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UPOV**C(Extr.)/11/5****ORIGINAL : English****DATE : April 20, 1994****INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS****GENEVA****COUNCIL****Eleventh Extraordinary Session****Geneva, April 22, 1994****EXAMINATION OF THE CONFORMITY OF THE LEGISLATION OF
THE REPUBLIC OF COLOMBIA WITH THE UPOV CONVENTION**Document prepared by the Office of the Union**Introduction**

1. By letter dated April 4, 1994 (which was received in the Office of UPOV under cover of a letter from the Ambassador and Head of Mission of Colombia in Geneva on April 19), Dr. Noemí Sanín de Rubio, Minister for Foreign Affairs of Colombia, 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 laws of Colombia concerning plant variety protection with the 1978 Act. Copies of the legislative acts comprising the laws of Colombia were attached to the letter. The letter is reproduced in Annex I to this document.

2. Colombia is a party to the Agreement for Subregional Integration (hereinafter called "the Cartagena Agreement") which was concluded on May 26, 1969. Other States currently party to the Cartagena Agreement are Bolivia, Ecuador, Peru and Venezuela, which States together with Colombia are sometimes collectively referred to as "the Andean Group" but are hereafter referred to as "the Member States."

3. The Cartagena Agreement established two main bodies, namely, the Commission of the Cartagena Agreement (hereinafter called "the Commission") and the Board of the Cartagena Agreement (hereinafter called "JUNAC"). The Commission is the political and legislative body under the Cartagena Agreement, while JUNAC is the technical executive body of the Cartagena Agreement and the Secretariat of the Commission. Subsequent amendments to the Cartagena Agreement established two additional bodies, namely, the Court of Justice of the Cartagena Agreement and the Andean Parliament.

4. The Commission is the highest governing body under the Cartagena Agreement and, under Article 6 thereof, has exclusive legislative capacity in respect of matters within its competence. It is composed of one plenipotentiary representative from the government of each of the Member States. The Commission issues legislation in the form of "Decisions."

5. The Member States concluded in 1979 the Treaty establishing the Court of Justice of the Cartagena Agreement (hereinafter called "the Treaty"). The Treaty entered into force in 1983 following ratification by the Member States. The Treaty establishes (Article 1) that the legal system under the Cartagena Agreement comprises:

- (a) the Cartagena Agreement, its protocols and additional instruments;
- (b) the Treaty establishing the Court of Justice of the Cartagena Agreement;
- (c) the Decisions of the Commission; and
- (d) the Resolutions of JUNAC.

6. Decisions issued by the Commission bind Member States as of the date of their approval by the Commission (the Treaty, Article 2). Decisions are directly applicable (i.e. self-executing) in the Member States as of their date of publication in the Official Gazette of the Cartagena Agreement, unless a different date is specified in the Decision (the Treaty, Article 3). A Decision may itself provide that implementing legislation at the national level shall be required, in which case each Member State must provide the required legislation and indicate the date of coming into force of the Decision for that State.

7. On October 21, 1993, during its sixtieth ordinary session, the Commission decided by its Decision 345 to approve a Common Regime for the Protection of the Rights of the Breeders of New Plant Varieties. As a result of its self-executing nature, Decision 345 takes effect as a domestic law of Colombia. Decision 345 is reproduced in Annex II to this document.

8. Article 5 of Decision 345 requires the Member States to grant breeders' rights in accordance with principles established in the Decision, to appoint a competent national authority for this purpose, and to establish the national procedure for the implementation of the Decision.

9. Pursuant to the said Article 5 of Decision 345, the President of the Republic of Colombia, on March 8, 1994, by Decree No. 533 established implementing regulations for Decision 345 in Colombia. The said Decree is reproduced in Annex III to this document.

10. The Office of UPOV assisted the JUNAC by preparing an initial draft of a proposed decision and participated in or was represented at three meetings of a Committee of Experts convened by the JUNAC which considered successive drafts of the decision.

