

Council**C/51/20****Fifty-First Ordinary Session
Geneva, October 26, 2017****Original:** Spanish
Date: September 26, 2017**EXAMINATION OF THE CONFORMITY OF THE DRAFT LAW FOR THE PROTECTION OF NEW VARIETIES OF PLANTS OF GUATEMALA WITH THE 1991 ACT OF THE UPOV CONVENTION***Document prepared by the Office of the Union**Disclaimer: this document does not represent UPOV policies or guidance*

1. By letter dated September 8, 2017, addressed to the Secretary-General of UPOV, Mr. Byron Omar Acevedo Córdón, Vice-Minister, Ministry of Agriculture of Guatemala, requested the examination of the Draft Law of Guatemala for the Protection of New Varieties of Plants, (hereinafter referred to as the "Draft Law"), for conformity with the 1991 Act of the UPOV Convention (hereinafter referred to as the "1991 Act"). The translation of the letter is reproduced in Annex I to this document. Annex II contains a translation in English of the Draft Law prepared by the Office of the Union. The letter and the Draft Law in the original language can be found in the Spanish version of this document.

BACKGROUND

2. Article 34(3) of the 1991 Act provides that "any State which is not a member of the Union and any intergovernmental organization shall, before depositing its instrument of accession, ask the Council to advise it in respect of the conformity of its Draft Laws with the provisions of this Convention. If the decision embodying the advice is positive, the instrument of accession may be deposited."

3. The Government of Guatemala started the procedure to become a member of UPOV by means of a letter of September 20, 2006, in which the Government of Guatemala requested the advice of the Council on the conformity with the 1991 Act of the Draft Law of 2006 for the Protection of New Varieties of Plants. The Council examined the Draft Law of 2006, at its fortieth ordinary session, held in Geneva on October 19, 2006, and decided to (see document C/40/19 "Report", paragraph 10):

"(a) take note of the information given in document C/40/15, as modified by the Council;

"(b) take a positive decision, subject to the inclusion in Article 16(2) of the Draft Law of "within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder" after "using", on the conformity of the Draft Law for the Protection of New Varieties of Plants with the provisions of the 1991 Act of the International Convention for the Protection of New Varieties of Plants, in accordance with Article 34(3) of that Act, which allows the Republic of Guatemala to deposit its instrument of accession once the Draft Law is enacted and in force; and

"(c) authorize the Secretary-General to inform the Government of Guatemala of that decision."

4. On March 26, 2009, the Office of the Union was informed that the Draft Law of 2006 which provided the basis for the positive decision of the Council on accession to the UPOV Convention was no longer relevant and that a different Draft Law (Draft Law of 2009) was being prepared by the Government.

5. At the request of the Government of Guatemala, on May 5, 2009, the Office of the Union provided comments on a new version of the draft law and informed the relevant authorities that the new version of the draft law or the adopted law would need to be submitted to the Council for examination of its conformity with the 1991 Act.

6. By letter dated September 10, 2009, the Government of Guatemala requested the examination of the Draft Law No. 4013 on the Protection of New Varieties of Plants of 2009. The Council examined the Draft Law of 2009, at its forty-third ordinary session, held in Geneva on October 22, 2009, and decided to (see document C/43/17 "Report", paragraph 11):

"(a) take note of the analysis in document C/43/15 and the information provided by the Delegation of Guatemala that intends to delete the second sentence of paragraph 4 of Article 43 of the Draft Law "[t]his obligation shall also apply to varieties covered by the breeder's right under Article 15 of this Law";

"(b) subject to the introduction in the Draft Law of the changes identified in document C/43/15 concerning the correction of cross references and the deletion of "[t]his obligation shall also apply to varieties covered by the breeder's right under Article 15 of this Law" in paragraph 4 of Article 43 of the Draft Law, take a positive decision on the conformity of the Draft Law No. 4013 on the Protection of New Varieties of Plants of 2009 of Guatemala with the provisions of the 1991 Act of the International Convention for the Protection of New Varieties of Plants, which allows that, once the changes recommended in document C/43/15 concerning the correction of cross references and the deletion of "[t]his obligation shall also apply to varieties covered by the breeder's right under Article 15 of this Law" in paragraph 4 of Article 43 of the Draft Law, have been introduced in the Draft Law and the Draft Law is adopted and the Law in force, Guatemala may deposit its instrument of accession to the 1991 Act; and

"(c) authorize the Secretary-General to inform the Government of Guatemala of that decision."

7. On July 15, 2014, the Office of the Union received from Mr. Jorge Eduardo Salazar, Director, Ministry of Agriculture, Livestock and Food, a copy of the Plant Variety Protection Law of Guatemala of June 24, 2014, which was scheduled to enter into force on September 26, 2014. On September 5, 2014, Mr. Salazar notified the Office of the Union that, on September 4, 2014, the Congress had repealed the Law.

8. On April 28, 2017, Mr. Acevedo requested the assistance of the Office of the Union in the procedure of accession of Guatemala to the UPOV Convention and in the provision of comments on the Draft Law of 2017 for the Protection of New Varieties of Plants.

9. On July 31, 2017, the Office of the Union provided comments on the Draft Law of 2017 and on August 4, 2017, participated in a meeting held in Guatemala, to explain relevant provisions of the UPOV Convention. On August 29, 2017, the Office of the Union received an updated Draft Law incorporating the comments provided by the Office of the Union and the conclusions at the meeting in Guatemala.

BASIS FOR THE PROTECTION OF NEW PLANT VARIETIES IN GUATEMALA

10. In Guatemala, the protection of new plant varieties in accordance with the 1991 Act will be governed by the Draft Law, once adopted. An analysis of the Draft Law follows in the order of the substantive provisions of the 1991 Act.

