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**INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS**  
GENEVA

**COUNCIL**

**Twenty-Sixth Extraordinary Session**  
**Geneva, April 3, 2009**

**EXAMINATION OF THE CONFORMITY OF THE LEGISLATION OF PERU  
WITH THE 1991 ACT OF THE UPOV CONVENTION**

*Document prepared by the Office of the Union*

Introduction

1. By letter dated March 9, 2009, addressed to the Secretary-General of UPOV, His Excellency Mr. J. Eduardo Ponce Vivanco, Ambassador, Permanent Representative, Permanent Mission of Peru to the United Nations Office and other International Organizations at Geneva, requested the examination of the legislation of Peru for conformity with the 1991 Act of the UPOV Convention (“1991 Act”) on the basis of the Decision 345 of the Commission of the Cartagena Agreement on the Common Provisions for the Protection of the Rights of Breeders of Plant Varieties of October 21, 1993 (“Decision 345”) and the consolidated text of the Draft Supreme Decree establishing the Regulations for the Protection of Rights of Breeders of Plant Varieties (“Regulations of the Draft Decree”). A translation of that letter is reproduced in Annex I. Annex II contains a translation in English of Decision 345. Annex III contains an English translation of the consolidated text of the Regulations of the Draft Decree.

2. Article 34(3) of the 1991 Act provides that “[a]ny State which is not a member of the Union and any intergovernmental organization shall, before depositing its instrument of accession, ask the Council to advise it in respect of the conformity of its laws with the provisions of this Convention. If the decision embodying the advice is positive, the instrument of accession may be deposited.”

### Legal Basis for the Protection of New Varieties in Peru

3. Peru is a party to the Agreement for Subregional Integration (“Cartagena Agreement”) which was concluded on May 26, 1969. The parties to the Agreement, namely; Bolivia; Colombia; Ecuador and Peru (“Member Countries”), constitute “the Andean Community”. Details on the functioning of the Agreement were given in document C(Extr.)/11/5, in relation to the request for advice made by Colombia and examined by the Council at its eleventh extraordinary session, on April 22, 1994.

4. The legal basis for the protection of new plant varieties in Peru is Decision 345. Decision 345 is directly applicable (that is, it is self-executing) in the Member Countries. Article 5 of Decision 345 requires the Member Countries to establish a national procedure for the implementation of Decision 345. The Government of Peru adopted the Supreme Decree 008-96-ITINCI, “Regulations for the Protection of Rights of Breeders of Plant Varieties” of May 3, 1996 (Decree of 1996). As explained in paragraph 1, the Government of Peru has decided to amend the Decree of 1996 by means of the Draft Supreme Decree establishing the Regulations for the Protection of Rights of Breeders of Plant Varieties (Regulations of the Draft Decree).

5. The analysis of the legislation of Peru (Decision 345 and the Regulations of the Draft Decree) follows in the order of the substantive provisions of the 1991 Act. The following may be noted:

(a) The Council has already examined the conformity of the Decision 345 with the 1991 Act in the context of the requests for advice of Colombia (see documents C(Extr.)/11/5 and C(Extr.)/11/6, paragraphs 20 to 23), Bolivia (see documents C/29/12 and C/29/14, paragraph 6) and Ecuador (see documents C(Extr.)/13/2 and C(Extr.)/13/4, paragraph 7);

(b) The Regulations of the Draft Decree do not restate the provisions of the Decision 345 but supplement it in the areas in which further provisions are necessary at the national level.

#### Article 1 of the 1991 Act: Definitions

6. Article 1A.1 and 1A.3 of the Regulations of the Draft Decree contain the definitions of “breeder” and “variety” in line with the corresponding definitions in Article 1 of the 1991 Act.

7. Article 3 of Decision 345 contains a definition of essentially derived varieties corresponding to the definition in Article 14(5)(b) of the 1991 Act.

8. Article 1A.4 of the Regulations of the Draft Decree clarifies that the definition of “material”, in Article 3 of Decision 345, relates to the definition of “material” for the exhaustion of the breeder’s right (see Article 27 of Decision 345 and Article 16 of the 1991 Act).

9. Article 3 of Decision 345 provides a definition of “Live sample”, Article 4 of Decision 345 provides a definition of “created” and Article 1A.2 of the Regulations of the Draft Decree contains definitions of “discovery” and “development”.

Article 2 of the 1991 Act: Basic obligation of the contracting Parties

10. Article 1 of Decision 345 provides as follows:

“The purpose of this Decision is:

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

11. The purpose in Article 1(a) of Decision 345 satisfies the obligation established in Article 2 of the 1991 Act.

Article 3 of the 1991 Act: Genera and Species to be Protected

12. Article 2 of Decision 345 provides that “the scope of this Decision shall encompass all botanical genera and species insofar as the growing, possession or use thereof are not prohibited for reasons of human, animal or plant health.”

