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DRAFT TREATY ON THE INTERNATIONAL RECOGNITION
OF THE DEPOSIT OF MICROORGANISMS
FOR THE PURPOSES OF PATENT PROCEDURE

prepared by the International Bureau

SUMMARY

This document contains a revised draft of the Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure. Another document (DMO/IV/3) contains a revised draft of Regulations to accompany the Treaty. Both drafts have been prepared by the International Bureau in accordance with the recommendations adopted by the Committee of Experts on the Deposit of Microorganisms for the Purposes of Patent Procedure at its second session (April 1975) and taking into account the replies received to WIPO Circular No. 2256 of July 18, 1975, inviting comments on some of the provisions.

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Observations on Article 1

This Article is similar to the corresponding articles of other "special agreements" established under Article 19 of the Paris Convention for the Protection of Industrial Property (hereinafter referred to as "the Paris Convention") among countries members of the Union set up by the Paris Convention ("the Paris Union"). Article 13 of the present draft Treaty limits the possibility of becoming party to the proposed Treaty--as far as States are concerned--to those which are members of the Paris Union.

Article 19 of the Paris Convention does not state that intergovernmental organizations may also be party to special agreements. This is understandable since the recognition of the legal capacity of intergovernmental organizations to be party to treaties is of more recent date. For that reason, and because the Paris Convention does not expressly prohibit intergovernmental organizations from becoming party to a special agreement, it is believed that Article 1 of the proposed Treaty is compatible with Article 19 of the Paris Convention.

Not every intergovernmental organization may become party to the proposed Treaty but only those which fulfill the following two conditions provided for in Article 13(1) of the present draft:

(i) the intergovernmental organization must be one "to which several States have entrusted the task of granting regional patents," and

(ii) "at least one of the member States" of the intergovernmental organization must be "a member of the International (Paris) Union for the Protection of Industrial Property."

As of today only one intergovernmental organization fulfills these two conditions: the African and Malagasy Industrial Property Office (OAMPI). When the European Convention on the Grant of European Patents (European Patent Convention) enters into force, the European Patent Organisation will also qualify.

The reason for which it is proposed that such intergovernmental organizations should be able to become party to the proposed Treaty is that one of their essential tasks is to process patent applications and that the deposit of microorganisms for the purposes of patent procedure is an integral part of processing patent applications. Furthermore, the proposed solution would allow such an intergovernmental organization to become party to the proposed Treaty even if some of the member States of that organization did not become party to it; thus it would spare those States the trouble of ratifying or acceding to the proposed Treaty but would still allow their nationals and residents to use the facilities it offers to patent applicants.

INTRODUCTORY PROVISIONS

Article 1

Establishment of a Union

The States and intergovernmental organizations party to this Treaty (hereinafter called "the Contracting Parties") constitute a Union for the international recognition of the deposit of microorganisms for the purposes of patent procedure.

Observations on Article 2

ad (i): This definition follows to a large extent the definition contained in Article 2(ii) of the Patent Cooperation Treaty.

ad (ii): "Patent procedure" includes not only the procedure preceding the grant and the grant itself but also procedure after the grant, such as maintenance of the patent and nullity, infringement or opposition proceedings in which the patent is involved. It also covers procedures such as those for the grant of a compulsory license or for the invalidation of the patent.

ad (iii): This definition is relevant to Rules 11.2 (if that rule is maintained), 11.3 and 13.3.

ad (iv): A regional patent office is also "an authority competent for the grant of patents."

ad (v): In the case of the European Patent Organisation, the European Patent Office would be "the industrial property office...of that organization."

ad (vi): This definition is necessary in view of the fact that certain provisions of the Treaty and the Regulations (e.g., Article 7(1)) refer specifically to "Contracting States" and not to "Contracting Parties," which include intergovernmental organizations.

ad (vii): The term "microorganism" has various meanings depending on the context in which it is used, including, in particular, "strain of microorganism" and "culture of microorganism." It includes a mixture of microorganisms. Specification of these meanings for the purposes of the Treaty does not seem to be necessary.

As regards the kinds of microorganisms covered, these should be interpreted in the broadest sense, taking into account the purposes of the Treaty; such interpretation need not necessarily correspond to usage in some scientific circles. It includes all microorganisms which can be stored by a depositary institution.

ad (viii): The reference to Article 7, here and in every other place where no express reference is made to one of the two (A or B) alternatives of that Article, is a reference to either alternative. "Competent body" is defined in item (v).

ad (ix) to (xviii): These items do not seem to call for observations.

