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### Law 28477 and the registry of native potatoes

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#### **Registries of native crops and potatoes in Peru**

The move towards creating a registry for native crops was strongly stimulated by the idea that these crops needed some form of legal protection, especially from misuse, misappropriation and biopiracy in general. Policy discussions had already been under way for a considerable amount of time, when Law 28477 Declaring Crops, Native Breeds and Usufruct Wildlife Species are Part of the Nation's Natural Heritage was enacted in 2005.<sup>1</sup> Soon thereafter, in 2008, a regulation created the National Registry for Native Potatoes.

Law 28477 establishes a closed list – in an annex – of crops, breeds and wild species that are recognized as part of the natural patrimony of the nation. This list includes a wide range of species and crop varieties, including native potatoes as well as domesticated animal breeds and wild animals. The law places on the Ministry of Agriculture (in coordination with local and regional governments and public and private entities) the responsibility of registering, disseminating, conserving and promoting genetic materials of these crops and breeds as well as the production, commercialization and internal and international consumption of domesticated breeds of animals and wild animals (indicated in the annex), according to sustainability criteria.

In this context, there are a few comments that can be made in regard to the practical implications of Law 28477. First, the law gives special recognition and legal status to those crops, breeds and animals that are contained in the list – they are all part of the natural patrimony of the nation. What does this special recognition mean? Essentially it means that the state has a special interest in these crops and breeds, which is reflected in a series of measures conducive to their conservation, wider use, registration and so on. This may include a series of measures, projects and activities to realize these goals. The law does not specify what this registration will specifically entail in legal terms. For example, whether registration may mean the recognition of constitutive, exclusionary rights or simply involve a declaratory tool with no specific or enforceable right attached to it. Second, the law also describes a range of measures that will be adopted to ensure the appropriate conservation and promotion of the listed crops, breeds and animals. Finally, the law does not recognize nor grant specific rights over the listed crops and breeds. There are no specific beneficiaries or rights holders. Rather, it

is the state, in the name of the nation (in accordance with the National Constitution of 1993), which takes on the responsibility of ensuring that its economic, cultural and political interests (specifically in biodiversity) are safeguarded.

Specific rights over seeds are granted through the protection of new plant varieties under Supreme Decree 035–2011-PCM, which is a type of system modelled after the International Convention for the Protection of New Varieties of Plants (UPOV, in its 1991 version) and derived from Decision 345 of the Andean Community on the Protection of New Varieties of Plants (1993).<sup>2</sup> In addition, Law 27262 and its regulation on Seeds also determines how certified seeds can be commercialized throughout the country. Both these legal regimes are mostly concerned with modern, high-yielding varieties and not traditional, local and native crops. However, the seed regime does recognize “non-certified” seeds as a special category of genetic resource that will require special regulations and is mostly related to native and ancestral cultivars that may be legally commercialized throughout the country.

In contrast with the more classical seed protection regimes, the National Registry for Native Potatoes was created through Ministerial Resolution 0533–2008-AG in July 2008. This registry was created in response to the express recognition of the potato’s critical importance and contribution as a key component of the Peruvian people’s diet as well as a good portion of the world’s diet and food security in general. More specifically, in the preamble of this resolution, the state acknowledges that it is necessary to create mechanisms that facilitate access to information regarding native Peruvian potatoes, by means of a registry that contains reliable genetic, morphological and anatomical indicators of this tuber. Such information may become the technical basis for the potato’s international recognition and protection.

The registry is overseen by the Ministry of Agriculture. Its implementation, maintenance and updating is the responsibility of the National Institution for Agricultural Innovation (INIA). INIA, in turn, is responsible for developing and enacting the necessary complementary provisions and guidelines that may be required for the appropriate operation of the registry. Ministerial Resolution 0533–2008-AG also provides that INIA, under the supervision of the Ministry of Agriculture, honours various other agreements with other research institutions (such as the Agrarian University or the International Potato Center) to support the implementation and continued updating of the registry.

The registry does not grant rights, however. Registration per se is carried out by INIA. Its main functions are twofold. On the one hand, it provides useful technical data and information regarding native Peruvian potatoes to any interested party (researchers, farmers, universities and so on). On the other hand, and equally importantly, it may serve as a ‘defensive mechanism’ or order to ward off attack from patents or other intellectual property rights that may invoke novelty or inventiveness or seek to claim origin in regard to unique and endemic potato crops of the Peruvian Andes. Data, information, registration dates, knowledge and other details contained in the registry may assist in invalidating claims put forward in patent or in plant breeders’ rights applications. The idea is that the registry stimulates small farmers and native seed producers to identify themselves as conservers and producers of these crops. Though no monetary compensation or IP-type exclusive rights are envisioned, social recognition becomes important through the registry.

