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UNIÓN INTERNACIONAL PARA LA PROTECCIÓN DE LAS OBTENCIONES VEGETALES

Ginebra

CONSEJO**Cuadragésima sexta sesión ordinaria
Ginebra, 1 de noviembre de 2012****EXAMEN DE LA CONFORMIDAD DEL PROYECTO DE LEY DE GHANA
SOBRE LOS OBTENTORES CON EL ACTA DE 1991
DEL CONVENIO DE LA UPOV***Documento preparado por la Oficina de la Unión*

1. En una carta fechada el 25 de septiembre de 2012, dirigida al Secretario General de la UPOV, Su Excelencia el Dr. Benjamin Kunbuor, Fiscal General y Ministro de Justicia de la República de Ghana (en adelante denominada "Ghana"), solicitó el examen del proyecto de Ley de Ghana sobre los Obtentores (en adelante denominado el "proyecto de Ley"), a los fines de determinar su conformidad con el Acta de 1991 del Convenio de la UPOV (en adelante denominada el "Acta de 1991"). La carta figura en el Anexo I del presente documento. En el Anexo II figura una copia en inglés del proyecto de Ley.

ANTECEDENTES

2. En el artículo 34.3) del Acta de 1991 se dispone que "[a]ntes de depositar su instrumento de adhesión, todo Estado que no sea miembro de la Unión o cualquier organización intergubernamental solicitará la opinión del Consejo acerca de la conformidad de su legislación con las disposiciones del presente Convenio. Si la decisión haciendo oficio de opinión es positiva, podrá depositarse el instrumento de adhesión."

3. Desde octubre de 2000, la Oficina de la Unión ha prestado asistencia, en varias ocasiones, al Gobierno de Ghana respecto de diversos proyectos de Ley sobre la protección de las variedades vegetales. El 23 de julio de 2011, en Koforidua (Ghana), la Oficina de la Unión participó en una sesión de información para parlamentarios sobre el proyecto de Ley y el Acta de 1991 del Convenio de la UPOV. El 11 de septiembre de 2012, la Oficina de la Unión envió sus observaciones más recientes sobre la versión del proyecto de Ley del 14 agosto de 2012.

BASE DE LA PROTECCIÓN DE LAS OBTENCIONES VEGETALES EN GHANA

4. En Ghana, la protección de las obtenciones vegetales estará regida por el proyecto de Ley, una vez la Ley haya sido adoptada. El proyecto de Ley se reproduce en inglés en el Anexo II. A continuación se analiza el proyecto de Ley en el orden en que figuran las disposiciones fundamentales del Acta de 1991.

Artículo 1 del Acta de 1991: Definiciones

5. Las definiciones de variedad y de obtentor que constan en los artículos 2 y 61 del proyecto de Ley se corresponden con las definiciones del artículo 1.vi) y 1.iv), respectivamente, del Acta de 1991.

6. El artículo 61 del proyecto de Ley contiene definiciones de los siguientes términos, que no están definidos en el Acta de 1991:

“genoma” es la totalidad de la información hereditaria de un organismo;

“genotipo” es la constitución genética de una célula;

“ensayo en cultivo” es el que se utiliza para examinar la distinción, la homogeneidad y la estabilidad;

“mutante natural” es la variación producida en el genoma sin intervención humana;

“géneros vegetales” son categorías de clasificación de los seres vivos; concretamente, grupos de especies estrechamente emparentadas en estructura y origen evolutivo, situados por debajo de la familia o subfamilia y por encima de la especie;

“especie vegetal” es el concepto fundamental en la clasificación de los organismos vivos; las especies son grupos de organismos que se caracterizan por tener una forma, un tamaño, una conducta y un hábitat similares y cuyos rasgos permanecen constantes a lo largo del tiempo;

“material de reproducción o multiplicación” se refiere a semillas, plántulas, injertos, lotes o cualquier otra parte de una planta que esté destinada a ser sembrada, plantada o replantada;

“variedad protegida” es aquella que es objeto del derecho de obtentor;

“variante somaclonal” es un clon que se propaga por el desarrollo de células somáticas o vegetativas.

Artículo 2 del Acta de 1991: Obligación fundamental de las Partes Contratantes

7. El proyecto de Ley se titula “Ley de Derechos de Obtentor de 2012. Ley que regula la concesión y la protección de los derechos de obtentor y cuestiones afines”, en concordancia con la obligación fundamental prevista en el artículo 2 del Acta de 1991.

8. En el artículo 59 del proyecto de Ley, “Aplicación del Convenio”, se establece lo siguiente:

“59. 1) El Ministro velará por que la aplicación de esta Ley no afecte al cumplimiento de las obligaciones del Gobierno relativas a la protección de los derechos de obtentor en virtud del Convenio del que el país es parte.

2) El Ministro, en nombre de la República, podrá suscribir acuerdos bilaterales o multilaterales con gobiernos extranjeros para el reconocimiento mutuo y la protección de los derechos de obtentor.”

