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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

ADMINISTRATIVE AND LEGAL COMMITTEE

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MODEL LAW ON THE PROTECTION OF NEW VARIETIES OF PLANTS

Document prepared by the Office of the Union

1. The Annex to this document contains a draft Model Law on the Protection of New Varieties of Plants based upon the 1991 Act of the Convention.

2. From the point of view of form, it is to be noted that the numbering of the Articles is discontinuous, to simplify future revisions. A continuous numbering may be adopted in the final version.

3. From the point of view of substance, attention is drawn to the following:

i) The draft has been conceived as a self-contained law, covering all provisions that may be included in national legislation. Nevertheless, the Model Law will essentially serve as a guide for States wishing to adopt plant variety protection legislation; those States will indeed have to take account of national circumstances, in particular of their needs and wishes, of the existing laws and regulations to which the law on the protection of new varieties of plants must conform or to which it may refer, and of their legislative practice.

ii) The commentary, which will be drafted at a later stage and submitted to the Administrative and Legal Committee, will indicate which provisions are indispensable; where necessary, it will propose alternatives for certain provisions and set out the circumstances under which a particular alternative would be preferable.

iii) The draft obviously had to be based upon choices as to the solutions set out therein. The draft does not pretend to set out the ideal solutions. However, it includes solutions which have demonstrated their value in the

current member States; the other proven solutions will be described in the commentary. The draft also draws some elements from the WIPO Model Law for Developing Countries on Inventions.

iv) More specifically, the draft does not intend to take a position on the form of the breeder's right (special title of protection or plant patent), or on the administrative organization of protection.

v) The draft contains provisions which would enable a State adopting the Model Law as national law to conform to the TRIPS Agreement (concerning the latter, see document CAJ/34/3).

4. It is suggested that the new Model Law be drawn up, like its predecessor, by the Office of the Union "under its own responsibility," (see paragraph 12 of document CAJ/V/7) and that therefore the members of the Administrative and Legal Committee be invited to express opinions and give advice to the Office. It may be appropriate for this purpose that a drafting group be convened to progress the preparation of the Model Law.

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PART I

GENERAL PROVISIONS

CHAPTER I

PURPOSE AND SCOPE OF THE LAW

Article 1

Purpose of the Law

The purpose of this Law is to recognize and to ensure to the breeder of a new plant variety or to his successor in title a right, to be known as "breeder's right," under the conditions hereinafter defined.

Article 2

Reservation in Favor of International Treaties

[Alternative A]

Applicants for a breeder's right and holders of such a right may invoke the provisions of the most recent text ratified by the State of any treaty concluded between States, when the provisions of that treaty are more favorable to them than the provisions of this Law.

[Alternative B]

This Law is without prejudice to the application at national level of the most recent text ratified by the State of any treaty concluded between States and pertaining directly [or incidentally] to the protection of new varieties of plants.

Article 3

Scope of the Law

- (1) This Law applies to all botanical genera and species.
- (2) It shall be applied progressively according to a calendar to be established in the Regulations to this Law.

CHAPTER II

DEFINITIONS

Article 11Definitions

For the purposes of this Law:

(i) "Council" means the Plant Breeders' Rights Council referred to in Article 121(1);

(ii) "Office" means the Plant Breeders' Rights Office referred to in Article 122(1);

(iii) "Minister" means the Minister who has the protection of new varieties of plants within his attributions;

(iv) "Regulations" means the implementing regulations to this Law;

(v) "Convention" means the International Convention for the Protection of New Varieties of Plants, in the most recent version ratified by the State;

(vi) "Union" means the International Union for the Protection of New Varieties of Plants;

(vii) "Contracting Party" means a State (other than the State*) or an intergovernmental organization party to the Convention;

(viii) "authority of a Contracting Party" means the authority entrusted with the execution of the law on the protection of new varieties of plants of that party;

(ix) "applicant" means the person who has filed an application for the grant of a breeder's right;

(x) "holder" means the holder of a breeder's right;

(xi) "protected variety" means a variety being the subject of a breeder's right.

(xii) "notice" means, unless otherwise required by the context, a communication by the Office to a party to a procedure before the Office.

* In this particular context, this is the State which is deemed to have adopted the Model Law. The phrase "the State" has the same meaning in other Articles of the Model Law.

Article 12

Notion of Variety

(1) For the purposes of this Law, "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 breeder's right 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.

(2)(a) The characteristics to be taken into account in the definition and distinction of varieties shall be determined by the Office upon the advice of the Council. The list may be amended in the light of developments in scientific and technical knowledge.

(b) The Guidelines for the Conduct of Tests for Distinctness, Homogeneity and Stability drawn up by the Union shall be duly taken into account.

(3)(a) A protected variety shall be defined by a denomination to which shall correspond an official description, and also an official sample kept in a collection.

(b) The official description set up when the breeder's right is granted may be extended or amended thereafter on the basis of developments in knowledge, without causing a change in the subject matter of protection.

Article 13

Notions of Material and Product

(1)(a) For the purposes of this Law, "propagating material" means the parts of plants intended for the production of new plants, the whole plants from which the said parts are produced, and the whole plants intended for cultivation by planting.

(b) This notion extends to seeds and vegetative propagating material of any kind, in particular to cell or tissue cultures for the production of plantlets, to cuttings, to layers, to grafts and to seed tubers.

(c) The base culture intended for the exploitation of a variety by a "microbiological" process shall be assimilated to propagating material.

(2)(a) For the purposes of this Law, "harvested material" means the product obtained from the cultivation of the variety, irrespective of whether the said product is in its raw form or conditioned or has undergone a first step of processing in accordance with the established practices of the trade.

(b) This notion extends more specifically,

(i) in the case of ornamental plants, to pot plants and to cut flowers and foliage and,

(ii) in the case of varieties used repeatedly for the production of another variety (hereditary components), to the propagating material of that other variety.

(c) The desired metabolite resulting from the exploitation of a variety by a "microbiological" process shall be assimilated to harvested material.

(3) For the purposes of this Law, "products made directly from harvested material" means the products that are so considered under the established practices of the trade.

PART II

SUBSTANTIVE LAW

CHAPTER I

CONDITIONS FOR THE GRANT OF A BREEDER'S RIGHT

Section I

Conditions Attaching to the Variety

Article 21

Conditions of Protection

(1) The breeder's right shall be granted where the variety is

- (i) new,
- (ii) distinct,
- (iii) homogeneous and
- (iv) stable.

(2) The variety shall also be designated by a denomination pursuant to the provisions of Article 114(1) et seq.

Article 22

Novelty

(1) The variety is new if, at the date of filing of the application or, where relevant, at the priority date, propagating material 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 his successor in title, for purposes of exploitation of the variety,

- (i) in the territory of the State for longer than one year and,
- (ii) in a territory other than that of the State for longer than four years or, in the case of trees and grapevine, for longer than six years.

(2) Novelty shall not be lost through a sale or disposal to others

(i) which is the result of an abuse to the detriment of the breeder or his successor in title,

(ii) which forms part of an agreement for the transfer of the right in the variety,

(iii) which forms part of an agreement under which a third party increases the supplies of propagating material of the variety concerned on behalf of the breeder or his successor in title, provided that the multiplied supply comes again under the control of the latter,

(iv) which forms part of an agreement under which a third party undertakes field tests or laboratory trials, or small-scale processing trials, with a view to evaluating the variety,

(v) which forms part of the fulfilment 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

(vi) which involves harvested material being a by-product or a surplus product of the creation of the variety or of the activities referred to in items (iii) to (v) of this Article, provided that the said material is sold or disposed of anonymously (without variety identification) for purposes of consumption.

Article 23

Distinctness

(1) The variety is 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 relevant, at the priority date.

(2) Common knowledge may be established by reference to various factors such as: exploitation of the variety already in progress, grant of a breeder's right in the variety, entry of the variety in a catalogue of varieties admitted to trade or entry in the register of varieties kept by a recognized professional association, inclusion of the variety in a reference collection or precise description of the variety in a publication, including a patent document.

(3) The filing, in any country, of an application for a breeder's right 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 from the date of the application, provided that the application leads to the granting of the breeder's right or the entry in the catalogue, as the case may be.

Article 24

Homogeneity

The variety is homogeneous 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 25

Stability

The variety is 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.

Section IIConditions Attaching to the PersonArticle 31Nationality, Place of Residence or Registered Office[Alternative A]

(1) The rights conferred by this Law may be acquired by

(i) nationals of the State and persons having their place of residence or registered office in the State,

(ii) nationals of Contracting Parties and persons having their place of residence or registered office in the territory of a Contracting Party, and

(iii) [Alternative 1] nationals of any State which, without being a Contracting Party, grants reciprocity to the State and persons having their place of residence or registered office in that State.

[Alternative 2] nationals of any State which, without being a Contracting Party, is a party to the agreement establishing the World Trade Organization (WTO).

