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INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS

GENEVA

COUNCIL

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EXAMINATION OF THE CONFORMITY OF THE LEGISLATION OF BOLIVIA WITH THE UPOV CONVENTION

Document prepared by the Office of the Union

Introduction

1. By letter dated September 15 (which was received by the Office of the Union on October 3), Mr. Carlos Agreda Lema, National Secretary for Agriculture and Livestock, requested the advice of the Council of UPOV, pursuant to Article 32(3) of the 1978 Act of the UPOV Convention (hereinafter referred to as "the 1978 Act"), on the conformity of the legal provisions of Bolivia concerning seeds with the 1978 Act. The letter is reproduced in Annex I to this document.
2. Bolivia did not sign the 1978 Act. Under Article 32(1)(b) of that Act it must accordingly deposit an instrument of accession in order to become a member State of UPOV on the basis of that Act. Under Article 32(3), an instrument of that kind can only be deposited by Bolivia if it has requested the advice of the Council on the conformity of its laws with the provisions of the 1978 Act and if the decision of the Council embodying the advice is positive.

Legal Basis for the Protection of New Varieties in Bolivia

3. Bolivia is a party to the Agreement for Subregional Integration (hereinafter called "the Cartagena Agreement") which was concluded on May 26, 1969. The parties to the Agreement

(hereinafter referred to as “the Member Countries”) are Bolivia, Colombia, Ecuador, Peru and Venezuela. 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 Bolivia is Decision 345 (of October 21, 1991) of the Commission of the Cartagena Agreement on the Common Regime for the Protection of the Rights of Breeders of New Plant Varieties (Annex II to this document). Decision 345 is directly applicable (self-executing) in the Member Countries.

5. Article 5 of Decision 345 requires the Member Countries to appoint a competent national authority, and to establish the national procedure for the implementation of the Decision. By Supreme Decree No 23069 (of February 28, 1992) of the President of the Republic, attached to the above-mentioned letter but not reproduced here, a National Seed Council and Regional Seed Councils were set up and their composition and tasks were defined. The General Rules (of August 1995) for the Implementation of Supreme Decree No 23069 appointed the National Seed Council as the competent national authority and defined the national procedure for the implementation of Decision 345. An extract from the General Rules is reproduced in Annex II to this document.

6. The protection of new plant varieties in Bolivia is thus governed by Decision 345 and the General Rules. An analysis of the legal situation resulting from these legal instruments follows in the order of the substantive law provisions of the 1978 Act. Time has not permitted the submission of this analysis to the Bolivian authorities in advance of the session.

Article 1(1) of the 1978 Act: Purpose of the Convention

7. Article 1(1) of the 1978 Act provides that “the purpose of this Convention is to recognize and to ensure to the breeder of a new plant variety or to his successor in title ... a right.” Article 1(a) of Decision 345 states that “the purpose of the Decision is [...] to recognize and ensure the protection of the rights of breeders of new plant varieties by the grant of breeders’ certificates.” The purpose of Decision 345 thus accords with the purpose of the Convention.

Article 2 of the 1978 Act: Forms of Protection

8. Decision 345 requires the granting of “breeders’ certificates” fulfilling the requirements of the Decision, which conditions are based upon the UPOV Convention. The General Rules uses the expression “Title of Ownership.” Such certificates or titles constitute a “special title of protection” for the purposes of Article 2 of the 1978 Act.

9. Decision 344 of the Commission of the Cartagena Agreement (which establishes a common regime for the grant of industrial property protection), Decision 345 and the General Rules are silent concerning the granting of industrial patents for varieties.

Article 3 of the 1978 Act: National Treatment; Reciprocity

10. There are no provisions in Decision 345 concerning the nationality, or place of residence or registered office, of the applicant or breeder. Article 18(l) of the General Rules, however, establishes a principle of reciprocity based upon the country of establishment (*país de radicación*). The latter provision would conform with Article 3 of the 1978 Act if “country of establishment” were interpreted to include the country of origin of a breeder who is a national of a member State of UPOV and is resident in a non-member State that does not have plant variety protection.

