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

GENEVA

**ADMINISTRATIVE AND LEGAL COMMITTEE****Fifth Session****Geneva, April 17 and 18, 1980**

## UPOV MODEL LAW ON PLANT VARIETY PROTECTION

Document prepared by the Office of the Union

1. A Preliminary Draft of a UPOV Model Law on Plant Variety Protection was considered at the fourth session of the Administrative and Legal Committee, held in November 1979. That Preliminary Draft forms the Annex to document CAJ/IV/3.
2. Even before the fourth session of the Administrative and Legal Committee, the Office of the Union received observations by the heads of the plant breeders' rights offices of Denmark, Switzerland and the United Kingdom. The Danish observations form the Annex to document CAJ/IV/6, the Swiss observations form Annex I to document CAJ/IV/5 and the United Kingdom observations form Annex II to document CAJ/IV/5. The Preliminary Draft of a UPOV Model Law on Plant Variety Protection was discussed, during the fourth session of the Administrative and Legal Committee, in the light of the above-mentioned observations and a number of further--oral--observations were made by participants in that session. Those remarks are reflected in paragraph 16 of the draft report on that session (document CAJ/IV/8). Following that session the Office received two more sets of observations, one by the Canadian Department of Agriculture, the other by the US Patent and Trademark Office. The first set of observations forms Annex II to this document; the second set of observations forms Annex III to this document.
3. Following the request of the Administrative and Legal Committee, the Office of the Union has prepared a second draft of a UPOV Model Law on Plant Variety Protection which forms Annex I to this document. That second draft, accompanied by commentaries, takes account of all observations made so far. It also contains in its Chapter III three new Parts, namely Part VI, dealing with the procedure in cases of contested ownership, Part VII, dealing with the procedure when annulment is requested and with the procedure for forfeiture, and Part VIII, containing common provisions for all proceedings before the Plant Variety Rights Office. Those Parts were believed to be missing in the Preliminary Draft.
4. The second draft of a UPOV Model Law on Plant Variety Protection as contained in Annex I to this document is intended to facilitate the consideration of Item 5 of the draft agenda proposed by the Office of the Union for the fifth session of the Administrative and Legal Committee (document CAJ/V/1).

[Three Annexes follow]

## UPOV MODEL LAW ON PLANT VARIETY PROTECTION

## SECOND DRAFT

Introductory Note

The UPOV Model Law on Plant Variety Protection (hereinafter referred to as "the Model Law" or "this Law") is primarily intended as a guide to States wishing to join the International Union for the Protection of New Varieties of Plants (hereinafter referred to as "the Union") and should assist them in drafting or revising their legislation on plant breeders' rights. With a few insertions any State may use the Model Law as it stands as its national law on plant breeders' rights. It is, however, more likely that such a State might need to adapt the provisions of this Law to its own special national needs and to its legislative practice and national traditions. They might also have to be adjusted to existing laws in related fields, for example a law on the seed trade or the law on industrial patents. In such cases, the Model Law could serve as a guide and as a check-list of provisions which the national law on plant breeders' rights must or should contain. In certain States, it might be possible to incorporate some of the legal provisions contained in the Model Law in implementing rules of procedure, ordinances, decrees and other forms of legislative instruments which according to the constitution of the State concerned do not need to receive the approval of the--or of all of the--legislative bodies of the State or do not require to be submitted to a particular legislative procedure. The incorporation of legal provisions in such implementing rules of procedure, ordinances or decrees might not only speed up the procedure for introducing a plant breeders' rights system but could also have the advantage of facilitating any further amendment of such rules. For subject matters which are normally included in Regulations, Section 50 of the Model Law provides that such Regulations may be established by the Minister of Agriculture.

The Model Law follows first the basic rules contained in the International Convention for the Protection of New Varieties of Plants as revised on October 23, 1978 (hereinafter referred to as "the UPOV Convention" or "the Convention"). Where no rules are contained in the UPOV Convention or where the latter leaves certain options open to the member States of the Union, the Model Law proposes the solution which seems to be simplest for a new member State. Where appropriate, the Commentary on the provisions indicates which rules are mandatory under the UPOV Convention and which are mere proposals by the drafters of the Model Law. The Commentary on some provisions contains suggestions for alternative solutions. Additional alternative solutions can be found by consulting the legislations of the present member States of the Union. States whose legislation closely follows that of one of the present member States of the Union are advised to examine whether the national law of that State does not fit its needs better than the Model Law.

The Model Law does not pretend to contain the ideal solution. Where States wish to deviate from the suggested solution, they are completely free to do so as long as they observe the mandatory rules contained in the UPOV Convention. The Model Law should also not be understood as representing a step towards a possible further harmonization of the national laws of member States.

In suggesting that the right of the breeder of a new plant variety should be recognized through the grant of a special title of protection, the Model Law follows the legal system of the majority of the present member States of the Union. According to Article 2(1) of the UPOV Convention, breeders' rights can also be recognized by the grant of a plant patent. This is indicated in the Commentary on Section 1.

A plant breeder's right--as the special title of protection is called in Section 1 of the Model Law--is roughly speaking a document, issued by a governmental authority (called "Plant Variety Rights Office" in the Model Law) to the breeder of a new plant variety or his successor in title, whose legal and economic effects are such that for a limited number of years it is only the holder of that right or a person authorized by him who may exploit the new plant variety by producing--for the purpose of marketing--or by offering for sale or marketing seed or other propagating material of that variety, or by performing certain other activities in connection with that variety which the national law especially reserves to the holder of the right.

The recognition of the right of the breeder through the grant of a plant breeder's right has proved by experience to be a very efficient means of encouraging breeding activities. Increased breeding activities will contribute to the development of agriculture, horticulture and forestry and will thereby help a country to improve the utilization of its natural resources to make available to its population and, as the case may be, for export purposes, the required agricultural, horticultural and forestry products. Plant breeders' rights also contribute to the establishment of justice in society since they enable the breeder to obtain a fair remuneration for the considerable investments he generally has to make in creating a new plant variety. This puts the breeder on the same footing as the inventor in the technical field and the author in the fields of art and literature, who, in most legislations, are given a similar right to exclude others from exploiting the fruits of their labor, investment and ingenuity.

#### Structure of the Model Law

The Model Law contains six Chapters which are subdivided into various Parts of unequal lengths. Chapter I deals with the general rules concerning plant breeders' rights. It enumerates, in Part I, the substantive provisions which govern the granting of plant breeders' rights. Part II contains the rules for determining who is entitled to protection. Part III deals with the possibility of assigning the application and transferring the right granted and with joint holders of plant breeders' rights. Part IV describes the scope of protection of the rights granted. Part V provides for the obligation of the holder of a plant breeder's right to maintain the variety. Lastly, Part VI deals with the duration of the protection and the need to pay renewal fees, and enumerates the cases in which the protection may be terminated, annulled or become forfeit before the expiration of the normal period of protection.

Chapter II deals, in Part I, with the establishing of the Plant Variety Rights Office and, in Part II, with the applicability of the provisions of international agreements.

Chapter III deals with all procedures before the Plant Variety Rights Office and with appeals. Part I deals with the application for the grant of a plant breeder's right, Part II with the variety denomination, Part III with the filing date, Part IV with the examination of the application, including the decision to grant the right and the rejection of the application, Part V with the procedure where an opposition is filed, Part VI with the procedure in the case of contested ownership, Part VII with the procedure in cases of requests for annulment and the procedure for forfeiture. Part VIII contains common rules on the proceedings before the Plant Variety Rights Office and Part IX deals with appeals and the Tribunal to be established for the hearing of appeals.

Chapter IV deals with the measures to be taken in the case of infringement of plant breeders' rights. Part I of the Chapter deals with civil sanctions and Part II with penal sanctions, while Part III determines the competent courts in both cases.

Chapter V deals with licenses, Part I of that Chapter with contractual licenses, Part II with licenses of right and Part III with compulsory licenses. Part IV deals with the question of instituting legal actions by licensees.

Chapter VI contains basic provisions on Regulations (in Part I), on the Register and on the Gazette (in Part II).

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Starting with page 6, the text of the Model Law is printed on pages with uneven numbers; the Commentaries are printed on pages with even numbers.

UPOV MODEL LAW ON PLANT VARIETY PROTECTION

SECOND DRAFT

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## COMMENTARY ON CHAPTER I

This Chapter contains the general provisions on plant breeders' rights, that is to say, the conditions for the grant of that right, for the entitlement to such right, for the assignment of an application and the transfer of and the joint holders of such rights, for the obligation of the holder of the right to maintain the protected variety, for the duration of the protection for the need to pay renewal fees and for the different cases of termination of the protection. The institutions to be established, the procedural rules on the granting of plant breeders' rights, the sanctions in cases of infringements of plant breeders' rights, the rules on licenses as well as the provisions governing the establishing of Regulations, keeping a Register and issuing a Gazette form the subject of separate Chapters.

## COMMENTARY ON PART I

This Part deals with the conditions a plant variety has to fulfill if a plant breeder's right is to be granted. Section 1 enumerates the conditions, while the subsequent Sections contain more detailed definitions of four of these conditions.

## COMMENTARY ON SECTION 1

This Section states the general principle that plant breeders' rights are granted for certain plant varieties and enumerates the conditions that a plant variety has to fulfill to qualify for protection by a plant breeder's right. It corresponds to Article 6 of the UPOV Convention. It should be noted that according to Article 6(2) of the UPOV Convention the grant of a plant breeder's right may only be made subject to the conditions set forth in the UPOV Convention, provided that the formalities of the national law of the State in which the application for the grant of a plant breeder's right was filed have been complied with and the national fees have been paid. No member State of the Union is thus entitled to make the grant of a plant breeder's right dependent on additional conditions. On the other hand, all the conditions in Article 6(1) of the UPOV Convention and in this Section are mandatory for the grant of plant breeders' rights according to that Convention.

Member States of the Union are not obliged to apply the UPOV Convention to all genera and species and none of the present member States of the Union does. Article 4 of the UPOV Convention only prescribes the minimum number of genera and species to which member States of the Union have to apply the Convention at the date of its entry into force on their territory and within certain periods thereafter; each member State of the Union must apply the Convention at the time of its entry into force on its territory to at least five genera or species, within three years from that date to at least ten genera or species, within six years from that date to at least 18 genera or species and within eight years from that date to at least 24 genera or species in all. Within each genus or species a State may limit the application of the Convention to varieties with a particular manner of reproduction or multiplication, or a certain end-use (Article 2(2)), of the Convention, e.g. to the vegetatively reproduced or to the ornamental varieties of a given genus or species. Such limitation does not prevent that genus or species from being taken into consideration for the purpose of the fulfillment of the minimum requirements of Article 4 of the UPOV Convention (see Article 4(3)(c) of the Convention).

In accordance with the above-mentioned provisions of the Convention, Section 1 states that plant breeders' rights are granted in respect of plant varieties of those genera or species which are included in a special national list called the "List of Genera and Species to Which This Law is Applied." Section 6 prescribes in detail how this list is established.

Furthermore, Section 1 lists five more conditions which need to be fulfilled before a plant breeder's right can be granted. Four of them are defined in detail in the subsequent Sections of this Part I, while the details of the fifth are given in Part II of Chapter III dealing with variety denominations.

UPOV MODEL LAW ON PLANT VARIETY PROTECTION

SECOND DRAFT

CHAPTER I

PLANT BREEDERS' RIGHTS

PART I

CONDITIONS REQUIRED FOR PROTECTION

Section 1. Enumeration of Conditions

Rights, to be known as plant breeders' rights, shall be granted in respect of plant varieties of those genera or species which are included in the List of Genera and Species to Which This Law is Applied (Section 6), where, subject to the formal conditions, including the payment of fees, prescribed in this Law or in Regulations made under this Law, the plant variety

- (i) is new,
- (ii) is distinct,
- (iii) is homogeneous,
- (iv) is stable, and
- (v) has been given a variety denomination which is acceptable for registration under the rules laid down in Section 25.

No definition is given of the term "plant variety" or "variety." It is believed that the meaning of these terms is sufficiently clear and, in any case, it would be difficult to propose a definition which would not be too narrow in the light of possible future developments. It was for that reason that in the 1978 version of the UPOV Convention the--incomplete--definition contained in Article 2(2) of the original 1961 version of the Convention was abandoned. It is generally accepted among the present member States of the Union that the term "variety" is to be understood in the broadest sense and should comprise clones, lines, stocks and hybrids, but, as already stated, a member State of the Union may limit the application of the Convention within a given genus or species to varieties with a particular manner of reproduction or multiplication, or a certain end-use. A member State of the Union is thus, for example, not obliged to grant plant breeders' rights to F1-hybrids.

Section 1 envisages the grant of plant breeders' rights, i.e., of special titles of protection for new plant varieties. According to Article 2 of the UPOV Convention, member States of the Union may also grant plant patents. However, they are not permitted to provide for protection under both forms for one and the same botanical genus or species, except where they have already done so prior to October 31, 1979, and on the condition that, when signing or ratifying, accepting, approval of or acceding to the UPOV Convention, they will notify the Secretary-General of UPOV of their intention to continue that practice (see Articles 2(1) and 37(1) of the Convention). Where a State provides for the grant of plant patents, such patents must fulfill all the conditions provided for under the UPOV Convention, except where that State has made the said notification according to Article 37(1) of the Convention. In the latter case, that State is permitted to deviate from certain, otherwise mandatory, rules of the UPOV Convention: it may apply the patentability criteria and the period of protection of the national patent legislation to varieties which fall under patent protection (see Article 37(2) of the UPOV Convention).

In none of the present member States of the Union is the UPOV Convention applied to microorganisms, though application of the Convention to microorganisms is not expressly excluded.

## COMMENTARY ON SECTION 2

This Section defines in detail the term "novelty." It corresponds to Article 6(1)(b) of the UPOV Convention. It must be underlined that the terms "new" and "novelty" are used in a special sense which differs in particular from the meaning given to those terms under national laws on industrial patents. In this Model Law both terms refer solely to the variety itself and to its possible former use, that is to say, they show under what conditions the former use of the variety itself prevents that variety from being protected by a plant breeder's right. To describe the relationship between the variety for which a protection is sought and any other existing variety this Model Law uses the terms "distinct" and "distinctness," which are defined in the next Section.

The only acts which might be detrimental to the novelty of the variety under the UPOV Convention and under this Model Law are the offering for sale or the marketing of the variety with the agreement of the breeder (discoverer) or that of his successor in title prior to certain dates. As to these dates, both the UPOV Convention and the Model Law contain different rules for the offering for sale or the marketing in the country in which the application is filed and in other countries, referred to by the term "abroad." In the case of offering for sale or marketing in the country of the application, the UPOV Convention allows the national legislator to avail himself of two possibilities: the national law may prescribe that the variety must not yet have been offered for sale or marketed with the agreement of the breeder (discoverer) or that of his successor in title at the date on which the application was filed\*; the national law may provide that the variety may already have been offered for sale or marketed in the country for a period of up to one year. This period of up to one year is sometimes referred to as the "period of grace." The Model Law contains suggestions for both possibilities. If the first-mentioned possibility is chosen (no period of grace), the words which appear in paragraph (1) between square brackets must be omitted. If the second-mentioned possibility is chosen (in the form of a one-year period of grace), the square brackets in the text of paragraph (1) must be deleted. In any other country ("abroad") the variety must not, at the date on which the application is actually filed in the application country, have been offered for sale or marketed with the agreement of the breeder (discoverer) or that of his successor in title for longer than four years or, in the case of some varieties mentioned in the second sentence of Section 2(1), for longer than six years.

Following Article 6(1)(b) of the UPOV Convention and the law of some member States of the Union, paragraph (1) of this Section does not specify the type of material the offering for sale or marketing of which is detrimental under certain conditions to novelty. National legislators may wish to be more precise in this respect and to state expressly that it is not only the offering for sale or the marketing of propagating material of the variety but also the offering for sale or the marketing of other material of the variety that is to be considered offering for sale or marketing of the variety within the meaning of the national law. If such refinement is desired, the beginning of Section 2 could be worded as follows:

"A variety shall be considered new if propagating or harvested material of the variety itself has not yet been offered for sale or marketed..."

Another way of expressing the same idea would be to say:

"A variety shall be considered new if no plants of the variety and no material forming part of or derived from the variety have been offered for sale or marketed..."

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\* In the case of a validly claimed priority, this date is replaced by the --earlier--priority date. See the text of Article 2(1) and of Article 21(3).

Section 2. Novelty

(1) A variety shall be considered new if the variety itself has not yet been offered for sale or marketed with the approval of its breeder or discoverer or the successor in title of either of them in the country [either for longer than one year]<sup>1</sup> before the date on which protection is applied for under this Law or before the priority date duly claimed, whichever is the earliest, and abroad for longer than four years before the effective national filing date. However, in the case of vines, forest trees, fruit trees and ornamental trees, including their rootstocks, the variety itself may have been offered for sale or marketed abroad for up to six years before the effective national filing date without such fact being considered detrimental to its novelty.

(2) It shall not be considered detrimental to the novelty of a variety if that variety has been offered for sale or marketed in the country with the approval of its breeder or discoverer or the successor in title of either of them for up to [four]<sup>2</sup> years prior to the inclusion of the genus or species to which the variety belongs in the List of Genera and Species to Which This Law is Applied and for up to [six months]<sup>2</sup> after such inclusion.

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<sup>1</sup> Alternative solution.

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

Paragraph (2) deals with the case where a variety has already for some time been offered for sale or marketed with the agreement of the breeder (discoverer) or his successor in title when the genus or species to which the variety belongs is included in the List of Genera and Species to Which This Law is Applied. In this case, Article 38 of the UPOV Convention allows member States of the Union to be more flexible as far as the conditions of novelty are concerned. In paragraph (2) of Section 2 it is provided that in such a case the variety is still considered to be new if it has not been offered for sale or marketed for longer than four years prior to the inclusion of the genus or species in question in the List. However, a second condition has to be fulfilled in the interest of legal security: the application for protection must be filed within six months after such inclusion. Article 38 of the UPOV Convention not being a mandatory provision, member States of the Union are free to decide whether they wish to introduce a provision of this kind. They may also decide on other periods than those provided for, in square brackets, in paragraph (2).

