



PLANT VARIETY PROTECTION

GAZETTE AND NEWSLETTER

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GAZETTE

NEW MEMBERS OF UPOV

PERU¹

On July 8, 2011, the Government of Peru deposited its instrument of accession to the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, with the Secretary-General of UPOV.

The Convention entered into force for Peru one month after the deposit of its instrument of accession, i.e. on August 8, 2011.

On that date, Peru became the seventieth member of the Union.

According to the notification deposited with the Secretary-General together with the instrument of accession, protection is available to all plant genera and species.

¹ Pursuant to Article 34 (3) of the 1991 Act of the UPOV Convention, any State which is not a member of the Union and any intergovernmental organization shall, before depositing its instrument of accession, ask the Council of UPOV to advise it in respect of the conformity of its laws with the provisions of the UPOV Convention. If the decision embodying the advice is positive, the instrument of accession may be deposited. The positive advice of the Council of UPOV concerning the legislation of Peru is contained in paragraph 6 of document C(Extr.)/26/4 (www.upov.int/en/documents/c_extr/index_c_extr_26.htm).

THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA²

On April 4, 2011, the Government of the former Yugoslav Republic of Macedonia deposited its instrument of accession to the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, on October 23, 1978, and on March 19, 1991, with the Secretary-General of UPOV.

The Convention entered into force for the former Yugoslav Republic of Macedonia one month after the deposit of its instrument of accession, i.e. on May 4, 2011.

On that date, the former Yugoslav Republic of Macedonia became the sixty-ninth member of the Union. According to the notification deposited with the Secretary-General together with the instrument of accession, protection is available to the genera and species listed below.

LIST OF GENERA

- *Avena* L.
- *Beta* L.
- *Brassica* L.
- *Capsicum* L.
- *Citrullus* Schrad.
- *Cucumis* L.
- *Helianthus* L.
- *Hordeum* L.
- *Lycopersicon* Mill.
- *Medicago* L.
- *Onobrychis* Mill.
- *Secale* L.
- *Triticosecale* Wittm. ex A. Camus
- *Triticum* L.
- *Zea* L.

² Pursuant to Article 34 (3) of the 1991 Act of the UPOV Convention, any State which is not a member of the Union and any intergovernmental organization shall, before depositing its instrument of accession, ask the Council of UPOV to advise it in respect of the conformity of its laws with the provisions of the UPOV Convention. If the decision embodying the advice is positive, the instrument of accession may be deposited. The positive advice of the Council of UPOV concerning the legislation of the former Yugoslav Republic of Macedonia is contained in paragraph 14 of document C/42/21 (www.upov.int/en/documents/c/index_c42.htm).

EXTENSION OF PROTECTION TO FURTHER GENERA AND SPECIES

CROATIA

On August 17, 2011, the Office of the Union received a notification concerning the extension of protection to all plant genera and species from September 1, 2011.

The notification stated that a transitional novelty regime will be applied to the additional genera and species for a period of two years in accordance with Article 6(2) of the 1991 Act of the UPOV Convention.

KYRGYZSTAN

On August 10, 2011, the Office of the Union received a notification concerning the extension of the list of genera and species in Kyrgyzstan.

The notification stated that the Government of Kyrgyzstan grants legal protection to all genera and species of plants on its territory.

SOUTH AFRICA

On August 24, 2011, the Office of the Union received a notification from the Directorate: Genetic Resources of the Department of Agriculture of South Africa concerning the extension of protection to the following genera and species:

1		2	3	4
Kind of Plant		Category	Period of Plant Breeder's Right (Years)	Period of sole Right (Years)
Botanical Name	Common Name			
<i>Bulbine</i> Wolf (All/Alle spp.)	Bulbine	A	20	5
<i>Choisya x dewitteana</i>	Mexican orange	B	25	8
<i>X Cupressocyaparis</i> Dallim	-	B	25	8
<i>Euphorbia hypericifolia</i> L.	Spurge	B	25	8
<i>Gasteria</i> Duval (All./Alle spp.)	Tongue Plant	A	20	5
<i>Ilex crenata</i> Thunb.	Japanese holly, Box-leaved holly	B	25	8
<i>Isopogon</i> R.Br. ex Knight (All/Alle spp.)	-	B	25	8
<i>Parahebe cottaractae</i> (G.Forsst.) W.R.B. Oliv.	Parahebe	B	25	8
<i>Sarcococca</i> Lindl.	Sweet box, Christmas box	B	25	8
<i>Senecio</i>	Mustard canary creeper	A	20	5

LEGISLATION

FINLAND³

PLANT BREEDER'S RIGHT ACT (1279/2009)

CHAPTER 1: GENERAL PROVISIONS

Section 1 Scope of application

This Act applies to the protection of the plant variety right (*plant breeder's right*). A plant breeder's right may be granted to varieties of all botanical genera and species.

Section 2 European Community legislation

(1) Provisions on the plant variety rights of the European Community are laid down in Council Regulation (EC) No 2100/84 on Community plant variety rights.

(2) The same protection as laid down by this Act applies to a Community plant variety right holder, unless otherwise specified in the Act.

Section 3 Definitions

(1) In this Act:

- 1) *essentially derived variety* means a variety produced by utilising a protected variety in an essential way;
- 2) *plant breeder's right* means the exclusive right of a breeder to the professional exploitation of the variety as laid down in this Act; a plant breeder's right also applies to:
 - a) varieties which are not clearly distinct from a protected variety,
 - b) essentially derived variety if the variety itself is not an essentially derived variety, and
 - c) varieties whose production requires repeated use of a protected variety;
- 3) *plant breeder's right holder* means the breeder of the variety or the successor to this title; the plant breeder's right holder is the person who has last been entered to the register of plant breeder's rights referred to in section 22 as the plant breeder's right holder, unless otherwise shown;
- 4) *variety* means a plant grouping within a botanical taxon of the lowest known rank which can be:
 - a) defined by the expression of characteristics of a given genotype or combination of genotypes,
 - b) distinguished from any other plant grouping by at least one characteristic, and
 - c) considered as a unit on the grounds of its suitability for being propagated unchanged;
- 5) *hybrid* means the progeny of parents with different genotypes;

³ The Plant Breeder's Act (1279/2009) entered into force on January 1, 2010.

- 6) *propagating material* means all plant parts which can be used for propagating plants;
- 7) *material of a variety* means;
 - a) propagating material of a variety;
 - b) crop, whole plants and parts of plants harvested from the plantation of the variety; and
 - c) all produce directly manufactured from the harvested crop.
- 8) *marketing* means sale or other conveyance against compensation, storage for sales purposes, offering for sale, conveyance without reimbursement for commercial utilisation as well as placing on the market against charge or free of charge within the European Union for distribution or use within the Union territory.

CHAPTER 2: PLANT BREEDER'S RIGHT

Section 4 Content of plant breeder's right

- (1) A plant breeder's right holder has the exclusive right to exploit the propagating material of the variety in professional production and marketing
- (2) The following acts concerning propagating material require the authorisation of the plant breeder's right holder conditions subject to conditions determined by the holder:
 - 1) propagating;
 - 2) conditioning for the purpose of propagation;
 - 3) marketing, export and import; and
 - 4) storage for use for purposes referred to in 1-3
- (3) Acts referred to in subsection 2 above may not be performed to crop obtained through unauthorised exploitation of the propagating material of a protected variety without the authorisation of the plant breeder's right holder if the plant breeder's right holder has not had a reasonable opportunity to exercise his or her right to the material concerned.

Section 5 Exceptions to plant breeder's right

- (1) Plant breeder's right does not restrict the use of a variety:
 - 1) privately for other than commercial purposes;
 - 2) for experimental and research purposes; or
 - 3) for breeding new varieties.
 - 4) subject to the conditions laid down in section 6, for the production of sowing seed for the farm's own use.

Section 6 Right to cultivate a protected variety and obligation to pay remuneration for it

- (1) Subject to payment of remuneration a farmer has the right to use or produce propagating material of protected varieties for propagation purposes on his or her own holding. This applies to the cultivation of varieties of the following plant species, except for hybrids: oats, barley, rye, wheat, triticale, turnip rape, swede rape, flax, pea, field bean, potato and buckwheat.
- (2) The remuneration must be substantially lower than the royalty payable in the marketing of the propagating material of the variety. A contract may be concluded

between the plant breeder's right holder and the farmer or between organisations representing them on a reasonable amount of remuneration payable to the plant breeder's right holder. Where such contract has been concluded or does not apply, the farmer has the obligation to pay to the plant breeder's right holder a remuneration of 50 per cent of the sum payable for the marketing of the propagating material of the variety.

(3) Farmers who possess an arable area of less than 10 hectares are entitled to use the propagating material of a protected variety in the manner referred to in subsection 1 without paying remuneration. However, in such a case remuneration must be paid for the cultivation of a protected potato variety if the cultivation area of the variety is larger than two hectares or if the area of early potato cultivated under covering is larger than one hectare.

(4) A farmer is obligation to give, upon request, the authority and the plant breeder's right holder the necessary information for establishing the payment obligation.

Section 7 Right to obtain cultivation information concerning a protected variety

(1) For the enforcement of the payment obligation laid down in section 6, the plant breeder's right holder is entitled to access the following necessary information from the information system referred to in the Act of the Information Systems of Rural Business Authorities (284/2008):

- 1) name and contact information of the farmer;
- 2) code of holding;
- 3) arable land area in the possession of the farmer if this is more than two hectares in the case of a protected potato variety, one hectare in the case of early potato cultivated under covering and 10 hectares in the case of other varieties;
- 4) cultivation area of varieties protected by the plant variety right of the European Community if this exceeds the calculated area needed for the production of 92 tonnes of cereal;
- 5) cultivation area of potato varieties protected by the plant variety right of the European Community if this exceeds the calculated area needed for the production of 185 tonnes of potato;
- 6) cultivation areas sown with seed of protected varieties produced on farmer's own holding under this Act by variety.

(2) A plant breeder's right holder may use information conveyed under subsection 1 only for the enforcement of the right to receive payment referred to in section 6. The plant breeder's right holder is not entitled to forward the information to another party.

(3) A condition for the conveyance of information under subsection 1 is that the plant breeder's right holder and farmer or organisations representing them have agreed on the remuneration payable to the plant breeder's right holder under section 6.

Section 8 Destroying cultivation information concerning a protected variety

(1) A plant breeder's right holder must destroy information obtained under section 7 within one year from the end of the calendar year concerned in the enforcement of the payment obligation referred to in section 6 for which the information has been given.

Section 9 Exhaustion of plant breeder's right

(1) Plant breeder's right does not apply to relating to the marketing of a protected variety or material of varieties referred to in points a-c of Article 3(7) in Finland if such acts are not taken with a view to:

- 1) further propagation of the variety; or
- 2) export of material of the variety to a country which does not protect the varieties of the plant genus or species to which the variety belongs, except where the exported material is intended for consumption.

CHAPTER 3: CONDITIONS FOR THE GRANT OF PLANT BREEDER'S RIGHT*Section 10 Conditions concerning the applicant*

(1) A plant breeder's right may be applied for by a natural person, legal entity or body which may be equated with legal entities under the legislation concerning these. A plant breeder's right may be applied for by two or several persons jointly.

(2) If a party other than the breeder of the variety applies for the plant breeder's right, it must prove its right to the variety.

Section 11 Conditions concerning the variety

(1) A plant breeder's right is granted if the variety is novel, distinct from other known varieties, uniform as regards plant growth and stable as regards its relevant characteristics.

