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## **STANDING COMMITTEE ON THE LAW OF PATENTS**

**Eighth Session**

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DRAFT SUBSTANTIVE PATENT LAW TREATY

*prepared by the International Bureau*

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\* Following the discussion at the seventh session of the SCP, the International Bureau suggests that draft Article 17 be discussed together with the final and administrative provisions at a later stage.

## 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 seventh session (May 6 to 10, 2002).

2. Differences between the former text of the draft SPLT contained in document SCP/7/3 and the revised text contained in the present document, except where an existing provision or paragraph as a whole has been moved from another provision or paragraph, have been highlighted as follows:

(i) words which did not appear in document SCP/7/3 but appear in the present text are underlined, and

(ii) words which appeared in document SCP/7/3 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. In addition, document SCP/8/5 contains the proposals submitted by the Delegations of Brazil and the Dominican Republic at the seventh session of the SCP concerning Articles 2, 13 and 14 of the draft SPLT, as well as related background information prepared by the International Bureau.

5. Draft Regulations under the draft SPLT are contained in document SCP/8/3. Draft Practice Guidelines under the draft SPLT are contained in document SCP/8/4.

*Article 1*

*Abbreviated Expressions*

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) “international application” means an application filed under the Patent Cooperation Treaty;

(iv) “parent application” means an application from which a divisional, continuation or continuation-in-part application is derived in accordance with the applicable law;

(v) “earlier application filed with effect in a Contracting Party” means:

(a) where the Contracting Party is a State, a national application for a patent for invention or for a patent of addition filed with or for the Office of the Contracting Party, a regional application for a patent for invention or for a patent of addition filed with or for the Office of a regional patent organization in which patent protection in the Contracting Party is sought, or an international application, for a patent for invention or for a patent of

[Article 1(v), continued]

addition, under the Patent Cooperation Treaty, [which designates the Contracting Party][the processing or examination of which has started in the Contracting Party under Article 23 or 40 of that Treaty];

(b) where the Contracting Party is a regional patent organization, a regional application for a patent for invention or for a patent of addition filed with or for the Office of the Contracting Party or an international application, for a patent for invention or for a patent of addition, under the Patent Cooperation Treaty, [which designates the Contracting Party][the processing or examination of which has started in the Contracting Party under Article 23 or 40 of that Treaty];

*[COMMENT: If the words within square brackets “ the processing or examination of ....” are included, international applications under the PCT would constitute prior art under Article 8(2) only if such applications have entered the “national phase.” At its seventh session, the SCP agreed that, in view of the importance of the issue, the words concerned should be retained in square brackets for the purpose of future discussion and review (see paragraph 37 of document SCP/7/8 Prov. 2).]*

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

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

(viii) “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;

(ix) “patentee” means the person whom the records of the Office show as the owner of the patent;

(~~viii~~) ~~the~~ “claim date” for a claimed invention in an application means, subject to item (ix), the filing date of the application or, where priority is claimed in accordance with the applicable law, the filing date of the earliest application whose priority is claimed and which contains the ~~subject matter of the claimed invention~~ (“~~priority date~~”); where a claim defines its subject matter in the alternative, [the claim date for the claimed invention in respect of each alternative shall be the claim date to which that alternative is entitled] [each alternative shall be considered to be a separate claimed invention for the purposes of determining the claim date];

*[COMMENT: There is no substantive difference between the two texts within brackets. According to the first option, each alternative could be afforded a different claim date, i.e., the one to which that alternative is entitled to, while according to the second option, for the purposes of the claim date, the fiction is established that each alternative shall constitute a separate claimed invention, and could therefore have a different claim date.]*

(ix) ~~the~~ “claim date” for a claimed invention in a divisional, continuation or continuation-in-part application shall be the filing date of the parent application the benefit of the filing date of which ~~contains the subject matter of the claim in the divisional, continuation or continuation-in-part application~~ is preserved in accordance with the applicable law or, where that parent application claims priority in accordance with the applicable law, the filing date of the earliest application whose priority is claimed and which contains the ~~subject matter of the claimed invention contained~~ in the divisional, continuation or continuation-in-part application;

[Article 1(x), continued]

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

[*COMMENT: This provision was moved from Rule 1(c) since draft Article 11(4) includes the term “general knowledge of a person skilled in the art.”*]

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

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

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

(xvi) “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;

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

(xviii) “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;

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

(xvix) “Organization” means the World Intellectual Property Organization;

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

(xixii) “Director General” means the Director General of the Organization.



