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D E C I S I O N
of 20 April 1999

Case Number: T 0392/97 - 3.2.1

Application Number: 86402654.7

Publication Number: 0230804

IPC: F16J 15/08

Language of the proceedings: EN

Title of invention:
Metallic gasket

Patentee:
Nihon Metal Gasket Kabushiki Kaisha

Opponent:
Ishikawa Gasket Co. Ltd.
REINZ-Dichtungs-GmbH
Meillor S.A.
Freudenberg & Co.

Relevant legal provisions:
EPC Art. 56, 105(1) second sentence, 112(1)
EPC R. 71(1)

Keyword:
"Request for postponing appointed oral proceedings (refused)"
"Admissibility of intervention under Article 105(1) second sentence EPC (denied)"
"No request from the patentee that the intended interveners cease their alleged infringement"
"Referral of questions to the Enlarged Board of Appeal (no)"

Decisions cited:
J 0005/81, T 0198/88, T 0275/89

Catchword:

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Boards of Appeal

Chambres de recours

Case Number: T 0392/97 - 3.2.1

D E C I S I O N
of the Technical Board of Appeal 3.2.1
of 20 April 1999

Appellant:
(Opponent 01)

Ishikawa Gasket Co. Ltd.
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Representatives:

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Kraus Weisert & Partner
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Hering, Hartmut, Dipl.-Ing.
Patentanwälte
Berendt, Leyh & Hering
Innere Wiener Straße 20
81667 München (DE)

Other party:
(Intervener)

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- 2 -

Respondent: Nihon Metal Gasket Kabushiki Kaisha
(Proprietor or the patent) 3308, Aza-deguchi
Ohaza-mikajiri
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Representative: Röhl, Wolf Horst, Dipl.-Phys., Dr.
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Decision under appeal: Interlocutory decision of the Opposition Division
of the European Patent Office posted
17 February 1997 concerning maintenance of
European patent No. 0 230 804 in amended form.

Composition of the Board:

Chairman: F. Gumbel
Members: M. Ceyte
V. Di Cerbo

Summary of Facts and Submissions

- I. The Respondent is proprietor of European patent No. 0 230 804 (application No. 86 402 654.7).
- II. By its former decision posted on 1 June 1992 the Opposition Division revoked the European patent arguing that the subject-matter of claim 1 lacked novelty in view of

D5: GB-A-1 549 200 or

D8: US-A-4 468 044.

- III. In its decision T 684/92 of 25 July 1995, the Board 3.2.1 came to the conclusion that the amended claimed subject-matter was novel over the cited prior art. In exercise of its discretion under Article 111(1) EPC the Board remitted the case to the opposition division for further decision on the issue of inventive step.

In the course of the opposition and appeal proceedings the following state of the art was inter alia additionally opposed

D1: DE-A-2 220 053

D13: JP-A-6 0 170053

D18: DE-C-2 849 018

D20: US-A-1 928 759.

Documents D5 and D8 above played no significant role in

the further appeal proceedings.

- IV. By interlocutory decision posted on 17 February 1997, the Opposition Division maintained the patent as amended.

An appeal against this decision was filed by opponent 01 on 8 April 1997, with the appeal fee being paid at the same time.

The Statement of Grounds of Appeal was filed on 16 June 1997.

- V. A further appeal was filed by the intervener in the former appeal proceedings (opponent 02). By its letter dated 15 June 1998, it withdrew its opposition and took no further part in the appeal proceedings.

- VI. A summons to oral proceedings, scheduled for 20 April 1999 was dispatched to the parties on 23 December 1998.

By telecopy of 25 March 1999 one of the two co-representatives of the appellant (opponent 01), requested postponement of the appointed oral proceedings on account of a collision with a date for oral proceedings set by another patent court.

Furthermore, since very relevant documents were about to be gathered, it was requested to postpone the date for oral proceedings for at least half a year and if possible much longer.

- VII. In its communication dated 7 April 1999, the Board held that the subsequent fixing of oral proceedings by another patent court at the same date as the previously

appointed oral proceedings before the Board was not sufficient reason for postponing. A request to postpone an appointment could only be allowed, if unforeseen and exceptional circumstances had arisen. Reference was made in this respect to the notice of the Vice-Presidents Directorates-General 2 and 3 dated 14 February 1989 (OJ EPO 1989, 132).

