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## INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

## ADMINISTRATIVE AND LEGAL COMMITTEE

## Fourth Session

Geneva, November 14 to 16, 1979

## PRELIMINARY DRAFT OF A UPOV MODEL LAW

## ON PLANT VARIETY PROTECTION

Memorandum prepared by the Office of the Union

1. At its third session, held in April 1979, the Administrative and Legal Committee (hereinafter referred to as "the Committee") decided to deal with the UPOV Model Law on Plant Variety Protection (hereinafter referred to as "the UPOV Model Law") during its fourth session (see paragraph 24 of document CAJ/III/9).
2. The UPOV Model Law is primarily intended as a guide to States wishing to join the Union, and should assist them in drafting or revising their legislation on plant breeders' rights. It must naturally be compatible with the UPOV Convention, but it is not intended as a step towards possible harmonization of the national laws of member States.
3. The Annex to this document contains a Preliminary Draft of the UPOV Model Law which has been prepared by the Vice Secretary-General. It is submitted for one purpose and for one purpose only, namely, to invite advice for the Office of the Union's further work on the substance of the matters dealt with in the Preliminary Draft. Discussion on the arrangement of the various provisions (their order, their breakdown into parts, chapters, sections and paragraphs) is not invited at this stage, neither is a discussion on mere drafting questions. Such discussion should wait until the Committee has given its advice on the substantive issues, since the substantive concepts will have a determinative effect on the arrangement of the provisions, the terminology to be used and the details concerning drafting.
4. By "advice on substance" is meant advice mainly on the following questions:
  - (i) Are there any matters which the UPOV Model Law should deal with, but the Preliminary Draft does not deal with? If so, what are they?
  - (ii) Are there any matters dealt with in the Preliminary Draft which the UPOV Model Law should not deal with? If so, what are they? Are there any matters dealt with in the Preliminary Draft which should be dealt with in implementing regulations rather than in the UPOV Model Law itself?
  - (iii) Are the Preliminary Draft's solutions on substance the right ones? If, on any matter, another solution is preferred, what is it? Are there any issues on which two or more alternative solutions should be included in the UPOV Model Law? If so, what are those issues, and what are the alternatives to be included?

5. Once the UPOV Office has the Committee's advice on the questions referred to in the preceding paragraph, it will prepare a new (second) draft which will take the advice into account and which will also be an improved draft from the viewpoint of its form or organization and manner of expression or "drafting" (stricto sensu).

[Annex follows]

UPOV MODEL LAW ON PLANT VARIETY PROTECTION  
PRELIMINARY DRAFT

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UPOV MODEL LAW ON PLANT VARIETY PROTECTION  
PRELIMINARY DRAFT

CHAPTER I  
PLANT BREEDERS' RIGHTS

PART I  
CONDITIONS REQUIRED FOR PROTECTION

Section 1. Enumeration of Conditions

Rights, to be known as plant breeders' rights, shall be granted in respect of plant varieties of those genera or species which are included in the List of Genera and Species Eligible for Protection (Section 7), where, subject to the formal conditions, including the payment of fees, prescribed in this Law, the plant variety

- (i) is distinct and new,
- (ii) is homogeneous,
- (iii) is stable, and
- (iv) has been given a variety denomination which is acceptable for registration under the rules laid down in Section 27.

Section 2. Meaning of the Term "Plant Variety"

Plant variety (hereinafter referred to as "variety") shall mean, for the purposes of this Law, any assemblage of cultivated plants the single plants of which are similar to each other to such an extent that the assemblage is readily recognizable as such by experts. The term comprises assemblages of clones, lines, stocks or hybrids if they satisfy the other conditions, enumerated in Section 1, for being considered a variety. The initial variation from which the variety has resulted may be of artificial or of natural origin.

Section 3. Distinctness and Novelty

(1) A variety shall be considered distinct if it is clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the date on which protection is applied for.

(2) Common knowledge of another variety is established in particular if that variety has been entered in an official register of varieties, if it has been precisely described in a publication or included in a reference collection, if it has been publicly cultivated, or if propagating material or harvested material of the variety has been marketed.

(3) If an application for the protection of a variety (hereinafter referred to as "application" unless the full expression is used) has been duly filed according to this Law, that variety shall be deemed to have been a matter of common knowledge as from the date of that application, provided that protection has been granted as a result of that application; where, pursuant to Section 23, a right of priority has been validly claimed for an application, the variety which is the subject of that application shall be deemed to have been a matter of common knowledge in the country as from the date of the filing of the first application abroad on which the priority claim was based.

#### Section 4. Novelty

(1) A variety shall be considered new if propagating or harvested material of the variety itself has not yet been offered for sale or marketed with the approval of the breeder or his successor in title in the country [for longer than one year]<sup>1</sup> before the date on which protection is applied for under this Law, or for longer than four years before that date abroad. However, in the case of vines, forest trees, fruit trees and ornamental trees, including their rootstocks, propagating or harvested material of the variety itself may have been offered for sale or marketed abroad for up to six years before the date mentioned in the preceding sentence without such fact being considered detrimental to their novelty.