It has not been considered necessary to define the terms "offered for sale" and "marketed." They are thought to be self-explanatory. As far as offering for sale is concerned, it should, however, be noted that such offering must have reached the public. The mere holding available or storing of material by the breeder (discoverer) or his successor in title does not constitute offering for sale. Marketing should be interpreted in the broadest sense. It should cover any business transaction by which material of the variety is turned over to another person, no matter whether the legal title passes to him or not.

## COMMENTARY ON SECTION 3

This Section defines in detail the term "distinctness." The Commentary on Section 2 has already explained that the term "distinctness" is used to refer to the relationship of the variety which is the subject of the application to any other variety, whereas the term "novelty" dealt with in the preceding Section refers to any possible former use of the variety itself with the consent of the breeder.

The first two paragraphs of Section 3 correspond to Article 6(1)(a) of the UPOV Convention. As to the meaning of the expression "clearly distinguishable by one or more important characteristics," it should be noted that guidance on the interpretation is given in the General Introduction to the Guidelines for the Conduct of Tests for Distinctness, Homogeneity and Stability of New Varieties of Plants, a revised version of which was issued by the Union in April 1980 (UPOV document UPOV/TG/1/2). In particular, it is explained that the term "important" should be interpreted as meaning "important for distinction." It is not necessary that the characteristic should also be important for the use of the variety or have a certain value.

As far as the meaning of the expression "common knowledge" is concerned, paragraph (2) mentions, in accordance with Article 6(1)(a) of the UPOV Convention, a number of factors on the basis of which common knowledge might be established. It must be emphasized that these factors are mere examples and there is no intention of making an exhaustive enumeration.

Paragraph (3) specifies that the subject of an application for protection which has been filed according to this Law is deemed to have been a matter of common knowledge as from the date of that application or, if the priority of another application has been claimed for that application, as from the filing date of that other application. This is only the case, however, if the application has resulted in the grant of a plant breeder's right. A variety forming the subject of an application that has been withdrawn or rejected before grant is not considered to be a matter of common knowledge by the mere fact of the filing of the application; it might have become a matter of common knowledge because of other factors, for instance, description in a publication or inclusion in a reference collection. This paragraph is intended to prevent protection from being granted under different titles for varieties which are not truly distinct from each other.

Section 3. Distinctness

(1) Whatever may be the origin, artificial or natural, of the initial variation from which it has resulted, a variety shall be considered distinct if it is clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge at the date on which protection is applied for or the priority date duly claimed, whichever is the earlier. The characteristics which permit a variety to be defined and distinguished must be capable of precise recognition and description.

(2) Common knowledge of another variety is established in particular if that variety has been entered in an official register of varieties or such entry has been requested, if it has been precisely described in a publication or included in a reference collection or if it is being cultivated or marketed.

(3) If an application for the protection of the variety (hereinafter referred to as "application" unless the full expression is used), has been filed according to this Law, that variety shall be deemed to have been a matter of common knowledge as from the date of that application or from the priority date duly claimed for that application, whichever is earlier, provided that protection has been granted as a result of that application.

## COMMENTARY ON SECTION 4

This Section determines in detail when a variety is to be considered homogeneous. It refers to the characteristics by which the variety can be defined. Those characteristics must be alike in all plants of the variety. However, account is taken of the fact that each variety will have a number of off-types. This number depends largely on the kind of propagation. A variety propagated by cross-pollination cannot be expected to show the same homogeneity as a variety which is vegetatively propagated. Section 4 first of all refers to the normal manner of propagation of the genus or species to which the variety belongs. This alone would not be sufficient since it is possible that a certain variety may be propagated according to another method than that which is normal in the field of the genus or species in question. In such a case, in judging homogeneity, account may be taken of the particular features of that particular method of propagation if it is defined for the variety by the breeder in the application.

Section 4 corresponds to Article 6(1)(c) of the UPOV Convention, which, however, is more general in its approach and simply says that the variety, is to be "sufficiently homogeneous, having regard to the particular features of its sexual reproduction or vegetative propagation".

## COMMENTARY ON SECTION 5

This Section defines the term "stable" in more detail. It follows the wording of Article 6(1)(d) of the UPOV Convention. As in the latter provision, a difference is made between the normal case, that the essential characteristics of the variety have to be true to the description after repeated reproduction or propagation, and the more special case, where the breeder has defined a special cycle of reproduction on completion of which the essential characteristics of the variety must again be true to the description as, for instance, in the case of a hybrid variety.

It is generally not possible to perform, in the short time which can reasonably be taken for the testing of a variety, tests on stability which lead to the same certainty as the testing of distinctness and homogeneity. Sometimes lack of stability does not show until after a longer period of time. The present member States of the Union normally do not prolong the period of examination only for the sake of being surer about the stability of the variety. Where a variety loses its stability after the grant of the title, it may be annulled in application of Section 17(4) of the Model Law.

Section 4. Homogeneity

A variety shall be considered homogeneous if its plants all show the same expression of the characteristics which permit the variety to be defined, subject to the variation which may be expected from the particular features of the normal method of propagation of the genus or species to which the variety belongs or of any particular method of propagation defined for the variety by its breeder in the application.

Section 5. Stability

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

## COMMENTARY ON SECTION 6

It has already been explained in the Commentary on Section 1 that in most States protection is not granted for varieties of all genera or species of the vegetable kingdom. The limited means at the disposal of the authorities of member States of the Union oblige those states to offer protection only for a selected group of genera and species. Section 6 authorizes the Minister of Agriculture to establish the list of those genera and species and to amend it after the introduction of a plant breeders' rights system. Such amendment will normally consist in enlarging the list, but occasionally a member State of the Union may be obliged to delete a certain genus or species from that list. It is also conceivable that it might become necessary to modify the name of a genus or species listed. Both cases are provided for in paragraph (1) of this Section.

Paragraph (2) makes it clear that the Minister of Agriculture may, as permitted under Article 2(2) of the UPOV Convention, exclude certain groups of varieties from the application of the Convention to a given genus or species. He may for instance exclude ornamental varieties or hybrid varieties from such application. It is recalled that in such a case the genus or species in question may nevertheless be counted among those genera or species which form the minimum to which that member State of the Union has to apply the Convention (see Article 4(3)(c) of the UPOV Convention).

Paragraph (3) is intended to ensure that only those genera or species are included in the list for which the member State of the Union is in a position to handle all applications whose filing might be expected. It also makes it clear that not only may a member State of the Union rely to that extent on its own means but it can also be assisted by the authorities of other member States of the Union, provided that the necessary agreements are concluded with those authorities.

Paragraph (4) is meant to be a guarantee to the breeder in the event of deletion of a given genus or species from the list. Such deletion must not affect applications which have been filed before the deletion becomes effective. It may also, of course, not affect the validity of the rights granted for varieties of that genus or species.

Section 6. List of Genera and Species to Which This Law is Applied

(1) The Minister of Agriculture<sup>1</sup> is authorized:

- (i) to establish a list of those genera and species to which this Law is applied (the "List of Genera and Species to Which This Law is Applied"),
- (ii) to amend the List of Genera and Species to Which This Law is Applied by adding new genera or species to it, modifying the names of genera or species already listed or deleting certain of these genera or species with effect from a given future date.

(2) When including a given genus or species in the List of Genera and Species to Which This Law is Applied, the Minister of Agriculture may exclude all varieties of that genus or species which are not characterized by a particular manner of reproduction or multiplication or by a certain end-use.

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

(4) If a genus or species is deleted from the List of Genera and Species to Which This Law is Applied with effect from a given date, the deletion does not affect the rights of applicants that have filed applications for the protection of varieties of that genus or species before that date.

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<sup>1</sup> Another Minister or body may be authorized, according to the constitution or the organization of the country concerned. The same applies to subsequent Sections in which the Minister of Agriculture is mentioned.

## COMMENTARY ON PART II

This Part deals with the question who is entitled to protection.

## COMMENTARY ON SECTION 7

This Section contains the basic principle according to which the breeder is discoverer of the variety or the successor in title of either of them, referred to in the text as "the owner of the variety", it entitled to protection.

The plant breeder's rights laws of some States contain special provisions concerning plant varieties created by employees of a breeding firm in the course of their work. In such a situation several questions have to be answered, but mainly the question whether the employer or the employee is entitled to file an application and whether, where the right to file an application and to obtain protection is given to the employer, the employee will receive some kind of remuneration. The Model Law does not contain any rules of that kind in view of the fact that States will probably wish to solve these problems in the same way for the whole field of intellectual property and in accordance with their basic economic systems.

The third and the fourth sentences of this Section contain the rules for cases where a variety has been bred by more than one person, either in common or independently of each other. Where the variety has been bred (or discovered) in common by several persons, these persons are entitled to file joint applications and the plant breeder's right will thus be granted to them as joint holders. Where the variety has been bred (or discovered) by several persons independently of each other, this Section follows the "first-to-file" system according to which the breeder who files the first application at the Plant Variety Rights Office, or the application with the first priority date, is entitled to ask for the grant of a right and will obtain the right. It is to be noted that in such cases it is also admissible under the UPOV Convention to follow the rule that the right is accorded to the person who was the first to breed the variety. Such a rule would correspond to the legal tradition of a few States which has developed in the related field of--technical--patents. It should be noted that such a system would be more difficult to administer since it would oblige the Plant Variety Rights Office to decide which of the several breeders had first completed the breeding process. Where it is possible in the light of the legal tradition, States are advised to follow the "first-to-file" system.

## COMMENTARY ON SECTION 8

In order to prevent the Plant Variety Rights Office from being obliged, in the case of each application filed with it, to investigate officially whether the applicant is the breeder or discoverer of the variety or the successor in title of either of them, Section 8 contains a presumption that the applicant is deemed to be entitled to ask for the grant of the plant breeder's right, unless that Office positively knows that the applicant is not the owner of the variety which is the subject of the application. In the latter event, the Plant Variety Rights Office must refuse the grant of the plant breeder's right. In all other cases, the Plant Variety Rights Office will proceed with the granting procedure and may grant a title even where the applicant's right is contested. In the latter event, the Office may advise the contender of the right to initiate separate proceedings under Section 9, to file an opposition under Section 33 or to request that the right granted be annulled under Sections 17(3) and 35 of this Law.

A provision according to Section 8 is not mandatory under the UPOV Convention.

PART II

ENTITLEMENT TO PROTECTION

Section 7. Right to Apply for Protection

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

Section 8. Presumption of Entitlement

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

## COMMENTARY ON SECTION 9

This Section deals with the case where an application has been filed by a person who is not the owner of the variety, that is to say, who is neither the breeder or discoverer of the variety nor the successor in title of either of them. In this case, the true owner is given the following options: if the plant breeder's right has not yet been granted, the true owner may submit a request to the Plant Varieties Rights Office that the application is assigned to him, and that the granting procedure be therefore continued in his name. It is to be noted that the presumption under Section 8 is not applicable to this type of procedure. The Plant Varieties Rights Office has to examine the entitlement on the basis of the evidence produced by the parties. Where the right has already been granted, the true owner may request that the right granted be transferred to him. Such a request, however, may not be submitted before the expiration of five years after the publication of the grant of the plant breeder's right, except in cases where the holder was not acting in good faith in alleging entitlement at the time of the grant of the title. This latter rule, which is not mandatory under the UPOV Convention, is provided for since, after a certain time, it will be difficult to decide on the entitlement and, also, since a change in the holder some considerable time after the title has been granted might disturb the market; it should therefore be envisaged only in the exceptional case of bad faith on the part of the holder (where limitation would remunerate fraudulent behavior): but even there the true owner should be obliged to request the transfer within two years after being notified of the grounds of his claim: the grant of the title to the present holder and the lack of the latter's entitlement.

The Model Law does not explain the term "good faith" in detail, assuming that that term is generally used in the legislations of most States and has been given an established interpretation in each of these States. Good faith will not be assumed where the holder of the title knows that he is neither the breeder nor discoverer nor the successor in title of either of them. Under most legislations good faith is also not assumed where the holder of the title, in alleging entitlement, does not apply the care which is to be expected of him, in other words, where he acts negligently in that respect. In this latter case, however, the interpretation of the term "good faith" will differ from State to State.

The Model Law does not contain any provision on the question whether the Plant Variety Rights Office may continue the granting procedure or not if a request for assignment of the application is filed. It is in fact intended to give the Plant Variety Rights Office a certain discretion in this matter. Where the Office, after a first summary examination of the request for assignment, has gained the impression that the request is not well founded, it may continue the granting procedure, in other cases, the Office may suspend the procedure or at least delay the granting of the plant breeder's right. Where the title is granted while the procedure on the request for assignment of the application is still pending, paragraph (2) provides that the latter will be treated as procedure for the transfer of the title.

It might well be that the true owner of the variety is not interested in having the application assigned or the title transferred but prefers to have the grant prevented or annulled. The Model Law does not provide for the possibility of requesting the rejection of the application for lack of entitlement before the testing of the variety has been completed because it is undesirable that the granting procedure should be disturbed at the testing stage. After the testing has been concluded, the person claiming that he is the owner is given the right to intervene. He may file an opposition against the grant of the title based on the alleged lack of ownership of the applicant (Section 33 (1)) or, where the right has been granted, he may request the right granted to be annulled for that reason (Sections 17(3) and 35).

States not wishing their Plant Variety Rights Office to decide in cases of contested entitlement could provide for the competence of the courts in such matters. In such a case, Section 9 should be worded as follows:

Section 9. Application or Holding of Title by a Person Who Is Not the Owner of the Variety

(1) Where an application has been filed by a person who is not the owner of the variety, the owner of the variety may submit a request to the Plant Variety Rights Office for assignment of the application. Where the plant breeder's right has already been granted on such application, the owner of the variety may submit a request to the Plant Variety Rights Office for transfer of the title. In the latter case, the request must not be filed later than five years after the publication of the grant of the plant breeder's right unless the holder of that right was not acting in good faith in alleging entitlement at the time of the grant of the title, while the owner was unaware of the grant of the title to the holder or of the lack of the holder's entitlement for longer than two years.

(2) Where a plant breeder's right is granted while a request for assignment of the application is still pending, that request shall be regarded by the Plant Variety Rights Office as a request for the transfer of the title.

"Where an application has been filed by the person who is not the owner of the variety, the owner of the variety may bring an action for the assignment of the application or, where the plant breeder's right has already been granted on such application, for transfer of the title before the court mentioned in Section 44(1). The action for transfer of the title must not be brought later than five years after the publication of the grant of the plant breeder's right, except in cases where the holder of the plant breeder's right was not acting in good faith when alleging entitlement at the time of the grant of the title, while the owner was unaware of the grant of the title to the holder or of the lack of the holder's entitlement for longer than two years."

The Model Law does not state what effect the assignment of the application or transfer of the title will have on any right granted to third parties by the first applicant or first holder. It is considered that this question should be decided according to general principles by the courts of each member State. Should a provision be considered necessary, it could be drafted as follows:

"If the request [the action] succeeds, any rights granted by the person who was not the owner of the variety to third parties shall become ineffective. For license agreements, Section 17(6), second sentence, is applicable mutatis mutandis."

For an explanation of the reason for the second sentence of the provisions proposed above, see the Commentary on Section 17.

## COMMENTARY ON SECTION 10

This Section deals with the entitlement to file applications for protection on the grounds of being a national or having one's residence or, in the case of a legal person, one's headquarters in the State of application or certain other States.

Member States of the Union may accept applications filed by anybody, no matter what his nationality or where his residence or headquarters may be. In that case, a provision corresponding to Section 10(1) would not be necessary.

Article 3(3) of the UPOV Convention permits member States of the Union, however, to apply the so-called reciprocity principle according to which they may accept applications from foreigners not having their residence or headquarters in that State only if the State of which the foreigner in question is a national or a resident or in which he has his headquarters also applies the Convention to the genus or species to which the variety that is the subject of an application belongs. Section 10(1)(i) to (iv) reflects this system of reciprocity. Subsection (v) goes further and grants access to protection also to nationals, residents or persons having their headquarters in another State which, without being a member State of the Union, grants reciprocity. Whether this condition is fulfilled by a non-member State must be stated in a publication by the Minister of Agriculture. States not wishing or not needing the last-mentioned rule may simply delete subparagraph (v).

States wishing to grant access to protection to their own nationals or residents or to legal persons having their headquarters in the country, as well as to persons fulfilling those conditions in other member States of the Union, without making use of the reciprocity rule, may take over paragraph (1)(i) to (iv) of this Law, but delete the last part of subparagraph (iv) which reads "provided that the other member States grant protection to the genus or species to which a variety that is the subject of the application belongs."

Paragraph (2) makes the participation of nonresidents or persons having their headquarters in the country in any procedure under this Law dependent on the designation of a representative in the country and contains rules on such designation. To facilitate legal proceedings against or by foreigners having neither their residence nor their headquarters in the country, the third sentence of paragraph (2) provides that the place of business of the representative, or of a given representative, is deemed to be the place where the right in the variety is located. Such a provision will assist in establishing the local competence of courts.

None of the rules contained in Section 10(2) is mandatory under the UPOV Convention. Instead of obliging persons having neither their residence nor their headquarters in the country to designate a representative, the possibility might be merely envisaged of providing that such persons indicate a so-called "address for service," i.e. an address to which correspondence may be sent. This is a simpler solution which, on the other hand, gives less assurance to the counterparts of the foreigner in question.

Section 10. Persons Entitled to File Applications

(1) An application for the grant of a plant breeder's right may be filed by the owner of the variety if he is:

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

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

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<sup>1</sup> Optional limitation according to Article 3(3) of the UPOV Convention.

<sup>2</sup> Going beyond the UPOV Convention.

## COMMENTARY ON PART III

This Part deals with the passing-over of a plant breeder's right to another person and with the right of joint applicants and joint holders of plant breeders' rights.

## COMMENTARY ON SECTION 11

This Section states that an application for the grant of a plant breeder's right and a plant breeder's right may be assigned or transferred by succession of any kind. For reasons of legal security, the assignment must be made in writing and must be undersigned by the contracting parties. In the case of succession--for instance, succession by inheritance--such safeguards cannot be provided for. In any case, assignment or transfer must be registered on request and cannot be used against third parties unless they are registered.

None of these rules is mandatory under the UPOV Convention.