11. On February 21, 1994, the Office of UPOV received a draft Decree designed to implement Decision 345 from Sr. Juan Manuel Ramírez Pérez, General Manager of the Instituto Colombiano Agropecuario (ICA) within the Ministry of Agriculture of Colombia. By letter dated February 25, 1994, the Office of UPOV commented upon the said draft Decree from the standpoint of its conformity with the 1978 Act and the 1991 Act of the UPOV Convention (hereinafter called "the 1991 Act"). Most, but not all, of the suggestions of the Office of UPOV are reflected in Decree No. 533.

12. Colombia 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 Colombia 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 Colombia

13. The protection of new plant varieties in Colombia is governed by Decision 345 and Decree 533.

14. An analysis of the legal situation resulting from the combined effect of Decision 345 and of Decree 533 follows in the order of the substantive law provisions of the 1978 Act. Where a provision of the Colombian law conforms with a provision of the 1991 Act, it is taken to conform with the corresponding provision of the 1978 Act. Time has not permitted the submission of this analysis to the Colombian authorities in advance of the session.

15. Any eventual accession to the 1978 Act by Colombia will require the approval of the Colombian Congress. After such approval, the provisions of the 1978 Act will be incorporated into the domestic law of Colombia and will constitute a higher law overriding, if necessary, the provisions of national laws or decrees. The procedure will ensure that any minor departure from conformity with the provisions of the 1978 Act, which is present in a national decree, will be remedied upon accession.

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

16. 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 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

17. Decision 345 requires the granting of breeders' certificates to the creators of plant varieties which fulfill the requirements of the Decision. Such certificates constitute a "special title of protection" for the purposes of Article 2 of the 1978 Act.

18. Decision 344 of the Commission of the Cartagena Agreement (which establishes a common regime for the grant of industrial property protection in the Member States), Decision 345 and Decree 533 are silent concerning the granting of normal industrial (or utility) patents for varieties of plant species for which protection is provided under Decision 345 and Decree 533.

Article 3 of the 1978 Act: National Treatment; Reciprocity

19. Article 4 of Decision 345 provides that the Member States shall grant breeders' certificates to persons who have created plant varieties. There are no express provisions in Decision 345 concerning the granting of protection to nationals and residents of UPOV member States. Accordingly by its silence on

this question, it must presumably be assumed that Decision 345 permits the granting of protection without restriction to the nationals and residents of all States. In any event, Article 18 of Decision 345, which concerns priority, confirms, by implication, that protection is available to persons from countries which accord reciprocal treatment to a member country of the Cartagena Agreement. Accordingly, if Colombia accedes to the 1978 Act, protection will be available to nationals and residents of UPOV member States on the same basis as for Colombian nationals so as to satisfy the provisions of Article 3 of the 1978 Act.

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

20. 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." The second paragraph of Article 1 of Decree 533 provides that "the Decree shall not apply to wild species or to plant species and individual plants which have not been cultivated or improved by man." These provisions more than fulfill the requirements of Article 4 of the 1978 Act which specifies only that an acceding State must protect a minimum of five plant genera and species when first applying the provisions of the 1978 Act in its territory.

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

21. Article 24 of Decision 345 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 in Article 14(1) for which the breeder's consent is required is extended by the addition of "the commercial use of ornamental plants or parts of plants as propagating material for the production of ornamental plants or fruit crops or parts thereof or cut flowers."

22. Under Article 24(i), the authorization of the breeder's certificate owner is 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.

23. Article 25 of Decision 345 provides that the breeders' certificate shall not entitle the owner of the certificate 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. The second paragraph of Article 25 of Decision 345 extends the right of the breeder to varieties whose production calls for repeated use of the protected variety, as required by the last sentence of Article 5(3) of the 1978 Act.

