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para la
Agricultura
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COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE

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PROGRESS REPORT ON THE INTERNATIONAL NETWORK OF *EX SITU* COLLECTIONS UNDER THE AUSPICES OF FAO

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PROGRESS REPORT ON THE INTERNATIONAL NETWORK OF *EX SITU* COLLECTIONS UNDER THE AUSPICES OF FAO

BACKGROUND

1. The Commission called for the development of the International Network in 1989, in line with Article 7.1(a) of the International Undertaking, because of the uncertainty of the legal situation of *ex situ* germplasm in genebanks, and of the lack of appropriate agreements to ensure its safe conservation. Since the provisions regarding access to genetic resources in the Convention on Biological Diversity (CBD) do not apply to *ex situ* collections assembled prior to its entry into force, Resolution 3 of the Nairobi Conference for the Adoption of the Agreed Text of the CBD (May 1992) recognized the need to resolve this issue within the context of the FAO Global System.
2. Twelve Centres of the Consultative Group on International Agricultural Research (CGIAR) signed agreements with FAO in 1994, placing some 500,000 accessions in the International Network, whereby they agree, in particular, to hold designated germplasm “*in trust for the benefit of the international community*”, and “*not to claim ownership, or seek intellectual property rights over the designated germplasm and related information*”. They also undertake that “*where samples of the designated germplasm and/or related information are transferred to any other person or institution, the Centre shall ensure that such person or institution and any further entity receiving samples of the germplasm*” are bound by these conditions.
3. The Sixth Session of the Commission (June 1995) considered and revised the model agreements for adherence to the International Network, in order to harmonize them with the provisions of the CBD, and agreed that negotiations with the 32 countries that had expressed their willingness to join the International Network should continue, using the revised agreements as appropriate. It noted, however, that the final form of such agreements would depend upon the outcome of the negotiations for the revision of the International Undertaking.
4. During the preparatory process of the Leipzig International Technical Conference on Plant Genetic Resources (June 1996), several additional countries expressed interest in joining the International Network. A number of relevant recommendations were made in the inter-governmental sub-regional meetings, particularly that institutions which had, prior to the entry into force of the Convention, made commitments for the availability and long-term conservation of their collections, within the former International Board for Plant Genetic Resources (IBPGR) Register of Base Collections, should now place those collections in the International Network. These collections from all over the world, many of which were made with IBPGR support, account - together with those of the CGIAR - for about a quarter of the world's collections of plant genetic resources for food and agriculture (and undoubtedly a much higher proportion of the world's unique accessions).
5. The Seventh Session of the Commission (May 1997), considering that the 1994 agreements with the twelve CGIAR Centres would come up for renewal in 1998, “*recommended that the existing agreements between FAO and the twelve International Agricultural Research Centres of the CGIAR be extended, pending the revision of the International Undertaking*”¹. Those agreements have now been renewed.

¹ CGRFA-7/97/REP, para. 26.

PROGRESS SINCE THE SEVENTH SESSION AND MATTERS FOR CONSIDERATION

COGENT agreements

6. Since the Seventh Session, consultations have continued between FAO and the International Plant Genetic Resources Institute (IPGRI), on behalf of the International Coconut Genetic Resources Network (COGENT), regarding the placing of coconut genetic resource collections, held by the host countries on behalf of their respective regions and forming part of the COGENT, into the International Network under the auspices of FAO to reflect the wishes of the member countries of COGENT. Such consultations led to the conclusion of a tripartite agreement (between the Government of India as holder of the International Coconut Genebank for South Asia, IPGRI acting on behalf of the COGENT, and FAO) in October 1998. The text of the agreement is available in document CGRFA-8/99/Inf. 6. The agreement follows very closely the format of previous agreements with the CGIAR Centres, duly taking into account the recommendations of the Sixth Session of the Commission.

7. A second agreement was signed in November 1998 between the Government of Papua New Guinea, as holder of the International Coconut Genebank for the South Pacific, IPGRI acting on behalf of the COGENT, and FAO. Negotiations for a further agreement with the Government of Indonesia are in the final stages. Other COGENT regional centres are expected to join the International Network in the near future. Regarding Africa and the Indian Ocean, the COGENT Steering Committee, during its meeting in Papua New Guinea, in November 1998, decided first to conduct a site-suitability and pest-risk assessment of the proposed genebank extension areas, to ensure pest security and to confirm country commitment. This assessment is scheduled for the first quarter of 1999.

