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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

COUNCIL

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EXAMINATION OF THE CONFORMITY OF THE LEGISLATION OF KENYA
WITH THE UPOV CONVENTION

Document prepared by the Office of the Union

Introduction

1. By letter dated September 20, 1996 (which was received by the Office of the Union on October 1), Mr. S. Amos Wako, Attorney General of the Government of Kenya, requested the advice of the Council of UPOV, pursuant to Article 32(3) of the 1978 Act of the UPOV Convention (hereinafter referred to as "the 1978 Act"), on the conformity of the legal provisions of Kenya with the 1978 Act. The letter is reproduced in Annex I to this document.
2. Kenya did not sign the 1978 Act. Under Article 32(1)(b) of that Act it must accordingly deposit an instrument of accession in order to become a member State of UPOV on the basis of that Act. Under Article 32(3), an instrument of that kind can only be deposited by Kenya if it has requested the advice of the Council on the conformity of its laws with the provisions of the 1978 Act and if the decision of the Council embodying the advice is positive.

Legal Basis for the Protection of New Varieties in Kenya

3. The legal basis for the protection of new plant varieties in Kenya is The Seeds and Plant Varieties Act, 1972 ("the Act"). The Act, which closely resembles the Plant Varieties and Seeds Act, 1964 of the United Kingdom, comprises seven Parts as follows:

PART I	Preliminary
PART II	Seeds (this part contains seed regulations and provisions for an index of plant varieties and performance trials)
PART III	Seed Testing
PART IV	Control of Imports and Prevention of Cross-Pollination
PART V	Plant Breeder's Rights
PART VI	The Seeds and Plants Tribunal
PART VII	General.

There are six Schedules to the Act.

4. Parts I, V, VI and VII and Schedules 3, 4, 5 and 6 contain provisions relevant to the protection of plant varieties and are set out (in English only) in Annex II.
5. Section 1 of the Act provides that the various provisions of the Act shall come into operation on such day or days as the Minister responsible for matters relating to Agriculture may appoint.
6. Implementing regulations under the Act entitled "The Seeds and Plant Varieties (Plant Breeder's Rights) Regulation" ("the Regulation") were made by the Minister for Agriculture, Livestock Development and Marketing, on November 10, 1994, and came into force on November 25, 1994. The Regulations are set out in Annex III.

Article 1(1) of the 1978 Act: Purpose of the Convention

7. Article 1(1) of the 1978 Act provides that "the purpose of this Convention is to recognize and to ensure to the breeder of a new plant variety or to his successor in title ... a right." The preamble describes the Act as "An Act of Parliament ... to provide for the grant of proprietary rights to persons breeding or discovering new varieties.

Article 2 of the 1978 Act: Forms of Protection

8. Section 17(1) and (2) make provisions for the grant of rights, known as "plant breeder's rights," where the conditions laid down in the Act, which reproduce the conditions for a grant of protection under the 1978 Act, are fulfilled. Such plant breeder's rights constitute a "special title of protection" for the purposes of the first sentence of Article 2 of the 1978 Act.
9. Section 18 of the Industrial Property Act 1989 provides that plant varieties as provided for in the Act, but not parts thereof or products of biotechnological processes shall not be patentable. The Laws of Kenya thus meet the requirements of the second sentence of Article 2 of the 1978 Act.

Article 3 of the 1978 Act: National Treatment; Reciprocity

10. There are no provisions in the Act limiting the nationality, or place of residence or registered office, of the applicant or breeder. The Act accordingly conforms fully with Article 3 of the 1978 Act.

Article 4 of the 1978 Act: Botanical Genera and Species Which Must or May be Protected

11. The Act provides for the grant of rights in respect of plant varieties of such species or groups as may be specified by a scheme made by the Minister. The Act accordingly enables Kenya to comply with Article 4 of the Convention by making schemes enabling the protection of a minimum of five plant genera and species prior to any eventual accession to the 1978 Act.

