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UPOV**C(Extr.)/11/4****ORIGINAL : French****DATE : April 11, 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 PORTUGAL
WITH THE UPOV CONVENTION**Document prepared by the Office of the Union**Introduction**

1. By letter dated March 11, 1994, the Secretary of State for Agriculture of Portugal 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 Portuguese legislation on plant variety protection with the 1978 Act. The letter is reproduced in Annex I to this document.

2. Portugal 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 if the State concerned 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 Plant Varieties in Portugal

3. Legislation comprises:

i) Decree-Law No. 213/90 (of June 28 [1990]), reproduced in Annex II to this document;

ii) Ministerial Order No. 940/90 (of October 4 [1990]), reproduced in Annex III to this document.

Regulations on the Protection of New Plant Varieties are attached as an annex to the said Order. The Regulations were last amended, in respect of the list of protected species, by Ministerial Order No. 379/93 of April 3, 1993. The said list is reproduced in Annex IV to this document.

4. An analysis of the legislation follows in the order of the substantive law provisions of the 1978 Act. This analysis has been submitted to the Portuguese authorities, which have agreed to it.

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

5. 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(1) of the Decree-Law provides that "this Decree-Law establishes the legal regime governing breeders' rights in new plant varieties." The purpose of the legislation under study thus accords with the purpose of the Convention.

Article 2 of the 1978 Act: Forms of Protection

6. Portuguese legislation provides for the grant of "breeder's rights" which constitute a "special title of protection" within the meaning of Article 2(1) of the 1978 Act.

7. Neither the legislation on the protection of new plant varieties nor the legislation on patents--based on a text which dates back to 1940--provide for an exclusion of plant varieties from patentability. A draft new patent law is under preparation; in view of the harmonization efforts deployed at the European level, the new law will contain an exclusion provision based upon Article 53(b) of the European Patent Convention. Moreover, it may be concluded from Article 1(1) of the Decree-Law ("this Decree-Law establishes the legal regime ... " (emphasis added)) and from the preamble to the Decree-Law that the breeder's right is the only form of protection available in Portugal for plant varieties as such.

8. The legislation of Portugal thus conforms with Article 2 of the 1978 Act.

Article 3 of the 1978 Act: National Treatment; Reciprocity

9. Article 2(1) of the Regulations makes the access of foreigners to protection subject to the provisions of the international conventions to which Portugal is party. Portugal will thus be able to conform to Article 3 of the 1978 Act.

10. According to Article 2(2) of the Regulations, in the absence of conventions, the access to protection is closed to nationals of another State only where that other State has a protection system, but has not opened it to Portuguese nationals in the same circumstances, i.e. does not grant reciprocity.

11. The corresponding implementation rule appears in Article 8(1) of the Regulations. According to that provision, the access of foreigners to protection is governed by the principles set out in paragraphs (1) to (3) of Article 3 of the 1978 Act, including the rule of reciprocity.

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

12. The list of protected taxa currently contains 43 entries; Portugal thus conforms with the minimum requirements set out in Article 4 of the 1978 Act.

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

13. The content of the breeder's right is defined in general terms in Article 4 of the Decree-Law; the definition is repeated in Article 4 of the Regulations.

14. The breeder's right confers on its holder the exclusive entitlement to produce and market plants of the variety or the corresponding reproductive or vegetative propagating material. This language covers all elements of Article 5(1) of the 1978 Act; it seems to go further than the said Article, since the exclusive entitlement to produce is not limited to "purposes of commercial marketing."

15. Article 5(3) of the 1978 Act is taken over in Article 4(2) of the Decree-Law (and of the Regulations).

Article 6 of the 1978 Act: Conditions Required for Protection

16. The conditions of distinctness, homogeneity, stability and novelty are mentioned in Article 2 of the Decree-Law and amplified in Article 5(1) of the Regulations in terms which enable Portugal to conform with Article 6(1)(a) to (d) of the 1978 Act. It should be noted that Portugal applies the one-year "grace period." The requirement for denominations to meet the specified conditions (Article 6(1)(e) of the 1978 Act) is taken over in Article 5(2) of the Regulations.

17. The Decree-Law and the Regulations contain no further condition, except for the fulfilment of the formalities and the payment of fees, and also for the designation of a representative where the applicant has no place of residence or registered office in Portugal or where there are several applicants.

18. The legislation thus conforms with Article 6 of the 1978 Act.

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

19. The examination of varieties is contemplated by Article 17 of the Regulations in terms which enable Portugal to conform to Article 7(1) and (2) of the 1978 Act.

20. There is no provisional protection. Under Article 7(3) of the 1978 Act, however, provisional protection is optional.

Article 8 of the 1978 Act: Period of the Protection

21. Under Article 4 of the Decree-Law, the minimum term of protection is 15 years for herbaceous plants and 20 years for woody plants. These minimum durations have been specified as effective durations in Article 6 of the Regulations, which conforms with Article 8 of the 1978 Act.

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

22. Article 24 of the Regulations provides for a regime of compulsory licenses in terms which conform to Article 9 of the 1978 Act.

