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COMMISSION ON PLANT GENETIC RESOURCES

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THE INTERNATIONAL NETWORK OF *EX SITU* COLLECTIONS, AND THE CGIAR CENTRES.

JOINT REPORT BY FAO AND THE INTERNATIONAL PLANT GENETIC RESOURCES INSTITUTE (ON BEHALF OF THE CGIAR CENTRES) ON THE IMPLEMENTATION OF THE AGREEMENT SIGNED BETWEEN FAO AND THE CGIAR CENTRES ON 26 OCTOBER 1994

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INTRODUCTION

1. Under the guidance of the Commission on Plant Genetic Resources and its Working Group, the Food and Agriculture Organization (FAO) and the twelve Centres of the Consultative Group on International Agricultural Research (CGIAR) which maintain germplasm collections, concluded, on 26 October 1994, a series of agreements to place these collections under the auspices of FAO, as part of the International Network of *Ex Situ* Collections provided for in Article 7 of the International Undertaking on Plant Genetic Resources. The agreements and a joint statement of FAO and the Centres thereon were presented to the First Extraordinary Session of the Commission in November 1994 (CPGR-Ex1/94/Inf.5/Add.1).

DESIGNATED GERMPLASM

2. Considering the provisions of the aforementioned Agreement as well as those of the Convention on Biological Diversity (CBD) the following categories of germplasm maintained by the Centres of the CGIAR can be distinguished:

- i) germplasm acquired prior to the entry into force of the CBD;
- ii) material developed by a Centre from germplasm acquired prior to the entry into force of the CBD;
- iii) germplasm acquired after the entry into force of the CBD but obtained with the agreement of the country of origin that such material will be conserved and utilized in accordance with mutually agreed terms; and,
- iv) material developed by a Centre from germplasm acquired wholly or in part after the entry into force of the CBD.

3. The germplasm which has been "designated" by the individual Centres under the Agreement with FAO belongs to categories (i) and (ii). Materials in categories (iii) and (iv) may also be designated in cases where the country of origin has given written consent to this effect. Such consent might be granted conditional on new arrangements for distribution and use coming into effect once international agreement has been reached on the issues of terms of access and the fair and equitable sharing of benefits.

4. A total of almost 450,000 designated accessions have been listed in the annexes to the individual Agreements. The designated germplasm is maintained in accordance with internationally accepted standards and made available, with related information, for direct use, scientific research, plant breeding or genetic resource conservation.

5. As per Article 10 of the aforementioned Agreement, Centres have accepted the responsibility of ensuring that any recipient of the designated germplasm and/or related information is bound to the same conditions as the Centres, i.e. not to claim ownership over the designated germplasm or to seek intellectual property rights over that germplasm or related information, and to ensure that any subsequent person or institution to whom the germplasm is made available is bound by the same provisions.

INTERIM ARRANGEMENTS REGARDING OWNERSHIP AND INTELLECTUAL PROPERTY RIGHTS

6. In order to comply with the provisions of Article 10 of the Agreement with FAO, the Centres, in close consultation with FAO, are developing the necessary instruments to ensure that no ownership or intellectual property rights are claimed over the designated germplasm and that the recipients of such material are bound to the same provisions. It is foreseen that all cooperators will be notified by the individual Centres through an agreed standard Notice Letter of this new *modus operandus*. Copies of the draft Standard Order Form and of the draft Shipment Notice will be distributed for the information and use of persons or institutions requesting germplasm from the Centres. These draft documents are attached in Annex 1.

ONGOING DISCUSSIONS ON OUTSTANDING ISSUES

7. While the above interim arrangements concerning ownership and intellectual property rights are required to comply with the provisions of the Agreement with FAO, their implementation, in the opinion of both FAO and the Centres, still leaves two main issues outstanding.

GERMPLASM ACQUIRED OTHER THAN IN ACCORDANCE WITH THE CONVENTION

8. The first of these relates to the possible implementation of any future agreement reached within the framework of the Convention on Biological Diversity and the FAO Global System on Plant Genetic Resources for Food and Agriculture regarding access to germplasm acquired otherwise than in accordance with the Convention and the fair and equitable sharing of benefits derived from the commercial or other utilization of such germplasm.

