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**UNIÓN INTERNACIONAL PARA LA PROTECCIÓN DE LAS OBTENCIONES VEGETALES**  
GINEBRA

**CONSEJO**

**Vigésima quinta sesión extraordinaria**  
**Ginebra, 11 de abril de 2008**

**EXAMEN DE LA CONFORMIDAD DEL PROYECTO DE LEY DE PROTECCIÓN  
DE LAS VARIEDADES VEGETALES DE MONTENEGRO CON  
EL ACTA DE 1991 DEL CONVENIO DE LA UPOV**

*Documento preparado por la Oficina de la Unión*

Introducción

1. Por carta con fecha 19 de marzo de 2008 dirigida al Secretario General de la UPOV, el Ministro de Agricultura, Silvicultura y Recursos Hídricos de Montenegro, S.E. Sr. Milutin Simovic, pidió que se examine la versión definitiva del “proyecto de Ley de Protección de las Variedades Vegetales” (que en adelante se denominará “proyecto de Ley”), aprobada por el Gobierno de Montenegro el 19 de marzo de 2008, para garantizar su conformidad con el Acta de 1991 del Convenio de la UPOV (a la que en adelante se denominará el “Acta de 1991”). La versión en español de la carta del Ministro se reproduce en el Anexo I del presente documento. En el Anexo II figura una traducción al inglés del proyecto de Ley proporcionada por las autoridades de Montenegro.

2. El artículo 34.3) del Acta de 1991 dispone que “[t]odo Estado que no sea miembro de la Unión o cualquier organización intergubernamental solicitará la opinión del Consejo acerca de la conformidad de su legislación con las disposiciones del presente Convenio. Si la decisión haciendo oficio de opinión es positiva, podrá depositarse el instrumento de adhesión”.

3. El Gobierno de Montenegro inició el procedimiento para ser miembro de la UPOV mediante una carta de fecha 11 de septiembre de 2007 en la que el Ministro de Agricultura, Silvicultura y Recursos Hídricos, S.E. Sr. Milutin Simovic, pedía al Consejo de la UPOV su opinión sobre la conformidad de la “Ley de Protección de Variedades Vegetales”, aprobada el 24 de julio de 2007, con el Acta de 1991.

4. En su cuadragésima primera sesión ordinaria, celebrada el 26 de octubre de 2007, el Consejo tomó la siguiente decisión:

- “a) tomar nota de la información proporcionada en el documento C/41/14;
- b) recomendar a Montenegro que incorpore en la Ley las disposiciones adicionales y enmiendas propuestas en el documento C/41/14 y que, en el párrafo 3 del artículo 12 de la Ley, sustituya “30 días” por “60 días”; una vez incorporadas en la Ley dichas disposiciones y enmiendas, la Ley modificada deberá presentarse al Consejo para que la examine de conformidad con el artículo 34.3) del Acta de 1991;
- c) solicitar a la Oficina de la Unión que ofrezca asistencia al Gobierno de Montenegro en la redacción de las disposiciones adicionales y enmiendas que han de introducirse en la Ley; y
- d) autorizar al Secretario General a informar al Gobierno de Montenegro acerca de esa decisión.”

5. Con arreglo a la citada decisión del Consejo de 26 de octubre de 2007, y en virtud del artículo 34.3) del Acta de 1991, el Gobierno de Montenegro ha formulado una nueva solicitud (véase el párrafo 1 del presente documento) con la finalidad de recabar la opinión del Consejo acerca de la conformidad del proyecto de Ley con el Acta de 1991.

#### Bases para la protección de las obtenciones vegetales en Montenegro

6. En Montenegro la protección de las obtenciones vegetales estará regida por el proyecto de Ley, una vez la Ley haya sido adoptada. A continuación se analiza el proyecto de Ley en el orden en el que figuran las disposiciones sustantivas del Acta de 1991.

#### Artículo 1 del Acta de 1991: Definiciones

7. El artículo 2 del proyecto de Ley contiene definiciones que guardan conformidad con las del artículo 1 del Acta de 1991.

#### Artículo 2 del Acta de 1991: Obligación fundamental de las Partes Contratantes

8. En el primer párrafo del artículo 1 del proyecto de Ley se dispone que “[l]a presente Ley fijará las condiciones y el procedimiento de obtención de protección para las variedades vegetales (a las que en adelante se denominarán “variedades”) y determina los derechos y las obligaciones de los titulares de derechos de obtentor”; con cuyo texto queda cumplida la obligación básica prevista en el artículo 2 del Acta de 1991.

Artículo 3 del Acta de 1991: Géneros y especies que deben protegerse

9. En el segundo párrafo del artículo 1 del proyecto de Ley se dispone que “[l]a presente Ley se aplicará a todos los géneros y especies vegetales”. Esta disposición se ajusta a lo dispuesto en el artículo 3.2)ii) del Acta de 1991. Cabe señalar que, de conformidad con lo dispuesto en el artículo 36.1)ii) del Acta de 1991, cuando Montenegro deposite su instrumento de adhesión, deberá notificar mediante declaración que la Ley se aplica a todos los géneros y especies vegetales.

Artículo 4 del Acta de 1991: Trato nacional

10. El artículo 3 del proyecto de Ley dispone que “Las personas físicas y jurídicas extranjeras tendrán los mismos derechos que las nacionales en lo que respecta a la protección de variedades en Montenegro”. Esta disposición se ajusta a lo dispuesto en el artículo 4 del Acta de 1991.

Artículos 5 a 9 del Acta de 1991: Condiciones de la protección; novedad; distinción; homogeneidad; estabilidad

11. Los artículos 5 y 7 a 10 del proyecto de Ley establecen las condiciones de la protección de conformidad con lo dispuesto en los artículos 5 a 9 del Acta de 1991.

12. El artículo 57 del proyecto de Ley insta un régimen provisional de novedad para las “variedades de reciente creación” sobre la base de lo dispuesto en el artículo 6.2) del Acta de 1991.

