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# INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

Geneva

## COUNCIL

### Forty-Sixth Ordinary Session Geneva, November 1, 2012

#### EXAMINATION OF THE CONFORMITY OF THE PLANT BREEDERS' BILL OF GHANA WITH THE 1991 ACT OF THE UPOV CONVENTION

*Document prepared by the Office of the Union*

1. By letter dated September 25, 2012, addressed to the Secretary-General of UPOV, His Excellency Dr. Benjamin Kunbuor, Attorney General and Minister of Justice of the Republic of Ghana (hereinafter referred to as "Ghana"), requested the examination of the Plant Breeders' Bill (hereinafter referred to as the "Draft Law"), 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 a copy of the Draft Law 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. Since October 2000, the Office of the Union has provided assistance to the Government of Ghana with different drafts laws relating to plant variety protection on various occasions. On July 23, 2011, in Koforidua, Ghana, the Office of the Union participated in an information session for Parliamentarians on the Draft Law and the 1991 Act of the UPOV Convention. The Office of the Union sent its latest comments on the version of the Draft Law of August 14, 2012, on September 11, 2012.

#### BASIS FOR THE PROTECTION OF NEW PLANT VARIETIES IN GHANA

4. In Ghana, the protection of new plant varieties will be governed by the Draft Law, once adopted. The Draft Law in English is presented in Annex II. An analysis of the Draft Law follows in the order of the substantive provisions of the 1991 Act.

#### Article 1 of the 1991 Act: Definitions

5. Section 2 and Section 61 of the Draft Law contain definitions of variety and breeder corresponding to the definitions in Article 1(vi) and (iv) of the 1991 Act, respectively.

6. The Draft Law in its Section 61 contains definitions of the following terms, which are not defined in the 1991 Act:

“genome” means the entirety of the hereditary information of an organism;

“genotype” means the genetic constitution of a cell;

“growing test” means a test for the examination of distinctness, uniformity and stability;

“natural mutant” means the variation produced in the genome without human intervention;

“plant genera” means categories of classification of living beings, that is, groups of species closely related in structure and evolution origin which are situated below the family or sub-family and above the species;

“plant species” means the basic concept in the classification of living organisms and are groups of organisms characterised by similar shape, size, behaviour and habitat with features that remain constant over time;

“propagating material” means seeds, seedlings, grafts, stock and any other parts of a plant that is intended to be sown, planted or replanted;

“protected variety” means a variety which is the subject matter of a breeder’s right;

“somaclonal variant” means a clone propagated from the development of somatic or vegetation cells.

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

7. The Draft Law is entitled “Plant Breeders Act, 2012. An Act to provide for the grant and protection of plant breeder rights; and for related matters”, corresponding to the basic obligation provided by Article 2 of the 1991 Act.

8. Section 59 of the Draft Law “Application of Convention” provides as follows:

“59. (1) The Minister shall ensure that the implementation of this Act does not affect the fulfilment of the Government’s obligations pertaining to the protection of breeders’ rights under the Convention to which the country is a party.

(2) The Minister may on behalf of the Republic enter into a bilateral or multilateral agreement with a foreign government for the mutual recognition and protection of breeders rights.”

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

9. Section 1 of the Draft Law provides that “[t]he provisions of this Act Law apply to all plant genera and plant species”. This conforms with Article 3(2)(ii) of the 1991 Act. It should be noted that, in accordance with Article 36(1)(ii) of the 1991 Act, when depositing its instrument of accession, Ghana must notify in a declaration that the Law applies to all plant genera and species.

#### Article 4 of the 1991 Act: National Treatment

10. In order to correspond to the requirements of Article 4 of the 1991 Act, it is recommended to modify Section 9 (2) of the Draft Law as follows:

“2) An application for the grant of a plant breeder right may be ~~filed~~ filed by

(a) ————— the breeder of a new variety who is

(i) a citizen or who is resident in the country; or

(ii) a foreign citizen, or a resident in the territory, of a party to a treaty to which the Republic is party;

~~(b)~~ ~~————~~ (iii) a legal entity that has its registered office within the territory of a party to a treaty to which the Republic is party; or

~~(c)~~ ~~————~~ ~~(iv)~~ ~~————~~ a legal entity that has its registered office in the country.”

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

11. Sections 3 to 7 of the Draft Law contain the conditions of protection corresponding to the provisions of Articles 5 to 9 of the 1991 Act.

12. Section 19 of the Draft Law implements a transitional novelty regime for “Varieties of recent creation” based on Article 6(2) of the 1991 Act, as follows:

“19. (1) A variety shall be deemed to be new in accordance with section 4 even where the sale or disposal of that variety to another person took place in this country within

(a) four years before the application for a plant breeder right; or

(b) six years before the application for a plant breeder right in the case of trees or of vines.

(2) Subsection (1) applies only to an application for a plant breeder right that is made within one year after the commencement of this Act.”

#### Article 10 of the 1991 Act: Filing of Applications

13. Sections 8 to 10 of the Draft Law contain provisions on the filing of applications. The Draft Law does not seem to contain provisions which conflict with Article 10 of the 1991 Act.

#### Article 11 of the 1991 Act: Right of Priority

14. Sections 11 to 13 of the Draft Law contain 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

15. Section 14 of the Draft Law contains 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

16. Section 15 of the Draft Law contains provisions on provisional protection corresponding to the provisions in Article 13 of the 1991 Act, as follows:

“15. (1) An applicant is entitled to enjoy provisional protection of a plant breeder right between the date of the publication of the notice of the application for the grant of a plant breeder right in the Gazette or the Varieties Bulletin and the date of the grant of that right.

(2) For the period of provisional protection, the applicant is deemed to be the holder of a plant breeder right in relation to any person who during the period has carried out an act which would require the breeder’s authorisation under section 20, once the plant breeder right is conclusively granted.

(3) An applicant may take measures to prove an infringement during the period of provisional protection.”

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

17. Section 20 of the Draft Law 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

18. In order to correspond to the provisions of Article 15(1) of the 1991 Act concerning the compulsory exceptions to the breeder's right, it is recommended to modify Section 21(1) of the Draft Law as follows:

- "(1) A breeder's right shall not extend to cover any act done
- (a) privately and for non-commercial purposes,
  - (b) for experimental purposes, and
  - (c) for the purpose of breeding other varieties, and, ~~except~~
    - (i) except where subsections (4), (5) and (6) of section 20 apply; ~~and,~~
    - (ii) ~~for~~ acts referred to in subsections (1) and (2) of section 20 in respect of such other varieties."

19. Section 21(2) and (3) of the Draft Law contains provisions on the optional exception under Article 15(2) of the 1991 Act as follows:

- "(2) The Minister shall make Regulations to restrict a plant breeder right in relation to any variety of agricultural plants within reasonable limits.
- (3) The Minister shall in making the Regulations take into account the need to
- (a) safeguard the legitimate interests of breeders; and
  - (b) permit farmers to make personal use on their own holdings for purposes of propagation of the product of harvest which they have obtained by planting on their own holdings the protected variety or a variety provided for under paragraphs (a) and (b) of subsection (4) of section 20."

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

20. Section 22 of the Draft Law 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

21. Section 27 of the Draft Law contains provisions concerning the restrictions on the exercise of the breeder's right which correspond to the provisions in Article 17 of the 1991 Act.

Article 18 of the 1991 Act: Measures Regulating Commerce

22. Section 23 of the Draft Law contains provisions concerning measures regulating commerce which correspond to the provisions of Article 18 of the 1991 Act. The Draft Law 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

23. Section 28 of the Draft Law 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

24. In order to correspond to the provisions of Article 20(4) of the 1991 Act concerning “prior rights of third persons”, it is recommended to modify Section 37 of the Draft Law as follows:

“37. (4) The prior right of a third person shall not be affected. ~~If~~ If, by reason of a prior right, the use of the denomination is prohibited ~~by~~ for a person who is obliged to use it in accordance with subsection (1) of section 38. ~~(2) — Where the prior right of a third person is not affected,~~ the Registrar shall require the breeder concerned to submit another denomination in respect of the variety for registration.”

25. Subject to the above modification, Sections 34 to 39 of the Draft Law contain 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

26. Section 29 of the Draft Law 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

27. Section 30 of the Draft Law 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

28. 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), Section 57 and Section 58 of the Draft Law provide as follows:

“Civil remedies

57. (1) Where a person is aggrieved by the infringement of a plant breeder right, that person may bring an action for

- (a) an order of injunction to prevent the commission or continuation of the commission of the act of infringement or to prohibit the continuation of the infringement;
- (b) the recovery of damages for the infringement;
- (c) the forfeiture, seizure or destruction of propagating or harvested material which has been produced contrary to this Act;
- (d) an order requiring the Customs Division of the Ghana Revenue Authority to detain goods imported or ready for export; and
- (e) any other remedy that the court considers fit.

