

ANTIGUA AND BARBUDA



THE PROTECTION OF NEW PLANT VARIETIES ACT, 2007.

No. of 2007

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*The Protection of New Plant Varieties Act, 2007.*

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**THE PROTECTION OF NEW PLANT VARIETIES ACT, 2007**

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**ANTIGUA AND BARBUDA**

**THE PROTECTION OF NEW PLANT VARIETIES ACT, 2007**

**No. of 2007**

**A BILL FOR**

**AN ACT** to provide for the protection of new varieties of plants, to give effect to the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994 as it relates to the protection of new plant varieties and for related matters.

**ENACTED** by the Parliament of Antigua and Barbuda as follows:

**PART I  
PRELIMINARY**

**1. Short title**

This Act may be cited as the Protection of New Plant Varieties Act, 2007.

**2. Interpretation**

In this Act—

“applicant” means an applicant for a plant breeder’s right;

“Authority of a Contracting Party” means the Authority entrusted with the implementation of the law on the protection of new varieties of plants for that Party;

“Contracting Party” means-

(a) a State which is a party to the TRIPS Agreement; or

(b) a State or an intergovernmental organisation, party to any treaty or agreement with Antigua and Barbuda in respect of the protection of new varieties of plants;

“Court” means the Eastern Caribbean Supreme Court;

“plant breeder” means the person who has bred or discovered and developed a variety;

“priority” means the period determined under section 24 in respect of the filing of an application;

“protected variety” means any variety that is the subject of a plant breeder’s right;

“publish” includes publication on the internet;

“register” means the register of plant breeders’ rights in which the matters specified in section 49 are required to be recorded;

“Registrar” means the Registrar of Intellectual Property;

“TRIPS Agreement” means the Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994;

“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 plant breeder’s right are fully met, can be

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

## **PART II ADMINISTRATION**

### **3. Administration**

Subject to this Act, the Registrar together with the Director of Agriculture is responsible for the administration of this Act.

### **4. Agents**

(1) Every person whose ordinary residence or principal place of business is outside Antigua and Barbuda, shall be represented by an agent who is resident in, and has an office in Antigua and Barbuda.

(2) The principal shall give the agent power to act on his behalf

(a) in any matter before the Registrar; and

(b) in legal proceedings relating to plant breeders' rights.

(3) For the purposes of instituting legal proceedings by or against any person represented by an agent, the place which the Registrar identifies as the address of the agent, or where there are several agents, the address of the main agent, or agent first designated, shall be deemed to be the place where the right in the variety is located.

**PART III**  
**PLANT BREEDERS' RIGHTS**  
**QUALIFICATION FOR A PLANT BREEDER'S RIGHT**

**5. Criteria for protection**

(1) Subject to this Act, a right to be known as a plant breeder's right shall be granted in respect of plant varieties of those genera or species, which the Minister may by order specify, where the variety is

(a) new;

(b) distinct;

(c) homogenous;

(d) stable; and

(e) given a variety denomination which is acceptable for registration in accordance with section 27.

(2) In compiling the list of genera or species under subsection (1), the Minister may exclude varieties of that genus or species which are not characterized by a particular manner of reproduction or multiplication or by a certain end-use.

(3) Where a genus or species is deleted from the list of genera and species to which this Act ap-

plies with effect from a specified date, the deletion shall not affect the rights of applicants who have filed applications for the protection of varieties of that genus or species before that date.

## **6. Novelty**

(1) Subject to subsections (2) and (3), a variety shall be considered new if the propagating or harvested material of the variety has not been sold or otherwise disposed of to others with the authorisation of the plant breeder or his successor in title

- (a) in Antigua and Barbuda for more than one year before the date on which protection is applied for under this Act; and
- (b) outside Antigua and Barbuda for more than 6 years in the case of trees or vines, or longer than 4 years in the case of other plants, before the effective filing date in Antigua and Barbuda.

(2) It shall not be considered detrimental to the novelty of a variety if the propagating or harvested material of that variety has been sold or otherwise disposed of in Antigua and Barbuda with the authorisation of its breeder or his successor in title for a period not exceeding 4 years prior to the inclusion of the genus or species to which the variety belongs in the list of genera and species specified in the Order, and for a period not exceeding 6 months after such inclusion, where the application is filed within that 6-month period.

## **7. Distinctness**

(1) A variety shall be considered to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge at the time of the filing of the application or where relevant, at the priority date.