## COMMENTARY ON SECTION 12

This Section deals with the rights of joint applicants and joint holders of plant breeders' rights. Unless an agreement to the contrary has been concluded between the parties concerned, joint applicants and joint holders can exercise their respective rights separately, with one exception, namely, the grant of an exclusive license to a third party. This right may be exercised only jointly, the reason being that--at least for the same region--any such license may be granted only once.

This provision is not mandatory under the UPOV Convention.

PART III

ASSIGNMENT AND TRANSFER OF THE APPLICATION OR OF  
THE PLANT BREEDERS' RIGHTS; JOINT HOLDERS OF RIGHTS

Section 11. Assignment and Transfer

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

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

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

Section 12. Joint Applicants for Plant Breeders' Rights and Joint Holders of Plant Breeders' Rights

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

## COMMENTARY ON PART IV

This Part comprises only one Section, on the scope of protection.

## COMMENTARY ON SECTION 13

This Section deals with the scope of protection.

Paragraph (1) corresponds to Article 5(1), first sentence, of the UPOV Convention, paragraph (2) corresponds to Article 5(1), third sentence, of that Convention and paragraph (3) to Article 5(3) of that Convention. The second sentence of Article 5(1) and the whole of paragraph (2) of Article 5 of the UPOV Convention are not restated in Section 13 since their content is assumed to be self-explanatory.

The first three paragraphs of Section 13 reflect the minimum scope of protection, i.e. the scope of protection which every member State of the Union must grant according to the UPOV Convention.

Paragraph (4) contains provisions which are not mandatory under the UPOV Convention, but permitted under Article 5(4) of that Convention, which stipulates that member States of the Union may grant more extensive rights than those comprised in the minimum scope of protection set out in paragraph (1) of that Article. It is envisaged that the Minister of Agriculture may provide two types of such extensions for certain genera and species specially designated in the List of Genera and Species to Which This Law is Applied, the first type being an extension of the protection to the marketed product and the second being an extension to the propagation of plants with a view to their utilization for producing fruit or other products for commercial purposes. Under the first mentioned extension it would be possible, in particular, to prevent ornamental plants from being multiplied in countries where no protection exists and thus no authorization from the breeder is required, and the plants thus multiplied from being used in those countries for the production of cut flowers and those cut flowers from then being shipped to, and sold in, a member State without the breeder being in a position to exercise any control or to charge any royalty. The second-mentioned extension aims at preventing the propagation of mainly fruit-bearing plants of a protected variety, not for the purpose of selling the fruits or other products of such plants. The paragraph is so drafted that both extensions may or may not be introduced by the Minister of Agriculture. Neither the provision as a whole nor the details of it are mandatory under the UPOV Convention.

The part between square brackets would correspond to Article 5(4), last sentence, of the UPOV Convention allowing--but not obliging--a member State of the Union granting extended rights to limit the benefit of such extension to its own nationals, residents, etc., and to those of other member States offering the same extended rights.

PART IV

SCOPE OF PROTECTION

Section 13. Effect of a Plant Breeder's Right

(1) The effect of a plant breeder's right is that the prior authorization of the holder of that right shall be required for:

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

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

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

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

(4) The Minister of Agriculture may designate, in the List of Genera and Species to Which This Law is Applied, certain genera or species or parts thereof the varieties of which are afforded an extended scope of protection. For such varieties, the prior authorization of the holder of the plant breeder's right any production, offering for sale or marketing of the marketed product of these varieties. The Minister of Agriculture may designate, in the above-mentioned List, other genera or species or parts thereof the varieties of which must not, without the prior authorization of the holder of the right, be propagated with a view to producing fruit or other products for commercial purposes. [Any such rights may, however, not be claimed by a person who is neither a national of a member State of the International Union for the Protection of New Varieties of Plants (UPOV) which extends the protection in the same manner to the genus or species in question nor a natural person having his residence or a legal person having its headquarters in such State. The Minister of Agriculture shall publish in the Gazette the names of those member States of UPOV which extend the protection in such manner]<sup>1</sup>.

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<sup>1</sup> Optional limitation according to Article 5(4), second sentence, of the UPOV Convention.

## COMMENTARY ON PART V

This Part comprises only one Section on the maintenance of propagating material by the breeder.

## COMMENTARY ON SECTION 14

Protection for a plant variety is afforded only for as long as the variety is still in existence and has proved to be stable within the meaning of Section 5, which means that it has remained true to the description of the variety after repeated reproduction of propagation or, where the breeder has defined a special cycle of reproduction, at the end of each cycle. It is for the breeder to maintain the variety. He has to apply adequate measures to ensure that the plants grown from propagating material of the variety continue to show the characteristics defined for the variety when the right was granted. If this condition is no longer fulfilled, the Plant Variety Rights Office must take action and must declare the right forfeit (see Section 17(4)).

To enable the Plant Variety Rights Office to check whether the variety is being duly maintained, Section 14(1) provides that the holder must be in a position to provide that Office with propagating material fulfilling the said requirements, while paragraph (2) of the same Section obliges the holder to afford to the said Office all information and assistance requested by that Office to whether the variety is being sufficiently maintained. Where the holder does not cooperate with the Office as provided under paragraph (2), the Office may make use of the sanction made available to it under Section 17(5) by declaring the right forfeit.

## COMMENTARY ON PART VI

This Part deals with the normal periods of protection and with all cases of termination of the protection and mentions the renewal fees which have to be paid for each year of protection, failing which the right may be declared forfeit.

## COMMENTARY ON SECTION 15

Paragraph (1) deals with the minimum period of protection, which is either 15 or 18 years depending on the group of genera or species to which the variety belongs. These period correspond to the minimum protection which a member State of the Union has to grant to its breeders according to Article 8 of the UPOV Convention. States are free to grant longer periods and most present member States of the Union do.

Paragraph (2) of this Section provides for the reduction of the period of protection where, according to Section 2(2) of the Model Law and in accordance with Article 38 of the UPOV Convention, the variety was offered for sale or marketed by the breeder or with his consent before the date of filing or--where the law grants a period of grace of one year--for longer than one year before the date of filing. In those exceptional cases, the holder of the plant breeder's right will not benefit from a longer period in which to commercialize his variety than in normal cases. Thus the duration of protection is reduced by the number of full years completed between the date of the first offering for sale or marketing and the decisive date for assessing the novelty according to Section 2(2) of the Model Law, which is either the filing date or the date of the day that is one year before the filing date. Where Section 2(2) of the Model Law is applied with the parts appearing between square brackets, Section 15(2) of that Law should also be applied with the parts appearing between square brackets.

Of course, also in the base of Section 15(2), it is only the offering for sale or marketing which is performed by the breeder himself or with the approval of the breeder or his successor in title that counts. This is said at end of paragraph (2).

Paragraph (2) is not mandatory under the UPOV Convention.

PART V

MAINTENANCE OF PROPAGATING MATERIAL

Section 14. Maintenance of Propagating Material

(1) Every holder of a plant breeder's right shall ensure that, throughout the period for which the right is exercisable, he is in a position to provide the Plant Variety Rights Office with propagating material capable of producing plants which correspond to the characteristics defined for the variety when the right was granted.

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

PART VI

PERIOD OF PROTECTION; RENEWAL FEES; TERMINATION  
OF PROTECTION; ANNULMENT AND FORFEITURE OF RIGHTS

Section 15. Period of Protection

(1) The period of protection shall last:

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

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

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<sup>1</sup> For an alternative solution, see Section 2(1) and the Commentary on it.

## COMMENTARY ON SECTION 16

This Section deals with the obligation to pay a renewal fee for each year of protection. The amount of the fee will be prescribed under the Regulations on Fees. The calendar year following the grant of the right is the first year for which such a renewal fee is to be paid. Where the renewal fee is not paid, the holder will receive a reminder. If he does not respond to the reminder, the plant breeder's right will be declared forfeit. This is said in paragraph (5)(iii) of the following Section.

Section 16 is not mandatory under the UPOV Convention.

## COMMENTARY ON SECTION 17

This Section deals with other cases of termination of protection before the period of protection provided for under Section 15 has run out.

Paragraph (1) deals with the case where the holder himself waives his right. To avoid misunderstandings, provision is made for the waiver to be in a written declaration and to be addressed to the Plant Variety Rights Office. The waiver becomes effective at the date determined therein. Where the holder has not determined a date, the right is considered to be waived at the date on which that declaration has been received by the Office.

Paragraphs (2) to (4) deal with cases of termination against the holder's will. They correspond to Article 10 of the UPOV Convention, which means that they are mandatory.

In the case dealt with under paragraph (2), the plant breeder's right was granted in error and it was established later that the variety was not new or not distinct at the decisive date (see Sections 2 and 3 of the Model Law). In this case the right is declared null and void by the Plant Variety Rights Office. Such annulment can take place only on request. The request may be filed by anybody and is subject to the payment of a fee.

According to paragraph (3), a plant breeder's right may also be declared null and void if it was granted to a person who is not the owner of the variety. Such annulment may take place only at the request of the person claiming that he is the true owner of the variety. According to Section 9, the owner of the variety may instead request that the title be transferred to him. He thus may choose between having the right annulled or turned over to him.

As a general principle, annulment has retroactive effect. The right is normally treated as if it had never existed. This is justified since, in the cases falling under paragraph (2), one of the basic conditions for the granting of the right was not fulfilled and, in the cases falling under paragraph (3), one of the conditions for the granting of the right or its holder had never existed. On the other hand, the right had appeared to be a valid right until it was declared null and void and others might have relied on that appearance. It is for this reason that in most countries the principle of retroactivity is not fully applied and exceptions are recognized in the law or through jurisprudence. One case in which the retroactive effect should not be fully applied is dealt with in the second sentence of paragraph (7) of this Section and the reasons for that exception are given in the Commentary on that paragraph. In other cases, a just decision can be made only on the basis of the facts of each individual case. The decision must be left to the courts and it does not seem to be advisable to provide for further detailed rules on this question in the Model Law.

Paragraphs (4) and (5) contain two cases in which the plant breeder's right can be declared forfeit. Forfeiture differs from annulment to the extent that it has no retroactive effect whatsoever. The right ceases to be valid on the date of the declaration of forfeiture. This sanction is provided for the case where the holder of the right is no longer in a position to provide the Plant Variety Rights Office with propagating material capable of producing the variety with its characteristics as defined when the protection was granted. Several cases are conceivable in which the holder would be in that unfavourable position: he might not have maintained the variety; the variety might have ceased to exist, for at least no propagating material is available to the holder himself. In such

Section 16. Renewal Fees

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

Section 17. Termination of Protection, Annulment and Forfeiture of Rights

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

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

(3) If it is established that a plant breeder's right was granted to a person who is not the owner of the variety, the Plant Variety Rights Office shall declare that right null and void at the request of the owner. The second and the third sentences of paragraph (2) shall be applied mutatis mutandis.

(4) The plant breeder's right shall be declared forfeit by the Plant Variety Rights Office if the holder of the right is no longer in a position to provide that Office on request with the propagating material capable of producing plants which correspond to the characteristics defined for the variety when the right was granted.

(5) The plant breeder's right may also be declared forfeit if its holder:

- (i) does not fulfill his obligations under Section 14(2);
- (ii) does not pay the renewal fee that is due having been reminded to do so by the Plant Variety Rights Office and after four weeks have elapsed since the date of the reminder.

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

(7) License agreements concerning plant breeders rights become ineffective if those rights are declared null and void or forfeit. However, no repayment of any royalties which were due before the date of annulment or forfeiture can be demanded by the licensee in view of that annulment or forfeiture.

cases, the holder is no longer able to commercialize the variety and there is no point in retaining an exclusive right. It is also possible that the variety may have changed its characteristics so that the variety as defined when the right was granted no longer exists. In this case also, the holder should not retain an exclusive right.

No specific sanction is provided for the case where the variety never was homogeneous or stable so that the grant of the title was not justified from the beginning. The allegation that homogeneity or stability did not exist at a given date in the past would be extremely difficult if not impossible to prove. In practice, the right can be declared forfeit by applying paragraph (4) in these cases.

Paragraph (5)(i) deals with the case where the holder refuses to cooperate with the Plant Variety Rights Office if that Office wishes to check whether the variety is being properly maintained. The envisaged sanction is necessary since otherwise the holder could prevent the Plant Variety Rights Office from taking a decision under paragraph (4) by simply not providing the Office at the latter's request with the necessary material or rendering to it the necessary other assistance.

Paragraph (5)(ii) gives, as a further reason for a declaration of forfeiture the fact that the holder does not pay the renewal fee that is due after having been reminded to do so. The holder is allowed a period of four weeks after such reminder. States basing their law on the Model Law should check whether the four weeks' period is sufficient in view of the conditions prevailing in the country or whether a longer period should be provided for.

Paragraph (7) states the effect of a declaration of annulment or forfeiture on license agreements concluded with the--former--holder of the right. It says that such license agreements become ineffective after the declaration is made; they are not considered ineffective from the beginning. This is natural in the case of the forfeiture since forfeiture has effect only for the future. In the case of annulment of the right with retroactive effect, it might be considered more logical also to declare any license agreements null and void. This would, however, take no account of the fact that a right which is declared null and void appeared to be valid until the date of that declaration. Normally, it is not only the holder of the right but also his licensee that profits from the appearance of validity since third parties will very probably presume that the right is valid and thus respect it. It is for this reason that in cases of annulment also the license agreement will become ineffective only for the future and that in the second sentence any repayment of royalties which were due before the date of the annulment or forfeiture is expressly excluded. This rule, however, is not based on any provision of the UPOV Convention.

## COMMENTARY ON CHAPTER II

This Chapter deals, on the one hand, with the Office to be established and, on the other hand, with the applicability of international agreements.

## COMMENTARY ON PART I

This Part has one Section only, which deals with the Plant Variety Rights Office.

## COMMENTARY ON SECTION 18

This Section contains the basic provisions concerning the Plant Variety Rights Office and its organization. Article 30(1)(b) of the UPOV Convention obliges member States either to establish a special authority for the protection of new varieties of plants or to entrust their protection to an existing authority. The first alternative was chosen for the Model Law. If a State wishes to adopt the second alternative, it may say in paragraph (1) of this Section that it entrusts an existing office--for instances, the Patent Office--with the task of protecting new plant varieties.

The detailed provisions of paragraph (1) are not in any way mandatory under the UPOV Convention. They correspond to the practice of most member States of the Union.

States may see no need to mention in the Law which Minister appoints the head of the Office and how that head is to be named. States are also free to entrust another Minister with the appointment of the head of the Office and to place the Office under the control of two officers, one for administrative and the other one for technical matters, or of a Board consisting of an even larger number of persons.

The provision in paragraph (2) is also not mandatory under the UPOV Convention. However, it appears to be desirable to enable the Plant Varieties Rights Office to use the results of the testing performed by foreign government institutions and to create a secure legal basis for such practice in the Law. All present member States of the Union try to avoid duplication of efforts by using foreign examination results, or intend to do so in the future.

Paragraph (3) expressly states that the President of the Plant Varieties Rights Office may establish an Opposition Board and any other board which seems necessary to him for the performance of the tasks of that Office. The need of such a provision depends again on the legislative practice of the country. In any case, it might be advisable at least to mention the Opposition Board since that Board has to render decisions in any dispute between two private parties. It is of course possible to leave the establishing of such a Board to another person or another organ.

## COMMENTARY ON PART II

This Part contains only Section, which deals with international agreements.

## COMMENTARY ON SECTION 19

The reason for including this Section, which is not mandatory under the UPOV Convention, is a practical one. It is intended to ensure the application of all provisions of international agreements which might be of importance for nationals of the Contracting States or persons assimilated to such nationals. It must, however, be noted that the constitution of a country or its general practice might demand that all obligations under international agreements have to be implemented by an express provision in the national law. In that case, a provision which corresponds to Section 19 of the Model Law cannot be foreseen.

## CHAPTER II

## OFFICE AND INTERNATIONAL AGREEMENTS

## PART I

## OFFICE

Section 18. Plant Variety Rights Office

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

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

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

## PART II

## INTERNATIONAL AGREEMENTS

Section 19. Applicability of International Agreements<sup>2</sup>

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

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1 Alternatives: Director, Commissioner, Controller.

2 The need for, and the contents of, this provision have to be examined in the light of the constitutional rules and the practice of the country.

## COMMENTARY ON CHAPTER III

This Chapter contains the provisions on all procedures before the Plant Variety Rights Office and on appeals.

## COMMENTARY ON PART I

This Part deals with the application as the basis of the granting procedure.

## COMMENTARY ON SECTION 20

This Section lists the obligations which the applicant has to fulfill in filing an application. It also deals with the submission of material, the application fee and the publication of the application and of its withdrawal or rejection.

The applicant has to fulfill basically four obligations. First, he has to complete the application form; all indications which are required in that form have to be given. A copy of that form, which may be amended by the President of the Plant Variety Rights Office, is attached to the Model Law. Any amended version of the form has to be published in the Gazette and becomes effective only two months after such publication. The question whether a period of two months is sufficient will have to be examined.

In addition, the applicant has to complete a technical questionnaire. Such technical questionnaires are issued by the Plant Variety Rights Office for the different genera or species. The indications given in the technical questionnaire help the Plant Variety Rights Office to conduct, in a reasonable manner, the technical examination of the variety. The technical questionnaire must be duly completed by the applicant to the best of his knowledge, taking into account the fact that the applicant may occasionally not be able to give precise answers to some of the questions asked. Models of technical questionnaires for the various genera or species are established by UPOV. They are usually attached to the UPOV Guidelines for the Conduct of Tests for Distinctness, Homogeneity and Stability. The technical questionnaires may, like the application form, be amended by the President of the Plant Varieties Rights Office and any amended version has to be published in the Gazette.

Furthermore, the applicant has to pay an application fee. That fee is fixed in the Regulations on Fees which may be established according to Section 50 of the Model Law. The application will not be processed before the fee is paid.

A final obligation to be fulfilled by the applicant is the submission of a sample of propagating material. The amount of the propagating material, the date at which it has to be turned in and the place where it has to be submitted will be fixed by the Office in the light of its intentions as regards the conduct of the technical examination. The Office is free to decide whether it wishes to receive the sample at its headquarters, in which case it will transmit it, if necessary, to the place where the actual testing is to be undertaken, or whether it prefers to ask the applicant to send the sample immediately to the competent testing station.

Paragraph (5) provides for the publication of the application by the Plant Variety Rights Office. It will be published in the Gazette, and the indications to be given are enumerated in paragraph (5).

