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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

COUNCIL**Seventeenth Extraordinary Session
Geneva, April 7, 2000****EXAMINATION OF THE CONFORMITY OF THE BANGUI AGREEMENT
ON THE CREATION OF AN AFRICAN INTELLECTUAL PROPERTY ORGANIZATION
WITH THE UPOV CONVENTION***Document prepared by the Office of the Union*Introduction

1. By letter of December 20, 1999, Mr. Anthioumane N'Diaye, Director General of the African Intellectual Property Organization (OAPI), requested the advice of the UPOV Council on the conformity with the 1991 Act of the UPOV Convention (hereinafter referred to as "the Convention") of the Bangui Agreement on the Creation of an African Intellectual Property Organization as revised on February 24, 1999. The request was made pursuant to a resolution adopted by the Administrative Council of OAPI and on behalf of OAPI itself and of its member States (Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Congo, Côte d'Ivoire, Gabon, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Senegal, Togo).

2. The revised Bangui Agreement comprises a main part (hereinafter referred to as "the Main Part") and ten Annexes. In the preamble to the Main Part – of which extracts are reproduced at Annex I to this document – the signatory States undertook to accede, *inter alia*, to the 1991 Act of the UPOV Convention. Annex X – reproduced at Annex II to this document – contains the detailed provisions governing plant variety protection.

3. The conformity of the revised Bangui Agreement with the Convention is examined below.

4. The member States of OAPI have not signed the Convention. In accordance with Article 34(2) of the Convention, they are required to deposit an instrument of accession in order to become members of UPOV on the basis of that Convention. Under Article 34(3), they can only deposit such instrument if they have asked for the advice of the Council on the conformity of their legislation – that is to say Annex X – with the provisions of the Convention and if the decision embodying the advice is positive.

5. OAPI may become a member of the Union – if it has been duly authorized in accordance with its internal procedures to accede to the Convention – since it has competence for matters of plant variety protection and its own legislation provides for the grant and protection of breeders' rights that will be binding on all its member States.

Legal basis for plant variety protection in the OAPI member States

6. Plant variety protection will be governed in the OAPI member States, in a unitary fashion, by Annex X. However, under Article 3 of the Main Part, the intellectual property rights provided for by the Agreement constitute “independent national rights subject to the legislation of each of the member States in which they have effect”; however, according to Article 18 of the Main Part, final legal decisions relating to the validity of titles, including plant variety certificates, will be binding on all OAPI member States, with the exception of decisions based on public policy and morality.

7. According to Article 43 of the Main Part, the Bangui Agreement will enter into force two months after the deposit of instruments of ratification by at least two thirds of the signatory States. So far, a single instrument has been deposited, that of Cameroon. The Annexes will enter into force at a date to be determined by decision of the Administrative Council.

8. Annex X was drafted on the basis of the UPOV Model Law and in close cooperation with the Office of the Union.

Article 1 of the Convention: definitions

9. Article 1 of Annex X reproduces the definition of “variety” and gives the definitions of “essentially derived variety” and “material”. With respect to breeder, Annex X uses a narrow definition and stipulates that “the term does not include a person who has redeveloped or rediscovered a variety whose existence is publicly known or is a matter of common knowledge”. Articles 9 and 10 of Annex X contain further provisions on those persons who are entitled to a plant variety certificate and on varieties bred by employees or service providers. All of those provisions are in conformity with the Convention.

Article 2 of the Convention: basic obligation of the Contracting Parties:

10. Annex X provides for the protection of varieties by means of plant variety certificates. It is therefore in conformity with Article 2 of the Convention.

11. It should be noted that, under Article 6 of Annex I – dealing with patents for invention – patents are not granted for inventions “having as their subject matter plant varieties”. The plant variety certificate will therefore constitute the sole form of protection for plant varieties.

Article 3 of the Convention: genera and species to be protected

12. According to its Article 3, Annex X applies to all botanical taxa with the exception of wild species, that is to say species that have been neither planted nor improved by man.

Article 4 of the Convention: national treatment

13. Article 11 of Annex X provides that foreigners may also obtain plant variety certificates. Article 6 of the Main Part lays down the rules relating to the filing of applications, including the obligation in certain cases to appoint a representative. All of those provisions are in conformity with Article 4 of the Convention.

Articles 5 to 9 of the Convention: conditions of protection; novelty; distinctness; uniformity; stability

14. The conditions for granting a plant variety certificate are set out in Articles 4 to 8 of Annex X in terms similar to those of Articles 5 to 9 of the Convention, together with additional details also given in Articles 6 (novelty) and 7 (distinctness) of the Model Law.

15. Article 52 of Annex X sets out a liberal approach to the protection of varieties that have lost their novelty on the date of entry into force of the protection scheme. That Article is in conformity with Article 6(2) of the Convention.

16. It should be noted that, in view of the unitary nature of the plant variety certificate, novelty is “regional” in conformity with Article 6(3) of the Convention.

Article 10 of the Convention: filing of applications

17. Annex X contains no provisions contrary to Article 10 of the Convention.

Article 11 of the Convention: right of priority

18. Article 13 of Annex X provides for a priority right in conformity with Article 11 of the Convention.

Article 12 of the Convention: examination of the application

19. The provisions on the processing of an application and examination of the variety that is the subject matter of the application, given in Title III of Annex X (issuance procedure for plant variety certificates) are drafted in terms that are in conformity with Article 12 of the Convention.

Article 13 of the Convention: provisional protection

20. Article 21 of Annex X gives provisional protection which affords the applicant, as of the filing of the application, practically all the rights deriving from a plant variety certificate. Annex X is therefore in conformity with Article 13 of the Convention.

Article 14 of the Convention: scope of the breeder's right

21. Article 28 of Annex X provides in its paragraphs (1) and (2) that a plant variety certificate confers on its holder the exclusive right to exploit the variety and to prohibit any person from exploiting the variety, under the conditions and limits laid down by the Annex. According to paragraph (5), the holder may also institute legal proceedings with respect to violation of the provisions on variety denominations.

22. Article 29 of Annex X provides for a scope of the breeder's right that is in conformity with Article 14 of the Convention. It should be noted that OAPI has availed itself of the option provided for in Article 14(3) of the Convention and has extended protection to all products made directly from harvested material.

23. Consequently, Annex X is in conformity with Article 14 of the Convention.

Article 15 of the Convention: exceptions to the breeder's right

24. Article 30 of Annex X defines the compulsory exceptions to breeders' rights in terms that are in conformity with Article 15(1) of the Convention. The "farmer's privilege" in accordance with paragraph (d) does not apply to fruit, forestry or ornamental plants.

Article 16 of the Convention: exhaustion of the breeder's right

25. Article 31 of Annex X reproduces Article 17 of the Convention and contains, on account of the unitary nature of the right, the "regional" exhaustion of the breeder's right.

Article 17 of the Convention: restrictions on the exercise of the breeder's right

26. Article 36 of Annex X contains provisions on the grant of compulsory licenses that are in conformity with the provisions of Article 17 of the Convention.

Article 18 of the Convention: measures regulating commerce

27. Annex X reproduces Article 18 of the Convention in its Article 32.

Article 19 of the Convention: duration of the breeder's right

28. Under Article 33 of Annex X, the duration of protection is 25 years as from the date of issue of the plant variety certificate. It therefore satisfies Article 19 of the Convention.

Article 20 of the Convention: variety denomination

29. The provisions of Title IV of Annex X are in conformity with those of Article 20 of the Convention.

Article 21 of the Convention: nullity of the breeder's right

30. Article 40 of Annex X contains provisions on the nullity of a plant variety certificate that are in conformity with the provisions of Article 21 of the Convention.

