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**Datasheet for the decision
of 30 September 2008**

Case Number: T 0791/06 - 3.2.07

Application Number: 98919749.6

Publication Number: 0972094

IPC: C30B 15/00

Language of the proceedings: EN

Title of invention:

Low defect density, vacancy dominated silicon

Patentee:

MEMC Electronic Materials, Inc.

Opponents:

- I. Sumitomo Mitsubishi Silicon Corporation
II. S.O.I. Tec Silicon on Insulator Technologies (Intervener)

Headword:

-

Relevant legal provisions:

EPC Art. 100(a), 100(b), 83, 105, 111(1)
EPC R. 144(d)

Relevant legal provisions (EPC 1973):

EPC R. 93(d)

Keyword:

"Procedural aspects of intervention filed between oral proceedings and notification of the decision announced at the oral proceedings before the Opposition Division (no procedural violation)"

"Remittal to Opposition Division for further prosecution (yes)"

"Reimbursement of appeal fee of the intervener (yes)"

Decisions cited:

T 0389/86, G 0012/91, G 0001/94, G 0003/04

Catchword:

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Case Number: T 0791/06 - 3.2.07

DECISION
of the Technical Board of Appeal 3.2.07
of 30 September 2008

Appellant I: Sumitomo Mitsubishi Silicon Corporation
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Tokyo 105-8634 (JP)

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Appellant II: MEMC Electronic Materials, Inc.
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Representative: Maiwald Patentanwalts GmbH
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Eilsenstrasse 3
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Appellant III: S.O.I. Tec Silicon on Insulator Technologies
(Opponent II) Parc Technologique des Fontaines
Intervener Chemin des Franques
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Representative: Collin, Jérôme
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Decision under appeal: Interlocutory decision of the Opposition
Division of the European Patent Office posted
18 May 2006 concerning maintenance of European
patent No. 0972094 in amended form.

Composition of the Board:

Chairman: H. Meinders
Members: H. Hahn
I. Beckedorf

Summary of Facts and Submissions

- I. The opponent (appellant I) and the patent proprietor (appellant II) lodged an appeal against the decision of the Opposition Division to maintain European patent No. 0 972 094 in amended form on the basis of claims 1 to 29 according to the second auxiliary request filed during the oral proceedings before the Opposition Division of 11 October 2005.

- II. The opposition had been filed against the patent as a whole based on Article 100(a) EPC, for lack of novelty and inventive step, and on Article 100(c) EPC for extension beyond the content of the application as originally filed.

- III. The Opposition Division held that the priority date was invalid so that the filing date of 9 April 1998 is the effective date. It decided that the technical experts should not be allowed to speak because the respective requests for hearing them was made after expiry of the time limit under Rule 71a EPC 1973. Furthermore, the Opposition Division considered that document D14, although having been late filed with letter of 11 August 2005, was considered to be relevant and thus, together with its translations D14a and D24, was admitted into the proceedings. Furthermore, claim 1 of the main request (comprising claims 1 to 17, 19 to 28 and 30 as granted and the amended claims 18 and 29 as filed with letter dated 24 February 2003) and claim 1 of the first auxiliary request as filed with fax of 26 September 2005 was considered to lack novelty over the disclosure of D14, using its translation D24. The Opposition Division refused the request of the opponent

to postpone the oral proceedings so as to have sufficient time to study the amended second auxiliary request as filed during the oral proceedings. Furthermore, the Opposition Division refused to consider objections under Article 100(b) EPC raised in the context of said amended second auxiliary request. The request of the opponent in the oral proceedings not to admit into the proceedings the further amendments made to said second auxiliary request for being late filed, being not clear and not supported by the application as originally filed was also refused by the Opposition Division which decided to allow these amendments. Claims 1 to 29 of the second auxiliary request as filed during the oral proceedings were subsequently considered to meet all requirements of the EPC.

- IV. The minutes of the oral proceedings were sent to the parties with letter dated 24 November 2005.

With its letter dated 14 December 2005 appellant I requested corrections in the minutes. Appellant II, with its letter dated 19 January 2006, requested additional corrections in said minutes. Both parties filed further submissions in this respect with letters dated 15 February 2006 and 28 February 2006, respectively.

In its communication dated 27 March 2006 the Opposition Division accepted some of the corrections requested, stated that the compliance of the amendments to the patent with Article 83 EPC would of course be considered in the decision and annexed a corrected version of the minutes to this communication. Appellant

I filed further submissions with letter of 11 April 2006.