Other agreements

8. Consultations with other national or international germplasm banks, with a view to their becoming part of the International Network, are at present to some extent on hold, pending the outcome of the negotiations for the revision of the International Undertaking. The results of such negotiations will have a bearing on the final form and content of future agreements, as already stated by the Commission at its Sixth Session.

Operation of the CGIAR's Genebanks

9. At the Seventh Session, the CGIAR reported on its External Review of the CGIAR Genebank Operations, undertaken with FAO's participation. This review showed that most of the genebanks meet international standards, are satisfactorily operated, and are typically well managed, though in some cases the genebanks are under-funded. As a result of the review, initiatives have been taken by the CGIAR Centres to upgrade and enhance certain of their facilities and operations.

Material Transfer Agreements (MTAs)

10. In transferring germplasm designated under the agreements with FAO, the CGIAR Centres now use a standard Material Transfer Agreement (MTA), the text of which was agreed with FAO. The MTAs require that recipients not claim ownership or intellectual property rights over the designated germplasm and related information, and that they bind subsequent recipients to the same conditions. The text of the agreed MTA is attached as **Annex 1**.

Intellectual Property Rights (IPRs)

11. During 1998 some problems arose in the implementation of the CGIAR Centres' agreements and MTAs, specifically as regards intellectual property rights (plant variety protection or patent protection) being sought by third parties over designated germplasm provided by the CGIAR Centres. The existence of the agreements allowed the CGIAR Centres and FAO to take immediate action to investigate and attempt to resolve the problems.

12. In early 1998, FAO received reports that a number of applications had been filed with the Australian Plant Breeders' Rights Office for IPRs over plant germplasm designated under the agreements, in particular regarding accessions of chickpeas, lentils and forage crops. In late 1998, a similar concern was voiced regarding a patent for Basmati rice lines in the USA. FAO accordingly informed the CGIAR Centres and invited them to investigate and take whatever actions were appropriate, in accordance with the agreements.

13. The CGIAR Centres took action forthwith. In the first case the applications were subsequently withdrawn; in the second case, the relevant Centre ascertained that the agreement had not been violated, since no designated rice germplasm was covered by a patent or IPR claim. It has since become clear that some of the problems related to material, currently designated under the agreements, which had been distributed prior to the agreements between the CGIAR Centres and FAO.

14. On 11 February 1998, the CGIAR called for a moratorium on the granting of intellectual property rights on material that had been designated, by the Centres, as forming part of the International Network of *Ex Situ* Collections under the Auspices of FAO, regardless of whether the material was distributed before or after the agreements with FAO. In announcing this call for a moratorium, the CGIAR Chairman reiterated the CGIAR's strong and unequivocal support for the agreements.

15. While it may be that the materials provided by the CGIAR Centres should not be considered eligible for plant varietal protection under the terms of most national legislation, applications have been filed on occasion. As noted, CGIAR Centres have responded to this situation, as agreed. Special care should be taken at present to avoid any actions that might anticipate and thereby possibly prejudice the outcome of the negotiations for the revision of the International Undertaking.

16. In October 1998, the CGIAR Centres and FAO issued a *Second Joint Statement of FAO and the CGIAR Centres* (attached as **Annex 2**)². In the Second Joint Statement, the CGIAR Centres and FAO commit themselves to taking appropriate remedial action, in accordance with agreed procedures, in case of suspected violations of the MTAs, and agree on a common understanding concerning certain provisions of the agreements, in particular regarding (i) the size and number of samples to be made available, (ii) the health and quarantine standards to be followed, (iii) the addition of new materials to the list of designated germplasm, and (iv) the updating and revision of that list.

RECOMMENDED ACTION BY THE COMMISSION

17. The Commission may wish to make recommendations to improve the implementation of the agreements in the *interim* period until the revision of the International Undertaking is complete, including by defining further the role of member countries and non-governmental organizations, in facilitating its monitoring work.

² The first *Joint Statement of FAO and the CGIAR Centres on the agreement placing CGIAR germplasm collections under the auspices of FAO* was made available to the Commission, at its First Extraordinary Session (November 1994), in document CPGR-Ex1/94/Inf.5/Add.1.

ANNEX 1

**MATERIAL TRANSFER AGREEMENT
(MTA)**

The material contained herein is being furnished by [Centre] under the following conditions:

Designated Germplasm

[Centre] is making the material described in the attached list available as part of its policy of maximizing the utilization of genetic material for research. The material was either developed by [Centre]; or was acquired prior to the entry into force of the Convention on Biological Diversity; or if it was acquired after the entering into force of the Convention on Biological Diversity, it was obtained with the understanding that it could be made freely available for any agricultural research or breeding purposes.