Artículo 3 del Acta de 1991: Géneros y especies que deben protegerse

9. En el artículo 1 del proyecto de Ley se establece que “[l]as disposiciones de esta Ley se aplican a todos los géneros y especies vegetales”, de conformidad con lo dispuesto en el artículo 3.2)ii) del Acta de 1991. Cabe observar que, conforme al artículo 36.1)ii) del Acta de 1991, al depositar su instrumento de adhesión, Ghana deberá efectuar una declaración en el sentido de que la Ley se aplica a todos los géneros y especies vegetales.

Artículo 4 del Acta de 1991: Trato nacional

10. A fin de que corresponda a las disposiciones del artículo 4 del Acta de 1991, se recomienda modificar el artículo 9.2) del proyecto de Ley como se indica a continuación:

“2) Podrá ~~presentar~~ presentar una solicitud de concesión del derecho de obtentor

a) ~~el~~ el obtentor de una nueva variedad que sea

i) un ciudadano o residente del país; o

- ii) un ciudadano extranjero, o residente en el territorio, de una parte de un tratado del que la República sea parte;
- b) ———— iii) una persona jurídica que tenga su sede en el territorio de una parte de un tratado del que la República sea parte; o
- e) ———— iv) una persona jurídica que tenga su sede en el país.”

Artículos 5 a 9 del Acta de 1991: Condiciones de la protección, novedad, distinción, homogeneidad y estabilidad

11. En los artículos 3 a 7 del proyecto de Ley se establecen las condiciones de la protección, de conformidad con las disposiciones de los artículos 5 a 9 del Acta de 1991.

12. En el artículo 19 del proyecto de Ley se contempla un régimen de transición en lo que respecta a la novedad para las “variedades de reciente creación” que refleja el artículo 6.2) del Acta de 1991, a saber:

- “19. 1) Una variedad se considerará nueva conforme al artículo 4, aun cuando la venta o entrega de dicha variedad a un tercero haya tenido lugar en este país en el transcurso de
- a) los cuatro años anteriores a la solicitud del derecho de obtentor; o,
 - b) en el caso de árboles o vides, los seis años anteriores a la solicitud del derecho de obtentor.
- 2) El apartado 1) se aplicará únicamente a las solicitudes de derechos de obtentor que se efectúen en el transcurso de un año tras la entrada en vigor de esta Ley.”

Artículo 10 del Acta de 1991: Presentación de solicitudes

13. En los artículos 8 a 10 del proyecto de Ley se establecen disposiciones sobre la presentación de solicitudes. No parece haber en el proyecto de Ley disposición alguna que sea incompatible con el artículo 10 del Acta de 1991.

Artículo 11 del Acta de 1991: Derecho de prioridad

14. En los artículos 11 a 13 del proyecto de Ley se establecen disposiciones sobre el derecho de prioridad que están en conformidad con lo dispuesto en el artículo 11 del Acta de 1991.

Artículo 12 del Acta de 1991: Examen de la solicitud

15. En el artículo 14 del proyecto de Ley se establecen disposiciones sobre el examen de la solicitud que están en conformidad con lo dispuesto en el artículo 12 del Acta de 1991.

Artículo 13 del Acta de 1991: Protección provisional

16. En el artículo 15 del proyecto de Ley se establecen las siguientes disposiciones sobre la protección provisional, que están en conformidad con las disposiciones del artículo 13 del Acta de 1991:

- “15. 1) El solicitante gozará de protección provisional del derecho de obtentor desde la fecha de publicación de la presentación de la solicitud de concesión del derecho de obtentor en la Gaceta o el Boletín de Variedades hasta la fecha de concesión de dicho derecho.
- 2) Durante el período de protección provisional, se considerará que el solicitante es el titular del derecho de obtentor respecto de quien en dicho intervalo haya realizado actos que, tras la concesión definitiva el derecho de obtentor, requieran la autorización del obtentor en virtud del artículo 20.
- 3) Un solicitante podrá adoptar medidas para demostrar una infracción durante el período de protección provisional.”

Artículo 14 del Acta de 1991: Alcance del derecho de obtentor

17. En el artículo 20 del proyecto de Ley se establecen disposiciones sobre el alcance del derecho de obtentor que están en conformidad con las disposiciones del artículo 14 del Acta de 1991.

Artículo 15 del Acta de 1991: Excepciones al derecho de obtentor

18. A fin de que corresponda a las disposiciones del Artículo 15.1) del Acta de 1991 relativas a las excepciones obligatorias al derecho de obtentor, se recomienda modificar el artículo 21.1) del proyecto de Ley como se indica a continuación:

- “1) El derecho de obtentor no se extenderá a los actos realizados
- a) en un marco privado con fines no comerciales,
 - b) a título experimental, y
 - c) a los fines de la creación de nuevas variedades, así como ~~a menos que~~
 - i) a menos que los apartados 4), 5) y 6) del artículo 20 sean aplicables; ~~y,~~
 - ii) ~~a los~~ actos mencionados en los apartados 1) y 2) del artículo 20 realizados con tales variedades.”

