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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

COUNCIL**Fortieth Ordinary Session
Geneva, October 19, 2006****EXAMINATION OF THE CONFORMITY OF THE
DRAFT LAW ON THE PROTECTION OF NEW VARIETIES OF PLANTS
OF THE REPUBLIC OF GUATEMALA WITH THE
1991 ACT OF THE UPOV CONVENTION***Document prepared by the Office of the Union*Introduction

1. By letter dated September 20, 2006, His Excellency Mr. Bernardo López Figueroa, Minister for Agriculture, Livestock and Food of the Government of the Republic of Guatemala (hereinafter referred to as "Guatemala"), requested the examination of the "Draft Law 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"). Translations provided by the Office of the Union in English of the letter and the Draft Law are reproduced in Annexes I and II of this document. The letter and the Draft Law in Spanish, as provided by the Government of Guatemala, are reproduced in Annexes I and II of the Spanish version of document C/40/15.

2. Guatemala did not sign the 1991 Act. In conformity with Article 34(2) of the 1991 Act, it therefore has to deposit an instrument of accession in order to become a Contracting Party on the basis of the 1991 Act. Under Article 34(3) of the 1991 Act, an instrument of accession 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 1991 Act, and if the decision of the Council embodying the advice is positive.

Basis for the Protection of New Plant Varieties in Guatemala

3. In Guatemala, the protection of new plant varieties 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 1991 Act: Definitions

4. Article 3 of the Draft Law contains definitions of relevant terms used in the Draft Law. In particular, the definition of “variety” conforms with the definition in Article 1(vi) of the 1991 Act. In addition, the definition of “breeder” in Article 3 and the provisions in Article 12(1) and (3) of the Draft Law concerning the person entitled to file for protection conform with the definition of breeder in Article 1(iv) of the 1991 Act.

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

5. Article 1 of the Draft Law provides that the purpose of the Law is the recognition and protection of the rights of the breeder in a new plant variety. This fulfills the basic obligation in Article 2 of the 1991 Act.

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

6. Article 4 of the Draft Law provides that “the Law will apply to 15 genera and species” and, by the expiration of a period of ten years, it will apply to all genera and species. The Draft Law conforms with Article 3(2) of the 1991 Act.

Article 4 of the 1991 Act: National Treatment

7. Article 5 of the Draft Law contains provisions concerning national treatment in conformity with the requirements of Article 4 of the 1991 Act.

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

8. Articles 7 to 11 of the Draft Law contain the conditions of protection in conformity with the provisions of Articles 5 to 9 of the 1991 Act.

9. Article 55 of the Draft Law provides for a transitional novelty regime for varieties of recent creation in line with Article 6(2) of the 1991 Act.

Article 10 of the 1991 Act: Filing of Applications

10. Article 34 of the Draft Law deals with the filing of applications. The Draft Law does not contain provisions which conflict with Article 10 of the 1991 Act.

Article 11 of the 1991 Act: Right of Priority

11. Article 35 of the Draft Law contains provisions concerning the right of priority in conformity with Article 11 of the 1991 Act.

Article 12 of the 1991 Act: Examination of the Application

12. Articles 36 to 39 of the Draft Law contain provisions concerning the examination of the application in line with Article 12 of the 1991 Act.

Article 13 of the 1991 Act: Provisional Protection

13. Article 19(2) and (3) of the Draft Law contains provisions on provisional protection that conform with Article 13 of the 1991 Act.

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

14. Article 15 of the Draft Law incorporates the scope of the breeder's right in line with Article 14 of the 1991 Act. Article 15(2)(b) of the Draft Law also provides for the optional provision of Article 14(3) of the 1991 Act concerning "acts in respect of certain products".

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

15. Article 16 of the Draft Law contains provisions concerning the exceptions to the breeder's right which conform with Article 15 of the 1991 Act.

16. Article 16(2) of the Draft Law provides for the optional exception under Article 15(2) of the 1991 Act. Article 16(3) of the Draft Law provides that varieties of fruit, ornamentals and forest species are excluded from this exception and that the regulations will introduce additional limitations to Article 16(2), as considered appropriate.

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

17. Article 17 of the Draft Law contains provisions concerning the exhaustion of the breeder's right which conform with Article 16 of the 1991 Act.

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

18. Article 22 of the Draft Law contains provisions concerning compulsory licenses for reasons of public interest which conform with Article 17 of the 1991 Act. Article 22(4) of the Draft Law stipulates that the beneficiary of the compulsory license should ensure that the breeder receives equitable remuneration.

Article 18 of the 1991 Act: Measures Regulating Commerce

19. Article 18 of the Draft Law contains the principles of Article 18 of the 1991 Act. Furthermore, the Draft Law does not contain any provision which conflict with Article 18 of the 1991 Act.

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

20. Article 19(1) of the Draft Law contains provisions concerning the duration of the breeder's right in line with Article 19 of the 1991 Act.

Article 20 of the 1991 Act: Variety Denomination

21. Articles 44 to 47 of the Draft Law contain provisions on variety denominations in line with Article 20 of the 1991 Act.

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

22. Article 24 of the Draft Law contains provisions on nullity of the breeder's right in line with Article 21 of the 1991 Act. In order to facilitate the understanding of the complete scope of the reason for nullity in Article 21(1)(iii) of the 1991 Act, it is recommended to modify Article 24(1)(c) of the Draft Law as follows (additional text underlined):

“(c) That the breeder's right has been granted to a person who is not entitled to it, unless it is transferred to the person who is so entitled in conformity with the provisions of Article 14”.

