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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

COUNCIL**Thirty-First Extraordinary Session
Geneva, April 11, 2014****EXAMINATION OF THE CONFORMITY OF THE DRAFT ARIPO PROTOCOL
FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
WITH THE 1991 ACT OF THE UPOV CONVENTION***Document prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance*

1. By letter dated March 6, 2014, addressed to the Secretary-General of UPOV, Mr. Fernando dos Santos, Director General of the African Regional Intellectual Property Organization (ARIPO), requested the examination of the Draft ARIPO Protocol for the Protection of New Varieties of Plants (hereinafter referred to as the "Draft Protocol"), for conformity with the 1991 Act of the UPOV Convention (hereinafter referred to as the "1991 Act"). The letter is reproduced in Annex I to this document. Annex II contains the Draft Protocol in English.

BACKGROUND

2. Article 34(3) of the 1991 Act provides that "[a]ny State which is not a member of the Union and any intergovernmental organization shall, before depositing its instrument of accession, ask the Council to advise it in respect of the conformity of its laws with the provisions of this Convention. If the decision embodying the advice is positive, the instrument of accession may be deposited."

3. On November 27, 2009, the Council of Ministers of ARIPO took a decision on the need to develop a regional framework on the protection of new varieties of plants for ARIPO and its member States with a request addressed to the ARIPO Office to implement that decision as soon as possible (see document ARIPO/CM/XII/6 "Report", paragraph 54).

4. At the request of the ARIPO Office, the Office of the Union has provided its assistance in the development of a draft legal framework for the protection of new varieties of plants (draft legal framework) on the basis of document UPOV/INF/6 "Guidance for the Preparation of Laws based on the 1991 Act of the UPOV Convention".

5. The Council of Ministers of ARIPO, at its thirteenth session, held in Accra, Ghana, on December 1 and 2, 2011, considered document ARIPO/CM/XIII/8 "Draft Regional Policy and Legal Framework for Plant Variety Protection" of September 30, 2011.

6. In the preparatory work for the thirteenth session of the Council of Ministers of ARIPO, a request for clarification was sought in relation to Article 1(viii) and Article 34(1) of the 1991 Act of the UPOV Convention (reproduced below for ease of reference).

Article 1

Definitions

[...]

(viii) 'territory,' in relation to a Contracting Party, means, where the Contracting Party is a State, the territory of that State and, where the Contracting Party is an intergovernmental organization, the territory in which the constituting treaty of that intergovernmental organization applies; [...]"

Article 34

Ratification, Acceptance or Approval; Accession

(1) [States and certain intergovernmental organizations] (a) Any State may, as provided in this Article, become party to this Convention.

(b) Any intergovernmental organization may, as provided in this Article, become party to this Convention if it

(i) has competence in respect of matters governed by this Convention,

(ii) has its own legislation providing for the grant and protection of breeders' rights binding on all its member States and

(iii) has been duly authorized, in accordance with its internal procedures, to accede to this Convention. [...]"

7. The following drafting options were presented for consideration by the Consultative Committee, at its eighty-second session, which was held in Geneva on October 19 and 20, 2011, in relation to Article 1(viii) and Article 34(1) of the 1991 Act of the UPOV Convention, with regard to the draft legal framework:

Option based on all ARIPO Member States

(a) "territory of ARIPO" means the territories of the Members States of ARIPO to which the [constituting treaty of ARIPO/Lusaka Agreement] applies;

(b) any application filed under this regional instrument with the ARIPO Office shall be valid in all the Members States of ARIPO; and

(c) pursuant to [insert Article on filing of applications], any grant made by the ARIPO Office shall be valid in all the Members States of ARIPO.

Option based on all Contracting States to the regional instrument

(a) "territory of ARIPO", for the purpose of this regional instrument, means the territories of the Contracting States to which this regional instrument applies;

(b) any application filed under this regional instrument with the ARIPO Office shall be valid in all the Contracting States; and

(c) pursuant to [insert Article on filing of applications], any grant made by the ARIPO Office shall be valid in all the Contracting States.

Option based on the Harare Protocol on Patents and Industrial Designs within the Framework of the African Regional Intellectual Property Organization (1982) (Harare Protocol)

(a) an application for a breeder's right shall designate the Contracting States to the regional instrument for which the breeder's right is requested to be granted; and

(b) under specific reasons, a designated State is entitled to make a written communication to the ARIPO Office that, if a breeder's right is granted by the ARIPO Office, that breeder's right shall have no effect in its territory."

8. The Consultative Committee concluded, on a preliminary basis, that the "Option based on all ARIPO Member States" and the "Option based on all Contracting States to the regional instrument" appeared to be acceptable, while noting that the "Option based on all Contracting States to the regional instrument" provided

greater flexibility. The Consultative Committee also noted that the “Option based on the Harare Protocol” did not appear to correspond to the relevant provisions of the UPOV Convention.

9. At the fourteenth session of the ARIPO Council of Ministers, held in Kampala, Uganda, on November 28 and 29, 2013, the Council of Ministers of ARIPO adopted the revised draft legal framework for the protection of new varieties of plants as the basis for the conclusion of a Protocol at the Diplomatic Conference to be held in 2014. In relation to the notion of territory, the ARIPO Council of Ministers adopted the “Option based on all Contracting States to the regional instrument” (see document ARIPO/CM/XIV/16 “Report”, paragraph 73 and paragraph 7, above).

BASIS FOR THE PROTECTION OF ARIPO BREEDERS' RIGHTS IN THE CONTRACTING STATES

10. The protection of ARIPO breeders' rights will be governed, in the Contracting States that become party to the Protocol, by the Draft Protocol once adopted and in force. In that regard, Article 41 (3) of the Draft Protocol provides as follows:

“(3) This Protocol shall come into force three months after four States have deposited their instruments of ratification or accession.”