Article 1 of the 1991 Act Definitions

11. Article 3 of the Draft Law contains definitions of breeder and variety corresponding to the definitions in Article 1(iv) and (vi) of the 1991 Act, respectively.

Article 2 of the 1991 Act: Basic Obligation of the Contracting Parties

12. Article 1 of the Draft Law contains provisions corresponding to the basic obligation provided by Article 2 of the 1991 Act.

Article 3 of the 1991 Act: Genera and Species to be Protected

13. Article 4 of the Draft Law provides that "This law shall apply to all plant genera and species on the date of its entry into force" corresponding to the provisions of Article 3(2)(ii) of the 1991 Act.

Article 4 of the 1991 Act: National Treatment

14. Article 5 of the Draft Law contains provisions on national treatment corresponding to the provisions of Article 4 of the 1991 Act.

Articles 5 to 9 of the 1991 Act: Conditions of Protection, Novelty, Distinctness, Uniformity and Stability

15. Articles 7 to 11 of the Draft Law contains provisions on the conditions of protection corresponding to the provisions of Articles 5 to 9 of the 1991 Act.

16. Article 8(2) and (3) contains provisions concerning the optional provision of Article 6(2) "Varieties of recent creation" of the 1991 Act, as follows:

"(2) Where, in accordance with article 4, this Law applies to a plant genus or species to which it did not previously apply, varieties belonging to that plant genus or species shall be deemed to satisfy the condition of novelty defined in paragraph (1) of this Article even where the sale or disposal to third parties described in that paragraph had taken place in the territory of Guatemala within four years before the filing date or, in the case of trees and vines, within six years before that date.

"(3) The provision in paragraph (2) of this Article shall apply only to applications for breeder's rights submitted within a maximum period of one year as from the application of the provisions of the Law to the genera or species concerned."

Article 10 of the 1991 Act: Filing of Applications

17. Article 33 of the Draft Law contains provisions on the filing of applications. The Draft Law does not seem to contain provisions which conflict with Article 10 of the 1991 Act.

Article 11 of the 1991 Act: Right of Priority

18. Article 34 of the Draft Law contains provisions on the right of priority corresponding to the provisions of Article 11 of the 1991 Act.

Article 12 of the 1991 Act: Examination of the Application

19. Articles 35 to 38 of the Draft Law contain provisions concerning the examination of the application corresponding to the provisions of Article 12 of the 1991 Act.

Article 13 of the 1991 Act: Provisional Protection

20. Article 19(2) and (3) of the Draft Law contains provisions on provisional protection corresponding to the provisions of Article 13 of the 1991 Act.

Article 14 of the 1991 Act: Scope of the Breeder's Right

21. Article 15 of the Draft Law contains provisions on the scope of the breeder's right corresponding to the provisions of Article 14 of the 1991 Act.

22. Article 15(3) contains provisions concerning the optional provision of Article 14(3) "Acts in respect of certain products" of the 1991 Act, as follows:

"(3) Subject to Articles 16 and 17, the acts referred to in paragraph 1(a)(i) to (vii) in respect of products made directly from harvested material of the protected variety falling within the provisions of paragraph (2), through the unauthorized use of such harvested material shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material."

Article 15 of the 1991 Act: Exceptions to the Breeder's Right

23. Article 16(1) of the Draft Law contains provisions concerning the compulsory exceptions to the breeder's right corresponding to the provisions of Article 15(1) of the 1991 Act.

24. Article 16(2) of the Draft Law contains provisions concerning the optional exception under Article 15(2) of the 1991 Act, as follows:

"(2) The breeder's right shall not be deemed to be infringed if, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, farmers use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 15(4)(a)(i) or (ii), as stipulated in the regulations of the Law.

"(3) The provisions of paragraph 2 of this Article shall not apply to protected varieties of fruit, ornamental or forest species."

Article 16 of the 1991 Act: Exhaustion of the Breeder's Right

25. Article 17 of the Draft Law contains provisions concerning the exhaustion of the breeder's right which correspond to the provisions of Article 16 of the 1991 Act.

Article 17 of the 1991 Act: Restrictions on the Exercise of the Breeder's Right

26. Article 22 of the Draft Law contains provisions concerning the restrictions on the exercise of the breeder's right which correspond to the provisions of Article 17 of the 1991 Act.

Article 18 of the 1991 Act: Measures Regulating Commerce

27. Article 18 of the Draft Law contains provisions concerning measures regulating commerce which correspond to the provisions of Article 18 of the 1991 Act. The Draft Law does not seem to contain provisions which conflict with Article 18 of the 1991 Act.

Article 19 of the 1991 Act: Duration of the Breeder's Right

28. Article 19(1) of the Draft Law contains provisions concerning the duration of the breeder's right which correspond to the provisions of Article 19 of the 1991 Act.

Article 20 of the 1991 Act: Variety Denomination

29. Articles 43 to 46 of the Draft Law contain provisions on variety denominations corresponding to the provisions of Article 20 of the 1991 Act.

Article 21 of the 1991 Act: Nullity of the Breeder's Right

30. Article 24 of the Draft Law contains provisions on the nullity of the breeder's right corresponding to the provisions of Article 21 of the 1991 Act.

Article 22 of the 1991 Act: Cancellation of the Breeder's Right

31. Article 25 of the Draft Law contains provisions on the cancellation of the breeder's right corresponding to the provisions of Article 22 of the 1991 Act.