(2) A variety is not considered novel if propagating or harvested material of the variety has been sold or otherwise disposed of to others with the consent of the plant breeder's right holder for purposes of exploitation of the variety:

- 1) in Finland for more than one year before the filing of the application;
- 2) abroad for more than six years before the filing of the application in the case of a tree or vine; or
- 3) abroad for more than four years in the case of plants other than those mentioned in point 2;

(3) A plant breeder's right may not be granted if the variety is covered by Community protection under Council Regulation (EC) No 2100/84 on Community plant variety rights.

CHAPTER 4: APPROVAL OF PLANT BREEDER'S RIGHT*Section 12 Competent authority*

(1) The Finnish Food Safety Authority (Evira) is responsible for the approval, registration and publication of a plant breeder's right and the upkeep of the register of plant breeder's rights.

Section 13 Application

(1) An application for the grant of a plant breeder's right is filed in writing to Evira in the Finnish, Swedish or English language. The application must show:

- 1) name, contact information, personal or business identity code and place of domicile of the applicant of the plant breeder's right and possible agent as well as the name and contact information of the breeder;

- 2) proposal for variety denomination and account of the use of the variety denomination as well as breeder's reference;
- 3) plant genus and species;
- 4) information on the origin of the variety, protection in another state and test results;
- 5) information on whether right of priority is applied for as well as where and when earlier applications have been filed;
- 6) assurance that the variety has not been marketed in a way referred to in section 11(2) prior to the filing of the application; and
- 7) an account of whether the variety has been approved under the Gene Technology Act (377/1995) or Regulation (EC) No 1829/2003 of the European Parliament and of the Council on genetically modified food and feed.

(2) The date when the application documents are filed to Evira and the application fee is paid is entered as the date of application. As minimum information for assigning the application date the application must show the name and contact information of the applicant, plant genus and species, variety denomination and breeder's reference.

(3) If the applicant has not provided all information referred to in subsection 1, Evira must request the applicant to correct the shortcomings within a set time period. If the applicant does not correct the shortcomings within the set time period, the application is not examined.

(4) An application which has been left unexamined is taken up for examination if this is requested by the applicant within one month from the expiry of the time limit set by Evira and if the applicant takes action to correct the shortcomings and pays the re-examination fee within the same time period.

(5) If the proposed variety denomination may be confused with a brand name, denomination, business name or other indication concerning variety material or similar goods to which the applicant has a right of priority, an extract from the register from the National Board of Patents and Registration must be attached to the application, showing that the brand name, denomination, business name or other indication has been removed from the relevant register. If such an indication has not been registered, the applicant must attach to the application an account that the applicant has relinquished or is willing to relinquish the right to use this indication.

(6) Further provisions on the information to be presented in an application under subsection 1 may be issued by Decree of the Ministry of Agriculture and Forestry.

Section 14 Provisional protection

(1) Provisional protection starts as from the date of application and continues until plant breeder's right has been granted. Provisional protection ceases to exist if plant breeder's right is not granted.

Section 15 Right of priority

(1) The right of priority of plant breeder's right applications is determined on the basis of the date of application. If several applications have the same date of application, their mutual priority is determined on the basis of the time of receipt of the application. If the priority cannot be established on the basis of the time of receipt of the application, the applications have the same right of priority.

(2) If the applicant has previously applied for plant breeder's right in a territory which is in the jurisdiction of a member of the International Union for the Protection of New Varieties of Plants or the World Trade Organization, an application filed within 12 months of the filing of the previous application must be considered to have been filed simultaneously in the territory concerned.

(3) A precondition for determining the right of priority under subsection 2 is that the right of priority is specifically claimed upon filing the application and copies of the previous application concerning the variety and the related document are delivered to Evira within three months from the filing of the application. The copies must be certified by the authority which received the first application concerning the variety in question.

(4) The applicant must deliver the information, documents and materials necessary for examining the application to Evira within two years from the expiry of the period of validity of the right of priority under subsection 2. If the first application has been rejected, the applicant must be granted enough time to deliver the information, documents and materials necessary for examining the application to Evira.

(5) Further information on making the request concerning the right of priority may be issued by Decree of the Ministry of Agriculture and Forestry.

Section 16 Publication of an application

(1) Evira must reserve the general public the opportunity to make claims concerning the application by publishing the identification information of the application.

(2) Claims concerning the application must be filed to Evira in writing within a set time period of three months from the publication of the application.

(3) Further information on the publication of an application and the identification information to be published may be issued by Decree of the Ministry of Agriculture and Forestry.

Section 17 Claim for a better right

(1) If a third party claims that it has a better right to a variety than the applicant, it must file a written claim on this to Evira. If the matter is unclear, Evira must by a preliminary ruling advise the party concerned to institute proceedings at a court of law within a set time period. If court proceedings are not instituted within the set time period, the claim is ignored, which must be mentioned in the preliminary ruling.

(2) If a dispute over a better right to a variety is pending at a court of law, the examination of the application must be suspended until the matter is finally resolved.

Section 18 Transfer of an application

(1) If a third party proves to Evira that it has a better right to a variety than the applicant, Evira must, upon the third party's claim, transfer the application to the third party. The transferee must at the same time pay the application fee.

(2) The application may not be left unexamined, approved, rejected or cancelled until the transfer claim has been finally resolved.

Section 19 Examination of a variety

- (1) Evira organises the examination of the variety upon request by the applicant and according to international methods to find out whether the variety is distinct, uniform and stable, unless the examination is to be considered unnecessary for special reasons.
- (2) The applicant must deliver the necessary material of the variety and other necessary information to Evira or the party which conducts the examination.

Section 20 Decision on plant breeder's right

- (1) Evira investigates, after the expiry of the time period reserved for filing claims, whether the variety fulfils the requirements set in section 11, as well as makes the decision on the approval of the plant breeder's right. Decisions concerning the application and cancellations are published and decisions concerning approved applications are entered to the register of plant breeder's rights referred to in section 22.

Section 21 Validity of plant breeder's right

- (1) A plant breeder's right is valid as from the date when the Evira has made the approval decision. The right may be maintained in force for 30 years from the beginning of the year following the approval decision by paying an annual fee by the end of January of each calendar year valid.
- (2) The validity of plant breeder's right expires if a Community plant variety right to the protected variety is granted to the applicant.

Section 22 Register of plant breeder's right

- (1) The following information on approved plant breeder's rights is entered to the register of plant breeder's rights kept by Evira:
 - 1) registration number of the plant breeder's right;
 - 2) name and contact information of the plant breeder's right holder and possible agent, business identity code, place of domicile, notification of the change of agent as well as name and contact information of the breeder;
 - 3) plant genus and species which the variety belongs to and identification information of the variety description;
 - 4) approved variety denomination, date of variety denomination proposal and breeder's reference;
 - 5) date of application, number and publication date of the application and approval date of plant breeder's right;
 - 6) granted right of priority and the state in which the previous application concerning the variety has been filed, as well as the date of application when the application has been filed;
 - 7) payment of annual fee;
 - 8) compulsory licence, compulsory cross-licence and licence which has been granted;
 - 9) lien;
 - 10) decisions by Evira which have no legal validity, appeals, executions, seizures and court decisions on the matter;
 - 11) expiry date of the plant breeder's right.

- (2) If the entry to the register cannot be resolved immediately, an entry to the register must be made that such an entry has been requested. .
- (3) Otherwise the provisions laid down in the Act on Information Systems of Rural Business Administration apply to the register of plant breeder's rights and documents included in the register.
- (4) Further provisions on the content of entries made in the register under subsection 1 may be issued by Decree of the Ministry of Agriculture and Forestry.

Section 23 Removal of an entry from the register

- (1) If it is proven that a licence, lien or compulsory licence has expired, the entry must be removed from the register.
- (2) Personal data of a natural person referred to in point 2 of section 22(1) are removed from the register no later than within ten years from the expiry of the validity of the plant breeder's right. The provisions laid down in the Personal Data Act (523/1999) or decisions made under it apply to the removal of information recorded in the register.
- (3) Provisions on archiving the information removed from the register are laid down in the Archiving Act (831/1994).

CHAPTER 5: VARIETY DENOMINATION

Section 24 Selection and use of variety denomination

- (1) Variety denomination must be such that a variety can be distinguished from other varieties of the same or closely related species.
- (2) Variety denomination may not be approved if it can be confused with a brand name, denomination, business name or other indication to which a party other than the applicant has the protection so that this protection of another party is an impediment to the registration of the variety denomination.
- (3) The approved variety denomination must be used when marketing the propagating material of a protected variety. The approved variety denomination must also be used after the expiry of the validity of the plant breeder's right or the right has otherwise lapsed.
- (4) Further provisions on the selection and use of variety denomination may be issued by Decree of the Ministry of Agriculture and Forestry.

Section 25 Cancellation of variety denomination and new variety denomination

- (1) Evira must cancel an approved variety denomination:
 - 1) if the variety denomination has been approved in a way that violates this Act and the impediment to the approval continues to exist;
 - 2) if the plant breeder's right holder so requests and presents due grounds for this; or
 - 3) if someone presents decision of a court of law forbidding the use of the denomination for a certain variety.

- (2) Evira must notify the plant breeder's right holder of the claim to cancel the variety denominations and request the holder to submit a new denomination proposal within 30 days of having received notice of such a claim.
- (3) Evira must examine the proposal concerning new denomination. When Evira has approved the new denomination, it must be published and registered.
- (4) Further provisions on the cancellation and registration of variety denomination may be issued by Decree of the Ministry of Agriculture and Forestry.

CHAPTER 6: LAPSE, ANNULMENT AND FORFEITURE OF PLANT BREEDER'S RIGHT

Section 26 Lapse of plant breeder's right

- (1) Evira states by its decision that a plant breeder's right lapses if the plant breeder's right holder notifies Evira in writing that the holder waives the plant breeder's right.
- (2) If the annual fee has not been paid as laid down in section 21, Evira must urge the plant breeder's right holder to pay the annual fee within a set time period, subject to the threat that the plant breeder's right lapses. If the plant breeder's right holder has not paid the fee within the set time period, Evira states by its decision that the plant breeder's right has lapsed.
- (3) If a plant breeder's right has been seized or there is a lien which has been entered to the register on it or a dispute concerning the transfer of the plant breeder's right is pending, the plant breeder's right may not be cancelled as long as the seizure or lien is effective or the dispute has not been finally resolved.

Section 27 Annulment

- (1) A court of law must annul plant breeder's right if, when granting the right:
 - 1) the preconditions for distinctness or novelty of the variety did not exist;
 - 2) the preconditions for uniformity or stability did not exist and the decision of the approval of the plant breeder's right was essentially based on information provided by the applicant;
- (2) A court of law must annul plant breeder's right if right has been granted to an applicant who is not entitled to it, unless Evira transfers the plant breeder's right to a party which is entitled to it.
- (3) A court of law must request a statement of Evira in matters concerning the annulment of plant breeder's right.

Section 28 Forfeiture

- (1) Evira declares a plant breeder's right forfeit if:
 - 1) the plant breeder's right holder is unable to produce propagating material for the variety with identifying features corresponding to those of the protected variety;
 - 2) the plant breeder's right holder does not provide within the set time period, upon Evira's request, propagating material, documents and other information which are necessary to examine whether the variety is appropriately maintained; or

- 3) the variety denomination has been cancelled after the rights have been granted and the plant breeder's right holder does not propose an acceptable new variety denomination.

Section 29 Registration of expiry of plant breeder's right

- (1) An entry of the expiry of plant breeder's right is made in the register if:
 - 1) plant breeder's right has lapsed as laid down in section 26;
 - 2) plant breeder's right has been annulled by a legally valid decision of a court of law as laid down in section 27;
 - 3) plant breeder's right has been declared forfeit by a decision of Evira as laid down in section 28; or
 - 4) validity of plant breeder's right has expired as laid down in section 21.

