

REVIEW OF THE PROVISIONS OF ARTICLE 27.3 (b)

Information from Members

Addendum

SOUTH AFRICA¹

The present document represents the information requested by the Council for Trade-Related Aspects of Intellectual Property Rights which the Secretariat has received from South Africa, by means of a communication from its Permanent Mission, dated 16 April 1999.

I. PATENT PROTECTION OF PLANT AND ANIMAL INVENTIONS

1. *To what extent are inventions concerning plants or animals, whether products or processes, patentable under your country's law, if they meet the conditions for patentability stipulated in Article 27.1 of the TRIPS Agreement?*

The Patents Act, No. 57 of 1978 (as amended) "the Act" states that a patent shall not be granted for any variety of animal or plant or any essentially biological process for the production of animals or plants, not being a micro-biological process or the product of such a process.

2. *Where any such inventions are not patentable, even if they meet these conditions:*

(i) *To what extent is this due to per se exclusions from patentability?*

Not applicable.

(ii) *To what extent is this based on other grounds (for example because conditions for patentability other than those stipulated in Article 27.1 are not met or in order to protect ordre public or morality (see Article 27.2 of the Agreement))?*

It is provided in the Act that a patent shall not be granted for an invention the publication or exploitation of which would be generally expected to encourage offensive or immoral behaviour.

¹ An illustrative list of questions prepared by the Secretariat in response to a request from the Council is available in document IP/C/W/122.

3. *Please describe any specific provisions, guidelines, final judicial decisions and administrative rulings of general application concerning the application of the conditions for patentability stipulated in Article 27.1 to subject-matter addressed by Article 27.3(b).*

Not applicable.

4. *Where plant varieties are not as such patentable subject-matter under your country's law, please indicate the extent to which the scope of protection under patents for inventions concerning plants can nevertheless embrace plant varieties or a botanical taxon whose plants express a trait covered by the claims of a patent.*

Not applicable.

5. *Please provide any definitions used under your country's law with regard to subject-matter specifically excluded from patentability or specifically patentable (e.g. micro-organisms, microbiological processes, non-biological processes, plant varieties).*

Not applicable.

6. *To what extent is subject-matter that is identical to what occurs in nature patentable under your country's law?*

Although this aspect is not covered specifically, the Act states that anything which consists of a discovery shall not be an invention for the purposes of this Act.

7. *Explain the requirements under your country's law for ensuring adequate disclosure of the patentable inventions referred to above.*

Not applicable.

8. *What rights are conferred upon owners of the patents referred to above? Are product and process patents subject to the same rules as other patents? Do they benefit from the same protection as stipulated in Article 28 of the TRIPS Agreement?*

The Act does not distinguish between the various subject-matter and therefore all patents are subject to the same rules. The patentee benefits from the same protection as stipulated in Article 28 of the TRIPS Agreement.

9. *Are there any specific exceptions to these rights (affecting the scope or duration of the patents referred to above)? To what extent are exceptions, available in respect of plant variety rights (e.g. those referred to under question B.4(i) below), available in respect of rights conferred upon patent owners?*

Not applicable.

10. *Are there any specific provisions under your country's law for compulsory licensing in respect of the patents referred to above?*

Not applicable.

II. PROTECTION OF PLANT VARIETIES

1. *Does your country's law provide for the protection of plant varieties by plant breeder's rights, plant patents or any other sui generis system for the protection of plant varieties?*

South Africa's law provides for protection by plant breeders' rights only.

2. (a) *If your country is a party to the International Convention for the Protection of New Varieties of Plants (UPOV), please indicate which Act or Acts of the UPOV Convention your country has signed; which it has ratified; to which it has acceded; and to the standards of which its law conforms but to which it has not (yet) adhered.*

South Africa is a member of UPOV and has ratified the 1978 Convention. We have acceded to the 1991 Convention, and our Plant Breeders' Rights Act, No. 15 of 1976 (as amended) "the Act", was further amended by the Plant Breeders' Rights Amendment Act, No 673 of 1996 to bring South Africa's legislation into conformity with the 1991 Convention. The last mentioned Act was approved by Parliament and entered into force on 19 April 1996. The 1991 Convention has, however, not been ratified by South Africa.

(b) *If your country is not a party to the UPOV Convention, does the protection offered to plant varieties under your country's law conform to the standards of any of the Acts of the UPOV Convention and, if so, which?*

Not applicable.

3. *Please indicate whether concurrent protection under your country's plant variety protection law and its patent law is available (see also question A.4 above).*

Plant varieties can only be protected under plant breeders' rights. However, where a plant variety is the product of a micro-biological process, it may be protected by patent law.

4. *Please provide the following details of your country's sui generis system for the protection of plant varieties:*

(a) *the relevant laws and regulations and, if they have been notified to the Council for TRIPS, a reference to the relevant WTO documents;*

The Plant Breeders' Rights Act, No 15 of 1976, has been notified to the Council for TRIPS (See WTO document IP/N/1/ZAF/1). The Plant Breeders' Rights Amendment Act, No 673 of 1996, has, however, not been notified to the TRIPS Council yet.