9. The provisions of the Convention dealing with access and sharing of benefits apply only to materials acquired after the entry into force of the Convention. Resolution 3 of the Nairobi Conference, adopted together with the Convention, recognized the need to seek solutions to outstanding matters concerning plant genetic resources, in particular access to *ex-situ* collections not acquired in accordance with the Convention, within the Global System for the Conservation and sustainable use of Plant Genetic Resources for Food and Agriculture. This is one of the matters under discussion in the current negotiations on the revision of the International Undertaking. In this connection, the problem arises of how to provide for the implementation of any agreements reached within this framework, when the terms of any such agreement and even its possible existence are not yet known. FAO and the Centres have been working on two possible approaches. The first would be to delay any reference to future agreements on this matter in Material Transfer Agreements (MTAs), other than general references in preambular paragraphs, until after such agreements have been reached. The other possible approach would be to provide that, where designated germplasm is distributed under an MTA, the terms of any agreements within the framework of the FAO Global System on Plant Genetic Resources relating to the sharing of benefits would be applicable to any commercialization of such germplasm undertaken after the entry into force of any such agreements. This latter approach would allow for the future commercialization of material transferred before the entry into force of such agreements to be covered by such agreements. However, it may prove more difficult for recipients of such material to accept, given that the conditions to be imposed by future agreements would be unknown.

10. The negotiation of long-term agreements within the framework of the FAO Global System may take some time. In the meantime, there may be a need to develop interim arrangements and mechanisms allowing for the sharing of benefits (e.g. Farmers' Rights) from the commercial or other utilization of germplasm acquired before the entry into force of the Convention, in addition to the arrangements concerning ownership and intellectual property rights.

GERMPLASM ACQUIRED IN ACCORDANCE WITH THE CONVENTION

11. The second outstanding issue concerns the treatment of germplasm obtained after the entry into force of the Convention.

12. The acquisition of germplasm after the entry into force of the Convention will of course be subject to the provisions of the Convention on Biological Diversity. These, *inter alia*, recognize the sovereign rights of States over their natural resources, that the authority to determine access rests with national governments and is subject to national legislation, provide that access will be on mutually agreed terms and further provide for the fair and equitable sharing of benefits arising from the commercial and other utilization of such germplasm. While the emphasis seems to be on bilateral arrangements for access and benefit sharing, the Convention provisions do not exclude the possibility of multilateral approaches. Indeed where material covered by the Convention is released to the CGIAR centres this in itself may indicate a preference by the parties concerned for a multilateral approach. Future arrangements regarding access to and sharing of benefits from germplasm acquired in accordance with the Convention may therefore need to cover both multilateral terms and conditions and bilateral terms and conditions set by the country of origin.

13. Arrangements in the form of model Germplasm Acquisition Agreements (GAAs) and MTAs are being discussed by FAO and the Centres that would reflect the above approaches and the requirements of the Convention. One option would be for future GAAs with parties to the Convention to provide for the application of future multilateral agreements reached within the framework of the FAO Global System and/or the Convention to the further distribution of the germplasm acquired under the GAA, in addition to allowing for the expression of terms and conditions of access by the country of origin. Similar provisions could be included in MTAs.

14. In any case, all such arrangements will have to be designed to meet the following criteria, in line with both the CBD and the FAO code of conduct for Plant Germplasm Collecting and Transfer:

- a) facilitate the sustainable use of these resources;
- b) recognize the sovereign rights of states over their own biological resources;
- c) contribute to and facilitate the effective conservation of plant genetic resources for food and agriculture;
- d) provide appropriate access on mutually agreed terms; and
- e) facilitate the fair and equitable sharing of the benefits arising out of the use of genetic resources.

15. Both FAO and the CGIAR Centres very much hope that it will be possible to conclude the negotiations expeditiously, and to this end are willing to contribute their technical expertise to the debate.

GUIDANCE REQUESTED FROM THE COMMISSION ON PLANT GENETIC RESOURCES

16. The guidance of the Commission is required, especially on:
- i) whether and how material under category (iii) and (iv) of para. 2 should be "designated" (see para. 3);
 - ii) draft documents provided in Annex 1 (see para. 6); and
 - iii) the need for, and nature of, possible interim arrangements, including possible interim mechanisms for sharing benefits (see para. 10).