CHAPTER 7: LICENCE, COMPULSORY LICENCE AND COMPULSORY CROSS-LICENCE

Section 30 Licence

- (1) If the plant breeder's right holder has granted another party the right to professional exploitation of the protected variety (*licence*), this may not assign the licence to a further party, except if this has been agreed on.
- (2) If the licence is held by a company, it may be assigned further in connection with the transfer of the company, unless otherwise agreed.
- (3) If the plant breeder's right holder notifies of giving up the plant breeder's right and a licence concerning the right has been entered to the register, Evira must notify the licence holder of the matter in order to reserve a reasonable time to supervise its rights before Evira declares by its decision that the plant breeder's right has lapsed.

Section 31 Compulsory licence

- (1) If after the registration propagating material of the variety is not produced for the market on reasonable conditions and sufficiently as regards the general food supply needs, a party wishing to exploit the variety professionally in Finland may obtain a compulsory licence for this, if there is no acceptable reason for the action by the plant breeder's right holder. Compulsory licence includes the right to obtain the necessary amount of the propagating material of the variety from the plant breeder's right holder.
- (2) Compulsory licence may only be granted to a party who is considered to possess the prerequisites to exploit the variety subject to the plant breeder's right in an acceptable manner and on the conditions set in the compulsory licence. Compulsory licence does not prevent the plant breeder's right holder from exploiting the right or from issuing a licence for the variety
- (3) Compulsory licence is granted by a court of law, which determines to what extent the protected variety may be exploited as well as confirms the remuneration and other conditions of the compulsory licence. The court of law may, upon demand by the plant breeder's right holder, cancel a compulsory licence or confirm new conditions for it if this is necessary due to essential changes in the circumstances.

Section 32 Compulsory cross-licence

- (1) If a holder of a patent concerning a biotechnological invention cannot exploit the patent without infringing a prior plant breeder's right concerning the variety, the patent

holder may apply for a compulsory licence from a court of law for non-exclusive use of the variety protected by the right concerned subject to payment of an appropriate royalty. If such a compulsory licence is granted to the patent holder, the plant breeder's right holder will be entitled to a cross-licence on reasonable terms to use the protected invention.

(2) The applicant for a licence referred to in subsection 1 above must demonstrate that they have applied unsuccessfully to the plant breeder's right holder to obtain a contractual licence and that the invention constitutes significant technical progress of considerable economic interest as regards the protected variety.

(3) Provisions on the right of a plant breeder to obtain a compulsory licence for the exploitation of an invention protected by a patent are laid down in the Patent Act (550/1967).

CHAPTER 8: PRIVATE LAW PROTECTION

Section 33 Prevention of infringement

If someone infringes an exclusive right acquired through a plant breeder's right a court of law may forbid the continuation or repetition of the act.

Section 34 Suspension order on an intermediary

(1) When processing an action referred to in section 33 a court of law may, upon demand by the plant breeder's right holder, order a party maintaining a transmitter, server or other similar device or offering other service that functions as an intermediary to suspend any use that is claimed to infringe a plant breeder's right (*suspension order*), unless this is considered unreasonable taking account of the rights of the alleged infringer of the plant breeder's right, the intermediary and the plant breeder's right holder.

(2) Before bringing an action referred to in section 33 the court of law may, upon demand of the plant breeder's right holder, issue a suspension order if the preconditions for this under subsection 1 are met and if it is evident that the realisation of the rights of the right holder would otherwise be at serious risk. The court of law must reserve the opportunity to be heard for both the party to which the order is to be issued and the party claimed to have infringed the plant breeder's right. The notification to the party to which the order is to be issued may be delivered by post, telefax or e-mail. Otherwise the provisions of Chapter 8 of the Code of Real Estate apply to the processing of the matter.

(3) A court of law may, upon request issue the suspension order referred to in subsection 1 as a temporary one without hearing the alleged infringer, if this is imperative due to the urgency of the matter. The order is in force until further notice. The alleged infringer must be reserved the opportunity to be heard immediately after the issue of the order. When the alleged infringer has been heard, the court of law must decide without delay whether the order is kept in force or cancelled.

(4) A suspension order issued under this section may not compromise the right of a third party to send and receive messages. Without prejudice to Chapter 7, section 7 of the Code of Judicial Procedure, a suspension order becomes effective when the applicant lodges with the bailiff a security referred to in Chapter 8, section 2 of the Enforcement Code. A suspension order issued under subsection 2 or 3 of this section lapses unless action referred to in section 33 is brought within a month from the issue of the order.

(5) The party which demanded the suspension order must compensate the party for which the order is issued as well as the alleged infringer for any damage caused due to the enforcement of the order and costs arisen from the matter if an action referred to in section 33 is rejected or left unexamined or if the processing of the matter is dismissed

without consideration because the plaintiff has cancelled the action or has failed to appear at the court of law. The same applies when a suspension order is cancelled under subsection 3 or lapses under subsection 4. The provisions of Chapter 7, section 12 of the Code of Judicial Procedure apply to bringing action for the compensation of damages and expenses.

Section 35 Declaratory action

(1) A plant breeder's right holder or a party who is entitled under a licence or compulsory licence to exploit a variety protected under plant breeder's right may initiate declaratory action concerning whether the he or she is entitled to protection from another party under the granted plant breeder's right if the matter is unclear and causes harm to him or her.

(2) Anyone who exploits or intends to exploit a variety protected on the basis of plant breeder's right may, on the same conditions, initiate declaratory action against the plant breeder's right holder concerning whether the plant breeder's right constitute an impediment to the activity concerned.

Section 36 Remuneration and compensation for damages

(1) Anyone who intentionally or through negligence infringes plant breeder's right or the provisions of section 24(3) on using variety denominations is liable to pay a reasonable remuneration for exploiting the variety and compensation for any damage caused by the infringement. If the negligence is minor, compensation for the damages can be adjusted.

(2) If infringement of plant breeder's right or the provisions of section 24(3) on using variety denominations is not intentional or caused by negligence, the infringer is liable to pay a reasonable remuneration for exploiting the variety.

(3) Compensation for damages based on infringement of plant breeder's right or the provisions of section 24(3) on using variety denominations may only be claimed concerning the five-year period preceding the institution of proceedings.

(4) If plant breeder's right has been annulled by a court decision that has gained legal force, liability for remuneration or compensation for damages does not exist.

(5) The provisions of the Tort Liability Act (412/1974) also apply to the compensation for damages.

Section 37 Farmers' liability for damages

A farmer who neglect the obligation laid down in section 6 is liable to pay compensation to the plant breeder's right holder. The amount of the compensation is determined in accordance with Commission Regulation (EC) No 1768/95 implementing rules on the agricultural exemption provided for in Article 14(3) of Council Regulation (EC) No 2100/94 on Community Plant Variety Rights.

Section 38 Returning plant variety material

(1) On the institution of proceedings by a party suffering from infringement of the right, a court of law may, within reasonable limits, order that the plant material of the variety concerned in the infringement be surrendered to the injured party against payment. The above does not apply to parties who have obtained plant material of the variety or a special right thereto in good faith and have not themselves infringed the plant breeder's right.

(2) The plant material of the variety referred to in subsection 1 above may be confiscated if the party suffering the infringement has filed a claim demanding surrender of the plant material of the variety in accordance with the Enforcement Code.

Section 39 Infringement of provisional protection

(1) If a party other than the applicant exploits professionally a variety or propagating material of a variety during the time referred to in section 14, the provisions concerning the infringement of plant breeder's right must be applied if the plant breeder's right is granted later on.

(2) Punishments referred to in Chapter 9 of this Act or Chapter 49, section 2 of the Criminal Code cannot be imposed for infringement of plant breeder's right which has taken place during provisional protection.

(3) Compensation for damage which has arisen before the publication of an application referred to in section 16 may only be ordered under section 36(2).

(4) If an action concerning compensation for damages is initiated within one year from the approval of the plant breeder's right, the provision of section 36(3) does not apply.

Section 40 Publication of the judgement

(1) In a dispute concerning the infringement of plant breeder's right a court of law may order, upon demand by the plaintiff, that the defendant must compensate for costs incurred to the plaintiff for taking appropriate action to publish information on a legally valid judgement in which the defendant is found to have infringed plant breeder's right. The order may not be issued if the dissemination of information has been restricted in other legislation. When considering the issue of the order and the content of the order, the court of law must take account of the general significance of the publication, type and extent of the infringement, costs arising from the publication and other similar matters.

(2) A court of law may order the maximum amount of the reasonable publication costs to be compensated for. The plaintiff is not entitled to compensation if information on the judgement is not published within the time limit from the time when the judgement became legally valid set by court of law.

CHAPTER 9: PENAL PROVISIONS

Section 41 Infringement of plant breeder's right

(1) Anyone who intentionally infringes the exclusive right laid down in section 4, sentenced to a fine for *infringement of plant breeder's right*, unless the act is to be punished as violation of incorporeal rights referred to in Chapter 49, section 2 of the Criminal Code.

Section 42 Violation of plant breeder's right

(1) Anyone who intentionally or through gross negligence neglects obligation to give information laid down in section 6(4) or violates the provisions on the use of variety denomination of section 24(3) must be sentenced to a fine for *violation of plant breeder's right*.

Section 43 Misuse of cultivation information concerning a protected variety

(1) Plant breeder's right holder who intentionally or through gross negligence uses information given under section 7 in a way that violate the purpose of use laid down in

section 7(2) or forwards the information in a way that violates the said provision must be sentenced to a fine for misuse of cultivation information concerning a protected variety.

Section 44 Right to institute criminal proceedings

(1) The prosecutor may not bring charges for offence referred to in sections 41-43 unless the complainant reports the offence for prosecution.

CHAPTER 10: MISCELLANEOUS PROVISIONS

Section 45 Appeal

(1) A decision by Evira under this Act may be appealed to the Administrative Court as laid down in the Administrative Judicial Procedure Act (586/1996).

Section 46 Legal venue

(1) The court of competent jurisdiction in matters under this Act is the Helsinki District Court.

Section 47 Request for statement

(1) In matters concerning plant breeder's right a court of law may request a statement from Evira.

Section 48 Charges to be collected

(1) Charges for tasks undertaken by Evira to the State are collected on the grounds laid down in Act on Criteria for Charges Payable to the State (150/1992).

Section 49 Agent of an applicant for and holder of plant breeder's right

(1) If the applicant for or holder of plant breeder's right has no domicile in Finland, the applicant or holder must have an agent residing within the European Economic Area who is entitled to represent the applicant or holder in all matters concerning the plant breeder's right.

Section 41 Entry into force

(1) This Act enters into force on 1 January 2010.

(2) This Act repeals the Act on Plant Variety Rights of 21 August 1992 with subsequent amendments and the Act on the Protection of Plant Variety Rights Granted by the European Community under Private and Public Law in Finland of 5 March 1999 (239/1999).

(3) Provisions and regulations issued under the repealed Act on Plant Variety Rights remain in force until otherwise provided under this Act.

(4) This Act applies to applications for plant breeder's right pending upon entry into force of this Act and plant breeder's rights granted on the basis of these as well as plant breeder's rights granted before the entry into force of the Act.

(5) The period of validity of plant breeder's rights in force upon entry into force of this Act are extended as laid down in this Act as from the approval decision.

(6) Measures necessary for the implementation of this Act may be undertaken before the Act's entry into force.

(7) If in other law reference is made to the Act on Plant Variety Rights in force upon entry into force of this Act, this Act applies instead.