19. En el artículo 21.2) y 3) del proyecto de Ley se establecen las siguientes disposiciones sobre la excepción facultativa prevista en el artículo 15.2) del Acta de 1991:

- “2) El Ministro elaborará un reglamento para restringir el derecho de obtentor respecto de toda variedad vegetal agrícola dentro de límites razonables.
- 3) Al elaborar el reglamento, el Ministro tendrá en cuenta la necesidad de
- a) salvaguardar los intereses legítimos de los obtentores; y
 - b) permitir a los agricultores hacer un uso personal, en su propia explotación, a fines de reproducción o multiplicación del producto de la cosecha que hayan obtenido por el cultivo, en su propia explotación, de la variedad protegida o de una variedad cubierta por los párrafos a) y b) del apartado 4) del artículo 20.”

Artículo 16 del Acta de 1991: Agotamiento del derecho de obtentor

20. En el artículo 22 del proyecto de Ley se establecen disposiciones relativas al agotamiento del derecho de obtentor que están en conformidad con las disposiciones del artículo 16 del Acta de 1991.

Artículo 17 del Acta de 1991: Limitación del ejercicio del derecho de obtentor

21. En el artículo 27 del proyecto de Ley se establecen disposiciones sobre la limitación del ejercicio del derecho de obtentor que están en conformidad con las disposiciones del artículo 17 del Acta de 1991.

Artículo 18 del Acta de 1991: Reglamentación económica

22. En el artículo 23 del proyecto de Ley se establecen disposiciones relativas a la reglamentación económica que están en conformidad con las disposiciones del artículo 18 del Acta de 1991. No parece haber en el proyecto de Ley disposición alguna que sea incompatible con el artículo 18 del Acta de 1991.

Artículo 19 del Acta de 1991: Duración del derecho de obtentor

23. En el artículo 28 del proyecto de Ley se establecen disposiciones sobre la duración del derecho de obtentor que están en conformidad con lo dispuesto en el artículo 19 del Acta de 1991.

Artículo 20 del Acta de 1991: Denominación de la variedad

24. A fin de que corresponda a las disposiciones del Artículo 20.4) del Acta de 1991 relativas a “derechos anteriores de terceros”, se recomienda modificar el artículo 37 del proyecto de Ley como se indica a continuación:

“37. 4) Los derechos anteriores de terceros no serán afectados. ~~Si~~ Si, en virtud de un derecho anterior, la utilización de la denominación está prohibida ~~por~~ a una persona que está obligada a utilizarla de conformidad con el apartado 1) del artículo 38. ~~2) Cuando los derechos anteriores de terceros no resulten afectados,~~ el Registrador exigirá que el obtentor en cuestión proponga otra denominación de la variedad para su registro.”

25. A reserva de la modificación antedicha, en los artículos 34 a 39 del proyecto de Ley se establecen disposiciones sobre la denominación de variedades que están en conformidad con lo dispuesto en el artículo 20 del Acta de 1991.

Artículo 21 del Acta de 1991: Nulidad del derecho de obtentor

26. En el artículo 29 del proyecto de Ley se establecen disposiciones sobre la nulidad del derecho de obtentor que están en conformidad con las disposiciones del artículo 21 del Acta de 1991.

Artículo 22 del Acta de 1991: Caducidad del derecho de obtentor

27. En el artículo 30 del proyecto de Ley se establecen disposiciones sobre la caducidad del derecho de obtentor que están en conformidad con las disposiciones del artículo 22 del Acta de 1991.

Artículo 30 del Acta de 1991: Aplicación del Convenio

28. En lo que respecta a la obligación de “prever los recursos legales apropiados que permitan defender eficazmente los derechos de obtentor” (artículo 30.1)i) del Acta de 1991), en los artículos 57 y 58 del proyecto de Ley se dispone lo siguiente:

“Recursos civiles

57. 1) Quien resulte perjudicado por una infracción del derecho de obtentor podrá interponer una demanda para

- a) solicitar un mandamiento judicial con objeto de impedir que se cometa o se siga cometiendo la infracción o para poner fin a la infracción;
- b) el resarcimiento de los daños y perjuicios causados por la infracción;
- c) el decomiso, la confiscación o la destrucción del material de reproducción o multiplicación o del producto de la cosecha que se haya obtenido contraviniendo esta Ley;
- d) solicitar una orden para que el Departamento de Aduanas del Organismo Fiscal de Ghana proceda a la retención de las mercancías importadas o listas para su exportación; y
- e) cualquier otro recurso que el tribunal considere procedente.

2) El apartado 1) no impide la interposición de una demanda en virtud de cualquier otra disposición referente a la ejecución de un derecho personal.”

“Delitos

58. Quien, deliberadamente

- a) ponga en venta, venda o comercialice material de reproducción o multiplicación de una variedad protegida en Ghana;
- b) comercialice material de reproducción o multiplicación de una variedad protegida en Ghana sin la denominación registrada de la variedad; o

- c) utilice la denominación registrada de una variedad protegida en Ghana para otra variedad de la misma especie vegetal o de una especie vecina que pueda prestarse a confusión,

comete un delito y puede ser condenado en juicio sumario a una multa de dos mil unidades de sanción como máximo o a una pena de prisión de dos años como máximo, o a ambas.”