Paragraph (6) prescribed that any withdrawal or rejection of the application should also be published in the Gazette.

CHAPTER III

PROCEDURES BEFORE THE VARIETY RIGHTS OFFICE; APPEALS

PART I

APPLICATION FOR THE GRANT OF PLANT BREEDERS' RIGHTS

Section 20. Application, Application Fee, Submission of Material, Publications

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

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

(3) An application for the grant of a plant breeder's right shall not be processed until the corresponding fee prescribed under the Regulations on Fees has been paid.

(4) At the request of the Plant Variety Rights Office, the applicant shall submit the amount of propagating material determined by that Office, on the date and at the place fixed by that Office.

(5) The application shall be published by the Plant Variety Rights Office in the Gazette, mentioning the date on which it was filed, the name and address of the applicant and the original breeder or discoverer, and the denomination proposed under Section 24. Such publication shall also mention the main characteristics of the variety as indicated in the application.

(6) Any withdrawal or rejection of the application shall also be published in the Gazette.

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

## COMMENTARY ON SECTION 21

This Section deals with priority as provided for under Article 12 of the UPOV Convention.

Paragraph (1) contains the basic rules on priority and also some details for calculating the priority period. Those details go partly beyond the mandatory rules of Article 12 of the UPOV Convention, for instance, the rule that not only the date of the filing of the first application but also the date of the filing of the subsequent application should not be included in the priority period. Also the rule for cases where the last day of the priority day of the priority period falls on a holiday or another day on which the Plant Variety Rights Office does not receive applications goes beyond the strict minimum provided for under the UPOV Convention.

Paragraph (2) states the general principle developed under the Paris Convention for the Protection of Industrial Property according to which each first application whose filing was adequate to establish the date on which the application was filed in the country concerned is deemed to have been duly filed and can thus serve as a basis for priority, irrespective of the subsequent fate of that application.\* Thus, a withdrawal or a rejection of the first application has no effect on the validity of a priority claim based on that application.

Paragraph (3) deals with the effect of the priority. It states that the priority date replaces the filing date for the purposes of establishing novelty and distinctness and for the right to apply for protection in the case where a variety has been bred or discovered by several persons independently of each other. This has already been stated in Sections 2(1), 3(1) and 7 of the Model Law. It is repeated here to assist users of this Law in understanding the concept of priority. Where such double mention is not desired, paragraph (3) may be deleted or the words "or the priority date duly claimed, whichever is the earlier" in Sections 2(1) and 3(1) and "or filed and application with a prior priority date, whichever is the earlier" in Section 7 may be deleted.

## COMMENTARY ON SECTION 22

Paragraph (1) deals with the formal requirements for claiming priority. It corresponds to Article 12(2) of the UPOV Convention, but is more detailed. A provision of this kind is mandatory under the UPOV Convention.

Paragraph (2) states the right of the applicant to submit any propagating material or any additional documentation requested by the Office of the second application at a later date, unless four years have already elapsed since the end of the priority period. Such a right is not granted where the first application has been withdrawn or rejected in the country in which it was filed. Paragraph (2) corresponds to Article 12(3) of the UPOV Convention, but it clarifies that the Office at which the subsequent application is filed may in any case ask for such material or documentation, and that it is up to the applicant to declare that he will submit it later.

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\* Article 4.A(3) of the Stockholm Act of that Convention.

Section 21. Priority

(1) Any person who has duly filed in another member State of the International Union for the Protection of New Varieties of Plants (UPOV) an application for the grant of a plant breeder's right shall enjoy, under this Law, for the filing of such application for the same variety, a right or priority for a period of twelve months from the date of the filing of the first application. Neither the date of the first nor the date of the subsequent filing shall be included in such period. If the last day of the priority period falls on a holiday or on another day on which the Plant Variety Rights Office does not receive applications, the period shall end at the closing hour of the first day on which such Office again receives applications.

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

(3) The effect of the right of priority shall be that the date of priority shall count as the date on which protection is applied for under this Law for the purposes of Sections 2, 3 and 7, last sentence.

Section 22. Claiming of the Right of Priority; Documents and Material to be Furnished

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

(2) The applicant shall be entitled to declare that he will submit the material mentioned in Section 20(4) at a later date, but no later than four years after the end of the priority period, unless the earlier application mentioned in the preceding paragraph has been withdrawn in the country in which it was filed, or has been rejected there. The same applies to any additional documentation requested by the Office at which the subsequent application was filed.

## COMMENTARY ON SECTION 23

This Section deals with the language or languages in which the application has to be filed. Normally it has to be filed in the language of the country. The President of the Plant Variety Rights Office may, however, determine that applications in other languages will also be accepted. Such determination, which has to be published in the Gazette, would not only facilitate the work of foreign applicants; it might also be practical in cases where essential parts of the procedure--for instance, the examination--will be performed by the Office of another State--where another official language is spoken--as the result of an agreement of cooperation concluded between the Offices concerned.

This Section is not mandatory under the UPOV Convention

## COMMENTARY ON PART II

This Part deals with the variety denomination which must be given to each variety before a title of protection can be granted (see Articles 6(1)(e) and 13 of the UPOV Convention). In their essence, the provisions contained in this Part are mandatory under the UPOV Convention.

## COMMENTARY ON SECTION 24

This Section deals with the proposal for a variety denomination which must be submitted by the applicant. It should--like the application for the grant of a plant breeder's right--be made on a form issued by the Plant Variety Rights Office for this purpose, a copy of which is attached to this Law and which may be amended by the President of the Plant Variety Rights Office in the same manner as the application form.

The Section provides that the proposal should be submitted at the same time as the application is filed. The laws of some of the present member States of the Union provide that the proposal for a variety denomination may be made later. If a State wishes to adopt such a more generous rule, the first sentence of paragraph (1) would have to be worded along the following lines: "The applicant for a plant breeder's right must, within.... months after the filing of the application, propose a variety denomination; the proposal must be made on the form issued by the Plant Variety Rights Office for that purpose, a copy of which is attached to this Law."

For the detailed indications which have to be given concerning the proposed variety denomination, the Law refers to the above-mentioned form.

Section 23. Language of the Application

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

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

PART II

VARIETY DENOMINATION

Section 24. Proposal

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

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

## COMMENTARY ON SECTION 25

This Section contains the basic rules which have to be observed for variety denominations. In general, it restates the contents of Article 13 of the Convention but is more explicit on some details. Where it contains provisions going beyond the said Article 13, it follows the laws of present member States of the Union. It must be mentioned that this Section does not allow for a variety denomination consisting only of figures; however, a footnote clarifies that such a variety denomination may be accepted in countries where it is an established practice for designating varieties, thus following Article 13(2), second sentence, of the UPOV Convention.

Paragraph (3) goes beyond Article 13 of the UPOV Convention since it allows the applicant under certain conditions to propose--without being requested by the Office to do so--a variety denomination that is different from the one used for the same variety in another member State of the Union. It is believed that giving the applicant this possibility does not contravene Article 13(5) of the UPOV Convention since the Plant Variety Rights Office is not obliged to follow any such proposal by the applicant. As in Article 13(5), third sentence, of the UPOV Convention, the Plant Variety Rights Office can require the breeder to submit another denomination if it considers that the one used in another member State of the Union unsuitable.

## COMMENTARY ON SECTION 26

This Section deals with the obligation for the Plant Variety Rights Office to publish periodically in the Gazette the variety denominations which have been proposed to it or registered or cancelled by it. Such publication is necessary to enable the information concerning variety denominations to be ensured according to Article 13(6) of the UPOV Convention.

Section 25. Form, Contents and Procedure

(1) The variety denomination may consist of one word, or of several words up to a maximum of three, or of a combination of letters and figures, or of a combination of words and letters, or of a combination of words and figures. In a combination of words and figures, the figures must, however, have a meaning in relation to the words. The variety denomination may not consist solely of figures<sup>1</sup>.

(2) It is prohibited to use as a variety denomination a designation which

- (i) is liable to mislead or to cause confusion concerning the origin, derivation, characteristics, value or identity of the variety, or the identity of the breeder;
- (iii) is identical or can be confused with a variety denomination which in the country or in another member State of the International Union for the Protection of New Varieties of Plants (UPOV) designates a variety of the same botanical or of a related species; such denomination is, however, admissible if the other variety is neither registered nor grown any more;
- (iv) is identical or can be confused with a designation in which a third party enjoys a prior right which would prohibit the use of the designation as a variety denomination;
- (v) is scandalous;
- (vi) refers solely to attributes which are also common in other varieties of the species concerned;
- (vii) consists of a botanical or common name of a genus or species;
- (viii) suggests that the variety is derived from or related to another variety when this is not the case;
- (ix) includes words such as "variety," "cultivar";
- (x) is, for reasons other than those mentioned above, not suitable as a generic designation of the variety.

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

Section 26. Publication

The Plant Variety Rights Office shall periodically publish in the Gazette the variety denominations which have been proposed to it or registered or cancelled by it.

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<sup>1</sup> This sentence may be modified where the use of such denominations is established practice.

## COMMENTARY ON SECTION 27

The first paragraph of this Section corresponds to the obligation under Article 13(7) of the UPOV Convention according to which the variety denomination has to be used by every person who offers for sale or markets the variety.

Paragraph (2) corresponds to Article 13(8) of the UPOV Convention.

Paragraph (3) prohibits the holder of the plant breeder's right from invoking any trademark, trade name or other right in his possession against the legitimate use of a variety denomination in the offering for sale or marketing of the variety by another person. This or an equivalent rule must be contained in the Model Law since member States of the Union have to ensure, under Article 13(1) of the UPOV Convention, that no rights in the designation which is registered as the denomination of the variety should hamper the free use of the denomination in connection with the variety.

## COMMENTARY ON SECTION 28

In accordance with Article 13(4), first sentence of the UPOV Convention, this Law states that the prior rights of third parties in a designation remain unaffected by its provisions.

## COMMENTARY ON SECTION 29

This Section deals with the cancelling of a variety denomination.

There are three different cases.

In the first case, which is dealt with in paragraph 1(i), the registration of the variety denomination was already in contradiction to the terms of the Model Law, which means that either the Plant Variety Rights Office has overlooked a fact which should have prevented such registration or that such fact was not known at the time of the registration. In this case, anybody has the right to request the cancellation and the Plant Variety Rights Office may cancel the denomination on its own motion.

In the second case, the variety denomination is incompatible with the right of a third party or for another reason not admissible under this Law. In this case, the variety denomination has to be cancelled at the request of the holder of the plant breeder's right or of a third party if a final court decision is delivered according to which the variety denomination must be cancelled (paragraph 1(ii), first case). In order to avoid the need--in the case of a conflicting third-party right--for the parties concerned to insist on the delivery of a final court decision, it is provided, as a second alternative in paragraph 1(ii), that the variety denomination must be cancelled if it is established that such third-party right exists in the denomination; in this case, it is necessary however that the holder of the plant breeder's right should be in agreement with the cancellation. In other words, without a final court decision, cancellation on the grounds of the existence of third-party rights is admissible only on request or at least with the agreement of the holder, and neither can a third party enforce it nor can the Plant Variety Rights Office cancel the denomination on its own motion.

In a third case, which is dealt with in paragraph 1(iii), a person who is obliged to use the variety denomination according to Section 27(1), that is to say, a person who offers for sale or markets propagating material of the protected variety, is prohibited by a final court decision from using that denomination. Such a person can request the cancellation of the variety denomination, provided that the holder of the plant breeder's right has participated in the court proceedings or has at least been given the possibility of participating. In other words, the holder must have had the possibility of defending the variety denomination before the competent court.

Section 27. Use of the Variety Denomination

(1) Any person who offers for sale or markets propagating material of a variety protected in the country must, even after the expiration of the protection, use the registered variety denomination in so far as prior rights do not prevent such use.

(2) 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 provided that the denomination is easily recognizable.

(3) The holder of the plant breeder's right may not invoke any trademark, trade name or other right in his possession against a variety denomination legitimately used in the offering for sale or marketing of the variety by another person, even after the expiration of the protection.

Section 28. Prior Rights of Third Parties

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

Section 29. Cancellation of a Variety Denomination

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

- (i) at the request of any person or on its own initiative, if it should not have been registered or if subsequently facts become known which would have justified the rejection of the denomination;
- (ii) at the request of the holder of the plant breeder's right or of a third person, if a final court decision is delivered according to which the variety denomination must be cancelled or if it is established that a third-party right exists in the denomination and the holder of the plant breeder's right agrees to the cancellation;
- (iii) at the request of a person who is obliged to use the variety denomination (Section 27(1)), if he is prohibited by a final court decision from using that denomination, provided that the holder of the plant breeder's right had participated or had been given the possibility of participating in the court proceedings.

(2) In the case of the cancellation of the variety denomination, the Plant Variety Rights Office shall request the holder of the plant breeder's right to submit, within an appropriate period fixed by it, a proposal for a new variety denomination, which shall be registered if it is considered admissible for that Office. If the proposal is not acceptable, the request for submission shall be repeated. The Plant Variety Rights Office shall establish, at the request of the holder of of any third person, a provisional variety denomination if a justified interest exists therein. If, after the period for submitting a proposal for a new variety denomination has expired, the holder of the plant breeder's right has not submitted the requested proposal, the Plant Variety Rights Office may establish on its own initiative a provisional or a permanent variety denomination.

Where a variety denomination is cancelled, there is a need for another variety denomination. Paragraph (2) provides the necessary rules which ensure that a new denomination is either proposed by the holder of the plant breeder's right or, if that holder does not comply with the invitation to submit a new denomination, is established by the Plant Variety Rights Office, either as a provisional variety denomination or as a permanent variety denomination. A provisional variety denomination will probably be established where the Plant Variety Rights Office still expects that the holder will propose another variety denomination. There might be cases where a provisional denomination should be established for the--sometimes lengthy--period needed by the Office to decide on the registration of a new permanent variety denomination. In this case, the holder or even a third party can request that such provisional variety denomination be established.

## PART III

This Part contains only one Section, which deals with the filing date.

## COMMENTARY ON SECTION 30

In order to promote legal security and certainty for the parties concerned, this Section contains provisions on the fixing of the filing date of the application.

## COMMENTARY ON PART IV

This Part contains the rules for the main part of the granting procedure, namely, the part that leads either to the rejection of the application or to the decision to grant the plant breeder's right. The grant itself is dealt with in connection with the rules on opposition in the subsequent Part of this Law. The provisions of this Part are mandatory since the UPOV Convention provides for the grant of plant breeders' rights only after examination of the variety. The procedural rules could, however, be different from those provided for in this Part.

## COMMENTARY ON SECTION 31

This Section provides that, as a first step, the application is examined as to formal aspects. Non-compliance with formal obligations leads normally to rejection of the application, subject to the right of the Plant Variety Rights Office to grant a further period to comply with such obligation. In the case of non-compliance with any formality concerning a priority claim, such claim is simply disregarded, which means that the examination of the question whether the conditions for granting protection are fulfilled by the variety and the decision on the entitlement to protection are based on the filing date of the application.

## COMMENTARY ON SECTION 32

Section 32 deals with the main part of the granting procedure, which starts with the examination as to novelty, in other words, the examination of the question whether the conditions of Section 2 of the Model Law are fulfilled. This part of the examination is of an administrative and not of a technical character. It can thus be performed by the administrative departments of the Plant Variety Rights Office. If the result of that examination is positive, the procedure will be continued. In the case of a negative result, the application will be rejected.

The next step is the examination of the variety as to distinctness, homogeneity and stability. This part of the examination is of a technical character. It is performed in the present member States of the Union by growing tests which are carried out either by technical departments of the Plant Variety Rights Office or by other governmental trial stations under the supervision of that Office or simply at the request of that Office.

To an increasing degree, member States of the Union cooperate in the examination as to distinctness, homogeneity and stability. This is done under bilateral agreements concluded by the services competent for testing varieties or, where the constitution or the general practice of the country so requires, by government authorities of a superior hierarchical order. Bilateral agreements of this kind are based on a model developed in UPOV, the UPOV Model Agreement for International Cooperation in the Testing of Varieties. Under such a bilateral agreement, the authority of one member State of the Union agrees to carry out, for a certain genus or species, at the request of the authority of the other member State of the Union party to the agreement, the technical work associated with the testing of new varieties in respect of applications filed in that other member State. The authority requesting test results from another authority is thus in a position to base its decision concerning the application on the test results obtained in that other State. The bilateral agreements facilitate the division of labor between two authorities. Only the examining authority has to create the necessary infrastructure for the testing of varieties of a given genus or species. The bilateral agreements also envisage the possibility that test results already available in the partner State, whether they refer to a genus

PART III

FILING DATE

Section 30. Filing Date

The filing date of the applications is fixed by the Plant Variety Rights Office as the day on which the application form, duly completed, on a document substituted for that form, and a proposal for a variety denomination have been received and the application fee has been paid.

PART IV

EXAMINATION OF THE APPLICATION; REJECTION OF THE APPLICATION  
OR DECISION TO GRANT THE RIGHT

Section 31. Formal Examination of Application; Consequences of Defects

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

(2) If any of the requirements under the preceding paragraph has not been complied with, the application for the grant of a plant breeder's right shall be rejected, unless the Plant Variety Rights Office grants to the applicant a further period to complete the application or to submit the propagating material. No such further period may be granted which will end later than three months<sup>1</sup> after the application date or the date fixed for submission of the material as applicable. If any of the provisions of Section 22 has not been complied with, the application shall be handled as if no priority had been claimed.

Section 32. Examination of Novelty; Testing Fee and Testing; Decision on the Grant; Rejection of the Application Immediately After the Examination of Novelty or the Testing

(1) The Plant Variety Rights Office shall examine whether the variety fulfills the conditions of novelty. If those conditions are not fulfilled, it shall reject the application.

(2) The Plant Variety Rights Office shall invite the applicant, on a date fixed by it before the beginning of each year or testing period, as prescribed under the Regulations on Fees for that year or testing period, failing which the application will be rejected.

(3) The Plant Variety Rights Office shall, after having received the testing fee for the first year or the first testing period, examine whether the variety fulfills the conditions of distinctness, homogeneity and stability. Where the President of the Plant Variety Rights Office has decided that the examination shall be performed by another national or foreign governmental authority, the conclusion may be based on the examination results received.

