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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

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Geneva, April 3, 1998

EXAMINATION OF THE CONFORMITY OF THE LAWS OF BRAZIL
WITH THE UPOV CONVENTION

Document prepared by the Office of the Union

Introduction

1. At its thirteenth extraordinary session held in Rome on April 18, 1996, the Council examined, at the request of the Government of Brazil, a Government Bill (Bill No. 1457 of 1996) of Brazil (hereinafter referred to as "the Bill") for conformity with the 1978 Act of the UPOV Convention (see document C(Extr.)/13/3).
2. The Council decided (see paragraph 11 of the Report of the session, document C(Extr.)/13/4)

"..., on the basis of the conclusions drawn by the Office of the Union in paragraphs 37 to 39 of document C(Extr.)/13/3 and the suggestion by the delegation of the Netherlands,

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

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

"(c) to further advise the Government of Brazil that

“(i) after the enactment into law of the Bill incorporating the amendments suggested by the Office of the Union, but without other substantial changes, and the making of necessary Regulations, and

“(ii) after consultation of the Office of the Union as to whether the amendments and Regulations were adequate,

“it may deposit an instrument of accession to the 1978 Act (provided that such Act remained open to accession at the date of the proposed deposit).”

3. The Office of the Union had commented in paragraphs 37 and 38 of document C(Extr.)/13/3 as follows:

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

“(i) provisions concerning priority are incorporated;

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

“38. Regulations to be made under an eventual law should

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

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

The Incorporation into the Law of the Suggestions of the Council

4. Bill No. 1,457 was subsequently adopted by the Brazilian Congress and after approval by the President of Brazil was published as Law No. 9456 of April 1997 in the *Diário Oficial* on April 28, 1997, on which date it became effective. A translation of the Law (hereinafter referred to as “the Law”) is reproduced in Annex I (in English only) in the form in which it was received from the Brazilian Government on July 10, 1997. Contact between the Office of the Union and the Brazilian authorities was maintained during the legislative process with a view to ensuring to the extent possible that any amendments or additions to the Bill conformed with the Convention.

5. A team of officials from the Government of Brazil has visited and consulted with the Office of the Union on June 27, 1997, as to whether the amendments to the Bill were adequate. It also discussed with the Office of the Union a draft of its proposed implementing Regulations. A translation of Decree No. 2366 of November 5, 1997, containing the adopted Regulations (hereinafter referred to as “the Regulations”) is contained in Annex II (in English only) in the form in which it was received by the Office of the Union from the Brazilian Government on March 11, 1998 (it does not include attachments I to VIII referred to in Article 34).

6. As suggested in paragraph 37(i) of document C(Extr.)/13/3, provisions concerning priority have been incorporated into Article 27 of the Law. The provisions satisfy the requirements of Article 12 of the 1978 Act.

7. As suggested in paragraph 37(ii) of document C(Extr.)/13/3, modifications were made to Articles 31 and 34 of the Bill so as to satisfy the requirements of Article 10 of the 1978 Act. Suitable provisions concerning declarations of nullity and cancellation of protection have been incorporated into Articles 40 to 43 of the Law. Articles 40 to 43 do now reflect the provisions of Article 10 of the 1978 Act.

8. However, note should be taken of Article 42 V. This provides that the Protection Certificate may be cancelled “due to evidence that the plant variety has caused, after commercialization thereof, an unfavorable negative impact on the environment or human health.” Strictly speaking, this is not a ground for forfeiture (cancellation) that is permitted by Article 10 of the 1978 Act. However, legislators pressed for its inclusion in order to reflect, to some extent, the provisions of Article 27.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994). The said Article 27.2 allows member States of the World Trade Organization (WTO) to exclude inventions from patentability in order to protect, *inter alia*, human health and the environment. The Office of the Union accepted that the inclusion of Article 42 V of the Law did not significantly affect the conformity of the Law with the 1978 Act.

9. As suggested in paragraph 38 of document C(Extr.)/13/3, the Regulations do provide in the second paragraph of Article 21 and in Articles 7 and 8

(a) for remuneration of the breeder where a variety is declared to be “of restricted public use” based upon “freely negotiated percentages in accordance with the current market practice” for the species concerned so as to satisfy Article 9(2) of the 1978 Act;

(b) detailed provisions on denominations so as to satisfy Article 13 of the 1978 Act.

10. The Law and Regulations accordingly contain amendments and additions which implement the suggestions made by the Office of UPOV in document C(Extr.)/13/3. However, the decision of the Council reproduced in paragraph 2 above also requires that there be “no other substantial changes.” The Law contains many textual changes when compared with the Bill, the major textual changes being shown in italics in the text set out in Annex I. The changes which are considered to be substantial by the Office of the Union are examined in the paragraphs which follow.