PERU

DECISION 345 OF THE COMMISSION OF THE CARTAGENA AGREEMENT ON THE COMMON PROVISIONS FOR THE PROTECTION OF THE RIGHTS OF BREEDERS OF PLANT VARIETIES OF OCTOBER 21, 1993 (“DECISION 345”)

CHAPTER I SUBJECT MATTER AND SCOPE

Article 1

The purpose of this Decision is:

- (a) to recognize and ensure the protection of the rights of breeders of new plant varieties by the grant of breeders’ certificates;
- (b) to promote research activities in the Andean area;
- (c) to promote technology transfer activities within and outside the subregion.

Article 2

The scope of this Decision shall encompass all botanical genera and species insofar as the growing, possession or use thereof are not prohibited for reasons of human, animal or plant health.

CHAPTER II DEFINITIONS

Article 3

For the purposes of this Decision, the following definitions are adopted:

Competent national authority: Body appointed by each Member Country to apply the provisions on plant variety protection.

Live sample: A sample of the variety supplied by the applicant for a breeder’s certificate, which sample shall be used for the testing of novelty, distinctness, uniformity and stability.

Variety: Set of cultivated botanical individuals that are distinguished by specific morphological, physiological, cytological and chemical characteristics and can be perpetuated by reproduction, multiplication or propagation.

Essentially derived variety: A variety shall be deemed to be essentially derived from an initial variety when it originated therefrom or from a variety itself essentially derived from the initial variety and retains the expression of the essential characteristics that result from the genotype or combination of genotypes of the original variety, and which although distinguishable from the initial variety, nevertheless conforms to it in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety, except with respect to differences resulting from the derivation process.

Material: Reproductive or vegetative multiplication material in any form; harvested material, including whole plants and parts of plants; any product made directly from harvested material.

CHAPTER III RECOGNITION OF BREEDERS' RIGHTS

Article 4

The Member Countries shall grant breeders' certificates to persons who have created plant varieties, insofar as the varieties are new, uniform, distinct and stable, and if they have been given a denomination that constitutes their generic designation.

For the purposes of this Decision, "created" shall be understood to denote the production of a new variety by the application of scientific skills to the genetic improvement of plants.

Article 5

Without prejudice to the provisions of Article 37, the Government of each Member Country shall appoint its competent national authority and shall establish the functions thereof, and shall also establish the national procedure for the implementation of this Decision.

Article 6

There shall be established in each Member Country a National Register of Protected Plant Varieties, in which all varieties conforming to the conditions laid down in this Decision shall be registered. The Board shall be responsible for keeping a subregional register of protected plant varieties.

Article 7

To be entered in the Register referred to in the foregoing Article, varieties shall fulfil the conditions of novelty, distinctness, uniformity and stability and in addition shall have an appropriate generic denomination.

Article 8

A variety shall be deemed to be new if reproductive or multiplication material or harvested material thereof has not been lawfully sold or disposed of to others in another manner by or with the consent of the breeder or his successor in title for purposes of commercial exploitation of the variety.

Novelty shall be lost where:

- (a) exploitation has begun more than one year prior to the filing date of the application for the grant of a breeder's certificate or the date of any priority claimed, if sale or disposal to others has taken place within the territory of any Member Country;
- (b) exploitation has begun more than four years or, in the case of trees and grapevines, more than six years prior to the filing date of the application for the grant of a breeder's certificate or the date of any priority claimed, if the sale or disposal to others has taken place in a territory other than that of any Member Country.

Article 9

Novelty shall not be lost through sale or disposal of the variety to others, *inter alia*, when those acts:

- (a) are the result of an abuse to the detriment of the breeder or his successor in title;
- (b) form part of an agreement to transfer the rights in the variety, provided that the variety has not been physically disposed of to a third party;
- (c) form part of an agreement under which a third party has, on behalf of the breeder, increased supplies of reproductive or multiplication material;

- (d) form part of an agreement under which a third party has carried out field or laboratory tests or small-scale processing tests with a view to the evaluation of the variety;
- (e) involve harvested material that has been obtained as a by-product or surplus product of the variety or from the activities mentioned in this Article under (c) and (d);
- (f) are performed in any unlawful manner.

Article 10

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

The filing in any country of an application for the grant of a breeder's certificate or for the entry of the variety in an official register of cultivars shall make the said variety a matter of common knowledge as from that date, insofar as the act concerned leads to the grant of the certificate or the entry of the variety, as the case may be.

Article 11

A variety shall be deemed to be uniform if it is sufficiently uniform in its essential characteristics, due account being taken of the variations that may be expected from the manner of its reproduction, multiplication or propagation.

Article 12

A variety shall be deemed to be stable if its essential characteristics remain unchanged from generation to generation and at the end of each particular cycle of reproduction, multiplication or propagation.

Article 13

Each Member Country shall ensure that no rights in the designation registered as the denomination of the variety hamper the free use thereof, even after the breeder's certificate has expired.

The designation adopted may not be registered as a mark and shall be sufficiently distinctive in relation to other denominations registered previously.

Where one variety is the subject of applications for the grant of breeders' certificates in two or more Member Countries, the same denomination shall be used in all cases.

Article 14

The owners of breeders' certificates may be natural persons or legal entities. The certificate shall belong to the breeder of the variety or the party to whom it has been lawfully transferred.

The breeder may claim his rights before the competent national authority if the certificate has been granted to a person not entitled thereto.

Article 15

The State employer, whatever its form and nature, may transfer part of the profits from plant breeding to its breeder employees in order to stimulate research activity.

CHAPTER IV REGISTRATION

Article 16

The application for the grant of a breeder's certificate for a new variety shall comply with the conditions set forth in Article 7 and shall be accompanied by a detailed description of the relevant breeding process. In addition, should the competent national authority consider this necessary, the application shall likewise be accompanied by a live sample of the variety or the document evidencing the deposit thereof with the competent national authority of another Member Country.

The Member Countries shall regulate the manner in which samples are to be deposited, including, among other matters, the necessity and desirability of effecting such a deposit, the duration thereof and the replacement or supply of samples.

Article 17

The breeder shall enjoy provisional protection during the period between the filing of the application and the grant of the certificate. No action for damages may be brought until the breeder's certificate has been granted, but such an action may cover damages caused by the defendant as from the publication of the application.

Article 18

The owner of an application for the grant of a breeder's certificate filed in a country that accords reciprocal treatment to the Member Country in which registration of the variety is being sought shall enjoy a right of priority for a period of 12 months for the purpose of seeking protection for the same variety in any of the other Member Countries. This period shall be calculated from the filing date of the first application.

In order to benefit from the right of priority, the breeder shall, in the subsequent application, claim the priority of the first application. The competent national authority of the Member Country in which the subsequent application has been filed may require the applicant to supply, within a period of not less than three months from the date of the said filing, a copy of the documents which constitute the first application, which copy shall be certified true by the authority with which that application was filed, and samples or other evidence that the variety which is the subject matter of both applications is the same.

Article 19

The competent national authority of each Member Country shall issue a technical report on novelty, distinctness, uniformity and stability.

Article 20

On the issue of a favorable technical report and after compliance with the prescribed procedure, the competent national authority shall grant the breeder's certificate.

The grant of the certificate shall be notified to the Board of the Cartagena Agreement, which in turn shall bring it to the notice of the other Member Countries for the purposes of the recognition thereof.

Article 21

The term of the breeder's certificate shall be from 20 to 25 years in the case of vines, forest trees and fruit trees, including their rootstocks, and from 15 to 20 years for other species, calculated in both cases from the date of grant, as determined by the competent national authority.

CHAPTER V OBLIGATIONS AND RIGHTS OF THE BREEDER

Article 22

The owner of a variety entered in the Register of Protected Plant Varieties shall be under the obligation to maintain it and reconstitute it as necessary throughout the term of the breeder's certificate.

Article 23

A breeder's certificate shall give the owner thereof the right to bring administrative or judicial actions under his national legislation with a view to preventing or restraining any acts that constitute infringement or violation of his right, and securing the appropriate forms of compensation or indemnification.

Article 24

The grant of a breeder's certificate shall confer on the owner thereof the right to prevent third parties from engaging without his consent in the following acts in respect of reproductive, propagating or multiplication material of the protected variety:

- (a) production, reproduction, multiplication or propagation;
- (b) preparation for the purposes of reproduction, multiplication or propagation;
- (c) offering for sale;
- (d) sale or any other act that entails placing reproductive, propagating or multiplication material on the market for commercial purposes;
- (e) exportation;
- (f) importation;
- (g) possession for any of the purposes mentioned in the foregoing subparagraphs;
- (h) commercial use of ornamental plants or parts of plants as multiplication material for the production of ornamental and fruit plants, or parts thereof or cut flowers;
- (i) the performance of the acts mentioned in the foregoing subparagraphs in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of reproductive or multiplication material of the protected variety, unless the owner has had reasonable opportunity to exercise his exclusive right in relation to the said reproductive or multiplication material.

The breeder's certificate shall likewise entitle the owner thereof to exercise the rights specified in the foregoing subparagraphs in respect of varieties that are not clearly distinguishable from the protected variety, within the meaning of Article 10 of this Decision, and in respect of varieties whose production calls for repeated use of the protected variety.

The competent national authority may confer on the owner the right to prevent third parties from engaging, without his consent, in the acts specified in the foregoing subparagraphs in respect of varieties essentially derived from the protected variety, except where the latter variety is itself an essentially derived variety.

Article 25

The breeder's certificate shall not confer on the owner thereof the right to prevent third parties from using the protected variety where such use is made:

- (a) in a private circle, for non-commercial purposes;
- (b) for experimental purposes;

- (c) for the breeding and exploitation of a new variety, except in the case of a variety essentially derived from a protected variety. The said new variety may be registered in the name of the breeder thereof.

Article 26

Anyone who stores and sows for his own use, or sells as a raw material or food, the product of his cultivation of the protected variety shall not be thereby infringing the breeder's right. This Article shall not apply to the commercial use of multiplication, reproductive or propagating material, including whole plants and parts of plants of fruit, ornamental and forest species.

Article 27

Breeders' rights may not be invoked against the acts mentioned in Article 24 of this Decision where the material of the protected variety has been sold or otherwise marketed by the owner of the said right, or with his consent, except where those acts involve:

- (a) further reproduction, multiplication or propagation of the protected variety, subject to the limitation specified in Article 30 of this Decision;
- (b) exportation of the material of the protected variety, such as would permit reproduction thereof, to a country that does not grant protection to the varieties of the plant species to which the exported variety belongs, except where the said material is for human, animal or industrial consumption purposes.

Article 28

Where necessary, the Member Countries may adopt measures for the regulation or control, on their territory, of the production or marketing, importation or exportation of reproductive or multiplication material of a variety, provided that such measures do not imply disregard for the breeders' rights recognized by this Decision, or hamper the exercise thereof.

CHAPTER VI LICENSING

Article 29

The owner of a breeder's certificate may grant licenses for the exploitation of the variety.

Article 30

With a view to ensuring adequate exploitation of the protected variety, in exceptional circumstances affecting national security or the public interest, national governments may declare the said variety freely available subject to equitable compensation of the breeder. The competent national authority shall decide on the amount of compensation, after having heard the parties and taken expert advice, on the basis of the scale of exploitation of the variety so licensed.

Article 31

During the period of validity of the declaration of free availability, the competent national authority shall allow exploitation of the variety by interested persons who offer sufficient technical guarantees and apply to it to that end.

Article 32

The declaration of free availability shall remain in force for as long as the circumstances that brought it about continue to obtain and up to a maximum of two years, which period may be renewed once for the same amount of time, provided that the circumstances under which the declaration was made have not disappeared with the lapse of the first such period.