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

23. Article 25 of the Draft Law contains provisions on the cancellation of the breeder's right in line with Article 22 of the 1991 Act. To facilitate the understanding of the reasons for cancellation of this provision, the following drafting changes are recommended to be added after the first sentence in Article 25 of the Draft Law: “(2) Furthermore, the breeder's right shall be cancelled:”. It is further proposed to replace “(d)” by “(3)” and “(e)” by “(4)” since those paragraphs concern procedural matters and not reasons of cancellation.

Article 30 of the 1991 Act: Implementation of the Convention

24. Articles 52 and 53 of the Draft Law refer to the relevant civil and criminal actions and remedies to enforce the breeder's right. Those actions include border measures as well as specific provisions for non-compliance or misuse of variety denominations. The Draft Law complies with the obligation under Article 30(1)(i) of the 1991 Act.

25. Articles 27 and 42 of the Draft Law provide that the authority responsible for the implementation and administration of the Law including the granting of breeders' rights is the "Area Fitozoogenética de la Unidad de Normas y Regulaciones del Ministerio de Agricultura, Ganadería y Alimentación" (Phytozoogenetic Area of the Standards and Regulations Unit of the Ministry of Agriculture, Livestock and Food). Thus, the Draft Law conforms with the obligation under Article 30(1)(ii) of the 1991 Act.

26. Article 31 of the Draft Law specifies the information that will be published in "The Breeders' Rights Journal" in line with the obligation under Article 30(1)(iii) of the 1991 Act. Furthermore, Article 40 of the Draft Law provides that the applications for grants of the breeders' rights shall also be published in the "Official Gazette".

General Conclusion

27. In the opinion of the Office of the Union, the Draft Law incorporates the substance of the 1991 Act, and once adopted without substantive changes, it would enable Guatemala "to give effect" to the provisions of the 1991 Act, as required by its Article 30(2).

28. *The Council is invited to:*

(a) take note of the information given above;

(b) take a positive decision 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.

[Annexes follow]

ANNEX I

From: Minister for Agriculture, Livestock and Food, Guatemala, C.A.

To: Dr. Kamil Idris, Secretary-General, International Union for the Protection of New Varieties of Plants (UPOV), Geneva

Ref. No.: DM-605-2006

Guatemala, September 20, 2006

Dear Secretary-General,

I have the pleasure to inform you that the Draft Law for the Protection of New Varieties of Plants is currently being examined by the members of the Honorable Congress of the Republic of Guatemala.

The Republic of 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 March 19, 1991 (UPOV Convention)). In accordance with Article 34(3) of the Convention, the Government of the Republic of Guatemala therefore requests the Council under the Convention to issue an opinion in that regard, in accordance with the Draft Law for the Protection of New Varieties of Plants.

Yours sincerely,

(signed and stamped)

Mr. Bernardo López Figueroa,

[Annex II follows]

ANNEX II / ANNEXE II / ANLAGE II

[Original: Spanish / Original : espagnol / Original: spanish]

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DRAFT LAW
FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

TITLE I
PURPOSE AND SCOPE OF THE LAW

Article 1.- Purpose

The purpose of this Law is to recognize and protect the rights of the breeder of a new plant variety, covered by a plant protection title.

Article 2.- Scope

This Law shall be enforced throughout the national territory.

Article 3.- Definitions

The following meanings shall be used for the purposes of this Law:

AREA: Phytozoogenetic Area of the Standards and Regulations Unit of the Ministry of Agriculture, Livestock and Food,

MAGA: Ministry of Agriculture, Livestock and Food;

Breeder: Natural person or legal entity that has created or discovered and developed a variety;

Regulations: Implementing Regulations for the Protection of New Varieties of Plants;

Title holder: Natural person or legal entity that holds the breeder's right;

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 the subject of a breeder's right; defined by the description established by Article 38(1)(c) and by the sample referred to in Article 51(1)(a) and identified by the denomination defined in Article 7(1)(e) and in Article 46.

Article 4.- Genera and species to be protected

This Law shall apply to 15 plant genera or species listed in the respective regulations.

Within a period of ten years from the date of entry into force of this Law, it shall apply to all plant genera and species.

Article 5.- Nationality, domicile and headquarters

1. The following shall benefit from the rights provided for by this Law:

- (a) Nationals of Guatemala and all persons that have their domicile or main business address in the country;
- (b) Where Guatemala is a party to an international agreement relating to obtaining and the grant of protection for new varieties of plants, the same rights as provided for in this Law shall be granted to nationals or residents of the members party to the said agreement.

Article 6.- Legal representation

In order to be a party to proceedings in accordance with this Law and to avail itself of the rights resulting therefrom, the breeder shall be domiciled in Guatemala or shall appoint a legal representative domiciled in Guatemala.

TITLE II

MATERIAL LAW

CHAPTER I

CONDITIONS FOR THE GRANT OF THE BREEDER'S RIGHT

Article 7.- Conditions for the grant

1. The breeder's right shall be granted where the variety is:

- (a) new;
- (b) distinct;
- (c) uniform and;
- (d) stable; and
- (e) has obtained the registration of the variety denomination, in accordance with this Law.

Article 8. - Novelty

The variety shall be new if, at the priority date or 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.

- (a) in the territory of Guatemala, earlier than one year before that date, and
- (b) in a territory other than Guatemala, earlier than four years or, in the case of trees or of vines, earlier than six years before that date.