*Article 2<sup>1</sup>*

*General Principles and Exceptions*

(1) [*Requirements Relating to Infringement*] Subject to Article 11(4), nothing in this Treaty and the Regulations shall limit the freedom of a Contracting Party to apply any requirements in relation to infringement.

(2) [*Security Exception*] Nothing in this Treaty and the Regulations shall limit the freedom of a Contracting Party to take any action it deems necessary for the preservation of essential security interests.

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<sup>1</sup> See paragraph 4 of the Introduction and document SCP/8/5.

*Article 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:

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

(ii) to regional applications for patents for invention and for patents of addition which are filed with or for the Office of a regional patent organization that is a Contracting Party;

(iii) to international applications, for patents for invention and for patents of addition, under the Patent Cooperation Treaty, the processing or examination of which has started under Article 23 or 40 of that Treaty;

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

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

[*COMMENT: One delegation further indicated at the sixth session of the SCP that exceptions that may be envisaged were the applications in the context of the so-called re-issue and re-examination proceedings.*]

*Article 4*

*Right to a Patent*

(1) [*Principle*] The right to a patent shall belong:

(i) to the inventor; or

(ii) to the successor in title of the inventor.

(2) [*Employee's Inventions and Commissioned Inventions*] ~~[(a)]~~ Notwithstanding paragraph (1), any Contracting Party shall be free to determine the circumstances under which and the extent to which the right to the patent shall belong to the employer of the inventor or to the person who commissioned the work of the inventor which resulted in the invention.

~~[(b)] Notwithstanding subparagraph (a), the law applicable to the State in which the employee performs the main activity for which he is employed shall apply for the determination of the right to the patent, except where the employment contract provides otherwise; where the State in which the employee performs the main activity for which he is employed cannot be determined, the law applicable to the State in which the employer has a real and effective industrial or commercial establishment to which the employee is attached shall apply.]~~

(3) [*Invention Made Jointly by Several Inventors*] Where a claimed invention was made jointly by several inventors, each inventor shall have an equal and undivided right to the patent under paragraph (1), except where otherwise agreed by each of the inventors among themselves.

(4) [*Inventions Made Independently by ~~M~~ore ~~F~~than One Inventor*]

[Reserved]

[*COMMENT: This paragraph is currently reserved since it relates to the first-to-file/first-to-invent issue.*]

*Article 5*

*Application*

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

(i) a request;

(ii) a description;

(iii) one or more claims;

(iv) one or more drawings, where they are necessary for the understanding of the claimed invention; and

(v) an abstract.

(2) [*Requirements Concerning Parts of Application*] (a) Except where otherwise provided for by this Treaty and the Regulations 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 the requirements relating to the request, description, claims, drawings or abstract which are provided for under the Patent Cooperation Treaty in respect of international applications.

(b) A Contracting Party shall be free to provide for requirements which, from the viewpoint of applicants and patentees, are more favorable than the requirements referred to in subparagraph (a) in so far as they relate to the form or contents of an application.

(3) *[Abstract]* ~~Subject to Article 7(3)(a),~~ The abstract referred to in paragraph (1)(v) shall merely serve the purpose of information and shall not be taken into account for the purpose of interpreting the scope of the protection sought or of determining the sufficiency of the disclosure and the patentability of the claimed invention.

*Article 6<sup>2</sup>*

*Unity of Invention*

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.

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<sup>2</sup> The text of this Article is subject to the outcome of the Working Group on Multiple Invention Disclosures and Complex Applications.