V. With a notice of appeal dated 10 March 2006, referring to decision T 389/86 (OJ EPO 1988, 87) appellant I requested to set aside the decision under appeal and to revoke the patent. As an auxiliary request oral proceedings were requested.

VI. A notice of intervention pursuant to Article 105 EPC was filed by fax on 15 March 2006 by S.O.I. TEC Silicon on Insulator Technologies, Bernin France on the basis of infringement proceedings instituted against it on 28 December 2005. The intervener ("appellant III") paid the opposition fee and also the appeal fee on 15 March 2006. It requested that the intervention be treated as an intervention in opposition proceedings before the Opposition Division since the latter was still responsible for the proceedings. In this context appellant III mentioned that the Opposition Division, in accordance with G 12/91 (OJ EPO 1994, 285; see point 3 of the reasons), could allow the parties to present comments on the submissions of the parties or could decide to reopen oral proceedings for further debate.

Auxiliarily it requested that the intervention be treated as an intervention in appeal proceedings in accordance with decisions G 1/94 (OJ EPO 1994, 787) and G 3/04 (OJ EPO 2006, 118). The reimbursement of the appeal fee was also requested if the evolution of the case should make it clear that no appeal fee had to be paid by the intervener. It was further requested that the patent be revoked in its entirety taking account of

the version as granted and as amended during the opposition proceedings.

The intervention was based on the grounds of opposition under Article 100(a) (lack of novelty and/or inventive step), 100(b) (insufficiency of disclosure) and 100(c) EPC (inadmissible amendment), and was directed to the patent as granted as well as the patent as maintained amended.

It was stated with respect to Article 100(b) EPC that there is no disclosure as to how the control of temperature distribution over space and time in the ingot should be performed so that the resulting ingot would have regions which are vacancy dominated and free of agglomerated vacancy type intrinsic point defects (IPDs). There are many parameters which are presented in the patent as important to control, such as the pull rate, the "hot zone" design, the temperature T , the temperature gradient G , the average temperature gradient G_0 , their spatial and/or radial distributions within the ingot, the cooling time, the cooling rate, the oxygen content, etc., but the patent does not teach which are ultimately the driving parameters on which the man skilled in the art should act. The design of the "hot zone" determines the temperature distribution but is nowhere described. This fact has been recognized as important by the US court in California which has ruled that the US counterpart of the patent in suit, i.e. US 5 919 302, had to be seen as invalid for lack of enablement, among others because that patent lacks a proper description of the hot zones used. Further, the patent in suit is deficient with respect to the size of the defects to be detected and with respect to the

limits of the detection methods so that the man skilled in the art is not able to determine regions being "substantially free of agglomerated intrinsic point defects". Furthermore, the feature added to the claims regarding the nominal diameter being 200 mm or greater has no proper support in the patent.

With respect to patentability further arguments for lack of novelty and/or inventive step were given based on a number of the documents of the opposition proceedings, as well as on two new documents:

D22: M. Hourai et al., "Formation Behaviour of Infrared Light Scattering Defects in Silicon during Czochralski Crystal Growth", J. Electrochem. Soc., Vol. 142, no. 9, September 1995, hereafter numbered *D32*,

D23: WO-A-97 26393, hereafter numbered *D33*, and

D23a: EP-A-0 875 607, hereafter numbered *D33a* (the document designated *D24* corresponds to *D28* of the impugned decision).

The feature "having a diameter of 200 mm or greater than 200 mm" introduced into the claims and various parts of the description was considered to make the patent extend beyond the content of the application as originally filed.

VII. The impugned decision was sent to all parties on 18 May 2006.

VIII. With letter dated 17 July 2006 appellant II filed its appeal and requested to set aside the decision under appeal. Auxiliarily, oral proceedings were requested.

- IX. With its grounds of appeal dated 28 September 2006 appellant I submitted the reasons as to why the patent lacks enablement under Article 83 EPC and as to why the Opposition Division should have considered this opposition ground. It was stressed by appellant I that the patent actually contains fewer instructions than D14/D24, contrary to the Opposition Division's statement in the impugned decision (see page 12, lines 2 to 3 of the decision). Appellant I also submitted D31, the decision of the US District Court for the Northern District of California concerning US-A-5 919 302 (referred to by appellant III, see point VI above, and being directed to the same wafers/ingots as claimed in the opposed patent) which was found invalid for failing to provide an enabling disclosure. Additionally, an experimental report designated "Annex I", concerning the growth of ingots of a diameter of 200 mm using the method of D14/D24 in hot zone IV as described in the sentence bridging pages 5 and 6 of D14/D24, and an "Annex II", concerning contradictions in the opposed patent, were submitted.
- X. With letter dated 27 April 2007 appellant II requested to remit the case to the Opposition Division to examine the fresh ground of opposition under Article 100(b) EPC, as raised by appellant III. In case that the Board refuses remittal to the department of first instance, reversal of the Opposition Division's decision and maintenance of the patent according to request 1 as filed with the same letter was requested. Alternatively, it was requested to maintain the patent according to one of the requests 2 to 5 as submitted with the same letter (said request 3 corresponds to the amended

second auxiliary request underlying the impugned decision).

