THE LEGAL STATUS

OF CGIAR GERMPLASM COLLECTIONS

AND RELATED ISSUES

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Executive Summary

Concern is growing within the CGIAR community and outside over the control and ownership of the centers' genebank collections. Past reviews of the legal status of these collections have considered their status unclear; the headquarters agreements of some centers could be interpreted as giving succession rights on the collections to the host country.

In this paper, we first review the legal status of the centers themselves, then the status of their germplasm collections. In our assessment, the centers that were created under the aegis of the CGIAR, and set up by agreement between or among international legal entities (mostly FAO, UNDP and the World Bank as co-sponsors of the CGIAR) enjoy full international legal status. This implies that the termination of a headquarters agreement by the host country will not affect the legal existence of a center. However, the situation would appear weaker for centers created under the law of the host country. This holds for some centers created prior to the CGIAR, namely IRRI, CIP and IITA. The legal provisions of two other centers whose creation preceded that of the CGIAR, namely CIMMYT and CIAT, have since been "internationalized" as their establishment arrangements governed by domestic law had been considered to offer insufficient protection of import, export and tax privileges and to imply too high a risk of civil liability in the host country.

With regard to the legal status of the germplasm collections of the centers, our review of establishment instruments and headquarters agreements of centers holding and maintaining germplasm collections finds that in only one instance is there an explicit provision on ownership of germplasm: WARDA's germplasm holdings are owned by its member states with WARDA being "the legal custodian". Other centers have privileges in regard to import and export of genetic material without duties and restrictions, subject only to quarantine and phyto-sanitary regulations; the headquarters agreements of these centers are silent on the question of ownership of genetic material.

Most establishment instruments and/or headquarters agreements contain explicit provisions on the dissolution of centers and the consequent disposition of center assets. While land and improvements would pass back to the host state (which generally provided the land for the center in the first place), other assets are designated to stay within the host country to be distributed to institutions with objectives similar to those of the dissolved center. The Board of Trustees of a center would generally have to agree, and in some cases is expected to consult with the CGIAR.

It is our view that the centers' genebank collections cannot be considered among a center's assets, and in case of a center's cessation would thus not be distributed within the State. While most national genebanks are still considered the property of the State or a public authority, CGIAR policy has clearly defined the roles of the centers as that of custodians, and the material is derived from source nations on the understanding that it will be used for the benefit of global research. Thus, the centers' rights in this material are subject to the rights of the beneficiaries. Their trusteeship responsibility has to be seen as irrevocable as long as a center legally exists. As a result, the genebank material is legally beyond the reach of the host nation government.

As custodians or trustees of their germplasm collections, the centers have the duty to manage them for the benefit of their beneficiaries, that is the developing countries. This management responsibility includes the maintenance of the assets held in trust and their defense against physical destruction as well as the appropriation through intellectual property rights. An appropriate strategy to fend off the risk of appropriation may involve the filing for a patent or seeking other forms of intellectual property protection.

The duty to maintain the collections and to defend them against physical deterioration and possible destruction also entails an obligation of the centers as trustees to duplicate these collections systematically in different geographical zones. We emphasize that this obligation exists irrespective of political circumstances prevailing in a host country.

To clearly identify the beneficiary of the trust is important. While CGIAR Policy documents variously refer to humanity, all people, and present and future generations of research workers in all countries throughout the worlds as benefitting from the centers' germplasm collection efforts, the purpose of the establishment of the CGIAR in order to meet the food needs of the developing countries suggests that these countries should be

considered the primary beneficiaries also of the collection effort. This will, of course, not preclude the free release of germplasm as has been center policy to date. We also anticipate that only if the developing countries are clearly seen as the beneficiaries of the centers' genebank collections, will they be willing to allow continued free access to their germplasm resources.

We have reviewed the implications of the base collections network proposed by FAO should the centers decide to join it. This would be possible with appropriate modifications (which we have spelt out) of the current proposals to accommodate the centers' position as custodians. While gains would be small in terms of strengthening the legal status of the materials, the centers would gain political standing in case a genebank operation is under threat of war, civil disturbances, interference from country authorities or natural disasters. We also believe that the centers' accession to the proposed FAO network would encourage countries to follow their example; this could lead to more effective international oversight of national genebanks.

I. Introduction

The CGIAR centers, now sixteen in number, have been set up with very different legal provisions and instruments. As a result, they enjoy different degrees of protection from action and intervention on the part of public authorities in the countries in which they operate.

In the past, a major concern for the centers has been the free movement of, and the privileges and immunities enjoyed by, expatriate scientists and staff, which to an important degree influence a center's ability to recruit competent staff. Surprisingly little concern has been expressed with regard to the unencumbered movement and storage of germplasm. With growing public awareness of the importance of CGIAR genebank operations, the question is now being posed of the possibility that civil riots or events of war would threaten the existence of these unique collections. During recent political developments in Ethiopia, the fate of the national genebank remained uncertain for some time. This has lent urgency to the debate.

In Chapter I, the study will review the legal arrangements under which the CGIAR centers have been established, especially those provisions relating to the handling and storage of germplasm in case a center ceases to exist. Many headquarters agreements provide formulas for the disposal of assets of a center in case of its dissolution. But there is doubt that the CGIAR germplasm collections can be treated as assets like real estate and improvements. Such a legal interpretation might have been acceptable in the past, but could now well be challenged in light of the CGIAR's 1989 policy statement on plant genetic resources. Under the heading "ownership," this document states that "it is the CGIAR policy that collections assembled as a result of international collaboration should not become the property of any single nation, but should be held in trust for the use of present and future generations of research workers in all countries throughout the world." As these collections are held in trust, and thus not owned by the centers, whose are they if a center ceases to exist?

Chapter II will investigate the implications of the trusteeship concept for the question

of who controls the genebank collections of the international centers. It will also review the ownership and control of other genebank accessions which have not been assembled "as a result of international cooperation" but are the product of the centers own research such as constructs and elite lines, or are proprietary lines the centers have acquired, with or without an obligation to protect them. To our knowledge, centers are not currently storing proprietary items in their collections, but may do so in future, especially when incorporating biotechnological advances into their breeding programs.

Chapter III will review the "Base Collections Network" proposed by the FAO, and the potential applicability of the FAO's three proposed models for the center base collections. In doing so, it will focus both on legal feasibility and on policy choices, and in this latter context, will review the alternatives available to construct a legal and physical framework that would safeguard the survival of the center genebank collections if the existence of a center is at risk.

In Annex I we have included assessments by some centers of how they see the status of their genebank collections and whether they would be ready to include them in FAO's proposed base collection network. Annex II contains a description of the establishment arrangements of individual centers which operate genebanks or otherwise store germplasm. In Annex III we have included a draft agreement for the transfer of plant genetic material by the international centers which we were asked to prepare.

II. Establishment Arrangements of the International Centers and their Provisions for the Handling and Storage of Germplasm

In recent years, concerns have been expressed about the status and safeguarding of germplasm collections of the international centers should the operations of a center come to an end. This could be because the Board or the host country so decides, or it could derive from war or natural disasters that threaten the center's operations. During recent political developments in Ethiopia, the fate of the national genebank remained uncertain for some time. This has lent urgency to the debate.

Two longer-term developments have heightened these concerns: First, the centers

collections have grown and now account for more than 13% of unduplicated genebank accessions of the centers' mandated crops. Thus, the critical importance of their survival as stock for future breeding work has become obvious. Second, international discussion has focussed on the question of who controls the germplasm; some countries of origin claim ownership rights.

These concerns have led to at least two earlier reviews of the legal environment in which the CGIAR centers operate, one by the FAO Commission on Plant Genetic Resources, the other by TAC. In addition, individual centers have reviewed their legal positions. In this chapter we will discuss these earlier reviews, and analyze the establishment arrangements of the various CGIAR centers which maintain genebanks or other germplasm storage facilities, with particular attention to their provisions in regard to the treatment and disposal of such facilities in case of cessation of operations. Details of the arrangements surrounding the creation of individual centers and the legal instruments that led to their creation are set out in Annex II. It should be noted that our review will only cover those centers which maintain germplasm collections, i.e. the so-called commodity centers plus ILRAD and ILCA. It will exclude IBPGR/IPGRI, IFPRI, ISNAR and IIMA.

A. Previous Reviews

In 1986, the FAO Commission on Plant Genetic Resources conducted a comprehensive review of the legal status of national and international institutions operating genebanks.[1] With regard to the legal status of the CGIAR centers it concluded that these centers can be considered international only in a loose sense because of their international support and objectives, and their relative autonomy within their host countries.

> ... they cannot be considered "international" in the strict sense, since they are not created by a formal treaty concluded among States or other international legal persons, and their activities are not directed by States or such other international legal persons. [...] Notwithstanding this international support and their enjoyment of certain international privileges, the IARCs are usually national corporations, established and operating under the law of their host state.

[1] Commission on Plant Genetic Resources. *Legal Status of Base and Active Collections of Plant Genetic Resources*, doc. CPGR/87/5, December 1986

At the same time the Commission found that, because of the fact that control over policy information and implementation was shared between national and international representatives on the various Board of Trustees,

> ... irrespective of their legal status, these IARCs cannot be considered simply as national institutions. Therefore, the genebanks maintained by the IARCs are neither under the control of any given State or national authority, nor in the private sector. Their status is, in fact, *sui generis*. . .

We agree with the assessment of the FAO Commission with regard to the status of certain of the centers established prior to the creation of the CGIAR. As discussed later, however, the centers since established (or re-established) have full international legal personality.

With regard to plant genetic resources held in national genebanks the Commission found that in the majority of cases these were considered property of the government or the state. On the basis of disparate assessments received from a number of CGIAR centers, according to which some centers considered themselves owners of the germplasm while others did not[2], the Commission concluded that the formal legal ownership remained "unclear."

> There is no certainty that, if a legal dispute regarding the ownership of material actually arose, a court would support this position [of ownership]. In fact, the lack of legal provisions in the documents under which IARCs have been established generates an element of uncertainty in the settlement of the problem of ownership. Since the IARCs are mostly national corporations established and operating under the law of their host state, the ownership of the plant genetic resources would be, in principle, governed by the national law applicable to the IARCs concerned.

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[2] *ibid.:* "... CIAT and IRRI ... do not consider themselves the owners of the material, but rather the custodians or depositories thereof. In that context, however, it is not clear on behalf of what legal persons the material is held and whether these institutes' freedom to dispose of such material is limited by any rights retained by third parties. ...ICARDA states that the Center is custodian of the germplasm, without explicitly excluding ownership. ... ICRISAT considers that the institute is the owner of the plant genetic resources which it has collected or received, although its Constitution does not contain any explicit provision on the subject. ... IITA ... states that it ... works on the basis that it owns, like all other acquired assets, any genetic material in its possession."