VIII. On 14 April 1999 the same representative lodged on behalf of the firms Meillor S.A. and Freudenberg & Co. a notice of intervention pursuant to Article 105(1) second sentence EPC and paid the prescribed opposition fees.

The notice of intervention was essentially based on an alleged request of the patentee's licensee that the interveners cease their infringement of the patent and on the fact that they had instituted proceedings for a court ruling that they were not infringing the patent, as inter alia evidenced by the following annexes:

- A1: Letter dated 7 December 1998 from Elring Klinger GmbH, the patentee's licensee, to Freudenberg & Co.
- A2: Letter dated 8 January 1999 from Meillor S.A. to the patentee's licensee
- A3: Response of the patentee's licensee dated 12 January 1999 to Meillor S.A.
- A6: Statement of claim lodged on 12 April 1999 at a court in Italy, i.a. by the two intended interveners Meillor S.A. and Freudenberg & Co.

and its English translation according to annex 6A.

A7, A8: Papers showing that this statement was also communicated to the patentee and its licensee.

This notice also contained a reasoned statement of grounds for opposition. The objections to patentability were in particular based on the above cited document D20.

The request for postponement of the appointed oral proceedings was repeated.

- IX. On 16 April 1999, the present Board of Appeal dispatched a teletype stating that the date for oral proceedings was maintained.
- X. Oral proceedings were held as appointed on 20 April 1999. The appellant (opponent 01) requested that the decision under appeal be set aside and the European patent be revoked in its entirety.

The intended interveners requested a decision as to the admissibility of the interventions and revocation of the European patent in its entirety.

Additionally they requested that two questions filed during the hearing be referred to the Enlarged Board of Appeal, if the interventions were to be rejected as inadmissible.

The respondent (patent proprietor) requested that:

- the interventions be rejected as inadmissible

- the appeal be dismissed and the patent be maintained on the basis of claim 1 filed at the oral proceedings (main request) or in the alternative on the basis of the auxiliary request filed 20 March 1999.

Amended claim 1 (main request) reads as follows:

"1. A metallic gasket comprising a laminated structure of plates being provided with a combustion chamber hole (12), said structure having a flat elastic metal base plate (8, 38) provided with one full bead (16, 36) adjacent to its edge portion (8a, 38a) surrounding said combustion chamber hole (12), a flat compensating plate (4), a compensating means (20) extending around said combustion chamber hole (12), thicker in wall thickness than the other portion when the metallic gasket is fastened, being formed by folding back the edge (4a) of said compensating plate (4) adjacent to said combustion chamber hole (12) in a direction opposite to said hole (12), and a flat intermediate plate (6),

c h a r a c t e r i z e d in that

the intermediate plate (6, 34) which is placed between said base plate (8, 38) and said compensating plate (4) is laminated onto said compensating plate (4),

said compensating means (20) comprises the compensating plate (4), the folded edge thereof (4a) and the edge portion (8a, 38a) of said base plate (8, 38), said folded edge (4a) being folded back so that it is in

complete contact with said compensating plate (4) or said intermediate plate (6, 34), already before being fastened,

said base plate (8, 38) is an outer plate, said edge portion (8a, 38a) not being covered by the folded edge (4a) of the compensating plate (4), and

said bead (16, 36) of said base plate (8, 38) is disposed outside of the compensating means (20)."

- XI. As to the admissibility of the interventions, the intended interveners made essentially the following submissions.

As evidenced by the Annexes A1 to A3, the patentee's licensee has implicitly requested that the interveners, Freudenberg & Co. und Meillor S.A. ceased their alleged infringement, as required by Article 105(1) second sentence EPC. Meillor S.A. is a subsidiary company to Freudenberg & Co.. Since this parent company has only one subsidiary company and does not itself produce any gaskets, there can be no doubt that the letter A1 from the patentee's licensee to the parent company was also directed to the subsidiary company. Here it was stated that the patentee's licensee was about to take legal action against Meillor S.A. which was infringing the European patent. It was also said that the granting of a sub-license to Meillor S.A. did not come into consideration.

