

WIPO



WIPO/GRTKF/IC/8/13

ORIGINAL: English

DATE: June 1, 2005

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

Eighth Session
Geneva, June 6 to 10, 2005

MINISTRY OF AGRICULTURE, RURAL DEVELOPMENT AND FISHERIES,
DECREE-LAW NO. 118/2002

Document submitted by Portugal

1. In a communication dated May 31, 2005, the Government of Portugal submitted a document to the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("the Committee"). The document consists of Decree-Law No. 118/2002 which establishes a legal regime for the registration, conservation, legal safeguarding and transfer of autochthonous plant material as well as associated traditional knowledge. The above-mentioned communication specified that the English text was not the original language or an official translation of the law, since the original text of the law is in Portuguese.
2. The submission is published in the form received in the Annex to this document.

*The Committee is invited to take note of the
contents of the Annex.*

[Annex follows]

ANNEX

MINISTRY OF AGRICULTURE, RURAL DEVELOPMENT AND FISHERIES

Decree-Law No. 118/2002

April 20, 2002

The sovereign rights of States over their genetic resources and the fair and equitable allocation of benefits arising from their use are specified in the Convention on Biological Diversity, under which all Contracting Parties shall, as far as possible and as appropriate, promote the preparation of legislation and other regulatory provisions to protect species diversity and genetic resources.

Furthermore, paragraph 203(e) of the Global Plan of Action for the Conservation and Sustainable Utilization of Plant Genetic Resources for Food and Agriculture, adopted by the FAO International Technical Conference on Plant Genetic Resources in Leipzig in 1996, provides that governments shall consider legislative measures allowing the distribution and commercialization of local varieties.

Among these resources, and specifically with respect to plant material of agrarian, agroforest and landscape interest, local varieties constitute a distinct part within the national genetic heritage. The adaptation of those varieties is promoted by the action of successive generations of farmers who recognize the importance of such material for adding economic value to the region, particularly through sustainable rural development.

In addition to this material, the genetic wealth embodied in spontaneously occurring autochthonous material is an equally important basis for the promotion of sustainable agrarian, agroforest and landscape systems, particularly for the maintenance and development of agrobiodiversity.

The establishment of a mechanism for the legal registration of the aforementioned types of material – applicants for which may be public or private bodies of any kind, such as self-supporting businesses, farmers' associations, regional development associations or individuals – which relies on an adequate description and draws on reference collections specifically designated for the purpose, constitutes a valid basis for the identification of the material and consequently for its correct conservation *in situ* and *ex situ*.

The description of this material, the identity of which shall be defined in *sui generis* terms according to the particular characteristics of the populations to which it belongs, further reinforces the grounds for formulating processes with which to protect appellations of origin and geographical indications and affords some kind of protection against any misappropriation of the material.

This instrument will likewise form the basis for the fair allocation of the benefits generated by the use of this material among the parties involved in their differentiation or maintenance or both. Finally, it will also make a positive contribution to the promotion of the secure interchange of plant genetic resources, at the same time ensuring the protection and preservation of the cultural diversity of local populations that is associated with the plant genetic resources of communities that have not had access to proper intellectual property machinery and so have seen innumerable technical contributions fall into the public domain or

be appropriated by third parties without deriving any benefit therefrom.

WIPO/GRTKF/IC/5/INF/2Annex III, page 54

The adoption and publication of this draft Decree-Law assumes the utmost importance and urgency on account of the obligations arising from the Convention on Biological Diversity signed by the EC on June 13, 1992, and approved on December 21, 1993, to which Portugal is party, and under which the signatory States undertook to adopt adequate legislative measures to allow the distribution and commercialization of local varieties. Similarly, it is only through the adoption and publication of this regime of registration and protection of autochthonous plant material can measures be taken that allow certain specific plant genetic resources to be protected and safeguarded, thus ensuring the cultural diversity of local populations.

Under this Decree conditions may also be established for the collection of specific material with the aim of preventing its extinction.

