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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

COUNCIL

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EXAMINATION OF THE CONFORMITY OF A GOVERNMENT BILL
OF BRAZIL WITH THE UPOV CONVENTION

Document prepared by the Office of the Union

Introduction

1. By letter dated January 31, 1996, Mr. Gilberto Vergne Saboia, Ambassador and Deputy Permanent Representative of Brazil to the United Nations Office at Geneva, requested the advice of the Council of UPOV on the conformity with the 1978 Act of the UPOV Convention (hereinafter referred to as "the 1978 Act") of a Bill on the protection of new varieties of plants and other matters which had just been sent to the National Congress of Brazil. A translation into English of the said Bill was attached to the letter. Annex I to this document contains the text of the said letter and of the Secretary-General's reply to that letter, while Annex II contains a translation into English of the Bill which is based upon the translation attached to the letter of January 31 with some adjustments made in the Office of the Union.

2. Brazil did not sign the 1978 Act. Under Article 32(1)(b) of that Act, it must deposit an instrument of accession in order to become a member State of UPOV on the basis of that Act. Under Article 32(3), an instrument of that kind can only be deposited if the State in question has requested the advice of the Council on the conformity of its laws with the provisions of the 1978 Act and if the decision of the Council embodying the advice is positive.

Basis for the Protection of New Plant Varieties in Brazil

3. The protection of new plant varieties will be governed in Brazil by the law on the protection of new varieties of plants which is eventually enacted by the National Congress of Brazil on the basis of the Bill. The Brazilian Government accepts that if the law that is eventually enacted on the basis of the Bill, differs substantially from the Bill, it will be necessary for it to seek fresh advice from the Council on the conformity of the law with the 1978 Act. An analysis of the Bill follows in the order of the substantive law provisions of the 1978 Act.

Article 1(1) of the 1978 Act: Purpose of the Convention

4. Articles 1 to 5 of the Bill establish the granting of protection to the breeders of plant varieties as the main function of the Bill which is thus in accordance with the purpose of the Convention.

Article 2 of the 1978 Act: Forms of Protection

5. Article 2 of the Bill states that the protection of rights concerning intellectual property in plant varieties “shall be effected by means of the grant of a certificate of protection, which is considered to be moveable property for all legal purposes and the sole form of protection of new cultivars in the Country.” The Bill thus establishes a “special title of protection” within the meaning of Article 2(1) of the 1978 Act.

6. The requirement that protection under the Bill should be the sole form of protection of plant varieties ensures that there is no conflict with Article 2(1) of the Convention. It is understood that a patent law Bill which is also currently before the Brazilian Congress expressly excludes the possibility of protecting plant varieties by patent.

7. The Brazilian Bill thus accords in all respects with Article 2 of the 1978 Act.

Article 3 of the 1978 Act: National Treatment, Reciprocity

8. Article 6 of the Bill provides for the application of the law in relation to applications for protection coming from abroad from countries with whom Brazil has a treaty relationship governing plant variety protection and from “nationals or persons resident in a country which grants to Brazilians or persons resident in Brazil reciprocally equivalent or equal rights.”

9. The only special formality required in relation to foreign applicants is that they should appoint an attorney to represent them in Brazil (see Articles 14 and 38).

10. The Bill accordingly conforms with Article 3 of the 1978 Act.

Article 4 of the 1978 Act: Botanical Genera and Species Which Must or May be Protected

11. Article 4 of the Bill provides that “a new cultivar or an essentially derived cultivar of any plant genera or species is eligible for protection,” while paragraph 4 of Article 5 establishes that it is the responsibility of the authority in charge of the registration and protection of cultivars to progressively announce the plant species for which applications for protection can be filed. The Bill accordingly contains provisions which will enable Brazil to conform with the requirements of Article 4 of the 1978 Act.

Article 5 of the 1978 Act: Rights Protected; Scope of Protection

12. Articles 8 and 9 of the Bill taken together provide for the grant to the right holder of the right to commercial reproduction in Brazil of the propagating material “of the whole plant,” and the right to forbid others from selling, offering for sale, reproducing, importing, exporting, packing, storing and transferring on whatever legal basis [material] of the cultivar. “The whole plant” is defined in Article 3 XVII as “a plant with all its parts susceptible of being used for the propagation of a cultivar.” The Bill accordingly more than satisfies the requirements of Article 5 of the 1978 Act.

13. Article 10 contains exceptions to the breeder’s right relating to the saving of seed on the farm, use or sale of the end product of the variety and the use of the variety as a source of variation in genetic improvement or scientific research, which do not conflict with the provisions of Article 5 of the 1978 Act.

