

THE PLANT BREEDER'S RIGHT BILL [OF MAURITIUS]
(No. of 2003)

Explanatory Memorandum

The object of this Bill is to –

(1) To provide for the protection of plant breeder's right on new varieties in the Republic of Mauritius;

(2) More specifically to provide for

- (i) the legal framework and the mechanism to protect the rights of plant breeders,
- (ii) the economic and the personal non-economic relations arising out of the creation, use and legal protection of plant varieties,
- (iii) to encourage the development of new varieties of plants; and
- (iv) to give effect to the proper implementation of governmental policies and enforcement provisions necessary therefor.

..... 2003

P.K. Jugnauth

Minister of Agriculture,
Food Technology and Natural Resources

THE PLANT BREEDER'S RIGHT BILL
(No. of 2003)

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A BILL

To

ENACTED by the Parliament of the Republic of Mauritius, as follows

PRELIMINARY

1. Short title

This Act may be cited as the Plant Breeder's Right Act 2003.

2. Interpretation

In this Act –

Authority of a Contracting Party means the Authority entrusted with the grant of Plant Breeder's Right;

Breeder means

- the person who bred, or discovered and developed, a variety,
- the person who is the employer of the aforementioned person or who has commissioned the latter's work, where the laws of the relevant Contracting Party so provide, or
- the successor in title of the first or second aforementioned person, as the case may be;

Competent Authority means the Permanent Secretary of the Ministry

Contracting Party means a State other than the Republic of Mauritius or an intergovernmental organization party to any of the Acts of the International Convention for the Protection of New Varieties of Plants (UPOV Convention);

Convention means the International Convention for the protection of new varieties of plants.

Member State means a State member of the World Trade Organization, which came into existence on 1.1.1995

“National Catalogue of Varieties” means the list of varieties recommended for production on the whole territory of Mauritius or in certain regions thereof.

Plant Breeder's Right means the right of the plant breeder provided under this Act;

Propagating material in relation to any plant variety means its propagules, namely, any plant or plants in whole or component or part thereof, including seed, vegetative part, tissue culture or cell culture, and this includes an intended seed which is capable of or suitable for regeneration into a plant;

Register means the register of plant breeder's rights in which the matters specified in

subsection 3(4) are required to be recorded;

Registrar means the Registrar of the Office of Plant Breeder's Right;

Third party means someone, other than the holders of the plant breeder's right, who benefits from the grant of an exclusive license to exploit the variety;

Variety means 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 – defined by the expression of the characteristics resulting from a given genotype or combination of genotypes; distinguished from any other plant grouping by the expression of at least one of the said characteristics; and considered as a unit with regard to its suitability for being propagated unchanged;

ADMINISTRATION

3. Administration of Plant Breeder's Right

(1) For the purposes of this Act, the Minister shall designate and authorise in writing an Office of Plant Breeder's Right in the Ministry to be responsible for all matters concerning the administration of Plant Breeder's Right.

(2) The Minister may give such directions of a general character, not inconsistent with the Plant Breeder's Right Act, for

- (a) the proper discharge of functions of the Office, and
- (b) the implementation of such policies as may be determined.

(3) There shall be posted to the Office, A Registrar and other such officers as may be necessary for the proper discharge of the functions and duties of the office.

(4) The Registrar shall maintain a register in the Office, to be known as the Register of Plant Breeders' Rights, in which the following shall be entered:

- (a) any grant of a breeder's right;
- (b) any change in the holder of that right;
- (c) any declaration of nullity or cancellation;
- (d) any compulsory license; and
- (e) any license contract at the request of one of the parties to such contract;
- (f) any other particulars related to plant breeder's right.

4. Examination of Register

A person who has paid the prescribed fee shall be entitled, during normal business hours, to examine the Register kept in accordance with subsection 3(4), and to make copies of or extracts from the information contained therein.

THE BREEDER'S RIGHT

5. Criteria for Protection

Subject to this Section and any other formal requirements of this Act, a right to be known as a breeder's right shall be granted where the variety is:

- (a) new;

- (b) distinct;
- (c) uniform;
- (d) stable; and
- (e) given a variety denomination which is acceptable for registration in accordance with section 28.

6. Novelty

A variety shall be considered new if, at the date of filing of the application for a breeder's right, 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 before the filing date:

- (a) in the Republic of Mauritius for longer than one year before the date on which protection is applied for under this Act; and
- (b) outside the Republic of Mauritius, for longer than six years in the case of trees or vines or longer than four years in the case of varieties of other genera or species.