Article 4 of the 1978 Act: Botanical Genera and Species Which Must or May be Protected

11. 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 18(n)(2), however, provides that Titles of Ownership are not granted “in respect of foreign genera and species for whose varieties no protection is available in the country of origin or whose varieties are of public use, either for want of legislation or because of the expiration of the period of protection.” The latter provision is not easy to understand and will certainly be difficult to implement; the limitation it creates would not prevent Bolivia from conforming to Article 4 of the 1978 Act.

Article 5 of the 1978 Act: Rights Protected; Scope of Protection

Decision 345

12. Article 24, first paragraph, expresses the scope of protection in relation to propagating material under a breeder’s certificate in terms which reproduce the substance of Article 14(1) of the 1991 Act. However, the list of acts for which the owner’s consent is required is extended by the “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.” That addition is based upon the third sentence of Article 5(1) of the 1978 Act.

13. Under Article 24, first paragraph, item (i), the authorization of the owner is also required for the performance of the listed acts in relation to harvested material which has been obtained by the unauthorized use of propagating material of the variety, thus reproducing the substance of Article 14(2) of the 1991 Act. The scope of protection under a breeder’s certificate thus far exceeds the minimum required by Article 5(1) of the 1978 Act.

14. Article 25 provides that the breeder’s certificate does not entitle the owner to prevent third parties from using the protected variety for the breeding and exploitation of a new variety, as required by the first sentence of Article 5(3) of the 1978 Act. Article 24, second paragraph, extends the right of the breeder to varieties whose production calls for repeated use of the protected variety, as required by the second sentence of Article 5(3) of the 1978 Act.

15. Article 24, third paragraph, empowers the competent national authorities of the Member Countries to extend the rights of the owner of a breeder’s certificate to varieties which are

essentially derived from the protected variety, except where the protected variety is itself an essentially derived variety, thus offering the possibility of implementing Article 14(5)(i) of the 1991 Act.

16. Article 26 provides for a “farmer’s privilege” that is not applicable to fruit, ornamental and forest species, as permitted by Article 15(2) of the 1991 Act. Article 27 sets out the principle of exhaustion of the right in line with Article 16 of the 1991 Act.

General Rules

17. The General Rules restate the scope of protection. Under Article 18(b), the Title of Ownership confers on its owner the exclusive right to “produce, introduce, multiply, sell, offer for sale, or otherwise exploit reproduction seeds of the variety concerned.” Exceptions are defined in paragraph (d) of the same Article; they concern: (i) harvested material and products made directly therefrom; (ii) farm-saved seed (and vegetative propagating material), including--apparently--for ornamental plants; (iii) the use of the variety for experimental or breeding purposes, with the required exception relating to repeated use.

Conclusion

18. Decision 345 creates a scope of protection which satisfies the minimum scope of protection of both the 1978 Act and the 1991 Act. The General Rules provide for a different scope which matches the minimum scope of protection of the 1978 Act, except with regard to the “farmer’s privilege” for ornamental plants.

Article 6 of the 1978 Act: Conditions Required for Protection

Decision 345

19. Article 4 provides that Member Countries must grant breeders’ certificates to persons who have created plant varieties, insofar as the varieties are new, uniform, distinct and stable, and if the varieties have been given a denomination that constitutes their generic designation. The substance of this Article is repeated in Article 7 in the context of the requirements for entry in a National Register of Protected Plant Varieties, while Articles 8, 9 and 10 provide in detail for the conditions of novelty, distinctness, homogeneity and stability in terms which substantially follow the text of the corresponding provisions in the 1991 Act.

20. Under Article 8, a novelty destroying event in one Member Country destroys novelty in all of them. This aspect of the novelty provision is in conformity with Article 6(3) of the 1991 Act. Article 9 specifies that certain transactions in propagating or harvested material of the variety which involve sales or disposal to others by or with the consent of the breeder, should not be regarded as being for the purposes of the exploitation of the variety so as to destroy its novelty.