(2) For the purposes of paragraph (1)(ii), above, "nationals" means, where the Contracting Party is a State, the nationals of that State and, where the Contracting Party is an intergovernmental organization, the nationals of the States which are members of that organization.

[Alternative B: no Article]

Article 32Agent

(1) Any person having neither residence nor registered office in the State may be party to an action instituted pursuant to this Law and assert rights deriving therefrom only if it has an agent having residence or an office in the State. The agent shall have the power to act on his principle's behalf before the Office and in legal proceedings relating to the protection of new varieties of plants.

(2) The appointment of an agent admitted to the Industrial Property Office shall not be mandatory.

(3) The Office may refuse to admit a person as agent where that person is guilty either of an infringement of the rules of conduct of the profession of industrial property agent or attorney, or of acts contrary to probity, honor or scruples.

CHAPTER II

ENTITLEMENT TO PROTECTION

Section I

In General

Article 41

Principles

(1) The entitlement to the protection of a variety shall belong to the person who has bred, or discovered and developed, the variety (breeder).

(2) The entitlement to protection shall be inheritable and transferable by any means admitted in law. It may be divided.

Article 42

Multiple Breeders

(1) Where two or more persons have originated a variety together through joint efforts, whether simultaneous or consecutive, the entitlement to protection shall belong to those persons jointly. Subject to any agreement to the contrary between the joint breeders, their shares shall be equal.

(2) Where two or more persons have originated the same variety independently, the entitlement to protection shall be governed by the provisions of Article 23.

Section II**Employee's, etc. Breeding****Article 51****Applicable Law**

(1) The entitlement to the protection of a variety originated in the State in execution of an employment or commission contract shall be governed by the provisions of this Section.

(2) The entitlement to the protection of a variety originated in another State under the aforesaid circumstances shall be governed by the provisions of the law of that State. This Section shall apply in the absence of such provisions.

Article 52**Employee's Breeding**

(1)(a) Notwithstanding the provisions of Article 41(1), where a variety is originated by an employee, or with his assistance, in execution of an employment contract, the entitlement to protection shall belong, in the absence of contractual provisions that are more favorable to the employee, to the employer in the following cases:

(i) where the employment contract comprises a mission of creative breeding, or of assistance to creative breeding, which has been explicitly entrusted to the employee;

(ii) where the employment contract comprises a mission of maintenance breeding and the variety derives directly from such breeding;

(iii) where the employment contract comprises a mission of studies and research and the variety derives directly from those studies and research.

(b) The employee shall have the right to equitable remuneration, unless such remuneration is deemed to be included in his salary and other elements of his compensation. He shall have the right to a special remuneration when the economical value of the variety is much greater than that which the parties could reasonably expect.

(2) [Alternative A] (a) Notwithstanding the provisions of Article 41(1), where a variety is originated by an employee either in execution of an employment contract not falling under the provisions of the foregoing paragraph or in the field of activity of the employer by reason of knowledge or use of technology or specific means of the employer or of data acquired by the employer, the entitlement to protection shall also belong, in the absence of contractual provisions that are more favorable to the employee, to the employer.

(b) The employee shall have the right to equitable remuneration, which shall take into account his salary, the economic value of the variety and any profit accruing to the employer from the variety.

(c) The employee who originates a variety under the circumstances referred to in subparagraph (a) shall inform his employer thereof and the latter shall confirm receipt. The employee and the employer shall refrain from any act which would compromise the granting of a breeder's right in the variety.

[Alternative B] (a) Where a variety is originated by an employee either in execution of an employment contract not falling under the provisions of the foregoing paragraph or in the field of activity of the employer by reason of knowledge or use of technology or specific means of the employer or of data acquired by the employer, the entitlement to protection shall belong to the employee.

(b) However, the employer shall have the right to have assigned to him the ownership of the variety; the entitlement to the breeder's right shall then be deemed to have belonged to him from the outset and the employee shall have a right to equitable remuneration, which shall take into account his salary, the economic value of the variety and any benefit accruing to the employer from the variety.

(c) Where the employer has not asserted the faculty provided for in the foregoing subparagraph, he shall be entitled to have assigned to him the enjoyment of all or some of the rights in the breeder's right protecting his employee's variety.

(d) [Identical with subparagraph (c) of alternative A]

(3) Any contractual provision which is less favorable to the breeder employee than the provisions of this Article shall be null and void.

(4) There shall be established a conciliation board to hear, at the request of the parties or of any one of them, any dispute arising from this Article.

(5) The implementing rules for this Article shall be laid down in special regulations.

Article 53

Breeding in Execution of Commission

The provisions of Article 52(1) shall apply mutatis mutandis to varieties originated by a person, or with his assistance, in execution of a commission.

Section III**Position of Applicant****Article 61****Presumption of Title**

The applicant shall be considered, pending proof to the contrary, as being entitled to protection.

Article 62**Judicial Assignment of the Application for a Breeder's Right
or of the Breeder's Right**

(1) Where an application for a breeder's right has been filed by a person not entitled to protection, the entitled person may bring an action for the assignment of the application or, if already granted, of the breeder's right.

(2) The action shall be barred after five years from publication of the grant of the breeder's right; any conciliation proceedings under Article 52(4) shall suspend the limitation of the action. An action brought against a defendant who has acted in bad faith shall not be subject to any limitation.

(3)(a) Where the action succeeds, any rights granted by the defendant to third parties on the basis of the application or, where relevant, the breeder's right shall become null and void.

(b) However, the holder of any exploitation right acquired in good faith who has taken effective and serious measures with a view to exercising his right before the date of the notification of the action or, failing such notification, of the decision may perform or continue to perform the exploitation acts resulting from the measures taken, subject to payment of equitable remuneration to the entitled person.

CHAPTER III

THE OBLIGATIONS OF THE HOLDER

Article 71

Maintenance and Exploitation of the Variety

(1)(a) The holder shall have the obligation to maintain the protected variety or, where relevant, its hereditary components for the whole duration of the right.

(b) On request of the Office, he shall furnish to the Office or to an authority designated by the latter, within the prescribed period, the information, documents or material deemed necessary for verifying the maintenance of the variety.

(2) Furthermore, the holder shall have the obligation to exploit the variety to the extent required by public interest and under conditions that are compatible with the said interest.

Article 72

Supply of Samples

(1) At the request of the Office, the holder shall provide the Office or any authority designated by the latter, within the prescribed period, with samples of the protected variety or, where relevant, of its hereditary components for the purpose of

(i) establishing or renewing the official sample referred to in Article 12(3)(a), above,

(ii) undertaking the comparative examination of varieties for the purposes of protection or entry of varieties in the Official Catalogue of Varieties Admitted to Trade, or

(iii) conserving the genetic heritage.

(2) The holder may be required to ensure himself the maintenance of the official sample.

(3)(a) For the whole duration of the breeder's right, access to the protected variety through the genetic resources repository shall be subject to prior consent by the holder where the request for a sample is made by a person from a country which does not protect varieties of the genus or species to which the variety belongs.

(b) Access to hereditary components held in such a repository pursuant to this Law shall be subject, at any time and whatever the place of residence of the person requesting a sample, to prior consent by their breeder or the successor in title of their breeder.

Article 73**Marking and Notice of Protection****[Alternative A]**

(1) The holder shall have the obligation to indicate on the packaging and labels used in relation to propagating material put on the market, and also in his business papers and his advertisements, that the variety is protected, unless circumstances prevent him from doing so, cause unreasonable costs or make the marking undesirable for other reasons.

(2) The mention of protection may be explicit (for instance, "variety protected [in the State], Law of ..." or "protected variety") or cursory, through the letter P in a circle being affixed to the variety denomination.

(3) Notice of protection may also be given in relation to harvested material.

[Alternative B: no Article]

CHAPTER IV

THE RIGHTS OF THE HOLDER

Article 81

Principle

(1) The breeder's right shall cover the varieties specified in Article 82 and its effect shall be that the authorization of its holder is required for the accomplishment of any of the acts specified in Article 83 in respect of the elements specified in Article 84, this within the limits provided for in this Chapter.

(2) The holder may make his authorization subject to conditions and limitations.

Article 82

Varieties Covered by the Breeder's Right

(1) The breeder's right shall be in respect of the protected variety.

(2) The right shall also be in respect of plant groupings which are not clearly distinguishable from the protected variety, irrespective of whether such groupings are considered as varieties by the man of the art ("non-distinct plant groupings").

(3)(a) The right extends

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

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

(b) [Alternative A] A variety is essentially derived from another variety ("the initial variety") if

(i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety,

(ii) it is clearly distinguishable from the initial variety but does not differ from it significantly and

(iii) except for the differences which result from the act of derivation, it 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].

[Alternative B] A variety is essentially derived from another variety ("the initial variety") when, on the basis of its characters, it is considered by the man of the art with average knowledge of the particular features of the species in question as essentially incorporating the whole genotype or combination of genotypes of the initial variety.

