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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

**DIPLOMATIC CONFERENCE
FOR THE ADOPTION OF A NEW ACT OF THE HAGUE
AGREEMENT CONCERNING THE INTERNATIONAL DEPOSIT
OF INDUSTRIAL DESIGNS**

Geneva, June 16 to July 6, 1999

**ARTICLE 24 OF THE BASIC PROPOSAL FOR THE NEW ACT OF
THE HAGUE AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION
OF INDUSTRIAL DESIGNS**

*submitted, under Rule 29(1)(a) of the Draft Rules of Procedure,
by the Director General of WIPO*

INTRODUCTION

1. The present document is the document referred to in paragraph 3 of the introduction to the basic proposal for a new Act of the Hague Agreement (document H/DC/3), which stated that the question of the right to vote in the Assembly of the Hague Union continued to be reserved but that a further document regarding that question would be distributed later.
2. The main point at issue is the question of the right of an intergovernmental organization which becomes party to the new Act in accordance with Article 27(1)(ii) to vote in the Assembly.
3. A secondary question, which is believed to be non-controversial, concerns the right of a member of the Assembly to vote on matters which concern only an Act of the Hague Agreement to which that member is not party. In the seventh session of the Committee of Experts on the Development of the Hague Agreement, the Delegation of the United States of America proposed that provision should be made along the lines of the second sentence of Article 10(3)(a) of the Madrid Protocol; the International Bureau indicated that this would be reflected in the next draft or in the Rules of Procedure of the Assembly (paragraph 91 of document H/CE/VII/6). In fact, Rule *2bis* (Adoption and Amendment of Certain Provisions of the Regulations) of the current Rules of Procedure of the Hague Union Assembly (as adopted on September 27, 1976, and amended on May 28, 1979 and on October 1, 1985) reads as follows (see document AB/XXIV/INF/2, page 23):

Only the States bound by the 1960 Act shall have the right to vote on the adoption or on any amendment of the provisions of the Regulations under the Hague Agreement which concern the implementation of the said 1960 Act.

It is therefore proposed that this matter should be dealt with in the said Rules of Procedure once the new Act has entered into force.

4. As regards the question of the right of Contracting Parties to the new Act that are intergovernmental organizations to vote in the Assembly of the Hague Union, it is useful first of all to consider the solutions which have been adopted in the past in treaties which make provision for adherence by entities other than States. These are given in Annex I to the present document, in chronological order of their adoption. In addition, it should be noted that, although Article 19(1) of the Trademark Law Treaty (TLT), adopted in October 1994, provides for adherence by an intergovernmental organization which maintains an Office in which marks may be registered with effect in the territory in which its constituting treaty applies, that treaty does not provide for an Assembly; this is because the Diplomatic Conference which adopted the TLT was unable to agree on what provision should be made for the right to vote in such an Assembly. This solution would not however be possible in the context of the new Act of the Hague Agreement. In the first place, the Assembly of the Hague Union already exists and will continue to function whatever provision concerning an Assembly is adopted in the new Act. In the second place, it is indispensable to have a body which is competent to amend the Regulations, fix the fees and take other decisions concerning the implementation of the new Act.

5. In practice, the discussions in the conferences that have adopted these treaties have always focused on the position of the European Community; no other intergovernmental organization has taken part in those discussions. However, the question is a more general one; apart from Article IX of the Agreement Establishing the World Trade Organization (WTO Agreement), which expressly refers to the European Communities, all the provisions cited in Annex I refer simply to an “intergovernmental organization”. Moreover, Article 27(1)(ii) of the draft new Act provides for adherence by any intergovernmental organization which maintains an Office in which the protection of industrial designs may be obtained with effect in its territory. This would allow, for example, the African Intellectual Property Organization (OAPI) to become party to the new Act.

6. With the exception of Article 10 of the Madrid Protocol, all the provisions cited in Annex I have the effect that *either* the Member States of an intergovernmental organization may vote (in their own names) *or* the organization may cast a number of votes equal to the number of its Member States that are party to the treaty concerned. In the case of the Madrid Protocol, however, Article 10(3)(a) provides that each Contracting Party, whether a State or an intergovernmental organization, has a vote. According to the Notes on Article 10 prepared by the International Bureau and submitted to the Madrid Diplomatic Conference (1989), conferring the right to vote on an intergovernmental organization was “justified by the fact that, under the Protocol, the rights and obligations of a Contracting Organization are the same as the rights and obligations of a Contracting State” (paragraph 214 of document MM/DC/3). The reason for that statement is that, in the case of the European Community which was expected to have its own Trademark Office (which it now has), the Member States of the European Community continue to have their own Offices (the situation is different in the case of OAPI, whose Member States do not have their own Trademark Offices).