24. Article 24(3) of Decision 345 empowers the competent national authorities of the Member States to extend the rights of the holder 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. Pursuant to this provision, Article 8 of Decree 533 extends the scope of protection of the breeder in Colombia to essentially derived varieties.

25. Decision 345 and Decree 533 together create within the laws of Colombia a scope of protection for the breeder which more than satisfies the minimum scope of protection of both the 1978 Act and the 1991 Act.

Article 6 of the 1978 Act: Conditions Required for Protection

26. Article 4 of Decision 345 provides that Member States shall grant breeders' certificates to persons who have created plant varieties, insofar as the varieties are new, uniform, distinct and stable, if the varieties have been given a denomination that constitutes their generic designations. 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.

27. It should be noted that, under the provisions of Article 8 of Decision 345, a novelty destroying event in one Member State is a novelty destroying event in all other Member States. This aspect of the novelty provision is in conformity with Article 6(3) of the 1991 Act. Article 9 of Decision 345 specifies 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, which should not be regarded as being for the purposes of the exploitation of the variety so as to destroy its novelty.

28. The first Transitional Provision of Decision 345 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 State 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 State in which the application is filed, may be protected. Accordingly, after an eventual accession of Colombia to the 1978 Act, any variety currently protected in UPOV member States will be in principle eligible for protection in Colombia. However, the application must be filed within one year from the opening of the Register in Colombia and the period of protection is reduced by the length of time this has elapsed since the variety was entered on the relevant Register of Cultivars outside Colombia.

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 States to issue a technical report on novelty, distinctness, uniformity and stability, while Article 20, Article 3(a), (j) and (k) establish the duties of the Instituto Colombiano Agropecuario (hereinafter called "ICA") in relation to tests of distinctness, homogeneity and stability. Article 5 of Decree 533 specifically requires I.C.A. to issue a report on the novelty, distinctness, homogeneity and stability of candidate varieties. These provisions taken together enable Colombia to conform with the requirements of Article 7(1) and (2) of the 1978 Act.

30. 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.

Article 8 of the 1978 Act: Period of Protection

31. 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 21 permits the competent

national authority of each Member State to fix the precise period of protection within the specified limits. Decree 533 specifies in Article 7 that the duration of protection in Colombia shall be 20 years in the case of vines and trees and 15 years in the case of other plants.

32. The period of protection would accordingly seem to comply with Article 8 of the 1978 Act. However, the third paragraph of Article 13 of Decree 533 provides that in the case of a variety protected in a foreign country the maximum period of protection shall be the period during which the variety remains protected in the foreign country. Such varieties could receive a period of protection in Colombia which is shorter than that required by the 1978 Act.

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

32. Articles 29 to 32 of Decision 345 contain provisions permitting the granting of compulsory licenses, only, however, in exceptional circumstances affecting national security or the public interest. Where compulsory licenses are granted, Member States are required to make provision for the equitable compensation of the breeder. The law accordingly conforms with the requirements of Article 9 of the 1978 Act.

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

33. Article 33 of Decision 345 requires competent national authorities ex officio or at the request of a party to invalidate a breeder's certificate 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 declare the breeder's certificate invalid whenever it can be 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 a declaration of nullity for a lack of uniformity or stability to those cases where the grant was based on information and documents furnished by the breeder.

34. Under Article 35 of Decision 345, the competent national authorities of the Member States are required to revoke breeders' certificates if any of the conditions specified (which correspond with the condition for cancellation in Article 22(1)(b) of the 1991 Act) are fulfilled.

35. Decree 533 contains no provision dealing with nullity or cancellation of the breeders' rights. The provisions of the law are substantially in conformity with Articles 21 and 22 of the 1991 Act and should thus be deemed to satisfy the requirements of Article 10 of the 1978 Act.