Artículo 10 del Acta de 1991: Presentación de solicitudes

13. Los artículos 15 a 18 del proyecto de Ley se ocupan de la presentación de solicitudes. En el proyecto de Ley no hay disposiciones que estén en conflicto con lo dispuesto en el artículo 10 del Acta de 1991.

Artículo 11 del Acta de 1991: Derecho de prioridad

14. El artículo 19 del proyecto de Ley contiene disposiciones sobre el derecho de prioridad que se ajustan a lo dispuesto en el artículo 11 del Acta de 1991.

Artículo 12 del Acta de 1991: Examen de la solicitud

15. Los artículos 16 a 18 y 20 a 24 del proyecto de Ley contienen disposiciones relativas al examen de la solicitud que se ajustan a lo dispuesto en el artículo 12 del Acta de 1991.

Artículo 13 del Acta de 1991: Protección provisional

16. El artículo 31 del proyecto de Ley contiene disposiciones sobre la protección provisional que se ajustan a lo dispuesto en el artículo 13 del Acta de 1991.

Artículo 14 del Acta de 1991: Alcance del derecho de obtentor

17. El artículo 28 del proyecto de Ley contiene disposiciones sobre el alcance del derecho de obtentor que se ajustan a lo dispuesto en el artículo 14 del Acta de 1991.

Artículo 15 del Acta de 1991: Excepciones al derecho de obtentor

18. El artículo 29 del proyecto de Ley contiene disposiciones sobre las excepciones al derecho de obtentor que se ajustan a lo dispuesto en el artículo 15 del Acta de 1991.

Artículo 16 del Acta de 1991: Agotamiento del derecho de obtentor

19. El artículo 30 del proyecto de Ley contiene disposiciones sobre el agotamiento del derecho de obtentor que se ajustan a lo dispuesto en el artículo 16 del Acta de 1991.

Artículo 17 del Acta de 1991: Limitación del ejercicio del derecho de obtentor

20. Los artículos 37 a 41 del proyecto de Ley contienen disposiciones sobre las licencias obligatorias.

21. El artículo 37 del proyecto de Ley contempla la concesión de licencias obligatorias por razones de interés público y se ajusta a lo dispuesto en el artículo 17.1) del Acta de 1991.

22. El artículo 17.2) del Acta de 1991 establece la obligación de que “el obtentor reciba una remuneración equitativa”. A ese respecto, en el artículo 39 de la Ley se hace referencia a la remuneración en el caso de las licencias obligatorias y se estipula que “[e]l titular de la licencia obligatoria deberá pagar al titular del derecho de obtentor las tasas establecidas de mutuo acuerdo. De no haber acuerdo sobre el importe y el método de pago de la tasa en cuestión, dicho importe será fijado por las autoridades judiciales competentes, teniendo en cuenta las circunstancias de cada caso y el valor económico que represente la licencia obligatoria.” El artículo 39 de la Ley se ajusta a lo dispuesto en el artículo 17.2) del Acta de 1991.

Artículo 18 del Acta de 1991: Reglamentación económica

23. El artículo 52 del proyecto de Ley dispone que:

“A los fines de la protección de los derechos de obtentor concedidos en virtud de esta Ley, la autoridad competente supervisará el cumplimiento de dicha Ley mediante un inspector fitosanitario de conformidad con la ley.

Las disposiciones de otras leyes o reglamentos que regulan la producción, el control y la comercialización del material de las variedades, o la importación y exportación de ese material, no deberán obstaculizar la aplicación de las disposiciones de esta Ley.”

24. No parece haber en el proyecto de Ley disposición alguna que sea incompatible con el artículo 18 del Acta de 1991.

Artículo 19 del Acta de 1991: Duración del derecho de obtentor

25. El artículo 6 del proyecto de Ley contiene disposiciones sobre la duración del derecho de obtentor que se ajustan a lo dispuesto en el artículo 19 del Acta de 1991.

Artículo 20 del Acta de 1991: Denominación de la variedad

26. Los artículos 11 a 14 del proyecto de Ley contienen disposiciones sobre la denominación de variedades que se ajustan a lo dispuesto en el artículo 20 del Acta de 1991.

Artículo 21 del Acta de 1991: Nulidad del derecho de obtentor

27. El artículo 43 del proyecto de Ley contiene disposiciones sobre la nulidad del derecho de obtentor que se ajustan a lo dispuesto en el artículo 21 del Acta de 1991.

Artículo 22 del Acta de 1991: Caducidad del derecho de obtentor

28. El artículo 44 del proyecto de Ley contiene disposiciones sobre la caducidad del derecho de obtentor que se ajustan a lo dispuesto en el artículo 22 del Acta de 1991.

Artículo 30 del Acta de 1991: Aplicación del Convenio

29. En lo que respecta a la obligación de prever “recursos legales apropiados que permitan defender eficazmente los derechos de obtentor” (artículo 30.1)i) del Acta de 1991), el proyecto de Ley contempla lo siguiente:

a) los artículos 46 a 51 del proyecto de Ley contemplan las medidas y los recursos civiles existentes a los fines de proteger el derecho de obtentor;

b) los artículos 55 y 56 del proyecto de Ley contemplan sanciones administrativas y multas; y

c) el artículo 57a del proyecto de Ley dispone lo siguiente:

“Las disposiciones sobre la Ley de Observancia de la Legislación que regula la protección de los derechos de propiedad intelectual (“Boletín Oficial de la República de Montenegro”, N° 45/2005) y el Reglamento sobre los actos de la autoridad aduanera en relación con las mercancías sospechosas de infringir derechos de propiedad intelectual (“Boletín Oficial de la República de Montenegro”, N° 25/2005) se aplicarán *mutatis mutandis* a los derechos de obtentor establecidos por esta Ley”.

30. En el párrafo 1 del artículo 23 del proyecto de Ley se dispone lo siguiente: “[s]obre la base de los resultados del examen, la autoridad competente tomará una decisión sobre la protección de la variedad, o la denegación de la solicitud de protección de la misma, según sea el caso”. El proyecto de Ley se ajusta, así, con la obligación prevista en el artículo 30.1)ii) del Acta de 1991.