Article 2

Definitions

For the purposes of this Treaty and the Regulations:

(i) references to a "patent" shall be construed as references to patents for inventions and other titles for the protection of inventions [, including in particular inventors' certificates, utility certificates, utility models, patents or certificates of addition, inventors' certificates of addition, and utility certificates of addition];

(ii) "patent procedure" means any administrative or judicial procedure relating to a patent application or a patent;

(iii) "publication for the purposes of patent procedure" means the publication, by an industrial property office, of a patent application filed with it, or a patent granted by it, relating to an invention involving the use of the deposited microorganism, including the laying open for public inspection of such application or patent;

(iv) "industrial property office" means an authority competent for the grant of patents;

(v) "competent body" of a Contracting Party shall mean:

(a) where the Contracting Party is a State, the industrial property office or any other authority, including any court, of that State or of any intergovernmental organization of which that State is a member and which is competent in any patent procedure having effect in that State,

(b) where the Contracting Party is an intergovernmental organization, the industrial property office or any other authority, including any court, of that organization or of any State member of that organization, provided that the office, authority or court of such State, as the case may be, is competent in any patent procedure having effect in that organization or that State;

(vi) "Contracting State" means a Contracting Party which is a State;

(vii) "depository institution" means an institution which provides for the storage of microorganisms and the release of samples thereof;

(viii) "internationally recognized depository authority" means a depository institution which, for the purposes of patent procedure before the competent bodies of the Contracting Parties, has been recognized as provided in Article 7;

(ix) "depositor" means the natural person or legal entity transmitting a microorganism to an internationally recognized depository authority and the successor in title of the said natural person or legal entity;

[Article 2, continued]

(x) "deposit of microorganism" means, according to the context in which these words appear, the transmittal (sending and receipt), as provided in this Treaty and the Regulations, of a microorganism by the depositor to an internationally recognized depositary authority or the storage of that microorganism by that authority, or both the said transmittal and the said storage;

(xi) "release of sample" means the making available by an internationally recognized depositary authority of a sample of the deposited microorganism to a third party;

(xii) "Union" means the Union referred to in Article 1;

(xiii) "Assembly" means the Assembly referred to in Article 8;

(xiv) "Organization" means the World Intellectual Property Organization;

(xv) "International Bureau" means the International Bureau of the Organization and, as long as it subsists, the United International Bureaux for the Protection of Intellectual Property (BIRPI);

(xvi) "Director General" means the Director General of the Organization;

(xvii) "Regulations" means the Regulations referred to in Article 10;

(xviii) "Gazette" means the Gazette referred to in Article 9(1)(iii).

Observations on Article 3

ad (1)(a): As to the granting or acquisition of the status of internationally recognized depositary authority, see Article 7 (Alternative A) and Article 7 (Alternative B), respectively. As to the making of the deposit, see Rule 8.1; as to the receipt, see Rule 9.

ad (1)(b): If the time limits are considered to be too long, the Committee of Experts may wish to consider further the system provided for in this subparagraph.

As to the viability statement, see Rule 12.

ad (1)(c): This subparagraph is intended to clarify subparagraph (a) by mentioning the most important aspects of the obligation of recognizing the validity of deposits of microorganisms. Since it is explanatory and not indispensable, it is placed between square brackets.

ad (2)(a): Other reasons for not being able to furnish samples are, for example, that the microorganism has been lost or that it has been destroyed.

Where the inability to furnish samples is due to the depositary authority's interrupting or discontinuing its functions or losing its status (for all or some kinds of microorganisms), the microorganism should be available in another internationally recognized depositary authority since Rules 6 and 7 provide for the obligation to transfer the microorganism to such other authority. However, should this obligation not be fulfilled, a new deposit is permitted since Article 3(2)(b)(ii) does not apply in such a case.

ad (2)(b): The exclusion referred to in item (i) is necessary in order to prevent possible abuses by the depositor.

ad (2)(c): The general obligation to make the new deposit with the same internationally recognized depositary authority should prevent possible abuses by the depositor. If the new deposit is made with another depositary authority, the depositor will have to prove that he is not responsible for the non-availability where the retroactive effect of the new deposit (see subparagraph (e)) is contested.

ad (2)(d): The statement that the microorganism which is the subject of the new deposit is the same as that which was the subject of the original deposit reinforces the essential condition for the effect of the new deposit referred to in subparagraph (e).

ad (2)(e): The burden of proof as regards the conditions of the retroactive effect of the new deposit is upon the depositor if that effect is contested. In particular, the depositor has to prove that the newly deposited microorganism is the same as the one which was originally deposited.

ad (2)(f): ---

Additional observations. It is to be noted that nothing in the Treaty prevents the making of deposits of the same microorganism, by the same depositor, with several internationally recognized depositary authorities. On the other hand, the Treaty contains no express reply to the question whether any national law or regional treaty may exclude the possibility of referring, in any given patent application, to more than one deposit of the same microorganism.

CHAPTER I

SUBSTANTIVE PROVISIONS

Article 3

Recognition of the Deposit of Microorganisms

(1) (a) Each competent body of any Contracting Party which allows or requires the deposit of microorganisms shall recognize as valid, for the purposes of patent procedure, the deposit of a microorganism with any internationally recognized depositary authority, provided that the deposit complies with the provisions of this Treaty and the Regulations and provided further that the deposit is proved by a receipt issued by the said authority and filed with the industrial property office of the said Contracting Party.

(b) Where the receipt issued by the internationally recognized depositary authority indicates that the deposit was made more than five years before the date of the filing of the receipt with the industrial property office of the Contracting Party, the obligation of recognition referred to in subparagraph (a) shall, as far as the competent bodies of that Contracting Party are concerned, apply only if, together with the receipt, a statement issued by the same internationally recognized depositary authority is filed indicating that, on a date preceding the date of filing by not more than one year, the deposited microorganism was viable.

[(c) The recognition of the validity of any deposit referred to in subparagraph (a) shall include the recognition of the fact and date of the deposit as indicated by the internationally recognized depositary authority as well as the recognition of the identity of any microorganism a sample of which is released with the deposited microorganism.]

