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Act 14, 1996,
Act 19, 1997,
Act 8, 2010,
S.I. 69, 2012.

An Act to provide for the protection of industrial property in Botswana, giving effect to various international conventions, treaties and protocols to which Botswana is a party and for matters related thereto.

[*Date of Commencement: 31st August, 2012*]

Part: I Preliminary ss 17**1. Short title**

This Act may be cited as the Industrial Property Act.

2. Interpretation

In this Act, unless the context otherwise requires-

"ARIPO" means the African Regional Intellectual Property Organization;

"Banjul Protocol" means the Banjul Protocol on Marks of 27th April, 1994 as last revised or amended;

"basic application" means an application for registration of a mark filed with the Office under section 76;

"basic registration" means the registration of a mark under section 80;

"Budapest Treaty" means the Budapest Treaty of 28 April, 1977 as last revised or amended including the Regulations, on the international recognition of the deposit of micro-organisms for the purposes of patent procedure;

"collective mark" means any visible sign belonging to a collective owner and capable of distinguishing the origin or other common characteristic, including the quality, of goods or services of different enterprises which use the sign subject to the control of that owner;

"Common Regulations" means, in respect of industrial designs, the Common Regulations adopted under the Hague Agreement and, in respect of marks, the Common Regulations under the Madrid Protocol;

"convention country" means a country which is a party to the Paris Convention;

"court" means the High Court of Botswana;

"geographical indication" means an indication or sign which identifies goods as originating in the territory of a country or a region or locality in a country where a quality, reputation or other characteristic of the goods is essentially attributable to that geographical origin;

"HARARE Protocol" means the Protocol on Patents and Industrial Designs Within the Framework of the African Regional Industrial Property Organization (ARIPO) adopted at Harare, Zimbabwe, on December 10, 1982 as last revised or amended;

"industrial design" means any composition of lines or colours or any three dimensional form, whether or not associated with lines or colours, which gives a special appearance to a product of industry or handicraft;

"integrated circuit" means a circuit, in its final or intermediate form, in which the elements, at least one of which is an active element, and some or all of the interconnections are integrally formed in or on a piece of material and that is intended to perform an electronic function;

"International Bureau" means the International Bureau of the World Intellectual Property Organization (in this Act referred to as "WIPO");

"International Classification", in respect of marks, means the classification according to the Nice Agreement concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks, of June 15, 1957, as last revised or amended, and, in respect of industrial designs, means the classification according to the Locarno Agreement concerning the International Classification for Industrial Designs, of October 8, 1968, as last revised or amended;

"International Patent Classification" means the classification according to the Strasbourg Agreement of March 24, 1971 as last revised or amended;

"International Register" means the official collection of data concerning international registrations, as maintained by the International Bureau;

"invention" means an idea of an inventor which permits in practice the solution to a specific problem in the field of technology;

"Journal" means the journal of marks, patents and designs referred to in section 5 (e);

"Madrid Protocol" means the Madrid Protocol on International Registration of Marks adopted in Madrid on 27th June, 1989 as last revised or amended;

"mark" means any visible sign capable of distinguishing the goods or services of an enterprise;

"Master" means the Master of the High Court;

"Office" means the Patents, Marks and Designs Office referred to in section 3;

"office of origin" means the office with which the basic application was filed or by which the basic registration was made;

"Paris Convention" means the Paris Convention for the Protection of Industrial Property of March 20, 1883, as last revised or amended;

"patent" means a title granted to protect an invention under this Act;

"Patent Cooperation Treaty" means the Patent Cooperation Treaty of 19th June, 1970, as last revised or amended;

"patentee" means a person, or a successor-in-title to the person, to whom a patent has been granted under this Act;

"priority date" means the date of the earlier application that serves as the basis for the right of priority provided for in the Paris Convention;

"Registrar" means the Registrar of Marks, Patents and Designs appointed under section 4;

"right of priority" means the right of priority provided for in Article 4 of the Paris Convention;

"the Hague Agreement" means the Hague Agreement concerning the International Registration of Industrial Designs as last revised or amended;

"the 1999 Act" means the Act of the Hague Agreement signed in Geneva on July 2, 1999;

"trade name" means the name or designation by which a business or enterprise is distinguished;

"traditional knowledge" means an idea, knowledge, practice, use or invention, written or unwritten, which may be associated to biological diversity, is a cultural, traditional or spiritual belief or value of a group of people;

"TRIPS Agreement" means the Agreement on Trade-related aspects of Intellectual Property contained in Annex 1C of the Agreement establishing the World Trade Organization, concluded on April 15, 1994 as last revised or amended; and

"utility model" means a technical creation that consists of a new shape or configuration of an object or of a component of an object that increases its functionality or utility.

3. Continuance of Marks, Patents and Designs Office

The Marks, Patents and Designs Office established in terms of section 3 of the Act repealed under section 138 of this Act shall continue to exist as if it has been established under this Act.

4. Registrar, Deputy Registrar and Assistant Registrars of Marks, Patents and Designs

(1) There shall be a Registrar of Marks, Patents and Designs (referred to in this Act as "the Registrar") who shall-

- (a) be a public officer;
- (b) subject to the control of the Minister, be responsible for the administration of this Act; and
- (c) perform such functions and exercise such powers as may be conferred on him or her by this Act or any other enactment.

(2) The Registrar shall be appointed in accordance with the provisions of the Public Service Act.

(3) There shall be a Deputy Registrar of Marks, Patents and Designs, and such number of Assistant Registrars as it may be necessary to appoint for the efficient functioning of the Marks, Patents and Designs Office.

(4) The Deputy Registrar and Assistant Registrars shall be public officers and shall, likewise, be appointed in accordance with the provisions of the Public Service Act and perform such functions and exercise such powers as the Registrar may lawfully perform or exercise under this Act or any other enactment.