21. The first Transitional Provision establishes a transitional limitation of the requirement of novelty, as permitted by Article 38 of the 1978 Act. Any variety that has been entered in a

Register of Cultivars in any Member Country or in a Register of Protected Cultivars in any State which has special legislation on the protection of plant varieties and which grants reciprocal treatment to the Member Country in which the application is filed, may be protected, provided the application is filed within one year from the opening of the relevant register of protected varieties.

General Rules

22. The General Rules require first of all that the variety whose protection is sought must be the subject of a certificate from the National Register of Varieties (Article 18(a)). Article 16(a) provides that “the purpose of the National Register of Varieties is to establish a general framework (*ordenamiento*) for seeds used in the country and seeds which, for one reason or another, do not meet the requirements set for their cultivation.” This requirement may be considered as a formality to the extent that the procedure is globally the same as for an application for protection.

23. However, it would have to be applied in such a way that the application for a certificate and the application for protection may be filed at the same time; otherwise the opportunity of obtaining protection might be lost by an applicant through no fault of his, where the processing of the application for the certificate is delayed and causes a loss of novelty, in particular because of the acts of exploitation done abroad. Since the procedure is globally the same, it would in fact be highly advisable to amend the General Rules to the effect that an application for protection will lead, at the same time, to the entry in the National Register of Varieties.

24. The conditions of distinctness, homogeneity and stability are restated in Article 18(e) in terms which conform with those of the 1978 Act.

25. The condition of novelty includes a one-year period of grace for sales and offers for sale in Bolivia, as permitted by Article 6(1)(b)(i) of the 1978 Act. However, Article 18(n)(1) provides that Titles of Ownership are not granted for varieties which had been released for public use at the time of the application. This provision, if applied strictly, would defeat the period of grace.

26. The particulars to be given in the application(s) are set out in Article 16(c)--in respect of the application for entry in the National Register of Varieties--and in Article 18(p)--in respect of the application for a Title of Ownership. The first-mentioned Article refers to the requirement of a variety denomination. The second, in addition to the certificate from the National Register of Varieties already mentioned in paragraph (a) of the same Article, also requires a certificate from the Register of Agronomic Validation. This seems to be a mistake insofar as there is no substantive provision to support it.

27. Article 18(q) enables the Coordination Unit (a subsidiary organ of the National Seed Council entrusted with the execution of sectorial policies--Article 7) to set additional or supplementary requirements on a species-by-species basis. Such requirements presumably are of a technical nature and should therefore conform with Article 6(2) of the 1978 Act.

Conclusion

28. Decision 345 conforms with the 1991 Act. The General Rules sets out different conditions; generally speaking, they conform with the 1978 Act, but would require improvements to make sure that no problem arises in their implementation.

Article 7 of the 1978 Act: Official Examination of Varieties; Provisional Protection

29. Article 19 of Decision 345 requires the competent national authority of each Member Country to issue a technical report on novelty, distinctness, uniformity and stability, and Article 20 makes the granting of protection subject to the issue of a favorable technical report.

30. The General Rules establish a system in which the granting of protection is essentially based upon the information provided by the applicant--and the possible representations by third parties (see Article 18(r)). According to Article 16(f)--relating to the entry in the National Register of Varieties--field and laboratory tests and trials will (only) be conducted where the information provided in the sworn declaration on the characteristics of the variety does not clearly indicate that the material to be registered is a new variety.

31. Whereas Decision 345 clearly conforms with Article 7(1) and (2) of the 1978 Act, the General Rules may be considered to conform.

32. Article 17 of Decision 345 requires that the breeder be granted provisional protection during the period between the filing of the application and the grant of the certificate and gives details on the actions for damages. There is no provision on this subject in the General Rules.

Article 8 of the 1978 Act: Period of Protection

33. Article 21 of Decision 345 specifies that the period of protection shall be between 20 and 25 years in the case of vines, forest trees and fruit trees, including their rootstocks, and from 15 to 20 years in the case of other species, calculated from the date of grant. Article 18(f) fixes the period to 20 years in the case of annual and biennial plants and to not less than 25 years in the case of trees, leaving it to the National (Seed ?) Council to determine the precise period for each species. These periods conform with Article 8 of the 1978 Act.