Therefore:

By virtue of Article 198.1(a) of the Constitution, the Government decrees as follows:

ARTICLE 1. OBJECT

1. This Decree establishes the legal regime for the registration, conservation, legal safeguarding and transfer of autochthonous plant material of current or potential interest to agrarian, agroforest and landscape activity, including the local varieties and spontaneously occurring material referred to in Article 2, as well as associated knowledge, without prejudice to the provisions of Decree-Laws 316/89 of September 22 and 140/99 of April 24.
2. The plant material covered by the application of this Decree, as defined in Articles 2(1) and (2), is considered a phytogenetic resource of the utmost importance, since its access and use depend on the provisions established in this Decree and the regulations under it, without prejudice to current special legislation.

ARTICLE 2. SCOPE

1. This Decree-Law applies to all local varieties and other spontaneously occurring autochthonous material of plant species that are of current or potential interest to agricultural, agroforest or landscape activity, regardless of their genotypical composition, with the exception of varieties protected by intellectual property rights or concerning which the grant of such protection is pending.
2. For the purposes of Articles 4 and 15, the species shall be fixed by joint decree of the Minister of Agriculture, Rural Development and Fisheries and the Minister of the Environment and Land Management on a proposal by the Directorate General for Crop Protection (DGPC) after the Technical Council of the Ministry of Agriculture, Rural Development and Fisheries on Agrarian Genetic Resources, Fisheries and Aquaculture (CoTeRGAPA) has been heard.

3. Any plant material collected that is not included in the species referred to in paragraph (2) must be described by the collector, who shall supply free of charge a description and a representative sample of the material collected to the bodies authorizing the WIPO/GRTKF/IC/5/INF/2Annex III, page 55 collection or, in their absence, to the Regional Agricultural Directorate (DRA) of the geographical region in which the collection took place.

ARTICLE 3. TRADITIONAL KNOWLEDGE

1. Traditional knowledge comprises all intangible elements associated with the commercial or industrial utilization of local varieties and other autochthonous material developed in a non-systematic manner by local populations, either collectively or individually, which form part of the cultural and spiritual traditions of those populations. That includes, but is not limited to, knowledge of methods, processes, products and designations with applications in agriculture, food and industrial activities in general, including traditional crafts, commerce and services, informally associated with the use and preservation of local varieties and other spontaneously occurring autochthonous material covered by this Decree.

2. That knowledge shall be protected against reproduction or commercial or industrial use or both as long as the following conditions of protection are met:

(a) the traditional knowledge shall be identified, described and registered in the Register of Plant Genetic Resources (RRGV);

(b) the description referred to above shall be so phrased that third parties may reproduce or utilize the traditional knowledge and obtain results identical to those obtained by the owner of the knowledge.

3. The owners of the traditional knowledge may choose to keep it confidential, in which case the regulations shall provide for publication in the registration bulletin referred to in Article 12, which shall be limited to disclosure of the existence of the knowledge and identification of the varieties to which it relates, with the protection conferred by registration being limited to cases in which it is unfairly acquired by third parties.

4. The registration of traditional knowledge that until it is requested has not been used in industrial activities or is not publicly known outside the population or local community in which it originated shall afford its owners the right to:

(i) object to its direct or indirect reproduction, imitation and/or use by unauthorized third parties for commercial purposes;

(ii) assign, transfer or license the rights in the traditional knowledge, including transfer by succession;

(iii) exclude from protection any traditional knowledge that may be covered by specific industrial property registrations.

5. The entities defined in Article 9 of this Decree have the right to register traditional knowledge.

6. The registration of traditional knowledge shall be effective for a period of 50 years from the application therefor, and may be renewed for an identical period.

7. The provisions of Articles 7, 9, 10, 12, 13 and 14 shall apply *mutatis mutandis* to traditional knowledge. WIPO/GRTKF/IC/5/INF/2 Annex III, page 56

ARTICLE 4. REGISTRATION OF PLANT MATERIAL

1. Plant material that falls within the scope of this Decree, as defined in Articles 2(1) and (2), may be registered in the RRGV, which shall be kept at the DGPC's National Center for the Registration of Protected Varieties.
2. Registered plant material must possess a designation and description that satisfy the conditions established by decree of the Minister of Agriculture, Rural Development and Fisheries.
3. The description of the plant material on which registration was based shall become the official description thereof for the purposes of this legislation.
4. The registration of the material referred to in paragraph (1) confers on the owner thereof the right to a share in the benefits derived from its use, as provided in Article 7.
5. Registration shall be granted by the Director General of Crop Protection, after CoTeRGAPA has been heard, in accordance with conditions to be defined by joint decree of the Minister of Agriculture, Rural Development and Fisheries and the Minister of the Environment and Land Management.
6. Once registration of the specific plant material has been granted, it shall be included in the National Directory of Registrations of Plant Genetic Resources (LNRGV), for which the RRGV is responsible.