(4) Subject to Section 22(2), the Plant Variety Rights Office may, where necessary for the examination, require the applicant to submit additional material or documents within an appropriate period fixed by that Office. If the applicant does not furnish the required material or the required documents within that period, and is unable to give valid reasons therefor, the application shall be rejected.

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

or species covered by the bilateral agreement or not, may be requested by the authority of the other state. It should be added that this type of cooperation is not restricted to the testing necessary for the application of the plant breeders' rights system. Test results may be requested for other purposes, in particular, for the purpose of any testing necessary under the national law for the entering of a variety in a national catalogue or recommended list.

Though in the present member States of the Union varieties are normally tested by government institutions, it is possible that the Plant Variety Rights Office may base the examination of a variety on test results obtained by other institutions or even by the applicant himself. Where the latter type of testing is chosen, the Plant Variety Rights Office has to ensure that the growing tests are conducted according to guidelines established by it and that these tests continue until the decision on the application has been taken. The Office also has to ensure that the applicant makes the growing tests accessible to persons properly authorized by it. In this case, the applicant would also have to comply with Section 20(4) and submit a sample of propagating material, and the Plant Variety Rights Office would have to provide for the proper storing of that material. The details of that procedure need not be reflected in this Law. They should be contained in regulations or in office instructions. The growing tests performed by the applicant himself are part of the examination by the Plant Variety Rights Office within the meaning of Section 32(3).

Section 32 provides that the testing of a variety is performed only if a testing fee is paid by the applicant. Testing fees are usually charged on a yearly basis, or on the basis of a growing period where the growing period does not coincide with the calendar year. This system of charging testing fees on a yearly or growing-period basis is recommendable since the testing might take different times for different varieties. Normally the testing lasts two years or two growing periods. The testing begins after the payment of the testing fee for the first year or growing period. The fees for the subsequent years or growing periods are charged before the start of the testing in these years or periods. If the applicant fails to pay a testing fee, the application will be rejected. The same is true where the applicant does not comply with a request from the Plant Variety Rights Office to submit any additional material or documents needed within an appropriate period fixed by that Office.

Where the testing leads to a negative result--in other words, where it shows that the variety is not distinct, homogeneous or stable--the application will be rejected.

Where the examination of the variety denomination proposed by the applicant shows that that denomination cannot be registered, the Plant Variety Rights Office will request the applicant to submit another denomination within a period fixed by it. If the applicant does not comply with such request, the application will be rejected. Where the applicant submits another proposal for a variety denomination, it may again not be possible to register the proposed denomination. In such a case, the procedure will continue. In other words, the variety will be rejected only if the applicant does not comply with the request to submit another proposal and never where the variety denomination is found to be unsuitable by the Plant Variety Rights Office. On the other hand, unless a proposed variety denomination is found to be suitable for registration, the plant breeder's right cannot be granted.

Where the examination by the Plant Variety Rights Office shows that the variety fulfills the conditions for the grant of a plant breeder's right--that is to say, where it is new, distinct, homogeneous and stable--and where a variety denomination proposed by the applicant can be registered, the right is not immediately granted by the Plant Variety Rights Office: the latter merely decides that a plant breeder's right is to be granted and publishes that decision in the Gazette. At the same time, it invites anyone who is opposed to the grant to file an opposition within three months after that publication. This gives the general public the possibility of starting proceedings to prevent the grant of a plant breeder's right where such grant is considered not to be justified.

(5) If the examination shows that application satisfies the conditions of novelty and distinctness, homogeneity and stability and that the proposed denomination of the variety can be registered, the Plant Variety Rights Office shall decide that a plant breeder's right is to be granted. If the examination shows that the variety is not distinct, homogeneous or stable, the Plant Variety Rights Office shall reject the application. If the examination shows that the proposal denomination of the variety cannot be registered, the Plant Variety Rights Office shall request the applicant to submit another denomination within a period fixed by it, failing which the application shall be rejected.

(6) The rejection of the application shall be published in the Gazette.

(7) A decision to grant a plant breeder's right shall be published in the Gazette and any person who is opposed to the grant of such right shall be invited to file an opposition within three months after that publication.

## COMMENTARY ON PART V

This Part contains the rules on opposition, including the two possible results of sub opposition: rejection of the application or grant of a plant breeder's right. It also contains the necessary provision on the grant of the plant breeder's right where no opposition has been filed within the period provided for it. It is not mandatory under the UPOV Convention to provide for opposition.

## COMMENTARY ON SECTION 33

This Section deals with the procedure in cases where an opposition is filed and with the further procedure after the decision is taken that a plant breeder's right is to be granted, leading either to the rejection of the application or to the grant of a plant breeder's right.

An opposition may be based on different types of claims.

The opponent may claim that the applicant is not the owner of the variety. If such opposition is justified, the decision to grant the plant breeder's right will be revoked and the application will be rejected. It should be noted that the true owner may not be interested in having the application rejected and may prefer to have the plant breeder's right granted to him instead. In this case, he should not file an opposition but should request the Plant Variety Rights Office to have the application assigned to him (see Section 9).

The opponent may also claim that, at the decisive date, the variety was not new or distinct, or that it was not homogeneous or stable. If such opposition is justified, the decision to grant the right will also be revoked and the application will be rejected.

An opposition may furthermore be based on the claim that the variety denomination which the Plant Variety Rights Office intends to register is inadmissible. Such opposition, if justified, does not, however, lead to the rejection of the application: the Office will revoke its decision that a plant breeder's right is to be granted and will reopen the granting procedure; the applicant will be asked to propose another denomination, failing which the application will then be rejected. If the applicant proposes another denomination which is acceptable, a new decision will be taken to the effect that a plant breeder's right is to be granted.

Where none of the oppositions filed is found to be justified, or where no opposition is filed within the period provided therefor, the Plant Variety Rights Office will grant the plant breeder's right and register the variety denomination. This decision will be published in the Gazette.

Paragraph (5) provides that a special fee has to be paid for filing an opposition. This seems to be necessary to prevent irresponsible use being made of the possibility of filing an opposition.

PART V

OPPOSITION AND REJECTION OF THE APPLICATION AFTER  
OPPOSITION OR GRANT OF THE PLANT BREEDER'S RIGHT

Section 33. Opposition, Rejection After Opposition or Grant of the Plant  
Breeder's Right

(1) Within three months after the date of publication in the Gazette of the decision that a plant breeder's right is to be granted, any person may file an opposition against the grant and the opposition shall be examined by the Opposition Board of the Plant Variety Rights Office. The opposition can be based on the claim that the applicant is not the owner of the variety, that the variety at the date of the application\* or any validly claimed priority date was not new or distinct, or that it was not homogeneous or not stable. The opposition can also be based on the claim that the variety denomination which the Plant Variety Rights Office intends to register is inadmissible.

(2) If the opposition is justified, the decision that a plant breeder's right is to be granted shall, subject to the provisions of paragraph (3), be revoked and the application shall be rejected. If the opposition is not justified, it shall be rejected.

(3) If an opposition based on the claim that the variety denomination is inadmissible is justified, the Plant Variety Rights Office shall revoke the decision that a plant breeder's right is to be granted and reopen the granting procedure by requesting the applicant to submit another denomination, failing which the application shall be rejected.

(4) If no opposition is filed within the period mentioned in paragraph (1) or if all oppositions filed within that period have been rejected, the Plant Variety Rights Office shall grant the plant breeder's right and register the variety denomination.

(5) An opposition shall not be accepted unless the fee prescribed for it under the Regulations on Fees have been paid within the prescribed period.

(6) The grant of the plant breeder's right shall be published in the Gazette.

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\* To be adjusted if a period of grace (see Article 2(1)) is provided for.

## COMMENTARY ON PART VI

This Part, which comprises only one Section, deals with the procedure in cases where the assignment of the application or the transfer of the title is requested by a person claiming that he and not the applicant or the holder of the title is the true owner of the variety. The right to file such a request with the Plant Variety Rights Office is provided for in Section 9 of this Law.

## COMMENTARY ON SECTION 34

This Section contains the procedural rules for the handling of requests for the assignment of an application or the transfer of a title of protection by a person claiming that he and not the applicant or holder of the title is the true owner of the variety.

Paragraph (1) makes the filing of such a request dependent on the payment of a fee.

Paragraph (2) states that the request has to be made in writing and has to be accompanied by reasons.

Paragraph (3) enumerates the cases in which the request is considered inadmissible.

Paragraph (4) provides that the applicant or, where the title has already been granted, the holder of the plant breeder's right must be heard on the request and that the Plant Variety Rights Office may obtain the evidence offered by the parties concerned, that is to say, on the one hand, the person who has filed the request and, on the other hand, the applicant or the holder of the title. This means that, contrary to the general rule contained in Section 37(5) of this Law, the Plant Variety Rights Office will not obtain any other evidence on its own motion since the procedure in cases of contested ownership is conducted merely in the interest of the parties concerned and not in the general interest. It is thus not necessary for the Plant Variety Rights Office to conduct an official investigation as to the ownership of the variety. In order to clarify this, paragraph (4) goes on to state that the person who has requested the assignment or the transfer has to prove his ownership.

Paragraph (5) and (6) deal with the possible results of the procedure: decision of assignment or of transfer or rejection of the request. The request will be rejected where the person who has filed it cannot prove his ownership. Proof of the lack of ownership of the applicant or the holder is not sufficient, but would, in the case of an application, prevent the grant of the title by the Plant Variety Rights Office; it is recalled that the presumption of entitlement contained in Section 8 is not valid in cases where the Office positively knows that the applicant is not the owner of the variety.

Paragraph (7) states that decision taken under this Section may be the subject of an appeal to the Tribunal.

The UPOV Convention being silent on cases of contested ownership of a variety, this Section is not mandatory. The decision on contested ownership may be left entirely to the ordinary courts of the country. It is also conceivable that an official investigation of ownership may be provided for where the right to apply for protection or the right to the title is contested. Section 34 steers a middle course: it provides for a procedure before the Plant Variety Rights Office--in most countries faster and cheaper than a court procedure--without forcing that Office on to the cumbersome route of an official investigation that goes beyond the mere obtaining of evidence offered by the parties concerned.

PART IV

PROCEDURE IN CASES OF CONTESTED OWNERSHIP

Section 34. Procedure in Cases of Contested Ownership

(1) A request by the owner of the variety for assignment of the application or for transfer of the title (Section 9(1)) shall not be deemed to have been filed unless the fee prescribed for it under the Regulations on Fees has been paid.

(2) The request shall be filed in a written reasoned statement.

(3) The Plant Variety Rights Office shall declare the request inadmissible where it is filed by a person who does claim in his written statement to be the owner of the variety or where, in the case of a request for transfer of the title, that request has not been filed within the time limit provided for under Section 9(1), third sentence, of this Law.

(4) If the request is admissible, the Plant Variety Rights Office shall hear the applicant or the holder of the plant breeder's right, as the case may be, on the request. It may obtain only such evidence as is offered by any of the parties concerned. The person having requested the assignment of the application or the transfer of the title, as the case may be, must prove that he, and not the applicant or the holder of the plant breeder's right, is the owner of the variety.

(5) If the Plant Variety Rights Office finds that the person having filed the request, and not the applicant or the holder of the plant breeder's right, is the owner of the variety, it shall decide that the application is to be assigned or the plant breeder's right is to be transferred to that person.

(6) If the Plant Variety Rights Office finds that the person having filed the request has not proved to its satisfaction that he is the owner of the variety, it shall reject the request.

(7) An appeal shall lie to the Tribunal against any decision taken under this Section.

## COMMENTARY ON PART VII

This Part contains the procedural rules in cases where the annulment of a plant breeder's right is requested or where the Office wishes to declare such right forfeit. The substantive provisions are contained in Section 17, paragraphs (2) to (4). Annulment and forfeiture are provided for under the UPOV Convention and are thus mandatory, as already stated in the Commentary on Section 17. The details of the proceedings envisaged in this Part are not mandatory.

## COMMENTARY ON SECTION 35

Section 35 deals with the procedure in cases of requests for annulment.

Besides stating that a fee has to be paid for any requests for annulment, paragraph (1) makes it clear that annulment for lack of novelty or distinctness at the decisive date may be requested by any person, while annulment in the case of contested ownership of the variety may be requested only by a person claiming to be the true owner.

Paragraph (2) states that a request for annulment must be filed in writing and must be accompanied by reasons. It also contains the important principle that a plant breeder's right may be annulled even after its period of protection has run out.

Paragraph (3) attempts to prevent the validity of the granted plant breeder's right being contested in two parallel proceedings: in annulment proceedings before the Plant Variety Rights Office according to the provisions of Section 17 and 35, and in proceedings on the basis of an appeal against the grant of the title before the Tribunal according to the provisions of Section 38 (1)(iii).

Paragraph (4) lists the cases in which a request for annulment is inadmissible.

Paragraph (5) deals with the further proceedings where the request has been considered admissible. Here a difference is made between the two cases of annulment. Where annulment is requested for reasons of lack of novelty or distinctness, the proceedings are conducted by the Plant Variety Rights Office on its own motion since it is not only the person who has filed the request that has an interest in the annulment, but also the general public; the Plant Variety Rights Office may thus obtain any evidence if required beyond that offered by the parties concerned and it has to continue the examination even where the request for annulment is withdrawn. In the case of contested ownership, annulment proceedings are treated differently; here the procedure is conducted only in the interest of the parties to the litigation and the Office may not obtain any other evidence than that offered by these parties; it follows from the wording of paragraph (5) that in this case the procedure is not continued when the request for annulment is withdrawn.

Paragraphs (6) and (7) state the two possible results of the proceedings: rejection of the request or annulment.

Paragraph (8) stipulates that any decision taken under Section 35 may be the subject of an appeal to the Tribunal.

## PART VII

PROCEDURE IN CASES OF REQUESTS FOR ANNULMENT AND  
PROCEDURE FOR FORFEITURESection 35. Procedure in Cases of Requests for Annulment

(1) A request for annulment may, in the case of Section 17(2) of this Law, be filed by any person, whereas, in the case of Section 17(3) of this Law, it may be filed by the person who claims to be the owner of the variety. A request shall not be deemed to have been filed unless the fee prescribed for it under the Regulations on Fees is paid.

(2) A request shall be filed in a written reasoned statement. It may be filed even after the plant breeder's right has expired.

(3) The request may not be filed during the period within which an appeal may still be made against the grant of the plant breeder's right or while proceedings on such appeal are still pending before the Tribunal.

(4) The Plant Variety Rights Office shall declare the request inadmissible if it is not accompanied by any reasoned statement, or if, where based on Section 17(3) of this Law, it was filed by a person not claiming to be the owner of the variety, or if it was filed during the period within which an appeal may still be made against the grant of the plant breeder's right, or while proceedings on such appeal are still pending before the Tribunal.

(5) If the request is admissible, the Plant Variety Rights Office shall hear the holder of the plant breeder's right. It may, in the case of Section 17(3) of this Law, obtain only such evidence as is offered by any of the parties concerned. In the case of Section 17(2) of this Law, it may also obtain any other evidence and shall conduct the examination on its own motion; it shall continue the examination if the request for annulment is withdrawn.

(6) If the Plant Variety Rights Office finds that the request is not justified, it shall reject it.

(7) If the Plant Variety Rights Office finds that the request is justified, it shall declare the plant breeder's right null and void.

(8) An appeal shall lie to the Tribunal against any decision taken under this Section.

## COMMENTARY ON SECTION 36

This Section deals with the procedure for declaring a plant breeder's right forfeit. The basic conditions for such declarations are contained in Section 17(4) and (5). The Plant Variety Rights Office must declare the plant breeder's right forfeit where the holder is not able to comply with the Office's request to provide it with propagating material capable of producing plants which correspond to the characteristics defined for the variety by the Office when the right was granted. The Office may declare the plant breeder's right forfeit if the holder does not cooperate with that Office, as provided in Section 14(2), in checking whether the variety is being duly maintained, that is to say, if the holder does not give that Office the requested information and assistance in its supervising activity or if it does not allow the Office or the person instructed by that Office to inspect the measures taken by the holder of the plant breeder's right to maintain the variety. Another case in which the Plant Variety Rights Office may declare the plant breeder's right forfeit is the non-payment of a renewal fee that is due no later than four weeks after a reminder has been sent by that Office. In all these cases, the Plant Variety Rights Office will act on its own motion. A request by a private party is neither necessary nor does it have any legal consequence. If such a request is filed, it will be treated by the Plant Variety Rights Office as a mere suggestion to examine the need or the usefulness of official action according to Section 37(6) of this Law. That is what is said in paragraph (1).

Paragraph (2) ensures that the holder of the plant breeder's right is heard before that right is declared forfeit.

Paragraph (3) states that the Plant Variety Rights Office must formally declare the proceedings terminated where it finds no reason to declare the right forfeit. It has to inform the holder of its decision if he has been heard and thereby officially informed of the proceedings.

Paragraph (4) obliges the Plant Variety Rights Office, when declaring a plant breeder's right forfeit, to indicate the reasons for its decision and to fix the date of forfeiture. Normally that date will be the date of the decision.

Paragraph (5) states that the decision to declare a plant breeder's right forfeit may be the subject of an appeal to the Tribunal, but it is only the holder of the plant breeder's right who may appeal and not his licensee or any other person who might have an interest in upholding the right.

The UPOV Convention only contains provisions, in Article 10(2) and (3), on the question when a plant breeder's right must and when it may be declared forfeit. The details are not regulated under the Convention and are thus not mandatory. A member State of the Union may, for instance, deviate from the Model Law by providing that the initiation of proceedings on forfeiture may be formally requested by private parties, or it may adopt different rules as to the date of forfeiture. As far as paragraph (5) is concerned, it is believed that this rule derives from the obligation under Article 30(1)(a) of the UPOV Convention to ensure appropriate legal remedies for the effective defense of the rights provided for in that Convention.

Section 36. Procedure for Forfeiture of a Plant Breeder's Right

(1) Proceedings for forfeiture of a plant breeder's right shall be initiated by the Plant Variety Rights Office on its own motion if the condition under Section 17(4) of this Law is fulfilled. They may be initiated if any of the conditions under Section 17(5) is fulfilled. A request shall not be necessary; if any such request is filed, the Plant Variety Rights Office shall treat it as a suggestion to initiate official proceedings.

(2) Before declaring a plant breeder's right forfeit, the Plant Variety Rights Office must hear the holder of that right.