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

23. Portuguese legislation, like many others, makes no distinction between nullity and forfeiture; the Decree-Law uses the term "lapse" (extinção) in Article 5, and the Regulations, "lapse" (caducidade) in Article 27 (on expiry of the period of protection) and "revocation" in Article 28 (for cases where the breeder's right is terminated before the said expiry). Moreover, Portuguese legislation, like some others, does not distinguish between the cases where forfeiture is mandatory and those where it is discretionary.

24. This results in provisions that are much simpler than those of Article 10 of the 1978 Act, but still conform in essence with the latter.

25. According to Article 28 of the Regulations, the breeder's right may be revoked for failure to pay the fees due (thus covering Article 10(3)(b) of the 1978 Act), for failure to provide material or for obstructing the inspection of the measures taken for the maintenance of the variety (which corresponds to Article 10(3)(a) of the 1978 Act; these provisions are partly repeated in Article 22 of the Regulations) and, finally, "where the plant variety ceases to display the characteristics on the basis of which [the rights] were granted." Both the annulment under Article 10(1) of the 1978 Act and the forfeiture under Article 10(2) may be covered by this language.

26. Furthermore, the breeder's right may be revoked where it has been granted to a person who was not entitled thereto (Article 28(1)(f) of the Regulations), but it may also be transferred to the rightful owner (Article 28(2) of the Regulations). These provisions, although not foreseen by Article 10 of the 1978 Act, are perfectly legitimate and appear in the legislation of many member States, and also in Article 21(1)(iii) of the 1991 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

27. Portuguese legislation contains no provision contrary to Article 11 of the 1978 Act.

Article 12 of the 1978 Act: Right of Priority

28. The provisions regarding priority appear in Article 11 of the Regulations; they essentially conform with Article 12 of the 1978 Act.

Article 13 of the 1978 Act: Variety Denomination

29. The provisions regarding variety denominations appear in Articles 12 and 13 of the Regulations; they essentially conform with Article 13 of the 1978 Act, and also with the UPOV Recommendations Concerning Variety Denominations.

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

30. The legislation under study contains no provision conflicting with the provisions of Article 14 of the 1978 Act.

Article 30(1) of the 1978 Act: Implementation of the Convention on the Domestic Level

31. Neither the Decree-Law, nor the Regulations contain provisions on appropriate legal remedies for the effective defense of the rights conferred by the breeder's right. According to information received from the Portuguese authorities, such remedies are available, however, under the Civil Code. Similarly, there is no provision enabling an applicant to lodge an appeal against a decision by the competent authority. According to the said information, the right to appeal arises from the general administrative law.

32. On the other hand, Article 7 of the Decree-Law provides that the infringement of the rights of the breeder constitutes an offense (contra-ordenação) punishable with a fine.

33. Article 6 of the Decree-Law provides for the institution of the National Registry of Protected Varieties (CENARVE) within the National Institute of Agricultural Research (INIA). The composition and functioning of CENARVE are the subject of detailed provisions appearing in Articles 2 to 7 of the Ministerial Order.

34. Article 8 of the Ministerial Order provides for the publication of a journal of CENARVE which meets the requirements set out in Article 30(1)(c) of the 1978 Act. Details are given in Article 15(1) of the Regulations on the information to be published in the case of an application, and in Article 20(2) to (5) on information to be published in the case of the grant or refusal to grant a breeder's right.

General Conclusion

35. In the opinion of the Office of the Union, Portuguese legislation on the protection of new varieties of plants essentially conforms with the 1978 Act and will enable Portugal to "give effect to the provisions of this Convention" as provided by Article 30(3) of the said Act.

36. The Council is invited to:

i) take a positive decision on the conformity of the legislation of Portugal on the protection of new varieties of plants with the provisions of the 1978 Act, in accordance with Article 32(3) of that Act;

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

[Four annexes follow]

ANNEX I

**LETTER, DATED MARCH 11, 1994, FROM MR. ALVARO DOS SANTOS AMARO,
SECRETARY OF STATE FOR AGRICULTURE OF PORTUGAL,
TO THE SECRETARY-GENERAL OF UPOV**

I have the honor to inform His Excellency that Decree-Law No. 213/09 which regulates the protection of plant varieties has been published in the Official Gazette of Portugal and has been the subject of regulations under Ministerial Order No. 940/90, as amended by Orders Nos. 351/90, 15/92 and 379/93.

Portugal now wishes to request the Council of the International Union for the Protection of New Varieties of Plants, pursuant to the provisions of Article 32, paragraph (3) of the 1978 Act of the UPOV Convention, to pronounce on the conformity of the attached Decree-Law and Orders with 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.

To this effect I am sending to his Excellency a copy of the said Decree-Law and Orders in the Portuguese language, together with an English translation thereof.

[Annex II follows]

ANNEX II

**DECREE-LAW No. 213/90
of June 28**

The extraordinary progress made in plant breeding, due among other things to ever-greater knowledge in the fields of physiology and biotechnology, has been responsible for the appearance of new varieties in almost all developed countries.

Thanks to their superior or improved characteristics, those new varieties --already commonly called "prestige varieties"--are designed to solve the problems of improving quality, increasing unitary yield, enhancing disease and pest resistance or raising market value.

In order to produce and fix their new varieties, breeders have to devote a great deal of time to research, invest considerable amounts in the acquisition of material and conduct numerous experiments and growing trials.