31. En el párrafo 9 del artículo 23 del proyecto de Ley se dispone lo siguiente: “[l]a información relativa a la protección de la variedad, como pueda ser la denominación de la variedad, la información sobre el obtentor y sobre el titular del derecho y sus domicilios y domicilios sociales, según sea el caso, se publicará en el “Boletín Oficial de Montenegro” en un plazo de 30 días contados a partir de la fecha de inscripción en el Registro de Variedades Protegidas”. Esa disposición se ajusta a la obligación de publicar información sobre la concesión de derechos de obtentor y denominaciones aprobadas prevista en el artículo 30.1)iii) del Acta de 1991.

32. El artículo 25 del proyecto de Ley estipula lo siguiente: “[t]oda persona interesada que alegue que el solicitante no reúne los requisitos para disfrutar de los derechos de obtentor, o que no le corresponde el derecho de prioridad, o que no se han cumplido las condiciones necesarias para la protección de la variedad en virtud de lo dispuesto por la presente Ley, dispondrá de un plazo de 60 días, contados a partir del día de la publicación de la información sobre la inscripción, para apelar ante el Ministerio con respecto a la inscripción de la solicitud en el Registro de Solicitudes o a la inscripción de la variedad en el Registro de Variedades Protegidas”. Asimismo, en el párrafo 3 del artículo 12 del proyecto de Ley se establece lo siguiente: “[t]oda persona interesada podrá formular objeciones en relación con la denominación propuesta en un plazo de 60 días contados a partir de la publicación de dicha denominación”. Estas disposiciones cumplen con la obligación de publicar información relativa a las solicitudes de derechos de obtentor y las denominaciones propuestas según lo previsto en el artículo 30.1)iii) del Acta de 1991.

### Conclusiones generales

33. En opinión de la Oficina de la Unión, el proyecto de Ley recoge las disposiciones sustantivas del Acta de 1991. Una vez que se haya adoptado la Ley, Montenegro podrá “dar efecto” a las disposiciones del Acta de 1991 como se estipula en el artículo 30.2).

34. *Se invita al Consejo a:*

a) *tomar nota del análisis que figura en el presente documento;*

b) *tomar una decisión positiva sobre la conformidad del proyecto de Ley de Protección de Variedades Vegetales de Montenegro con las disposiciones del Acta de 1991 del Convenio Internacional para la Protección de las Obtenciones Vegetales; de modo que, una vez aprobada la Ley, sin modificaciones, y una vez esté en vigor, Montenegro pueda depositar su instrumento de adhesión al Acta de 1991; y*

v) *autorizar al Secretario General a informar al Gobierno de Montenegro acerca de esa decisión.*

[Siguen los Anexos]

ANEXO I

[Traducción por la Oficina de la Unión de una carta con fecha 19 de marzo de 2008]

Enviada por: S. E. Sr. Milutin Simovic  
Ministro de Agricultura, Silvicultura y Recursos Hídricos  
Montenegro

A: Dr. Kamil Idris  
Secretario General de la UPOV

Ref.: 320/07-0202-2005/18

Señor Secretario General:

Tengo el agrado de informarle de que la Ley de Protección de Variedades Vegetales modificada está en curso de aprobación por el Parlamento de Montenegro. En el proyecto de Ley que se adjunta figuran las modificaciones recomendadas por el Consejo de la UPOV en su cuadragésima primera sesión, celebrada el 25 de octubre de 2007. Dicho texto es la versión definitiva oficial.

De conformidad con lo dispuesto en el párrafo 3 del artículo 34 del Convenio de la UPOV, mucho le agradecería que el Consejo de la UPOV examine la conformidad de la Ley de Montenegro con las disposiciones del Convenio de la UPOV.

Aprovecho la oportunidad para expresarle, Señor Secretario General, el testimonio de mi más distinguida consideración.

(firmada)

Anexos: Traducción oficial del [proyecto] de Ley de Protección de Variedades Vegetales en uno de los idiomas oficiales de la UPOV (inglés)

[Sigue el Anexo II]



ANNEX II / ANNEXE II / ANLAGE II / ANEXO II

[In English only / En anglais seulement /  
Nur auf Englisch / En Inglés solamente]

MONTENEGRO

[DRAFT] LAW ON PROTECTION OF PLANT VARIETIES

I. GENERAL PROVISIONS

Subject-matter of the Law

Article 1

This Law shall govern the terms and the procedure for the protection of plant varieties (hereinafter referred to as: varieties) as well as rights and obligations of holders of the breeder's rights.

This Law shall apply to all plant genera and species.

Article 2

For the purposes of this Law, the terms used shall have the following meaning:

- 1) Variety shall mean 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 and is distinguished from any other plant grouping by the expression of at least one of the said characteristics and considered a unit with regard to its suitability for being propagated unchanged;
- 2) Protected variety shall mean a variety protected in accordance with the provisions of this Law;
- 3) Breeder shall mean:
  - the person who bred or discovered and developed a new variety,
  - the person who is the employer of the aforementioned person referred to in indent 1 of this item, or the person who has commissioned the latter's work; or
  - the successor in title of the person referred to in first or second indent of this item, as the case may be.
- 4) Breeder's right shall mean the right of the breeder acknowledged by registration of the protected variety into the Register of Protected Varieties, in accordance with this Law;
- 5) Breeder's right holder shall mean a person who has been granted a breeder's right in accordance with provisions of this Law, or his successor in title or heir;
- 6) Register of Applications for variety protection shall mean the register into which duly filed applications for protection of a plant variety are recorded (hereinafter referred to as: Register of Applications);
- 7) Register of Protected Varieties shall mean a register into which protected varieties are recorded;
- 8) UPOV means the International Union for the Protection of New Varieties of Plants.

Rights of Foreign Persons  
Article 3

Foreign legal and natural persons shall enjoy the rights identical to those of domestic persons with respect to variety protection in Montenegro.

Article 4

In the proceedings before the competent authority, any foreign legal and natural person shall be represented by a local representative.