The material is held in trust under the terms of an agreement between [Centre] and FAO, and the recipient has no rights to obtain Intellectual Property Rights (IPR) on the germplasm or related information.

The recipient may reproduce the seed and use the material for agricultural research and breeding purposes and may distribute it to other parties provided the recipient is also willing to accept the conditions of this agreement (1).

The recipient, therefore, hereby agrees not to claim ownership over the germplasm to be received, nor to seek IPR over that germplasm or related information. He/She further agrees to ensure that any subsequent person or institution to whom he/she may make samples of the germplasm available, is bound by the same provision and undertakes to pass on the same obligations to future recipients of the germplasm.

[Centre] makes no warranties as to the safety or title of the material, nor as to the accuracy or correctness of any passport or other data provided with the material. Neither does it make any warranties as to the quality, availability, or purity (genetic or mechanical) of the material being furnished. The phytosanitary condition of the material is warranted only as described in the attached phytosanitary certificate. The recipient assumes full responsibility for complying with the recipient nation's quarantine/biosafety regulations and rules as to import or release of genetic material.

Upon request, [Centre] will furnish information that may be available in addition to whatever is furnished with the seed. Recipients are requested to furnish [Centre] performance data collected during evaluations.

The material is supplied expressly conditional on acceptance of the terms of this agreement. The recipient's acceptance of the material constitutes acceptance of the terms of this Agreement.

(1) This does not prevent the recipient from releasing or reproducing the seed for purposes of making it directly available to farmers or consumers for cultivation, provided that the other conditions set out in the MTA are complied with.

ANNEX 2

**SECOND JOINT STATEMENT OF FAO AND THE CGIAR CENTRES
ON THE AGREEMENT PLACING CGIAR GERMPLOSM COLLECTIONS
UNDER THE AUSPICES OF FAO**

A Joint Statement issued by FAO and the CGIAR in conjunction with the signing of the FAO-CGIAR Agreements placing CGIAR Germplasm Collections under the auspices of FAO observed that:

The parties to the Agreement recognize that the conclusion of the Agreements represents but one stage of a continuing, dynamic process and agree to continue the dialogue in the context of the implementation of the Convention on Biological Diversity and the FAO Global System on Plant Genetic Resources. They will consult from time to time to review these matters and to consider such modification as may be appropriate in the circumstances.

FAO and the CGIAR have consulted frequently since the Agreements were concluded in 1994 in order to review the implementation of the Agreements.

The Parties understand and agree that:

While Centres distribute germplasm designated under the FAO/CGIAR Agreements through Material Transfer Agreements which prohibit the recipient, or any subsequent recipient, from taking out intellectual property rights, the CGIAR cannot guarantee that recipients will abide by the terms of the MTA. Violations may take place. However, in such cases the Parties commit themselves to taking appropriate remedial action, in accordance with the following agreed procedures:

When Centres become aware of a possible violation of their MTAs by a recipient of germplasm, the Centres will henceforth voluntarily undertake the following actions in response to the perceived violation:

1. The Centres will request an explanation. Upon failure to receive a satisfactory and timely explanation for the situation from the germplasm recipient, the Centres will notify the recipient that a violation is thought to have occurred and request that the recipient cease and desist in its efforts to obtain intellectual property rights over the material, or renounce such rights or ownership if they have already been granted or claimed.
2. The Centres will notify the proper regulatory body in the relevant country of the possibility that the MTA has been violated, and bring to their attention the fact that the grant of intellectual property rights may, therefore, have been inappropriate in the case of the material obtained from the CGIAR.
3. The Centres will notify IPGRI and the FAO Commission on Genetic Resources for Food and Agriculture, through its Secretariat, of the possible violation of the MTA under the Agreements with FAO.

The Centres reserve the right to take other action, including legal action, as they might deem feasible and appropriate to enforce the MTAs and preserve the integrity of the Agreements with FAO. In this regard, it would be the intent of the Centres to work in cooperation with FAO, under whose auspices the materials are held in trust by the CGIAR for the benefit of the international community.