It is therefore no more than justice that the breeder's right should be recognized, through the grant of a title of protection for such varieties, which, by ensuring just recompense for their skills and their work, at the same time strongly motivates them to develop their plant breeding work and thereby contribute to the defense and enrichment of the national genetic heritage.

Consequently,

Pursuant to subparagraph (a) of paragraph (1) of Article 201 of the Constitution, the Government decrees as follows:

Article 1**Object**

(1) This Decree-Law establishes the legal regime governing breeders' rights in new plant varieties.

(2) Those botanical species the plant varieties of which may be the subject of breeders' rights shall be specified by order of the Minister of Agriculture, Fisheries and Food.

Article 2**Plant Varieties Eligible for Protection**

Breeders' rights may be accorded solely in respect of those plant varieties which, according to the definition to be laid down by order of the Minister of Agriculture, Fisheries and Food, are deemed to be distinct, homogeneous, stable and new.

Article 3

Content of the Breeder's Right

(1) The breeder's right in a plant variety shall confer on its owner exclusive entitlement to produce and market plants of that variety or the corresponding reproductive or vegetative propagating material.

(2) The breeder's right shall not prevent the use of the protected plant variety as initial or basic material for the production of other varieties, except where its repeated or systematic use is necessary.

Article 4

Term of Breeders' Rights

(1) Breeders' rights shall have a limited term which shall be a minimum of 15 or 20 years, depending on whether they relate to herbaceous plants or to woody plants.

(2) Terms may differ according to species or group of species.

Article 5

Lapse of the Breeder's Right

The breeder's right shall lapse, inter alia:

- (a) when its term has expired;
- (b) when fees due have not been paid;
- (c) when the plant variety no longer displays the characteristics required by this Decree-Law and the Regulations under it;
- (d) when the breeder or the actual owner so requests;
- (e) when it is demonstrated that the holder of the right is not the lawful owner thereof.

Article 6

National Registry of Protected Varieties

(1) The National Registry of Protected Varieties (Centro Nacional de Registo de Variedades Protegidas--CENARVE) is hereby created, to operate within the framework of the National Institute of Agricultural Research (Instituto Nacional de Investigação Agrária--INIA), the President of which shall direct it.

(2) CENARVE shall be responsible for taking the necessary action for the implementation of this Decree-Law.

(3) The President of INIA, in his capacity as Director of CENARVE, shall be assisted, in the exercise of the functions conferred on him by this Decree-Law, by a Technical Board, the membership of which shall be laid down by order of the Minister of Agriculture, Fisheries and Food.

(4) The members of the Technical Board shall carry out their functions without remuneration.

Article 7

Offenses

(1) The production, marketing and use of plant varieties in breach of the provisions of Article 3 of this Decree-Law and the Regulations for which it provides shall constitute an offense (contra-ordenação) punishable with a fine of 20,000 to 500,000 escudos.

(2) Negligence shall be punishable.

(3) Where liability for the offense lies with a legal entity, the maximum amount of the fines shall be 6,000,000 escudos in the case of a fraudulent act or 3,000,000 escudos in the case of an act committed by negligence.

(4) Forty per cent of the proceeds from fines imposed shall be paid to INIA, and the balance to the State Treasury.

Article 8

Fees

For the purposes of registration with CENARVE and the keeping of its Register, the persons and entities concerned shall pay fees, the amount of which shall be set in accordance with paragraph (2) of Article 38 of Decree-Law No. 5-A/88 (of January 14).

Article 9

Regulations

The technical provisions for the implementation of this Decree-Law shall be approved by order of the Minister for Agriculture, Fisheries and Food.

[Annex III follows]

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ANNEX III

**MINISTERIAL ORDER No. 940/90
of October 4**

Whereas Decree-Law No. 213/90, of June 28, lays down the general principles of the legal regime governing breeders' rights in new plant varieties;

Whereas it is becoming essential to organize and establish those principles;

Considering the provisions of paragraph (2) of Article 1, of paragraph (3) of Article 6 and of Articles 8 and 9 of Decree-Law No. 213/90, of June 28;

The Government, through the agency of the Minister for Agriculture, Fisheries and Food, orders as follows:

1. (1) The Regulations on the Protection of New Plant Varieties, annexed to this Order, of which they form an integral part, are approved.

(2) The Regulations on the Protection of New Plant Varieties shall enter into force 30 days after the date of their publication.

2. (1) The National Registry of Protected Varieties, designated by the abbreviation CENARVE, shall be the department responsible for the implementation of the provisions of this Order.

(2) CENARVE shall operate within the framework of the National Institute of Agricultural Research, and shall be directed by the President of that Institute or by his representative.

3. CENARVE shall be responsible, inter alia, for:

- (a) producing and examining documents in support of the grant of breeders' right;
- (b) conducting tests and inspections, and taking any other action necessary to evaluate and rule on applications for the grant of a breeder's right;
- (c) requesting or contracting for the provision of specialized services in its areas of concern, particularly with regard to IHS (identity, homogeneity and stability) testing;
- (d) producing a periodical journal to publicize the varieties granted protection and also the most important documents from the files on the grant of a breeder's right;
- (e) seeking the cooperation of the Departments of the Ministry of Agriculture, Fisheries and Food where such cooperation proves necessary for the proper conduct of its activities;
- (f) coordinating its action with that of other bodies--both national and foreign--that concern themselves with plant variety protection matters, and promoting the conclusion of such agreements and protocols as may prove necessary or useful for the safeguarding of the interests in its charge.