Article 9 of the 1978 Act: Restrictions in the Exercise of Rights Protected

34. Articles 30 to 32 of Decision 345 contain provisions on the granting of compulsory licenses in exceptional circumstances affecting national security or the public interest. Broadly similar provision have been included in Article 18 of the General Rules, in paragraph (k). They conform with the requirements of Article 9 of the 1978 Act.

Article 10 of the 1978 Act: Nullity and Forfeiture of the Rights Protected

Decision 345

35. Article 33 requires competent national authorities, either *ex officio* or at the request of a party, to declare a breeder's certificate null and void if either of the three conditions for nullity specified in Article 21(1) of the 1991 Act are fulfilled. It should be noted, however, that the competent national authority is required to also declare the breeder's certificate null and void when it is established that the variety was not uniform or stable at the date of grant. This differs from Article 21(1)(ii) of the 1991 Act, which limits such declaration to those cases where the grant was based on information and documents furnished by the breeder.

36. Under Article 35, the competent national authorities are required to declare breeders' certificates canceled if any of the conditions specified (which correspond with those in Article 22(1)(b) of the 1991 Act) are fulfilled.

General Rules

37. The General Rules also enter into the matter. According to Article 18(i) the Title of Ownership shall be revoked or canceled where the variety is no longer new, distinct, homogeneous and stable, where the title has been obtained fraudulently, or where the circumstances contemplated in Article 10(2) and (3)(b) of the 1978 Act obtain.

38. Article 18(j) specifies that the variety--where it still exists--becomes public property, except where the fraudulently obtained title can be transferred to the true owner.

Conclusion

39. Although not in accordance with the letter of Article 10 of the 1978 Act, the provisions described in the two previous paragraphs may be considered as reflecting the spirit of the Article.

40. It should be added that Article 18(h) also deals with the cancellation of the "annual protection right." The drafting of the provision suggests that the underlying intention--already taken care of in Article 18(i)(6)--has not been properly reflected.

Article 11 of the 1978 Act: Free Choice of the Member State in Which the First Application is Filed; Applications in Other Member States; Independence of Protection in Different Member States

41. There are no provisions in Decision 345 or the General Rules which would prevent a breeder from choosing the member State of the Union in which he wishes to file his first application, or from applying for protection in other member States until a Title of Ownership is issued in Bolivia. The laws of Bolivia accordingly conform with Article 11(1) and (2) of the 1978 Act.

42. Doubts must be cast, however, as to whether the protection available in Bolivia for foreign varieties is independent of the protection obtained in the country of origin, given the wording of Article 18(n)(2).

Article 12 of the 1978 Act: Right of Priority

43. Article 18 of Decision 345 provides for a right of priority in terms which satisfy Article 12 of the 1978 Act. There is no corresponding provision in the General Rules.

Article 13 of the 1978 Act: Variety Denomination

44. Provisions relating to variety denominations are to be found in Articles 4, 7 and 13 of Decision 345 and in Article 16(i) of the General Rules. These provisions reproduce the substance of Article 13 of the 1978 Act, the obligation to use the variety denomination being made in Article 27 of the General Rules, in connection with the seed trade.

Article 14 of the 1978 Act: Protection Independent of Measures Regulating Production, Certification and Marketing

45. Article 28 of Decision 345--in line with Article 14 of the 1978 Act--provides that Member Countries may adopt measures for the regulation or control, on their territory, of the production or marketing, importation or exportation of propagating material of a variety, provided that such measures do not imply disregard for the breeders' rights recognized by the Decision or hamper the exercise thereof. The General Rules do not contain any provision contrary to the stated principle if the overlap between the National Register of Varieties and variety protection is recognized and, in particular, if the procedures are streamlined

Article 30 of the 1978 Act: Implementation of the Convention on the Domestic Level

46. Article 23 of Decision 345 requires that the owner of a breeder's certificate be given 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 18(c) of the General Rules states that the Title of Ownership is transferable and may be the subject of any type of contract, and that any dispute may be referred to the ordinary courts of justice. It may be assumed that this provision implies appropriate civil law remedies.