5. Functions of Registrar

Without derogating from the generality of section 4, the Registrar shall-

- (a) process all applications made in terms of this Act;
- (b) grant patents and utility model certificates;
- (c) register industrial designs, marks, collective marks, geographical indications and traditional knowledge;
- (d) administer granted patents and utility model certificates and registered industrial designs, marks, collective marks, geographical indications and traditional knowledge; and
- (e) establish and maintain a Journal of marks, patents, designs, geographical indications and traditional knowledge in which he or she shall publish all matters that are required to be published under this Act.

6. Seal of office

The Registrar shall have a seal of office which shall be affixed to every document issued or granted and to any copy issued in lieu of the original document.

7. Registers for patents, etc.

(1) The Registrar shall maintain separate registers for patents, utility model certificates, industrial designs, marks, geographical indications and traditional knowledge and shall, in a section of the register of marks created for that purpose, register collective marks.

(2) There shall be entered in the registers referred to in subsection (1) such particulars as are required by this Act and such further particulars as the Minister may, by regulations, prescribe.

(3) Any person may, upon payment of the prescribed fee, and in accordance with any prescribed conditions, consult, inspect or make a copy of, or obtain an extract from, any register referred to in subsection (1)

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VOLUME: XIV

INDUSTRIAL PROPERTY

CHAPTER: 68:03

Part:II Patents ss 836

8. Patentable inventions

(1) An invention shall be patentable if it is new, involves an inventive step, and is capable of industrial application.

(2) An invention may be or relate to a product or a process.

(3) An invention is considered to be new if it does not form part of the state of the art.

(4) For the purposes of this Act, the state of the art in relation to an invention, means anything which has been disclosed to the public, whether in Botswana or outside Botswana, in a tangible form, orally, by use or in any other way, prior to the filing or priority date of the application claiming the invention.

(5) For the purpose of determining the novelty of a claimed invention, a matter contained in another application filed with the Office and having an earlier filing or priority date shall form part of the state of the art, if the application is published under this Act.

(6) Disclosure of information which would otherwise affect the patentability of an invention claimed in the application shall not affect the patentability of that invention where the information was disclosed by-

(a) the applicant or his or her predecessor in title; or

(b) a third party that obtained the information directly or indirectly from the applicant or his or her predecessor in title, if the disclosure took place-

(i) during the 12 months preceding the filing date; or

(ii) where priority is claimed, during the 12 months preceding the priority date of the application.

(7) An invention shall be considered as involving an inventive step if, having regard to the state of the art relevant to the application claiming the invention as defined in subsection (4), it would not have been obvious to a person having ordinary skill in the art.

(8) An invention shall be considered as being capable of industrial application if it can be used in trade, or in any kind of industry including handicraft, agriculture, fishery and other services.

9. Matter excluded from patent protection

(1) For the purposes of this Act, the following shall not be regarded as inventions and shall be excluded from patent protection-

(a) a discovery or a plant, animal, micro-organism or substance as found in nature, including the human body;

(b) a scientific theory or mathematical method;

(c) a literary, dramatic, musical or artistic work or other aesthetic creation;

(d) a scheme, rule or method for doing business, performing a mental act or playing a game;

(e) a computer program.

(2) For the purposes of this Act, the following shall not be protected by patents, even if they are inventions-

(a) methods for treatment of the human or animal body by surgery or therapy, as well as diagnostic methods practised in relation thereto, except products for use in any such methods;

(b) an invention the commercial exploitation of which is necessary to protect public order or morality including protection of human or animal health, plant life or to avoid prejudice to the environment;

(c) plants and animals other than micro-organisms;

(d) essentially biological processes for the production of plants or animals.

10. Right to an invention

(1) The right to a patent shall belong to the inventor.

(2) If two or more persons have made an invention jointly, the right to the invention shall belong to them jointly.

(3) Where two or more persons have made the same invention but independently of each other, the person whose application bears the earliest filing date, or, if priority is claimed, the person



whose application bears the earliest validly claimed priority date shall, unless that application is abandoned, withdrawn or rejected by the Registrar, have the right to the patent.

(4) Where an invention is made in execution of a contract of employment, the right to the patent shall, in the absence of any agreement to the contrary, belong to the employer.

(5) The inventor shall be named as such in the patent, unless, in a special declaration in writing signed by him or her and addressed to the Registrar, he or she indicates that he or she wishes not to be named, and any promise or undertaking by the inventor made to any person to the effect that he or she will make such a declaration shall be without legal effect.

11. Who may apply for patent

(1) An application for a patent in respect of an invention may be made by the inventor or by any other person who has acquired the right to apply from the inventor.

(2) Unless otherwise agreed, joint inventors may jointly apply for a patent.

12. Application for patent

(1) Every application for a patent shall be filed with the Registrar and shall contain-

- (a) a request;
- (b) a description;
- (c) one or more claims defining the matter for which protection is sought;
- (d) drawings (where referred to in the description or the claims);
- (e) an abstract in the prescribed form,

and shall be accompanied by such fee as may be prescribed.

(2) A request referred to in subsection (1) shall contain a petition that a patent be granted, the name of and other prescribed information concerning the applicant, the inventor and the agent, if any, and the title of the invention.

(3) Where the applicant is not the inventor, the request shall be accompanied by a statement justifying the applicant's right to the patent.

(4) The description set out in the application shall disclose the invention in a manner which is sufficiently clear and complete to enable a person having ordinary skill in the art to carry out the invention, and shall indicate at least one mode known to the applicant in which the invention can be performed.

(5) Where an invention refers to or involves the use of biological material that is not available to the public and cannot be described in the patent application in such a manner as to enable the invention to be reproduced by a person skilled in the art, the description shall be regarded as inadequate for the purposes of this Act unless-

- (a) the biological material has been deposited with a depository institution recognised by the Minister no later than the date on which the patent application was filed at the Office;
- (b) the application as filed contains relevant information available to the applicant on the characteristics of the biological material deposited;
- (c) the application states the name of the depository institution and the deposit accession number; and
- (d) other prescribed conditions regarding the formalities for the deposit and the supply of samples of the deposited material are complied with.