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

36. There are no provisions in the laws of Colombia which would prevent a breeder from choosing the member State of the Union in which he wishes to file his first application or which would prevent the breeder from applying for protection in other member States or in Colombia until a title of protection is issued in the member State of the Union in which he filed his first application. The laws of Colombia accordingly conform with Article 11(1) and (2) of the 1978 Act.

37. The third paragraph of Article 13 of Decree 533 specifies that the period of protection for a variety cannot exceed that which remains in the foreign country in which protection was first granted for the variety. This provision is contrary to Article 11(3) of the 1978 Act which requires that the protection granted must be independent of the protection obtained for the same variety in other States.

Article 12 of the 1978 Act: Right of Priority

38. Article 18 of Decision 345 provides for a right of priority in terms which satisfy Article 12 of the 1978 Act. There is no provision in the law concerning the period of time which the applicant must be allowed in order to provide additional documents and material required by the laws of Colombia.

Article 13 of the 1978 Act: Variety Denominations

39. Provisions relating to variety denominations are to be found in Articles 4, 7 and 13 of Decision 345 and in the supplementary paragraph of Article 10 of Decree 533. These provisions reproduce the substance of Article 13 of the 1978 Act although there is no provision in the law precisely conforming to paragraph 7 of Article 13.

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

40. Article 28 of Decision 345 provides that member countries may adopt measures for the regulation or control, on their territory, of the production or marketing, importation or exportation or propagating 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. The law of Colombia accordingly complies with Article 14 of the 1978 Act.

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

41. 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 rights, and to securing the appropriate forms of compensation or indemnity. Article 15 of Decree 533 provides that the norms and procedures established by the commercial code of Colombia in respect of infringements of industrial property rights shall apply to infringements of the rights conferred by a breeder's certificate. The laws of Colombia accordingly conform with Article 30(1)(a) of the 1978 Act.

42. Article 2 appoints ICA as the competent national authority for the application of the plant variety protection régime. The law of Colombia accordingly conforms with Article 30(1)(b) of the 1978 Act.

43. Article 3(g) of Decree 533 requires ICA to publish a Protected Plant Variety Gazette which will contain information concerning applications, protected varieties, denominations, acceptance or refusal of applications, the grant of breeders' certificates, declarations of nullity or revocation and details of all legal acts which are the concern of the National Register of Protected Plant Varieties. The laws of Colombia accordingly comply with Article 31(c) of the 1978 Act.

General Conclusion

44. In the opinion of the Office of the Union, the law conforms to the 1978 Act in all its main features. It also conforms with the provisions of the 1991 Act, with the exception of the minimum duration of protection, in all its main features.

45. A departure from conformity occurs in the case of varieties for which protection is granted outside Colombia prior to the date of grant in Colombia, where the duration of protection may be less than, not only the minimum prescribed by the 1978 Act, but also the minimum required by Article 21 of Decision 345. The provision in question (see paragraph 32 above) also conflicts with the provisions of Article 11(3) which requires that the protection granted in a member State of UPOV shall be independent of the protection granted for the same variety in other States.

46. The Council is invited to

(i) advise the Government of Colombia that, upon the deletion or modification of the third paragraph of Article 13 of Decree 533 so as to accord with Articles 8 and 11 of the 1978 Act of the UPOV Convention, its laws would conform with the said Act so as to permit the deposit of an instrument of accession to the 1978 Act;

(ii) authorize the Secretary-General to inform the Government of Colombia of that decision.

[Annexes follow]

ANNEX I

**LETTER, DATED APRIL 11, 1994, FROM MR. GUILLERMO ALBERTO GONZALES,
AMBASSADOR, PERMANENT MISSION OF COLOMBIA AT GENEVA,
TO THE SECRETARY-GENERAL**

Permit me, in the name of the Government of Colombia, to present to you the original of Note No. DM.00890 of April 4, 1994, in which Dr. Noemí Sanín de Rubio, Minister for Foreign Affairs, formally requests the Council of the International Union for the Protection of New Varieties of Plants, pursuant to Article 32(3) of the Act of 1978, to give its opinion to Colombia concerning the conformity of our laws with the provisions of the 1978 Act, so as to initiate, by this means, the process for the adhesion of my country to the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, and on October 23, 1978.