47. Article 45(t) of the General Rules contemplates the imposition of a fine and, where appropriate, the confiscation of the seed and/or closing of the establishment where the seed has been commercialized, distributed, transported or donated without the authorization of the owner of the Title of Ownership. The sanctions are determined by the Regional Seed Councils and inflicted by them through the Regional Seed Offices with the assistance of the public police.

48. There is no provision on the remedies against decisions of the competent authority. It may be assumed that the Code of Administrative Procedure will be applicable.

49. The chapeau of Article 18 of the General Rules appoints the National Seed Council as the competent national authority for the implementation of Decision 345 and the plant variety protection system.

50. Article 18(r) contemplates the publication of a summary of the application in three newspapers. The publication of the list of protected varieties is mentioned in Article 16(h).

General Conclusion

51. Through its decision on the request made by Colombia in April 1994, the Council has already given a positive advice on the conformity of Decision 345 with the UPOV Convention.

52. The General Rules regulate anew many aspects--but not all--of the subject matter covered by the Decision, so that they have the appearance of a free-standing legislative instrument. In the opinion of the Office of the Union, they contain a number of discrepancies with the 1978 Act of the Convention, but provide a framework for legislation that, upon incorporation of suitable amendments, will conform to that Act. Amendments appear in any event necessary to improve their internal consistency and in some respects--particularly the overlap between the National Register of Varieties and variety protection--their efficiency. The General Rules have been adopted at ministerial level, so that their amendment should be relatively easy.

53. On the basis of the foregoing, the Office of the Union would suggest that the Council may wish:

(a) to advise the Government of Bolivia that the General Rules provide a framework for legislation that, upon incorporation of suitable amendments, would conform to the 1978 Act;

(b) to request the Office of the Union to offer its assistance to the Government of Bolivia in respect of the amendments that are necessary to achieve conformity, or are otherwise advisable;

(c) to further advise the Government of Bolivia that, upon incorporation of the amendments proposed by the Office of the Union, it may deposit an instrument of accession to the 1978 Act.

54. The Council is invited to take note of the information given above and to take decisions on the basis of the proposal set out in the preceding paragraph.

[Three Annexes follow]

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ANNEX I

LETTER, DATED SEPTEMBER 15, 1995, FROM Mr. CARLOS AGREDA LEMA,
NATIONAL SECRETARY FOR AGRICULTURE AND LIVESTOCK
OF BOLIVIA, TO THE SECRETARY-GENERAL

I have the honor to write to you for the purpose of requesting the accession of Bolivia to the International Union for the Protection of New Varieties of Plants (UPOV).

To that effect, I am attaching to this letter the legal provisions which are in force in our country in respect of seeds, so that the Council may undertake the relevant examination and we may thus come under the auspices of the International Convention for the Protection of New Varieties of Plants, in accordance with the 1978 Act.

We hope to receive a favorable response and remain at your disposal for any further information.

[Annex II follows]

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ANNEX II

SUBREGIONAL INTEGRATION AGREEMENT

Decision 345

Common Provisions on the Protection of the Rights of Breeders of New 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:

* Spanish title: Decisión 345. Régimen común de protección a los derechos de los obtentores de variedades vegetales.

Source: *Gaceta oficial del Acuerdo de Cartagena* of October 29, 1993.

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]

C/29/12

ANNEX III

EXTRACT FROM THE GENERAL RULES FOR THE IMPLEMENTATION
OF SUPREME DECREE No. 23069

(of August 1995)

SCOPE, PURPOSE AND FUNCTIONS

Article 1

The purpose of these Rules is to promote the production and use of seeds through the processes of certification and/or control. They establish the norms and rules for the implementation of Supreme Decree No. 23069, of February 28, 1992, on the control of production, conditioning, distribution, internal and foreign trade of seeds.

[...]

STRUCTURE AND FUNCTIONS OF THE COORDINATION UNIT
OF THE NATIONAL SEED COUNCIL

Article 7

The National Seed Council shall have a Coordination Unit entrusted with the execution of sectorial policies.

Article 8

The offices and the staff of the Coordination Unit shall be appointed in accordance with the Internal Regulations, proposed by the Council and approved by the "SNAG" [National Secretariat for Agriculture and Livestock].