7. Distinctness

(1) A variety shall be considered to 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 relevant, at the priority date.

(2) In particular, the filing, in any State, of an application for a breeder's right, or for entry in a catalogue of varieties admitted to trade, shall be deemed to render that other variety a matter of common knowledge from the date of the application, provided that the application leads to the grant of the breeder's right or the entry in the catalogue, as the case may be.

8. Uniformity

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

9. Stability

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

10. Protection of Known Varieties

Notwithstanding Section 6, 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 Act in respect of the relevant species, subject to the following conditions:

- (a) the application shall be filed within the year following the said date; and
- (b) the variety must
 - (i) have been entered in the National Catalogue of Varieties or in a register of varieties held by a professional organization recognized by the Office, for the purposes of this Section,

(ii) have been the subject of a breeder's right in a Contracting Party, or be the subject of an application in a Contracting Party, provided that the application subsequently leads to the granting of the breeder's right, or
(iii) be the subject of proof acceptable to the Office concerning the date on which the variety ceased to be new under the provisions of Section 7.

(2) The duration of the breeder's right granted under this Section shall be calculated from the date of the entry referred to in paragraph (1)(b)(i), above, the date of the grant of the breeder's right referred to in paragraph (1)(b)(ii), above, or the date upon which the variety ceased to be new referred to in paragraph (1)(b)(iii), above. Where relevant, the earliest of those dates shall be used.

(3) Where a breeder's right is granted under this Section, the holder shall be under the obligation to grant licenses on reasonable terms in order to allow the continuation of any exploitation initiated in good faith by a third party before the said filing.

ENTITLEMENT TO PROTECTION

11. List of genera and species to which this Act applies

(1) The Minister, may by order, subject to subsection (2), publish a list of those genera and species to which this Act applies and may also amend such list by adding new genera or species to it, modifying the names of the genera or species already published or by deleting such names, with effect from any prospective date specified in the Order.

(2) In compiling the list under Subsection (1), the Minister may exclude certain genera or species.

(3) Where a genus or species is deleted from the list of genera and species to which this Act applies with effect from a given date, the deletion shall not affect the rights of the applicants who have filed applications for the protection of varieties of that genus or species before that date.

12. Right to apply for protection

The breeder of a variety or his successor in title shall be entitled to apply for protection under this Act.

13. Persons entitled to file applications

(1) An application for the grant of a breeder's right may be filed by the breeder of a variety who is a national or resident of:

(a) the Republic of Mauritius;

(b) a Contracting Party; or

(c) any State which, not being a Contracting Party, grants reciprocity of treatment to the Republic of Mauritius.

(2) For the purposes of subsection (1)(b), "national" means, where the Contracting Party is a State, a national of that State, and where the Contracting Party is an intergovernmental Organization, the nationals of the States that are members of that Organization.

(3) An agent shall be given the power to act on the breeder's behalf before the office and in legal proceedings relating to the plant breeder's right.

14. Joint applicants and joint holders

Where there are two or more applicants for the grant of a plant breeder's right or where there are two or more holders of such a right in any protected variety, in the absence of any agreement to the contrary, each applicant or holder may separately transfer his shares, or exploit the variety as the case may be, or subject to this Act, exclude others from exploiting it.

ASSIGNMENT AND TRANSFER OF THE APPLICATION OR OF THE BREEDER'S RIGHT

15. Assignment and transfer

(1) An application for the grant of a breeder's right or the breeder's right may be assigned or otherwise transferred.

(2) The assignment or transfer shall be in writing, shall be signed by the parties and shall be registered in the Register.

SCOPE AND DURATION OF THE BREEDER'S RIGHT

16. Scope of the breeder's right

(1) (a) Subject to Sections 17 and 18, the following acts in respect of the propagating material of a protected variety shall require the authorization of the holder of the breeder's right:

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

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

(2) Subject to Sections 17 and 18, the acts referred to in paragraphs (i) to (vii) of subsection (1)(a) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of the propagating material of the protected variety shall require the authorization of the holder, unless the holder has had reasonable opportunity to exercise his right in relation to the said propagating material.

(3) (a) The provisions of subsections (1) and (2) shall also apply in relation to varieties:

- (i) which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety;
- (ii) which are not clearly distinguishable in accordance with Section 7 from the protected variety; and
- (iii) whose production requires the repeated use of the protected variety.

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

- (i) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining

the expression of the essential characteristics that result from the genotypes 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.

17. 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 other varieties, and, except where the provisions of subsection 16(3) apply, acts referred to in subsections 16(1) and (2) in respect of such other varieties.