CHAPTER VII NULLITY AND CANCELLATION*Article 33*

The competent national authority shall, either *ex officio* or at the request of a party, declare the breeder's certificate null and void when it is established that:

- (a) the variety did not fulfill the requirements of novelty and distinctness when the certificate was granted;
- (b) the variety did not fulfill the conditions laid down in Articles 11 and 12 of this ecision when the certificate was granted;
- (c) the certificate has been granted to a person who has no right to it.

Article 34

In order to keep the breeder's certificate in force, the appropriate fees shall be paid in accordance with the provisions laid down in the domestic legislation of the Member Countries.

The owner shall be allowed a period of grace of six months following the expiration of the prescribed period within which to effect payment of the fee due, together with the appropriate surcharge. The breeder's certificate shall remain fully valid throughout the period of grace.

Article 35

The competent national authority shall declare the certificate canceled in the following cases:

- (a) where it is established that the protected variety has ceased to meet the conditions of uniformity and stability;
- (b) where the breeder does not provide the information, documents or material necessary for testing the maintenance or reconstitution of the variety;
- (c) where the breeder does not, after the denomination of the variety has been rejected, propose another suitable denomination within the prescribed period;
- (d) where payment of the fee has not taken place by the expiration of the period of grace.

Article 36

Any nullity, lapse, cancellation, cessation or loss of breeders' rights shall be notified to the Board, by the competent national authority, within 24 hours of the making of the corresponding pronouncement, which shall in addition be duly published in the Member Country, whereupon the variety shall become public property.

CHAPTER VIII COMPLEMENTARY PROVISIONS

Article 37

The Subregional Committee for the Protection of Plant Varieties, composed of two representatives of each of the Member Countries, is hereby created. The Board shall provide the Technical Secretariat of the Committee.

Article 38

The Committee referred to in the foregoing Article shall have the following functions:

- (a) to consider the compilation of an up-to-date inventory of the present biodiversity of the Andean subregion and, in particular, of the plant varieties susceptible of registration;
- (b) to draw up guidelines for the standardization of procedures, examinations, laboratory tests and the deposit or growing of such samples as may be necessary for the registration of the variety;
- (c) to devise technical criteria for distinctness in relation to the state of the art, with a view to determining the minimum number of characteristics that have to vary for one variety to be considered different from another;
- (d) to analyze matters relating to the scope of protection of essentially derived varieties, and to propose common provisions thereon.

Article 39

The recommendations of the Committee shall be submitted through the Board for consideration by the Commission.

TRANSITIONAL PROVISIONS

ONE.- A variety that is not new on the date on which a Member Country's Register is opened for the filing of applications may be registered, notwithstanding the provisions of Article 4 of this Decision, if the following conditions are met:

- (a) the application is filed within the year following the opening date of the Register for the genus or species to which the variety belongs;
- (b) the variety has been entered in a register of cultivars in any of the Member Countries, or in a register of protected varieties in any country having special legislation on the protection of plant varieties which grants reciprocal treatment to the Member Country in which the application is filed.

The term of the breeder's certificate granted under this provision shall be proportional to the period already elapsed since the date of entry or registration in the country referred to in subparagraph (b) above. Where the variety has been entered in two or more countries, the relevant entry or registration shall be the one with the earliest date.

TWO.- The competent national authority in each Member Country shall implement this Decision within 90 days following the date of the publication thereof in the Official Gazette of the Cartagena Agreement.

THREE.- The Member Countries shall, before December 31, 1994, approve common provisions governing access to biogenetic resources and guaranteeing the biosecurity of the subregion, pursuant to the provisions of the Convention on Biodiversity adopted in Rio de Janeiro on June 5, 1992.

PERU⁴**SUPREME DECREE N° 035-2011-PCM APPROVING THE REGULATIONS FOR THE PROTECTION OF THE RIGHTS OF BREEDERS OF NEW PLANT VARIETIES**

THE PRESIDENT OF THE REPUBLIC

WHEREAS:

The Trade Promotion Agreement between Peru and the United States of America was approved by Legislative Resolution No. 28766;

Chapter 16 of the above-mentioned Agreement sets out provisions relating to intellectual property [rights] and Peru's undertaking to accede to the International Convention for the Protection of New Varieties of Plants (1991 UPOV Convention), which was adopted by Congress of the Republic through Legislative Resolution No. 295957;

Decision 345 of the Commission of the Cartagena Agreement lays down provisions governing the protection of the rights of breeders of new plant varieties at Andean Community level;

The promotion and protection of the rights of breeders of new plant varieties are mechanisms that promote and encourage technological development and agricultural research with the aim of consolidating a sustainable production system;

It is necessary to create a regulatory framework governing provisions relating to the protection of the plant varieties contained in Decision 345, the Common Regime for the Protection of the Rights of Breeders of New Plant Varieties and in the 1991 UPOV Convention, so as to facilitate access to the protection of *plant varieties* and in turn stimulate and standardize formalities established to this end in an attempt to produce effective procedures to enable the protection of those rights.

Consequently, it is necessary to approve and issue regulations that lay down rules for implementing the above-mentioned measures so as to be able to rely on a consolidated set of regulations that facilitate the provision of access to the protection of the rights of breeders of plant varieties;

In accordance with paragraph 8 of Article 118 of the Political Constitution of Peru and Law No. 29158 – the Organic Law of the Executive Branch;

DECREES:

Article 1 Adoption of the Regulations for the Protection of the Rights of Breeders of New Plant Varieties

The Regulations for the Protection of the Rights of Breeders of New Plant Varieties, consisting of six (6) chapters, thirty-eight (38) articles and two (2) final supplementary provisions, attached hereto and which form an integral part hereof, shall be adopted.

⁴ The Supreme Decree N° 035 – 2011 PCM was adopted on April 14, 2011 and published in the Official Gazette "El Peruano" on April 15, 2011.

Article 2 Publication

This Supreme Decree shall be published in the Official Gazette "El Peruano". These Regulations shall be posted on the website of the Presidency of the Council of Ministers (<http://www.pcm.gob.pe>) on the same day it is published in the Official Gazette "El Peruano".

Article 3 Repeal

Supreme Decree No. 008-96-ITINCI and other legal rules that run contrary to the regulations adopted pursuant to Article 1 shall be repealed.

Article 4 Endorsement

This Supreme Decree shall be endorsed by the President of the Council of Ministers, the Minister of Agriculture and the Minister of Foreign Trade and Tourism.

Given at Government House, Lima, on the fourteenth day of April 2011.

ALAN GARCÍA PEREZ
Constitutional President of the Republic

ROSARIO DEL PILAR FERNÁNDEZ FIGUEROA
President of the Council of Ministers of Justice

RAFAEL QUEVEDO FLORES
Minister of Agriculture

EDUARDO FERREYROS KUPPERS
Minister of Foreign Trade and Tourism

REGULATIONS FOR THE PROTECTION OF THE RIGHTS OF BREEDERS OF NEW PLANT VARIETIES

CHAPTER I SCOPE

Article 1 Scope

The scope of these Regulations shall encompass all botanical genera and species insofar as the cultivation, possession and use are not prohibited on the basis of human, animal or plant health.

Article 2 Definitions

For the purposes of these Regulations:

2.1 "Breeder" means

- (a) the person who bred, or discovered and developed, a variety,
- (b) the person who is the employer of the aforementioned person or who has commissioned the latter's work, or
- (c) the successor in title of the first or second aforementioned person, as the case may be;

2.2 It should be specified that discovery is not a mere find. Rather, it refers to the selection process within the natural variation in a population of plants and the development is the process of reproduction or propagation and evaluation.

2.3 "Variety" means a plant grouping within a set of cultivated botanical individuals which, irrespective of whether or not the conditions for the grant of a breeder's right are fully met, may be:

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

2.4 For the purposes of the provisions of Article 27 of Decision 345 of the Commission of the Cartagena Agreement (hereinafter Decision 345), "material" means, in relation to a variety,

- (a) Propagating material of any kind,
- (b) Harvested material, including entire plants and parts of plants, and
- (c) Any product made directly from the harvested material.

CHAPTER II COMPETENT AUTHORITY

Article 3 Competent Authorities

The Directorate of Inventions and New Technologies of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) is the competent national authority responsible for the administrative functions contained in Decision 345 establishing Common Provisions on the Protection of the Rights of Breeders of New Varieties of Plants and these Regulations, and the Sub-Directorate for Genetic Resources and Biotechnology of the National Institute for Agricultural Research (INIA) is the body responsible for performing the technical functions contained therein.

Article 4 Functions of the Directorate of Inventions and New Technologies

The functions of the Directorate of Inventions and New Technologies shall be:

- (a) to receive and process applications for breeder's certificates;
- (b) to examine novelty on breeder's certificates applications filed with the Office of Inventions and New Technologies;
- (c) to set and collect, in coordination with the Sub-Directorate for Genetic Resources and Biotechnology, fees for services related to the protection of varieties, pursuant to INDECOPI's Sole Text of Administrative Procedures;
- (d) to open and maintain a National Register of Protected Plant Varieties;
- (e) to publish monthly in the Gazette of Intellectual Property all legal acts related to the protected plant varieties that are being registered;
- (f) to inform the Andean Community General Secretariat of the granting of breeder's certificates within a period not exceeding five (5) working days, from the date on which the resolution granting the Breeder's Certificate is authorized;
- (g) to inform the Board of the Cartagena Agreement of the termination of breeder's certificates within a period of twenty-four (24) hours from the time of issuance of the corresponding pronouncement;

- (h) to grant breeder's certificates;
- (i) to carry out registrations, cancellations and annulments of breeder's certificates, and record them in the National Register of Protected Plant Varieties;
- (j) to register license contracts granted, upon request of the holder of the breeder's certificate or of the licensee;
- (k) to prepare and execute the agreements with international organizations or other countries that may be established for the protection of new plant varieties;
- (l) to maintain, in coordination with the Sub-Directorate for Genetic Resources and Biotechnology, relations with international organizations or of other countries with which Peru has entered into agreements for the protection of new plant varieties, carrying out mutually agreed upon activities, except where the general legislation of the Peruvian State establishes other channels;
- (m) to meet the requirements set by judicial authorities as to disputes that may arise concerning the protection of new plant varieties;
- (n) to exercise other administrative powers granted under Decision 345.

Article 5 Functions of the Sub-Directorate for Genetic Resources and Biotechnology

The Sub-Directorate for Genetic Resources and Biotechnology shall have the following functions:

- (a) to establish the criteria and procedures for conducting tests [to determine] distinctness, uniformity and stability of a variety, in coordination with the Directorate of Inventions and New Technologies;
- (b) to validate the tests conducted by the breeder, for distinctness, uniformity and stability of a variety, as well as issue technical concepts and establish, in coordination with the Directorate of Inventions and New Technologies, cooperation agreements with other national or foreign institutions for the purposes indicated in this subparagraph;
- (c) to validate, for the Directorate of Inventions and New Technologies, the deposit of live material in the breeder's field with a scientific institution, whether national or of another Andean Community Member Country, or of one that grants reciprocal treatment and has internationally recognized legislation on the protection of the rights of breeders of new varieties of plants;
- (d) to establish mechanisms for the standardization of tests carried out abroad to satisfy the requirements of distinctness, uniformity, and stability;
- (e) to maintain the Documentation Fund of the National Register of Protected Plant Varieties;
- (f) to issue a registration report;
- (g) to publish the Annual Journal of the National Registry of Protected Plant Varieties with information on applications for breeder's rights and the grant thereof, and the proposed and approved denominations.
- (h) Other technical powers granted under Decision 345.