(2) Subject to subsection (1), common knowledge may be established by reference to the following factors—

- (a) exploitation of the variety already in progress;
  - (b) grant of a plant breeder's right in the variety;
  - (c) entry of the variety in a catalogue of varieties admitted to trade;
  - (d) entry in the register of varieties kept by a recognised professional association; or
  - (e) inclusion of the variety in a reference collection.
- (3) The filing, in any State, of an application for a plant breeder's right, or for entry in a catalogue

of varieties admitted to trade, shall be deemed to render the variety the subject of the application on a matter of common knowledge from the date of the application, if the application leads to the grant of the breeder's right or the entry in the catalogue, as the case may be.

### **8. Homogeneity**

A variety shall be considered to be homogenous if its plants show the same expression of the same characteristics, subject to the variation which may be expected in view of the particular features of its propagation.

### **9. Stability**

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

### **10. Right to Apply for a Plant Breeder's Right**

(1) Subject to this Part, the plant breeder of a variety or his successor in title shall be entitled to apply for a plant breeder's right.

(2) Where 2 or more persons have bred or discovered and developed, a variety jointly, the right to apply for a plant breeder's right vests in them jointly, and subject to any agreement to the contrary between the joint breeders, their shares in the property of the breeder's rights are equal.

(3) Where a variety has been bred or discovered and developed by several persons independently of each other, the right to apply for the grant of the plant breeder's right belongs to the person who has first applied for the right or filed an application with an earlier priority date with the Registrar.

(4) Where a variety has been bred or discovered and developed in execution of a commission or a contract of employment, the right to apply for a plant breeder's right belongs, in the absence of contractual provisions to the contrary, to the person who commissioned the work, or to the employer, as the case may be.

### **11. Presumption of Title**

The applicant shall, in the absence of proof to the contrary, be presumed to be entitled to a plant breeder's right under this Act, but where the application is made by a successor in title, it shall be accompanied by sufficient proof of the successor's title.

### **12. Persons Who May Apply**

(1) An application for the grant of a plant breeder's right may be made by the owner of a variety—

- (a) who is a citizen or resident of Antigua and Barbuda;
- (b) who is a citizen or resident of a Contracting Party; or
- (c) who is a citizen or resident of any State which without being a contracting party, grants reciprocity of treatment to Antigua and Barbuda.

(2) For the purposes of subsection (1), "citizen" means, where the Contracting Party is a State, a citizen of that State, and where the Contracting Party is an intergovernmental Organisation, the citizens of the States that are members of that Organisation.

#### **ASSIGNMENT AND TRANSFER OF THE APPLICATION OR OF A PLANT BREEDER'S RIGHT**

##### **13. Assignment and Transfer**

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

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

(3) An assignment or transfer shall be registered in the register on the written request of the assignor or transferor and on payment of the prescribed fee.

(4) No assignment or transfer to a successor in title has effect against a third party unless it is registered.

##### **14. Joint Applicants and Joint Holders of a Plant Breeder's Right**

(1) Where there are 2 or more applicants for the grant of a plant breeder's right or where there are 2 or more holders of such a right in any protected variety, in the absence of any agreement to the contrary, each applicant or holder may separately transfer his shares, or exploit the variety, as the case may be, or subject to this Act, exclude others from exploiting it.

(2) For the purposes of the grant of an exclusive licence, in the case referred to under subsection (1), the holders of a plant breeder's licence may only jointly grant an exclusive licence to a third party to exploit the variety.

#### **PART IV**

## SCOPE AND DURATION OF A PLANT BREEDER'S RIGHT

### 15. Scope of Plant Breeder's Right

(1) Subject to sections 16 and 17, no person shall do any of the following acts in respect of the propagating material of a protected variety without the consent of the holder of the plant breeder's right granted in respect of the variety—

- (a) produce, reproduce or multiply that material;
- (b) condition that material for the purpose of propagation;
- (c) offer that material for sale;
- (d) sell or otherwise market that material;
- (e) export that material;
- (f) import that material; or
- (g) stock that material for any purpose referred to in paragraphs (a) to (f).

(2) The holder of a plant breeder's right may give his consent subject to conditions and limitations.

(3) Subject to sections 16 and 17, no person shall, without the consent of the holder of a plant breeder's right, do any act referred to in paragraphs (a) to (g) of subsection (1) in respect of harvested material, including entire plants and parts of plants, obtained through the unauthorised use of the propagating material of the protected variety.

(4) Subsection (2) does not apply where the holder of the plant breeder's right had reasonable opportunity, before the harvested material was obtained, to exercise his right in relation to the unauthorised use of the propagating material.

(5) The provisions of subsections (1), (2) and (3) also apply in relation to varieties

- (a) that are essentially derived from the protected variety, where the protected variety is not itself an essentially derived variety;
  - (b) that are not clearly distinguishable in accordance with section 7 from the protected variety; and
  - (c) whose production requires the repeated use of the protected variety.
- (6) For the purposes of subsection (5), a variety shall be deemed to be essentially derived from

another variety (in this Act referred to as the “initial variety”) where—

- (a) it is predominantly derived from the initial variety, or from a variety that is itself predominantly derived from the initial variety, while retaining the expression of the essential characteristics that result from the genotypes of the initial variety;
- (b) it is clearly distinguishable from the initial variety; and
- (c) 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.

(7) Essentially derived varieties may be obtained by—

- (a) the selection of a natural or induced mutant or a somaclonal variant;
- (b) the selection of a variant individual from plants of the initial variety;
- (c) backcrossing;
- (d) transformation by genetic engineering; or
- (e) any other similar means.

#### **16. Exceptions to Plant Breeder’s Right**

(1) The plant breeder’s right shall not extend to—

- (a) acts done privately by an individual;
- (b) acts done for non-commercial purposes;
- (c) acts done for experimental purposes; and
- (d) acts done for the purpose of breeding other varieties, and except where the provisions of section 15(5) apply, acts referred to in section 15(1) in respect of the other varieties.

(2) The Minister may by regulations which protect the legitimate interests of the holders of plant breeders’ rights, restrict the rights in relation to the varieties of any specified plant genera or species, in order to permit farmers to use for propagating purposes on their own holdings, the product of the harvest which the farmers have obtained by planting on their own holdings, the protected variety or a variety mentioned under section 15(5)(a) or (b).

#### **17. Exhaustion of Plant Breeder’s Right**

(1) A plant breeder's right does not extend to acts concerning any material of the protected variety or of a variety mentioned under section 15(4), which has been sold or otherwise marketed in Antigua and Barbuda by the breeder or with his consent, or any material derived from the said material unless such acts—

- (a) involve further propagation of the variety; or
- (b) involve an export of material of the variety, which enables the propagation of the variety into a country which does not protect varieties of the plant genus or species to which the variety belongs, except where the exported material is for final consumption purposes.

(2) For the purposes of subsection (1), "material" means, in relation to a variety,

- (a) propagating material of any kind; and
- (b) harvested material, including entire plants and parts of plants.

#### **18. Maintenance of Propagating Material**

(1) The holder of a plant breeder's right shall, throughout the period for which the right is exercisable, be under an obligation to provide the Director of Agriculture with propagating material capable of producing plants which correspond to the characteristics defined for the variety when the right was granted.

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

#### **19. Period of Protection**

(1) Subject to subsection (2), the plant breeder's right in respect of vines, forest trees, fruit trees and ornamental trees including in each case, their rootstocks, shall expire 25 years after the grant thereof.

(2) Protection for all genera or species, other than that mentioned in subsection (1), shall expire 20 years after the grant thereof.

(3) Where in the cases referred to in section 6(2), a variety has already been offered for sale or marketed in Antigua and Barbuda for a period of more than one year before the date of the filing of the application, the duration of the protection shall be reduced by the number of full years minus one

year that have elapsed since the beginning of the offering for sale or the marketing, as the case may be, with the consent of the plant breeder or his successor in title, before the filing of the application.

## **20. Annual Fees**

(1) In order to maintain a plant breeder's right or an application for a plant breeder's right, an annual maintenance fee shall be paid in advance to the Registrar for each year, starting one year after the date of filing of the application.

(2) A grace period of 6 months shall be allowed for the late payment of the annual fee on payment of the prescribed surcharge.

(3) Where the annual fee is not paid in accordance with this section, the application for the plant breeder's right shall be deemed to have been withdrawn or, as the case may be, the plant breeder's right shall be deemed to have been surrendered.

## **21. Cancellation**

(1) The Registrar shall cancel the plant breeder's right where the holder of the right—

- (a) is no longer able to provide the Director of Agriculture, at the request of the Director of Agriculture, with the propagating material capable of producing plants which correspond to the characteristics defined for the variety when the right was granted;
- (b) does not comply with section 18(2); or
- (c) does not within 3 months after he has been reminded in writing to do so by the Registrar, pay the annual fee.

(2) Where the Registrar determines for the purposes of subsection (1) that a plant breeder's right should be cancelled, the Registrar shall give notice in writing to the holder of the right of his intention to cancel the plant breeder's right and shall state his reasons for the intended cancellation.

(3) Where the holder of the right does not within 60 days of the receipt of the Registrar's notice under subsection (2), deliver or send to the Registrar a written reply to the notice showing cause, the Registrar may proceed to cancel the plant breeder's right.

(4) The cancellation of a plant breeder's right by the Registrar under this section shall be published.

## **PART V**

## **APPLICATIONS**

### **Submission of Applications**

#### **22. Applications**

(1) An applicant for a plant breeder's right must file an application with the Registrar in the prescribed form.

(2) The application must be accompanied by the technical questionnaire in the prescribed form for the relevant genus or species, which must be completed by the applicant to the best of his knowledge.

(3) The Registrar shall, after consultation with the Director of Agriculture, give the applicant written notice of a date, place and time for the submission of the amount of propagating material required by the Director of Agriculture, and the applicant shall submit the amount of propagating material as requested.

(4) Every application received by the Registrar and completed in accordance with this section shall, be published together with

- (a) the date of filing;
- (b) the name and address of the applicant and the original plant breeder;
- (c) the variety denomination proposed under section 27; and
- (d) the main characteristics of the variety as indicated in the application.

(5) Every application for a plant breeder's right must be accompanied by the prescribed fee.

(6) The refusal or withdrawal of an application shall be published.

#### **23. Filing Date**

The Registrar shall accord, as the filing date of the application, the date of receipt of the application and the technical questionnaire, duly completed.

#### **24. Priority**

(1) The applicant for a variety may avail himself of the priority of an earlier application that has been duly filed for the same variety by himself or by his predecessor in title with the Authority of a Contracting Party or with the authority responsible for plant breeders' rights in a state which accords

priority to citizens or residents of Antigua and Barbuda on a reciprocal basis.

(2) Where the application referred to in subsection (1) is preceded by several such applications, priority may be based only on the earliest application.

(3) Priority shall be expressly claimed in the application referred to in subsection (1), and may only be claimed within a period of 12 months from the date of filing of the earliest application, but the day of filing shall not be included in that period.

## **25. Documents and Material to be furnished for Priority**

(1) An applicant who wishes to avail himself of the right of priority referred to in section 24 shall, within 3 months of filing the application in Antigua and Barbuda, send to the Registrar, a copy of the documents that constitute the earlier application certified to be a true copy by the Authority with which that application was filed.

(2) Where the earlier application referred to in subsection (1) is not in the English Language, the Registrar may request that a translation thereof be produced within 3 months from the date of receipt of the request.

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

(4) The applicant may declare that he will send the propagating material referred to in section 22(3), or any additional material or document necessary for an examination under section 32, required by the Registrar, at a date later than the date fixed by the Registrar pursuant to section 22(3) or section 32(5), but no later than 2 years after the end of the priority period, unless the earlier application referred to in subsection (1) has been withdrawn or refused in the country in which it was filed.

(5) Where the applicant fails to comply with this section, the application shall be dealt with as if no priority has been claimed.

## **26. Where Application Documents not in English**

Any document filed under this Act shall, if not in the English Language, be accompanied by a translation thereof in the English Language, verified by the translator that the translation is, to the best of his knowledge, complete and faithful.

### **Variety Denomination**

**27. Application and Procedure for Variety Denomination**

(1) The applicant for a plant breeder's right shall, within 3 months of the filing of the application, propose on the form issued by the Registrar for that purpose, a variety denomination in accordance with subsection (4).

(2) A variety denomination—

- (a) may comprise one word; or
- (b) may comprise a combination of
  - (i) not more than 3 words;
  - (ii) words and figures;
  - (iii) words and letters; or
  - (iv) letters and figures;

but shall not comprise figures only, except that in the case of a combination of words and figures, the figures shall be given a meaning in relation to the words.

(3) No person shall use as a variety denomination a designation that—

- (a) does not enable the variety to be identified;
- (b) is misleading or likely to cause confusion concerning the origin, derivation, characteristics, value or identity of the variety, or the identity of the plant breeder;
- (c) is identical to or can be confused with a variety denomination, which in Antigua and Barbuda or in a State that is party to a plant varieties treaty, is designated an existing variety of the same or a related botanical species, except that the denomination shall be admissible if the other variety is not registered and has not been grown for a considerable time;
- (d) is identical to or can be confused with a designation in which a third party enjoys a prior right which would prohibit the use of the designation as a variety denomination;
- (e) is contrary to public policy or morality;
- (f) refers solely to attributes which are also common in other varieties of the species con-

cerned;

- (g) consists of a botanical or common name of a genus or species, or includes such a name, where this is likely to mislead or cause confusion;
- (h) suggests that the variety is derived from, or related to another variety when this is not the case;
- (i) includes words such as “variety”, “cultivar”, “form”, “hybrid”, “cross” or a translation of such words; or
- (j) is, for reasons other than those mentioned in paragraphs (a) to (i), not suitable as a generic designation of the variety.

(4) Where a variety is already protected by a Contracting Party or where an application for the protection of the same variety is filed in a state which is party to a plant varieties treaty, only the variety denomination which has been proposed or registered in that State may be proposed and registered, and the Registrar shall not register any other designation as a denomination for the variety.

(5) Where the variety denomination used in the State mentioned in subsection (4) is inappropriate for linguistic reasons, or for any reason specified in subsection (3), the Registrar may, on the advice of the Director of Agriculture, request the applicant to propose another variety denomination.

(6) The Registrar shall publish the variety denominations which have been proposed to him, or registered or cancelled by him.

(7) For the purposes of this section, “plant varieties treaty” means a treaty or an agreement in respect of the protection of plant varieties to which Antigua and Barbuda is party.

## **28. Use of Variety Denomination**

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

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

(3) The holder of a plant breeder’s right may not invoke any trademark, trade name or other right in his possession against a variety denomination legitimately used in the offering for sale or marketing of the variety by another person, even after the expiration of the protection.

## **29. Prior Rights of Third Parties**

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

### **30. Cancellation of Registered Variety Denomination**

(1) The Registrar shall cancel any registered variety denomination at the request of—

- (a) any interested person, or on the Registrar's own initiative if,
  - (i) the denomination should not have been registered; or
  - (ii) subsequent to registration, facts become known which would have justified the rejection of the denomination;
- (b) the holder of the plant breeder's right or of a third person,
  - (i) where the variety denomination is cancelled by the Court; or
  - (ii) where it is established that a third party right exists in the denomination and the holder of the plant breeder's right agrees to the cancellation;
- (c) a person who is obliged to use the variety denomination under section 28(1), if he is prohibited by a decision of the Court from using that denomination, if the holder of the plant breeder's right had participated or had been given the opportunity to participate in the court proceedings.

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

(3) Where the proposal for a new variety denomination is not acceptable to the Registrar, he shall require the holder of the plant breeder's right to send another proposal for a new variety denomination.

(4) The Registrar shall, on the advice of the Director of Agriculture, establish at the request of the holder of a plant breeder's right or a third person, a provisional variety denomination, where the holder or the third person demonstrates a legitimate interest.

(5) Where, after the period for submitting a proposal for a new variety denomination has expired, and the holder of the plant breeder's right has not submitted the requested proposal, the Registrar may establish on his own initiative, a provisional variety or permanent variety denomination.

(6) Where the Registrar determines for the purposes of paragraph (a) or (c) of subsection (1) that a

registered variety denomination should be cancelled, the Registrar shall give notice in writing to the holder of the right and to any other interested person of his intention to cancel the registered variety denomination, and shall state his reasons for the intended cancellation.

(7) Where the holder of the right does not within 60 days of the receipt of the Registrar's notice under subsection (2), deliver or send to the Registrar a written reply to the notice showing cause, the Registrar may cancel the registered variety denomination.

### **Examination of Application**

#### **31. Formal Examination of Application**

(1) The Registrar shall examine or cause every application to be examined in order to determine whether—

- (a) the application and its supporting documents satisfy the requirements for applications under this Act; and
- (b) the required amount of propagating material has been submitted to the Director of Agriculture on the due date and at the proper place.

(2) Where any requirement referred to in subsection (1) has not been complied with, the Registrar shall reject the application for the grant of a plant breeder's right, unless the Registrar grants to the applicant a further period to complete the application or to submit the propagating material, but no such further period may be granted which will expire later than 3 months after the application date or the date fixed for submission of the material, as the case may be.

#### **32. Examination for Novelty etc.**

(1) The Registrar shall, on payment of the prescribed testing fee for each testing period, cause the variety to be examined by the Director of Agriculture or as provided for under subsection (3), for the purposes of determining whether the variety satisfies the requirements of novelty, distinctness, homogeneity and stability; and where any of those requirements is not satisfied, the Registrar shall reject the application.

(2) Where the applicant fails to pay the testing fee for any testing period, or subject to section 20, the annual fee referred to under that section, for any year, the application shall be deemed to have been withdrawn.

(3) The Minister may, for the purposes of the examination, enter into arrangements with relevant institutions or persons both in or outside Antigua and Barbuda, to carry out scientific tests to determine the novelty, distinctness, uniformity or stability of the variety; and the Registrar may use the results of any such test that have already been carried out.

(4) The Registrar may treat the test results obtained from, and expert opinions given by, the Director of Agriculture or any institution or person referred to under subsection (3), as results obtained from and opinions given by the Registrar himself.

(5) Subject to section 25(4), the Registrar may, where necessary for an examination, request the applicant by notice in writing, to submit additional material or documents within 60 days from the date of the receipt of the notice, and where the applicant fails to do so without giving valid reasons for such failure, the application shall be deemed to have been withdrawn.

#### Grant and Surrender of Plant Breeders' Rights

### **33. Grant of a Plant Breeder's Right**

(1) Where the examination shows that the variety satisfies the requirements of novelty, distinctness, homogeneity and stability, and that the proposed denomination of the variety can be registered, the Registrar shall grant a plant breeder's right.

(2) Where a plant breeder's right is granted under subsection (1), the Registrar shall publish a notice of the grant of the plant breeder's right.

(3) Where the examination shows that the proposed denomination of the variety is unregistrable, the Registrar shall request the applicant to submit another denomination within a period fixed by him, and if the applicant fails to do so, the Registrar shall refuse the application.

### **34. Surrender of a Plant Breeder's Right**

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

(2) The date of surrender shall be that specified in the declaration or, if no date is specified, the date on which the declaration is received by the Registrar.

## **PART VI LICENCES AND LEGAL PROCEEDINGS BY LICENSEE**

### **35. Licence Contracts**

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

(2) A licence-contract shall be in writing.

(3) A licence-contract shall be registered by the Registrar and shall have no effect against a third party until it has been registered.

(4) The grant of an exclusive licence shall be published.

### **36. Grant of Further Licences etc.**

In the absence of any provision to the contrary in a licence-contract, the grant of a licence shall not prevent the licensor from granting further licences to third parties or from exploiting the variety himself.

### **37. Non-Assignability of Licences**

In the absence of provisions to the contrary in the licence-contract, rights granted therein shall not be assigned to a third party by the licensee.

### **38. Certain Clauses in Contract Void**

A clause in a licence-contract or relating to such a contract is void in so far as it imposes upon the licensee, restrictions that

- (a) do not derive from the rights conferred by the plant breeder's right; or
- (b) are necessary for the safeguarding of the right.

### **39. Licences of Right**

(1) Any holder of a plant breeder's right or any applicant for the grant of a plant breeder's right may make a declaration that a person may, on the payment of a royalty, use his variety as from the date on which that person has informed the holder or applicant, as the case may be.

(2) The declaration referred to in subsection (1) shall be addressed to the Registrar and a reference to that effect shall be entered in the register.

(3) The royalty payable by the licensee of a right, shall be stated in the declaration referred to in subsection (1), and shall also be entered in the register.

(4) After a declaration referred to in subsection (1) is entered in the register, the holder of the plant breeder's right shall pay only half of the prescribed renewal fee.

(5) The Registrar may cancel the entry referred to in subsection (2) at the request of the holder of the plant breeder's right if all the beneficiaries agree.

(6) A licence agreement made under this Act shall become ineffective if the plant breeder's right under which it was granted is invalidated or cancelled, but no payment of any royalty which was due before the date of invalidation or cancellation may be demanded by the licensee as a result of that invalidation or cancellation.

#### **40. Compulsory Licences**

(1) At any time after the expiration of 3 years after the date of the grant of a plant breeder's right under this Act, any interested person may apply to the Court for the grant of a compulsory licence in respect of that plant breeder's right, on the ground that it is necessary to safeguard the public interest in Antigua and Barbuda.

(2) Subject to subsections (4), (5) and (6), where the Court is satisfied that the ground referred to in subsection (1) is established, the Court may make an order for the grant of the licence in accordance with the application on such terms as it thinks fit.

(3) A licence granted under this section shall confer on the owner, the non-exclusive right to perform any activity referred to in section 15 for the supply of the national market.

(4) Any person to whom a licence is granted under this section shall pay the licensor the remuneration agreed upon or determined by the method agreed upon between that person and the licensor, or, in default of agreement, as is determined by the Court on the application of either party.

(5) The Court may require the holder of the plant breeder's right, to hold available for the owner of the compulsory licence, the amount of propagating material necessary for making reasonable use of the compulsory licence, against payment of adequate remuneration to the holder of the right and under conditions which are economically acceptable to him.

(6) A licence shall not be granted under this section unless

- (a) the applicant for the licence is financially able and otherwise in a position to exploit the plant breeder's right in a competent and business-like manner, and is prepared to do so;
- (b) the holder of the plant breeder's right has refused to permit the applicant for the licence to produce or market propagating material of the protected variety in a manner sufficient for the needs of the general public as referred to in subsection (1) or is not prepared to give such permission under reasonable terms;
- (c) no conditions exist under which the holder of the plant breeder's right cannot be expected to permit the use of his variety in the manner requested; and
- (d) the applicant for the compulsory licence has paid the prescribed fee for the grant of such licence.

(7) The duration of the licence referred to in this section shall be fixed by the Court and shall not, except under extraordinary circumstances, be granted for less than 2 or more than 4 years, but the period may be extended if the Court is satisfied, on the basis of a new application, that the conditions for granting a compulsory licence continue to exist after the expiration of the first period.

(8) Before granting a compulsory licence, the Court may hear the national non-governmental organisations involved in the field of plant breeding as well as the seed trade.

(9) Where the Court is satisfied that the grounds on which any licence granted under this section have ceased to exist, or that its owner has failed to comply with the conditions under which it was granted, the Court may, on the application of any interested party, terminate the licence.

#### **41. Legal Proceedings by Licensee**

(1) Any licensee under a contractual or compulsory licence or a licensee of right, may request the licensor to institute a civil action or criminal proceedings in respect of any infringement of the plant breeder's right suffered by the licensee.

(2) Where the licensor refuses or neglects to institute the legal proceedings referred to in subsection

(1) within 3 months after the request has been made to institute such proceedings, the licensee may institute the proceedings in his own name, without prejudice to the right of the licensor to intervene in such proceedings.

### **PART VII LEGAL PROCEEDINGS**

#### **Invalidation of a Plant Breeder's Right**

#### **42. Invalidation of Right**

(1) Any interested person may institute an action in the Court to have a plant breeder's right declared invalid.

(2) In any proceedings under subsection (1), the Court may declare a plant breeder's right invalid

- (a) if the variety is not new or distinct within the meaning of, and on applicable dates referred to in sections 6 and 7; or
- (b) if the holder of the right is not the owner of the variety.

### **APPEALS**

#### **43. Appeals against Decision of Registrar**

(1) When any person is aggrieved by any decision or act of the Registrar, that person may,

- (a) within the time provided by a provision of this Act therefor;
  - (b) within 3 months from the day he became aware of the decision or act;
  - (c) within such further time as the Court may allow with Rules of Court,
- appeal against the decision or act to the Court.

(2) An appeal to the Court under this Act may be brought by a notice of motion.

(3) Rules of Court shall make provision for the appointment of advisers to assist the Court in proceedings under this Act, for regulating the functions of such advisers and for the payment of such remuneration as the Court may determine from time to time.

### **INFRINGEMENT PROCEEDINGS**

#### **44. Civil Proceedings**

(1) Subject to the provisions of this Part, proceedings may be brought in the Court by the owner of a plant breeder's right in respect of any act that infringes the right and in those proceedings a claim may be made

- (a) for an injunction to prohibit the infringement or to prohibit the continuation of the infringement;
- (b) for damages for the infringement;
- (c) for an order for the defendant to deliver up or destroy any product in relation to which the plant breeder's right is infringed or any article in which that product is inextricably comprised;
- (d) for an account of the profits derived by the defendant from the infringement; or
- (e) for a declaration that the plant breeder's right is valid and has been infringed by the defendant.

(2) The Court shall not, in respect of the same infringement, both award the holder of the plant breeder's right damages and order that he be given an account of profits.

#### **45. Provisional Protection**

(1) Where a plant breeder's right is granted, the holder of the right is entitled to reasonable compensation for anything done during the application period which, if done after the grant of the right, would constitute an infringement of the right.

(2) In this section, "application period", in relation to the grant of a plant breeder's right, means the period

- (a) beginning with the day on which details of the application for the grant of the right were published pursuant to section 22(4); and
- (b) ending with the grant of the right.

#### **46. Judicial Assignment of Application for Plant Breeder's Right**

Where an application is filed for a plant breeder's right by a person who is not entitled to the right, the person entitled may bring an action in the Court for the assignment to him of the application or, if the plant breeder's right has already been granted, of the right.

#### **47. Limitation**

Subject to this Part, no action shall be commenced under section 46 after 5 years of the publication of the notice of the grant of the plant breeder's right, but an action brought against a defendant who has acted in bad faith shall not be subject to any limitation period.

### **CRIMINAL LIABILITY**

#### **48. Criminal Liability in Respect of Variety Denomination**

(1) Any person who wilfully offers for sale or markets propagating material of a variety protected in Antigua and Barbuda in contravention of this Act, is guilty of an offence, and liable on summary conviction to a fine of \$20,000, or imprisonment for 3 years, or to both.

(2) Any person who wilfully makes use of

- (a) the registered variety denomination of a variety protected in Antigua and Barbuda;
- (b) a denomination likely to cause confusion therewith; or
- (c) another variety of the same botanical or a related species, or the variety referred to in paragraph (a), is guilty of an offence, and is liable on summary conviction to a fine of \$20,000, or imprisonment for 3 years, or to both.

### **PART VIII**

## GENERAL

### 49. Register

(1) The Registrar shall maintain a register of plant breeders' rights in such form as may be approved by the Registrar, in which the following shall be recorded

- (a) all applications for a plant breeder's right;
- (b) any grant of a plant breeder's right;
- (c) any change relating to the ownership of that right;
- (d) any invalidation or cancellation of the right;
- (e) any submission, registration, change or cancellation of the variety denomination;
- (f) any licence of right or compulsory licence granted, with an indication of the conditions of such licences; and
- (g) the conclusion of any licence contract at the request of any of the parties to the contract.

(2) The Registrar shall publish in the Gazette or in an intellectual property journal published under the authority of the Registrar, or in both, all the publications provided for in this Act.

(3) A person who pays the prescribed fee is entitled, during normal business hours, to examine the register and to make copies of, or extracts from the information contained therein.

### 50. Transmission of Court Decision to Registrar

The Registrar of the Court shall, on the determination of any action or appeal to the Court under this Act, send a certified copy of the Court's decision to the Registrar, who shall

- (a) record the decision in the register in the appropriate place or file;
- (b) publish a notice of the decision; and
- (c) communicate the decision to the interested owner of the plant breeder's right, applicant for a plant breeder's right, licensee, transferor, transferee, and to any other person to whom the decision is relevant, as the circumstances require.

### 51. Rectification of Register

(1) Subject to subsection (2), the Registrar may or any person may request the Registrar to

- (a) correct any linguistic error;
- (b) correct any error of transcription;
- (c) correct any clerical error;
- (d) correct any mistake

in any specification of a plant breeder's right or any application for a plant breeder's right or any document filed in pursuance of an application; or

- (e) correct any other error in the register.

(2) Before a correction is made to the register under subsection (1), the Registrar shall give notice of the proposal to the owner of the plant breeder's right, to the applicant for the plant breeder's right and to any other person who appears to him to be concerned, as the case requires.

(3) The Court may, on the application of a person aggrieved, order the register to be rectified by the making or variation or deletion of any entry in it.

(4) In proceedings under subsection (3), the Court may determine any question which it may be necessary or expedient to decide in connection with the rectification of the register.

## **52. Immunity in Respect of Official Acts**

No employee of the [Intellectual Property Office] nor any other public officer

- (a) shall be taken to warrant the validity of any plant breeder's right granted under this Act; or
- (b) shall incur liability by reason of or in connection with any examination or investigation required or authorised by this Act or any report consequent on any such examination or investigation.

## **53. Service of Communication**

Unless otherwise provided by this Act, any communication with an applicant for a plant breeder's right under this Act, an owner of a plant breeder's right under this Act, a licensee, or an agent of any of them, may be validly made by sending the communication to his address, or to his address for

service, in Antigua and Barbuda, as recorded in the register.

#### **54. Fees to Consolidated Fund**

All payments received by the Registrar pursuant to this Act shall be paid into the Consolidated Fund.

#### **56. Reciprocity**

The Minister may, by order, provide for reciprocal treatment in relation to the protection of plant varieties to be given to any country that provides similar protection for the protection of plant varieties registered in Antigua and Barbuda, and to applications for registration of the protection of plant varieties in Antigua and Barbuda, as that given by this Act.

#### **56. Regulations**

The Minister may make regulations

- (a) respecting the procedure to be followed by the Registrar with regard to plant breeders' rights;
- (b) respecting the invalidation or cancellation of plant breeders' rights;
- (c) respecting variety denominations;
- (d) respecting the maintenance and conservation of samples;
- (e) respecting the co-operation with germ-plasm banks or other institutions for the conservation of genetic material;
- (f) respecting any matter to be prescribed under this Act; and
- (g) generally to give effect to this Act.

#### **57. Act to Bind Crown**

This Act binds the Crown.

*The Protection of New Plant Varieties Act, 2007.*

No.      of 2007

Passed by the House of Representatives on  
this      day of      , 2007.

Passed by the Senate on this      day  
of      , 2007.

*Speaker.*

*President.*

*Clerk to the House of Representatives.*

*Clerk to the Senate.*