Union has organs composed of all member States on the highest level ("Conference of Representatives," "Conference of Plenipotentiaries," Lisbon Act, Art. 14(5)); their powers, however, are much more limited than they would be under the Protocol. The basic objective of the proposed administrative reform is to create a body in which all Member States have a voice and control the policy of the Union. The objective would be accomplished by this Article which would create a separate Assembly of all Member States for each of the five Unions and would give to each the powers which, according to contemporary views on international organizations, should be given to it.

Paragraph (1) is identical in each of the five Protocols.

Paragraph (2)

(2) The Assembly shall:
(i) deal with all matters concerning the maintenance and development of the Union and the implementation of its Convention Agreement;

This paragraph deals with the powers of the Assembly.

Item (i) is the same in all five Protocols, except that the word "Convention" is replaced by the word "Agreement" in the Protocols of the Madrid, The Hague and Nice Unions. The provision is based on Article 14(5)(a) of the Lisbon Act of the Paris Convention, providing that

(Protocol, Article A: Assembly, contd.)

Draft Text

Commentary

(Paragraph (2), contd.)

"Conferences of Representatives shall... consider questions relating to the protection and development of the Union." No similar provision exists for the other four Unions. Inclusion of such a provision seems to be an obviously desirable result since it is logical that Member States should have a constant and close control over and influence on the present and future of their Unions.

(ii) give directions to the International Bureau of Intellectual Property (hereinafter referred to as the "International Bureau") concerning the preparation for conferences of revision;

Item (ii) concerns preparations for conferences of revision. The provisions appear in each of the five Protocols.

Under the present system, preparations for conferences of revision are made by the host country, with the assistance of BIRPI (see Paris Convention, Art. 14(3); Berne Convention, Art. 24(2)). This method, which places a heavy burden on one member country, requires revision in line with modern practice. The Berne Union, in creating, at the Brussels Conference of 1948, a "Permanent Committee" of 12 members, made a first step in the right direction; however, that Committee's only task is to "assist" the International Bureau in its task of assisting, in turn, the Government of the host country of the revision conference. De facto, member countries participate more and more in the preparation of revision conferences. The Stockholm Conference has thus far been preceded by two preparatory meetings regarding the Berne Convention; two, concerning the matter of inventors' certificates in the Paris Convention; and two, on "Structure."

(Protocol, Article A: Assembly, contd.)

Draft Text

Commentary

(Paragraph (2), contd.)

These meetings were held, not only with the approval, but with the encouragement and active cooperation of the Swedish Government, which will be the host of the revision Conference.

The proposed provision completes the institution of required changes as it gives equal power to all Member States in the preparation for revision conferences, and does so for each of the five Unions: preparation for revision conferences would be made by the International Bureau according to directions received from the Assembly, i.e., all the Member States.

(iii) determine the program and adopt the triennial budget of the Union and approve its final accounts;

This item (number (iii) in the Paris, Berne, and Nice Protocols, and number (iv) in the Madrid and the Hague Protocols) deals with one of the most important powers of the Member States, the power to control the program and the budget.

This power, so natural and so customary in intergovernmental organizations that it hardly requires justification, is, curiously, missing from the present provisions in which there is practically no legal basis for the control of the program and the budget of BIRPI by Member States. One only of the Member States, Switzerland, exercises the role of a financial controller. A beginning towards multilateral control has been made in the Paris Union, but is limited to the drawing up of a report on foreseeable expenditure (Lisbon Act, Art. 14(5)(a)). A body of some 20 States, the Interunion Coordination Committee, which, however, has no legal basis in the various Conventions, does exercise a kind of de facto

(Protocol, Article A: Assembly, contd.)

Draft Text

Commentary

(Paragraph 2), contd.)

control, through its "advice," both over program and budget. The proposed provision vests the power of control, not only in a limited number of States, but in all Member States, and not only as a matter of expressing advice, but as a matter of sovereign decision.

(iii) Madrid and The Hague Protocols only modify the Regulations including the fixation of fees;

This item (number (iii) in the Madrid and The Hague Protocols, and appearing only in these two Protocols) provides that modifications of the Regulations of the Madrid and The Hague Agreements, including modification of the fees, shall be within the power of the Assembly, i.e., of all the Member States. The fees in question are the fees payable for the international registration of trademarks, and the international deposit of industrial designs, respectively. The provision should be read in conjunction with par.(3)(d) which provides that any such modification requires at least two-thirds of the votes cast.

Since the Paris and Berne Conventions and the Nice Agreement do not provide for international registration or deposit, no provision paralleling the one in question would exist in the Paris, Berne, and Nice Protocols.

(iv) Paris and Berne Protocols only elect the members of the Executive Committee of the Assembly;

This item would be in the Paris and Berne Protocols only. It provides for the election of an Executive Committee, consisting of one-fourth of the Member States (cf., Art.B(3)). No Executive Committee is provided for the Madrid, The Hague, and Nice Unions since the number of their members (21, 14, and 19, respectively) does not seem to justify the

(Protocol, Article A: Assembly, contd.)