In a separate 1988 report on plant genetic resources[3], TAC suggested that "ownership of genebanks held by the Commodity Centers [was] partly conditioned by their agreements with their host countries", adding that these differed considerably among Centers. Based on a canvassing of the Commodity Centers, the TAC document included a description of the legal arrangements of individual centers with respect to the long-term security of their germplasm collections. The canvas results are reprinted in Appendix I. The TAC document suggested that Center boards give high priority to the ownership issue, and where necessary, seek to revise headquarters agreements.[4]

The TAC document recognizes the need for long-term security of the collections while accommodating political sensitivities of countries concerning ownership and value of germplasm originating from within their territories. It avoids taking sides in the disputes over whether a country has the sovereign right over its germplasm and can control its outflow; but suggests that once a country has collaborated in a collection effort any ownership right to the collected material ceases. The germplasm would then be held by Centers in trust for all people. By introducing the trusteeship concept[5], TAC suggested a basis for the centers' genebank operations which, as we will show in Chapter III, offers a sustainable legal framework. It was subsequently adopted as CGIAR policy.[6]

In addition, individual centers have reviewed their legal position from time to time. According to a recent Survey by IBPGR (see Annex II), with one exception, all centers that replied appear to still hold that their genebank collections are part of center assets and would be treated as such in case of dissolution of a center.

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[3] TAC Document AGR/TAC:IAR/88/4 "CGIAR Policy on Plant Genetic Resources", Rome, February 1988

[4] TAC ibid.: "Where necessary, Boards should seek to revise their agreement with their host countries to ensure that, in the event of the center ceasing to operate, the provisions made for the future of germplasm collections are consistent with CGIAR policies. In general, provisions should be made for samples of all accessions to be transferred to an alternative genebank, if conditions arise that prevent the center from continuing its operations. The alternative genebank should be nominated by the Board of Trustees in consultation with the CGIAR."

[5] "Collections assembled as a result of international collaboration should not become the property of any single nation, but should be held in trust" [by the CGIAR centers].

[6] "CGIAR Policy on Plant Genetic Resources". 1989. IBPGR Rome

B. Assessment

No two establishment arrangements for CGIAR centers are alike. The way they were set up was determined as much by the legal culture of the sponsors as by that of the host countries. Some were founded on a contractual basis, often sealed and signed before a notary public, while others, in particular more recent centers, were based on more comprehensive arrangements involving international organizations (and indirectly the CGIAR) and thus implicating formal international law.

Establishment arrangements generally include several legal instruments. Typically two such instruments are used: one is an instrument establishing a center as a legal entity, generally a document signed by one or several sponsors who may be private individuals, national or international organizations, or states, including the host country; the second is a headquarters agreement between the host country and the center which sets out mutual rights and obligations including the privileges and immunities enjoyed by the center and its staff. In some cases, the headquarters agreement was signed before the formal creation of the center, by an organization that had been requested by the CGIAR to negotiate such agreement on its behalf. When the center was created, that organization would endorse all rights under the agreement to the new center.

An important question is whether an establishment instrument can be revoked and by whom. Normally, because the establishment instrument has created a legal entity, the establishment instrument cannot be revoked or annulled by the founders. The only legal way of dissolving a center is by decision of its members, generally through the board of trustees. The establishment instrument or the Board charter (constitution, by-laws) would set out the conditions under which a center can be dissolved, and the majority required for such a decision. While some headquarters agreements allow the host country government to revoke them or have a specified term (most do not), the termination of the agreement would not affect the legal existence of a center but rather its right to residence in that country. Should a host government elect to revoke a headquarters agreement, this would force a center to relocate its operations to another country.

"*Pacta sunt servanda*", whether they have been concluded under national or international law. Yet, in political terms, there is clearly a difference as to the "durability" of covenants and provisions challenged in situations of war or public disorder or by the

action of a host government. Breach of contract under national law entails compensation claims under national law. Violation of international law, however, can generate international pressure which may well induce a potential violator to refrain from such action. And their direct sponsorship in setting up several CGIAR centers would probably induce international agencies such as FAO, UNDP and the World Bank to take a strong stance should a host country violate its obligations vis-a-vis a center on its territory.

Both in terms of the legal quality of their establishment arrangements and of the political sustainability of these arrangements, we consider the current establishment arrangements satisfactory with three exceptions. Unlike CIMMYT and CIAT whose legal set-up has been renegotiated in the mid-1980s, IRRI and CIP are operating under legal arrangements made prior to the creation of the CGIAR. Both centers have been set up under local law, and in both cases the host governments could default on their commitments with no more formal legal response available than claims for damages resulting as a legal consequence. IITA negotiated a new headquarters agreement in 1986 which, however, did not change its status as a legal entity incorporated under Nigerian law. Of course, we believe that practical realities also in the case of these three centers would likely cause their host nations to refrain from defaulting on their commitments under their national laws.

1. Privileges, Immunities and the Treatment of Germplasm

Most centers enjoy fairly generous privileges and immunities. This includes the right to import and export, without taxes or restrictions, goods needed for center operations, as well as broader freedom from taxes and local jurisdiction. Expatriate staff mostly enjoys privileges and immunities similar to those granted by the host country to United Nations staff.

Specific provisions for the treatment of genetic material are included in some of the more recent center agreements, generally specifying that imports and exports are unrestricted, with imports having to comply with phyto-sanitary and quarantine regulations of the host country.

2. Cessation of Operations and the Status of Genebanks

One should distinguish between two scenarios here: the legal dissolution of a center; and a hostile termination of its operation as may be the result of war or civil disturbances in the host country. The formal legal arrangements are, of course, much more likely to be relevant in the first case.

Most agreements include provisions for the dissolution of a center. The establishment instruments (constitution, by-laws, charter) generally spell out the terms and conditions and the voting rules for the members or the board of trustees to dissolve a center, and also specify what should happen with center assets. The host government is normally in the position to influence the decision only through its membership in the center or on its board, but the headquarters agreement often spells out what will happen with center assets. Typically, land and improvements thereon pass to the government (especially in cases where the government has made land available to a center), while other assets can be retained by the host government or be disposed of at the government's discretion. In several agreements, however, agreement with the board will be needed for such disposal, and consultation with the CGIAR may be called for.

Some centers consider the dissolution rules applicable to their germplasm collections, with the effect that the collections would become property of the host government and could be disposed of by the government without restrictions under generally rather liberal (for the Government that is) provisions contained in host country agreements.[7]

As will be developed below, we disagree with this interpretation. According to the CGIAR policy statement mentioned earlier (and to the understandings from nations that supplied the germplasm), centers hold the germplasm in trust, and thus do not own it like other assets. Consequently, it should not be considered among the assets available for distribution in the event of dissolution. In our view, the trusteeship concept calls for different treatment which will be discussed in the following chapter.

The other scenario to consider is what would happen to a center's germplasm collection if the center falls victim to hostilities and has to stop its operations. The practical arrangements here are those taken in advance. Only in the case of WARDA did we find

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[7] See Annex I

a provision which requires WARDA to deposit its germplasm samples "with the most appropriate international germplasm bank" (see Annex II). As the discussion in the following chapter will show, we believe that the trusteeship concept devolves obligations on a center not dissimilar to those stipulated in the WARDA agreement.

III. The Trusteeship Concept and its Consequences for the Genebank Collections Held by CGIAR Centers

As described above, the CGIAR stated in 1989 that, "it is CGIAR policy that collections assembled as a result of international collaboration should not become the property of any single nation, but should be held in trust for the use of present and future generations of research workers in all countries throughout the world."[8] This is certainly a description of the CGIAR system's intentions with respect to the future of these resources; it may also be a description of the understanding under which the materials were collected and held since acquisition;

The interpretation of this concept is particularly important in two contemporary contexts. These are the operational questions that are sometimes summed up in the question, "who owns the germplasm in the genebanks?"

In the first context, already explored above, a Center builds up a collection of genetic material that it has received from a variety of nations "in trust," and the Center then leaves the host nation (sometimes but normally not the source of the material) in which it is operating. This departure could derive from the Center's choice or the Center might be forced out by host government decision. Are the genetic materials then subject to the host nation's control or must they be returned to the source nation or must they be transferred to another center that will conserve them or use them for research purposes?

In the second context, arising from the new commercialization of germplasm, a Center holding such materials considers the possibility that someone will obtain intellectual property protection on certain of the genes contained in the materials. Is the Center free

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[8] CGIAR Policy on Plant Genetic Resources (1989).

to do so? Must it do so if it fears that a third party will obtain such protection? If it does so, what are its rights and obligations with respect to any financial proceeds?

A. Origins of the Trust Concept

In attempting to interpret this concept of "trust," a concept that was almost certainly used in a relatively non-technical way by the CGIAR, one must begin by considering the international meaning, if any, that can be attributed to the term "trust." Although there is little formal international law in the area, the leading international application of the trust concept is in another non-technical context, namely the international trusteeship arrangement under which certain nations served as trustees for certain former dependent areas at the end of World War II.[9]

This United Nations system was an evolutionary development of the Mandate system of the League of Nations, created at Versailles:[10]

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

Under this Mandate system, specific nations supervised the development of the mandates; the supervising nations reported in turn to the League institutions. The United Nations system followed a similar intellectual tradition and overall design, even repeating the words "sacred trust."[11]

The most careful study found on the history and origin of this concept traced it back to four possible sources: Spanish legal scholars of the 16th century, British colonial

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[9] See United Nations Charter, Chapter XI, XII, and XIII.

[10] The Covenant of the League of Nations, Article 22. Entered into force January 10, 1920.

[11] United Nations Charter, Article 73.

doctrine, United States doctrine preceding World War I, and the diplomats who created the League of Nations and the United Nations. The study viewed the diplomats as playing a role that was more pragmatic than conceptual and found that the Spanish legal scholars were the source of the intellectual concept of an obligation to protect the peoples involved. Nevertheless, the first quoted use of the actual word, "trust," in this context, however, was by an English politician, Edmund Burke.[12]

Edmund Burke's priority undoubtedly reflected the fact that the legal doctrine of a trust (as opposed to the broader concept of an obligation to the peoples involved) is, in large part, a unique Anglo-Saxon concept. The fundamental trust concept is of a trustee holding property in trust for another person, the beneficiary. There may be Roman or Germanic origins, but the divided early English judicial system involved one set of courts that dealt with the formal legal ownership rights of the trustee and another that dealt with the equitable rights of the beneficiary:[13]

> The trust owes its peculiar character to the more or less accidental circumstance that in England in the fifteenth century, and for four hundred years thereafter, there were separate courts of law and equity. . . . It was possible therefore for one person to have the legal title to property and for another to compel him to exercise his legal rights for the other's benefit. There would be nothing extraordinary about the trust if the matter had stopped there. But the courts of equity went further than merely to impose personal duties on the holder of the legal title. They gave the beneficiary an interest in the property and gave him protection in the enjoyment of that interest. The result is something unique: a double form of ownership. Down below is the trustee who holds the legal title; above him is the beneficiary who has the equitable ownership.[14]

The concept is so unusual -- but also broadly useful -- that there has recently been negotiated a special Hague Convention on the Law Applicable to Trusts and on Their Recognition, designed to ensure that the relative rights of the trustee and the beneficiary

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[12] R. N. Chowdhuri, *International Mandates and Trusteeship Systems; A Comparative Study* (Martinus Nijhoff: The Hague 1955) pp. 13-33.