Article 30 of the 1991 Act: Implementation of the Convention

32. In relation to the obligation to “provide for appropriate legal remedies for the effective enforcement of breeders’ rights” (Article 30(1)(i) of the 1991 Act), Articles 48 and 49 of the Draft Law contain provisions on the available measures for the enforcement of breeders’ rights.

33. In relation to the obligation under Article 30(1)(ii) of the 1991 Act, Article 27 of the Draft Law provides as follows:

“All of the functions provided for in this Law for the protection of the rights of new plant varieties shall be performed by the Vice-Ministry of Agricultural Health and Regulations (VISAR) of the Ministry of Agriculture, Livestock and Food (MAGA).”

34. Articles 26, 31 and 39 of the Draft Law corresponds to the obligation to publish information concerning applications for and grant of breeders’ rights, and proposed and approved denominations as required in Article 30(1)(iii) of the 1991 Act.

General Conclusion

35. In the opinion of the Office of the Union, the Draft Law incorporates the substantive provisions of the 1991 Act. On that basis, once the Draft Law is adopted with no changes and the Law is in force, Guatemala would be in a position “to give effect” to the provisions of the 1991 Act, as required by its Article 30(2).

36. *The Council is invited to:*

(a) *note the analysis in this document;*

(b) *take a positive decision on the conformity of the “Draft Law for the Protection of New Varieties of Plants” (“Draft Law”) with the provisions of the 1991 Act of the International Convention for the Protection of New Varieties of Plants, which allows Guatemala once the Draft Law is adopted with no changes and the Law is in force, to deposit its instrument of accession to the 1991 Act; and*

(c) *authorize the Secretary-General to inform the Government of Guatemala of the above decision.*

[Annexes follow]

Government of the Republic of Guatemala
Ministry of Agriculture, Livestock and Food
Vice-Ministry of Agricultural Health and Regulations

Guatemala, September 8, 2017
REF: 579-2017/BM/ssg

Mr. Francis Gurry
Secretary-General
International Union for the Protection of New Varieties of Plants (UPOV)
34, chemin des Colombettes
CH-1211 Geneva 20

Dear Secretary-General,

I am pleased to inform you of the development of the Draft Law on the Protection of New Varieties of Plants¹ which will be submitted to our National Congress for enactment.

Guatemala intends to accede to the International Convention for the Protection of New Varieties of Plants (UPOV Convention of December 2, 1961, revised at Geneva on November 10, 1972, October 23, 1978, and on March 19, 1991 (UPOV Convention). Therefore, pursuant to Article 34(3) of the UPOV Convention, the Government of Guatemala asks the advice of the UPOV Council in respect of the conformity of the Draft Law on the Protection of New Varieties of Plants with the provisions of the UPOV Convention.

Yours faithfully,

[signed]
Byron Omar Acevedo Cordón
Vice-Minister of Agricultural Health and Regulations

Encl.: copy of the draft Law on the Protection of New Varieties of Plants

[Annex II follows]

¹ It is worth noting that governments may submit to the Council their enacted laws or, alternatively, the final official version of their draft laws as presented to their parliaments. Final official versions of draft laws may provide the basis for a positive decision of the Council on accession to the UPOV Convention provided that changes have not been made to the draft laws during parliamentary procedures.

DRAFT LAW OF GUATEMALA ON THE PROTECTION OF NEW VARIETIES OF PLANTS

Article 1 Object and Purpose

The purpose of this Law shall be to recognize and protect the rights of breeders of new plant varieties, protected by a plant protection title.

Article 2 Scope

This law shall apply to natural, legal, autonomous and semi-autonomous persons seeking to protect improved plant varieties.

Protection shall not be granted to wild plants that are part of Guatemalan biodiversity and that have not been bred by persons, whose access will be governed by the relevant current legislation.

Article 3 Definitions

For the purposes of this Law, the following definitions shall apply:

Successor-in-title: A person who, by succession or assignment, acquires the rights of another person.

Discovered and developed: process that includes the observation of a natural variation of a plant species, its identification, isolation, selection, propagation, characterization and evaluation. The above definition shall not encompass mere discovery.

MAGA: Ministry of Agriculture, Livestock and Food

VISAR: Vice-Ministry of Agricultural Health and Regulations of the Ministry of Agriculture, Livestock and Food.

Regulation: Set of general legal rules issued by the Government and subject to this law.

Breeder: The person who bred, or discovered and developed, a variety; the person who is the employer of the aforementioned person or who has commissioned the latter's work, unless agreed otherwise or the successor-in-title of the first or second aforementioned person, as the case may be.

Variety: A plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder's right are fully met, can be:

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

Protected variety: a variety that is entered into the Registry of Protected Varieties.

Contracting Party: a State or an intergovernmental organization party to the UPOV Convention.

Member of UPOV: a State party to the UPOV Convention of 1961/Act of 1972 or Act of 1978, or a Contracting Party of the Act of 1991.

Article 4
Genera and Species to Be Protected

This law shall apply to all plant genera and species on the date of its entry into force.

Article 5
National Treatment

- (1) Without prejudice to the rights specified in this Law, nationals of a Contracting Party, as well as natural persons resident in the territory of that Contracting Party and legal entities having their registered offices in such territory, shall insofar as the grant and protection of breeder's rights are concerned, enjoy within the territory of Guatemala the same treatment that this Law accords to Guatemalan nationals, provided that such nationals, natural or legal persons comply with the conditions and formalities imposed on Guatemalan nationals.
- (2) "Nationals" means, where the Contracting Party is a State, the nationals of that State and, where the Contracting Party is an intergovernmental organization, the nationals of the States which are members of that organization.

Article 6
Agent or Legal Representative

To be a party to a procedure in accordance with this Law and assert the rights deriving therefrom, the agent or legal representative of the breeder shall be resident in Guatemala.