CHAPTER III RECOGNITION OF BREEDER'S RIGHTS AND REGISTRY OF PROTECTED PLANT VARIETIES

Article 6 Issuance of the Breeder's Certificate

A 'Breeder's Certificate' shall be issued to natural or legal person who has created a plant variety, provided it complies with the conditions laid down in Article 7 of Decision 345

and the plant variety is designated by a denomination in accordance with the provisions of Article 7 of these Regulations.

Article 7 Denomination of the Variety

Natural or legal persons living abroad must designate a representative whose domicile is in Peru.

7.1 Designation of varieties by denominations; use of the denomination. The variety shall be designated by a denomination which shall be its generic designation. Subject to paragraph 7.4 below, no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the breeder's right.

7.2 Characteristics of the denomination. The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any member of the International Convention for the Protection of New Varieties of Plants (hereinafter UPOV Convention), an existing variety of the same plant species or of a closely related species.

7.3 Registration of the denomination. The denomination of the variety shall be submitted by the breeder to the Directorate of Inventions and New Technologies. If it is found that the denomination does not satisfy the requirements of paragraph 7.2 above, the Directorate of Inventions and New Technologies shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period.

7.4 Prior rights of third persons. Prior rights of third persons shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph 7.7 below, is obliged to use it, the Directorate of Inventions and New Technologies shall require the breeder to submit another denomination for the variety.

7.5 Same denomination in all members of UPOV. A variety that is the subject of an application for the issuance of a breeder's right must be submitted to all members of UPOV under the same denomination. The Directorate of Inventions and New Technologies shall register the denomination so submitted, unless it considers the denomination unsuitable within its territory. In the latter case, it shall require the breeder to submit another denomination.

7.6 Information concerning variety denominations. The Directorate of Inventions and New Technologies shall ensure that the authorities of all the members of UPOV are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations. Any authority may address its observations, if any, on the registration of a denomination to the Directorate of Inventions and New Technologies which communicated that denomination.

7.7 Obligation to use the denomination. Any person who, within the territory of the Republic of Peru, offers for sale or markets propagating material of a variety protected within said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph 7.4 above, prior rights prevent such use.

7.8 Indications used in association with denominations. When a variety is offered for sale or marketed, it shall be permitted to associate a trademark, trade name or other

similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable.

Article 8 Representatives of the Persons Domiciled Abroad

Natural or legal persons living abroad must designate an authorized representative who resides in Peru.

Article 9 Action for Recovery

If the application for a Breeder's Certificate relates to a variety that has been unlawfully obtained from the breeder or from his or her successor in title, or if by virtue of contractual or legal obligations the holder of the Breeder's Certificate is a person other than the applicant, anyone with a legitimate interest may claim the status of true owner before the Directorate of Inventions and New Technologies at any time and up to three years after the Certificate has been granted.

Article 10 Claiming Priority

If priority has been claimed, [the applicant] must, within three (3) months from the date of filing the application, file the following with the Directorate of Inventions and New Technologies:

- a copy of the documents which constitute the first application, certified to be a true copy by the authority with which the application was filed; and
- samples or any other evidence that the variety which is the subject matter of both applications is the same.

Notwithstanding the provisions of Article 20 of these Regulations, the breeder shall be allowed a period of up to two years after the expiration of the period of priority provided for in Article 18 of Decision 345 or, where the first application is rejected or withdrawn, an appropriate time after the date of such rejection or withdrawal, in which to furnish, to the Directorate of Inventions and New Technologies, any [necessary] information, documents or material required for purpose of the examination,

Article 11 Technical Advice

In the cases considered relevant, the Directorate of Inventions and New Technologies, in coordination with the Sub-Directorate for Genetic Resources and Biotechnology, may entrust other national or foreign institutions with the responsibility of formulating the technical concept.

If this concept is favorable and the application complies with the other requirements, the Directorate of Inventions and New Technologies shall grant the Breeder's Certificate and register it with the corresponding denomination.

Article 12 The National Registry of Protected Plant Varieties

The National Registry of Protected Plant Varieties shall contain a description of the protected variety, the number of the breeder's certificate, the denomination of the variety, the identification of the holder of a protection right and of the person who bred or discovered and developed a variety, where the person is a person other than the breeder and any legal act that affects the breeder's rights and has been made known to the Directorate of Inventions and New Technologies.

Article 13 The Protection Period

The term of protection for vine, forest trees, fruit trees, including their rootstocks shall be 25 years and 20 years for other species, in both cases effective from the date [protection] is granted.

CHAPTER IV BREEDER'S RIGHTS, EXCEPTIONS AND OBLIGATIONS*Article 14 Rights Derived from the Registration*

The breeder or anyone to whom he or she has transferred and/or assigned his or her rights to a protected variety, may prevent third parties from engaging without his or her authorization in acts covered by Article 24 of Decision 345, during the lifetime of the Breeder's Certificate. The breeder may make his or her authorization subject to conditions and limitations.

Article 15 Essentially Derived Varieties

The Breeder's Certificate shall also enable the holder to exercise the rights stipulated in Article 24 of Decision 345 in respect of varieties essentially derived from the protected variety, except where the protected variety is itself an essentially derived variety.

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

Article 16 The Storing and Sowing of Seeds for Own Use

"Anyone who stores and sows for his or her own use" as per Article 26 of Decision 345, shall mean anyone who stores and sows on his own holdings, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, the product of the harvest which he has obtained by planting, on his own holdings, the protected variety or a variety covered by Article 24 of Decision 345.

Article 17 The Obligation to Maintain and Replace a Live Sample

Upon the request of the Directorate of Inventions and New Technologies, the holder of a variety registered in the Register of Protected Plant Varieties shall have the obligation to maintain and replace the live sample of the variety during the entire lifetime of the Breeder's Certificate.

Article 18 Annuity Payments

Annuities shall be paid annually, in advance, commencing on the first anniversary of the granting of the Breeder's Certificate. The expiration date of each annuity shall be the last day of the month of the anniversary of the date on which the Breeder's Certificate was granted.

CHAPTER V FILING OF THE APPLICATION AND ITS ADMISSION OR REFUSAL*Article 19 Application Requirements*

Applications for the granting of a Breeder's Certificate shall be filed with the Directorate of Inventions and New Technologies and contain or attach, as the case may be:

- (a) the name, address and nationality of the applicant;
- (b) the common and scientific name of the species;

- (c) an indication of the generic denomination proposed;
- (d) the name of the person who has created or discovered and developed a variety if it is different from the person indicated in Article [19](a) above;
- (e) the most important morphological, physiological, sanitary, phenological and physical and chemical aspects, as well as industrial or technological characteristics, which allow the variety to be described;
- (f) the method and procedure for obtaining the new variety, as well as all information regarding any knowledge relating to the variety that may facilitate the inspection of the compliance with provisions of Article 7 of Decision 345 and ensure that the variety is designated by a denomination that is consistent with Article 5(a) of these Regulations;
- (g) if the application relates to a variety for which an application has been previously filed abroad, it should indicate:
 - the countries where protection has been requested,
 - the type of protection requested,
 - the relevant application number,
 - the filing date,
 - the status of the application,
 - the breeder or inventor's denomination or reference, in the case of a patent application for an invention, and
 - the registration date;
- (h) A resolution cancelling a trademark registration, if the denomination proposed by the applicant is registered in one of the Andean Community member countries as a trademark or service mark in his or her name for identical or similar goods in accordance with the provisions of applicable trademark legislation;
- (i) Proof of payment of the prescribed filing fee;
- (j) The Directorate of Inventions and New Technologies may request whatever additional information, documents or materials it deems necessary for purposes of examining compliance with the conditions set out in Article 7 of Decision 345 and ensuring that the variety is designated by a denomination that is consistent with Article 7 of these Regulations;
- (k) If applicable, power of attorney, assignment or any other additional document, in accordance with Article 5(2) of the 1991 Act of the UPOV Convention.

The application and the attached documents shall be drafted in Spanish.

Article 20 Examination of the Formal Requirements of the Application

Once the application is received, the Directorate of Inventions and New Technologies shall verify compliance with the formal requirements set out in the foregoing Article within a period of thirty (30) working days.

If the formal examination [of the application] reveals that the application does not meet the requirements set forth in subparagraphs (a), (b), (c), (d) and (i) of Article 19 above, the application shall be deemed not to have been filed for processing and shall not be assigned a filing date.

If the application does not include the documents specified in subparagraphs (f), (g), (h), and (j) of Article 19 above, the applicant shall be requested to complete the application within a period of thirty (30) working days from the date of receipt of the notification, renewable at the applicant's request, with the warning that if no reply is received, the application shall be deemed to have been abandoned.

Article 21 Publication

Upon the completion of the examination of the formal requirements of an application, the Directorate of Inventions and New Technologies shall issue an order of publication requiring publication of an excerpt of the description of the plant variety which is the subject of the application in the Official Gazette El Peruano. The applicant shall provide a copy of the relevant publication using extracted material to Directorate of Inventions and New Technologies within three (3) months of receipt of the order of publication.

Article 22 Third Party Observations

Within a period of thirty (30) working days from the date of publication, anyone with a legitimate interest may make one submission of substantiated observations contesting compliance with the conditions stipulated in Article 7 of Decision 345.

Article 23 Reply to the Observations

If, within the period prescribed in the preceding Articles, observations have been filed, the Directorate of Inventions and New Technologies shall notify the applicant so that he or she may submit, where appropriate, his or her arguments or documents within [a period of] thirty (30) working days from the date of notification. This period may only be extended once for a similar period.

Article 24 Substantive Examination of the Application

Examination of novelty, distinctness, uniformity and stability shall be conducted upon the expiration of the periods for the submission of observations or replies, as the case may be, provided in the previous Articles.

Article 25 Approval and Validation of Tests

The Sub-Directorate for Genetic Resources and Biotechnology, in coordination with the Directorate of Inventions and New Technologies, shall determine the cases in which it will be appropriate to validate the tests carried out by the breeder, as also those in which it will be appropriate to approve the tests carried out abroad to determine compliance with the requirements of distinctness, uniformity and stability.

Article 26 Competent Authority Opinion Deadline

The Directorate of Inventions and New Technologies shall issue its opinion on the conditions established in Article 7 of Decision 345 within a period of three (3) years for annual species and of five (5) years, exceptionally extendable to ten (10), for bi-annual and perennial species, as of the date of filing the application for protection.

Article 27 Evaluation in the Breeder's Field

Upon request of the breeder and subject to the approval of the Sub-Directorate for Genetic Resources and Biotechnology, in coordination with the Directorate of Inventions and New Technologies, the conditions laid down in Article 7 of Decision 345 may be assessed in the place or places where the breeder has developed his or her new variety.

Article 28 Application Abandonment

Except in cases where a different period is prescribed in this Decree, the application shall be deemed to have been abandoned if the corresponding file remains inactive for three (3) months due to the lack of a response by the applicant. There shall be no grounds for abandonment while the case is pending resolution.

The resolution declaring the abandonment of the application shall be notified to the person concerned. Abandonment shall not be lifted nor shall the fees paid be returned [to the applicant] when an application is declared abandoned.

Article 29 Nullity of the Breeder's Certificate

Under Article 33(b) of Decision 345, a breeder's rights shall be null and void if it is established that the granting of such rights was essentially based upon information and documents furnished by the breeder and the conditions of uniformity and stability are not complied with at the time of the grant of the breeder's right.

