



منظمة الأغذية والزراعة للأمم المتحدة
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**THE INTERNATIONAL NETWORK OF *EX SITU* GERMPLASM
COLLECTIONS: PROGRESS REPORT ON AGREEMENTS WITH
THE INTERNATIONAL AGRICULTURAL RESEARCH CENTRES,
DISCUSSED BY THE NINTH SESSION OF THE WORKING GROUP,
(11 - 12 May 1994)**

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THE INTERNATIONAL NETWORK OF EX SITU GERMPLASM COLLECTIONS:
PROGRESS REPORT ON AGREEMENTS WITH
THE INTERNATIONAL AGRICULTURAL RESEARCH CENTRES

I. INTRODUCTION

1. The Commission on Plant Genetic Resources, at its Fifth Session in April 1993, welcomed the offer made by the CGIAR Centres to place their base and active collections under the auspices of FAO and to receive policy guidance from the Commission on these collections. In this connection the Commission reviewed a proposal for a modified Basic Agreement for International Agricultural Research Centres based on the three model agreements prepared by the secretariat of FAO. While accepting the proposed model as a basis for further negotiations, the Commission expressed its concerns on a number of points in the agreement. It requested the secretariat to carry on further negotiations with the CGIAR Centres and, if satisfied, to conclude agreements with those centres that would take into account these concerns. The main concerns expressed by the Commission related to (i) clarification of the concept of trustee and beneficiary, in particular as it relates to the concept of ownership; (ii) obligations with respect to conservation of germplasm and its availability that would flow from the concept; (iii) the policy role of the Commission; and (iv) the duration of the agreement and opportunities for its review by the Commission. At its Twenty-seventh Session in November 1993, the Conference expressed concern that the negotiations should take fully into account the observations and comments made by the Commission and noted that progress on the negotiations would be reported to the Working Group and to the Commission itself.

2. A number of contacts have been held with the CGIAR Centres on the model agreement. These contacts have focused on the areas of concern of the Commission, but have also covered other minor modifications to the draft agreement. The following are the results of those contacts.

II. CLARIFICATION OF THE CONCEPT OF TRUSTEE AND BENEFICIARY, IN PARTICULAR AS IT RELATES TO THE CONCEPT OF OWNERSHIP

3. The concept of holding designated germplasm in trust for the benefit of the international community, in particular developing countries, is one that the CGIAR centres hold dearly. As explained by the representatives of the centres at the Fifth Session of the Commission, and as the Commission itself noted, the concept of trusteeship may be used as a vehicle to imply certain obligations or standards with which centres would have to comply in their holding of the germplasm. These were noted as including to manage *"them on behalf of the beneficiaries, in particular the developing countries, ... to conserve the material to the highest technical standards, to duplicate it for safety reasons, and not to seek any intellectual property right over it. This last obligation would include, where possible, if necessary, mechanisms to avoid another party subsequently making the collections unavailable for research and breeding."* The Commission wished to see these obligations reflected in the agreement.

4. The concept of trusts, while existing in international law in a more generalized form, is primarily a creation of common law systems. Trusts under the common law system normally imply the transfer of legal ownership to the trustee, who then holds the property "in trust" for specified beneficiaries, i.e., while holding legal ownership rights in the property, he is required to manage the property for the benefit of the specified beneficiaries and in accordance with the terms and conditions set out in the trust. While the creation of a trust might normally imply the transfer or recognition of legal ownership by the trustee in the property, this is not necessarily the case, and trusts may exist in respect of rights other than full legal ownership. As noted above, the concept of trusts in international law is somewhat more diffuse and does not necessarily, and in the case of trust territories does not absolutely, imply transfer of legal ownership rights or sovereignty.

5. Under the Biodiversity Convention, the issue of access to germplasm in collections existing before the entry into force of the Convention is left open. The question of who has legal ownership over such germplasm is clearly of relevance to this issue. An FAO report in 1987 indicated that there was doubt over who were the legal owners of germplasm stored in the CGIAR collections¹. The Conference that adopted the Convention called for the issue of access to existing ex situ collections to be resolved within the Global System for the Conservation and Sustainable Use of Plant Genetic Resources for Food and Agriculture.