These two statements can only be construed as a clear request from the patentee's licensee that Meillor S.A. cease its infringement. Thus, the spirit if not the

letter of the first condition laid down in Article 105(1) second sentence EPC is complied with.

It cannot be disputed that the second condition, that Firma Meillor S.A. und Freudenberg & Co. have instituted proceedings for a court ruling, is also fulfilled as it is evidenced by the annexes A6, A7 and A8.

Therefore the interventions comply with Article 105(1) second sentence EPC and are thus admissible.

XII. As to the issue of patentability, the intended interveners and the appellant made in essence the following submissions:

(i) The only difference between the gasket of document D20 and the claimed gasket resides in the provision of full bead. Whilst it is true that the flat elastic metal base of document D20 is provided with a half bead, no exercise of inventive skill would have been required to replace the half bead of document D20 by a conventional full bead.

(ii) The claimed subject-matter is also not inventive in respect of the combination of documents D1 and D13: In document D1 a gasket is disclosed composed of a metal plate having a single full bead which is remote from the aperture. The drawback in the use of this kind of gasket is that combustion gases may penetrate into the gap between the cylinder head and the cylinder block structure of the engine. Because of deposition of the material

contained therein on the full bead, the sealing performance is deteriorated. Document D13 teaches a solution to remedy this drawback. The gasket disclosed therein comprises a metal plate the edge of which is folded back so as to provide a sealing edge round the aperture. This gasket is also provided with a surface pressure adjusting plate.

Thus for the skilled person wanting to obviate the above drawback it would be obvious to combine the gasket of document D1, Figure 1 and the sealing arrangement of document D13, Figure 3 so as to arrive at the claimed subject-matter. It is true that in document D13 a space \acute{a} is formed between the metal plate and its folded sealing edge. However when such a gasket is tightly clamped between the block structure and the cylinder head, this folded sealing edge is flattened and the space \acute{a} thus would not exist any more.

XIII. The respondent - in support of its requests as stated under point X above - rejected in detail the arguments brought forward by the interveners and the appellant, respectively.

Reasons for the Decision

1. The appeal is admissible.
2. *Admissibility of the interventions*
 - 2.1 Article 105(1) second sentence EPC requires that an intervener proves both

(i) that the patentee has requested that he cease alleged infringement of the patent and that

(ii) he has instituted proceedings for a court ruling that he is not infringing the patent.

This means that an intervention is admissible only, if both distinct requirements (i) and (ii) above are fulfilled.

2.2 In order to establish that the requirement (i) is complied with, the intended interveners filed Annexes A1 to A3.

Annex A1 is a letter dated 7 December 1998 from the patentee's licensee dispatched to the intended intervener Freudenberg & Co.. This letter was personally and confidentially addressed to two members of Freudenberg & Co.. It was assumed that the Freudenberg group was about to acquire Meillor S.A. and attention was drawn to the fact that the patentee's licensee was considering taking legal action against Meillor S.A. which was infringing inter alia the European patent in suit. It was also stated that the granting of a sub-license to Meillor S.A. did not come into consideration.

The Board is unable to construe this letter as a request from the patentee's licensee that Freudenberg cease alleged infringement, simply because Freudenberg & Co. was not accused of and did not in fact infringe the patent at that time. Nor can this letter be considered as a request of the patentee's licensee directed to Meillor S.A., because such letter was sent

to Freudenberg & Co. and not to Meillor S.A. at a period where Freudenberg & Co. and Meillor S.A. were two unrelated, separate entities, notwithstanding the fact that it was a confidential and personal letter addressed to two members of Freudenberg S.A. only.

Annex A2 is a second letter dated 8 January 1999 from the intended intervener Meillor S.A. to the patentee's licensee, confirming that the first letter A1 was dispatched "before the cooperation agreement between Freudenberg & Co. and Meillor S.A. was signed". Here it is stated that the first letter from the patentee's licensee (annex 1) can only be understood as a warning to Meillor S.A. since only this subsidiary company was involved in the Freudenberg group in the production of gaskets.

In the third letter A3 dated 12 January 1999 from the patentee's licensee to the intended intervener Meillor S.A. the following was inter alia stated:

- the first letter (A1) "cannot be regarded as a warning letter" to Meillor S.A.
- currently there is no legal action initiated against Meillor S.A., but the patentee's licensee expressly reserves its right to take such action in the future.