Appellant II additionally submitted arguments as to why the Opposition Division was correct in not considering appellant I's objections regarding sufficiency of disclosure of the patent as amended. These objections were to be considered a late filed ground of opposition, which should only be admitted if *prima facie* relevant. That was not the case. It further argued why the amended claims complied with the requirements of Article 83 EPC. Furthermore, an affidavit of an expert of the CZ crystal puller method, Dr. J.C. Holzer, was submitted as evidence that the experiments of "Annex I" were not made in accordance with the "hot zone IV" of D14/D24.

XI. With letter of 27 April 2007 appellant I submitted further arguments with respect to insufficiency of disclosure, particularly since the impugned patent is devoid of any working example illustrating as to how the claimed wafers/ingots can be manufactured, together with a declaration of a Dr. Park concerning figure 10(e) of D14/D24, a copy of patentee's brief dated 29 January 2007 in the opposition proceedings regarding EP-B-1 273 684 (being a divisional of the patent in suit) and a copy of this European patent.

XII. With its letter dated 4 May 2007 appellant III filed for the first time in these proceedings the documents E1 to E11. It commented with respect to the statements made by appellant I and appellant II and supplied further arguments on lack of sufficient disclosure, based on E1, E4, E7, E10 and E11. Also further

arguments concerning lack of novelty and/or inventive step of the claims having regard to documents E2, E3, E5, E6, E8 and E9, were submitted.

Appellant III reiterated its request that the intervention be treated as an intervention in opposition proceedings before the Opposition Division and auxiliarily that the case be remitted to the department of first instance for further prosecution of the ground of opposition under Article 100(b) EPC. As a second auxiliary request it was requested that all grounds of opposition are examined by the Board of Appeal, and as a general request, which came in addition to all requests mentioned above, oral proceedings were requested. Additionally it requested that document E10 be excluded from file inspection, in accordance with the Decision of the President of the EPO dated 7 September 2001 concerning documents excluded from file inspection (Rule 93(d) EPC 1973).

XIII. With communication dated 12 July 2007 the Board presented its provisional opinion with respect to the requests of all parties, which needed to be clarified, particularly with respect to the issue of oral proceedings and a suggested remittal to the Opposition Division.

The Board stated amongst others that the intervention was considered to represent an intervention during opposition appeal proceedings and fulfilled all formal requirements for such an intervention.

Document E10 was provisionally excluded from file inspection, pending a final decision of the Board on

this request of appellant III. In this context appellant II was requested to state whether or not it considers that inspection of E10 would be prejudicial to its legitimate interests.

Taking account of the requests of appellant II and of appellant III the Board intended to remit the case to the Opposition Division for examining the opposition ground under Article 100(b) EPC.

Furthermore, since there exists no legal basis for the payment of the appeal fee by an intervener in opposition appeal proceedings the Board intended to reimburse the appeal fee paid by appellant III.

Finally, the parties were requested to express their opinion on these proposals of the Board within the time limit set, and to clarify their requests.

XIV. With letter dated 5 September 2007 appellant I stated that its request for oral proceedings was maintained only in the event that the Board would not remit the case to the Opposition Division.

XV. Appellant III with its letter dated 12 September 2007 amended its previous requests by merely requesting that a) the case be remitted to the Opposition Division both for examination of the fresh ground under Article 100(b) EPC, **as well as renewed examination as to novelty and inventive step, on the basis of the facts, evidence and arguments which have been introduced for the first time in opposition appeal proceedings, and that the patent be revoked under Articles 100(b) and 100(a) EPC;**

b) in the event that the above request for remittal is refused, to arrange for oral proceedings;
c) as an auxiliary request, remittal of the case to the Opposition Division for examination only of the fresh ground of opposition under Article 100(b) EPC as raised by it in its intervention; and
d) that the requests to revoke the patent for all grounds of opposition as set out in the letters of 15 March 2006 and 2 May 2007 are maintained, in particular for those issues which will not be remitted to the first instance.