ANNEX 1

DRAFT DOCUMENTS FOR USE BY CGIAR CENTRES

IN PROVIDING "DESIGNATED GERMLASM" TO OTHER PARTIES

IMPORTANT NOTICE

On October 26, 1994, the [Center] signed an agreement with the United Nations Food and Agriculture Organization placing germplasm collections maintained by [Center] under the auspices of FAO, as part of the international network of *ex situ* collections provided for in Article 7 of the International Undertaking on Plant Genetic Resources, to be held in trust by [Center]. The Agreement is attached herewith.

The Agreement recognizes the intergovernmental authority of FAO and its Commission on Plant Genetic Resources in setting policies for the International Network referred to in Article 7 of the International Undertaking on Plant Genetic Resources. The materials covered by the Agreement are listed as "designated germplasm" in an annex to the Agreement. "Designated Germplasm" is indicated as such on the seed list attached to the Shipment Notice, and on each packet of seeds.

[Center] has traditionally adhered to a policy of unrestricted availability of germplasm held in its genebank(s). In the interest of keeping this material available for future research and utilization, [Center] has undertaken, under Article 3(b) of the Agreement with FAO, not to claim legal ownership over the designated germplasm, or to seek any intellectual property rights over that germplasm or related information. To ensure continued free availability of designated germplasm, [Center] has also agreed to pass on the same obligations to all future recipients of designated germplasm.

Accordingly, no designated germplasm will be released in future unless the recipient signs the attached Standard Order Form by which the recipient agrees -

- a) not to claim ownership over the designated germplasm received, or to seek intellectual property rights over that germplasm or related information.
- b) to ensure that any subsequent person or institution to whom he or she makes samples of the germplasm available, is bound by the same provision.

Rules for the future exchange of germplasm for food and agriculture are currently being debated in the FAO Commission on Plant Genetic resources in coordination with the Conference of the Parties to the Convention on Biological Diversity. [Center] and the Consultative Group on Agricultural Research (CGIAR) are actively participating in this debate with the aim of assuring that any future arrangements will facilitate exchange and utilization of this precious global resource and the fair and equitable sharing of the benefits derived from the commercial or other utilization of the germplasm.

[CENTER]

STANDARD ORDER FORM

Consecutive Number: SOF/Year/number

I/we order the following material :

In so far as this material is "designated germplasm" under the Agreement between **[Center]** and the Food and Agriculture Organization of the United Nations (FAO) Placing Collections of Plant Germplasm under the Auspices of FAO dated 26 October 1994¹,

I/we agree

- a) not to claim ownership over the material received, nor to seek intellectual property rights over that germplasm or related information.
- b) to ensure that all successive persons or institutions to whom I/we make samples of the germplasm available, are bound by the same provision.

Place/date

Name of person or institution requesting the germplasm

Address

Shipping address (if different from the above)

Authorized signature

[CENTER]

SHIPMENT NOTICE

Consecutive Number: SN/Year/number

In response to your request signed and dated you are receiving with this notice the following germplasm samples as indicated on the attached seed list.

[Center] does not warrant the safety, quality, viability or purity (genetic or mechanical) of the germplasm nor the accuracy of passport or other data provided with it. Its phytosanitary condition is only warranted as described in the attached phytosanitary certificate.

It is the recipient's responsibility to comply with the recipient's country's biosafety and import regulations and any of the recipient's country's rules governing the release of genetic material.

Please note that samples indicated as "Designated Germplasm" on the seed list or on the seed packets are subject to the Agreement between *[Center]* and the Food and Agriculture Organization of the United Nations (FAO) placing collections of plant germplasm under the auspices of FAO, dated 26 October 1994, and are thus subject to the following conditions:

- a) The recipient agrees not to claim ownership over the material received, nor to seek intellectual property rights over that germplasm or related information.
- b) The recipient agrees to ensure that any subsequent person or institution to whom the recipient makes samples of the germplasm available, is bound by the same provision.

Name of recipient

Institution

Address

Date

For *[Center]*

(Signature)

(Name and title)

¹ Whether or not the material is "designated germplasm" will be indicated on the seed list attached to the Shipment Notice and on the seed packets.