CHAPTER I
CONDITIONS FOR THE GRANT OF THE BREEDER'S RIGHT
Article 7
Conditions of Grant

- (1) The breeder's right shall be granted where the variety is:
 - (a) new;
 - (b) distinct;
 - (c) uniform; and
 - (d) stable.
- (2) Where the applicant complies with the formalities provided for by this Law before the authority with which the application has been filed and where the variety has been designated by a denomination in accordance with the provisions of Article 43 of this Law and the applicant has paid the required fees. The grant of breeder's right shall not be subject to any further or different conditions from those mentioned above.

Article 8 Novelty

For a plant variety to be deemed to be new, it shall fulfill the following criteria.

- (1) A variety shall be deemed to be new if, at the date of filing of the application, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety
 - (i) in the territory of Guatemala earlier than one year before the filing date; and
 - (ii) in a territory other than that of Guatemala earlier than four years or, in the case of trees or vines, earlier than six years.
- (2) Where, in accordance with article 4, this Law applies to a plant genus or species to which it did not previously apply, varieties belonging to that plant genus or species shall be deemed to satisfy the condition of novelty defined in paragraph (1) of this Article even where the sale or disposal to third parties described in that paragraph had taken place in the territory of Guatemala within four years before the filing date or, in the case of trees and vines, within six years before that date.
- (3) The provision in paragraph (2) of this Article shall apply only to applications for breeder's rights submitted within a maximum period of one year as from the application of the provisions of the Law to the genera or species concerned.

Article 9 Distinctness

A variety shall be deemed to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge on the filing date of the application, or the applicable date of any priority claim.

In particular, the filing of an application for the granting of a breeder's right or for the entering of another variety in an official register of varieties, in any country, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the granting of a breeder's right or the entering of the other variety in the official register of varieties, as the case may be.

Article 10 Uniformity

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

Article 11 Stability

A variety shall be deemed to be stable if its relevant characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle.

Article 12 Principles

The breeder shall be entitled to apply for a breeder's right; where two or more persons have bred, or discovered and developed, a variety jointly, entitlement to protection shall be vested in them jointly, unless the joint breeders agree otherwise.

If they file the application as joint breeders, they shall be entitled to equal shares of protection.

The breeder's right shall be transferable by any title whatsoever.

**Article 13
Presumption of Title**

An applicant shall be deemed to be the holder of the right to protection. If the application is filed by a beneficiary or successor-in-title, it shall be accompanied by the act under which the right to breed the plant variety was acquired.

**Article 14
Judicial Assignment of an Application for a Breeder's Right**

Where an application for a breeder's right has been filed by a person not entitled to protection, the entitled person may bring an action in the appropriate court for the assignment to him of the application or, if already granted, of the breeder's right.

**CHAPTER III
BREEDER'S RIGHTS**

**Article 15
Scope of the Breeder's Right**

(1) (a) Subject to Articles 16 and 17, the following acts in respect of the propagating material of the protected variety shall require the authorization of the holder:

- (i) production or reproduction (multiplication);
- (ii) preparation or conditioning for the purposes of propagation;
- (iii) offering for sale;
- (iv) selling or other marketing;
- (v) exporting;
- (vi) importing; or,
- (vii) stocking for any of the purposes mentioned in (i) to (vi) above.

(b) The breeder may make his authorization subject to conditions and limitations.

(2). Subject to Articles 16 and 17, the acts referred to in paragraph 1(a)(i) to (vii) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

(3). Subject to Articles 16 and 17, the acts referred to in paragraph 1(a)(i) to (vii) in respect of products made directly from harvested material of the protected variety falling within the provisions of paragraph (2), through the unauthorized use of such harvested material shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said harvested material.

(4). (a) The provisions of the above paragraphs shall apply in relation to

- (i) varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety;
- (ii) varieties which are not clearly distinguishable from the protected variety in accordance with Article 9 of this Law; and,
- (iii) varieties whose production requires the repeated use of the protected variety.

(b) For the purposes of subparagraph (a)(i), a variety shall be deemed to be essentially derived from another variety ("the initial variety"), when

- (i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety;
- (ii) it is clearly distinguishable from the initial variety; and,
- (iii) except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.

(c) Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing or transformation by genetic engineering.

Article 16 **Exceptions to the Breeder's Right**

- (1) The breeder's right shall not extend to
 - (a) acts performed privately and for non-commercial purposes;
 - (b) acts performed for experimental purposes; and,
 - (c) acts performed for the purpose of breeding other varieties, and, except where the provisions of Article 15(4) apply, acts referred to in Article 15(1) to (3) in respect of such other varieties.
- (2) The breeder's right shall not be deemed to be infringed if, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, farmers use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 15(4)(a)(i) or (ii), as stipulated in the regulations of the Law.
- (3) The provisions of paragraph 2 of this Article shall not apply to protected varieties of fruit, ornamental or forest species.

Article 17 **Exhaustion of the Breeder's Right**

- (1) The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 15(4) of this Law, which has been sold or otherwise marketed by the breeder or with his consent in the territory of Guatemala, or any material derived from the said material, unless such acts:
 - (i) involve further propagation of the material of a protected variety;
 - (ii) involve an export of material of the protected variety, which enables the propagation of the variety, in a country that does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.
- (2) For the purposes of this Article, "material" means, in relation to a variety:
 - (i) propagating material of any kind;
 - (ii) harvested material, including entire plants and parts of plants; and,
 - (iii) any product made directly from the harvested material.

