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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

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I. INTRODUCTION

1. The International Undertaking on Plant Genetic Resources (hereinafter referred to as "the Undertaking" was adopted by the Conference at its Twenty-third Session in 1983 1/. Under Article 7.1(a) it is envisaged that international arrangements that were current at the time would be further developed and, where necessary, complemented in order to ensure, inter alia, that:

- (a) there develops an internationally coordinated network of national, regional and international centres, 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;"

Article 7.2 of the Undertaking refers to an international network of base collections in gene banks under the auspices or the jurisdiction of FAO in the following terms:

"7.2 Within the context of the global system any Governments or institutions that agree to participate in the Undertaking, may, furthermore, notify the Director-General of FAO that they wish the base collection or collections for which they are responsible to be recognized as part of the international network of base collections in gene banks, under the auspices or the jurisdiction of FAO. The centre concerned will, whenever requested by FAO, make material in the base collection available to participants in the Undertaking, for purposes of scientific research, plant breeding or genetic resource conservation, free of charge, on the basis of mutual exchange or on mutually agreed terms."

2. The organization of an international network under the "auspices or jurisdiction of FAO" must be considered, first of all in the light of its basic objectives and the current status of, and control exercised over, base collections. With this no doubt in mind, the Commission on Plant Genetic Resources, at its First Session held in March 1985, requested the Director-General to prepare a document on the "legal situation related to ex situ base collections" 2/. This document is now before the Commission 3/.

1/ Resolution 8/83. See also C 83/REP, paras. 275 et seq.

2/ CPGR/85/REP para. 29

3/ CPGR/87/5

3. The establishment of an international network of base collections must also be considered from the point of view of the legal issues that arise for FAO and the legal arrangements that would have to be entered into by FAO with third parties. In this connexion the Commission's Working Group, at its meeting held on 2 and 3 June 1986 considered that "it was necessary to speed up the preparation of the legal arrangements which were necessary to permit the base collections in government institutions to be placed under FAO jurisdiction by the governments which wished to do so in accordance with Article 7 of the Undertaking" 4/. Taking into account the information received from governments and institutions in connexion with the preparation of document CPGR/87/5, referred to in paragraph 2 above, the present further document is submitted for consideration by the Commission. It deals specifically with legal issues related to the actual creation of the international network of base collections such as the arrangements that might be concluded between FAO and Governments, intergovernmental bodies or international institutions to bring their base collections, or part of these, within the network under the auspices or jurisdiction of FAO, and the types of legal instrument that would be necessary to do so. The document also suggests follow-up action that might be taken in this connexion.

II. GENERAL CONSIDERATIONS REGARDING AN INTERNATIONAL NETWORK
UNDER THE AUSPICES OR THE JURISDICTION OF FAO

(i) The purpose of such an international network

4. It would seem clear from the very detailed discussions which took place in the Council and the Conference prior to the adoption of the Undertaking by the Conference in 1983 5/, from the wording of the Undertaking itself, as well as from the deliberations of the Conference at its Twenty-third Session in 1985 6/, that the underlying purposes of the international network are to ensure that 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 institutions.

4/ AGPS/PGR/86/REP para. 23

5/ In particular CL 84/REP paras. 71-75; CL 84/PV/4 and 6; C 83/25; C 83/LIM/2, C 83/II/PV/15, 16, 17, 18 and 20; C 83/PV/21.

6/ C 85/REP para. 294.

5. It is for the above reasons that FAO's governing bodies have stressed the complementarity of the international network under the auspices or jurisdiction of FAO with the existing arrangements. Such an international network is not intended to substitute itself for arrangements that already exist, for example within the framework of the International Board for Plant Genetic Resources (IBPGR), or as a result of co-operation among governments or between governmental or non-governmental institutions concerned with plant genetic resources. Thus, the international network under the auspices or jurisdiction of FAO would be part of a wider global system. However, at the same time and only for those governments or institutions wishing to do so for all or part of the germplasm stored in their base collections, it would place on an intergovernmental basis, and within the framework of internationally binding legal commitments, the co-operation which to a certain extent already exists, but whose continuation and extension is subject to political, financial or other decisions taken by individual governments or national entities.