(2) (a) Where the internationally recognized depositary authority can no longer furnish samples of the deposited microorganism for any reason, in particular, where such microorganism is no longer viable, the said authority shall promptly notify the depositor of its inability to furnish samples and the cause thereof, and the depositor shall have the right, subject to the provisions of this paragraph, to make a new deposit of the same microorganism as that which was originally deposited.

(b) The right referred to in subparagraph (a) shall not exist where:

(i) the inability to furnish samples of the deposited microorganism has been intentionally caused by the depositor, or

(ii) the deposited microorganism has been transferred to another internationally recognized depositary authority and that authority is in a position to furnish samples of such microorganism.

[Article 3, continued]

(c) The new deposit shall be made with the internationally recognized depository authority with which the original deposit was made, provided that:

(i) it shall be made with another internationally recognized depository authority where the institution with which the original deposit was made has lost its status of internationally recognized depository authority, or has lost such status in respect of the kind of microorganism to which the deposited microorganism belongs,

(ii) it may be made with another internationally recognized depository authority where item (i) does not apply and the depositor is in no way responsible for the inability to furnish samples.

(d) Any new deposit shall be accompanied by a statement signed by the depositor alleging that the newly deposited microorganism is the same as that originally deposited.

(e) Subject to subparagraphs (a) to (d) and (f), the new deposit shall be treated as if it had been made on the date on which the original deposit was made where all the preceding statements concerning the viability of the originally deposited microorganism indicated that the microorganism was viable and where the new deposit was made within six months from the date on which the depositor received the notification referred to in subparagraph (a).

(f) Where subparagraph (c)(i) applies and the depositor does not receive the notification referred to in subparagraph (a) within six months from the date on which the fact referred to in subparagraph (c)(i) was published in the Gazette, the six-month time limit referred to in subparagraph (e) shall be counted from the date of the issue of the Gazette in which the said fact was published.

Observations on Article 4

ad (1): The import, and sometimes the export, of certain microorganisms, particularly if they are dangerous, is generally prohibited by national law. Such prohibitions could completely frustrate the aims of the Treaty whenever the internationally recognized depositary authority and the would-be depositor or the person or authority requesting the release of microorganisms are in different countries.

The Treaty would consequently limit the freedom of the Contracting Parties to impose import or export restrictions: those restrictions could be imposed only when they were "absolutely necessary" and only when they were absolutely necessary for the protection of "health" (whether human, animal or plant) or of "environment" (for example, for the purity of soil, water or air).

As regards restrictions on release inside a country, see Rule 13.4(c).

[ad (2): "Appropriate action" could consist of recommendations made by an inter-governmental organization to the competent authorities of its member States.]

Article 4

Export and Import Restrictions

[(1)] If and to the extent to which any Contracting Party adopts regulations restricting the export or import of certain kinds of microorganisms, it shall apply such regulations to microorganisms deposited, or destined for deposit, under this Treaty only where the restriction is absolutely necessary in view of the dangers that the export or import of the microorganisms entails for health or the environment.

[(2)] Any intergovernmental organization which is party to this Treaty shall take any appropriate action, within its competence, to facilitate the implementation by its member States of the principle set forth in paragraph (1).]

Observations on Article 5

ad (i): See the observations on Article 6.

ad (ii): See the observations on Article (6)(1)(ii) to (vii).

ad (iii): Location on the territory of a Contracting State has the consequence that--by virtue of its laws, decrees or other appropriate measures, including contracts which it could conclude with the internationally recognized depository authority--the State has direct means of compelling that authority to respect its obligations, obligations whose performance that State would guarantee under Article 6.

Article 5

General Conditions of the Status of
Internationally Recognized Depository Authority

In order to qualify for the status of internationally recognized depository authority, any depository institution must and, once it has that status, must continue to:

- (i) benefit from the guarantees referred to in Article 6,
- (ii) comply with the requirements referred to in Article 6(1)(ii) to (vii),
- (iii) be located on the territory of a Contracting State.

Observations on Article 6

ad (1), introductory passages: The difference between Alternatives A and B of Article 7 is that, under the first, the guaranteeing State merely requests international recognition and the Assembly grants or refuses such recognition, whereas, under the second, the acquisition of international recognition flows, automatically, from the sole will of the guaranteeing State, from its having professed the required guarantees. It is to be noted that, once the status exists, the difference disappears, since under both Alternatives the status can be taken away and such taking away depends solely on the Assembly.

The guarantee principle provided for in Article 6 and refined in other provisions of the Treaty and the Regulations is the pivotal principle of the solutions proposed. It is dictated mainly by a practical consideration and by a legal consideration. The practical consideration is that depositary institutions are usually not branches of a government, and the legal consideration is that, for the said reason, they cannot become party to a treaty. Thus, instead of providing that the institution will do this or that, the Treaty provides that the Contracting State giving the guarantee must see to it that the said institution will do this or that.