XVI. With letter dated 12 September 2007 appellant II confirmed its requests and stated that "Oral proceedings are requested as an auxiliary request in case that the Appeal Board considers not to remit the case to the first instance and none of the requests is considered allowable". Furthermore, the exclusion of E10 from file inspection was not considered necessary.

XVII. With a fax dated 26 September 2007 appellant II pointed out that appellant III's request for remittal to the Opposition Division also for renewed examination of the opposed patent as to novelty and inventive step, seemed to be unjustified and that the case should only be remitted for examination of the fresh ground under Article 100(b) EPC.

Reasons for the Decision

1. *Intervention - filed in pending opposition proceedings?*

1.1 The Board cannot accept appellant III's arguments that the Opposition Division should have treated the

intervention because it was still responsible for the case and that the debate cannot be considered as having been closed since the opponent and the patent proprietor had made submissions after the oral proceedings of 11 October 2005 which were taken into account by the Opposition Division. Moreover, the Opposition Division - in line for instance with G 12/91 (*supra*), point 3 of the reasons - could have allowed the parties to present their comments on the submissions or decide to reopen the proceedings for further debate.

- 1.2 According to Article 105 EPC any third party may intervene in opposition proceedings after the opposition period has expired, if certain conditions are fulfilled.

This requires as a precondition, however, that opposition proceedings **are in existence** (G 4/91, OJ EPO 1993, 707, reasons point 7). A decision by an Opposition Division which decides upon the issues raised by the opposition is a final decision in the sense that thereafter the Opposition Division has no power to change its decision. Proceedings before an Opposition Division are terminated upon issue of such a final decision, regardless of when such decision takes legal effect (G 4/91, *supra*, reasons point 7).

- 1.3 Fact is that at the end of the oral proceedings the Opposition Division pronounced its decision upon the issues raised by the opposition, see the minutes dated 24 November 2005, page 6 and form 2309.2. Neither the corrections proposed by the parties nor those allowed by the Opposition Division can affect this part of the

minutes, see page 6 and form 2309.2 of the corrected minutes, sent with communication of 27 March 2006. Thus a final decision was issued at the oral proceedings on 17 October 2005 and the opposition proceedings were thus terminated by that date. The intervention was filed on 15 March 2006 and is therefore filed outside pending opposition proceedings. In such a case the Opposition Division has no power to even consider the intervention.

- 1.4 The above conclusion is not altered by the fact that the written decision of the Opposition division was notified with its despatch to the parties only on 18 May 2006 because that decision was effectively appealed by appellant I on 10 March 2006 after the Opposition Division had pronounced its tenor at the end of the oral proceedings on 11 October 2005 and before the written decision was despatched (cf. T 389/86 of 31 March 1987, unpublished in OJ EPO, point 1 of the reasons).

Neither does the fact that the parties proposed corrections to the minutes, that the opposition Division accepted some of these and sent a communication with corrected minutes in this respect, as this, being an issue accessory to the decision on the substantive issues, has no bearing on the fact that a final decision was issued at the end of the oral proceedings, nor on the substance of the decision itself.

The correspondence on the part of the Opposition Division in respect of the minutes can also not be considered a reopening of the debate on the substantive

issues, as suggested by appellant III's reference to G 12/91 (*supra*, point 3 of the reasons), as the Enlarged Board of Appeal clearly does not allow the debate to be reopened once a decision is pronounced (see point 3 of the reasons, the first, second and last sentence in combination).

- 1.5 Finally, appellant III contends that because the Opposition Division also sent the communication of 27 March 2006, with the corrected minutes, to it, it had been formally recognised as having gained party status in the opposition proceedings and that the intervention was already treated as an opposition. The Board notes in this respect that the Opposition Division in addition to the above also sent a copy of the decision dated 18 May 2006 to appellant III.

The Board considers the argument to mean that appellant III had a legitimate expectation, caused by the receipt of the corrected minutes and the impugned decision, that its intervention was considered as one having been filed in pending opposition proceedings.

- 1.6 The Board cannot see a case for such an expectation on the part of appellant III, as the Opposition Division, in a communication dated 22 March 2006, i.e. prior to the communication of the corrected minutes and of the decision under appeal, clearly stated that "admissibility of the opposition will be decided during the appeal procedure", while making reference to the intervention filed with letter of 15 March 2006.