Article 18
Measures Regulating Commerce

The breeder's right is independent of any measure taken by the State to regulate the production, certification and marketing of material of varieties or the importing or exporting of such material. In any case, such measures shall not affect the application of the provisions of this Law.

Article 19
Duration of the Breeder's Right

- (1) The breeder's right shall be granted for a period of twenty-five (25) years for trees and vines and for twenty (20) years for other plants. In all cases, the duration shall be computed as from the date of grant of protection until the year of expiration.
- (2) Provisional protection shall be established to safeguard the interests of the breeder for the period between the publication of the application for a breeder's right and the granting of the right.
- (3) The applicant shall be deemed to be the holder of the breeder's right in respect of any person who, in the interval provided for in paragraph (2), has carried out acts which, after the granting of the right, require the breeder's authorization in accordance with the provisions of Article 15. The applicant shall have the same rights to enter into licensing agreements and to take legal action as if on the publication date the breeder's right had been granted to the applicant, in respect of the variety in question. If the right is not granted, it shall be deemed that the rights conferred under this paragraph have never been granted.

CHAPTER IV
THE BREEDER'S RIGHT AS PROPERTY

Article 20
Assignment of Property

As the breeder's right is a subject which concerns intellectual property, the general legal norms of legislation governing the subject shall apply, unless otherwise stipulated in this Law.

Such rights may be subject to assignment to one or more successors-in-title, or assignees, which must be recorded in a public deed. Any act conveying or amending the breeder's right shall not affect the rights acquired by others prior to the date of such act.

An act conveying or amending a breeder's right shall be enforceable on others as soon as it has been registered with VISAR.

Nonetheless, prior to its entry, an act shall be enforceable on others who have acquired the rights since the date of this act but who were aware of the existence of this act when they acquired such rights.

CHAPTER V
LICENSES FOR USE

Article 21
Contractual Licenses

The applicant or holder may grant to others an exclusive or non-exclusive license for use which covers all or part of the holder's rights provided by this Law.

To have effect in respect of third parties, the exclusive license or the non-exclusive licenses shall be entered in the Register of Applications or the Register of Rights, as the case may be, and shall be published in the Official Gazette.

Article 22 Compulsory Licenses

MAGA may, for reasons of public interest and provided that the interested party is heard, *ex officio*, upon application by the authority or an interested party, order at any time that the plant variety be used or applied industrially or commercially by a government institution or by one or more public or private legal entities that have been appointed to this end; or that the said plant variety, notwithstanding the proceedings under way for the granting of the breeder's right, may remain open for the granting of one or more compulsory licenses, in which case the competent national authority may grant such a license to any person who applies for it, subject to the conditions that have been stipulated for that purpose.

The compulsory license shall confer on the applicant a non-exclusive right to perform all or part of the acts covered by Article 15 of this Law, solely in the public interest.

Upon granting a compulsory license, MAGA shall set the conditions for such granting, that is, the scope of the license, including its duration and the acts for which it is granted, which shall be limited to the purposes underpinning its granting, the amount corresponding to equitable remuneration and the form of payment to the holder as well as the necessary conditions for ensuring that the license serves its purpose, and shall pay the corresponding fee to MAGA.

VISAR may require the holder to make available to the beneficiary of the compulsory license the quantity of propagating material needed for the reasonable use of the compulsory license, provided that the payment indicated in the fee is made.

The compulsory license shall be granted solely in the public interest and MAGA may cancel the compulsory license if the circumstances which warranted its granting no longer prevail and it is unlikely that they will recur, while taking the necessary steps to protect the legitimate interests of the licensees. For this purpose, in addition to the evidence provided by the breeder, MAGA shall gather the information it deems necessary to verify those facts.

MAGA shall revoke the compulsory license if the beneficiary violates the conditions under which it was granted.

Before granting a compulsory license, MAGA may hear the professional national organizations from the sector of activity that is the subject of this Law. It shall issue a ministerial agreement declaring that the act is in the public interest.

CHAPTER VI EXPIRATION OF THE BREEDER'S RIGHT Article 23 Premature Expiration

The breeder's right shall expire before the time limit stipulated in Article 19 of this Law if renunciation submitted by the owner is registered by means of a sworn declaration addressed to MAGA.

Article 24 Nullity of the Breeder's Right

- (1) The breeder's right shall be declared null and void when it is established:
 - (i) that at the time of the granting of the breeder's right, the conditions laid down in Articles 8 and 9 were not effectively met;
 - (ii) that, where the grant of the breeder's right has been essentially based on the information and documents furnished by the breeder, the conditions laid down in Articles 10 and 11 were not effectively met at the time the breeder's right was granted; or
 - (iii) that the breeder's right was granted to a person not entitled to it, unless it had been assigned to the person who is so entitled, in accordance with the provisions laid down in Article 14 of this Law.
- (2) No breeder's right shall be declared null and void for reasons other than those referred to in paragraph (1).

Article 25
Cancellation of the Breeder's Right

- (1) Reasons for cancellation.
- (a) The breeder's right may be cancelled if it is proven that the conditions set forth in Articles 10 and 11 are no longer fulfilled.
 - (b) Furthermore, the breeder's right shall be cancelled if, within a period stipulated in the Law and after having been requested to do so:
 - a. the breeder does not provide VISAR with the information, documents or material deemed necessary for verifying the maintenance of the variety;
 - b. the breeder has not paid such fees as may be due to maintain the validity of his right; or
 - c. the breeder does not propose another suitable denomination in accordance with Article 43 of this Law within the prescribed time limit, where the denomination of the variety is cancelled.
- (2) No breeder's right may be cancelled for reasons other than those referred to in paragraph (1) above.