(b) *the definition of "plant variety";*

"Variety" means any cultivar, clone, breeding line or hybrid of a kind of plant which can be cultivated, any plant grouping within a single botanical taxon of the lowest known classification, which grouping, irrespective of whether or not the conditions for the grant of a plant breeder's right are fully met, can be:

- (1) defined by the expression of the characteristics resulting from a given genotype or combination of genotypes;
- (2) distinguished from any other plant grouping by the expression of at least one of the said characteristics; and

- (3) considered as a unit with regard to its suitability for being propagated unchanged."

(c) *the conditions required for protection;*

The variety must be:

- (1) new;
- (2) distinct;
- (3) uniform; and
- (4) stable.

(d) *the extent to which subject-matter that is already known to the public or identical to what occurs in nature is protectable under your country's sui generis system for the protection of plant varieties;*

Varieties which are generally known to the public or which are identical to what occurs in nature are not protectable under our sui generis system for the protection of plant varieties.

(e) *the extent to which protection can be based on characteristics of germplasm, as opposed to characteristics of plant varieties derived from such germplasm;*

Protection for a variety can only be obtained if it is morphologically distinguishable from any other known variety of the same kind of plant. Protection cannot be obtained on differences which are based on characteristics of the germplasm.

(f) *who is entitled to the rights;*

An application for the grant of a plant breeder's right may be made by:

- (1) the breeder of a new variety of a kind of plant; or
- (2) if the breeder is an employee (irrespective of whether or not he is a paid a salary) whose duties are such that they involve plant breeders' activities relating to the kind of plant in question, and the new variety in question was bred in the performance of such duties, the employer of such breeder; or
- (3) the successor in title of the breeder or employer referred to in paragraph (a) and (b) respectively.

The aforesaid application may only be made by a person who: -

- is a citizen of, or is domiciled in, the Republic or a convention country or an agreement country; or
- in the case of a juristic person, has a registered office in the Republic or a convention country or an agreement country.

(g) *the procedure for the acquisition of rights, including the authority in charge of administering the rights;*

Application must be made in writing (application forms and technical questionnaires must be completed), be accompanied by the prescribed examination fee and documents (e.g. written authorization from the owner of the variety that an application for a plant breeder's right may be submitted), be accompanied by the prescribed quantity of propagating material of the variety and must contain an address in the Republic of South Africa to which any notice or communication may be sent. [Propagating material of the variety must be submitted within one year of submission of the application and within the time limit as prescribed for the kind of plant]. Where the applicant is not resident in the Republic or, in the case of a juristic person, which does not have a registered office in the Republic such application shall be submitted only through an agent. The application can be submitted by post, or delivered by hand to the offices of Registrar in Pretoria.

The variety is then evaluated and described and if it complies with the requirements as mentioned in (c) above, the right is granted to the variety.

The authority in charge of administering the rights is the National Department of Agriculture. The Registrar of the Act is the Director of the Directorate Genetic Resources, within the Department of Agriculture.

(h) *the rights conferred ;*

The following rights are conferred on a holder of plant breeders' rights:

- production or reproduction (multiplication);
- conditioning for the purpose of propagation;
- sale or any other form of marketing;
- exporting;
- importing;
- stocking for any of the five purposes referred to above,

of

- propagating material for the relevant new variety; or
- harvested material, including plants, which was obtained through the unauthorised use of propagating material of the relevant variety.

(i) *exceptions to the rights conferred, such as:*

- *acts performed for research or experimental purposes;*
- *acts performed to develop new varieties of plants;*
- *acts performed to commercialize such newly developed varieties;*

- *any “farmer’s privilege” (e.g. acts performed by a farmer on his own land in respect of seed saved from the previous harvest);*
- *acts done privately and for non-commercial purposes;*
- *compulsory licensing.*

Exceptions

It is not an infringement of a right if a person who has obtained propagating material of a new variety in a legitimate manner which does not infringe any right of the holder of the relevant plant breeder’s right:

- (1) resells the propagating material;
- (2) sells the propagating material or products derived from the material for purposes other than the further propagation or multiplication thereof;
- (3) uses or multiplies the propagating material in the development of a different variety;
- (4) uses the propagating material for bone fide research; or
- (5) uses the propagating material for private or non-commercial purposes.

Farmer’s privilege

Farmers may harvest seed on their own land or land occupied by them, for purposes of propagation. The propagating material may not be used for purposes of propagation by any person other than that farmer.

Compulsory licensing

After the expiration of the sole right period, any person may apply to the registrar for the issue of a compulsory licence if he is of the opinion that the holder for the right:

- unreasonably refuses to grant him a licence; or
 - imposes unreasonable conditions for the issue of a licence.
- (j) *the duration of protection;*
- For trees and vines - 25 years; and
 - In all other cases - 20 years.

(k) *transfer of rights;*

The holder of a right may transfer the right to any other person.

(1) *the enforcement of the rights.*

Provision is made in the Act for punitive measures in the event of the violation of the holder's rights. The onus lies with the holder of the right to enforce his or her right. The Authorities cannot initiate such enforcement procedure.
