Section 1. Basic principles.

1.1 & 1.2. The first three principles listed are necessary but not sufficient. In particular, "predictable resolution of disputes" is important, but if the resolution is predictably wrong, unjust, or undesirable from a public policy standpoint, that is not acceptable. Also, the statement of principles only assumes, and does not specify, that the processes for obtaining a patent will correctly apply the substantive rules on patentability.

The public policy interests mentioned in the fourth principle should to a large extent be integrated into the substantive rules on what can be patented, and into the substantive rules on resolution of disputes.

1.3. Public debate is necessary, as has been shown by the recent debacle over the proposed Community directive on patents for Computer Implemented Inventions. There is at present a dissonance throughout intellectual property, because the legislative authorities have allowed themselves to become dominated by the commercial exploiters of IP, who favor strong protection. As a result, large consumer and freedom of information factions perceive themselves as disenfranchised, and a destructive revolutionary mindset is arising.

In addition, there is an important unresolved debate on the "right to exclude." For example, the pharmaceutical industry is still close to the classical model of "one invention - one patent - one product" where an exclusionary patent makes economic sense. In the electronics industry, where a single product may be covered by hundreds or even thousands of patents, the exclusionary model is scarcely supportable, and a compulsory royalty would be more rational.

Section 3 - the European Patent Litigation Agreement

3.1 The proposal as presented is potentially disastrous, because it allows identical decisions to be made by different, parallel court systems with no mechanism to ensure consistent results. Most spectacularly, if two infringements occur in a non-contracting state by different infringers, one of whom is domiciled in a contracting state, the cases must be heard one by the new European Patent Court, and one by the existing national courts. There is no mechanism for either court to be bound by the other court's decision interpreting the scope of the claim, and so the probability of inconsistent decisions is very high. Further, the draft does not seem to mention the question of which court has jurisdiction when the two infringers are acting together, and so would normally be sued in a single action.

In fact, a situation where the result of a lawsuit can reasonably depend on the place of domicile of the defendant must violate the principle of equal treatment.

3.2 Ideally, where the same cause of action extends across more than one country, there should be a procedure for resolving the cause in a single proceeding, regardless of whether it is founded in national, European, or Community patents. However, complete integration requires not only standardization of substantive law on patentability, infringement, and remedies, not only standardization of the subtleties of interpretation of the scope of claims (see discussion of forum-shopping under 4.4 below), but also standardization of the claims of patents granted in different countries for the same invention. Without uniform claims, it will be impossible to define the single cause of action needed for all the other steps. This will be a very long-term project.

Section 4 - approximation

4.1 Under current practice on exhaustion of rights, the major barrier arises where a product is patented in some but not all European Union countries. The worst case is probably where it is debatable whether the product is covered by the patents, so that there is country-by-country guesswork that can have a great deterrent effect. See my comments under 3.2 above.

4.2 I am a patent attorney and can make a lot of money out of advising my clients on such problems. That is not necessarily a good thing for the Community as a whole.

4.3 Options (1) and (2) will bring the substantive rules on patentability into the political arena. In view of the issues noted under 1.3 above, this may be healthy, but will not lead to quick results.
Option (3) is potentially dangerous, because applicants will naturally seek to obtain a patent from the most lenient patent office, and then have that patent "recognized" by other patent offices. "An agreed quality standards framework" will be useless unless it is enforced by a higher authority. Effectively, this degenerates into a proposal for a single patent office, which may or may not be a good thing. The EPO is good but it is far from perfect: the EPO is already hopelessly overworked, and the extra volume of work from "validating" the work of national patent offices would overwhelm the EPO completely.

4.4 A central court to control "interpretation" of patent claims would reduce a lot of the scope for forum-shopping provided that it does its work honestly. However, such a court must lay down clearly, and apply consistently, rules of interpretation that lead to the "predictable resolution of disputes" discussed under 1.1 above. Compare the U.S. Court of Appeals for the Federal Circuit, which is accused even by its own members of picking a winner in a case and then inventing rules of interpretation to reach the desired conclusion: unfortunately, the accusations are sufficiently credible to discredit the whole process.

To the extent that different courts may have jurisdiction over essentially the same question, measures to control forum shopping are essential. If the plaintiff is allowed to choose the forum, then the cases will all be brought in the most pro-plaintiff (usually, pro-patentee) forum, resulting in a bias in the entire system. If the forum is determined by accidents such as the place of domicile of the parties, discriminatory results will be inevitable. The best remedy, of course, is to ensure that the choice of forum does not affect the result of the case, which brings us back to the possibility of a single, central court system.

Section 5 - general.

Since I am commenting as a patent attorney, I do not think my answers would help your statistics.

Contact details;

Surname:         Blanco White
Forename:       Henry N.  
E-mail:         henry.blancowhite@dbr.com
Postal address:  c/o Drinker Biddle & Reath LLP  
                 1 Logan Square  
                 Philadelphia, PA 19103-6996  
                 USA

I am writing in my personal capacity as a US and European Patent Attorney, not on behalf of Drinker Biddle & Reath.