[13] *Potter's Historical Introduction to English Law*, pp. 604-606 (4th Ed. 1958).

[14] A. Scott & W. Fratcher, 1 *The Law of Trusts* 3-4 (1987).

are recognized in those jurisdictions for which the trust concept is unfamiliar.[15]

B. Legal Significance of the Concept

1. In International Law

a. Public International Law

To the extent that there is an international law doctrine of trust, it is that defined by the International Court of Justice in interpreting the Trusteeship provisions of the United Nations Charter. That approach has been very much a pragmatic one of attempting to define the wisest approach to managing the territories so as actually to benefit their residents.

The legal disputes arose over Namibia, then South West Africa, a League Mandate territory placed under the supervision of South Africa after World War I. When the United Nations replaced the League after World War II and the UN's Trusteeship system replaced the League's Mandate system, South Africa refused to transfer the territory voluntarily to Trusteeship status, believing that it could thus avoid UN supervision. There followed a variety of international legal actions dealing with the extent to which the League's rights were transformed into United Nations rights even in the absence of South Africa's consent. Of the various International Court of Justice opinions, the most relevant was that of 1971, an advisory opinion in which it was asked to define the legal effect of a Security Council Resolution which declared "that the continued presence of the South African authorities in Namibia is illegal."[16] In discussing the League's "sacred trust" concept, the Court wrote

> . . . Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is

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[15] Final Act of the Hague Conference on Private International Law, Fifteenth Session, The Hague October 20, 1984, reprinted at 23 *Int'l. Leg. Mats.* 1388 (1984). As of mid-1990, Canada, Italy, Luxembourg, the Netherlands, the United Kingdom, and the United States had either signed or ratified. See also discussion under b. below.

[16] Security Council Resolution 276 (30 January 1970).

> bound to take into account the fact that the concepts embodied in Article 22 of the Covenant - "the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned - were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust." The parties to the Covenant must consequently be deemed to have accepted them as such. . . . Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.[17]

According to the Court, the "sacred trust" notion which had remained undefined in the Mandate covenant had to be interpreted not as its drafters would have understood it (which they had not spelt out) but as the interests of the beneficiaries required it fifty years later. While not explaining the trusteeship concept itself, the ruling suggests that the interests of the beneficiaries under an international trust arrangements must be defined in a dynamic fashion, and must be understood as they evolve over time.

b. Private International Law

In a sense, the newly negotiated Hague Convention is no more than an international arrangement to support domestic doctrines governing trusts. Nevertheless, it gives these doctrines international recognition, and is also encouraging a spread of trust ideas to new nations. Although much of the draft Convention covers choice of law issues, the draft does have certain substantive provisions, of which the most relevant is Article 11:

> A trust created [normally in another country] in accordance with the law specified by the preceding Chapter shall be recognized as a trust [in any other country that is a member of the Convention]. Such recognition shall imply, as a minimum, that the trust property constitutes a separate fund . . . .
>
> In so far as the law applicable to the trust requires or provides, such recognition shall imply, in particular -

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[17] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Resolution 276 (1970), 1971 I.C.J. Reports 16, 31.

a that personal creditors of the trustee shall have no recourse against the trust assets;

b that the trust assets shall not form part of the trustee's estate upon his insolvency or bankruptcy;

. . .

d that the trust assets may be recovered when the trustee, in breach of trust, has mingled trust assets with his own property or has alienated trust assets. . .

As will be seen, for the issues covered in this memorandum, this is absolutely consistent with the domestic law positions which are about to be described.

2. In National Law

The most complete exposition of the concept is in its national law source. Hence, it is important to review these national conceptions, and the Anglo-Saxon law is the context within which the trust concept appears to have developed.

a. The Anglo-Saxon Tradition

In Anglo-Saxon law, a trust is created by a settlor who places certain assets in trust under the control of a trustee for the benefit of a beneficiary. Thus, a will might direct that a business be managed by a trustee who would control and operate it until a minor heir becomes old enough to take over the business. At that time the trust would be terminated and the assets of the trust given to the heir.

Under this Anglo-Saxon theory, a trust in the genetic resources might have been created by the CGIAR declaration as owner of the materials it held in the genebanks. Alternatively, under the implicit understandings with the nations of origin, the genebanks took the materials as trustees; and the CGIAR statement is a recognition of the preexisting status of the materials. In the first case, by analogy, the CGIAR, acting as owner, would be placing the materials in trust, under its own (or the Centers') trusteeship. In the second case, source nations gave the material to the Centers in trust, under the Centers'

trusteeship.[18] In either case, the beneficiary would be either "present and future generations of research workers in all countries throughout the world" or the farmers of the developing world as the beneficiaries of the work of those researchers.

In general, under a trust of this type, the assets held in trust are *not* regarded as assets of the trustee, so that a third party could not obtain the assets in settlement of an obligation of the trustee.[19] It is thus the clear implication of the Anglo-Saxon law that the host nation would not be able to obtain genetic resources from the trustee without the assent of the beneficiary.

Under this body of law, the trustee is "under a duty to the beneficiary to take reasonable steps to take and keep control of the trust property,"[20] and "to use reasonable care and skill to preserve the trust property."[21] Thus, under the analogy, the trustee centers are obligated to maintain the germplasm carefully. This could include, for example, an obligation to ensure that the material is duplicated in order to protect it from loss.

With respect to the intellectual property question, the possible analogies cut both ways, but generally favor the right of the trustee to obtain patent protection only if the interests of the beneficiary are carefully protected. As just noted, the trust must be operated for the benefit of the beneficiary. This requires the trustee "to use reasonable care and skill to make the trust property productive."[22] In the case of institutions holding the materials for the benefit of humanity, one can easily argue that obtaining intellectual

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[18] "A trust may be created by
(a) a declaration by the owner of property that he holds it as trustee for another person; or
(b) a transfer inter vivos by the owner of property to another person as trustee for the transferor or for a third person; or
. . ."
American Law Institute, I *Restatement of the Law 2d of Trusts* § 17 (1959).

[19] *Id.* § 266. There is an exception "if the purpose of the settlor [trustor] in creating the trust is to defraud his creditors or other persons." *Id.* § 63.

[20] *Id.* § 175.

[21] *Id.* § 176.

[22] *Id.* § 181.

property protection is a way to gain protection against the possibility that a windfall profit would be gained by the private sector and thus be lost from the international public sector research community. Thus, the trust doctrine gives support for a right -- and even an obligation --- to patent. The negative argument is that traditional trust law seriously restricts self-dealing on the part of the trustee, out of fear that transactions between the trustee and the trust would end up being unfair to the beneficiary. For example, a trustee is not to sell trust property to himself or herself;[23] likewise, the trustee is not to commingle trust assets with his or her own assets, unless so permitted by the terms of the trust.[24] Thus, the doctrine reflects a strong fear that the trustee will place his or her interest ahead of that of the beneficiary. By analogy, then, it would be essential for the CGIAR or the center to administer any patenting and the use of any royalties in a way that transparently ensures that these resources would be used for research that does benefit humanity.

b. Other Private Law Systems

There is a doctrine of fiduciary in the law of some civil law nations such as Germany and Switzerland, but not of others such as France.[25] France, however, is considering an addition to its Civil Code to respond to the draft Hague Convention noted above. This addition would create a new title in the Civil Code, governing a contract of *"fiducie,"* with

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[23] *Id.* § 170, Comment b. on Subsection (1).

[24] *Id.* § 179 and comment f.

[25] C. Laurroumet, "La fiducie inspirée du trust," *Recueil Dalloz* 1990, c119-121. In the French system, one finds the "usufruit" doctrine as the closest analogue to an Anglo-Saxon trust. This doctrine describes, for example, the French legal treatment of an inheritance situation similar to that described above, and the pattern is really closer to that of an Anglo-Saxon life estate. The person holding the property has the use of it during the period of usufruit, and can enjoy the fruits of the property, Code Civil § 582, but is restricted in touching the principal. (See, e.g., the restrictions on cutting trees contained in § 592.) It is clear that the ownership of the property remains with the proprietor. Civil Code § 578 "L'usufruit est le droit de jouir des choses dont un autre a la propriété, comme le propriétaire lui-même, mais à la charge d'en conserver la substance." Thus, this law, designed to deal with a somewhat different situation, is equally clear in that a creditor cannot seize the property to the detriment of a beneficiary. Because, however, the usufruitier is expected to enjoy the fruits of the property the rules against self-dealing are less severe than in the Anglo-Saxon pattern. The result would be greater freedom for patenting than in the Anglo-Saxon system.

properties very similar to those of the Anglo-Saxon trust. It would be created by a settlor (*constituant*), and the rights and obligations of the trustee (*fiduciaire*) would be quite similar to those of Anglo-Saxon law.[26]

C. Implications of the Trusteeship for the CGIAR Genebanks

Certain material held by the Centers and Genebanks is presumably not subject to the trust doctrine. Certainly this is the case for proprietary material supplied under a specific contract. It is probably also the case for material that has received breeding attention and is improved from the material supplied in trust -- there has long been a differentiation between unimproved material and advanced material developed from such unimproved material.[27] The advanced material reflects an intellectual input separate from that of the unimproved sources. Such material is clearly the Center's asset; the Center has full rights to patent or dispose of it (save as those rights are affected by a particular grant

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[26] "Avant-projet de loi relatif à la fiducie," 44 *Rev. Juridique et Politique Indépendance et Coopération* 366 (1990). The arrangements with respect to the rights of third parties are presented somewhat differently than in Anglo-Saxon law, but have much the same effect:

> [Proposed] Article 2067 - Les biens et droits transférés au fiduciaire forment une masse séparée dans son patrimoine.
>
> Le fiduciaire doit prendre toutes mesures propres à éviter la confusion desdits droits et biens ainsi que des dettes s'y rapportant, soit avec ses biens personnels, soit avec d'autres biens fiduciaires.
>
> Sans préjudice des droits des créanciers du constituant titulaires d'un droit de suite attaché à une sûreté née antérieurement au contrat de fiducie et hors le cas de fraude aux droits des créanciers chirographaires du constituant, les biens transférés au fiduciaire ne peuvent être saisis que par les titulaires de créances nées de la conservation ou de la gestion de ces biens.

The entire issue of this journal is a report of a 1989 colloquium on "La Fiducie ou Du Trust dans les droits occidentaux francophones."

[27] Such a differentiation is really implied by the terms of the 1989 Agreed Interpretation (on Plant Breeders' Rights) of the 1983 International Undertaking on Plant Genetic Resources. Report of the Commission on Plant Genetic Resources, Third Session, Rome 1989, p. 12.

or contract); as a Center asset, such material would normally follow the terms of the Center's establishment arrangements and host nation agreement upon dissolution.

But the material in genebank base collections is, we believe, subject to the trust concept, no matter who is its formal legal owner. This is the clear implication of the CGIAR's declaration; it is also the implication of the Undertaking's recognition of "the universally accepted principle that plant genetic resources are a heritage of mankind."[28] The question of formal ownership is relatively unimportant; what is important is that the centers have the responsibility to preserve and apply the material for the benefit of scientific research and the developing nations.[29] In developing the implications of the trust concept, however, we recognize that we are on untrodden ground. The application of this body of law to international genetic resources (or other similar resources) has not previously been attempted. Hence, we attempt to interpret the concept as well as possible and with the help of the Undertaking.