Article 6 of the 1978 Act: Conditions Required for Protection

14. The conditions required for the grant of protection are incorporated into the Bill rather unusually through the medium of definitions contained in Article 3 and, in particular, by means of the definition of “new variety,” “new variety of plant,” “distinct new variety of plant,” “homogeneous new variety of plant” and “stable new variety of plant.” The conditions for the grant of protection are in effect incorporated into the law by the use of these defined expressions in various places in the law and, in particular, in Article 4 and Article 5 where the use of the word “cultivar” incorporates the definition in Article 3 IV, and the addition of the word “new” incorporates the definition in Article 3 V.

15. Article 15 incorporates into the Bill the main principles of Article 13 of the 1978 Act concerning denominations. The reference to synonyms in Article 18 should also be noted. The Brazilian authorities have indicated that supplementary provisions which will satisfy the requirements of Article 13 of the 1978 Act will be included in Regulations.

16. Article 40 contains provisions permitting the protection on a transitional basis of varieties which have already been commercialized. These provisions would seem to satisfy the requirements of Article 38 of the 1978 Act concerning the transitional limitation of the requirement of novelty. However, Article 39 would seem to offer the breeders of any existing commercialized varieties which have been “registered” pursuant to Article 35 rights over varieties which are essentially derived from their existing commercialized varieties. This represents a generous interpretation of the concept of “varieties of recent creation” and gives

rights to breeders of varieties which have not otherwise been granted protection under the Law of Brazil. It is suggested that provided the eventual law provides protection to breeders, which conforms with the 1978 Act, the fact that other breeders receive certain rights in relation to existing varieties is primarily a domestic concern for Brazil.

Article 7 of the 1978 Act: Official Examination of Varieties; Provisional Protection

17. Article 18 of the Bill provides for a formal and substantive examination of the application for protection. Article 14, which lists the mandatory contents of the application for protection, establishes the requirement for a test of the distinctness, uniformity and stability of the variety which may have been carried out by the applicant or by public or private institutions, whether in Brazil or in the country of origin of the variety.

18. Article 21 of the Bill provides that, once that the certificate of protection has been issued, its holder would be entitled to compensation for any commercial exploitation of his variety by a non-authorized person between the date of publication of the application and the granting of protection. The Bill accordingly provides for provisional protection which accords with Article 7(3) of the 1978 Act.

19. The Bill satisfies the requirements of Article 7 of the 1978 Act.

Article 8 of the 1978 Act: Period of Protection

20. Article 11 of the Bill provides for a period of protection of 25 years for “perennial and semi-perennial species in commercial use such as fruit trees, forestry and ornamental species and their respective rootstocks” and for a period of 15 years for all other species. A “semi-perennial species” is defined in Article 3 XVIII as “a species whose utilization in commercial cultivation is equal to or longer than four years and shorter than ten years after planting.” “Perennial species” is defined as “a species whose utilization in commercial cultivation exceeds ten years after planting. Accordingly, all species whose commercial use exceeds four years after planting will be protected for 25 years.

21. It would seem that “vines, forest trees, fruit trees and ornamental trees” will, for the purpose of the Bill, be used in commercial cultivation for longer than four years and will receive a period of protection longer than the minimum specified in Article 8 of the 1978 Act.

22. The duration of protection accordingly satisfies the minima established by Article 8 of the 1978 Act.

Article 9 of the 1978 Act: Restrictions on the Exercise of Rights Protected

23. Article 27 contains provisions authorizing the Ministry of Agriculture, Supplies and Agrarian Reform to declare protected plant varieties “of restricted public use” in order to meet the public interest. The Article provides for payment to the holder of the rights that is to be defined in Regulations. This provision will not comply with the requirements of Article 9 unless such Regulations make provision for “equitable” remuneration of the holder.

Article 10 of the 1978 Act: Nullity and Forfeiture of the Rights Protected

24. Article 31 lists the circumstances in which the protection of a cultivar terminates. Items I, II, V are unexceptional. Item III corresponds in effect to Article 10(2) of the 1978 Act, while item VII is permitted by Article 10(3)(a) of the 1978 Act. Item VI is not permitted by the said Article 10 and seems a severe penalty for an essentially administrative failure on the part of the holder. Item IV is linked by Article 32 of the Bill to Article 34 (Nullity of Protection) which is the subject of the next paragraph.

25. Article 34 provides for protection to be void (it is not clear whether this is *ab initio*) as follows:

I. when “conditions provided for in Article 4 have not been observed”

Article 4 incorporates indirectly the requirements of novelty, distinctness, uniformity and stability. A declaration of nullity is permitted by Article 10 of the 1978 Act only when a variety was either not novel or not distinct at the date of grant. This provision should be amended in order to conform with the 1978 Act.