(3) If, after having heard the holder of the plant breeder's right, the Plant Variety Rights Office finds that there is no reason to declare the right forfeit, it shall declare the proceedings terminated and inform the holder of the right accordingly.

(4) If the Plant Variety Rights Office declares a plant breeder's right forfeit, it shall indicate the reasons for its decision and the date of forfeiture.

(5) An appeal shall lie to the Tribunal against any decision by which a plant breeder's right is declared forfeit. Such appeal may be filed only by the holder of the plant breeder's right.

## COMMENTARY ON PART VIII

This Part contains only one Section dealing with general rules for proceedings before the Plant Variety Rights Office.

## COMMENTARY ON SECTION 37

This Section contains some general rules for the proceedings before the Plant Variety Rights Office.

Paragraph (1) lists the various possibilities of obtaining evidence. In particular, it states the principle that the Plant Variety Rights Office may either hear the parties in the proceedings the experts or the witnesses itself or may request the competent court to conduct such hearings.

Paragraph (2) states the principle that the Plant Variety Rights Office may conduct oral hearings. In some instances, where normally the general public's interest in the outcome of the proceedings can be assumed, the hearing must be public.

Paragraph (3) contains a basic guarantee for anybody who might be affected by a decision of the Plant Variety Rights Office: such decisions may only be based on grounds or evidence on which all the parties affected by the decision have had the opportunity to comment.

Paragraph (4) gives the Plant Variety Rights Office the possibility of rejecting any fact or evidence offered which is not produced in due time by any of the parties concerned. This rule is intended to ensure that the Office is not prevented by one of the parties from taking the necessary decisions in time.

Paragraph (5) states, as a general principle, that the Plant Variety Rights Office is free to obtain evidence on its own motion. This principle does not, however, apply where the contrary is stated in other Sections of this Law. It is recalled that in all proceedings except opposition proceedings concerning the ownership of the variety the Office is restricted to the evidence offered by any of the parties to the proceedings.

Paragraph (6) contains clarifications as to the observations or suggestions submitted by third parties. The granting of a plant breeder's right and its annulment or forfeiture affect the interests of the general public so that third parties might be interested in the grant or the denial of such a right. On the other hand, it would considerably slow down the decisions to be rendered by the Office if everybody became a party to the proceedings simply by submitting observations or suggestions. Where observations or suggestions are numerous, it might even be difficult to inform everybody who has made an observation or suggestion on the outcome of his intervention. It is for this reason that paragraph (6) requires the Plant Variety Rights Office only to confirm the receipt of any observation or suggestion. It is understood that any Plant Variety Rights Office will go beyond this obligation and fully inform a person who has submitted an observation or suggestion where it is in a position to do so without great difficulties, or where special reasons call for such information.

Section 37 is not applicable to proceedings before the Tribunal (Section 39) or before the courts in infringement cases. These judicial bodies follow their own rules of procedure; in the case of the Tribunal, this means those provisions of the national law or of national regulations which were declared to be applicable according to Section 40.

PART VIII

COMMON RULES ON THE PROCEEDINGS BEFORE THE PLANT  
VARIETY RIGHTS OFFICE

Section 37. Common Provisions for Proceedings Before the Plant Variety  
Rights Office

(1) Where in proceedings before the Plant Variety Rights Office evidence is to be obtained, it may be obtained either by hearing any of the parties to the proceedings or experts or witnesses before the Office or by requesting the competent court of the country of residence of the person concerned to take such evidence. Evidence may also be obtained by requesting the submission of documents and other information by, or in the possession of, any party to the proceedings, by requesting information from another government authority, by requesting an expert opinion, by inspecting the installations of any party to the proceedings with that party's consent, or by requesting the submission of a sworn statement in writing by any party to the proceedings or by any witness or expert named by such party.

(2) The Plant Variety Rights Office may in any proceedings under this Law conduct an oral hearing. Hearings in proceedings concerning the assignment of an application, the transfer of a plant breeder's right or the annulment or forfeiture of such right shall be public unless the legitimate interests of any person might be violated thereby.

(3) Any decision of the Plant Variety Rights Office may be based only on grounds or evidence on which any party to the proceedings whose rights are affected by that decision has had an opportunity to submit his comments.

(4) Facts or evidence which are not submitted in due time by any of the parties to the proceedings may be disregarded by the Plant Variety Rights Office.

(5) Unless expressly stated otherwise in other Sections of this Law, the Plant Variety Rights Office shall conduct the necessary investigations on its own motion; in these investigations, it shall not be restricted to the facts, evidence and arguments provided by any of the parties to the proceedings.

(6) Any person may submit observations or suggestions to the Plant Variety Rights Office concerning any proceedings pending before that Office. That person shall not become a party to those proceedings by the mere fact of such submission. Observations and suggestions thus submitted shall be communicated to the applicant or the holder of the plant breeder's right, as the case may be. The Plant Variety Rights Office shall confirm the receipt of such observations or suggestions but need not inform the person having submitted them of any steps taken by it or of its opinion on the observations or suggestions submitted.

## COMMENTARY ON PART IX

This Part contains the necessary provisions on appeals and on the body established to handle appeals, which is the Tribunal. Under the UPOV Convention it is mandatory to provide for appropriate legal remedies for the effective defense of the rights provided for in that Convention. Beyond that, the provisions of this Part are not mandatory under the UPOV Convention.

## COMMENTARY ON SECTION 38

This Section mainly lists the cases in which an appeal may be filed against a decision of the Plant Variety Rights Office. The appeals against decisions concerning variety denominations and those concerning compulsory licenses are dealt with in separate paragraphs (paragraph (2) and paragraph (3)). An appeal is provided for all cases in which the interests of a private person are affected by a decision of the Plant Variety Rights Office.

In this Model Law, the fact that any decision of the Office may be appealed against is also mentioned in the Sections dealing with that decision. This facilitates the understanding of the Model Law but might be considered superfluous. Where that is the case, the mention of the fact that a decision may be appealed against should be deleted in all other Sections except Section 38.

Paragraph (4) restricts the right to appeal to any person whose legal position is directly affected by the decision of the Plant Variety Rights Office. In other words, the person appealing must have a legitimate interest in contesting the decision of the Plant Variety Rights Office. Where this rule is a general principle of the law of the country, the first sentence of paragraph (4) may be deleted. The other sentence of this paragraph contain the necessary rules about the period within which an appeal has to be filed.

## COMMENTARY ON SECTION 39

In this Section, the name of the court that will serve as the Tribunal has to be inserted. That Tribunal may either be a special court established for the particular purpose or a court already existing and having the competence also to decide on other matters, such as the legal supervision of the country's Patent Office. It may also be any other court, but preferably a court dealing with administrative matters.

## COMMENTARY ON SECTION 40

This Section deals with the procedure to be applied by the Tribunal. It refers to the provisions of a more general law. Where an existing court is established as the Tribunal under Section 39, it is advisable to refer to the procedural rules normally applied by that court. Otherwise the procedural rules to be chosen should be those which are applied by judicial bodies dealing with administrative matters.

PART IX  
APPEAL AND TRIBUNAL

Section 38. Appeal

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

- (i) an application for the grant of a plant breeder's right is rejected,
- (ii) a demand under Section 9 of this Law is complied with or rejected,
- (iii) a plant breeder's right is granted,
- (iv) a plant breeder's right is declared null and void or forfeit,
- (v) an opposition is rejected, or
- (vi) a request to have the plant breeder's right declared null and void is rejected.

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

- (i) a proposal for registration of a variety denomination is rejected,
- (ii) the decision that a plant breeder's right is to be granted is revoked for inadmissibility of the variety denomination and the granting procedure is reopened,
- (iii) a variety denomination is registered or cancelled,
- (iv) the submission of a new variety denomination is requested, or
- (v) a new variety denomination is registered.

(3) An appeal shall also lie to the Tribunal against any decision of the Plant Variety Rights Office concerning a compulsory license, licenses of right or any application for the grant of a compulsory license.

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

Section 39. Tribunal

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

Section 40. Procedure in Cases of Appeal

Subject to Section 38 of this Law and to any provision in the regulations issued under Section 54, the provisions of ...<sup>2</sup> shall be applicable mutatis mutandis to appeals filed against decisions of the Plant Variety Rights Office.

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

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

## COMMENTARY ON CHAPTER IV

This Chapter deals with the infringement of plant breeders' right. Such infringement may lead to civil or penal sanctions, or to both. The UPOV Convention obliges member States to provide for appropriate legal remedies for the effective defense of the rights provided for in the Convention. Beyond that, none of the detailed provisions contained in this Chapter is mandatory.

## COMMENTARY ON PART I

This Part deals with the civil sanctions in cases of infringement and has only one Section.

## COMMENTARY ON SECTION 41

This Section contains the provisions on which the civil law proceedings may be based in the case of an infringement or in cases where an infringement is expected. Such proceedings must be brought before a civil court. Certain civil courts, as determined in Section 44, are competent since the litigation is between two private parties: the holder of the right or his licensee and the alleged infringer.

The said legal proceedings may have two aims. Where infringement is expected, the aim is to prevent such infringement; where infringement has already been committed, the aim is to prohibit its continuation. In the case of an infringement that has been committed, the holder of the plant breeder's right may also claim damages, provided that the infringer acted willfully or negligently. In this case, the holder may at the same time ask for the application of any other sanction which the civil law of the country provides for infringement of private rights. Such sanctions might, for instance, consist in the destruction of propagating material which has been produced in violation of an plant breeder's right, or a publication aimed at preventing further sales of propagating material which has been put on the market illegally. It is to be noted that such destruction may also take place after a product has been confiscated in the course of a penal procedure (see Section 38(2) of this Model Law).

Paragraph (3) contains rules for the calculation of damages. Two possibilities are foreseen. Damages may be calculated on the basis of the royalty which the holder of the right would probably have received if a license agreement had been concluded. However, the holder has also another choice, namely, to ask for compensation of the actual damage caused by the infringement, including compensation for the profits the holder of the right was prevented from making as a result of the infringement (lucrum cessans). The Model Law provides only for full compensation of the damage as a maximum. It does not provide, as the laws of some countries do, for the adjudication of double the amount or even a higher amount of damages as a deterrent.

CHAPTER IV  
INFRINGEMENTS OF PLANT BREEDERS' RIGHTS

PART I  
CIVIL SANCTIONS

Section 41. Civil Infringement Proceedings; Calculation of Damages

(1) The holder of a plant breeder's right whose rights under Section 13 are threatened with infringement or are infringed may institute legal proceedings before the court mentioned in Section 44 in order to prevent the infringement or to prohibit its continuation.

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

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

## COMMENTARY ON PART II

This Part deals with the penal sanctions for infringement of a plant breeder's right.

## COMMENTARY ON SECTION 42

Paragraph 1 states the principle that the willful or even negligent infringement of a plant breeder's right constitutes a criminal offense. Such infringement may consist of any of the acts reserved under Section 13 of this Law to the holder of the right. Punishment may consist of a fine or of imprisonment. This paragraph might need to be adjusted to the normal type of criminal law provision in each country.

No special punishment has been provided for cases of recidivism. Where providing for such special punishment would correspond to the normal criminal law practice, an additional paragraph might be added, which could read as follows:

"In the event of recidivism, the maximum penalties shall be doubled."

Paragraph (2) provides that the court may in any case confiscate any product the manufacturing, offering for sale or marketing of which constitutes an infringement punishable under paragraph (1). This rule is also applicable where the court is unable to prosecute or sentence an individual person because the infringer is not known or has not acted willfully or negligently or there is not sufficient evidence for prosecution or punishment. In such cases, the court must, of course, be convinced that an infringement has taken place.

## COMMENTARY ON SECTION 43

This Section contains rules for prosecution and punishment in cases concerning variety denominations. Paragraph (1) deals with the case where a registered variety denomination is not used as prescribed under Section 27(1), when the propagating material is offered for sale or marketed. Paragraph (2) deals with the case where a denomination of a protected variety, or a denomination likely to cause confusion therewith, is used for another variety of the same botanical or a related species.

PART II

PENAL SANCTIONS

Section 42. Punishment of Infringements

(1) Any person who willfully or negligently performs, in respect of a plant variety protected under this Law and without the prior authorization of the holder of the plant breeder's right, any act reserved to that holder by virtue of Section 13 of this Law shall be punishable for infringement by a fine not exceeding ... or by imprisonment not exceeding ... , or both.

(2) Even in cases where no specific person can be prosecuted or sentenced, the court may order the confiscation of any product the manufacturing, offering for sale or marketing of which constitutes an infringement within the meaning of paragraph (1).

Section 43. Infringement of the Obligation to Use the Variety Denomination; Misuse of the Variety Denomination

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

(2) Any person who willfully or negligently makes use of the registered variety denomination of a variety protected in the country, or a denomination likely to cause confusion therewith, for another variety of the same botanical or a related species shall be punishable by a fine not exceeding ... .

## COMMENTARY ON PART III

This Part deals with the competence of courts in infringement cases. It contains only one Section.

## COMMENTARY ON SECTION 44

This Section deals, in paragraph (1), with the competence of courts for civil proceedings in infringement cases. Two possibilities are offered. The competence must either be given to the courts which would be competent for proceedings concerning the infringement of an industrial patent or to the courts which would be competent for cases of damage caused to private property. The two possibilities are shown within square brackets. The paragraph contains additional indications as to which court should be locally competent. These indications follow principles which are recognized in most countries for determining the local competence of courts, but avoid referring to the place at which the infringement was committed (locus delicti commissi) since that place is very much disputed. It should be noted that the UPOV Convention is silent on the local competence of courts in infringement cases, so that member States of the Union are free to adopt whatever rules they wish to adopt in that connection. They may choose between one of the two possible solutions offered in this Model Law or they may adopt another solution or they may rely on general rules or general practice in the country for determining the competence of courts.

Paragraph (2) follows the example of some member States of the Union and offers the possibility of concentrating civil proceedings in infringement cases in one court or in several selected courts. It is proposed that this be done through a regulation established jointly by the Minister of Agriculture and the Minister of Justice. The UPOV Convention being silent on these matters, States may decide on their own responsibility whether they wish to adopt any of the other detailed stipulations proposed in this paragraph (2).

Paragraph (3) contains the necessary provisions for the competence of courts in penal proceedings initiated in cases of infringement. This rule also is not mandatory under the UPOV Convention.

PART III

COMPETENT COURTS IN CIVIL AND CRIMINAL PROCEEDINGS

Section 44. Competent Courts in Civil and Criminal Proceedings

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

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

(3) The competent courts for criminal proceedings under Sections 42 and 43 shall be the criminal courts which would be competent for any other criminal offense committed by the infringer at the same place and would be subject to penal sanction.

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<sup>1</sup> Alternative solutions.

## COMMENTARY ON CHAPTER V

Chapter V deals with licenses, licenses of right and compulsory licenses. As to the need for such provisions, the situation will vary from State to State. None of the proposed rules is mandatory under the UPOV Convention. In some cases it might be possible to leave this question entirely to the common law provisions of the country or to existing special laws, for instance laws dealing with unfair competition, restrictions on monopolies, etc. It must also be noted that the whole field of licensing, including compulsory licenses and licenses of right, is closely interlinked with the economic policy of the country. In view of this, the proposals contained in this Chapter can only be regarded as examples. They have been restricted to a small number of rules which appear to be accepted by a great number of States.

## COMMENTARY ON PART I

This Part deals with contractual licensing, which means the granting, by way of contract, of the authorization to some other party or undertaking to exploit the plant variety.

## COMMENTARY ON SECTION 45

Paragraph (1) states the general principle that the holder of a plant breeder's right is entitled to grant licenses by contract. It mentions in particular that a license can be granted against payment of a royalty or without such payment, for instance on an exchange basis.

Paragraph (2) provides that the license contract must have the same form as that envisaged in this Model Law for assignment of the right (Section 11(2)): it must be in writing and must be signed by the contracting parties. Paragraph (3) also follows the example of the rules on assignment in providing that a license contract must be registered at the Plant Variety Rights Office and will have no effect against third parties until such registration has been effected.

## COMMENTARY ON SECTION 46

This Section and the following two Sections contain rules for cases where license contract does not contain any provision to the contrary. Section 46 in particular states the principle that a license is normally a non-exclusive license which does not prevent the licensor either from granting further licenses to others or from exploiting the variety himself.

## COMMENTARY ON SECTION 47

Normally license contracts contain stipulations concerning the kind, the territorial applicability and the subject matter of the license granted. Where this is not the case or where the stipulated provisions do not say anything different, the license is granted for the duration of the plant breeder's right, for the entire territory of the country for which the right was granted and in respect of all activities falling within the scope of protection of the right. The scope of protection is described in this Model Law under Section 13. Where Section 13 permits options, the license will have the same field of application as the individual plant breeder's right on which the license was granted.

## COMMENTARY ON SECTION 48

This Section states the principle that the licensee may not assign the license to third parties or grant sublicenses. That is reserved to the holder of the plant breeder's right.

## CHAPTER V

## LICENSES, COMPULSORY LICENSES AND LICENSES OF RIGHT

## PART I

## CONTRACTUAL LICENSES

Section 45. License Contracts

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

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

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

Section 46. Right of Licensor to Grant Further Licenses or to Exploit the Variety

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

Section 47. Rights of Licensee

In the absence of any provision to the contrary in the license contract, the licensee shall be entitled to exploit the variety, during the whole duration of the plant breeder's right, in the entire territory of the country and in respect of all activities referred to in Section 13 of this Law.

Section 48. Non-Assignability of Licenses

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

## COMMENTARY ON SECTION 49

This Section has been included since it can be expected that a number of countries, especially developing countries, will insist on a rule which allows their government authorities to control the payment of royalties abroad. The aim of such governmental supervision would be to ensure that private enterprises in the country conclude license contracts for the use of foreign varieties involving payments abroad--this generally means payments in foreign currencies--only where the right to produce or market those plant varieties is in the indubitable interest of the whole country and not only in the interest of the enterprise concerned or the growers of certain crops in the country. The UPOV Convention is based on the assumption that the interests of plant breeders and the interests of the general public largely coincide. Nevertheless, a clash of interests is conceivable where the government has special reasons for wishing to reserve the limited financial resources available for the most necessary investments, such as obtaining and growing new varieties of food crops rather than of ornamental species, unless the latter can guarantee an income from exports.