6. In order to ensure that incorporation of the notion of trust in the agreement with the CGIAR Centres is not taken to imply recognition of legal ownership by the Centres over the designated germplasm, it is proposed that a further provision should be included in Article 3 of the agreement dealing with the concept of trusteeship, providing that *"the Centre shall not claim legal ownership over the designated germplasm, nor shall it seek any intellectual property rights over that germplasm or related information"*.

III. OBLIGATIONS WITH RESPECT TO CONSERVATION OF GERmplasm AND ITS AVAILABILITY THAT WOULD FLOW FROM THE CONCEPT OF TRUSTEESHIP

7. As noted above, the Commission at its Fifth Session requested that the agreement should reflect the obligations with respect to conservation of germplasm and its availability that would flow from the concept of trusteeship, as described by the representatives of those centres to the Commission itself. It is therefore proposed that former Article 8 (now Article 9) be modified and a new Article be added to the Agreement to reflect these obligations as follows:

*"Article 9. Availability of designated germplasm and related information.
The Centre undertakes to make samples of the designated germplasm and related*

¹ See CPGR/87/5: *Legal Status of Base and Active Collections of Plant Genetic Resources*, and *Report of the Second Session of the Commission on Plant Genetic Resources*, 1987, para. 17.

information available directly to users or through FAO, for the purpose of scientific research, plant breeding or genetic resource conservation, without restriction."

"Article 10. *Transfer of designated germplasm and related information.*
Where samples of the designated germplasm and/or related information are transferred to any other person or institution, the Centre shall ensure that such other person or institution, and any further entity receiving samples of the designated germplasm from such person or institution, are bound by the conditions set out in Article 3 (b) and, in the case of samples duplicated for safety purposes, to the provisions of Article 5 (a). This provision shall not apply to the repatriation of germplasm to the country that provided such germplasm."

IV. THE POLICY ROLE OF THE COMMISSION

8. In order to meet the concerns expressed by the Commission on this matter, the following new wording is suggested for Article 5 (now Article 6) of the Agreement:

"Article 6. *Policies.*
The Centre recognizes the intergovernmental authority of FAO and its Commission in setting policies for the International Network referred to in Article 7 of the International Undertaking and undertakes to consult with FAO and its Commission on proposed policy changes related to the conservation of, or accessibility to, the designated germplasm, subject, always, to the provisions of Article 9 hereinafter. The Centre shall give full consideration to any policy changes proposed by the Commission."

V. THE DURATION OF THE AGREEMENT AND OPPORTUNITIES FOR ITS REVIEW BY THE COMMISSION

9. Article 9 (now Article 11) of the Agreement has been modified to limit the duration of the Agreement to 4 years renewable rather than 10 years renewable, in order to reflect the concerns expressed by the Commission regarding the need for the Commission to be able to review the agreement every four years.

VI. OTHER MODIFICATIONS TO THE MODEL AGREEMENT

10. In addition, the following other modifications have been made in agreement with the representatives of the CGIAR Centres:

- the title of the Agreement has been modified to bring it into line with the model agreements between Member Governments and FAO;
- the Preamble has been extended to include more background information on the activities of the CGIAR Centres in the area of plant genetic resources;

- a new Article 1 has been added to make clearer the consistency of the Agreement with the provisions of the Convention on Biological Diversity and of the International Undertaking on Plant Genetic Resources.
- the wording of former Article 1 (now Article 2) has been modified for the sake of clarity and to include reference to the International Undertaking, previously contained in Article 2;
- the title of former Article 2 (now Article 3) has been modified to bring it into line with the modified content.
- paragraph (a) of Article 4 (now Article 5) has been extended to clarify the concept of accepted standards.
- the phrase "and its related information" has been added to the first line of former Article 8 (now Articles 9 and 10);
- the article on termination (now Article 12) is brought forward to precede the article on "Settlement of Disputes" (now Article 13).
- paragraph (b) of the Article 11 (now Article 12) has been expanded to require the Parties, in the event of termination of the Agreement, to take measures to ensure the continued conservation of and access to the designated germplasm.
- other minor linguistic changes have been introduced in Articles 3 (a), 7 (b), and 9.

VII. CONCLUSIONS

11. The full text of the agreement as it now stands is set out in the Annex to this document for the information of the Working Group. As noted above, all of the concerns expressed by the Commission and emphasized by the Conference have been taken into account through changes to the draft agreement. Once the formal concurrence of the individual Centres has been received, the secretariat would intend to conclude legal agreements with those Centres in accordance with the request of the Commission. Further progress in this respect will be reported to the Commission at its next session.