The Treaty does not regulate the question of the liability of internationally recognized depositary authorities for acts or omissions under the Treaty and the Regulations. Thus, any claims against those authorities are governed by the applicable national law. Naturally, differences may exist between various national laws as regards the provisions on liability. Under certain systems, liability may be excluded for particular cases or limited as regards the amount of damages. Differences may also exist between government institutions and private institutions, and for the latter the law may require the conclusion of liability insurance. The provisions of the national law on liability may or may not be mandatory. In so far as they are not mandatory, contractual stipulations may establish additional liability or limit or exclude liability provided for under the applicable law.

ad (1)(i): Naturally, it cannot be guaranteed that the institution will last for ever. The provision is mainly intended to emphasize that the institution should have a long existence without interruptions while it lasts. Should the institution, qua internationally recognized depositary authority, still interrupt or discontinue its functions, the guaranteeing State will have to see to it that the deposits held by the said institution are transferred to another such authority (see Article 6(2) and Rule 6.1).

ad (1)(ii): As to staff, equipment and facilities, see Rule 2.2.

ad (1)(iii): If the institution is financed by the government, is a State or private university or a scientific association, or is simply a private enterprise (even when working for profit), it may still qualify although, occasionally, it accepts deposits from a government agency of the same State, the research branch of the same university or the owners of the same private enterprise, as long as such State, branch or owners do not exercise upon it any material influence which could endanger its impartiality. As regards the requirements of objectiveness and impartiality, the Assembly will weigh all the circumstances and, if it is not satisfied, it will refuse to grant the status (under Article 7, Alternative A) or will withdraw it (under both Alternatives of Article 7).

ad (1)(iv): As to "certain kinds of microorganisms," see also Article 3(2) and Rules 3.1(b)(iii) and 3.3.

As to the examination of viability, see Rules 12 and 14.

As to the acceptance of deposits, see Rules 8, 9 and 14. As to refusal of certain kinds of microorganisms, see Rule 6.2. With respect to Rule 6.2(a), the recommendations contained in paragraph 80 of document DMO/III/16 have not been implemented, since it may happen that the refusal to accept certain kinds of microorganisms by the internationally recognized depositary authority is due to purely technical reasons relating to the complexity of the biological structure of certain microorganisms which would render their storage a difficult operation.

Article 6

Guarantees

(1) [Alternative A:]¹ The Contracting State which, under Article 7 (Alternative A), proposes a depositary institution for recognition as an internationally recognized depositary authority

[Alternative B:]² The Contracting State whose certification, under Article 7(Alternative B), causes the depositary institution to become an internationally recognized depositary authority

[Both Alternatives:] shall guarantee that, in its capacity of internationally recognized depositary authority, that institution shall

- (i) have a continued existence;
- (ii) maintain a generally recognized, high scientific standard and have specialized staff, equipment and facilities, as prescribed in the Regulations;
- (iii) be impartial and objective, in particular in the sense of being free from any material influence on the part of actual or prospective depositors and their actual or potential competitors, and be available, for the purposes of deposit, to any depositor under the same conditions;
- (iv) accept for deposit any or certain kinds of microorganisms, examine their viability and store them, as prescribed in the Regulations;
- (v) issue to the depositor a receipt, and any required viability statement, as prescribed in the Regulations;
- (vi) comply, in respect of the microorganisms deposited with it, with the requirement of secrecy, as prescribed in the Regulations;
- (vii) release samples of any deposited microorganism only where, under the Regulations, it is required to do so, and in conformity with the procedure provided in the Regulations.

(2) The Regulations shall provide the measures to be taken where an internationally recognized depositary authority

(i) while still having the status of such authority, interrupts or discontinues its functions in respect of microorganisms already deposited with it or refuses to accept kinds of microorganisms it should accept,

(ii) loses its status of internationally recognized depositary authority or loses such status in respect of certain kinds of microorganisms.

¹ This Alternative applies if Alternative A of Article 7 is adopted.

² This Alternative applies if Alternative B of Article 7 is adopted.

[Observations on Article 6, continued]

In the case of those microorganisms, the Contracting State would not be in a position to furnish the guarantee provided for under Article 6.

As to storage, see Rule 11.

ad (1)(v): As to the receipt, see Rule 9.

As to the viability statement, see Rule 12.2.

ad (1)(vi): As to the return and destruction of deposited microorganisms, see Rule 11.2. That Rule has been placed within square brackets since its necessity and practicability are questionable. The deposit under the Treaty is made for the purposes of disclosing an invention. If the relevant patent application is withdrawn, no information on the deposit may be given, nor may samples of the deposited microorganism be released (see, however, Rule 13.3(b)). In order to be sure that no publication of the description has taken place, the depositary institution would require relevant information from all industrial property offices concerned. The proviso in square brackets in Rule 11.2 has been inserted in compliance with the recommendations contained in paragraph 94 of document DMO/III/16. The requirement that a period of three years should have elapsed before the internationally recognized depositary authority returns or destroys the deposited microorganism may not, however, be practical since the publication of the description normally takes place before the said three years.

As to secrecy, see Rule 11.3.

ad (1)(vii): The question who has a right to a sample of the microorganism, and when and under what conditions, is dealt with in the Regulations (Rule 13) rather than in the Treaty itself so as to allow for amendment, in the light of experience, without having to have recourse to the cumbersome procedure of revising the Treaty. However, because the matter is so important, mainly for the depositors, it seems appropriate to provide that the rules concerning the release of microorganisms can be amended only by a unanimous decision of the States (and organizations) party to the Treaty (Article 10(4)(b)).