The Other Substantial Changes

11. Article 3 of the Law contains a revised definition of an “essentially derived variety.” The definition implies that an essentially derived variety must be a protected variety and expressly requires that the variety be “novel.” The Office of the Union has explained to the Brazilian authorities that the inclusion of the requirements of protection and novelty makes it possible for the breeder of an essentially derived variety to avoid the effect of the rights of the breeder of the initial variety either by deciding not to protect the essentially derived variety or by selling a quantity of material of the essentially derived variety so as to destroy its novelty.

However, this substantial change to the essential derivation provisions of the Bill is not relevant to the conformity of the Law with the 1978 Act.

12. Article 10 IV of the Law reads as follows:

“The right to property of the plant variety shall not be deemed infringed by whoever:

[...]

“IV - being a small rural producer, multiplies seeds, for donation or exchange, exclusively for other small rural producers, within the scope of financing or support programs benefiting small rural producers, conducted by public agencies or non-governmental agencies, authorized by the Public Administration.”

§ 3 defines a “small rural producer” as follows:

“§ 3. For the purposes of the provisions of Insert IV of the caput, a small rural producer is one that fulfills simultaneously the following requisites:

“I - exploits a parcel of land in the condition of owner, holder in possession, lease holder or in partnership;

“II - maintains up to two permanent employees, the eventual resorting to the help from third parties being admissible, when so required by the seasonable nature of the agriculture and livestock breeding activity;

“III - does not hold, under any title, an area exceeding four fiscal modules, quantified in accordance with the legislation in effect;

“IV - has, at least, eighty per cent of his annual gross income originating from farming or livestock breeding or extractive exploiting; and

“V - resides at the property or in a nearby urban or rural community.”

13. It should be noted that Article 10 IV excludes from the breeder’s right only the multiplication of the variety for *donation* or *exchange*. Accordingly, the provision does not conflict with Article 5(1) of the 1978 Act which calls for the prior authorization of the breeder for “the production for the purposes of commercial marketing” of the reproductive or vegetative propagating material of the variety.

14. New provisions also appear in § 1 in Article 10. These have the effect of excluding the rights of certain producers to multiply and re-use propagating material of sugar cane varieties. The provisions do not conflict with the provisions of the 1978 Act in any way.

15. Article 11 of the Bill provided terms of protection of twenty-five years for “semi-perennial species” and for fifteen years for all other species. Article 11 of the Law provides for a period of protection of eighteen years for trees and vines and fifteen years for other species. The modified periods conform with Article 8 of the 1978 Act.

16. Articles 28 to 35 of the Law contain new provisions which permit the grant of compulsory licenses. Such licenses may only be granted for reasons which fall within the

concept of public interest and require the payment of reasonable remuneration to the breeder. The provisions of the Law accordingly satisfy the requirements of Article 9 of the 1978 Act.

General Conclusion

17. Amendments are included in the Law or provisions are included in Regulations which take into account the observations of the Office of the Union in document C(Extr.)/13/3. The other substantial changes embodied in the Law do not represent substantial departures from the requirements of the 1978 Act. Accordingly, the Law and Regulations substantially conform with the provisions of the 1978 Act of the UPOV Convention.

18. The Council is invited

(i) to decide that the Law and Regulations conform with the 1978 Act of the UPOV Convention, and

(ii) to request the Secretary-General to inform the Government of Brazil of its decision.

[Two Annexes follow]

ANNEX I / ANNEXE I / ANLAGE I / ANEXO I

LAW No. 9,456 OF APRIL 1997

Establishes the Plant Variety Protection Law and provides other measures

THE PRESIDENT OF THE REPUBLIC

There shall be made public that the National Congress has decreed and I hereby sanction the following Law:

TITLE I
PRELIMINARY PROVISIONS

Art. 1. There is hereby established the right to Protection of Plant Varieties, in accordance with the provisions of this Law.

Art. 2. The protection of intellectual property rights regarding plant varieties is performed through the granting of a Plant Variety Protection Certificate, which is considered a commodity for all legal purposes *and the sole form of protection for plant varieties and legal form that may inhibit the free utilization of plants or of their reproduction or vegetative multiplication parts*, in the Country.

Art. 3. For the purposes of this Law, it is considered that:

I – the breeder: is the individual who obtains a plant variety and establishes descriptors that may establish a distinction between the same and any other;

II – the descriptor: is the morphological, physiological, biochemical or molecular characteristic that is genetically inherited, and is utilized to identify the plant variety;

III – minimum margin: is the minimum set of descriptors, at the discretion of the competent agency, which is deemed sufficient to distinguish a novel plant variety or an essentially derived plant variety from the remaining known plant varieties;

IV – plant variety: is the variety of any higher vegetable kind or species that is clearly distinct from other known plant varieties by a minimum margin of descriptors, by its own designation, that is homogenous and stable as to the descriptors throughout successive generations and that belongs to a species useful to the farming and forestry complex, being described in an available specialized publication being accessible to the public, as well as the component strain of hybrids;