II. “the grant conflicts with the rights of third persons”

This possibility is not mentioned in Article 10. However, it is generally admitted that it must be possible to nullify a grant if it constitutes a fraud on third parties. This *lacuna* in the 1978 Act is remedied by Article 21(1)(iii) of the 1991 Act and is acceptable in the Bill.

III. “the title [of protection] does not correspond to the true object [of protection]”

This possibility for nullity would seem to embrace the possibility of fraud by the applicant and in particular that the protected variety does not correspond to the descriptive data supplied by the applicant. It would seem to embrace the possibility envisaged by Article 21(1)(ii) of the 1991 Act where the grant is based upon information supplied by the breeder. It is suggested that this provision does not conflict with the spirit of Article 10 of the 1978 Act.

IV. “any of the steps necessary for the examination of the application and the issuing of the certificate... has been omitted”

This is not a permitted justification for a declaration of nullity under the 1978 Act. It would seem to leave open the possibility that the protection could be declared null and void for procedural defects that are the fault of the competent authority rather than the applicant.

26. Articles 31 and 34 of the Bill should be amended so as to distinguish more clearly between a declaration of nullity *ab initio* and cancellation with effect *in futuro*. The reasons for declarations of nullity and cancellation should be limited to those permitted by the 1978 Act. It is suggested that clarifications of such reasons contained in the 1991 Act should also be permitted.

Article 11 of the 1978 Act: Free Choice of the Member State in which the First Application is Filed; Application in Other Member States; Independence of Protection in Different Member States

27. The Bill contains no provision which is contrary to Article 11 of the 1978 Act.

Article 12 of the 1978 Act: Right of Priority

28. There is no provision granting a right of priority. In this respect, the Bill fails to conform with the 1978 Act.

Article 13 of the 1978 Act: Variety Denomination

29. Article 15 contains provisions relating to the denomination of new varieties. It does not satisfy all the requirements of Article 13 of the 1978 Act. Thus there is no provision corresponding to Article 13(1)(b) which requires that the free use of the denomination in connection with the variety shall not be hampered even after the expiration of the breeder's right. There is no provision corresponding to Article 13(2) which requires that the approved denomination must be different from every denomination which designates an existing variety of the same plant species or of a closely related species in UPOV member States. Equally, there are no provisions corresponding to Article 13(4) concerning the prior rights of third persons or to Article 13(5) requiring varieties to be submitted in all UPOV member States under the same denomination or to the requirement of Article 13(7) that persons shall be obligated to use the approved denomination even after the expiration of protection for the variety. Brazilian officials have suggested that these shortcomings will be remedied in Regulations.

Article 14 of the 1978 Act: Protection Independent of Measures Regulating Production, Certification and Marketing

30. The Bill contains no provision whereby protection is made subject to measures regulating production, certification or marketing. It accordingly satisfies the requirements of Article 14 of the 1978 Act. Articles 35 and 36 create a National Registry of Varieties. It is not, however, a condition for the grant of protection that a variety should be "registered."

Article 30(1) of the 1978 Act: Implementation of the Convention on the Domestic Level

31. Article 28 makes reference to damages for infringement and to the seizure of infringing material and also to heavy fines as a result of infringement. It contains no express reference to the availability of other legal remedies, such as injunction. However, Article 2 provides that a certificate of protection is considered to be moveable property for all legal purposes. As a result, all remedies for the defense of moveable property rights in the general law of Brazil should be available. The Bill accordingly conforms with Article 30(1)(a) of the 1978 Act.

32. Article 35 of the Bill provides for the creation of a National Service for the Registration and Protection of Cultivars “SNRPC” to be responsible for the protection of cultivars. The Bill accordingly satisfies the requirement of Article 30(1)(b) of the 1978 Act.

33. Articles 16, 19, 20 and 23 make provision for the publication of information concerning applications for and grants of protection in the Official Journal of the Union and thus satisfy Article 30(1)(a) of the 1978 Act.

1991 Act of the UPOV Convention

34. It should be noted that the Brazilian Bill not only includes provisions for the protection of essentially derived varieties but in other respects also, for example protection of the whole plant kingdom, the provision of provisional protection, the scope of protection in relation to propagating material, it incorporates provisions of the 1991 Act.

35. However, it should be noted that the definition of an essentially derived variety contained in Article 3 IX of the Bill fails to include the substance of the words “where the protected variety is not itself a protected variety” of Article 14(5)(a)(i) and “or from a variety that is itself derived from the initial variety” of Article 14(5)(b)(ii) of the 1991 Act. The Brazilian system of essential derivation will not correspond to the international system of the UPOV Convention unless the substance of these words is effectively incorporated into the Bill.