Article 22 of the Convention: cancellation of the breeder's right

31. Article 41 of Annex X, concerning cancellation of the breeder's right, is in conformity with Article 22 of the Convention.

Article 30 of the Convention: implementation of the Convention

32. Annex X contains the corresponding provisions on the implementation of the Agreement:

(a) Chapter IX of Annex X (Articles 43 *et seq.*), together with Article 28(4) and (5), set out the remedies enabling the rights afforded by a plant variety certificate to be effectively defended (Article 30(1)(i) of the Convention); under Article 33 of the Main Part, contested decisions of the Organization may be appealed from to the High Commission of Appeal of the Organization;

(b) The administration of the plant variety protection system is entrusted to OAPI and applications may also (or in some cases must) be filed with a national Office — see Article 6 of the Main Part (Article 30(1)(ii) of the Convention);

(c) Article 14 of the Main Part provides for the “registration, maintenance and publication” of plant varieties in a special register as provided for Article 16 (Article 30(1)(iii) of the Convention).

General Conclusions

33. The revised Bangui Agreement is in full conformity with the Convention.

34. The Office of the Union suggests that the Council should invite the Secretary-General to inform the Director General of OAPI:

(a) that the Bangui Agreement is in conformity with the Convention;

(b) that once the Bangui Agreement, in particular its Annex X, is in force, the member States of OAPI and OAPI itself will be able to deposit their instruments of accession to the Convention.

35. The Council is invited to note the above information and to adopt the decision set out in the preceding paragraph.

[Two Annexes follow]

ANNEX I

**EXTRACTS FROM THE MAIN PART OF
REVISED BANGUI AGREEMENT ON THE CREATION OF
AN AFRICAN INTELLECTUAL PROPERTY ORGANIZATION**

The Government of the Republic of Benin,
The Government of Burkina Faso,
The Government of the Republic of Cameroon,
The Government of the Central African Republic,
The Government of the Republic of Chad,
The Government of the Republic of Congo,
The Government of the Republic of Côte d'Ivoire,
The Government of the Gabonese Republic,
The Government of the Republic of Guinea,
The Government of the Republic of Guinea-Bissau,
The Government of the Republic of Mali,
The Government of the Islamic Republic of Mauritania,
The Government of the Republic of Niger,
The Government of the Republic of Senegal,
The Government of the Togolese Republic,

Moved by the desire to promote the effective contribution of intellectual property to the development of their States on the one hand, and concerned on the other hand to protect intellectual property rights on their territories in as effective and uniform a manner as possible;

Undertake, for that purpose, to accede to

[...]

(ix) the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, October 23, 1978, and March 19, 1991,

(x) the Marrakesh Agreement Establishing the World Trade Organization, including the Agreement on Trade-Related Aspects of Intellectual Property Rights, of April 15, 1994,

[...]

Having considered Article 4(iv) of the aforementioned Convention Establishing the World Intellectual Property Organization, which provides that the Organization "... shall

encourage the conclusion of international agreements designed to promote the protection of intellectual property”;

[...]

Having considered Article 8 of the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994, which provides that “Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement ...”;

Having considered Article 69 of the Agreement on Trade-Related Aspects of Intellectual Property Rights of 1994, which provides that “Members agree to cooperate with each other with a view to eliminating international trade in goods infringing intellectual property rights ...”;

[...]

Having considered Article 36(1) of the Bangui Agreement of March 2, 1977, Relating to the Creation of an African Intellectual Property Organization, which provides that “The present Agreement may be revised from time to time, in particular, with a view to introducing amendments liable to improve the services rendered by the Organization”;

Considering the advantages of establishing a uniform system for the protection of literary and artistic property and industrial property and, particularly in the latter field, a system for the single deposit of applications for patents, registration of utility models, trademarks, service marks, industrial designs, trade names, geographical indications, integrated circuits, plant varieties and microorganisms on the one hand, and a common system of protection against unfair competition on the other hand, in order to facilitate recognition of the rights provided for in the legislation of their countries;

Considering the role played by intellectual property in the achievement of the aims of technological development;

Considering the advantages of creating a body responsible for applying common administrative procedures deriving from a uniform system for the protection of intellectual property;

Have resolved to revise the Bangui Agreement of March 2, 1977, on the Creation of an African Intellectual Property Organization, and have designated for that purpose plenipotentiaries, who have agreed on the following provisions:

Article 1
Definitions

The following terms have the meanings specified:

“Bangui Agreement” means the Agreement Relating to the Creation of an African Intellectual Property Organization, done at Bangui on March 2, 1977, and all the Annexes to it;

“Organization” means the African Intellectual Property Organization;

“High Commission of Appeal” means the High Commission of Appeal of the Organization;

“Chairman” means the Chairman of the Administrative Council of the Organization;

“Director General” means the Director General of the Organization;

“Member States” means the States members of the Organization;

[...]

“National administration” means the Ministry of each member State that is in charge of industrial property matters;

[...]

TITLE I - GENERAL PROVISIONS

SECTION I – FUNDAMENTAL PRINCIPLES

Article 2
Creation and Responsibilities

(1) The African Intellectual Property Organization created by the Bangui Agreement of March 2, 1977, is responsible for

(a) implementing and applying the common administrative procedures deriving from a uniform system for the protection of industrial property, as well as the provisions of international agreements in this field to which the member States of the Organization have acceded, and providing services related to industrial property;

(b) contributing to the promotion of the protection of literary and artistic property as an expression of cultural and social values;

(c) encouraging the creation of associations of national authors in those member States where such bodies do not exist;

(d) centralizing, coordinating and disseminating information of all kinds relating to the protection of literary and artistic property and communicating that information to any State party to this Agreement that requests it;

(e) promoting the economic development of member States, notably by means of effective protection of intellectual property and related rights;

(f) providing intellectual property training;

(g) undertaking any other assignment connected with its objective that might be entrusted to it by the member States.

[...]

Article 3

Nature of the Rights

(1) Rights relating to the fields of intellectual property, as provided for in the Annexes to this Agreement, shall be independent national rights subject to the legislation of each of the member States in which they have effect.

(2) Nationals may claim application for their benefit of the provisions of the Paris Convention for the Protection of Industrial Property (1967 Act), the Berne Convention for the Protection of Literary and Artistic Works (1971 Act), the Universal Copyright Convention, the Agreement on Trade-Related Aspects of Intellectual Property Rights and also the agreements, additional acts and closing protocols that have amended or will amend those Conventions or that Agreement, in all cases where such provisions are more favorable than those of this Agreement and its Annexes in protecting the rights deriving from intellectual property.

Article 4

Annexes

(1) The Annexes to this Agreement contain, respectively, the provisions to be applied in each member State concerning

- patents (**Annex I**);
- utility models (**Annex II**);
- trademarks and service marks (**Annex III**);
- industrial designs (**Annex IV**);
- trade names (**Annex V**);
- geographical indications (**Annex VI**);
- literary and artistic property (**Annex VII**);
- protection against unfair competition (**Annex VIII**);

- layout-designs (topographies) of integrated circuits (**Annex IX**)
 - plant variety protection (**Annex X**).
- (2) The Agreement and its Annexes shall be applicable in their entirety to every State that ratifies or accedes to the said Agreement.
- (3) Annexes I to X inclusive form an integral part of this Agreement.

Article 5

Implementation of International Treaties

On a decision by the Administrative Council referred to in Articles 27 and subsequent Articles of this Agreement, the Organization may take all measures necessary for the application of the administrative procedures arising from implementation of the international treaties concerning intellectual property to which the member States have acceded.