11. An analysis of the Draft Protocol follows in the order of the substantive provisions of the 1991 Act.

Article 1 of the 1991 Act: Definitions

12. Article 1 of the Draft Protocol contains definitions of breeder and variety corresponding to the definitions in Article 1(iv) and (vi) of the 1991 Act, respectively.

13. In relation to Article 1(viii) and Article 34(1) of the 1991 Act of the UPOV Convention, Article 4(1) and (2) and Article 37 of the Draft Protocol provide as follows:

“Article 4 “Administration

“(1) Breeders' rights granted under this Protocol shall, on the basis of one application be valid in all the Contracting States.

“(2) The ARIPO Office is empowered to grant breeders' rights and to administer such breeders' rights on behalf of the Contracting States.

“[...]”

“Article 37 “Uniform Effect of Regional Breeders' Rights

“Regional breeders' rights shall have uniform effect within the territories of the Contracting States and may not be granted, transferred or terminated in respect of the above mentioned territories otherwise than on a uniform basis.”

Article 2 of the 1991 Act: Basic Obligation of the Contracting Parties

14. Article 2 of the Draft Protocol provides that “[t]he purpose of this Protocol is to grant and protect breeders' rights” corresponding to the basic obligation provided by Article 2 of the 1991 Act.

Article 3 of the 1991 Act: Genera and Species to be Protected

15. Article 3 of the Draft Protocol provides that “[t]his Protocol shall be applied to all plant genera and species from the date of coming into force of this Protocol”. This conforms with Article 3(2)(ii) of the 1991 Act.

Article 4 of the 1991 Act: National Treatment

16. Article 11 of the Draft Protocol contains provisions on “Persons entitled to apply for protection” as follows:

“(1) An application may be filed by a breeder who—

- (a) is a resident in any Contracting State; or
- (b) is not a resident in a Contracting State.

“(2) An application filed under paragraph (1), by a breeder who is not resident in any of the Contracting States shall be submitted only through an agent with residence in any of the Contracting States or in the host country of ARIPO.”

17. The Draft Protocol corresponds to the requirements of Article 4 of the 1991 Act.

Articles 5 to 9 of the 1991 Act: Conditions of Protection, Novelty, Distinctness, Uniformity and Stability

18. Articles 6 to 10 of the Draft Protocol contain the conditions of protection corresponding to the provisions of Articles 5 to 9 of the 1991 Act.

19. Article 7(2) and (3) of the Draft Protocol concerning the optional provision of Article 6(2) of the 1991 Act reads as follows:

“(2) Where, according to Article 3, this Protocol applies to a plant genus or species to which it did not previously apply, varieties belonging to such plant genus or species shall be considered to satisfy the condition of novelty set out in paragraph (1), even where the sale or disposal of the variety to others took place in the territories of the Contracting States—

- (a) within four years before the date of filing of an application; or
- (b) in the case of trees or vines, within six years before the date of filing of an application.

“(3) Paragraph (2), shall apply only to applications for a breeder’s right filed within one year, at the latest, after the provisions of this Protocol apply to the genera or species concerned.”

Article 10 of the 1991 Act: Filing of Applications

20. Article 12(1) to (3) of the Draft Protocol contains provisions on the filing of applications as follows:

“Article 12
“Filing of Application

“(1) In accordance with Article 11, an application for the grant of a breeder’s right by the ARIPO Office shall be filed—

- (a) by the breeder; or
- (b) by an agent;

with either the ARIPO Office or, the National Authority of a Contracting State:

“(2) An application filed with the National Authority of a Contracting State under the provisions of paragraph (1), shall have the same effect as if it had been filed on the same date at the ARIPO Office.

“(3) Where an application is filed with a National Authority, the National Authority shall—

- (a) verify that the application on the face of it contains the minimum information specified in the regulations; and
- (b) within one month of receiving the application, transmit that application to the ARIPO Office.

“[...]”

21. In relation to the independence of protection in Article 10(3) of the 1991 Act, Article 19(6) of the Draft Protocol provides as follows:

“(6) The ARIPO Office shall not—

- (a) refuse to grant a breeder’s right on the ground that protection for the same variety has not been applied for, or has been refused, in any other State or inter-governmental organization; or
- (b) limit the duration of the breeder’s right on the ground that protection for the same variety has expired in any other State or inter-governmental organization.”

22. The Draft Protocol does not seem to contain provisions which conflict with Article 10 of the 1991 Act.

Article 11 of the 1991 Act: Right of Priority

23. Article 14 of the Draft Protocol contains provisions on the right of priority corresponding to the provisions of Article 11 of the 1991 Act.

Article 12 of the 1991 Act: Examination of the Application

24. Articles 17 and 18 of the Draft Protocol contain provisions concerning the examination of the application corresponding to the provisions of Article 12 of the 1991 Act.

Article 13 of the 1991 Act: Provisional Protection

25. Article 20 of the Draft Protocol contains provisions on provisional protection corresponding to the provisions of Article 13 of the 1991 Act.

Article 14 of the 1991 Act: Scope of the Breeder’s Right

26. Article 21(2)(b) of the Draft Protocol contains the optional provision “Acts in respect of certain products” of Article 14(3) of the 1991 Act as follows:

“(2) Subject to Articles 22 and 23, the acts referred to in paragraph (1) items (a) to (g), in respect of—
[...]

“(b) products made directly from harvested material of the protected variety falling within the provisions of paragraph (a) through the unauthorized use of the said harvested material shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise the right in relation to the said harvested material.”

27. Article 21 of the Draft Protocol contains provisions on the scope of the breeder’s right corresponding to the provisions of Article 14 of the 1991 Act.

Article 15 of the 1991 Act: Exceptions to the Breeder’s Right

28. Article 22(1) of the Draft Protocol contains provisions concerning the compulsory exceptions to the breeder’s right corresponding to the provisions of Article 15(1) of the 1991 Act.