Draft Text

Commentary

(Paragraph (2), contd.)

creation of a smaller body: their Assemblies, themselves, are not too large to handle even matters of detail. On the other hand, the Paris and Berne Unions have so many members that the frequent convocation of all of them would hardly be economical or practical.

(v) Paris and Berne Protocols only review and approve reports and activities of its Executive Committee, and give instructions to such Committee;

This item, too, deals with Executive Committees. Since such would exist only in the Paris and Berne Unions, the item is not included in the Madrid, Hague and Nice Protocols.

The provision is self-explanatory.

(vi) review and approve reports and activities of the Director General concerning the Union and give instructions to him on such matters;

This item would be numbered (vi) in the Paris and Berne Protocols, (v) in the Madrid and Hague Protocols, and (iv) in the Nice Protocol.

The provision provides for the supervision of the management of the Director General by the Assembly. This power of the Member States is acknowledged in other intergovernmental organizations in general, but has no legal basis in the present Conventions and Agreements.

(vii) establish in addition to the Committee of Experts established under Article 3* such committees as may be considered necessary for the work of the Union;

These last four items of paragraph(2) would appear in all five Protocols, although with different numbers (vii-viii-ix-x in the Paris and Berne Protocols, vi-vii-viii-ix in the Madrid and Hague Protocols, and v-vi-vii-viii in the Nice Protocol).

* The words in brackets are in the Nice Protocol only.

(Protocol, Article A; Assembly, contd.)

Draft Text

Commentary

(Paragraph (2), contd.)

(viii) determine which States not Members of the Union and which international organizations shall be admitted to its meetings as observers;

(ix) take any other appropriate action designed to further the objectives of the Union;

(x) exercise such other functions as are allocated to it.

They contain provisions which are customary and do not seem to require any comments.

Item (v) in the Nice Protocol would include an express reference to the Committee of Experts established under Article 3 of the Nice Agreement. That Committee deals with the periodic modification of the international classification.

Paragraph (3)

This paragraph deals with the matter of voting in each of the Assemblies.

(3)(a) Each Member State of the Union shall have one vote in the Assembly.

Subparagraph(a) provides that each State shall have one vote. This is a corollary of the equality of sovereign States, with no regard to their size, population, the class they chose for the purposes of contributions in the Paris, Berne, or Nice Unions, or other criteria which otherwise distinguish each of them.

(b) Subject to the provisions of subparagraphs (c) and (d) and Article E*, the Assembly shall make its decisions by a simple majority of the votes cast.

Subparagraphs (b), (c) and (d) deal with the majorities required for decision in the Assembly. The majority is two-thirds in two cases: admission of observers (subpar.(c)) and decisions on certain financial matters (subpar.(d)).

* In the Madrid, the Hague and the Nice Protocols, the reference would be to Article D.

(Protocol, Article A; Assembly, contd.)

Draft Text

Commentary

(Paragraph (3), contd.)

(c) Decisions to admit to meetings as observers States not Members of the Union, as well as international organizations, shall require at least two-thirds of the votes cast.

In the case of the Paris, Berne and Nice Unions, where Member States pay contributions, any increase of contributions could be made only if approved by a two-thirds vote. In the Madrid and Hague Unions States do not pay contributions, but any modification of the Regulations--which fix the fees for international registration or deposit--would require a qualified majority of two-thirds.

(d) The adoption of the budget to the extent that it increases the financial obligations of the Member States** shall require at least two-thirds of the votes cast.

It is to be noted that voting on amendments to the Protocol is governed by separate rules contained in Article E (or D)*. They require either unanimity or a qualified vote of three-fourths (the matter is discussed under Article E (or D) below).

It is to be noted also that the paragraph under consideration does not deal with the revision of the substantive clauses of the Conventions or Agreements. This matter is untouched by the Protocol, and the present rules, for example, the unanimity rule in Article 24(3) of the Berne Convention, would continue.

(e) Abstentions shall not be counted as votes.

Subparagraphs (e) and (f) would be the same in each of the five Protocols. Abstentions would not be counted. Neither would absences, since paragraphs (b), (c) and (d) speak about votes "cast." The rule contained in paragraph (f) excludes voting by proxy.

(f) Each State shall be allowed to cast only its own vote.

* In the Madrid, the Hague and the Nice Protocols, the reference would be to Article D.

** The first 18 words of this subparagraph would be replaced by the words "Any modifications of the regulations" in the Madrid and the Hague Protocols.

(Protocol, Article A: Assembly, contd.)

Draft Text

Commentary

Paragraph (4)

Paragraph (4) concerns the convocation of sessions of the Assembly and related questions.

(4)(a) The Assembly shall meet in ordinary session upon convocation by the Director General during the same period and at the same place as the General Assembly of the International Intellectual Property Organization (hereinafter referred to as the "Organization").

Subparagraph (a) would be identical in all five Protocols. The ordinary sessions of all five Assemblies would take place at the same place and during the same period in order to facilitate contact where coordination is necessary and in order to reduce expenses both for the delegates and the secretariat. Since the IPO Convention provides for General Assemblies once every three years, the five Assemblies of the five Unions would also meet every three years.