Rule 13 distinguishes between three cases:

The first case is where the release of a microorganism is needed by a competent body of a Contracting Party (see Article 2(v)) for its patent procedure (Rule 13.1). With respect to Rule 13.1(i), it should be noted that the word "use" should be understood as also including use as inoculating material in a process of propagation to obtain more cells constituting a final product. In that case, the release is made, upon request, to the industrial property office of the said Contracting Party.

The second case is where a microorganism is to be released on the express request, or with the express authorization, of the depositor (Rule 13.2).

The third case concerns release of a microorganism neither to the industrial property office nor to the depositor or a person authorized by him but to some other person, including, possibly, a competitor of the depositor.

The solution provided for in Rule 13.3 is that the question who has the right to a sample of the microorganism is not answered by the Treaty or the Regulations, but is left for the applicable national law or regional treaty to deal with.

[Observations on Article 6, continued]

Taking this latter principle into account, Rule 13.3 provides for two alternative procedures. Under the first procedure (paragraphs (a) and (b)), the (national or regional) industrial property office with which the depositor has filed an application for the grant of a patent for an invention involving the use of the deposited microorganism (Rule 13.3(a)(ii)) must certify that under the law or regional treaty by virtue of which that office operates the party desiring the release of a microorganism has a right to obtain such microorganism. Thus, Rule 13.3 leaves the matter to the national law (or the regional treaty) applicable according to the procedure of those industrial property offices with which the depositor has filed applications, except that, whatever that law (or treaty), release will not be permitted before the description of the said invention has been published (Rule 13.3(a)(ii); see, however, Rule 13.3(b)).

Rule 13.3(a)(iii) further provides that, where the said law makes the right to the release of a microorganism "dependent on the fulfillment of certain conditions," the said office must satisfy itself that such conditions have in fact been fulfilled. Such conditions may include, for example, the requirement that the party desiring the release must sign an undertaking to the effect that he will not give the sample to third persons and/or that he will use the sample only for purposes of identification and research and particularly not for industrial or commercial exploitation of the invention involving the use of the microorganism.

Rule 13.3(b) takes care of the situation where the release of a microorganism is required, under the patent procedure before an industrial property office, before the publication of the description of the invention involving the use of the deposited microorganism. This is the case, for example, in interference procedures under the law of the United States of America.

The second procedure (Rule 13.3(c), (d) and (e)) may be chosen, at the option of the industrial property office of any Contracting Party, through a notification to the Director General. It provides for a system of communication to the internationally recognized depositary authority with which the microorganism has been deposited of the date from which release may be effected and, where applicable, of the conditions to be fulfilled. The said communication must be made, even if there is no actual request for release, by transmitting to the internationally recognized depositary authority a form to be signed by any party which may request release of a microorganism, before such release is effected (Rule 13.3(c)(i)). It is thus ensured that the release can be effected without delay as soon as the patent or patent application has been published. Simultaneous availability might be important in order to ensure that the published patent or patent application is included in the prior art as of the date of publication.

The question should be considered of the effectiveness of the declaration also vis-à-vis the depositor.

Rule 13.4 contains common provisions for requests and declarations under Rule 13.1, 13.2 or 13.3. Rule 13.4(d) ensures that the depositor is notified by the internationally recognized depositary authority of the release of a microorganism, its date, and the name and address of the party to whom the release was effected. The question whether it would be appropriate that the depositor should also receive a copy, under Rule 13.4(d), of the request for release before the release is effected might be further studied.

ad (2): As to interruption and discontinuance, see Rule 6.1. As to refusal, see Rule 6.2. As to loss of status, see Rule 7.1. As to loss of status in respect of certain kinds of microorganisms, see Rule 7.2.

It is understood that the transfer is free of charge to the depositor and to the industrial property office concerned. If an internationally recognized depositary authority refuses to accept certain kinds of microorganisms, the guaranteeing Contracting State should proceed as provided in Article 7(3)(b). In any case, such refusal could lead, under Article 7(2), to the withdrawal or limitation of the status of internationally recognized depositary authority.

Observations on Article 7

(Alternative A)

(Alternative B)

As to the existence of two Alternatives (A and B): See the first two paragraphs of the observations on Article 6.

As to the existence of two Alternatives (A and B): See the first two paragraphs of the observations on Article 6.

ad (1): See Rule 3 (Alternative A).

ad (1): See Rule 3 (Alternative B).

ad (2): See Rule 4 (Alternative A).

ad (2): See Rule 4 (Alternative B).

ad (3): See Rule 5.

ad (3): See Rule 5.

ad (4): ---

ad (4): ---

ad (5): See the Rules referred to in the observations on paragraphs (1) to (3).

ad (5): See the Rules referred to in the observations on paragraphs (1) to (3).

Article 7

(Alternative A)

Granting, Withdrawal, Loss
and Limitation of the Status of
Internationally Recognized Depository
Authority

(1) (a) Any Contracting State may propose to the Assembly that a depository institution located on its territory be granted by the Assembly the status of internationally recognized depository authority; the proposal shall include an express declaration by the Contracting State making such proposal to the effect that that State guarantees the compliance with the requirements provided for in Article 6. The proposal may indicate a date before which the grant of the status of internationally recognized depository authority shall not take effect.

(b) Where the Assembly finds that the conditions set forth in Article 5 are fulfilled, it shall decide to grant to the depository institution the status of internationally recognized depository authority.