Article 5 of the 1978 Act: Rights Protected; Scope of Protection

12. Section 20 of the Act provides that the holder of plant breeder's rights in a plant variety shall have the exclusive right to "produce propagating material of the variety for commercial purposes, to commercialize it, to offer it for sale, to export it, to stock it for any of the purposes" The Fifth Schedule to the Act provides for the extension of the breeder's right to the sale of cut blooms, fruit or some other part or product of plants of the variety in certain specified circumstances. Strictly speaking, the reference to "propagating material" in Section 20(1)(a) should be a reference to "reproductive material" which expression is defined in Section 27(1). If this definition is inserted in Section 20, the scope of protection offered by the Act is wider than the minimum required by Article 5(1) of the 1978 Act.

13. Section 20(4) provides that the holder of plant breeder's rights may impose any conditions, limitation or restrictions which may be imposed by the holder of any other kind of proprietary rights. The Act thus complies with Article 5(2) of the 1978 Act.

14. The proviso to Section 20(1) provides that the production and the stocking for production of the propagating material of a protected variety for research purposes or for developing new varieties falls outside the scope of the breeder's right so as to satisfy the first sentence of Article 5(3) of the 1978 Act.

15. Paragraph 2 of the Fifth Schedule extends the right of the breeder to the repeated use of the protected variety to produce another variety so as to satisfy the second sentence of Article 5(3) of the 1978 Act.

Article 6 of the 1978 Act: Conditions Required for Protection

16. Article 6 of the 1978 Act provides that the breeder shall benefit from protection when the conditions specified in Article 6 are satisfied and that "the grant of protection may not be made subject to conditions other than those set forth above." Part II of the Fourth Schedule to the Act sets out the conditions that must be satisfied prior to the grant of plant breeder's rights. It should be noted that paragraph (1)(i)(b) and the words appearing after the end of

paragraph 1.(1)(d) create conditions that are not included in Article 6(1) of the 1978 Act. The provisions of paragraph 1.(1)(b) of the Act could, on their own, be disregarded since they add little to the conditions of uniformity and stability. However, the condition that “the agro-ecological value [of the variety] must surpass, in one or more characteristics, that of existing varieties according to results obtained in official tests” is a departure from the principles of the UPOV Convention. The Convention does not consider that the value of a variety should be taken into account for the purposes of protection. The fathers of the Convention considered that the value of a variety varied too greatly with time and space to be suitable as a condition for grant in an international system of protection. In particular the concept of value is particularly difficult and probably impossible to apply to ornamental plants which are of great importance in some economies.

17. Paragraph 2., Part II, of the Fourth Schedule makes provision for the novelty criterion of Article 6(1)(b) of the 1978 Act. Whilst provision is made for varieties to retain their novelty if they have been sold or offered for sale outside Kenya for up to four years prior to the date of application, there is no provision for the six year period in respect of trees and vines required by Article 6(1)(b)(ii) of the 1978 Act. It is suggested that the proviso to paragraph 2(2) in the Fourth Schedule to the Act should be amended to read as follows:

“Provided that the restriction imposed by this sub-paragraph shall not apply to sales or offers or exposures for sale made outside Kenya

- (a) in the case of trees and vines during the period of six years, and
- (b) in any other case during the period of four years

ending with the date of the application.”

18. The Act satisfies the most important aspects of Article 6 of the 1978 Act but will not totally meet its requirements unless the condition of value is removed and the novelty condition is adjusted as indicated in paragraph 17. Ideally paragraph 1.(1)(b) should also be deleted.

Article 7 of the 1978 Act: Official Examination of Varieties; Provisional Protection

19. Section 17(2) of the Act provides that plant breeder’s rights shall be granted if the authorized officer is satisfied that the conditions laid down in Section 18 of the Act are satisfied. The conditions laid down by Section 18 are that the applicant must be the breeder or his successor in title and the variety must, subject to paragraph 18 above, satisfy the conditions of Article 6 of the 1978 Act. Regulation 14 of the Regulations contains detailed provisions concerning the provision of information and material for the purposes of the examination. The Act accordingly satisfies Article 7 of the 1978 Act.