2.3 It is true that the contents of the first and third letters A1 and A3 cannot be dismissed as a mere piece of information.

However, Article 105(1) second sentence EPC requires a

"request" by the patentee that the intervener cease its alleged infringement which presupposes a clear and unconditional action in this respect by the patentee. In the Board's view the sentence "we expressly reserve our right to take such action in the future" cannot be construed as being a request that the intended intervener cease its alleged infringement. On the contrary this can only be interpreted as meaning that the patentee's licensee had not yet decided whether to take a legal action against Meillor S.A.. Moreover, the licensee has made it clear in this letter (A3) that the first letter (A1) cannot be regarded as a warning letter to Meillor S.A..

For the reasons stated above in the Board's judgement the first condition laid down in Article 105(1) second sentence EPC is in the present case not complied with. The interventions are therefore not admissible.

3. *Request for referral of questions to the Enlarged Board of Appeal*

Article 112(1)(a) EPC requires the Board of Appeal during proceedings on a case, and in order to ensure uniform application of the law or if an important point of law arises, to refer any question to the Enlarged Board of Appeal, either of its own motion or following a request from a party to the appeal, "if it considers that a decision is required for the above purposes".

In the present case the intended intervener's representative has formulated two questions and requested that they be referred to the Enlarged Board as an important point of law. The first question to be

referred relates to the issue whether the only subsidiary company may consider itself as the addressee of a request to cease alleged infringement if the respective letter was sent to the parent company which does not produce the protected article. The second question is whether the requirements of Article 105(1), second sentence are fulfilled if a patentee informs a third person that it infringes his patent, that a license does not come into consideration and that legal actions are in preparation.

However, as pointed out above, under Article 112(1) EPC these questions can be referred to the Enlarged Board only if the Board of Appeal considers this to be necessary. As follows from the findings under point 2 above, this is not the case here, since the Board of Appeal has been able to answer the second question beyond any doubt on the basis of the Convention (see decisions J 5/81, OJ EPO 1982, 155, T 198/88, OJ EPO 1991, 254).

As to the first question it is to be noted that it does not arise in the present case since Meillor S.A. was clearly not a subsidiary company of Freudenberg & Co. when the letter according to annex A1 was sent to members of this latter company.

The request for referral of the above questions to the Enlarged Board of Appeal must therefore be refused.

4. *Requests to postpone the date for the appointed oral proceedings*

4.1 As stated in its communication dated 7 April 1999 the

subsequent fixing of oral proceedings by another patent court to take place at the same date as the previously appointed oral proceedings before the Board is not in itself a sufficient reason for adjournment. A request to postpone an appointed and agreed date could only be allowed in the case of "unforeseen and exceptional" circumstances within the meaning of the notice of the Vice-Presidents Directorates-General 2 and 3 dated 14 February 1989 (OJ EPO 1989, 132). In decision T 275/89 (OJ EPO 1992, 126 - Steel radiators/KLOSTERMANN), the term "exceptional" was construed as meaning such circumstances which either make it impossible for oral proceedings to take place or might have a material bearing on the course and outcome of the proceedings (such as the unforeseen inability of an important witness or an expert to attend), cf. point 2 of the reasons.

- 4.2 In the present case, the absence of the representative concerned did not make it impossible for the oral proceedings to take place. Moreover, the representative in question does not run a one-person Office and could have been substituted by a colleague of the representative's office. In this respect the Board notes that the general authorisation concerning this representative, signed by the appellant, has not revoked the general authorisation of the former representatives who were thus able to represent the appellant during the oral proceedings.

Concerning the question whether the presence of this representative might have had a material bearing on the decision which was to be taken, the Board observes that there was nothing in the written or oral submissions to

give rise to the assumption that the representative's participation in the oral proceedings was indispensable. Given that the technical facts of the case were clear, the Board has been unable to ascertain circumstances which would have made it necessary for him to be personally present at the proceedings.