2. The condition of novelty shall not be lost as a result of selling a variety or otherwise disposing of it to others:

- (a) where it is the result of misuse committed to the detriment of the breeder or of his successor in title;
- (b) where it is part of an agreement to transfer the right in the variety;
- (c) where it is part of an agreement under which a third person has increased, on behalf of the breeder or of his successor in title, the existence of propagating material of the variety in question, provided that the propagated material is once again under the control of the breeder or of his successor in title, and provided that the said material is not used to produce another variety;
- (d) where it is part of an agreement under which a third person has carried out field or laboratory tests, or small-scale research tests to evaluate the variety;
- (e) where it is part of the fulfillment of a legal or regulatory obligation, in particular one that relates to biological safety or to the entry of varieties in an official register of varieties suitable for marketing, or
- (f) where the subject is harvested material that constitutes a secondary or surplus product obtained as part of the creation of the variety or the activities mentioned in sections (c) to (e) of this Article, provided that the product is sold or anonymously disposed of, without the variety being identified, for consumption purposes.

Article 9.- Distinctness

1. The variety shall be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application or, where appropriate, at the priority date.

2. In particular, the filing of an application for the granting of a breeder's right or for entry in an official register of varieties suitable for marketing, in any country, shall be deemed to render the variety that is the subject of the application 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 to entry in the register, as the case may be.

3. The common knowledge of the existence of another variety may be established by means of different references such as commercial exploitation of the variety already in progress, entry of the variety in a register of varieties kept by a recognized professional association, or the presence of the variety in a reference collection.

Article 10.- Uniformity

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

Article 11.- Stability

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

CHAPTER II

PERSONS ENTITLED TO PROTECTION

Article 12.- Principles

1. The breeder or his successor in title shall have the right to apply for a breeder's right.
2. Where several persons have jointly created or discovered and developed a variety, they shall have the right to joint protection, unless stipulated otherwise by the cobreeders. The cobreeders shall have equal rights in the variety.
3. Where the breeder is an employee, the right to apply for a breeder's right shall be governed by the employment contract under which the variety has been created or discovered and developed.

Article 13.- Presumption of ownership

1. The applicant shall be deemed to be the owner of the right to protection.
2. Where the application is filed by a successor in title, it shall be accompanied by sufficient proof of ownership.

Article 14.- Judicial transfer of the breeder's right application or of the breeder's right

1. Where a person not entitled to protection has filed a breeder's right application, the lawful owner may file a request for the rights in the application to be transferred to him, or for the breeder's right to be transferred to him, where that right has already been granted.
2. The action to request the transfer of the breeder's right shall lapse after five years, beginning from the date of publication of the grant of the breeder's right. The said period shall not operate where it is shown that the claimant acted in bad faith.
3. Where the request is successful, the rights granted to third parties on the basis of the application or, where appropriate, transfers of the breeder's right, shall be without effect. Notwithstanding, the holders of an exploitation right acquired in good faith, who have taken effective and serious measures intended to benefit from that right, before the notification date of the request or, failing that, the final decision, may perform or continue performing the acts of exploitation resulting from the measures which they have taken, provided that fair remuneration is paid to the successor in title.

CHAPTER III

OWNER'S RIGHTS

Article 15.- Scope of the breeder's right

1. Subject to Articles 16 and 17 of this Law, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

- (a) production or reproduction (multiplication);
- (b) preparation or conditioning for the purpose of propagation;
- (c) offering for sale;
- (d) selling or other marketing;
- (e) exporting;
- (f) importing; or
- (g) stocking for any of the purposes mentioned in (a) to (f), above.

2. Subject to Articles 16 and 17 of this Law the acts referred to in the previous paragraph shall require the authorization of the owner in respect of:

- (a) harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety, unless the owner has had reasonable opportunity to exercise his right in relation to the said propagating material, and
- (b) products made directly from harvested material of the protected variety falling within the provisions of paragraph (a) above, through the unauthorized use of the said harvested material, unless the owner has had reasonable opportunity to exercise his right in relation to the said harvested material.

3. (a) The provisions of the above paragraphs shall apply 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 in accordance with Article 9 from the protected variety, and
- (iii) varieties whose production requires the repeated use of the protected variety.

(b) For the purposes of subparagraph (a)(i) above, 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 done privately and for non-commercial purposes;
- (b) acts done for experimental purposes; and
- (c) acts done for the purpose of breeding new varieties, and, except where the provisions of Article 15(3) apply, acts referred to in Article 15(1) and (2) in respect of such varieties.

2. Any person using the harvested material which has been obtained by growing, on its own holding, the protected, essentially derived or insufficiently distinguishable variety, for the purposes of propagation on its own holding, shall not infringe the breeder's right.

3. The use of propagating material, including entire plants and parts thereof, for fruit, ornamental and forest species shall not be covered by the provisions of paragraph (2) of this Article. Where appropriate, the regulations shall incorporate other exceptions to paragraph (2) of this Article.

Article 17.- Exhaustion of the breeder's right

1. The breeder's right shall not extend to acts concerning the material of the protected variety, or of a variety covered by the provisions of Article 15(3), which has been sold or otherwise marketed by the breeder or with his consent in the territory of Guatemala, unless such acts:

- (a) involve further propagation of the material of a protected variety;
- (b) involve an export of material of the protected variety, which enables the propagation of the variety, into a country which 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 paragraph (1), “material” means, in relation to a variety:
 - (a) propagating material of any kind,
 - (b) harvested material, including entire plants and parts of plants, and
 - (c) any product made directly from the harvested material.

Article 18.- Economic regulation

The breeder’s right shall be independent of any measure taken by the State to regulate the activities concerned with the production and marketing of varieties.

Article 19.- Validity of the breeder’s right. Provisional protection.

1. The breeder’s right shall be valid for 25 years for trees and vines, and for 20 years for all other plants. In all cases, the validity shall extend from the date of grant until December 31 of the year of expiration.
2. The applicant shall enjoy provisional protection and all the rights provided for by this Law, from the date of filing of the application.
3. All applicants shall note in all their proceedings with third parties that in the use of their rights they shall enjoy provisional protection during the period between the filing of the application and the grant of the right.