## Policy, social and legal framework

The initial interest for agrobiodiversity can be traced to the early 1990s with the development of policies and laws that implemented the principles of access to genetic resources and benefit sharing, conservation of agrobiodiversity and protection of traditional knowledge under the Convention on Biological Diversity (CBD).<sup>3</sup> At this time, Peru enacted a new set of laws including an environmental code, a biodiversity conservation law, a biosafety law, a protected areas law and, immediately afterwards, a national biodiversity strategy, a law for the promotion of medicinal plants, a law for the protection of traditional knowledge and a series of regulations.

All of these pieces of legislation made a direct and sometimes indirect reference to the need to conserve agrobiodiversity and enhance the capacity of farmers and institutions to make better and more efficient use of their components (seeds, soils, agroecosystems, animal breeds and so on). In terms of specific projects, the Global Environment Facility's In Situ Conservation of Native Crops and Wild Relatives Project, which ran from 1997 to 2006, was a pioneering and important awareness-raising effort, through which, probably for the first time, ideas regarding how to effectively protect native crops and their wild relatives first emerged. The Genetic Resources Policy Initiative (GRPI, led by IPGRI at the time), which was set up from 2003 to 2007, also served to draw attention to agrobiodiversity and native crops and especially to policy and legal elements regarding conservation and sustainable use. Other initiatives such as the Potato Park, the Andean Project for Peasant Technologies, the Science and Technology Coordinator of the Andes, Association Arariwa, El Centro IDEAS, and a wide range of localized projects have all contributed in different ways, from providing different perspectives and approaches to revaluing agrobiodiversity.

Although the importance of potatoes for world, national and local needs is widely recognized, 'new' crops such as mashua (*Tropaeolum tuberosum*), maca (*Lepidium meyenii*), arracacha (*Arracacia xanthorrhiza*), yacon (*Smilax tuberosa*), Oca (*Oxalis tuberosa*) and others have emerged with considerable potential to satisfy food and nutritional needs (even health needs) of a wider population in Peru. They are often called 'underutilized crops,' a term that gives little indication of their importance at the local/community level or for food security purposes.

At the same time as these developments, more and more interest was being placed in the 1990s on a highly emotional and politically charged phenomenon: biopiracy, or the misappropriation of Peruvian biodiversity through intellectual property theft and other means. While the CBD recognized national sovereignty over biodiversity, more and more cases were being identified in which Peruvian products in all fields (natural products, pharmaceuticals, bioremediation, agroindustry and so on) were subject to intellectual property rights and thus appropriated through indirect means. Regardless of the validity of this concept in strictly technical terms, it became very significant politically in terms of Peru's vast wealth of biodiversity.

The potential role of these native crops has been in a way rediscovered by social and natural scientists, and economists and lawyers have realized that incentives and specific regulations are required to support the conservation, development, protection and wider utilization of these seeds and crops. It is this recognition and multidisciplinary interest that has led policy makers and decision makers to develop specific laws and measures. The role and drive provided by a true ‘gastronomic boom’ that started in Peru in the late 1990s to native crops has also been instrumental to the revaluing of local and native agribiodiversity, seeds and small farmers’ activities.

### **Some legal issues and final remarks**

The notion of registering biodiversity or native crops has always been very appealing for countries with high biodiversity. Probably since the initial discussions in Peru regarding genetic resources and traditional knowledge in the early 1990s, registering biodiversity has become almost synonymous with protecting biodiversity – the idea being that the act of registration automatically grants certain rights. This is not necessarily so in technical terms. A lot depends on the objective of the register and whether it is of a constitutive or declarative nature. In the first case, the registry creates and grants rights (which would need to be defined in content, scope, beneficiaries and so on). In the latter case, the registry does not create a right but simply recognizes the existence of a seed, maybe its location or its developers or some of the related knowledge, in addition to providing other useful technical or economic information related to the seed.

These discussions regarding the registry and its objectives are important because they may define who owns, controls or has certain rights (in opposition to or the exclusion of others). Both Law 27844 and Ministerial Resolution 0533–2008–AG do not create legal rights. In the case of Law 27844, it recognizes or stresses a situation that is also recognized in the Peruvian Constitution of 1993 (and other national laws), which is that natural resources, including genetic resources, are the patrimony of the nation, and the state exercises rights over these resources in the nation’s name and representation.

Property rights over the list of crops and breeds in the annex to Law 27844 and the national registry cannot be granted for a simple reason: many of the crops, breeds and varieties are shared between communities (and even countries) and are also widely distributed. Thus, assigning a specific right to a specific person would be of no practical use whatsoever.

### **Notes**

- 1 Law 28477 Declaring Crops, Native Breeds and Usufruct Wildlife Species Part of the Nation’s Natural Heritage, 22 March 2005, online: <[www.wipo.int/wipolex/en/details.jsp?id=6684](http://www.wipo.int/wipolex/en/details.jsp?id=6684)> (last accessed 15 June 2012).
- 2 International Convention for the Protection of New Varieties of Plants, 2 December 1961, available at <[www.upov.int/en/publications/conventions/index.html](http://www.upov.int/en/publications/conventions/index.html)> (last accessed 15 June 2012).
- 3 Convention on Biological Diversity, 31 I.L.M. 818 (1992).