4.3 Moreover account was to be taken of the unusual age of this case. In fact the patent in suit was applied for in November 1986 and the grant of the patent in suit was published in Bulletin 90/24 of 13 June 1990. Thus a very long space of time, about 9 years, has elapsed between the grant of the patent and the appointed oral proceedings (20 April 1999). This was partly due to the fact that the case had to be remitted by the Board under Article 111(1) EPC to the first instance for further decision. In view of these special circumstances and having regard to the patentee's objection to a postponement of the appointed oral proceedings, the Board considered such postponement not justifiable in the present case.

4.4 The intended interveners also requested that the date for the appointed oral proceedings be postponed and submitted that they had not been duly summoned to the oral proceedings in accordance with Rule 71(1) EPC, second sentence which stipulates at least two months notice.

In this respect it is to be noted that in any case the summons issued by the Board were clearly in accordance with Rule 71(1) EPC. They were issued well in advance of the stipulated period and communicated to all parties existing at that time.

In the Board's view Rule 71(1) does not stipulate that the requirement of a two-month period also applies if, subsequent to a duly effected summons, there is an intervention of a third party. As a general principle, an intervener enters the proceedings at the stage they are in at the date of intervention, including pending time limits.

Issuing a further summons or adjourning the date for this reason would clearly conflict with the previous agreement between the opponent 01 and the patentee as to the fixing of the oral proceedings and with the legitimate interest of the parties to bring the proceedings before the EPO to a conclusion.

Finally, the Board observes that the representative of the intended interveners did not request the adjournment of the appointed date for oral proceedings on the grounds that he did not have sufficient time to prepare himself properly for these proceedings. The only reason which was given was that oral proceedings before another patent court were scheduled at the same date. In fact the interventions are in essence based on documents already cited during the opposition and appeal proceedings and the representative of the intended interveners is also co-representative of the appellant (opponent 01), which was duly summoned.

For the reasons stated above the requests for postponement of the appointed oral proceedings have to be rejected.

5. *Formal matters*

There is no formal objection under Article 123(2) EPC to the current version of claim 1.

In particular it is readily apparent for the skilled person that the bead depicted in the original drawings is a "full" bead. It was not in dispute that this added feature does not extend beyond the content of the application as originally filed.

Amended claim 1 contains all the features of granted claim 1 so that the requirements of Article 123(3) EPC are also met.

6. *Novelty*

The Board is satisfied that the subject-matter of amended claim 1 is novel over the opposed prior art documents which in fact was not contested by the appellant.

In particular, document D20 does not *inter alia* disclose a gasket provided with a full bead as claimed in amended claim 1.

7. *Inventive step*

7.1 In its written and oral submissions the appellant suggested that the embodiment of Figure 1 of document D1 acknowledged in the introductory part of the European patent should represent the starting point for the assessment of inventive step.

In this citation a metal gasket is disclosed composed of a metal plate provided with a single full bead which

is remote from the aperture. The drawback of this kind of gasket is that combustion gases penetrate into the gap between the cylinder head and the cylinder block structure of the engine resulting in a deposition of the material contained in these gases on the full bead and thus a deterioration of the sealing performance.

Consequently starting from this prior art document, the technical problem to be solved by the present invention is in essence the same as that stated in the European patent, that is to provide a gasket which overcomes this disadvantage by preventing "the pollution of the metallic gasket and the deterioration of the sealing effect, thereby enabling the stable and effective sealing performance to be accomplished" (cf. column 2 lines 55 to 60 of the European patent).

This problem is in essence solved by the features stated in amended claim 1.

7.2 The claimed invention is based on the idea of providing a two sealing-line gasket arrangement having a first static sealing line formed by the compensating means and located immediately around the combustion chamber and a secondary dynamic sealing line located adjacent to, and being protected by, the first one. The compensating means thereby serves to control the compression of the full bead, which forms the secondary elastic sealing line.

In order to make it clear that the first sealing line is a static, not an elastic one, the claimed subject-matter was amended during the opposition proceedings so as to read "said folded edge (4a) being folded back so

that it is in complete contact with said compensation plate or said intermediate plate (6, 34) already before being fastened." In this context the term "in complete contact" is to be interpreted as meaning that this contact should be as complete as it can be achieved by the folding techniques available to the practitioner.