Article 4 of the 1991 Act: National Treatment

13. In relation to the filing of applications, there are no provisions in Decision 345 or the Regulations of the Draft Decree restricting the nationality, or place of residence or registered office, of the breeder.

Articles 5, 6, 7, 8 and 9 of the 1991 Act: Conditions of Protection

14. Article 4 of Decision 345 provides that “Member Countries shall grant breeders’ certificates to persons who have created plant varieties, insofar as the varieties are new, uniform, distinct and stable, and if they have been given a denomination that constitutes their generic designation”. The substance of this Article is repeated in Article 7 of Decision 345 in the context of the requirements for entry in a National Register of Protected Plant Varieties.

15. Articles 8, 9 and the first Transitional Provision of Decision 345 contain provisions concerning the condition of novelty.

16. Article 8 of Decision 345 provides as follows:

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

“Novelty shall be lost where:

“(a) exploitation has begun more than one year prior to the filing date of the application for the grant of a breeder’s certificate or the date of any priority claimed, if sale or disposal to others has taken place within the territory of any Member Country [of the Andean Community];

“(b) exploitation has begun more than four years or, in the case of trees and grapevines, more than six years prior to the filing date of the application for the grant of a breeder’s certificate or the date of any priority claimed, if the sale or disposal to others has taken place in a territory other than that of any Member Country [of the Andean Community].

“[...]”

17. As enabled in Article 6(3) of the 1991 Act, the notion of “territory of the Contracting Party”, in Article 6(1)(i) of the 1991 Act, has been assimilated to “territory of any Member Country [of the Andean Community]”, in Article 8(a) of Decision 345.

18. Article 9 of Decision 345 provides as follows:

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

- (a) are the result of an abuse to the detriment of the breeder or his successor in title;
- (b) form part of an agreement to transfer the rights in the variety, provided that the variety has not been physically disposed of to a third party;
- (c) form part of an agreement under which a third party has, on behalf of the breeder, increased supplies of reproductive or multiplication material;
- (d) form part of an agreement under which a third party has carried out field or laboratory tests or small-scale processing tests with a view to the evaluation of the variety;
- (e) involve harvested material that has been obtained as a by-product or surplus product of the variety or from the activities mentioned in this Article under (c) and (d);
- (f) are performed in any unlawful manner.”

19. The first Transitional Provision of Decision 345 implements a transitional novelty regime for “Varieties of recent creation” based on Article 6(2) of the 1991 Act.

20. Articles 10 to 12 of Decision 345 provide for the conditions of distinctness, uniformity and stability.

21. In relation to Article 5(2) of the 1991 Act, Article 15(e)(f) and (k) of the Decree of 1996 provides as follows:

“Article 15.- Request for granting of a Breeders’ Certificate shall be filed before the Office of Inventions and New Technologies and contain or attach, as corresponds:

“[...]

“(e) Geographical origin of the raw plant material of the new variety to be protected, including, if it be the case, the document that proves the legal origin of the genetic resources, issued by the Competent National Authority in the matter of access to genetic resources;

“(f) Origin and genetic content of the variety, which must include every known detail related to the origin of genetic resources used in it or in its breeding, as well as all information about any knowledge related to the variety, if it be the case;

“[...]

“(k) Other requisites established by the Office of Inventions and New Technologies.”

22. Article 15(e)(f) and (k) of the Decree of 1996, as amended by Article 15 (e)(f) and (k) of the Regulations of the Draft Decree, would read as follows:

“Article 15.- Applications for the granting of a breeder’s certificate shall be filed with the Directorate of Inventions and New Technologies and contain or attach, as the case may be:

“[...]

“(e) The most important morphological, physiological, sanitary, phenological, physical and chemical aspects, and industrial or technological characteristics, which allow the variety to be described;

“(f) The method and procedure for obtaining the new variety, as well as all information on any knowledge relating to the variety which can facilitate the examination for compliance with the conditions under Article 7 of Decision 345 and ensure that the variety is designated by a denomination that is consistent with the provisions of Article 5A of this Decree.

“[...]

“(k) As the case may be, documents concerning powers of attorney, assignment or any other additional document, in accordance with Article 5.2 of the 1991 UPOV Convention”

#### Article 10 of the 1991 Act: Filing of Applications

23. Articles 15, 16 and 24 of the Regulations of the Draft Decree contain provisions relevant for the filing of applications. Decision 345 and the Regulations of the Draft Decree do not appear to contain provisions which conflict with Article 10 of the 1991 Act.

Article 11 of the 1991 Act: Right of Priority

24. Article 18 of Decision 345, with the additional provisions in Article 8 of the Regulations of the Draft Decree, contains the provisions on the right of priority corresponding to Article 11 of the 1991 Act.