(2) Subsection (1) does not preclude an action being brought under any other enactment for the enforcement of a person’s right.”

“Offences

58. A person who wilfully

- (a) offers for sale, sells or markets the propagating material of a variety protected in Ghana;
- (b) markets propagating material of a variety protected in Ghana without the registered variety denomination; or

- (c) uses the registered variety denomination of a variety protected in Ghana for another variety of the same plant species or closely related species likely to cause confusion

commits an offence and is liable on summary conviction to a fine of not more than two thousand penalty units or to a term of imprisonment of not more than two years or to both.”

29. In relation to the obligation under Article 30(1)(ii) of the 1991 Act, Section 14(4) and Section 43(2)(b) of the Draft Law provide as follows:

“(4) The Registrar shall examine the application to determine whether it complies with the requirements of novelty, distinctness, uniformity and stability under section 3 to 7, and the requirements of sections 9 and 12 and section 34 to 39.”

“(2) The functions of the Technical Committee are to [...]

(b) obtain from the Registrar reports as regards the applications for the protection of plant breeder rights and advise the Registrar on the grant of plant breeder rights; [...]”

30. Section 56 of the Draft Law 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

31. In the opinion of the Office of the Union, once the modifications recommended in paragraphs 10, 18 and 24 of this document have been introduced in Draft Law, the Draft Law would incorporate the substantive provisions of the 1991 Act. On that basis, once the Draft Law is modified, as recommended in paragraphs 10, 18 and 24 of this document, with no additional changes, and the Draft Law is adopted and the Law is in force, Ghana would be in a position “to give effect” to the provisions of the 1991 Act, as required by its Article 30(2).

32. *The Council is invited to:*

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

(b) *take a positive decision on the conformity of the Plant Breeders' Bill of Ghana with the provisions of the 1991 Act of the International Convention for the Protection of New Varieties of Plants, which allows Ghana, once the Draft Law is modified as recommended in paragraphs 10, 18 and 24 of this document, with no additional changes, and the Draft Law is adopted and the Law is in force, to deposit its instrument of accession to the 1991 Act; and*

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

[Annexes follow]

LETTER FROM THE MINISTER OF JUSTICE TO THE SECRETARY-GENERAL OF UPOV

In case of Reply the number and date of this letter should be quoted

Our Ref:

L2/2005/V2

Your Ref : .....



REPUBLIC OF GHANA

MINISTRY OF JUSTICE  
P. O. BOX MB 60  
ACCRA

25<sup>th</sup> September 2012

Fax: 667609  
Tel: 665051

DR. FRANCIS GURRY  
SECRETARY-GENERAL  
INTERNATIONAL UNION FOR THE  
PROTECTION OF NEW VARIETIES OF PLANTS (UPOV)  
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1211 GENEVA 20  
SWITZERLAND

Dear Secretary-General Francis Gurry,

DEPOSIT OF DRAFT PLANT BREEDER RIGHTS BILL FOR ADVICE OF COUNCIL

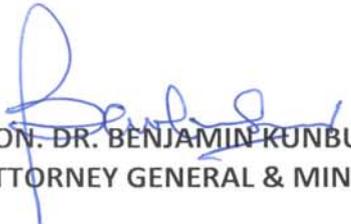
I have the pleasure to inform you that the Parliament of the Republic of Ghana is in the process of adopting the Plant Breeder Rights.

The Republic of Ghana intends to adhere to the International Convention for the Protection of New Varieties of Plants of December 2, 1961, revised at Geneva on November 10, 1972, on October 23, 1978 and on March 19, 1991 (UPOV Convention).

Pursuant to the provisions of Article 34 (3) of the UPOV Convention, I would appreciate it if the Council of UPOV could examine the conformity of the Draft Plant Breeders Bill of the Republic of Ghana with the provisions of the UPOV Convention.

Please find enclosed a copy of the Draft Law.

Sincerely yours,

  
HON. DR. BENJAMIN KUNBUOR  
ATTORNEY GENERAL & MINISTER OF JUSTICE

[Annex II follows]

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

## **PLANT BREEDERS BILL, 2012**

### **MEMORANDUM**

The purpose of this Bill is to establish a legal framework to protect the rights of breeders of new varieties of plants or plant groupings and to promote the breeding of new varieties of plants aimed at improving the quantity, quality and cost of food, fuel, fibre and raw materials for industry.

The Bill seeks to acknowledge the achievements of breeders of new varieties by making available to them an exclusive right on the basis of a set of uniform and clearly defined principles. This will promote the growth of the seed industry and safeguard the lawful right and interest of plant breeders. Furthermore, the Bill seeks to regulate the production, offer for sale, sale, marketing and advertisement, of new varieties.

The Trade Related Aspects of Intellectual Property Rights (TRIPS) which resulted from the negotiations of the Uruguay Round requires contracting parties to protect varieties either by patent or by an effective sui generis system of protection or by a hybrid of these two systems which is the plant breeders rights system. The plant breeder's rights system permits farmers to save and replant seed and provides them with the right to use protected varieties as a source of further research and breeding activities.

Ghana in compliance with her international obligations has passed six pieces of legislation in the area of intellectual property between 2003 and 2006. The legislation enacted includes Patents Act, 2003 (Act 657), Geographical Indications Act, 2003, (Act 659), Industrial Designs Act, 2003 (Act 660), Trademarks Act, 2004 (Act 664), Layout - Designs (Topographies) of Integrated Circuits Act, 2004 (Act 667) and the Copyright Act, 2005 (Act 690). These pieces of legislation created a new landscape for the regime of intellectual property but overlooked a major aspect, being the development and protection of rights related to plant varieties.

Even though the enactment of the Plant and Fertilizer Act, 2010 (Act 803) seeks to complement the existing legal framework for intellectual property, it stands to reason that the introduction of a legal framework to support the protection of the rights of breeders of new varieties and to promote the development of new varieties is of paramount importance at this point in time when the food situation on the globe is not only precarious but uncertain as the world population continues to grow.

The protection for new plant varieties will encourage investment in plant breeding since plant breeding requires long term investment and efforts which entrepreneurs are most often unprepared to sponsor in the absence of protection. The Bill will promote the development of new varieties adapted to the environment and specific needs of the country and in particular the increase of agricultural productivity in the face of scarcity of arable land and other resources.

Recent breeding initiatives by the Crops Research Institute and other private plant breeders have failed to yield the required dividends to the owners as the new varieties were appropriated and used by persons who failed to recognise the investment and effort of the breeder and the need to pay the necessary royalties to the breeder due to the absence of protection.

In recognition of Government's effort to improve the seed industry, by stimulating competition among enterprises, encouraging price stabilisation and offering employment to the private sector, the Ministry of Food and Agriculture acknowledged the significance of variety protection as an important element of the country's national seed policy initiative. Variety protection is particularly relevant at this time when plant breeders are being encouraged to increase their contribution to the development of agriculture in the country and the seed supply system. The protection of plant breeder rights is currently required to support plant breeding activities realised by the private and public breeding activities. Currently, arable land and other resources needed for agricultural production worldwide are scarce. In view of the potential for

productivity growth in Ghana, the provision of better seeds to farmers will result in increased yields on the same piece of land which will thereby enhance the economic development of the country. It is therefore critical that the country creates and promotes an enabling environment for the stakeholders in the agricultural sector especially the seed industry through the development of policies and strategies to ensure food security and increase the efforts of the country to compete on international markets. Food security can be improved by breeding and making available to farmers seeds of high yielding varieties that are not only adaptable to our environment but have good taste and nutritional qualities. The Bill will encourage foreign breeders and local breeders to contribute to the development of the agriculture sector of the country, resulting in technology transfer and know how, as new varieties enter the channels of trade.

The Bill seeks to promote agriculture which will complement the committed initiatives of the Ministry of Food and Agriculture in the development of the seed industry, as well as ongoing reforms in the agriculture sector. The Ministry of Justice is responsible for the administration and implementation of intellectual property rights under TRIPS and invariably has a joint responsibility with the Ministry of Trade which is entrusted with the responsibility to comply with Ghana's international obligations under TRIPS. The emerging consensus among stakeholders indicates that variety protection can produce benefits by increasing the scope of plant improvement and help farmers to break out of the cycle of subsistence farming.