SECTION II – OPERATING PROCEDURES AND RULES

Article 6

Filing of Applications

- (1) Patent applications, applications for the registration of utility models, trademarks or service marks, industrial designs, trade names, geographical indications or layout-designs (topographies) of integrated circuits and applications for plant variety certificates shall be filed direct with the Organization.
- (2) Notwithstanding paragraph (1), any member State may demand that the application be filed with the national administration of that State where the applicant is domiciled on its territory. A record shall be taken, and a copy thereof issued to the applicant, by the national administration which shall attest every filing and specify the date and time of the filing of the documents. The national administration shall convey the application to the Organization within a period of five (5) working days from filing.
- (3) Applicants domiciled outside the territory of the member States shall file through an agent selected in one of those member States. The exercise of the profession of agent accredited to the Organization shall be governed by special rules adopted by the Administrative Council.
- (4) Applications filed with the Organization or the national administration may be conveyed by postal or any other legal means of communication.

[...]

Article 7
*Filing and Registration
of National and International Applications*

(1) Subject to the provisions of paragraphs (2) to (4) below, any filing effected with the administration of one of the member States in accordance with the provisions of this Agreement, or with the Organization, shall be equivalent to a national filing in each member State.

[...]

Article 14
*Registration, Maintenance and Publication
of New Plant Varieties*

(1) The Organization shall undertake the examination and provide for the registration, maintenance and publicity of new plant varieties according to the common procedure provided for in this Agreement and its Annex X.

(2) In each of the member States, registered and published new plant varieties shall produce their effects in accordance with the provisions of this Agreement and its Annex X.

Article 15
Publications of the Organization

Any publication of the Organization shall be addressed to the administration of each of the member States responsible for industrial property, literary and artistic property or new plant varieties, as the case may be.

Article 16
Special Registers

(1) The Organization shall maintain, for all the member States, a Special Register of Patents, a Special Register of Utility Models, a Special Register of Trademarks and Service Marks, a Special Register of Industrial Designs, a Special Register of Trade Names, a Special Register of Geographical Indications, a Special Register of New Plant Varieties and a Special Register of Layout-Designs (Topographies) of Integrated Circuits, in which the entries specified by this Agreement shall be made.

(2) Any person may consult the Registers and obtain extracts therefrom on the terms specified in the Implementing Regulations.

Article 17
Divergent Provisions

In the case of discrepancies between the provisions of this Agreement or its Annexes and those of the international conventions to which the member States are party, the latter shall prevail.

Article 18
Scope of Legal Decisions

Final legal decisions relating to the validity of titles and rendered in one member State under the provisions of Annexes I to X of this Agreement shall be binding on all other member States, with the exception of decisions based on public policy and morality.

Article 19
Appeals

Decisions taken by the Organization on cases of rejection or opposition provided for in Article 33(2) below shall be subject to appeal to the High Commission of Appeal of the said Organization.

Article 20
Other Action

Any other action relating to the application of the laws of intellectual property may be entrusted to the Organization by unanimous decision of the Administrative Council.

TITLE II - MEMBER STATES

SECTION I - MEMBERSHIP

Article 21
Membership

- (1) Membership of the Organization shall be determined by the principle of the sovereign equality of States.
- (2) In addition to its members, the Organization may have associated States. Associated States are not member States.

Article 22
Member States

- (1) African States party to the Bangui Agreement of March 2, 1977, are members of the Organization *ex officio*.

(2) Any African State that is not party to the Bangui Agreement but is party to the Convention Establishing the World Intellectual Property Organization, the Paris Convention for the Protection of Industrial Property, the Berne Convention for the Protection of Literary and Artistic Works and/or the Universal Copyright Convention, and the Patent Cooperation Treaty may accede to this Agreement.

To that end, an application for accession shall be submitted to the Administrative Council, which shall rule by a majority vote of its members. Notwithstanding Article 32 of this Agreement, equally divided votes shall constitute rejection.

(3) Instruments of ratification of or accession to this Agreement shall be deposited with the Director General of the Organization.

(4) Accession shall take effect two months after the deposit referred to in paragraph (3) above, except where a later date has been specified in the instrument of accession.

Article 23

Associated States

(1) Any African State not party to this Agreement may acquire the status of associated State by filing an application to that end with the Administrative Council.

(2) The Administrative Council shall rule on that application in the same way as provided in Article 22(2) above.

SECTION II – RIGHTS AND OBLIGATIONS OF MEMBER STATES

Article 24

Rights of Member States

In addition to exercising the responsibilities provided for in Article 2 above, the Organization shall offer member States all the required services connected with its aims, in accordance with the guidelines of the Administrative Council.

Article 25

Rights of Associated States

An associated State has the right, to the exclusion of any other right, to avail itself of the services offered by the Organization in connection with intellectual property documentation and information.

Article 26
Obligations

(1) An initial financial contribution shall be required of any State that becomes a member of the Organization or acquires the status of associated State.

The amount and methods of payment of that initial contribution shall be determined by the Administrative Council of the Organization.

Nevertheless, States recognized as *ex-officio* members of the Organization under Article 22(1) above shall be exempted from this initial contribution.

(2) Where required to balance the budget, an exceptional contribution shall be made to the Organization by member States and possibly also by associated States.

That contribution shall be entered in the budget of the Organization and distributed equally among the member States and the associated States where applicable.

TITLE III - ORGANS OF THE ORGANIZATION

Article 27
Organs of the Organization

Under this Agreement, the Organization shall have the following organs at its disposal for the conduct of its action:

- the Administrative Council;
- the High Commission of Appeal;
- the Directorate General.

SECTION I – ADMINISTRATIVE COUNCIL

Article 28
Membership

(1) The Administrative Council of the Organization shall be composed of representatives of the member States on the basis of one representative per State.

(2) Any member State may, where necessary, entrust its representation on the Council to the representative of another member State. No member of the Council may represent more than two States.

(3) Associated States shall not be members of the Administrative Council.

[...]

SECTION II – HIGH COMMISSION OF APPEAL

Article 33

Name, Functions, Composition

- (1) The High Commission of Appeal shall be composed of three members selected by the drawing of lots from a list of representatives designated by the member States, each State having designated one representative.
- (2) The High Commission of Appeal shall be responsible for ruling on appeals following
 - (a) rejection of applications for titles of industrial property protection;
 - (b) rejection of requests for the maintenance or extension of terms of protection;
 - (c) rejection of requests for reinstatement;
 - (d) decisions on oppositions.
- (3) The sessions of the High Commission of Appeal and the appeal procedure before it shall be governed by rules adopted by the Administrative Council.

SECTION III – DIRECTORATE GENERAL

Article 34

Functions of the Directorate General

The Directorate General shall be placed under the authority of a Director General and responsible for the executive work of the Organization. It shall take care of the day-to-day management and continuity thereof. It shall implement the instructions of the Administrative Council and carry out the tasks deriving from the provisions of this Agreement and its Annexes, and shall report to the Administrative Council.

[...]

TITLE IV - FINANCIAL RESOURCES
OF THE ORGANIZATION

[...]

Article 37

Income and Fees

The Administrative Council shall lay down the fees and the income necessary for the running of the Organization and shall fix the amounts and methods of payment thereof.

**TITLE V - MISCELLANEOUS, TRANSITIONAL
AND FINAL PROVISIONS**

[...]

Article 40

Headquarters of the Organization

The headquarters of the Organization shall be at Yaoundé (Republic of Cameroon). The Organization shall be placed under the protection of the Government of the Republic of Cameroon.

[...]