II. VARIETY PROTECTION

1. CONDITIONS AND DURATION

Conditions  
Article 5

A variety shall be protected in accordance with this Law provided that it is new, distinct, uniform, stable and designated by an appropriate denomination.

Period of protection  
Article 6

The period of protection of a variety shall expire after twenty five years, and in the case of trees and vines it shall expire thirty years from the day of the grant of the breeder's right.

2. NEW VARIETY  
Article 7

A variety shall be considered new if, at the date of filing of the application for a variety protection, the 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 the purpose of exploitation of the variety in Montenegro for the period longer than one year or in a territory other than Montenegro for the period longer than four years or, in the case of trees and vines, longer than six years from the said date.

The variety referred to in the paragraph 1 of this Article shall also be considered new in cases when it is disposed of to others in one of the following ways:

- 1) By a contract on the transfer of the breeder's right;
- 2) By a contract on the basis of which the propagating material of the variety is multiplied on behalf of the holder of the breeder's right, provided that the propagating material multiplied is returned to the holder of the breeder's right and that the propagating material multiplied is not used for production of another variety;
- 3) By a contract on the basis of which researches are made in the experimental field and in laboratories, for the purpose of variety evaluation.

3. DISTINCTNESS  
Article 8

The variety shall be deemed 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.

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

The methods for checking the distinctness of a variety shall be laid down by the Ministry responsible of agriculture (hereinafter referred to as: Ministry).

4. UNIFORMITY  
Article 9

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

The methods for checking the uniformity of a variety shall be laid down by the Ministry.

5. STABILITY  
Article 10

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

The methods for checking the stability of a variety shall be laid down by the Ministry.

6. VARIETY DENOMINATION

Variety  
Article 11

The variety denomination may be a word, a combination of words, a combination of words and numbers or a combination of letters and numbers, meaningful or meaningless, provided that the designation enables the variety to be identified.

Where a variety denomination has already been used in Montenegro or some other country or where an application is filed or the denomination already registered in Montenegro or some other country, only the variety denomination which has been proposed may be used in the protection procedure before the competent authority.

Where a variety denomination proposed is inappropriate for use in Montenegro, the breeder shall propose another denomination which, if it is appropriate, shall be registered in the Register of Applications and the Register of Protected Varieties.

A variety denomination may not consist solely of figures unless this is an established practice for designating specific varieties. A variety denomination may not mislead or cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. A variety denomination shall be different from any other denomination used on the territory of UPOV Members for designation of existing variety of the same plant species or a closely related species.

Any person who markets or advertises the propagating material of a variety protected shall use the registered variety denomination.

The obligation concerning the use of the registered variety denomination shall not expire even after the expiration of the period of variety protection referred to under the Article 6 of this Law, except where, in accordance with the provisions of paragraph 8 of this Article, prior rights prevent such use.

When a variety is marketed or advertised, a trademark, trade name or other similar indication may be associated with the registered variety denomination, provided that the variety denomination is easily distinguishable.

Where use of a variety denomination is forbidden to a person who is bound to use it, for reasons of any of the prior rights of a third person, the competent authority in responsible for plant variety protection (hereinafter referred to as: competent authority) shall request from the breeder to propose another denomination for the variety.

#### Denomination Proposal Article 12

The applicant shall propose a variety denomination in the application.

The applicant may temporarily postpone the proposal of a denomination, but not longer than 30 days from the day of filing the application. If the applicant fails to submit the proposal in due time, the competent authority shall reject the application.

An interested person may, within the period of 60 days from the date of publication of the proposed denomination, file an objection to the proposed denomination.

The competent authority shall notify the applicant of the objection referred to in paragraph 3 of this Article and invite him to submit a reply to the objection within the period of 30 days from the day of the receipt of the notification.

In his reply to the objection, the applicant may propose a new denomination for the variety.

In case the denomination proposed does not comply with this Law, the competent authority shall order the applicant to file a proposal for a new denomination of the variety within the period of 60 days from the day of the receipt of the notification.

If the applicant fails to submit the proposal of the new denomination within the prescribed period of time, the competent authority shall reject the application.

The variety denomination is granted by the competent authority in the decision on variety protection.

Reasons for Rejection of Denomination Proposed  
Article 13

The competent authority shall reject the proposal of a variety denomination, which:

- 1) Is inappropriate for a variety identification;
- 2) Consists solely of signs or indications that may serve for indication of a variety, kind, quality, quantity, intended objective, value geographic origin or time of production;
- 3) Is contrary to Article 11 of this Law;

The Ministry shall prescribe which species are to be deemed closely related .

Denomination Cancellation  
Article 14

The competent authority shall cancel a variety denomination under the circumstances referred to in Article 13 paragraph 1 of this Law, or on the basis of a court decision prohibiting the use of the denomination.

The competent authority shall issue a notification on cancellation of the variety denomination and invite the holder of the breeder's right to propose a new denomination within the period of 30 days from the day of receipt of the notification.

### III. VARIETY PROTECTION PROCEDURE

#### 1. APPLICATION

##### Article 15

The procedure for protection of a variety instigated by the filing of an application filed to the competent authority by the breeder or his representative.

The form and contents of the application referred to in paragraph 1 of this Article shall be prescribed by the Ministry.

##### Additional Information Article 16

The application referred to in Article 15, paragraph 1 of this Law shall be supplemented by the information, documents and material necessary for examination purposes.

The method of submission of the information, documents and material referred to in paragraph 1 of this Article shall be prescribed by the Ministry.

Examination of the Application  
Article 17

The competent authority shall examine whether the application is complete, i.e. whether it meets the requirements as laid down by this law.

If the application is found not to be complete, the competent authority shall, stating the reasons, invite the applicant to correct the deficiencies identified within the period of 30 days from the day of receipt of the notification.

If the applicant does not correct deficiencies within the period referred to in paragraph 2 of this Article, the competent authority shall reject the application.

Entry into the Register of Applications  
Article 18

Where it is established that the application meets the requirements, the competent authority shall register it into the Register of Applications.

The contents of the Register of Applications shall be prescribed by the Ministry.