CHAPTER IV

THE BREEDER’S RIGHT AS A SUBJECT OF OWNERSHIP

Article 20.- Transfer of ownership

1. The breeder’s right shall constitute intellectual property subject matter and, unless provided for otherwise in this Law, the relevant general legal standards shall apply to it.
2. Such rights may be the subject of a transfer to one or more successors in title. Such a transfer shall be formalized in writing.
3. Any act through which the breeder’s right is transferred or modified shall not affect the rights acquired by third parties prior to the date of the said act.
4. An act through which a breeder’s right is transferred or modified shall be binding on third parties from the time when it has been registered with MAGA.
5. Notwithstanding, prior to its entry an act shall be binding on third parties that have acquired the rights after the date of that act, but who knew of the existence of that act when acquiring such rights.

CHAPTER V

EXPLOITATION LICENSES

Article 21.- Licenses

Exploitation licenses shall be granted as stipulated by the respective regulations, in the following manner:

1. The applicant or owner may grant to third parties an exclusive or non-exclusive license which covers all or part of the owner's rights provided for in this Law.
2. The license shall be granted by means of a written contract.
 - (a) The exclusive license or non-exclusive licenses shall be entered in the Register of Applications or in the Register of Rights, as the case may be, and shall be published through MAGA.
 - (b) Licenses shall be binding only on a person who, in good faith, has acquired rights in the breeder's right, and if they have been registered on the acquisition date.

Article 22.- Compulsory licenses

1. By filing an application with the Area, any person may request the grant of a compulsory license corresponding to the breeder's right. The Area shall grant the compulsory license only where this is necessary to safeguard the public interest.
2. In addition, the compulsory license shall be granted only if the following conditions are satisfied:
 - (a) The applicant shall prove that it has sufficient capacity to carry out the exploitation and shall prove that it has tried to obtain the authorization of the rights' owner on reasonable commercial terms and conditions and those attempts have not produced any effect within a reasonable period;
 - (b) Three years have elapsed between the date of grant of the breeder's right and the application date for the grant of the compulsory license; and
 - (c) The person applying for the grant of the compulsory license has paid the fee provided for in the Regulations for the grant of the said compulsory license.
3. The compulsory license shall confer on its beneficiary the non-exclusive right to carry out all, or some, of the acts covered by Article 15, with a view to supplying the national market.
4. When granting a compulsory license, the Area shall fix the conditions subject to which it grants the license, limit the scope and duration to the authorized purposes, and establish equitable remuneration which the beneficiary of the compulsory license shall pay to the owner. The beneficiary of the compulsory license shall pay a security as a guarantee of the payment of the remuneration to the owner and shall settle the corresponding fee with the Area.

5. The Area may request the owner to make available to the beneficiary of the compulsory license the amount of propagation material that is necessary for reasonable use of the compulsory license, provided that appropriate remuneration is paid.

6. The Area shall fix the duration of the compulsory license. The compulsory license shall not, other than in extraordinary circumstances, have a duration of less than two or more than four years. The license may be extended if the Area is convinced, on the basis of a new examination, that the requirements for the grant of the license still exist, once the first expiration date has passed.

7. The Area shall withdraw the compulsory license if its beneficiary infringes the requirements for its grant.

8. Before granting a compulsory license, the Area may hear the national professional organizations from the activity sector in question. A Ministerial Agreement declaring the act to be of public interest shall be issued.

CHAPTER VI

LAPSE OF THE BREEDER'S RIGHT

Article 23.- Premature expiration

The breeder's right shall expire before the period provided for in Article 19(1) where the abandonment submitted by the owner in the form of a written statement to the Area is registered.

Article 24.- Nullity of the breeder's right

1. The breeder's right shall be declared null and void, if it is verified that:

- (a) the variety was not new or distinct on the application filing date or, where applicable, on the priority date;
- (b) where the grant of the breeder's right is based essentially on the information and documents supplied by the applicant, the variety was not uniform or stable on the date referred to; or
- (c) the breeder's right was granted to a person who did not have the right thereto, in accordance with the provisions of Article 14.

2. When being declared null and void, the breeder's right shall be deemed not to have been granted.

Article 25.- Cancellation of the breeder's right

1. The breeder's right shall be cancelled if it is verified that the variety is no longer uniform or stable.

- (a) If it is planned to cancel the variety denomination and the owner does not submit another suitable denomination, in accordance with Article 47, during the period granted.
- (b) If the breeder, in response to the requirement of the Area, does not submit the documentation or material considered necessary for verifying the maintenance of the variety.
- (c) Where the breeder's right has not been cancelled on the expiration date, the annual maintenance fee for the breeder's rights.
- (d) The breeder's right shall be cancelled if, two months after notification of a cancellation request, the owner has not responded.
- (e) The cancellation shall enter into force from the date on which it is entered in the Register of Rights. It shall be published in the Breeder's Rights Journal.

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

The normal premature expiration, nullity and cancellation of the breeder's right, as defined in Articles 23, 24 and 25, as well as the grounds therefor, shall be entered in the Register of Rights. These lapses shall be published in the Breeder's Rights Journal.

TITLE III

ORGANIZATION AND PROCEDURE

CHAPTER I

**ORGANIZATION, POWERS AND
GENERAL OPERATING STANDARDS**

Article 27.- Authority responsible for the protection of new varieties of plants

All the functions established in this Law for the protection of the rights in new varieties of plants shall be performed by the Phytozoogenetic Area of the Standards and Regulations Unit of the Ministry of Agriculture, Livestock and Food.