36. It should also be noted that the scope of protection of the holder of rights in an initial cultivar over an essentially derived cultivar is established in Paragraph 2(b) of Article 10 of the Bill and not in Article 8. The holder of rights in an initial variety would seem to have rights which are defined differently from the normal rights under a Certificate of Protection; the holder seems to be able to control all “commercial use” of the essentially derived variety. The fact that the holders of a “registration” of any existing variety under Article 36 of the Bill are granted rights for periods of years over all varieties essentially derived from their existing varieties has already been noted in paragraph 16 above.

General Conclusion

37. The Bill, in its main provisions, incorporates the substance of the 1978 Act. However, the law to be enacted on the basis of the Bill will not completely satisfy the 1978 Act unless

(i) provisions concerning priority are incorporated;

(ii) modifications are made to Articles 31 and 34 so as to satisfy the requirements of Article 10 of the 1978 Act.

38. Regulations to be made under an eventual law should

(i) provide for equitable remuneration of the breeder where varieties are declared to be “of restricted public use,” and

(ii) contain detailed provisions on denominations so as to satisfy Article 13 of the 1991 Act.

39. The Office of the Union suggests that the Council may wish

(a) to advise the Government of Brazil that the Bill, when supplemented by Regulations and with the incorporation of suitable amendments, provides the basis for a law conforming with the 1978 Act;

(b) to request the Office of the Union to offer its assistance to the Government of Brazil in respect of the amendments that are necessary to achieve conformity;

(c) to further advise the Government of Brazil that after the enactment into law of the Bill incorporating the amendments suggested by the Office of the Union, but without other substantial changes, and the making of necessary Regulations, it may deposit an instrument of accession to the 1978 Act (provided that such Act remains open to accession at the date of the proposed deposit).

40. The Council is invited to take note of the information given above and to take decisions on the basis of the proposal set out in the preceding paragraph.

[Two Annexes follow]

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ANNEX I

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[Annex II follows]

ANNEX II

CHAMBER OF DEPUTIES

BILL No. 1.457 of 1996
(From the Executive Authority)

MESSAGE No. 81/96

A Bill establishing a Law on the Protection of Cultivars and making other provisions is submitted for the consideration of the National Congress (To the Committees for Economy, Industry and Commerce, and Constitution, Justice and Drafting (Art. 54, RI - Art. 24, II)).

THE NATIONAL CONGRESS decrees:

TITLE I

PRELIMINARY PROVISIONS

Article 1: The right of protection of cultivars is hereby established.

Article 2: The protection of rights concerning intellectual property in cultivars shall be effected by means of the grant of a certificate of protection, which is considered to be moveable property for all legal purposes and as the sole form of protection of new cultivars in the Country.

Article 3: For the purposes of this Law:

I. breeder: means the physical person who breeds a cultivar and establishes the descriptors that distinguish it from all others;

II. descriptor: means a morphological, physiological, biochemical or molecular characteristic which is genetically inherited, and used in the identification of the cultivar;

III. minimum distance: means the minimum set of descriptors which, in accordance with the criteria of the competent authority, suffices to differentiate a new cultivar from other known cultivars;

IV. cultivar: means a variety of any species or genera of higher plant which can be clearly distinguished from other known cultivars by a minimum distance [of descriptor], which has its own denomination, whose descriptors are homogeneous and stable through successive generations and is of a species able to be used by the agro-forestry complex, and is described in a specialized publication available and accessible to the public; it includes the parent lines of a hybrid;

V. new cultivar: means a cultivar that, in the twelve months immediately preceding the date of filing of the application for protection has not been offered for sale in Brazil (or in other countries that have the same time limit for commercialization as Brazil)

and has not been offered for sale in other countries, for more than six years for trees and grapevine species, and for more than four years for all other species;

VI. distinct cultivar: means a cultivar that is clearly distinguishable from any other whose existence is recognized on the date of the application;

VII. homogeneous cultivar: means a cultivar which, when planted on a commercial scale, shows minimum variability in the descriptors that identify it, according to the criteria established in documents to be issued by the competent authority;

VIII. stable cultivar: means a cultivar which, when reproduced on a commercial scale, maintains its homogeneity through successive generations;

IX. essentially derived cultivar: means a cultivar which:

(a) is predominantly derived from the initial variety, without losing the expression of the essential characteristics resulting from the genotype or from the combination of genotypes of the initial variety, and

(b) is clearly distinct from the initial variety, and

(c) corresponds to the initial variety in the expression of the essential characteristics which result from the genotype or the combination of genotypes of the initial variety, except in respect of differences resulting from the derivation;

X. line: means homogeneous genetic materials resulting from successive selfing;

XI. hybrid: means the immediate product of inbreeding between genetically different lines;

XII. test for distinctness, homogeneity and stability (DHS): means the technical procedure for proving that a new cultivar is distinct from another whose descriptors are known, is homogeneous in its characteristics in each reproductive cycle, and is stable in reproducing the same characteristics throughout successive generations;