4. The Director of CENARVE shall be responsible, inter alia, for:
 - (a) directing CENARVE and coordinating its operations;
 - (b) presiding over the Technical Board of CENARVE;
 - (c) issuing breeders' certificates, amending them or revoking them;
 - (d) proposing to higher authorities such regulatory and legislative acts and measures as are necessary for the discharge of CENARVE's duties;
 - (e) performing any other acts provided for in this Order or in other legislative or regulatory texts.
5. (1) The Technical Board is a consultative body that advises the Director of CENARVE; its members shall be:
 - (a) the Director of CENARVE, who shall preside over it;
 - (b) the Director of the National Center for the Protection of Agricultural Production, or his representative;
 - (c) a representative of the breeders' associations;
 - (d) a representative of the seed producers' associations;
 - (e) a representative of the associations of producers of vegetative propagating material;
 - (f) two public figures of recognized competence in the field of plant variety protection, one of them having legal training.

(2) The members referred to in the foregoing paragraph under (c), (d), (e) and (f) shall be designated by the Director of CENARVE, after the relevant associations have been heard.

(3) The Director of CENARVE may invite public figures of recognized competence to attend meetings of the Technical Board, without the right to vote, should such a step prove useful for the clarification of matters under consideration.

(4) The secretariat shall be provided by a CENARVE official designated by the Chairman of the Board, which official shall not have the right to vote.
6. (1) The Technical Board of CENARVE shall be responsible for:
 - (a) issuing the advice provided for in this Order and pronouncing on all questions submitted to it by the Director of CENARVE;
 - (b) proposing to the Director of CENARVE such acts and measures as it considers useful for the satisfactory performance of CENARVE's duties.

(2) Where not provided otherwise by law or by a decision of the Director of CENARVE, the Technical Board shall issue the reports requested of it within a maximum period of one month.
7. The Technical Board shall meet in accordance with the rules governing it; minutes shall be taken of every meeting.

8. (1) For the purpose of publicizing the main documents in the files entrusted to CENARVE, a periodical journal entitled CENARVE Bulletin (Boletim do CENARVE) shall be produced.

(2) The CENARVE Bulletin shall publish the following, inter alia:

- (a) applications for the grant of breeders' rights accepted by CENARVE;
- (b) the refusal and the grant of breeders' certificates, and also the amendment, revocation or lapse thereof where applicable.

Regulations on the Protection of New Plant Varieties

CHAPTER I

General Provisions

Article 1

Object

These Regulations establish the legal regime for the breeders' rights in accordance with Decree-Law No. 213/90 of June 28.

Article 2

Persons to Whom the Regime Applies

(1) Foreigners shall enjoy the protection granted to nationals under the conditions laid down in the conventions to which Portugal is party.

(2) In the absence of international conventions, foreigners shall enjoy the protection granted to nationals except where the legal order in the country concerned, while granting protection to its own nationals, does not do so to Portuguese nationals in the same circumstances.

Article 3

Definitions

For the purposes of these Regulations:

- (a) "clone" means a group of individuals produced by vegetative propagation from a single plant and having an identical genetic heritage;
- (b) "line" means a natural or artificial sexually-reproduced group having sufficient uniformity;
- (c) "stock" means the offspring of plants of the same origin, produced by selection and possessing numerous common characteristics;
- (d) "hybrid" means a plant resulting from spontaneous or induced crosses from parent material with a generally different genetic heritage;
- (e) "new plant variety" means any variety (cultivar), clone, line, stock or hybrid recognized as such from a technical or commercial point of view.

CHAPTER II

Fundamental PrinciplesArticle 4

Content of the Breeder's Right

(1) The breeder's right in a plant variety shall confer on its owner exclusive entitlement to produce and market plants of that variety or the corresponding reproductive or vegetative propagating material.

(2) The breeder's right shall not prevent the use of the protected plant variety as initial or basic material for the production of other varieties, except where its repeated or systematic use is necessary.

Article 5

Requirements for the Grant of Plant Breeders' Rights

(1) The breeder's right in a plant variety shall be granted for any new variety which:

- (a) is distinct, meaning that, irrespective of the manner in which it was produced, it differs from any other variety whose existence is recognized, by one or more characteristics susceptible of recognition and precise description;
- (b) is homogeneous, meaning that all the plants constituting the new variety are similar, taking into account the particular features of its reproduction or vegetative propagation;
- (c) is stable, meaning that, after repeated reproduction or vegetative propagation, it displays the same essential characteristics, in conformity with the description given by its breeder;
- (d) is new, meaning that, on the filing date of the corresponding application for the grant of a breeder's right, it has not been put on sale or marketed within the country for more than one year--with its breeder's consent--or abroad for more than six years or four years in the case of woody plants or herbaceous plants, respectively.

(2) In addition to the conditions specified in the foregoing paragraph, the grant of a breeder's right shall be determined by the conformity of the relevant denomination to the provisions of these Regulations and by compliance with the other conditions laid down therein.

Article 6

Term of Breeders' Rights

Breeders' rights shall have a term of 15 or 20 years, depending on whether they relate to herbaceous plants or to woody plants.