The Centres recognize that many accessions designated under the Agreements with FAO, were distributed to plant breeders and researchers prior to designation in keeping with the CGIAR policy for providing "unrestricted availability" to germplasm - as noted in the Preamble of Agreements. In dealing

with this situation, Centres will request and urge that no intellectual property rights be sought for designated germplasm that was distributed prior to its designation under the FAO-CGIAR Agreement.

Periodic reports will be presented to the Commission on Genetic Resources for Food and Agriculture on the actions taken in support of the objectives of the Agreements between the CGIAR Centres and FAO.

In considering the text of the Agreement, the common understanding of the parties concerning certain of its provisions is, as follows:

Under the terms of the Agreements (Article 9), the Centres undertake “to make samples of the designated germplasm available directly to users or through FAO for the purpose of scientific research, plant breeding or genetic resource conservation, without restriction.” It is implicit in this undertaking that users will make only reasonable requests for these specific purposes, and that the liability of the Centres would not extend to the fulfilment of unreasonable requests.

Sound management practices as well as practical or even biological constraints (such as seed availability or the health status of a sample) may at times make it difficult or inappropriate for centres to provide germplasm designated under the Agreements for the purposes spelled out in Article 9. It is understood that centres must use some discretion in determining the size and number of samples to be provided at any given time to a particular recipient. Centres are not obligated to distribute seed or other designated materials when such distributions would reduce stocks below accepted levels for conservation purposes, or when the request is for such a number of samples or quantity of a particular accession as to pose an undue burden on the financial or technical resources of the centre or on its ability to meet requests from others. In such cases, the centre may ask that the recipient cover the actual costs of multiplying the relevant accessions. In cases of limited supplies, immediate availability of materials cannot be guaranteed. Such availability will follow a process of multiplication. Centres are not obligated to supply quantities of a sample which exceed basic requirements for the purposes stated in Article 9. Recipients are advised that they may need to undertake their own seed multiplication when existing sample sizes are small (such as in the case with many accessions of wild relatives) or when demand for a particular sample exceeds supply. In filing requests for material for conservation purposes alone, users are invited to note the Global Plan of Action’s objectives of “safeguarding as much existing unique and valuable diversity as possible in *ex situ* collections,” while reducing “unnecessary and unplanned redundancy in current programmes.”

In cases when a centre cannot fully or immediately meet a request, the centre will enter into a discussion with the requesting entity to develop and agree upon a plan and schedule for the supply of materials. This process might establish an agreed list of accessions to which priority would be given.

Some designated accessions cannot be multiplied without considerable cost. For example, certain accessions of woody species may take upwards of 10 hectares of land and 30 years to multiply. Similarly, supplying materials of vegetatively propagated species can involve very time-consuming and expensive procedures. While centres endeavour to supply materials free of cost, in such circumstances it would be unreasonable to expect that centres could guarantee unlimited quantities or immediate availability of all designated germplasm. Users are encouraged to exercise good judgement and appropriate constraint in requests for such materials. At their discretion, centres may request that users cover all or part of the costs involved in multiplication.

Centres are neither obligated nor advised to distribute samples that do not meet health or quarantine standards, or whose transfer could pose the danger of a spread of pests or disease. Centres will inform those requesting materials of the danger which might be posed by invasiveness in those cases where they perceive such dangers to be significant, and of the need for the prior informed consent of the recipient Government for the import of such materials. Materials will then be supplied upon receipt of such prior informed consent.

Article 2 provides that “The list of designated germplasm will be updated every two years as new accessions are added to the collection.” This does not preclude Centres from adding new germplasm to the list of designated germplasm without having to wait for the biennial updating of the lists. In such cases, the status of particular germplasm as “designated germplasm” becomes effective immediately upon a centre’s determining that it is designating the germplasm under the Agreement and managing the germplasm under the terms of the Agreement. The additional designations will be consolidated into updated lists, which will be notified to FAO every two years or more frequently as may be appropriate.

As management and information systems improve and as genomic information about accessions becomes available, centres will update the list of materials covered under the Agreements. In addition to adding new materials, centres may find, for example, that particular accessions have been designated more than once; that an accession’s registration number conveyed to FAO on the list of designated germplasm referred to in Article 2, may be incorrect or no longer correspond to an actual accession in the centre’s genebank; or that an accession may, through natural or accidental causes, have lost viability. Logically, such “accessions” will no longer be considered as designated under the terms of the Agreement. The Centre or Centres concerned will notify FAO of any proposals for the deletion of accessions from the list of designated germplasm for such reasons and will provide FAO with a statement of the reasons therefore.