XIII. live sample: that supplied by the person requesting the right of protection which, if used in the propagation of the new variety of plant, confirms the filed descriptors;

XIV. seed: means all and any plant structure used for the propagation of a cultivar;

XV. propagation: means the reproduction and the multiplication of a cultivar and includes concomitant activities;

XVI. propagating material: means all and any part of a plant or plant structure used in its reproduction and multiplication;

XVII. whole plant: means a plant with all its parts susceptible of being used for the propagation of a cultivar;

XVIII. semi-perennial species: means a species whose utilization in commercial cultivation is equal to or longer than four years and shorter than ten years after planting;

XIX. perennial species: means a species whose utilization in commercial cultivation exceeds ten years after planting;

XX. agricultural and forestry complex: means the set of activities relating to the cultivation of plant genera and species for the purposes, among others, of human or animal alimentation, production of fuels, oils, colorants, fibers and other inputs for industrial, medical, forestry and ornamental purposes;

TITLE II

INTELLECTUAL PROPERTY

CHAPTER I

Protection

SECTION I

Cultivars Eligible for Protection

Article 4: A new cultivar or an essentially derived cultivar of any plant genus or species is eligible for protection.

Sole paragraph: Cultivars dealt with in Article 40 of this Law are also eligible for protection.

SECTION II

The Right to Protection

Article 5: Protection granting rights of ownership under the conditions established in this Law will be assured to physical or legal persons who breed cultivars in the Country.

Paragraph 1: Protection may be requested by physical or legal persons who have bred a cultivar, by their heirs and successors, or by their assignees on presentation of the appropriate document.

Paragraph 2: When the process of obtention is carried out by two or more persons in cooperation, protection may be requested jointly or singly, whilst defining their shares as a guarantee of their respective rights.

Paragraph 3: When protection is requested by a legal person, it must indicate the names of all breeders who, as employees or renderers of services, bred the new cultivar.

Paragraph 4: It is the responsibility of the authority in charge of the registration and protection of cultivars to progressively announce the plant species and their respective necessary minimum descriptors for which registration or protection is available.

Article 6: The provisions of this Law also apply to:

I. Applications for protection of cultivars coming from abroad, filed in the Country, for which protection is assured by a Treaty in force in Brazil.

II. To nationals or persons resident in a country which grants to Brazilians or persons resident in Brazil reciprocally equivalent or equal rights.

Article 7: Provisions of Treaties in force in Brazil shall apply in equal conditions to physical or legal persons, nationals of or resident in the Country.

SECTION III

The Right to Protection

Article 8: Protection of the cultivar shall extend to the reproductive or vegetative propagating material of the whole plant.

Article 9: Protection secures for its holder the right to commercial reproduction on Brazilian territory, it being forbidden for third persons to sell, offer for sale, reproduce, import, export, pack, store, transfer title on whatever legal basis [to material] of the cultivar during the period of protection, without the holder's authorization.

Article 10: The right of ownership over the cultivar shall be of no effect against a person who:

I. saves and plants seeds for his own use on his property or on a property belonging to a third person from whom he holds possession;

II. uses or sells as food or raw material the product obtained by its planting, except for purposes of reproduction;

III. uses the cultivar as a source of variation in genetic improvement or scientific research.

Paragraph 1: The provisions in numerals I and II of this Article also apply to cultivars of essentially vegetatively propagated species which are in cultivation for the purposes of subsistence.

Paragraph 2: For the purposes of numeral III of this Article, whenever

(a) it is indispensable to use the protected cultivar permanently for the commercial production of another cultivar, the holder of the latter is obliged to obtain the consent of the holder of the original material;

(b) a protected cultivar is modified in such a way as to be characterized as a cultivar which is essentially derived from a protected initial cultivar; it shall not be susceptible of commercial use without the consent of the owner of the initial cultivar.

SECTION IV

Duration of Protection

Article 11: Protection of the cultivar will be in force for a period of fifteen years as from the date of grant of protection, except for perennial and semi-perennial species in commercial use, such as fruit trees, forestry and ornamental species and their respective rootstocks, for which duration will be of twenty-five years.

Article 12: Once the duration of the right of protection has elapsed, the cultivar will fall into the public domain and no other right shall hinder its free use.

SECTION V

Application for Protection

Article 13: The request of protection will be formalized by an application signed by the physical or legal person who has obtained the cultivar, or by their attorney, and filed with the competent authority.

Sole paragraph: Protection, on the national territory, of a cultivar obtained by an individual or artificial person resident abroad, in accordance with indents I and II of Article 6, should be filed directly by their attorneys, resident in Brazil, in accordance with Article 38 of this Law.