29. En lo que respecta a la obligación estipulada en el artículo 30.1)ii) del Acta de 1991), en los artículos 14.4) y 43.2)b) del proyecto de Ley se dispone lo siguiente:

“4) El Registrador examinará la solicitud para determinar si satisface los requisitos de novedad, distinción, homogeneidad y estabilidad establecidos en los artículos 3 a 7, así como los requisitos de los artículos 9 y 12 y de los artículos 34 a 39.”

“2) Las funciones del Comité Técnico consisten en [...]

b) obtener del Registrador informes referentes a las solicitudes de protección de los derechos de obtentor y asesorar al Registrador sobre la concesión de derechos de obtentor; [...]”

30. El artículo 56 del proyecto de Ley se ajusta a la obligación de publicar información relativa a las solicitudes de derecho de obtentor y a los títulos concedidos, así como a las denominaciones propuestas y aprobadas, según se exige en el artículo 30.1)iii) del Acta de 1991.

Conclusión general

31. En opinión de la Oficina de la Unión, una vez que las modificaciones recomendadas en los párrafos 10, 18 y 24 del presente documento se hayan introducido en el proyecto de Ley, éste recogerá las disposiciones sustantivas del Acta de 1991. A la luz de lo antedicho, una vez que el proyecto de Ley haya sido modificado como se recomienda en los párrafos 10, 18 y 24 del presente documento, sin cambios adicionales, y el proyecto de Ley se apruebe y la Ley entre en vigor, Ghana estará en condiciones de “dar efecto” a las disposiciones del Acta de 1991, como se estipula en su artículo 30.2).

32. *Se invita al Consejo a:*

a) *tomar nota del análisis expuesto en el presente documento;*

b) *tomar una decisión positiva en relación con la conformidad del proyecto de Ley de Ghana sobre los Obtentores con las disposiciones del Acta de 1991 del Convenio Internacional para la Protección de las Obtenciones Vegetales, de modo que, una vez que el proyecto de Ley haya sido modificado como se recomienda en los párrafos 10, 18 y 24 del presente documento, sin cambios adicionales, y el proyecto de Ley se apruebe y la Ley entre en vigor, Ghana pueda depositar su instrumento de adhesión al Acta de 1991; y*

c) *autorizar al Secretario General a informar de dicha decisión al Gobierno de Ghana.*

[Siguen los Anexos]

CARTA DEL MINISTRO DE JUSTICIA AL SECRETARIO GENERAL DE LA UPOV

[Traducción por la Oficina de la Unión de una carta fechada el 25 de septiembre de 2012]

Enviada por: S. E. Dr. Benjamin Kunbuor, Fiscal General y Ministro de Justicia de la República de Ghana

Destinatario: Sr. Francis Gurry, Secretario General de la Unión Internacional para la Protección de las Obtenciones Vegetales (UPOV)

DEPÓSITO DEL PROYECTO DE LEY DE DERECHOS SOBRE LOS OBTENTORES PARA RECABAR LA OPINIÓN DEL CONSEJO

Me complace comunicarle que el Parlamento de la República de Ghana está examinando los derechos de obtentor con miras a su adopción.

La República de Ghana tiene intención de adherirse al Convenio Internacional para la Protección de las Obtenciones Vegetales de 2 de diciembre de 1961, revisado en Ginebra el 10 de noviembre de 1972, el 23 de octubre de 1978 y el 19 de marzo de 1991 (Convenio de la UPOV).

Según lo dispuesto en el Artículo 34.3) del Convenio de la UPOV, le agradecería que el Consejo de la UPOV examine la conformidad del proyecto de Ley sobre los Obtentores de la República de Ghana con las disposiciones del Convenio de la UPOV.

Se adjunta a la presente una copia del proyecto de Ley.

(Firmada)

[Sigue el Anexo II]

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

PLANT BREEDERS BILL, 2012

MEMORANDUM

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

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

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

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

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

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

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

In recognition of Government's effort to improve the seed industry, by stimulating competition among enterprises, encouraging price stabilisation and offering employment to the private sector, the Ministry of Food and Agriculture acknowledged the significance of variety protection as an important element of the country's national seed policy initiative. Variety protection is particularly relevant at this time when plant breeders are being encouraged to increase their contribution to the development of agriculture in the country and the seed supply system. The protection of plant breeder rights is currently required to support plant breeding activities realised by the private and public breeding activities. Currently, arable land and other resources needed for agricultural production worldwide are scarce. In view of the potential for productivity growth in Ghana, the provision of better seeds to farmers will result in increased yields on the same piece of land which will thereby enhance the economic development of the country. It is therefore critical that the country creates and promotes an enabling environment for the stakeholders in the agricultural sector especially the seed industry through the development of policies and strategies to ensure food security and increase the efforts of the country to compete on international markets. Food security can

be improved by breeding and making available to farmers seeds of high yielding varieties that are not only adaptable to our environment but have good taste and nutritional qualities. The Bill will encourage foreign breeders and local breeders to contribute to the development of the agriculture sector of the country, resulting in technology transfer and know how, as new varieties enter the channels of trade.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Clause 35 describes the characteristics of a variety denomination to imply a word, a combination of words and numbers or a combination of letters and numbers provided the designation enables the variety to be identified. Subclause (2) underlines the required distinction between one variety denomination and

another which designates an existing variety of the same plant species or closely related species in the country of any State Party to the Convention. *Clause 35* further requires that a variety denomination must not consist solely of figures except where it is an established practice for designation of specific varieties and should not be misleading.

