



C(Extr.)/15/6

ORIGINAL: English

DATE: April 2, 1998

INTERNATIONAL UNION FOR THE PROTECTION OF NEW VARIETIES OF PLANTS
GENEVA

COUNCIL

Fifteenth Extraordinary Session
Geneva, April 3, 1998

**EXAMINATION OF THE CONFORMITY OF THE LEGISLATION OF VENEZUELA
WITH THE UPOV CONVENTION**

Document prepared by the Office of the Union

Introduction

1. By letter dated March 23, 1998, addressed to the Secretary-General, the Minister of Industry and Commerce of Venezuela 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") and to Article 34(3) of the 1991 Act of the UPOV Convention (hereinafter referred to as "the 1991 Act"), on the conformity of the laws of Venezuela concerning the protection of new varieties of plants with the 1978 and 1991 Acts on the basis of Decision 345 of the Commission of the Cartagena Agreement. The Note is reproduced in Annex I to this document.
2. By letter dated March 26, 1998, at the request of the Office of the Union, the Director of the Autonomous Service of Intellectual Property of Venezuela, submitted the draft Regulations implementing Decision 345 in Venezuela. The Note is reproduced in Annex II.
3. Venezuela did not sign the 1978 Act, or the 1991 Act. Under Article 32(1)(b) of 1978 Act and Article 34(2) of the 1991 Act, it must accordingly deposit an instrument of accession in order to become a member State of UPOV on the basis of either the 1978 or the 1991 Act. Under Article 32(3) of the 1978 Act and Article 34(3) of the 1991 Act, an instrument of that kind can only be deposited by Venezuela if it has requested the advice of the Council on the

conformity of its laws with the provisions of the 1978 Act and/or 1991 Act and if the decision of the Council embodying the advice is positive.

Legal Basis for the Protection of New Varieties in Venezuela

4. Venezuela 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, Bolivia, Colombia, Ecuador, Peru and Venezuela (hereinafter referred to as “the Member Countries”) constitute “the Andean Community”. Details on the functioning of the Agreement were given in document C(Extr.)/11/5, in relation to the request for advice made by Colombia and examined by the Council at its eleventh extraordinary session, on April 22, 1994.

5. The legal basis for the protection of new plant varieties in Venezuela is Decision 345 (of October 21, 1993) of the Commission of the Cartagena Agreement on the Common Regime for the Protection of the Rights of Breeders of New Plant Varieties (Annex III to this document, hereinafter called “Decision 345”). Decision 345 is directly applicable (that is, it is self-executing) in the Member Countries.

6. Article 5 of Decision 345 requires the Member Countries to appoint a national competent authority, and to establish the national procedure for the implementation of the Decision. The Venezuelan Government has prepared a draft of the regulations necessary to implement Decision 345 in Venezuela (hereinafter referred to as “the draft Regulations”). They are reproduced in Annex IV to this document. Article 3 of the draft Regulations establishes the National Seeds Service (*el Servicio Nacional de Semillas*) as the national competent authority for the implementation of Decision 345.

7. In its eleventh extraordinary session held on April 22, 1994, the Council accepted that it was necessary to so interpret the modifications to the 1978 Act introduced by the 1991 Act as to enable States to be bound simultaneously by and to be for all practical purposes in conformity with both Acts and that, accordingly, a law which conforms with the provisions of the 1991 Act, will necessarily conform with the provisions of the 1978 Act (see the Report of the session, document C(Extr.)/11/6 at paragraph 14).

8. The analysis of the legislation of Venezuela which follows (that is to say Decision 345 and the draft Regulations) is in the order of the substantive provisions of the 1991 Act. The assumption is made that conformity with these provisions results *ipso facto* in conformity also with the requirements of the 1978 Act. The following may be noted:

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

(b) The draft Regulations are true implementing regulations, i.e., they do not restate the provisions of Decision 345 but merely supplement it in the areas in which further provisions are necessary.

Article 1 of the 1991 Act: Definitions

9. Article 3 of Decision 345 contains definitions of plant variety and breeder (which are reproduced *verbatim* in Article 2 of the draft Regulations) which substantially conform with those in Article 1(iv) and (vi) of the 1991 Act.

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

10. Article 2 of the 1991 Act requires a State acceding to the 1991 Act to grant and protect breeders' rights. 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 satisfies the obligation established in Article 2 of the 1991 Act.