29. Article 22(2) and (3) of the Draft Protocol contains provisions concerning the optional exception under Article 15(2) of the 1991 Act as follows:

“(2) Notwithstanding Article 21, for the list of agricultural crops and vegetables with a historical common practice of saving seed in the Contracting States specified by the Administrative Council of Plant Variety Protection which shall not include fruits, ornamentals, other vegetables or forest trees, the breeder’s right shall not extend to a farmer who, within reasonable limits and subject to the safeguarding of the legitimate interests of the holder of the breeder’s right, uses for propagating purposes, on the farmer’s own holdings, the product of the harvest which the farmer has obtained by planting on the farmer’s own holdings, the protected variety or a variety covered by Article 21(3) (a) or (b).

“(3) The conditions for the implementation of the provisions under paragraph (2), such as the different level of remuneration to be paid by small scale commercial farmers and large scale commercial farmers and the information to be provided by the farmer to the breeder, shall be stipulated in the regulations.”

Article 16 of the 1991 Act: Exhaustion of the Breeder's Right

30. Article 23 of the Draft Protocol contains provisions concerning the exhaustion of the breeder's right which correspond to the provisions of Article 16 of the 1991 Act.

Article 17 of the 1991 Act: Restrictions on the Exercise of the Breeder's Right

31. Article 24 of the Draft Protocol contains provisions concerning the restrictions on the exercise of the breeder's right which correspond to the provisions of Article 17 of the 1991 Act.

Article 18 of the 1991 Act: Measures Regulating Commerce

32. Article 25 of the Draft Protocol contains provisions concerning measures regulating commerce which correspond to the provisions of Article 18 of the 1991 Act.

33. The Draft Protocol does not seem to contain provisions which conflict with Article 18 of the 1991 Act.

Article 19 of the 1991 Act: Duration of the Breeder's Right

34. Article 26 of the Draft Protocol contains provisions concerning the duration of the breeder's right which correspond to the provisions of Article 19 of the 1991 Act.

Article 20 of the 1991 Act: Variety Denomination

35. Article 27 of the Draft Protocol contains provisions on variety denominations corresponding to the provisions of Article 20 of the 1991 Act.

Article 21 of the 1991 Act: Nullity of the Breeder's Right

36. Article 28 of the Draft Protocol contains provisions on the nullity of the breeder's right corresponding to the provisions of Article 21 of the 1991 Act.

Article 22 of the 1991 Act: Cancellation of the Breeder's Right

37. Article 29 of the Draft Protocol contains provisions on the cancellation of the breeder's right corresponding to the provisions of Article 22 of the 1991 Act.

Article 30 of the 1991 Act: Implementation of the Convention

38. In relation to the obligation to "provide for appropriate legal remedies for the effective enforcement of breeders' rights" (Article 30(1)(i) of the 1991 Act), Article 35 of the Draft Protocol provides as follows:

"The Contracting States shall ensure that accessible and appropriate enforcement measures and dispute settlement mechanisms, sanctions and remedies are available for the effective enforcement of breeders' rights and any other breach of this Protocol."

39. In relation to the obligation under Article 30(1)(ii) of the 1991 Act, Article 4(2) of the Draft Protocol provides as follows:

"(2) The ARIPO Office is empowered to grant breeders' rights and to administer such breeders' rights on behalf of the Contracting States."

40. Article 15 of the Draft Protocol corresponds to the obligation to publish information concerning applications for and grant of breeders' rights, and proposed and approved denominations as required in Article 30(1)(iii) of the 1991 Act.

General Conclusion

41. In the opinion of the Office of the Union, the Draft Protocol incorporates the substantive provisions of the 1991 Act. Once the Draft Protocol is adopted with no changes and the Protocol is in force, the Contracting States to the Protocol and ARIPO itself, in relation to the territories of the Contracting States to the Protocol, would be in a position "to give effect" to the provisions of the 1991 Act, as required by its Article 30(2).

42. *The Council is invited to:*

(a) *note the analysis in this document;*

(b) *take a positive decision on the conformity of the Draft ARIPO Protocol for the Protection of New Varieties of Plants with the provisions of the 1991 Act of the International Convention for the Protection of New Varieties of Plants, which allows:*

(i) *the Contracting States to the Protocol that are not members of the Union, and*

(ii) *ARIPO,*

once the Draft Protocol is adopted with no changes and the Protocol is in force, to deposit their instruments of accession to the 1991 Act; and

(c) *authorize the Secretary-General to inform ARIPO of that decision.*

[Annexes follow]



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ARIPO.8/1/1

March 6, 2014

Mr Francis Gurry
Secretary-General
International Union for the Protection of
New Varieties of Plants (UPOV)
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Switzerland

Dear Secretary-General Gurry

I have pleasure to inform you that the Fourteenth Session of the ARIPO Council of the Ministers, which was held in Kampala, Uganda from November 28 to 29, 2013, the Council of Ministers adopted the revised Draft Legal Framework for the Protection of New Varieties of Plants as the basis of the conclusion of a Protocol at the Diplomatic Conference to be held in 2014.

Pursuant to the provisions of Article 34(3) of the UPOV Convention, I would appreciate if the Council of UPOV could examine the conformity of the Draft ARIPO Protocol for the Protection of New Varieties of Plants with the provisions of the UPOV Convention.

