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DRAFT SUBSTANTIVE PATENT LAW TREATY

prepared by the International Bureau

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INTRODUCTION

1. The present document contains a revised version of the draft Substantive Patent Law Treaty (SPLT). It takes into account the views expressed in the Standing Committee on the Law of Patents at its fifth session (May 14 to 19, 2001).
2. Differences between the former text of the draft SPLT contained in document SCP/5/2 and the revised text contained in the present document have been highlighted as follows:
 - (i) words which did not appear in document SCP/5/2 but appear in the present text are underlined, and
 - (ii) words which appeared in document SCP/5/2 but which are omitted from the present document are shown as struck through.
3. It should be noted that certain of the suggested provisions (for example, draft Article 8(2)) reflect a first-to-file system. This approach does, however, neither prejudice the future drafting of the SPLT, nor the discussion by the Committee on the inclusion of additional issues into the Treaty.
4. Draft Regulations and Draft Practice Guidelines under the draft SPLT are contained in document SCP/6/3. Explanatory Notes on the provisions of the draft SPLT, draft Regulations and draft Practice Guidelines are contained in document SCP/6/4.
5. Concerning the interface between the draft SPLT, the Patent Law Treaty (PLT) and the Patent Cooperation Treaty (PCT), reference is made to document SCP/6/5 (“Study on the Interface between the SPLT, the PLT and the PCT”).

~~PART I: GENERAL PROVISIONS~~

Article 1

Abbreviated Expressions¹

For the purposes of this Treaty, unless expressly stated otherwise:

(i) “Office” means the authority of a Contracting Party entrusted with the granting of patents or with other matters covered by this Treaty;

(ii) “application” means an application for the grant of a patent, as referred to in Article 3;

(iii) “patent” means a patent as referred to in Article 3;

(iv) “claimed invention” means the subject matter of a claim for which protection is sought;

(v) “applicant” means the person whom the records of the Office show, pursuant to the applicable law, as the person who is applying for the patent, or as another person who is filing or prosecuting the application;

¹ Items in square brackets indicate that the expression is not used in the draft Treaty yet.

[Article 1, continued]

(vi) “filing date” means the filing date of an application as provided for in the applicable law of the Contracting Party in accordance with [Article 5 of] the Patent Law Treaty;

(vii) reference to the “time of filing” means the [precise time] [time expressed in hours and minutes] at which the application is filed with the Office on a particular date;

(viii) the “priority date” for an application means, where a right of priority is claimed, the filing date of the earliest filed application whose priority is claimed under the applicable law in accordance with the Paris Convention;

(ix) the “claim date” for a claim means the filing date of the application containing the claim, or, where priority is claimed, the filing date of the earliest application whose priority is claimed and whose priority the claim is entitled to under the applicable law; where there is more than one alternative limitation in one claim, and different of those limitations are entitled to different claim dates, [the claim date for the claim shall be the latest of those dates] [the claim date for the claim in respect of each limitation shall be the claim date to which that limitation is entitled];

(x) “general knowledge of a person skilled in the art” means the common knowledge generally known to a person skilled in the art, including well-known or commonly used information, or matters clear from empirical rules;

(xi) except where the context indicates otherwise, words in the singular include the plural, and *vice versa*, and masculine personal pronouns include the feminine;

(xii) “Paris Convention” means the Paris Convention for the Protection of Industrial Property, signed on March 20, 1883, as revised and amended;

(xiii) “Patent Law Treaty” means the Patent Law Treaty, signed on June 2, 2000, together with the Regulations under that Treaty, as revised and amended;

(xiv) “Patent Cooperation Treaty” means the Patent Cooperation Treaty, signed on June 19, 1970, together with the Regulations and the Administrative Instructions under that Treaty, as revised, amended and modified;

(xv) “Contracting Party” means any State or intergovernmental organization that is party to this Treaty;

(xvi) “applicable law” means, where the Contracting Party is a State, the law of that State and, where the Contracting Party is an intergovernmental organization, the legal enactments under which that intergovernmental organization operates;

[(xvii) “instrument of ratification” shall be construed as including instruments of acceptance or approval;]

[Article 1, continued]

[(xviii) “Organization” means the World Intellectual Property Organization;]

(xix) “International Bureau” means the International Bureau of the
Organization;

[(xx) “Director General” means the Director General of the Organization.]