1. Responsibilities to Conserve the Genetic Resources

Under the trust concept, the trustee is, as noted above, "under a duty to the beneficiary to take reasonable steps to take and keep control of the trust property," and "to use reasonable care and skill to preserve the trust property." This corresponds to the Undertaking's emphasis, for example, on placing plant genetic resource activities "on a firmer financial basis."[30] The ideas of the trust concept clearly apply: the centers are obligated to maintain the germplasm carefully, and may have, for example, an obligation to ensure that the material is duplicated in order to protect it from loss. Likewise, they must seek to ensure that it is widely available for plant breeding should access be threatened by national action or the activity of a party gaining intellectual property rights over the material.

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[28] *International Undertaking on Plant Genetic Resources,* Article 1, FAO Resolution 8/83.

[29] The possible separation of legal and beneficial ownership is part of the point of the trust doctrine. For a discussion of legal (as opposed to beneficial) ownership, see Commission on Plant Genetic Resources (Footnote 1 above).

[30] Undertaking, Article 8.

2. Responsibilities upon Closure of a Center

Uniform domestic interpretation of the trust concept, as reflected in the draft Hague Convention imply that the host nation has no control over the genetic resources contained in an international gene bank. Under the domestic law analogy, the host nation can be no more than a creditor -- and the entire operating pattern of international research suggests exactly the same result on a policy basis. Indeed, this is the major point of the International Undertaking's position that "plant genetic resources . . . should be available without restriction."[31] These materials cannot be taken by the host government and must instead be saved for the benefit of the global research community.

The trust principles are slightly less clear as to whether the source nations of germplasm would be entitled to regain the materials under any such circumstances. Their interest is clearly adverse to that of the world community, which has build up expectations deriving from the existence of the trust. Indeed, it is traditional Anglo-Saxon trust law that a trustor, in general, has power to revoke the trust only if that power was reserved or in certain mistake-like situations.[32] This would suggest that the source nation has lost rights over the material. In contrast, under the French draft law, the trust assets would return to the original owner (either the genebank or the source nation) upon the dissolution of the trust unless the trust document had stated otherwise.[33] The Undertaking, however, would certainly suggest an approach emphasizing global availability. It is thus the more sound principle that the materials should be transferred to the global research community rather than the source nation. This way, they can be available to all.

3. Responsibilities with Respect to Intellectual Property Rights

As noted above, the trust arguments cut both ways with respect to intellectual property protection. Conservation and support for global research suggest that, if intellectual property rights are plausible, they be taken out in the name of the public sector

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[31] *International Undertaking on Plant Genetic Resources*, Article 1, FAO Resolution 8/83.

[32] *Restatement of Trusts 2d* § 330.

[33] Draft Article 2070-2.

rather than of a private sector holder who might obtain a windfall profit. This may even be implied by the obligation of the trustee "to use reasonable care and skill to make the trust property productive."[34] At the same time, the trust concept warns against self-dealing (although it is abundantly clear that the international centers are expected to use the materials for breeding). And both the trust concept and the Undertaking suggest that intellectual property rights should never be exercised to the detriment of the developing nation farmer. Thus, any such rights should be waived or exercised at a zero royalty in developing nations, save perhaps as part of a carefully supervised mechanism of private distribution to developing-nation farmers.

Moreover, should there be patenting, the trust concept implies an obligation to ensure that any resulting profits (i.e. revenues from royalties less the costs of obtaining and enforcing patents) are transparently used for the benefit of the global research community in the interest of developing countries. It would undercut the trust concept if the profits were used to reduce donor nation support for the international agricultural research system.

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[34] Consider Art. XII (d) of the Memorandum of Understanding between Kenya and Rockefeller dated Sept 21, 1973 concerning ILRAD's responsibilities:

> Any vaccines or other discoveries which may result from work conducted by the Laboratory are intended to be of universal benefit and, in particular, to developing countries. It will, therefore, be the responsibility of the management of the Laboratory and its Board of Trustees to avoid exploitation of such vaccines and discoveries by special interests. Accordingly, arrangements concerning patents, royalty and other arrangements will need to be subjected to legal guidelines to be established at an early date, and such guidelines will be reported to the CGIAR.

IV. The Proposed FAO Base Collections Network and Other Options

A. The FAO Proposal

1. Origins and Status

As part of the Undertaking, the FAO Conference called for:

> . . . an internationally coordinated network of national, regional, and international centers, including an international network of base collections in gene banks, under the auspices or the jurisdiction of FAO, that have assumed the responsibility to hold, for the benefit of the international community and on the principle of unrestricted exchange, base or active collections of the plant genetic resources of particular plant species.[35]

Part of the purpose of this provision was to provide the collections with any additional formal legal status that would derive from their affiliation with the FAO, an organization with formal international personality. As the FAO suggested:

> . . . the ultimate responsibility for the conservation of plant genetic resources covered by this network and for unrestricted access to such resources, should rest with an intergovernmental authority such as FAO. In this way, conservation and free exchange of these valuable resources would enjoy greater stability, since it would not depend solely on the policy, financial means, or diligence of any single government or institution. The conservation and unrestricted availability of plant genetic resources would, so to speak, be underwritten by an intergovernmental organization. Similarly, policies relating for example to the resources that should be preserved, or to access to such resources for plant breeding and scientific purposes, would be subtracted from the unilateral decision-making power of individual governments or institution.[36]

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[35] *Undertaking*, Article 7.

[36] Commission on Plant Genetic Resources, *Study on Legal Arrangements with a View to the Possible Establishment of an International Network of Base Collections in Gene Banks Under the Auspices or Jurisdiction of FAO*, CPGR/87/6, December 1986.

2. The Three Models

The FAO has developed several models of agreements for placing genetic resources in the FAO network and the Joint Center Directors/TAC Committee on Plant Genetic Resources has suggested consideration of Models B, C, and D. The three Models differ in several important respects with, in general, Model B transferring the materials most completely to the FAO, Model D transferring them least completely, and Model C offering an intermediate position. All are designed for signature by national governments; all include clauses for arbitration, ultimately with a neutral appointed by the President of the International Court of Justice.

Under Model B, intended to place the materials under the "jurisdiction" of the FAO, ownership of the material is transferred to FAO, and the national government renounces the right to subject the germplasm to national legislation. The national government retains ownership in the other cases.

The other models only place the materials under the "auspices" of the FAO. Model B gives the FAO a right of access to the premises and a right, under certain circumstances, to require administrative action to protect the material, as well as a right to set policies for the material. Of these FAO rights, only the right of access is included in Model C, but the host government agrees to involve FAO in the decision-making process. The FAO has none of these rights in Model D.

Models B and C include a procedure for bringing financial difficulties to the attention of FAO; there is no such provision in Model D.

3. Applicability to the Centers

Because these models all involve national governments, none is directly appropriate to the CGIAR genebanks -- certainly an implication of the above analysis is that the plant genetic materials in the CGIAR genebanks are not now held by host or other governments. Adaptation to a Center-FAO pattern would require a number of technical changes; for example, it is not clear that an ICJ role in dispute settlement between the FAO and a center would be the most appropriate solution.

In general, as trustees, the CGIAR centers are responsible themselves to manage the materials for the benefit of "present and future generations of research workers in all countries throughout the world." Although it is possible to exercise this right through the FAO, the Centers will probably be able to manage the materials most effectively if they retain as much authority and flexibility as possible. This would suggest a model close to Model D. With the other models, there would be a need at least "to associate FAO with the policy-making process" for policies "in respect of activities related to the designated germplasm. (Model C, Art. 5) Thus, some decisions might have to be delayed, for example, pending consideration by the Commission on Plant Genetic Resources or the FAO Conference.[37]

At the same time, an adaptation of Model D might be valuable. Such a new "Model E" would put the collection under the "auspices" of the FAO. It would not define ownership: neither FAO nor the center would be described as owning the germplasm, but the Center might be described as holding it in trust. The FAO and the Center would both agree to help defend the rights of the beneficiaries of the materials in rare event that the future of the materials depended on a formal legal action. An arbitration process would have to be agreed upon.

For most realistic threats to the materials, legal arguments will probably be overridden by such exigencies as a natural disaster or a civil war. In the rare case that a formal legal proceeding matters, that proceeding could be in a court that might consider trust logic or interpret a host-nation agreement on a reasonable basis. Bringing in the FAO provides an additional international legal basis for action, particularly if local proceedings fail to recognize global interests.

B. The Political Argument

While legally a *sui generis* arrangement of the kind discussed above ("Model E")

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[37] A number of governments have been queried as to the terms under which they would participate in the network. Of those answers given in a 1989 report by FAO, none was prepared to accept Model A and only Iraq would be prepared to accept Model B. All the others willing to participate would accept either Model C or Model D.

would neither harm nor more than marginally reinforce the status of a center's genebank collection, it may well strengthen international solidarity should there be need to mount a rescue operation for a genebank that is jeopardized by war, civil disturbances or natural disaster.

In the role of a "senior custodian" of all genebank collections in the world, national and international, FAO would certainly be called upon to coordinate a rescue operation. Because of its custodial relations with genebanks worldwide (as proposed for the base collections network) it would also be in an excellent position to orchestrate an evacuation and determine where collections should be relocated. FAO would take on the lead role, closely coordinating its actions with IBPGR and the CGIAR. We would see this as a mutually supportive collaborative effort.

Should the centers decide to join the FAO network under a *sui generis* arrangement this would also set a strong example for national genebanks to follow, thus helping to bring stronger international oversight to a global conservation strategy which currently lacks effectiveness.

C. Other Options

While the inclusion of center base collections in the FAO network may thus be desirable legally and politically, the CGIAR centers may still want to strengthen their current legal status. This would be particularly true for those centers whose current establishment arrangements are based on the law of the host country and could be modified by legislation in the host country.

One could think of a standard agreement to be signed by each center and its host country. This could also be a convention to be signed by host countries, countries in which centers hold assets, all CGIAR centers, and CGIAR members. Such an agreement would explicitly recognize the trust status of the materials and impose a strong obligation on host governments to facilitate center operations.

Because of our perception developed in this paper that center germplasm collections are not part of center assets and therefore will not become the property of the host country in case of a center's dissolution, we do not see the need for either of these options as a

legal mechanism of protecting these collections. They might, however, contribute to political recognition of the trust concept and might facilitate border treatment of germplasm shipments, especially phyto-sanitary and quarantine regulations where they impede imports and exports.

In practical terms, and as an outgrowth of the obligations incumbent upon the centers as trustees of the germplasm, we strongly recommend that the material held in the centers be widely and systematically duplicated in different geographical areas of the areas. This should be done irrespective of possible political concerns with regard to a specific host country, and is clearly far more important than any formal legal approach to strengthening the safety of these materials.