AGREEMENT BETWEEN [Name of Centre] AND THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS (FAO) PLACING COLLECTIONS OF PLANT GERmplasm UNDER THE AUSPICES OF FAO.

PREAMBLE

The [Name of Centre] (hereinafter referred to as the "Centre"), supported by the Consultative Group on International Agricultural Research (hereinafter referred to as "CGIAR"), and the Food and Agriculture Organization of the United Nations (hereinafter referred to as "FAO");

Considering the importance to humanity of protecting and conserving plant germplasm for future generations;

Considering the International Undertaking on Plant Genetic Resources adopted by the FAO Conference at its Twenty-second Session in 1983 (Resolution 8/83) and in particular Article 7 thereof; and the Annexes of the Undertaking adopted by the FAO Conference in 1989 and 1991;

Considering that the FAO Commission on Plant Genetic Resources (hereinafter referred to as the "Commission"), as the relevant intergovernmental body in this field, has the responsibility for monitoring of the implementation of Article 7 of the International Undertaking on Plant Genetic Resources;

Considering the Memorandum of Understanding Between the Food and Agriculture Organization of the United Nations and the International Board for Plant Genetic Resources (IBPGR) dated September 21, 1990, on the respective roles of the two organizations in establishing, maintaining and managing germplasm collections and setting standards for these collections;

Considering the strong support FAO, as one of the co-sponsors, has provided and continues to provide to the CGIAR;

Considering the importance of the plant germplasm collections held by the International Agricultural Research Centres (IARCs), supported by the CGIAR, as part of a global strategy for germplasm conservation;

Considering that the CGIAR adheres to a policy on plant genetic resources which is based on the unrestricted availability of germplasm held in their genebanks;

Considering that the germplasm accessions have been donated or collected on the understanding that these accessions will remain freely available and that they will be conserved and used in research on behalf of the international community, in particular the developing countries;

Considering that the Centre has expressed the wish that its designated germplasm be recognized as part of the international network of *ex situ* collections (as per the International Undertaking on Plant Genetic Resources) under the auspices of FAO;

Have agreed as follows:

Article 1

APPLICATION OF THIS AGREEMENT

This Agreement shall be construed and applied in a manner consistent with the provisions of the Convention on Biological Diversity and the International Undertaking on Plant Genetic Resources.

Article 2

BASIC UNDERTAKING

The Centre hereby places under the auspices of FAO, as part of the international network of *ex situ* collections provided for in Article 7 of the International Undertaking on Plant Genetic Resources, the collections of plant genetic resources listed in the Appendix hereto (hereinafter referred to as the "designated germplasm"), as catalogued and published by the Centre in print or machine-readable form, in accordance with the terms and conditions set forth in this Agreement. The list of designated germplasm will be updated every two years as new accessions are added to the collection.

Article 3

STATUS OF DESIGNATED GERmplasm

- (a) The Centre shall hold the designated germplasm in trust for the benefit of the international community, in particular the developing countries in accordance with the International Undertaking on Plant Genetic Resources and the terms and conditions set out in this Agreement.
- (b) The Centre shall not claim legal ownership over the designated germplasm, nor shall it seek any intellectual property rights over that germplasm or related information.

Article 4

PREMISES

- (a) The premises in which the designated germplasm is conserved shall remain in the charge of the Centre.
- (b) FAO shall have a right of access to the premises at any time and the right to inspect all activities performed therein directly related to the conservation and exchange of the designated germplasm.

Article 5**MANAGEMENT AND ADMINISTRATION**

- (a) The Centre undertakes to manage and administer the designated germplasm in accordance with internationally accepted standards, including, with respect to the storage, exchange and distribution of seeds, the international Genebank Standards endorsed by the Commission, as soon as possible applying the "preferred standards" where these are specified, and ensuring that all the designated germplasm is duplicated in order to ensure its safety.
- (b) FAO may recommend action, if it considers such action to be desirable, in order to ensure the proper conservation of the designated germplasm.
- (c) If the orderly maintenance of the germplasm collection of the Centre is impeded or threatened by whatever event, including *force majeure*, FAO shall assist in the evacuation and/or transfer of the collections, to the extent possible. The cost of such an operation will be covered by the Centre concerned.