(2) It shall not be considered detrimental to the novelty of a variety if propagating or harvested material of that variety has been offered for sale or marketed with the approval of the breeder or his successor in title in the country for up to [four]<sup>2</sup> years prior to the inclusion of the genus or species to which the variety belongs in the List of Genera and Species Eligible for Protection and up to [six months]<sup>2</sup> after such inclusion.

(3) The characteristics which permit a variety to be defined must be capable of precise recognition and description.

(4) Offering for sale includes any holding available or storing of material for the obvious or proven purpose of selling it as propagating material or harvested material in the course of trade.

(5) Marketing includes any sale or other turning over of material against consideration or without consideration for commercial purposes, no matter whether the legal title passes from one person to another or not.

(6) Propagating material means:

- (i) seed,
- (ii) plantlets grown from seed,
- (iii) for genera or species, the plants of which are normally vegetatively propagated, whole plants or parts thereof

where destined to be used for the production of a crop.

#### Section 5. Homogeneity

A variety shall be considered homogeneous if its plants are sufficiently alike in their essential characteristics having due regard to the particular features of the normal method of propagation of the genus or species to which the variety belongs or of any particular method of propagation defined for the variety by its breeder.

#### Section 6. Stability

A variety is stable if its plants remain, in their essential characteristics, true to the description of the variety after each successive propagation or, where the breeder has defined a special cycle of reproduction, at the end of each cycle.

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<sup>1</sup> Alternative solution.

<sup>2</sup> Another period may be fixed.



Section 7. List of Genera and Species Eligible for Protection

(1) The Minister of Agriculture is authorized:

- (i) to establish a list of those genera and species which are eligible for protection (the "List of Genera and Species Eligible for Protection"),
- (ii) to amend the List of Genera and Species Eligible for Protection by adding new genera or species to it, modifying the name of genera and species already listed or deleting certain of these genera and species with effect from a given future date.

(2) A genus or species may be listed in the List of Genera and Species Eligible for Protection only if the Plant Variety Rights Office is in a position to handle all applications for the protection of varieties belonging to that genus or species, either by means at its disposal or by an appropriate agreement concluded with authorities of other member States of the Union for the Protection of New Varieties of Plants (UPOV).

(3) If a genus or species is deleted from the list with effect from a given date, the deletion does not affect the rights of breeders that have applied for the protection of varieties of that genus or species before that date.

PART II

ENTITLEMENT TO PROTECTION

Section 8. Right to Apply for Protection

The owner of a variety is entitled to ask for the grant of a plant breeder's right. The owner shall be the breeder or discoverer of the variety or his successor in title. If several persons have bred or discovered the variety in common, they are entitled jointly to ask for the grant of a plant breeder's right. If a variety has been bred or discovered by several persons independently of each other, the entitlement to ask for the grant of a plant breeder's right belongs to the person who has first applied for protection at the Plant Variety Rights Office.

Section 9. Presumption of Entitlement

In proceedings before the Plant Variety Rights Office, the applicant is deemed to be entitled to ask for the grant of a plant breeders' right, except where the national office knows that the applicant is not the owner of the variety which is the subject of the application for protection.

Section 10. Application by a Person Who is Not the Owner

Where an application has been filed by a person who is not the owner of the variety, the owner of the variety may demand that the entitlement to the grant of the plant breeder's right be ceded to him by the applicant. Where the plant breeder's right has already been granted on such application, the owner of the variety may demand that the holder of that right transfer it to him. In both cases, demands must be filed with the Plant Variety Rights Office not later than five years after the publication of the grant of the plant breeder's right, except in cases where the holder of the plant breeder's right was not acting in good faith when he claimed entitlement at the time of the grant of the title.

Section 11. Persons Entitled to Protection

(1) An application for the grant of plant breeders' rights may be filed by any of the following persons:

- (i) nationals of the country,

- (ii) foreigners having their residence in the country,
- (iii) legal persons having their headquarters in the country,
- (iv) nationals of another member State of the Union for the Protection of New Varieties of Plants (UPOV) or persons having their residence or, being legal persons, their headquarters in another member State of UPOV [provided that the other member State grants protection to the genus or species to which the variety that is the subject of the application belongs],<sup>1</sup>
- (v) nationals of, or persons having their residence or, being legal persons, their headquarters in any State other than the States referred to above under this Section in which, by virtue of a publication by the Minister of Agriculture, persons possessing the nationality of the country or having their residence or, being legal persons, their headquarters in the country enjoy, for varieties of the genus or species to which the application refers, essentially the same protection as that accorded to nationals of that State.<sup>2</sup>

(2) Persons having neither their residence nor their headquarters in the country must not participate in any procedure under or derive rights from this Law unless they have designated a representative within the country. A representative thus designated is entitled to make all declarations which, in the course of procedure regulated under this Law, are to be made or may be made by the owner of the variety or his successor in title and to accept all declarations directed to that owner or his successor in title. For the purpose of instituting legal proceedings by or against any person thus represented, the place which has been reported to the Plant Variety Rights Office as the business address of the representative--or, in the case of the designation of several representatives, of the representative designated as the main representative or, failing such designation, of the representative designated first--is deemed to be the place where the plant breeder's right is located.