Article 7*

Protected Species

The botanical genera and species the varieties of which may be the subject of breeders' rights shall be the following:

- (a) cereals: rice, oats, rye, barley, maize, wheat and triticale;
- (b) oil-bearing plants: sunflower and soya bean;
- (c) fodder plants: ryegrass, common vetch, lupin, clover, lucerne and fescue;
- (d) horticultural plants: tomato, sweet pepper, French bean, broad bean, onion, turnip and melon;
- (e) Pip fruit: apple and pear;
- (f) Stone fruit: peach, plum, apricot, almond and cherry;
- (g) Soft fruit: raspberry, currants and gooseberry, blackberry and blueberry;
- (h) Grapevine;
- (i) Annona;
- (j) Strawberry;
- (l) Potato;
- (m) Ornamental plants: rose, carnation, chrysanthemum, Leucospermum, Leucadendrum and Protea.

CHAPTER III

Procedure for the Grant of Protection

Article 8

Persons Qualified to Apply for the Grant of Breeders' Rights

(1) The grant of a breeder's right in a plant variety may be applied for by the breeder thereof or by whoever succeeds him, whether by contract or mortis causa, provided that the person concerned is:

- (a) of Portuguese nationality;
- (b) of foreign nationality but resident in Portugal;
- (c) a legal entity with headquarters in Portugal;
- (d) a national of a member State of the International Union for the Protection of New Varieties of Plants (UPOV) or a natural person or legal entity with residence or headquarters in one of the States of the Union, provided that the State concerned grants protection to the species or genus to which the variety referred to in the application belongs;

* As amended by Order No. 379/93, of April 3.

- (e) a national of another State or a natural person or legal entity with residence or headquarters in a State in which Portuguese, or foreigners resident in Portugal and legal entities with headquarters in Portugal, enjoy the same protection as is accorded to the nationals of the State concerned with respect to varieties belonging to the genus or species referred to in the application.

(2) Persons or entities not resident or not having headquarters in Portugal may apply for the grant of a breeder's right only if they designate a representative who fulfils those conditions.

(3) Where two or more persons have jointly discovered a plant variety, the corresponding application for a breeder's right shall likewise be drawn up jointly; a representative shall however be appointed who shall act in the name of all of them in any relations to be conducted with CENARVE.

(4) The representative referred to in the foregoing paragraph may be one of the applicants or a third party. Where no representative is appointed, the applicant named first shall be considered the representative.

Article 9

Application for the Grant of a Breeder's Right

(1) The application for the grant of a breeder's right may be filed with CENARVE personally or sent by registered letter with notice of receipt.

(2) The application, made on the appropriate printed forms provided by CENARVE, shall be written in Portuguese, and any documents to be submitted that are written in a foreign language shall be accompanied by a duly certified translation.

(3) The date of the application shall be that of its filing with CENARVE.

Article 10

Conditions to Be Met by the Application for the Grant of a Breeder's Right

1. The application for the grant of a breeder's right shall contain the following particulars:

- (a) the name or business style of the applicant, with residence or headquarters;
- (b) the nationality of the applicant in the case of a natural person;
- (c) the name and address of the representative, if any;
- (d) the name and address of the breeder, if other than the applicant;
- (e) the denomination of the plant variety or the designation given it by its breeder;
- (f) where the plant variety is protected or where protection has already been applied for in any country, the following particulars shall also be given;

- the identity of that country or those countries;
 - the denomination registered in that country or those countries;
 - the number under which the application for or title of protection is registered;
 - the date of the application or title granted;
- (g) if any priority is claimed, the date of the first application for the grant of a breeder's right and the country in which it was filed;
- (h) the signature of the applicant or his representative.
- (2) The application shall be accompanied by:
- (a) a full description of the plant variety;
 - (b) a power of attorney signed before a notary, where the application is filed by a representative;
 - (c) where the application is not made by the breeder, a document attesting the acquisition of the corresponding rights;
 - (d) a declaration stating that the plant variety is new within the meaning of these Regulations;
 - (e) a declaration stating that the applicant undertakes, as from the grant of the breeder's right, not to exercise his rights in the use of any trademark or trade name liable to cause confusion with the denomination for which protection is sought that may have been registered in his favor in the country or in any other country with which Portugal has entered into an agreement on identical or similar goods;
 - (f) any other particulars that the applicant considers useful for the full evaluation of the application;
 - (g) the amount of fees payable;
 - (h) an inventory of the documents submitted to CENARVE.
- (3) The description referred to in subparagraph (a) of the foregoing paragraph shall expressly state:
- (a) the botanical species to which the plant variety belongs;
 - (b) the main morphological and physiological characteristics and also, in the case of hybrid varieties, the main morphological and physiological characteristics of the parents;
 - (c) the technique used to breed the variety concerned;
 - (d) the similarities and differences of the variety in relation to any other variety in existence.

Article 11

Benefit of Priority

(1) When applying for the grant of a breeder's right in a plant variety, the person concerned may claim the benefit of priority if, less than one year previously, he has filed an application in due form for the protection of the same variety in a member country of UPOV.

(2) The effect of the benefit of priority shall be that the date of the application for the grant of a breeder's right shall be deemed to be that of the earlier application for grant filed in the foreign country.

(3) The request for priority shall be considered in the light of copies of the documents attesting the filing of the earlier application for the grant of a breeder's right on the basis of which priority is claimed, duly certified and dated by the appropriate departments.