(c) The genotypic modification leading to an essentially derived variety may be brought about without alien genetic material, or through limited addition, subtraction or substitution. The selection of a natural or induced mutant, or of a somaclonal variant, the selection of variant individual from plants of the initial variety, backcrossing and the transformation by genetic engineering are typical methods for originating essentially derived varieties.

(d) [Alternative A] The breeder's right confers, in addition, on its holder the faculty of causing a denomination to be registered for varieties referred to in subparagraph (a), above, according to the procedure provided for in Article 145.

[Alternative B: no provision]

Article 83

Acts Subject to the Breeder's Right

- (1) The breeder's right shall relate to
 - (i) production or reproduction (multiplication),
 - (ii) conditioning for purposes of propagation,
 - (iii) offering for sale,
 - (iv) selling or other marketing,
 - (v) exporting,
 - (vi) importing, and
 - (vii) stocking for any of the purposes mentioned in (i) to (vi), above.
- (2) The breeder's right shall not extend to
 - (i) acts done privately and for non-commercial purposes,
 - (ii) acts done for experimental purposes, and
 - (iii) acts done for the purpose of breeding other varieties and, except in the cases referred to in Article 82(2) and (3)(a), acts referred to in the foregoing paragraph done with such other varieties.

Article 84

Elements Covered by the Breeder's Right

- (1) The breeder's right shall relate
 - (i) to propagating material,

(ii) to harvested material, unless the holder has had reasonable opportunity to exercise his right at the preceding stage, in relation to the propagating material used to obtain the said harvested material, and

(iii) subject to paragraph (2), to the products made directly from harvested material, unless the holder has had reasonable opportunity to exercise his right at a preceding stage, in relation to the propagating material or the harvested material.

(2) The breeder's right may only extend to the aforesaid products when it appears that plant breeding will not be sufficiently remunerated through the exercise of the breeders' rights at the preceding stages. The species and, where relevant, the products to which the extended right applies shall be defined by the Minister, upon the advice of the Council, in an order.

Article 85

Derogation in Favor of Farmers

(1) It shall be permitted to farmers to use, for purposes of propagation, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety, an essentially derived variety (Article 82(3)(a)) or a non-distinct plant grouping (Article 82(2)).

(2) Paragraph (1) shall only apply to species that are considered to be agricultural crops [Alternative A: ...] [Alternative B: and are specified by the Minister, upon the advice of the Council, in an order].

(3) The Minister shall, upon the advice of the Council, take any measures that are necessary for the safeguarding of the legitimate interests of the breeders. Those measures may include

(i) a limitation of the quantity of self-produced seeds or plants in absolute terms or in relative terms, in particular by comparison with the quantity of commercial seeds or plants initially purchased by the farmer, or a limitation of the number of generations of self-production, and

(ii) an obligation to pay equitable remuneration to the holder, under the terms specified by the Council and approved by the Minister.

(4) The remuneration referred to in paragraph (3)(ii), above, shall be paid by farmers on their own initiative.

Article 86

Exhaustion of the Breeder's Right

The breeder's right shall not extend to acts concerning elements, as defined in Article 84(1), which have been sold or otherwise marketed by the holder or with his consent in the territory of the State, or any elements derived from the aforesaid elements, unless such acts

(i) involve further propagation of the variety in question or

(ii) 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 genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

Article 87

Restrictions on the Exercise of the Breeder's Right

(1) The breeder's right shall be independent of any measure taken by the State to regulate within its territory the production, certification and marketing of material of varieties, or the importing or exporting of such material.

(2) However, it shall be granted without prejudice to any provision adopted on the grounds of ordre public, public security, the protection of human, animal or plant health, the protection of the environment or the protection of industrial or commercial property, or with a view to safeguarding competition; its exercise may only be restricted for reasons deriving from the aforesaid provisions, provided that public interest requires a restriction.

(3) Any restriction made on the basis of the foregoing provisions with a view to authorizing a third party to perform any one of the acts for which the authorization of the holder is required shall be subject to payment, by the beneficiary of the restriction, of equitable remuneration to the holder.

Article 88

Rights Over the Variety Denomination

(1) The breeder's right confers on its holder a right over the variety denomination.

(2)(a) For as long as the variety is exploited, it shall be prohibited to use, in the territory of the State [or of a Contracting Party], a designation which is identical with the variety denomination, or so similar as to create a risk of confusion with it, in relation to another variety of the same species or a closely related species. The prohibition shall remain in force when the variety ceases to be exploited, in the event that the denomination has acquired particular significance in relation to the variety.

(b) The aforesaid prohibition shall also apply to [Alternative A, linked with Alternative A for Article 82(3)(d): denominations registered pursuant to the procedure provided in Article 145 and] [Alternative B, linked with Alternative B for Article 82(3)(b): -] denominations registered in the Contracting Parties.

(3)(a) Any person who offers for sale, sells or otherwise markets propagating material of the protected variety shall be obliged to use the denomination of that variety.

(b) [Alternative A] Where it is customary to specify the variety in the trade with harvested material, any person who offers for sale, sells or otherwise markets harvested material of a protected variety shall also be obliged to use the denomination of that variety.

[Alternative B] Any person who offers for sale, sells or otherwise markets a product of the protected variety shall be obliged to use the denomination of that variety when the variety must be specified in accordance with other provisions in law or in response to a request made by an authority, by the purchaser or by any person having a legitimate interest.

(c) The aforesaid obligations shall also apply to the varieties referred to in Article 82(3)(a) when they have been given a denomination.

(4) The obligation to use the denomination shall not end with the breeder's right which gave rise to it.

(5) Prior rights of third parties shall not be affected.

(6) It shall be permitted to associate a trademark, trade name or other similar indication with the registered variety denomination, in the trade with the variety, subject to the denomination remaining easily recognizable.

Article 89

Duration of the Breeder's Right; Provisional Protection

(1) The breeder's right shall expire at the end of the twentieth calendar year following the grant; for trees and grapevine, it shall expire at the end of the twenty-fifth year.

(2) Subject to Article 103, the applicant shall enjoy all rights provided by this Chapter as from the filing of the application.

CHAPTER V

THE BREEDER'S RIGHT AS AN OBJECT OF PROPERTY

Section IIn GeneralArticle 91Transfer of Property

- (1) The breeder's right shall be inheritable and transferable by any means admitted in law, including before it is granted. It may be divided.
- (2) The voluntary transfer shall be executed in writing on pain of nullity.

Article 92Special Provisions on Joint Ownership

- (1) [Alternative A: no provision]

[Alternative B] Any joint owner who wishes to assign his share shall offer it first to the other joint holders at reasonable conditions. Where the latter do not accept the offer within a period of three months, the share may be assigned to a third party.

- (2)(a) Where a joint holder wishes to renounce his share, the latter shall accrue to the other joint owners in proportion of their rights, except where otherwise agreed as to the sharing.

(b) The joint owners may not withdraw the application or renounce the breeder's right otherwise than in common.

- (3)(a) Subject to any agreement to the contrary, each joint owner may freely exploit the variety. Each joint owner may also institute infringement proceedings subject to notifying the action to the others.

(b) The joint owners may not conclude license contracts otherwise than in common.

Article 93Rights in rem

The breeder's right may be given in pledge or be the subject of any other rights in rem.

Article 94Levy of Execution

- (1) The patrimonial rights in a breeder's right may be levied in execution.

(2) The execution shall be subject to the provisions of the Code of Civil Procedure relating to movable property.

(3) The execution shall be notified to the Office for entry in the Register of Applications or the Register of Rights, as the case may be, and to any person holding rights in the breeder's right. Any change in the rights in the breeder's right occurring after entry may not be held against the creditor.

Article 95

Effect Against Third Parties

(1) Any act by which the rights in an application or a breeder's right are transferred or modified shall not affect the rights acquired by third parties before the date of the act.

(2) Any act by which the rights in an application or a breeder's right are transferred or modified, including the judicial assignment (Article 62), shall have no effect against third parties unless it has been entered in the Register of Applications or the Register of Rights, as the case may be.

(3) However, an act shall have effect before its entry against third parties who acquired rights after the date of the act but had knowledge of the act when acquiring those rights.

Section II**Exploitation Licenses****Article 101****Contractual Licenses**

(1) The applicant or the holder may grant to a third party an exclusive or non-exclusive right of exploitation relating to all or part of the rights provided for in Chapter IV of this Part (license).

(2) The license contract shall be in writing.

(3)(a) The exclusive license shall be entered in the Register of Applications or the Register of Rights, as the case may be, and a notice thereon shall be published in the Gazette. The non-exclusive license may be the subject of an entry and a publication at the request of either party to the contract.

(b) The license shall not have any effect against a third party who has acquired rights in the breeder's right in good faith unless it is entered.

Article 102**Prohibited Clauses**

(1) The license contract may not include express or implicit clauses imposing restrictions on the licensee which do not derive from the rights conferred by the breeder's right or are not justified by considerations of optimal exploitation of the variety or safeguarding of the breeder's right.

(2) Prohibited clauses shall be null and void.