### PART III

#### ASSIGNMENT AND TRANSFER OF PLANT BREEDERS' RIGHTS; JOINT HOLDERS OF RIGHTS

##### Section 12. Assignment and Transfer

(1) A plant breeder's right and an application for the grant of a plant breeder's right may be assigned or transferred by succession.

(2) The assignment shall be made in writing and shall require the signature of the contracting parties.

(3) Any assignment or transfer by succession shall be registered in the Plant Variety Register on request and on payment of a fee fixed by the Regulations on Fees; no assignment or transfer by succession shall have effect against third parties until after such registration.

##### Section 13. Joint Applicants for Plant Breeders' Rights and Joint Holders of Plant Breeders' Rights

In the absence of any agreement between the parties concerned, joint applicants for a plant breeder's right or joint holders of such a right may, separately, transfer their shares, exploit the variety and, within the limits of this Law, exclude others from exploiting it; they may, however, only jointly grant a license to a third party to exploit the variety.

<sup>1</sup> Facultative limitation according to UPOV Convention (Article 4(4) of the text of 1961, Article 3(3) of the Revised Text).

<sup>2</sup> This subparagraph is not necessary under the UPOV Convention. It may thus be deleted.

PART IV

SCOPE OF PROTECTION

Section 14. Effect of a Plant Breeder's Right

(1) The effect of a plant breeder's right is that the prior authorization of the holder of that right or of his successor in title shall be required for

- the production for purposes of commercial marketing,
- the offering for sale,
- the marketing,

of the reproductive or vegetative propagating material, as such, of the variety.

(2) In addition to the provisions of paragraph (1), the effect of a plant breeder's right granted for an ornamental variety is that the prior authorization of the holder of that right or of his successor in title shall also be required where plants of the protected variety or parts thereof, normally marketed for purposes other than propagation, are used commercially as propagating material in the production of ornamental plants or cut flowers of that variety.

(3) Authorization by the holder of the plant breeder's right or by his successor in title shall not be required for the utilization of the variety protected by that right as an initial source of variation for the purpose of creating other varieties or for the marketing of such other varieties. Authorization shall, however, be required when the repeated use of the variety, protected by a plant breeder's right, is necessary for the commercial production of another variety.

(4) Authorization by the holder of the plant breeder's right or by his successor in title shall be required for the exportation of propagating material of the protected variety to another State in which comparable protection is generally not available for varieties of the genus or species in question, or not available to the holder of the plant breeder's right or his successor in title.

(5) The Minister of Agriculture may designate, in the List of Genera and Species Eligible for Protection, certain genera or species or parts thereof the varieties of which are afforded an extended scope of protection. In respect of such varieties, the prior authorization of the holder of the plant breeder's right or of his successor in title shall also be required for any production, offering for sale or marketing of the marketed products of these varieties. [Such right may, however, not be claimed by a person who is neither a national of a member State of the Union for the Protection of New Varieties of Plants (UPOV) which extends the protection granted also to such marketed products of varieties of the genus or species in question nor a natural person having his residence or a legal person having its headquarters in such State. The Minister of Agriculture shall publish in the Plant Varieties Gazette the names of those member States of UPOV which extend the protection granted to the marketed products in the case of all or certain genera or species or parts thereof.]<sup>1</sup>

PART V

MAINTENANCE OF REPRODUCTIVE MATERIAL

Section 15. Maintenance of Reproductive Material

(1) Every holder of a plant breeders' right shall ensure that, throughout the period for which the right is exercisable, he is in a position to provide the Plant Variety Rights Office with reproductive material which when grown, corresponds with the morphological, physiological and other characteristics which were defined when the right was granted.

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<sup>1</sup> Facultative limitation according to Article 5(4), second sentence.

(2) The holder of a plant breeder's right shall also afford to the Plant Variety Rights Office all such information and facilities as the latter may request for the purpose of satisfying itself that the holder of the plant breeders' right is fulfilling his obligations under the foregoing paragraph, including facilities for the inspection by or on behalf of the Plant Variety Rights Office of the measures taken for the preservation of the variety.

## PART VI

### PERIOD OF PROTECTION; RENEWAL FEES; TERMINATION OF PROTECTION, NULLITY AND FORFEITURE OF RIGHTS

#### Section 16. Period of Protection

(1) The period of protection shall last:

- (i) for vines and forest trees, fruit trees, ornamental trees including, in each case, their rootstocks, until the end of the eighteenth year following the grant of the plant breeders' right,
- (ii) for all other genera or species, until the end of the fifteenth year following the grant of the plant breeder's right.

(2) If, in the cases under Section 4(2) of this Law, the variety has already been offered for sale or marketed in the country [for longer than one year]<sup>1</sup> before the date of the filing of the application, the duration of the protection shall be reduced by the number of full years [minus one year]<sup>1</sup> which have elapsed since the beginning of the offering for sale or the marketing, with the approval of the breeder or his successor in title, before the grant of the title.

#### Section 17. Renewal Fees

For each year of the period of protection (protection year), the holder of the plant breeder's right shall pay a renewal fee provided for under the Regulations on Fees. The first year of payment of the renewal fee is the year following the grant of the right.