(2) The Minister may, within reasonable limits and subject to safeguarding the legitimate interests of the breeder, make regulations restricting the breeder's right in relation to any variety in order to permit farmers to make personal use of the variety on their own holdings for propagating purposes.

18. Exhaustion of the breeder's right

(1) A breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Section 16(3), which has been sold or otherwise marketed by the breeder or with his consent in the Republic of Mauritius, or any material derived from the said material, unless such acts:

- (a) involve further propagation of the variety in question; or
- (b) involve an export of material of the 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.

19. Maintenance of the protected variety

(1) The holder of a breeder's right shall, throughout the period for which the right is exercisable, be under an obligation to make available, at the request of the Registrar, reasonable samples of the protected variety capable of producing plants which correspond to the characteristics defined for the variety when the right was granted.

(2) The holder of a breeder's right shall also provide the Registrar with all such information and assistance as the Registrar may request for the purpose of ensuring that the holder of the breeder's right is fulfilling his obligations under subsection (1), including facilities for the inspection by or on behalf of the Registrar of the measures taken for the maintenance of the variety.

20. Duration of protection

(1) Subject to subsection (2), the breeder's right in respect of varieties of trees and vines, shall expire twenty five years after the grant of the breeder's right.

(2) Protection for all other varieties of genera or species shall expire twenty years after the grant thereof.

TERMINATION, NULLITY AND CANCELLATION

21. Termination of Protection

(1) The breeder's right shall terminate before the term expires when the holder of that right renounces it by written declaration addressed to the Registrar.

(2) The date of termination shall be that specified in the declaration or, if none is specified, the date on which the declaration is received by the Registrar.

22. Nullity

(1) The Registrar shall declare a breeder's right granted null and void when it is established:

(i) that the conditions laid down in Sections 6 or 7 were not complied with at the time of the grant of the breeder's right;

(ii) that, where the grant of the breeder's right has been essentially based upon information and documents furnished by the breeder, the conditions laid down in Sections 8 or 9 were not complied with at the time of the grant of the breeder's right; or

(iii) 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.

(iv) The request for the annulment of the plant breeder's right shall be addressed to the office at the prescribed fee.

23. Cancellation

(1) (a) The Registrar shall cancel the breeder's right granted by him if it is established that the conditions laid down in Sections 8 or 9 are no longer fulfilled, and

(b) furthermore, the Registrar may cancel the breeder's right, if the breeder fails to comply with the following within a reasonable period determined by the Registrar:

(i) the breeder does not provide the Registrar with the information, documents or material deemed necessary for verifying the maintenance of the variety;

(ii) the breeder fails to pay such fees as may be payable to keep his right in force; or

(iii) breeder does not propose, where the denomination of the variety is cancelled after the grant of the right, another suitable denomination.

(2) No breeder's right shall be cancelled for reasons other than those referred to in subsection 23 (1).

APPLICATIONS

24. Application

(1) An applicant for the protection of a variety shall file an application with the Registrar

in the prescribed form.

(2) At the request of the Registrar, the applicant shall, on the date and at the place fixed by the Registrar, submit for the purpose of the examination any necessary information, document or material determined by the Registrar. The application form shall be accompanied by the technical questionnaire in the prescribed form, for the relevant genus or species, which shall be completed by the applicant to the best of his knowledge.

(3) The Registrar shall accord, as the filing date of the application, the date of receipt of the application duly filed.

(4) The refusal or withdrawal of an application shall be published in a government gazette.

25. Priority

(1) The applicant may avail himself of the priority of an earlier application (hereinafter referred to as the “right of priority”) that has been duly filed for the same variety with the Authority of a Contracting Party.

(2) Where the application filed with the Registrar is preceded by several such applications, priority may be based only on the earliest application.

(3) The right of priority shall be expressly claimed in the application filed with the Registrar and may only be claimed within a period of twelve months from the date of filing of the earliest application, but the day of filing shall not be included in the said period.

26. Documents and material to be furnished for priority

(1) In order to avail himself of the right of priority, the applicant shall submit to the Registrar within three months of filing the application in the Republic of Mauritius, a copy of the documents that constitute the earlier application, certified to be a true copy by the Authority with which that application was filed.

(2) The effect of the right of priority shall be that, with respect to the conditions of protection attached to the variety, the application shall be deemed to have been filed at the date of the filing of the earlier application.

(3) The applicant may declare that he will submit the information, document or material referred to in Section 24(2) required by the Registrar at a later date, but no later than two years after the end of the priority period unless the earlier application referred to in subsection (1) has been withdrawn or refused in the Contracting Party in which it was filed.