(4) The documents referred to in the foregoing paragraph shall be filed together with the application for the grant of a breeder's right or within the three months thereafter, failing which the benefit of priority shall not be recognized.

(5) Where appropriate, the applicant shall state in the application for the grant of a breeder's right the date on which he intends to submit the propagating material referred to in paragraph (3) of Article 16, whereby the period of four years following the date on which the priority expires may not be exceeded.

(6) The request for priority shall be accompanied by the amount of the fee payable.

Article 12

Denomination of the Plant Variety

(1) Any plant variety shall be designated by a single denomination that enables it to be identified and is different from that used for any other plant variety of the same or a related species already registered in the country or in any other member State of UPOV.

(2) The denomination given to a protected variety may not be used as a trademark or trade name for any new plant variety of the same or a related species.

Article 13

Conditions to Be Met by the Denomination

(1) The denomination of the plant variety may be composed of:

- (a) not more than three words;
- (b) an alphanumerical combination comprising not more than four elements;
- (c) a combination of words and letters comprising not more than four elements;
- (d) a combination of words and numerals comprising not more than four elements.

(2) The proposed denomination shall be written in full.

(3) The proposed denomination must not:

- (a) be difficult to pronounce or remember;

- (b) be misleading as to the origin, source, value or characteristics of the plant variety or the identity of the breeder;
- (c) be identical, or easy to confuse, with another denomination already registered in the country or in any other member State of UPOV, which is used to designate a plant variety of the same species or of a species in the same class;
- (d) be contrary to morality or public policy;
- (e) incorporate the botanical or common name of a plant genus or species, or the words "variety," "cultivar," "hybrid," "form" or "cross";
- (f) give the impression that the plant variety derives from another variety, or is related to such a variety, when that is not the case;
- (g) evoke solely characteristics that are common to other protected plant varieties of the same species;
- (h) be inadequate for linguistic reasons;
- (i) be identical to a denomination used to designate another commonly-grown plant variety, even if the latter variety is already public property.

(4) Notwithstanding the provisions of the foregoing paragraph, if the plant variety for which protection is sought is already protected in another member State of UPOV, or if an application for protection has already been filed in such a State, only the previously-used denomination may be proposed and registered.

(5) The denomination of the protected plant variety shall always be used for the marketing of the said variety, or for the marketing of propagating material of the variety, even after the term of protection has expired.

Article 14

Acceptance or Rejection of the Application

(1) Within a period of five working days following the date of its filing with CENARVE, the application for the grant of a breeder's right shall be examined to determine whether it fulfils the conditions laid down in these Regulations.

(2) If it contains all the elements necessary for evaluation, the application shall be accepted and entered in a special register, in which the filing date shall also be recorded.

(3) Where the application is incomplete, or where CENARVE considers that further details are necessary, it shall invite the applicant to provide them and shall set a time limit for the purpose which shall be neither shorter than 15 days nor longer than 30 days.

(4) Where the elements requested pursuant to the foregoing paragraph are not communicated within the time limit set, the application shall be rejected and the fact shall be notified to the applicant, who shall not be entitled to repayment of any fees already paid.

Article 15

Publication of the Application and Oppositions Filed Against It

(1) Once the application has been accepted, it shall be published in the CENARVE Bulletin, which shall record the date of filing, the name or business style of the applicant with address, the name or business style of the breeder --if other than the applicant--with address, the proposed denomination and the main characteristics of the variety as given in the application.

(2) Within two months following the date of the publication referred to in the foregoing paragraph, any interested party may file opposition to the grant of the breeder's right in question.

(3) Oppositions shall be filed in triplicate and shall clearly and precisely state:

- (a) the name or business style and address of the opponent;
- (b) the application for a breeder's right opposed and the issue of the CENARVE Bulletin in which it was published;
- (c) the grounds on which the grant of the breeder's right should be refused.

(4) Oppositions filed with CENARVE shall be communicated to the applicant, in order that the latter may reply to them within a period of 30 days.

Article 16

Decision on the Continuation of the Procedure

(1) On expiry of the time limit set in paragraph (2) of the foregoing Article or, where oppositions have been filed, after the submission of the reply or the expiry of the time limit allowed for the purpose, the Director of CENARVE shall decide whether to continue or to cancel the procedure, basing his decision, inter alia, on oppositions filed and, if possible, satisfying himself that the requirement specified in subparagraph (d) of paragraph (1) of Article 5 has been fulfilled.

(2) Cancellation of the procedure shall be notified to the applicant with a sufficient statement of reasons.

Article 17

Tests for Distinctness, Homogeneity and Stability

(1) New plant varieties for which an application for the grant of a breeder's right has been made shall be tested to determine their distinctness, homogeneity and stability.

(2) The tests referred to in the foregoing paragraph shall be carried out by CENARVE or by any other body, either national or foreign, designated by it.

(3) CENARVE shall inform the applicant of the quantity of propagating material that he has to provide, and also of the place and date of delivery;

C(Extr.)/11/4
Annex III, page 12

it shall likewise inform him of the body that will be carrying out the tests, the place in which they will be carried out, the date on which they will start and their expected duration.

(4) In the course of the tests, CENARVE may request the applicant to provide further information or additional propagating material, setting a date for compliance.