Article 2

General Principle

Nothing in this Treaty and the Regulations shall limit the freedom of a Contracting Party to apply any substantive requirements in relation to infringement.

Article ~~Hbis~~³

Applications ~~and Patents~~ to Which the Treaty Applies

(1) [*Principle*] Subject to paragraph (2), the provisions of this Treaty and the Regulations shall apply ~~to~~:

(i) ~~to~~ applications for patents for invention and for patents of addition, which are filed with or for the Office of a Contracting Party;

[(ii) to divisional applications of the applications referred to in item (i);]

(iii) to patents for invention, and to ~~national and regional~~ patents of addition, which have been granted with effect for a Contracting Party.

(2) [~~Reserved~~*Exceptions*] This Treaty and the Regulations shall not apply to the applications [and patents] prescribed in the Regulations.

Article 24

Right to a Patent

The right to a patent shall belong

(i) to the inventor ~~or~~;

(ii) to his the inventor's successor in title, or;

(iii) to any third party, who is in a contractual relationship with the inventor, and who owns the claimed invention under another legal title,

as prescribed in the Regulations.

~~PART II: APPLICATION~~

Article 35

~~Contents of Application~~

~~{Alternative A}~~

~~{No provision.}~~

~~{End of Alternative A}~~

~~{Alternative B}~~

~~(1) [Parts of Application] An application shall contain the following parts:~~

- ~~(i) a request; as provided for in the Patent Law Treaty,~~
- ~~(ii) a description;~~
- ~~(iii) one or more claims;~~
- ~~(iv) one or more drawings, where required; and~~
- ~~(v) an abstract.~~

~~{End of Alternative B}~~

~~(2) [Requirements Concerning Parts of Application] Except where otherwise provided for by this Treaty or the Patent Law Treaty, no Contracting Party shall require~~

compliance with any requirement relating to the request, description, claims, drawings or abstract of an application different from or additional to:

(i) the requirements relating to the request, description, claims, drawings or abstract which are provided for in respect of international applications under the Patent Cooperation Treaty;

(ii) any further requirements prescribed in the Regulations.

(3) [Abstract] The abstract referred to in paragraph (1)(v) shall merely serve the purpose of information and cannot be taken into account for any other purpose. In particular, it shall not be taken into account for the purpose of interpreting the scope of the protection sought.

[~~Article 4~~²

~~Lengthy Applications~~

~~A Contracting Party may prescribe special requirements in respect of lengthy applications, as prescribed in the Practice Guidelines.]~~

²— This provision is placed in square brackets, since its inclusion has not been specifically requested by the SCP. The SCP may consider the option of moving this provision to the Regulations under Article 5.

Article 5

Contents, and Order of Contents, of Description

~~The description part of the application shall be in writing and have the contents, and be presented in the order, prescribed in the Regulations.~~

Article 6

Contents, Style and Manner of Presentation of Claims

(1) ~~[*Contents of the Claims*] The claims shall define the matter for which protection is sought[, as prescribed in the Regulations].~~

(2) ~~[*Style of the Claims*] The claims, both individually and in their totality, shall be clear and concise, as prescribed in the Regulations.~~

(3) ~~[*Manner of Presentation of the Claims*] The claims shall be presented as prescribed in the Regulations.~~

Article 76

Unity of Invention

~~{Alternative A}~~

~~(1)—[*Requirement of Unity of Invention*] The application shall relate to one invention only, or to a group of inventions so linked as to form a single general inventive concept (“requirement of unity of invention”), as prescribed in the Regulations.~~

~~(2)—[*Validity of Patent Not Affected by Lack of Unity of Invention*] The fact that a patent has been granted on an application that did not comply with the requirement of unity of invention shall not be a ground for the invalidation or revocation of the patent.~~