(4) If any of the provisions of this Section are not complied with, the application shall be dealt with as if no priority has been claimed.

27. Fees

The Registrar perceives fees for the execution of his duties according to this Act and annual fees will be due at the beginning of each year of the period of protection.

VARIETY DENOMINATION

28. Application and procedure for variety denomination

(1) The applicant for a breeder’s right shall propose a variety denomination in accordance

with this Section.

(2) No person shall use as a variety denomination a designation which:

(a) does not enable the variety to be identified;

(b) consists solely of figures except where this is an established practice for designating varieties;

(c) is liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety, or the identity of the breeder;

(d) is identical to a variety denomination which in the Republic of Mauritius or in another Contracting Party designates an existing variety of the same plant species or of a closely related species;

(e) by a reason of a prior right, the use of the variety denomination is forbidden.

(3) Where a variety is already protected by a Contracting Party or where an application for the protection of the same variety is filed in such Contracting Party, only the variety denomination which has been proposed or registered in that other Contracting Party may be proposed and registered, and the Registrar shall not register any other designation as a denomination for the variety unless the Registrar considers the denomination unsuitable within the territory of the Republic of Mauritius.

(4) Where the variety denomination used in the other Contracting Party is inappropriate for linguistic reasons, or for any reason specified in subsection (2), the Registrar may request the applicant to propose another variety denomination.

(5) The Registrar shall publish in a periodical the variety denominations which have been proposed, or registered or cancelled.

29. Use of variety denomination

(1) Any person who offers for sale or markets the protected material of a variety protected in the Republic of Mauritius shall, even after the expiration of the protection, use the registered variety denomination only in so far as prior rights do not prevent such use.

(2) When a protected variety is offered for sale or marketed, a trademark, trade name or other similar indication may be associated with the registered variety denomination provided that the denomination is easily recognizable.

(3) The holder of a breeder's right may not invoke his rights (trademark, trade name or other right) against the legitimate use of his variety denomination in the offering for sale or marketing of the variety by another person, even after the expiration of the protection of the breeder's right.

30. Prior rights of third parties

Prior rights of third parties in a designation shall not be affected by this Act.

31. Cancellation of registered variety denomination

(1) The Registrar shall cancel any registered variety denomination if the denomination should not have been registered or if, subsequent to registration, facts become known which would have justified the rejection of the denomination.

(2) Where he cancels the variety denomination, the Registrar shall request the holder of a breeder's right to submit, within the time specified by him, a proposal for a new variety denomination, and shall, if the proposal is acceptable, register it.

EXAMINATION OF THE APPLICATION

32. Examination of the application

The Registrar shall examine the variety to determine whether it fulfills the requirements of novelty, distinctness, uniformity and stability, and where those requirements are not fulfilled, the Registrar shall reject the application.

33. Examination of novelty, distinctness, etc.

(1) The Registrar for the purposes of the examination may enter into arrangements with relevant institutions or persons both in or outside the Republic of Mauritius to carry out scientific tests to determine the distinctness, uniformity or stability of the variety or may use the results of such tests that have already been carried out.

(2) The Registrar shall invite the applicant, on a date fixed by him before the beginning of each year or testing period to pay the prescribed fee, for that year or testing period and failure to do so, shall cause the application to be rejected.

34. Grant and refusal of the breeder's right

(1) Where the examination shows that the application satisfies the requirements of novelty, distinctness, uniformity and stability and that the proposed denomination of the variety can be registered, the Registrar shall grant a breeder's right and publish that decision in a periodical.

(2) Where the examination shows that the proposed denomination of the variety cannot be registered, the Registrar shall request the applicant to submit another denomination within a period fixed by him, failing which he shall reject the application.

35. Provisional protection

When a breeder's right is granted, the holder of the right shall be entitled to equitable compensation for acts specified in Section 16 done during the period between the publication of the application for the grant of a breeder's right and the grant of that right.

36. Opposition

(1) The opposition procedure should be available to any interested persons as prescribed in the Regulations on the payment of the prescribed fee

(2) The opposition shall be based on any of the following grounds, namely that:

- (a) 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;
- (b) the variety is not new or distinct at the filing date, or priority date if applicable;
- (c) the variety is neither uniform nor stable;
- (d) the variety denomination that the Registrar intends to register is unsuitable.

APPEALS AND ENFORCEMENT PROCEEDINGS

37. Appeals

1. Any person who feels aggrieved by any decision or action taken by the Registrar may

within 30 days and upon the payment of the prescribed fee, appeal against such decision or action to the Minister.