(6) For purposes of subsection 5 (a) an international depository authority recognised under the Budapest Treaty shall be recognised without requiring a Minister's decision to recognise it.

(7) A claim referred to in subsection (1) shall be clear and concise and shall be fully supported by the description, and the description and any drawings filed may be used to interpret the claim.

(8) An abstract referred to in subsection (1) shall not be taken into account for the purpose of interpreting the scope of the protection but shall merely serve as technical information.

13. Withdrawal and amendment of application

(1) An application for a patent may, at any time before the patent is granted, be withdrawn by the applicant.

(2) The applicant may, of his or her own initiative at any time before the grant of a patent, amend or correct his or her application.

(3) The applicant shall not, in amending his or her application under this section, include any material matter which was not disclosed in the initial application as filed.

14. Unity of invention

(1) An application for a patent shall be in respect of a single invention or, where it is in respect of a group of inventions, the inventions shall be so linked as to form a single general inventive concept or have a unity of invention.

(2) The fact that a patent has been granted on an application that did not comply with the requirement of unity of invention shall not be a ground for the invalidation or revocation of the patent.

15. Division of application

(1) An applicant may, at any time before the grant of a patent, divide his or her application into two or more applications (in this Act referred to as "divisional applications"), provided that each divisional application shall not include any matter which was not disclosed in the initial application as filed.

(2) The Registrar shall accord each divisional application the same filing date and, where applicable, the same priority date, as the initial application.

(3) The Registrar may require an applicant to divide the applications where the terms of section 14 (1) have not been complied with.

16. Joint applicants

(1) Where two or more persons make a joint application for a patent, the applicants shall, in the absence of an agreement to the contrary, have equal undivided shares in the application and no one applicant shall deal with the application in any way without the consent of the other applicant or applicants.

(2) Without prejudice to subsection (1), if any steps are required to be taken to save the application from being abandoned, any applicant may, on his or her own behalf as well as on behalf of any other joint applicant, take such steps without recourse to the other applicant or applicants.

17. Right of priority

(1) An application for a patent made under this Part may contain a declaration, in writing, claiming priority, as provided for in Article 4 of the Paris Convention, of one or more earlier national, regional or international applications filed by the applicant or his or her predecessor in title in any convention country or any member of the World Trade Organization.

(2) Where a declaration of priority is made under subsection (1) the applicant shall, within such time as may be prescribed, furnish the Registrar with a copy of the application earlier filed which copy shall be certified as correct by the patent office with which it was so earlier filed.

(3) Where the earlier application referred to in subsection (2) is not in the English language and the Registrar deems that the validity of the priority claim is relevant to determine whether the invention concerned is patentable, the applicant shall submit an English translation of such earlier application within two months from the date of being notified to that effect by the Registrar.

(4) Where an applicant does not satisfy the requirements of subsections (2) and (3) and any regulations pertaining thereto, the declaration shall be considered as having not been made.

(5) The effect of the declaration referred to in subsection (1) shall be as provided for in Article 4B of the Paris Convention.

(6) The applicant may, in such form as may be prescribed, request the correction or addition of a priority claim, provided the filing date of the application before the Office is not later than the date of the expiration of the priority period calculated from the filing date of the earliest application whose priority is claimed.

(7) Where an application that claims or could have claimed the priority of an earlier application has a filing date that is later than the date on which the priority period expired, the Registrar shall, within two months from that date, upon request being filed as prescribed, restore the right of priority if the request states the reasons for the failure to comply with the priority period.

(8) The Registrar shall restore the right of priority where he or she finds out that the failure to file the subsequent application within the priority period occurred in spite of due care required by the circumstances having been taken.

(9) Where a copy of an earlier application required under subsection (2) is not filed within the prescribed time limit by an applicant, the Registrar may, upon a request being filed by the applicant as prescribed, restore the right of priority if that request is filed within the time limit for filing such copy, provided that-

- (a) the Registrar is satisfied that a request to obtain the copy was filed with the Office that received the earlier application not later than 14 months from the date of filing of that earlier application; and
- (b) a copy of the earlier application is filed with the Registrar within one month from having been obtained from the said Office.

(10) Any request under this section shall be subject to payment of the prescribed fees by the applicant.

18. Conversion of patent application into application for utility model certificate

(1) At any time before the grant or refusal of a patent, an applicant for a patent may, upon payment of the prescribed fee convert his or her application for a patent into an application for a utility model certificate.

(2) No person may convert an application under subsection (1) more than once.

19. Information concerning corresponding foreign applications for patents

(1) An applicant shall indicate in the application for a patent the date and the number of other applications filed by him or her or his or her predecessor in title outside Botswana relating to the same or essentially the same invention as that claimed in the application filed in Botswana.

(2) The applicant shall, when requested by the Registrar, furnish the following documents relating to any of the applications referred to in subsection (1)-

- (a) a copy of any communication received by the applicant concerning the results of any search or examination carried out in respect of such application;
- (b) a copy of the patent or other title of protection granted in respect of such application;
- (c) a copy of the final decision rejecting the application or refusing the grant requested in respect of the application; and
- (d) a copy of the final decision revoking or invalidating the patent or other title of protection granted in respect of such application.

20. Filing date of application for patent

(1) The filing date of an application for a patent shall be the date on which the application is received by the Office if on the date of its receipt, the application contains-

- (a) an express or implicit indication that the grant of a patent is sought;
- (b) information which will enable the Registrar to establish the identity of the applicant and to contact him or her;
- (c) a part which, on the face of it, appears to be a description of the invention; and
- (d) a part which, on the face of it appears to be a claim of the invention.