(b) The Assembly shall meet in extraordinary session upon convocation by the Director General at the request of the Executive Committee or* at the request of one-fourth of the Member States of the Union.

Subparagraph (b) would be identical in the five Protocols except that the Madrid, Hague and Nice Protocols would not refer to the Executive Committee since the Madrid, Hague and Nice Unions would have only Assemblies and no Executive Committees.

(c) In Madrid, The Hague and Nice Protocols only The agenda of each session shall be prepared by the Director General.

Subparagraph (c) would appear only in the said three Protocols. The agenda of the Paris and Berne Union Assemblies would be prepared by their respective Executive Committees rather than by the Director General.

Paragraph (5)

(5) The Assembly shall adopt its own rules of procedure.

This paragraph is self-explanatory.

* The words "at the request of the Executive Committee or" would not appear in the Madrid, the Hague and the Nice Protocols.

PROTOCOL, ARTICLE B: EXECUTIVE COMMITTEE

This Article would appear only in the Paris and Berne Protocols since, for the reasons explained in connection with Article A, the Madrid, the Hague and the Nice Unions would have no Executive Committees.

Of course, if their memberships increase and the establishment of Executive Committees appears desirable, they could provide for establishing them by amending their Administrative Protocols accordingly.

All the provisions of this Article would be identical in the Paris and Berne Protocols.

Draft Text

(1) /Paris and Berne Protocols only/ The Assembly shall have an Executive Committee.

CommentaryParagraph (1)

It is customary practice of intergovernmental organizations having a certain number of members to institute a body of more restricted number to deal with matters which because of their urgency cannot be considered by the Assembly of all States, or because of their lesser importance do not need to be considered by such Assembly.

Such body is variously called Governing Body, Executive Committee, Executive Board. The draft uses the name "Executive Committee."

Paragraph (2)

(2) /Paris and Berne Protocols only/ (a) The Executive Committee shall consist of Members of the Union elected by the Assembly from among the States Members of the Union. Furthermore, the Member State on whose territory the organization has its Headquarters shall, subject to the provisions of Article D(7), have an ex officio seat.

This paragraph, as well as paragraphs (3) to (5), concerns the composition of the Executive Committee.

The first sentence of subparagraph (a), and subparagraph (b), are self-explanatory. The second sentence of subparagraph (a), giving an ex officio seat to Switzerland, is explained in connection with Article D(7).

(Protocol, Article B: Executive Committee, contd.)

Draft Text

Commentary

(Paragraph (2), contd.)

(b) /Paris and Berne Protocols only/ The Government of each State Member of the Executive Committee shall be represented by one delegate who may be assisted by alternate delegates or advisors.

Paragraph (3)

(3) /Paris and Berne Protocols only/ The number of the States Members of the Executive Committee shall correspond to one-fourth of the number of the States Members of the Union. In establishing the number of seats to be filled, remainders after division by four shall be disregarded.

This paragraph follows closely the system already in force in the Paris Union and means that the number of seats available on each of the two Executive Committees would correspond to one-fourth (or a little less because of the possible remainders after division by four) of the number of the States Members of the corresponding (Paris or Berne) Union. (There would be an extra seat for Switzerland; see para. 2(a)). This would, for the Berne Union, result in an Executive Committee which would have one more member than its Permanent Committee has today, and, for the Paris Union, in an Executive Committee of the same size as today. Under this provision the Committees would be enlarged should the membership of the Unions grow. The Executive Committee of the Paris Union has this feature already, but not so the Permanent Committee of the Berne Union.

Paragraph (4)

(4) /Paris and Berne Protocols only/ In electing the Members of the Executive Committee, the Assembly shall have due regard to a balanced geographical distribution.

Such a provision is customary in comparable international instruments. Its justification is self-evident.

(Protocol, Article B: Executive Committee, contd.)

Draft Text

Commentary

Paragraph (5)

(5) Paris and Berne Protocols only/ Each Member of the Executive Committee shall serve from the close of the session of the Assembly which elected it to the close of the next ordinary session of the Assembly. However, Members may be reelected, but not more than two-thirds of them. At each election, and until the limit of two-thirds may have been attained, the names of the States Members of the Executive Committee shall be called in alphabetical order and the Assembly shall vote on each separately whether to reelect it or not. It shall be decided by lot drawn before each election whether the names of the States shall be called on the basis of the English or the French alphabetical listing of their names; furthermore, the letter of the alphabet with which the calling for possible reelection will start shall be drawn by lot.

The first sentence of this paragraph means that members would generally serve not less than three years.

According to the second sentence, a limited number of the members could be reelected. The limit is to be understood as a maximum: no percentage of the members would have to be reelected but, within the stated limit, some may be reelected. The limit is two-thirds. In other words, every third year the minimum proportion of new members would have to be one-third. It is to be noted that any given State may be reelected, not only once but any number of times. Thus, States whose presence in the Committee is considered to be indispensable could serve continuously.