(ii) The nature of such an international network and the plant genetic resources that it would cover

6. From the very reference to a "network" it is apparent that there is no question of establishing a single, comprehensive, base collection under international auspices or jurisdiction. It also appears from the wording of Article 7 of the Undertaking that, as regards the scope of the genetic resources concerned, the network would only include base collections and that the resources in those base collections would be made available for purposes of scientific research, plant breeding, or genetic resource conservation. Such base collections do not normally include commercial varieties or special genetic stocks such as breeders' lines which are to be found on the market. Most base collections in fact consist primarily of wild species, primitive cultivars (land races) and obsolete cultivars. The Commission will recall that a detailed description of the nature and role of base collections including the kind of resources kept therein was submitted to its First Session in document CPGR 85/4. The coverage of the international network, by crop, would naturally depend on the coverage of the base collections forming part of the network.

(iii) The meaning of the term "under the auspices or the jurisdiction of FAO" as used in the Undertaking.

7. In the draft of what was to become the Undertaking, submitted to the Council and to the Twenty-second session of the Conference in the Director-General's report, reference was made only to the "auspices of FAO" 7/. The term "auspices or the jurisdiction of FAO" was introduced at the Twenty-second Session of the Conference. The meaning of this term was the subject of some discussion in the course of the final drafting of the Undertaking at the Conference 8/. However, no definitive interpretation has

7/ C 83/25, p. 35

8/ See for instance C 83/III/PV/15, C 83/II/PV/17 and in particular C 83/II/PV/20.

been given to it. Indeed it would appear that the terminology used was, advisedly, flexible in order to accommodate different types of arrangement that might be made to bring base collections under the auspices or jurisdiction of FAO. The common denominator of such arrangements would seem to derive from the primary purposes of the network which are to bring conservation of the plant genetic resources in the network base collections and free access to these resources under what might be called, in a generic way, the "control" of FAO. It would also appear that the term "jurisdiction of FAO" is intended to signify an arrangement whereby FAO would exercise a considerable degree of control over the base collection.

III. LEGAL ARRANGEMENTS FOR BRINGING BASE COLLECTIONS
WITHIN THE AUSPICES OR JURISDICTION OF FAO

(i) Nature of the legal instrument required

8. From document CPGR/87/5 it will be seen that base collections may, in some cases, be under the international control of more than one country (e.g. the Nordic Gene Bank and CATIE), or of autonomous, internationally oriented institutions such as international agricultural research centres (IARCs). Other base collections are owned and administered by non-governmental national institutions. However, for the most part, base collections are owned by and are under the control of governments or governmental institutions. It therefore follows that the type of legal instrument that would most frequently be required to bring a base collection under the auspices or jurisdiction of FAO would be an agreement constituting a treaty between international legal persons (i.e. the state controlling the base collection and an intergovernmental organization (FAO)). In this connexion, it should be borne in mind that in contemporary international practice the form in which an agreement is concluded may vary considerably, not only as regards the presentation of the text, but also with respect to the procedures to be followed for it to become binding on the parties. While the procedures would depend largely on the internal practices of individual states, the agreement between the government and FAO could be considered as comparable to project agreements or plans of operation concluded between organizations in the United Nations system and governments for the execution of specific projects. Hence, the procedures need not necessarily be of such a degree of formality as to complicate or delay the formal conclusion of such agreements.

9. If a base collection that was under the control of an entity other than an international legal person were to be brought within the network under the auspices or jurisdiction of FAO, the nature of the legal instrument would, perforce, be different. Since parties would not both be international legal persons, the "agreement" would be contained in a contract between FAO and the other party. The procedures for enforcing the contract would be specifically laid down in the terms of the contract itself.