Article 28.- Right of defense

1. All the decisions taken by the Area, which harm the interests of a party to proceedings, shall be communicated to said party, accompanied by the reasoning on which the decisions are based.
2. The said party shall have the possibility to make observations, either orally or in writing, within 30 days of the date on which the communication is received.

Article 29.- Appeal

The decisions taken by the Area may be appealed in accordance with the provisions of the Law on Administrative Litigation.

Article 30.- Registrations. Keeping of records

1. The Area shall keep a Register of Applications and a Register of Rights. The Registers shall be public.
2. Any interested person may:
 - (a) consult the documents relating to the application;
 - (b) consult the documents relating to a breeder's right already granted, and
 - (c) visit the growth tests and examine the other necessary tests, carried out under Article 38 or Article 50.
3. In the case of varieties whose production requires the repeated use of other varieties (components), when filing the application the applicant may request that the documents and tests relating to the components be exempt from advertising measures.
4. The Area shall keep the records, originals or reproductions, for a period of five years from the date of withdrawal or rejection of the application, or where appropriate, the date of lapse of the breeder's right.

Article 31.- Official publication

The Area shall publish twice a year, for information purposes, the Breeder's Rights Journal which shall contain the following information:

- (a) applications for the grant of breeder's rights;
- (b) applications for variety denominations;
- (c) registration of new denominations for 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) grant of breeder's rights;
- (g) amendments relating to persons (applicants, owners and representatives);
- (h) lapse of breeder's rights;
- (i) transfers of ownership;
- (j) contractual and compulsory licenses;
- (k) official announcements; and
- (l) lists of plant genera or species to which this Law applies.

Article 32.- Fees

1. The administrative acts of the Area in the application of this Law shall give rise to the payment of a fee, which shall be fixed by regulation so as to cover all the expenses generated in the provision of the following services:

- (a) for the processing of an application for a plant variety title;
- (b) for the conduct of a technical examination of the variety;
- (c) for the grant of the plant variety title;
- (d) for the publication of rulings in the Official Gazette and in the Breeder's Rights Journal;
- (e) for the annual maintenance of breeder's rights;
- (f) restitution of the right;
- (g) change of denomination, transfer of ownership, operating licenses, and dispatch of copies, certificates and duplicates of any document;
- (h) for the restoration of a title already revoked;
- (i) compulsory license fee;
- (j) Where the Area has agreed that the technical examination shall be carried out by a natural person or legal entity recognized by MAGA as a service provider, the fee to be paid for the conduct of the technical examination of the varieties established in Article 32(1)(b) shall, in these cases, be the actual amount that the Area shall pay to the Institution carrying out the examination, including a percentage determined by regulation.

2. The natural persons or legal entities that request and receive from the Area any of the services defined in this Law shall pay these fees.

3. The funds generated by the payments for the services provided and the financial resources established shall be deposited in a special MAGA account, opened with any of the banks in the national banking system, and shall be administered subject to the relevant inspections.

4. The funds in question shall be used to strengthen the annual programs devised by the Area.

5. These funds shall be used exclusively to fulfill the purposes of this Law, subject to the responsibility of those that legally administer it.

Article 33.- Restoration of the right

1. A title holder, whose rights were suspended in accordance with this Law and who demonstrates the opposite to the Area, shall have his rights restored.

2. The request shall be submitted within a maximum period of 12 months, from the time when the right ceases.

The said request shall be reasoned and accompanied by the fee for the restoration of the right.

3. The Area shall assess whether the application meets the requirements established for processing.

4. Where the claimant has his rights restored, he may not invoke those rights against third persons who, in good faith, have exploited his variety or taken serious steps with a view to exploitation, between the date on which the rights were lost and the date of publication of the restoration of the rights.

CHAPTER II

APPLICATION

Article 34.- Forms and content of the application

1. Any person who wishes to obtain protection for a plant variety shall file an application with the Area and shall pay the corresponding fee.

2. The application shall include at least the following information which, if not provided in accordance with Article 36(3), shall lead to the application being deemed rejected:

- (a) name and address of the applicant and, where applicable, those of his representative with his identity card number;
- (b) name, identity card and address of the breeder, where this is not the applicant;
- (c) identification of the botanical taxon (Latin name and common name);
- (d) denomination proposed for the variety, or a provisional designation;
- (e) where priority is claimed, the date and authority with which the priority application was filed;
- (f) technical description of the variety;
- (g) proof of payment of the application fee, and
- (h) signature of the applicant.

3. The form and detailed content of the application, and also any documents to be attached, shall be defined in the Regulations under this Law.

Article 35.- Priority

1. The applicant may benefit from the priority of an earlier application, filed lawfully for the same variety by himself or by his predecessor in title with the authority of a contracting

party to an international agreement related to the grant of protection for plant varieties, to which Guatemala is also a party, in accordance with the provisions of this Law.

2. If the application filed with the Area has been preceded by various applications, the priority may be based only on the earliest application.

3. Priority shall be claimed, in specific form, in the application filed with the Area. It may be claimed only within 12 months of the filing date of the first application. It shall expire on the day provided for during the period.

4. In order to benefit from the right of priority, the applicant shall supply the Area, within three months of the filing date, in accordance with Article 36(4), with a copy of the first application, certified as true by the authority of the Contracting Party that has received it.

5. Where the communication is not in Spanish, the Area may request a translation of the first application to be provided, within three months of the date on which the communication is received, in accordance with the Law on Judicial Authority regarding documents received from abroad.

6. The effect of the priority shall be such that the application shall be deemed to have been filed on the date on which receipt of the first application was recorded, with respect to the conditions of protection linked to the variety.