ANNEX I: Center Positions on Long-Term Security of Their Germplasm Collections

On at least two occasions Centers were asked to assess the legal status of their germplasm collections: The first time in response to a request by TAC in 1988; and recently in replying to a questionnaire sent out by IBPGR which queried Center positions on the legal status of their collections; the applicability of FAO's base collection models to the Centers; and the Centers' adherence to the FAO Undertaking on Plant Genetic Resources. The responses to TAC were reported in TAC document AGR/TAC:IAR/88/4 of February 1988 and are reprinted below under A.; responses to the IBPGR Survey of 1991 are reproduced under B.

A. Center Positions Reported to TAC in 1988

CIAT — A recent agreement (to be ratified) between CIAT and Colombia allows CIAT the right to export seed without restriction. This right is extended for one year after either party notifies the other of its intention to terminate the existence of the Institute.

CIMMYT — The existing CIMMYT agreement states that in case of termination, its assets shall become a part of the National Center for Agricultural Education, Research and Extension Plan Chapingo. A proposed revised set of statutes states "in case of dissolution, the assets of CIMMYT INT situated in the host or other collaborating countries shall be retained by such countries and used for similar purposes or distributed to institutions having purposes similar to those of CIMMYT INT in the respective countries after agreement between the governments of those countries and the Board in consultation with members of the CGIAR."

CIP — CIP is developing an inter-gene bank cooperation system to conserve genetic resources of mandated crops. Complete duplicate copies should be deposited in gene banks in two continents.

ICARDA — In the ICARDA agreement there is no specific reference to the gene bank. The basic

host-country agreement states that, in the event of dissolution, the assets of the Center shall be retained by the host country.

ICRISAT — The ICRISAT constitution states that, in the event of dissolution, the disposition of all assets except any land within India and fixed capital improvement thereon, shall be determined by the CGIAR after receiving recommendations from the Governing Board of ICRISAT.

IITA — In the event of its closure, IITA will move its germplasm collections to safe storage at a place determined by the CGIAR, and will leave duplicates of them with Nigerian authorities if asked to do so.

ILCA — All unique genetic resources held by ILCA are duplicated outside Africa, at Kew. ILCA has an agreement with the Ethiopian Government for the unrestricted movement of germplasm, in or out of the country, as required. There is a proposed agreement with the Plant Genetic Resources Centre (Ethiopia) to duplicate all original Ethiopian material in ILCA's long-term store.

IRRI — The IRRI agreement states that no part of the assets and property of the Institute shall inure to the benefit of or be distributable to its members and if the existence of the Institute is terminated for any reason, all its physical plant, equipment and other assets shall become the property of the University of the Philippines. IRRI will explore the host country's concurrence to send out a duplicate set of the entire rice collection to appropriate sites for duplicate storage in the event of dissolution.

WARDA — It is agreed that, if WARDA were to wind up its activities, arrangements would be made by WARDA to relocate its germplasm collection in suitable centers within and outside the region. This agreement has been established not only with the host country, but also with all WARDA member states.

B. Center Positions Reported to IBPGR in 1991

Questions

(1) LEGAL STATUS OF COLLECTION: Provide a summary of the legal arrangements between the Centre and the host country that affect the long-term security and legal aspects of all germplasm collections maintained by the Centre. This information was provided in the document AGR/TAC:IAR/88/4 Sup. 1. If a formal agreement has been

signed, please enclose a copy.

(2) ACCEPTABILITY OF SIGNING ONE OF THE FAO MODEL AGREEMENTS: Three model agreements are proposed by FAO (B,C, and D). Indicate which, if any, of these models is acceptable and the Centre would agree to sign it. If one of the models is acceptable with modifications, indicate the model and explain the restrictions that are required or desired.

(3) ADHERENCE TO THE FAO UNDERTAKING: Respond YES is the Centre has formally agreed to adhere to the FAO Undertaking for Plant Genetic Resources or NO if it does not. If the Centre adheres with restrictions, state this and provide restriction details. Also indicate whether your Centre, though not adhering to the Undertaking, subscribes to the principles of the Undertaking.

Responses

CIAT

(1) An international agreement between the UNDP and the World Bank formalized the creation of CIAT as an international organization on 28 May 1986. Subsequently, the Convenio between the Colombian Government and CIAT, signed on 5 May 1987, formalized the establishment of the newly international [word illegible in fax transmission] the right to import and export biological materials for its research requiring only a bill of lading for such operations and adherence to Colombian quarantine regulations. This right is granted for the duration of the international agreement and will continue to be in effect for one year after one or both parties decide to terminate the Agreement (Article 8, 2c).

(2) There is a basic problem with the three models related to ownership. CIAT has never assumed "ownership" of the germplasm conserved in the Genetic Resources", published in 1989, the germplasm of the IARCs is held in trust for the use of present and future generations of research workers in all countries throughout the world. CIAT has interpreted this policy in that this Center has trusteeship but not ownership. Since CIAT does not claim direct ownership, CIAT probably cannot make legal arrangements for transfer of ownership to FAO. This conclusion will need to be seen against the background of replies from other IARCs on this matter and possibly legal advice on the matter.

(3) With respect to adherence to the FAO Undertaking we do not see any real impediment for CIAT provided that there is a system-wide decision in this regard, i.e. all Centers agree to adhere at the same time. We feel this would give us all many advantages in the

present climate.

CIMMYT

(1) The CIMMYT, INT agreement with the Government of Mexico states 'in case of dissolution, the assets of CIMMYT, INT situated in the host or other collaborating countries shall be retained by such countries and used for similar purposes or distributed to institutions having purposes similar to those of CIMMYT, INT in the respective countries after agreement between the governments of those countries and the Board in consultation with members of CGIAR'. Irrespective of that, all of our material will be backed-up in banks outside of Mexico.

(2) CIMMYT has not signed any agreement nor asked for an opinion from our Board of Trustees if any such agreement should be signed. A type D agreement probably would be acceptable once there is a clear agreement of what is meant by 'under the auspices of FAO'. I would prefer that phrase be deleted.

(3) It is my understanding that CIMMYT has not formally agreed to adhere to the FAO Undertaking. Neither do we have a policy on this. Probably we should decide on joint action on this rather than have some centers agree and others not.

ICARDA

(1) In the agreement between ICARDA and its host country Syria there is no specific reference to the genebank. The basic host-country agreement states that, in the event of dissolution, the assets of the Centre shall be retained by the host country.

(2) The model agreement D proposed by FAO is most acceptable but if there is a common CGIAR policy on this issue ICARDA would join the other IARCs.

(3) The policy vis-a-vis the FAO Undertaking should be decided by the CGIAR for all centers in the System. ICARDA, though not adhering formally to the Undertaking, subscribes to its principles.

ICRAF

(1) Current agreement with Kenya does not cover depository and sharing of germplasm resources. As we get more involved in germplasm improvement and conservation research, there is a need to include this aspect in the new agreement with the host country.

(2) ICRAF prefers TYPE C AGREEMENT which provides the flexibility for ICRAF to make its germplasm available either directly to users or through FAO.

(3) In principle, ICRAF supports the proposed FAO undertaking as a means of more effective sharing and conservation of genetic resources of the world.

ICRISAT

(1) The ICRISAT constitution states that, in the event of dissolution, the disposition of all assets, except any land within India and fixed capital improvement thereon, shall be determined by the CGIAR after receiving recommendations from the Governing Board of ICRISAT.

(2) The choice of a "model" may best be made in close consultation with all IARCs, particularly the IBPGR.

(3) Supported in principle. Details to be worked out in consultation with IBPGR and other IARCs.

ILCA

(1) The Centre has an agreement with the Government of Ethiopia which allows the property and assets to be immune from legal processes, requisition, confiscation, expropriation and interference and allows free movement of germplasm in accordance with the national quarantine regulations. In the event of closure, the obligations and physical assets will be distributed to institutions having purposes similar to those of ILCA as agreed by the Ethiopian Government and ILCA Board in consultations with the CGIAR.

(2) ILCA would be willing to sign an agreement of the type D with FAO and is committed to maintenance of the germplasm collection and free availability of germplasm for bona-fide users. ILCA adheres to the CGIAR policy on plant genetic resources.

(3) The Centre has not formally agreed to the FAO undertaking on plant genetic resources, but agrees to the general principles set out in the undertaking.

IRRI

(1) The information in the report AGR/TAC:IAR/88/4 Sup. 1 is taken from IRRI's Articles of Incorporation and By-Laws, amended October 14, 1982.

The second sentence beginning "IRRI will explore ..." is not part of the Articles, but

expresses IRRI's perspective to agree with the host country concerning future disposition of the germplasm collection.

(2) Model D would be acceptable to IRRI. Since this model involves only consultation with FAO, and would place the collection under the auspices of FAO as part of the global system; it would ratify what IRRI's germplasm program is already undertaking routinely.

(3) Currently IRRI does not adhere to the FAO Undertaking. IRRI could adhere, in principle, to the FAO Undertaking. However, adherence at this stage is difficult since the Undertaking itself has yet to be finalized, given the lack of consensus on a number of clauses for which substantive modifications were suggested during the Third Session of the FAO Commission on Plant Genetic Resources in April 1991. Furthermore, current CGIAR discussions on Intellectual Property Rights should be clarified in the context of the Undertaking.

ANNEX II: Details of Center Establishment Arrangements

This Annex provides a discussion of the legal establishment arrangements of individual centers. A synopsis is attached.

A. Establishment Arrangements of Centers established prior to the CGIAR

Several centers sponsored by the Ford and Rockefeller Foundations (IRRI, CIMMYT, CIAT, IITA) and FAO (WARDA) predate the creation of the CGIAR.

IRRI

The International Rice Research Institute (IRRI) was the first international center to be established and later integrated into the CGIAR. The elaborate legal arrangements for its establishment bespeak the fact that it was the first effort by the Ford and Rockefeller Foundations to create such a center.

The original agreement to establish IRRI was contained in a Memorandum of Understanding signed on December 9, 1959 between the Ford and Rockefeller Foundations and the Secretary of Agriculture and Natural Resources of the Government of the Philippines. That Memorandum of Understanding was replaced by IRRI's Articles of Incorporation which were signed before public notaries in New York and Manila on February 18 and 29, 1960, respectively. IRRI's by-laws were adopted by IRRI's Board of Trustees on April 14, 1960. Tax exempt status was granted by the Philippine parliament on January 5, 1960, and a broad set of other privileges and immunities was granted by presidential decree of April 19, 1979.

On October 14, 1982, IRRI's Board of Trustees amended the Articles of Incorporation and the By-laws. The decision was notarized in the Philippines. The main purpose of these amendments seems to have been to combine into these two legal instruments the various provisions contained in the other legal instruments mentioned.

IRRI's legal status was not affected by the amendments: it remains a corporation

established under Philippine law. The fact that the representatives of the Philippine Government on IRRI's Board voted for the amendments and subsequently declared before the notary public that the amendments had been approved by the Board does not give IRRI's Articles and By-laws the quality of a treaty commitment on the part of the Philippine State.