*Clause 1 to 7* of the Bill provides for the scope of application of the Bill and the conditional requirements for the protection of a plant breeder rights.

*Clause 8 to 14* deals with the application process for a plant breeder right.

*Clause 15 to 19* deals with the protection of plant breeder rights. *Clause 20 to 33* maps out the scope and duration of plant breeder rights. *Clause 34 to 39* deals with the variety denomination. *Clause 40 to 50* is on administrative and financial matters. *Clause 51 to 53* relates to appeals. *Clause 54 to 61* provide for miscellaneous matters.

*Clause 1* of the Bill defines the scope of application of the Bill. Ghana has opted to apply the requirement for compliance with the International Convention for the Protection of New Varieties of Plants of December 2, 1961 and subsequently revised on November 10<sup>th</sup>, 1972, on 23<sup>rd</sup> October, 1978 and on 19<sup>th</sup> March, 1991.

*Clause 2* provides a meaning for 'variety'. *Clause 3* enumerates the conditions for the protection of a variety. The conditions require a variety to be new, distinct, uniform and stable before the variety denomination is acceptable for the purposes of protection of a plant breeder right.

*Clause 4 to 7* expands on the elements of each condition stated in clause 2. *Clause 4* describes a variety as new if at the date of filing the relevant application for registration as a variety on the priority date as defined in *clause 11*, the propagating or harvested material of the variety has not been sold or otherwise disposed of to another person or with the consent of the plant breeder for the purpose of exploitation of the variety in Ghana or a foreign country within the indicated time frames set out in *clause 4*.

*Clause 5* states the distinctness of a variety to be the ability to clearly distinguish it from any other variety the existence of which is common knowledge.

*Clause 6* describes the condition of uniformity to mean that a variety must be sufficiently uniform in its characteristics.

*Clause 7* describes a variety to be stable if its relevant characteristics remain unchanged after repeated propagation or in the case of a particular cycle or propagation at the end of that cycle.

The eligibility requirements for a plant breeder right are expressly stated in *clause 8*. These include the due process for application and the category of individuals eligible for application. Individuals may apply on their own or jointly with another person or employers. It must be noted that in the event that several individuals have bred or discovered and developed the same variety, the one with an earlier prior date of application for protection holds the right to apply for registration of the plant breeder's right.

*Clause 9* outlines the application process and indicates the persons who may file the application. A legal entity with its registered office in the country or within the territory of a State which is a party to an international treaty to which the Republic is a party may file an application. *Clause 9* also spells out conditions to which the application of the protection of a plant breeder right is subject. These include the payment of the prescribed fee, personal details of the applicant and the person that has bred or discovered and developed a variety if different from the applicant, technical, generic and botanical specifications of the variety as well as any prescribed information for the purposes of examination.

The Bill in *clause 10* provides expressly for a discrete presumption. It represents the first tier of protection of a plant breeder right. In the absence of any contrary proof, an applicant is presumed to be entitled to protection of a breeder right except that where the application is made by a successor in title, it must be supported by proof of the title of the successor.

*Clause 11* enables an applicant to claim the right of priority of an earlier application that has been duly filed for the same variety by the applicant or the predecessor in title of the applicant. The clause further indicates the yardstick to determine the precedence of applications.

*Clause 12* stipulates the requirements for the claim of the right of priority. These include a certified true copy of the documents which constitute the first application and a sample or evidence to prove the identity of the variety which is the subject matter of both applications.

*Clause 13* states the effect of priority of an application. The clause provides the applicant with an opportunity to furnish the Registrar with information or material required for the purpose of examination.

*Clause 14* states the modalities for the examination of an application. These include the determination of validity of the application in the light of the appropriateness of the botanical taxon to which the variety belongs, the completion and accuracy of the application and the compliance with the conditions provided in *clause 3* to *7* and the requirements of *clauses 9* and *12*.

*Clause 15* introduces the subject on the provisional protection of plant breeder rights.

*Clause 16* deals with matters that pertain to the objection to a plant breeder right and *clause 17* outlines the procedure for consideration of objections. *Clause 18* mandates the Registrar to record in the register entries in relation to withdrawals, refusals of applications and decisions on the nullification or cancellation of registration.

Even though *clause 4* requires novelty to be one of the conditions for the registration of a variety, *clause 19* discounts this requirement and provides for the grant of a plant breeder right for a variety where the sale or disposal of the varieties took place in Ghana four years before the application for a plant breeder right or within six years before the application for a breeder's right in the case of trees or vines. The conditions require the filing of the application for a plant breeder right within the ensuing year after the passage of the Bill.

*Clause 20* prohibits the production, conditioning, offer for sale, marketing, export, import or stocking of a protected variety without the authority of the holder of the plant breeders. The clause is subject to *clauses 21* and *22*. Subclause (5) of the clause defines an essentially derived variety.

*Clause 21* stipulates exceptions to a plant breeder right. The right does not extend to cover any act done privately and for non-commercial purposes, for experimental purposes or research or for the purpose of breeding other varieties. Furthermore, subclause (2) empowers the Minister to make Regulations to provide for specific restrictions to plant breeder rights, within reasonable limits and subject to the safeguarding of the legitimate interest of the breeder, in relation to any variety of agricultural plants as provided by the Regulations. The Minister shall, in making the Regulations for the purpose, take account of the need to permit farmers to make personal use on their own holdings for propagating purposes and of the product of the harvest which they have obtained by planting on their own holdings and the protected variety covered by *clause 20(4) (a) and (b)*.

*Clause 22* deals with the exhaustion of a plant breeder right. The clause stipulates that a plant breeder right shall not extend to acts regarding any material of the protected variety or of a variety to which subclauses (3), (4) and (5) of *clause 20* apply, which has been sold or otherwise marketed in the country by the breeder or with the breeder's consent amongst others. "Material" in relation to a variety as used in subclause (1) is defined to mean propagating material of any kind, harvested material including entire plants or parts of a plant and any product made directly from the harvested material.

*Clause 23* makes the plant breeder right independent of any measure taken by the Republic to regulate within Ghana the production, certification and marketing of material of a variety or the importation or exportation the material.

*Clause 24* makes provision for a plant breeder right to be assigned or transferred to one or more successors in title. The assignment which should be in writing signed by the parties concerned does not affect a right acquired by a third party provided the assignment is recorded in the register.

*Clause 25* deals with the grant of licences by the applicant for or the holder of a plant breeder right to any person. The licence may relate to all or any of the rights provided for in the Bill. The grant of a licence is subject to payment of a prescribed fee, is required to be in writing, may be registered at the Registrar General's Department and be published in the *Gazette* and *Varieties Bulletin*.

*Clause 26* delineates the rights attached to a valid licence granted by a breeder or applicant for the grant of a plant breeder right. The application of the right is subject to a statutory declaration required to be made by the holder of a plant breeder right or an applicant for the grant of a plant breeder right.

In contrast to a contractual licence provided for in *clause 25*, the Bill also makes provision for a compulsory licence in *clause 27*. This clause empowers the Registrar to grant a compulsory licence if the grant of the licence is in the public interest. Other preconditions for the grant of the licence relate to the financial status of the applicant, the applicant's ability to exploit the plant breeder right in a competent and efficient manner, the refusal of the holder to grant the applicant a licence on reasonable terms, a lapse of three years between the date of the grant of the plant breeder right and the date of the application for the grant of the compulsory licence and the fee payable for the grant.

*Clause 27* is a trigger for remuneration for the holder of the plant breeder right in respect of the grant of a compulsory licence. The court is responsible for the determination of the amount of the remuneration and the method of payment. *Clause 27* also empowers the Registrar to determine the terms of the compulsory licence, to require the holder to provide the licensee with enough propagation material necessary for reasonable use to be made of the compulsory licence and to terminate the licence.

*Clause 28* states categorically the duration of a plant breeder right in respect of varieties of trees and vines to cover a twenty-five year period after the grant of the plant breeder right and for varieties of all genera or species to expire twenty years after the grant of the breeder's right.

*Clause 29* deals with circumstances where a plant breeder right is declared null and void by the Registrar. The Registrar is empowered to take this decision on the advice of the Plant Breeders Advisory Committee. These circumstances are invoked by the contravention of *clause 4* or *5* at the time of the grant of the plant breeder's right or where the plant breeder right has been granted to a person who is not entitled to it subject to an assignment. *Clause 29* further provides for the objection of a decision by the Registrar on the nullification of the registration of a variety.