(Alternative B)

Acquisition, Termination, Loss
and Limitation of the Status of
Internationally Recognized Depository
Authority

(1) (a) Any Contracting State may, by a communication addressed to the Director General, certify, in respect of any depository institution located on its territory, that that institution fulfills the conditions referred to in Article 5(ii) and (iii); the communication shall include an express declaration by the Contracting State making such communication to the effect that that State guarantees the compliance with the requirements provided for in Article 6. The communication may indicate a date before which the acquisition of the status of internationally recognized depository authority shall not take effect. The Director General shall have the right to ask the Contracting State having made the communication to furnish relevant information in respect of the said depository institution.

(b) Where the Director General finds that the communication referred to in subparagraph (a) contains the prescribed certification and includes the prescribed declaration, such communication shall, as of the date of receipt of the said communication or, where a later date has been indicated in the communication, as of that date, confer upon the depository institution concerned the status of internationally recognized depository authority.

[Article 7 (Alternative A), continued]

(2) (a) Any Contracting Party other than the Contracting State which has made the relevant proposal under paragraph (1) (a) may, in respect of any internationally recognized depositary authority, request the Assembly to withdraw, either entirely or in respect only of certain kinds of microorganisms, such authority's status of internationally recognized depositary authority on the ground that the conditions set forth in Article 5 are no longer fulfilled.

(b) Before making the request under subparagraph (a), the Contracting Party shall, through the intermediary of the Director General, bring the reasons for the proposed request to the attention of the Contracting State which has made the relevant proposal under paragraph (1) (a) so that that State may, within two months, take appropriate action to obviate the need for making the proposed request.

(c) Where the Assembly finds that the request is well founded, it shall decide to withdraw, either entirely or in respect only of certain kinds of microorganisms, the status of internationally recognized depositary authority from the authority referred to in subparagraph (a).

[Article 7 (Alternative B), continued]

(2) (a) Any Contracting Party other than the Contracting State which has made the relevant communication under paragraph (1) (a) may, in respect of any internationally recognized depositary authority, request the Assembly to terminate, either entirely or in respect only of certain kinds of microorganisms, such authority's status of internationally recognized depositary authority on the ground that the conditions set forth in Article 5 were not or are no longer fulfilled.

(b) Before making the request under subparagraph (a), the Contracting Party shall, through the intermediary of the Director General, bring the reasons for the proposed request to the attention of the Contracting State which has made the relevant communication under paragraph (1) (a) so that that State may, within two months, take appropriate action to obviate the need for making the proposed request.

(c) Where the Assembly finds that the request is well founded, it shall decide to terminate, either entirely or in respect only of certain kinds of microorganisms, the status of internationally recognized depositary authority of the authority referred to in subparagraph (a).

[Article 7 (Alternative A), continued]

(3) (a) The Contracting State having made the declaration referred to in paragraph (1) (a) may, by a communication addressed to the Director General, withdraw its declaration either in its entirety or in respect only of certain kinds of microorganisms.

(b) Such a communication shall, from the date provided for in the Regulations, entail, where it relates to the entirety of the declaration, the loss of the status of internationally recognized depositary authority or, where it relates only to certain kinds of microorganisms, a corresponding limitation of such status.

(4) (a) Any decision under paragraph (1) (b) shall require that a majority of three-fourths of the votes cast be in favor of the proposal to grant the status of internationally recognized depositary authority.

(b) Any decision under paragraph (2) (c) shall require that a majority of the votes cast be in favor of the request to withdraw the status of internationally recognized depositary authority.

(5) The details of the procedure under paragraphs (1) to (4) are provided in the Regulations.

[Article 7 (Alternative B), continued]

(3) (a) The Contracting State having made the declaration referred to in paragraph (1) (a) may, by a communication addressed to the Director General, withdraw its declaration either in its entirety or in respect only of certain kinds of microorganisms.

(b) Such a communication shall, from the date provided for in the Regulations, entail, where it relates to the entirety of the declaration, the loss of the status of internationally recognized depositary authority or, where it relates only to certain kinds of microorganisms, a corresponding limitation of such status.

(4) Any decision under paragraph (2) (c) shall require that a majority of the votes cast be in favor of the request to terminate the status of internationally recognized depositary authority.

(5) The details of the procedure under paragraphs (1) to (4) are provided in the Regulations.

Observations on Articles 8 to 18

The contents of Articles 8 to 18 follow so closely the corresponding provisions of treaties recently concluded under the aegis of WIPO--in particular, the Patent Cooperation Treaty and the Trademark Registration Treaty--that it seems superfluous to comment on them (this holds also for Rule 17 concerning voting by correspondence referred to in Article 8(5)(b)); the following points should, however, be mentioned.

Article 8(2)(a)(vi) does not consider the possibility of admitting depositary institutions to the meetings of the Assembly before they have acquired the status of internationally recognized depositary authority, since it is only the said status that seems to justify such admission.

Article 12(1)(a) follows the precedents of other treaties administered by WIPO and is to be understood in the sense that it cannot be amended under Article 12.