The Register of Applications shall be kept by the competent authority.

2. RIGHT OF PRIORITY

Article 19

Any breeder who has duly filed an application for the protection of a variety with the competent authority of another UPOV member for the grant of a breeder's right shall enjoy a right of priority for a period of twelve months from the day of filing the application.

If two or more breeders have independently bred or discovered and developed a new variety, the right of priority shall be enjoyed by the breeder who was the first to file an application for the variety protection to the competent authority.

In order to avail himself of the right of priority, the breeder shall furnish the competent authority with the evidence on the priority date within a period of 90 days.

If the competent authority accepts the evidence on the priority date, the application shall be deemed as filed on the priority day.

The breeder shall be allowed a period of two years after the expiration of the period of priority or, where the first application is rejected or withdrawn, an appropriate time after such rejection or withdrawal, in which to furnish, to the competent authority, any necessary information, document or material required for the purpose of the examination of the application,

The Minister shall prescribe the appropriate time referred to in paragraph 5 of this Article.

### 3. VARIETY EXAMINATION

#### Examination Article 20

Any decision to grant a breeder's right shall require an examination for compliance with the conditions under this Law. In the course of the examination, the competent authority may grow the variety or carry out other necessary tests, cause the growing of the variety or the carrying out of other necessary tests, or take into account the results of growing tests or other trials, which have already been carried out. For the purposes of examination, the competent authority may require the breeder to furnish all the necessary information, documents or material.

#### Examiner Article 21

Examination of a variety may be carried out by a natural or legal person that meets the requirements for carrying out such examination in terms of human resources, facilities and equipment (hereinafter referred to as: examiner).

Requirements that need to be met by the examiner shall be prescribed by the Ministry.

Compliance with requirements referred to in paragraph 2 of this Article shall be prescribed by the competent authority.

#### Processing of Examination Results Article 22

The competent authority shall conclude the contract with the examiner on the basis of public announcement procedure.

The competent authority shall process the examination results obtained from the examiner.

The Ministry shall prescribe the methods for processing of the results referred to in paragraph 2 of this Article.

### 4. DECISION ON VARIETY PROTECTION AND GRANT OF BREEDER'S RIGHT

#### Article 23

Based on examination results, the competent authority shall issue a decision on protection of the variety or refusal of the application for the protection of the variety, as the case may be.

Based on the decision on protection of the variety, the variety shall be registered into the Register of Protected Varieties.

The applicant shall have the right to lodge an appeal to the Ministry against the decision on refusal of the variety protection.

In the appeal procedure, the examination of the variety in the examination field and the laboratory for the purpose of the supervision shall be conferred to another examiner.

When the supervision results confirm that the variety meets the requirements for protection and entry into the Register of Protected Varieties, the supervision costs shall be borne by the examiner who initially presented the examination results.

When the supervision results confirm the initial examination results, the supervision costs shall be borne by the applicant who has lodged the appeal.

The contents of the Register of Protected Varieties shall be prescribed by the Ministry.

The Register of Protected Varieties shall be kept by the competent authority.

The information on the variety protection, including the variety denomination and information on the breeder, the holder of the right and their domicile or corporate domicile, as the case may be, shall be published in the "Official Journal of Montenegro of Montenegro", within the period of 30 days from the day of entry in the Register of Protected Varieties.

#### Availability of Information and Confidentiality Article 24

Any interested person may peruse the following:

- 1) the Register of Applications for Variety Protection;
- 2) the results of variety examination in the protection procedure;
- 3) the Register of Protected Varieties.

When a variety production requires repeated use of another variety (component), the applicant may request in his application that the documents and results of component examination be treated as confidential.

### 5. APPEAL

#### Right to Appeal Article 25

Any interested person who alleges that the applicant is not entitled to the breeder's right or that he does not have the right of priority or that conditions for protection of a variety under this Law have not been complied with, may lodge an appeal to the Ministry with respect to the entry of the application into the Register of Application or to the entry of the variety into the Register of Protected Varieties within the period of 60 days from the day of publicizing the information on the entry.

The appeal shall be lodged in writing, accompanied with the appropriate evidence.

The appeal referred to in paragraph 1 of this Article shall be forwarded to the applicant or holder of the right, together with an invitation to provide a reply to the appeal within the period of 15 days from the date of the receipt of the complaint.



Decision on the Appeal to the Entry into the Register of Applications  
Article 26

If the applicant fails to present a reply to the appeal within the period prescribed, the application shall be deemed withdrawn.

If the applicant presents a reply to the appeal and demands the decision on his application, with or without amendments, the decision on the application and the appeal shall be made concurrently.

Appeal to Registration in the Register of Protected Varieties  
Article 27

The appeal to registration in the Register of Protected Varieties may be submitted by a person who alleges that the variety is not new, distinct, uniform or stable.

The appeal referred to in paragraph 1 of this Article shall be lodged to the Ministry. Additional examination of the variety may be ordered in the appeal procedure in order to verify the statements of the appeal.

At the request of the body that decides the appeal, the person who has lodged the appeal shall present, within the period of 15 days, the additional information and documents to substantiate the appeal or reproduction material necessary for the examination.

When the person who lodged the appeal fails to act in compliance with paragraph 3 of this Article, the appeal shall be rejected.

Based on the findings in the proceedings initiated upon the appeal, the appeal may be either accepted, thus canceling the entry into the Register of Protected Varieties, or dismissed.

#### IV. THE RIGHTS AND OBLIGATIONS OF THE BREEDER

##### 1. RIGHTS

##### Scope of the Breeder's Right Article 28

The holder of the breeder's rights shall be entitled to indication of his name and the denomination in acts, registers, documents and publications.

The propagating material of a protected variety shall be used only with authorization of the holder of the breeder's right, who sets the conditions for granting the authorization.

Subject to Articles 29 and 30 of this Law, the following acts in respect of the propagating material of a protected variety shall require the authorization of the breeder:

- 1) Production or reproduction (multiplication) of the variety protected;
- 2) Conditioning for the purpose of propagation of the protected variety;
- 3) Offering the protected variety for sale;

- 4) Selling or other marketing of the protected variety;
- 5) Exporting or importing of the protected variety;
- 6) Stocking for any of the purposes referred to in items 1 to 5 of the paragraph 3 of this Article.