Article 12 of the 1991 Act: Examination of the Application

25. Article 19 of Decision 345 and Articles 4, 9, 15(f) and (j), 21, 22, 23 of the Regulations of the Draft Decree contain provisions corresponding to the provisions of Article 12 of the 1991 Act.

Article 13 of the 1991 Act: Provisional Protection

26. Article 17 of Decision 345 contains provisions on provisional protection corresponding to Article 13 of the 1991 Act.

Article 14 of the 1991 Act: Scope of the Breeder's Right

27. Article 24 of Decision 345 contains provisions on the scope of the breeder's right corresponding to Article 14(1)(a) and (2) of the 1991 Act. Article 29 of Decision 345 contains a provision on commercial licensing. Article 12 of the Regulations of the Draft Decree contains the provision of Article 14(1)(b) of the 1991 Act.

28. Articles 3 and 24 of Decision 345 and Article 12A of the Regulations of the Draft Decree contain provisions on essentially derived and certain other varieties corresponding to Article 14(5) of the 1991 Act.

Article 15 of the 1991 Act: Exception to the Breeder's Right

29. Article 25 of Decision 345 contains provisions concerning the compulsory exceptions to the breeder's right of Article 15(1) of the 1991 Act as follows:

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

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

“(b) for experimental purposes;

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

30. Article 26 of Decision 345 and Article 12B the Regulations of the Draft Decree provides for the optional exception to the breeder's right of Article 15(2) of the 1991 Act as follows:

Article 26 of Decision 345

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

Article 12B the Regulations of the Draft Decree

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

Article 16 of the 1991 Act: Exhaustion of the Breeder's Right

31. Article 27 of Decision 345 contains provisions concerning the exhaustion of the breeder's right corresponding to Article 16(1) of the 1991 Act. Article 1A.4 of the Regulations of the Draft Decree contains a definition of “material” that corresponds to the definition of “material” in Article 16(2) of the 1991 Act.

Article 17 of the 1991 Act: Restrictions on the Exercise of the Breeders' Right

32. Articles 30 to 32 of Decision 345 contain provisions on the granting of compulsory licenses. In relation to the requirements of Article 17 of the 1991 Act, Article 30 of Decision 345 provides as follows:

“With a view to ensuring adequate exploitation of the protected variety, in exceptional circumstances affecting national security or the public interest, national governments may declare the said variety freely available subject to equitable compensation of the breeder.

“The competent national authority shall decide on the amount of compensation, after having heard the parties and taken expert advice, on the basis of the scale of exploitation of the variety so licensed.”

Article 18 of the 1991 Act: Measures Regulating Commerce

33. Article 28 of Decision 345, provides as follows:

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

34. The Regulations of the Draft Decree do not appear to contain provisions which conflict with Article 18 of the 1991 Act.

Article 19 of the 1991 Act: Duration of the Breeder's Right

35. Article 21 of Decision 345 provides as follows:

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

Article 11 of the Regulations of the Draft Decree fixes these periods at 25 and 20 years, respectively.

Article 20 of the 1991 Act: Variety Denominations

36. Articles 4, 7 and 13 of Decision 345 with the additions in Article 5A of the Regulations of the Draft Decree contain the provisions on variety denominations of Article 20 of the 1991 Act.



Article 21 of the 1991 Act: Nullity of the Breeder's Right

37. Article 33(a) and (c) of Decision 345 contains provisions concerning the nullity of the breeder's right corresponding to Article 21(1)(i) and (iii) of the 1991 Act. In relation to Article 21(1)(ii) of the 1991 Act, Article 24A of the Regulations of the Draft Decree provides as follows:

“Article 24A – By virtue of Article 33(b) of Decision 345, a breeder's right shall be deemed to be null and void if the granting of such right was based essentially on information and documents provided by the breeder and the conditions for uniformity and stability were not effectively fulfilled when the breeder's right was granted.”

Article 22 of the 1991 Act: Cancellation of the Breeder's Right

38. Article 35 of Decision 345 contains provisions concerning the cancellation of the breeder's right corresponding to the provisions of Article 22 of the 1991 Act.

Article 30 of the 1991 Act: Implementation of the Convention

39. In relation to the obligation to “provide for appropriate legal remedies for the effective enforcement of breeders' rights” (Article 30(1)(i) of the 1991 Act), Article 23 of Decision 345 provides the following:

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

40. Chapter VI of the Regulations of the Draft Decree (Articles 25 to 33) provides for administrative, provisional and customs measures for the enforcement of breeders' rights, without prejudice to other civil and criminal measures available under the Peruvian legal system.