V – novel plant variety: the plant variety not having been offered for sale in Brazil for more than twelve months of the date of the application for protection and that, with due regard to

the term for commercialization in Brazil, has not been offered for sale in other countries, authorized by the breeder, for more than six years for tree and vine species and for more than four years for the remaining species;

VI – distinct plant variety: the plant variety that is clearly distinct from any other which existence on the date of application for protection is acknowledged;

VII – homogenous plant variety: the plant variety that, when utilized in planting, on a commercial scale, presents a minimum degree of variance as to the descriptors identifying the same, following criteria established by the competent agency;

VIII – stable plant variety: the plant variety that, when reproduced on a commercial scale, maintains its homogeneity throughout successive generations;

IX – essentially derived plant variety: that which is essentially derived from another plant variety provided that, cumulatively, it is:

a) predominantly derived from the initial plant variety or from another essentially derived plant variety, without losing the ability to exhibit the essential characteristics resulting from the genotype or from the combination of genotypes of the plant variety from which it derived, except regarding the differences resulting from the derivation;

b) clearly distinct from the plant variety from which it derived, by a minimum margin of descriptors, in accordance with criteria established by the competent agency;

c) has not been offered for sale in Brazil for more than twelve months from the date of application for protection and that, with due regard to the term for commercialization in Brazil, has not been offered for sale in other countries, authorized by the breeder, for more than six years for tree and vine species and for more than four years for the remaining species;

X – strains: the homogenous genetic materials obtained by some continued autogamic process;

XI – hybrid: the immediate product of the crossing between genetically different strains;

XII – test of distinctness, homogeneity and stability (DHS): the technical procedure to verify that the new plant variety or the essentially derived plant variety differs from another which descriptors are known, is homogenous as to the characteristics thereof in each reproductive cycle and is stable as to the recurrence of the same characteristics throughout successive generations;

XIII – live sample: that which is supplied by the applicant to the right of protection, and which, if utilized in the propagation of the plant variety, confirms the descriptors having been presented;

XIV – seed: every and any plant structure utilized in the propagation of a plant variety;

XV – propagation: the reproduction and multiplication of a plant variety, or the concurrence of those actions;

XVI – propagation material: every and any part of the plant or plant structure utilized in the reproduction and multiplication thereof;

XVII – whole plant: the plant with all its parts capable of being utilized in the propagation of a plant variety;

XVIII – farming and forestry complex: the group of activities relating to the cultivation of plant kinds and species aiming, among others, at human or animal nourishment, the production of fuels, oils, dyes, fibers and other implements for industrial, medical, forestry and ornamental purposes.

TITLE II INTELLECTUAL PROPERTY

CHAPTER I PROTECTION

Section I Protectable Plant Variety

Art. 4. The novel plant variety or the essentially derived plant variety, of any kind or species of plant, are entitled to protection.

§ 1 The plant varieties not fitting into the provisions of the caput and that have already been offered for sale before the date of the application shall also be entitled to protection, provided that the following cumulative conditions are met:

I – that the application requesting protection be submitted within twelve months of compliance with the provisions of § 2. of the present Article, for each species or plant variety;

II – that the first instance of commercialization of the plant variety has occurred, at most, ten years before the date of the application for protection;

III – the protection shall be effective only for purposes of utilization of the plant variety to obtain essentially derived plant varieties;

IV – protection shall be granted for the remaining period of the terms provided in Article 11, considering to such end, the date of the first instance of commercialization.

§ 2. The agency being responsible for the protection of plant varieties is due to disclose, progressively, the plant species and the respective minimum descriptors required to initiate applications for protection, as well as the respective deadlines for the purposes of Insert I of the preceding Paragraph.

§ 3. *The disclosure referred in the preceding Paragraph shall follow a scale of species, observing the following schedule, being expressed in cumulative total protected species:*

I – on the date of initial effectiveness of the regulation of this Law: at least 5 species;

II – after 3 years: at least 10 species;

III – after 6 years: at least 18 species;

IV – after 8 years: at least 24 species.

Section II Breeders

Art. 5. The individual or business entity having obtained a plant variety or an essentially derived plant variety in the Country shall be entitled to protection ensuring the same the right to property thereto in the conditions established in this Law.

§ 1. The protection may be requested by an individual or a business entity having obtained a plant variety, by the heirs or successors thereof or by eventual assignees by means of submission of a proper document.

§ 2. When the process of breeding has been realized by two or more persons, jointly, the protection may be requested jointly or separately, through the naming and qualification of each of same, to ensure protection of their respective rights.

§ 3. In the case of breeding arising from a labor contract, a service contract or other labor activity, the application for protection should indicate the names of all the breeders that, under the condition of employees or providers of services, have obtained the novel plant variety or the essentially derived plant variety.

Art. 6. The provisions of this Law also apply to:

I – applications for protection of plant varieties originated abroad and filed in the Country by a person or entity which protection is ensured by a Treaty effective in Brazil.