Subject to Articles 29 and 30 of this Law, acts referred to in the paragraph 3 items 1 to 6 of this Article, in respect of the harvested material, including whole 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 of the breeder's right, unless the holder has had reasonable opportunity to exercise his right in relation to the propagating material concerned.

The authorization of the holder of the breeder's right shall also be required for the acts referred to in paragraphs 3 and 4 of this Article for a variety:

- 1) Which is essentially derived from the protected variety where the protected variety is not in itself an essentially derived variety;
- 2) Which is not clearly distinguishable from the protected variety; and
- 3) Whose production requires the repeated use of the protected variety.

A variety shall be deemed to be essentially derived from the initial variety when:

- 1) 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 resulting from the genotype or combination of genotypes of the initial variety;
- 2) It is clearly distinguishable from the initial variety; and
- 3) With the exception of the differences resulting from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or a combination of genotypes of the initial variety.

For the purpose of paragraph 5, subparagraph 1 and paragraph 6 of this Article, an essentially derived variety may be obtained, for example, by 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.

#### Exceptions to the Breeder's Right Article 29

Authorization of the holder of the breeder's right shall not be required for the acts undertaken for:

- Personal use and for non-commercial purposes;
- Experimental purposes;
- For the purpose of breeding other varieties, and, except where the provisions of Article 28 paragraph 5 apply, acts referred to in Article 28 paragraphs 3 and 4 of this Law, in respect of such other varieties.

The Ministry may, taking into account the need for safeguarding the breeder's rights, restrict within reasonable limits the breeder's right, subject to remuneration that shall not be lower than the market one, in relation to selected agricultural crops to allow farmers to use for

propagation purposes, on their own holdings, the harvested material obtained by planting the protected variety on their own holdings.

The Ministry shall prescribe the list of agricultural crops referred to in paragraph 2 of this Article.

The exception referred to in paragraph 2 of this Article shall not apply to fruits, ornamentals and vegetables.

#### Exhaustion of the Breeder's Right Article 30

The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of Article 28, paragraph 5 of this Law, which has been sold or otherwise marketed by the breeder or with his consent in the territory of Montenegro, or any material derived from the said material, unless such acts:

- 1) Involve further propagation of the variety in question, or
- 2) 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.

For the purposes of paragraph 1 of this Article, "material" shall mean, in relation to a variety,

- 1) Propagating material of any kind,
- 2) Harvested material, including entire plants and parts of plants, and
- 3) Any product made directly from the harvested material.

#### Provisional Protection Article 31

During the period between publication of the application for the grant of the variety protection and the granting of the right on the variety protection, the holder of the breeder's right shall be entitled to equitable compensation from any person who, during the period concerned, has carried out acts which, once the right is granted, require the authorization of the holder of the breeder's right, as provided in Article 28 of this Law.

#### Several Breeders, Breeder and Employer Article 32

If two or more persons have jointly bred or discovered and developed a variety, they shall have equal rights to protection. The rights and obligations of such persons may be regulated by a contract.

When a variety is bred or discovered and developed during the employment, the rights of the employee who bred, discovered or developed the variety concerned and the rights of the employer shall be laid down by this Law, general legal acts and a contract between the employer and the employee or their representatives, as the case may be.

## 2. OBLIGATIONS

### Maintenance of the Protected Variety Article 33

The holder of the breeder's right shall ensure maintenance of the protected variety unchanged during the period of protection.

### Monitoring of Variety Maintenance Article 34

The competent authority shall issue a decision on cancellation of the breeder's right if it is established that the holder of the breeder's right has failed to maintain the variety.

### Providing Samples of the Variety Article 35

At the request of the competent authority, the holder of a breeder's right shall provide an appropriate quantity of samples of the propagating material of the protected variety deemed necessary for verifying the maintenance of the variety.

At the request of the competent authority, the holder of the breeder's right shall maintain or keep the sample of the variety.

## V. LICENSES

### Transfer and Licensing of Breeder's Right Article 36

A holder of the breeder's right may transfer his right to a protected variety as a whole, or license some of his rights to another person.

The transfer of right and granting the license shall be made by a written contract, which shall include provisions on the following: the scope of right, the period of time for which the right is transferred and the fee for use of the right, if any.

For the purpose of entry into the Register of Protected Varieties, the holder of the breeder's right shall inform the competent authority of any transfer or license of rights. The information shall include the particulars of the transferee or the licensee, scope of right, and the period of time for which the right is transferred or licensed.

### Compulsory License Article 37

When the holder of the breeder's right refuses to transfer his right of economic use of the variety protected to other persons, or when he sets unjustified conditions for such transfer, the competent authority may grant the compulsory license, provided that the use is of public interest for development of plant production, for protection and development of the environment or for a specific economic branch.

Prior to filing the request referred to in paragraph 1 of this Article, the interested person shall have to provide evidence on his attempt to obtain the authorization from the holder of the breeder's right for the acts referred to in Article 28 of this Law reasonable economic conditions, and the evidence that the authorization was not granted to him within the reasonable period of time.

The compulsory license referred in paragraph 1 of this Article shall be granted only to the interested person who proves its capability and capacity required for the economic use of the protected plant variety.

#### Time Limit for Requesting the Compulsory license Article 38

The request for grant of the compulsory license may not be filed earlier than four years from the date of filling the application, or three years from the date of grant of the breeder's right, whichever expires later.

The compulsory license shall not be granted if the holder of the breeder's right proves that there are reasons justifying his refusal to grant the authorization for use of the protected variety or conditions for such a use.

#### Compulsory License Fee Article 39

The holder of the compulsory license shall pay the holder of the breeder's right the fee mutual agreed. In the absence of the agreement on the amount and method of paying the fee, the amount of the fee shall be set by the competent court, taking into account the circumstances of each individual case and the economic value of the compulsory license.