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

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

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

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

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

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

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

Clause 43 establishes a standing committee namely the Plant Breeders Technical Committee. Its membership includes the Registrar and some members of the Plant Protection Advisory Council established under the Plants and Fertilizer Act, 2010 (Act 803). Its responsibilities include to advise the Minister on the effective implementation of the Bill, the provision and verification of results of tests and examinations on application and to advise the Registrar specifically or generally on the grant of plant breeder rights. The Committee is also required to obtain reports from the Registrar on the applications of plant breeder rights.

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

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

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

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

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

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

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

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

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

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

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

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

DR. BENJAMIN KUNBUOR
ATTORNEY-GENERAL AND
MINISTER FOR JUSTICE

Date:

PLANT BREEDERS BILL, 2012

ARRANGEMENT OF SECTIONS

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BILL

ENTITLED

PLANT BREEDERS ACT, 2012

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

PASSED by Parliament and assented to by the President:

Application and conditions of variety

Scope of application

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

Meaning of variety

2. Variety means a plant grouping within a single botanical taxon of the lowest known rank which grouping irrespective of whether the conditions for the grant of a plant breeder right are fully met, can be

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

Conditions of variety for the protection of a plant breeder rights

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

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

Novelty

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

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

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

Distinctness

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

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

Uniformity

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

Stability

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

Application for breeder's right

Eligibility for a plant breeder right

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

Application for a plant breeder right

9. (1) A person may apply to the Registrar for the grant of a plant breeder right if that person is eligible in accordance with section 8.

- (2) An application for the grant of a plant breeder right may be filed by
- (a) the breeder of a new variety who is
 - (i) a citizen or who is resident in the country; or
 - (ii) a foreign citizen resident in the territory of a party to a treaty to which the Republic is party;
 - (b) a legal entity that has its registered office within the territory of a party to a treaty to which the Republic is party; or
 - (c) a legal entity that has its registered office in the country.

- (3) The application for a plant breeder right
- (a) is subject to the payment of the prescribed fee; and
 - (b) shall contain the following details:
 - (i) the name and the address of the applicant,
 - (ii) the name and address of the person that has bred or discovered and developed a variety if it is different from the applicant,
 - (iii) the identification of the botanical taxon and the Latin or common name,
 - (iv) the generic designation proposed for the variety or a provisional designation,
 - (v) a technical description of the variety, and
 - (vi) any information, document or material required for the purposes of examination.

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

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

Presumption of protection

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

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

Priority of application

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

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

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

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

Requirements for claim of right of priority of application

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

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

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

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

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

Effect of priority of application

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

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

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

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

Examination of application

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

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

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

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

(5) In examining the application, the Registrar may

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

- (i) new,
 - (ii) distinct,
 - (iii) uniform, or
 - (iv) stable; and
- (b) use the results of tests that have already been carried out.

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

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

Protection of plant breeder rights

Provisional protection of plant breeder rights

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

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

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

Objection

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

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

Consideration of objections

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

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

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

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

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

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

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

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

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

Record of entries in register

18. The Registrar shall record in the register, each entry of the

- (a) withdrawal or refusal of an application for a plant breeder right, and
- (b) decision of the nullification or cancellation of the registration of the plant breeder right.

Protection of varieties of recent creation

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

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

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

Scope and duration of plant breeder right

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

20. (1) Subject to sections 21 and 22, the following acts in respect of propagating material of a protected variety require the authorisation of the breeder:

- (a) production or reproduction,
- (b) conditioning for the purpose of propagation,
- (c) an offer for sale,
- (d) sale or marketing,
- (e) exportation,
- (f) importation; and
- (g) stocking for any of the purposes mentioned in paragraph (a) to (f).

(2) The breeder may make an authorisation subject to conditions and limitations.

(3) Subject to sections 21 and 22, the acts referred to in subsection (1) as regards harvested material, including the whole of a plant and part of a plant obtained through the unauthorised use of the propagating material of the protected variety, shall require the

authorisation of the breeder, unless the breeder has had a reasonable opportunity to exercise the right in relation to the propagating material.

- (4) Subsections (1) and (2) apply in relation to the following:
- (a) varieties which are not clearly distinguishable from the protected variety in accordance with section 5;
 - (b) a variety which is essentially derived from the protected variety where the protected variety is not itself an essentially derived variety; and
 - (c) a variety, the production of which requires the repeated use of the protected variety.
- (5) For the purposes of subsection (4) (b), a variety shall be deemed to be essentially derived from another variety being the initial variety if it
- (a) is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety;
 - (b) is clearly distinguishable from the initial variety; and
 - (c) except for the differences which result from the act of derivation, conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.
- (6) An essentially derived variety may be obtained for example by the selection of a
- (a) natural mutant or induced mutant,
 - (b) somaclonal variant, or
 - (c) variant individual from a plant of the initial variety, back crossing or transformation by genetic engineering.