#### Section 18. Termination of Protection, Nullity and Forfeiture of Rights

(1) The protection ceases before the end of the period of protection if the holder of the plant breeder's right waives that right by written declaration addressed to the Plant Variety Rights Office at the date determined in the waiver or, failing such determination, at the date on which that declaration has been received by that Office, according to its files.

(2) The plant breeder's right shall be declared null and void ab initio on request if it is established that the variety has not been distinct or new within the meaning of, and at the dates referred to in, Sections 3 and 4 of this Law. The request, which may be filed by any person, shall be addressed to the Plant Variety Rights Office. If the fee provided for the request under the Regulations on Fees is not paid within one month after the request has been mailed to that Office, the request shall be deemed never to have been filed.

(3) The plant breeder's right shall ex officio be declared forfeit ex nunc if the holder of the right is no longer in a position to provide the Plant Variety Rights Office on request with the reproductive material which, when grown, corresponds to the morphological, physiological or other characteristics which were defined when the right was granted.

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<sup>1</sup> For alternative solution, see Section 4(1).

(4) The plant breeder's right may also ex officio be declared forfeit ex nunc if its holder

- (i) does not fulfill his obligations according to Section 15(2),
- (ii) does not pay the required renewal fee after having been reminded to do so by the Plant Variety Rights Office and after four weeks have elapsed since the reminder was mailed by that Office.

(5) An appeal shall lie to the Tribunal against any decision of the Plant Variety Rights Office under this Section.

## CHAPTER II

### OFFICE AND TRIBUNAL; INTERNATIONAL AGREEMENTS

#### PART I

#### OFFICE

#### Section 19. Plant Variety Rights Office

(1) For the purposes of this Law, there shall be an Office, to be known as the Plant Variety Rights Office, which shall be under the direct control of an Officer appointed by the Minister of Agriculture, to be known as the President<sup>1</sup> of the Plant Variety Rights Office.

(2) The Plant Variety Rights Office shall act under the general direction of the Minister of Agriculture.

(3) The Minister of Agriculture may appoint, in addition to the President, as many Vice-Presidents or such other officers and civil servants as are deemed to be necessary for the appropriate functioning of the Office.

(4) The President of the Plant Variety Rights Office may, in performing his duties under this Law, rely either on the services of his own Office or on the services of persons who have not been appointed for his Office and who shall be paid in respect of their services fees in accordance with such a scale as the President may, with the approval of the Minister of Agriculture and the Treasury,<sup>2</sup> determine. He may also use the services of plant variety rights offices or similar governmental institutions in other countries and may pay the fees fixed by agreement with those other offices or institutions, or otherwise, for the services received.

(5) Subject to the general direction of the Minister of Agriculture, the President of the Plant Variety Rights Office may treat examination results obtained from and expert opinions given by foreign governmental institutions as results obtained and opinions given by his own Office.

(6) The President of the Plant Variety Rights Office shall establish an Opposition Board and other Boards necessary for the performance of the tasks of that Office.

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<sup>1</sup> Alternatives: Director, Commissioner, Controller.

<sup>2</sup> To be in conformity with the national terminology.

## PART II

## TRIBUNAL AND APPEALS

Section 20. Tribunal and Appeals

(1) The Tribunal competent to decide on appeals against decisions of the Plant Variety Rights Office shall be the ...<sup>1</sup>

(2) Subject to Section 35 of this Law, the provisions of ...<sup>2</sup> shall be applicable mutatis mutandis to appeals filed against decisions of the Plant Variety Rights Office.

## PART III

## INTERNATIONAL AGREEMENTS

Section 21. Applicability of International Agreements<sup>3</sup>

The relevant provisions of international bilateral or multilateral agreements on the protection of plant breeders' rights to which the country is a party and which regulate the rights of nationals of States parties to such agreements and of persons assimilated to such nationals shall be applicable by virtue of this Law.

## CHAPTER III

PROCEDURE FOR GRANTING PLANT BREEDERS' RIGHTS;  
PRIORITY

## PART I

## APPLICATION FOR GRANT OF PLANT BREEDERS' RIGHTS

Section 22. Application

(1) The application for the grant of a plant breeder's right shall be filed at the Plant Variety Rights Office. It should be made on the form<sup>4</sup> issued by the Plant Variety Rights Office for that purpose and a copy of which is attached to this Law. It must contain all indications required under that form.

(2) The application must be accompanied by a technical questionnaire as issued by the Plant Variety Rights Office for the respective genus or species. The technical questionnaire must be duly completed by the applicant to the best of his knowledge.

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<sup>1</sup> A specific court is to be named here.

<sup>2</sup> Here, reference is to be made to the national laws and regulations to govern the proceedings on appeals according to this Law.

<sup>3</sup> The need for, and the contents of, this provision have to be examined in view of the constitutional rules of the country.

<sup>4</sup> Not yet added to this Preliminary Draft.

(3) At the request of the Plant Variety Rights Office, the applicant shall submit the required amount of propagating material on the date and at the place fixed by that Office. If the amount of propagating material is not expressly fixed by the Plant Varieties Rights Office, the breeder shall submit the amount determined in the Technical Notes to the respective Guidelines for the Conduct of Test for Distinctness, Homogeneity and Stability as issued by the Union for the Protection of New Varieties of Plants (UPOV).