Article 3 of the 1991 Act: Genera and Species to 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." The draft Regulations do not contain any provision on the subject. The legislation of Venezuela thus conforms with Article 3 of the 1991 Act.

Article 4 of the 1991 Act: National Treatment

12. There are no provisions in Decision 345 or the Draft Regulations restricting the nationality, or place of residence or registered office, of the applicant or breeder. The legislation of Venezuela thus conforms with Article 4 of the 1991 Act.

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

13. Article 4 of Decision 345 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 to 12 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.

14. Under Article 8 of Decision 345, 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.

15. The first Transitional Provision establishes a transitional limitation of the requirement of novelty, as permitted by Article 6(2) of the 1991 Act. Any variety that has been entered in a register of cultivars in any Member Country or in a register of protected varieties 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.

16. The draft Regulations specify, in Articles 13, 14 and 15, the formal requirements for the application and thus conform with the 1991 Act.

Article 10 of the 1991 Act: Filing of Applications

17. There are no provisions in Decision 345 or the draft Regulations 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 Breeder's Certificate is issued in Venezuela. There are no provisions that would make protection in Venezuela dependent upon the protection granted (or not granted) in another country. The legislation of Venezuela accordingly conforms with Article 10 of the 1991 Act.

Article 11 of the 1991 Act: Right of Priority

18. Article 18 of Decision 345 provides for a right of priority in terms which satisfy Article 11 of the 1991 Act. The right is referred to in Article 14 of the draft Regulations, which provide that in case of a previous application filed in another country, the application for the same variety in Venezuela must be accompanied by the certified copy of the original application. In Article 15 of the draft Regulations a period of 30 days, which can be extended to another 30 days upon request of the applicant, is provided to complete formal requirements. This conflicts not only with Article 11(2) of the 1991 Act but also with the second paragraph of Article 18 of Decision 345. The provision should be amended by extending the period of 30 days to a minimum of three months.

Article 12 of the 1991 Act: Examination of the Application

19. 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.

20. Article 9 of the draft Regulations establishes that the National Seeds Service will carry out the testing that will provide the basis of that technical report. Articles 10 and 11 establish the Advisory Committee on Protected Plant Varieties, and give it responsibility for the evaluation of varieties and the grant of a Breeder's Certificate.

21. Article 21 of the draft Regulations establishes that the National Seeds Service authority will, initially and for a period no longer than two years, conclude an agreement with any other official institution for the implementation of Decision 345 and the draft Regulations.

22. The legislation of Venezuela thus conforms with Article 12 of the 1991 Act.

Article 13 of the 1991 Act: Provisional Protection

23. 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 draft Regulations.

24. The legislation conforms with Article 13 of the 1991 Act.

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

25. Article 24 of Decision 345, 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.

26. Under Article 24 of Decision 345, 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.

27. 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 Article 14(5)(iii) of the 1991 Act.

28. 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. The draft Regulations do not at present contain any provision on this subject. However, as stated in the letter reproduced in annex II, the Venezuelan Government proposes to introduce in the regulations the extension of protection to essentially derived varieties.

29. Decision 345 enables the Member Countries to provide a scope of protection which satisfies the minimum scope of protection of the 1978 and 1991 Acts. The scope of protection of the 1991 Act will be provided in full by the draft Regulations if they are amended so as to extend protection to essentially derived varieties .

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

30. Article 25 of Decision 345 reproduces Article 15(1) of the 1991 Act almost verbatim.

31. Article 26 of Decision 345 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.

32. The legislation is thus in conformity with article 15 of the 1991 Act.

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

33. Article 27 of Decision 345 sets out the principle of exhaustion of the right in line with Article 16 of the 1991 Act. There is no provision on this subject in the draft Regulations.

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

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. There is no further provision on this subject in the draft Regulations. The legislation of Venezuela conforms with the requirements of Article 17 of the 1991 Act.

Article 18 of the 1991 Act: Measures Regulating Commerce

35. Article 28 of Decision 345--in line with Article 18 of the 1991 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 draft Regulations do not contain any provision conflicting with this principle.

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

36. 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 19 of the draft Regulations fixes these periods at 25 and 20 years, respectively. These periods conform with Article 19 of the 1991 Act.