(3) The provisions of competition law shall remain unaffected.

Article 103**Effects of the Breeder's Right not Being Granted
or Being Terminated Prematurely**

(1) Any license contract based upon an application shall automatically expire when the application is not granted; any license contract based upon a breeder's right shall automatically expire when the right is terminated prematurely.

(2)(a) The royalties paid shall remain with the licensor insofar as [Alternative A] this is equitable [Alternative B] the licensee has benefitted from the license.

(b) The licensee shall have a right to equitable compensation for the measures taken in vain with a view to exploiting the variety on the basis of the license contract. He shall also be entitled to the compensation of any damage where the licensor has failed to take due care.

Article 104

Licenses of Right

- (1) The holder may file with the Office a public offer of voluntary license.
- (2) The public offer shall be entered in the Register of Rights and published in the Gazette.
- (3) The Office shall grant an exploitation right, under the conditions and within the limits specified in the offer, to any person who places a request and offers sufficient technical and economic guarantees.
- (4) The public offer may be withdrawn at any time. The withdrawal shall also be entered in the Register of Rights and published in the Gazette.
- (5) The withdrawal shall not affect the exploitation rights granted pursuant to paragraph (3).

Article 105

Compulsory Licenses Relating to the Protected Variety

[Alternative A]

- (1) Where it is established that the holder fails to comply with the obligation put on him under Article 71(2) and that he cannot adduce any legitimate reason for his failure, the Minister, upon the advice of the Council, shall declare the variety to be of public use.
- (2) The Council shall elaborate a public offer of compulsory license after having heard the holder. The offer shall set out, in particular, the number and geographic extent of the licenses that may be granted, the acts covered by the licenses, the duration of the licenses, the remuneration to be paid to the holder and the conditions of payment, and any other condition attaching to the licenses. It shall also set out whether and to what extent sublicenses may be granted.
- (3) The public offer shall be entered in the Register of Rights and published in the Gazette.
- (4) The Office shall grant an exploitation right, under the conditions and within the limits specified in the offer, to any person who places a request and offers sufficient technical and economic guarantees. The right shall not be assignable and cannot be exclusive.
- (5) The holder shall have the obligation to supply the holder of an exploitation right with such plant material, information and documents as are necessary for the exercise of the exploitation right.
- (6) The parties may request revision of the conditions attaching to the exploitation right with a view to having them adjusted to new circumstances. The Council shall decide. The request for revision may only be made on the expiration of a period of one year from the granting of the exploitation right, or from the previous request.

[Alternative B]

(1) The Office shall, after having heard the Council, grant an exploitation right to any person who has placed a request, but only on grounds of public interest.

(2) When granting the exploitation right, the Office shall in particular set out the acts covered by the license, the duration of the license, the remuneration to be paid to the holder and the conditions of payment, and any other condition attaching to the license.

(3) The holder shall have the obligation to supply the holder of the exploitation right with such plant material, information and documents as are necessary for the exercise of the exploitation right.

(4) [Identical with paragraph (6) of Alternative A]

Article 106Compulsory Licenses Relating to Other Varieties[Alternative A, linked with Alternative A for the preceding Article]

(1) Where it is established that the holder does not grant the authorizations which are necessary for the exploitation of a variety referred to in Article 82(3)(a) in a manner which meets the requirements of public interest described in Article 71(2), and that he cannot adduce any legitimate reason for his refusal, the Minister shall, upon the advice of the Council, impose a restriction on the exercise of the breeder's right.

(2)(a) Where the aforesaid variety is the subject of a breeder's right in favor of a third party and the findings are made on the initiative of that party, the Council shall elaborate a personal offer of compulsory license.

(b) The provisions of paragraphs (2) to (6) of the preceding Article shall apply mutatis mutandis; however, the offer may be subject to the obligation put on the third party to offer a cross-license.

(3) The other cases shall give rise to a public offer of compulsory license under the conditions provided for in paragraphs (2) to (6) of the preceding Article.

[Alternative B, linked with Alternative B for the preceding article: no Article]

CHAPTER VI

EXTINCTION OF THE BREEDER'S RIGHT

Article 111

Premature Termination

(1) The breeder's right shall be terminated before the expiry of the term provided in Article 89

(i) where the holder renounces it by a written declaration addressed to the Office, or

(ii) where an annual fee which has become due is not paid.

(2) In the first case, the termination date shall be the date indicated in the declaration, or failing this, the date of receipt of the declaration. In the second case, it shall be the due date of the fee.

Article 112

Nullity of the Breeder's Right

(1) The Office shall declare the breeder's right null and void when it is established

(i) that the variety was not new or distinct at the date of filing of the application or, where relevant, the date of priority (Articles 22 and 23),

(ii) that, where the grant of the breeder's right has been essentially based upon information and documents submitted by the applicant, the variety was not homogeneous or stable at the said date (Articles 24 and 25), or

(iii) that the breeder's right has been granted to a person who is not entitled to it and the entitled person has not brought an action for judicial assignment pursuant to Article 62 or has renounced to bring an action.

(2) Subject to any provision of this Law to the contrary, the breeder's right which has been declared null and void shall be deemed to have never been granted.

(3) Any person having a legitimate interest may file a request for annulment with the Office.

Article 113

Cancellation of the Breeder's Right

(1) The Office shall cancel the breeder's right when it is established that the holder failed to meet his obligation under Article 71(1)(a) and that the variety is no longer homogenous or stable.

(2)(a) Furthermore, the Office shall cancel the breeder's right when

(i) the breeder does not meet a request made by the Office under Article 71(1)(b) for the purpose of verifying the maintenance of the variety, [or a request made by the Office under Article 72(1),]* or

(ii) the breeder does not propose within the prescribed period, where the denomination of the variety is cancelled, another, suitable denomination (Article 144).

(b) The breeder's right may only be cancelled after the holder has been formally put on notice to meet the obligation put on him. The Office may, within the limits of its discretionary power, grant an extension of the time limit.

(3) The cancellation shall take effect on the date of its entry in the Register of Rights.

Article 114

Publication of the Extinction of the Breeder's Right

The extinction of the breeder's right and its reason shall be entered in the Register. They shall also be published in the Gazette.

* This sanction is not provided for by the Convention, but is logical!

PART III

ORGANIZATION AND PROCEDURE

CHAPTER I

ORGANIZATION, COMPETENCE AND GENERAL RULES OF PROCEDURE

Article 121

Plant Breeders' Rights Council

- (1) The Minister for [...] shall appoint a Plant Breeders' Rights Council comprising representatives of the various circles having an interest in protection.
- (2) The Council shall be presided over by a [Magistrate of the Court of Appeal of ...] [high official of the Ministry].
- (3) The conditions for the appointment of the members of the Council and for the functioning of the Council shall be determined in the Regulations.
- (4) The Council shall give advice and make proposals to the Minister, assist through its advice the Office in the implementation of this Law and carry out the other tasks which are specifically entrusted to it by this Law.

Article 122

Plant Breeders' Rights Office

- (1) [Alternative A] The Plant Breeders' Rights Office is hereby established as a public authority. It shall be under the supervision of the Minister for [...].

[Alternative B] [An existing institution, in particular the authority competent for the Official Catalogue of Varieties Admitted to Trade] shall operate as the Plant Breeders' Rights Office.

- (2) The Office shall have a director appointed by the Minister, upon the advice of the Council.
- (3) The composition of the Office and its administrative and financial rules shall be determined in the Regulations.
- (4) The Office shall grant breeders' rights and carry out the related administrative duties.

Article 123

Examination Section

- (1) [Alternative A] An Examination Section shall be established within the Office to deal with the distinctness, homogeneity and stability of varieties. The Director may establish subsections for given botanical species or groups of botanical species.

[Alternative B] [An existing institution, in particular a research institute or the authority competent for the Official Catalogue of Varieties Admitted to Trade, hereinafter referred to as the "Examination Section"] shall be entrusted with the examination of varieties for distinctness, homogeneity and stability.

(2) [The Office] [The Examination Section, in agreement with the Office] may seek the assistance of third parties, including the applicants, and take into consideration the results of the examinations carried out abroad.

Article 124

Appeals

(1) An appeal shall lie against any individual decision taken pursuant to this Law.

(2) [Alternative A, linked with Alternative A for Articles 105 and 106] The [Administrative Tribunal] shall hear directly appeals against decisions taken by the Minister and the Council under Articles 105 et 106.

[Alternative B, linked with Alternative B for Articles 105 and 106: no provision]

(3) [Alternative A] (a) There shall be set up within the Office an Appeal Board to hear, under the conditions specified in the Regulations, appeals against decisions of the Office.

[Alternative B] An appeal shall lie against any decision of the Office with the [Appeal Board of the Patent Office] or, if the decision is on a matter of distinctness, homogeneity or stability, with the Technical Appeal Board set up within the Office under the conditions specified in the Regulations.

(4) A further appeal shall lie against the decisions of the Appeal Board[s] [with the Administrative Tribunal].