For the purpose mentioned above, a copy of Decision 345 of October 21, 1993, of the Commission of the Cartagena Agreement and of Decree 533 of March 8, 1994, by which the Common Régime of Protection is implemented, is attached. For the same purpose, we hope that the request of Colombia will be considered at the next session of the Council.

As always, I avail myself of this opportunity of reiterating to the Secretary-General the expression of my most high and distinguished consideration.

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**LETTER, DATED APRIL 4, 1994, FROM DOCTOR NOEMI SANIN DE RUBIO,
MINISTER FOR FOREIGN AFFAIRS OF COLOMBIA,
TO THE SECRETARY-GENERAL**

I have the honor to inform you that on October 21, 1993, in Santa Fe de Bogotá, Colombia, the Commission of the Cartagena Agreement approved Decision 345, the Common Régime for the Protection of the Rights of the Breeders of Plant Varieties. This Decision enters into force with effect from March 8, 1994, as a national law of Colombia as a result of the provisions of the above-mentioned Cartagena Agreement. In accordance with the said Decision, the Government of Colombia has nominated the Colombian Institute for Agriculture and Livestock ("ICA") as its national competent authority, and by Decree No. 533 of March 8, 1994, has enacted, by virtue of Article 50 of the said Decision, procedural regulations for its application. We are attaching to this letter a copy of Decision 345 and of the said Decree.

Colombia now wishes to adhere to the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, and on October 23, 1978. In this connection, I have the honor to request the Council of the International Union for the Protection of New Varieties of Plants, pursuant to Article 32(3) of the 1978 Act, to advise Colombia on the conformity of its laws with the provisions of the 1978 Act.

I take this opportunity to express my most distinguished consideration.

[Annex II follows]

ANNEX II

Sixtieth Ordinary Session of the Commission
October 20 and 21, 1993
Santa Fe de Bogotá, Colombia

DECISION 345

Common Provisions on the Protection
of the Rights of Breeders of New
Plant Varieties

THE COMMISSION OF THE CARTAGENA AGREEMENT

Considering the first transitional provision of Decision 313,

DECIDES

to approve these Common Provisions on the Protection of the Rights of
Breeders of New Plant Varieties.

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 originates 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 propagating 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.

DONE in the city of Santa Fe de Bogotá, Colombia, on this twenty-first day of October, nineteen ninety-three.

[Annex III follows]

ANNEX III

REPUBLIC OF COLOMBIA
MINISTRY OF AGRICULTURE

Decree No. 533 of March 8, 1994
Introducing Common Provisions on the
Protection of Plant Breeders' Rights

THE PRESIDENT OF THE REPUBLIC OF COLOMBIA

By virtue of the powers conferred on him by paragraph 11 of Article 189 of the Constitution, and

Considering that, by Decision 345 of October 21, 1993, the Commission of the Cartagena Agreement approved the Common Provisions on the Protection of Plant Breeders' Rights,

Considering further that it has become necessary to enact provisions for the implementation of the said Decision 345 of 1993,

HAS DECREED AS FOLLOWS:

CHAPTER I

SCOPE OF THIS DECREE

Article 1

The scope of this Decree shall extend to all cultivated varieties of botanical genera and species, provided that the cultivation, possession or use thereof is not prohibited on grounds of human, animal or plant health.

This Decree shall not apply to wild species, that is, those individual plant species that have not been planted or improved by man. Such species shall be subject to the provisions of paragraph 21 of Article 5 of Law No. 99 of 1993.

CHAPTER II

COMPETENT NATIONAL AUTHORITY

Article 2

The Colombian Agricultural and Livestock Institute (ICA) shall be the competent national authority for the application of the provisions on plant variety protection.