The one major difference between the administrative provisions of the said treaties and those of the present draft Treaty is that, while the other treaties contain financial provisions, this one does not. The reason is that, once the Treaty becomes operational, the tasks of the International Bureau, though important substantively, will be modest as far as costs are concerned. Those tasks would probably be mainly the following:

- (i) preparing the documentation for the meetings of the Assembly and other possible bodies convened under the Treaty,
- (ii) providing the secretariat, meeting rooms, interpretation, etc., for such meetings,
- (iii) publishing the Gazette (probably not more than a dozen pages per year).

It is proposed that these relatively modest costs arising from the Treaty should be borne by the budget of the Paris Union. They do not seem to warrant the complications that a system of contributions (for such moderate amounts) would entail for the contributing States (and organizations).

CHAPTER II

ADMINISTRATIVE PROVISIONS

Article 8

Assembly

(1)(a) The Assembly shall consist of the Contracting Parties.

(b) Each Contracting Party shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts.

(c) Any State not member of the Union which is a member of the Organization or of the International (Paris) Union for the Protection of Industrial Property and any intergovernmental organization specialized in the field of patents may be represented by observers in the meetings of the Assembly and, if the Assembly so decides, in those of such committees or working groups as may have been established by the Assembly.

(2)(a) The Assembly shall:

(i) deal with all matters concerning the maintenance and development of the Union and the implementation of this Treaty;

(ii) exercise such rights and perform such tasks as are specially conferred upon it or assigned to it under this Treaty;

(iii) give directions to the Director General concerning the preparations for revision conferences;

(iv) review and approve the reports and activities of the Director General concerning the Union, and give him all necessary instructions concerning matters within the competence of the Union;

(v) establish such committees and working groups as it deems appropriate to facilitate the work of the Union and of its organs;

(vi) determine, subject to paragraph (1)(c), which States other than Contracting States and which intergovernmental and international non-governmental organizations shall be admitted to its meetings as observers [and whether internationally recognized depositary authorities shall be admitted to its meetings as observers];

(vii) take any other appropriate action designed to further the objectives of the Union;

(viii) perform such other functions as are appropriate under this Treaty.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Assembly shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

[Article 8, continued]

(3) A delegate may represent, and vote in the name of, one Contracting Party only.

(4) Each Contracting Party shall have one vote.

(5)(a) One-half of the Contracting Parties shall constitute a quorum.

(b) In the absence of the quorum, the Assembly may make decisions but, with the exception of decisions concerning its own procedure, all such decisions shall take effect only if the quorum and the required majority are attained through voting by correspondence as provided in the Regulations.

(6)(a) Subject to Articles [7(4)(a),]¹ 10(4) and 12(2)(b), the decisions of the Assembly shall require a majority of the votes cast.

(b) Abstentions shall not be considered as votes.

(7)(a) The Assembly shall meet once in every third calendar year in ordinary session upon convocation by the Director General, preferably during the same period and at the same place as the General Assembly of the Organization.

(b) The Assembly shall meet in extraordinary session upon convocation by the Director General, either on his own initiative or at the request of one-fourth of the Contracting Parties.

(8) The Assembly shall adopt its own rules of procedure.

¹ This reference applies only in the case of Alternative A of Article 7.

Article 9

International Bureau

(1) The International Bureau shall:

(i) perform the administrative tasks concerning the Union, in particular, such tasks as are specifically assigned to it under this Treaty or by the Assembly;

(ii) provide the secretariat of revision conferences, of the Assembly, of committees and working groups established by the Assembly, and of any other meeting convened by the Director General and dealing with matters of concern to the Union;

(iii) publish a Gazette, as prescribed in the Regulations.

(2) The Director General shall be the chief executive of the Union and shall represent the Union.

(3) The Director General shall convene all meetings dealing with matters of concern to the Union.

(4)(a) The Director General and any staff member designated by him shall participate, without the right to vote, in all meetings of the Assembly, the committees and working groups established by the Assembly, and any other meeting convened by the Director General and dealing with matters of concern to the Union.

(b) The Director General, or a staff member designated by him, shall be ex officio secretary of the Assembly, and of the committees, working groups and other meetings referred to in subparagraph (a).

(5)(a) The Director General shall, in accordance with the directions of the Assembly, make the preparations for revision conferences.

(b) The Director General may consult with intergovernmental and international non-governmental organizations concerning the preparations for revision conferences.

(c) The Director General and persons designated by him shall take part, without the right to vote, in the discussions at revision conferences.

(d) The Director General, or a staff member designated by him, shall be ex officio secretary of any revision conference.

Article 10

Regulations

(1) The Regulations provide rules concerning:

- (i) matters in respect of which this Treaty expressly refers to the Regulations or expressly provides that they are or shall be prescribed;
- (ii) any administrative requirements, matters or procedures;
- (iii) any details useful in the implementation of this Treaty.

(2) The Regulations adopted at the same time as this Treaty are annexed to this Treaty.

(3) The Assembly may amend the Regulations.

(4) (a) Subject to subparagraph (b), adoption of any amendment of the Regulations shall require two-thirds of the votes cast.

(b) Adoption of any amendment concerning the release of samples of deposited microorganisms by the internationally recognized depositary authorities shall require that no Contracting Party vote against the proposed amendment.

(5) In the case of conflict between the provisions of this Treaty and those of the Regulations, the provisions of this Treaty shall prevail.

CHAPTER III

REVISION AND AMENDMENT

Article 11

Revision of the Treaty

(1) This Treaty may be revised from time to time by conferences of the Contracting Parties.