(5) Where the applicant does not deliver the propagating material referred to in paragraph (3) to the place or on the date specified, or where without explanation he refuses to cooperate in the manner described in the foregoing paragraph, the application shall be cancelled without reimbursement of any fees already paid.

Article 18

Test Results

(1) Once the IHS tests have been completed, the body that has carried them out shall draw up a report on them and also a final assessment of the new plant variety.

(2) The documents referred to in the foregoing paragraph shall be sent to the applicant, who shall be allowed one month within which to comment on them.

Article 19

Advice of the Technical Board

Once the period referred to in paragraph (2) of the foregoing Article has expired, the file shall be submitted to the Technical Board of CENARVE for its advice.

Article 20

Decision and Publication

(1) Once the advice of the Technical Board of CENARVE has been given or the period set for the purpose has expired, the file shall be submitted to the Director of CENARVE for a decision.

(2) If the breeder's right applied for is granted, a title called a "breeder's certificate" shall be issued in which the following particulars shall appear:

- (a) the number thereof;
- (b) the species to which the plant variety that is the subject of the breeder's right belongs;
- (c) the denomination given to the plant variety;
- (d) the name of the owner of the breeder's right and that of the breeder if another person;
- (e) the date of grant of the certificate and that on which the protection afforded by it ceases to operate;
- (f) the signature of the Director of CENARVE.

(3) The grant of the breeder's certificate shall be published in the CENARVE Bulletin, which shall record the elements referred to in the foregoing paragraph.

(4) Refusal to grant the breeder's right shall also be published, with an indication of the grounds on which it was pronounced.

Article 21

Recording in the National Register of Protected Varieties

(1) The grant of a breeder's right shall be recorded in the Register of Protected Varieties in chronological order.

(2) The Register entry referred to in the foregoing paragraph shall contain the following:

- (a) the elements mentioned in paragraph (2) of the foregoing Article;
- (b) the serial number and dates of filing and acceptance of the application;
- (c) the description of the plant variety, drawn up after the tests of identity, homogeneity and stability;
- (d) the name and residence of the representative, if any;
- (e) the date on which the breeder's certificate was issued, and the date of publication thereof in the CENARVE Bulletin;
- (f) payment of the required fees;
- (g) revocation or transfer of the breeder's right;
- (h) any licenses granted;
- (i) judicial actions concerning the breeder's right.

(3) Any alteration to Register entries shall be communicated to CENARVE for recording.

CHAPTER IV

Post-controls and Maintenance Fees

Article 22

Post-controls

(1) CENARVE may demand of the owner of a breeder's right that he provide additional material or documents for the purposes of tests to determine whether the protected plant variety still retains the characteristics on the basis of which the said right was granted.

(2) For the purposes of the controls referred to in the foregoing paragraph, CENARVE may inspect the maintenance growing plots.

(3) Failure to observe the provisions of paragraph (1), or unwarranted opposition to the inspections referred to in the foregoing paragraph, shall cause the breeder's right concerned to be revoked.

Article 23

Maintenance Fees

The owner of a breeder's right shall pay the appropriate maintenance fee for each year of the term of protection.

CHAPTER V

Transfer of the Breeder's Right and Exploitation Licenses

Article 24

Transfer of the Breeder's Right

- (1) Breeders' rights shall be transferable by contract or by inheritance.
- (2) The person who succeeds in the breeder's rights under the foregoing Article shall communicate this fact to CENARVE within one month and shall pay the corresponding fee.

Article 25

License Contracts

- (1) The owner of a breeder's right may by contract, either free of charge or for a consideration, authorize another person to exploit the plant variety covered by the right.
- (2) The conclusion of a contract as referred to in the foregoing paragraph shall be communicated to CENARVE for recording in the Register of Protected Varieties.
- (3) Unless expressly provided to the contrary, the conclusion of a contract shall not prevent the breeder from concluding other contracts or from exploiting the plant variety in question directly.
- (4) The owner of an exploitation license may not transfer it or allow another person to exploit the plant variety in question without the express authorization of the breeder.
- (5) Transfer of the license shall be communicated to CENARVE for recording in the Register of Protected Varieties.

Article 26

Compulsory Licenses

- (1) At the request of interested parties, CENARVE may decide to grant compulsory licenses where such a step is considered necessary for the safeguarding of the public interest which requires the rapid and wide distribution of the plant variety in question.

(2) When it grants a compulsory license, CENARVE shall set the equitable compensation, which shall be economic in character, that accrues to the owner of the breeder's right after the interested party has been heard and the Technical Board has given its advice.

(3) A compulsory license shall be dependent:

- (a) on the interested parties possessing the technical and economic means necessary for the correct and efficient exploitation of the plant variety concerned;
- (b) on the owner of the breeder's right having refused without justification to enter into a license contract with the interested party;
- (c) on the interested party providing every assurance of payment of the compensation referred to in paragraph (2);
- (d) on a period of three years having elapsed after the date of grant of the breeder's right concerned;
- (e) on payment of the fee due for the purpose.

(4) The term of the compulsory license shall be from two to four years; that term may be prolonged if the conditions on the basis of which the license was granted continue to obtain.

(5) A compulsory license may be revoked if its holder fails to discharge the obligations that he has assumed.