41. In relation to the obligation under Article 30(1)(ii) of the 1991 Act, Article 2 of the Regulations of the Draft Decree provides as follows:

“Article 2.— The Competent National Authority in charge of the administrative functions contained in Decision 345 that 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) [Directorate of Inventions and New Technologies] of the National Institute for the Defense of Competition and 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).”

42. Furthermore, Article 3 (h) of the Regulations of the Draft Decree provides as follows:

“Article 3.— The functions of OINT [Directorate of Inventions and New Technologies] shall be:

“[...]”

“(h) grant breeder’s certificates;”

43. Articles 3(e), 4(g) and 17 of the Regulations of the Draft Decree contain provisions corresponding to the obligation to publish information concerning applications for and grants of breeders’ rights, and proposed and approved denominations as required in Article 30(1)(iii) of the 1991 Act.

#### General Conclusion

44. In the opinion of the Office of the Union, the legislation of Peru (Decision 345 and the Regulations of the Draft Decree) incorporates the substantive provisions of the 1991 Act. On that basis, once the Regulations of the Draft Decree are adopted, with no changes, and in force, Peru would be in a position “to give effect” to the provisions of the 1991 Act, as required by its Article 30(2).

45. *The Council is invited to:*

*(a) take note of the analysis in this document;*

*(b) take a positive decision on the conformity of the legislation of Peru (Decision 345 on Common Provisions for the Protection of the Rights of Breeders of Plant Varieties and the Draft Supreme Decree establishing the Regulations for the Protection of Rights of Breeders of Plant Varieties) with the provisions of the 1991 Act of the International Convention for the Protection of New Varieties of Plants; which allows that, once the Regulations of the Draft Decree are adopted, with no changes, and in force, Peru may deposit its instrument of accession to the 1991 Act; and*

*(c) authorize the Secretary-General to inform the Government of Peru of that decision.*

[Annexes follow]

ANNEX I

Note N° 15, dated March 9, 2009, from  
H.E. Mr. J. Eduardo Ponce Vivanco, Ambassador, Permanent Representative,  
Permanent Mission of Peru, Geneva, Switzerland,  
to the Secretary-General of UPOV

Note No. 15

Geneva, March 9, 2009

H.E. Mr. Francis Gurry  
Secretary General of the  
International Union for the Protection  
of New Varieties of Plants (UPOV)  
Geneva

Dear Secretary General,

I have the honour of bringing to your attention the fact that Peru has decided to accede to the International Convention for the Protection of New Varieties of Plants, adopted in Paris in 1961 and amended in 1972, 1978 and 1991.

With a view to accession and pursuant to Article 34(3) of the UPOV Convention, my Government hereby requests the UPOV Council to give an enlightened opinion on the conformity of Decision 345, Common Provisions for the Protection of the Rights of Breeders of Plant Varieties, and on the Draft Supreme Decree that will constitute the Regulations for the Protection of the Rights of Breeders of Plant Varieties in Peru, in accordance with the provisions of the UPOV Convention. For this purpose, I attach herewith a copy of the above-mentioned legislation.

Yours sincerely,

(signed)

J. Eduardo Ponce Vivanco  
Ambassador  
Permanent Representative

[Annex II follows]

ANNEX II

Decision 345 Common Provisions on the Protection of the  
Rights of Breeders of Plant Varieties

(of October 21, 1993)

CHAPTER I

SUBJECT MATTER AND SCOPE

Article 1

The purpose of this Decision is:

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

Article 2

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

CHAPTER II

DEFINITIONS

Article 3

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

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

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

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

- Essentially derived variety: A variety shall be deemed to be essentially derived from an initial variety when it originated therefrom or from a variety itself essentially derived from the initial variety and retains the expression of the essential characteristics that result from the genotype or combination of genotypes of the original variety, and which although distinguishable from the initial variety, nevertheless conforms to it in the expression of the essential characteristics that result from the genotype or combination of genotypes of the initial variety, except with respect to differences resulting from the derivation process.
- Material: Reproductive or vegetative multiplication material in any form; harvested material, including whole plants and parts of plants; any product made directly from harvested material.

### CHAPTER III

#### RECOGNITION OF BREEDERS' RIGHTS

##### Article 4

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

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

##### Article 5

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

##### Article 6

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

Article 7

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

Article 8

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

Novelty shall be lost where:

(a) exploitation has begun more than one year prior to the filing date of the application for the grant of a breeder's certificate or the date of any priority claimed, if sale or disposal to others has taken place within the territory of any Member Country;

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

Article 9

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

(a) are the result of an abuse to the detriment of the breeder or his successor in title;

(b) form part of an agreement to transfer the rights in the variety, provided that the variety has not been physically disposed of to a third party;

(c) form part of an agreement under which a third party has, on behalf of the breeder, increased supplies of reproductive or multiplication material;

(d) form part of an agreement under which a third party has carried out field or laboratory tests or small-scale processing tests with a view to the evaluation of the variety;

(e) involve harvested material that has been obtained as a by-product or surplus product of the variety or from the activities mentioned in this Article under (c) and (d);

(f) are performed in any unlawful manner.