Article 42

Signature and Ratification

Any State party to the Bangui Agreement of March 2, 1977, shall sign and ratify this Act and the instruments of ratification shall be deposited with the Director General of the Organization.

Article 43

Entry into Force and Effects

This Act of the Bangui Agreement shall enter into force two months after the deposit of instruments of ratification by at least two-thirds of the States party to the Bangui Agreement of March 2, 1977.

The date of entry into force of the Annexes to this Act of the Agreement shall be determined by decision of the Administrative Council.

[...]

Article 46

Titles in Force Within OAPI Prior to the Accession of a State

The owners of titles in force within the Organization prior to the accession of a State who wish to extend protection to that State shall file a request for such extension with the Organization according to the procedure laid down in the Implementing Regulations.

[...]

[Annex II follows]

ANNEX II

BANGUI AGREEMENT
ANNEX X

PLANT VARIETY PROTECTION

TITLE I - GENERAL PROVISIONS

Article 1
Definitions

For the purposes of this Annex:

- (a) “*plant variety certificate*” means a title issued to protect a new plant variety;
- (b) “*plant variety*” means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a plant variety certificate are fully met, can be:
 - (i) defined by the expression of the characteristics resulting from a given genotype or combination of genotypes;
 - (ii) distinguished from any other plant grouping by the expression of at least one of the said characteristics and
 - (iii) considered as a unit with regard to its suitability for being propagated unchanged;
- (c) “*botanical taxon*” means the unit of the botanical classification, particularly the genus and the species;
- (d) “*protected variety*” means a variety that is the subject of a plant variety certificate;
- (e) “*essentially derived variety*” means a variety which;
 - (i) is predominantly derived from another variety, “*initial variety*”, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety;
 - (ii) is clearly distinguishable from the initial variety; and
 - (iii) except for the differences which result from the act of derivation, conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety. Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or other somaclonal variant, the selection of

a variant individual from plants of the initial variety, back-crossing, or transformation by genetic engineering;

(f) “*breeder*” means the person who has discovered and developed a variety. The term does not include a person who has redeveloped or rediscovered a variety whose existence is publicly known or is a matter of common knowledge;

(g) “*variety-related material*” means:

- (i) reproductive or propagating material in any form whatsoever;
- (ii) harvested material, including entire plants and parts of plants;
- (iii) products made directly from harvested material.

Article 2

Plant Variety Certificates

- (1) The breeding of a new plant variety shall give the breeder the right to a title of protection known as a “*plant variety certificate*”.
- (2) Plant variety protection shall be obtained by registration.
- (3) A plant variety certificate shall be granted for one variety only.

Article 3

Botanical Taxa Eligible for Protection

All botanical taxa shall be protected by this Annex, except for wild species, that is to say species that have been neither planted nor improved by man.

TITLE II - CONDITIONS FOR THE ISSUE OF A PLANT VARIETY CERTIFICATE

Article 4

Criteria for the Protection of a Plant Variety

In order to enjoy the protection afforded by this Annex, a variety shall be:

- (a) new;
- (b) distinct;
- (c) uniform
- (d) stable

(e) the subject of a denomination established in accordance with the provisions of Article 23.

Article 5
Novelty

(1) A variety shall be deemed to be new if, at the date of filing of the application or, where applicable, at the date of priority, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder or of his successor in title or assignee, for the purposes of exploitation of the variety:

(a) on the territories of the member States of the Organization earlier than one year before that date;

(b) on the territories of non-member States, earlier than;

(i) six years, in the case of trees and vine;

(ii) four years, in the case of other species.

(2) Novelty shall not be lost by sale or disposal to others:

(a) where it results from an abuse committed to the detriment of the breeder or of his successor in title or assignee;

(b) where it forms part of an agreement for the transfer of the rights in the variety;

(c) where it forms part of an agreement under which a person multiplies propagating material of the variety concerned on behalf of the breeder or his successor in title or assignee, on condition that the multiplied material reverts to the breeder or his successor in title or assignee and on condition that the multiplied material is not used for the production of another variety;

(d) where it forms part of an agreement under which a person undertakes field tests or laboratory trials or small-scale processing trials in order to evaluate the variety;

(e) where it forms part of the fulfillment of a statutory or administrative obligation, in particular concerning biological security or the entry of varieties in an official catalogue of varieties admitted to trade; or

(f) where it involves harvested material being a by-product or a surplus product of the creation of the variety or of the activities referred to in subparagraphs (c) to (e) of this paragraph, on condition that the material is sold or otherwise disposed of without variety identification for the purposes of consumption.

(3) Where the production of a variety demands repeated use of one or more other varieties, the sale or disposal to others of propagating material or of harvested material of such variety shall constitute relevant facts for the novelty of the other variety or varieties.

Article 6
Distinctness

- (1) A variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application or, where appropriate, at the priority date.
- (2) The filing, in any country, of an application for a plant variety certificate or for entry in a catalogue of varieties admitted to trade shall be deemed to render the variety being the subject of the application a matter of common knowledge as from the date of the application, provided that the application leads to the issue of a plant variety certificate or to entry in the catalogue, as the case may be.
- (3) The fact that the existence of another variety is a matter of common knowledge may be established by various factors such as:
 - (a) exploitation of the variety already in progress;
 - (b) entry of the variety in a variety register kept by a recognized professional association;
 - (c) the inclusion of the variety in a reference collection.

Article 7
Uniformity

A variety shall be deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in its relevant characteristics.

Article 8
Stability

A variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

Article 9
Right to a Plant Variety Certificate

- (1) The right to a plant variety certificate shall belong to the breeder.
- (2) If two or more persons have bred a variety jointly, the right to a plant variety certificate shall belong to them jointly.
- (3) The right to a plant variety certificate may be assigned or transferred by succession.
- (4) The breeder shall be mentioned as such on the plant variety certificate.

(5) (a) The applicant shall be deemed, unless proven otherwise, to be the person entitled to a plant variety certificate.

(b) Where a person not entitled to a plant variety certificate has filed an application, the entitled person may institute proceedings for transfer of the application or of the plant variety certificate if already issued. Proceedings for transfer shall be prescribed five years after the publication date of the issue of the plant variety certificate. No time limit shall apply to proceedings directed against a defendant acting in bad faith.

Article 10

Plant Varieties Bred by Employees

(1) Subject to the statutory provisions governing contracts of service or of employment and except where otherwise agreed by contract, the right to a plant variety certificate for a variety bred in execution of such contract shall belong to the commissioner or the employer.

(2) The same provision shall apply where an employee is not required by his employment contract to carry out inventive activities, but has bred the variety using the information or facilities available to him in his employment.

(3) In the case referred to in the preceding paragraph (2), an employee who has bred a variety shall be entitled to remuneration taking into account the importance of the variety and which, failing agreement between the parties, shall be laid down by the court. In the case referred to in the preceding paragraph (1), the aforesaid employee shall have the same right if the invention is of very exceptional importance.

(4) The provisions of this Article shall also apply to servants of the State, of the local authorities and of any public law legal person, except where otherwise provided by special provision.

(5) If the employer expressly waives his right to the plant variety certificate, the right shall belong to the employee-breeder.

(6) The provisions of the preceding paragraph (3) shall be a matter of public policy.

Article 11

National Treatment

Foreigners may also obtain plant variety certificates in accordance with the conditions laid down by this Annex.

**TITLE III - ISSUANCE PROCEDURE FOR PLANT
VARIETY CERTIFICATES**

Article 12

Filing the Application

(1) (a) Where an application for a plant variety certificate is filed with the Ministry responsible for industrial property, a record, of which one copy shall be handed to the applicant, shall be drawn up by the competent official of that Ministry recording the filing and the date and time on which the documents were submitted. The Ministry shall transmit the application to the Organization within five working days of the filing date.