The Registrar may by virtue of the *clause 30* cancel a plant breeder right on the advice of the Plant Breeders Advisory Committee due to insufficient information from the breeder for the purpose of verification of the maintenance of the variety, the failure of the breeder to pay the annual fee required and the absence of a suitable denomination for the protected variety.

*Clause 31* takes cognisance of the situation where a plant breeder right terminates before the due time. This occurs if the holder renounces the right by written notice or declaration.

*Clause 32* imposes a responsibility on an applicant of a plant breeder right or the holder of the right to bear the costs of laboratory and annual fees for variety protection and the fees for the examination of the variety in the examination field.

Additional responsibilities are placed on the holder of a plant breeder right in *clause 33* to ensure that maintenance of the protected variety is unchanged during the period of protection. In line with this responsibility, the holder is obliged to provide at the request of the Registrar, an appropriate quantity of samples of propagating material of the protected variety necessary for the verification of the maintenance of the variety.

*Clause 34* broaches the subject of variety denominations. *Clause 34* makes it mandatory to register a variety with a denomination to be considered as its generic designation.

*Clause 35* describes the characteristics of a variety denomination to imply a word, a combination of words and numbers or a combination of letters and numbers provided the designation enables the variety to be identified. Subclause (2) underlines the required distinction between one variety denomination and another which designates an existing variety of the same plant species or closely related species in the country of any State Party to the Convention. *Clause 35* further requires that a variety denomination must not consist solely of figures except where it is an established practice for designation of specific varieties and should not be misleading.

*Clause 36* provides the third tier of the protection of a plant breeder right and this is the registration of a variety denomination. By this clause an applicant may register a denomination with the Registrar provided the variety denomination proposed is considered suitable by the Registrar being that it is compliant with the provisions of the Bill and the prescribed fee is paid by the applicant. The clause also makes provision for the proposal of a new denomination in the event that the initial proposal is rejected.

*Clause 37* makes provision for the prior rights of third parties. The clause correlates the use of prior rights to the obligatory use of a denomination provided for under *clause 38*.

*Clause 38* makes it mandatory for a person who offers for sale, sells or otherwise markets or advertises a propagating material of a protected variety to use the registered variety denomination even after the expiration of the plant breeder's right connected to that variety. The clause also takes cognisance of the prior rights of third parties by reason of a denomination. The third party rights in respect of a denomination of a variety take precedence over the plant breeder's right to the same denomination of a variety.

*Clause 39* permits the trademarks, trade names or other similar indications to be associated with a protected variety denomination provided the denomination is easily recognisable.

*Clause 40* introduces the first provision for administrative matters contained in the Bill. It provides for the establishment of a registry for the purpose of the administration of genera and species to be protected. The registry is to be located at the Registrar-General's Department and will be headed by the Registrar-General.

*Clause 41* provides for a register of plant breeder rights which the Registrar is required to keep and maintain. The clause lists the various entries required to be listed in it and provides for a periodical update of the content of the register. Access to examine the register or to obtain an extract from it is subject to the payment of a fee.

The rectification of entries in the register and the publication of information in the *Gazette* and *Varieties Bulletin* in respect of breeders' rights is the content of *clause 42*. The rectification of matters that affect the validity of the registration of a variety are excluded from the ambit of this clause.

*Clause 43* establishes a standing committee namely the Plant Breeders Technical Committee. Its membership includes the Registrar and some members of the Plant Protection Advisory Council established under the Plants and Fertilizer Act, 2010 (Act 803). Its responsibilities include to advise the Minister on the effective implementation of the Bill, the provision and verification of results of tests and examinations on application and to advise the

Registrar specifically or generally on the grant of plant breeder rights. The Committee is also required to obtain reports from the Registrar on the applications of plant breeder rights.

*Clause 44* relates to the disclosure of interest of members of the Plant Breeders Technical Committee. *Clause 45* provides for the allowances for members of the Plant Breeders Technical Committee.

*Clause 46* establishes a Plant Breeders Development Fund. Moneys of the Fund are for various activities including the publication of information in respect of applications for the grants of plant breeder rights, proposed and approved denominations, the maintenance of variety collections, the examination of varieties and the protection of plant breeder rights. The sources of the fund are provided for in *clause 47*.

*Clause 48* makes the Plant Breeders Technical Committee responsible for the management and disbursement of the Fund and in line with this, also responsible for the development of rules and procedures for the operation and management of the Fund subject to the approval of the Minister.

*Clause 49* makes provision for accounts and audit and *clause 50* is on the annual report and other reports.

*Clause 51* establishes the Appeal Board which consists of at least three members including one expert in legal and administrative matters and two experts qualified in agricultural science. The Appeal Board is responsible for the prescription of its own rules of procedure, ordering the attendance of witnesses, the production of documents and keeping the record of its proceedings.

*Clauses 52* and *53* respectively deal with the tenure of office of members of the Appeal Board and appeals from decisions of the Registrar.

*Clauses 54* to *61* are miscellaneous provisions. *Clause 54* provides for the inspection and preservation of documents. This clause facilitates the access to information on documents relating to applications, grants of plant breeder rights and growing tests. The clause further mandates the Registrar to preserve the original copies of every document for a period of five years after withdrawal or rejection of the application or lapse of a plant breeder right.

*Clause 55* establishes a Varieties Bulletin exclusively for matters provided for in this Bill. It is required to be maintained in both hard copy format and electronic format. *Clause 56* mandates the Registrar to publish matters specified in the clause.

*Clause 57* provides civil remedies for the redress of grievances. These include injunction, recovery of damages for infringement of personal rights, forfeiture, seizure or destruction of propagating or harvested material produced contrary to the Bill, detention of goods imported or ready for export and other remedies of the court. The clause is not restrictive as it further provides for remedies under other enactments for the enforcement of personal rights.

*Clause 58* stipulates the offences in the Bill and the correlative penalty.

*Clause 59* guarantees government's obligations as regards the International Convention for the Protection of New Varieties of Plants pertaining to the protection of plant breeder rights.

Matters for which the Minister may make Regulations in respect of the Bill are the content of *clause 60*. *Clause 61* is on interpretation.

**DR. BENJAMIN KUNBUOR**  
ATTORNEY-GENERAL AND  
MINISTER FOR JUSTICE

Date:

**PLANT BREEDERS BILL, 2012**

**ARRANGEMENT OF SECTIONS**

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*Application and conditions of variety*

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2. Meaning of variety
3. Conditions of variety for protection of a plant breeder right
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7. Stability

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A

BILL

ENTITLED

**PLANT BREEDERS ACT, 2012**

**AN ACT** to provide for the grant and protection of plant breeder rights; and for related matters.

**PASSED** by Parliament and assented to by the President:

*Application and conditions of variety*

**Scope of application**

1. The provisions of this Act apply to all plant genera and plant species.

**Meaning of variety**

2. 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 plant breeder right are fully met, can be

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

**Conditions of variety for the protection of a plant breeder rights**

3. A variety shall not be deemed suitable for the purpose of the protection of a plant breeder right unless it is

- (a) new,
- (b) distinct;
- (c) uniform; and
- (d) stable.

**Novelty**

4. A variety is new if at the date of filing the relevant application for registration as a variety or where applicable on the priority date, the propagating or harvested material of the variety has not been sold or otherwise disposed of to any person by or with the consent of the breeder for the purpose of exploitation of the variety

- (a) in Ghana, earlier than one year before the date of filing the application, or
- (b) in a foreign country, earlier than
  - (i) four years; or

- (ii) six years in the case of trees or vines

before the date on which protection is applied for under this Act.

### **Distinctness**

5. (1) A variety is distinct if it is clearly distinguishable from any other variety the existence of which is a matter of common knowledge
- (a) at the date of filing the application for registration, or
- (b) on the priority date of the application for registration.

(2) For the purpose of subsection (1) the filing an application for a plant breeder right, or for the entry of another variety into a catalogue of varieties admitted to trade in any country shall be deemed to render that other variety a matter of common knowledge from the date of the application, if the application leads to the grant of the plant breeder right or the entry in the catalogue.

### **Uniformity**

6. A variety is 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.

### **Stability**

7. A variety is stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle or propagation at the end of that cycle.

### *Application for breeder's right*

#### **Eligibility for a plant breeder right**

8. (1) A breeder is eligible for a plant breeder right if that breeder duly makes an application for it in accordance with this Act.
- (2) The eligibility of a breeder to apply for a plant breeder right shall not be affected by the fact that, the same variety
- (a) has not been applied for, or
- (b) has been refused in a foreign country.
- (3) Where two or more persons have jointly bred or discovered and developed a variety, they are both eligible to apply for a plant breeder right with respect to that variety.
- (4) Where a variety has been bred or discovered and developed in the execution of a commission or a contract of employment, the person that commissioned the work or the employer has the right to apply for the respective plant breeder right except as otherwise provided in the contract.

