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TRANSITIONAL PROVISIONS INCLUDED IN LAWS ADAPTED TO THE 1991 ACT

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Introduction

1. So far, the following States have amended their plant variety protection law to adapt it to the 1991 Act of the Convention: Australia, Denmark, Israel, Netherlands (with the amendments entering into force at a later date, presumably at the date of entry into force of the 1991 Act in respect of the Netherlands), Poland, South Africa, Slovakia, United States of America (Plant Variety Protection Act, applicable to seed reproduced and tuber propagated varieties).

2. This document contains information on the provisions that have been made (or not made) to ensure the transition between the old and the new legislation, and it does so with regard to the condition of novelty, farm-saved seeds and essentially derived varieties. It does not pretend to be exhaustive, in particular since not all texts are available in a form that is readily usable.

3. This document also considers the case of the European Community. The Council of the European Union adopted a Regulation on Community plant variety rights. The Regulation provides that recently created varieties (in brief, marketed for less than four or six years on the territory of the Community at the date of entry into force of the Regulation) could be the subject of a Community right, notwithstanding the novelty condition, and could be so even if they were already the subject of a national right in one or more member States of the

Community. That possibility gave rise to transitional provisions which are likely to serve as a model for many UPOV member States, including outside the Community.

Novelty

4. In Israel, the adoption of the Law Amending the Law of 1973 on the Rights of the Breeders of Plant Varieties gave rise to an exchange of correspondence between patent agents and breeders on the subject of the changes made in the rules for distinctness and novelty, and also on the usefulness of using a particular procedure for the filing of applications for protection.

5. The amendment of legislation generally does not entail transitional provisions for the novelty condition, so that applications filed after the entry into force of the new law are immediately governed by the new provisions. It seems important to draw the attention of breeders to the fact that a variety which was new under the old law may no longer be so under the new one. This is the case, in particular, when a State has based the former novelty condition on "the variety"—thus taking over the text of the 1978 Act—and interpreted these words as referring to propagating material only; under the new condition, the sale of harvested material will also be a relevant factor.

Extension of the Scope of the Breeder's Right

General

6. Generally speaking, with the adaptation of a law to the 1991 Act, certain activities suddenly fall into the scope of the right granted to the breeder. This is (or may be) the case, in particular, for the following activities:

(a) the acts of exploitation of the variety done whilst the application is pending; they will be subject to the provisions on provisional protection (and will require the authorization of the breeder or the payment of remuneration);

(b) certain acts of exploitation, of a commercial nature, of the variety relating to the propagating material, for instance the exporting into certain countries;

(c) the production and use of farm-saved seed;

(d) certain acts of exploitation of the variety relating to the harvested material and, possibly, products made directly from harvested material;

(e) the acts of exploitation done with essentially derived varieties.

7. It will be noted that this situation is far from new and that several member States have already been confronted, on the occasion of the amendment of their law independently from its adaptation to the 1991 Act, to the question whether there should be transitional provisions in respect of the new provisions that are more favorable to breeders. Generally speaking, such

transitional provisions have only been envisaged where the protection of important interests or the overcoming of opposition to the amendment of the law were at stake, essentially with respect to farm-saved seed and essentially derived varieties.

8. The United States of America has provided what the old law will continue to apply to varieties protected under it. Pending applications could be refiled, so that the breeders could benefit from the more favorable provisions of the new law.

9. With respect to the other States, it is assumed in this document that—unless otherwise provided in the new law—the new scope of protection (and, where relevant, the new duration of protection) applies also to varieties granted protection under the old law.

Farm-Saved Seed

10. The question of transitional provisions does not arise where the new law unconditionally authorizes farmers to produce and use farm-saved seed. Such is the case for Australia and South Africa.

11. In the European Community, the possibility of producing and using farm-saved seed is limited to some 20 specified crops, and is subject to payment of remuneration in the case of farmers who are not "small farmers." This possibility is not recognized for other crops. A transitional provision has only been introduced in respect of the first-mentioned crops: the obligation to pay remuneration will only apply, for farmers who have already produced and used farm-saved seed from the variety concerned, as from June 30, 2001 (a date which may be postponed).

12. In Israel, the "farmer's privilege" has been done away entirely. However, the former scope of protection—and therefore the "privilege"—has been maintained for the varieties that were granted protection before the amendment of the law.

13. Poland has adopted a system of "farmer's privilege" requiring payment of remuneration to the breeder where the acreage exceeds 50 hectares in the case of agricultural crops, 200 m^2 in the case of crops grown under cover, and one hectare in the case of other crops. There is no transitional provision.

Essentially Derived Varieties

14. South Africa did not adopt any transitional provision for essentially derived varieties.

15. In Australia, the question of essentially derived varieties has not been left to breeders, but requires the intervention of the authorities. The right granted in respect of a specified (initial) variety may only be extended to an essentially derived variety upon declaration by the Secretary of the Department, which declaration must be sought by the breeder of the initial variety (and already holder of the right in it), and can only be sought when the essentially derived variety is itself the subject of an application for protection. For (initial) varieties

protected under the old law, such a declaration may only be obtained in respect of a variety protected under the new law.

16. In the European Community, the plant variety right granted in respect of a recently created variety on the basis of the transitional limitation of the requirement of novelty may not extend to essentially derived varieties whose existence has become a matter of common knowledge before the date of entry into force of the Regulation.

17. Israel has adopted a similar system, the criterion being, however, the date of the grant of protection in respect of the essentially derived variety, or the date of filing of the application where the application leads to the granting of protection after the entry into force of the new law.

18. In Poland, the decision criterion is the date of the filing of the application for protection in respect of the variety which, technically, is essentially derived.

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