*Article 7*

*Observations, Amendments or Corrections of Application*

(1) [*Opportunity to Make Observations, Amendments or Corrections in Case of Intended Rejection or Refusal*] (a) Wherever the Office intends to reject or refuse an application on the grounds that the application does not comply with any requirements under Article 13(1), it shall give the applicant at least one opportunity to make observations on the intended rejection or refusal, and to make amendments and corrections of the application, within the time limit prescribed in the Regulations.

(b) No Contracting Party shall be obliged to apply subparagraph (a) in respect of any error or defect in divisional, continuation or continuation-in-part applications, where the opportunity provided for in that subparagraph was already given in respect of the same ~~requirement which was not complied with~~ error or defect contained in the parent application.

(2) [*Amendments or Corrections on Applicant's Initiative*] (a) The applicant shall have the right, on his own initiative, to amend or correct the application or to comply with a requirement under Article 13(1) up to the time when the application is in order for grant; however, any Contracting Party which provides for substantive examination by its Office or through another Office may provide that, except for the correction of a clear mistake under paragraph (3)(b), the applicant shall have the right to amend or correct, on his own initiative, the description, the claims, the abstract and any drawings, only up to the time allowed for the reply to the first substantive communication from the Office.



[Article 7(2), continued]

(b) A Contracting Party shall be free to provide for time limits which, from the viewpoint of applicants, are more favorable than the time limits referred to in subparagraph (a).

(3) [*Limitation of Amendments or Corrections*] (a) An amendment or correction of the description, the claims, the abstract and any drawings shall be permitted, provided that the amendment or correction would not result in the disclosure in the amended or corrected application going beyond the disclosure in the description, the claims, and any drawing and, where prepared by the applicant, the abstract on the filing date, or, in accordance with the Patent Law Treaty, included in the a missing part of the description or the a missing drawing, in accordance with the Patent Law Treaty.

(b) Notwithstanding subparagraph (a), the correction of a clear mistake shall be permitted. A mistake shall be considered clear only 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} ~~[anyone]~~ on the filing date.

Article 7bis

Changes in Patents

(1) [Limitation of Extent of Protection] (a) The competent Office shall, upon request by the patentee, make changes in the patent in order to limit the extent of the protection conferred by it.

(b) Notwithstanding subparagraph (a), the competent Office may refuse a request where the purpose of the limitation is to take into consideration an item of prior art of which the patentee was aware at a time when he could still amend or correct the application.

(2) [Clear Mistakes] The patentee shall have the right to request the competent Office to make changes in the patent in order to correct clear mistakes referred to in Article 7(3)(b).

(3) [Additional Changes That May be Allowed] A Contracting Party may provide that the patentee shall have the right to request the competent Office to make changes in the patent in order to correct mistakes other than those referred to in paragraph (2), provided that, where the change would result in a broadening of the extent of protection conferred by the patent, no request may be made after the expiration of two years from the grant of the patent and the change shall not affect the rights of any third party which has relied on the patent as published.

[Article 7bis, continued]

(4) [Changes Affecting the Disclosure] No change in a patent shall be permitted under paragraph (1) or (3) where the change would result in the disclosure contained in the patent going beyond the disclosure contained in the description, the claims and any drawings on the filing date, or, in accordance with the Patent Law Treaty, included in a missing part of the description or a missing drawing.

[COMMENT: The text of this Article is modeled after draft Article 17 of the Draft Treaty Supplementing the Paris Convention as Far as Patents Are Concerned (see documents PLT/DC/3 and 69).]

*Article 8*

*Prior Art*

(1) [*Definition*] Subject to paragraph (2) and Article 9, the prior art with respect to a claimed invention 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 ~~relevant~~ claim date.

(2) [*Prior Art Effect of Earlier Applications*] (a) If the filing date of an earlier application (~~“earlier application”~~) filed ~~in, or~~ with effect ~~for, in~~ a Contracting Party is earlier than the claim date of a particular claimed invention contained in another application filed ~~in, or~~ with effect ~~for, in~~ the same Contracting Party, the whole contents of the earlier application shall form part of the prior art for the purpose of determining the novelty of the claimed invention, ~~provided to the extent~~ that the earlier application or the patent granted thereon is published subsequently by the competent authority, as prescribed in the Regulations.