(2) The convocation of any revision conference shall be decided by the Assembly.

(3) Articles 8, 9 and 12 may be amended either by a revision conference or according to Article 12.

Article 12

Amendment of Certain Provisions of the Treaty

(1)(a) Proposals for the amendment of Articles 8, 9, and the present Article, may be initiated by any Contracting Party or by the Director General.

(b) Such proposals shall be communicated by the Director General to the Contracting Parties at least six months in advance of their consideration by the Assembly.

(2)(a) Amendments to the Articles referred to in paragraph (1) shall be adopted by the Assembly.

(b) Adoption shall require three-fourths of the votes cast, provided that adoption of any amendment to Article 8 and to the present subparagraph shall require four-fifths of the votes cast.

(3)(a) Any amendment to the Articles referred to in paragraph (1) shall enter into force one month after written notifications of acceptance, effected in accordance with their respective constitutional processes, have been received by the Director General from three-fourths of the Contracting Parties members of the Assembly at the time the Assembly adopted the amendment.

(b) Any amendment to the said Articles thus accepted shall bind all the Contracting Parties which were Contracting Parties at the time the amendment was adopted by the Assembly, provided that any amendment creating financial obligations for the said Contracting Parties or increasing such obligations shall bind only those Contracting Parties which have notified their acceptance of such amendment.

(c) Any amendment which has been accepted and which has entered into force in accordance with subparagraph (a) shall bind all States and intergovernmental organizations which become Contracting Parties after the date on which the amendment was adopted by the Assembly.

CHAPTER IV

FINAL PROVISIONS

Article 13

Becoming Party to the Treaty

(1)(a) Any State member of the International (Paris) Union for the Protection of Industrial Property may become party to this Treaty by:

(i) signature followed by the deposit of an instrument of ratification, or

(ii) deposit of an instrument of accession.

(b) Any intergovernmental organization to which several States have entrusted the task of granting regional patents and of which at least one of the member States is a member of the International (Paris) Union for the Protection of Industrial Property may become party to this Treaty by:

(i) signature followed by the deposit of a declaration of approval, or

(ii) deposit of a declaration of acceptance.

(2) Instruments of ratification or accession and declarations of approval or acceptance shall be deposited with the Director General.

Article 14

Entry Into Force of the Treaty

(1) This Treaty shall enter into force, with respect to the first five States or intergovernmental organizations which have deposited their instruments of ratification or accession or declarations of approval or acceptance, three months after the date on which the fifth instrument of ratification or accession or declaration of approval or acceptance has been deposited.

(2) This Treaty shall enter into force with respect to any other State or intergovernmental organization three months after the date on which that State or intergovernmental organization has deposited its instrument of ratification or accession or declaration of approval or acceptance unless a later date has been indicated in the instrument of ratification or accession or declaration of approval or acceptance. In the latter case, this Treaty shall enter into force with respect to that State or intergovernmental organization on the date thus indicated.

Article 15

Denunciation of the Treaty

(1) Any Contracting Party may denounce this Treaty by notification addressed to the Director General.

(2) Denunciation shall take effect two years after the day on which the Director General has received the notification.

(3) The right of denunciation provided for in paragraph (1) shall not be exercised by any Contracting Party before the expiration of five years from the date on which it becomes party to this Treaty.

(4) Where this Treaty is denounced by a Contracting State on whose territory an internationally recognized depositary authority is located, such authority shall lose its status of internationally recognized depositary authority on the date on which the denunciation takes effect.

Article 16

Signature and Languages of the Treaty

(1) (a) This Treaty shall be signed in a single original in the English and French languages, both texts being equally authentic.

(b) Official texts shall be established by the Director General, after consultation with the interested Governments, in the German, Italian, Japanese, Portuguese, Russian and Spanish languages, and such other languages as the Assembly may designate.

(2) This Treaty shall remain open for signature at until
.....

Article 17

Deposit of the Treaty; Transmittal of Copies;
Registration of the Treaty

(1) The original of this Treaty, when no longer open for signature, shall be deposited with the Director General.

(2) The Director General shall transmit two copies, certified by him, of this Treaty and the Regulations to the Governments of all the States referred to in Article 13(1) (a) and to the intergovernmental organizations referred to in Article 13(1) (b) and, on request, to the Government of any other State.

(3) The Director General shall register this Treaty with the Secretariat of the United Nations.

(4) The Director General shall transmit two copies, certified by him, of any amendment to this Treaty and to the Regulations to all Contracting Parties and, on request, to the Government of any State and to any intergovernmental organization referred to in Article 13(1) (b) where such State or organization is not a Contracting Party.

Article 18

Notifications

The Director General shall notify the Contracting Parties of:

- (i) signatures under Article 16;
- (ii) deposits of instruments of ratification or accession and of declarations of approval or acceptance under Article 13(2);
- (iii) the date of entry into force of this Treaty under Article 14(1);
- (iv) the decisions and communications under Article 7 relating to the status of internationally recognized depositary authority;
- (v) acceptance of amendments to this Treaty under Article 12(3);
- (vi) any amendment of the Regulations;
- (vii) the dates on which amendments to the Treaty or the Regulations enter into force;
- (viii) denunciations received under Article 15.

[End of document]