(5) Where a variety has been bred or discovered and developed by several persons independently of each other, the person who makes an application with an earlier prior date for protection has the right to apply for the plant breeder right.

#### **Application for a plant breeder right**

9. (1) A person may apply to the Registrar for the grant of a plant breeder right if that person is eligible in accordance with section 8.
- (2) An application for the grant of a plant breeder right may be filed by
- (a) the breeder of a new variety who is

- (i) a citizen or who is resident in the country; or
  - (ii) a foreign citizen resident in the territory of a party to a treaty to which the Republic is party;
- (b) a legal entity that has its registered office within the territory of a party to a treaty to which the Republic is party; or
- (c) a legal entity that has its registered office in the country.
- (3) The application for a plant breeder right
- (a) is subject to the payment of the prescribed fee; and
  - (b) shall contain the following details:
    - (i) the name and the address of the applicant,
    - (ii) the name and address of the person that has bred or discovered and developed a variety if it is different from the applicant,
    - (iii) the identification of the botanical taxon and the Latin or common name,
    - (iv) the generic designation proposed for the variety or a provisional designation,
    - (v) a technical description of the variety, and
    - (vi) any information, document or material required for the purposes of examination.

(4) Where the applicant is not resident in Ghana, the applicant shall appoint a legal representative or agent in this country to process the application.

(5) A person referred to in paragraph (b) or (c) of subsection (2), shall enjoy within Ghana the same treatment as is accorded by this Act to citizens.

#### **Presumption of protection**

10. (1) An applicant shall in the absence of any proof to the contrary, be presumed to be entitled to the protection of a plant breeder right under this Act.

(2) Where the application is made by the successor in title of the applicant, the applicant shall support the application with proof of the successor's title.

#### **Priority of application**

11. (1) An applicant may declare the right of the priority of an earlier application that has been duly filed for the grant of a plant breeder right for the same variety by the applicant or the predecessor in title of the applicant with a State or intergovernmental organisation which is party to a treaty to which the Republic is a party.

(2) Where the application filed with the Registrar is preceded by several applications duly filed, priority shall be based only on the earliest application.

(3) The applicant shall claim the right of priority expressly in the application filed with the Registrar.

(4) The applicant may only claim the right of priority within a period of twelve months after the date on which the earliest application was filed except that the day of filing shall not be considered as part of the twelve month period.

### **Requirements for claim of right of priority of application**

12. (1) Where an applicant claims the right of priority, that applicant shall submit to the Registrar a certified true copy of the documents which constitute the first application, within three months after the date of filing the application in Ghana.

(2) The authority with which the first application was filed, shall certify the documents.

(3) The Registrar shall request the applicant to submit a sample or evidence to prove that the variety which is the subject matter of both applications is the same.

(4) Where the first application is in a foreign language, the Registrar shall request the applicant to produce a translation of the first application into English within three months after the date of receipt of the request.

(5) Where the Registrar determines that the requirements of subsection (1) to (4) have not been met, the claim ceases to have effect.

### **Effect of priority of application**

13. (1) The effect of priority is that, the application filed is considered to have been filed at the date of the filing of the first application.

(2) The applicant is entitled to furnish the Registrar with any necessary information, document or material required for the purpose of examination within

(a) a period of two years after the expiration of the period of priority; or

(b) an appropriate time determined by the Registrar in the case of the rejection or withdrawal of the first application.

### **Examination of application**

14. (1) The filing date of the application is the date on which the application was filed with the Registrar.

(2) Where the application is incomplete or incorrect, the Registrar shall request the applicant to complete or correct it within thirty days after notification.

(3) An application which is not corrected within the prescribed period shall be considered not to have been filed.

(4) The Registrar shall examine the application to determine whether it complies with the requirements of novelty, distinctness, uniformity and stability under section 3 to 7, and the requirements of sections 9 and 12 and section 34 to 39.

(5) In examining the application, the Registrar may

(a) enter into an arrangement with a relevant authority or person within the country and outside the country to carry out tests to determine whether the variety is

(i) new,

(ii) distinct,

(iii) uniform, or

(iv) stable; and

(b) use the results of tests that have already been carried out.

(6) An applicant shall submit to the Registrar any information, document or material requested by the Registrar for purposes of the examination of the application and matters related to it.

(7) Where the Registrar is satisfied that an application has been duly filed under this Act or the Regulations, the Registrar shall record the date of filing the application in the register established under section 41.

#### *Protection of plant breeder rights*

#### **Provisional protection of plant breeder rights**

15. (1) An applicant is entitled to enjoy provisional protection of a plant breeder right between the date of the publication of the notice of the application for the grant of a plant breeder right in the *Gazette* or the *Varieties Bulletin* and the date of the grant of that right.

(2) For the period of provisional protection, the applicant is deemed to be the holder of a plant breeder right in relation to any person who during the period has carried out an act which would require the breeder's authorisation under section 20, once the plant breeder right is conclusively granted.

(3) An applicant may take measures to prove an infringement during the period of provisional protection.

#### **Objection**

16. (1) A person may object to the grant of a plant breeder right within sixty days after the publication in the *Gazette* or the *Varieties Bulletin*.

(2) The objection shall be made in writing and supported by the grounds of objection.

#### **Consideration of objections**

17. (1) The Registrar shall within the prescribed period, notify the applicant of the objection to the grant of the plant breeder right.

(2) The applicant shall within the prescribed period state a personal intention to maintain, correct or withdraw the application.

(3) On request made by the applicant, the Registrar may extend the time for the submission of the statement or correction of the application.

(4) Where the applicant does not submit the statement within the prescribed period, the application shall be considered to have been withdrawn by the applicant.

(5) Where the applicant maintains the application, the Registrar shall notify the person who objects to the grant of the plant breeder right.

(6) The person who objects shall within the prescribed period, respond to the statement of the applicant as to whether the person intends to maintain or withdraw the objection.

(7) The Registrar may require the person to submit further information and documents in support of the objection or any plant material which is necessary for a technical examination.

(8) The Registrar shall study the relevant documents and subsequently hear both parties before taking a decision as to whether to grant the plant breeder right or not.

(9) The Minister may appoint a person to advise the Registrar for the purposes of the examination of applications, having regard to that person's expert knowledge in the area of plant breeding.

### **Record of entries in register**

18. The Registrar shall record in the register, each entry of the
- (a) withdrawal or refusal of an application for a plant breeder right, and
  - (b) decision of the nullification or cancellation of the registration of the plant breeder right.

### **Protection of varieties of recent creation**

19. (1) A variety shall be deemed to be new in accordance with section 4 even where the sale or disposal of that variety to another person took place in this country within
- (a) four years before the application for a plant breeder right; or
  - (b) six years before the application for a plant breeder right in the case of trees or of vines.
- (2) Subsection (1) applies only to an application for a plant breeder right that is made within one year after the commencement of this Act.

#### *Scope and duration of plant breeder right*

### **Requirement of authorisation of holder of a plant breeder right for specific acts**

20. (1) Subject to sections 21 and 22, the following acts in respect of propagating material of a protected variety require the authorisation of the breeder:
- (a) production or reproduction,
  - (b) conditioning for the purpose of propagation,
  - (c) an offer for sale,
  - (d) sale or marketing,
  - (e) exportation,
  - (f) importation; and
  - (g) stocking for any of the purposes mentioned in paragraph (a) to (f).
- (2) The breeder may make an authorisation subject to conditions and limitations.
- (3) Subject to sections 21 and 22, the acts referred to in subsection (1) as regards harvested material, including the whole of a plant and part of a plant obtained through the unauthorised use of the propagating material of the protected variety, shall require the authorisation of the breeder, unless the breeder has had a reasonable opportunity to exercise the right in relation to the propagating material.
- (4) Subsections (1) and (2) apply in relation to the following:
- (a) varieties which are not clearly distinguishable from the protected variety in accordance with section 5;
  - (b) a variety which is essentially derived from the protected variety where the protected variety is not itself an essentially derived variety; and
  - (c) a variety, the production of which requires the repeated use of the protected variety.
- (5) For the purposes of subsection (4) (b), a variety shall be deemed to be essentially derived from another variety being the initial variety if it

- (a) is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety;
  - (b) is clearly distinguishable from the initial variety; and
  - (c) except for the differences which result from the act of derivation, 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.
- (6) An essentially derived variety may be obtained for example by the selection of a
- (a) natural mutant or induced mutant,
  - (b) somaclonal variant, or
  - (c) variant individual from a plant of the initial variety, back crossing or transformation by genetic engineering.