(b) Where an application is filed directly with the Organization, the competent official shall draw up the record referred to in the preceding subparagraph.

(2) The application shall contain:

(a) the name and other required information relating to the applicant, the breeder and, where appropriate, the representative;

(b) identification of the botanical taxon (Latin name and common name);

(c) the denomination proposed for the variety or a provisional designation; and

(d) a succinct technical description of the variety.

(3) Proof of payment of the required fees shall be attached to the application.

(4) The above mentioned documents shall be in one of the working languages of the Organization.

(5) The applicant may withdraw his application at any time prior to a determination that the application satisfies the necessary conditions leading to the issue of a plant variety certificate.

Article 13

Claiming Priority

(1) Any person wishing to claim the priority of an earlier filing under Article 11 of the International Convention for the Protection of New Varieties of Plants shall be required to attach to his application for a plant variety certificate or submit to the Organization within four months of the date of his application:

(a) a written statement containing the date and number of the earlier application, the country in which it was filed and the name of the applicant;

(b) a certified copy of the earlier application;

(c) if he is not the person making the application, written authorization from the applicant or his successor in title empowering him to assert the priority concerned.

(2) In the event of more than one earlier application, priority may be based only on the earliest application.

(3) Priority may be claimed only within a period of 12 months as from the filing date of the first application.

(4) (a) Priority shall have the effect that the application shall be deemed to have been filed on the filing date of the first application with regard to the conditions for the protection enjoyed by the variety.

(b) Furthermore, the applicant shall have the faculty of requesting that the examination of the variety be deferred for up to two years as from the expiry date of the priority term or three years as from the filing date of the first application. However, if the first application is rejected or withdrawn, examination of the variety may be commenced before the date given by the applicant; in such case, the applicant will be afforded a reasonable period in order to furnish the information, documents or material required for examination.

(5) Failure to submit in good time any of the aforementioned items shall imply *ex-officio* loss of enjoyment of the priority right claimed. Any item that reaches the Organization more than four months after the filing of the application for a plant variety certificate shall be declared inadmissible.

Article 14

Inadmissibility for Lack of Payment

No application shall be admissible if not accompanied by a document proving payment of the prescribed fees.

Article 15

Filing Date

(1) (a) The Organization shall allocate as the filing date, the date of receipt of the application at the Ministry responsible for industrial property or at the Organization on condition that at the time of receipt, the application contains at least the items referred to in Article 12(2).

(b) If the Organization determines at the time of receiving the application that the items referred to in Article 12(2) have not all been furnished, it shall invite the applicant to make the necessary corrections and shall allocate, as the filing date, the date of receipt of the required corrections; if the correction is not carried out within the prescribed time limit, the application shall be deemed not to have been filed.

(2) If the application contains defects other than those referred to in the preceding paragraph, the Organization shall invite the applicant to regularize them; if the application is not regularized within the prescribed time limit, it shall be deemed not to have been filed.

Article 16
Publication of the Application

The Organization shall publish a notice of filing of the application containing, as a minimum, the items referred to in Article 12(2)(a) to (c).

Article 17
Objection to the Issue of a Plant Variety Certificate

- (1) Once the application is published, any person may file with the Organization, within the prescribed time limit and in the prescribed form, written and reasoned objections to the issue of a plant variety certificate. The filing of an objection shall be subject to payment of a fee.
- (2) Objections may be filed exclusively on the grounds that the variety is not new, not distinct, not uniform or not stable or that the applicant is not entitled to protection.
- (3) The Organization shall send a copy of the notice of objection to the applicant, who may make a reasoned reply to that notice within a period of three months, renewable once. If his reply does not reach the Organization within the prescribed time limit, the applicant shall be deemed to have withdrawn his application for registration.
- (4) Before deciding on the objection, the Organization shall hear the parties or one of the parties, or their representatives, if a request is made.
- (5) The decision of the Organization concerning the objection may be appealed from to the High Commission of Appeal within a period of thirty days as from notification of the decision to the parties concerned.

Article 18
*Examination of the Application for a Plant Variety Certificate and
Technical Examination of the Variety*

- (1) The Organization shall examine the application as to form and as to substance in order to check, on the basis of the information supplied;
 - (a) that a filing date may be allocated in accordance with Article 15;
 - (b) that the documents in the application are complete and satisfy the requirements of the provisions of Articles 12 and 13;
 - (c) that the application is not excluded under the provisions of Article 3;
 - (d) that the variety applied for is new.
- (2) If the items of the application are incomplete or do not comply, the Organization shall invite the applicant to regularize the application within a period of sixty days as from the date of receipt of the notification. Any application not regularized within the prescribed time limit shall be deemed not to have been filed.

- (3) A technical examination shall also be carried out on the basis of growing trials and other required tests to establish:
- (a) that the variety belongs to the stated taxon;
 - (b) the variety is distinct, uniform and stable; and
 - (c) where it is determined that the variety satisfies the above conditions, to establish the official description of that variety.
- (4) The technical examination shall be conducted by an appropriate institution, approved by the Organization.
- (5) Where the growing trials and other required tests have been carried out by the official body of a Contracting Party to the International Convention for the Protection of New Varieties of Plants, or are being carried out by such service, and the results may be obtained by the Director General, the examination shall be based on such results.
- (6) The Organization shall determine the practical conditions for the technical examination.

Article 19

Information, Documents and Material Required for Examination; Examination Fee

- (1) The applicant shall be required to provide all information, documents or material required by the Organization for the technical examination; failure to supply shall result, unless the applicant is able to give good grounds, in rejection of the application.
- (2) The creator of a new plant variety may be required to submit additional information and documents to support his variety, together with the plant material required for the technical examination.
- (3) The cost of the technical examination shall be borne by the applicant and shall be paid directly to the Organization. The latter shall establish a schedule of fees for the principal botanical taxa.

Article 20

Confidentiality of Applications

Applications for plant variety certificates shall be kept secret by the Organization, the administrations and institutions involved in the procedures. Access to information concerning applications shall be regulated. No information relating to applications may be disclosed without the consent of the breeder, except in special cases determined by the Organization.

Article 21

Grounds for Rejection of Applications

- (1) An application shall be rejected prior to registration if it is established that:

- (a) the applicant is not entitled to file an application;
 - (b) the applicant has not replied within the prescribed time limit to the regularization notifications issued by the Organization, particularly where:
 - (i) the information given was erroneous or incomplete;
 - (ii) the application contained a material irregularity;
 - (c) the variety to which the application refers:
 - (i) does not satisfy the requirements of Articles 4 to 8
 - (ii) belongs to a botanical taxon that is excluded under Article 3;
 - (d) the applicant refuses or is unable to propose an acceptable denomination.
- (2) The Organization shall notify its decision to the applicant, shall record it and publish a notice of rejection. The rejection decision may be appealed from to the High Commission of Appeal.

Article 22

Issue of Plant Variety Certificate and Publication

- (1) Where the Organization determines as a result of the technical examination of the variety that the variety satisfies the conditions set out in Article 4 and that the applicant satisfies the other conditions set out in this Annex, it shall issue a plant variety certificate.
- (2) The Organization:
- (a) shall publish a notice of issue of a plant variety certificate;
 - (b) shall issue to the applicant a plant variety certificate containing a description of the variety;
 - (c) shall register the certificate; and
 - (d) shall make copies of the variety description available to the public, on payment of the prescribed fee.