Article 8 of the 1978 Act: Period of Protection

20. Section 19(2) and (3) specifies minimum periods of protection for trees and vines (18 years) and other varieties (15 years) calculated from the date of grant and thus conforms with Article 8 of the 1978 Act.

Article 9 of the 1978 Act: Restrictions in the Exercise of Rights Protected

21. Section 23 of the Act contains provisions on the granting of compulsory licenses in circumstances which may be considered to involve the public interest. They conform with the requirements of Article 9 of the 1978 Act.

Article 10 of the 1978 Act: Nullity and Forfeiture of the Rights Protected

22. Section 19(7) of the Act requires the Minister to cancel (not to declare null and void) a grant which did not meet all the conditions for a grant of protection established in Part II of the Fourth Schedule to the Act. As with most common law legal systems, the Act does not distinguish between nullity and forfeiture as required by Article 10 of the 1978 Act. Section 22 of the Act requires the Minister to cancel a grant of protection as required by Article 10(2) of the 1978 Act.

Article 11 of the 1978 Act: Free Choice of the Member State in Which the First Application is Filed; Application in Other Member States; Independence of Protection in Different Member States

23. There are no provisions in the Act or the Regulations which would prevent a breeder from choosing the member State of the Union in which he wishes to file his first application, or from applying for protection in other member States until a grant of plant breeder's rights is made in Kenya. The Act and Regulations accordingly conform with Article 11(1) and (2) of the 1978 Act.

Article 12 of the 1978 Act: Right of Priority

24. Part I of the Fourth Schedule to the Act provides for a right of priority in terms which satisfy Article 12 of the 1978 Act.

Article 13 of the 1978 Act: Variety Denomination

25. Provisions relating to variety denominations are to be found in Section 21 of the Act and in Regulation 21 of the Regulations. These provisions reproduce the substance of Article 13 of the 1978 Act.

Article 14 of the 1978 Act: Protection Independent of Measures Regulating Production, Certification and Marketing

26. The Act and the Regulations contain no provisions which conflict with Article 14 of the 1978 Act.

Article 30 of the 1978 Act: Implementation of the Convention on the Domestic Level

27. Section 20(1) of the Act provides that “infringements of plant breeder’s rights shall be actionable at the suit of the holder of such rights, and ... all such relief by way of damages, injunction, account or otherwise shall be available as is available, in any corresponding proceedings in respect of infringements of other proprietary rights.” The Act accordingly satisfies Article 30(1)(a) of the 1978 Act.

28. The Act places responsibility for administering the Act upon the Minister for the time being responsible for matters relating to agriculture and upon public officers authorized by the Minister to exercise functions specified in the Act, so as to satisfy Article 30(1)(b) of the 1978 Act.

29. Section 24(3) provides for regulations made by the Minister for the keeping of registers and records relating to plant breeder’s rights and for their inspection by members of the public and for the publication of applications and decisions relating to plant breeder’s rights. Regulations 22 and 24 contain detailed provisions concerning the above-mentioned records and registers and access thereto by members of the public. The Act and Regulations accordingly conform with Article 30(1)(c) of the 1978 Act.

General Conclusion

30. On the basis of the foregoing, the Office of the Union would suggest that the Council may wish:

(a) to advise the Government of Kenya that the Act and the Regulations conform with the 1978 Act of the UPOV Convention subject to the following:

(i) Rule 1(1)(b) should be deleted;

(ii) the words “and the agro-ecological value must surpass in one or more characteristics that of existing varieties according to results obtained in official tests” in Part II of the Fourth Schedule should be deleted;

(iii) the proviso to Rule 2(2) in Part II of the Fourth Schedule to the Act should be amended on the lines of the suggestion made in paragraph 17 above.

(b) to further advise the Government of Kenya that, upon the deletion of the said Rule and words and the addition of the amendment suggested by the Office of the Union, it may deposit an instrument of accession to the 1978 Act.

31. The Council is invited to take note of the information given above and to take decisions on the basis of the proposal set out in the preceding paragraph.

[Three Annexes follow]

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ANNEX I

ANNEX II

ANNEX III

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