#### Article 10

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

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

#### Article 11

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

#### Article 12

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

#### Article 13

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

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

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

#### Article 14

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

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

Article 15

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

CHAPTER IV

REGISTRATION

Article 16

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

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

Article 17

The breeder shall enjoy provisional protection during the period between the filing of the application and the grant of the certificate.

No action for damages may be brought until the breeder's certificate has been granted, but such an action may cover damages caused by the defendant as from the publication of the application.

Article 18

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

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



Article 19

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

Article 20

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

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

Article 21

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

CHAPTER V

OBLIGATIONS AND RIGHTS OF THE BREEDER

Article 22

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

Article 23

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

Article 24

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

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

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

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

#### Article 25

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

- (a) in a private circle, for non-commercial purposes;
- (b) for experimental purposes;
- (c) for the breeding and exploitation of a new variety, except in the case of a variety essentially derived from a protected variety. The said new variety may be registered in the name of the breeder thereof.

#### Article 26

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

#### Article 27

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

(a) further reproduction, multiplication or propagation of the protected variety, subject to the limitation specified in Article 30 of this Decision;

(b) exportation of the material of the protected variety, such as would permit reproduction thereof, to a country that does not grant protection to the varieties of the plant species to which the exported variety belongs, except where the said material is for human, animal or industrial consumption purposes.

#### Article 28

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

### CHAPTER VI

#### LICENSING

#### Article 29

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

#### Article 30

With a view to ensuring adequate exploitation of the protected variety, in exceptional circumstances affecting national security or the public interest, national governments may declare the said variety freely available subject to equitable compensation of the breeder.

The competent national authority shall decide on the amount of compensation, after having heard the parties and taken expert advice, on the basis of the scale of exploitation of the variety so licensed.

### Article 31

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

### Article 32

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

## CHAPTER VII

### NULLITY AND CANCELLATION

### Article 33

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

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

### Article 34

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

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

### Article 35

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

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

#### Article 36

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

### CHAPTER VIII

#### COMPLEMENTARY PROVISIONS

#### Article 37

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

#### Article 38

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

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

(d) to analyze matters relating to the scope of protection of essentially derived varieties, and to propose common provisions thereon.

### Article 39

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

### TRANSITIONAL PROVISIONS

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

(a) the application is filed within the year following the opening date of the Register for the genus or species to which the variety belongs;

(b) the variety has been entered in a register of cultivars in any of the Member Countries, or in a register of protected varieties in any country having special legislation on the protection of plant varieties which grants reciprocal treatment to the Member Country in which the application is filed.

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

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

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

[Annex III follows]

ANNEX III

Draft Supreme Decree No. [...]  
Regulations for the Protection of the Rights of Breeders of Plant Varieties  
[Consolidated Text]

THE PRESIDENT OF THE REPUBLIC

Pursuant to the powers granted to him under the Constitution and the Law,

WHEREAS:

The Trade Promotion Agreement between Peru and the United States of America was approved by means of Legislative Resolution No. 28766, published in the Official Gazette El Peruano on June 29, 2006;

Chapter 16 of the above-mentioned Agreement contains provisions relating to the need to respect and safeguard intellectual property rights, which are to be incorporated into the relevant Peruvian legislation;

One of the obligations set out in the said Agreement is Peru's undertaking to accede to the International Convention for the Protection of New Varieties of Plants (UPOV Convention, 1991);

In accordance with the provisions of the UPOV Convention, 1991, before depositing the respective instrument of accession, every State must seek the opinion of the UPOV Council on the conformity of its legislation with the provisions of the UPOV Convention, 1991;

To comply with the provisions of the UPOV Convention, 1991, and the trade commitments flowing from the Agreement, it is necessary to amend Articles 4, 5, 10, 12, 15, 16, 20, 21, the fourth paragraph of Article 30, as well as the title of Chapter IV, and to incorporate Articles 1A, 5A, 12A, 12B and 24A into a second paragraph of Article 8 of Supreme Decree No. 008-96-ITINCI, published in the Official Gazette El Peruano on May 3, 1996, which establishes the Regulations for the Protection of the Rights of Breeders of New Varieties of Plants.

DECREES AS FOLLOWS:

Article 1.— To adopt the Supreme Decree amending the “REGULATIONS FOR THE PROTECTION OF THE RIGHTS OF BREEDERS OF NEW VARIETIES OF PLANTS” that regulate at the national level the Decision 345 of the Commission of the Cartagena Agreement, Common Provisions for the Protection of the Rights of Breeders of New Varieties of Plants”, which shall henceforth be known as the REGULATIONS FOR THE PROTECTION OF THE RIGHTS OF BREEDERS OF NEW VARIETIES OF PLANTS.