Article 26
Publication of the lapse of the breeder's right

Entries concerning the premature expiration, nullity and cancellation of a breeder's right, as covered by Articles 23, 24 and 25 of this Law, as well as the corresponding grounds, shall be made in the Register of New Plant Varieties.

MAGA shall publish such expirations in *Diario de Centroamérica* and electronically on its website.

TITLE III
ORGANIZATION AND PROCEDURE

CHAPTER I
ORGANIZATION, POWERS AND GENERAL RULES OF PROCEDURE

Article 27
Authority Responsible for the Protection of New Plant Varieties

All of the functions provided for in this Law for the protection of the rights of new plant varieties shall be performed by the Vice-Ministry of Agricultural Health and Regulations (VISAR) of the Ministry of Agriculture, Livestock and Food (MAGA).

Article 28
Right of Defense

Any decisions taken by VISAR that are prejudicial to the interests of a party in the proceedings shall be communicated to the party, together with the corresponding grounds.

The party may submit observations in writing within 30 days following the date of receipt of the communication.

Article 29
Appeal

Decisions taken by VISAR may be appealed in accordance with the provisions laid down in the Law of Judicial Review.

**Article 30
Registration
Conservation of Files**

VISAR shall maintain a register of applications and a register of breeder's rights.

Applications for breeder's rights shall be published once they have been granted.

Interested parties may:

- (i) consult the documents filed in relation to the application;
- (ii) verify the documents relating to a breeder's right that has already been granted; and
- (iii) visit cultivation trials and examine other necessary trials carried out as part of the registration procedure and those submitted as part of cooperation in the technical examination of a variety in accordance with Articles 37 or 50 of this law.

In the case of varieties whose production requires repeated use of other varieties (components), the applicant may, upon filing the application, request that the documents and trials relating to the components be exempted from the measures laid down in previous paragraphs.

VISAR shall store the files, originals or reproductions as from the date of withdrawal or rejection of the application, or, as the case may be, the date on which the breeder's right lapsed, establishing a computer registration.

**Article 31
Official Publication**

VISAR shall publish the following information twice a year on MAGA's website:

- (a) applications for the grant of breeder's rights;
- (b) applications for denominations of varieties;
- (c) registration of new denominations of protected varieties;
- (d) withdrawal of applications for the grant of breeder's rights;
- (e) rejection of applications for the grant of breeder's rights;
- (f) grants of breeder's rights;
- (g) changes relating to persons (applicants, owners and agents);
- (h) lapses of breeder's rights;
- (i) assignment of property;
- (j) contractual licenses and compulsory licenses;
- (k) official announcements.

Article 32
Fees

Administrative acts performed by VISAR with a view to the implementation of this Law shall give rise to the charging of a fee, which shall be set by regulation to cover all of the expenses deriving from the provision of the following services:

- (a) processing of applications for titles to new plant varieties;
- (b) technical examination of varieties;
- (c) grants of title to new plant varieties;
- (d) publication of decrees in the Official Gazette;
- (e) annual payment for the maintenance of breeder's rights;
- (f) administration of the registry with regard to denomination, assignment of property, licenses for use, dispatching of copies, certificates and duplicates of documents;
- (g) reinstatement of titles that have already been cancelled;
- (h) fee for compulsory licensing;
- (i) where VISAR has agreed that the technical examination shall be carried out by a natural or legal person recognized by MAGA for the delivery of the service, the fee due for the performance of the technical examination of the varieties referred to in paragraph (b), the applicant shall pay the corresponding fee to the institution performing the examination, including a percentage of the fee to VISAR to be determined by regulation.

This fee shall be paid by natural or legal persons who apply for and receive from VISAR one of the services defined by this Law.

The general fund for the payment of the services provided and the financial resources generated shall be deposited in a special VISAR account and may not be used for any purpose other than the object and purpose of this Law.

CHAPTER II
APPLICATION
Article 33

Form and Substance of the Application

A person seeking protection for a plant variety shall file an application with VISAR and pay the corresponding fee. VISAR shall prepare a form to this end.

The detailed form and content of the application, and the documents to be attached, shall be specified in the regulations of this Law.

Article 34
Right of Priority

- (1) A breeder who has properly filed an application for protection of a variety in any of the Contracting Parties ("first application") shall enjoy a priority right for a period of 12 months to file an application for the grant of a breeder's right for the same plant variety in Guatemala ("subsequent application"). This priority period shall commence as from the filing date of the first application. The filing day shall not be included in the priority period.
- (2) To avail himself of the priority right, the breeder must claim the priority of the first application in the application filed in Guatemala; The applicant shall have a period of three months as from the date of

filing of the application in Guatemala to provide a copy of the documents constituting the first application, certified to be a true copy by the authority before which the first application was filed, together with the samples or any other evidence that the variety that is the subject of the two applications is the same.

- (3) The applicant shall be entitled to a period of up to two years from the date of expiry of the priority period, or, if the first application is rejected or withdrawn, of a period of up to six months as from the time of rejection or withdrawal, within which to furnish VISAR with any information, documents or material required for the purpose of the examination provided for in Article 38 of this Law.
- (4) Any acts that occur within the time limit prescribed in paragraph (1) above, such as the existence of an application or the use of the variety that was the subject of the first application shall not constitute grounds for the rejection of the subsequent application. Moreover, such acts shall not create rights in respect of third parties.

CHAPTER III PROCESSING OF THE APPLICATION

Article 35 Examination of the Form of the Application

VISAR shall examine the application with regard to form, in accordance with the information specified in Article 33 of this Law.

If the application is incomplete or fails to meet the requirements, VISAR may request the applicant to correct it within a period of three months as from the date of receipt of the notification. Any application which has not been corrected within that period shall be deemed to have been abandoned.