(ii) General coverage of legal instrument

10. As pointed out above, the nature of the legal instrument that will be needed to bring a base collection within a network under the auspices or jurisdiction of FAO will, in the majority of cases, be an international agreement. In principle, it would be desirable for the contents of such international agreements to be, as far as possible, standardized. In that way, the relationship between FAO and the various States whose base collection or collections were to be brought within the network would be essentially the same and a standard agreement could be drawn up. This would, undoubtedly, be administratively simpler for FAO. However, the very use of the term "under the auspices or jurisdiction of FAO" clearly reflects recognition of the fact that different arrangements will most probably have to be negotiated in the light of the precise agreed role that FAO would play in respect of the management of individual base collections.

11. Before dealing below with certain general types of arrangement that might be envisaged and with their legal implications, it would seem apparent at the outset that such arrangements - including to a certain extent arrangements with non-governmental institutions - would of necessity have to cover, in one way or another, certain essential legal and technical matters. From the legal point of view, such matters would include ownership of the plant genetic resources; title to the premises in which the resources are kept; responsibility for managerial and policy decisions relating to the base collection; financial responsibility for maintaining the base collection and for all activities connected with it; and the applicability or otherwise of national legislation - whether general, or specific such as phytosanitary or import/export regulations - to the resources. From the technical point of view agreements would normally have to cover responsibility for the collection of plant genetic resources; their reception in the base collection in the gene bank; their maintenance; and for preparation of the data and documentation relating to these resources. Moreover, unless the base collections were unconditionally transferred to FAO, agreements would have to contain provisions regarding access to the plant genetic resources in the base collection and to the procedures pursuant to which they would be made freely available by or through FAO for scientific research, plant breeding or genetic resource conservation.

(iii) Types of legal arrangement

12. The type of legal instrument and the matters to be covered by that instrument are likely to be similar in most cases. Yet there may be considerable differences as regards the ways in which the various matters referred to in the preceding paragraph would be dealt with. It is naturally impossible to examine here every possible arrangement that might have to be considered in practice. However, in order to assist the Commission to study the matter further, four possible models will be discussed ranging from complete control over the base collection being exercised by FAO, to a much looser arrangement whereby a government would subscribe to a number of specific obligations to FAO regarding the base collection.

Model "A"

13. This model would reflect a strict interpretation of the concept of a base collection being under the "jurisdiction" of FAO. The principal features would be as follows:

- (a) Ownership of the resources in the base collection would be unconditionally transferred to FAO;
- (b) The premises in which the base collection is conserved would be donated or leased to FAO;
- (c) Entire responsibility for the management and administration of the base collection would be transferred to FAO and carried out according to rules promulgated by FAO;
- (d) All policies concerning activities relating to the base collection would be determined by FAO;
- (e) Financial responsibility for the maintenance of the base collection and all related activities would either devolve upon FAO, or be the object of continuing financial commitments on the part of the government;
- (f) The staff assigned to running the base collection would become FAO staff members or would carry out their functions under contracts with FAO giving them some other status.

14. This course of action would have the advantage of placing the base collection as well as the premises in which it is conserved, its management and administration under the exclusive authority and control of FAO. It is FAO that would determine the policies to be pursued and could ensure that plant genetic resources in the base collection are properly conserved and, would be freely available to all interested parties.

15. On the other hand, very careful consideration would have to be given to the financial and administrative implications. If ownership of the base collection and the premises in which it is conserved, as well as control of its management and administration were to be transferred to FAO, the running costs would have to be borne by FAO, or else arrangements would have to be made for the costs to be borne either by the government transferring the base collection to FAO or else be financed by other sources. The question of the status of the staff required to carry out the activities related to the management of the base collection would arise, as would also the status of the premises on which the base collection was kept. In order to cover the inviolability of the premises and related issues, it would be necessary to include in the agreement with the government relating to the transfer, or alternatively in a separate agreement, detailed provisions along the lines of those which are traditionally to be found in an agreement for the establishment in a country of an organization's headquarters or office. From the practical point of view it should also be borne in mind that gene banks may not comprise exclusively base collections, in which case it would be necessary to define with precision the genetic resources and other assets that were being transferred to FAO.