CHAPTER VI

Lapse and Revocation of Breeders' Rights

Article 27

Lapse of Breeders' Rights

The breeder's right shall lapse on expiry of the periods referred to in Article 6.

Article 28

Revocation

(1) Breeders' rights may be revoked on the following grounds:

- (a) for failure to pay the fees due;
- (b) where the plant variety ceases to display the characteristics on the basis of which they were granted;
- (c) at the request of the owner;
- (d) where the owner has not provided the material demanded by CENARVE for the purposes of verifying the continued presence of the characteristics of the plant variety in question;
- (e) where the owner of the rights opposes the inspections referred to in paragraph (2) of Article 19;
- (f) where it is shown that the holder of the rights is not the rightful owner thereof.

(2) In the case provided for in subparagraph (f) of the foregoing paragraph, and at the request of the rightful owner, the breeder's right may be granted to the said owner without the necessity of a new grant procedure.

CHAPTER VII

Final Provisions

Article 29

Fees

(1) Each of the acts provided for in these Regulations shall give rise to the payment of the following fees, which are calculated according to a system of points:

	points
(a) application for a breeder's rights (Article 9)	12,500
(b) claim of the benefit of priority (Article 11)	4,500
(c) opposition to the grant of protection (Article 15)	4,500
(d) testing of distinctness, homogeneity and stability carried out by CENARVE (Article 17)	25,000 to 41,500
(e) testing of distinctness, homogeneity and stability carried out by other bodies (Article 17)	variable
(f) grant of breeder's right (Article 20)	17,500
(g) maintenance of breeder's right (Article 23):	
first year	8,000
second year	20,000
third year	35,000
fourth year	50,000
fifth and following years	70,000
(h) registration of transfer of breeder's right (Article 24)	8,000
(i) registration of a license contract (Article 25)	7,500
(j) other alterations or entries made in the Register	1,500

(2) The amount of the fee provided for in subparagraph (c) of the foregoing paragraph shall be refunded if the opposition filed is judged valid.

(3) The amount of the fee provided for in subparagraphs (d) and (e) of paragraph (1) shall be set by CENARVE according to the complexity and cost of the tests.

(4) the value of each point is 1.50 escudos.

[Annex IV follows]

ANNEX IV/ANNEXE IV/ANLAGE IV

**LIST OF PROTECTED TAXA/LISTE DES TAXONS PROTEGES/
LISTE DER SCHUTZFAEHIGEN TAXA**

<u>Português</u>	<u>English</u>	<u>Français</u>	<u>Deutsch</u>
Ameixeira	Plum	Prunier	Pflaume
Amendoeira	Almond	Amandier	Mandel
Amora	Blackberry	Ronce fruitière	Brombeere
Anona	Annona, Cherimoya	Anone, Chérimolier	Annone, "Cherimoya"
Arroz	Rice	Riz	Reis
Aveia	Oats	Avoine	Hafer
Azevém	Ryegrass	Ray-grass	Weidelgrass
Batata	Potato	Pomme de terre	Kartoffel
Cebola	Onion	Oignon	Zwiebel
Centeio	Rye	Seigle	Roggen
Cerejeira	Cherry	Cerisier	Kirsche
Cevada	Barley	Orge	Gerste
Craveiro	Carnation	Oeillet	Nelke
Crisântemo	Chrysanthemum	Chrysanthème	Chrysantheme
Damasqueiro	Apricot	Abricotier	Aprikose
Ervilhaca	Common Vetch	Vesce commune	Saatwicke
Fava	Broad Bean, Horse Bean, Field Bean, Tick Bean	Fève, Féverole	Dicke Bohne (Puffbohne), Ackerbohne
Feijao	French Bean	Haricot	Gartenbohne
Festuca	Fescue	Fétuque	Schwingel
Framboesa	Raspberry	Framboisier	Himbeere
Girassol	Sunflower	Tournesol	Sonnenblume
Groselha	Currants, Gooseberry	Cassis, Groseilliers	Johannisbeeren, Stachelbeere
Leucadendro	Leucadendron	Leucadendron	Leucadendron
Leucospermo	Leucospermum	Leucospermum	Leucospermum

<u>Português</u>	<u>English</u>	<u>Français</u>	<u>Deutsch</u>
Luzerna	Lucerne	Luzerne	Luzerne
Macieira	Apple	Pommier	Apfel
Melao	Melon	Melon	Melone
Milho	Maize	Maïs	Mais
Mirtilo	Bilberry, Blue- berry, Whortleberry	Myrtille	Heidelbeere
Morangueiro	Strawberry	Fraisier	Erdbeere
Nabo	Turnip	Navet	Herbstrübe, Mairübe
Pereira	Pear	Poirier	Birne
Pessegueiro	Peach	Pêcher	Pfirsich
Pimento	Pepper	Poivron, Piment	Paprika
Prótea	Protea	Protea	Protea
Roseira	Rose	Rosier	Rose
Soja	Soya Bean, Soybean	Soja	Sojabohne
Tomate	Tomato	Tomate	Tomate
Tremoceira	Lupin	Lupin	Lupine
Trevo	Clover	Trèfle	Klee
Trigo	Wheat	Blé	Weizen
Triticale	Triticale	Triticale	Triticale
Videira	Vine	Vigne	Rebe

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