Article 14: Besides the petition, the application for protection, which must relate to only one cultivar, shall contain:

- I. the botanical species;
- II. the name of the cultivar;
- III. the genetic origin;
- IV. the descriptive report listing all required descriptors;
- V. a statement confirming the existence of a live sample at the disposal of the competent authority for an examination in due course;
- VI. the name and address of applicant and breeders;
- VII. the proof of the performance of a DHE test directly by the petitioner himself or by a public or private institution, either Brazilian or of the country of origin;

VIII. a report of other descriptors indicating its distinctness, homogeneity and stability, or the proof of the performance, by the petitioner, of trials with the cultivar together with controls specified or designated by the competent authority;

IX. the proof of payment of the fee pertaining to the application for protection;

X. a statement as to the existence of commercialization of the cultivar in the country or abroad;

XI. a statement as to the existence of protection or any application for protection in another country;

XII. an abstract capable of identifying the object of the application.

Paragraph 1: The petition, the listing of the defined descriptors and the indication of new descriptors should satisfy the conditions set by the competent authority.

Paragraph 2: Documents mentioned in this Article should be presented in the Portuguese language.

Article 15: All cultivars shall have a denomination that identifies it, is destined to be its generic denomination and, for purposes of protection, should satisfy the following criteria:

- I. be unique, it may not be expressed solely in numeric form;
- II. have a denomination different from that of any pre-existent cultivar;
- III. not be misleading as to its intrinsic characteristics or as to its origin.

Article 16: An abstract of the application for protection, capable of identifying the object of the application, will be published in an Official Journal of the Union within a period of sixty days from the date of its filing.

Sole paragraph: Once the application for protection is published so as to inform objectors, the ninety-day period for the filing of any objection will run.

Article 17: The descriptive report and the descriptors indicating [the variety's] distinctness, homogeneity and stability may not be modified by the petitioner, except:

- I. to correct printing or typing mistakes;
- II. if unavoidable, to clarify or make the application more precise and only prior to the date of its publication;
- III. if it fails to satisfy the provisions of paragraph 2 of Article 18.

Article 18: Upon filing the application for protection, the formal preliminary checking as to the existence of synonyms will take place, and, if non-existent, the application will be accepted, if correctly completed.

Paragraph 1: The register of applications for the protection of cultivars will list the hour, day, month, year and number of the filing of the application, the name and full address of the person concerned and of any attorney involved.

Paragraph 2: The examination, which will not be subject to subsequent objections, will check if the application meets the legal requirements, if it is technically correct and if there is no earlier application, perhaps under a different denomination.

Paragraph 3: The application will be rejected if the cultivar does not satisfy the provisions of Article 4.

Paragraph 4: If necessary, further requirements will be formulated as appropriate, including the presentation of a new descriptive report, its complementation and any other information deemed relevant for the conclusion of the examination of the application.

Paragraph 5: Requirements not met or not contested within a sixty-day period calculated from notice and [or] notification will result in the shelving of the application for protection and the termination of the administrative proceedings.

Paragraph 6: The application for protection will be shelved if objection to a requirement is considered to be groundless.

Paragraph 7: Subject to the provisions of paragraph 5, it will be possible to appeal from a decision to deny or grant the application for protection, for sixty days after its publication.

Paragraph 8: The competent authority will have a period of up to sixty days after the appeal is filed to decide on it.

SECTION VI

Granting the Certificate of Protection

Article 19: The certificate of protection of a cultivar will be issued immediately after the period for appeals has elapsed or, if an appeal is filed, after the publication in the Official Journal of the Union of the decision on the appeal.

Paragraph 1: If the application is granted and there being no timely appeal pursuant to paragraph 7 of Article 18, publication will take place within fifteen days.

Paragraph 2: The certificate of protection of a cultivar must list its number, the nationality of the holder and of his heir, successor or assignee, if there are such, and the period of duration of protection.

Paragraph 3: Besides the name of the holder, the certificate of protection of a cultivar will include the name of the breeder and whether its breeding resulted from an employment contract or from a contract for the rendering of services or other work activity, facts which should be established in the relevant application for protection.

Article 20: The grant of protection will be announced through publication in the Official Journal of the Union within fifteen days from the date of grant.

Article 21: After the issuing of the certificate of protection of a cultivar, the holder will be entitled to damages for any commercial exploitation of the cultivar by a non-authorized third person, between the date of publication of the application and the granting of protection.

SECTION VII

Changes in the Certificate of Protection

Article 22: Ownership of the protected cultivar may be transferred by *inter-vivos* act or by virtue of testamentary succession or succession by operation of law.

Article 23: On transfer, by *inter-vivos* act, by testamentary succession, or by operation of law of the certificate of protection of a cultivar, any change of name, residence or office of its holder, any conditions of restricted public use, any temporary suspension or cancellation of protection, shall, after entry in the records of the relevant process, be recorded in the certificate of protection.