Article 125

Registers; Preservation of Files

(1) The Office shall maintain a Register of Applications and a Register of Rights.

(2) Subject to the safeguarding of trade secrets, any person having a legitimate interest may consult the registers and obtain extracts thereof.

(3) The Office shall preserve the originals or copies of the documents in the files until five years after the withdrawal or rejection of the application, or the extinction of the breeder's right, as the case may be.

Article 126

Gazette

- (1) The Office shall publish a Gazette.
- (2) [Alternative A] The detailed content of the Gazette shall be specified in the Regulations.

[Alternative B] The Gazette shall contain the following items:

- (i) Applications for the grant of a breeder's right;
- (ii) Applications for a variety denomination;
- (iii) Registration of new denominations for protected varieties;
- (iv) Withdrawal of applications for the grant of a breeder's right;
- (v) Rejection of applications for the grant of a breeder's right;
- (vi) Grant of breeders' rights;
- (vii) Changes in the persons (applicants, holders and agents);
- (viii) Extinction of breeders' rights;
- (ix) Licenses;
- (x) Official announcements.

Article 127

Fees

The administrative acts of the Office shall give rise to payment of a fee, under the conditions specified in the Regulations. The tariff of fees shall be set by order.

Article 128

Restitutio in integrum

(1) Where, in spite of having taken all due care in the particular circumstances, the applicant or the holder, or any other party to proceedings before the Office, has been unable to observe a time limit vis-à-vis the Office, his rights shall, upon request, be restored if his failure to observe the time limit has resulted directly in the loss of any right or means of redress provided by this Law.

(2) The request shall be submitted within two months after the cause of non-compliance has ceased to operate and, in any event, within one year following the expiry of the unobserved time limit. The request must be properly substantiated and must be accompanied by the fee for restitutio in integrum.

(3) The department competent to decide on the omitted act shall decide upon the request.

(4) Where the request is granted, the petitioner shall be given a time limit equal to the unobserved time limit, starting on the date of receipt of the notification of the decision, to perform the omitted act.

(5) Where the rights are restored, the petitioner may not assert his rights against any person who, in good faith, has engaged in, or taken effective and serious measures with a view to, exploitation in the period between the loss of the rights and the publication of the notice on the restoration of the rights.

CHAPTER II

THE APPLICATION

Section I

Application; Priority

Article 131

Form and Content of the Application

(1) Anyone wishing to have a variety protected shall file, in the prescribed manner, an application with the Office. The application fee shall be paid at the same time.

(2) The application shall, at pain of nullity, comprise at least the following elements:

(i) the name and address of the applicant and, where relevant, his agent;

(ii) the name and address of the breeder, if he is not the applicant;

(iii) the identification of the botanical taxon;

(iv) the denomination proposed for the variety, or a provisional designation (breeder's reference);

(v) where the priority of an earlier application is claimed, the Contracting Party with which the application has been filed and the filing date;

(vi) a brief description of the variety;

(vii) the proof of payment of the application fee.

(3) The detailed form and content of the application, and the documents to be attached, shall be specified in the Regulations.

Article 132

Correction of the Application; Filing Date

(1) Where the application is manifestly incomplete or incorrect, the Office shall request the applicant to correct it within thirty days from the date of receipt of the notice.

(2) Any application that is not corrected within the prescribed period shall be deemed not to have been filed.

(3) Any application that is prima facie complete and correct shall be given a filing date. The filing date shall be taken to be the day on which the information referred to in Article 131(2) has been received by the Office.

Article 133Priority

(1) The applicant may benefit from the priority of an earlier application that has been duly filed for the same variety by himself or by his predecessor in title with the authority of a Contracting Party.

(2)(a) The priority shall be expressly claimed in the application filed with the Office. It may only be claimed within a period of twelve months from the date of filing of the first application. The day of filing shall not be included in the period.

(b) Where the application filed with the Office is preceded by several applications, priority may only be based on the earliest application.

(3)(a) In order to benefit from the right of priority, the applicant shall furnish, within three months from the filing date referred to in Article 132(3), to the Office a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that application was filed.

(b) The Office may request that a translation of the first application, or of some documents which constitute the first application, be produced within three months from the date of receipt of the notice.

(4)(a) The effect of priority shall be that, with respect to the conditions of protection attaching to the variety (Articles 21 to 25), the application shall be deemed to have been filed at the date of filing of the first application.

(b) Furthermore, the applicant shall be entitled to request that the examination of the variety be deferred by up to two years from the date of expiry of the priority period (three years from the date of filing of the first application). However, where the first application is rejected or withdrawn, the Office shall be entitled to initiate the examination of the variety before the date specified by the applicant; in such case, it shall give the applicant an appropriate period of time to furnish the information, documents or material required for the purpose of the examination.

Section II

Variety Denomination

Article 141

Purpose of the Denomination and Signs Which May Constitute a Denomination

- (1) The denomination shall be the generic designation of the variety.
- (2) The denomination may be comprised of any word, combination of words, combination of words and figures or combination of letters and figures, with or without an already existing meaning, on condition that such signs enable the variety to be identified.
- (3) Where a denomination has already been used for the variety in the State or a Contracting Party, or proposed or registered in a Contracting Party, that denomination alone may be used for the purposes of the procedure before the Office, unless there is a ground for refusal under Article 142. The synonyms, if any, shall be recorded in the Register of Applications and the Register of Rights.

Article 142

Grounds for Refusal

- (1)(a) Without prejudice to the provisions of the Convention and the rules established by the Union, registration as a denomination shall be refused for designations which
 - (i) do not conform to the provisions of Article 141,
 - (ii) are not suitable for the identification of the variety, in particular for lack of distinctiveness or for linguistic unsuitability,
 - (iii) are contrary to ordre public or morality,
 - (iv) consist exclusively of signs or indications which may serve, in the plant varieties and seeds sector, to designate the kind, quality, quantity, intended purpose, value, geographic origin or the time of production,
 - (v) consist exclusively of signs or indications which have become customary in the current language or in the bona fide and established practices of the plant varieties and seeds industry,
 - (vi) are liable to mislead or to cause confusion concerning the characteristics, value or geographic origin of the variety, or the links between the variety and persons such as the breeder or the applicant, or
 - (vii) are identical with, or so similar as to cause confusion to, a denomination which designates, in the territory of the State or a Contracting Party, an existing variety of the same species or a closely related species, unless the existing variety is no longer exploited and its denomination has not acquired any particular significance.

(b) The Office shall specify, by means of a general decision or a particular decision, the species which are closely related within the meaning of subparagraph (a)(vii), above.

(2)(a) Without prejudice to the provisions of the Convention and the rules established by the Union, registration as a denomination shall also be refused to designations which include an element which hampers or is liable to hamper the free use of the denomination in connection with the variety, in particular an element whose registration as a trademark for products bearing a relation to the variety would be refused under trademark law.

(b) Such designations shall be refused upon opposition of the holder of the rights in the said element.

Article 143

Registration Procedure

(1)(a) The denomination proposed for the variety whose protection has been applied for shall be submitted together with the application, using a special form.

(b) Subject to payment of a special fee and mention of a provisional designation in the application, the applicant may have the procedure for the registration of the denomination deferred. In such a case, the applicant shall submit the proposal for a denomination within thirty days from the date of receipt of the request addressed by the Office to him. Failure to submit the proposal within the prescribed period shall entail the application to be rejected.

(2) The proposal for a denomination shall be published in the Gazette, unless the Office has found a ground for refusal under Article 142(1)(a) or knows of a ground for refusal under Article 142(2)(a). The proposal shall also be communicated to the authorities of the Contracting Parties.

(3) Any interested person may, in the three months following the publication, file an opposition to the registration of the denomination based upon any one of the grounds for refusal under Article 142. The authorities of the Contracting Parties may submit observations.

(4) The oppositions and observations shall be communicated to the applicant, who shall have thirty days to reply.

(5)(a) The applicant may, on the basis of the oppositions and observations, submit a new proposal.

(b) Where the proposal for a denomination does not conform to the provisions of Article 142, the Office shall request the applicant to submit a new proposal for a denomination within thirty days from the date of receipt of the notice. Failure to submit the proposal within the prescribed period shall entail the application to be rejected.

(6)(a) The new proposal shall be subject to the examination, publication and registration procedure provided for in this Article.

(b) Where the new proposal does not conform to the provisions of Article 142, the Office may put the applicant on notice to propose a denomination conforming to the said provision. Failure to respond shall entail the application to be rejected.

(7) Where oppositions or observations have been received, the decisions of the Office shall be substantiated; they shall be notified to the parties. The refusal of a proposal for a denomination shall likewise be substantiated.

(8) The denomination shall be registered at the same time as the breeder's right is granted.

Article 144

Cancellation of a Denomination and Registration of a New Denomination

(1) The Office shall cancel the registered denomination

(i) when it is established that the denomination has been registered despite the existence of a ground for refusal under Article 142(1)(a),

(ii) when the holder so requests, adducing the existence of a legitimate interest, or

(iii) when a third party produces a judicial decision prohibiting the use of the denomination in connection with the variety.