ARTICLE 5. DURATION OF REGISTRATION

Registration shall be valid for a period of ten years and renewed for subsequent periods of the same duration, provided that the conditions required for the registration to be granted are maintained, on pain of termination.

ARTICLE 6. GOODS WITH AN APPELLATION OF ORIGIN OR GEOGRAPHICAL INDICATION

The plant material used in making goods with a protected appellation of origin or geographical indication must be registered, in so far as they are covered by this Decree, and then be entered in the directory referred to in Article 4(6).

ARTICLE 7.
ACCESS TO AND ALLOCATION OF BENEFITS

1. Access to the germ plasm of the plant material referred to in Articles 2(1) and (2) for the purposes of study, research, improvement or biotechnological applications shall be subject to prior authorization by CoTeRGAPA, the owner of the registration having been heard.
2. The use, for industrial or biotechnological purposes, of plants or parts thereof included in the plant material referred to in Articles 2(1) and (2), either directly or through application of the active ingredients contained in them, shall also be subject to prior authorization by CoTeRGAPA, and where appropriate by the competent body of the Ministry of the Environment and Land Management, the owner of the registration having been heard.
WIPO/GRTKF/IC/5/INF/2Annex III, page 57
3. In order to prevent them from becoming extinct, specific restrictions may apply at a local or national level to the collection or uprooting of plants of the species in question or of parts thereof, as determined by joint decree of the Minister of Agriculture, Rural Development and Fisheries and the Minister of the Environment and Land Management.
4. Access as defined in paragraphs (1) and (2) requires a fair allocation of the benefits resulting from such use, by prior agreement with the owner of the registration.

ARTICLE 8.
COMMERCIALIZATION

The rules governing the commercialization of seeds or propagules of plants included in the material mentioned in Articles 2(1) and (2) shall be the subject of a joint decree of the Minister of the Economy, the Minister of Agriculture, Rural Development and Fisheries and the Minister of the Environment and Land Management.

ARTICLE 9.
APPLICANT FOR REGISTRATION

1. An application for the registration of plant material covered by the provisions of Article 4(1) may be filed by any entity, whether public or private, individual or corporate, that fulfils the following conditions:
 - (a) as required by paragraph (2) below, it represents the interests of the geographical area in which the local variety is most widely found or where the spontaneously occurring autochthonous material displays the greatest genetic variability;
 - (b) it complies with the provisions of Article 10(3).
2. To satisfy the conditions mentioned in (1)(a) above, the applicant shall be recognized by the competent municipal chamber by means of a document affirming the entity's fitness to protect the interests referred to in paragraph (1).
3. The municipal chamber competent to confirm the recognition referred to above shall be that designated by CoTeRGAPA, the permanent representatives of the DRA having been

heard, or by the competent body of the Ministry of the Environment and Land Management in the case of autochthonous wild species.

4. In order to prove that the essential conditions for meeting the requirements of paragraph (1)(b) are present, the applicant shall submit a supporting document, approved by the DRA of the area in which the plant material in question is to be maintained.

ARTICLE 10.

RIGHTS AND OBLIGATIONS OF THE OWNER OF THE REGISTRATION

1. The entity owning the registration has the right to receive part of any benefits resulting from the use provided for in Articles 7(1) and (2).

2. The performance of any of the acts provided for in Article 7(1) in the case of registered plant material may only be authorized after the owner of the registration has been heard.
WIPO/GRTKF/IC/5/INF/2 Annex III, page 58

3. The owner of the registration shall be responsible for the maintenance *in situ* of the registered plant material and for ensuring that it remains consistent with its official description, provided for in Article 4(3), and with the technical conditions laid down by CoTeRGAPA, and may delegate the performance of that task to others, in which case the RRGV shall be notified of the entity chosen for the purpose.