### **Exceptions to plant breeder right**

21. (1) A plant breeder right shall not extend to cover any act done
- (a) privately and for non-commercial purposes,
  - (b) for experimental purposes, and
  - (c) for the purpose of breeding other varieties, and except
    - (i) where subsections (4), (5) and (6) of section 20 apply; and
    - (ii) for acts referred to in subsections (1) and (2) of section 20.
- (2) The Minister shall make Regulations to restrict a plant breeder right in relation to any variety of agricultural plants within reasonable limits.
- (3) The Minister shall in making the Regulations take into account the need to
- (a) safeguard the legitimate interests of breeders; and
  - (b) permit farmers to make personal use on their own holdings for purposes of propagation of the product of harvest which they have obtained by planting on their own holdings the protected variety or a variety provided for under paragraphs (a) and (b) of subsection (4) of section 20.

### **Exhaustion of plant breeder right**

22. (1) A plant breeder right shall not extend to acts regarding any material of the protected variety or of a variety to which subsections (3), (4) and (5) of section 20 apply, which has been sold or otherwise marketed in the country by the breeder or with the breeder's consent, or any material derived from the said material unless that act involves the
- (a) further propagation of the variety in question; or
  - (b) 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 genera or species to which the variety belongs except where the exported material is for final consumption.
- (2) For the purposes of subsection (1), 'material' in relation to a variety means
- (a) propagating material of any kind;

- (b) harvested material including entire plants or parts of a plant and
- (c) any product made directly from the harvested material.

### **Measures regulating commerce**

23. A plant breeder right shall be independent of any measure taken by the Republic to regulate within Ghana the production, certification and marketing of material of a variety or the importation or exportation of the material.

### **Assignment**

24. (1) An application for the grant of a plant breeder right may be assigned or otherwise transferred to one or more successors in title.
- (2) The assignment or transfer shall be
- (a) in writing; and
  - (b) signed by the parties concerned.
- (3) An assignment under this section does not affect a right acquired by a third party unless it is recorded in the register and published in the *Gazette* or *Varieties Bulletin*.

### **Contractual licence**

25. (1) The holder of, or the applicant for, a plant breeder right, may grant to any person, a licence that relates to any of the rights provided for under this Act.
- (2) A licence shall be in writing and include provisions on the
- (a) scope of the licence;
  - (b) period of time for which the licence is transferred; and
  - (c) fee or royalty for the use of the licence if any.
- (3) The applicant may register a licence at the Registrar General's Department on payment of the prescribed fee.
- (4) licence is not binding on a third party that has acquired a right in good faith unless the licence was registered before its acquisition.
- (5) The Registrar shall publish a notice of the registration in the *Gazette* and *Varieties Bulletin*.

### **Statutory declaration for payment of royalty**

26. (1) A holder or an applicant for the grant of a plant breeder right, may make a statutory declaration to declare that any person prepared to pay a royalty is entitled to carry out any of the acts referred to in section 21, from the date on which the person concerned informed the holder or applicant of the intention to carry out the acts.
- (2) The holder or applicant shall address the statutory declaration to the Registrar who shall enter a reference of the declaration in the register.
- (3) The holder or applicant shall state in the statutory declaration the royalty payable by the licensee.
- (4) The Registrar may cancel the entry at the request of the holder or applicant if the beneficiaries concerned agree.

## **Compulsory licence**

27. (1) A person may apply to the Registrar for the grant of a compulsory licence as regards a plant breeder right.

(2) Subject to subsection (3), the Registrar shall grant the applicant the compulsory licence only where the grant of the licence is in the public interest.

(3) The Registrar shall not grant a compulsory licence unless

- (a) the applicant is of a financially sound status;
- (b) the applicant can exploit the variety in a competent and efficient manner, and is willing to embark on the exploitation;
- (c) the holder has refused to grant the applicant a licence on reasonable terms;
- (d) three years have lapsed between the date of the grant of the plant breeder right and the date of the application for the grant of the compulsory licence; and
- (e) the applicant has paid the prescribed fee.

(4) A person to whom a licence is granted under this section shall pay the holder an equitable remuneration in the absence of an agreement on the amount.

(5) The method of payment as regards the remuneration and the amount shall be determined by a competent court taking into account the circumstances of each individual case.

(6) The Registrar may require the holder to provide the licensee with the propagating material required for reasonable use to be made of the compulsory licence.

(7) A compulsory licence confers on the licensee a non-exclusive right to carry out acts referred to in section 20.

(8) The Registrar shall determine the term of the compulsory licence.

(9) The Registrar shall extend the term of a compulsory licence where the Registrar is satisfied, on the basis of a new examination that the conditions for the grant of the licence continue to exist after the expiration of the first term.

(10) Where the Registrar is satisfied that the grounds on which any compulsory licence granted under this section have ceased to exist or that the licensee has failed to comply with the conditions under which the licence was granted, the Registrar may on the application of any interested party, terminate the licence.

## **Duration of plant breeder right**

28. (1) Subject to subsection (2), a plant breeder right as regards varieties of trees and vines, expires twenty-five years after the grant of the breeder right.

(2) Protection for varieties of all other genera or species expire twenty years after they have been granted.

## **Nullity**

29. (1) The Registrar shall on the advice of the Plant Breeders Technical Committee established under section 43 declare a holder's right null and void

(a) if the conditions laid down in section 4 or 5 were not complied with at the time of the grant of the plant breeder right;

(b) where the grant of the right has been essentially based on information and

documents furnished by the holder if the conditions laid down in section 6 or 7 were not complied with at the time of the grant of the plant breeder right; or

- (c) where the plant breeder right has been granted to a person, who is not entitled to it, except in the case of an assignment to a person who is so entitled.

(2) A plant breeder right which has been declared null and void shall be considered never to have been granted.

(3) The Registrar shall

- (a) enter in the register the decision of the nullification of the plant breeder right; and
- (b) publish the decision in the *Gazette* or *Varieties Bulletin* within seven days after entry in the register.

(4) An interested person may challenge the decision, by a written objection lodged with the Registrar within thirty days after the date of the decision.

(5) The Registrar may hold a hearing or decide the matter, based on written submissions of the interested parties within sixty days after receipt of the objection.

### **Cancellation**

30. (1) The Registrar shall on the advice of the Plant Breeders Advisory Committee cancel a plant breeder right if the conditions laid down in section 6 or 7 are no longer fulfilled.

(2) The Registrar may cancel the registration of a variety in any of the following instances if after being requested to do so and within the prescribed period:

- (a) the breeder does not provide the Registrar with the information, documents or material necessary for the verification of the maintenance of the variety;
- (b) the breeder fails to pay the annual fee required; or
- (c) the breeder does not propose a suitable denomination for the protected variety where the denomination of the variety is cancelled after the registration.

(3) The Registrar shall record in the register, the decision of the cancellation of the registration of the variety and publish the decision in the *Gazette* or *Varieties Bulletin*.

### **Termination**

31. (1) A plant breeder right shall terminate before the term referred to in section 28 duly expires

- (a) where the holder of that right renounces it by written notice or declaration addressed to the Registrar; or
- (b) on the date of termination specified in the notice or declaration or, if none is specified, the date on which the notice or declaration is received by the Registrar.

(2) The Registrar shall enter in the register the decision on termination of the plant breeder right.

### **Fees for examination of variety and variety protection**

32. The applicant for a plant breeder right or the holder shall bear the fees for the examination of the variety in the field or the laboratory and the annual fees for variety protection.

### **Maintenance of the protected variety**

33. (1) A breeder or holder shall, ensure the maintenance of the protected variety during the period of protection.

(2) At the request of the Registrar, the breeder or holder shall provide an appropriate quantity of samples of the propagating material of the protected variety necessary for the verification of the maintenance of the variety.

(3) At the request of the Registrar, the holder or breeder may keep or maintain the sample of the variety.

### *Variety denomination*

### **Designation of varieties by denomination**

34. (1) A variety shall be designated with a denomination, which shall be deemed to be its generic designation.

(2) Subject to section 37, the rights in the designation registered as the denomination of the variety shall not hamper the free use of the denomination in connection with the variety even after the expiration of the plant breeder right.

### **Characteristics of variety denomination**

35. (1) Subject to subsection (3), a variety denomination may be a word, a combination of words and numbers or a combination of letters and numbers for the purpose of the variety to be identified by the designation

(2) A variety denomination shall be different from every denomination which designates an existing variety of the same plant species or closely related species in the country of any State Party to the Convention.