The proposed system is almost identical with that provided for the renewal of the present Executive Committee of the Paris Union. Its main feature is that it provides for a minimum rotation in the membership of the Committees in order to avoid non-application of rules for renewal (as was generally the case in the Permanent Committee of the Berne Union) and to afford opportunity for every country of the Union to serve on the Executive Committee.

The remainder of the paragraph deals with the procedure of election. The decision as to which members should be reelected and which should not be reelected would be taken by voting (the procedure would, of course, cease if the maximum number

(Protocol, Article B: Executive Committee, contd.)

Draft Text

Commentary

(Paragraph (5), contd.)

of "re-eligibles" is attained before the entire list is voted upon). In actual practice, the Assembly of the Union would probably set up a nomination committee which could agree on and propose a complete list, and the Assembly could adopt, by a single vote, the list as proposed.

Paragraph (6).

(6) /Paris and Berne Protocols only/ The Executive Committee shall:

This paragraph enumerates the functions of the Executive Committee.

(i) prepare the draft agenda of the Assembly;

Items (i), (ii) and (iv) are functions concerning the preparation for the work of the Assembly. Items (iii) and (v) are functions to be performed by the Committee between ordinary sessions of the Assembly. The provisions are of the customary kind.

(ii) submit proposals to the Assembly respecting the draft program and triennial budget of the Union, prepared by the Director General;

(iii) establish, within the limits of the program and the triennial budget, the specific yearly budgets and programs prepared by the Director General;

(iv) submit, with appropriate comments, to the Assembly the periodical reports of the Director General and the yearly audit reports on the accounts;

(v) in accordance with the decisions of the Assembly and having regard to circumstances arising between two ordinary sessions of that Assembly, take all necessary measures to ensure the execution of the program of the Union by the Director General;

(vi) perform such other functions as are allocated to it.

(Protocol, Article B: Executive Committee, contd.)

Draft Text

Commentary

Paragraph (7)

(7) In Paris and Berne Protocols only/ The Executive Committee shall meet at least once every year upon convocation by the Director General.

This paragraph means that normally each Executive Committee will meet once a year.

Paragraph (8)

(8) In Paris and Berne Protocols only/ Each State Member of the Executive Committee shall have one vote. Decisions shall be made by a simple majority of the votes cast. More than half of the votes cast by the Members present shall constitute a simple majority. Abstentions shall not be considered as votes. Each State shall be allowed to cast only its own vote.

This paragraph deals with voting and follows a customary pattern.

Paragraph (9)

(9) In Paris and Berne Protocols only/ The Executive Committee shall adopt its own rules of procedure.

This paragraph concerning rules of procedure is also of the customary kind.

PROTOCOL, ARTICLE C: INTERNATIONAL BUREAU

This Article deals with the tasks of the International Bureau in connection with the various Unions.

The provisions proposed are generally based on the provisions presently existing in the Paris and Berne Conventions and the Madrid, the Hague and the Nice Agreements, and dealing with the role of the International Bureau (BIRPI).

The comments accompanying these provisions generally point out the corresponding provisions in the existing texts and the main differences between such texts and the present proposals.

This Article is designated as Article C in the draft Administrative Protocols of the Paris and Berne Unions, and as Article B in the draft Administrative Protocols of the Nice, Madrid and The Hague Unions.

Since the contents of the Article in the first two Protocols would be rather different from its contents in the Nice Protocol and the last two Protocols, they will be discussed separately.

Draft TextParis and Berne Protocols:

(1) The administrative tasks with respect to the Union shall be performed by the International Bureau.

(2) The International Bureau shall assemble and publish information concerning the protection of industrial property* copyright** . Each

CommentaryParis and Berne ProtocolsParagraph (1)

This paragraph constitutes a general clause; the details follow in the subsequent paragraphs.

Paragraph (2)

The first sentence is essentially identical to the first sentence of Article 13(3) of the Paris Convention, and the first two sentences of Article 22(1) of the Berne Convention. The

* In the Paris Protocol.

** In the Berne Protocol,

(Protocol, Article C: International Bureau, contd.)

Draft Text

(Paris and Berne Protocols, contd.)

Member State shall promptly communicate to the International Bureau all new laws and official texts concerning the protection of industrial property, and shall furnish to the International Bureau all the publications of its industrial property service which the International Bureau may find useful in its work^{*}. of copyright^{**}.

Commentary

(Paris and Berne Protocols, contd.)

(Paragraph (2), contd.)

second sentence is designed to facilitate the tasks given to the International Bureau by the first sentence, by providing that the relevant official texts must be communicated by the Member States to the International Bureau. The Paris (Art.13(3)) and the Berne (Art.22(1)) Conventions already provide that the Administrations must place certain documents at the disposal of the International Bureau.

Paragraph (3)

(3) The International Bureau shall publish a monthly periodical.