A complete application which meets the requirements shall be assigned a date of filing, which shall be entered in the Register of Plant Varieties. The date of filing shall be deemed to be the date on which VISAR has received the elements of the form mentioned in Article 33 of this Law.

Article 36 Substantive Examination of the Application

VISAR shall examine the substance of the application in order to verify, on the basis of the information and documents presented in the application and material provided, that the variety fulfills the conditions for grant established in Article 7 to 11 and that the applicant is entitled in accordance with Articles 3, 12 and 13 of this Law.

If the examination reveals an obstacle to the grant of the breeder's right, the application shall be rejected.

Article 37 Technical Examination of the Variety

VISAR shall examine the candidate varieties to be protected with respect to their distinctness, uniformity and stability, having regard to any of the following options:

- (a) through crop trials or other type of evidence conducted by VISAR, to which purpose it may rely on the collaboration of other national research institutions and/or organizations;
- (b) through the reports of examinations conducted by other competent official agencies or by specialized bodies, within the framework of international cooperation. Such bodies must be completely independent of the person applying for the breeder's right;
- (c) on the basis of the trial information (DUS) filed by the breeder, in accordance with the requirements to this end set forth by VISAR, which shall be empowered to inspect trials and verify the results; and

- (d) through *in situ* inspections, approval of DUS examinations conducted by official agencies, documentary review or a combination of the above.

VISAR shall be empowered to enter into agreements with national agencies and the competent authorities of other countries with a view to meeting the requirements for the technical examination of the candidate varieties to be protected.

Article 38 **Information, Documents and Material Required for the Examination**

The breeder shall provide all of the necessary information, documents or material which VISAR requires for the technical examination.

Failing the provision of such information, the application shall be rejected.

Article 39 **Publication of the Application**

The application shall give rise to a decree in the Official Gazette which shall contain, at the least, the information stipulated in the regulation of this Law.

Once the application has been published, any person may submit to VISAR, within two months of the date of publication, observations relating to the grant of the breeder's right.

Such observations shall be made in writing and shall be supported by grounds. The evidentiary documents shall be attached thereto.

Observations may only be submitted with a view to asserting that the variety does not meet one of the conditions established in Article 7 to 11 or that the applicant is not entitled to protection under the provisions of Article 3, 12 and 13 of this Law.

Article 40 **Observations**

Observations shall be notified to the applicant, who shall have three months, computed from the date of the corresponding notification, to comment on the observations and state whether he intends to maintain, modify or withdraw his application; the deadline may be extended on the basis of a reasoned request from the applicant.

The analysis of the observations shall take place as follows:

- (1) The observations submitted shall be analyzed:
 - (a) independently of the normal procedure for analyzing applications, where a lack of novelty of the variety or a lack of title by the applicant is invoked; or
 - (b) in conjunction with the technical examination of the variety, when a lack of distinctiveness, uniformity or stability is invoked.
- (2) VISAR may decide to amend the arrangements for the technical examination of the variety with a view to providing more robust technical grounds for the observations.

The author of the observations may be requested to submit additional supporting information and documents, as well as the necessary plant material for the technical examination, by means of the procedure set out in Article 38 of this Law.

Article 41
Grant of the Breeder's Right

VISAR shall grant the breeder's right when, as a result of the technical examination of the variety, it is established that the variety meets the conditions laid down in Article 7 of this Law and that the applicant has satisfied the requirements of this Law and paid the requisite fees.

The breeder's right shall also be entered in the Register of Plant Varieties and shall be published in the Official Gazette. The description of the variety may be included in the Register as a reference to VISAR's technical files.

Article 42
Rejection of an Application for a Breeder's Right

VISAR shall reject an application if it does not meet the conditions laid down in Article 7 of this Law or the other requirements stipulated herein; such rejection shall be noted in the Register of Plant Varieties for corresponding applications.

CHAPTER IV
VARIETY DENOMINATION

Article 43
Subject Matter of the Denomination and Signs Likely to Constitute a Denomination

- (1) The denomination shall serve as the generic designation of the variety.
- (2) The following elements may serve as denominations: any words, combinations of words, combinations of words and figures, and combinations of letters and figures which may or may not have a pre-existing meaning, provided that the signs serve to identify the variety. The denomination may not consist entirely of figures unless this is an established practice to designate varieties. It shall not be likely to mislead or lead to confusion as to the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from any denomination which designates, in the territory of any of the UPOV Member States, an existing variety of the same plant species or a related species.
- (3) When a denomination has already been used for the variety in another Contracting Party, or has been proposed or registered in another Contracting Party, such denomination may only be used for the purposes of the proceedings before VISAR, unless there are grounds for rejection under Article 44 of this Law, in which case VISAR shall require the breeder to propose another denomination for the variety.
- (4) Any propagating material of a protected variety offered for sale, sold or marketed in any other form in Guatemala shall use the denomination of this variety, including after the date of expiration of the breeder's right for the variety, provided that no prior rights bar its use, in accordance with the provisions of paragraph (5) governing such use.
- (5) The prior rights of others shall be reserved if, under a prior right, the use of the denomination of the variety is prohibited for a person who is obliged to use it, in accordance with the provisions of paragraph (4), in which case VISAR shall require the breeder to propose another denomination for the variety.
- (6) Where a variety is offered for sale or marketed in another form, the use of a factory or trade mark, trade name or similar indication shall be allowed, similar to the denomination of the registered variety. If such indication is associated in this manner, the denomination shall be easily recognizable.