(3) A variety denomination shall not

- (a) consist solely of figures except where it is an established practice for designation of varieties, or
- (b) be misleading or cause confusion concerning
  - (i) the characteristics,
  - (ii) value or identity of the variety, or
  - (iii) the identity of the breeder.

### **Registration of variety denomination**

36. (1) A person who seeks to register a variety denomination shall apply in writing to the Registrar and propose in the application, the variety denomination for registration.

(2) The applicant shall submit a variety denomination under the same denomination that pertains in any State Party to the Convention.

(3) Subject to subsection (5), the Registrar shall register the variety denomination proposed under subsection (2), unless the Registrar considers the denomination unsuitable.

(4) Where the Registrar finds that the variety denomination does not meet the requirements of section 35, the Registrar shall

- (a) refuse to register the variety denomination; and
- (b) require the breeder to propose another denomination within a prescribed period.

(5) Where the proposed denomination is appropriate the Registrar shall register the denomination at the same time that the plant breeder right is granted.

### **Prior rights of third persons**

37. (1) The prior right of a third person shall not be affected if by reason of a prior right, the use of the denomination is prohibited by a person who is obliged to use it in accordance with subsection (1) of section 38.

(2) Where the prior right of a third person is not affected, the Registrar shall require the breeder concerned to submit another denomination in respect of the variety for registration.

### **Obligation to use variety denomination**

38. (1) Subject to subsection (2), a person who offers for sale, sells or otherwise markets propagating material of a protected variety within the country shall use the denomination of that variety even after the expiration of the breeder right in respect of that variety.

(2) The obligation to use a variety denomination under subsection (1) shall not affect the prior rights of third parties provided for under section 37.

(3) The Registrar shall ensure that the authorities of the members to the Convention are informed of matters that concern variety denominations and in particular the submission, registration and cancellation of denominations.

(4) An authority of a member state to the Convention may address observations on the registration of a denomination to the Registrar.

### **Indications in association with denomination**

39. When a protected variety is offered for sale or marketed, a trademark, trade name or other similar indication may be associated with the registered variety denomination if the denomination is easily recognisable.

### *Administrative and financial provisions*

#### **Registry of varieties**

40. (1) There is established by this Act a registry for plant varieties which shall be located at the Registrar-General's Department.

(2) The registry shall be headed by the Registrar who shall be assisted by an Assistant Registrar appointed in accordance with article 195 of the Constitution.

(3) The Registrar may delegate a function of the office of the Registrar to an Assistant Registrar.

(4) The Registrar is responsible for the registration of varieties.

#### **Register of plant breeder rights**

41. (1) There is established by this Act a register of plant breeder rights.

(2) The Registrar shall keep and maintain the register.

(3) The Registrar shall record in the register the following entries:

- (a) applications for the grant of plant breeder rights;
- (b) applications for variety denominations;
- (c) grants of plant breeder rights;
- (d) withdrawals and applications for the grant of plant breeder rights;
- (e) changes in the particulars of holders;
- (f) lapses of the plant breeder rights;
- (g) matters related to licences;
- (h) registration of new denominations for protected varieties;
- (i) official announcements; and
- (j) any other particulars related to plant breeder rights required under this Act.

(4) The Registrar shall review the content of the register every four months in each year.

(5) The register shall be open to the public during normal working hours.

(6) A person may on payment of the prescribed fee examine the register or obtain an extract from the register.

#### **Rectification of information**

42. (1) The Registrar may correct or authorise the correction of any clerical error, omission, non insertion or defect as regards the description of a new variety, which appears in an application or other document lodged with the Registrar for purposes of entries in the register.

(2) A person aggrieved by a clerical error, omission, non-insertion or defect regarding an entry of particulars in the register, may apply to the Registrar to effect the necessary rectification except that an application for rectification may not be made for a matter that affects the validity of the registration of a variety.

#### **Plant Breeders Technical Committee**

43. (1) There is established by this Act a technical committee to be known as the Plant Breeders Technical Committee consisting of the following members appointed by the Minister

- (a) the Registrar;
- (b) the Director of the Crops Research Institute;
- (c) the Director of the Directorate of Crops Services, Ministry of Agriculture;
- (d) the Director of Plant Protection and Regulatory Services of the Ministry of Agriculture;
- (e) one representative of one of the Faculties of Agriculture in one of the universities in Ghana nominated on a rotational bases for a term of three years at a time by the universities;
- (f) the Director of the Savannah Agricultural Research Institute; and
- (g) one representative from the private sector who is engaged in the seed industry.

- (2) The functions of the Technical Committee are to
  - (a) advise the Minister on the effective implementation of this Act;
  - (b) obtain from the Registrar reports as regards the applications for the protection of plant breeder rights and advise the Registrar on the grant of plant breeder rights;
  - (c) provide and verify the results of tests and examinations on application for a plant breeder right; and
  - (d) give the Registrar advice of a specific and general nature.
- (3) The Technical Committee may determine the procedure for its meetings.
- (4) The Minister shall designate a member of the Technical Committee as the chairperson of the Technical Committee.
- (5) In the absence of the chairperson, the members of the Technical Committee shall elect one of their members to act as chairperson.

#### **Disclosure of interest**

44. (1) A member of the Technical Committee who has an interest in a matter for consideration by the Technical Committee
- (a) shall disclose the nature of that interest and the disclosure shall form part of the record of the consideration of the matter; and
  - (b) shall not participate in the deliberations of the Technical Committee as regards that matter.
- (2) A member ceases to be a member of the Technical Committee, if that member has an interest in a matter before the Board and
- (a) fails to disclose that interest, or
  - (b) participates in the deliberations of the matter.

#### **Allowances**

45. Members of the Plant Breeders Technical Committee shall be paid allowances approved by the Minister in consultation with the Minister responsible for Finance.

#### **Plant Breeders Development Fund**

46. (1) There is established by this Act, a Plant Breeders Development Fund.
- (2) The object of the Fund is to finance activities to protect the rights of breeders and to promote the breeding of new varieties.
- (3) For the purposes of achieving the object of the Fund, moneys of the Fund shall be applied for the following activities:
- (a) the regular publication of information as regards
    - (i) applications for the grant of plant breeder rights; and
    - (ii) proposed and approved variety denominations;
  - (b) the maintenance of variety collections for the purposes of examination,
  - (c) the examination of varieties, and

- (d) the protection of plant breeder rights.

### **Sources of money for the Fund**

47. (1) The funds of the Plant Breeders Development Fund include
- (a) fees as regards applications, registration and other relevant services rendered in pursuance of this Act;
  - (b) donations, grants and other voluntary contributions;
  - (c) moneys approved by Parliament; and
  - (d) any other moneys that are approved by the Minister responsible for Finance.
- (2) The Registrar may retain a percentage of internally generated funds realised in the performance of functions for the purposes of this Act.
- (3) The percentage of internally generated funds retained by the Registrar shall be as specified in writing by the Minister responsible for Finance.

### **Management of Fund**

48. (1) The Technical Committee is responsible for the management and disbursement of the Fund and is answerable to the Minister.
- (2) The Technical Committee shall make rules and procedures for the operation and management of the Fund subject to the approval of the Minister.
- (3) Moneys in the Fund shall be paid into a bank account opened by the Registrar for the purpose of the Fund with the approval of the Controller and Accountant-General.
- (4) The administrative expenses of the Fund related to the management of the Fund shall be charged on the Fund.

### **Accounts and audit**

49. (1) The Technical Committee shall keep books of account and records in relation to them in the form approved by the Auditor-General.
- (2) The Technical Committee shall submit its accounts to the Auditor-General for audit within three months after the end of the financial year.
- (3) The Auditor-General shall, not later than three months after the receipt of the accounts, audit the accounts and forward a copy of the audit report to the Minister.

### **Annual report and other reports**

50. (1) The Technical Committee shall within one month after the receipt of the audit report, submit an annual report to the Minister covering the activities and operations of the Fund for the year to which the report relates.
- (2) The annual report shall include the report of the Auditor-General.
- (3) The Minister shall within one month after the receipt of the annual report submit the report to Parliament with a statement that the Minister considers necessary.
- (4) The Technical Committee shall also submit to the Minister any other report which the Minister may require in writing.