Provisions for the publication of a periodical are already contained in the existing texts (Paris Convention, Art.13(3); Berne Convention, Art.22(1)). No provisions are proposed on the languages of these periodicals (presently both English and French in the case of "Industrial Property," "La Propriété industrielle," and in the case of "Copyright," "Le Droit d'Auteur"). The matter would be decided by the General Assembly.

Paragraph (4)

(4) The number of free copies of the monthly periodical and other publications of the International Bureau that each Member State shall be entitled to receive shall be proportionate to the number of units in the class to which the State belongs according to Article D(4) and shall be fixed by the Assembly.

This paragraph is based on Article 13(4) of the Paris Convention but leaves the details for decision by the Assembly.

* In the Paris Protocol.

** In the Berne Protocol.

(Protocol, Article C: International Bureau, contd.)

Draft Text

Commentary

(Paris and Berne Protocols, contd.)

(Paris and Berne Protocols, contd.)

Paragraph (5)

(5) The International Bureau shall, on request, furnish information to the individual Member States on matters concerning the protection of industrial property* copyright**.

This provision is, in essence, similar to the first sentence of Article 13(5) of the Paris Convention and Article 22(2) of the Berne Convention.

Paragraph (6)

(6) The International Bureau shall conduct studies, and shall provide services, designed to facilitate the protection of industrial property* copyright**.

The basic idea contained in this provision comes from Article 13(3) of the Paris Convention. ("It the International Bureau undertakes studies of general utility concerning the Union..") and Article 22(1) of the Berne Convention ("It the International Bureau shall undertake the study of questions of general interest to the Union ...").

Paragraph (7)

(7) The International Bureau shall, in accordance with the directions of the Assembly, make the preparations for the periodical conferences of revision of the Convention. It shall take part in the discussions at these conferences, but without the right to vote.

This paragraph deals with the role of the International Bureau in the preparation for revision conferences and in the Conference. The corresponding provisions are now in Article 14(3) and (4) of the Paris Convention and the last two sentences of Article 24(2) of the Berne Convention. At present the role of the International Bureau is limited to assisting.

Paragraph (8)

(8) The International Bureau shall carry out any other tasks assigned to it by this Convention.

This provision is self-explanatory.

* In the Paris Protocol.

** In the Berne Protocol.

(Protocol, Article C: International Bureau, contd.)

Draft Text

Commentary

Nice Protocol:

Nice Protocol

(1) The administrative tasks with respect to the Union shall be performed by the International Bureau.

This paragraph constitutes a general clause; the details follow in the subsequent paragraphs.

Paragraph (1)

Paragraph (2)

(2) The International Bureau shall, in accordance with the directions of the Assembly, make preparations for the periodical conferences of revision of the Agreement to which the present Protocol is annexed. It shall take part in the discussions of these conferences, but without the right to vote.

This paragraph deals with the role of the International Bureau in the preparation of, and at, Revision Conferences. The corresponding provisions are now in Article 8(3) and (4) of the Nice Agreement of 1957. However, as already indicated, the role of the International Bureau in the preparation for Revision Conferences would no longer consist of assisting the host country but of working under the direction of the Assembly of the Union.

Paragraph (3)

(3) The International Bureau shall make preparations for the meetings of the Committee of Experts provided in Article 3 of the Agreement to which the present Protocol is annexed. It shall take part in the discussions of this Committee, but without the right to vote.

The first sentence of this paragraph means that preparations will be made by the International Bureau for the work of the meetings of the Committee of Experts "charged with deciding all modifications and additions to be made in the international classification." The second sentence parallels the last sentence of Article 3(1) of the Nice Agreement providing that "the International Bureau shall be represented on the Committee."

(Protocol, Article C: International Bureau, contd.)

Draft Text

Commentary

Madrid and The Hague Protocols:

Madrid and The Hague Protocols

(1) The international registration and related duties, as well as all the other administrative tasks with respect to the Union, shall be performed by the International Bureau.

Paragraph (1)

Since the main activity under the Madrid and The Hague Agreements consists of maintaining the international registration services for trademarks and industrial designs, respectively, this paragraph emphasizes the task of registration.

(2) The International Bureau shall, in accordance with the directions of the Assembly, make preparations for the periodical conferences of revision of the Agreement to which the present Protocol is annexed. It shall take part in the discussions of these conferences, but without the right to vote.

Paragraph (2)

This paragraph would give a similar role to the International Bureau in connection with the revisions of the Agreements of the Madrid and The Hague Unions as it would have in connection with the revision of the Paris Convention (see Art.C(7) of the draft Protocol to be annexed to the Paris Convention.).

PROTOCOL, ARTICLE D: FINANCES

This Article deals with finances. Subject to the few exceptions indicated below, the Article would be identical in each of the five proposed Administrative Protocols. However, it would be designated as "Article D" in the Paris and Berne Protocols, and as "Article C" in the Madrid, the Hague and the Nice Protocols.

The Article would leave intact the mode of contributions in the Paris, Berne and Nice Unions, characterized by the class-and-unit system and by the free choice of class by each Member State. This system is very different from that prevailing in most other comparable organizations, where the contribution of each State is expressed in terms of a percentage, imposed by the will of the majority of the Member States. But since the class-and-unit system, based on the free choice of the class, continues to work in a satisfactory way, there seems to be no reason to depart from it.