7. This position was accepted without any discussion at the Madrid Diplomatic Conference (1989). Since that time however, certain States (including some which are interested in becoming party to the new Act of the Hague Agreement) have indicated that they consider that a Contracting Party that is an intergovernmental organization should not have a vote that is additional to the votes of its Member States.

8. For the same reason, any proposal that would give every Contracting Party, whether it is a State or an intergovernmental organization, an unconditional right to vote in the Assembly of the Hague Union would attract the same objections. This would be the case if no provision were made in the new Act concerning the right to vote of intergovernmental organizations; indeed, Article 23 of the draft new Act provides that Contracting Parties shall be bound by Articles 2 to 5 of the Complementary Act of 1967, references in those provisions to “countries” being construed as references to Contracting Parties; Article 2(3)(a) of the Complementary Act states that each country member of the Assembly shall have one vote; if therefore the new Act contained no provision concerning the question of the voting rights of intergovernmental organizations, the result would be that each Contracting Party (whether a State or an intergovernmental organization) would automatically have a vote.

9. Equally unlikely to be acceptable would be a proposal that would give the right to vote in the Assembly of the Hague only to Contracting Parties that are States.

10. It is therefore necessary to look for a solution somewhere between those two.

POSSIBLE OPTIONS FOR THE QUESTION OF THE RIGHT TO VOTE
OF AN INTERGOVERNMENTAL ORGANIZATION IN THE
ASSEMBLY OF THE HAGUE UNION

11. The following is a list of options that have been envisaged by the International Bureau with regard to the question of the right of an intergovernmental organization to vote in the Assembly of the Hague Union.

12. The *first option* could be drafted as follows:

(1) *The Assembly shall endeavor to take its decisions by consensus.*

(2) *Where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. In such a case,*

(i) each Contracting Party that is a State shall have one vote and shall vote only in its own name, and

(ii) any Contracting Party that is an intergovernmental organization may vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Act; no such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote [, and vice versa].

13. Paragraph (1) is not indispensable. Its purpose is essentially political; it affirms that the normal way in which the Assembly will take a decision is to attempt to reach an outcome which is acceptable to all, and that taking a decision by voting would be very much an exceptional case. Indeed, since the Hague Union Assembly came into being in 1975, there has never been a vote in that Assembly; the same is true of the Madrid Union Assembly, which has existed since 1970.

14. Paragraph (2) is modeled on the provisions contained in several of the treaties cited in Annex I. The consequence would be that if, for example, the European Community or OAPI became party to the new Act, these organizations would be able to cast the votes of those of their Member States that would also be party to the new Act, provided that those States themselves did not vote. The words “and *vice versa*”, in square brackets, do not appear in the text of the Washington Treaty on Intellectual Property in Respect of Integrated Circuits (1989); they were introduced in the text of the 1991 Act of the UPOV Convention and they also appear in the texts of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty of 1996.

15. The *second option* could be drafted as follows:

(1) *The Assembly shall endeavor to take its decisions by consensus.*

(2) *Where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. In such a case,*

(i) *each Contracting Party shall have one vote and shall vote only in its own name, and*

(ii) *the number of votes cast by a Contracting Party that is an intergovernmental organization and its Member States shall not exceed the number of Member States of that organization that are Contracting Parties.*

16. This option is based on a proposal that was put forward during the TLT Conference (document TLT/DC/36), which in turn was based on Article IX of the WTO Agreement.

17. The effect of paragraph (2)(ii) is illustrated by the following example. Suppose that the European Community and eight of its Member States were party to the new Act. Votes could be cast either by all eight of these States or by up to seven of these States and the Community. However, it would never be possible for all eight Member States and the Community to vote. If these Member States and the Community were all represented in a meeting and all wished to vote, they would have to decide between themselves who should not take part in the vote. This problem would be mitigated (though not eliminated) by the third option.