(4) The President of the Plant Variety Rights Office may at any time amend the form mentioned under paragraph (1) of this Section and any of the technical questionnaires mentioned under paragraph (2). Any amended version of the form or of any questionnaire shall be published in the Gazette and shall become effective two weeks after the date under which the issue of the Gazette is published.

### Section 23. Priority

(1) Any person who has duly filed in another member State of the Union for the Protection of New Varieties of Plants (UPOV) an application for the grant of a plant breeder's right shall, according to this Law, enjoy for the filing of such application for the same variety a right of priority for a period of twelve months from the date of the filing of the first application. The dates of filing shall not be included in such period.

(2) A first application shall be deemed to have been duly filed if the filing was sufficient to establish the date on which the application was filed whatever may be the outcome of that application.

(3) The effect of the right of priority shall be that the date of priority shall count as the date on which protection is applied for under this Law for the purposes of Sections 3, 4 and 8, last sentence.

### Section 24. Claiming of the Right of Priority; Documents and Material to be Furnished

(1) Any applicant for the grant of a plant breeder's right who wishes to avail himself of the priority of an earlier application in another member State of the Union for the Protection of New Varieties of Plants (UPOV) shall be required to attach to his application a written declaration, indicating the date and the number of the earlier application, the country in which he or his predecessor in title filed such application and the name of the applicant under which it was filed. Within a period of three months from the date of the later application, the applicant shall furnish a copy of the earlier application, certified as correct by the Plant Variety Rights Office or any other competent office of the country where the first application was filed.

(2) The material mentioned in Section 22(3) shall not be required by the Plant Variety Rights Office before four years have elapsed since the filing of the application, unless the earlier application mentioned in the preceding paragraph has been withdrawn in the country in which it was filed, or has been finally rejected there. The same applies to any additional documentation.

### Section 25. Language of the Application

(1) The application and all its annexes must be filed in [the language of the country].

(2) The President of the Plant Variety Rights Office may determine that applications in other languages shall also be accepted. Any determination of that kind shall be published by the President in the Gazette.

## PART II

## VARIETY DENOMINATION

Section 26. Proposal

(1) The application for a plant breeder's right must be accompanied by a proposal for a variety denomination, which should be made on the form<sup>1</sup> issued by the Plant Variety Rights Office for that purpose and a copy of which is attached to this Law. The form should be duly completed by the applicant to the best of his knowledge.

(2) The President of the Plant Variety Rights Office may at any time amend the form mentioned under paragraph (1). Any amended version shall be published in the Gazette and shall become effective two weeks after the date under which the issue of the Gazette is published.

Section 27. Form, Contents and Procedure

(1) The variety denomination may consist of one word, or several words, or combinations of letters and figures, or combinations of words and figures. It may not consist solely of figures.<sup>2</sup>

(2) The Plant Variety Rights Office shall register the variety denomination proposed by the applicant unless it is prohibited under this and the following Sections.

(3) It is in particular prohibited to use as a variety denomination a designation which

- (i) does not enable the variety to be identified;
- (ii) is liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety, or the identity of the breeder;
- (iii) is identical or can be confused with a variety denomination which in the country or in another member State of the Union for the Protection of New Varieties of Plants (UPOV) designates a variety of the same botanical or of a related species; such denomination is, however, admissible if the other variety is neither registered nor grown any more, provided that the other variety denomination has not acquired great importance;
- (iv) is identical or can be confused with a designation in which a third party enjoys a prior right which would prohibit the use of the designation as a variety denomination;
- (v) is scandalous;
- (vi) is, for reasons other than those mentioned above, not suitable as a generic designation of the variety.

(4) If the variety is already protected in another member State of the Union for the Protection of New Varieties of Plants (UPOV) or if an application for the protection of the same variety is filed in such State, only the variety denomination which has been proposed or registered in that other State may be proposed and registered and the Plant Variety Rights Office shall not register any other designation as a denomination for the variety. However, if the variety denomination used in the other State is inappropriate for linguistic reasons, or for any of the reasons mentioned in the preceding paragraph, the applicant may, and can be requested to, propose another variety denomination.

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<sup>1</sup> Not yet added to this Preliminary Draft.

<sup>2</sup> This sentence may be modified where the use of such denominations is established practice.



Section 28. Publication

The Plant Variety Rights Office shall periodically publish in the Gazette the variety denominations which have been proposed, registered or cancelled in any of the member States of the Union for the Protection of New Varieties of Plants (UPOV).

Section 29. Use of the Variety Denomination

(1) Any person who offers for sale or markets propagating material of a variety protected in the country must, even after termination of the plant breeder's right, use the registered variety denomination. The denomination must, where associated with another indication, be easily recognizable and clearly legible.

(2) A variety denomination which is used to designate a variety protected in the country or in another member State of the Union for the Protection of New Varieties of Plants (UPOV) or a designation which can be confused with such denomination must not be used for another variety of the same botanical or of a related species.

Section 30. Prior Rights of Third Parties

Prior rights of third parties in a designation remain unaffected by this Law.