Article 20 of the 1991 Act: Variety Denominations

37. Provisions relating to variety denominations are to be found in Articles 4, 7 and 13 of Decision 345. These provisions reproduce the substance of Article 20 of the 1991 Act. However, the obligation to use the variety denomination is not specifically spelled out.

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

38. Article 33 of Decision 345 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.

39. The provisions of the legislation of Venezuela substantially conform to Article 21 of the 1991 Act.

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

40. Under Article 35 of Decision 345, the competent national authorities are required to declare breeders' certificates canceled if any of the specified conditions (which correspond with those in Article 22(1)(b) of the 1991 Act) are fulfilled.

41. Article 9 of the draft Regulations specifies the authority that is competent for the implementation of the above-mentioned provisions (the National Seeds Service) and the applicable procedure.

Article 30 of the 1991 Act: Implementation of the Convention

42. Article 30(1)(i) of the 1991 Act requires adhering States to provide for appropriate legal remedies for the effective enforcement of breeders' rights. 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.

43. Article 30(1)(ii) of the 1991 Act requires adhering States to "maintain an authority entrusted with the task of granting breeders' rights ...". The National Seeds Service, a unit of the National Foundation for Agriculture and Livestock Research, created through resolution of the Ministry of Agriculture and Livestock, has been appointed under Article 3 of the draft Regulations as competent national authority.

44. Article 30(1)(iii) of the 1991 Act requires adhering States to publish information concerning applications and grants of breeders' rights and proposed and approved denominations. Article 9(f) of the draft Regulations provides for the publication of a Gazette on Protected Plant Varieties. Article 16 stipulates that the application will be published once in an official gazette and in a well-known journal or in a journal of the capital of Venezuela, at the expense of the applicant.

General Conclusion

45. In the opinion of the Office of the Union, the legislation of Venezuela conforms with the provisions of the 1991 Act and also with those of the 1978 Act in all its main features, (subject to the extension of the period to furnish certified copy of the documents that constitute the first application to a minimum of three months from the filing date, and to the extension of protection to essentially derived varieties).

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

(a) to take a positive decision on the conformity of the legislation of Venezuela with the provisions of the 1978 Act, and, subject to the amendments mentioned in paragraph 45, with the 1991 Act;

(b) to request the Office of the Union to offer its assistance to the Government of Venezuela in respect of the amendments to be made to the draft Regulations;

(c) to further advise the Government of Venezuela that

i) after consultation with the Office of the Union as to whether the amendments of the Regulations are adequate,

ii) after adoption of the draft Regulations incorporating such amendments but without other substantial changes,

it may deposit an instrument of accession to the 1978 Act prior to April 24, 1999, or to the 1991 Act at any time.

47. 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.

[Four Annexes follow]

ANNEX I

LETTER, DATED MARCH 23, 1998, FROM MR. HECTOR MALDONADO LIRA,
MINISTER FOR INDUSTRY AND COMMERCE OF VENEZUELA
TO THE SECRETARY-GENERAL

I have the honor to approach you with the request that you submit to the UPOV Council that is to meet on April 3 of this year, for consideration, the contents of Decision 345 of the Commission of the Cartagena Agreement, constituting Common Provisions for the Protection of Plant Breeders' Rights for Member Countries of the Andean community, published by Venezuela in Official Gazette No. 4.676 (extraordinary edition) on January 18, 1994, a copy of which is enclosed.

We should like to be informed of the compatibility of the enactment in question with the 1978 and 1991 Acts of the UPOV Convention, with a view to the possible accession of Venezuela in the course of the coming months.

[Annex II follows]

ANNEX II

LETTER, DATED MARCH 27, 1998, FROM MR. FRANCISCO ASTUDILLO GOMEZ,
DIRECTOR OF THE AUTONOMOUS SERVICE OF INTELLECTUAL PROPERTY OF
VENEZUELA, TO THE SECRETARY GENERAL

Further to the request for analysis of Decision 345 of the Commission of the Cartagena Agreement, submitted by Minister Hector Maldonado Lira on March 23 of this year, I enclose a copy of the draft Regulations under that Decision, Article 3 of which provides that the National Seeds Service is to be the competent national authority for the implementation of the common provisions for the protection of plant breeders' rights.

Another important feature of the draft Regulations is that Article 19 sets the term of rights at 25 years for vines and forest and fruit trees and 20 years for other species.