18. The *third option* could be drafted as follows:

(1) *The Assembly shall endeavor to take its decisions by consensus.*

(2) *Where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. In such a case,*

(i) *each Contracting Party shall have one vote and shall vote only in its own name, and*

(ii) *the number of votes cast in the same direction by a Contracting Party that is an intergovernmental organization and its Member States shall not exceed the number of Member States of that organization that are Contracting Parties.*

19. Under this option (which has the same wording as the second option except for the addition of the words “in the same direction” in paragraph (2)(ii)), there would be no obstacle to, for example, the European Community and five of its Member States voting in favor of a decision and the other three Community Member States that are party to the new Act voting against the decision. It would not however be possible for all nine to vote in favor, or all nine to vote against, the decision. (It is understood that the objection of certain States to a separate vote for an intergovernmental organization is that this would give that organization and its Member States a block of votes greater in number than the number of States; under the present option, an extra vote could be cast only where the votes of the organization and its Member States are *not* cast as a block.) It would however still be necessary, in the case where the Community and its Member States wished to vote in the same direction, for them to decide who should not take part in the vote. This problem would be resolved by the fourth option.

20. The *fourth option* could be drafted as follows:

(1) *The Assembly shall endeavor to take its decisions by consensus.*

(2) *Where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. In such a case, each Contracting Party shall have one vote and shall vote only in its own name. Where however an intergovernmental organization and all of its Member States that are Contracting Parties cast their votes in the same direction, the number of votes counted shall be equal to the number of Member States of that organization that are Contracting Parties.*

21. On the hypothesis described in paragraph 19, above, if the Community and five of these States voted in favor of the decision and three against, all nine votes would be counted. On the other hand, if the European Community and the eight Member States that are Contracting Parties all cast their votes in favor of a proposal (or against a proposal), nine votes would be cast but only eight votes would be counted. As far as the outcome of a vote is concerned, the result would be the same as under the third option; however, it would not be necessary to determine whose vote is not counted.

22. The *fifth option* could be drafted as follows:

The Assembly shall take its decisions by consensus.

23. As noted above, the Assembly has functioned by consensus for over 20 years. This has however been in the knowledge that, in the last resort, the matter could be decided by a vote. Under this option, if there is no consensus, a decision will not be possible.

24. The *sixth option* could be drafted as follows:

Notwithstanding Article 23 and Article 2(3)(a) of the Complementary Act, any Contracting Party which maintains an Office in which the protection of industrial designs may be obtained shall have the right to vote. In addition, any State having made the notification referred to in Article 21 shall have the right to vote; however, where more than one of the States members of a group of States having made the said notification votes, only a single vote shall be counted for that group of States.

25. This option enshrines the principle of “one Office, one vote”. The consequences in the case of the European Community would be as follows: supposing that all 15 Member States of the European Community became party to the new Act, and assuming that Belgium, Luxembourg and Netherlands notified the Director General, in accordance with Article 21, that the Benelux Designs Office is substituted for their national Offices; if all these States were to vote, along with the Community itself, a total of 14 votes would be counted. It would also mean that, if OAPI and all or some of its Member States became party to the new Act, only the organization itself would have a vote, since the Member States of OAPI do not maintain Offices of their own.

26. It is assumed that all the members of a group of States that have made the notification referred to in Article 21 would vote in the same direction, since their interest in the decision under discussion would be in respect of the same Office; this is different from the situation of the European Community and its Members States, where the latter are responsible also for their own Offices.

CONCLUSION

27. After consultations, the International Bureau has reached the conclusion that only some of the options presented above are likely to be a basis for an acceptable solution in the Diplomatic Conference.

28. Proceeding by elimination, two options, the fifth and the sixth, are unlikely to be acceptable, for the following reasons:

- the *fifth option* (see paragraphs 22 and 23, above) makes the taking of decisions difficult since a Contracting Party objecting to consensus and knowing that no vote would follow the finding that consensus is lacking is not induced to accept a compromise;

- the *sixth option* (see paragraphs 24 to 26, above) is likely to be rejected by those potential Contracting Parties that would be deprived of the right to vote.

29. As regards the *third option* (see paragraphs 18 and 19, above), it has been noted that the outcome of any vote taking place under that option would be the same as under the fourth option but that it would be necessary to determine whose vote is not counted. It appears therefore that the third option, since it leads to the same result but is more complicated to apply than the fourth option, is superfluous.