4. For the purpose of inclusion in the reference collection or replacement of existing material, the owner of the registration shall be obliged to provide the entity responsible for the coordination of reference collections, at its request and in the place specified by it, with propagating material corresponding to the registration that has the characteristics specified by the DGPC and conforms to the official description referred to in Article 4(3).

ARTICLE 11.

REFERENCE COLLECTION

1. The entity responsible for the technical supervision of reference collections shall be the DGPC, and CoTeRGAPA shall promote and coordinate the establishment and maintenance of the reference collections, which must include all material registered at the regional or the national level, depending on what is most appropriate in each specific case.

2. In the case of material registered or in the process of being registered, the owner of the reference collection may not supply it to third parties without authorization from the registration owner or applicant and a favorable ruling from CoTeRGAPA.

ARTICLE 12.
REGISTRATION BULLETIN

The DGPC shall from time to time publish a bulletin reporting all material submitted for registration and that which has already been registered in the LNRGV, and also traditional knowledge registered in accordance with the provisions of Article 3.

ARTICLE 13.
VIOLATIONS

1. The use of plants or parts thereof that constitute plant material within the meaning of Article 2(1) and (2) in a manner contrary to the provisions of Articles 7(1), (2) and (3) and to the regulations under this Decree, and also infringement of the provisions on traditional knowledge contained in Article 3, constitute violations punishable with a fine of between €100 and €2,500.
2. Negligence is punishable.
3. In the event of responsibility for the violation resting with a corporate entity, the maximum amount of fines shall be €30,000.
4. The proceeds from fines shall revert to the DGPC (20%), the National Agrarian Research Institute (10%) and the DRA concerned (10%), with the remainder going to State funds.
5. The DRA shall be competent to manage the violation proceedings provided for in this Article, and the Director General for Crop Protection shall be competent to impose the corresponding fines and accompanying sanctions. WIPO/GRTKF/IC/5/INF/2 Annex III, page 59.

ARTICLE 14.
ACCOMPANYING SANCTIONS

Depending on the seriousness of the violation and the degree of guilt of the party who committed it, the following accompanying sanctions may be imposed in addition to the fine according to the provisions of the general regime governing violations:

- (a) loss of the guilty party's property;
- (b) prohibition from the exercise of a profession or activity that requires a public enactment or the approval of a public authority;
- (c) removal of the right to participate in fairs and markets;
- (d) removal of the right to bid or to participate in tenders or public competitions in connection with the award of contracts for the execution of public works, the supply of goods and services, the rendering of public services and for the award of licenses and permits;
- (e) closure of an establishment that relies for its operation on authorization or licensing by an administrative authority;
- (f) suspension of authorizations, licenses and permits.

ARTICLE 15.
CIVIL LIABILITY

The imposition of the fines referred to in the preceding Article shall not prevent the owner from claiming his rights under Articles 7 and 10, and specifically the right to compensation and a share in benefits.

ARTICLE 16.
FEES

Registration in the LNRGV or the RRGV is subject to the payment of fees to be fixed by joint decree of the Minister of Agriculture, Rural Development and Fisheries and the Minister of Finance.

ARTICLE 17.
REGULATIONS

Implementing regulations under this Decree shall be enacted by joint decree of the Minister of Agriculture, Rural Development and Fisheries and the Minister of the Environment and Land Management. Seen and approved in the Council of Ministers on January 23, 2002.

António Manuel de Oliveira Guterres

Guilherme d'Oliveira Martins

António Luís Santos Costa

Luís Manuel Capoulas Santos

José Sócrates Carvalho Pinto de Sousa.

Annex III, page 60

Promulgated on April 5, 2002.

Publication of the foregoing is hereby ordered.

The President of the Republic, JORGE SAMPAIO.

Countersigned on April 5, 2002.

The Prime Minister, *António Manuel de Oliveira Guterres.*

[End of Annex and of document]