

# Regulations for the Protection of the Rights of Breeders of New Varieties of Plants

Supreme Decree No. 008-96-ITINCI

THE PRESIDENT OF THE REPUBLIC

Pursuant to the powers granted by the Constitution and the Law,

WHEREAS:

Through Decision 345 of the Board of the Cartagena Agreement, the Common Provisions on the Protection of the Rights of Breeders of New Varieties of Plants was approved for the countries of the Andean Community;

It is essential to regulate Decision 345 of the Board of the Cartagena Agreement;

The Office of Inventions and New Technologies (OINT) of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI) and the National Program of Genetic Resources and Biotechnology (PRONARGEB) of the National Institute for Agricultural Research (INIA), are entities that, due to their functions, shall guide the actions related to the application of Decision 345 of the Board of the Cartagena Agreement;

Pursuant to Legislative Decree 653, Law for the Promotion of Investments in the Agricultural Sector, the State promotes and fosters the development of agricultural research and extension with the purpose of contributing to an increase in agricultural production and productivity;

Breeder's rights constitute a mechanism to promote national technological development and capacity building for research;

The Second Transitional Provision of Decision 345 states that each competent national authority shall regulate such Decision, and pursuant to Article 118(8) of the Political Constitution of Peru and Article 3(2) of Legislative Decree No. 560, Law on the Executive;

**DECREES:**

**Article 1.-** To adopt the "REGULATIONS FOR THE PROTECTION OF THE RIGHTS OF BREEDERS OF NEW VARIETIES OF PLANTS" that regulate at the national level Decision 345 of the Board of the Cartagena Agreement – "Common Provisions on the Protection of the Rights of Breeders of New Plant Varieties" – which is in Annex to this document and has six Chapters, thirty three Articles and three Supplementary Provisions.

**Article 2.-** This Supreme Decree shall enter into force starting on the day following its publication in the Official Gazette *El Peruano*.

**Article 3.-** This Supreme Decree shall be countersigned by the Minister of Industry, Tourism, Integration and International Trade Negotiations.

Done at the House of Government, in Lima, on the third day of May one thousand, nine hundred and ninety six.

ALBERTO FUJIMORI FUJIMORI

Constitutional President of the Republic

LILIANA CANALE NOVELLA

Minister of Industry, Tourism, Integration, and International Trade Negotiations

**REGULATIONS FOR THE PROTECTION OF THE RIGHTS OF BREEDERS OF NEW VARIETIES OF PLANTS THAT REGULATES AT THE NATIONAL LEVEL DECISION 345 OF THE BOARD OF THE CARTAGENA AGREEMENT WHICH ESTABLISHES COMMON PROVISIONS ON THE PROTECTION OF THE RIGHTS OF BREEDERS OF NEW VARIETIES OF PLANTS**

**Chapter I**

**SCOPE**

**Article 1.-** These Regulations 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**

**COMPETENT AUTHORITY**

**Article 2.-** The Competent National Authority in charge of the administrative functions contained in Decision 345 which establishes Common Provisions on the Protection of the Rights of Breeders of New Varieties of Plants and these Regulations, is the Office of Inventions and New Technologies (OINT) of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPi) and the body in charge of the technical functions therein, is the National Program of Genetic Resources and Biotechnology (PRONARGEb) of the National Institute for Agricultural Research (INIA):

**Article 3.-** The functions of OINT shall be:

- (a) to receive and process applications for Breeder's Certificates;
- (b) to examine novelty for applications for Breeder's Certificates filed with OINT;
- (c) to set and collect, in coordination with PRONARGEb, fees for services related to the protection of varieties, pursuant to the Sole Text of Administrative Procedures of INDECOPi;
- (d) to open and maintain a National Register of Protected Plant Varieties;
- (e) to publish monthly in the Intellectual Property Gazette all the legal acts related to the protected plant varieties that are being registered;
- (f) to inform the Board of the Cartagena Agreement of the granting of breeder's certificates in a period of no more than five working days, starting 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 in a period of no more than 24 hours, starting from the issuance of the corresponding announcement;
- (h) to grant breeder's certificates;
- (i) to carry out the registrations, cancellations and annulments of breeder's certificates, and enter them in the National Register of Protected Plant Varieties;
- (j) to register the license contracts granted, upon request of the holder of the breeder's certificate or of the licensee;