## COMMENTARY ON SECTION 50

This Section follows the customary rules of antitrust or similar legislation. The provisions are included in this Model Law in order to prevent national legislators from overlooking these important aspects. Under the UPOV Convention it is not necessary to deal with these matters, but it might be expedient for the sale of legal security to have some provisions of this kind.

The holder of a plant breeder's right cannot be prevented from imposing on his licensees restrictions which immediately derive from the right since Article 5(2) of the UPOV Convention provides that the authorization given by the breeder to another person to produce, offer for sale or market the variety or to perform other activities falling within the scope of protection of a plant breeder's right may be subject to such conditions as the holder of the variety may specify. A holder may, however, wish to stipulate more far-reaching conditions. In many countries some of such conditions which might create or strengthen a monopoly on the part of the licensor are not admissible. Section 50 contains two typical cases of "inadmissible clauses."

According to subparagraph (i), the licensee must not be forbidden to attack the grant of the plant breeder's right or to question the validity of the plant breeder's right to which the licensee refers. Such "non-attacking" clauses are not admissible in most countries. Furthermore, according to subparagraph (ii), the licensee must not be obliged to abstain from applying for a compulsory license. A licensee might, for instance, wish to apply for a compulsory license where the license agreement is too narrow to allow him to perform certain activities that would be in the public interest, and the license agreement must not prevent him from doing so.

## COMMENTARY ON PART II

This Part contains only one Section dealing with licenses of right.

## COMMENTARY ON SECTION 51

Licenses or right have proved to be a practical means of encouraging the exploitation of a plant breeder's right where its holder cannot serve the whole market. They constitute an incentive for the holder since he will save on fees, while the user will be spared difficult negotiations with the holder of the plant breeder's right on licensing.

Section 49. License Contracts Involving Payments Abroad

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

Section 50. Inadmissible Clauses in License Contracts

A license contract may not contain:

- (i) the obligation imposed upon the licensee to abstain from all actions capable of impeding or preventing the grant of the plant breeder's right or prejudicing its validity;
- (ii) the obligation imposed upon the licensee to abstain from applying for a compulsory license.

PART II

LICENSES OF RIGHT

Section 51. Licenses of Right

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

(2) The declaration must be addressed to the Plant Variety Rights Office and a remark to that effect shall be entered in the Register.

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

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

(5) If all beneficiaris agree, the Plant Variety Rights Office may cancel the entry under paragraph (2) at the request of the holder of the plant breeder's right.

(6) An appeal shall lie to the Tribunal against any refusal to cancel the entry under paragraph (2).

## COMMENTARY ON PART III

This Part deals with compulsory licenses. In this context it should be mentioned that the preamble to the UPOV Convention states that the Contracting Parties to that Convention are conscious of the limitations that the requirements of the public interest may impose on the free exercise of the plant breeder's right. In conformity with that statement, Article 9 of the UPOV Convention provides that the free exercise of the exclusive right in a plant variety may be restricted--only--under one condition, namely, for reasons of public interest. The same Article guarantees to the breeder, in its second paragraph, that in the case of any restriction in order to ensure the widespread distribution of the new variety member States of the Union must take the necessary measures to ensure that the breeder receives an equitable remuneration. It follows, therefore, that each member State of the Union is in a position to provide for compulsory licenses under certain conditions.

## COMMENTARY ON SECTION 52

Paragraph (1) states the general principle that, on request, compulsory licenses may be granted in respect of any plant breeder's right.

Paragraph (2) describes the rights of the owner of a compulsory license. He has a non-exclusive right to perform all activities which fall, in each individual case, within the scope of protection. It follows, therefore, that the owner of a compulsory license can exclude neither the holder of the right nor other licensees from also producing and commercializing the variety.

Paragraph (3) states that the royalty to be paid by the owner of the compulsory license to the holder of the plant breeder's right is to be fixed by the Plant Variety Rights Office and that the owner of the compulsory license must render to the holder of the plant breeder's right adequate security for the payment of the royalty.

The owner of the compulsory license will in most cases not be able to produce plants of the protected variety until he obtains the necessary amount of propagating material to start the production. If that propagating material cannot be obtained otherwise, the Plant Variety Rights Office may according to paragraph (4), oblige the holder of the plant breeder's right to hold available for the owner of the compulsory license the amount of propagating material necessary for making reasonable use of the compulsory license but, of course, against payment of adequate remuneration. It is stipulated in particular that the conditions under which such propagating material may be required must be economically acceptable to the holder of the plant breeder's right. What is economically acceptable can only be decided in each individual case. In any case, account must be taken of the holder's own needs and those of his contractual licensees.

Paragraph (5) contains the basic conditions that must be fulfilled if a compulsory license is to be granted. The license must be in the public interest, and this is described in detail in subparagraph (i). The applicant must in any event be qualified to exploit the plant breeder's right in a competent and businesslike manner and must be prepared to do so (subparagraph (ii)). In other words, there must be a guarantee that the value of a plant breeder's right is not impaired by the activity of the owner of a compulsory license. Subparagraph (iii) reflects the general principle that a compulsory license is provided only for cases where a private license cannot be concluded, or cannot be concluded in a satisfactory manner. Subparagraph (iv) is a clause which allows the Plant Variety Rights Office to take into account special situations in which the holder of the plant breeder's right cannot be expected to permit the use of his variety in the manner requested. Subparagraph (v) allows the holder of the plant breeder's right a so-called "period of sole rights," that is to say, a period in which no compulsory license can be granted. There are many reasons for a rule of this kind, which is not mandatory under the UPOV Convention but corresponds to a provision in Article 5(4) of the Paris Convention for the Protection of Industrial Property of March 20, 1883\*. Very often,

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\* The provision is contained, in a slightly different wording, in the revised versions of The Hague (1925), London (1934), Lisbon (1958) and Stockholm (1967)

PART III  
COMPULSORY LICENCES

Section 52. Compulsory Licences

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

(2) The compulsory license shall confer on its owner the non-exclusive right to perform all activities referred to in Section 13 of this Law.

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

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

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

- (i) The grant of the compulsory license must respond to the public interest in the rapid and wide distribution of new varieties and in their availability to the public at adequate and reasonable prices.
- (ii) The applicant for the grant of a compulsory license must be financially and otherwise in a position to exploit the plant breeder's right in a competent and businesslike manner, and must be prepared to do so.
- (iii) The holder of the plant breeder's right has refused to permit the applicant for the compulsory license to produce or market propagating material of the protected variety in a manner sufficient for the needs of the general public as referred to in subparagraph (i) or is not prepared to give such permission under reasonable terms.
- (iv) No conditions exist under which the holder of the plant breeder's right cannot be expected to permit the use of his variety in the manner requested.
- (v) Three years have elapsed between the time of the grant of the plant breeder's right and the applications for the grant of the compulsory license ("period of sole rights").
- (vi) The applicant for the compulsory license has paid the fee prescribed for the grant of such compulsory license under the Regulations on Fees.

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

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

during the first years after the grant, propagating material is not even available in sufficient quantities to the holder himself or his contractual licensees. In addition, the holder should be allowed a certain period to explore the market, without being disturbed by owners of compulsory licenses, in order to discover which part he may reasonably serve himself. Furthermore, it is usually only after some initial marketing of the variety that the holder can judge the true value of the variety and determine what royalty would be adequate. Finally, especially during the first years after breeding the variety, the holder of a plant breeder's right should have the advantage of obtaining prices for his products which offer him reasonable remuneration for his initial investments; this advantage he would usually enjoy even where no plant breeders' rights system existed, by the mere fact of being the first on the market. Finally, subparagraph (vi) determines that a fee has to be paid for the grant of a compulsory license.

Paragraph (6) states that the Plant Variety Rights Office will determine the duration of the compulsory license and fix certain limits for that decision.

Paragraph (7) gives the Plant Variety Rights Office the possibility of preventing misuse of the compulsory license.

Paragraph (8) gives the Plant Variety Rights Office the possibility of hearing national non-governmental organizations in the field of plant breeding and the seed trade before granting a compulsory license. This rule takes into account the fact that in granting a compulsory license a number of factors have to be considered which do not fall within the normal field of competence of the Plant Variety Rights Office; that Office might therefore wish to rely on expert opinion from a neutral source possessing the necessary experience.

Paragraph (9) states the principle that in the cases under this Section an appeal will lie to the Tribunal and that the Tribunal may take provisional measures.

Paragraph (10) gives the Tribunal the authority to change the conditions of the compulsory license fixed by the Plant Variety Rights Office. The Tribunal is thus not limited to upholding or annulling the decision of the Office.

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

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

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

## COMMENTARY ON PART IV

This Part, which contains only one Section, deals with the question who can introduce legal actions in cases of infringement of the plant breeder's right where a license agreement has been concluded.

## COMMENTARY ON SECTION 53

Normally it is the holder of a plant breeder's right who institutes legal actions in cases of infringement and he is the person who has an interest in doing so. This might be different where a license agreement has been concluded; in such cases, it might be the licensee and not the holder who is interested in defending the plant breeder's right. Section 53 takes account of this and gives the licensee the possibility of requiring the holder to institute legal actions. If the holder does not react within a certain period, the licensee is given the authority to act in his own name.

This Section is not mandatory under the UPOV Convention. The rules of the present member States of the Union are rather different in this matter. It is believed that the proposed rule reflects a sound compromise between two extreme solutions, namely, giving the licensee in any case the right to institute legal proceedings or leaving the right to institute such proceedings in all cases to the licensor.

As can be seen from the final words of this Section, the licensor will always be in a position to participate in any legal proceedings.

PART IV

LEGAL PROCEEDINGS BY LICENSEES

Section 53. Legal Proceedings by Licensees

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

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

## COMMENTARY ON CHAPTER VI

This Chapter contains provisions on the adoption of the required implementing rules and on the necessary publications.

## COMMENTARY ON PART I

Part I deals with the issuing of certain implementing provisions by regulation. It contains only one Section.

## COMMENTARY ON SECTION 54

This Section summarizes the cases in which regulations may be established for the implementation of the Model Law. It mentions the instances in which such regulations may be issued at least in some of the member States of the Union. Noteworthy is the fact that a regulation may also be issued on the cooperation of plant variety rights offices with germ-plasm banks, an activity which will become rather important in the future in view of the need to conserve gene material.

The UPOV Convention being silent on these matters, none of the provisions is mandatory, nor is it necessarily the Minister of Agriculture who should issue such regulations.

Subparagraph (iii) might have special importance. It offers the possibility of adopting additional rules on the relationship between variety denominations and trademarks. The need for such rules may not appear until after some years of practical experience in applying plant breeders' rights legislation.

Subparagraph (vi) has been included only to prevent any omissions. It might be considered superfluous in certain States.

CHAPTER VI  
REGULATIONS, REGISTER, GAZETTEPART I  
REGULATIONSSection 54. Regulations

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

- (i) The procedure of the Plant Variety Rights Office in respect of the receiving and handling of applications, the conduct of the examination of varieties and of variety denominations, the handling of oppositions, the grant of plant breeders' rights, the rejection of applications, the annulment or forfeiture of plant breeder' rights, the assignment of an application or the transfer of a plant breeder's right to the owner of the variety, the cancellation of variety denominations, the maintenance and conservation of samples, the cooperation with germ-plasm banks or other institutions for the conservation of gene material, the establishing and maintenance of a plant variety register and the receiving and filing of any documents concerning plant breeders' rights, as well as the procedure of the Tribunal in the case of an appeal, including rules on the summoning and hearing of parties, witnesses or experts and on other evidence to be obtained.
- (ii) The amounts and the levying of all fees provided for under this Law.
- (iii) The introduction of additional rules to prevent the use of the same or confusing denominations for more than one variety and to regulate the relationship between variety denominations and trademarks.
- (iv) The administration of the Register of Plant Breeders' Rights provided for under Section 55, including the determination of the facts to be registered.
- (v) The issuance of the Gazette provided for under Section 56.
- (vi) Additional matters for which the competence of the Minister of Agriculture, or the Minister of Agriculture in cooperation with another Minister, is expressly provided for under this Law.

## COMMENTARY ON PART II

This Part deals with the organs established for publications under this Law. It is not mandatory under the UPOV Convention, which merely provides, in Article 30(1)(c), that member States of the Union have to ensure that the public is informed of matters concerning plant breeders' rights protection, including as a minimum the periodical publication of the list of titles of protection. This Part, as proposed, goes somewhat beyond this minimum.

## COMMENTARY ON SECTION 55

This Section provides for the establishment of a Register and mentions all the facts which are to be entered in that Register. As already said in the Commentary on this Part II, the publication of the titles of protection issued is a minimum requirement. Reference should also be made to Article 13(6), which obliges authorities of member States of the Union to ensure that all other authorities are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations. Most entries provided for under this Section are connected with either the titles of protection or variety denominations. It is only the last-mentioned items that concern another field, that of licenses. Here the need to mention certain facts arises from the rules proposed for licenses under Chapter V of the Model Law.

Paragraph (2) contains, as a practical rule, the presumption that everything entered in the Register is known to everybody. It stipulates that nobody may avail himself of the claim that he is unaware of the existence of any entry in the Register.

## COMMENTARY ON SECTION 56

The Plant Variety Rights Office must issue, in addition to a Register in which facts of legal relevance are entered, a Gazette whose purpose is to inform the general public in a broader manner. The main matters to be published in the Gazette are mentioned in this Section. They are all self-explanatory. It should be noted in this connection that UPOV has adopted a Model Gazette.

PART II  
REGISTER; GAZETTE

Section 55. Register

(1) The Plant Variety Rights Office shall have a register, to be known as the Register of Plant Breeders' Rights, in which facts of legal relevance concerning plant breeders' rights are entered, in particular, any plant breeders' rights granted, any change in the holder of that right, any change in the variety denomination, any annulment or forfeiture of the right and any cancellation of the variety denomination, as well as any license of right or compulsory license granted, with an indication of the conditions of both licenses and the conclusion of any license contract at the request of one of the parties to such contract.

(2) No one may claim that he was unaware of the existence of any entry in the Register.

Section 56. Gazette

The Plant Variety Rights Office shall issue a Gazette in which are published matters concerning plant breeders' rights and applications for such rights which have to be brought to the attention of the public, in particular:

- (i) any application filed and the indications mentioned in Section 20(5);
- (ii) any decision that a plant breeder's right is to be granted;
- (iii) any opposition filed;
- (iv) any withdrawal or rejection of an application;
- (v) any right granted, including the variety denomination registered;
- (vi) any change in the holder and any waiver of the plant breeder's right;
- (vii) any appeal filed;
- (viii) any decision on any appeal;
- (ix) any decision of annulment or forfeiture of a plant breeder's right;
- (x) any proposal or new proposal concerning a variety denomination and any cancellation of a variety denomination.

[Appendix 1 follows]

## FORM ACCORDING TO SECTION 20 (1) OF THE LAW

## APPLICATION FOR PLANT BREEDERS' RIGHTS

1. Applicant(s): name(s) and address(es)          nationality(ies) _____	2. Address to which correspondence is to be sent       This is the address <input type="checkbox"/> of one of the applicants <input type="checkbox"/> of the agent/proxy <input type="checkbox"/> for service			
3. Species _____				
4. Proposed denomination ( <i>in block letters</i> ) _____ ( <i>see also special form</i> ) Breeder's reference _____				
5. The original breeder(s) is (are) <input type="checkbox"/> the (all) applicant(s) <input type="checkbox"/> the following person(s):  No other person participated in the breeding. The variety was transferred to the applicant(s) by: <input type="checkbox"/> contract <input type="checkbox"/> succession <input type="checkbox"/> other ( <i>specify</i> ) _____  The variety was bred in ( <i>State(s)</i> ) _____				
6. Prior applications	Filing ( <i>State - date</i> )	Application number	Stage	Denomination or breeder's reference
Plant breeders' rights				
Official variety list				
7. Priority is claimed in respect of the application filed in ( <i>State</i> ) _____ on ( <i>date</i> ) _____				
8. The variety <input type="checkbox"/> has not been offered for sale or marketed in the State of application <input type="checkbox"/> was offered for sale or marketed for the first time on ( <i>date</i> ) _____ under the denomination _____ <input type="checkbox"/> has not been offered for sale or marketed in other States <input type="checkbox"/> was offered for sale or marketed for the first time in ( <i>State</i> ) _____ on ( <i>date</i> ) _____ under the denomination _____				
9. Authorization is hereby given to the Plant Breeder's Rights Office to exchange with the competent authorities of any UPOV member State all necessary information and material related to the variety, provided that the rights of the applicant are safeguarded.				
10. Other forms and documents attached: <input type="checkbox"/> 1 <input type="checkbox"/> 2 <input type="checkbox"/> 3 <input type="checkbox"/> a <input type="checkbox"/> b <input type="checkbox"/> c <input type="checkbox"/> d <input type="checkbox"/> e <input type="checkbox"/> f				
I (we) hereby apply for the grant of plant breeders' rights. I (we) hereby declare that, to my (our) knowledge, the information necessary for the examination of the application and given in this form and in the annexes is complete and correct.  Place _____, date _____				
				Signature(s)

FORM ACCORDING TO SECTION 24 (1) OF THE LAW

PROPOSAL FOR A VARIETY DENOMINATION

1. This application refers to the variety filed on the attached form \* with application number\* \_\_\_\_\_  
 Former proposed denomination if any or breeder's reference \_\_\_\_\_

2. Applicant(s) \_\_\_\_\_

3. Species \_\_\_\_\_

4. Proposed denomination (in block letters) \_\_\_\_\_

5. Denominations submitted or registered in other member States of UPOV

State	Stage	Denomination (if different from 4 above)

6.  The proposed denomination has been filed by or registered for the applicant(s) as a trademark in the State of application, in a UPOV Member State or with the International Bureau of the World Intellectual Property Organization (WIPO) in respect of products which are identical or similar within the meaning of trademark law.