(2) For the purposes of establishing the filing date, information mentioned in 1 (a) may be filed in English or Setswana, provided that where the information is filed in Setswana, a translation into English shall be supplied by the applicant upon request by the Registrar.

(3) Where the application does not comply with the requirements of subsection (1), the Registrar shall, in writing, request the applicant to supply the missing information, and the filing date shall be the date on which the missing information is received by the Office.

(4) If an applicant fails to comply with any request made by the Registrar under subsection (2), the application shall be treated as though it had never been filed.

(5) Where a part of the description of the invention appears to be missing from an application for a patent, or the application makes reference to drawings which are not included in the application, the Registrar shall request the applicant to furnish the missing part or drawings within such time as may be prescribed, and the filing date of the application shall be the date on which such part or drawings are received by the Office.

(6) If the applicant fails to comply with any request made by the Registrar under subsection (5), the Registrar shall accord to the application the date on which the application was received by him or her, as the filing date, and shall treat any reference to such part or drawings as being non-existent.

(7) Notwithstanding the provisions of subsection (6) and subject to the prescribed requirements, a reference, made in the application to a previously filed application shall, for the purposes of establishing the filing date of the application, replace the description and any drawings.

21. Publication, observations and opposition

(1) Upon the expiry of 18 months, counted from the date of filing the application for a patent with the Registrar or, where relevant, from the applicable priority date, the Registrar shall, in the prescribed manner and subject to payment of the prescribed fee by the applicant, publish the application in the Journal and thereafter the application shall be open for public inspection.

(2) The applicant may request, in writing, for the application to be published before the expiry of the period under subsection (1) and subject to compliance with the requirements for publication, the Registrar shall publish the application as requested.

(3) The applicant shall be entitled to claim compensation from any person who, after the publication of the application and before the grant of the patent, performs without authorisation from the applicant in respect of the claimed invention any act that would be regarded as an infringement of a patent granted on the invention.

(4) An applicant may claim compensation referred to in subsection (3) where the applicant gives notice to the person concerned and the claim deals with only those acts covered by the patent as

published.

(5) Any interested person may, within the prescribed period and in the prescribed manner, submit to the Registrar, an observation or objection against the application for a patent on grounds that-

- (a) the claimed subject matter does not constitute an invention in terms of section 2, or is excluded from patentability under section 9;
- (b) the requirements of sections 8, 12 (1), 12 (4), 12 (5), 12 (7) or 14 have not been satisfied; or
- (c) sections 13 (3) and 15 (1), where applicable, have not been complied with.

(6) The person submitting an observation or objection under subsection (5) shall state the reasons for his or her observation or objection, and attach any documents or other evidence in support of the observation or objection.

(7) The person submitting an observation or objection under subsection (5) shall not become a party to any proceedings under this Act by reason only that he or she submitted an observation or objection under this section.

(8) Where an observation or objection is submitted, the Registrar shall send a copy to the applicant who may, within the prescribed period and in the prescribed manner, send to the Registrar his or her counter-statement.

(9) If the applicant sends a counter-statement, the Registrar shall provide a copy to the person who submitted the observation or objection and the Registrar may, at his or her discretion, hear the parties if either or both wish to be heard.

(10) The Registrar shall consider the observation or objection made under subsection (5) before deciding on the application for a patent.

(11) An interested person referred to in subsection (5) may apply to the High Court, within the prescribed period and in the prescribed manner, on grounds that he or she has been aggrieved by the decision of the Registrar under subsection (10) and in such a case the Registrar shall suspend the patent application proceedings pending a decision on the matter by the court.

22. Examination of applications

(1) The Registrar shall cause the application to be examined for compliance with the requirements of the Act.

(2) The Minister may, by regulations, prescribe the categories of inventions in respect of which an examination under this section shall not cover the requirements of novelty and inventive step.

(3) An examination under this section may be undertaken by persons or institutions appointed by the Registrar, including any designated foreign, national or regional industrial property authorities.

23. Grant of patent

(1) Where the Registrar is satisfied that the requirements of section 22 have been fulfilled, he or she shall grant the applicant a patent.

(2) Where there is any requirement or observation that is missing from the application, the Registrar shall notify the applicant, inviting him or her to comply with any missing requirement or submit any observation within the prescribed time limit and where the applicant fails to provide or submit any missing requirement or observation within the prescribed time limit, the Registrar may refuse the application and notify the applicant of that decision.

(3) Where the Registrar grants a patent, he or she shall-

- (a) issue a certificate of the grant of the patent and a copy of the patent to the applicant;
- (b) record the patent in the patent register; and
- (c) publish, in the Journal, a reference to the grant of the patent.

(4) The Registrar shall, on payment of the prescribed fee, make a copy of any patent granted in terms of this section available to any person who requests such copy.

(5) The Registrar shall, upon request by the patentee, make changes in the text or drawings of the patent in order to limit the extent of the protection conferred by the patent.

24. Rights conferred by patent

(1) The patent confers on the patentee the right to prevent third parties not having such patentee's consent from exploiting the patent in Botswana.

(2) For the purposes of this section, exploitation of a patent means-

- (a) where the patent has been granted in respect of a product-
 - (i) making, offering for sale, selling or using the product, or
 - (ii) importing the product for the purposes of offering it for sale, selling or using it; and
- (b) where the patent has been granted in respect of a process-
 - (i) using the process, and

- (ii) doing any act referred to in paragraph (a) in respect of a product obtained directly by means of the process.