~~[End of Alternative A]~~

~~{Alternative B}~~

~~The claims in the application shall relate to one invention only, or to a group of inventions so linked as to form a single general inventive concept, as prescribed in the Regulations.~~

~~[Regulations with substance as in Alternative A]~~

~~[End of Alternative B]~~

~~PART VII: AMENDMENTS AND CORRECTIONS~~

Article 20Z

Amendment or Correction of Application

(1) [*Amendments or Corrections Following Office Findings*] Wherever the Office finds that the application does not comply with any requirements under ~~the~~this Treaty or the Regulations applicable to it, it shall give the applicant at least one opportunity to amend or correct the application or to comply with the said requirements.

(2) [*Amendments or Corrections on Applicant's Initiative*] The applicant shall have the right, on his own initiative, to amend or correct the application or to comply with a requirement applicable to the application up to the time when the application is in order for grant, ~~as prescribed in the Regulations~~; however, any Contracting Party which provides for substantive examination may provide that the applicant shall have the right to amend or correct, on his own initiative, the description, the claims and any drawings, only up to the time allowed for the reply to the first substantive communication from the Office.

(3) [*Limitation of Amendments or Corrections*] (a) ~~No~~An amendment or correction, ~~other than the correction of a clear mistake [or of a clerical error] within the meaning of subparagraph (b)~~, shall be permitted, provided where the amendment or correction would not result in the disclosure of the invention contained in the amended or corrected application going beyond the disclosure of the invention contained in the application ~~as filed for the purposes of the filing date at the time of~~ filing.

(b) Notwithstanding subparagraph (a), the correction of a clear mistake within the meaning of subparagraph (c) shall be permitted.

~~(bc)~~ For the purposes of subparagraph ~~(ab)~~, a mistake shall be considered clear~~r~~, and an error shall be considered clerical,~~]~~ where what is corrected would have been clearly wrong, and the amendment or correction would have been clear, to a person skilled in the art at the time of filing.

~~PART III: PRIOR ART~~

Article 8

~~Definition of Prior Art~~

~~{Alternative A}~~

~~The prior art shall consist of everything which, before the filing date or, where priority is claimed, the priority date of the application claiming the invention, has been made available to the public anywhere in the world, as prescribed in the Regulations.~~

~~{End of Alternative A}~~

~~{Alternative B}~~

~~(1) *[Definition]* Subject to paragraph (2) and Articles 9 and 10, the prior art with respect to the subject matter of a particular claim shall consist of all information which has been made available to the public anywhere in the world in any form, as prescribed in the Regulations, before the ~~filing date or, where priority is claimed, the priority date~~[time of filing on the] claim date of the application which discloses the subject matter of the ~~that claim~~.~~

~~(2) *[Prior Art Effect of Former Applications]* If the filing date or, where applicable, the priority date, of an application (“former application”) filed in, or with effect for, a Contracting Party is earlier than the claim date of a particular claim contained in another application filed in, or with effect for, the same Contracting Party, the former application~~

[Article 8(2), continued]

shall form part of the prior art with respect to the subject matter of that particular claim,
provided that the former application or the patent granted thereon is published subsequently,
as prescribed in the Regulations.

[End of Alternative B]

Article 9

Prior Art Effect of Earlier Applications

[Alternative A]²

~~An application filed in, or with effect for, a Contracting Party before, but published after, the filing date or, where priority is claimed, the priority date of another application filed in, or with effect for, that Contracting Party shall form part of the prior art, as prescribed in the Regulations.~~

[End of Alternative A]

[Alternative B]

~~An application filed before, but published after, the filing date or, where priority is claimed, the priority date of the application under consideration shall form part of the prior art, as prescribed in the Regulations.~~

[End of Alternative B]

² ~~If the Alternative A is chosen, a provision concerning prior art effect of earlier PCT international applications, which may be similar to Article 13(3) of the 1991 Draft, shall be included in Rule 7~~

[Article 109³²

[Alternative A]

~~Disclosures~~Information Not Affecting Patentability (Grace Period)

(1) [*~~Circumstances of Disclosure Not Affecting Patentability~~General Principle*]

~~Disclosure of i~~Information which otherwise would affect the patentability of an invention claimed in the application shall not affect the patentability of that invention, where the information was ~~disclosed~~made available to the public during, or with effect under Article 98(2) on a date during, the 12 months preceding the filing date or, where priority is claimed, the priority date of the application,

- (i) by the inventor,
- (ii) by an Office and the information was contained
 - (a) in another application filed by the inventor and should not have been ~~disclosed~~made available to the public by the Office, or
 - (b) in an application filed without the knowledge or consent of the inventor by a third party which obtained the information directly or indirectly from the inventor,

or

³² This provision is placed in square brackets, since its inclusion may be dependent on discussions to take place at a later stage.

[Article 9(1), continued]

(iii) by a third party which obtained the information directly or indirectly from the inventor.

(2) [*“Inventor”*] For the purposes of paragraph (1), “inventor” also means any person who, at or before the filing date of the application, had the right to the patent.

(3) [*No Time Limit for Invoking Grace Period*] The effects of paragraph (1) may be invoked at any time.

(4) [*Evidence*] Where the applicability of paragraph (1) is contested, the party invoking the effects of that paragraph shall have the burden of proving, or of making the conclusion likely, that the conditions of that paragraph are fulfilled.

[End of Alternative A]

[Alternative B]

Grace Period

The prior art shall not include information made available to the public during the 12 months preceding the filing date or, where priority is claimed, the priority date of the application, where that information was made available as prescribed in the Regulations.]

[Regulations with substance as in Alternative A]

[End of Alternative B]

~~PART IV: DISCLOSURE AND CLAIMS~~

Article ~~11~~10

~~{Alternative A}~~

Enabling Disclosure in Application as a Whole

(1) [General Principle] The application shall disclose the claimed invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art, as prescribed in the Regulations.

~~{End of Alternative A}~~

~~{Alternative B}~~

Adequacy of the Disclosure

The disclosure of the claimed invention shall be ~~adequate~~ considered sufficiently clear and complete if, taking into account the description, claims and drawings contained in the application on the filing date of the application, it provides information which is sufficient to allow the invention to be made and used by a person skilled in the art as of the filing date, without undue experimentation, as prescribed in the Regulations.

(2) [Parts of Application to be Taken Into Account for Assessing Disclosure] For the purposes of assessing sufficiency of disclosure under paragraph (1), the description, claims and drawings contained in the application on the filing date, as amended and corrected in a manner consistent with Article 7, shall be taken into account.

~~{End of Alternative B}~~

Article 1211

~~Relationship of Claims to the Disclosure~~

{Alternative A}

(1) [Contents of the Claims] The claims shall define the matter for which protection is sought.

(2) [Style of the Claims] The claims, both individually and in their totality, shall be clear and concise.

(3) [Relationship of Claims to the Disclosure] (a) ~~The~~ Each claims shall be fully supported by the description and the drawings.³

(b) The claimed invention shall be supported by the disclosure of the application as filed in a manner allowing a person skilled in the art to recognize from such disclosure that the applicant was, as of the filing date, in possession of the claimed invention.

(4) [Interpretation of Claims] Each claim shall be interpreted in light of the description and drawings, as prescribed in the Regulations.

{End of Alternative A}

³ The SCP may wish to discuss the need of this paragraph in view of draft Article 10.

~~{Alternative B}~~

~~The claims shall be supported by the disclosure as prescribed in the Regulations.~~

~~{End of Alternative B}~~

Article 13

Scope of Claims

[Alternative A]

[No provision.]

[End of Alternative A]

[Alternative B]

~~The scope of the claim shall not exceed the scope of the disclosure of the application.
However, the claim shall not be limited to what is expressly disclosed in the application.~~

[End of Alternative B]

Article 14

[Alternative A]

Scope of Protection

(1) — [*Scope*] The scope of protection conferred shall be determined by the claims, which are to be interpreted in the light of the description and drawings, as prescribed in the Regulations.

{(2) — [*Equivalents*] For the purpose of determining the scope of protection conferred by the application, due account shall be taken of elements which are equivalent to the elements expressed in the claims, as prescribed in the Regulations.}

[End of Alternative A]

[Alternative B]

Interpretation of Claims

For the purposes of examination, and of determining rights under a published application, each claim shall be interpreted in light of the [description, drawings] [disclosure] and the prior art, as prescribed in the Regulations.

[End of Alternative B]

PART V: ~~SUBSTANTIVE CONDITIONS OF PATENTABILITY~~

Article 1512

~~Patentable Subject Matter~~ Conditions of Patentability

~~{Alternative A}~~

~~{Reserved}~~

~~{End of Alternative A}~~

~~{Alternative B}~~

~~The claimed invention shall [contain] [be] patentable subject matter, as prescribed in the Regulations.~~

~~{End of Alternative B}~~

(1) ~~[Patentable Subject Matter]~~ A claimed invention shall fall within the scope of patentable subject matter. Patentable subject matter shall include products and processes which can be made and used in any field of activity, except as prescribed in the Regulations.

(2) ~~[Novelty]~~ A claimed invention shall be new. It shall be considered new if it does not form part of the prior art, as prescribed in the Regulations.

(3) ~~[Inventive Step/Non-Obviousness]~~ A claimed invention shall involve an inventive step. It shall be considered to involve an inventive step (be non-obvious) if, having regard to the differences and similarities between the claimed invention and the prior art as defined in

[Article 12(3), continued]

Article 8(1), it would not have been obvious to a person skilled in the art at the claim date, as prescribed in the Regulations.

Article 16

Industrial Applicability/Utility

{Alternative A}

~~An invention shall be considered industrially applicable (useful) if, according to its nature, it can [be made or used in any kind of industry][have a specific, substantial and credible utility], as prescribed in the Regulations.~~

{End of Alternative A}

{Alternative B}

~~{Delete industrial applicability/utility requirement.}~~

{End of Alternative B}

Article 17

Novelty

{Alternative A}

~~An invention shall be considered novel if it does not form part of the prior art, as prescribed in the Regulations.~~

{End of Alternative A}

{Alternative B}

~~A claimed invention shall be considered novel unless every limitation of the claimed invention is found in a single item of prior art, as prescribed in the Regulations.~~

{End of Alternative B}

Article 18

Inventive Step/Non-Obviousness

{Alternative A}

~~An invention shall be considered to involve an inventive step (be non-obvious) if, having regard to the prior art as defined in Article 8, it would not have been obvious to a person skilled in the art at the filing date or, where priority is claimed, the priority date of the application claiming the invention, as prescribed in the Regulations.~~

{End of Alternative A}

{Alternative B}

~~A claimed invention shall be considered to involve an inventive step (be non-obvious) unless the differences between the claimed invention and the prior art, at the filing date or, where priority is claimed, the priority date of the application which discloses the subject matter of the claim, were obvious to a person skilled in the art, as prescribed in the Regulations.~~

{End of Alternative B}

~~PART VI: PATENTABILITY~~

Article 1913

Patentability of Grounds for Refusal of a Claimed Invention

(1) [~~Determination of Patentability of Claim~~Grounds for Refusal of a Claimed Invention] ~~A claimed invention shall be patentable, unless~~An application shall be refused where the Office finds that such application or a claimed invention in the application does not meet the following requirements:

(i) ~~it~~ the claimed invention does not meet the requirements ~~in~~of Articles ~~2, 4, 6, 11(2) and (3), 7 and 15 to 18~~ 12;

(ii) the application does not meet the requirements of the Patent Law Treaty, as implemented in the applicable law, and of Articles ~~3, [4], 5 and 10-11 to 13~~, herein;
or

(iii) ~~it relies on disclosure that resulted from~~ an amendment or correction results in a disclosure as prohibited by Article 207(3)(a).