- (k) to prepare and execute the agreements that may be established for protection of new plant varieties with international organizations or of other countries;
- (l) to maintain, in coordination with INIA, relations with the international bodies or countries with which Peru has established agreements for protection of new plant varieties; and carry out mutually agreed activities, except in cases in which the general legislation of the State of Peru establishes other channels;
- (m) to meet the requirements set by judicial authorities in relation to disputes that may originate in relation to protection of new plant varieties;
- (n) other administrative powers granted by Decision 345 of the Board of the Cartagena Agreement.

**Article 4.-** The functions of PRONARGEBA shall be:

- (a) to establish the criteria and procedures for carrying out tests of distinctness, uniformity and stability of a variety, in coordination with OINT;
- (b) to validate the tests carried out by the breeder, of distinctness, uniformity and stability of a variety; issue technical concepts and establish in coordination with OINT of INDECOPI, cooperation agreements with other national or foreign institutions for the purposes indicated in this item;
- (c) to validate, for OINT of INDECOPI, the deposit of live material in the field of the breeder, with a scientific institution, be it national or of another Member Country of the Cartagena Agreement, or one that gives reciprocal treatment and that has internationally recognized legislation on the protection of the rights of breeders of plant varieties;
- (d) to establish approval mechanisms for tests carried out abroad, in order 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 Register of Protected Plant Varieties;
- (h) other technical powers granted by Decision 345 of the Board of the Cartagena Agreement.

### **Chapter III**

## **RECOGNITION OF BREEDER'S RIGHTS AND REGISTER OF PROTECTED PLANT VARIETIES**

**Article 5.-** Breeder's certificates shall be granted to natural or legal persons who have created a plant variety, insofar as the variety complies with the conditions set out in Article 7, Decision 345 of the Board of the Cartagena Agreement.

**Article 6.-** Natural or legal persons living abroad must designate a representative whose domicile is in Peru.

**Article 7.-** If the application for a Breeder's Certificate refers to a variety that has been stolen from the breeder or his assignees, or if in accordance with contractual or legal obligations the holder of the Breeder's Certificate must be a person other than the applicant, anyone who has a legitimate interest may claim the capacity of true holder before OINT at any time and up to three years after the Certificate has been granted.

**Article 8.-** In case of a priority claim, the following must be filed with OINT within three months starting from the date of filing of the application:

- a certified copy of the documents of the first application duly approved by the authority with which the application has been filed;
- samples or any other proof that the variety what is the subject matter of the two applications is the same.

**Article 9.-** In cases considered relevant, OINT, in coordination with PRONARGEB, shall entrust the issuance of technical concepts to other national or foreign institutions.

If the concept is favorable and the application complies with the other requirements, OINT shall grant the Breeder's Certificate and shall register it with the corresponding denomination.

**Article 10.-** The National Register of Protected Plant Varieties shall contain a description of the protected variety, number of the Breeder's Certificate, denomination of the variety, breeder's identification, owner of the protection rights identification, when this is a person other than the breeder and any legal act that affects the breeder's rights and has been made known to OINT.

**Article 11.-** The term of protection shall be 25 years for the case of vines, forest trees and fruit trees, including their rootstocks, and 20 years for other species, starting from the date of the grant.

## CHAPTER IV

### BREEDER'S RIGHTS AND OBLIGATIONS

**Article 12.-** The breeder or anyone to whom he has transferred and/or assigned his rights in a protected variety, may prevent third parties from engaging without his consent in the acts indicated in Article 24 of Decision 345, during the lifetime of the Breeder's Certificate.

**Article 13.-** The owner of a variety entered 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, upon request by OINT.

**Article 14.-** Annuities shall be paid annually in advance starting 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 15.-** Applications for the granting of a Breeder's Certificate shall be filed with OINT 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 and nationality of the breeder;
- (e) the geographical origin of the raw plant material of the new variety to be protected, including, as the case may be, the document that proves the legal origin of the genetic resources, issued by the Competent National Authority as regards access to genetic resources;

- (f) the origin and genetic content of the variety, which shall include every known detail related to the source of the genetic resources used therein or in its breeding, as well as all information on any knowledge related to the variety, as the case may be;
- (g) the most important morphological, physiological, sanitary, phenological, physical and chemical aspects, and industrial or technological characteristics which allow the variety to be described;
- (h) If the application involves a variety for which an application was previously filed abroad, it should indicate:
  - the countries where protection has been requested;
  - the type of protection requested;
  - the corresponding application numbers;
  - the date of filing;
  - the stage of application;
  - the denomination or reference of the breeder or inventor, if a patent application for an invention is involved;
  - the date of registration.
- (i) The cancellation decision for a trademark registration, in the event that the generic denomination proposed by the applicant has been registered in his name as a mark of a product or of a service for identical or similar products in accordance with the legislation on trademarks, in a Member Country of the Cartagena Agreement;
- (j) Proof of payment of the prescribed filing fee;
- (k) Other requirements established by OINT.

The application and documents attached shall be in Spanish.

**Article 16.-** Once the application is received, OINT shall verify compliance with the formal requirements set out in the foregoing article, within a period of thirty working days.

Should the formal examination reveal that the application does not meet the requirements set out in (a), (b), (c), (d) and (g) of the foregoing article, it shall be deemed not to have been filed for processing and shall not be assigned a date of filing.

In the event that the application does not include the documents mentioned in (e), (f), (h), (i), and (j) of Article 16, the applicant shall be requested to complete the application within a period of thirty working days, starting from the date of receipt of notification., Subject to a warning, where no response is made, the application shall be deemed to have been abandoned. That period may be extended, once only for an equal period, at the applicant's request.

**Article 17.-** Once the test of formal requirements of the application has been completed, OINT shall issue an order for publication of an extract of the description of the plant variety that forms the subject matter of the application, to be published by the applicant in the Official Gazette *El Peruano*. Within three (3) months of receipt of the publication order, the applicant shall deliver a copy of the same to OINT.

**Article 18.-** Within a period of thirty working days following the date of publication, anyone who has a legitimate interest, may file, on one occasion only, essential observations calling into question compliance with the conditions stipulated in Article 7 of Decision 345 of the Board of the Cartagena Agreement.

**Article 19.-** If during the period provided for in the foregoing article, observations have been filed, OINT shall notify the applicant so that, within thirty working days starting from the date of

notification, a deadline that may be extended once only and for the same period, he may present his arguments or actual documents, as he sees fit.

**Article 20.-** After the expiration of the periods established in the foregoing articles for the submission of observations or for answering, as the case may be, the tests for novelty, distinctness, uniformity and stability shall be carried out.

**Article 21.-** PRONARGEB, in coordination with OINT, shall determine the cases in which it will be sufficient to validate the tests carried out by the breeder or approve the tests carried out abroad in order to determine that the requirements of distinctness, uniformity and stability have been fulfilled.

**Article 22.-** OINT shall issue its opinion regarding the conditions established in Article 7 of Decision 345 of the Board of the Cartagena Agreement 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, starting from the date of filing of the application for protection.

**Article 23.-** The conditions stipulated in Article 7 of Decision 345 of the Board of the Cartagena Agreement may be evaluated, upon request by the breeder and subject to the approval of OINT, in coordination with PRONARGEB, in the place or places where the breeder has developed his new variety.

**Article 24.-** Except in cases where this Decree stipulates a different period, the application shall be deemed to have been abandoned if the corresponding file remains blocked, owing to the lack of a response by the person concerned, for three (3) months. There shall be no grounds for abandonment while the file is in the resolution phase.

The resolution to notify abandonment shall be made known to the person concerned. Abandonment shall not be lifted nor shall fees paid be returned in applications declared abandoned.

## CHAPTER VI

### INFRINGEMENTS

**Article 25.-** Notwithstanding any admissible civil and criminal actions, the holder of a breeder's certificate may file an action for infringement against anyone who infringes his rights. The licensee of a breeder's certificates may file an action for infringement against anyone who infringes the rights of the holder of the breeder's certificate, as long as this possibility is provided for in the licensing contract and the holder has been previously notified accordingly. Actions for infringement shall also be brought when there is an imminent danger that the holder's rights might be infringed.

**Article 26.-** The proceedings must be made in writing to OINT. The document shall contain:

- (a) an indication of the protected plant variety that is the subject matter of the infringement, or upon which a threat of infringement weighs;
- (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 27.-** The holder whose right has been infringed may request:

- (a) cessation of the infringing acts;
- (b) seizure of the reproduction or propagation material for the protected variety, or of the product of the harvest;

- (c) temporary closure of the infringer's business;
- (d) adoption of the necessary measures so that customs authorities may prevent the infringing products from entering the country;
- (e) publication of the sentence at the cost of the infringer; and
- (f) in general, any necessary measures to prevent the infringement from continuing or taking place.

OINT shall maintain a register of infringers.

**Article 28.-** Once the infringement action or denunciation has been filed by the holder, OINT shall inform the presumed infringer, so that he may put forward the arguments and evidence he deems appropriate within a non-renewable period of fifteen (15) days.

**Article 29.-** Once the period referred to in the foregoing article has expired, OINT shall proceed to issue the corresponding resolution.

Once the resolution has been approved or confirmed in the second instance, OINT may ask law-enforcement agencies for assistance in respect of the execution of the planned measures.

**Article 30.-** By filing an infringement action or a denunciation for infringement, the plaintiff may request, on his own behalf and at his own risk, that an inspection visit be made to the premises where it is known or presumed that the infringement is taking place, in order that the necessary precautionary measures be taken to prevent or stop the infringement.

The representatives of OINT and of PRONARGE B shall appear at the designated premises and shall notify the presumed infringer of the infringement action, then proceed to verify the facts denounced and hear the arguments of the person in charge of the premises, or in his absence, of whoever is there.

Every individual shall have the obligation to provide the necessary facilities so that OINT and PRONARGE B 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 the imminent threat thereof is convincingly established, the required measures shall be taken immediately, if necessary with the help of law-enforcement agencies, to prevent or stop the infringement, such as the impoundment and immobilization of the reproduction or propagating material for the variety from the person to whom the infringement is attributed; or the temporary closure of the premises.

If the infringement or threat thereof is not proven during the inspection, OINT may request PRONARGE B 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 presumed infringer.

**Article 31.-** In the event that precautionary measures have been adopted, the decision issued by OINT pursuant to Article 28, shall also decide on the continuation, modification or cessation of the precautionary measures taken.

**Article 32.-** The plaintiff or denouncer shall be liable for the damage caused to the presumed infringer, in case of malicious or negligent acts or denunciations. Public officials shall be accountable under the law.

**Article 33.-** The holder whose rights have been infringed may only request compensation for damage by way of civil proceedings, once administrative remedies have been exhausted.

## SUPPLEMENTARY PROVISIONS

**First.-** It is understood that Articles 9 and 14 of the General Law on Seeds (Decree-Law No. 23056) have been amended by Decision 345 of the Board of the Cartagena Agreement and by the Law on the Organization and Functions of INDECOPI (Decree-Law No. 25868).

**Second.-** For the purposes of these Regulations, the first administrative authority shall be deemed to be OINT and the second and final administrative authority, the Court for the Protection of Competition and Intellectual Property, pursuant to Decree-Law No. 25868 and amendments thereto.

**Third.-** Peru shall be represented before the Sub-Regional Committee for the Protection of New Plant Varieties of the Andean Community and any other official international entity involved in this area, as a titular member, by a representative of OINT of INDECOPI, and, as an alternate, by a representative of PRONARGEB of INIA. Both entities shall coordinate their participation depending on their roles.