II – national citizens or persons domiciled in a country that assures Brazilians or persons domiciled in Brazil the reciprocity of equal or equivalent rights.

Art. 7. The provisions of Treaties effective in Brazil are applicable, in equal conditions, to national individuals or business entities or those being domiciled in the Country.

Section III
Right to Protection

Art. 8. The protection of a plant variety shall fall upon the reproduction or vegetative multiplication material of the entire plant.

Art. 9. The protection ensures the holder thereof the right to commercial reproduction in the Brazilian territory, third parties being prohibited, during the term of protection, production for commercial purposes, offering for sale or commercialization of the propagation material of the plant variety, without authorization of the same.

Art. 10. The right to property of the plant variety shall not be deemed infringed by whoever:

I – stores and plants seeds for private use, in his premises or in the premises of third parties whereof he holds possession;

II – uses or sells as food or raw material the product obtained from the planting thereof, except for purposes of reproduction;

III – utilizes the plant variety as a source of variety in genetic improvement or in scientific research;

IV – being a small rural producer, multiplies seeds, for donation or exchange, exclusively for other small rural producers, within the scope of financing or support programs benefiting small rural producers, conducted by public agencies or non-governmental agencies, authorized by the Public Administration.

§ 1. The provisions of the *caput* specifically do not apply to the cultivation of the sugar cane, where there will be observed the following additional provisions, regarding the right to property concerning the plant variety:

I – to multiply vegetative material, even for private use, the producer shall be obliged to secure an authorization from the holder of the right to the plant variety;

II – when there is required payment for the granting of the authorization, the same may not impair the economic and financial balance of the crop developed by the producer;

III – the provisions of Insert I shall only apply to the crops conducted by producers holding in possession or in ownership rural properties with an area equivalent to at least, four fiscal modules, calculated in accordance with the provisions of Law No. 4,504, of 30 November 1964, when the same are intended for production for purposes of industrial processing;

IV – the provisions of this Paragraph shall not apply to producers being able to clearly evidence having initiated, before the date of enactment of this Law, a process of multiplication, for private utilization, of a plant variety that may become protected.

§ 2. For the purposes of Insert III of the *caput*, whenever:

I – it may be indispensable to utilize repeatedly the protected plant variety for commercial production of another plant variety or of a hybrid, the holder of the second shall be obliged to secure an authorization of the holder of the right to protection of the first;

II – a plant variety is characterized as being essentially derived from a protected plant variety, the commercial exploitation thereof shall be conditioned to the authorization from the holder of protection of this same protected plant variety.

§ 3. For the purposes of the provisions of Insert IV of the caput, a small rural producer is one that fulfills simultaneously the following requisites:

I – exploits a parcel of land in the condition of owner, holder in possession, lease holder or in partnership;

II – maintains up to two permanent employees, the eventual resorting to the help from third parties being admissible, when so required by the seasonable nature of the agriculture and livestock breeding activity;

III – does not hold, under any title, an area exceeding four fiscal modules, quantified in accordance with the legislation in effect;

IV – has, at least, eighty per cent of his annual gross income originating from farming or livestock breeding or extractive exploiting; and

V – resides at the property or in a nearby urban or rural community.

Section IV Term of Protection

Art. 11. The protection of the plant variety shall be effective from the date of granting of the Provisional Certificate of Protection, for a period of fifteen years, except for vines, fruit trees, forest trees and ornamental trees, including, in each case, the mother graft thereof, for which the term shall amount to eighteen years.

Art. 12. Upon the end of the term of effectiveness of the right to protection, the plant variety shall be deemed to be in the public domain and no other right may inhibit the free utilization thereof.

Section V Application for Protection

Art. 13. The request for protection shall be formalized by means of an application signed by the individual or the business entity that has obtained the plant variety, or by an attorney thereof, and shall be docketed at the competent agency.

Sole Paragraph: The protection, in the national territory, of a plant variety obtained by an individual or a business entity domiciled abroad, in accordance with the provisions of Inserts I and II of Article 6th., should be requested directly by the attorney of the same, being domiciled in Brazil, in accordance with the provisions of Article 50 of this Law.

Art. 14. In addition to the filing form, the application for protection, which may only refer to a single plant variety, should include:

I – the botanical species;

II – the name of the plant variety;

III – the genetic origin;

IV – a specification duly completed including all required descriptors;

V – a statement assuring the existence of a live sample at the disposal of the competent agency and the localization thereof for eventual examination;

VI – name and address of the applicant and of the breeders;

VII – evidence of the DHS characteristics, for national and foreign plant varieties;

VIII – report of other descriptors indicative of the distinctness, homogeneity and stability thereof, or evidence of performance, by the applicant, of tests concerning the plant variety together with specific controls or those indicated by the competent agency;

IX – evidence of payment of the fee concerning the application for protection;

X – a statement as to the existence of commercialization of the plant variety in the Country or abroad;

XI – a statement as to the existence, in another country, of protection, or an application for protection, or of any request concerning the right of priority, relative to a plant variety which protection is being requested;

XII – an abstract allowing the identification of the object of the application.