(2) The Office shall inform the holder of the cancellation and request him to submit a proposal for a new denomination within thirty days from the date of receipt of the notice. If the variety is no longer protected, the proposal shall be made by the Office.

(3) The proposal for a new denomination shall be the subject of the examination and publication procedure provided for in Article 143. The new denomination shall be registered and published once approved.

Article 145

Registration of Denominations for Other Varieties

[Alternative A, linked with Alternative A for Article 82(3)(d)]

(1) The holder of a breeder's right who wishes to avail himself of the faculty provided for in Article 82(3)(d) shall

(i) file a request with the Office,

(ii) satisfy the Office that the variety concerned is, or will be, commercially exploited without a denomination having been established for it, and

(iii) indicate, if he knows it, the identity of the breeder of the variety.

(2) Where the request is granted and where the breeder is specified, the Office shall invite the latter to submit a proposal for a denomination within ninety days. Where the proposal is not submitted within the prescribed period, or where the breeder is not specified, the Office shall request the holder to submit a proposal within thirty days. Where the holder fails to reply within the prescribed period, the procedure shall be annulled.

(3) The proposal for a denomination submitted by the above-mentioned breeder or holder shall be subject to the examination and publication procedure provided for in Article 143. The denomination shall be registered and published once approved.

[Alternative B, linked with Alternative B for Article 82(3)(d): no Article]

CHAPTER III

PROCESSING OF THE APPLICATION

Section I

Examination of the Application

Article 151

Examination of the Application as to Form

(1) The Office shall examine the application which has been given a filing date under Article 132(3) as to form. The examination shall be made within thirty days from the date of filing or the date of correction under Article 132.

(2) Where there are still defects, the Office shall request the applicant to correct the application within thirty days from the date of receipt of the notice, unless the examination of the application as to substance under Article 152 reveals a ground for rejection of the application; the time limit may be extended on the basis of a properly substantiated request made by the applicant.

(3) Any application which is not corrected within the prescribed time limit shall be deemed not to have been made.

(4) Any application which is regular as to form shall be recorded in the Register of Applications.

Article 152

Documentary Examination of the Application as to Substance

(1) The Office shall examine the application as to substance. The examination shall be made within thirty days from the date of filing or the date of correction under Article 132, or the date of correction under Article 151 where the correction is material to the substance.

(2) The purpose of the examination is to check, on the basis of the information given in the application,

(i) that the application is receivable by reason of the botanical taxon to which the variety belongs (Article 3),

(ii) that the variety is new (Article 22), and

(iii) that the applicant is entitled under Article 31.

(3) Where the examination reveals an obstacle to the grant of the breeder's right, the application shall be rejected. The application and its rejection shall not be published; the decision to reject the application shall be recorded in the Register of Applications.

Article 153**Technical Examination of the Variety**

- (1) The variety shall undergo a technical examination for the purpose of
 - (i) verifying that the variety belongs to the stated botanical taxon,
 - (ii) establishing that the variety is distinct (Article 23), homogeneous (Article 24) and stable (Article 25),
 - (iii) establishing, where relevant, any fact that may be held against the novelty of the variety (Article 22), and
 - (iv) establishing the official description of the variety (Article 12).
- (2)(a) The examination shall be undertaken under the control of the Office and, where relevant, the Examination Section.
 - (b) Where growing tests or other necessary tests have been made by the authority of a Contracting Party or are under way with that authority, and where the results may be obtained by the Office and transposed to the agroclimatical conditions of the State, the examination shall be based on the said results.
 - (c) Where subparagraph (b) is not applicable, the examination shall be based upon growing tests and other necessary tests made
 - (i) by the Examination Section or by another institution on its behalf, or
 - (ii) by the applicant at the request of the Office.
- (3) The Office shall publish announcements in the Gazette to define, species by species, the practical conditions for the examination. In the case of minor species, those conditions shall be defined ad hoc.

Article 154**Information, Documents and Material Required for the Examination**

- (1) The applicant shall be required to furnish all the information, documents or material required for the purposes of the technical examination.
- (2) The Office shall publish announcements in the Gazette to define, species by species, the nature of the information, documents and material necessary for the purposes of the technical examination and the practical arrangements for their submission, in particular the quantity and quality of the plant material and the dates and place of delivery. In the case of minor species, the requirements shall be defined ad hoc.
- (3) Failure to submit the necessary information, documents or material shall entail the application to be rejected, unless the applicant adduces valid grounds for his failure.
- (4) The provisions adopted with a view to ensuring the protection of human, animal or plant health or the protection of the environment shall remain unaffected. In particular, it shall belong to the applicant to satisfy, where relevant, the formalities provided for by the legislation on the release of genetically modified organisms where the variety is to be grown by the Examination Section or another institution on its behalf.

Section II

Publication

Article 161

Publication of the Application

- (1) The application shall be published in the Gazette.
- (2) At least the elements referred to in Article 131(2) shall be published. Where the technical examination is based upon growing tests and other necessary tests made by the applicant, the detailed description of the variety shall also be published.
- (3) As from the publication of the application and subject to the protection of manufacturing and business secrets, any person having a legitimate interest may consult the file of the application.

Article 162

Objections to the Grant of the Breeder's Right

- (1) Any person may submit objections to the grant of a breeder's right to the Office. The objections shall be made in writing and substantiated. The documentary evidence shall be attached.
- (2) The objections may only be based upon the allegation that the variety which is the subject of the application is not new (Article 22), distinct (Article 23), homogeneous (Article 24) or stable (Article 25).
- (3) The Office shall set a time limit for the objections on the basis of the expected duration of the processing of the applications.

Article 163

Instruction of Objections

- (1) The objections shall be communicated without delay to the applicant. The latter shall have thirty days to state his views on the objections and state whether he intends to maintain his application, amend it or withdraw it; the period may be extended on the basis of a properly substantiated request of the applicant.
- (2) Where the applicant does not reply within the prescribed period, the application shall be deemed to have been withdrawn. Where he replies and maintains the application, with or without amendment, his reply shall be communicated to the author of the objection, who shall have thirty days to state his views on the reply and state whether he intends to maintain his objection or to withdraw it.
- (3)(a) Objections that have been maintained shall be examined
 - (i) independently of the normal processing of the application where they are based on the allegation that the variety lacks novelty, or
 - (ii) in the course of the technical examination of the variety where they are based on the allegation that the variety lacks distinctness, homogeneity or stability.

(b) The Office may decide on modified conditions for the technical examination of the variety to accommodate the instruction of the objection.

(4) The author of an objection shall be party to the procedure. He may be required to submit further information and documents in support of his objection, or plant material necessary for the technical examination. Article 154 shall apply mutatis mutandis.

Section III

Decision

Article 171

Grant of the Breeder's Right

(1) The Office shall grant the breeder's right where, upon the technical examination of the variety and, where relevant, the instruction of any objection based upon the allegation that the variety lacks novelty, it is established that the variety

(i) belongs to the botanical taxon specified in the application,

(ii) is distinct (Article 23), homogeneous (Article 24) and stable (Article 25), and

(iii) is new (Article 22).

(2) The Office shall defer the grant of the breeder's right as long as an action for the judicial assignment of the application (Article 62) is pending.

(3) The breeder's right shall be granted without guarantee of the State. A certificate shall be issued to the applicant. The certificate shall include a description of the variety.

Article 172

Rejection of the Application

The Office shall reject the application, and refuse to grant the breeder's right, where it is established that the conditions referred to in Article 171(1) are not fulfilled.

Article 173

**Publication of the Grant of the Breeder's Right
or the Rejection of the Application**

(1) The grant of the breeder's right, or the rejection of the application, shall be recorded in the Register of Applications and published in the Gazette.

(2) The breeder's right shall also be recorded in the Register of Rights. The description of the variety may be included in the Register by reference to the technical files of the Examination Section.

CHAPTER IV

KEEPING THE BREEDER'S RIGHT IN FORCE

Article 181Annual Fee

(1) The maintenance in force of the breeder's right shall be subject to payment of an annual fee.

(2) The fee shall fall due at the beginning of the calendar year to which it relates. It shall be payable by January 31.

Article 182Control of the Maintenance of the Variety

(1) The Office shall have the task of checking that the variety and, where relevant, its hereditary components are maintained for the whole duration of protection.

(2) Where there are indices that the variety is not maintained and where the suspicions are not lifted by the information and documents submitted by the holder pursuant to Article 71(1)(b), the Office shall order a technical control to be made under conditions specified by it. The technical control shall include growing tests and other tests in which the material submitted by the holder is compared to the official description or the official sample of the variety.

(3) Where the technical control is negative for the holder, the latter shall be heard before a decision to cancel the breeder's right is taken pursuant to Article 113(1).