25. Exceptions to rights conferred by patent

(1) The rights conferred by a patent shall not extend to-

- (a) acts in respect of articles which have been put on the market in Botswana or abroad by the patentee or by another person acting with the patentee's consent, or having an economic tie to the patentee;
- (b) the use of articles on aircraft, land vehicles or vessels of other countries which temporarily or accidentally enter the airspace, territory or waters of Botswana;
- (c) acts done only for experimental purposes relating to the subject-matter of the patented invention;
- (d) use by a farmer in the harvest of a farm produce for propagation or multiplication by the farmer on the farmer's holding, where there has been a sale of plant propagating material to the farmer by the patentee or with the patentee's consent for agricultural use;
- (e) use of an animal or animal reproductive material by a farmer for an agricultural purpose following a sale to the farmer, by the patentee or with the patentee's consent, of breeding stock or other animal reproductive material which constitutes or contains the patented invention;
- (f) an act done in respect of the patented invention for purposes of compliance with regulatory marketing approval procedures for pharmaceutical, veterinary, agrochemical or other products subjected to such procedures;
- (g) the extemporaneous preparation in a pharmacy of a medicine for an individual in accordance with a prescription given by a medical or dental practitioner, and the use of a medicine so prepared;
- (h) acts performed by any person who in good faith, before the filing date or, where priority is claimed, the priority date of the application on which the patent is granted and in Botswana, was using the invention or was making effective and serious preparations for such use;
- (i) acts done solely for academic, scientific research, educational or teaching purposes; or
- (j) acts done for private non-commercial purposes.

(2) An economic tie referred to in subsection 1 (a), exists where one person may exercise, directly or indirectly, on the other a decisive influence with respect to the exploitation of the invention, or where a third party may exercise such an influence on both persons.

(3) The right of prior user referred to in subsection 1 (h) may be transferred or may devolve only together with the enterprise or business, or with that part of the enterprise or business, in which the use of preparations for use have been made.

26. Transfer of rights to patent

The right to a patent may be transferred by cession, assignment, testamentary disposition or by operation of patent law.

27. Proceedings for infringement of patent

(1) The patentee shall, in addition to any other rights, remedies or actions available to him or her, have the right to institute court proceedings against any person who infringes the patent by performing, without such patentee's consent or authorisation, any of the acts referred to in section 24 (2), or who performs any act which makes it likely that infringement will occur.

(2) The patentee in proceedings for infringement shall be entitled to relief by way of the following-

- (a) an interdict or injunction;
- (b) delivery up or destruction of any infringing product, article or product of which the infringing product forms an inseparable part;
- (c) damages; or
- (d) an account of the profits derived from the infringement.

(3) In any proceedings for infringement, the defendant may counter-claim for the invalidation of the patent and, by way of defence, rely upon any ground on which a patent may be invalidated.

(4) The patentee, before instituting proceedings, shall give notice to every licensee to the patent in question whose name is recorded in the patent register, and any such licensee shall be entitled to intervene as co-plaintiff.

(5) In any proceedings for infringement, other than criminal proceedings, where the subject matter of the patent is a process for obtaining a product, the burden of establishing that the product was not made by the process shall rest on the defendant if the product obtained by the patented process is

new in terms of section 8 (3).

(6) In requiring the production of evidence in proceedings for infringement, the court shall take into account the legitimate interests of the defendant in not disclosing his or her manufacturing secrets.

(7) The court shall, in awarding damages, calculate such damages taking into account the amount of a reasonable royalty which would have been payable by a licensee or sub-licensee in respect of the patent concerned.

(8) The court shall not, in awarding damages under this section, also order, in respect of the same infringement, that the plaintiff be given an account of the profits derived by him or her from the infringement.

28. Duration and maintenance of patent

(1) Subject to subsection (2), a patent shall expire 20 years after the filing date.

(2) In order to maintain a patent or patent application, the patentee or the applicant shall pay in advance to the Registrar for each year starting one year after the filing date of the application for the grant of the patent, such annual maintenance fee as may be prescribed.

(3) A patent shall lapse or a patent application shall be deemed to have been withdrawn if the owner fails to pay the prescribed fees under subsection (2).

(4) Where the patentee or the applicant is late in paying the annual maintenance fee, the Registrar shall, upon the payment of a surcharge that may be prescribed, give the patentee or applicant a grace period of six months, within which to pay the late annual maintenance fee.

29. HARARE Protocol Patents

A patent in respect of which Botswana is a designated State, granted by ARIPO by virtue of the HARARE Protocol, shall have the same effect and enjoy the same protection in Botswana as a patent granted under this Act unless the Registrar communicates, to ARIPO, in respect of the application therefor, a decision, in accordance with the provisions of the Protocol, that if a patent is granted by ARIPO, that patent shall have no effect in Botswana.

30. Joint patentees

(1) Where a patent is granted to two or more patentees jointly, the joint patentees shall, in the absence of an agreement to the contrary, be entitled to an equal undivided share in the patent.

(2) A joint patent shall be exercised subject to the following provisions-

- (a) each joint patentee is entitled to exploit commercially the patent to his or her benefit, but shall be required to pay equitable compensation, fixed by the court in case of a disagreement, to the other joint patentee who is not directly exploiting the patent or has not granted a licence for exploitation in accordance with paragraph (b);
- (b) a joint patentee may grant a non-exclusive licence to exploit the patent, but shall be required to pay equitable compensation fixed by the court in case of a disagreement to the other joint patentee who is not directly exploiting the patent or has not granted the licence for exploitation; the other joint patentee may oppose the grant of such licence provided he or she acquires the share of the joint patentee wishing to grant the licence and on condition that the price of that share shall be fixed by the court in case of disagreement;
- (c) an exclusive licence or sole licence to exploit the patent may only be granted by agreement among the joint patentees; and
- (d) a joint patentee may assign his or her share in the patent, provided that the patentee notifies the other joint patentee of his or her intention and such other joint patentee shall have a right of first refusal to acquire a share during a period of three months computed from the receipt of that notification.

(3) A joint patentee may institute proceedings for infringement on his or her rights on the patent after giving prior notice to the other joint patentee, and the other joint patentee may join the proceedings as a co-plaintiff and recover any damages in respect of any loss suffered as a result of the infringement.