2. The Minister shall appoint an appeal board comprising of at least three persons with expert knowledge in the field to give its recommendation.

3. (a) The Minister shall designate one of the members as chairman of the board.

(b) A person appointed under sub section (2) shall recuse himself as a member of the appeal board if he has any direct or indirect interest in the subject matter of the appeal. The recommendation of an appeal board, together with the reasons thereof, shall be communicated to the Minister, who shall make his decision on the appeal.

38. Civil proceedings

(1) The plaintiff in proceedings for infringement shall be entitled to relief by way of:

(a) a preliminary injunction and/or civil action to prohibit the committing or continuation of committing, an infringement of the breeder's right;

(b) forfeiture, seizure or destruction of material which has been produced in contravention of the breeder's right; and

(c) damages taking into account the pecuniary and non-pecuniary loss suffered by the holder of the breeder's right.

39. Non – compliance or misuse of variety denomination

(1) Any person who willfully offers for sale or markets material of a variety protected in the Republic of Mauritius without using the registered variety denomination commits an offence and is liable to a fine.

(2) Any person who willfully makes use of the registered variety denomination of a variety protected in the Republic of Mauritius for another variety of the same plant species or closely related species commits an offence and is liable to a fine.

LICENSES

40. License contracts

(1) The applicant for or the holder of a breeder's right may grant, to any person, an exclusive or a non-exclusive license relating to all or any of the rights provided for under this Act.

(2) A license contract shall be registered at the Office on request and on payment of the prescribed fee.

41. Compulsory licenses

(1) Any interested party may apply to the Registrar for the grant of a compulsory license on the payment of the prescribed fee in respect of any breeder's right on the ground that it is necessary to safeguard the public interest in the Republic of Mauritius.

(2) Any person to whom a license is granted under this Section shall pay the holder of the breeder's right an equitable remuneration.

42. Regulations

(1) The Minister may, in addition to the following matters, make regulations for any matter required to be prescribed by this Act, or for giving effect to the purposes of this

Act:

- (a) the procedure of the Office in respect of the receiving and handling of applications, the conduct of the examination of varieties and of variety denominations, the handling of oppositions, and the refusal of applications of the grant of breeder's rights;
- (b) the nullity and cancellation of breeder's rights, the transfer of an application, or the breeder's right, to the entitled person;
- (c) the maintenance and conservation of samples, the cooperation with germplasm banks or other institutions for the conservation of genetic material;
- (d) the establishment, administration and maintenance of the Register and the receiving and filing of any documents concerning breeder's rights;
- (e) the amounts and the collection of fees;
- (f) the making of additional rules to interpret the provisions of variety denominations;
- (g) the list of genera or species required to be published under this Act;
- (h) any other matters relating to the administration of this Act.

MISCELLANEOUS

43. Measures for regulating standards for the production, certification and marketing of seed or other propagating material of varieties

(1) Notwithstanding the provisions of the section 42 the Minister may make Regulations and notify standards for the production, certification and marketing of seed or other propagating material of varieties within the territorial limits of the Republic of Mauritius or for their importation or exportation.

(2) The measures provided in subsection (1) to regulate the standards for the production, certification and marketing of seed or other propagating material of varieties shall not affect the plant breeder's right granted in accordance with this Act.

44. Powers of the Minister to make regulations

(1) The Minister may make such regulations as may be necessary for the purpose of this Act.

(2) Any regulation and rules made under this Act may provide for

- (a) Forms for application and for other purposes of the Act;
- (b) Fees payable in terms of this Act;
- (c) Institutional arrangements, entitlement application, right of holder, trade duration, transfer of ownership, licensing, lapse and organisational procedure for the implementation of the breeders' rights;
- (d) The manner in which any notice or order shall be or may be served;
- (e) Regulations required or permitted for matters related to section 42.

(3) Generally any matter which the Minister may deem necessary or expedient to prescribe in order to further the objects of this Act.

45. Offence

(1) Any person who –

- (a) for the purposes of this Act makes any declaration or gives or makes use of any certificate which is false in a material particular;
 - (b) otherwise contravenes any other provision of this Act, shall commit an offence and shall, on conviction, be liable to a fine not exceeding 10,000 rupees and to imprisonment for a term not exceeding 2 years.
- (2) Notwithstanding subsection (1), where the offence committed is an infringement of a breeder's rights, the fine shall not exceed 25,000 rupees and a term of imprisonment not exceeding 5 years.

46. Commencement

This Act shall come into force on a date to be fixed by Proclamation.