PART IV

ENFORCEMENT

CHAPTER I

CIVIL LAW PROTECTION

Section I

General Principles

Article 191

Infringement

(1)(a) Any violation of the rights of the holder as defined in Articles 81 to 87 shall constitute an infringement.

(b) Shall also constitute an infringement

(i) the use of a designation in violation of Article 88(2), and

(ii) the failure to use a variety denomination in violation of Article 88(3).

(2) Acts which make it likely that infringement will occur shall constitute an imminent infringement.

(3)(a) Any infringement shall imply the liability of the person committing it.

(b) However, the offering for sale, sale or other form of marketing, and the stocking for these purposes of infringing foodstuffs, where such acts are committed by a person other than the producer of the foodstuffs, shall only imply the liability of the person committing them if such acts have been committed in full knowledge of the facts or through gross negligence.

Article 192

Persons Entitled to Sue

(1) Infringement proceedings shall be instituted by the holder.

(2)(a) The beneficiary of an exclusive license shall also be entitled to institute proceedings.

(b) The beneficiary of a license other than an exclusive license may institute proceedings if, after notice, the holder does not institute such proceedings.

(3) The holder shall be entitled to take part in the proceedings instituted by a licensee. The licensee shall be entitled to take part in the proceedings instituted by the holder in order to obtain compensation for an injury he has personally sustained.

Article 193**Right to Sue Before the Grant of the Breeder's Right**

- (1) The holder may bring an action for a report, for a restraining injunction, for an injunction for the elimination of the unlawful situation or for damages against any party presumed liable to whom a true copy of the application for the grant of a breeder's right has been served.
- (2) The action for a restraining injunction or the elimination of the unlawful situation may not be brought unless the petitioner furnishes securities to provide compensation for any prejudice suffered by the defendant if the infringement proceedings are subsequently held to be unfounded or if the breeder's right is not granted.
- (3) The proceedings shall be stayed in respect of an action for damages until the breeder's right is granted.

Article 194**Special Courts**

- (1) Any civil litigation arising out of this Law shall fall within the jurisdiction of the [district courts] specified in the Regulations and of the corresponding courts of appeal.
- (2) The Regulations shall also specify the areas for which the said courts shall have jurisdiction.

Article 195**Jurisdiction**

- (1) The actions provided for under this Law shall be brought before the judge of the defendant's place of residence or registered office in the State, or the judge of the place where the act has been committed or where the result was produced.
- (2) Where the action is brought by a third party against an applicant or a holder who has no place of residence or registered office in the State, the judge of the place of business of the agent recorded in the Register of Applications or the Register of Rights shall be competent to hear the case.
- (3) Where more than one place is eligible, the competent judge shall be the one before whom the action is initiated first.

Article 196**Arbitration**

The provisions of this Chapter shall not prevent recourse to arbitration [as provided for in Articles ... of the Civil Code].

Section II

Provisional Measures

Article 201

Evidence of Proof

(1) The aggrieved party shall have the possibility of furnishing proof by any means whatsoever of the infringement of which he claims to be a victim.

(2)(a) Where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, the judge shall have the authority to order the opposing party to produce the evidence in its control.

(b) Where a party refuses without good reason to produce the said evidence, or does not provide it within the prescribed period, or significantly impedes a procedure relating to the enforcement of the breeder's right, the judge shall have the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to him, including the complaint or the allegation presented by the party adversely affected by the denial of production, subject to providing the parties an opportunity to be heard on the allegations or evidence.

(3) The judge may order such measures of investigation as he deems fit, including the appointment of experts.

Article 202

Bailiff's Report

(1) The aggrieved party may apply to the President of the District Court of the place of the presumed infringement for an authorization to direct any bailiffs, accompanied by experts of his own choice, to proceed with a detailed description, with or without effective seizure,

(i) of the allegedly infringing propagating material, harvested material or products made directly from harvested material ("elements"),

(ii) of the means used for the production or making of the said elements, and

(iii) of the products and means which are prima face evidence of an imminent infringement,

and to carry out any enquiry required to ascertain the origin, nature and scope of the infringement.

(2) The President of the Court shall rule in summary proceedings, after summarily investigating the matter and, where advisable, hearing the person against whom the action was taken. That person shall not be heard where there is a danger that any delay may lead to a loss difficult to make good to the aggrieved party or to the destruction of the evidence.

(3) The President of the Court may make the report subject to a security on the part of the plaintiff.

(4) Where a report has been ordered before proceedings have been instituted, the plaintiff shall have twenty working days to bring the action; this term may be extended by the President of the Court, in the order authorizing the report or in an order given at the request of the plaintiff made within three working days from the report, when an in-depth examination of the allegedly infringing elements is necessary. The report shall automatically be null and void when the action is not brought within the prescribed period.

Article 203

Prohibition of Seizure

Notwithstanding the foregoing Article, allegedly infringing elements may only be described, and may not be seized, in the period when they appear within the enclosures of an official or officially recognized exhibition, or are in transit to such exhibition.

Article 204

Information on Third Parties

(1) The judge shall have the authority to order the presumed infringer to inform the aggrieved party of the origin and distribution channel of the infringing elements, in particular of the producer, the supplier, the prior owners of the elements and the clients, and also of the quantity of elements that has been produced, delivered or ordered.

(2) Where the infringement is likely, the order may be given in summary proceedings.

Section III

Civil Measures

Article 211

Restraining and Elimination

(1) The aggrieved party may bring an action for a restraining injunction or an injunction for the elimination of the unlawful situation.

(2)(a) The injunction shall be granted where the infringement, whether committed in full knowledge of the facts or through negligence, involves

(i) propagating material, or

(ii) the variety denomination.

(b) The judge shall have discretion in the other cases.

(3) The injunction may include a penalty of a daily fine.

(4)(a) Where proceedings are brought before the Court, the President of the Court, acting and ruling in summary proceedings, may give a provisional order where the substantive proceedings appear well-founded and are instituted within a short time of the day on which the aggrieved party became aware of the facts on which the proceedings are based.

(b) The provisional restraining injunction or the provisional injunction for the elimination of the unlawful situation may be made subject to the furnishing by the plaintiff of securities to provide compensation for any prejudice suffered by the defendant if the infringement proceedings are subsequently held to be unfounded.

(c) The provisional authorization to continue to perform the allegedly infringing acts may be made subject to the furnishing by the defendant of securities to provide compensation of the aggrieved party if the infringement proceedings are subsequently held to be founded.

Article 212

Damages

(1) The aggrieved party may bring an action for damages. The amount of the damages need not be indicated in the plaintiff's pleadings.

(2)(a) Damages shall be granted where the infringement has been committed in full knowledge of the facts or through gross negligence.

(b) The infringer shall be deemed to have acted in full knowledge of the facts where he holds a license granted by the holder [Alternative A, linked with Alternative A for Article 73: or where the infringement is based upon propagating material or harvested material marked pursuant to Article 73] [Alternative B, linked with Alternative B for Article 73: -].

(3)(a) In the event of slight negligence, the judge may fix, in lieu of damages, an indemnity within the limits of the damage to the injured party and the profit which has accrued to the infringer, provided that the former exceeds the latter.

(b) However, the indemnity shall not be less than double the royalty which would have been charged on the basis of a license contract concluded on reasonable conditions.

(4) Damages shall be granted irrespective of the circumstances of the infringement where the goodwill of the variety has been affected as a result of inadequate exploitation by the infringer.

Article 213

Forced Transfer and Destruction

(1) At the request of the aggrieved party, the judge may order that the infringing elements which are in the possession or ownership of the infringer be remitted to him and become his property, against payment of the production cost reduced, where relevant, by any award granted as compensation.

(2) At the request of the injured party, the judge may order that the infringing elements which are in the possession or ownership of the infringer be destroyed, without compensation of any sort, where, in view of the circumstances, this is necessary to ensure the discontinuance of the infringement.

Article 214

Other Remedies

Claims deriving from other statutory provisions shall remain unaffected.

CHAPTER II

PENAL LAW PROTECTION

Article 221

Penalty

(1) Any infringement committed in full knowledge of the facts shall constitute an offense punishable by a fine of ... or imprisonment of ... The attempt to infringe and the contribution to an infringement shall also be punishable.

(2) In the case of repetition, the penalties shall be doubled and may be cumulated. Repetition shall be deemed to have occurred where, within the preceding five years, the offender has been convicted for the same offense.

(3)(a) Public proceedings may only be instituted by the public prosecutor on a complaint by the aggrieved party once the civil court has confirmed the existence of the offense in a final decision. The civil action shall suspend the limitation in respect of the penal action.

(b) However, proceedings may be instituted ex officio by the public prosecutor when he considers that public interest so requires.

Article 222

Confiscation and Destruction

(1) The judge may order that the elements which are the subject of the infringement and which are in the possession or ownership of the infringer be confiscated and, where relevant, destroyed, where, in view of the circumstances, this is necessary to

(i) create an effective deterrent to infringement, or

(ii) safeguard the interests of third parties.