Yours sincerely


Fernando dos Santos
DIRECTOR GENERAL

C(Extr.)/31/2

ANNEX II / ANNEXE II / ANLAGE II / ANEXO II

[In English only / En anglais seulement /
Nur auf Englisch / En Inglés solamente]



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THE PROTECTION OF NEW VARIETIES OF PLANTS**

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PREAMBLE

The Contracting States of this Protocol,

Having regard to the Agreement on the Creation of an African Regional Intellectual Property Organization (ARIPO) then known as the Industrial Property Organization for English-Speaking Africa, concluded in Lusaka (Zambia) on December 9, 1976, and in particular to its Article III(c), in accordance with which the objectives of the Organization include the establishment of such common services or organs as may be necessary or desirable for the co-ordination, harmonization and development of the intellectual property activities affecting its members;

Considering the advantages to be gained by the pooling of resources in respect of intellectual property administration;

Recognizing the need to have an effective *sui generis* system of intellectual property protection of new varieties of plants that meets the requirements of Article 27.3 (b) of the Trade-Related Aspects of Intellectual Property Rights (TRIPs) Agreement;

Recognizing that nationals, natural persons and legal entities of Member States shall enjoy equal treatment within the Contracting States provided that the said nationals, natural persons and legal entities comply with all conditions and formalities as set out in this Protocol;

Recognizing the need to provide growers and farmers with improved varieties of plants in order to ensure sustainable agricultural production;

Convinced that provision for plant breeders' rights in the region will allow farmers access to a wide range of improved varieties to contribute to the attainment of the regional goal of economic development and food security;

Aware that the Member States require enhanced capacity building and need to develop effective national plant variety protection systems;

Convinced of the importance of providing an effective system for the protection of new varieties of plants with the aim of encouraging the development of new varieties of plants for the benefit of the society.

CHAPTER I

DEFINITIONS

Article 1
Definitions

“Administrative Council of Plant Variety Protection” means a body consisting of Heads of Offices dealing with the administration of plant variety protection in the Contracting States of this Protocol, provided that any Contracting State may nominate any other person or persons to represent it in the Administrative Council of Plant Variety Protection whom it considers to have the relevant knowledge or experience in plant variety protection;

“agent or representative” means a legally recognized and authorized representative of the breeder or the holder of the breeders’ right residing or having an office in the host country of ARIPO or in the Contracting States to this Protocol who has been so authorized through special power of attorney to act on behalf of the breeder or the holder of a breeder’s right;

“annual fees” means the fees that a breeder is required to pay to the ARIPO Office to keep a breeder’s right in force;

“applicant” means a breeder, who files an application for the grant of a breeder’s right according to Article 11;

“ARIPO” means the African Regional Intellectual Property Organization, established by the Agreement on the Creation of an African Regional Intellectual Property Organization (ARIPO) then known as the Industrial Property Organization for English-Speaking Africa, concluded in Lusaka (Zambia) on December 9, 1976;

“ARIPO Journal” means a Journal published by ARIPO as required in Article 15;

“ARIPO Office” means the Office of the African Regional Intellectual Property Organization;

“authorization” means a legal permission from the holder of the breeder’s right to allow exploitation or use of the protected variety in accordance with Article 20.

“breeder” means—

- (a) a person who bred, or discovered and developed, a variety; or
- (b) a person who is the employer of the aforementioned person or who has commissioned the latter’s work; or
- (c) a successor in title of the first or second aforementioned person, as the case may be;

“breeder’s right” means the rights of a breeder as provided for in Chapter VII;

“Contracting State” means any State that has become party to this Protocol;

“denomination” means the generic designation of a variety;

“holder of the breeder’s right” means—

- (a) a person or legal entity in whose name the breeder’s right certificate has been issued; or
- (b) a successor in title of the person referred to in paragraph (a);

“National Authority” means a designated authority in the Contracting States to this Protocol responsible for breeder’s rights. A Contracting State without a National Authority may appoint the ARIPO Office for the purposes of filing applications under Article 12;

“propagating material” means any reproductive or vegetative material of a plant variety, including seeds and any whole plant or part thereof, that may be used for reproduction or multiplication of that variety;

“register” means the ARIPO Register of Breeders’ Rights kept in terms of Article 5;

“regulations” means regulations made in terms of Article 40;

“variety” means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder’s right are fully met, can be—

- (a) defined by the expression of the characteristics resulting from a given genotype or combination of genotypes; and
- (b) distinguished from any other plant grouping by the expression of at least one of the said characteristics; and
- (c) considered as a unit with regard to its suitability for being propagated unchanged.

CHAPTER II

GENERAL

Article 2 Purpose

The purpose of this Protocol is to grant and protect breeders’ rights.

Article 3 Genera and Species to be Protected

This Protocol shall be applied to all plant genera and species from the date of coming into force of this Protocol.

Article 4 Administration

(1) Breeders’ rights granted under this Protocol shall, on the basis of one application be valid in all the Contracting States.

(2) The ARIPO Office is empowered to grant breeders’ rights and to administer such breeders’ rights on behalf of the Contracting States.

(3) The ARIPO Office shall be responsible for—

- (a) granting breeders’ rights; and
- (b) establishing a documentation centre for the purposes of dissemination of information on breeders’ rights; and
- (c) maintaining a register; and
- (d) providing information on breeders’ rights granted by the ARIPO Office; and

- (e) collaborating with other regional and international bodies whose functions relate to the protection of new varieties of plants; and
- (f) liaising with national authorities in all matters relating to the grant and administration of breeders' rights; and
- (g) performing such other functions as are necessary for the furtherance of the objectives of this Protocol.

Article 5 **ARIPO Register of Breeders' Rights**

- (1) The ARIPO Office shall maintain a register, to be known as the ARIPO Register of Breeders' Rights.
- (2) The register shall include the information prescribed in the regulations, in particular—
 - (a) information relating to applications for breeders' rights; and
 - (b) information relating to grants of breeders' rights; and
 - (c) any assignment and exclusive licences of the rights; and
 - (d) any declaration of nullity or cancellation of rights; and
 - (e) any submission, registration, rejection, change or cancellation of variety denomination.
- (3) Any person shall, upon payment of a prescribed fee be entitled, during normal business hours, to examine the register kept in accordance with paragraph (1), and to make or receive copies of or extracts from the information contained therein.

CHAPTER III

CONDITIONS FOR GRANT OF BREEDER'S RIGHT

Article 6 **Conditions of Protection**

- (1) A breeder's right shall be granted where it is determined that a variety is new, distinct, uniform and stable.
- (2) The grant of a breeder's right shall not be subject to any further or different conditions:

Provided that the variety is designated by a denomination in accordance with the provisions of Article 27 that the applicant complies with the formalities provided for in this Protocol and that the breeder pays the required fees.