7. In addition, the applicant shall be authorized to request a postponement of a maximum of two years, beginning from the date of expiry of the priority term (three years beginning from the date on which receipt of the first application was recorded) for the examination of the variety. Notwithstanding, if the first application is rejected or is withdrawn, the Area may undertake the examination of the variety before the date indicated by the applicant; in that case, the applicant shall be granted an appropriate period to supply the information, documents or material necessary for the examination.

CHAPTER III

PROCESSING OF THE APPLICATION

Article 36.- Examination as to formal requirements of the application

1. The Area shall examine the application in relation to form, according to the information specified in Article 34(2).

2. If the application is clearly unacceptable owing to the botanical taxon to which the variety belongs, the documents contained in the application shall be returned to the applicant and the application fee shall be reimbursed to him.

3. If the application is incomplete or does not comply, the Area shall request the applicant to correct it within 30 days beginning from the date of receipt of the notification. Any application that has not been corrected within the period granted shall be considered not to exist.

4. A filing date shall be assigned to a complete application in conformity, which shall be entered in the Register of Applications. The filing date shall be deemed to be the date on which the Area has received the items of information mentioned in Article 34(2).

Article 37.- Substantive examination of the application

1. The Area shall examine the application as to its substance in order to verify, on the basis of the information supplied in the application, that the variety is new and that the applicant is authorized according to Article 12.

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

Article 38.- Technical examination of the variety

1. The variety shall be subject to a technical examination, the purpose of which shall be to:

- (a) verify that the variety belongs to the botanical taxon announced,
- (b) determine that the variety is new, distinct, uniform and stable, and
- (c) where it has been verified that the variety satisfies the conditions mentioned, establish the official description of the variety.

2. The technical examination shall be conducted, subject to the following conditions:

- (a) The technical examination shall be conducted under the supervision of the Area.
- (b) Where growth tests and other necessary tests have been carried out or are being carried out by the authority of another contracting party to an international agreement related to the grant of protection for plant varieties, to which Guatemala is also a party, and the results may be obtained by the Area and may be transposed to the agricultural and climatic conditions of Guatemala, the examination may be based on the said results.
- (c) Where the examination is not based on the results obtained pursuant to paragraph (b), the examination shall be based on growth tests and on the other necessary tests carried out by:
 - (i) the Area or by a third institution subject to a contract, or
 - (ii) the applicant at the request of the Area.

3. The Area shall determine the practical arrangements for the examination.

4. The official description mentioned in paragraph 1(c) may be completed or amended subsequently in accordance with changes in agricultural and botanical knowledge, without the subject matter of the protection being amended thereby.

Article 39.- Information, documents and material required for the examination

1. The applicant shall supply all the necessary information, documents or material required by the Area for the purposes of the technical examination.

2. Apart from in the case of *force majeure* alleged by the applicant, the lack of such information shall be sanctioned through the rejection of the application.

Article 40.- Publication of the application; objections relating to the grant of the breeder's right

1. The application shall be the subject of a ruling in the Official Gazette, containing at least the information referred to in Article 34(2).

2. Once the application has been published, any person may file with the Area, within two months of the publication date, objections relating to the authorization of the breeder's right.

3. Those objections shall be made in writing and shall be supported by evidence. The documents serving as evidence shall be attached.

4. The objections shall enable it to be proven exclusively that the variety is not new, distinct, uniform or stable, or that the applicant is not entitled to protection, in accordance with Article 12.

Article 41.- Objections

1. Objections shall be communicated immediately to the applicant who shall have a period of three months from the date of the respective notification to express his opinion on the objections and specify whether he has the intention to maintain his application, amend it or withdraw it; the period may be extended on the basis of a reasoned request by the applicant.

2. If the applicant does not respond within the fixed period, the application shall be deemed to have been withdrawn. If in response he maintains the application, with or without amendments, his response shall be communicated to the author of the objection, who shall have 30 days to express his opinion on the response and specify whether he intends to maintain his objection or to withdraw it.

3. Objections shall be analyzed in the following manner:

(a) The objections maintained shall be analyzed:

(i) independently of the normal procedure for analyzing the application, where the lack of novelty of the variety or the lack of the applicant's title is invoked, or

(ii) within the framework of the technical examination of the variety, where the lack of distinctness, uniformity or stability is invoked.

(b) The Area may decide to amend the arrangements for the technical examination of the variety, with a view to achieving better support against the objection.

4. The author may be requested to provide additional information and documents in support of his objection, together with the plant material necessary for the technical examination, through the procedure established under Article 39.

Article 42.- Grant of the breeder's right

1. The Area shall grant the breeder's right where, as a result of the technical examination of the variety, it verifies that the variety fulfills the conditions of Article 7 and the applicant has satisfied the other requirements of this Law.
2. The grant of the breeder's right shall be entered in the Register of Applications.
3. The breeder's right shall also be entered in the Register of Rights and shall be published in the Journal of the Breeder's Rights Office. The description of the variety may be included in the Register through a reference to the Area's technical records.

Article 43.- Rejection of the application for the breeder's right

The Office shall reject the application if it verifies that the application does not meet the requirements of this Law and the rejection shall be entered in the Register of corresponding applications.