#### Scope and Duration of the Compulsory License Article 40

The scope and the duration of the compulsory license shall be limited to the purpose it was granted for.

The compulsory license shall not be exclusive.

The compulsory license may be transferred only together with the company or part of the company in which it is used, as the case may be.

The compulsory license shall be granted primarily for the purposes of supplying the domestic market.

The compulsory license may be cancelled if and when the circumstances that have led to its grant cease to exist and if it is unlikely that they will reoccur. Upon the substantiated request, the competent authority shall review the existence of such circumstances.

The compulsory license may also be cancelled when the competent authority establishes that the person to whom it was granted fails to meet the conditions under which it was granted.

Obligation to Supply Propagating Material  
Article 41

The holder of the breeder's right shall, at the request of the competent authority and subject to payment of the appropriate remuneration, supply the propagating material necessary for utilization of the compulsory license to the person to whom the compulsory license has been granted.

VI. TERMINATION OF BREEDER'S RIGHT

Reasons for Termination of Breeder's Right  
Article 42

The breeder's right shall terminate before the term referred to under the Article 6 of this Law if:

- 1) The right holder informs the competent authority in writing form that he wants to terminate the breeder's right, effective as of the date stated or as of the filing date;
- 2) The holder of the breeder's right dies or ceases to exist without a heir or successor in rights, on the date of death or cessation;
- 3) The annual costs of variety protection have not been paid on the due date.

The decision on termination of the breeder's right shall be made by the competent authority which shall enter it into the Register of Protected Varieties.

Nullity  
Article 43

The competent authority may declare null and void the decision on protection of the variety throughout the period of protection, *ex officio* or at the proposal of an interested person if:

- 1) It is established that the variety was neither new nor distinct at the time of the grant of the breeder's right;
- 2) It is established that the decision on granting the breeder's right has been essentially based upon information and documents furnished by the applicant, while conditions of stability and uniformity were not complied with at the time of the grant of the breeder's right;
- 3) The breeder's right has been granted to a person who is not entitled to it, except in the case where, in the meantime, it has been transferred to the person who is so entitled.

The decision referred to in paragraph 1 of this Article shall be entered into the Register of Protected Varieties.

After the decision referred to in paragraph 1 of this Article becomes final and enforceable, the competent authority shall delete the variety from the Register of the Protected Varieties.

An appeal against the decision referred to in paragraph 1 of this Article may be lodged to the Ministry.

Cancellation of the Decision  
Article 44

The competent authority shall cancel the decision on protection of the variety if:

- 1) It is established that the variety is no longer uniform or stable;
- 2) The holder of the breeder's right fails to furnish the competent authority with information, documents or material deemed necessary for verification of the variety maintenance;
- 3) The holder of the breeder's right fails to propose another denomination for the variety if the variety denomination has been cancelled after the grant of the right;
- 4) The breeder fails to pay the fee for maintenance of the breeder's right.

The decision referred to in paragraph 1 of this Article shall be entered into the Register of Protected Varieties.

After the decision referred to in paragraph 1 of this Article becomes final and enforceable, the competent authority shall delete the variety from the Register of the Protected Varieties.

## VII. COSTS

### Article 45

The costs of variety examination in the examination field and the laboratory and annual costs of variety protection shall be borne by the applicant or the holder of the breeder's right, as the case may be.

The amount of the costs referred to in paragraph 1 of this Article shall be prescribed by the Ministry.

## VIII. CIVIL LAW PROTECTION

### Article 46

The holder of the breeder's right or his successor in rights or heir, as the case may be, shall be entitled to file a civil action against the person infringing his right through actions referred to under the Article 28 paragraph 2, 3 and 4 of this Law without authorization, and shall have the right to claim the following:

- 1) Ascertaining of infringement of the breeder's right;
- 2) Prohibition of actions infringing the breeder's right;
- 3) compensation for damages caused by infringement, including direct damages, lost profits and justifiable legal costs and expenses;
- 4) Publicizing of the court decision at the expense of the defendant;
- 5) Forfeiture or destruction, without compensation of any sort, of the items and equipment predominantly used for infringement of the breeder's right;
- 6) Forfeiture or destruction, without compensation of any sort, of infringing products.

General regulations on compensation of damages shall be applied to issues related to compensation of the damage done by infringement of the breeder's right that have not been provided for by this law.

If a violation of rights has been committed intentionally or out of gross negligence, the plaintiff may, instead of the amount of compensation referred to paragraph 1, item 3 of this Article, claim an amount equal to the threefold amount of remuneration that would have been paid had the use of the right been lawful.

#### Statute of Limitations Article 47

The action referred to in Article 46, paragraph 1 of this Law may be filed within a period of three years from the date of obtaining information of the infringement and the offender, but not later than five years from the date on which the infringement has been committed.

Proceedings for the violation of breeder's right shall be administered in an expedited manner.

#### Provisional Measures Article 48

At the request of a right holder who makes it credible that his right has been infringed, or that such infringement is imminent, the court may order a provisional measure involving the seizure or removal from the market of the object with which the infringement has been made and/or a provisional measure involving a prohibition against the acts under way, which could be conducive to violation.

#### Securing of Evidence Article 49

At the request of the right holder who makes it credible that his/her right has been violated, or that such violation is imminent or that irreparable harm is likely to occur, or that there is a reasonable doubt that the evidence of that will be destroyed or that it will not be possible to obtain it later on, the court may order a measure to secure evidence without giving prior notice to or hearing the person from which evidence is to be collected.

For the purposes of Paragraph 1 of this Article, the securing of evidence shall mean the inspection of premises, books, documents, databases, etc., as well as the seizure of documents and infringing goods, depositions of witnesses and expert witnesses.

The court decision ordering measures to secure evidence shall be served to the person from which evidence is to be collected, on the occasion of the collection of evidence, and to an absent person, as soon as that becomes possible.

#### Request for Provisional Measures Article 50

Measures referred to in Articles 48 and 49 of this Law may be requested even before filing an action.