§ 1. The application, the completion thereof including the required descriptors and the indication of the new descriptors should meet the conditions established by the competent agency.

§ 2. The documents referred in this Article should be submitted in the Portuguese language.

Art. 15. Every plant variety should have a designation allowing the identification thereof, intended to be its generic designation, and should meet the following criteria for purposes of protection:

I – be unique, and not expressed only in numeric form;

II – have a designation which is different from that of a formerly existing plant variety;

III – induce no errors as to its intrinsic characteristics or as to its origin.

Art. 16. The application for protection, in the form of an abstract allowing identification of the object of the application, shall be published within sixty calendar days of the submission thereof.

Sole Paragraph. Upon publication of the application for protection, there shall begin a delay of ninety days for the submission of eventual appeals, the applicant being informed thereon.

Art. 17. The specification and the descriptors indicative of its distinctness, homogeneity and stability may not be modified by the applicant, except:

I – in order to correct printing or typing errors;

II – if indispensable to clarify or render precise the application and only until the date of publication of the same;

III – if it is the object of an official action due to non-compliance with the provisions of § 2. of Article 18.

Art. 18. In the act of submission of the application for protection, there shall be effected the preliminary formal examination as to the existence of synonyms, and these not being found to exist, the same shall be docketed, provided it is properly instructed.

§ 1. The docket data concerning the application for protection of a plant variety shall include the hour, the day, the year and the filing number of the application, the full name and address of the interested party and of the attorney thereof, if any.

§ 2. The examination, which shall not be conditioned to eventual appeals filed, shall confirm if the application for protection is in accordance with the legal prescriptions, if it is technically well defined and if there is no prior existence, even if under a different designation.

§ 3. The application shall be rejected if the plant variety is not compliant with the provisions of Article 4.

§ 4. If necessary, there will be formulated additional requirements deemed convenient, including as concerning the submission of a new specification, of additions thereto and other information deemed relevant for the conclusion of examination of the application.

§ 5. Failure to comply with or to submit arguments against an official requirement within sixty days of acknowledgement of notice shall entail the shelving of the application, the administrative stage being thereby concluded.

§ 6. The application shall be shelved if the arguments filed against the official requirement are considered unfounded.

§ 7. Except for the provisions of § 5. of this Article, the decision rejecting or allowing the application for protection may be appealed within the delay of sixty days of the date of publication thereof.

§ 8. Upon filing of the appeal, the competent agency shall have up to sixty days to decide on the same.

Art. 19. Upon publication of the application for protection, there will be granted, on a provisional basis, a Provisional Certificate of Protection, assuring the holder the right of commercial exploitation of the plant variety, in the terms of this Law.

Section VI Granting of the Plant Variety Protection Certificate

Art. 20. The Plant Variety Protection Certificate shall be immediately issued after the delay for appeal or, the same having been filed, upon the official publication of the decision concerning the same.

§ 1. The application having been allowed and no appeal having been timely filed, in the form of § 7. of Article 18., the publication shall be effected within the delay of up to fifteen days.

§ 2. The Plant Variety Protection Certificate shall include the respective number, the name and nationality of the holder or, if that is the case, of the heir, successor or assignee thereof, as well as the term of protection.

§ 3. In addition to the data indicated in the preceding paragraph, the Plant Variety Protection Certificate shall include the name of the breeder and, if that is the case, the circumstance that the obtention resulted from a labor or services contract or from another labor activity, a fact that should be clearly stated in the respective application for protection.

Art. 21. The protection granted shall be made public, through official publication, within the delay of up to fifteen days of the date of granting thereof.

Art. 22. Having obtained the Provisional Certificate of Protection or the Plant Variety Protection Certificate, the holder is bound to keep, during the term of protection, a live sample of the protected plant variety at the disposal of the competent agency, subject to cancellation of the respective Certificate if, upon receiving a notice to that effect, the same fails to submit it within the delay of sixty days.

Sole Paragraph. Notwithstanding the provisions of the caput of this Article., upon obtaining the Provisional Certificate of Protection or the Plant Variety Protection Certificate, the holder is bound to convey to the competent agency two live samples of the protected plant

variety, one being intended for handling and examination, the other being intended to integrate the germoplasm collection.

Section VII Alterations in the Plant Variety Protection Certificate

Art. 23. The ownership of plant variety protection may be transferred by means of an action *inter vivos* or by means of an action of legal or testamentary succession.

Art. 24. The transfer by an action *inter vivos* or by legal or testamentary succession of a Plant Variety Protection Certificate, the change of name, domicile or head office of the holder thereof, the conditions of compulsory license or of restricted public use, transitory suspension or cancellation of the protection, upon having been noted in the respective process, shall be recorded in the Protection Certificate.