In other respects, the proposals contain some innovations. They are pointed out and explained where they occur.

Draft Text

Commentary

Paragraph (1)

(1)(a) There shall be a budget of the Union.

Subparagraph (a) provides that the Union will have a budget, that is, a budget of its own, separate and distinct from the budgets of the other Unions and the Conference budget of the proposed new Organization.

(b) The budget of the Union shall include the proper expenses of the Union itself, its contribution to the Conference budget, and its share in the common expenses of the Organization.

Subparagraph (b) requires that the budgeted expenses of the Union be divided into three main headings: (i) proper expenses of the Union (for example, the expenses of a meeting dealing with matters exclusively relating to the Union), (ii) contributions to the Conference budget (as will be seen later, Union members contribute towards the Conference budget of the IPO only indirectly, namely through earmarking a portion

(Protocol, Article D: Finances, contd.)

Draft Text

Commentary

(Paragraph (1), contd.)

of the Union budget for purposes of the Conference), and, (iii) share in the common expenses of the International Bureau (for example, the salary of the Director General or the maintenance costs of the Headquarters Building). The first and the last divisions exist today in the budgets. The second one would, of course, be a new division as at the present time there is no IPO Conference.

Paragraph (2)

(2) The budget of the Union shall be established with due regard to the requirements of coordination among the various Unions administered by the Organization.

As this paragraph indicates, the administration of various Unions by the same International Bureau makes a certain coordination indispensable. For example, no Union should budget less than its fair share in such common expense as the cost of maintenance of the Headquarters Building used for its own purposes and for those of the other Unions.

Paragraph (3)

(3) The budget of the Union shall be financed from the following sources:

This paragraph enumerates the sources of income of the Union.

(i) In Paris, Berne and Nice Protocols only contributions of the Member States;

Item (i) would appear only in the Administrative Protocols of the Paris, Berne and Nice Unions since States do not pay contributions in the Madrid and The Hague Unions.

(ii) fees charged for services performed by the International Bureau;

Consequently, in the Madrid and Hague Protocols, items (ii) to (v) would bear the numbers (i) to (iv).

(Protocol, Article D: Finances, contd.)

Draft Text

Commentary

(Paragraph (3), contd.)

(iii) sale of, or royalties on, the publications of the International Bureau;

(iv) gifts, bequests and subventions;

(v) rents, interests, and other similar miscellaneous income.

Item (i) in these Protocols --that is, "fees charged for services performed by the International Bureau"--relates primarily to the fees charged for the international registration of trademarks and industrial designs.

The remaining items are self-explanatory.

Paragraph (4) in the Paris and Berne Protocols

This paragraph would be included only in the Paris and Berne Protocols. As will be noted later, however, the same provisions apply in effect also to the Nice Union. The paragraph deals with contributions of Member States. As there are no such contributions in the Madrid and The Hague Agreements, the provision would not be included in the Madrid and The Hague Protocols.

(4) Par. 4 of Paris and Berne Protocols only - see below for others/

(a) For the purpose of establishing its contributions towards the budget referred to in the preceding paragraph, each Member State shall belong to a class, and shall pay its annual contributions on the basis of a fixed number of units as follows:

Class I	:	25
Class II	:	20
Class III	:	15
Class IV	:	10
Class V	:	5
Class VI	:	3
Class VII	:	1

Subparagraph (a) continues the class-and-unit system presently applied in the Paris, Berne and Nice Unions (cf. Art. 13(8) of the Paris Convention, Art. 22(2) of the Berne Convention, Art. 5(1) of the Nice Agreement), subject to the only difference that an additional, VIIth, class would be added, with a share in the contributions which is one-third of the share of the lowest existing class. The addition was made by the 1965 Committee in order to take into account the fact that the relative contributive power of the richest and the least rich States is not adequately represented by the present six classes in which the highest contribution is only $8\frac{1}{3}$ times larger than the lowest contribution. If the proposed seventh

(Protocol, Article D: Finances, contd.)

Draft Text

Commentary

(Paragraph (4) in the Paris
and Berne Protocols, contd.)

class is accepted, the highest contributions will be 25 times larger than the lowest contributions.

(b) Paris and Berne Protocols only/ Unless it has already done so, each State shall indicate, concurrently with depositing its instrument of ratification or accession, the class to which it wishes to belong. Any State may change class. If the change is to a lower class, the State must announce it to an ordinary session of the Assembly. Any such change shall take effect at the beginning of the calendar year following the session.

Subparagraph (b) maintains the complete freedom of each country to choose the class which it wishes and later to modify its choice (cf. Art. 13(9) of the Paris Convention and Art. 23(4) of the Berne Convention; the former is incorporated by reference into Art. 5(1) of the Nice Agreement). The last sentence provides in effect that any change in class will be applicable only from the beginning of the next budgetary period following the announcement of the change. This is so because immediate effect would disturb budgetary provisions.