16. Considering the numerous matters that would have to be covered in some detail in an agreement along the lines of Model "A", the negotiation thereof would be a relatively complex matter. From FAO's constitutional point of view account would have to be taken of the possibility of continuing financial or programme implications for FAO that might flow from the conclusion of such an agreement. If there were such implications, the prior approval by FAO's governing bodies would be necessary.

17. In the above connexion it would seem evident that the technical supervision of activities carried out at each gene bank where a base collection was situated would require back-stopping at FAO Headquarters. Furthermore, it is likely that certain expenses would arise out of the administrative back-stopping that would be needed to handle staffing and related matters. These additional costs to FAO would have to be fully covered by the government transferring the base collection to FAO, unless provision were made therefore in the Organization's programme of work and budget in each biennium.

18. A further constitutional matter that should be considered is how the policy decisions relating to each base collection would be made within FAO. The day-to-day administration of base collections covered by an agreement on the lines of Model "A" would be the responsibility of the FAO Secretariat. However, general policies should, to the extent that such policies are not already embodied in the Undertaking itself, be established by the governing bodies of FAO, possibly on the recommendation of the Commission.

19. There can be little doubt that the arrangements envisaged under Model "A" would make the base collections thus included in the network truly international in the sense that they would be under the exclusive control of an intergovernmental organization. However, from what has been pointed out in paragraphs 13 to 18 above, it is equally apparent that such an arrangement raises constitutional, legal, financial and administrative issues which will, not be easy to resolve. For these reasons it would be appropriate to explore alternative courses of action that are rather less radical in nature.

Model "B"

20. This model would to a considerable extent reflect the concept of a base collection being placed under the jurisdiction of FAO. However, unlike Model "A", certain functions would still be performed by the Government. In effect, the Government would undertake to act as custodian of the base collection on behalf of FAO and, thereby, on behalf of the international community. The principal features would be as follows:

- (a) Ownership of the resources in the base collection would be unconditionally transferred to FAO;
- (b) As the resources would become the property of FAO, the Government would renounce the right to subject such resources to national legislation;

- (c) The premises in which the base collection is conserved would not be transferred to or leased by FAO, but FAO would, at any time, have a right of access to such premises and the right to inspect all activities performed therein directly related to the conservation and free exchange of resources covered by the network;
- (d) The management and administration of the base collection would remain with the Government, but would be carried out in agreement with FAO. FAO would have the right to recommend and even require action whenever it considered such action to be called for to ensure the proper conservation of and access to the base collection;
- (e) All policies concerning activities related to the resources in the base collection would be determined by FAO in consultation with the Government;
- (f) The staff assigned to run the base collection would not become FAO staff members, nor be paid by FAO, but would receive FAO's technical back-stopping and their work would be subject to inspection in accordance with (c) above;
- (g) Entire financial responsibility for the maintenance of the base collection would remain with the Government which would bring to FAO's attention any difficulties regarding the continued conservation of the resources in the base collection or regarding the implementation of measures recommended or required by FAO under (d) above;
- (h) The agreement between FAO and the Government would include a provision to the effect that FAO may, after consultation with the Government, re-allocate or transfer to other gene banks the resources in the base collection in the event that the government were to give formal notice of its wish to terminate its commitment or decide to withdraw from the FAO network.

21. As in Model "A" above general policies would, to the extent that such policies are not already embodied in the Undertaking itself, be established by the governing bodies of FAO, possibly on the recommendation of the Commission.

22. FAO would promptly be made aware of any financial or other difficulty arising in respect to the base collection through its close association with the management of the collection. FAO could then consult the Government with a view to finding appropriate solutions to problems that have been identified. Should the measures agreed upon between the Government and FAO entail financial responsibilities for the organization, FAO could then have recourse to any funds available for this purpose (perhaps under the international fund the creation of which had been proposed) or would examine the possibility, on a case by case basis, of obtaining extra-budgetary funds from donor countries or financing institutions.