Article 6**POLICIES**

The Centre recognizes the intergovernmental authority of FAO and its Commission in setting policies for the International Network referred to in Article 7 of the International Undertaking and undertakes to consult with FAO and its Commission on proposed policy changes related to the conservation of, or accessibility to, the designated germplasm, subject, always, to the provisions of Article 9 hereinafter. The Centre shall give full consideration to any policy changes proposed by the Commission.

Article 7**STAFF**

- (a) Staff responsible to manage and administer the designated germplasm shall be employed and remunerated by the Centre.
- (b) As and when deemed appropriate, FAO shall furnish technical backstopping on request by the Centre.

Article 8**FINANCES**

The Centre shall remain entirely responsible for financing the maintenance of the designated germplasm.

Article 9**AVAILABILITY OF DESIGNATED GERMPLASM AND
RELATED INFORMATION**

The Centre undertakes to make samples of the designated germplasm and related information available directly to users or through FAO, for the purpose of scientific research, plant breeding or genetic resource conservation, without restriction.

Article 10**TRANSFER OF DESIGNATED GERMPLASM AND
RELATED INFORMATION**

Where samples of the designated germplasm and/or related information are transferred to any other person or institution, the Centre shall ensure that such other person or institution, and any further entity receiving samples of the designated germplasm from such person or institution, are bound by the conditions set out in Article 3 (b) and, in the case of samples duplicated for safety purposes, to the provisions of Article 5 (a).

This provision shall not apply to the repatriation of germplasm to the country that provided such germplasm.

Article 11**DURATION**

This Agreement is concluded for a period of four years and shall be automatically renewed for further periods of four years unless notice of non-renewal is given in writing by either party not less than one hundred and eighty (180) days before the end of any four-year period.

Article 12**TERMINATION**

- (a) Either FAO or the Centre may terminate this Agreement at any time by giving notice to the other, one year in advance of the termination date.
- (b) FAO and the Centre shall, in such case, take all necessary measures to wind-up joint activities in an appropriate manner and, within the limits of their respective competence, to ensure the continued conservation of and access to the designated germplasm.

Article 13**SETTLEMENT OF DISPUTES**

- (a) Any dispute concerning the implementation of this Agreement shall be settled by mutual consent.
- (b) Failing mutual consent, such dispute may be submitted, at the request of either FAO or the Centre, to an arbitral tribunal composed of three members. Each party shall appoint one arbitrator. The two arbitrators thus appointed shall designate by mutual consent the third arbitrator, who will act as the presiding arbitrator of the tribunal.
- (c) If within two months after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed, the first party may request the Secretary-General of the United Nations to appoint the second arbitrator.
- (d) If within two months after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, such presiding arbitrator shall be designated by the Secretary-General of the United Nations at the request of either party.
- (e) Unless the parties to the dispute decide otherwise, the tribunal shall determine its own procedure.
- (f) A majority vote of the arbitrators shall be sufficient to reach a decision which shall be final and binding for the parties to the dispute.

Article 14**AMENDMENT**

- (a) FAO or the Centre may propose that the Agreement be amended by giving notice thereof.
- (b) If there is mutual agreement in respect of the amendment, the amendment shall enter into force on whatever date is set, and be reported to the next session of the Commission.

Article 15**DEPOSITARY**

The Director-General of FAO shall be the Depositary of this Agreement. The Depositary shall:

- (a) send certified copies of this Agreement to the Member Nations of FAO and to any other Government which so requests;

- (b) arrange for the registration of this Agreement, upon its entry into force, with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations;
- (c) inform FAO Members Nations of:
 - (i) the signature of this Agreement in accordance with Article 16; and
 - (ii) the adoption of amendments to this Agreement in accordance with Article 14.

Article 16

COMING INTO FORCE

This Agreement shall come into force upon signature by the authorized representative of FAO and the Centre.

**United Nations Food and Agriculture
Organization**

[Name of Centre]

by:.....
(signature)

By.....
(signature)

Date:.....

Date:.....

Appendix

DESIGNATED GERMPLASM

- a) List of germplasm accessions covered by this agreement
- b) List of locations where material is held