Article 7 **Novelty**

- (1) A variety shall be deemed to be new if, on the date of filing of an application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder of the variety, for purposes of exploitation of the variety—
 - (a) in the territories of the Contracting States earlier than one year before the date of filing of an application; and
 - (b) in a territory other than that of the territories of the Contracting States earlier than four years or, in the case of trees or of vines, earlier than six years before the date of filing of an application.

(2) Where, according to Article 3, this Protocol applies to a plant genus or species to which it did not previously apply, varieties belonging to such plant genus or species shall be considered to satisfy the condition of novelty set out in paragraph (1), even where the sale or disposal of the variety to others took place in the territories of the Contracting States—

- (a) within four years before the date of filing of an application; or
- (b) in the case of trees or vines, within six years before the date of filing of an application.

(3) Paragraph (2), shall apply only to applications for a breeder's right filed within one year, at the latest, after the provisions of this Protocol apply to the genera or species concerned.

Article 8 Distinctness

The variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application. In particular, the filing of an application for the granting of a breeder's right or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or to the entering of the said other variety in the official register of varieties, as the case may be.

Article 9 Uniformity

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

Article 10 Stability

A variety shall be deemed to be stable if its relevant characteristics remain unchanged—

- (a) after repeated propagation; or
- (b) in the case of a particular cycle of propagation, at the end of each such cycle.

CHAPTER IV

APPLICATION FOR GRANT OF BREEDERS' RIGHTS

Article 11 Persons entitled to apply for protection

- (1) An application may be filed by a breeder who—
 - (c) is a resident in any Contracting State; or
 - (d) is not a resident in a Contracting State.

(2) An application filed under paragraph (1), by a breeder who is not resident in any of the Contracting States shall be submitted only through an agent with residence in any of the Contracting States or in the host country of ARIPO.

Article 12

Filing of Application

(1) In accordance with Article 11, an application for the grant of a breeder's right by the ARIPO Office shall be filed—

- (c) by the breeder; or
- (d) by an agent;

with either the ARIPO Office or, the National Authority of a Contracting State:

(2) An application filed with the National Authority of a Contracting State under the provisions of paragraph (1), shall have the same effect as if it had been filed on the same date at the ARIPO Office.

(3) Where an application is filed with a National Authority, the National Authority shall—

- (c) verify that the application on the face of it contains the minimum information specified in the regulations; and
- (d) within one month of receiving the application, transmit that application to the ARIPO Office.

(4) An application shall include the information prescribed in the regulations, in particular—

- (a) the name, address and other required information of the applicant, including the person who bred, discovered and developed the variety, if different from the applicant, and, if applicable, the name, address and other information required of the agent;
- (b) identification of the botanical taxon (botanical and common name);
- (c) the proposed denomination for the variety or provisional designation;
- (d) technical description of the variety;
- (e) information on prior applications and grants of breeders' rights for the same variety;
- (f) date of sale or of disposal of to others for the purposes of exploitation of the variety in accordance with Article 7.

Article 13

Filing Date of Application

The filing date of the application for a breeder's right shall be the date of receipt of the application duly filed subject to the payment of the prescribed fees.

Article 14

Right of Priority

(1) Any breeder who has duly filed an application for the protection of a variety in a Contracting State or a party to an international agreement for the protection of new plant varieties (the "first application") shall, for the purpose of filing an application for the grant of a breeder's right for the same variety directly with the ARIPO Office or through the National Authorities, enjoy a right of priority for a period of twelve months which shall be computed from the date of filing of the first application.

The day of filing shall not be included in the latter period.

(2) In order to benefit from a right of priority, a breeder shall, in an application filed directly with the ARIPO Office or through the National Authorities, claim the priority of the first application.

(3) For the purposes of paragraph (1), the ARIPO Office shall require the breeder to furnish, within a period of not less than three months from the date of filing an application—

- (a) a copy of the documents which constitute the first application certified to be a true copy by the authority with which that first application was filed; and
- (b) samples or other evidence that the variety which is the subject matter of both applications is the same.

(4) The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time, after such rejection or withdrawal, in which to furnish, to the ARIPO Office, any necessary information, document or material required for the purpose of the examination under Article 17.

(5) Events occurring within the period provided for in paragraph (1), such as the filing of another application or the publication or use of a variety that is the subject of the first application, shall not—

- (a) constitute a ground for rejecting the subsequent application; and
- (b) give rise to any third-party right.

CHAPTER V

PUBLICATION OF INFORMATION

Article 15 **Publication of Information**

(1) The ARIPO Office shall at regular intervals publish an ARIPO Journal containing the following information—

- (a) applications for the grant of breeders' rights; and
- (b) information on variety denominations; and
- (c) withdrawals of applications for the grant of breeders' rights; and
- (d) rejections of applications for the grant of breeders' rights; and
- (e) grants of breeders' rights; and
- (f) changes in the persons (applicants, holders and agents); and
- (g) nullification, surrender, cancellation and expiry of breeders' rights.

(2) No confidential information, as indicated in an application form, shall be published without the written consent of the applicant or the holder of a breeder's right.

Article 16 **Objection**

(1) Any person who wishes to lodge an objection may only do so once an application for a breeder's right is published, in accordance with the procedures set out in the regulations made under Article 40(2)(a).

(2) Any person who wishes to lodge an objection in terms of paragraph (1), shall submit a written and reasoned objection to the ARIPO Office together with the payment of the prescribed fee, at any time prior to the refusal or to the grant of the right in respect of the provisions of Articles 6, 7, 8, 9, 10 and 11, within 3 months from the date of the publication of the proposed variety denomination in respect of the provisions of Article 27.