23. Model "B", while placing the base collection under the control of FAO, tends to obviate a number of the constitutional, legal and practical difficulties inherent in Model "A" which derive, inter alia, from ownership of premises, administration of staff and direct management of the base collection by FAO. However, as in the case of Model "A", the Government that transferred the whole or parte of the resources in its base collection to FAO would in principle have to undertake to finance future activities relating to the conservation of these resources. Therefore, the arrangements under Model "B" would not appear to entail any significant expense for FAO. The costs arising from its inspection activities and its participation in the organs responsible for policy and management decisions could most probably be borne by budgetary allocations for activities related to plant genetic resources in general. Similarly, the cost of back-stopping by Headquarters staff would not be significant.

24. It will be apparent that, unlike Models "C" and "D", given below, Model "B" provides for:

- (a) Governments' undertaking to act as custodians and not as owners of the resources that they transfer to FAO;
- (b) Ownership of the plant genetic resources in the base collection being vested in FAO;
- (c) Any national laws restricting the free exchange of germplasm not being applicable to resources owned by FAO;
- (d) All policies concerning the resources being determined by FAO;
- (e) FAO's withdrawal from the custodian, in given circumstances, of the resources that have been transferred to the Organization.

Thus, the arrangements envisaged in Model "B" would make the resources in the base collections transferred to FAO, and hence included in the international network, truly international in character.

25. In connexion with the types of arrangement considered in Models "A" and "B", it will be recalled that the Government of Spain offered to hold a base collection at the disposal of FAO. The offer, which is reproduced in the Director-General's report to the Twenty-second Session of the Conference 9/, was made in the following terms:

" FAO could designate species for long-term storage by the bank at global level. It is suggested that these should be seed legumes and fodder plants from rangelands propagated by genuine seeds;

The cost of conserving these seeds would remain the responsibility of the Government of Spain, and working samples could be provided on request through FAO". 10/

9/ C 83/25, para. 169 and Appendix C

10/ Ibid., Appendix G. The Government also indicated that an active collection could not be provided without international financing.

Subsequently, at the Conference itself, the delegate of Spain elaborated on his Government's offer. He stated that his Government wished to place certain base collections in the Spanish Gene Bank under the control and jurisdiction of the United Nations system; in other words that his country was ready to forego the exercise of its rights of ownership and the right to legislate with respect to those base collections so that they might be forever at the disposal of the international community ("nuestro país está dispuesto a renunciar expresamente a ejercer la propiedad y a legislar sobre estas colecciones básicas a fin de que puedan estar siempre a disposición de la Comunidad Internacional") 11/.

26. Thus, the Spanish offer, while not specifically covering all the aspects referred to in connexion with Models "A" and "B", is based on a complete cession of certain base collections to FAO, accompanied by financial support for their continued conservation.

27. As it is not known how many governments would be ready to transfer base collections to FAO while, at the same time, assuming financial responsibility therefor on a continuing basis, Models "C" and "D" below envisage a rather looser relationship between the Government and FAO.

Model "C"

2.8. The principal features of this Model might be along the following lines:

- (a) Ownership of the resources in the base collection would remain vested in the Government ^{12/} (unlike Models "A" and "B")
- (b) The premises in which the base collection is conserved would not be transferred to or leased by FAO, but FAO would, at any time, have a right of access to such premises and the right to inspect the activities performed there.
- (c) Responsibility for the management and administration of the base collection would remain with the Government and be carried out in conformity with national legislation, but FAO would have the right to recommend action, when it considers that such action is desirable for the proper conservation of the resources in the base collection.
- (d) Policies concerning the activities relating to the base collection would be determined by the Government (unlike Models "A" and "B"), but FAO would be associated with the policy making process.
- (e) Entire financial responsibility for the maintenance of the base collection would remain with the Government which would bring to FAO's attention any difficulties regarding the continued conservation of the resources in the base collection or regarding the implementation of measures recommended by FAO under (c) above.

11/ C 83/II/PV/15, p. 299

12/ The use of the term "Government" in (a), (c), (d) and (e) is intended to include governmental institutions.