Even though it is not actually mentioned in the Regulations, it is intended that there will be provision for the protection of essentially-derived varieties.

The Regulations are currently being evaluated by the legal advisers of the Minister of Agriculture and Livestock Breeding.

[Annex III follows]

ANNEX III

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:

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.

<u>Variety:</u>	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.
<u>Essentially derived variety:</u>	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.
<u>Material:</u>	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 IV follows]

ANNEX IV

DRAFT REGULATIONS UNDER DECISION 345 OF THE COMMISSION OF THE
CARTAGENA AGREEMENT (COMMON PROVISIONS FOR THE PROTECTION OF
PLANT BREEDERS' RIGHTS)

Decree No.

RAFAEL CALDERA
President of the Republic

By virtue of the powers conferred on him by paragraphs 10 and 12 of Article 190 of the Constitution and the third paragraph of the sole article of the Law Approving the Subregional Integration Agreement or Cartagena Agreement, signed in Bogota, Republic of Colombia, on May 26, 1969, and the Understanding of Lima, Republic of Peru, dated February 13, 1973, reached by the plenipotentiaries of Venezuela, Bolivia, Colombia, Chile, Ecuador and Peru, and also Decision 345—Common Provisions for the Protection of Plant Breeders' Rights, published in the Official Gazette of the Republic of Venezuela, No. 4.676 (extraordinary edition) dated January 18, 1994,

DECREES AS FOLLOWS:

Regulations Under Decision 345 of the Board of the Cartagena Agreement
on Plant Breeders' Rights

CHAPTER I
General Provisions

Article 1. The purpose of these Regulations is to elaborate on the principles contained in Decision 345 of the Commission of the Cartagena Agreement with respect to ensuring the proper and effective protection of plant breeders' rights.

Article 2. Without prejudice to the definitions contained in the said Decision 345, the following terms shall have the meanings specified:

Competent national authority: the body legally designated for the application and administration of Decision 345 and any regulations and implementing provisions under it.

Plant variety or cultivar: a set of cultivated botanical individuals that are distinguished by certain morphological, physiological, cytological, chemical or other characteristics and may be perpetuated by reproduction, multiplication or propagation.

Clone: a set of individuals that are produced by vegetative propagation, laboratory cell multiplication, apomixis or other tissue cultivation techniques from a single plant or plant cell and possess an identical genetic inheritance.

Line: a set of individuals having sufficient uniformity and produced naturally or artificially by sexual reproduction. A line is called a "pure line" where the individuals

constituting it have been obtained from one and the same parent by means of successive self-fertilizations.

Family: stock of plants of one and the same origin, obtained by breeding and possessing numerous common characteristics.

Hybrid: plant resulting from spontaneous or controlled crosses from parent material generally with a different genetic inheritance.

Seed: any plant structure or material, total or partial, intended for the reproductive or vegetative propagation of a botanical species.

Breeder: the person, whether natural person or legal entity, claiming responsibility for the breeding of a new plant variety by means of records of genetic improvement work undertaken and involving the application of traditional skills or novel techniques in accordance with the provisions of Article 4 of Decision 345 of the Commission of the Cartagena Agreement.

Breeder's certificate: the protection title that covers the rights accorded to the legal breeder of a new variety in the Andean national and subregional environment and in other countries that grant reciprocal treatment.

CHAPTER II

Competent National Authority

Article 3. The National Seeds Service, created as a department of FONAIAP by virtue of Resolution No. 159 of the Ministry of Agriculture and Livestock Breeding dated April 23, 1986, and published in Official Gazette No. 33.456 of April 24, 1986, shall be the competent national authority for the application in Venezuela of the Common Provisions for the Protection of Plant Breeders' Rights and these Regulations under the supreme authority of the National Fund for Agricultural and Livestock Research.

Article 4. The National Seeds Service (SENASA), as a department of the National Fund for Research, shall act as a national revenue office for the collection of the fees that it charges for its services and the fines that it imposes.

Article 5. The assets of the National Seeds Service shall consist of the following:

- (i) Ordinary and extraordinary credits assigned to it in the budget law and accruing to it through the National Fund for Agricultural and Livestock Research;
- (ii) Fees collected and other charges made by the Registry of Plant Varieties;
- (iii) Income deriving from the sale of publications and information and the rendering of services.

(iv) Donations or other unsolicited payments that are accepted in accordance with the relevant provisions.