Privileges, Immunities and the Treatment of Germplasm

IRRI's privileges and immunities appear to be comprehensive. Because they have their legal basis in an act of parliament and a presidential decree they could be revoked in the same way they were granted, without this entailing consequences other than liability for compensation under Philippine law.[1]

Dissolution

According to its Articles of Incorporation, the Center has been set up for a term of 50 years from its incorporation "unless earlier terminated in accordance with law". This is probably a reference to Philippine law of corporations which should be expected to stipulate the majority required to terminate a Philippine corporation.[2]

If IRRI is terminated "for any reason", all its physical plant, equipment and other assets become the property of the University of the Philippines. There is no room for a decision by its members or Board of Trustees, nor for consultation with, or agreement by, the CGIAR.

CIMMYT

The Centro International de Mejoramiento de Maïz y Trigo (CIMMYT) and the Centro International de Agricultura Tropical (CIAT) were the next two centers to be created, both by the Rockefeller Foundation through agreement with the host governments.

CIMMYT was created as an association under the laws of Mexico through a "civil partnership agreement" between the Government of Mexico and the Rockefeller Foundation notarized on

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[1] The First External Management Review of IRRI suggested that because IRRI's "international status" was accorded by Presidential Decree, IRRI should try to have it covered by an act of parliament.

[2] Under the original Memorandum of Understanding, now explicitly superseded by the Articles of Incorporation, IRRI could be terminated by agreement between the Government and the two foundations

April 12, 1966 in Mexico City. The original agreement provided for limited immunity from paying taxes on income. Informally, however, the government granted more extensive privileges to facilitate CIMMYT's operations. This included exemption from taxes, import duties and restrictions, and the free movement of staff and visiting scientists.

In the early 1980's; developments in Mexico and Colombia led the CGIAR to review the legal status of both CIMMYT and CIAT. As part of a general anti-corruption drive, the Mexican government had changed its liberal policy toward CIMMYT in 1982, removing most privileges it had informally granted, and subjecting CIMMYT and its staff to payment of taxes including income tax on staff salaries. CIAT, on the other hand, was drawn into a labor dispute with a former staff member which prompted calls for immunity from domestic jurisdiction. This led the CGIAR in 1983 to pass resolutions calling on the CGIAR Co-sponsors (FAO, UNDP and World Bank) to assist the two centers and their host governments in finding a solution to their legal situation and to provide the Centers with "legal capacity and international status".

On April 29, 1988, the Bank and UNDP agreed to create "CIMMYT, INT" (for International) which took over the international functions of the original CIMMYT (which continues to exist as "CIMMYT AC"). The Headquarters Agreement signed on May 9, 1988 between CIMMYT, INT and the Mexican State exlicitly recognizes CIMMYT, INT's legal capacity and international status.

Privileges, Immunities and the Treatment of Germplasm

CIMMYT's 1988 Headquarters Agreement accords "the Center's funds, its assets and personnel" (officer-in-charge, non-Mexican staff and consultants) the privileges and immunities accorded other international organizations in Mexico under the Convention on Privileges and Immunities of the United Nations of 1946 which Mexico ratified on May 10, 1963, and which is attached to the Headquarters Agreement (with exceptions for the acquisition of land and the treatment of Mexican employees). Generally, this appears to provide a satisfactory arrangement for CIMMYT.

With regard to germplasm, the Headquarters Agreement explicitly exempts CIMMYT from duties, taxes and restrictions on import and export of seeds for research purposes. There are no provisions in the headquarters or establishment agreements concerning CIMMYT's germplasm collection.

Dissolution

The headquarters agreement can be terminated by either party with a year's notice. Assets situated in the host or other collaborating countries shall be retained by these countries or

institutions in theses countries and used for similar purposes. Agreement between those countries and the Board of CIMMYT and consultation with CGIAR members is required.

CIAT

CIAT was created by agreement between the Rockefeller Foundation and the Government of Colombia on November 10, 1967.

Following the 1983 resolutions by the CGIAR (see under CIMMYT above) calling on the cosponsors to assist CIMMYT and CIAT and the host governments in resolving the problems found in the legal status of the two centers, the Bank and UNDP, on May 28, 1986, signed on behalf of the members of the CGIAR an agreement to establish CIAT "as an international organization possessing full juridical personality" according to a constitution annexed to the agreement. A new headquarters agreement was signed between CIAT and Colombia on May 5, 1987[3].

Privileges, Immunities and the Treatment of Germplasm

The 1988 headquarters agreement grants comprehensive privileges and immunities to CIAT and its staff. With regard to germplasm, it allows import and export subject only to quarantine legislation, and its free movement within Colombia. Export procedures are reduced to presentation of a bill of lading.

Dissolution

CIAT can be dissolved by its Board with a three-quarter majority. The headquarters agreement can be terminated by either party with one year's notice. The constitution permits the host or collaborating countries to retain CIAT assets or distribute them in agreement with the Board in consultation with the CGIAR. According to the headquarters agreement, CIAT and the Ministry of Agriculture will determine the distribution of CIAT's net assets.

IITA

A joint project by the Rockefeller and Ford Foundations, the International Institute of Tropical Agriculture (IITA) was incorporated by decree of the Government of Nigeria No. 32 of July 24

[3] Law No. 29 of 1988 dated March 18, 1988 (Diario Oficial of March 22, 1988)

1967 which was amended on June 17, 1974.

Referring to the original Ford/Rockefeller proposal of March 19, 1965, and the agreements earlier reached with the civil predecessor government, the Decree by the Military Government establishing IITA as a Nigerian institution provides for tax-free status and recognizes IITA as being international in character, operating under policies laid down by its Board of Trustees. The decree also provides for duty-free imports of goods and materials necessary for the operation of IITA and, for IITA staff, their families, trustees and visiting experts.

Privileges, Immunities and the Treatment of Germplasm

Efforts were initiated by IITA in 1986 to be granted treatment of an international organization under a headquarters agreement defining additional privileges and immunities of IITA along the lines of those accorded in Nigeria to ILCA and ICRISAT. Such an agreement was signed on June 7, 1988 by the Federal Minister of Science and Technology and IITA's Director-General. It provides for the inviolability of IITA's premises, duty-free import and exports of goods needed for IITA's operations, and privileges and immunities for its staff. In addition, Decree No. 32 allows IITA to "distribute improved plant materials to other research centers where they might be of significant value in breeding or improvement programs" (Art. 2 (d)).[4]

Dissolution

Decree No. 32 accepts only one reason for IITA's dissolution: "if the foundations discontinue financial support for the Institute and the existence of the Institute is thereafter terminated for any reason, all of the physical plant and equipment of the Institute shall become the property of the Government to be used by it for scientific or educational purposes." (Art. 14). The clause has apparently not been updated to reflect the funding role of the CGIAR.

There are no provisions on genebank operations or the disposition of IITA's germplasm collection in case of cessation of IITA's operations.

[4] As the Second External Management Review pointed out, the relationship between the mentioned decrees and the headquarters agreement is unclear. For instance, the headquarters agreement repeats several provisions, but not others of the earlier decrees, raising concern that all of the older provisions could be interpreted as having been superseded by the more recent headquarters agreement.

ANNEX II

CIP

The origin of the International Potato Center (Centro International de la Papa - CIP) dates back to 1965, when Peru signed an agreement with North Carolina State University for scientific cooperation aimed at creating a center for research on tuber and root crops. The Presidential Decree No. 102.A of September 1, 1967, announced that "There will be an international potato center in Peru", and initial statutes were approved by the government on November 29, 1968 (Supreme Decree No. 204-68-AG).

A formal agreement creating CIP and at the same time setting out its rights and obligations was signed on January 20, 1971 between the Minister of Foreign Affairs and the Chancellor of North Carolina State University.

On June 13, 1972, CIP's Director-General by appearing before a notary public in Lima, Peru, placed CIP's Statutes in the Peruvian Public Registry of Associations.

According to the 1989 External Management Review, CIP's agreement with the government of Peru is working satisfactorily. "Nevertheless, constant vigilance is required on CIP's part to make certain that the authorities (those who on a day-to-day basis monitor imports and collect duties and taxes) understand the privileges and immunities Peru has in fact accorded to CIP". The panel failed to explain what aroused its concerns in this regard.

The January 1971 agreement limited CIP's term of operations to a period of ten years. In 1975 this was extended to 20 years, and again in February 1982 until January 20, 2000.

The statutes authorize CIP to collect, maintain and distribute germplasm in order that it may be used both nationally and internationally (Art. 3.b).

Privileges, Immunities and the Treatment of Germplasm

The above mentioned agreement between the Government of Peru and North Carolina State University (January 20, 1971, Decree Law No. 18708 of December 29. 1970) grants comprehensive privileges and immunities to allow CIP to operate: movement of staff in and out of the country, duty-free importation of needed machinery, equipment, materials and vehicles, tax exemption on sales of products; "free movement of seeds and genetic material inside and out of Peru, according to Peruvian sanitary regulations" (Art. 14.d); and exemptions from income taxes for internationally recruited staff members.

Dissolution

Under the January 20, 1971 Agreement, all assets would, in case of CIP's dissolution, be transferred to the Ministry of Agriculture of Peru.

WARDA

The inclusion of the West Africa Rice Development Association (WARDA) in the CGIAR was a prime concern of the FAO when the CGIAR was set up in 1971. Following a conference in Monrovia in September 1969 of 11 West-African nations at which it was decided to form WARDA, FAO prepared a "constitution" which was adopted under the "Final Act" of a conference of the same countries held on September 1-4, 1970, in Dakar, Senegal.

When civil war made WARDA's operations in Liberia impossible, its Council of Ministers, in December 1986, decided to move WARDA's headquarters to Cote d'Ivoire. The new headquarters agreement with Cote d'Ivoire dates from September 22, 1989,

The headquarters agreement states that all germplasm samples held by WARDA are the property of its member states, without specifying whether this means joint and several ownership or ownership by individual member states. This appears to be the only provision on ownership of germplasm in a center establishment arrangement. The agreement also provides for the event of force majeure in which event it requires WARDA to relocate its collection.[5]

Privileges, Immunities and the Treatment of Germplasm

Under its constitution (revised in December 1986 to sanction to move of WARDA's headquarters to Cote d'Ivoire) WARDA is entitled to privileges and immunities from its member countries. "The scope and privileges of the organs of the Association, its property, funds and assets and its staff shall be determined, *mutatis mutandis*, in accordance with the provisions of the Convention on Privileges and Immunities of the Specialized Agencies of the United Nations." Concerning biological and genetic material, WARDA is allowed to import and export what it needs to conduct its research, subject to quarantine regulations.

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[5] "WARDA member states are the legal owners of all germplasm samples held by WARDA in Cote d'Ivoire. WARDA shall be the legal custodian of all such samples. In the event force majeure conditions render necessary a general relocation, WARDA shall deposit its germplasm samples with the most appropriate international germplasm bank." (Art. VII.4).

Dissolution

WARDA can be dissolved by unanimous decision of its member states, and would stand dissolved once the number of member states falls below five. The Constitution stipulates that material owned by WARDA continue to be used for purposes for which they had been acquired without specifying a beneficiary for such continued use; while material made available by member states and organizations would be disposed of in consultation with these states and organizations.