This can only mean that the intervention was considered to have been filed outside the pendency of opposition proceedings and that it would be treated as an intervention in opposition appeal proceedings. This is not altered by the fact that the Opposition Division erroneously mentioned the admissibility of the "opposition" instead of "intervention". The reference to the intervention letter dated 15 March 2006 makes this sufficiently clear.

The subsequent communication of the corrected minutes with letter of 27 March 2006 and of the decision (dated 18 May 2006) do not contain any further indications regarding appellant III's position in the proceedings, thus do not provide any substantive support for its contention that it became a party to the opposition proceedings.

The mere fact that the corrected minutes and the decision were also notified to appellant III cannot establish party status, because the opposition proceedings as such were finally terminated with the Opposition Division pronouncing its decision and closing the oral proceedings on 11 October 2005. At that moment the Opposition Division lost its power to change its decision on the issues raised by the opposition to which appellant III had not been a party. It just remained for the Opposition Division to notify the reasoning of its already pronounced decision and with the written decision.

The appeal proceedings were initiated by appellant I filing its notice of appeal on 10 March 2006, i.e. before appellant III filed its intervention on 15 March 2006.

Anything that happened after that, like the correction of the minutes and the despatch of the written decision, does not result in a formal reopening of the opposition proceedings that had been terminated on 11 October 2005. The Opposition Division did nothing else but informed appellant III of the corrected minutes and the written decision, without, however, granting appellant III any legal status.

- 1.7 The conclusion therefore is that the intervention is not considered as having been filed in pending opposition proceedings.

2. *Intervention - admissibility*

- 2.1 Even though appellant I filed its appeal on 10 March 2006, i.e. before receipt of the reasoned decision dated 18 May 2006, this appeal is considered to have been filed within the time limit of Article 108, first sentence, EPC. In this respect the Board concurs with T 389/86 (*supra*).

Appellant II filed its appeal on 17 July 2006; both appeals comply with the formal requirements and the respective grounds of appeal were filed with letter of 28 September 2006 (appellant I) and 19 September 2006 (appellant II). These appeals are thus admissible and have the effect that appeal proceedings are pending.

2.2 The intervention was filed on 15 March 2006, i.e. after the announcement of the decision in the oral proceedings on 11 October 2005 and before its notification on 18 May 2006. Had no appeal been lodged against this decision, the intervention would have had no standing at all (see T 296/93, OJ EPO 1995, 627, point 2.1 of the reasons, referring to G 4/91, (*supra*)).

As admissible appeals have been filed (see above), the intervention is considered to have been filed in appeal proceedings. As it further complies with all formal requirements and involves substantive reasoning in connection with the grounds of opposition 100(a), 100(b) and 100(c) EPC, in respect of the patent as granted, as well as the patent as maintained amended in the impugned decision, the Board considers the intervention admissible.

3. *Request that E10 be excluded from file inspection*

Since appellant II stated that the exclusion of E10 from file inspection was not considered necessary for not being prejudicial to its legitimate interests (see point XVI above) the Board considers that the preliminary exclusion of E10 from file inspection (Rule 144(d) EPC) is to be lifted.

4. *Remittal to the department of first instance
(Article 111(1) EPC)*

An intervention during appeal proceedings may be based on any of the grounds for opposition mentioned in Article 100 EPC; in case new grounds of opposition are raised in the intervention, the case should be remitted

to the first instance for further prosecution (see G 1/94, *supra*, point 13 of the reasons).

- 4.1 In the present case the ground of opposition under Article 100(b) EPC against the patent as granted has been put forward by appellant III, as have been objections under Article 83 EPC with respect to the patent as amended. These issues will thus have to be considered by the Opposition Division on remittal, in any case, as they constitute such a "new ground of opposition".
- 4.2 The Opposition Division, in the impugned decision under the heading "objections under Article 100(b) EPC", refused to consider appellant I's objections regarding the claims as maintained amended, having regard to the added feature of the ingot having a diameter larger than 200 mm. It based the refusal on Article 114(1) EPC. The Opposition Division considered these objections a new ground for opposition because they were:
- a) late filed (raised during the oral proceedings),
 - b) no evidence was presented that the invention does not work,
 - c) the application does not need to contain examples for all aspects of the invention and
 - d) the patent (in contrast to D24) contains instructions as to what the skilled person should do for carrying out the invention.
- 4.3 From the actual reasons the Opposition Division provided in its decision the Board derives that it based this decision rather on Article 114(2) EPC (the discretion to not consider late filed facts or evidence) than on Article 114(1) EPC (the performance of

examination of its own motion). Be that as it may, the Board considers that the Opposition Division erred in not considering these objections for the reasons that follow.