(v) Any other revenue collected by any other legal means.

Article 6. The administration of resources shall be the responsibility of the Director of the National Seeds Service, who shall act by virtue of powers delegated to him by the National Fund for Agricultural and Livestock Research. His administration shall be subject to supervision by the Controllershship General of the Republic in accordance with such provisions as may be applicable.

Article 7. The revenue collected by the National Seeds Service acting as a department of the National Fund for Agricultural and Livestock Research shall in all cases be devoted to the self-financing of the Service and shall be set aside both for operational and for investment costs, as provided in the Law Organizing the Budgetary Regime and other relevant provisions.

Article 8. The Director of the National Seeds Service shall be freely appointed and removed by virtue of the supreme authority of the National Fund for Agricultural and Livestock Research. He shall be a Venezuelan national and a person of recognized training and experience in matters concerning seeds.

Article 9. The National Seeds Service shall have the following functions:

- (a) It shall receive and process applications for breeders' certificates.
- (b) It shall undertake the testing of novelty, distinctness, uniformity and stability and shall approve generic designations in accordance with the guidelines laid down in Decision 345. The conduct of the testing may be delegated to public or private bodies of proven suitability that are duly registered with SENASEM, including actual SENASEM companies, subject to supervision and validation by the Service itself.
- (c) It shall organize the procedures for the deposit of live samples, ensuring strict observance of the technical conditions necessary for the characteristics of the said samples to be preserved. SENASEM may delegate the storage of live samples to duly accredited entities, either public or private, from within the country or from countries that accord reciprocal treatment and possess legislation on the protection of breeders' rights.
- (d) It shall grant the breeder's certificate and notify the grant to the Board of the Cartagena Agreement within a period not exceeding 72 working hours following the official issue of the breeder's certificate.
- (e) It shall create and maintain the National Register of Protected Varieties.
- (f) It shall publish the bulletin of the Registry of Protected Varieties.
- (g) It shall collect fees for services rendered.
- (h) It shall register license agreements that comply with legal requirements.

(i) It shall invalidate the breeder's certificate where any of the requirements laid down in Article 35 of Decision 345 are not complied with, and shall notify its verdict to the Board of the Cartagena Agreement in the manner provided for in Article 36 of the said Decision.

(j) It shall lay down the criteria governing infringements of these Regulations and the sanctions applicable.

(k) It shall promote the conclusion of agreements on technical cooperation and plant variety protection training with national and international organizations.

(l) It shall take part in national and international events on subjects within its competence, without entering into technical or administrative commitments that have not been authorized at the appropriate hierarchical levels.

(m) It shall relate everything within the scope of Decision 345 to the relevant legislation on production, quality control, plant health and the certification and commercialization of seed for the national and export markets.

(n) It shall exercise the functions assigned to it by its board of directors.

(o) It shall exercise the functions specified in Resolution MAC-DG-159, dated April 23, 1996, or in any laws that may be enacted on the subject.

Article 10. The Advisory Committee on Protected Plant Varieties is hereby created and shall be composed of the following seven principal members:

(i) The Director of SENASEM.

(ii) The Director of the Industrial Property Service (SAPI) or his deputy.

(iii) A representative of FONAIAP.

(iv) A representative of public bodies devoted to plant breeding that have been designated by consensus among the said institutions and duly accredited by SENASEM.

(v) A representative of private organizations devoted to plant breeding that have been designated by consensus among the said organizations and duly accredited by SENASEM.

(vi) A representative of seed producing and seed marketing firms.

(vii) A director of FEDEAGRO as the representative of seed users.

Article 11. The following shall be the functions of the Advisory Committee on Protected Plant Varieties:

(a) To consider and recommend the grant or cancellation of breeders' certificates for plant varieties that meet the requirements laid down in Decision 345 and these Regulations.

(b) To study and propose provisions and complementary measures for the protection of breeders' rights, and their application to the various genera and species specified in Decision 345.

(c) To recommend guidelines for defining relative ownership and incentives between breeding firms or organizations and their staff in connection with plant breeding activities.

(d) To analyze and provide information on variety protection matters submitted to it by SENASEM.

(e) To assist in the drafting and conclusion of reciprocity agreements and international treaties on variety protection.

(f) Any other function that may be entrusted or assigned to it by the board of directors.