Exceptions to plant breeder right

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

Exhaustion of plant breeder right

22. (1) A plant breeder right shall not extend to acts regarding any material of the protected variety or of a variety to which subsections (3), (4) and (5) of section 20 apply, which has been sold or otherwise marketed in the country by the breeder or with the breeder's consent, or any material derived from the said material unless that act involves the

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

(2) For the purposes of subsection (1), 'material' in relation to a variety means

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

Measures regulating commerce

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

Assignment

24. (1) An application for the grant of a plant breeder right may be assigned or otherwise transferred to one or more successors in title.

(2) The assignment or transfer shall be

- (a) in writing; and
- (b) signed by the parties concerned.

(3) An assignment under this section does not affect a right acquired by a third party unless it is recorded in the register and published in the *Gazette* or *Varieties Bulletin*.

Contractual licence

25. (1) The holder of, or the applicant for, a plant breeder right, may grant to any person, a licence that relates to any of the rights provided for under this Act.

(2) A licence shall be in writing and include provisions on the

- (a) scope of the licence;
- (b) period of time for which the licence is transferred; and
- (c) fee or royalty for the use of the licence if any.

(3) The applicant may register a licence at the Registrar General's Department on payment of the prescribed fee.

(4) A licence is not binding on a third party that has acquired a right in good faith unless the licence was registered before its acquisition.

(5) The Registrar shall publish a notice of the registration in the *Gazette* and Varieties Bulletin.

Statutory declaration for payment of royalty

26. (1) A holder or an applicant for the grant of a plant breeder right, may make a statutory declaration to declare that any person prepared to pay a royalty is entitled to carry out any of the acts referred to in section 21, from the date on which the person concerned informed the holder or applicant of the intention to carry out the acts.

(2) The holder or applicant shall address the statutory declaration to the Registrar who shall enter a reference of the declaration in the register.

(3) The holder or applicant shall state in the statutory declaration the royalty payable by the licensee.

(4) The Registrar may cancel the entry at the request of the holder or applicant if the beneficiaries concerned agree.

Compulsory licence

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

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

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

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

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

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

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

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

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

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

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

Duration of plant breeder right

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

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

Nullity

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

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

(b) where the grant of the right has been essentially based on information and documents furnished by the holder if the conditions laid down in section 6 or 7 were not complied with at the time of the grant of the plant breeder right; or

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

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

(3) The Registrar shall

(a) enter in the register the decision of the nullification of the plant breeder right; and

(b) publish the decision in the *Gazette* or *Varieties Bulletin* within seven days after entry in the register.

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

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

Cancellation

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

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

(a) the breeder does not provide the Registrar with the information, documents or material necessary for the verification of the maintenance of the variety;

(b) the breeder fails to pay the annual fee required; or

(c) the breeder does not propose a suitable denomination for the protected variety where the denomination of the variety is cancelled after the registration.

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

Termination

31. (1) A plant breeder right shall terminate before the term referred to in section 28 duly expires
- (a) where the holder of that right renounces it by written notice or declaration addressed to the Registrar; or
 - (b) on the date of termination specified in the notice or declaration or, if none is specified, the date on which the notice or declaration is received by the Registrar.
- (2) The Registrar shall enter in the register the decision on termination of the plant breeder right.

Fees for examination of variety and variety protection

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

Maintenance of the protected variety

33. (1) A breeder or holder shall, ensure the maintenance of the protected variety during the period of protection.
- (2) At the request of the Registrar, the breeder or holder shall provide an appropriate quantity of samples of the propagating material of the protected variety necessary for the verification of the maintenance of the variety.
- (3) At the request of the Registrar, the holder or breeder may keep or maintain the sample of the variety.

Variety denomination

Designation of varieties by denomination

34. (1) A variety shall be designated with a denomination, which shall be deemed to be its generic designation.
- (2) Subject to section 37, the rights in the designation registered as the denomination of the variety shall not hamper the free use of the denomination in connection with the variety even after the expiration of the plant breeder right.

Characteristics of variety denomination

35. (1) Subject to subsection (3), a variety denomination may be a word, a combination of words and numbers or a combination of letters and numbers for the purpose of the variety to be identified by the designation
- (2) A variety denomination shall be different from every denomination which designates an existing variety of the same plant species or closely related species in the country of any State Party to the Convention.
- (3) A variety denomination shall not
- (a) consist solely of figures except where it is an established practice for designation of varieties, or

- (b) be misleading or cause confusion concerning
 - (i) the characteristics,
 - (ii) value or identity of the variety, or
 - (iii) the identity of the breeder.

Registration of variety denomination

36. (1) A person who seeks to register a variety denomination shall apply in writing to the Registrar and propose in the application, the variety denomination for registration.
- (2) The applicant shall submit a variety denomination under the same denomination that pertains in any State Party to the Convention.
- (3) Subject to subsection (5), the Registrar shall register the variety denomination proposed under subsection (2), unless the Registrar considers the denomination unsuitable.
- (4) Where the Registrar finds that the variety denomination does not meet the requirements of section 35, the Registrar shall
- (a) refuse to register the variety denomination; and
 - (b) require the breeder to propose another denomination within a prescribed period.
- (5) Where the proposed denomination is appropriate the Registrar shall register the denomination at the same time that the plant breeder right is granted.