(b) If the filing date of an earlier application (~~“earlier application”~~) filed ~~in, or~~ with effect ~~for, in~~ a Contracting Party is the same as, or later than, the claim date of a particular claimed invention contained in another application filed ~~in, or~~ with effect ~~for, in~~ the same Contracting Party, but the earlier application claims the priority of a previous application having a filing date that is earlier than the claim date of the claimed invention, subject matter that is contained in both that earlier application and the previous application shall form part of the prior art for the purpose of determining the novelty of the claimed invention, ~~provided to the extent~~ that the earlier application or the patent granted thereon is published subsequently by the competent authority, as prescribed in the Regulations.

*Article 9*

~~[Alternative A]~~

*Information Not Affecting Patentability (Grace Period)*

(1) [*General Principle*] Information which otherwise would affect the patentability of a claimed invention shall not affect the patentability of that invention, in so far as the information was made available to the public anywhere in the world in any form during, or with effect under Article 8(2) on a date during, the [12][six] months preceding the claim date,

(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 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

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

*[COMMENT: Alternative texts with a different scope are presented within square brackets. One possibility would be a grace period with a broad scope: 12 months from the claim date and it is applicable to any previous applications which was filed by the inventor and which was disclosed during the grace period by the Office. Another possibility would be, as regards the disclosure of information in another application filed by the inventor, to limit the applicability of the grace period provisions to those applications which should not have been disclosed by the Office. One other possibility would be to limit the period to 6 months.]*

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

*[COMMENT: In connection with invoking the grace period, the SCP may wish to explore further details.]*

(3) [*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.

*[COMMENT: The reintroduction of this paragraph, which appeared in document SCP/6/2 and was deleted in document SCP/7/3, is consequential to the deletion of former draft Article 16(2).]*

(24) [*“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.

(45) [~~*Intervening*~~*Third Party Rights*] A ~~third~~ person who in good faith had, between the date on which the information was made available to the public under paragraph (1) and the claim date, used the invention for the purpose of his business or started effective and serious preparations for such use shall have the right to start or continue to use the invention for that purpose. The invention shall be considered to be used where the person performed any acts that would otherwise constitute an infringement under the applicable law.

[Article 9, continued]

*[COMMENT: Although this provision relates to the rights conferred by patents and the infringement of such rights, in accordance with the interventions of a number of delegations at the seventh session, it is kept in the draft SPLT. If the SCP agrees to the inclusion of such a provision, draft Article 2(1) may need to expressly exclude draft Article 9(5) from the non-applicability of the SPLT to infringement. The second sentence is intended to clarify what constitute a use of the invention under this paragraph.]*

~~[End of Alternative A]~~

~~[Alternative B]~~

*Grace Period*

~~The prior art shall not include information made available to the public anywhere in the world in any form during the 12 months preceding the claim date in so far as that information was made available as prescribed in the Regulations.~~

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

~~[End of Alternative B]~~

*Article 10*

*Enabling Disclosure*

(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. The disclosure of the claimed invention shall be considered sufficiently clear and complete if 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 disclosure on the filing date contained in the description, claims and drawings, as amended and corrected ~~in accordance with Article 7~~ under the applicable law, shall be taken into account.



*Article 11*

*Claims*

(1) [*Contents of the Claims*] The claims shall define the subject 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*] The claimed invention shall be fully supported by the disclosure of the ~~[claims,]~~ description and ~~the~~ drawings, as prescribed in the Regulations.

(4) [*Interpretation of Claims*] (a) The ~~wording~~ scope of the claims shall ~~provide the primary basis for their interpretation~~ be determined by their wording. Where the wording of the claims is not immediately [clear][evident], ~~the~~ description and the drawings, as amended ~~and/or corrected in accordance with Article 7, if~~ under the applicable law, and the general knowledge of a person skilled in the art on the filing date shall, in accordance with the Regulations, ~~form the secondary basis~~ be taken into account for the interpretation of the claims.