(2) The judge may also order the confiscation and, where relevant, the destruction of the specific equipment or means used in committing the infringement.

Article 223

Publication of Judgment

At the request of the aggrieved party who proves a legitimate interest, or at the request of the public prosecutor, the judge may order publication of the judgment, under conditions specified by him, in the general or specialized press.

Article 224

Reservation in Favor of Other Provisions

The provisions of the Penal Code shall remain unaffected.

CHAPTER III

MEASURES TAKEN BY THE AUTHORITIES

Section IBorder MeasuresArticle 231Ex Officio Seizure and Confiscation at the Border

- (1) The customs authorities may seize and confiscate ex officio, on import or export, any goods which are manifestly infringing the breeder's right.
- (2) The owner may be required by the customs authorities to furnish any information relevant to the exercise of the aforesaid faculty.
- (3) The seizure shall be notified without delay to the person declaring the goods or their owner. The goods shall be confiscated where, within ten working days from the seizure, the person declaring the goods or the owner has not opposed the seizure.

Article 232Suspension of Release and Seizure at the Border on Request

- (1)(a) The holder may request the customs authorities to withhold goods for which there is reason to believe that they are infringing.
- (b) The request shall be accompanied by a proof of the breeder's right and a statement of the reasons, and by a precise description of the relevant goods. It shall be subject to the deposit of security.
- (c) The customs authorities shall notify without delay the holder of their refusal or acceptance of the request and, in the latter case, of the conditions under which it will be executed.
- (2) Any withholding at the border under this Article shall be notified without delay by the customs authorities to the holder and to the person declaring the goods or their owner, specifying the nature, origin, quantity and place of storage of the goods, and also the names and addresses of the above-mentioned persons and of any person involved in the interrupted distribution channel. The holder shall be entitled to inspect the withheld goods with a view to identifying the variety concerned.
- (3) The holder shall have five working days from the date of the receipt of the aforesaid notification to request the continued withholding of the goods, and ten working days to produce proof of the institution of an action for seizure. Article 202 shall apply mutatis mutandis to the action.
- (4) Where an action has been brought, the goods shall be withheld until the President of the Court has ruled. The withholding shall be lifted on a decision of the President of the Court, at the request of the holder or as a result of his failure to act.

Article 233

Report at the Border

(1) The holder may request the customs authorities to procede with a detailed description, with or without effective seizure, of goods for which there is reason to believe that they are infringing. Article 232 shall apply mutatis mutandis.

(2)(a) Where a request for the withholding of goods at the border has been made to them, the customs authorities may decide to procede with a detailed description, with or without seizure of samples, in lieu of the withholding,

(i) where the goods are perishable and their withholding is clearly unreasonable in the particular case, or

(ii) where the presumed infringer adduces his good faith

and it appears that the release of the goods for distribution is not likely to cause a loss difficult to make good to the holder.

(b) A decision of this kind shall be subject to the furnishing by the person who benefits in the first place from the release of goods for circulation of securities to provide compensation of the holder if the infringement proceedings are subsequently held to be founded.

Section II**Repression of Frauds****Article 241****Frauds in Relation to the Breeder's Right**

(1) Any person improperly claiming to be the holder of a breeder's right or the applicant for the grant of a breeder's right shall be liable to a fine of ...

(2) In the case of repetition, the fine may be doubled. Repetition shall be deemed to have occurred where the offender has been convicted of a fraud under this Article within the preceding five years.

Article 242**Frauds in Relation to Variety Denominations**

(1) Any person using in full knowledge of the facts a designation in violation of Article 88(2), or omitting to use a variety denomination in violation of Article 88(3), shall be liable to a fine of ...

(2) In the case of repetition, the fine may be doubled. Repetition shall be deemed to have occurred where the offender has been convicted of a fraud under this Article within the preceding five years.

Article 243**Supervisory Authority**

The service for the control and certification of seeds and plants and [the service for the repression of frauds] shall be entrusted with the implementation of this Section.

CHAPTER IV

DISPUTE PREVENTION

Article 251

Action for Declaratory Judgment

- (1) Any person having a legitimate interest may request the applicant or the holder to state whether the latter's right may be held against a specific act of exploitation, the nature of which is communicated to the latter.
- (2) Where the applicant or holder does not state his position within three months or where the person disputes the reply that is given to him, the latter may bring an action with a view to have the judge declare that the performance of the act in question does not constitute an infringement.
- (3) Where the act in question is already the subject of infringement proceedings, the defendant in the infringement proceedings may not initiate a procedure under this Article.
- (4) Each party shall have the obligation to notify its licensees who are likely to be affected by the conclusion, of the proceedings and of their conclusion.

Article 252

Action for Determination of the Status of a Variety

- (1) Any person having a legitimate interest and the applicant or holder may invite each other to take position on the existence of a dependancy link under Article 82(3) between the variety whose protection has been applied for or granted and another variety whose description is communicated to the applicant or holder.
- (2) Both parties may jointly request the Office to rule by way of arbitration. The two varieties may be the subject of a comparative technical examination.
- (3) Where the inviting party has not received any reply within three months or disputes the reply that is given to it [, or where one of the parties disputes the arbitration award if not final], the said party may bring an action with a view to having the judge establish the existence or non-existence of a dependancy link.
- (4) Where infringement proceedings have been instituted on the basis of an alleged link, the defendant in the infringement proceedings may not initiate a procedure under this Article.
- (5) Each party shall have the obligation to notify its licensees who are likely to be affected by the conclusion, of the proceedings and of their conclusion.

Article 253**Threat of Action for Infringement**

- (1) Any person who, without reason, is threatened with infringement proceedings shall have the right to bring an action against the person making the threats with a view to be awarded damages for the trouble caused to him and, where relevant, the financial loss resulting from the threats.
- (2) The notification of the existence of the breeder's right or the application and the calling to the attention of the legal consequences of an infringement shall not in themselves constitute threats for the purposes of this Article.

CHAPTER V

GENERAL GUARANTEES CONCERNING PROCEDURE

Article 261

Safeguard of Manufacturing or Business Secrets

- (1) The manufacturing or business secrets of the parties shall be safeguarded.
- (2) Evidence liable to disclose such secrets may be made available to the opposing party only insofar as this is compatible with their safeguard.

Article 262

Indemnification of Defendant

- (1) Where a measure has been ordered against a person to enforce a breeder's right and the measure is subsequently found null and void or ill-based, that person shall be entitled to damages.
- (2) Where infringement proceedings have been instituted abusively or presumptuously, the defendant shall also be entitled to compensation for the injury.
- (3) In all cases where the action is unsuccessful, the judge shall order the plaintiff to pay the defendant expenses.
- (4) The action of the defendant shall be barred after one year from the day on which the measure or the action lapses.
- (5) The securities furnished by the plaintiff shall be returned to him only when it is certain that an action for damages will not be brought.

Article 263

Time Limit for Bringing Action

- (1) Subject to Article 262(4), the civil actions provided for in this Part shall be barred three years from the date on which the interested party gains knowledge of the infringement and of the identity of the infringer, or thirty years from the date of the infringement irrespective of such knowledge.
- (2) Arbitration proceedings shall suspend the limitation of a civil action, unless otherwise agreed by the parties.

PART VFINAL AND TRANSITORY PROVISIONSArticle 271Languages

- (1) The Office shall be entitled to decide that applications, or certain elements to be produced with the application, shall also be accepted if written in other languages than the [official language].
- (2) Any decision taken under this Article shall be published in the Gazette.

Article 272Cooperation in Examination

The Office shall be entitled to conclude administrative agreements for cooperation in the examination of varieties and the technical control of the maintenance of varieties with authorities of Contracting Parties or with their supervisory authorities.

Article 273Amendment of Other Provisions

[Pro memoria: the legislative texts that may be amended are in particular the Patent Law and the Trademark Law, the Code of Civil Procedure, the Code of Penal Procedure and the Penal Code.]

Article 274Protection of Known Varieties

- (1) Notwithstanding Article 22, a breeder's right may also be granted, under the following conditions, for a variety which is no longer new at the date of entry into force of this Law in respect of the relevant species:
- (a) The applications shall be filed within the year following the said date; and
- (b) The variety must
- (i) have been entered in the National Catalogue of Varieties Admitted to Trade or in a register of varieties held by a professional organization recognized by the Office, upon the advice of the Council, for the purposes of this Article, or
- (ii) have been the subject of a breeder's right in a Contracting Party.
- (2) The duration of the breeder's right granted under this Article shall be calculated from the date of the entry referred to in paragraph (1)(b)(i) or of the date of the grant of the breeder's right referred to in paragraph (1)(b)(ii), above. Where relevant, the earliest date shall be used.

(3) Where a breeder's right is granted under this Article, its holder may not raise claims in respect of acts of exploitation of the variety performed before the filing of the application. He shall have the obligation to grant licenses under reasonable conditions, to enable any exploitation that has been initiated in good faith by a third party before the said filing to be continued.

Article 275

Entry in Force

This Law shall enter into force on ...

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