Prior rights of third persons

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

Obligation to use variety denomination

38. (1) Subject to subsection (2), a person who offers for sale, sells or otherwise markets propagating material of a protected variety within the country shall use the denomination of that variety even after the expiration of the breeder right in respect of that variety.
- (2) The obligation to use a variety denomination under subsection (1) shall not affect the prior rights of third parties provided for under section 37.
- (3) The Registrar shall ensure that the authorities of the members to the Convention are informed of matters that concern variety denominations and in particular the submission, registration and cancellation of denominations.
- (4) An authority of a member state to the Convention may address observations on the registration of a denomination to the Registrar.

Indications in association with denomination

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

Administrative and financial provisions

Registry of varieties

40. (1) There is established by this Act a registry for plant varieties which shall be located at the Registrar-General's Department.
- (2) The registry shall be headed by the Registrar who shall be assisted by an Assistant Registrar appointed in accordance with article 195 of the Constitution.
- (3) The Registrar may delegate a function of the office of the Registrar to an Assistant Registrar.
- (4) The Registrar is responsible for the registration of varieties.

Register of plant breeder rights

41. (1) There is established by this Act a register of plant breeder rights.
- (2) The Registrar shall keep and maintain the register.
- (3) The Registrar shall record in the register the following entries:
- (a) applications for the grant of plant breeder rights;
 - (b) applications for variety denominations;
 - (c) grants of plant breeder rights;
 - (d) withdrawals and applications for the grant of plant breeder rights;
 - (e) changes in the particulars of holders;
 - (f) lapses of the plant breeder rights;
 - (g) matters related to licences;
 - (h) registration of new denominations for protected varieties;
 - (i) official announcements; and
 - (j) any other particulars related to plant breeder rights required under this Act.
- (4) The Registrar shall review the content of the register every four months in each year.
- (5) The register shall be open to the public during normal working hours.
- (6) A person may on payment of the prescribed fee examine the register or obtain an extract from the register.

Rectification of information

42. (1) The Registrar may correct or authorise the correction of any clerical error, omission, non insertion or defect as regards the description of a new variety, which appears in an application or other document lodged with the Registrar for purposes of entries in the register.
- (2) A person aggrieved by a clerical error, omission, non-insertion or defect regarding an entry of particulars in the register, may apply to the Registrar to effect the necessary

rectification except that an application for rectification may not be made for a matter that affects the validity of the registration of a variety.

Plant Breeders Technical Committee

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

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

(2) The functions of the Technical Committee are to

- (a) advise the Minister on the effective implementation of this Act;
- (b) obtain from the Registrar reports as regards the applications for the protection of plant breeder rights and advise the Registrar on the grant of plant breeder rights;
- (c) provide and verify the results of tests and examinations on application for a plant breeder right; and
- (d) give the Registrar advice of a specific and general nature.

(3) The Technical Committee may determine the procedure for its meetings.

(4) The Minister shall designate a member of the Technical Committee as the chairperson of the Technical Committee.

(5) In the absence of the chairperson, the members of the Technical Committee shall elect one of their members to act as chairperson.

Disclosure of interest

44. (1) A member of the Technical Committee who has an interest in a matter for consideration by the Technical Committee

- (a) shall disclose the nature of that interest and the disclosure shall form part of the record of the consideration of the matter; and
- (b) shall not participate in the deliberations of the Technical Committee as regards that matter.

(2) A member ceases to be a member of the Technical Committee, if that member has an interest in a matter before the Board and

- (a) fails to disclose that interest, or
- (b) participates in the deliberations of the matter.

Allowances

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

Plant Breeders Development Fund

46. (1) There is established by this Act, a Plant Breeders Development Fund.

(2) The object of the Fund is to finance activities to protect the rights of breeders and to promote the breeding of new varieties.

(3) For the purposes of achieving the object of the Fund, moneys of the Fund shall be applied for the following activities:

- (a) the regular publication of information as regards
 - (i) applications for the grant of plant breeder rights; and
 - (ii) proposed and approved variety denominations;
- (b) the maintenance of variety collections for the purposes of examination,
- (c) the examination of varieties, and
- (d) the protection of plant breeder rights.

Sources of money for the Fund

47. (1) The funds of the Plant Breeders Development Fund include

- (a) fees as regards applications, registration and other relevant services rendered in pursuance of this Act;
- (b) donations, grants and other voluntary contributions;
- (c) moneys approved by Parliament; and
- (d) any other moneys that are approved by the Minister responsible for Finance.

(2) The Registrar may retain a percentage of internally generated funds realised in the performance of functions for the purposes of this Act.

(3) The percentage of internally generated funds retained by the Registrar shall be as specified in writing by the Minister responsible for Finance.

Management of Fund

48. (1) The Technical Committee is responsible for the management and disbursement of the Fund and is answerable to the Minister.

(2) The Technical Committee shall make rules and procedures for the operation and management of the Fund subject to the approval of the Minister.