(4) If, in any proceedings under subsection (3), a joint patentee does not join the proceedings as a co-plaintiff, damages, if any, shall be awarded to the plaintiff as if he or she were the sole patentee, and the defendant shall not compensate the other patentee in respect of the same infringement.

31. Compulsory licences in the public interest or for competition

(1) The Minister may, without the consent or authority of the patentee and after giving a hearing to the patentee and any other interested party, authorise a Government agency, other person or body to exploit the patented invention on the payment of adequate remuneration to the patentee where-

- (a) it is in the public interest to do so for purposes of national security, nutrition, health, development of other vital sectors of the national economy, social service; or

(b) a court or administrative body has determined that the manner of exploitation of the invention by the patentee is anti-competitive or constitutes an abuse of the patent.

(2) In the determination of adequate remuneration under subsection (1), the Minister shall take into account the economic value of the exploitation of the patented invention and the need for the elimination of anti-competitive practices.

(3) The exploitation of the patented invention under subsection (1) shall be for the supply of the domestic market in Botswana only, except where paragraph 1 or 3 of Article 31*bis* of the TRIPS Agreement applies.

(4) Upon request by the patentee, a Government agency, other person or body authorised to exploit a patented invention under subsection (1), the Minister may, after hearing the parties, vary the terms of the decision authorising the exploitation of the patented invention as circumstances may justify.

(5) The Minister may revoke a decision made under subsection (1) where, after hearing all the parties he or she is satisfied that the circumstances which led to his or her decision have ceased to exist and are not likely to recur, or that the agency, person or body has failed to comply with the terms of the decision.

(6) Notwithstanding the provisions of subsection (5), the Minister shall not terminate the authorisation to exploit the patent if he or she is satisfied that public interest as referred to in subsection (1) justifies the maintenance of his or her decision.

(7) Where a third party has been designated by the Minister to exploit a patent under this section, such exploitation may be transferred only within the enterprise or business within which the patented invention is being exploited.

(8) The authorisation to exploit a patent under this section shall not exclude-

- (a) the right by the patentee to grant a licence to another person to exploit the patent; or
- (b) the continued exercise, by the patentee, of his or her rights under section 24 (2).

(9) A request to the Minister under subsection (4) by an agency, other person or body for an authorisation to exploit a patent under this section shall be accompanied by evidence that the patentee has received, from the person seeking the authorisation, a request for a contractual licence, and that such person has been unable, within a reasonable time, to obtain the licence on reasonable commercial terms and conditions.

(10) Subsection (9) shall not apply in cases of national emergency or other circumstances of extreme urgency, nor in the cases mentioned in subsection (1) (a).

(11) Where a competition authority has determined that the manner of exploitation of a patent in the field of semi-conductor technology is anti-competitive, the Minister shall authorise the issuance of a compulsory licence if he or she is satisfied that the issuance of a compulsory licence would remedy such practice.

(12) Any person who is aggrieved by a decision of the Minister under this section may appeal to the High Court against that decision.

32. Importation of patented products by Government or third party

(1) Subject to section 31, the Minister may issue a licence to a Government agency or any authorised person for the importation of patented products such as generic pharmaceutical products from any legitimate alternative foreign source without the approval of the patentee where-

- (a) it is in the public interest to do so for purposes of national security, nutrition, health, development of other vital sectors of the national economy, social service; or
- (b) the market for the patented product is not being supplied in sufficient quantities or on reasonable terms in relation to market demand.

(2) The importation of the patented product by a Government agency or any authorised person shall be solely for public non-commercial use within Botswana, except where paragraph 1 or 3 of Article 31 *is* of the TRIPS Agreement is applicable.

(3) A licence issued under subsection (1) shall include the name of the pharmaceutical product and an estimate of the quantities of the pharmaceutical product to be imported during the term of the licence: Provided that the estimate shall not limit the quantity of the pharmaceutical product required to address the public health problem that the importation seeks to address.

(4) Where in respect of the pharmaceutical product referred to in subsection (1) a compulsory licence has been granted in the exporting country under the system set out in Article 31*bis* of the TRIPS Agreement and the Annex thereto, and remuneration for the licence has been paid accordingly in the exporting country, the obligation to pay remuneration for the compulsory licence to import that product into Botswana shall not apply.

33. Compulsory licences for failure to exploit patent

(1) At any time after the expiration of three years from the date of the grant of a patent or four years from the filing date of the application, whichever occurs later, any person may apply to the High Court for an order to be granted a licence under the patent on the grounds that a market for the patent is not being supplied, or is not being supplied on reasonable terms, in Botswana.

(2) Notwithstanding the provisions of subsection (1) an order to issue a compulsory licence shall not be granted if the patentee satisfies the High Court that circumstances exist which justify the non-exploitation or insufficient exploitation of the patent.

(3) Where the High Court grants an order for the issue of a compulsory licence under this section, it shall-

- (a) set out the scope and function of the licence;
- (b) fix the time limit for the exploitation of the patent; and
- (c) set out the conditions and amount of remuneration to be paid to the patentee.

(4) A request for the issue of a compulsory licence shall be made in the prescribed form subject to payment of the prescribed fees.

34. Licences in respect of dependent patents

(1) If the exploitation of a patent (in this section referred to as "the later patent") is dependent upon the obtaining of a licence under an earlier patent, the patentee in respect of the later patent may apply to the High Court for an order to be issued a licence to exploit the earlier patent, and the order may be granted on such conditions as may be imposed, including a condition that such licence may be used only for the purpose of permitting the later patent to be exploited.

(2) The court shall not grant an order under this section unless the invention claimed in the later patent involves an important technical advance of considerable economic importance in relation to the invention claimed in the earlier patent.

(3) Where a holder of a plant variety right cannot exploit his or her right without infringing a prior patent, the holder may apply for a compulsory licence for the non-exclusive use of that patent, to the extent necessary to allow the exploitation of the plant variety right.