In the case referred to in Paragraph 1 of this Article, decision establishing the measure shall contain the period in which the action has to be filed, which shall not be shorter than 30 days from the execution of the measure.

An appeal lodged against a decision ordering a provisional measure shall not stay the execution of the decision.

#### Obligation of the Defendant to Furnish the Information Article 51

The court may order the defendant to furnish information about third parties related to the violation or hand over documents relating to the violation.

The person failing to meet the obligation referred to in paragraph 1 of this Article liable shall be liable for any damages thus incurred.

### IX. INSPECTORIAL SUPERVISION

#### Article 52

For the purpose of protection of breeder's rights granted under this Law, inspectorial supervision over the enforcement of this Law shall be performed by the competent authority through a phytosanitary inspector, in compliance with the law.

Any provisions of other laws or regulations that regulate the production, certification and marketing of material of varieties or the importing or exporting of such material, shall not affect the application of the provisions of this Law.

#### 1. POWERS OF A PHYTOSANITARY INSPECTOR

##### Article 53

A phytosanitary inspector shall perform inspectorial supervision particularly in regard to:

- 1) Examination of distinctness, stability or uniformity of varieties in the experimental field or laboratory of the examiner;
- 2) Examiner's compliance with the conditions for examination of varieties in the experimental field or laboratory;
- 3) Unauthorized acts in relation to the protected variety referred to in Article 28 of this Law;
- 4) Use of the protected variety denomination;
- 5) Sampling of propagating material, free of charge, for the purpose of establishing the compliance with the conditions prescribed by this Law.

#### 2. ADMINISTRATIVE MEASURES AND ACTIONS

##### Article 54

In cases where a breach of law or other regulation has been established, a phytosanitary inspector shall, in addition to administrative measures and actions laid down by the law

governing the inspectorial supervision, undertake the following administrative measures and actions:

- 1) Prohibit placing on the market, import or export of propagating material of varieties if it is established that the propagating material fails to meet the conditions prescribed by this Law, or that the right of the holder of the breeder right has been infringed;
- 2) Prohibit the examiner the examination of varieties in the experimental field or in the laboratory if he fails to remove the deficiencies in regard of conditions laid down by this Law.

## X. PENAL PROVISIONS

### Article 55

A fine ranging from 200 to 300 minimum wages in Montenegro shall be imposed on a state authority, company or other legal person or entrepreneur who:

- 1) Uses the variety denomination not granted by the decision of the competent authority (Article 12 paragraph 8);
- 2) Without authorization by the holder of the breeder's right, produces or reproduces, conditions for the purpose of propagation of the protected variety, offers for sale, sells or markets in any other way, exports or imports, or stocks for any of the said purposes the protected variety (Article 28, paragraph 3);

A fine of 20 minimal wages shall also be imposed on the responsible person in the legal person for the offence referred to in paragraph 1 of this Article.

A fine ranging from 15 to 20 minimal wages in Montenegro shall be imposed on the natural person for the offence referred in paragraph 1 of this Article.

For the offence referred to in paragraph 1 of this Article, in addition to the fine, a measure of prohibition of activity ranging from one to six months, may be imposed on the company, other legal person or entrepreneur.

### Article 56

A fine ranging from 150 to 200 minimum wages in Montenegro shall be imposed on an authority, company or other legal person or entrepreneur, who, at the request of the competent authority, fails to supply to the person to whom the compulsory license was granted the appropriate quantity of propagating material necessary for use of the compulsory license (Article 41).

For the offence referred to in paragraph 1 of this Article a fine ranging from 15 to 20 minimum wages in Montenegro shall be imposed on the natural person and the responsible person of the legal person.

## XI. TRANSITIONAL AND FINAL PROVISIONS

### Protection of Known Varieties Article 57

Notwithstanding Article 7 of this Law, the competent authority may grant the breeder's right for the variety that is not new on the day this Law enters into force when:

- 1) The application has been filed no later than 12 months from the day this Law entered into force; and
- 2) The variety is:
  - Registered in the appropriate variety register recognized by the competent authority;
  - The subject of the breeder's right in a UPOV member state, or the subject of the application in a UPOV member state, where the application leads to grant of the breeder's right; or
  - The subject of the evidence on the date when the variety ceased to be new in accordance with Article 7 of this Law, which the competent authority finds acceptable.

Duration of the breeder's right granted under paragraph 1 of this Article shall start from the date of:

- Registration referred to under the paragraph 1, item 2, indent 1 of this Article;
- Grant of the breeder's right referred to under the paragraph 1, item 2, indent 2 of this Article; or
- When the variety ceased to be new in accordance with paragraph 1, item 2, indent 3 of this Article.

When relevant to the decision of the competent authority, the earliest of the dates referred to in paragraph 2 of this Article shall apply.

When the breeder's right is granted under paragraph 1 of this Article, the holder of the right shall grant a license under reasonable terms in order to provide for the use of the variety that the third party began in good faith prior to filing of the application for the grant of the right under paragraph 1 of this Article.

### Article 57a

Provisions of the Law on Enforcement of the Legislation that Regulates Protection of Intellectual Property Rights ("Official Gazette of the Republic of Montenegro", No. 45/2005) and the Regulation on Actions of the Customs Authority Applicable To Goods Suspected Of Infringement Of Intellectual Property Rights ("Official Gazette of the Republic of Montenegro", No. 25/2005) shall apply *mutatis mutandis* to breeders' rights established by this Law.

### Article 58

Bylaws for implementation of this Law shall be adopted within the period of one year from the day this Law enters into force.

Pending the adoption of the regulations based on this Law the regulations adopted under the Law on Protection of Varieties of Agricultural and Forest Plants (Official Journal of FRY, No. 12/98, 28/ 2000, 37/02) provided that they not in the contravention of this Law.

Article 59

On the day this Law enters into force, the Law on Protection of Varieties of Agricultural and Forest Plants (Official Journal of FRY, No. 12/98, 28/ 2000, 37/02) shall cease to be effective.

Entering into force  
Article 60

This Law shall enter into force on the eighth day after its publishing in the Official Journal of the Republic of Montenegro.

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