Article 3

For the purposes of this Decree, the functions of the ICA shall be the following:

- (a) Conduct of tests to determine novelty, distinctness, uniformity and stability.

Such tests may be carried out by public or private entities or both, according to guidelines issued by the Subregional Committee for the Protection of Plant Varieties, established pursuant to Article 37 of Decision 345. The said entities shall have been previously authorized by the Ministry of Agriculture.

- (b) Grant of breeders' certificates.
- (c) Creation and upkeep of the National Register of Protected Plant Varieties.
- (d) Setting and collection, in accordance with the Law, of fees for services rendered by it, subject to the administrative procedure for the grant of breeders' certificates, the deposit of live samples, field and laboratory trials and other fees arising from the protection of varieties.
- (e) Organization and maintenance of deposits of live material or, failing that, recognition of the maintenance and deposit of such material in another member country or in a country that grants reciprocal treatment and has internationally recognized legislation on the protection of plant breeders' rights.
- (f) Participation in national and international gatherings and events, without prejudice to powers conferred on other public bodies, but without contracting international obligations except with express authorization.
- (g) Publication of the Protected Plant Varieties Gazette, which shall give information on the filing of applications, including the identification of applicants, the varieties filed for protection, the denominations given them, the acceptance or rejection of applications, the grant of breeders' certificates, declarations of lapse or invalidation of breeders' certificates and all legal acts subject to registration.
- (h) Notification of the grant of breeders' certificates to the Board of the Cartagena Agreement within a period not exceeding 48 hours following the date of publication, in the Protected Plant Varieties Gazette, of the decision granting the breeders' certificate.
- (i) Revocation of the breeder's certificate where any of the events provided for in Article 35 of Decision 345 of 1993 occurs.
- (j) Introduction of such tests and field and laboratory trials as it considers appropriate for the verification of compliance with the conditions laid down in Article 7 of Decision 345 of 1993.
- (k) Introduction of procedures for the approval of technical examinations conducted abroad to test the requirements of distinctness, uniformity and stability.
- (l) Such other powers as are conferred on it by Decision 345 of 1993.

CHAPTER III

GRANT AND REGISTRATION OF BREEDERS' RIGHTS

Article 4

A breeder's certificate shall be granted to the person, whether natural person or legal entity, who has created a plant variety, provided that the variety meets the conditions laid down in Article 4 of Decision 345 of 1993.

Article 5

The ICA shall issue a technical report on novelty, distinctness, uniformity and stability. If the report is favorable and the application complies with the other requirements, the breeders' certificate shall be granted and registration with the corresponding denomination shall be ordered.

Article 6

The National Register of Protected Plant Varieties is hereby established.

The Register shall contain a phenotypical description of the protected variety, the number of the breeder's certificate, the denomination of the variety, the particulars of the breeder and of his representative if any, the identity of the owner of the protection rights where not the same person as the breeder, and any other legal act affecting the breeder's rights.

Article 7

The term of protection shall be 20 years in the case of vines, forest trees and fruit trees, including the rootstocks thereof, and 15 years for all other species, both terms being counted from the date of grant.

CHAPTER IV

RIGHTS AND OBLIGATIONS OF THE BREEDER

Article 8

The breeder of a variety entered in the National Register of Protected Plant Varieties shall have the right to prohibit third parties from engaging without his consent, in the acts specified in Article 24 of Decision 345 of 1993 in relation to protected varieties and varieties essentially derived from the protected variety, except where the said variety is itself an essentially derived variety.

Article 9

The owner of a variety entered in the National Register of Protected Plant Varieties shall have the obligation, in addition to those contained in Decision 345 of 1993, to maintain and replace, at the request of the ICA, the live sample of the variety throughout the term of the breeder's certificate.