Section 31. Cancellation of a Variety Denomination

(1) The Plant Variety Rights Office shall cancel the variety denomination:

- (i) ex officio if it should not have been registered or if subsequently facts become known which would have justified the rejection of the denomination;
- (ii) at the request of the holder of the plant breeder's right or of a third person, if a final court decision is delivered according to which the variety denomination must be cancelled or if it is established that a third-party right exists in the denomination and the holder of the plant breeder's right agrees to the cancellation;
- (iii) at the request of a person who is obliged to use the variety denomination (Section 29(1)), if he is prohibited by a final court decision from using that denomination, provided that the holder of the plant breeder's right had participated or had been given the possibility of participating in the court proceedings.

(2) In the case of the cancellation of the variety denomination, the Plant Variety Rights Office shall ask the holder of the plant breeder's right to submit, within an appropriate period fixed by it, a new variety denomination. It shall establish, at the request of the holder or of any third person, a provisional variety denomination if a justified interest exists therein. After the period for submitting a new variety denomination has expired, the Plant Variety Rights Office may establish ex officio a provisional or a permanent variety denomination.

PART III

APPLICATION FEE

Section 32. Application Fee

An application for the grant of a plant breeder's right shall not be accepted unless the fee prescribed by the Regulations on Fees has been paid.

## PART IV

EXAMINATION OF THE APPLICATION; GRANT OR REFUSAL;  
OPPOSITION; APPEALSection 33. Formal Examination of Application; Consequences of Defects

(1) The Plant Variety Rights Office shall examine whether the application and its annexes contain all indications required under this Law and whether the required amount of propagating material has been submitted on the due date and at the proper place.

(2) If any of the requirements under the preceding paragraph has not been complied with, the application for the grant of a plant breeder's right shall be rejected, unless the Plant Variety Rights Office grants to the applicant a further period to complete the application or to submit the propagating material. No such further period may be granted which will end later than 3 months<sup>1</sup> after the application date or the due date for submission of the material, as applicable. If any of the provisions of Section 24 have not been complied with, the application shall be handled as if no priority had been claimed.

Section 34. Grant or Refusal of Plant Breeder's Rights

(1) The Plant Variety Rights Office shall examine whether the variety fulfills the conditions of novelty and distinctness, homogeneity and stability. Where the President of the Plant Variety Rights Office has determined that the examination shall be performed by another national or foreign governmental authority [or by the breeder himself], the examination shall be based on the examination results received.

(2) Subject to Section 24(2), the Plant Variety Rights Office may, where necessary for the examination, require the applicant to submit additional material or documents within an appropriate period to be fixed by the Office. If the applicant does not furnish the required material or the required documents within that period, and is unable to give valid reasons therefor, the application shall be rejected.

(3) If the examination shows that the application satisfies the conditions of novelty and distinctness, homogeneity and stability, and when the denomination of the variety can be registered, the Plant Variety Rights Office will grant a plant breeder's right and register the denomination. If the examination shows that one of these conditions is not satisfied, the grant will be refused. The grant of the right or the refusal of the grant will be published by the Plant Variety Rights Office in the Gazette.

Section 35. Opposition

(1) Within three months after the date of publication of the grant of the plant breeder's right in the Gazette, any person may file an opposition against the grant and the opposition will be examined by the Opposition Board of the Plant Variety Rights Office. The opposition can be based on the claim that the variety was not distinct or not new, or that it was not homogeneous or not stable, at the date decisive for the grant of the right. If the opposition is justified, the plant breeder's right will be declared null and void. If the opposition is not justified, it will be rejected.

(2) An opposition shall not be accepted unless the fees described by the Regulations on Fees have been paid within the period prescribed in paragraph (1).

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<sup>1</sup> Another period may be fixed.

Section 36. Appeal

(1) An appeal shall lie to the Tribunal against any decision of the Plant Variety Rights Office by which:

- (i) an application for the grant of a plant breeder's right is rejected,
- (ii) a demand under Section 10 of this Act is complied with or rejected,
- (iii) the grant of a plant breeder's right is refused,
- (iv) a plant breeder's right is declared null and void,
- (v) an opposition is rejected, or
- (vi) a request to have the plant breeder's right declared null and void is rejected.

(2) An appeal shall lie to the Tribunal against any decision of the Plant Variety Rights Office by which:

- (i) a proposal for registration of a variety denomination is rejected,
- (ii) a variety denomination is registered or cancelled,
- (iii) the submission of a new variety denomination is requested, or
- (iv) a new variety denomination is registered.

(3) An appeal shall lie to the Tribunal in any other case expressly regulated under this Law.

(4) The appeal may be filed by any person whose legal position is directly affected by the decision of the Plant Variety Rights Office. It must be filed within three months after notice of the decision against which the appeal is based has been served on that person or, where no such service of notice has taken place, within three months after the publication in the Gazette of the decision.

CHAPTER IV

INFRINGEMENTS OF PLANT BREEDERS' RIGHTS

PART I

CIVIL SANCTIONS

Section 37. Civil Infringement Proceedings; Calculation of Damages

(1) The holder of a plant breeder's right whose rights under Section 14 are threatened with infringements or are infringed may institute legal proceedings in order to prevent the infringement or to prohibit its continuation.