§ 1. Notwithstanding other applicable requirements, the original transfer document shall include the complete qualification of the assignor and of the assignee, as well as those of the witnesses and the precise indication of the protected plant variety.

§ 2. There shall be also be recorded and published those actions referring, among others, to the statement of compulsory license or of restricted public use, transitory suspension, extinction of the protection or cancellation of the certificate, upon decision of an administrative or judicial authority.

§ 3. The recording shall not produce any effect as regards the remuneration due by third parties to the holder, for the exploitation of a protected plant variety, when it refers to a plant variety which right to protection is extinct or undergoing a process of nullity or cancellation.

§ 4. The transfer shall only become effective concerning third parties upon publication of the allowance decision.

§ 5. The rejection of the annotation or recording may be appealed, within the delay of sixty days of acknowledgement of the respective decision.

Art. 25. Upon a request being filed by any person, with legitimate concern, who may have entered a judicial action regarding the ineffectiveness of the actions relative to an application for protection, of transfer of ownership or alteration of the name, address or head office of the holder, the judge may order the suspension of the process of protection, annotation or recording, until a final decision is reached.

Art. 26. The payment of annuities for the protection of the plant variety, to be defined by a regulation, should be made from the period following that of the date of granting of the Protection Certificate.

Section VIII
Right to Priority

Art. 27. The individuals or business entities having filed an application for protection in a country having an agreement with Brazil or in an international organization of which Brazil is a member and that produces the effect of a domestic filing, shall be assured the right of priority during a term of up to twelve months.

§ 1. The facts occurring within the delay provided in the caput, such as the submission of another application for protection, the publication or the utilization of the plant variety being the object of the first application for protection, do not constitute causes for the rejection of the later application and shall not originate rights in favor of third parties.

§ 2. The delay provided in the caput shall be counted from the date of submission of the first application, excluding the day of the submission.

§ 3. To be able to benefit from the provisions of the caput, the applicant should:

I – mention, explicitly, in the later application for protection, the claim of priority of the first application;

II – submit, within up to three months, copies of the documents that instructed the first application, duly certified by the agency or the authority to which the same will have been submitted, as well as sufficient evidence that the plant variety being the object of both applications is the same one.

§ 4. The individuals or business entities mentioned in the caput of this Article shall have a delay of up to two years upon expiry of the term of priority to submit information, additional documents or a live sample, if these come to be required.

CHAPTER II
COMPULSORY LICENSE

Art. 28. The plant variety protected in accordance with the terms of this Law may be the object of a compulsory license, which will ensure:

I – the availability of the plant variety in the market, at reasonable prices, when the maintenance of a regular supply is being unduly hindered by the holder of the right of protection of the plant variety;

II – the regular distribution of the plant variety and the maintenance of its quality.

III – reasonable remuneration to the holder of the right to protection of the plant variety.

Sole Paragraph. When assessing the undue restriction to the competition, the authority shall comply, where applicable, with the provisions of Art. 21 of Law No. 8,884 of July 11, 1994.

Art. 29. A compulsory license is understood to mean the action of the competent authority which, on request of a party with legitimate concern, authorizes the exploitation of the plant variety independently of authorization of the holder thereof, for a term of three years renewable for equal periods, not exclusively and against remuneration in a form to be established by a proper regulation.

Art. 30. The request of compulsory license shall bear, among others:

I – data qualifying the applicant;

II – data qualifying the holder of the right to protection of the plant variety;

III – sufficient description of the plant variety;

IV – the reasons substantiating the request, with due regard to the provisions of Article 28 of this Law;

V – evidence that the requester has attempted, unsuccessfully, towards obtaining a voluntary license from the holder of the plant variety;

VI – evidence that the requester is financially and technically qualified to exploit the plant variety.

Art. 31. The application requesting a license should be forwarded to the Ministry of Agriculture and Supply and shall be decided by the Administrative Board for Economic Defense – CADE, created by Law No. 8,884, of July 11, 1994.

§ 1. Upon receiving the request, the Ministry shall serve notice to the holder of the right to protection to submit a statement, if wishing to do so, within the delay of ten days.

§ 2. With or without the statement referred in the preceding Paragraph, the Ministry shall forward the process to the CADE, together with the technical opinion of the competent agency and within the maximum delay of fifteen days, advising the granting or denial of the compulsory license.

§ 3. There being no need of additional diligence, the CADE shall appreciate the request within the maximum delay of thirty days.

Art. 32. The Ministry of Agriculture and Supply and the Ministry of Justice, within the scope of their respective competence, shall provide additional decisions on the procedure and the conditions for appreciation and granting of the compulsory license, with due regard to the procedural requirements inherent to ample defense and protection of the right to property instituted by this Law.

Art. 33. The decision of the CADE granting the requested license shall not be appealable within the scope of the Administration nor may the same be the object of a judicial

measure in limine, except, regarding the latter, in case of infringement of the due legal process.