CHAPTER IV

VARIETY DENOMINATION

Article 44.- Subject of the denomination and signs liable to constitute a denomination

1. The variety shall be designated by a denomination which will be its generic designation.
2. The following elements may constitute denominations: all the words, combinations of words, combinations of words and figures, and combinations of letters and figures that have or do not have a pre-existing meaning, provided that such signs are used to identify the variety.
3. Where a denomination has already been proposed or registered in another contracting party to an international agreement related to the grant of protection for plant varieties, to which Guatemala is also a party, this denomination may be retained only for the purposes of proceedings before the Area, unless there are grounds for rejection under Article 45. Possible synonyms shall be mentioned in the Register of Applications and in the Register of Rights.
4. Any person offering for sale, selling or marketing in any other form propagating material of a protected variety shall use the denomination of this variety. This obligation shall also apply to the varieties mentioned in Article 15(3)(a)(ii).
5. The obligation to use a denomination shall not end with the breeder's right that gave rise to it.
6. The prior rights of third parties shall be reserved.
7. Where a variety is offered for sale or is marketed in another way, the use of a factory or trademark, trade name or similar indication in relation to the denomination of the registered variety shall be permitted, provided that the denomination may be easily recognized.

Article 45.- Grounds for rejection

1.
 - (a) Registration as a denomination of varieties shall be refused for designations which:
 - (I) do not comply with the provisions of Article 44;
 - (II) are not appropriate for identifying the variety, in particular owing to a lack of distinctive character or of linguistic suitability;
 - (III) are contrary to public order and decency,
 - (IV) consist exclusively of signs or indications that may be used, in the sector of varieties and seeds, to designate the species, quality, quantity, purpose, value, geographical origin or period of production.
 - (V) The denomination shall enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It shall not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it shall be different from any denomination which designates, in the territory of any of the Contracting Parties to an international agreement related to the grant of protection for plant varieties, to which Guatemala is also a party, an existing variety of the same plant species or of a closely related species. The latter shall be stipulated by the Area.
2. Registration as a denomination for varieties shall be refused for designations that contain an element that hampers or is liable to hamper the free use of the denomination in relation to the variety, in particular an element whose registration as a mark for products connected to the variety would be rejected pursuant to the law on marks.
3. Registration shall be refused for the said designations by means of an objection, submitted in writing to the Area, by the owner of the rights in the element in question.

Article 46.- Registration procedure

1.
 - (a) The denomination proposed for the variety, for which protection is applied for, shall be filed at the same time as the application, together with the sample.
 - (b) Subject to the payment of a special fee and to the indication of a provisional designation in the application, the applicant may defer the denomination registration procedure. In that case, the applicant shall submit the proposed denomination within 30 days of the date of receipt of the invitation sent to him by the Area. If the proposal is not submitted within the fixed period, the application shall be rejected.
2. The proposed denomination shall be published in the Official Breeder's Rights Journal, apart from where the Area verifies that grounds for rejection exist under Article 45(1)(a) or 45(2)(a). The proposal shall also be communicated to the authorities of the Contracting Parties.

3. Any interested person may, within three months of the publication, submit an objection to the registration of the denomination, based on any of the grounds for rejection provided for in Article 45. The authorities of other contracting parties to an international agreement related to the grant of protection for plant varieties, to which Guatemala is also a party, may make observations.
4. The objections and observations shall be communicated to the applicant, who shall have 30 days to respond to them.
5.
 - (a) The applicant may, on the basis of the objections and observations, submit a new proposal.
 - (b) Where the proposed denomination does not comply with the provisions of Article 45, the Area shall invite the applicant to submit a new proposed denomination within 30 days of the date of receipt of the notification. If the proposal is not submitted within the fixed period, the application shall be rejected.
6.
 - (a) The new proposal shall be subject to the examination and publication procedure provided for in this Article.
 - (b) Where the new proposal does not comply with the provisions of Article 45, the Area shall instruct the applicant to submit a denomination which complies. If the applicant does not obey the instruction, the application shall be rejected.
7. Where objections and observations have been received, the Area's decisions shall be justified and notified to the parties. The rejection of a proposed denomination shall also be justified.
8. The denomination shall be registered at the same time as the breeder's right is granted.

Article 47.- Cancellation of a denomination and registration of a new denomination

1. The Area shall cancel the registered denomination
 - (a) if it verifies that the denomination was registered despite the existence of grounds for rejection in accordance with Article 45(1)(a).
 - (b) if a third party submits a judicial ruling that prohibits the use of the denomination in relation to the variety.
2. The Area shall inform the owner of the proposed cancellation and shall notify him so that he submits a new proposed denomination within 30 days of the date of receipt of the notification. If the variety is no longer protected, the proposal may be formulated by the Area.
3. The proposed new denomination shall be subject to the examination and publication procedure provided for in this Law. The new denomination shall be registered and published as soon as it is approved; the old denomination shall be cancelled at the same time.

CHAPTER V

MAINTENANCE OF THE VALIDITY OF THE BREEDER'S RIGHT

Article 48.- Annual fee

1. The owner shall pay an annual fee to maintain the validity of his right.
2. The fee shall be paid during the first 15 days of January of each year after the right is granted.

Article 49.- Maintenance of the variety

1. The owner shall maintain the protected variety or, where applicable, its hereditary components while the breeder's right is in force.
2. At the request of the Area, the owner shall submit to the Area and to any authority designated by it, within the fixed period, the information, documents or material deemed necessary for inspecting the maintenance of the variety.

Article 50.- Inspection of the maintenance of the variety

1. The Area shall be responsible for verifying that the variety and, where applicable, its hereditary components, are maintained during the whole period of protection.
2. Where it is suspected that the variety is not being maintained and that suspicion is not dispelled by the information and documents submitted by the owner in accordance with Article 49(2), the Area shall order an inspection of the maintenance of the variety and shall fix the procedures therefor. The inspection shall include growth tests or other tests in which the material supplied by the owner shall be compared to the official description or to the official sample of the variety.
3. Where, as a result of the inspection carried out, the Area suggests that the owner has not maintained the variety, the owner shall make a declaration, before a decision is taken to cancel the breeder's right under Article 25(1).