Paragraph 1: Without prejudice to other appropriate requirements, the original transfer document shall contain the full description of transferor and transferee, as well as those of the witnesses and the exact description of the protected cultivar.

Paragraph 2: Legal acts referring, *inter alia*, to declarations of restricted public use, temporary suspension or extinction of protection or the cancellation of the certificate, pursuant to decisions of the administrative or judicial authorities, will also be entered in the records and published.

Paragraph 3: Recording [in the certificate of protection] of the right to protection expiring or being in the process of annulment or cancellation will have no effect on payments due by third persons to the holder for the exploitation of the protected cultivar.

Paragraph 4: An assignment will only be effective vis-à-vis third persons after the publication of the relevant act in the Official Journal of the Union.

Paragraph 5: Appeal will be possible against a refusal to make entries in the records or certificates, within sixty days calculated from knowledge of the relevant ruling.

Article 24: Upon application from any person having a legitimate interest and having started an action in the courts pertaining to defects in an application for protection, an assignment, or any change of name, address or headquarters of the holder, a judge may order the suspension of the process of protection or of entry in the records or recording on the certificate, pending a final decision.

Article 25: Annual fees for protection of a cultivar shall be defined in regulations and shall be payable from the fiscal year following the date of grant of the certificate of protection.

Article 26: The certificate having been issued, the holder is bound to maintain a live sample of the protected cultivar at the disposal of the competent authority during the period of protection.

Sole paragraph: Protection will be canceled if, duly notified, the holder does not present the sample dealt with in this article within sixty days from the date of notification.

CHAPTER II

Restricted Public Use

Article 27: The protected cultivar may be declared of restricted public use for a term of two years, renewable for equal periods, by the Ministry for Agriculture, Supplies and Agrarian Reform, upon technical advice from the competent authority that the public interest has not been satisfied in that

- I. the seed market has not been satisfactorily supplied;
- II. economic power has been abused.

Sole paragraph: A cultivar is considered to be of restricted public use when, by decision of the competent authority, it may be exploited by third persons, without the authorization by the holder, during the term of validity of the relevant decision, provided that the holder be paid in a manner to be defined in regulations.

CHAPTER III

Sanctions

Article 28: Whoever reproduces, packs, stores, imports, exports, sells, offers for sale or transfers on whatever legal basis, seed or propagating material [of a protected cultivar], with the correct denomination or as if it were some other protected cultivar, without the authorization of the holder, shall pay damages, without prejudice to the seizure of the material for destruction or for sale for consumption purposes, upon decision of the competent authority, and for the payment of a fine corresponding to twenty percent of the commercial value of the seized material, incurred for the crime of violating of the rights of the breeder, without prejudice to the remaining applicable penal sanctions.

Sole paragraph: In case of a recurrence of the offense concerning the same or other material, the percentage of the fine will be doubled compared with that imposed on the occasion of the last offense, without prejudice to the remaining applicable sanctions.

CHAPTER IV

Cultivars Bred During the Currency of an Employment Contract or a Contract for the Rendering of Services or Other Work Activity

Article 29: New cultivars, as well as essentially derived cultivars discovered and developed or bred by employees or service renderers during the currency of contracts of employment, contracts for rendering services or other work activity, which result from the performance of employee duties or of the execution of a contract, the object of which is research activity in Brazil, will belong to the employer or person who has contracted for services. The name of the breeder shall be compulsorily included in the application for protection and in the certificate of protection.

Paragraph 1: Unless expressly provided to the contrary by contract, the payments to employees and service renderers should not under this Article exceed the salary or other agreed remuneration.

Paragraph 2: The employer or whoever has contracted for services or other work activity who is holder of a certificate of protection will be entitled to grant the employee or service renderer a participation in the net economic profits arising from the right to protection.

Paragraph 3: Unless otherwise agreed, a new cultivar or an essentially derived cultivar whose certificate of protection is applied for by an employee or service renderer will be considered as bred during the currency of the employment contract or contract for the rendering of services or other work activity until thirty-sixth months after the extinction of the relevant contract.

Article 30: Unless expressly stipulated to the contrary, new cultivars or essentially derived cultivars bred by employees, service renderers or persons performing other work activity which are not covered by the provisions of Article 28, but which result from personal contributions and the use of resources, data, material means, facilities or equipment of the employer or hirer of services, will belong to both parties.

Paragraph 1: For the purposes of this Article, the employer, hirer of services or of other work activities shall have the exclusive rights to exploit the new cultivar or essentially derived cultivar while the employee or renderer of services or other work activity shall receive the payment agreed between the parties, without prejudice to the payment of salaries or other agreed remuneration.

Paragraph 2: Whenever there be more than one employee, renderer of services or other work activity, the share belonging to them will be equally divided among all, unless otherwise agreed.