(2) Where such infringement has been committed intentionally or negligently, the holder of the plant breeder's right may also claim damages and the application of any other sanctions provided for in the civil law for the infringement of private rights.

(3) Where damages can be claimed, they shall be calculated either on the basis of a royalty, which would have to be paid, for the legitimate use of the variety or on the basis of the actual damage caused.

## PART II

## PENAL SANCTIONS

Section 38. Punishment of Infringement

(1) Any intentional infringement of a plant breeder's right protected under Section 14 shall constitute a criminal offense.

(2) Such offense shall be punishable by a fine not exceeding .... , or by imprisonment not exceeding .... , or both.

(3) In the event of recidivism, the maximum penalties shall be doubled.

(4) Recidivism shall be deemed to have occurred when, in the course of the five preceding years, the offender has been convicted of another infringement of a plant breeder's right.

Section 39. Infringement of the Obligation to Use the Variety Denomination

Any person who offers for sale or markets propagating material of a variety protected in the country without using the registered variety denomination shall be punishable by a fine not exceeding .... .

## PART III

## COMPETENT COURTS IN INFRINGEMENT CASES

Section 40. Competent Courts in Infringement Cases

(1) The competent courts for civil proceedings instituted in infringement cases shall be the civil courts which would have jurisdiction for proceedings concerning [the infringement of a patent committed]<sup>1</sup> [damage caused to private property]<sup>1</sup> at the residence or, in the case of a legal person, at the headquarters of the infringer in the country, or, in the absence of such residence or headquarters, at the residence or headquarters of the holder of the plant breeder's right in the country, or, in the absence also of the latter residence or headquarters, at the business address of his representative in the country, or in the absence of such business address, at the seat of the Plant Variety Rights Office.

(2) The Minister of Agriculture and the Minister of Justice may, by a joint regulation, determine that for all civil procedures mentioned in paragraph (1) the civil court [at the seat of the Plant Variety Rights Office] shall have jurisdiction.

(3) The competent courts for penal proceedings instituted in cases of intentional infringements shall be the criminal courts which would be competent for any other criminal offences committed by the infringer at the same place and subject to similar penal sanctions.

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<sup>1</sup> Alternative solutions.

## CHAPTER V

### LICENSES, COMPULSORY LICENSES AND LICENSES OF RIGHT

#### PART I

#### CONTRACTUAL LICENSES

##### Section 41. License Contracts

(1) The holder of a plant breeder's right or the applicant for the grant of a plant breeder's right may, by contract, grant to some other person or undertaking the right to exploit the variety against or without payment of a royalty (license contract).

(2) The license contract must be in writing and shall require the signatures of the contracting parties.

(3) Any license contract shall be registered in the Plant Variety Rights Office on request and on payment of a fee fixed by the Regulations on Fees; the license shall have no effect against third parties until after such registration.

##### Section 42. Right of Licensor to Grant Further Licenses or to Exploit the Variety

In the absence of any provision to the contrary in the license contract, the grant of a license shall not prevent the licensor from granting further licenses to third parties or from exploiting the variety himself.

##### Section 43. Rights of Licensee

In the absence of any provision to the contrary in the license contract, the licensee shall be entitled to exploit the variety, during the whole duration of the plant breeder's right, in the entire territory of the country and in respect of all activities referred to in Section 14 of this Law.

##### Section 44. Non-Assignability of Licenses

In the absence of any provision to the contrary in the license contract, a license shall not be assignable to third parties by the licensee, and the licensee shall not be entitled to grant sublicenses.

##### Section 45. License Contracts Involving Payments Abroad

The Minister of Agriculture may, by regulation, provide that, on pain of invalidity, license contracts or certain categories of them and amendments or renewals of such contracts which involve the payment of royalties abroad shall require the approval of his Office, taking into account the needs of the country and its economic development.

##### Section 46. Clauses in License Contracts

(1) A license contract may not contain restrictions, not immediately deriving from the plant breeder's right and not belonging to the normal exercise of that right, which tend to create or to strengthen a monopoly on the part of the licensor.

(2) A license contract may especially not contain:

(i) the obligation imposed upon the licensee to abstain from all actions capable of impeding or preventing the grant of the plant breeder's right or prejudicing its validity;

(ii) the obligation imposed upon the licensee to abstain from applying for a compulsory license.

## PART II

## LICENSES OF RIGHT

Section 47. Licenses of Right

(1) Any holder of a plant breeder's right or any applicant for the grant of a plant breeder's right may declare that any person prepared to pay a royalty is entitled to use his variety as from the date on which he has informed the holder or applicant accordingly.

(2) The declaration must be addressed to the Plant Variety Rights Office and the remark "license of right" shall be entered in the Register.

(3) Any declaration according to paragraph (1) must mention the royalty which has to be paid by the beneficiary of the license of right. The required royalty shall also be entered in the Register.

(4) After the entry in the Register, the holder of the plant breeder's right shall pay only half of the renewal fees provided for in the Regulations on Fees.

(5) If all licensees agree, the Plant Variety Rights Office may cancel the entry "license of right" at the request of the holder of the plant breeder's right.

(6) An appeal shall lie to the Tribunal against any refusal to cancel the entry "license of right."