TITLE IV - VARIETY DENOMINATION

Article 23

Subject of the Denomination and Signs Admissible as a Denomination

- (1) The denomination shall constitute the generic designation of the variety.

(2) A denomination may consist of any word, combination of words and figures and combinations of letters and figures, with or without an existing meaning, provided that such signs allow the variety to be identified.

(3) Where a denomination has already been used for the variety in a member State or in a Contracting Party to the International Convention for the Protection of New Varieties of Plants, or proposed or registered in a member State or a Contracting Party, only such denomination may be used for the purposes of the procedure before the Organization, unless there is a ground for refusal under Article 24. Any synonyms shall be recorded in the register of applications and in the register of grants.

(4) (a) For as long as the variety is exploited, it shall be prohibited to use, on the territory of the member State, a designation that is identical or confusingly similar to the denomination of that variety in relation to another variety of the same or a closely related species. The prohibition shall remain in force after the variety has ceased to be exploited if the denomination has acquired particular significance in relation to the variety.

(b) The above prohibition shall also apply to denominations registered in the Contracting Parties to the International Convention for the Protection of New Variety of Plants.

(5) Any person who offers for sale, sells or otherwise markets propagating material of a protected variety shall be required to use the denomination of that variety. This obligation shall also apply to the varieties referred to in Article 29(4).

(6) The obligation to use a denomination shall not end with the plant variety certificate that gave rise to it.

(7) Prior rights of others shall not be affected.

(8) Where a variety is offered for sale or otherwise marketed, it shall be permissible to use a trademark or service mark, a trade name or similar indication in association with the registered variety denomination, subject to the denomination remaining easily recognisable.

Article 24

Grounds for Refusal of a Denomination

(1) Notwithstanding the provisions of the Convention and the rules adopted by the International Union for the Protection of New Varieties of Plants, a designation shall be refused registration as a denomination if:

(a) it does not comply with the provisions of Article 23;

(b) it is not suitable for identifying the variety, particularly due to lack of distinctiveness or for linguistic unsuitability;

(c) it is contrary to public policy or morality;

(d) it is composed exclusively of signs or indications that may serve, in the plant variety and seed sector, to designate the type, quality, quantity, intended purpose, value, geographical origin or time of production;

(e) it is liable to mislead or cause confusion as to the characteristics, value or geographical origin of the variety, or as to the links between the variety and persons such as the breeder or the applicant; or

(f) it is identical with or confusingly similar to a denomination that designates, on the territory of one of the member States, or of a Contracting Party to the International Convention for the Protection of New Varieties of Plants, an existing variety of the same or a closely related species, unless such existing variety is no longer exploited and its denomination has not acquired any particular significance.

(1) (a) Notwithstanding the provisions of the Convention and of the rules adopted by the International Union for the Protection of New Varieties of Plants, registration as a variety denomination shall also be refused for a designation comprising an element which hampers or is liable to hamper the free use of the denomination with respect to the variety, in particular any element whose registration as a trademark for products bearing some relation to the variety could be refused under trademark law.

(b) Such designations shall be refused registration if the holder of the rights in the element concerned has lodged with the Organization a written objection to the proposed denomination.

Article 25

Denomination Registration Procedure

(1) (a) The denomination proposed for a variety for which protection is sought shall be filed at the same time as the application.

(b) On payment of a special fee and the proposal of a provisional designation in the application, the applicant may defer the denomination registration procedure. In such case, the applicant shall be required to submit the proposal for a denomination within the time limit laid down by the Organization. If no proposal is submitted within the prescribed time limit, the application shall be rejected.

(2) The Organization shall publish the proposed denomination, unless it determines the existence of grounds for refusal under Article 24(1) or has knowledge of grounds for refusal under Article 24(2)(a). The proposal shall also be communicated to the official services of the Contracting Parties to the International Convention for the Protection of New Varieties of Plants.

(3) The denomination shall be registered at the time the plant variety certificate is issued.

Article 26

Opposition to Registration of a Denomination

- (1) Any concerned person may, within the prescribed time limit, file opposition to the registration of a denomination based on any of the grounds for refusal set out in Article 24. The official services of the Contracting Parties may submit observations.
- (2) Oppositions and observations shall be communicated to the applicant to enable him to respond to them or, where appropriate, to submit a new proposal.
- (3) Where the proposal for a denomination does not comply with the provisions of Article 23, the Organization shall invite the applicant to submit a new proposal for a denomination. If the proposal is not submitted within the prescribed time limit, the application shall be rejected.
- (4)
 - (a) The new proposal shall be subject to the examination and publication procedure set out in this Article.
 - (b) Where the new proposal does not comply with the provisions of Article 23, the Organization may give the applicant formal notice to propose a denomination that complies. If the applicant fails to do so, the application shall be rejected.
- (5) The Organization's decision on the opposition may be appealed from to the High Commission of Appeal during a period of three months as from receipt of notification of the decision to the persons concerned.

Article 27

Cancellation of a Denomination and Registration of a New Denomination

- (1) The Organization shall cancel a registered denomination:
 - (a) if it is established that the denomination was registered despite the existence of grounds for rejection under Article 21(1);
 - (b) if the holder so requests and proves a legitimate interest; or
 - (c) if a third party produces a court decision prohibiting the use of that denomination with respect to the variety.
- (2) The Organization shall advise the holder of the proposal for cancellation and shall invite him to submit a proposal for a new denomination within a prescribed time limit. If the variety is no longer protected, the proposal may be made by the Organization.
- (3) The proposal for a new denomination shall be subject to the examination and publication procedure laid down in Article 25. The new denomination shall be registered and published once it has been approved; the former denomination shall be cancelled at the same time.

**TITLE V - RIGHTS CONFERRED BY A
PLANT VARIETY CERTIFICATE**

Article 28

General

- (1) Under the conditions and within the limits set out by this Annex, a plant variety certificate shall confer on its holder the exclusive right to exploit the variety that is the subject of the certificate.
- (2) Under the conditions and within the limits laid down by this Annex, a plant variety certificate shall also confer upon its holder the right to prohibit any person from exploiting the variety that is the subject of the certificate.
- (3) The holder of a plant variety certificate shall also have the right to assign or transfer the certificate by succession and to conclude licensing contracts.
- (4) Subject to Article 36, the holder of a plant variety certificate shall have the right, in addition to all other rights, remedies and actions at his disposal, to institute legal proceedings against any person who infringes the rights conferred to him by the plant variety certificate through the performing, without his consent, of any of the acts referred to in Article 29(1) or against any person who carries out acts making it likely that an infringement will be committed.
- (5) The holder of a plant variety certificate shall also have the right, in addition to all other rights, remedies or actions at his disposal, to institute legal proceedings against any person who uses a designation in violation of Article 23(4) or who omits to use a variety denomination in violation of Article 23(5).

Article 29

Scope of Rights Conferred by a Plant Variety Certificate

- (1) Subject to Articles 30 and 31, “*exploitation*” means, for the purposes of this Title, any of the following acts carried out with respect to propagating material of a protected variety:
 - (a) production or reproduction (multiplication);
 - (b) conditioning for the purpose of propagation;
 - (c) offering for sale;
 - (d) selling or other marketing;
 - (e) exporting;
 - (f) importing;
 - (g) stocking for any of the purposes mentioned in (a) to (f) above.

(2) Subject to Articles 30 and 31, “*exploitation*” also means, for the purposes of this Title, the acts referred to in (a) to (g) of paragraph (1) carried out in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety, unless the holder has had reasonable opportunity to exercise his rights in relation to such propagating material.