*Appeals*

**Appeal Board**

51. (1) There is established by this Act an Appeal Board which shall consider and determine appeals provided under section 53.
- (2) The Appeal Board consists of five members including one expert in legal and administrative matters and four experts qualified in agricultural science.
- (3) The Minister shall appoint the members of the Appeal Board.
- (4) The provisions of sections 46 and 47 as regards the disclosure of interest and allowances apply to a member of the Appeal Board.
- (5) The Appeal Board may co-opt a person to act as an adviser at its meetings but that person shall not vote on a matter for decision at the meeting.
- (6) A person co-opted under subsection (5) may be an expert.
- (7) The Appeal Board shall have the power to
- (a) prescribe its own rules of procedure,
  - (b) order and secure the attendance of witnesses, and
  - (c) order the production of documents.
- (8) The Appeal Board shall keep a record of its proceedings.

**Tenure of office of members of the Appeal Board**

52. (1) A member of the Appeal Board shall hold office for a period not exceeding three years and is eligible for re-appointment.
- (2) The quorum at a meeting of the Appeal Board is three including the chairperson.
- (3) A member may at any time resign from office in writing addressed to the Minister.
- (4) Where a member of the Appeal Board is, for a sufficient reason, unable to act as a member, generally or in relation to a particular proceeding, the Minister may appoint another person to perform the functions of that member or in relation to those proceedings for a period of not more than six months at one time.
- (5) A person appointed to act as member for a period, shall have during the period of appointment or in relation to the proceedings in question the same powers as the member in whose place that person is appointed.

**Appeal from decision of the Registrar**

53. (1) An order or decision of the Registrar is subject to appeal to the Appeal Board.
- (2) A person who is aggrieved by any decision or order made by the Registrar may appeal to the Appeal Board by submitting to the Appeal Board a notice of appeal within sixty days after the publication or the receipt of the notice of the decision.
- (3) The notice of appeal shall be made in writing and accompanied with the appropriate evidence.
- (4) The Appeal Board may conduct investigations if it considers it necessary to do so and hold a hearing or make a decision based on written submissions.
- (5) The Appeal Board may confirm, set aside or vary any decision of the Registrar.
- (6) The Appeal Board shall give the reasons for its decision in writing.

(7) The Minister may order the Appeal Board to review a decision made under subsection (6), if the Minister is of the opinion that, because of new evidence or developments, the previous decision is inappropriate.

(8) A person may appeal to the High Court on a point of law against a decision taken by the Appeal Board within sixty days after the date of its notification.

(9) The Appeal Board may by way of case stated, refer a question of law to the High Court for its opinion.

(10) The decision of the High Court, whether on an appeal or on a case stated is binding on the Appeal Board.

*Miscellaneous provisions*

**Inspection and preservation of documents**

54. (1) A person who has an interest in a variety may inspect
- (a) the documents relating to the relevant application,
  - (b) the documents relating to a plant breeder right that has been granted, and
  - (c) the growing tests and other tests as regards the variety provided for under this Act.

(2) Where the production of a variety requires the repeated use of other varieties, an applicant may, when making the relevant application, request that the documents and tests relating to the other varieties be withheld from inspection.

(3) The Registrar shall preserve the original or copies of every document for a period of five years after the withdrawal or rejection of the application or the lapse of a breeder's right.

**Varieties Bulletin**

55. (1) There is established by this Act an official bulletin to be known as the Varieties Bulletin.

- (2) The Registrar shall
- (a) keep and maintain the Varieties Bulletin in an accurate form;
  - (b) ensure the accessibility of the Varieties Bulletin in the hard copy format and the electronic format.

(3) The Varieties Bulletin shall be maintained as a secured electronic database.

(4) The purpose for which the Varieties Bulletin is to be maintained is confined to matters provided in this Act.

**Publication of notices and information**

56. (1) The Registrar shall publish in the *Gazette* the following notices:
- (a) applications for plant breeder rights and the respective proposed denominations;
  - (b) grants of plant breeder rights;
  - (c) grants of approved denominations;
  - (d) decisions of the nullification or cancellation of plant breeder rights;

- (e) withdrawals or refusals of applications for plant breeder rights; and
- (f) and any other publication required under this Act.

(2) The Registrar shall publish every two months the following information in the *Gazette* or *Varieties Bulletin* established under section 55:

- (a) applications for and grants of plant breeder rights,
- (b) proposed and registered denominations,
- (c) cancelled variety denominations, and
- (d) the rectification of entries in the register.

### **Civil remedies**

57. (1) Where a person is aggrieved by the infringement of a plant breeder right, that person may bring an action for

- (a) an order of injunction to prevent the commission or continuation of the commission of the act of infringement or to prohibit the continuation of the infringement;
- (b) the recovery of damages for the infringement;
- (c) the forfeiture, seizure or destruction of propagating or harvested material which has been produced contrary to this Act;
- (d) an order requiring the Customs Division of the Ghana Revenue Authority to detain goods imported or ready for export; and
- (e) any other remedy that the court considers fit.

(2) Subsection (1) does not preclude an action being brought under any other enactment for the enforcement of a person's right.

### **Offences**

58. A person who wilfully

- (a) offers for sale, sells or markets the propagating material of a variety protected in Ghana;
- (b) markets propagating material of a variety protected in Ghana without the registered variety denomination; or
- (c) uses the registered variety denomination of a variety protected in Ghana for another variety of the same plant species or closely related species likely to cause confusion

commits an offence and is liable on summary conviction to a fine of not more than two thousand penalty units or to a term of imprisonment of not more than two years or to both.

## **Application of Convention**

59. (1) The Minister shall ensure that the implementation of this Act does not affect the fulfilment of the Government's obligations pertaining to the protection of plant breeder rights under the Convention to which the country is a party.

(2) The Minister may on behalf of the Republic enter into a bilateral or multilateral agreement with a foreign government for the mutual recognition and protection of breeders rights.

## **Regulations**

60. (1) The Minister may make Regulations
- (a) to prescribe the procedure for
    - (i) filing applications;
    - (ii) examination of applications made under this Act;
    - (iii) objections and oppositions;
    - (iv) cancellation of plant breeder rights; and
    - (v) cancellation of variety denominations;
  - (b) to prescribe fees to be charged under this Act; restrictions of plant breeder rights;
  - (c) to prescribe restrictions of plant breeder rights;
  - (d) for the administration of the register established under section 41;
  - (e) for publication requirements;
  - (f) for the regulation of varieties;
  - (g) for variety denominations;
  - (h) for entries in the register;
  - (i) to govern appeals and the proceedings of the Appeal Board; and
  - (j) for any other matter necessary for the effective implementation of this Act.

(2) A person who commits an offence under the Regulations is liable on summary conviction to a fine of not more than five thousand penalty units.

## **Interpretation**

61. In this Act, unless the context otherwise requires,

“agent” in relation to an application for, or grant of a plant breeder right, means a person that is duly authorised by the breeder to act on behalf of the breeder;

“authority” means the plant registry within the territory of a State which is a party to a treaty to which Republic is a party;

“breeder” means

- (a) the person who bred, or discovered and developed a variety,
- (b) the employer of the person referred to in paragraph (a); or

- (c) the successor in title of the persons referred to in paragraphs (a) or (b);

“Convention” means the International Convention for the Protection of New Varieties of Plant of 1961;

“denomination” means the name by which a variety is identified;

“Fund” means the Fund established under section 46;

“genome” means the entirety of the hereditary information of an organism;

“genotype” means the genetic constitution of a cell;

“growing test” means a test for the examination of distinctness, uniformity and stability;

“holder” means the person who has protection of a breeder’s right;

“Minister” means the Attorney-General and Minister for Justice;

“natural mutant” means the variation produced in the genome without human intervention;

“plant breeder right” includes the right granted to a breeder or a holder in this Act;

“plant genera” means categories of classification of living beings, that is, groups of species closely related in structure and evolution origin which are situated below the family or sub-family and above the species;

“plant species” means the basic concept in the classification of living organisms and are groups of organisms characterised by similar shape, size, behaviour and habitat with features that remain constant over time;

“propagating material” means seeds, seedlings, grafts, stock and any other parts of a plant that is intended to be sown, planted or replanted;

“protected variety” means a variety which is the subject matter of a breeder’s right;

“Registrar” means the Registrar-General;

“register” means the register established under section 41;

“Regulations” means Regulations made under this Act;

“Republic” means the Republic of Ghana;

“somaclonal variant” means a clone propagated from the development of somatic or vegetation cells;

“State Party” means a member of the Convention;

“Technical Committee” means the committee established under section 43;

“Varieties Bulletin” means the official publication of business proceedings and information established under section 55;

“variety” has the meaning assigned to it in section 2; and

“variety denomination” means the generic designation for a variety which serves as an identifier.