CHAPTER V

Extinction of the Right to Protection

Article 31: The protection of a cultivar terminates:

- I. on the expiry of the term of protection established in this Law;
- II. when surrendered by its respective holder;
- III. on loss of homogeneity or stability;

IV. when the certificate of protection is canceled;

V. by non-payment of the annual fee;

VI. when a physical or artificial person resident abroad does not maintain an attorney in Brazil, as provided for in Article 38;

VII. by non-presentation of a sample as provided for in the sole paragraph of Article 26.

Article 32: The certificate of protection may be administratively canceled upon request by any interested person, or *ex officio*, when any of the circumstances listed in numerals I to IV of Article 34 occur.

Paragraph 1: The holder will be notified of the opening of the administrative procedure for cancellation of the title, and shall be given a period of sixty days calculated from the date of notification in which to object.

Paragraph 2: An appeal may be filed against a decision to grant or refuse cancellation, within sixty days from the date of publication of the decision.

Article 33: The protected cultivar will fall into the public domain when no appeal is filed against the decision to cancel the title of protection.

CHAPTER V

Nullity of Protection

Article 34: Protection is void when:

I. conditions provided for in Article 4 have not been observed;

II. the grant conflicts with the rights of third persons;

III. the title [of protection] does not correspond to the true object [of protection];

IV. any of the steps necessary for the examination of the application and the issuing of the certificate of protection provided for in this Law have been omitted during its processing.

TITLE III

National Service Registration and Protection of Cultivars

Article 35: There is hereby created under the authority of the Ministry of Agriculture, Food and Law Reform a National Service for the Registration and Protection of Cultivars--SNRPC, which shall be responsible for the registration and protection of cultivars.

Sole paragraph: The structure, attributions and objectives of SNRPC shall be defined in regulations.

Article 36: Any new variety of plant may be registered and, for this purpose, there will be a recording system to be implemented according to the provisions of regulations.

Paragraph 1: Cultivars of all plant genera and species shall be eligible for registration.

Paragraph 2: A cultivar embodying characters that may cause agronomic problems for the solution of which it would be indispensable to use chemical or biological products which are not authorized for use in the Country or which have an unfavorable impact on the environment shall not be eligible for registration.

Paragraph 3: The registration dealt with in this Article does not represent a requirement for application for protection.

Paragraph 4: Once it is granted protection, a cultivar will be automatically entered in the register.

CHAPTER III

Certificates

Article 37: Certificates pertaining to matters dealt with in this Law will be issued within thirty days from the recording of a request provided that they are requested in accordance with the rules and on proof of payment of the relevant fees.

CHAPTER IV

Power of Attorney

Article 38: Physical and legal persons resident abroad must empower and maintain attorneys, duly qualified and resident in Brazil, with powers to represent them and receive judicial notifications pertaining to matters dealt with in this Law, from the date of the application for protection or of registration and during the validity of same, under the risk of loss of the right to protection.

Paragraph 1: Powers of attorney must grant express powers to present the application to the registration and its maintenance and the application for protection and its maintenance before the SNRPC.

Paragraph 2: When the application for protection or registration is not filed personally, it must be effected under a power of attorney containing the necessary powers and duly translated by a public sworn translator if done abroad.

CHAPTER V

Final Provisions

Article 39: Essentially derived cultivars obtained from cultivars registered within the twelve months subsequent to the publication of this Law may only be utilized for commercial purposes with the consent of the holder of the registration.

Sole paragraph: The right granted to the holder of the registration dealt with in the present Article will expire fifteen years from the date of registration, except for perennial and semi-perennial species in commercial use such as fruit trees, forestry and ornamental species, and their respective rootstocks, for which the term will be 25 years.

Article 40: Physical or legal persons who have bred cultivars which do not meet the requirements of Article 4 in that they have been continuously offered for sale prior to the date of promulgation of this Law will be allowed on a transitional basis and for the period of twelve months from the date of publication of this Law, to request protection for the remainder of the terms provided for in Article 11, [such date] being considered for such purposes the date of the first commercialization [after the deduction of the period elapsed since the date of first commercialization?].

Paragraph 1: The *bona fide* person who, before the date of application for registration or protection exploited the cultivar on whatsoever basis, will be granted the right to keep on doing so without charges.

Paragraph 2: The right granted by this Article may only be transferred by sale or lease together with the business or enterprise, or part of it, which directly relates to the exploitation of the object of protection.

Article 41: Cultivars commercialized in Brazil prior to coming into force of this Law, for which correctly completed applications for protection were not received within the period provided for in Article 40, will be considered automatically to fall into the public domain, except for the rights provided for in Article 39 of this Law.

Article 42: This Law enters into force on the date of its publication.

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