(4) Where a patentee of a biotechnological invention cannot exploit the patent without infringing a prior plant variety right, the patentee may apply for a compulsory licence for the non-exclusive use of the plant variety right, to the extent necessary to allow the exploitation of such patent.

(5) The High Court may, on an application made to it by the patentee in respect of an earlier patent or plant breeder's right, as the case may be, grant an order for the issue of a licence to use the invention claimed in the later patent or plant breeder's right.

(6) A licence granted under this section shall not be transferable except in conjunction with the transfer of the licence in respect of the later patent.

(7) The provisions of section 31 (1) regarding the remuneration due to the owner of the patent shall apply to licences issued under this section.

35. Termination of contracts relating to licences

Any contract relating to a licence to exploit a patent shall terminate on the date on which the patent under which the licence was granted expires, is revoked or otherwise ceases to protect such invention.

36. Invalidation of patents

(1) The Registrar or the High Court may, on the application of any interested party, invalidate a patent if it is found-

- (a) that the patent is not an invention within the meaning of the term as defined under this Act;
- (b) that the patentee is not a person entitled, under section 10, to apply for a patent;
- (c) that the patent concerned is not patentable under section 8;
- (d) that the invention is a matter which should have been excluded from patent protection;
- (e) that the patentee's application did not satisfy the requirements of section 12 (4), (5), (7) and (8) and corresponding regulations, or that the conditions under section 13 (3) or 15 (1), where applicable, were not complied with.
- (f) that the patentee failed to inform the Registrar about any corresponding foreign application filed or furnished information which in any material particular was false; or
- (g) that the patent was obtained on a misrepresentation.

(2) A claim arising from an invalidated patent shall be regarded as null and void from the date of the grant of the patent.

(3) Where an application for the invalidation of a patent is made to the High Court, it shall be served on the patentee and lodged with the court in the manner and within the time prescribed.

(4) Where subsection (3) applies, the Master shall notify the Registrar of any decision of the

court invalidating the patent and the Registrar shall, within such time and such manner as may be prescribed, publish the invalidation reference in the Journal.

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Part:III International Application under the Patent Cooperation Treaty ss 3741

37. Effect of international application designating Botswana

Subject to the provisions of this Part, an international application designating Botswana shall be treated as an application for a patent filed under this Act and shall have as its filing date the international filing date accorded under the Patent Cooperation Treaty.

38. Office as receiving, designated and elected office

The Office shall be-

- (a) the receiving office in respect of an international application lodged at it by a person who is a resident or citizen of Botswana;
- (b) the designated office in respect of an international application designating Botswana; and
- (c) the elected office, if an applicant in an international application designating Botswana elects Botswana for purposes of an international preliminary examination under Chapter II of the Patent Cooperation Treaty.

39. National processing

The Office shall not commence the processing of an international application before the expiration of the time limit referred to in section 40, except where the applicant has filed an express request for early commencement of the processing.

40. Entering national phase

(1) The applicant in respect of an international application designating Botswana shall, before the expiration of 30 months from the date of filing an international application-

- (a) pay the prescribed fee to the Office; and
- (b) if the international application was not filed in English, or has not been published under the Patent Cooperation Treaty as a translation into English, file with the Office a translation of the international application, containing the prescribed contents in English.

(2) If the applicant does not comply with subsection (1), the international application shall be considered to be withdrawn.

(3) The Registrar may, on an application made before or after expiry of 30 months from the date of filing of an international application, extend the time limit for a further period not exceeding three months.

41. Processing of international applications

(1) In processing an international application, the Office shall apply the provisions of the Patent Cooperation Treaty, the Regulations and administrative instructions issued under that Treaty, and the provisions of this Act and its regulations.

(2) When processing an international application, the Patent Cooperation Treaty, its Regulations and the administrative instructions issued under it shall, in the event of any conflict, prevail over this Act and its regulations.



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Part:IV Utility Model Certificates ss 4244

42. Applicability of provisions relating to patents

The provisions of Part II and III, except section 22 (2), shall with necessary modifications apply to utility model certificates and applications.

43. Duration of utility model certificate

A utility model certificate shall expire seven years after the filing date of the application.

44. Conversion of application for utility model certificate into application for patent

(1) At any time before the grant or refusal of a utility model certificate, an applicant may, upon payment of the prescribed fee, convert his or her application for a utility model certificate into an application for a patent, and the latter application shall be accorded the filing date of the initial application.

(2) No person may convert an application under subsection (1) more than once.



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Part:VI International Registration under the Hague Agreement ss 6063

60. Examination and refusal of protection, etc.

(1) Where the Registrar finds that a design that is the subject of an international registration designating Botswana does not satisfy the requirements for protection under this Act, the Registrar shall notify, within six months, a refusal of protection to the International Bureau in accordance with the relevant provisions of the 1999 Act and the Common Regulations.

(2) Where a design is refused under subsection (1), the holder of the international registration concerned shall enjoy the same remedies as if the design had been the subject of an application for registration filed directly in Botswana.

61. Effects of an international registration

(1) An international registration of an industrial design that contains a designation of Botswana shall have the same effects, as from the date of the international registration, as an application for registration filed with the Registrar in Botswana under this Act.

(2) If no refusal has been notified by the Registrar to the International Bureau in terms of section 60, or if a refusal was notified but subsequently withdrawn, the international registration shall have the same effect, from the date of the international registration, as if the registration of the industrial design has been granted directly by the Registrar in Botswana under this Act.

62. Invalidation of internationally registered design

Where the effect of an international registration is invalidated in Botswana, in part or in whole, and the invalidation is no longer subject to appeal, the Registrar shall, to the extent that he or she is aware of the decision of invalidation, notify the International Bureau in accordance with the relevant provisions of the 1999 Act and the Common Regulations.