CHAPTER V**FILING OF THE APPLICATION AND
ACCEPTANCE OR REJECTION THEREOF****Article 10**

The application for the grant of a breeder's certificate shall be filed with the ICA and shall contain the following:

- (a) Name, address and nationality of the applicant and of the breeder when the latter is acting through an agent.
- (b) Common and scientific names of the species.
- (c) Proposed generic denomination.
- (d) Identification of the breeder and place in which the variety was bred, specifying the country of origin.
- (e) Most noteworthy morphological, physiological, health, phenological and physico-chemical aspects and industrial or technological properties such as will permit description of the variety.
- (f) Genetic origin of the variety.
- (g) The mention, where appropriate, of the exercise of the right of priority provided for in Article 18 of Decision 345.
- (h) Geographical origin of the plant material constituting the raw material of the new variety to be protected.
- (i) The application for a breeder's certificate for a variety protected abroad shall specify all the countries in which the said certificate is registered, including the date of such registration.

In order to comply with the requirement specified in subparagraph (c) of this Article, the denomination shall possess all the following characteristics:

- (i) It shall allow the variety to be identified.
- (ii) It may not be composed solely of numbers.
- (iii) It may not mislead or confuse as to the characteristics, value or identity of the variety or as to the identity of the breeder.

Article 11

The ICA shall accept or reject an application within the period specified in Article 6 of the Code of Legal Administration. The acceptance or rejection of the application shall be determined by its compliance with the requirements of form specified in the foregoing Article.

Article 12

The ICA shall pronounce on the conditions specified in Article 7 of Decision 345 within a period of three years for short-cycle varieties and ten years for medium and long-cycle varieties, both periods being calculated from the filing date of the application for protection.

Article 13

The period of protection of breeders' rights shall begin to run on the date on which the decision granting the breeder's certificate comes into effect. That date shall be understood to be the date of grant of the certificate.

In the case of breeders' certificates or titles granted abroad, the ICA shall have a period of 30 calendar days, following the filing date of the application for protection, within which to pronounce thereon.

The term of protection shall have as its maximum duration that which has yet to run before the lapse of rights in the country that first granted protection, but shall not exceed the term provided for in this Decree.

RESEARCH INCENTIVES

Article 14

The National Government shall specify the manner in which entities under public law may distribute among their breeder employees and assign to research plans, programs and projects such funds as are derived from the exploitation of plant varieties in respect of which they hold breeders' certificates.

The participation of breeder employees in the funds referred to in this Article shall not be wage components and shall in no way be taken into account for the settlement of social benefits or entitlements of any kind deriving from their employment relations.

CHAPTER VI

INFRINGEMENTS

Article 15

In the event of infringement of the rights conferred by a breeder's certificate, those provisions and procedures shall be applied, subject to compatibility with this Decree, that are laid down by the Code of Commerce for infringements of industrial property rights, without prejudice to such criminal actions as may be available.

TRANSITIONAL PROVISION

A variety that is not new on the opening date of the National Register of Protected Plant Varieties, but has been registered prior to the said date in the register of the ICA or a register of cultivars in any of the Member Countries, or again in a register of protected varieties in any country having

special legislation on plant variety protection which grants reciprocal treatment to Colombia, shall enjoy protection as provided in this Decree if the application for protection is filed within the year following the opening date of the said Register.

The term of protection may not exceed that which has yet to run before the lapse of the periods specified in Article 7 of this Decree, counted from the date of registration of the variety at the ICA or in the register of another country.

Article 16

This Decree shall enter into force on the publication date thereof.

PUBLICATION AND ENFORCEMENT IS HEREBY ORDERED.

Done in Santa Fe de Bogotá on March 8, 1994.

(Signed)

Santiago Perry Rubio

Vice-Minister of Agriculture

Chargé d'Affaires at the Office of the Minister of Agriculture

(Signed)

Juan José Echavarria Soto

Vice-Minister of Foreign Trade

Chargé d'Affaires at the Office of the Minister of Foreign Trade

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