B. Establishment Arrangements of Centers Created under CGIAR Auspices

ICRISAT

The International Crop Research Institute for Semi-Arid Tropics (ICRISAT) was the first center to be established under the aegis of the CGIAR. The Ford Foundation which together with the Rockefeller Foundation had carried out the preparatory work, was appointed by the Chairman of the CGIAR to act on behalf of the CGIAR.

A Memorandum of Understanding was signed by four initial donors on February 22, 1972. In a "Special Accounts Agreement" of March 20, 1972, with the World Bank, the Ford Foundation agreed to launch the initial phase of the project. Under the agreement, the Bank opened an account and disbursed project funds during the set-up phase. The Ford Foundation signed a Memorandum of Agreement with the Government of India on March 28, 1972 which it endorsed to ICRISAT the following year on February 20, 1973.

In the meanwhile, on July 5, 1972, FAO and the World Bank signed an agreement on behalf of the CGIAR to establish ICRISAT.

Privileges, Immunities and the Treatment of Germplasm

By notification of October 1972, the Government of India granted diplomatic privileges and immunities by according ICRISAT treatment as a U.N. agency. In addition, the agreement between the Government of India and the Ford Foundation provides for the free movement of seeds and genetic material needed by the Institute, subject to quarantine regulations. There are no provisions on genecan operations.

Dissolution

The Institute can be dissolved by a three-fourth majority decision of its Board if its purpose has been accomplished or the Institute can no longer function effectively. Land and fixed assets will pass to the Government while the CGIAR would determine the disposal of other assets on recommendations from ICRISAT's governing board.

ILRAD

The International Laboratory for Research on Animal Diseases (ILRAD) was created in Kenya in 1973. A Memorandum of Understanding signed by eight initial donors on November 2, 1973, requested the Rockefeller Foundation, with support from the World Bank as disbursement agent, to initiate the first phase of the ILRAD project. The Rockefeller Foundation concluded a Memorandum of Agreement with the Government of Kenya on September 21, 1973 which the Rockefeller Foundation (as provided for in the Agreement) subsequently endorsed to ILRAD's Board of Trustees. According to it, ILRAD was to operate as an autonomous, non-profit organization, international in character, and to be governed by a Board of Trustees. It was incorporated as a "company limited by guarantee" (Memorandum of Association of May 1, 1974). Its original members were seven individuals who signed the Memorandum of Association in their personal capacity and not as representatives of ILRAD's sponsors.

Privileges, Immunities and the Treatment of Germplasm

Privileges and immunities are spelt out in the earlier Memorandum of Understanding, including freedom from import restrictions and customs duties of "all equipment and supplies deemed by the Laboratory to be required for the establishment and operation of the Laboratory and its program..." The memorandum contains an authorization "for the unrestricted movement of such scientific materials into and out of Kenya as may be needed by the Laboratory for its cooperative programs in any part of the world consistent with obligatory quarantine inspection" and with Government of Kenya assurance for prompt and expeditious inspection.

Dissolution

"Any property whatsoever" left upon the winding up and dissolution of ILRAD shall be given to charitable institutions in Kenya with objectives similar to those of ILRAD (Memorandum of Association of May 1, 1974).

ILCA

A Memorandum of Understanding was signed by ten "initial donors" in 1973/74 authorizing the World Bank and IDRC to initiate the establishment of the International Livestock Center for Africa (ILCA). Acting on behalf of the CGIAR, the Bank, on July 16, 1974, signed with Ethiopia an "Agreement of Understanding" for the establishment of ILCA, which, in turn, it endorsed to ILCA on October 31, 1975, after it had been amended on June 13, 1975 to strengthen ILCA's import privileges.

The Memorandum of Agreement was replaced by the "Agreement" between the Government of Ethiopia and ILCA on December 24, 1982.

Privileges, Immunities and the Treatment of Germplasm

The 1982 Agreement incorporates the privileges and immunities of the earlier agreement: it also authorizes the unrestricted movement of biological materials needed by the Center into and out of Ethiopia consistent with Ethiopian quarantine inspection. Center premises are inviolable.

Dissolution

ILCA can legally be dissolved only through mutual agreement of all involved, including the CGIAR in which case "the rights, obligations and physical assets of the Center, other than land, shall be distributed to an institution or institutions agreed by the Government and the Board in consultation with the CGIAR and having purposes similar to those of the Center" (Art. 15). This includes, one should assume, institutions outside Ethiopia.

ICARDA

A complex legal structure was put in place to establish the International Center for Research in the Dry Areas. This was largely conditioned by the diplomatic necessity to conclude basically equivalent agreements with three countries in the Region (Syria, Lebanon and Iran) without prejudging where ICARDA's headquarters were to be located.[6]

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[6] "There is hereby established in Iran [Lebanon] an international institute called the International Center for Agricultural Research in the Dry Area (ICARDA)", Art. I of the agreements between Iran with IDRC and Lebanon with IDRC. Note that the corresponding article in the Agreement with Syria establishes the Center "in the Region" defined elsewhere as the Near East, North Africa and the Mediterranean region. In Article III.1 all three agreements stipulate that a "Principal Station of the Center" shall be located in the respective host country. That ICARDA's headquarters were eventually established in Syria was the result of political developments in Iran and Lebanon at the time.

In November 1975, the World Bank, FAO and UNDP (the three co-sponsors of the CGIAR), and the Canadian International Development Research Center (IDRC) which had agreed to be Executing Agency in establishing ICARDA agreed on a Charter for ICARDA.

IDRC subsequently negotiated establishment arrangements for ICARDA on behalf of the CGIAR which were signed with the three host countries as follows: Syria on June 28, 1976, Iran on July 20, 1976, and Lebanon on July 6, 1977. Art. XIII of the three agreements allows ICARDA, upon a declaration by the Chairman of the CGIAR that the Center has been established as a legal entity and was functioning effectively, to endorse the IDRC agreements with the result that IDRC's role would lapse. It is not known whether this provision has taken effect.

ICARDA's By-Laws were established by its Board of Trustees on December 16, 1976 and amended several times. In 1985, Syria which currently hosts ICARDA's headquarters negotiated an "endorsement" of ICARDA's By-Laws which narrows the privileges and immunities earlier agreed upon with IDRC.

Privileges, Immunities and the Treatment of Germplasm

With the implicit purpose to induce ICARDA to procure in Syria and to save Syrian foreign exchange funds, the 1985 "endorsement" subjects imports for ICARDA's use to prior agreement with the Government of a list of required purchases. Because ICARDA would normally import its germplasm requirements free of cost, we would assume such imports should not require prior Government consent.

Dissolution

The Board can decide on the dissolution of ICARDA with a two-thirds majority. Land and fixed assets pass to the host state, while other ICARDA assets can either be retained by the host countries or distributed in agreement with the Board after consultation with the CGIAR.

ICRAF

The Agreement between the Government of Kenya and the International Development Research Center dated November 21, 1978, established the headquarters of the International Council for Research in Agroforestry (ICRAF) in Kenya. IDRC signed the Agreement as Executing Agency for group of countries and donor agencies. IDRC undertook to set up ICRAF who, upon its effective establishment, endorsed the Agreement.

According to ICRAF's charter which is part of the headquarters Agreement and attached thereto (it was not attached to the copy of the headquarters agreement we received from ICRAF) ICRAF has the status of an autonomous, non-profit making, international organization which is allowed to incorporate itself under Kenyan law (and may have done so).

The headquarters agreement with Kenya and ICRAF's charter are expected to be revised to reflect ICRAF's recent inclusion in the CGIAR.

Privileges, Immunities and the Treatment of Germplasm

The headquarters agreement grants some immunities to ICRAF and its foreign staff, including an exemption from import and export restrictions and duties. There are no specific provisions for the handling of germplasm.

Dissolution

In case of ICRAF's dissolution, assets other than land and improvements would be distributed to institutions with similar objectives in agreement with the Board of Trustees, and in consultation with the sponsors. This could include institutions outside Kenya.

INIBAP

The International Network for the Improvement of Banana and Plantain (INIBAP) was created through an "Agreement to Establish the INIBAP". It has been ratified by Belgium, Canada, Colombia, France, the Philippines and Senegal and became effective on August 25, 1990. Decree No. 90-866 dated ... (text not available) sets out arrangements between France as host country and INIBAP.

Privileges, Immunities and Treatment of Germplasm

Details of headquarters arrangements (i.e. the above-mentioned decree) not available.

Dissolution

Upon dissolution of INIBAP on which its Board can decide with a three-quarters majority, assets other than land and improvements would be given to institutions with similar objectives.

SYNOPSIS OF ESTABLISHMENT PROVISIONS

CENTER	INSTRUMENT OF ESTAB-LISHMENT	HEADQUARTERS AGREEMENT	PRIVILEGES AND IMMUNITIES	PROVISIONS: GERMPLASM	DISSOLUTION PROVISIONS:	DISTRIBUTION OF ASSETS UPON DISSOLUTION
IRRI	MoU GoP/ RF/FF (1960)	1. Presidential Decree No. 1620 (4/19/79). 2. Republic Act No. 2707 (6/18/60).	1. As for an inter-national organization accredited in the Philippines. 2. Confers tax exemptions.	No provision.	Center can be terminated by mutual agreement.	Become property of Univ. of Philippines, College of Agriculture.
[1] CIMMYT	Agreement: IBRD/UNDP (1988)	Agreement: GoM/CIMMYT, INT (5/9/88)	As for an inter-national organization accredited in Mexico (UN Privileges and Immunities).	Development and distribution of superior germplasm; Development and diffusion of improved technologies in developing countries through supply of improved germplasm; Free import and export of seeds for research	Center can be termi-nated by three-fourths majority of Board, with CGIAR approval.	Retained by host or collaborating countries or distributed to institutions with similar purposes.
[2] CIAT	Agreement IBRD/UNDP (1986)	Agreement: GoC/CIAT (5/5/87)	Duty free import of supplies and equipment; DG has diplomatic status; staff exempt from income tax; inter alia	Facility to collect, preserve, supply and exchange plant and animal germplasm; free import and export of biological materials for scientific research; free movement of seeds within Colombia.	Can be dissolved by Board decision.	Assets in Colombia to be transferred to other non-profit Colombian research, education or extension insti-tutions as determined by CIAT and Ministry of Agriculture.

SYNOPSIS OF ESTABLISHMENT PROVISIONS

CENTER	INSTRUMENT OF ESTAB-LISHMENT	HEADQUARTERS AGREEMENT	PRIVILEGES AND IMMUNITIES	PROVISIONS: GERMPLASM	DISSOLUTION PROVISIONS:	DISTRIBUTION OF ASSETS UPON DISSOLUTION
IITA	GoN Decrees No. 32 and No. 27 (1967)	HQ Agreement: IITA/GoN, 1988 (6/7/88) Diplomatic Immunities and Privileges (IITA) Order 1991 (7/26/91)	Duty free import of supplies and equipment; staff import privileges on first arrival; staff exempt from income tax; inter alia.	No specific provision, but Center can distribute improved plant materials, acquire property in trust.	n/a	Become property of Government to be used for scientific or educational purposes. (Note: HQ Agreement permits expropriation of real property against fair compensation.)
WARDA[3]	Revised Constitution dated December 1986 (adopted by Governing Council) (1986)	HQ Agreement: (9/22/89)	Duty free import of supplies and equipment; staff import privileges on first arrival; staff exempt from income tax; inter alia.	Owned by WARDA member states; free entry or exit; free movement within Cote d' Ivoire; in the event of force majeure, will be deposited with most appropriate inter-national germplasm bank.	Unanimous decision of Member States after consultation with BoT, cooperating states and organizations; consi-dered terminated if Member States fall below five.	WARDA-owned assets shall continue to be used for original purposes; material made available by Cooperating States and Organizations will be disposed of in consultation with them.
CIP	Agreement: GoP/NCSU (1971)	Included in Instrument of Establishment (1/20/71)	Duty free import of supplies and equipment; staff import privileges on first arrival; staff exempt from income tax; inter alia.	Collect, maintain and distribute germplasm; free movement of seeds and genetic stock within and without Peru.	Decision by two-thirds of members of BoT.	To be transferred to Peruvian Ministry of Agriculture.