(3) Moneys in the Fund shall be paid into a bank account opened by the Registrar for the purpose of the Fund with the approval of the Controller and Accountant-General.

(4) The administrative expenses of the Fund related to the management of the Fund shall be charged on the Fund.

Accounts and audit

49. (1) The Technical Committee shall keep books of account and records in relation to them in the form approved by the Auditor-General.

(2) The Technical Committee shall submit its accounts to the Auditor-General for audit within three months after the end of the financial year.

(3) The Auditor-General shall, not later than three months after the receipt of the accounts, audit the accounts and forward a copy of the audit report to the Minister.

Annual report and other reports

50. (1) The Technical Committee shall within one month after the receipt of the audit report, submit an annual report to the Minister covering the activities and operations of the Fund for the year to which the report relates.

(2) The annual report shall include the report of the Auditor-General.

(3) The Minister shall within one month after the receipt of the annual report submit the report to Parliament with a statement that the Minister considers necessary.

(4) The Technical Committee shall also submit to the Minister any other report which the Minister may require in writing.

Appeals

Appeal Board

51. (1) There is established by this Act an Appeal Board which shall consider and determine appeals provided under section 53.

(2) The Appeal Board consists of five members including one expert in legal and administrative matters and four experts qualified in agricultural science.

(3) The Minister shall appoint the members of the Appeal Board.

(4) The provisions of sections 46 and 47 as regards the disclosure of interest and allowances apply to a member of the Appeal Board.

(5) The Appeal Board may co-opt a person to act as an adviser at its meetings but that person shall not vote on a matter for decision at the meeting.

(6) A person co-opted under subsection (5) may be an expert.

(7) The Appeal Board shall have the power to

- (a) prescribe its own rules of procedure,
- (b) order and secure the attendance of witnesses, and
- (c) order the production of documents.

(8) The Appeal Board shall keep a record of its proceedings.

Tenure of office of members of the Appeal Board

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

Appeal from decision of the Registrar

53. (1) An order or decision of the Registrar is subject to appeal to the Appeal Board.
- (2) A person who is aggrieved by any decision or order made by the Registrar may appeal to the Appeal Board by submitting to the Appeal Board a notice of appeal within sixty days after the publication or the receipt of the notice of the decision.
- (3) The notice of appeal shall be made in writing and accompanied with the appropriate evidence.
- (4) The Appeal Board may conduct investigations if it considers it necessary to do so and hold a hearing or make a decision based on written submissions.
- (5) The Appeal Board may confirm, set aside or vary any decision of the Registrar.
- (6) The Appeal Board shall give the reasons for its decision in writing.
- (7) The Minister may order the Appeal Board to review a decision made under subsection (6), if the Minister is of the opinion that, because of new evidence or developments, the previous decision is inappropriate.
- (8) A person may appeal to the High Court on a point of law against a decision taken by the Appeal Board within sixty days after the date of its notification.
- (9) The Appeal Board may by way of case stated, refer a question of law to the High Court for its opinion.
- (10) The decision of the High Court, whether on an appeal or on a case stated is binding on the Appeal Board.

Miscellaneous provisions

Inspection and preservation of documents

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

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

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

Varieties Bulletin

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

(2) The Registrar shall

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

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

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

Publication of notices and information

56. (1) The Registrar shall publish in the *Gazette* the following notices:

- (a) applications for plant breeder rights and the respective proposed denominations;
- (b) grants of plant breeder rights;
- (c) grants of approved denominations;
- (d) decisions of the nullification or cancellation of plant breeder rights;
- (e) withdrawals or refusals of applications for plant breeder rights; and
- (f) and any other publication required under this Act.

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

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

Civil remedies

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

- (a) an order of injunction to prevent the commission or continuation of the commission of the act of infringement or to prohibit the continuation of the infringement;
- (b) the recovery of damages for the infringement;

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

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

Offences

58. A person who wilfully

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

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

Application of Convention

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

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

Regulations

60. (1) The Minister may make Regulations

- (a) to prescribe the procedure for
 - (i) filing applications;
 - (ii) examination of applications made under this Act;
 - (iii) objections and oppositions;
 - (iv) cancellation of plant breeder rights; and
 - (v) cancellation of variety denominations;
- (b) to prescribe fees to be charged under this Act; restrictions of plant breeder rights;
- (c) to prescribe restrictions of plant breeder rights;
- (d) for the administration of the register established under section 41;

- (e) for publication requirements;
- (f) for the regulation of varieties;
- (g) for variety denominations;
- (h) for entries in the register;
- (i) to govern appeals and the proceedings of the Appeal Board; and
- (j) for any other matter necessary for the effective implementation of this Act.

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

Interpretation

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

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

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

“breeder” means

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

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

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

“Fund” means the Fund established under section 46;

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

“genotype” means the genetic constitution of a cell;

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

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

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

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

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

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

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

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

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

“Registrar” means the Registrar-General;

“register” means the register established under section 41;

“Regulations” means Regulations made under this Act;

“Republic” means the Republic of Ghana;

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

“State Party” means a member of the Convention;

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

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

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

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

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