30. In conclusion, the International Bureau is of the view that a solution would have to be sought along the lines of the *first*, the *second* or the *fourth options*. These three options are therefore submitted as three alternatives (Alternative A for the first option, Alternative B for the second option and Alternative C for the fourth option) under Rule 29(1)(b) and (c) of the draft Rules of Procedure of the Diplomatic Conference (document H/DC/2). The texts of the three Alternatives appear in Annex II to the present document.

[Annex I follows]

ANNEX I

PROVISIONS IN EXISTING TREATIES CONCERNING VOTING
BY ENTITIES THAT ARE NOT STATES

**Treaty on Intellectual Property in Respect of Integrated Circuits
(Washington, May 1989)**

Article 9

Assembly

...

(3) [Voting] (a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an Intergovernmental Organization shall exercise its right to vote, in place of its member States, with a number of votes equal to the number of its member States which are party to this Treaty and which are present at the time the vote is taken. No such Intergovernmental Organization shall exercise its right to vote if any of its member States participates in the vote.

...

**Protocol Relating to the Madrid Agreement Concerning the
International Registration of Marks
(Madrid, June 1989)**

Article 10

Assembly

...

(3)(a) Each Contracting Party shall have one vote in the Assembly. On matters concerning only countries that are party to the Madrid (Stockholm) Agreement, Contracting Parties that are not party to the said Agreement shall not have the right to vote, whereas, on matters concerning only Contracting Parties, only the latter shall have the right to vote.

...

**UPOV Convention
(1991 Act)**

Article 26

The Council

...

(6) [Votes] (a) Each member of the Union that is a State shall have one vote in the Council.

(b) Any Contracting Party that is an intergovernmental organization may, in matters within its competence, exercise the rights to vote of its member States that are members of the Union. Such an intergovernmental organization shall not exercise the rights to vote of its member States if its member States exercise their right to vote, and *vice versa*.

...

Agreement establishing the World Trade Organization (1994)

Article IX

Decision-Making

1. The WTO shall continue the practice of decision-making by consensus followed under GATT 1947.¹ Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each Member of the WTO shall have one vote. Where the European Communities exercise their right to vote, they shall have a number of votes equal to the number of their member States² which are Members of the WTO. Decisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement.³

...

¹ The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no Member, present at the meeting when the decision is taken, formally objects to the proposed decision.

² The number of votes of the European Communities and their member States shall in no case exceed the number of the member States of the European Communities.

³ Decisions by the General Council when convened as the Dispute Settlement Body shall be taken only in accordance with the provisions of paragraph 4 of Article 2 of the Dispute Settlement Understanding.

[Note by the International Bureau: The above footnotes appear in the text of the WTO Agreement.]

WIPO Copyright Treaty (1996)

Article 15

Assembly

...

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and *vice versa*.

...

WIPO Performances and Phonograms Treaty (1996)

Article 24

Assembly

...

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and *vice versa*.

...

[Annex II follows]

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ANNEX II

ALTERNATIVES
FOR ARTICLE 24 OF THE BASIC PROPOSAL

Article 24

Taking Decisions in the Assembly

Alternative A

(1) [*Consensus*] The Assembly shall endeavor to take its decisions by consensus.

(2) [*Voting*] Where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. In such a case,

(i) each Contracting Party that is a State shall have one vote and shall vote only in its own name, and

(ii) any Contracting Party that is an intergovernmental organization may vote in, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Act; no such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote [, and *vice versa*].

Alternative B

- (1) [*Consensus*] The Assembly shall endeavor to take its decisions by consensus.
- (2) [*Voting*] Where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. In such a case,
 - (i) each Contracting Party shall have one vote and shall vote only in its own name, and
 - (ii) the number of votes cast by a Contracting Party that is an intergovernmental organization and its Member States shall not exceed the number of Member States of that organization that are Contracting Parties.

Alternative C

- (1) [*Consensus*] The Assembly shall endeavor to take its decisions by consensus.
- (2) [*Voting*] Where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. In such a case, each Contracting Party shall have one vote and shall vote only in its own name. Where however an intergovernmental organization and all of its Member States that are Contracting Parties cast their votes in the same direction, the number of votes counted shall be equal to the number of Member States of that organization that are Contracting Parties.

[End of Annex II and of document]