Article 51.- Supply of samples

1. At the request of the Area, the owner shall supply to the Area or to any authority designated by it, within the fixed period, appropriate samples of the protected variety or, where applicable, of its hereditary components for the purposes of:
 - (a) constituting or renewing the official sample of the variety, or
 - (b) carrying out a comparative examination of the varieties for protection purposes.
2. At the request of the Area, the owner shall maintain or preserve the official sample on behalf of the Area.

TITLE IV

ENFORCEMENT OF THE BREEDER'S RIGHT

Article 52.- Legal appeals

1. Any person that:

- (a) without being authorized to do so, carries out acts that require the owner's authorization under Article 15,
- (b) uses a designation in violation of Article 44(4), or
- (c) omits to use a variety denomination in violation of Article 44(4) and (5),

may be denounced by the owner or by the holder of an exclusive license, and any form of compensation shall be applicable as in any proceedings of this type instituted for an infringement of another property right.

2. Subject to the provisions of this Law, those applicable to the exercise of the rights conferred by a patent shall be applicable *mutatis mutandis* to the exercise of the rights resulting from a breeder's right.

3. Any person carrying out any act to exploit the protected variety or in any way infringing the rights conferred on the breeder by this Law shall pay compensation for damages. The competent authority may take into consideration, when calculating the compensation for damages, any of the following elements:

- (a) the amount of the profit obtained by the claimant as a result of the unlawful exploitation;
- (b) the amount which the breeder failed to collect owing to the unlawful exploitation;
or
- (c) the value that the infringing party would have paid to the breeder for the grant of a license for use on the terms on which the plant variety was unlawfully exploited.

Article 53.- Criminal sanctions

1. The offense of infringing a breeder's right shall, without prejudice to the corresponding civil liabilities, be sanctioned with a prison sentence of one to four years and a fine of 1,000 to 10,000 quetzales, and shall be committed by any persons who:

- (a) produce material of a protected variety without the consent of the owner of the variety;
- (b) trade material of a protected variety, with the knowledge that this has been obtained in violation of the rights of the owner of the breeder's right;
- (c) use repeatedly propagating material of a protected variety to produce propagating material of another variety under Article 15(3)(a)(iii);

- (d) hire the transport of the propagating material of a protected variety to a territory outside the scope of this Law, without special authorization from the rights owner.
2. Subject to the provisions of this Law, those applicable to the exercise of the rights conferred by a patent shall be applicable *mutatis mutandis* to the exercise of the rights resulting from a breeder's right.
3. Any person carrying out any act to exploit the protected variety or in any way infringing the rights conferred on the breeder by this Law shall pay compensation for damages; the damages may be calculated by the competent authority in relation to the provisions of Article 52(3).
4. At the request of the owner, the judge may, by interlocutory means, grant the suspension of the acts denounced, as well as any other applicable measure provided for by common law such as border measures. The judge may order immediate precautionary measures where the owner justifies his request with proof of the offense or that it will be committed imminently, provided that he grants a sufficient guarantee.

TITLE V

TRANSITIONAL AND FINAL PROVISIONS

Article 54.- Cooperation in examination

The Area shall be authorized to conclude administrative cooperation agreements for the technical examination of varieties and inspection of the maintenance of varieties with the authorities of the Contracting Parties to an international agreement related to the grant of protection for plant varieties, to which Guatemala is also a party, or with their supervisory authorities.

Article 55.- Protection of known varieties

1. Without prejudice to the provisions of Article 8, a breeder's right may also be granted for a variety that is no longer new on the date of entry into force of this Law with respect to the species under consideration, subject to the following conditions:

- (a) The application shall be filed within the year following the above-mentioned date, and
- (b) The variety shall:
- (i) have been entered in the Register of Commercial Varieties for Marketing or in a register of varieties kept by a professional association and accepted by the Area for the purposes of this Article;
 - (ii) have been the subject of a breeder's right or be the subject of an application for a breeder's right in a contracting party to an international agreement related to the grant of protection for plant varieties, to which Guatemala is also a party, provided that the application subsequently leads to the grant of the breeder's right, or

(iii) be the subject of proof acceptable to the Area, relative to the date on which the variety ceased to be novel, pursuant to the provisions of Article 8.

2. The duration of the breeder's right granted under this Article shall be calculated from the registration date mentioned in paragraph (1)(b)(i), the date of grant of the breeder's right mentioned in paragraph (1)(b)(ii), or the date mentioned in paragraph (1)(b)(iii) above, on which the variety ceased to be new. In cases where more than one of the situations cited in paragraph (1) above exists in relation to a variety, the earliest of these dates shall be selected.

3. Where a breeder's right has been granted under this Article, the owner shall grant licenses, on reasonable conditions, to allow the continuation of any exploitation begun in good faith by a third party, prior to the application filing mentioned.

Article 56.- Regulations. The Ministry of Agriculture, Livestock and Food shall, within a maximum period of 90 days, issue the Regulations under this Law.

Article 57.- Final provisions

The provisions and references relating to plant varieties in the Industrial Property Law of September 18, 2000, specifically Articles 97 and 98, and the second sentence of Article 93, are hereby repealed. Patents for plant varieties granted under the articles of the Industrial Property Law that are repealed shall remain valid until they expire. Patent applications for plant varieties that are being processed at the time of entry into force of this Law may be converted into applications for the grant of breeder's rights. The conversion shall be applied for in writing within 12 months of the date on which this Law enters into force.

Article 58.- Validity

This Law shall enter into force 30 days after its publication in the Official Gazette.

[End of Annex II and of document
Fin de l'annexe II et du document/
Ende der Anlage II und des Dokuments]