(c) Paris and Berne Protocols only/ The contribution of each State shall be an amount in the same proportion to the total sum to be contributed to the budget of the Union by all Member States as the number of its units is to the total of the units of all contributing States.

Subparagraph (c) is differently worded from, but would obtain the same result as, the last two sentences of Article 13(8) of the Paris Convention, Article 23(3) of the Berne Convention, and Article 5(1) of the Nice Agreement.

(d) Paris and Berne Protocols only/ The contributions of the Member States shall become due on the first of January of each year.

Subparagraph (d) would introduce an important change in the present system. In the present system, Member States pay their contributions approximately 6 months after the close of the financial year. It is now proposed that they pay their contributions on the first day of the budgetary year. The difference in time is some 18 months and would

(Protocol, Article D: Finances, contd.)

Draft Text

Commentary

(Paragraph (4) in the Paris
and Berne Protocols, contd.)

mean that in the year of the transition from the old to the new system States would be required to pay not only the contributions for the preceding year but also for the then current year. In other words, in that particular year, as an exception, they would be required to pay contributions relating to two years.

The present system is possible only because of loans to BIRPI by the Swiss Government to cover any cash need. Such need is constant because inherent in a system in which States are required to pay only 6 to 18 months after the expenses were incurred by BIRPI.

It is now proposed to do away with this system and adopt the system of concurrent payment. The proposed system would seem to be in conformity with the situation in all other intergovernmental organizations. It would, normally, liberate Switzerland from the obligation of granting loans, obligation partly assumed because of Switzerland's role as Supervisory Authority-- a role which would be discontinued.

(e) Paris and Berne Protocols only/ A Member State which is in arrears in the payment of its financial contributions shall have no vote in any organ of the Union, if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years.

Subparagraph (e) would suspend the right of vote of any State in arrears of contributions for two years or more. Naturally, once the arrears are paid, the right of vote would automatically revive. Similar provisions may be found in the charters of many other organizations. No similar provision exists in the present system in which the Swiss Government advances to BIRPI the overdue contributions of other countries. The proposed sanction

(Protocol, Article D: Finances, contd.)

Draft Text

Commentary

(Paragraph (4) in the Paris
and Berne Protocols, contd.)

for failure to pay has presumably been proposed by the Committee of 1965 because it realized that there must be some incentive for prompt payment in a situation in which non-payment could place the International Bureau in a precarious position.

Paragraph (4) in the Nice Protocol

(4)(a) /Nice Protocol only/
For the purpose of establishing its contributions towards the budget referred to in the preceding paragraph, each Member State shall belong to the same class to which it belongs in the International (Paris) Union for the Protection of Industrial Property, and shall pay its contributions as provided in the Protocol annexed to the Convention of that Union.

This paragraph deals with the question of contributions to the budget of the Nice Union.

The Nice Agreement of 1957 regulates this question by incorporating, by reference, the analogous provisions of the Paris Convention (Article 13(8),(9),(10)) into the Nice Agreement (see Article 5(1) of the Nice Agreement).

(b) /Nice Protocol only/
The consequences of non-payment shall be the same as those provided in the said Protocol.

Paragraph (4) proposed for the Nice Protocol would do exactly the same but, of course, what would be incorporated are the analogous provisions of the Administrative Protocol of the Paris Union rather than Article 13(8),(9), and (10), of the Paris Convention.

Paragraph (4) in the Madrid
and The Hague Protocols

(4) /Madrid and The Hague Protocols only/ The amount of the fees charged for international

Since the Madrid and Hague Unions are mainly supported by international registration fees

(Protocol, Article D: Finances, contd.)

Draft Text

registration / (including the basic fee, the supplementary fee, the complementary fee) and its renewal. / * shall be proposed by the Director General and shall be fixed by the Assembly of the Union. The fees shall be fixed at a level so that the revenues of the Union from fees and other sources shall be at least sufficient to cover the expenses of the International Bureau for maintenance of such service.

(5) The amount of the fees charged for / other / ** services rendered by the International Bureau shall be established, and reported to the Assembly, by the Director General.

Commentary

(Paragraph (4) in the Madrid and The Hague Protocols, contd.)

(non-existent in the other Unions) rather than contributions by States (not provided for in the Madrid and The Hague Unions), paragraph (4) in the Madrid and The Hague Protocols deals with these fees and not with contributions.

The fees in force at the time these Protocols will enter into effect will continue until they are modified. Modifications would be proposed by the Director General and would be adopted by the competent Assembly, by a two-thirds vote (see Madrid Protocol, Art.A (2)(iii) and (3)(d); The Hague Protocol, Art.A(2)(iii) and (3)(d)).

The second sentence expresses the principle according to which the Madrid and The Hague Unions should be self-supporting.

Paragraph (5)

This paragraph deals with the fees to be charged for services rendered by the International Bureau other than the international registration of trademarks and industrial designs.

As these miscellaneous fees are less important than the registration fees, the former would normally be fixed not by the Assembly concerned but by the Director General. The possibility for subsequent control, criticism, and instruction for change, by the

* The words in brackets would appear only in the Madrid Protocol.