CHAPTER VI INFRINGEMENTS

Article 30 Actions for Infringement of Rights

Notwithstanding any admissible civil and criminal proceedings, the holder of a Breeder's Certificate may bring infringement proceedings against anyone who infringes his or her rights. The licensee of a Breeder's Certificate may file an action for infringement against anyone who infringes the rights of the holder of a Breeder's Certificate, so long as such right is provided for in the licensing contract and the holder has been notified accordingly. Actions for infringement shall also be brought when there is imminent danger that the holder's rights will be infringed.

Article 31 Requirements for Proceedings involving Infringement of Rights

The proceedings must be made in writing to the Directorate of Inventions and New Technologies and contain:

- (a) the indication of the protected plant variety that is the subject of the infringement [proceedings], or the target of an infringement threat;
- (b) a description of the facts that have caused the infringement;
- (c) the name and address or any other information that can be used to identify the infringer, or the place or means whereby the infringement is presumed to have taken place; and
- (d) any other information that would allow the authorities to put an end to the infringement.

Article 32 Precautionary Measures

The holder whose right has been infringed may request:

- (a) the cessation of infringing acts;
- (b) the seizure of reproduction or propagation or multiplication material of the protected variety, or of the product of the harvest;
- (c) the temporary closure of the infringer's business;
- (d) the adoption of the necessary measures so that customs authorities may prevent infringing products from entering the country;
- (e) the publication of the sentence at the expense of the infringer; and
- (f) in general, any necessary measures to prevent the infringement from taking place or continuing.

The Directorate of Inventions and New Technologies shall maintain a register of infringers.

Article 33 Time-Limit for the Suspected Infringer to Present his or her Arguments

Once the infringement action or denunciation has been filed by the holder, the Directorate of Inventions and New Technologies shall inform the presumed infringer so that he or she may, within a non-renewable period of fifteen (15) days, present such arguments and evidence as he or she may deem appropriate.

Article 34 Issuance of Resolution and Execution of Measures Ordered

Once the time-limit referred to in Article 33 above has expired, the Directorate of Inventions and New Technologies shall proceed to issue the corresponding resolution.

Once the resolution has been approved or confirmed at second instance, the Directorate of Inventions and New Technologies may seek the assistance of law-enforcement agencies to ensure that the measures mandated are carried out.

Article 35 Inspection and Adoption of Precautionary Measures

By filing an infringement action or denunciation, the plaintiff may request that, on his or her own behalf and at his or her own risk, an inspection visit be made to the premises where the infringement is known or presumed to be taking place, so that the necessary precautionary measures may be taken to prevent or stop the infringement.

Representatives of the Directorate of Inventions and of New Technologies and of the Sub-Directorate for Genetic Resources and Biotechnology shall appear at the designated premises and notify the alleged infringer of the infringement proceedings filed, then proceed to verify the facts denounced and hear the arguments of the person in charge of the premises, or in his or her absence, of whoever is there.

It is the responsibility of every individual to provide the necessary facilities so that the Directorate of Inventions and of New Technologies and the Sub-Directorate for Genetic Resources and Biotechnology may fulfill the inspection role described in this Article. Whoever is in the premises shall indicate the name or denomination of the business that operates there.

If during the course of the inspection, the infringement or imminent threat thereof is conclusively substantiated, the required measures shall be taken immediately, if necessary with the help of law-enforcement agencies, to prevent or stop the infringement, such as impoundment and immobilization of the reproduction or propagation or multiplication material for the variety or product of the harvest of the variety allegedly infringed; or the temporary closure of the premises.

If the infringement or threat thereof is not proven during the inspection, the Directorate of Inventions and of New Technologies may request the Sub-Directorate for Genetic Resources and Biotechnology for a technical opinion on the matter. A record shall be drawn up of everything carried out during the inspection visit, including goods impounded, a copy of which shall be delivered to the plaintiff or denouncer and the alleged infringer.

Article 36 Continuance, Modification or Cessation of Precautionary Measures

In the event that precautionary measures have been adopted, the resolution issued by the Directorate of Inventions and of New Technologies pursuant to Article 33, shall also decide on the continuation, modification or cessation of precautionary measures taken.

Article 37 Responsibility for Malicious or Negligent Acts or Denunciations

The plaintiff or denouncer shall be liable for damages caused to the alleged infringer, in case of malicious or negligent acts or denunciations. Public officials shall be accountable under the law.

Article 38 Damages

A holder whose rights have been infringed may only request compensation for damages by way of civil proceedings, once administrative remedies have been exhausted.

FINAL SUPPLEMENTARY PROVISIONS

First. For the purposes of these Regulations, the first administrative authority shall be deemed to be the Directorate of Inventions and of New Technologies and the second and final administrative authority shall be deemed to be the Tribunal for the Protection of Competition and Intellectual Property, pursuant to Legislative Decree No. 1033 and amendments thereto.

Second. The Republic of Peru shall be represented before the Sub-Regional Committee for the Protection of Plant Varieties of the Andean Group and before any other official international entity involved in this area, as a titular member, by a representative of the Directorate of Inventions and of New Technologies of the National Institute for the Defense of Competition and the Protection of Intellectual Property (INDECOPI), and, as an alternate, by a representative of the Sub-Directorate for Genetic Resources and Biotechnology of the National Institute of Agrarian Innovation (INIA). Both entities shall decide the pertinence of their participation in terms of their roles.

THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA⁵

LAW ON THE BREEDER'S RIGHTS

I. GENERAL PROVISIONS

Article 1 Scope of the Law

This Law regulates the treatment, manner and the conditions for grant, protect and cease of breeders' rights.

Article 2 Purpose of the Law

The purpose of this Law is to grant breeders' rights and protect breeders' rights.

Article 3 National Treatment

Nationals of a member of UPOV, or contracting parties to international agreements to which the Republic of Macedonia is party to, as well as domestic and foreign natural persons resident and legal entities having their registered offices within the territory of a member of UPOV, shall, insofar as the grant and protection of breeders' rights are concerned, enjoy within the territory of Republic of Macedonia the same treatment as is accorded by this Law to its nationals.

Article 4 Definitions

For the purposes of this Law the terms used shall mean:

1. "breeder" means
 - 1) the person who bred, or discovered and developed, a variety,
 - 2) the person who is the employer of the aforementioned person or who has commissioned the latter's work, or
 - 3) the successor in title of the persons referred to in subparagraphs 1 and 2 of this paragraph, as the case may be;
2. "applicant" means the natural or legal person entitled to file an application for the grant of a breeder's right in accordance with the definition of "breeder" provided in this Law;
3. "breeder's right" means the right of the breeder provided for in this Law;
4. "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;

⁵ The Law of Breeder's Rights was published on April 21, 2009, in the "Official Gazette of the Republic of Macedonia" No 52/2009 and entered into force on April 29, 2009.

5. "UPOV" means the International Union for the Protection of New Varieties of Plants established by the International Convention for the Protection of New Varieties of Plants;
6. Member of UPOV means a State party or a Contracting Party to the International Convention for the Protection of New Varieties of Plants.

II. CONDITIONS FOR GRANTING OF THE BREEDER'S RIGHT

Article 5 Conditions of Protection

(1) The breeder's right shall be granted where the variety is

1. new,
2. distinct,
3. uniform and
4. stable.

(2) The grant of the breeder's right shall not be subject to any further or different conditions, provided that the variety is designated by a denomination in accordance with the provisions of Article 22 of this Law and the applicant complies with the formalities provided for in this Law and that he pays the required fees.

Article 6 Novelty

(1) The variety shall be deemed to be 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

- 1) in the territory of the Republic of Macedonia earlier than one year before the date of filing the application and
- 2) in a territory other than that of the Republic of Macedonia earlier than four years or, in the case of trees or of vines, earlier than six years before the said date before issuing the application.

(2) The following acts shall be considered not to result in the loss of novelty for the variety referred to in paragraph 1 of this Article:

- (i) sale or disposal of to others that forms part of an agreement for the transfer of rights to the successor in title.
- (ii) sale or disposal of to others that forms part of an agreement under which a person multiplies propagating material of a variety on behalf of the breeder where that agreement requires that: the property in the multiplied material reverts to the breeder; and the multiplied material is not used for the production of another variety;
- (iii) trials of the variety not involving sale or disposal of to others for purposes of exploitation of the variety;
- (iv) sale or disposal of to others that forms part of an agreement under which a person undertakes field tests or laboratory trials, or small-scale processing trials, with a view to evaluating the variety;
- (v) sale or disposal of to others that forms part of the fulfillment of a statutory or administrative obligation, in particular concerning biological security or the entry of varieties in an official catalogue of varieties admitted to trade.

(3) Where, according to Articles 10 and 34, this Law applies to a plant genus or species to which it did not previously apply, varieties belonging to such plant genus or species shall be considered to satisfy the condition of novelty defined in paragraph (1) even where the sale or disposal to others described in that paragraph took place in the territory of the Republic of Macedonia within four years before the filing date or, in the case of trees or of vines, within six years before the said date.

(4) The provision under paragraph 3 of Article 6, shall only apply to applications for protection of the breeder's right filed within one year, at the latest, after the provisions of the Law apply to the genera or species concerned.

Article 7 Distinctness

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

Article 8 Uniformity

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.

Article 9 Stability

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.

Article 10 Genera and Species to be protected

(1) At the date of the coming into force of this Law, the provisions of this Law shall apply to at least 15 plant genera and species designated by the Minister of Agriculture, Forestry and Water economy based on genera and species of economic interest for the Republic of Macedonia, to be proposed by a Commission that includes competent persons in this area.

(2) The persons to be included, and the manner of work of the Commission shall be designated by the Minister of Agriculture, Forestry and Water economy.

III. PROCEDURE FOR GRANTING OF THE BREEDER'S RIGHT

Article 11 Filing the application

(1) The breeder shall file an application for a breeder's right with the Seed and Seedlings Directorate.

(2) The filing date of the application for a breeder's right shall be the date of receipt of the application filed as regulated by the By-law referenced in paragraph 3 of this article for granting of the breeder's right.

(3) The breeder shall pay the fees for granting of the breeder's right, as prescribed by the Minister.

(4) The form and content, procedure and the amount of fees concerning the filing of the application and the fees for granting of the breeder's right referred to in paragraph (1) and (4) of this Article shall be prescribed by the Minister of Agriculture, Forestry and Water economy.

Article 12 Right of Priority

(1) Any breeder who has duly filed an application for the protection of a variety in one of the members of UPOV (the "first application") shall, for the purpose of filing an application for the grant of a breeder's right for the same variety with the Seed and Seedlings Directorate (the "subsequent application"), enjoy a right of priority for a maximum period of 12 months. This period shall be computed from the date of filing of the first application.

(2) In order to benefit from the right of priority, the breeder shall, in the subsequent application in the Republic of Macedonia, claim the priority of the first application. The Seed and Seedlings Directorate shall require the breeder to furnish, after a period of 3 months from the filing date, a copy of the documents which constitute the first application, certified to be a true copy by the authority with which that application was filed, and samples or other evidence that the variety which is the subject matter of both applications is the same.

(3) 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, period of one year after such rejection or withdrawal, in which to furnish, to the Seed and Seedlings Directorate, any necessary information, document or material required for the purpose of examination referred to in Article 13 of this Law.

Article 13 Examination of the Application

(1) Any decision to grant a breeder's right shall require an examination for compliance with the conditions under Articles 5 to 9. In the course of the examination, the Seed and Seedlings Directorate 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 Seed and Seedlings Directorate may require the breeder to furnish all the necessary information, documents or material.

(2) For all finalized testing and checks referred to in paragraph 1 of this article, the applicant takes on the real costs for finalizing the necessary testing and checks.

(3) Necessary information, documents or materials referred to in paragraph (1) of this Article, as well as the amount of the costs mentioned in paragraph 2 of this article, shall be prescribed by the Minister of Agriculture, Forestry and Water economy.

Article 14 Decision on granting of the breeder's rights

(1) On the basis of the completed examination results concerning the application submitted by the Directorate for Seed and Seedlings, the Minister for Agriculture, Forestry and Water Economy issues a decision for granting or rejecting breeding rights.

(2) For granted breeders' rights, the holder of the right is obliged to pay an annual fee, for keeping the right in force.

(3) The amount of the fee referred to in paragraph 2 of this article is prescribed by the Minister for Agriculture, Forestry and Water Economy.

(4) The Decision from paragraph 1 of this article is issued in the "Official Gazette of the Republic of Macedonia".

Article 15 Provisional Protection

The Republic of Macedonia shall provide measures designed to safeguard the interests of the breeder during the period between the publication of the application for the grant of a breeder's right and the grant of that right. Such measures shall have the effect that the holder of a breeder's right shall be entitled to equitable remuneration from any person who, during the said period, has carried out acts which, once the right is granted, require the breeder's authorization as provided in Article 16.

IV. THE RIGHTS OF THE BREEDER

Article 16 Scope of the Breeder's Right

(1) Acts in respect of the propagating material

(a) Subject to Articles 17 and 18 of this law, the following acts in respect of the propagating material of the protected variety shall require the authorization of the breeder:

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

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

(2) Acts in respect of the harvested material

Subject to Articles 17 and 18 of this law, the acts referred to in items i to vii of paragraph (1) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorized use of propagating material of the protected variety shall require the authorization of the breeder, unless the breeder has had reasonable opportunity to exercise his right in relation to the said propagating material.

(3) Essentially derived and certain other varieties

(a) The provisions of paragraphs (1) and (2) shall also apply in relation to

- i. varieties which are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety,
- ii. varieties which are not clearly distinguishable in accordance with Article 6 from the protected variety and
- iii. varieties whose production requires the repeated use of the protected variety.

(b) a variety shall be deemed to be essentially derived from another variety ("the initial variety") when

- i. it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety,
 - ii. it is clearly distinguishable from the initial variety and
 - iii. except for the differences which result from the act of derivation, it conforms to the initial variety in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety.
- (c) Essentially derived varieties may be obtained for example by the selection of a natural or induced mutant, or of a somaclonal variant, the selection of a variant individual from plants of the initial variety, backcrossing, or transformation by genetic engineering.

Article 17 Exceptions to the Breeder's Right

(1) The breeder's right shall not extend to

1. acts done privately and for non-commercial purposes,
2. acts done for experimental purposes,
3. acts done for the purpose of breeding other varieties, and, except where the provisions of Article 16(3) apply, acts referred to in Article 16(1) and (2) in respect of such other varieties.

(2) In relation to varieties included in a list of agricultural plants, the breeder's right shall not be infringed by small farmers who, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, use for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting, on their own holdings, the protected variety or a variety covered by Article 16 (3) (a) (i) or (ii) of this Law.

(3) The varieties of fruit trees, ornamentals, vegetables and forest plants are excluded from the exception under paragraph (2) of this Article.

Article 18 Exhaustion of the Breeder's Right

(1) The breeder's right shall not extend to acts concerning any material of the protected variety, or of a variety covered by the provisions of paragraph (3) of Article 16 of this Law, which has been sold or otherwise marketed by the breeder or with his consent in the territory of the Republic of Macedonia, or any material derived from the said material, unless such acts

- i. involve further propagation of the variety in question or
- ii. 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.

"material" means, for the purposes of this Article, in relation to a variety

- i. propagating material of any kind,
- ii. harvested material, including entire plants and parts of plants, and
- iii. any product made directly from the harvested material.

Article 19 Restrictions on the exercise of the breeder's right

(1) Except where expressly provided in this Law, the free exercise of a breeder's right shall not be restricted in the territory of the Republic of Macedonia for reasons other than of public interest.

(2) When any such restriction has the effect of authorizing a third party to perform any act for which the breeder's authorization is required, the breeder shall receive equitable remuneration, according to law

Article 20 Measures regulating commerce

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

Article 21 Duration of the Breeder's Right

The breeder's right shall be granted for 20 years from the date of the grant of the breeder's right. For trees and vines, the said period shall be 25 years from the said date.

V. VARIETY DENOMINATION*Article 22 Variety Denomination*

(1) The variety shall be designated by a denomination which will be its generic designation. Subject to paragraph (4), no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the breeder's right.

(2) The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any member of UPOV, an existing variety of the same plant species or of a closely related species.

(3) The denomination of the variety shall be submitted by the breeder to the Seed and Seedlings Directorate. If it is found that the denomination does not satisfy the requirements of paragraph (2) of this Article, the Seed and Seedlings Directorate shall refuse to register it and shall require the breeder to propose another denomination within a period of 6 months. The denomination shall be registered by the Seed and Seedlings Directorate at the same time as the breeder's right is granted.

(4) Prior rights of third persons shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden, to a person who, in accordance with the provisions of paragraph (6) of this Article, is obliged to use it, the Seed and Seedlings Directorate shall require the breeder to submit another denomination for the variety within a period defined in paragraph (3) of this article.

(5) A variety must be submitted to all members of UPOV under the same denomination. The Seed and Seedlings Directorate shall register the denomination so submitted, unless it considers the denomination unsuitable within the territory of Republic of Macedonia. In the latter case, it shall require the breeder to submit another denomination within a period defined in paragraph (3) of this article..

(6) Any person who, within the territory of the Republic of Macedonia, offers for sale or markets propagating material of a variety protected within the said territory shall be obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph (4), prior rights prevent such use.

(7) When a variety is offered for sale or marketed, it shall be permitted to associate a markable trademark, trade name or other similar indication with a registered variety denomination. If such an indication is so associated, the denomination must nevertheless be easily recognizable.

VI. NULLITY AND CANCELLATION OF THE BREEDER'S RIGHT

Article 23 Nullity of the Breeder's Right

- (1) The breeder's right shall be declared null and void when it is established
- i. that the conditions laid down in Articles 6 and 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 articles 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.
- (2) No breeder's right shall be declared null and void for reasons other than those referred to in paragraph (1).
- (3) The declaration of nullity of the breeder's right from paragraph (1) of this Article shall be published in the "Official Gazette of the Republic of Macedonia".

Article 24 Cancellation of the Breeder's Right

- (1) The breeder's right may be canceled if:
- (a) it is established that the conditions laid down in Articles 8 or 9 are no longer fulfilled
 - (b) after being requested to do so within the period of 6 months :
 - (i) the breeder does not provide the Seed and Seedlings Directorate 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) the 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 paragraph (1).
- (3) The decision of cancellation of the breeder's right from paragraph (1) of this Article shall be published in the "Official Gazette of the Republic of Macedonia".

VII. COMPETENT AUTHORITY

Article 25 Competences

- (1) The Seed and Seedlings Directorate is competent for keeping Breeder's Rights Register and for publication of information from the registers concerning a filed applications.
- (2) The Seed and Seedlings Directorate shall ensure that the public is informed through regular publication in the "Official Gazette of the Republic of Macedonia", of information concerning:
 - i. application for and grants of breeder's rights, and
 - ii. proposed and approved denominations.
- (3) The Seed and Seedlings Directorate shall ensure access to documents and information concerning filed applications and granted breeder's rights to persons, who will prove the right to have an access to its documents and information, in written request, concerning
 - i. Documents filed with the applications;
 - ii. Documents concerning granted breeder's rights.
- (4) The form, content and the manner of keeping of the Breeder's Rights Register shall be prescribed by the act of the Minister of Agriculture, Forestry and Water economy.

VIII. ENFORCEMENT OF BREEDERS' RIGHTS

Article 26 Legal remedies

- (1) The physical person or the legal entity that has violated the breeder's right is responsible for compensation for damages according to the applicable legislation.
- (2) The breeder whose rights have been violated may, in addition to the legal action for compensatory damages, also request an injunction to prohibit the committing of, or continuation of committing, the infringement of the breeder's right by suspension of the activity act resulting in such infringement, and that the expenses of the proceedings for infringement be charged to the physical person or the legal entity who has violated the breeder's right.
- (3) Breeder's right infringement shall refer to acts contrary to Article 16 of this Law.

Article 27 Juridical Protection of the breeder's rights

- (1) The juridical protection for infringement of the breeder's right provided in Article 16 of this Law shall be submitted within 3 (three) years from the date the plaintiff has notified the infringement to the defendant.
- (2) After the expiration of 5 (five) years after the violation occurred, a lawsuit can not be submitted.
- (3) The lawsuit referred to in paragraph 1 of this Article shall be submitted to the relevant Court.

IX. SUPERVISION

Article 28 Implementation

Supervision over the implementation of this Law and the Books of Rules adopted according this Law, shall be performed by the Ministry of Agriculture, Forestry and Water Economy through State Agriculture Inspectorate.

Article 29 Supervision of the State Agriculture Inspectorate

(1) Supervision over the implementation of the provisions from Articles 16 and 17 of this Law shall be performed by the State Agriculture Inspectorate through the state agriculture inspectors.

(2) Should justified doubts about violation arise during the supervision, the State Agriculture Inspectorate shall temporary seize all items used, or intended for use, or resulted from the violation itself.

(3) The State Agriculture Inspectorate shall hand over all seized items with no delay, along with the proposal for initiating lawsuit.

X. OFFENSES AND PENALTIES

Article 30 Penalties

(1) A legal entity shall be fined with monetary penalty of 3.000 to 5.000 Euros in MKD:
- in the case of a violation of a breeder's right provided in Article 16 of this Law.

(2) A person responsible for a legal entity shall be fined with monetary penalty of 500 to 1.000 Euros in MKD for the violation referred to in paragraph (1) of this Article.

(3) A civil person shall be fined with penalty of 200 to 800 Euros in MKD for violation referred to in paragraph (1) of this Article.

Article 31 Penalties

(1) A legal entity shall be fined with a penalty of 1.000 to 3.000 Euros in MKD if:
- contrary to paragraph (1) from from Article 22 of this Law willfully makes use of a registered variety denomination of a variety protected in the Republic of Macedonia for another variety of the same plant species or closely related species
- contrary to paragraph (6) of Article 22 of this Law, offers for sale or markets propagating material of a protected variety, without using the registered denomination of the variety,

(2) A person responsible for a legal entity shall be fined with monetary penalty of 200 to 500 Euros in MKD for the violations referred to in paragraph (1) of this Article.

(3) A civil person shall be fined with penalty of 300 to 500 Euros in MKD for the violations referred to in paragraph (1) of this Article.

Article 32 Procedures, Settlement and Mediation

Lawsuits for offences referred to in this Law shall be submitted to the relevant Court.

Prior to submission of claim for lawsuit for offences referred to in this Law, the Ministry conducts settlement procedures in accordance with the Law on penalties.

XI. TRANSITIONAL AND FINAL PROVISIONS

Article 33 Book of Rules

Book of Rules foreseen with this Law, shall be enacted within one year on the day of entering into force of this Law.

Article 34 Gradual application of the Law to additional genera and species

In respect to the genera and species which are not part of the list mentioned in article 10 of this law, the provisions of this law will be applied to additional plant genera and species, as designated by the Minister, and to all plant genera and species before the expiration of a period of 10 years after the entry into force of this law.

Article 35 Provisions, which shall cease to apply

On the day of entering into force of this Law, the Law for on protection of new varieties of agriculture plants shall cease to apply ("Official Gazette of Republic of Macedonia" No.84/2007).

Article 36 Entry into Force

This Law shall enter into force on the 8th day of its publication in the "Official Gazette of the Republic of Macedonia".