- (f) The staff assigned to running the base collection would not have any contractual relationship with FAO.
- (g) The Government would bind itself in the agreement concluded with FAO, to make the resources in the base collection available for the purpose of scientific research, plant breeding or genetic resource conservation, without restriction, either directly to users or through FAO, and either free of charge or on mutually agreed terms.

29. The features described in the preceding paragraph are subject to a number of variants, especially as regards (c) and (d), giving FAO a greater or lesser role in the running of the base collection ranging from a power of veto to mere advisory functions. However, participation of FAO in the determination of policies with respect to the management of a given base collection would introduce an international factor which would justify the base collection being considered under the "auspices" of FAO. This term would be all the more justified since reports on activities relating to the base collections could be submitted to the Commission for consideration and advice at the intergovernmental level.

30. From the point of view of the basic purposes of the international network of base collections "under the auspices or jurisdiction of FAO", it is true that Model "C" would, in the last analysis, leave the decision on whether or not to continue conservation activities with the Government. On the other hand, FAO would be automatically aware of any financial or other difficulties arising in this respect through its association with the management of the base collection. FAO would thus be in a position to alert the international community to the situation in a timely manner.

31. As regards unrestricted access to the resources in the base collection, this would be, as in Model "B", one of the essential provisions in the agreement that would be concluded with FAO, and thus become an international obligation that was binding on the Government.

32. For similar reasons to those mentioned in para. 23 above, costs in FAO may not be significant when considered on the basis of a single base collection. On the other hand, the cumulative effect, of a network of a large number of base collections on the lines envisaged in Models "B" or "C", could prove substantial. Therefore, it may well be necessary for FAO to include in agreements with governments some provision whereby all or certain costs of FAO's involvement would be borne by the Government.

33. Governments that wished to place their base collections under the auspices of FAO might not always be prepared to give FAO a direct part to play in the management of the base collection. Therefore, at the other extreme from Model "A", consideration should be given to what might be called a "minimum" course of action.

Model "D"

34. The principal features of this Model might be along the following lines:

- (a) Ownership of the resources in the base collection would remain vested in the Government;
 - (b) The premises in which the base collection is conserved would not be transferred to or leased by FAO, and (unlike Models "B" and "C") FAO would not have a right of access to the premises or to inspect activities performed there.
 - (c) Responsibility for the management and administration of the base collection, as well as for taking policy decisions concerning the activities relating to the base collection, would be exclusively in the hands of the Government.
 - (d) Entire financial responsibility for the maintenance of the base collection would be assumed by the Government and the staff would be employed by the Government.
- (e) The Government would bind itself in exactly the same way as indicated under (g) of Model "C" (see para. 28 above).

35. Thus, an arrangement on the lines of Model "D" would bring the base collection under the "auspices" of FAO on the basis of a legal commitment to make the resources freely available. Such an arrangement would resemble the arrangements made by the IBPGR with national institutions; the difference residing in the fact that Governments' obligations would be embodied in a treaty. Moreover, the monitoring of the implementation of these agreements concluded between FAO and Governments could be performed, at the intergovernmental level, by the Commission and, as necessary, by the FAO Council and Conference.

36. Model "D" is the easiest arrangement. On the other hand, its effect is little more than to give legally binding force to one of the unilateral declarations that a Government normally makes when adhering to the Undertaking. Nor does it contain any obligation to continue conservation activities in the future.

IV. FURTHER ACTION

37. Having reviewed the various types of legal arrangement outlined above, the Commission may wish to consider what further action should be taken at this juncture with respect to the legal arrangements for establishing a network of base collections under the auspices or jurisdiction of FAO. In this connexion the most logical course of action would seem to be for the Director-General to approach Governments with a view to ascertaining their readiness to bring their base collections within the auspices or jurisdiction of FAO and, further, if they are prepared to do so, to indicate, in the light of the Commission's deliberations, the main features of the arrangement that they would propose.

38. The Commission may therefore wish to make suggestions for future action regarding the legal arrangements for constituting the network of base collections under the auspices or jurisdiction of FAO.