Article 44 Grounds for Rejection

An application for registration as a denomination for varieties shall be rejected for designations which:

- (a) do not comply with the provisions of Article 43 of this Law; or
- (b) are contrary to public order or morality.

Registration shall also be refused for a denomination of varieties for designations which contain an element which hinders or is likely to hinder the free use of the denomination in relation to the variety in accordance with Article 43(4), in particular an element registered as a mark for products tied to the variety.

Article 45 Registration Procedure

Subject to the payment of a fee and the indication of a provisional designation in the application, the applicant may defer the procedure for registration of the denomination. In such case, the applicant shall submit the proposal for a denomination in accordance with the regulations of this Law.

The proposal for a denomination shall be published in the Official Gazette, unless VISAR establishes that there are grounds for rejection under Article 44 of this Law. The proposal shall also be notified to the authorities of the Contracting Parties.

Any interested party may submit, within a period of three months of publication, an observation concerning the registration of denomination, based on any of the grounds for refusal laid down in Article 44 of this Law. The authorities of other Contracting Parties may also submit observations.

The observations shall be notified to the applicant, who shall have three months to answer them.

The applicant may, on the basis of the objections and observations, submit changes to the proposal within the prescribed time limit.

If the changes to the proposal are inconsistent with Article 44 of this Law, VISAR may advise the applicant that he must propose a denomination that is consistent. If the applicant fails to comply, the application shall be rejected.

The denomination shall be registered at the same time as the grant of the breeder's right.

Article 46 Cancellation of a Denomination and Registration of a New Denomination

A competent court may order the cancellation of the registered denomination:

- (a) if it is established that the denomination was registered despite grounds for rejection stipulated in Article 44 of this Law;
- (b) if a third party submits a court decision prohibiting the use of the denomination in relation to the variety.

The holder may lodge an appeal for the cancellation of his denomination to be set aside.

**CHAPTER V
DURATION OF THE BREEDER'S RIGHT**

**Article 47
Fees**

The holder shall pay an annual fee to maintain the validity of his right.

The fee shall be paid during the first 90 days of every year following the grant of the right. The proceeds shall be deposited in the VISAR special account and may not be used for any purpose other than the object and purpose of this Law.

**TITLE IV
ENFORCEMENT OF THE BREEDER'S RIGHT**

**Article 48
Legal Remedies**

The holder of the breeder's right may report natural or legal persons who:

- (a) without being authorized to do so, perform acts which require the authorization of the holder under Article 15 of this Law;
- (b) use a designation in violation of Article 43 of this Law; or,
- (c) fail to use a variety denomination in violation of Article 43 of this Law.

Any compensation awarded shall be applicable as in any proceedings for infringement of another property right.

Subject to the stipulations of this Law, the provisions governing the enforcement of rights conferred with regard to a patent shall be applicable *mutatis mutandis* to the enforcement of rights under a breeder's right.

A person who performs an act requiring the authorization of the holder in accordance with Article 15 of this Law or in any manner infringes the rights conferred on the breeder under this Law shall be liable for damages. When calculating such damages, the competent authority may take any of the following elements into consideration:

- (a) the value of the utility obtained by the defendant as a result of the unlawful acts;
- (b) the lost profit incurred by the breeder as a consequence of the unlawful acts; or
- (c) the price which the infringer would have paid the breeder for a contractual license under the conditions for legitimate use of the new plant variety.

**Article 49
Penalties**

The following shall constitute a crime of infringement of the breeder's right which, without prejudice to the corresponding civil liabilities, shall be punishable by a fine of 50,000 to 100,000 quetzals:

- (a) a person who produces material of a variety that is protected or covered by Article 15 of this Law without the authorization of the holder of the variety;
- (b) a person who trades in material of a protected variety, with the knowledge that such material has been obtained in infringement of the rights of the holder of the breeder's right; or
- (c) a person who contracts to transport propagating material of a protected variety to a territory outside the scope of this Law without special authorization from the holder of the right.

Subject to the stipulations of this Law, the provisions governing the enforcement of rights conferred with regard to a patent shall be applicable *mutatis mutandis* to the enforcement of rights under a breeder's right.

A person who performs an act requiring the authorization of the holder in accordance with Article 15 of this Law or in any manner infringes the rights conferred on the breeder under this Law shall be liable for damages. Such damages shall be calculated by the competent authority in accordance with the provisions of Article 48 of this Law.

Upon request by the rightholder, the court may, through ancillary proceedings, order the suspension of the reported acts, or any other applicable measure provided for by ordinary law. The judge may order immediate precautionary measures if the holder supports his request with evidence of the infringement or imminent infringement, provided he offers sufficient security.

TITLE V FINAL AND TRANSITIONAL PROVISIONS

Article 50 Cooperation With Regard to the Examination

VISAR shall be empowered to enter into administrative cooperation agreements with national agencies the competent authorities of other countries for technical examinations and for the verification of the maintenance of the varieties to be protected.

Article 51 Regulations

At the request of MAGA, the Executive Authority shall issue the regulations within a period of no more than one hundred and twenty (120) days following the entry into force of this Law.

Article 52

Provisions that do not comply with the provisions of this Law shall be abrogated.

Patents for plant varieties granted under the provisions of the Law on Industrial Property that are repealed shall remain valid until their expiration.

Applications for patents for plant varieties which are being processed when this Law enters into force shall be converted into applications for the grant of breeder's rights.

Such conversion shall be requested in writing within a period of twelve (12) months following the date of entry into force of this Law.

Article 53 Validity

This Law shall enter into force ninety (90) days after its publication in the Official Gazette.

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Fin de l'Annexe II et du document /
Ende der Anlage II und des Dokuments /
Fin del Anexo II y del documento]