63. Recordings in the International Register

Any recording made in the International Register in respect of an international registration, and affecting Botswana as a designated Contracting Party, shall have the same effects as if it had been made in the register of industrial designs of Botswana.



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Part:X Geographical Indications ss 105113

105. Applicability of provisions relating to marks

Except as provided under the provisions of this Part, the provisions of Part VIII shall, with the necessary modifications, apply to geographical indications and their registration.

106. Acquisition of exclusive right to geographical indication

(1) The exclusive right to a geographical indication under this Act shall be acquired by registration in accordance with the provisions under this Part.

(2) A geographical indication shall not be registered if it is-

- (a) incapable of distinguishing goods originating from a particular territory, region or locality or does not possess characteristics attributed to that territory, region or locality in which those goods come from;
- (b) contrary to public order or morality;
- (c) likely to mislead the public or those in the trade, as regards the geographical origin of the goods concerned, or their nature or characteristics;
- (d) in respect to goods, identical with the term usually used in common language as the common name for such goods in Botswana; or
- (e) not protected, has ceased to be protected or has fallen into disuse in its country of origin.

107. Application for registration of geographical indication

(1) An application for the registration of a geographical indication, accompanied by such fees as may be prescribed, shall be made to the Registrar in the prescribed manner and shall contain the following-

- (a) a request, in writing, that the geographical indication be registered;
- (b) the geographical indication for which registration is sought;
- (c) a specification containing-
 - (i) the name of the products to which the geographical indication applies,
 - (ii) a description of the product, including its raw materials, if appropriate, and principal physical, chemical, microbiological or organoleptic characteristics,
 - (iii) the definition of the geographical area from which the designated product originates,
 - (iv) evidence that the product originates in the defined geographical area,
 - (v) a description of the method of obtaining or producing the product, including as appropriate, the traditional local methods, and information concerning packaging if it is claimed that the packaging is relevant to the claimed characteristics or required to safeguard the quality or ensure the genuine origin of the product,
 - (vi) details bearing out the link between the quality or characteristics of the product and its geographical origin,
 - (vii) the name and address of the authority or body responsible for certifying compliance with the specification, or
 - (viii) other information prescribed by regulation; and
- (d) other requirements prescribed by regulation.

(2) The applicant may at any time before his or her geographical indication is registered withdraw his or her application.

108. Examination of application for registration of geographical indication

(1) The Registrar shall examine an application for registration of a geographical indication to determine whether-

- (a) it complies with the requirements of section 107 (1) and any other requirements as may be prescribed; and
- (b) it complies with the requirements of paragraphs (a) to (e) of section 106 (2).

(2) The Registrar shall, if he or she is satisfied that the application complies with the requirements of the provisions of this section, accept that application and shall, within such time and in such manner as may be prescribed, publish that application in the Journal.

109. Opposition to registration of geographical indication



(1) Any interested person may, on the ground that the requirements of section 106 (2) have not been satisfied, or that the geographical indication does not comply with the definition of a geographical indication as specified in this Act, give to the Registrar within such period and in such manner as may be prescribed, notice of his or her opposition to the registration of the geographical indication.

(2) The Registrar shall, as soon as he or she receives a notice under subsection (1), send a copy thereof to the applicant who shall, within such period and in such manner as may be prescribed, send to the Registrar, his or her written response thereto (referred to as a "counter-statement") specifying the grounds on which he or she relies for his or her application.

110. Registration of geographical indication

(1) Where, having considered the merits of any opposition and any counter-statement, the Registrar is satisfied that the application for the registration of a geographical indication satisfies the requirements of this Act, the Registrar shall-

- (a) register the geographical indication in the appropriate register;
- (b) issue to the applicant, a certificate of registration; and
- (c) publish in the Journal, a reference to the registration of the geographical indication.

(2) Where the requirements for the registration of a geographical indication are not satisfied, or an application for the registration of a geographical indication has been successfully opposed, the Registrar shall not register the geographical indication.

111. Rights of registered owner, etc .

(1) The right to a registered geographical indication shall belong to the registered owner.

(2) Registration of a geographical indication shall confer on the registered owner the right to prohibit third parties from using the geographical indication, and to institute court proceedings against any person infringing his or her rights.

(3) No person shall, without authorisation from the owner of the registered geographical indication-

- (a) use the registered geographical indication to identify products of the same description but not originating from the place indicated by the geographical indication, even where the true origin is indicated or the geographical indication used is accompanied by disclaimers or expressions such as "kind", "type", "style", "imitation" or the like;
- (b) use the registered geographical indication to indicate that products originate in a geographical region other than their true place of origin; or
- (c) use the registered geographical indication for goods produced in the geographical area specified in the register in respect of the geographical indication that do not possess the quality, reputation or other characteristic specified in the register.

(4) The provisions of section 114 (3) shall apply in any action instituted by the owner of a geographical indication against any person who contravenes subsection (3).

112. Exceptions to rights conferred by registration

The rights conferred by registration of a geographical indication may not be invoked to prevent a national or domiciliary of Botswana who has previously used the geographical indication to identify wines or spirits to continue such use in the same manner, provided such use was undertaken continuously-

- (a) for at least 10 years preceding April 15, 1994; or
- (b) in good faith preceding the date specified under paragraph (a).

113. Invalidation of registration of geographical indication

(1) Any interested person may apply to the Registrar for the invalidation of the registration of a geographical indication on the ground that the requirements of section 106 (2) and the definition of a geographical indication as specified under this Act, have not been satisfied.

(2) An application for the invalidation of a geographical indication shall be served on the owner of the geographical indication in the prescribed manner, and on any other person having the right to use the geographical indication.

(3) Where the application for invalidation is based on the ground that the geographical area specified in the register does not correspond to the geographical indication, or that the indication of the products for which the geographical indication is used or the indication of the quality, reputation or other characteristic of such product is missing or unsatisfactory, the Registrar may order for the rectification of the registration.