Article 9

The structure of the Coordination Unit shall be according to the necessities and may be changed and approved in coordination with the SNAG.

Article 10

The basic functions of the Coordination Unit are the following:

[...]

(e) maintain the National Register of Varieties, the National Register of Plant Protection and the National Register of Merchants.

[...]

FUNCTIONS AND STRUCTURE OF THE REGIONAL SEED OFFICES

[...]

Article 14

For the interpretation of these rules on the norms, standards and requirements for certification:

[...]

(17) “Breeder” means any natural or legal person who has brought about through any method a variety that is different from the existing ones;

[...]

(24) “Seed” means any botanical structure of sexual or asexual origin to be used for the propagation of a species;

[...]

(35) “Variety” means a grouping of cultivated plants which are distinguishable by specific characteristics that are significant for agricultural purposes, and which maintain their distinctive characteristics when reproduced;

[...]

NATIONAL REGISTER OF VARIETIES

Article 16

The Coordination Unit of the National Seed Council shall maintain the National Register of Varieties, pursuant to the following rules:

(a) The purpose of the National Register of Varieties shall be to establish a general framework (*ordenamiento*) for seeds used in the country and seeds which, for one reason or another, do not need the requirements set for their cultivation.

(b) Requirements for a variety: To be registered, a variety shall meet the following requirements:

(1) it shall be distinct, by at least one characteristic, from those entered in the National Register;

(2) it must remain stable, that is to say that it must remain true to the description of the variety after its reproduction or at the end of each cycle;

(3) it shall be homogeneous, that is to say that the individuals which form it must be similar for the set of characteristics which are considered in each case.

(c) Application for registration:

(1) *applicant*: the application for the registration of a variety shall be made by the breeder or his legal representative domiciled in the country;

(2) *registration*: any application for registration shall be filed to the Coordination Unit of the National Seed Council, through the regional offices, including the requested information;

(3) *documentation*: in general, the application for registration shall include at least the following information:

- (a) name and address of the applicant,
- (b) name and address of the breeder,
- (c) crop,
- (d) name proposed for the variety,
- (e) country of origin of the variety,
- (f) breeding method,
- (g) description of the procedure to be used for maintaining the variety,
- (h) distinctive characteristics of the new variety,
- (i) tests undergone by the variety and results thereof,
- (j) detailed description of the variety,
- (k) ecological conditions most adequate for the cultivation of the variety,
- (l) where the applicant is not the breeder, documentary evidence of the right to make the application shall be submitted. Such evidence shall be legalized by the Bolivian Consulate in the country of origin, for varieties originating from abroad, and authenticated for varieties of national origin.

(d) Vegetative material: The applicant shall also attach the vegetative material (seeds, tubers, rhizomes, stolons or others) required for the tests and trials, each time this is requested.

(e) Sworn declaration: The applicant shall submit the sworn declaration indicating the characteristics of the new variety and specifying that it is new, different, homogeneous and stable.

(f) Field and laboratory tests: If the information given in the sworn declaration does not clearly indicate that the material to be registered is a new variety, the Coordination Unit of the National Council shall undertake field and laboratory tests to confirm the information.

(g) Approval or refusal: The Coordination Unit shall approve or refuse registration on the basis of the results of the prior information.

(h) List of varieties: If a variety is registered, the Coordination Unit of the National Seed Council shall publish the list of commercial varieties of cultivated species, of those restricted for cultivation, protected, freed, those which result from the certification process and others.

(i) Denomination of the variety: Each variety shall be designated by a single generic denomination enabling it to be identified without confusion; however:

- (1) it may not consist solely of figures;
- (2) it shall not be liable to mislead or to cause confusion concerning the characteristics of the variety, the identity of other breeders or owners who own other varieties;
- (3) if the variety has been obtained abroad, the denomination from the place of origin shall be maintained to the extent possible;
- (4) it shall not contain words such as “varieties,” “cultivar,” “form,” “hybrid,” “cross,” “genetic,” “basic,” or other generic terms;
- (5) it shall be distinct from the other varieties, with the use of diminutives and/or synonyms of names of existing varieties being excluded so as to avoid confusion and protect the right of registration.