ANNEX II

CENTER	INSTRUMENT OF ESTAB-LISHMENT	HEADQUARTERS AGREEMENT	PRIVILEGES AND IMMUNITIES	PROVISIONS: GERMPLASM	DISSOLUTION PROVISIONS:	DISTRIBUTION OF ASSETS UPON DISSOLUTION
ICARDA	Charter: IBRD/ FAO/UNDP/IDRC 1975, amended 1976 and 1985.	1. Agreement: GoS/ IDRC (6/28/76) 2. Amended Articles of Bylaw No. (22) (6/1/85)	1. Tax exempt, inter alia 2. Local purchase of goods where possible.	Collection, evaluation, maintenance, manipu-lation, distribution and exchange for research, development and production; free movement into and out of Syria.	Vote by three-fourths of BoT members, with CGIAR concurrence.	Other than land and fixed capital assets, retained by host countries and used for similar purposes or distri-buted to institu-tions with similar objectives.
INIBAP	Agreement Establishing the INIBAP: Signed by Belgium, Canada, Colombia, France, Philippines, Senegal (1988); effective 8/25/90.	Decret No. 90-866 (France) (9/21/90)	n/a	Promote and coordinate research and germplasm exchange.	Vote by three-fourths of BoT to propose dissolution; "parties" decide to seek additional funding or dissolve the Center.	Other than real property, given to organizations or institutions with similar objectives.
ICRAF	Charter (n/a)	Agreement: GoC/IDRC (11/21/78)	Free import of supplies and equipment; staff import privileges on first arrival; staff exempt from income tax; inter alia.	Free movement of scientific materials.	n/a	Other than real property, distributed to institution(s) having similar purposes, as agreed by ICRAF and GoK, after consultation

SYNOPSIS OF ESTABLISHMENT PROVISIONS

CENTER	INSTRUMENT OF ESTAB-LISHMENT	HEADQUARTERS AGREEMENT	PRIVILEGES AND IMMUNITIES	PROVISIONS: GERMPLASM	DISSOLUTION PROVISIONS:	DISTRIBUTION OF ASSETS UPON DISSOLUTION
ICRISAT	MoA: GoI/FF (1972)	Ministry of *External Affairs* Notification No. D221 (10/28/72)	UN (Privileges and Immunities) Act, 1947 made applicable by *External Affairs* Ministry Notification *D221 (10/28/72).*	Collection, evaluation, maintenance, manipulation and distribution for use in breeding, improvement, and *production; free* movement into and out of India.	n/a	Transferred to scientific or educational organizations as determined by CGIAR based on recommendations from Governing Board.
ILRAD	MoA: GoK/RF (1973)	Included in Instrument of Establishment (9/13/73)	Duty free import of supplies and equipment; staff import privileges on first arrival; staff exempt from income tax; inter alia.	Vaccines or other discoveries subject to yet-to-be-established guidelines; unrestricted movement of scientific materials.	n/a	Transferred to company(ies) or institution(s) having similar charitable objectives as determined by Members of the Company, or in default, by Judge of the High Court of Kenya.
ILCA [4]	Agreement: GoE/IBRD (1982)	Revised Agreement: GoE/ILCA (3/14/91)	Duty free import of supplies and equipment; staff exempt from income tax; inter alia.	No provision	n/a	Distributed to institution(s) having similar purposes, as agreed by GoE and BoT, with CGIAR.

ANNEX II

Footnotes:

1. CIMMYT: Original Instrument of Establishment - Agreement between GoM/RF establishing "Civil Partnership", 1966. 1988 Agreement between IBRD/UNDP created CIMMYT, INT, separate from CIMMYT, A.C.
2. CIAT: Original MoU, GoC/RF, establishing a non-profit corporation, 1967. The 1986 agreement between IBRD/UNDP replaced the original CIAT.
3. WARDA: Original Instrument of Establishment, agreement between 11 West African and Sahelian countries, establishing WARDA in Liberia, 1970. HQ moved to Cote d'Ivoire, 1986.
4. ILCA: Original Instrument of Establishment, MoA:GoE/IBRD (1974), repealed and replaced by 1982 Agreement: GoE/ILCA.

Abbreviations:

BoT = Board of Trustees
FF = The Ford Foundation
MoA = Memorandum of Agreement
MoU = Memorandum of Understanding
NCSU = North Carolina State University
RF = The Rockefeller Foundation
n/a = reference sources not available at time of writing

ANNEX III: Draft Material Transfer Agreement

The following draft of a Material Transfer Agreement has been prepared at the request of IBPGR. It is derived from the "Uniform Biological Material Transfer Agreement" developed by the U.S. National Institutes of Health.

The draft Agreement would be signed between a center and institutions/researchers that request to receive genetic material. With modifications, it could also cover the case where a center receives material for research purposes. Once signed, all shipments of genetic material from the Center to the Recipient would be covered under the Agreement. The Center would send out with the material a form letter as suggested in para 2.1 of the draft Agreement. It would keep copies of such letters for later tracking needs.

We investigated whether, in the absence of a signed agreement of the kind suggested, it would be legally sufficient for a Center to simply send out with the material a form letter setting out the conditions under which the material was being made available, on the assumption that acceptance of the material and the letter would represent acquiescence in the suggested terms. While this might be sufficient in some legal systems, and the question is not without doubt in Anglo-Saxon law, it may not be sufficient in that system. Since a large number of exchanges of genetic material will be conducted with institutions in countries that follow the Anglo-Saxon law, we feel that a formal agreement of the kind suggested below which requires signature by both parties will be needed if a legally effective agreement is sought. Once a framework agreement is signed, however, there is no need to require a signature from the Recipient every time he or she receive a sample from the Center.

The NIH agreement mentioned above is drafted in the form of a convention to be signed by collaborating research institutions. It also provides for a central depository which receives copies of all instruments of signature and maintains a list of signatories. Center Directors may prefer such arrangement to signing individual agreements with each collaborator. In this case each center could either develop its own legal instrument and invite collaborators to sign it; or all centers could agree on a uniform convention binding all centers and their collaborators who sign up on it. The draft agreement below contains clauses to cover the latter alternative shown in square brackets in paragraphs 4.2 and 4.3.

ANNEX III

Draft Material Transfer Agreement

1. Background

1.1 The CGIAR adheres to the principles of unrestricted availability and free exchange of germplasm. However, for reasons of fairness, and as custodian of the material held in trust in its own genebank collections, the CGIAR must ensure that, if commercial users of this resource obtain from it economic advantages that greatly exceed the cost of their own research efforts (windfall gains), a fair share of these gains be retained for the benefit of developing countries. This could be accomplished either by making the research results obtained from such material available to developing countries at no cost or on preferential terms, or by contributing to the research and conservation efforts conducted by the international centers for the benefit of developing countries.

1.2 Signatory parties to this Material Transfer Agreement (hereinafter referred to as "the Agreement" or "MTA") are concerned that commercial terms of material transfer agreements do not impede the exchange of biological materials and, hence, the advancement of science.

1.3 The parties that are signatory to this Agreement desire to utilize it to ensure that research results that are in the form of biological materials be promptly transferred to other scientists in a rapid and efficient manner.

2. Procedure

2.1 The Center when making biological material available to others in accordance with this Agreement shall present a Letter similar to the following to any requestor:

From: Sending Centker (the Supplier)

To: Receiving institution (the Recipient)

The biological material described below, [developed in the laboratory of _____ ; is being made available to the Recipient in accordance with the terms and conditions of the Material Transfer Agreement (MTA), which both the Supplier and the Recipient have signed.

1. Describe biological material here (the Material)

2. Describe here any payment required to cover the Supplier costs of shipping or preparation of material

3. Describe here any special handling needed

ANNEX III

Name of Center (Supplier)

Name of responsible individual

3. **Terms and Conditions**

3.1 Biological material (the Material) being made available pursuant to this Agreement is to be held by the Recipient in trust and used solely for scientific research purposes in the facilities of the Recipient's scientists and breeders.

3.2 The term "the Material" shall include progeny and any modification to the Material, if such modified material is substantially based on or incorporates a substantial element of the original Material, or any modification which is not new or obviously distinct from the original Material. However, nothing herein shall be construed to prevent the Recipient from seeking patent protection on an invention arising from its use of the Material or to prevent or delay publication of research results arising from use of the Material.

3.3 No rights are provided to the Recipient to use the Material and any related patents for profit-making or commercial purposes.

3.4 If the Recipient is a commercial institution, and desires to use the Material and related patents, if any, for profit-making or commercial purposes, it agrees to negotiate in good faith a license with the Supplier prior to making any profit-making or commercial use. The Supplier shall have no obligation to grant such license to the Recipient, and may grant exclusive or non-exclusive licenses to others for the use of the Material.

3.5 The provision of Material to a Recipient is understood to in no way alter any rights of any research sponsor of the Supplier.

3.6 The Recipient of Material under this Agreement shall not transfer the Material to any other party without the prior written consent of the Supplier.

3.7 Either the Supplier or the Recipient has the right to terminate this Agreement at any time, in which case the Recipient will immediately discontinue the use of the Material for research and, upon direction of the Supplier, return or destroy the Material.

3.8 The Recipient agrees to notify the Supplier of any transfer, by license or otherwise, of intellectual property rights, including rights in tangible property, to a third party if such intellectual property rights derived in whole or in part from use of the Material. The Recipient further agrees to notify such third party of the derivation of such intellectual property rights and that such third party may need rights from the Supplier in order to practice intellectual property rights provided by the Recipient.

4. Administration

4.1 By signature below of the responsible individual for the named institution, such institution has agreed that all transfers of biological material under the Form Letter of Article 2 above, shall be in complete conformance to all terms of this Material Transfer Agreement.

[4.2 Upon execution, the collaborating institution agrees to provide two executed copies to the [....]. A designated representative of [...] will acknowledge receipt by signature, return one copy to the signatory institution, and retain the other copy as a record of the institution's accession to the list of signatory institutions to this MTA.

4.3 The [....] has agreed to maintain the Master List of signatory institutions hereto and to provide that Master List, as it may be updated from time to time, to any institution, whether or not a signatory institution, requesting such list.]

International Center	Collaborating Institution
Signature _____	Signature _____
Date:	Date: