

# REVISION OF THE JAPANESE PLANT VARIETY PROTECTION AND SEED ACT

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## Introduction

The Japanese Plant Variety Protection and Seed Act ('the Act') covers the protection of intellectual property rights in respect of crops, plants and fruit trees whose varieties are bred or improved. The breeder's right is obtained through the filing of a plant variety registration (PVR) application to the Ministry of Agriculture, Forestry, and Fisheries (MAFF). Under the Act, a person who breeds a new variety of plant is eligible to be granted the exclusive right to plant variety registration. The breeder has the exclusive right to sales of the plant or seed made by him. Farmers are allowed to cultivate and export the plant or seed by making a payment to the breeder. The breeder's right relates to a variety of seeds, that is, the plant body itself. Plant variety registration expires within a maximum of 25 years, while the registration of fruit trees expires within a maximum of 30 years.

In the past, Japan's superior varieties have, however, been leaked overseas. Production in other countries and export to third countries has increased. Japanese-developed registered varieties include the Amao strawberry from Fukuoka Prefecture in southwestern Japan, and unique breeds of rice such as Yumepirika from Hokkaido. According to MAFF, China and South Korea have, moreover, grown Shine Muscat grapes and exported them to Southeast Asia and other areas without the local developers' permission. As a result, the

development of Japan's agriculture, forestry, and fisheries industries, including exports from Japan, has been hampered. It was thus deemed necessary to allow holders of the breeder's right to undertake measures such as preventing the export of registered varieties.

There have been also difficulties for breeders seeking to enforce their rights. In order to prove infringement of the breeder's right, the courts decided that comparative cultivation with the seed at the time of variety registration is required. It was thus also found necessary to introduce amendments to the Act that would make it easier for breeders to exercise their rights.

The revision of the Japanese Plant Variety Protection and Seed Act that came into force on 1 April 2021 and 1 April 2022 (the latter deadline was for the requirement to obtain approval for self-propagation of 'registered' varieties from plant breeder's right holders), respectively, was done to prevent the outflow of good seed varieties (registered plant varieties) abroad and to revitalise the agricultural industry in Japan. MAFF is hoping that the revised law will not only protect the intellectual property rights of domestic developers but also curb exports of such protected items by foreign countries.

## The Revised Plant Variety Protection and Seed Act

### Restriction on Exportation

The revised Act enables plant breeders to designate where their varieties are *permitted to be grown* and exported when registering their species. There is a restriction on exports of propagating and harvested materials. Before the amendment, breeders' rights did not cover the export of propagating materials (such as seeds and graft woods) and harvested materials (such as fruit) if an exported material was first placed in the market by the right holder or with its consent, or if the exported material was derived from materials first placed in the market by the right holder or with its consent.

In accordance with the amendment, if an applicant for a breeder's right files a notification with MAFF at the same time

and the notification is published by MAFF, the breeder's right can extend to export of the propagating materials and harvested materials that are placed on the market by the right holder or its licensees (excluding harvested materials exported for consumption).

Once the notification becomes effective, if propagating materials covered by the breeder's right are sold or transferred to a third party, the seller or transferor (such as distributor of the propagating materials) needs to include a relevant warning notice affixed to the propagating materials and their packaging and in relevant advertisements that complies with the implementation regulations under the Revised Act. Failure to affix the required notice is subject to a monetary penalty. According to the guidelines issued by MAFF, the required labelling can be very simple.

Breeder's right holders and applicants for PVRs who filed applications before 1 April 2021 were able to utilise this new system by submitting a notification by 30 September 2021.

A person who transfers these materials knowing that they will be taken overseas will be subject to criminal penalties and compensation for damages. Individuals found to have illegally exported designated agricultural products can be sentenced to up to 10 years in prison, or fined up to 10 million yen or punished with a combination of both, while institutions could face a fine of up to 300 million yen.

Japan has been promoting its exports of fruits and vegetables to other Asian countries. In line with the revised Act, MAFF released a list with 1,975 agricultural products, including 273 whose plant variety registrations with MAFF were pending, which are subject to export restrictions in accordance with the revised Act. These products have been developed by the National Agriculture and Food Research Organization under MAFF and prefectural governments across the country. In particular, leakage of fruits which are bred in Japan and improved had not decreased, and thus these subjects were added to the list including famous varieties of strawberries, grapes, rice, apples, tangerines, and peppers.

The details of the restrictions on exports have been made public on the MAFF website. The labelling of the existence of restrictions is mandatory. Otherwise a fine of not more than 100,000 yen may be imposed.

## Limitation on Cultivation Areas

The revised Act also enables plant breeders to designate where their varieties are permitted to be grown when registering their species, resulting in a limitation on cultivation areas. Breeder's right holders are allowed to limit the production areas of registered varieties. The purpose of this system is to give more control over the geographical area where the variety is produced to applicants who intend to make a certain area in Japan (such as a prefecture or city) a production area of the variety. To utilise this system, an applicant needs to file a notification specifying the permitted areas at the time of its application. If the notification is filed, products harvested outside the permitted area without the consent of the right holder constitute infringement of the plant breeder's right. Local governments in Japan (such as prefectural governments) who apply for plant breeder's rights can use this system to develop the farming industries in their areas.

Details of the restrictions on cultivation areas are publicised on the MAFF website. The labelling of the existence of restrictions is mandatory. Otherwise a fine of not more than 100,000 yen may be imposed.

## Approval for Self-propagation from Breeder's Right Holders

The previous Act allowed farmers who once bought a registered plant variety or its propagating material from an authorised seller to propagate it repeatedly by using harvested seeds or seedlings. However, under the Revised Act, farmers need to receive approval for self-propagation from breeder's right holders. The impact of this change on business activities is believed to be small in that registered varieties are typically sold to farmers under contracts that prohibit self-propagation.

## Measures to Facilitate the Use of Breeder's Rights

The use of breeder's rights, in particular their enforcement against infringers, has been improved in the Revised Act. A statutory presumption of characteristics of PVR-protected varieties has been introduced into the Revised Act in order to

facilitate the enforcement of breeder's rights. By comparing the characteristics listed in the Registry of Plant Varieties (Table of Characteristics) with those of the alleged infringing variety a system has been established to presume that the characteristics of both parties are identical, making it easier to prove infringement. Moreover, a system has been

introduced that allows the breeder to request an amendment to the characteristics table, and a system that allows the breeder, for example, to use the table as evidence in court. Finally, a system has been established whereby MAFF determines whether or not a variety is subject to the right of the owner of the variety.