(j) Reasons for refusal:

- (1) if the documentation submitted is incomplete;
- (2) if the variety is not uniform, stable and/or different;
- (3) if the authorization of the breeder is not produced.

(k) Removal of a variety from the Register: A variety may be removed from the Register:

- (1) where it is established that the submitted documentation was fraudulent;

- (2) where the variety is not maintained with the characteristics with which it was registered.
- (1) Fees: The costs of registration of a variety shall include:
 - (1) a registration fee;
 - (2) if field and/or laboratory tests are made prior to registration;
 - (3) additionally, for the post registration verifications through field and laboratory tests.

[...]

VARIETY PROTECTION

Article 18

In accordance with Decision 345 of the Commission of the Cartagena Agreement, which establishes the protection of the rights of plant breeders, any natural or legal person who has created or selected new varieties may request variety protection through the National Seed Council appointed as the competent national authority, pursuant to the following rules:

- (a) The variety whose protection is sought must be the subject of a certificate from the National Register of Varieties.
- (b) The natural or legal person who has obtained, created or discovered a new variety may request a “Title of Ownership” which shall give the owner thereof the exclusive right to produce, introduce, multiply, sell, offer for sale, or otherwise exploit reproduction seeds of the variety in question, provided that he complies with the provisions of these Rules.
- (c) The duly registered Title of Ownership shall be transferable or may be the subject of any type of contract; any dispute may be referred to the ordinary courts of justice. Any change of ownership shall be registered with the Coordination Unit of the National Seed Council.
- (d) The variety which is the subject of a Title of Ownership shall not give rise to rights in favor of its owner when:
 - (1) the reproductive or vegetative propagating material of any kind constitutes the harvested material, including entire plants and parts of plants, and any product made directly from the harvested material, or is used or sold as a raw material or food,

- (2) seed is stored and sown for the own use of the person concerned, setting aside any marketing, distribution or donation, including ornamentals,
 - (3) other breeders use the variety for experimental purposes or as a source of genetic material for the creation of new varieties, provided that the protected variety is not used repeatedly and systematically for the commercial production of other varieties.
- (e) To be the subject of protection, the variety shall meet the following requirements:
- (1) be new: at the date of filing of the application for protection in the country, the variety must not have been offered for sale or marketed, with the agreement of the breeder, on the whole national territory, for longer than one year. Moreover, it must not have been offered for sale or marketed, on the territory of any other country, with the agreement of the breeder, for longer than six years in the case of vines, forest trees, fruit trees and ornamental trees, including, in each case, their rootstocks, or for longer than four years, in the case of all other plants,
 - (2) be different: the variety shall be deemed to be distinct if it is clearly distinguishable from any other variety. The variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge,
 - (3) be homogeneous: in the sum of its characteristics, in accordance with its reproduction or propagation system,
 - (4) be stable: in its essential characteristics, that is to say that it retains the characteristics described by its breeder at the end of each cycle of multiplication.
- (f) The term of the “Title of Ownership” shall be 20 years for varieties of annual or biennial species and not less than 25 years for varieties of tree species, for which the National Council shall fix the term on a species-by-species basis.
- (g) The owner of a Title of Ownership shall submit, when so requested by the Coordination Unit, a living sample of the protected variety possessing the characteristics as defined for it, and any information deemed necessary for the purposes of the implementation of these Rules.
- (h) The annual protection right shall be canceled at the Coordination Unit, in accordance with the fee approved by the National Seed Council.
- (i) The Title of Ownership shall be revoked or canceled for the following reasons:
- (1) at the request of the owner;
 - (2) at the end of the legal period of protection of the ownership;
 - (3) in the case of failure to maintain the conditions of novelty, distinctness, homogeneity and stability;