(3) Subject to Articles 30 and 31, “*exploitation*” also means, for the purposes of this Title, the acts referred to in (a) to (g) of paragraph (1) carried out in respect of products made directly from harvested material of the protected variety falling within the provisions of paragraph (2) through the unauthorized use of such harvested material, unless the holder has had reasonable opportunity to exercise his rights in relation to such harvested material.

(4) The provisions of paragraphs (1) to (3) shall also apply:

(a) to varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety;

(b) to varieties which are not clearly distinguishable in accordance with Article 6 from the protected variety; and

(c) to varieties whose production requires the repeated use of the protected variety.

Article 30

Exceptions to the Rights Conferred by a Plant Variety Certificate

The rights conferred by a plant variety certificate shall not extend to:

(a) acts done privately and for non-commercial purposes;

(b) acts done for experimental or research purposes;

(c) acts done for the purpose of breeding other varieties and, except where the provisions of Article 29(4) apply, acts referred to in Article 29(1) to (3) in respect of such other varieties;

(d) use by a farmer on his own holding for propagating purposes of harvested material he has obtained by planting on his own holding a protected variety or a variety covered by Article 29(4)(a) or (b); this exception shall not apply to fruit, forestry or ornamental plants; and

(e) acts carried out by any third party in good faith prior to the filing of the application for a plant variety certificate.

Article 31

Exhaustion of Rights Conferred by a Plant Variety Certificate

The rights conferred by a plant variety certificate shall not extend to acts concerning material of the protected variety or a variety covered by Article 29(4) which has been sold or

otherwise marketed on the territory of a member State by the holder or with his consent or any material derived from such material, unless such acts:

- (a) involve further propagation of the variety in question; or
- (b) involve an export of material of the variety, which enables the propagation of the variety, into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

Article 32
Measures Regulating Commerce

The rights conferred by a plant variety certificate shall be independent of measures adopted by the member States in order to regulate on their territory the production, certification and marketing of variety material or the importing or exporting of such material.

Article 33
Term of a Plant Variety Certificate; Maintenance of Rights

- (1) Subject to the provisions of paragraph (2) below, a plant variety certificate shall lapse 25 years after its date of issue.
- (2) In order to maintain a plant variety certificate, an annual fee shall be paid to the Organization each year in advance, with the first fee due one year after the date of issue of the certificate. A period of grace of six months shall be afforded for payment of the annual fee after the due date, on payment of the prescribed additional fee. If an annual fee is not paid in accordance with the provisions of this paragraph, the holder of the plant variety certificate shall forfeit his rights.

Article 34
Provisional Protection

An applicant shall enjoy all the rights provided for by this Title as of the filing of his application, with the proviso that proceedings for damages may not be instituted for damages occasioned by the fault of the defendant after publication of the application until the plant variety certificate has been issued.

Article 35
Restoral of Rights

- (1) Notwithstanding the provisions of Article 33(2) above, if the protection conferred by a plant variety certificate has not been renewed for reasons beyond the control of the holder, he may, on payment of the required annual fee and of a restoral fee, request that it be restored within a period of six months as from the date on which such circumstances ceased to exist and, at the latest, within a period of two years as from the date on which renewal was due.

- (2) The request for restoral of a plant variety certificate, accompanied by evidence of payment of the fees referred to in the preceding paragraph, shall be filed with the Organization and shall set out the reasons which, for the holder or his successor in title, justify restoral.
- (3) The Organization shall examine the above mentioned reasons and shall restore the plant variety certificate or shall reject the request if it does not consider the reasons justified.
- (4) Restoral shall not imply prolongation of the term of the plant variety certificate. Any third parties who have begun to exploit the variety prior to restoral of the certificate shall be entitled to complete such exploitation.
- (5) Restored plant variety certificates shall be published by the Organization in the manner prescribed by the Implementing Rules.
- (6) The decisions of the Organization with respect to restoral may be appealed from to the High Commission of Appeal within a period of thirty days as from the date of receipt of their notification.

Article 36

Exploitation by the Public Authorities or by a Third Party Authorized by Them

- (1) **(a)** The Government may decide that a variety shall be exploited without the consent of the holder of the plant variety certificate by a State service or by a third party designated by the Government where:
 - (i) the public interest, particularly the food supplies of the member State concerned or public health, so demand; or
 - (ii) a judicial or administrative body has decided that the manner in which the holder of the plant variety certificate or his licensee exploits the variety is anti-competitive and the Government is convinced that exploitation of the variety pursuant to this Article will enable such practice to be remedied
- (b)** Exploitation of a variety pursuant to this Article shall be subject to payment of equitable remuneration to the holder of the plant variety certificate.
- (c)** The Government shall only take such decision if the following conditions have been satisfied:
 - (i) the holder of the plant variety certificate has been given formal notice to remedy the situation and has not taken the necessary steps within the prescribed time limit;
 - (ii) the State service or the designated third party is in a position to exploit the variety in a competent and efficient manner;
 - (iii) three years have elapsed between the date of issue of the plant variety certificate and the date of the decision.

(d) When taking the above mentioned decision, the Government shall define the conditions for exploiting the variety by the State service or the designated third party, particularly the authorized acts of exploitation, the duration of exploitation and the amount and method of payment of the remuneration due to the holder of the plant variety certificate.

(2) The Government may require the holder of the plant variety certificate to make available to the State service or to the designated third party, against payment of suitable remuneration, the quantity of propagating material required for reasonable use to be made of the exploitation authorization.

(3) **(a)** The Government may, at the request of the holder of the plant variety certificate, of the State service or of the designated third party, modify the conditions of the authorization to exploit the variety to the extent that a change in the circumstances justifies such modification;

(b) The Government shall terminate the authorization to exploit the variety prematurely, at the request of the holder of the plant variety certificate, if the State service or the designated third party fails to comply with the conditions set out by the Government or does not exploit the variety in a competent and efficient manner;

(c) The Government may extend the authorization to exploit the variety, after having heard the parties, if it is convinced, on the basis of a new examination, that the circumstances that led it to take the initial decision still apply.

(4) An authorization to exploit a variety given to a third party may not be transferred except with the enterprise or business of such person or with that part of the enterprise or business in which the variety is exploited.

(5) An authorization shall not exclude:

(a) exploitation of the variety by the holder of the plant variety certificate; or

(b) the conclusion of licensing contracts by the holder.

(6) Exploitation of the variety by the State service or the designated third party shall concern exclusively supply to the domestic market of the member State.

(7) The parties shall be heard before any decision is taken pursuant to this Article. Such decision may be appealed from to the competent administrative court.

**TITLE VI - OBLIGATIONS OF THE HOLDER OF
A PLANT VARIETY CERTIFICATE**

Article 37

Maintenance of the Variety

- (1) The holder of a plant variety certificate shall be required to maintain at his own expense the protected variety or, where appropriate, its hereditary components during the whole validity of the certificate.
- (2) At the request of the Organization, he shall be required to furnish to any authority designated by the Organization, within the prescribed time limit and at his own expense, the information, documents or material deemed necessary for verifying the maintenance of the variety.

Article 38

Furnishing of Samples

- (1) The holder of a plant variety certificate shall be required to furnish at his own expense to any authority designated by the Director General, within the prescribed time limit, reasonable samples of the protected variety or, where appropriate, of its hereditary components for the purposes of:
 - (a) establishing or renewing the official sample of the variety;
 - (b) carrying out the comparative examination of varieties for the purposes of protection.
- (2) The holder of a plant variety certificate may be required to himself maintain or preserve the official sample.