(2) [~~Prohibition of Other Requirements~~] ~~No requirement of patentability additional to or different from those provided for in paragraph (1) may be imposed~~ Contracting Party may require compliance with any requirement relating to the examination of an application or the grant of a patent on a claimed invention different from or additional to the requirements provided for in paragraph (1).

Article 14

Grounds for Invalidation or Revocation of a Claim or a Patent

(1) [Grounds for Invalidation or Revocation of a Claim or a Patent] Subject to paragraph (2) and the Patent Law Treaty, non-compliance with any of the requirements referred to in Article 13(1), except those referred to in Articles 6 and 11(3)(a), shall be a ground for the invalidation or revocation of the patented claim or patent.

(2) [Prohibition of Other Requirements] No Contracting Party may require compliance with any requirement with respect to the grounds for invalidation or revocation of the patented claim or patent additional to or different from those provided for in paragraph (1).

~~PART VIII: REMEDIES AGAINST REJECTION OR REFUSAL OF APPLICATION~~

Article ~~24~~15

Observations and Review

(1) [*Opportunity to Make Observations, Amendments or Corrections in Case of Intended Rejection or Refusal*] An application may not be rejected or refused on the grounds of lack of patentability, either totally or in part, without the applicant being notified and given the opportunity to make observations on the intended rejection or refusal, and to make amendments and corrections where permitted under the applicable law, within the time limit prescribed in the Regulations.

(2) [*Review After Rejection or Refusal*] The rejection or refusal of an application by the examining authority on the grounds ~~of lack of patentability of the invention under~~referred to in Article ~~49~~13(1) shall be subject to review by a judicial or quasi-judicial authority.

~~PART IX: RELATIONSHIP OF THE TREATY TO THE PATENT LAW TREATY~~

Article ~~22~~16

Relationship to PLT

Each Contracting Party shall [implement the provisions of] [adhere to] the Patent Law Treaty.

~~PART X: ADMINISTRATIVE AND FINAL PROVISIONS~~

Article ~~23~~17

Regulations

- (1) [*Content*] The Regulations annexed to this Treaty provide rules concerning:
- (i) matters which this Treaty expressly provides are to be “prescribed in the Regulations”;
 - (ii) details useful in the implementation of the provisions of this Treaty;
 - (iii) administrative requirements, matters or procedures.
- (2) [*Amending the Regulations*] Subject to paragraph (3), any amendment of the Regulations shall require [reserved].
- (3) [*Requirement of Special Majorities*] (a) The Regulations may specify provisions of the Regulations which may be amended only by [unanimity] [a majority of nine tenths] [a majority of four fifths] [, provided that [none of the Contracting Parties whose Offices have received at least yy applications according to the most recent annual statistics published by the International Bureau dissent] [at least xx Contracting Parties whose Offices have received at least yy applications according to the most recent annual statistics published by the International Bureau do not dissent]].

[Article 17(3), continued]

(b) Any amendment of the Regulations resulting in the addition of provisions to, or the deletion of provisions from, the provisions specified in the Regulations pursuant to subparagraph (a) shall require [unanimity] [a majority of nine tenths] [a majority of four fifths] [, provided that [none of the Contracting Parties whose Offices have received at least yy applications according to the most recent annual statistics published by the International Bureau dissent] [at least xx Contracting Parties whose Offices have received at least yy applications according to the most recent annual statistics published by the International Bureau do not dissent]].

(c) In determining whether unanimity is attained, only votes actually cast shall be taken into consideration. Abstentions shall not be considered as votes.

(4) [*Conflict Between the Treaty and the Regulations*] In the case of conflict between the provisions of this Treaty and those of the Regulations, the former shall prevail.

Article 2418

Practice Guidelines

(1) [*Content*] The Practice Guidelines annexed to this Treaty and the Regulations provide guidelines concerning:

(i) matters which [this Treaty or] the Regulations expressly provides are to be “prescribed in the Practice Guidelines”;

(ii) details useful in the implementation of the provisions of this Treaty and the Regulations.

(2) [*Amending the Practice Guidelines*] [Reserved]

[End of document]