Art. 34. There shall be applied to the compulsory license, where applicable, the provisions of Law No. 9,279, of May 14, 1996.

Art. 35. The compulsory license may only be requested after three years of granting of the Provisional Certificate of Protection, except in the case of abuse of economic power.

CHAPTER III RESTRICTED PUBLIC USE

Art. 36. The protected plant variety shall be declared to be of restricted public use, *ex officio* by the Ministry of Agriculture and Supply, based upon a technical opinion reported by the respective competent agencies, exclusively in the public interest, to attend to the needs of the agricultural policy, in the cases of national emergency, abuse of economic power, or other circumstances of extreme urgency and in cases of non-commercial public use.

§ 1. A plant variety shall be deemed to be of restricted public use if, by means of an act of the Ministry of Agriculture and Supply, it is exploited directly by the Federal Union or by third parties indicated thereby, not exclusively, without authorization of the holder thereof, for a period of three years, renewable for equal periods, provided that the holder is notified and remunerated in a form to be defined in a proper regulation.

CHAPTER IV PENALTIES

Art. 37. Anyone that sells, offers for sale, reproduces, imports, exports, as well as packs or holds in storage for such purposes, or provides for any purpose, the propagation material of a protected plant variety, under the correct designation or any other, without being authorized to do so by the holder thereof, shall be bound to indemnify the same, in amounts to be defined in a proper regulation, in addition to having the material seized, and shall also pay a fine in the amount equivalent to twenty per cent of the commercial value of the seized material, and shall additionally be deemed to have committed the crime of infringement of the rights of the breeder, notwithstanding other legal penalties being applicable.

§ 1. There being contumacy as to the same or another material, the percentage of the fine shall be twice that having been applied relatively to the last penalty, notwithstanding additional applicable penalties.

§ 2. *The competent agency shall forward the seized material at no cost – provided the same has an adequate quality – for distribution, as seeds for planting, to farmers settled by Agrarian Reform programs or in areas where there may be in course of development public programs of incentive to familiar agriculture, commercialization thereof being prohibited.*

§ 3. The provisions of the caput and of § 1. of this Article do not apply to the cases provided in Article 10.

CHAPTER V
OBTENTION OCCURRING DURING THE TERM OF EFFECTIVENESS OF
A LABOR OR SERVICE CONTRACT OR ANOTHER LABOR ACTIVITY

Art. 38. The rights pertaining to the novel plant varieties, as well as the essentially derived plant varieties, developed or obtained by the employee or the provider of the service during the effectiveness of the Labor Contract or of the Service Contract or another labor activity, resulting from the performance of labor duties or from the execution of the contract, which object is the activity of research in Brazil, shall belong exclusively to the employer or the contractor of the service, and the name of the breeder shall mandatorily be included in the application and in the Protection Certificate.

§ 1. Except where explicitly provided otherwise in the contract, the consideration of the employee or the provider of the service or other labor activity, in the case provided in this Article, shall be limited to the salary or the remuneration having been agreed.

§ 2. Except where otherwise agreed, the novel plant variety or the essentially derived plant variety, which Protection Certificate is applied for by the employee or service provider within thirty-six months after extinction of the respective contract shall be deemed as having been obtained during the term of effectiveness of the Labor Contract or of the Service Contract or other labor activity.

Art. 39. Except where explicitly provided otherwise, the novel plant varieties, as well as the essentially derived plant varieties, having been obtained by the employee or provider of services or other labor activity, not comprised in the provisions of Article 38, when resulting from a personal contribution and through the utilization of resources, data, means, materials, installations or equipment belonging to the employer or contractor of the service, shall belong to both parties.

§ 1. For the purposes of this Article, the employer or contractor of the service or other labor activity is hereby assured the right to exclusively exploit the novel plant variety or the essentially derived plant variety, and the employee or provider of service or other labor activity is assured the remuneration that is agreed between the parties, notwithstanding the payment of salary or of the remuneration agreed.

§ 2. In the case of more than one employee or provider of service or other labor activity, the part due to the same shall be equally divided therebetween, except where otherwise agreed.

CHAPTER VI
EXTINCTION OF THE RIGHT TO PROTECTION

Art. 40. The protection of the plant variety shall be deemed extinct:

I – upon expiry of the term of protection established in this Law;

II – upon waiver of the holder or of the successors thereof;

III – upon cancellation of the Protection Certificate under the terms of Article 42.

Sole Paragraph. The waiver of protection shall only be accepted if it does not jeopardize the rights of third parties.

Art. 41. Upon extinction of the protection, the object thereof shall be deemed in the public domain.

Art. 42. The Protection Certificate shall be canceled administratively *ex officio* or on request of any person with legitimate concern, in any of the following cases:

I – due to loss of homogeneity or of stability;

II – due to failure to effect payment of the respective annuity;

III – due to failure to comply with the requirements of Article 49;

IV – due to failure to submit a live sample, as established in Article 22;

V – due to evidence that the plant variety has caused, after commercialization thereof, an unfavorable negative impact on the environment or human health.