TITLE VII - CHANGE OF OWNERSHIP, NULLITY, CANCELLATION

Article 39

Change and Division of Ownership

- (1)
 - (a) A plant variety certificate may be assigned or transmitted by succession.
 - (b) Any change of ownership shall be recorded in writing. It shall also be registered by the Organization and shall not be invocable against third parties unless it is recorded in the special register; the Organization shall publish a notice of the change of ownership.
- (2)
 - (a) The holder of a plant variety certificate may grant exclusive or non-exclusive licenses.
 - (b) All licenses shall be recorded in writing and shall be registered by the Organization; they shall not be invocable against third parties unless registered in the special register; the Organization shall publish a notice thereof.

Article 40
Nullity of a Plant Variety Certificate

- (1) Any person having a legitimate interest may file a request for annulment with the Director General.
- (2) The court shall declare a plant variety certificate null and void if it is established:
 - (a) that the variety was not new or distinct on the filing date of the application or, where appropriate, on the priority date;
 - (b) that, where the issue of a plant variety certificate was essentially based on information and documents submitted by the applicant, the variety was not uniform or stable at the aforesaid date; or
 - (c) that the plant variety certificate was issued to a person not entitled thereto and the entitled person did not institute or has renounced instituting proceedings for judicial assignment in accordance with Article 9(5)(b).
- (3) A plant variety certificate declared null and void shall be deemed invalid as of its date of issue.
- (4) Annulment shall be registered by the Director General, who shall publish a notice thereof.

Article 41
Cancellation

- (1) The Organization shall cancel a plant variety certificate if it is established that the holder has failed to comply with his obligation under Article 37(1) and that the variety is no longer uniform or stable.
- (2) (a) Furthermore, the Organization shall cancel a plant variety certificate:
 - (i) if the holder does not reply to a request by the Director General under Article 37(2) with regard to verification of maintenance of the variety or
 - (ii) if the Organization intends to cancel the variety denomination and the holder does not propose a suitable denomination within the prescribed time limit.
- (b) A certificate may only be cancelled after the holder has been given formal notice of his obligation and allowed a reasonable period, notified to him, to comply therewith.
- (3) Cancellation shall take effect as of the date of its registration; the Organization shall publish a notice thereof.

TITLE VIII - PROCEDURAL TIME LIMITS

Article 42

Extension of Time Limits

Where the Organization deems it justified by the circumstances it may, on a written request addressed to it, extend, under the conditions it shall lay down, the time limit prescribed for performing an act or satisfying a requirement in accordance with provisions of this Annex or of the Implementing Rules, by notifying its decision to the parties concerned. Extension may be granted even if the time limit concerned has expired.

TITLE IX - INFRINGEMENT AND OTHER UNLAWFUL ACTS

Article 43

Infringement

(1) Subject to Articles 30, 31 and 36, any of the acts referred to in Article 29 carried out on the territory of a member State by a person other than the holder of the plant variety certificate and without his consent shall constitute an infringement.

(2) (a) At the request of the holder of a plant variety certificate, or of the licensee where the latter has invited the holder to institute legal proceedings and the holder has refused or omitted to do so, the court may give an injunction for cessation of the infringement or prevention of an imminent infringement or the committing of an act of unfair competition referred to in Annex VIII, and may award damages and order any other remedy provided by domestic legislation.

(b) At the request of a competent authority or of any other person, of any association or any union concerned, particularly of breeders, seed producers or farmers, the court may award the same remedies as in the case of an act of unfair competition as referred to in Annex VIII.

(3) Any person who knowingly commits an infringing act under paragraph (1) or an act of unfair competition under Annex VIII shall be guilty of an offense and liable to a fine of between 1 000 000 and 3 000 000 CFA francs or imprisonment of between one month and six months or both such penalties, without prejudice to civil damages.

Article 44

Infringement Seizure

(1) Holders of plant variety certificates or of exclusive exploitation rights may, under an order from the presiding judge of the civil court within whose jurisdiction the action is to be taken, cause bailiffs or public or judicial officers, including customs officers, if necessary with the aid of an expert, to make an inventory and detailed description, with or without seizure, of allegedly infringing objects.

(2) The order shall be given on a simple request and on presentation of the plant variety certificate and proof that it has not been cancelled and has not lapsed.

(3) In the event of seizure, the order may require the petitioner to deposit security before the operation is carried out. The security shall be sufficient but not such as would discourage recourse to the procedure.

(4) Security shall be required in all cases where a foreigner requests seizure.

(5) A copy of the order shall be handed to the holder of the objects that have been described or seized and, where appropriate, of the act recording the deposit of a security, in each case on pain of nullity and damages against the bailiffs or public or judicial officers, including customs officers.

Article 45

Time Limit for Instituting Substantive Proceedings

(1) If the petitioner fails to institute proceedings, whether civil or criminal, within a period of ten working days as from seizure or description, the seizure or description shall automatically become null and void, without prejudice to any damages that may be claimed, where appropriate.

Article 46

Other Sanctions

(1) The judge may order those items concerned by the infringement and which are held by the infringer to be confiscated and, where appropriate, destroyed or handed to the holder of the plant variety certificate where, in view of the circumstances, such is necessary:

(a) to provide a dissuasive effect against infringements;

(b) to safeguard third party interests.

(2) The judge may also order the confiscation of the devices or means specially intended for carrying out the infringement and order the publishing of the sentence.

(3) The infringing items and the devices or means that have been confiscated may be sold by public auction for the benefit of the State.

Article 47

Usurpation

Any person who falsely lays claim to be the holder of a certificate or of an application for a plant variety certificate shall be liable to a fine of between 1 000 000 and 3 000 000 CFA francs. In the event of a repeated offense, the fine shall be doubled.

Article 48
Extenuating Circumstances

The provisions of the domestic laws of the member States with respect to extenuating circumstances shall apply to the offenses referred to in this Annex.

Article 49
Conditions for Institution of Criminal Proceedings

Criminal proceedings for the application of the above penalties may be pursued by the public prosecutor only on a complaint from the injured party.

Article 50
Exceptional Jurisdiction of the Criminal Court

The criminal court hearing infringement proceedings shall pronounce on the objections made by the accused person, either as to the nullity or the lapse of the plant variety certificate or on matters relating to ownership of the certificate.

Article 51
Fraud in Relation to Variety Denominations

Any person who knowingly uses a designation contrary to Article 23(4) or who omits to use a variety denomination contrary to Article 23(5) shall be liable to a fine of between 400 000 and 1 000 000 CFA francs.

TITLE X - TRANSITIONAL AND FINAL PROVISIONS

Article 52
Protection of Known Varieties

(1) Notwithstanding Article 5, a plant variety certificate may also be issued for a variety that is no longer new on the date of entry into force of this Annex, subject to the following conditions:

(a) the application shall be filed within the year following the above mentioned date;
and

(b) the variety must;

(i) have been entered in the national catalogue of varieties admitted to trade of a member State or of a Contracting Party to the International Convention for the Protection of New Varieties of Plants or in a variety register kept by a professional association and accepted, for the purposes of this Article, by the Organization,

- (ii) have been the subject of a plant variety certificate in a Contracting Party, or have been the subject of an application for a plant variety certificate in a Contracting Party, on condition that such application subsequently leads to the issue of a certificate; or
 - (iii) have been the subject of proof acceptable to the Organization concerning the date on which the variety ceased to be new under the provisions of Article 5.
- (2) If protection is granted, its term shall be reduced by the number of years that have elapsed since the time at which the variety was offered for sale or distributed for the first time and that at which the application was submitted.
- (3) Where a plant variety certificate is issued under this Article, the holder may not prohibit exploitation by any third party who exploited the variety in good faith prior to the filing of the application.

[End of Annex II and of document]