CHAPTER VI

EXAMINATION FOR GRANTING OF BREEDER'S RIGHT

Article 17
Examination of Applications

- (1) The ARIPO Office shall—
- (a) examine an application to determine whether it and its supporting documents and material fulfill the criteria for protection as stipulated in Articles 6, 7, 8, 9 and 10; and
 - (b) examine the novelty condition in accordance with Article 7; and
 - (c) examine the formal requirements of the application and entitlement to the breeder's right in accordance with Article 11; and
 - (d) arrange for the examination of the distinctness, uniformity and stability of the variety in accordance with the provisions of Article 18; and
 - (e) examine the suitability of the denomination in accordance with Article 27; and
 - (f) receive the payment of fees in accordance with Articles 13 and 33.
- (2) For the purposes of examination, the ARIPO Office may require the applicant or agent to furnish all the necessary information, documents or material as specified in the regulations.

Article 18
Examination for Distinctness, Uniformity and Stability

- (1) In accordance with Article 17(1)(d), the ARIPO Office may, for the purposes of the examination and ensuring compliance with the conditions specified in Articles 8, 9 and 10—
- (a) arrange for the examination to be carried out by any competent institution of a Contracting State or of any member of an inter-governmental organization providing an effective system of plant variety protection; or
 - (b) take into account the results of tests that have already been carried out from the Contracting State or any member of an inter-governmental organization providing an effective system of plant variety protection.
- (2) The practical arrangements of the provisions of this Article will be specified in the regulations.

Article 19
Granting and Rejection of a Breeder's Right

- (1) Where a plant variety fulfils the requirements of novelty, distinctness, uniformity and stability as provided under Articles 7, 8, 9 and 10 and that the proposed denomination of the variety is suitable for registration, the ARIPO Office shall grant a plant breeder's right and where those requirements are not fulfilled, the ARIPO Office shall reject the application.
- (2) The ARIPO Office shall in respect of each breeder's right granted—
- (a) issue a Breeders' Right Certificate to the person who applied for the grant of the right; and
 - (b) enter the applicable particulars in the register; and
 - (c) publish such particulars relating to the grant of such right as may be prescribed by regulations.

(3) Where the examination shows that the proposed denomination of the variety cannot be registered, the ARIPO Office shall request the applicant in writing to submit another denomination within a period of three months, or further time period that the Director General may allow on good cause shown, failing which the application shall be rejected.

(4) An application shall be rejected if it is established that—

- (a) the applicant is not entitled to file an application in accordance with Article 11;
- (b) the applicant has not replied within the prescribed time limit to the official notifications issued by the ARIPO Office, particularly where—
 - (i) the information given was erroneous or incomplete;
 - (ii) the application contained a material irregularity;
- (c) the variety to which the applicant refers does not satisfy the requirements of Articles 7, 8, 9 and 10;
- (d) the applicant refuses or is unable to propose an acceptable denomination;
- (e) the applicant does not comply with the payment of fees as prescribed by regulations.

(5) The ARIPO Office shall in respect of each rejected application—

- (a) notify its decision in writing to the applicant; and
- (b) enter the applicable particulars in the register; and
- (c) publish a notice of rejection.

(6) The ARIPO Office shall not—

- (c) refuse to grant a breeder's right on the ground that protection for the same variety has not been applied for, or has been refused, in any other State or inter-governmental organization; or
- (d) limit the duration of the breeder's right on the ground that protection for the same variety has expired in any other State or inter-governmental organization.

Article 20

Provisional Protection

(1) The Protocol shall recognize provisional protection which is provided to safeguard the interests of the breeder during the period between the publication of the application for the grant of a breeder's right and the grant of that right.

(2) A breeder shall be considered to be a holder of provisional protection during the period provided in paragraph (1), and shall be entitled at least to equitable remuneration from any person who has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article 21.

(3) Any legal action in respect of provisional protection can only be initiated after the right is granted.

CHAPTER VII

RIGHTS OF BREEDER

Article 21

Scope of Breeder's Right

(1) Subject to Articles 22 and 23, the following acts in respect of the propagating material of a protected variety shall require the authorization of the breeder—

- (a) production or reproduction (multiplication);
- (b) conditioning for the purpose of propagation;
- (c) offering for sale;
- (d) selling or other marketing;
- (e) exporting;
- (f) importing
- (g) stocking for any of the purposes mentioned in (a) to (f), above:

Breeders may make their authorizations subject to conditions and limitations.

(2) Subject to Articles 22 and 23, the acts referred to in paragraph (1) items (a) to (g), in respect of—

- (a) harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise the right in relation to the said propagating material;
- (b) products made directly from harvested material of the protected variety falling within the provisions of paragraph (a) through the unauthorized use of the said harvested material shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise the right in relation to the said harvested material.

(3) The provisions of paragraphs (1) and (2) shall also apply in relation to—

- (a) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety; and
- (b) varieties which are not clearly distinguishable in accordance with Article 8 from the protected variety; and
- (c) varieties whose production requires the repeated use of the protected variety.

(4) For the purposes of paragraph (3)(a), a variety shall be deemed to be essentially derived from another variety (“the initial variety”) when—

- (a) it is predominantly derived from an initial variety, or from a variety that is itself predominantly derived from an initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety; and
- (b) it is clearly distinguishable from the initial variety; and
- (c) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

(5) Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.

Article 22

Exceptions to Breeder’s Right

(1) A breeder’s right shall not extend to—

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

(c) acts done for the purpose of breeding other varieties, and, except where the provisions of Article 21(3) apply, acts referred to in Article 21(1) and (2) in respect of such other varieties.

(2) Notwithstanding Article 21, for the list of agricultural crops and vegetables with a historical common practice of saving seed in the Contracting States specified by the Administrative Council of Plant Variety Protection which shall not include fruits, ornamentals, other vegetables or forest trees, the breeder's right shall not extend to a farmer who, within reasonable limits and subject to the safeguarding of the legitimate interests of the holder of the breeder's right, uses for propagating purposes, on the farmer's own holdings, the product of the harvest which the farmer has obtained by planting on the farmer's own holdings, the protected variety or a variety covered by Article 21(3) (a) or (b).