## PART III

## COMPULSORY LICENSES

Section 48. Compulsory Licenses

(1) The Plant Variety Rights Office shall, under the conditions hereinafter described grant to any person applying for it a compulsory license in respect of any plant breeder's right.

(2) The compulsory license shall confer on its owner the non-exclusive right to perform all activities referred to in Section 14 of this Law.

(3) When granting a compulsory license, the Plant Variety Rights Office shall fix a royalty which the owner of the compulsory license must pay to the holder of the plant breeder's right. The owner of the compulsory license shall render to the holder of the plant breeder's right adequate security for the payment of the royalty.

(4) The Plant Variety Rights Office may require the holder of the plant breeder's right to hold available for the owner of the compulsory license the amount of propagating material necessary for making reasonable use of the compulsory license, against payment of adequate remuneration to the holder of the right and under conditions which are economically acceptable to him.

(5) A compulsory license shall not be granted unless all of the following conditions are fulfilled:

- (i) The grant of the compulsory license must respond to the public interest in the rapid and wide distribution of new varieties and in their availability to the public at adequate and reasonable prices.
- (ii) The applicant for the grant of a compulsory license must be financially and otherwise in a position to exploit the plant breeder's right in a competent and businesslike manner, and must be prepared to do so.
- (iii) The holder of the plant breeder's right has refused to permit the applicant for the compulsory license to produce or market propagating material of the protected variety in a manner sufficient for the needs of the general public as referred to in subparagraph (i) or is not prepared to give such permission under reasonable terms.

- (iv) No conditions exist under which the holder of the plant breeder's right cannot be expected to permit the use of his variety in the manner requested.
- (v) Two years have elapsed between the time of the grant of the plant breeder's right and the application for the grant of the compulsory license.
- (vi) The applicant for the compulsory license has paid the fee prescribed for the grant of such compulsory license under the Regulations on Fees.

(6) The duration of the compulsory license is fixed by the Plant Variety Rights Office. The compulsory license shall not, except under extraordinary circumstances, be granted for less than two or for more than four years. The period may be extended if the Plant Variety Rights Office is satisfied, on the basis of a new examination, that the conditions for granting a compulsory license continue to exist after the expiration of the first period.

(7) The Plant Variety Rights Office shall withdraw the compulsory license immediately if its owner has grossly or repeatedly violated the conditions under which it was granted or if there is a reasonable fear that the quality of the variety will not be maintained.

(8) Before granting a compulsory license the Plant Variety Rights Office may hear the national non-governmental organizations in the field of plant breeding and the seed trade.

(9) An appeal shall lie to the Tribunal against any decision of the Plant Variety Rights Office under this Section. The Tribunal may, if an appeal is filed against the grant of a compulsory license, decide in a summary proceeding that the compulsory license shall be provisionally granted to the applicant. The provisionally granted compulsory license shall be terminated at the date on which the decision on the appeal becomes effective.

(10) The Tribunal may, when deciding on an appeal, fix different conditions than those fixed by the Plant Variety Rights Office.

#### PART IV

#### LEGAL PROCEEDINGS BY LICENSEES

##### Section 49. Legal Proceedings by Licensees

(1) Any licensee under a contractual or compulsory license or a license of right may, by registered letter, require the licensor to introduce legal actions necessary to obtain civil or penal sanctions in respect of any infringement of the plant breeder's right indicated by the licensee.

(2) If the licensor refuses or neglects to introduce the said legal actions within three months after the request has been mailed, the licensee may introduce them in his own name, without prejudice to the right of the licensor to intervene in such actions.

## CHAPTER VI

## REGULATIONS, REGISTER, GAZETTE

## PART I

## REGULATIONS

Section 50. Regulations

(1) Regulations may be established by the Minister of Agriculture on the following subject matters:

- (i) The procedure of the Plant Variety Rights Office in respect of the receiving and handling of applications, the conduct of the examination of varieties, the grant or the refusal to grant a plant breeder's right, the maintenance of a plant variety register and the filing of documents concerning plant breeder's rights.
- (ii) The amounts and the levying of all fees provided for under this Law.
- (iii) The introduction of additional rules to prevent the use of the same or confusing denominations for more than one variety and to regulate the relationship between variety denominations and trademarks.
- (iv) The administration of the Register of Plant Breeders' Rights provided for under Section 51, including the determination of the facts to be registered.
- (v) The issuance of the Gazette provided for under Section 51.
- (vi) Additional matters for which the competence of the Minister of Agriculture, or of the Minister of Agriculture in cooperation with another Minister, is expressly provided for under this Law.

## PART II

## REGISTER; GAZETTE

Section 51. Register

The Plant Variety Rights Office shall have a register, to be known as the Register of Plant Breeders' Rights, in which facts of legal relevance concerning plant breeder's rights are entered.

Section 52. Gazette

The Plant Variety Rights Office shall issue a Gazette in which matters concerning plant breeders' rights are published which have to be brought to the attention of the public, in particular the granting of titles of protection, the rejection of applications, refusals of the grant of plant breeders' rights, nullity of plant breeders' rights, and the proposal, registration and refusal to register variety denominations.

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and of document]