- 7.3 The first issue arising in the present case is whether the subject-matter of amended claim 1 is inventive over the combination of documents D1 and D13. The appellant submitted in this respect that no exercise of inventive skill would have been required to combine the known gasket according to Figure 1 of document D1 and the sealing arrangement of document D13 (Figure 3) so as to arrive at the claimed invention (see embodiment according to Figure 4 of the invention).

Document D13 shows in Figure 3 a gasket having a compensating plate (5) whose edge is folded back, so as to provide a space \acute{a} between the folded portion and the surface of the compensating plate. Since this space is said "to provide a cushion operation useful for sealing", it is clear that the folded edge forms in this citation a dynamic, elastic sealing line. The intermediate plate (6) called in the English translation "surface pressure adjusting plate" is thinner than the compensation plate (5). Such an intermediate plate apparently serves to control the compression of the folded edge (5a) forming the elastic sealing line.

The gasket shown in Figure 1 of document D1 on the other hand is provided with a full bead which forms an elastic sealing line.

As stated above, the essence of the claimed invention is to provide a two sealing-line gasket arrangement, namely a first **static** sealing line formed by the compensating means, the previously folded edge with complete contact being the major constituent thereof, and a second **elastic** or dynamic sealing line formed by a full bead, the compensating means being also used to control the compression of the full bead.

In combining the teachings of the above two documents the skilled person would possibly associate in a sealing arrangement a folded edge located immediately around the combustion chamber with a bead which forms an elastic sealing line. However, even if the skilled person had thought of combining Figure 1 of document D1 with Figure 3 of document D13 he would not have arrived at the teaching of claim 1, that is a double sealing-line arrangement, one which forms a non-elastic or static sealing line whilst the other forms an elastic or dynamic sealing line, since these two citations both relate to an elastic sealing line.

It is true that document D1 teaches (Figure 3) the provision of a second layer or plate for controlling or limiting the compression of the full bead provided on the first layer. On the other hand document D13 teaches the use of an intermediate layer (6) for limiting the compression of the folded edge which forms the elastic sealing line. However there is - as outlined above - no suggestion in these two citations of the claimed arrangement.

In the alternative of Figure 5 of document D1 the metal gasket of Figure 1 provided with the full bead is

placed on a second layer or plate and secured thereon by bending the material of the second layer round the periphery of the metal gasket at the aperture. There is no hint in this citation to provide a compensating means comprising a plate the edge of which being folded back on that plate and in complete contact therewith and the free edge portion being not covered by the folded edge of the metal plate equipped with the elastic full bead.

The same applies to document D18 which shows a similar construction as D1, Figure 5 and also teaches to rigidify the full bead by means of an additional plate means, the edge of which is folded back onto the metal plate.

- 7.4 A second issue arising in the present case is whether the subject-matter of amended claim 1 is inventive over the disclosure of document D20. The appellant alleged that it was obvious for a skilled person to modify the sealing arrangement of this citation by replacing the half bead by a conventional full bead.

This submission is based upon ex-post facto reasoning since there is no suggestion at all in this document of a full bead which serves as a secondary elastic sealing line, the first static sealing line being formed by compensating means. Furthermore the upper plate provided with the half bead is secured on the sealing arrangement by bending the material of a second base plate around the periphery of the upper plate at the aperture. The edge portion of the upper plate provided with the half bead is thus clamped by that folded edge. Therefore there is no disclosure whatsoever in this

citation of the claimed compensating means comprising an uncovered, free edge portion of the metal plate equipped with the elastic full bead.

- 7.5 Summarizing, in the Board's judgement, the subject-matter of claim 1 also involves an inventive step (Article 56 EPC) so that the patent is to be maintained on the basis of this main claim.
8. Dependent claims 2 to 7 concern particular embodiments of the invention claimed in claim 1 and are likewise allowable.

The opposition grounds thus do not prejudice the maintenance of the patent in amended form.

Order

For these reasons it is decided that:

1. The interventions are rejected as inadmissible.
2. The decision under appeal is set aside.
3. The case is remitted to the first instance with the order to maintain the patent on the basis of claim 1 submitted at the oral proceedings, claims 2 to 7, description and drawings as maintained according to the decision under appeal.

The Registrar:

The Chairman:

S. Fabiani

F. Gumbel