(3) The conditions for the implementation of the provisions under paragraph (2), such as the different level of remuneration to be paid by small scale commercial farmers and large scale commercial farmers and the information to be provided by the farmer to the breeder, shall be stipulated in the regulations.

Article 23 **Exhaustion of Breeder's Right**

(1) A breeder's right shall not extend to acts concerning any material of a protected variety, or of a variety covered by the provisions of Article 21 (3), which has been sold or otherwise marketed by the breeder or with the breeder's consent in the territories of the Contracting States to the Protocol, or any material derived from the said material, unless such acts—

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

(2) For the purposes of paragraph (1)—

“material” means, in relation to a variety

- (a) propagating material of any kind; and
- (b) harvested material, including entire plants and parts of plants; and
- (c) any product made directly from the harvested material.

Article 24 **Restrictions on Exercise of Breeder's Right**

(1) Compulsory licences shall be granted to an applicant or to a Contracting State by the ARIPO Office, on application by such third party or Contracting State, but only for reasons of public interest, after consultation with the Administrative Council of Plant Variety Protection.

(2) The ARIPO Office, when granting a compulsory licence, pursuant to paragraph (1), shall stipulate the acts covered and specify the reasonable conditions which shall include the payment of equitable remuneration to the breeder.

(3) The regulations shall lay down details on the implementation of the provisions under paragraphs (1) and (2).

Article 25

Measures Regulating Commerce

A breeder's right is independent of any measure to regulate the production, certification and marketing of material of varieties or the importing or exporting of such material and in any case, such measures shall not affect the application of the provisions of this Protocol.

Article 26

Duration of Breeder's Right

A breeder's right shall be granted for a period of twenty (20) years from the date of the grant of the breeder's right excluding trees and vines, for which a breeder's right shall be granted for a period of twenty-five (25) years from the said date.

CHAPTER VIII

VARIETY DENOMINATION

Article 27

Variety Denomination

- (1) A variety shall be designated by a denomination which—
 - (a) will be its generic designation and enables the variety to be identified;
 - (b) may not consist solely of figures except where this is an established practice for designating varieties;
 - (c) must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder;
 - (d) must be different from every denomination which designates, in the territory of any Contracting State and any member of an inter-governmental organization providing an effective system of plant variety protection, an existing variety of the same plant species or of a closely related species.
- (2) Subject to paragraph (5), no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the breeder's right.
- (3) The denomination of a variety shall be submitted by the breeder to the ARIPO Office in accordance with Article 12.
- (4) Where it is found that a denomination does not satisfy the requirements of paragraph (1), or that a prior right is in existence, the ARIPO Office shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period. The denomination shall be registered by the ARIPO Office at the same time as the breeder's right is granted.
- (5) If, by reason of a prior right, the use of the denomination of a variety is not forbidden, to a person who, in accordance with the provisions of paragraph (9), is obliged to use it, the ARIPO Office shall require the breeder to submit another denomination for the variety.
- (6) A variety must be submitted to the Contracting States, the ARIPO Office and to all members of an inter-governmental organization providing an effective system of plant variety protection under the same denomination.

(7) The ARIPO Office shall register the denomination so submitted, unless it considers the denomination unsuitable, in which case the ARIPO Office shall require the breeder to submit another denomination.

(8) The ARIPO Office shall ensure that the authorities of the Contracting States and of all members of an inter-governmental organization providing an effective system of plant variety protection are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations.

Any Contracting State and any member of an inter-governmental organization providing an effective system of plant variety protection may address its observations, if any, on the registration of a denomination to the ARIPO Office.

(9) Any person who offers for sale or markets propagating material of a variety protected within the territories of the Contracting States is obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (5), prior rights prevent such use.

(10) When a variety is offered for sale or marketed, it is permitted to associate a trademark, trade name or other similar indication with a registered variety denomination, and if such an indication is so associated, the denomination must nevertheless be easily recognizable.

CHAPTER IX

NULLITY, CANCELLATION AND SURRENDER OF BREEDER'S RIGHT

Article 28 **Nullity of Breeder's Right**

- (1) The ARIPO Office shall declare a breeder's right null and void when it is established—
- (a) that the conditions laid down in Articles 7 or 8 were not complied with at the time of the grant of the breeder's right; or
 - (b) that, where the grant of the breeder's right has been essentially based upon information and documents furnished by the breeder, the conditions laid down in Articles 9 or 10 were not complied with at the time of the grant of the breeder's right; or
 - (c) that the breeder's right has been granted to a person who is not entitled to it, unless it is transferred to the person who is so entitled.
- (2) No breeder's right shall be declared null and void for reasons other than those referred to in paragraph (1).

Article 29 **Cancellation of Breeder's Right**

- (1) The ARIPO Office may cancel a breeder's right if—
- (a) it is established that the conditions laid down in Articles 9 or 10 are no longer fulfilled; or
 - (b) after being requested to do so and within the prescribed period—
 - (i) the breeder does not provide the ARIPO Office with the information, documents or material deemed necessary for verifying the maintenance of the variety; or
 - (ii) the breeder fails to pay such fees as may be payable to keep the breeder's right in force; or

(iii) the breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.

(2) No breeder's right shall be cancelled for reasons other than those referred to in paragraph (1).

Article 30 **Surrender of Breeder's Right**

(1) A breeder's right may be surrendered before expiry of its term when the holder of that right renounces it by written declaration addressed to the ARIPO Office.

(2) The date of surrendering shall be the date specified in the declaration or, if none is specified, the date on which the declaration is received by the ARIPO Office.

(3) Upon surrender of the breeder's right, the certificate must be returned to the ARIPO Office.

CHAPTER X

LICENSES

Article 31 **Licenses**

The holder of a breeder's right may grant, to any person, an exclusive or a non-exclusive license relating to all or any of the rights granted to him or her in terms of Chapter VII.