** The word "other" would appear only in the Madrid and The Hague Protocols.

(Protocol, Article D: Finances, contd.)

Draft Text

Commentary

Paragraph (8)

(8) The auditing of the accounts shall be effected by one or more Member States or by external auditors, as provided in the financial regulations. They shall be designated, with their agreement, by the Assembly.

At the present time, it is the Swiss Government which, in conformity with the provisions of the Paris and Berne Conventions, (Articles 13(10) and 23(5), respectively) controls ("supervises," "draws up") the accounts of BIRPI. In the course of the meeting of the Working Group, the Swiss experts declared that it would be hardly justifiable to ask the Swiss Government to continue to assume this task in the new system in which the supervision of the Organization would no longer devolve upon the Swiss Government. Nevertheless, Switzerland would be prepared to continue to audit the accounts until the second ordinary session of the General Assembly of the new Organization, i.e., during a period of approximately three years from the entry into force of the Convention.

Thereafter, the financial control would be exercised by the Government of one or other of the Member States, or by external auditors (professional accountant firms). The designation would, of course, be made in agreement with the State or States designated, or the professional accountant firm engaged, for this purpose. The details would be regulated by the financial Regulations.

PROTOCOL, ARTICLE E: AMENDMENTS TO THE ADMINISTRATIVE PROTOCOL

Subject to one exception noted in connection with paragraph (3), this Article would appear in identical form in each of the five proposed Administrative Protocols.

The Article relates to the procedure for amending the provisions of the Administrative Protocol. It does not deal with the matter of amending the substantive and final provisions of the Conventions and Agreements. That matter is regulated by other provisions (Article 14 of the Paris Convention; Article 24 of the Berne Convention; Article 8 of the Nice Agreement). The unanimity rule for such revisions, contained in the Berne Convention (Art.24 (3)), would be maintained.

As previously indicated, one of the main reasons for formulating an "Administrative Protocol" to contain the administrative and financial provisions is to make it clear that amendment of those provisions is governed by different rules--appropriate for such provisions--than the rules governing amendment of the other provisions of the Conventions or Agreements.

The rules which apply are different not only as regards the matter of unanimity or majority but also with respect to the body which adopts the amendments prior to their submission to contracting parties for acceptance and with respect to the entry into force of the amendments.

The body which considers and adopts amendments of provisions of the Administrative Protocol is the Assembly of the Union. The body which takes such action with respect to the substantive provisions is a diplomatic conference held for the special purpose of negotiating and adopting revisions.

The provisions for entry into force of amendments of the Administrative Protocol are contained in the Administrative Protocol itself and would apply to every amendment of the Protocol. In the case of amendments of the substantive provisions there are no entry into force provisions which have general application. In each such case the entry into force provisions are formulated by the diplomatic conference of revision, in connection with its consideration of such amendments.

This Article would be designated as "Article E" in the Paris and Berne Protocols and as "Article D" in the Madrid, The Hague and Nice Protocols.

(Protocol, Article E: Amendments
to the Administrative Protocol, contd.)

Draft Text

(1) Proposals for the amendment of this Protocol shall be communicated by the Director General to the Member States of the Union at least six months in advance of their consideration by the Assembly.

(2)(a) Amendments to this Protocol shall be adopted by the Assembly. Adoption shall require three-fourths of the votes cast, provided, however, that any amendment of Article A shall require the unanimity of the votes cast.

(b) Abstentions shall not be counted as votes.

(c) Each State shall cast only its own vote.

(3) Amendments to this Protocol shall enter into force when written notifications of acceptance have been received by the Director General from three-fourths of the Member States of the Union. Amendments to the Protocol thus accepted shall bind all the Member States of the Union, [except that any amendment increasing the financial obligations of Member States shall bind a State not included in the three-fourths upon acceptance by it.]*

* The words in brackets would be in the Paris, Berne and Nice Protocols only.

Commentary

Paragraph (1)

This paragraph provides in essence that Member States must receive at least six months' advance notice if a proposal for amending the Administrative Protocol is to be considered by the Assembly.

Paragraph (2)

This paragraph deals with the majorities required for the adoption, by the Assembly, of amendments to the Administrative Protocol. It does not concern the matter of the majorities required for the entry into force of amendments. The latter question is governed by paragraph (3).

The paragraph distinguishes between amendment of Article A, dealing with the Assembly, and the amendment of other Articles of the Protocol. Amendment of Article A would require unanimity; amendment of other provisions would require three-fourths of the votes cast.

Paragraph (3)

This paragraph provides, in effect, that amendments will enter into force when three-fourths of the Member States have notified their acceptance. The amendments will thereupon bind not only those States but the remaining one-fourth as well. There is one exception to this rule--but only in the Paris, Berne and Nice Protocols--namely that if the amendment increases the financial obligations of Member States, then it will bind any given State only upon express acceptance by it. This exception does not appear in the Madrid and the Hague Protocols since in the Madrid and the Hague Unions the Member States have no financial obligations.