- (4) where the owner of the title is not able to submit, at the request of the Coordination Unit, reproductive material capable of producing the variety with its characteristics as defined when the title was granted;
 - (5) where the title has been obtained by fraud;
 - (6) where the annual fee has not been paid with the Register of Variety Ownership within three months from its notification.
- (j) The variety protected by the Title of Ownership shall become public property when it lapses for the reasons set out numbers (1), (2) and (3) of paragraph (i) and in the case of number (5) when it is legally not possible to transfer the right to the true owner.
- (k) With a view to ensuring adequate exploitation of the protected variety, by virtue of a possible public interest, the National Secretariat for Agriculture and Livestock may declare a variety freely available subject to equitable compensation of the breeder, for which the National Seed Council shall determine the amount of the compensations, after having heard the parties and on the basis of the scale of exploitation of the protected variety.
- During the period of validity of the declaration of free availability, the National Seed Council shall allow exploitation of the variety by interested persons who offer sufficient technical and financial guarantees and apply to it to that end in its offices.
- 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 (2) 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.
- (l) Breeders established abroad shall enjoy the same rights as breeders established in the country, provided that the country of establishment recognizes and protects their rights as breeders.
- (m) Any person seeking protection for a foreign variety shall:
- (1) elect, for that purpose, legal domicile in Bolivia or appoint an authorized representative;
 - (2) attach official records from the country of origin proving that he is in a position to protect the variety;
 - (3) undertake to comply with the Bolivian legal provisions and regulatory norms on the ownership of varieties.
- (n) Titles of ownership shall not be granted:
- (1) for varieties which had been released for public use at the time of the application;

- (2) in respect of foreign genera and species for whose varieties no protection is available in the country of origin or whose varieties are of public use, either for want of legislation or because of the expiration of the period of protection.
- (o) The Coordination Unit shall have the following responsibilities:
- (1) to maintain the Register of Variety Ownership;
 - (2) to grant, refuse to grant or renew the titles of ownership of varieties, together with the National Seed Directorate;
 - (3) to undertake, either itself or through other institutions, the tests of a technical nature which it deems necessary for the purpose of granting the titles of ownership of varieties, and also the consultation or checks which have to be made with foreign institutions of a similar nature;
 - (4) to participate in the conclusion of any national or international convention or agreement which may be made in this field;
 - (5) to request, where relevant, information and plant material from owners of titles of ownership.
- (p) For the purpose of obtaining a Title of Ownership of a variety an application having the status of a sworn declaration and containing the following information shall be filed:
- (1) species (common and scientific name);
 - (2) certificate from the National Register of Varieties and the Register of Agronomic Validation;
 - (3) germplasm from which the variety originated, with details on the crossing;
 - (4) method used for the creation and maintenance of the variety;
 - (5) description of the variety; the characteristics defined by the National Seed Directorate for each species and enabling its identification shall be indicated;
 - (6) confirm that the new variety meets the required standards;
 - (7) name of the breeder;
 - (8) origin; in the case of foreign cultivars, the country of origin shall be indicated;
 - (9) sponsoring agricultural engineer;
 - (10) any other information or material which the breeder deems necessary for the filing.

(q) The Coordination Unit shall define the requirements additional or complementary to those set out in the preceding Article, in accordance with the species concerned.

(r) Once the registration has been requested and prior to the examination of the documentation, the Coordination Unit shall publish, in three (3) newspapers of the country and once only, a summary of the application, thereby opening a period of thirty (30) working days from the said date to enable third parties to make any relevant representations. At the expiration of the said period and if no objection has been submitted, the Title of Ownership shall be granted.

If representations are made within the said period, they shall be communicated to the applicant, who shall have sixty (60) working days to submit the relevant rebuttal. The Coordination Unit of the National Seed Council shall, on the basis of the available submissions, grant the title or reject the application.

[...]

INFRINGEMENTS AND SANCTIONS

[...]

Article 45

The prohibition of the following acts shall be sanctioned with a fine and, where relevant, confiscation of the seed and/or closing of the establishment:

[...]

(t) commercialize, distribute, transport or donate seed of varieties which are protected without the consent of the owner of the title of ownership;

[...]

Article 48

The infringements shall be sanctioned by the Regional Seed Councils through the Regional Seed Offices, with the assistance of the public police.

Article 49

The amount of the fines shall be established by the Regional Seed Councils.

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