CHAPTER XI

ASSIGNMENT AND TRANSFER OF APPLICATION OR BREEDER'S RIGHT

Article 32 **Assignment and transfer**

(1) An application for the grant of a breeder's right or a breeder's right may be assigned or otherwise transferred.

(2) The assignment or transfer shall be in writing, shall be signed by the parties concerned and shall be registered in the register.

CHAPTER XII

FEES

Article 33 **Fees**

Fees for the implementation of this Protocol shall be paid in accordance with a schedule of fees prescribed in regulations made under Article 40(2)(b).

CHAPTER XIII

APPEALS AND ENFORCEMENT PROCEDURES

Article 34 Appeals

(1) There is hereby established a Board to be known as the Board of Appeal (hereinafter referred to as “the Board”).

(2) The Board shall consist of five (5) members with relevant experience in plant variety protection matters two of whom shall be technically qualified members.

(3) At all sittings of the Board, at least one technically qualified member shall be present.

(4) The members of the Board shall be appointed by the Administrative Council of Plant Variety Protection—

(a) for a period of two years renewable once for another term of two years; and

(b) from the Contracting States to this Protocol; and

(c) on such other terms and conditions as the Council may determine.

(5) The functions of the Board shall be—

(a) to consider and decide on any appeal lodged by an applicant or a holder of a breeders’ right who has been aggrieved by a decision made in terms of Articles 19(1)(3) and (4), 28 and 29;

(b) to review any final administrative decision of the ARIPO Office in relation to the implementation of the provisions of this Protocol;

(c) to decide on any other matter related to or incidental to the exercise of the Board’s powers.

(6) Three members of the Board shall form a quorum.

(7) The decisions of the Board shall be final.

(8) The Board shall have power to make and adopt its own rules of procedure.

Article 35 Enforcement Measures

The Contracting States shall ensure that accessible and appropriate enforcement measures and dispute settlement mechanisms, sanctions and remedies are available for the effective enforcement of breeders’ rights and any other breach of this Protocol.

CHAPTER XIV

GENERAL PROVISIONS

Article 36 Extension of Time Limits

(1) An extension may be granted even when the time limit concerned has expired, where the ARIPO Office deems it justified given the circumstances before it.

(2) The ARIPO Office may, upon having received a written request addressed to it, extend, under conditions it shall lay down, the time limit prescribed for performing an act or satisfying a requirement in

accordance with provisions of this Protocol or of the regulations, by notifying its decisions to the parties concerned.

Article 37
Uniform Effect of Regional Breeders' Rights

Regional breeders' rights shall have uniform effect within the territories of the Contracting States and may not be granted, transferred or terminated in respect of the above mentioned territories otherwise than on a uniform basis.

Article 38
National Plant Breeders' Rights for Plant Varieties

This Protocol shall be without prejudice to the right of the Contracting States to grant national plant breeders rights for plant varieties, subject to the provisions of Article 39.

Article 39
Prohibition of Cumulative Protection

Where the holder of a breeder's right has been granted another breeder's right for the same variety prior to the grant of the regional plant breeder's right, such breeder shall be unable to invoke the rights conferred by such protection for the variety for as long as the regional plant breeder's right remains effective.

CHAPTER XV

REGULATIONS

Article 40
Regulations

(1) The Administrative Council of Plant Variety Protection shall make regulations for the implementation of this Protocol and may amend them, as and when necessary.

(2) The Regulations shall in particular relate to—

- (a) any administrative requirements, matters of procedure, or any details necessary for the implementation of the provisions of this Protocol and any relevant international treaties; and
- (b) the fees to be charged and the details of the distribution of part of those fees among the Contracting States.

CHAPTER XVI

FINAL PROVISIONS

Article 41
Entry into Force

(1) Any State which is a member of ARIPO or any State to which membership of ARIPO is open may become party to this Protocol—

- (a) by signature followed by the deposit of an instrument of ratification; or

(b) by deposit of an instrument of accession.

(2) Instruments of ratification or accession shall be deposited with the Director General of ARIPO.

(3) This Protocol shall come into force three months after four States have deposited their instruments of ratification or accession.

(4) Any State which is not party to this Protocol upon its entry into force shall become bound by this Protocol three months after the date of which such State deposits its instrument of ratification or accession.

(5) Any State which ratifies or accedes to this Protocol shall, by the instrument of ratification or accession, be deemed to have indicated its acceptance to be bound by the provisions of the Agreement on the creation of the African Regional Intellectual Property Organization (ARIPO) and such State shall become a member of ARIPO on the date on which it deposits its instrument of ratification or accession to this Protocol.

Article 42 Reservations

Reservations may not be made to this Protocol.

Article 43 Signature of Protocol

(1) This Protocol shall be signed in a single copy and shall be deposited with the Director General of ARIPO.

(2) The Director General of ARIPO shall transmit certified copies of this Protocol to the Contracting States, other member States of ARIPO and the States to which membership of ARIPO is open in accordance with Article IV of the Agreement on the creation of the African Regional Intellectual Property Organisation (ARIPO).

Article 44 Amendment of Protocol

(1) This Protocol may be amended at the instance of any Contracting States or the Director General of ARIPO during the Sessions of the Administrative Council of Plant Variety Protection.

(2) Adoption of the amendments of any provisions of this Protocol shall require a majority of two-thirds of the votes of all the Contracting States.

Article 45 Denunciation of Protocol

(1) Any Contracting State may denounce this Protocol by notification addressed to the Director General of ARIPO.

(2) Denunciation of this Protocol shall take effect six months after receipt of the said notification by the Director General of ARIPO and shall not affect any application filed or breeder's right granted prior to the expiration of the said six months.

[End of Annex II and of document/
Fin de l'annexe II et du document/
Ende der Anlage II und des Dokuments/
Fin del Anexo II y del documento]