CHAPTER III National Registry of Protected Plant Varieties

Article 12. The National Register of Protected Plant Varieties (RENAVAPRO) is hereby created under the authority of SENASEM, and shall be organized in sections by species, group of species or variety or in such other manner as may be conducive to its operational efficiency.

Article 13. The application for registration of a plant variety with a view to the grant of breeders' rights shall respect the forms approved for the purpose by SENASEM and shall have the character of a sworn declaration. The corresponding file may not be consulted by third parties who are members thereof until such time as the application has been published by SENASEM on behalf of the person concerned, except where the requesting party provides written evidence of consent. Once publication has taken place, the file shall become public and may be consulted by individuals.

Any person who proves to the satisfaction of SENASEM that the applicant for a breeder's certificate has attempted to invoke rights deriving from the application against him may consult the file prior to its publication.

Article 14. Applications for registration shall contain the following:

(a) The request, signed by the legal entity or by its legal representative, with mandatory enclosure of the published articles of incorporation and statutes, together with any subsequent amendments and appropriate authorizations.

(b) A mention of the names of the natural persons who bred the variety, and a document attesting the assignment of rights.

(c) A detailed description of the process whereby the plant variety in which rights are sought was bred, with an indication of the genetic origin and breeding method.

- (d) The common and scientific names of the genus and species.
- (e) The proposed generic denomination.
- (f) The agricultural and ecological character of the area in which the variety was bred.
- (g) A description of the morphological, physiological, phytosanitary, phenological, physicochemical, industrial and agronomic characteristics that enable it to be identified.
- (h) An account of the conditions of novelty, distinctness, uniformity and stability.
- (i) The variety's national or foreign geographical origin.
- (j) Reproductive or vegetative propagation mechanism.
- (k) Drawings, photographs, diagrams or other technical material commonly used to illustrate characteristic morphological features of the variety.
- (l) A live sample representative of the variety that enables tests to be undertaken to determine whether it complies with the conditions required by Decision 345.
- (m) In the case of applications for breeders' certificates filed in another country, certified copies of the registrations or applications.

Article 15. On receipt of the application, SENASEM shall undertake an initial examination to determine whether the conditions of form provided for in Decision 345 and these Regulations are met, and shall mark the application with the hour and date of receipt, together with the Registry's seal and the corresponding registration number.

Where the application does not meet the said conditions of form, SENASEM shall return it with the appropriate comments so that the applicant may respond to them and complete the supporting documentation within a period of 30 working days following the date of the notification by SENASEM, which period shall be renewable for 30 more days at the request of the person concerned without any loss of priority.

On expiry of the above period without compliance with the unfulfilled requirements, the application shall be considered abandoned and the priority shall be forfeited.

Article 16. If it accepts the application, SENASEM shall publish it once in an official medium and in a widely circulated newspaper or a newspaper of the capital of the Republic of Venezuela, at the expense of the person concerned, with a view to allowing opposition to the application to be filed where it is thought to violate any of the provisions of Decision 345 of the Commission of the Cartagena Agreement or these Regulations.

Article 17. Where the application meets the technical conditions of substance provided for in Decision 345, and where no third party opposition has been filed, SENASEM shall grant the appropriate breeder's certificate.

Article 18. Where opposition of any kind is filed by third parties, SENASEM shall treat it according to the dispute procedure provided for in Decision 344 of the Commission of the Cartagena Agreement (Common Provisions on Industrial Property) for the purposes of patents.

CHAPTER IV Term of Rights and Licensing Regime

Article 19. Pursuant to Decision 345 of the Commission of the Cartagena Agreement, the term of a breeder's certificate shall be 25 years for vines and forest and fruit trees, including their rootstocks, and 20 years for all other species, in all cases counted from the time of grant.

Article 20. Any licensing or assignment of the rights of breeders of plant varieties shall be registered with SENASEM. Registration shall constitute proof, in the absence of evidence to the contrary, of the existence of the license or assignment.

CHAPTER V Final Provisions

Article 21. SENASEM may initially, for a period not exceeding two years, enter into an agreement with any other official body for the application of Decision 345 of the Commission of the Cartagena Agreement and these Regulations.

Done in Caracas on the day of , nineteen ninety seven. One hundred and eighty seventh year of independence and one hundred and-thirty eighth year of the Federation.

Countersignature

RAFAEL CALDERA

[End of document]