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

Supreme Decree amending Supreme Decree 008-96-ITINCI, Regulations for the Protection of the Rights of Breeders of New Varieties of Plants, which regulate at the national level the

Decision 345 of the Commission of the Cartagena Agreement, Common Provisions for the Protection of the Rights of Breeders of New Varieties of Plants.

## REGULATIONS FOR 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.

#### Article 1A. Definitions

For the purposes of this Decree:

##### 1A.1 “Breeder” means

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

1A.2 It should be specified that discovery is not a mere find. Rather, it refers to the selection process within the natural variation in a population of plants and the development is the process of reproduction or propagation and evaluation.

1A.3 “Variety” means a plant grouping within a single botanical taxon of the lowest known rank, which grouping, irrespective of whether the conditions for the grant of a breeder’s right are fully met, may be:

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

1A.4 For the purposes of the provisions of Article 27 of Decision 345, "material" means, in relation to a variety,

- (a) Propagating material of any kind,
- (b) Harvested material, including entire plants and parts of plants, and



- (c) Any product made directly from the harvested material.

## Chapter II

### COMPETENT AUTHORITY

Article 2.— The Competent National Authority in charge of the administrative functions contained in Decision 345 that 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 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 on 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 Proceedings of INDECOPI;
- (d) to open and maintain a National Register of Protected Plant Varieties;
- (e) to publish monthly in the Gazette of Intellectual Property all of the legal acts related to the protected plant varieties that are being registered;
- (f) inform the Board of the Cartagena Agreement of the granting of the breeder's certificates in a period no greater than five (5) working days, starting on the day the resolution granting the breeder's certificate is authorized;
- (g) inform the Board of the Cartagena Agreement of the termination of the breeders' certificates in a period no greater than 24 hours, starting from the issuance of the corresponding announcement;
- (h) grant breeder's certificates;
- (i) carry out the registrations, cancellations and annulments of the breeder's certificates, entering them in the National Register of Protected Plant Varieties;
- (j) register the licence contracts granted, upon request of the holder of the breeder's certificate or of the licensee;
- (k) prepare and execute the agreements that may be established for protection of new varieties of plants with international organizations or of other countries;

(l) maintain, in coordination with INIA, relations with the international bodies or of countries with which Peru has established agreements for protection of new plant varieties, carrying out the mutually agreed activities, except in cases in which the Peruvian general legislation establishes other channels;

(m) meet the requirements set by legal authorities in relation to disputes that may originate in relation to protection of new plant varieties;

(n) exercise other administrative powers granted under Decision 345 of the Commission of the Cartagena Agreement.

Article 4.- The functions of the Sub-Directorate of Genetic Resources and Biotechnology shall be to:

(a) establish the criteria and procedures to carry out the tests of distinctiveness, uniformity and stability of a variety, in coordination with the Directorate of Inventions and New Technologies.

(b) validate the tests carried out by the breeder, of the distinctiveness, uniformity and stability of a variety; issue technical concepts and establish, in coordination with the Directorate of Inventions and New Technologies of INDECOPI, cooperation agreements with other national or foreign institutions for the purposes indicated in this item.

(c) validate, for the Directorate of Inventions and New Technologies of INDECOPI, the deposit of live material in the field of the breeder, with a scientific institution, be it national or of another country member of the Andean Community, or one that gives reciprocal treatment and that has internationally recognized legislation on the protection of the rights of breeders of new varieties of plants.

(d) establish approval mechanisms for the tests carried out abroad, to prove the requirements of distinctiveness, uniformity and stability.

(e) maintain the Documentary Fund of the National Registry of Protected Plant Varieties.

(f) issue a registration report.

(g) publish the Annual Journal of the National Registry of Protected Plant Varieties with information on applications for breeder's rights and the grant thereof, and the denominations proposed and approved.

(h) Other technical powers granted under Decision 345.

### Chapter III

## RECOGNITION OF BREEDER'S RIGHTS AND REGISTRY 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 it complies with the conditions set out in Article 7, Decision 345, of

the Commission of the Andean Community and the variety is designated by a denomination that is consistent with the provisions of Article 5A of this Decree.

#### Article 5A

5A.1 *Designation of varieties by denomination; use of the denomination.* The variety shall be designated by a denomination which will be its generic designation. Subject to paragraph 4, no rights in the designation registered as the denomination of the variety shall hamper the free use of the denomination in connection with the variety, even after the expiration of the breeder's right.

5A.2 *Characteristics of the denomination.* The denomination must enable the variety to be identified. It may not consist solely of figures except where this is an established practice for designating varieties. It must not be liable to mislead or to cause confusion concerning the characteristics, value or identity of the variety or the identity of the breeder. In particular, it must be different from every denomination which designates, in the territory of any member of UPOV, an existing variety of the same plant species or of a closely related species.

5A.3 *Registration of the denomination.* The denomination of the variety shall be submitted by the breeder to the Directorate of Inventions and New Technologies of INDECOPI. If it is found that the denomination does not satisfy the requirements of paragraph 2 of this Article, the Directorate shall refuse to register it and shall require the breeder to propose another denomination within a prescribed period.

5A.4 *Prior rights of third persons.* Prior rights of third persons shall not be affected. If, by reason of a prior right, the use of the denomination of a variety is forbidden to a person who, in accordance with the provisions of paragraph 7, is obliged to use it, the Directorate of Inventions and New Technologies of INDECOPI shall require the breeder to submit another denomination for the variety.

5A.5 *Same denomination in all members of UPOV.* A variety that forms the subject matter of an application for the granting of a breeder's right must be submitted to all members of UPOV under the same denomination. The Directorate of Inventions and New Technologies of INDECOPI shall register the denomination so submitted, unless it considers the denomination unsuitable. In the latter case, it shall require the breeder to submit another denomination.

5A.6 *Information concerning variety denominations.* The Directorate of Inventions and New Technologies of INDECOPI ensures that the authorities of the members of UPOV are informed of matters concerning variety denominations, in particular the submission, registration and cancellation of denominations. Any authority may address its observations, if any, on the registration of a denomination to the Directorate of Inventions and New Technologies of INDECOPI.

5A.7 *Obligation to use the denomination.* Any person who offers for sale or markets propagating material of a variety protected within the territory of Peru is obliged to use the denomination of that variety, even after the expiration of the breeder's right in that variety, except where, in accordance with the provisions of paragraph 4, prior rights prevent such use.

5A.8 *Indications used in association with denominations.* When a variety is offered for sale or marketed, it is permitted to associate a trademark, trade name or other similar indication with

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

Article 6.— Natural or legal persons residing abroad must designate an authorized representative who resides 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 before 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 it has been filed;

— samples or any other proof that the variety that is the subject matter of the two applications is the same.

Notwithstanding Article 16 of this Decree, the breeder shall have a period of up to two years after the expiration of the period of priority stipulated in Article 18 of Decision 345, or, when the first application has been rejected or withdrawn, an appropriate time from the date of the rejection or withdrawal, to provide the Directorate of Inventions and New Technologies of INDECOPI with any information, documents or materials required for purposes of examination.

Article 9.— In cases considered relevant, OINT, in coordination with PRONARGEB, shall entrust the issuance of a technical concept 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, the number of the breeder's certificate, denomination of the variety, titleholder of the protection rights identification when it is different from the breeder and any legal act that affects the breeders' rights and has been made known to the Directorate of Inventions and New Technologies.

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, EXCEPTIONS AND OBLIGATIONS

Article 12.- The breeder or anyone to whom he has transferred and/or assigned his rights to a protected variety, may prevent third parties from engaging without his authorization in acts

covered by Article 24 of Decision 345, during the lifetime of the breeder's certificate. The breeder may make his authorization subject to conditions and limitations.

Article 12A.- The breeder's certificate shall also enable the holder to exercise the rights stipulated in Article 24 of Decision 345 in respect of varieties essentially derived from the protected variety, except where the protected variety is itself an essentially derived variety.

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

Article 12B.- "Anyone who stores and sows for his own use", as per Article 26 of Decision 345, shall mean anyone who stores and sows on his own holdings, within reasonable limits and subject to the safeguarding of the legitimate interests of the breeder, the product of the harvest which he has obtained by planting, on his own holdings, the protected variety or a variety covered by Article 24 of Decision 345.

Article 13.— The holder of a variety registered in the Register of Protected Plant Varieties shall have the obligation of maintaining and replacing the live sample of the variety during the lifetime of the breeders' certificate, upon request of 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 of granting of the breeder's certificate.

## 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 the Directorate of Inventions and New Technologies and contain or attach, as the case may be:

- (a) name, address and nationality of the applicant;
- (b) common and scientific name of the species;
- (c) indication of the generic denomination proposed;
- (d) Name of the person who has created or discovered and developed a variety if it is different from the person indicated in Article 15(a);
- (e) The most important morphological, physiological, sanitary, phenological, physical and chemical aspects, and industrial or technological characteristics, which allow the variety to be described;
- (f) The method and procedure for obtaining the new variety, as well as all information on any knowledge relating to the variety which can facilitate the examination for compliance with the conditions of Article 7 of Decision 345 and ensure that the variety is designated by a denomination that is consistent with Article 5A of this Decree;

(g) If the application involves a variety for which an application was previously filed abroad, the applicant should provide the information of which he is aware relating to:

- countries where protection has been requested;
- type of protection requested;
- corresponding application numbers;
- date of filing;
- stage of application;
- denomination or reference of the breeder or inventor, if a patent application for an invention is involved;
- date of registration;

(h) The cancellation decision in the register of trademarks, in the event that the generic denomination proposed by the applicant has been registered in his name as a trademark 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;

(i) Proof of payment of the filing fee fixed;

(j) The Directorate of Inventions and New Technologies may request any additional information, documents or materials needed with a view to examination for compliance with the conditions of Article 7 of Decision 345 and ensure that the variety is designated by a denomination that is consistent with Article 5A of this Decree;

(k) As the case may be, documents concerning powers of attorney, assignment or any other additional document, in accordance with Article 5.2 of the 1991 UPOV Convention.

The application and the attached documents shall be in Spanish.

Article 16.- Once it receives the application, the Directorate of Inventions and New Technologies shall verify compliance with the formal requirements set out in the foregoing article, within a period of 30 working days.

Should the formal examination reveal that the application does not meet the requirements set out in (a), (b), (c), (e) and (i) 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 under (f), (g), (h) and (j) of Article 15, the applicant shall be requested to complete the application within a period of 30 working days, from the date of receipt of notification, which may be extended at the applicant's request. Subject to a warning being issued, where no response is made, the application shall be deemed to have been withdrawn.

Article 17.— Once the test of formal requirements of the application has been completed, the Office of Inventions and New Technologies 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 request, the applicant shall deliver a copy of the same to the Office of Inventions and New Technologies.

Article 18.— Within a period of 30 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 Commission of the Cartagena Agreement.

Article 19.— If during the period foreseen in the previous article, observations had been filed, OINT shall notify the applicant so that, within 30 working days starting from the date of notification – a deadline that can be extended only once 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 an opinion in respect of the conditions set out in Article 7 of Decision 345 of the Commission of the Cartagena Agreement within a period of three (3) years for the annual species and of five (5) years, exceptionally extendable to ten (10), for biannual 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 Commission of the Cartagena Agreement may be evaluated, upon a request of the breeder and subject to the approval of the Office of Inventions and New Technologies, in coordination with PRONARGEB, in the place or places where the breeder has carried out the development of his new variety.

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

Article 24 A.- By virtue of Article 33(b) of Decision 345, a breeder's right shall be deemed to be null and void if the granting of such right was based essentially on information and documents provided by the breeder and the conditions for uniformity and stability were not complied with when the breeder's right was granted.

## Chapter VI

### INFRINGEMENTS

Article 25.— Notwithstanding any admissible civil or criminal proceedings, the holder of the breeder's certificate may file an action for violation against anyone who infringes his rights. The licensee of a breeder's certificate 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 notified accordingly. Actions

for infringement shall also proceed when there is an imminent danger that the holder's rights might be infringed.

Article 26.— The proceedings must be made in writing to the Office of Inventions and New Technologies. 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 rights have been infringed may request:

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

OINT shall maintain a register of infringers.

Article 28.— Once the infringement action or denunciation has been filed by the holder, the Office of Inventions and New Technologies 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 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 the 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 on the



premises where it is known or presumed that infringement is taking place, in order that precautionary measures be taken to prevent or stop the infringement.

Representatives of OINT and of PRONARGEB shall appear at the designated premises and shall notify the presumed infringer of the infringement action filed, 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 PRONARGEB may fulfill the inspection role described in this article. Whoever is on 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 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 propagation or multiplication material for the variety or the product of the harvest of the variety allegedly infringed; or the temporary closure of the premises.

If the infringement or threat thereof is not proven during the inspection, OINT may ask PRONARGEB 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 the Directorate of Inventions and New Technologies, in accordance with 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 damage caused to the presumed infringer, in case of malicious or negligent acts or denunciations. Public officials are accountable under the law.

Article 33.— A holder whose rights have been infringed may only request compensation for damage via civil proceedings, once administrative remedies have been exhausted.

#### COMPLEMENTARY 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 Commission 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 shall be deemed to be the Tribunal for the Protection of Competition and Intellectual Property, pursuant to Decree-Law 25868 and amendments thereto.

Third.— Peru shall be represented before the Sub-regional Committee for the Protection of Plant Varieties of the Andean Group and before any other official international entity involved in this area, as a titular member, by a representative of OINT of INDECOPI and, as

an alternate, by a representative of PRONARGEB of INIA. Both entities shall coordinate their participation depending on their roles.

Fourth. — Any reference, within the framework of Supreme Decree 008-96-ITINIC and the present Supreme Decree, to OINT or PRONARGEB, should be understood as a reference to the Directorate of Inventions and New Technologies and to the Sub-Directorate of Genetic Resources and Biotechnology, respectively.

[End of Annex III and of document]