(b) For the purpose of determining the scope of protection conferred by the patent, due account shall be taken, in accordance with the Regulations, of elements which are equivalent to the elements expressed in the claims.

*Article 12*

*Conditions of Patentability*

(1) [*Subject Matter Eligible for Protection*] ~~(a) A claimed invention shall fall within the scope of subject matter eligible for protection. Subject matter eligible for protection shall include products and processes [, in all fields of technology,] which can be made and used in any field of activity.~~

~~(b) Notwithstanding subparagraph (a), the following shall not be considered as subject matter eligible for protection:~~

~~(i) mere discoveries;~~

~~(ii) abstract ideas as such;~~

~~(iii) scientific and mathematical theories and laws of nature as such;~~

~~(iv) purely aesthetic creations.~~

[Reserved]

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

[Article 12, continued]

(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 ~~as a whole~~ and the prior art as defined in Article 8(1), ~~that~~ the claimed invention as a whole would not have been obvious to a person skilled in the art at the claim date, as prescribed in the Regulations.

(4) [*Industrial Applicability/Utility*] A claimed invention shall be industrially applicable (useful). It shall be considered industrially applicable (useful) if it

[Alternative A]

can be made or used for exploitation in any field of [commercial] activity.

[Alternative B]

can be made or used in any kind of industry. “Industry” shall be understood in its broadest sense, and shall not be limited to industry and commerce proper, but include agricultural and extractive industries.

[Alternative C]

has a specific, substantial and credible utility.

*[COMMENT: Alternative A intends to provide a single definition accommodating both “industrial applicability” and “utility”, although a Contracting Party may use either term under the applicable law. The second sentence of Alternative B is modeled after Article 1(3) of the Paris Convention.]*

(5) [*Exceptions*] ~~Notwithstanding paragraphs (1) to (4), a Contracting Party may, in accordance with the Regulations, exclude certain inventions from patentability.~~ [Reserved]

*Article 13<sup>3</sup>*

*Grounds for Refusal of a Claimed Invention*

(1) [*Grounds for Refusal of a Claimed Invention*] An application shall be refused where the Office finds that such application or a claimed invention in the application does not meet any of the following requirements:

- (i) the applicant does not have the right to the patent referred to in Article 4;
- (ii) the claimed invention does not meet the requirements of Articles 6, 11(2) and (3) and 12;
- (iii) the application does not meet the requirements of the Patent Law Treaty, as implemented in the applicable law, and of Articles 5 and 10; or
- (iv) an amendment or correction results in a disclosure as prohibited by Article 7(3)(a).

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<sup>3</sup> The SCP agreed at its sixth session to postpone the discussion on this Article until a consensus regarding the substance of the provisions referred to in this Article is reached. See also paragraph 4 of the Introduction and document SCP/8/5.

[Article 13, continued]

(2) [*Prohibition of Other Requirements*] No 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<sup>4</sup>*

*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) the Regulations under Article 5(2)(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).

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<sup>4</sup> The SCP agreed at its sixth session to postpone the discussion on this Article until a consensus regarding the substance of the provisions referred to in this Article is reached. See also paragraph 4 of the Introduction and document SCP/8/5.

*Article 15*

*Review*

The rejection or refusal of an application by the examining authority on the grounds referred to in Article 13(1) shall be subject to review by a judicial or quasi-judicial authority.

*Article 16*

*Evidence*

(1) [~~Principle~~Request for Submission of Evidence by the Office] (a) Where an Office reasonably doubts the veracity of an alleged fact relating to the determination of patentability, it may request the submission of evidence in order to establish the veracity of that fact.

(2) [Right of Applicants and Patentees to Submit Evidence](b) A Contracting Party shall provide for the right of applicants and patentees ~~owners~~ to submit evidence with its Office in order to establish the veracity of an alleged fact relating to the determination of patentability.

~~(2) [Burden of Proof] Where a party invokes a legal consequence from a particular fact, that party shall have the burden of proving the veracity of that fact.~~

[End of document]