§ 1. The holder shall be notified of the institution of the cancellation proceedings and shall be ensured the delay of sixty days to submit arguments thereagainst, from the date of notification.

§ 2. The decision allowing or denying cancellation may be appealed within the delay of sixty calendar days of publication thereof.

§ 3. The decision to cancel shall produce effects from the date of the request or of publication of institution of the proceedings *ex officio*.

CHAPTER VII NULLITY OF PROTECTION

Art. 43. The protection shall be deemed null when:

I – the conditions of novelty and distinctness of the plant variety, in accordance with Inserts V and VI of Article 3. of this Law, have been disregarded;

II – it has been granted in jeopardy of rights held by third parties;

III – the title does not correspond to its true object;

IV – there has been omitted in the proceedings thereof any of the measures established by this Law, being necessary to examine the application and to issue the Protection Certificate.

Sole Paragraph. The nullity of the Certificate shall be effective from the date of the application.

Art. 44. The nullity proceedings may be instituted *ex officio* or on request of any person with legitimate concern.

TITLE III NATIONAL PLANT VARIETIES PROTECTION SERVICE

CHAPTER I ESTABLISHMENT

Art. 45. The National Plant Varieties Protection Service – SNPC, which will be in charge of protection of plant varieties, is hereby established, within the scope of the Ministry of Agriculture and Supply.

§ 1. The structure, the prerogatives and the purposes of the SNPC shall be established in a proper regulation.

§ 2. The National Plant Varieties Protection Service – SNPC shall maintain the National Registry of Protected Plant varieties.

TITLE IV GENERAL PROVISIONS

CHAPTER I ACTIONS, ORDERS AND TERMS

Art. 46. The actions, orders and decisions regarding administrative proceedings relative to the protection of plant varieties shall only become effective upon publication thereof in the Official Gazette of the Union, except:

I – interlocutory decisions that need not be known by the parties;

II – technical statements of opinion, which shall be accessible for examination by the parties, if these so require;

III – others that may be indicated in the regulating Decree.

Art. 47. The National Plant Varieties Protection Service – SNPC shall edit a periodic publication to make public the National Registry of Protected Plant varieties, as foreseen in § 2. of Article 45 and in the provisions of the *caput*, and its Inserts I, II, and III, of Article 46.

Art. 48. The terms referred in this Law shall be counted from the date of publication thereof.

CHAPTER II CERTIFICATES

Art. 49. There shall be assured, within a delay of thirty days from the docket date of the requirement, the furnishing of the certificates relative to matters discussed in this Law, provided that the same have been properly required and upon submission of evidence of payment of the respective fees.

CHAPTER III POWER OF ATTORNEY OF INDIVIDUAL OR ENTITY DOMICILED ABROAD

Art. 50. The individual or business entity domiciled abroad should appoint and maintain an attorney, duly qualified and domiciled in Brazil, duly empowered to represent the same and receive service of administrative notices and service of process referring to the matter in this Law, from the date of application for protection and during the term of effectiveness of the same, subject to extinction of the right to protection.

§ 1. The power of attorney should grant power to apply for protection and for the maintenance of same before the SNPC and be specific for each case.

§ 2. When the application requesting protection is not filed by the applicant in person, the same should be instructed with a power of attorney, granting the necessary powers, duly translated by a sworn public translator, if executed abroad.

CHAPTER IV FINAL PROVISIONS

Art. 51. The application for protection of a plant variety being essentially derived from a plant variety protectable under § 1. of Article 4 shall be examined, and if applicable, the respective Certificates granted, only after the delay provided in Insert I of that same Paragraph, with due regard to the chronological order of submission of the applications.

Sole Paragraph. The SNPC may waive compliance with the delay mentioned in the *caput* when, regarding the plant variety being protectable under § 1. of Article 4:

I – a Protection Certificate has been granted; or

II – there existing an explicit authorization from the breeder thereof.

Art. 52. The plant varieties already marketed in Brazil, for which an application for protection, duly instructed, is not docketed within the delay provided in Insert I of § 1. of Article 4 shall be automatically deemed as being in the public domain.

Art. 53. The services discussed in this Law shall be remunerated under the regime of specific public service prices, the Ministry of Agriculture and Supply being in charge of establishing their respective amounts and the form of collection thereof.

Art. 54. The Executive Branch shall regulate this Law within the delay of ninety days of publication hereof.

Art. 55. This Law shall take effect from the date of publication hereof.

Art. 56. The provisions to the contrary are hereby revoked.

Brasilia, April 25, 1997;
176th. year since Independence and 109th. year of the Republic

FERNANDO HENRIQUE CARDOSO
Ailton Barcelos Fernandes

[Annex II follows/
Annexe II suit/
Anlage II folgt/
Sigue el Anexo II]