The feature in question has been filed for the first time in the proceedings as an amendment to claims 1 and 11, with fax dated 6 October 2005 and was transmitted to appellant I by the Opposition Division with fax of 7 October 2005 (a Friday). The oral proceedings took place the following Tuesday, 11 October 2005. This is hardly a situation in which a party can be expected to react in writing before the oral proceedings and/or present evidence that the invention does not work (points a) and b) above), so as to avoid its objections being considered late filed or unsupported by evidence.

- 4.4 Further, as the objections concern amendments carried out to the claims 1 and 11 as granted, by taking features from the description, by definition they could not have been raised when filing the opposition. Thus, they simply cannot be considered a new ground of opposition and in consequence be disregarded. On remittal, the Opposition Division will thus also have to properly consider appellant I's arguments relating to the compliance with Article 83 EPC of the patent as maintained with amended claims 1 and 11. In fact, the Opposition Division - contrary to the impugned decision - had announced in its communication dated 27 March 2006 that it would consider in its decision the compliance with Article 83 EPC of the amendments to the patent.

4.5 Appellant III amended its previous requests (see point XII above) to those filed with the letter dated 12 September 2007 (see point XV above). Thereby it requested as main request that the case be remitted to the Opposition Division both for examination of the fresh ground under Article 100(b) EPC, **and for renewed examination as to novelty and inventive step, on the basis of the facts, evidence and arguments which have been introduced for the first time in opposition appeal proceedings, and that the patent be revoked under Articles 100(b) and 100(a) EPC.**

Appellant II on the other hand pointed out that this request for remittal, also for renewed examination of the opposed patent as to novelty and inventive step, seemed to be unjustified and that the case should only be remitted for examination of the fresh ground of opposition under Article 100(b) EPC (see point XVII above).

4.6 With the intervention new evidence (see point VI) has been produced in support of an objection of lack of novelty/lack of inventive step in combination with D3 and D14 already on file. These objections have been further substantiated by additional evidence (E2-E6, E8-E10) submitted by appellant III, in combination with the aforementioned evidence (D32, D33, D33a) or evidence existing already in the file (D1-D3, D5, D9, D14, D21, D28).

The primary task of the Boards of Appeal is to review the decision of the department of first instance. The above mentioned evidence and the objections based on it have not been examined by the Opposition Division.

Examination of it by the Board would run counter to this principle and, as it has been submitted with an intervention in opposition appeal proceedings, would deny the parties an examination thereof by two instances.

The Board therefore considers that on remittal the Opposition Division should also examine the above mentioned facts, evidence and arguments, as supplied by appellant III in these appeal proceedings, insofar as it concerns the question of novelty and inventive step.

4.7 With respect to Article 123(2) EPC the Opposition Division in its decision stated that the feature incorporated into claims 1, 11, 18 and 28 of the patent as maintained "having a nominal diameter of 200 mm or greater than 200 mm" is supported by page 18, lines 9 to 17 and examples 1, 5 and 7 of the originally filed application.

Appellant III argued that the introduction of this feature into the claims and into certain parts of the description, as well as some deletions in the description, extend beyond the content of the application as originally filed, particularly since not all features disclosed in combination have been incorporated in claim 18 (see point VI above; and pages 15 and 16 of the intervention; and page 29 of the letter dated 2 May 2007).

The Board therefore considers that on remittal the Opposition Division should also examine the above mentioned arguments, as supplied by appellant III in these appeal proceedings, insofar as it concerns the

question of an intermediate generalization and Article 123(2) EPC.

- 4.8 In view of the auxiliary nature of the request for oral proceedings as expressed by all parties (see points XV, XVI and XVII above) the Board considers that the case can be remitted to the Opposition Division for further prosecution in the present form without having oral proceedings before the Board.

5. *Reimbursement of the intervener's appeal fee*

The intervention of appellant III having been considered, by the Board, as an admissible intervention in opposition appeal proceedings (see points 1 and 2 above), only the required opposition fee needs to be paid, as established by the Enlarged Board of Appeal in G 3/04, *supra*, point 11 of the reasons. Hence there is no legal basis for retaining the appeal fee, which was in any case paid as a precaution (see page 16 of the intervention). Therefore the Board concludes that the appeal fee of the intervener should be reimbursed.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the department of first instance for further prosecution.
3. The appeal fee of the intervener is to be reimbursed.

The Registrar:

The Chairman:

G. Nachtigall

H. Meinders