State and/or WIPO	Date of application	Date of registration	Registration number

Done at (place) \_\_\_\_\_, on (date) \_\_\_\_\_

Signature(s)

\* cross out the non - applicable part

## APPENDIX 3 TO ANNEX I/APPENDICE 3 A L'ANNEXE I/APPENDIX 3 ZU ANLAGE I

SAMPLE OF A TECHNICAL QUESTIONNAIRE/EXEMPLE D'UN QUESTIONNAIRE TECHNIQUE/  
MUSTER EINES TECHNISCHEN FRAGEBOGENS

Reference Number (not to be filled in by the applicant)  
Référence (réservé aux Administrations)  
Referenznummer (nicht vom Anmelder auszufüllen)

TECHNICAL QUESTIONNAIRE  
to be completed in connection with an application for plant breeders' rights

QUESTIONNAIRE TECHNIQUE  
à remplir en relation avec une demande de certificat d'obtention végétale

TECHNISCHER FRAGEBOGEN  
in Verbindung mit der Anmeldung zum Sortenschutz auszufüllen

1. Species/Espèce/Art
2. Applicant (Name and address)/Demandeur (nom et adresse)/Anmelder (Name und Adresse)
3. Proposed denomination or breeder's reference Dénomination proposée ou référence de l'obtenteur Vorgeschlagene Sortenbezeichnung oder Anmeldebezeichnung
4. Information on origin, maintenance and reproduction of the variety Renseignements sur l'origine, le maintien et la reproduction de la variété Information über Ursprung, Erhaltung und Vermehrung der Sorte

5. Characteristics of the variety to be indicated (the number in brackets refers to the corresponding characteristic in the Test Guidelines; please mark the state of expression which best corresponds)

Caractères de la variété à indiquer (le nombre entre parenthèses renvoie au caractère correspondant dans les principes directeurs d'examen; prière de marquer d'une croix le niveau d'expression approprié)

Anzgebende Merkmale der Sorte (die in Klammern angegebene Zahl verweist auf das entsprechende Merkmal in den Prüfungsrichtlinien; die Ausprägungsstufe, die der der Sorte am nächsten kommt, bitte ankreuzen)

Characteristics Caractères Merkmale	English	français	deutsch	Example Varieties Exemples Beispielssorten	Note
---	---------	----------	---------	--	------

6. Similar varieties and differences from these varieties  
Variétés voisines et différences par rapport à ces variétés  
Ähnliche Sorten und Unterschiede zu diesen Sorten

Denomination of varieties  
Dénomination des variétés  
Bezeichnung der Sorten

Differences  
Différences  
Unterschiede

7. Additional information which may help to distinguish the variety  
Renseignements complémentaires pouvant faciliter la détermination des caractères distinctifs de la variété  
Zusätzliche Informationen zur Erleichterung der Unterscheidung der Sorte

- 7.1 Resistance to pests and diseases  
Résistance aux parasites et aux maladies  
Resistenzen gegenüber Schadorganismen

- 7.2 Special conditions for the examination of the variety  
Conditions particulières pour l'examen de la variété  
Besondere Bedingungen für die Prüfung der Sorte

- 7.3 Other information  
Autres renseignements  
Andere Informationen

## ANNEX II/ANNEXE II/ANLAGE II

OBSERVATIONS ON THE PRELIMINARY DRAFT OF A  
UPOV MODEL LAW ON PLANT VARIETY PROTECTIONOBSERVATIONS SUR L'AVANT-PROJET DE LOI-TYPE DE  
L'UPOV SUR LA PROTECTION DES OBTENTIONS VEGETALES  
BEMERKUNGEN ZUM VORENTWURF EINES UPOV-MUSTERGESETZES

Canada/Kanada

Section 4. Novelty

- (1) States may wish to have the option of allowing a variety to be sold for up to one year prior to the application for protection, available for some species and not others. Also, as the exact time limit may vary it may be easier to include the time limit in the regulations.
- (2) There are two ways of handling the situation of applications for protection for a variety of a species recently included in the List of Genera and Species Eligible for Protection:
  - a) The option taken by the Federal Republic of Germany, whereby all varieties are eligible for protection, irrespective of whether or not they have been sold (either within or outside Germany) for a period of up to 4 years before the inclusion of that species on the List of Species and Genera Eligible for Protection, provided that the application for protection is received within a certain time period after the introduction of that species on the List (See section 2(3) of the Law on the Protection of Plant Varieties, Federal Republic of Germany).
  - b) The option taken by the United Kingdom where varieties may not be sold either within or outside the U.K. before that species was included in the List of Genera and Species Eligible for Protection. (See Schedule II, Part II, section 2 of the U.K. Plant Varieties and Seeds Act of 1964).

If option b) above is taken, states may want to have a clause allowing transitional limitation of the requirement of novelty (Article 38 of the Convention), whereby varieties may be protected even if they have been offered for sale for more than 1 year, provided that the application is received within a certain time period after the introduction of that species on the List of Species and Genera Eligible for Protection. (See section 36 of the French Act, and section 49 of the Belgian Act.)

### Section 8. Right to Apply for Protection

Perhaps the model law should state that the first lawful applicant to apply for plant variety protection is eligible for rights, irrespective of who first bred or discovered the variety. In cases where applications are received for the same variety, on the same day, the first person in a position to apply (ie. the first breeder or discoverer) shall be granted the rights.

### Section 11. Persons Entitled to Protection

- (1) Subsection (iv) and (v) assume that the state will join UPOV, and under the present wording of the model law, the state would be prevented from making reciprocal agreements with each UPOV member state in the case that it did not join UPOV.

### Section 14. Effect of a Plant Breeders' Rights

- (2) States may want to extend this philosophy to fruit trees.

### Section 18. Termination of Protection, etc.

States may want to be able to revoke rights for

- a) failure to comply with the terms set for a compulsory licence, and
- b) failure to abide by the terms agreed to for the grant of provisional protection.

However, with respect to a) above, you may want to note the solution the Irish Plant Breeders' Rights Bill adopts. A copy of the relevant section is attached.

### Section 34. Grant or Refusal of Plant Breeders' Rights

- (1) The second sentence should read as follows: "Where the President of the Plant Variety Rights Office has determined that the examination may be performed by another national or foreign governmental authority (or by the breeder himself), the examination may be based on the examination results received."

### Section 48. Compulsory Licences

- (5)(v) States may want to be able to
- a) vary the time for exclusivity (ie. the period during which no compulsory licence may be granted)
  - b) prescribe this for some species and not others.

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APPENDIX TO ANNEX II/APPENDICE A L'ANNEXE II/APPENDIX ZU ANLAGE II

PROVISIONS OF THE IRISH PLANT VARIETY  
(PROPRIETARY RIGHTS) BILL, 1979, ON  
COMPULSORY LICENCES

DISPOSITION SUR LES LICENCES OBLIGATOIRES  
DU PROJET DE LA LOI IRLANDAISE SUR LA  
PROTECTION DES OBTENTIONS VEGETALES

VORSCHRIFTEN DES IRISCHEN ENTWURFS  
EINES GESETZES ÜBER SORTENSCHUTZ 1979  
ÜBER ZWANGSERLAUBNISSE

Compulsory  
licences.

8. (1) Subject to the provisions of this section, if any person applies to the Controller and satisfies him that a holder has unreasonably refused to grant to the applicant an authorisation referred to in section 4 (5) (d) of this Act, or, in granting or offering to grant such an authorisation, has imposed or put forward terms which are either unreasonable or contrary to the public interest, the Controller may, if he is satisfied that the applicant is financially and otherwise in a position, and intends, to exercise rights in a competent manner which would be conferred by such an authorisation, grant to the person in the form of a licence any such rights as respects the relevant plant variety as might have been granted by the holder.

(2) (a) Subject to the provisions of this section, if any person satisfies him that it is in the public interest that a particular plant variety specified by the person (the name of which variety stands for the time being entered in the register) has been distributed by a holder in a manner which is not in the public interest or that such a plant variety should be widely distributed, or that it is otherwise in the public interest so to do, the Controller may, with the consent of the Minister, grant to the person in the form of a licence any rights as respects that variety as may be granted by the relevant holder.

(b) The Minister may, before giving a consent under this subsection, conduct such consultations as he considers appropriate in the particular circumstances.

(3) A licence granted under this section (which licence is in this section subsequently referred to as a "compulsory licence") may have attached thereto such conditions as the Controller may specify and shall have effect during such period, beginning on or after the date of the licence, as is specified therein.

(4) In disposing of applications and settling the terms of compulsory licences the Controller shall endeavour to secure that the relevant plant variety is maintained in quality, and that the holder concerned will be equitably remunerated by the licensee as regards any sales of reproductive material which are made pursuant to the licence.

(5) A compulsory licence may include terms obliging the holder concerned to make reproductive material available to the licensee concerned.

(6) In case the Controller grants a compulsory licence, then for the purpose of enabling the person to whom the licence is granted to use as regards the licence any remedy available to him by the institution of legal proceedings, the licence shall be regarded as having been granted by the relevant holder.

(7) The Controller may, on an application being made in that behalf by the holder or licensee concerned, extend, limit or otherwise amend, or revoke, a compulsory licence.

(8) (a) A compulsory licence may be granted to an applicant whether or not the holder concerned has granted licences to the applicant or any other person.

(b) A compulsory licence shall not be an exclusive licence.

(9) Where the Controller receives an application under this section he shall give to the holder concerned, unless he is the applicant, and to any other person who appears to him to be concerned, notice of the application and shall afford to each person to whom such notice is given an opportunity of being heard before he determines the application.

(10) If and in so far as any agreement purports to bind any person not to apply for a compulsory licence, it shall be void.

[Annex III follows/  
L'annexe III suit/  
Anlage III folgt]

## ANNEX III/ANNEXE III/ANLAGE III


**UNITED STATES DEPARTMENT OF COMMERCE**  
**Patent and Trademark Office**

 Address : COMMISSIONER OF PATENTS AND TRADEMARKS  
 Washington, D.C. 20231

February 15, 1980

Dr. Heribert Mast  
 Vice Secretary General  
 International Union for the Protection  
 of New Varieties of Plants  
 34, chemin des Colombettes  
 1211 Geneva, Switzerland

Dear Dr. Mast:

We welcome the opportunity to provide the Patent and Trademark Office's views on the proposed Model Law on Plant Variety Protection. On the whole, we found the Model Law extremely well thought-out and drafted. It should be of immeasurable help to States planning plant protection systems.

#### Section 1

This section speaks only about plant breeders' rights, even though the UPOV Convention also allows national patent systems to be utilized for protecting new plant varieties. We suggest a comment about the possibility of patent protection, even though the provision itself need not be changed. We assume that the Model Law will be accompanied by a Commentary, like the WIPO Model Law for Developing Countries on Inventions.

The section does not mention the possibility of protecting genes or microorganisms, although one or both could be protected under a breeders' rights law. The Commentary might point out why such protection is not being provided, possibly with arguments for and against protection in the future.

#### Section 2

We have misgivings about defining "plant variety" in the Model Law. Any definition, no matter how carefully drawn, will be argumentative. For the time being, this section could be bracketed to indicate that it is only under consideration as a possibility.

Turning to the definition itself, we are uncertain about the second sentence. It could be understood as requiring protection for hybrids. If so, one of the reasons that led to new Convention Article 2(2) may be negated.

The third sentence could be placed elsewhere in the Model Law if the section is not retained, perhaps in section 3(1).

#### Section 3

The Model Law may not make clear the difference between "distinctness" and "novelty." "Distinctness," we understand, means that a variety for which protection is sought must possess characteristics that enable it to be distinguished or differentiated from all other varieties known to the public. "Novelty," on the other hand,

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means that the variety for which protection is sought has not already been made known to the public. At the least, the Commentary should explain these terms. It would be clearer if the words "and Novelty" were deleted from the title of the section.

We wonder exactly what is meant by "harvested material" in paragraph (2), and an explanation in the Commentary would be helpful. Nor are we sure what "public cultivation" means. How does it differ from private cultivation?

Paragraph (3) is fairly confusing and hard to read, although we have no objections to its substance. For example, it is not necessary to refer to a "duly filed" application. If protection is granted, can't it be presumed that the application was duly filed?

#### Section 4

We note that different phrases are used to specify the time periods in paragraph (1); i.e., "for longer than four years" and "for up to six years." Convention Article 6 uses the phrase "for longer than..." for both time periods, which the Model Law could follow.

The definition of "offering for sale" in paragraph (4) might not be suitable in all cases. Under our law, for example, merely storing plant material that may or may not eventually be sold would probably not be regarded as an offer for sale.

#### Section 7

Paragraph (1)(ii) should provide a specific time limit by which amendments to the List will take effect. Rather than referring only to "a given future date," a period of perhaps three months from the publishing of the amendment could be substituted.

#### Section 10

Possibly there should be some time limitation on the opportunity of a true owner to demand transfer of the title to him, even when the title holder does not act in good faith. It seems odd to permit the true owner to wait ten or fifteen years before demanding title. It would be especially odd if the true owner knew all this time that the title was improperly granted in the first place.

#### Section 11

We realize that paragraph (1), even without subparagraph (v), complies with the UPOV Convention. Nevertheless, the Commentary could mention or suggest the possibility of according national treatment to all foreigners.

Insofar as paragraph (2) is concerned, the Model Law might require foreigners to comply with certain formalities. A similar requirement is included in Paris Convention Article 2(3). This could be presented as an alternative or mentioned in the Commentary.

Section 12

Paragraph (3) might be improved by stating specifically that an assignment or transfer may be registered by either of the contracting parties. It could also make clear that these registrations will be publicly available.

Section 13

This provision is a little confusing when applied to the exploitation of a protected variety by third parties. It seems to us that each joint holder should independently be able to grant non-exclusive licenses, but both must act together for the grant of an exclusive license. The section, however, does not distinguish between exclusive and non-exclusive licenses.

Section 14

Paragraph (1) should make it clear that the definitions of "offering for sale" and "marketing" in section 4 also apply to this section, which we assume they do. The same seems true of "propagating material," referred to in paragraph (4) of this section and defined in section 4(6).

Paragraph (4) might be improved by offering the alternative of protection against exportation, whether or not the country to which the plant material is sent offers protection of its own.

Section 16

The eighteen-year term in paragraph (1)(i) and the fifteen-year term in paragraph (1)(ii) might be bracketed, with an explanation in the Commentary that these periods could be longer.

Section 17

We have no objection to the payment of renewal fees. We point out, however, that an annual payment requirement may prove a considerable burden on plant breeders. The Model Law might contain, or the Commentary suggest, an alternative of charging renewal fees only every few years during the term of protection. Also, a grace period of somewhat longer duration than that provided in subsection 18(4) should be considered. The Paris Convention grace period for paying patent maintenance fees, for example, is six months.

Section 18

Paragraph (1) might provide for recording these declarations in the Official Gazette.

It is not clear if the nullification procedure of paragraph (2) is the same as the opposition procedure of section 35, or if two distinct procedures are contemplated. Whichever is the case, clarification would be helpful.

Paragraph (4)(ii) could be more definite. The grace period should not be fixed in relation to the mailing of a reminder. This is administratively complicated and may eventually require legal proof of the date of mailing the reminder. We are not even convinced that a reminder is necessary.

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Section 19

Paragraph (3) may need amending or cancelling. It seems odd to expect the Minister of Agriculture to appoint every employee.

Section 22

Paragraph (3) may present problems for breeders. The Plant Variety Rights Office should always tell breeders how much propagating material is to be supplied. The breeder cannot be expected to learn this from UPOV Technical Notes.

The two week time period of paragraph (4) seems unduly short. This period could be bracketed, with an indication that States may prefer a longer period. Even better, this could be handled as an administrative matter.

Section 23

The Commentary should point out some difficulties that arise over the right of priority. For example, the last day for filing an application in order to receive the right of priority might fall on a holiday. Matters like this are taken care of in the Paris Convention. Its or similar provisions might be included in the UPOV Model Law (at least, in brackets).

Section 24

Paragraph (1) could be somewhat more liberal. For example, a declaration of entitlement to the right of priority really need not be provided at the time the application is filed. It is only important to know about priority by the time examination begins.

Paragraph (2) might be a little clearer. It does not state exactly when propagating material or additional documentation will be required by a Plant Variety Rights Office if the priority-supporting (earlier-filed foreign) application is withdrawn. This paragraph could provide a period of perhaps two months for supplying such material or documentation and, of course, the two-month period could be bracketed.

Section 26

In connection with paragraph (2), the two-week period may not be long enough.

Section 27

Paragraph (1) inadvertently fails to mention that a variety denomination may be a combination of words and letters.

We question whether the proviso in paragraph (3)(iii) should be retained. It seems to us that variety denominations must not be confusing, whether or not one of the denominations has acquired great importance. Nor have we any idea how to judge the presence of "great importance."

In connection with paragraph (3)(vi), it might help to mention in the Commentary that suitability is decided by the Plant Variety Rights Office, not the breeder.

Section 28

We presume that each Plant Variety Rights Office will publish in its Gazette only the variety denominations proposed to it, or those it registers or cancels. No Office would be expected to publish information about denominations proposed, registered or cancelled in other States.

Section 38

We question whether infringement should ever be a criminal offense, even if repeated or intentional. There are other effective ways to prevent these kinds of infringements; e.g., the leveling of double or triple damages against the infringer or charging him the breeder's attorney's fees. These possibilities are available under our laws, and we have encountered no difficulties with repeated or intentional infringements.

Section 39

This section may be incomplete. It fails to provide the possibility of enjoining a person marketing propagating material without using the registered variety denomination. Such unlawful marketing should always be enjoined, whether or not a fine is also imposed.

Section 46

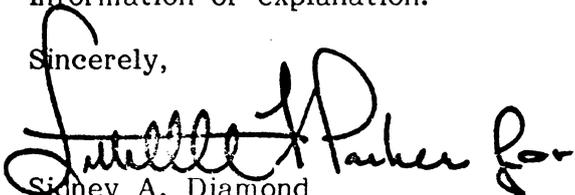
We are not convinced of the necessity of including paragraph (1). This rather general proscription against monopolization might be better placed in an antitrust or unfair competition law. Its very broadness may promote litigation.

Section 48

Paragraph (5)(v) specifies a two-year waiting period between the grant of a plant breeders' right and the date of applying for a compulsory license. This may be very confusing or difficult for countries adhering to the Paris Convention, since it does not comply with that Convention's compulsory license provisions. Referring to Paris Convention Article (5)(3), we suggest changing the "two year" requirement to three years.

I hope these comments are helpful. Please let me know if you wish any further information or explanation.

Sincerely,



Sidney A. Diamond  
Commissioner of Patents  
and Trademarks

[End of document/  
Fin du document/  
Ende des Dokuments]