

## MINUTES OF THE GENETIC RESOURCES POLICY COMMITTEE (GRPC)

### 26th Session, Bioversity, Rome, 22-24 September 2009

Members present:	Carlos Correa (Chair) Emile Frison (Committee Secretary) Carl-Gustaf Thornström (CGIAR member) Tony Gregson (Alliance Board) Shadrack Moephuli (CGIAR member) Orlando de Ponti (Private sector)* Dan Leskien (FAO Observer) <sup>†</sup> Benito Odala Eliasi (Farmers' Organizations)* Chee Yoke Ling (NGOs) Teresita Borromeo (NARS) Sirkka Immonen (Science Council)
Excused absences:	Mahmoud Solh (Alliance Executive)
Members of Secretariat:	Michael Halewood (Bioversity)
Resource Persons:	Victoria Henson-Apollonio (CAS-IP); Adam Druker (Bioversity); Barbara Vicenti (Bioversity); Sebastian Poehlmann (CAS-IP)
Invitees:	Shakeel Bhatti, Kent Nnadozie (International Treaty Secretariat)

### Tuesday 22 September

#### A. Welcome, introductions, logistics, and adoption of the agenda

The GRPC Chair, Carlos Correa, welcomed participants to the meeting. The committee observed a minute's silence, in honour of Mike Gale, who passed away in July, 2009.

The agenda was adopted; it is included as *Appendix 1* to these minutes.

The Chair introduced the document summarizing issues raised that the Executive Committee of the Inter Centre Working Group on Genetic Resources (ICWG-GR) for the committee's attention, based on a teleconference with the ICWG-GR Executive, on 4 September 2009.

#### B. Overview of activities from GRPC 25 work plan

Michael Halewood summarized progress to date on the work plan adopted by GRPC 25.

Emile Frison provided an update of the different work streams that are part of the CGIAR Change Management process. The committee noted that particular attention

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\* Tuesday and Wednesday only

<sup>†</sup> Tuesday only

should be paid, throughout the change process, to policy issues that are within the mandate of the GRPC. The committee made comments on the draft Consortium constitution, recommending the explicit inclusion of ‘responsible management of intellectual assets’ as a responsibility of the Consortium Board.

### **C. Report on the Third Session of the Governing Body of the International Treaty and intersessional activities**

Shakeel Bhatti described the outcomes of the Third Session of the Governing Body of the Treaty. He highlighted the participation of the Centres both at that meeting, and in the intersessional activities leading up to it. He noted in particular the importance of the report from the SGRP concerning Centres’ acquisitions and distributions of PGRFA using the SMTA. He emphasized that the Governing Body recognized the contributions of the CGIAR Centres to the successful implementation of the Treaty. He highlighted resolutions made by the Governing Body concerning the multilateral system, procedures for the operation of the Third Party Beneficiary, the development of information tools, the adoption of a Funding Strategy, procedures to promote compliance (to continue negotiations of the compliance rules), and farmers’ rights. He also provided details about the 11 projects that have received support from the Treaty’s international benefit sharing fund, noting that most of them focus on on-farm conservation and sustainable use.

In subsequent discussion, the committee noted that the outcomes of the Third Session of the Governing Body were quite positive.

Shakeel will send a letter to the Centres’ Director Generals, thanking them for their hard work developing their report to the Governing Body, noting in particular the usefulness of Centres’ reports on acquisitions and distributions, and the importance of the Centres developing such reports in the future.

The committee made two recommendations with respect to reporting. The first recommendation was for the Centres to complete the development of a template to facilitate submission of data to SINGER, and subsequent compilation of metadata from Centres’ genebanks and breeders concerning their germplasm acquisitions and distributions under the SMTA. The committee expressed its appreciation that such reporting is new to the breeders in particular, and emphasized the importance of getting their ‘buy in’ to using the standardized data template.

The second recommendation concerned the development of an information technology tool to make it easy for Centres (and possibly other users of the SMTA) to record the relevant metadata while filling-in the SMTA on line. The committee noted with appreciation the Treaty Secretariat’s ongoing work to develop an on line ordering tool through which information for the Third Party Beneficiary (as per Resolution 5/2009) will be automatically generated. It recommended that the same tool or a complementary tool should be developed to minimize workload of the Centres recording and storing additional data for their reports to the Governing Body regarding acquisition and distribution.

The Governing Body mandated the continuation or establishment of several intersessional processes and meetings, including the Ad Hoc Third Party Beneficiary Committee, which will consider the issue of the application of the Third Party

Beneficiary provisions and procedures to transactions related to non-Annex I material transferred with the SMTA; and the Ad Hoc Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System, which will consider implementation questions raised by users of the SMTA. The participation and input of the CG Centres will be sought in relevant cases.

The Fourth Session of the Governing Body will be held in Bali, Indonesia, in March 2011.

#### **D. Report concerning next meeting of Commission on Genetic Resources for Food and Agriculture**

Dan Leskien provided an update on the relevant intersessional activities of the Secretariat of the Commission on Genetic Resources for Food and Agriculture (the Commission) in the lead-up to the Twelfth Regular Session of the Commission, 19-22 October 2009, including meetings of the Intergovernmental Technical Working Groups on Animal Genetic Resources, and Plant Genetic Resources for Food and Agriculture.

He described intersessional work on the development of: the strategic plan for the implementation of the MYPOW, the development of the second State of the World Report on PGRFA, and options for the review of the Global Plan of Action. He described information papers commissioned by the Commission Secretariat to be considered under the agenda item concerning access and benefit sharing. He also described scoping papers that have been developed on forest GR, microbial GR and invertebrate GR for the Commission.

He noted the additional following issues will also be considered at CGRFA-12: rules of procedure; the constitutional status of the Commission; a joint work plan with the CBD; and collaboration with the Treaty, Trust, Treaty Secretariat and the CGIAR Centres.

The Twelfth Regular Session will be preceded by one-day regional consultations and a one-day special event on access and benefit-sharing for genetic resources for food and agriculture.

#### **E. FAO/Biodiversity/Treaty Secretariat Joint Programme on Treaty Implementation**

Michael Halewood described the activities of the Joint Programme.

#### **F. Developing an explanatory document concerning the proposed system-wide policy on intellectual assets**

Emile Frison introduced the explanatory document. The committee watched a video of Dr Sean Butler, analyzing the proposed policy during a workshop at ICARDA in November 2008.

The committee reviewed and revised the explanatory document. The revised version is attached as *Appendix 3* to these minutes.

The committee expressed its concern that since the Guiding Principles for the Consultative Group on International Agricultural Research Centres on Intellectual

Property and Genetic Resources, 1996, were adopted, there has been a proliferation of inconsistent guidelines and statements as well as some practices within the CGIAR system on matters related to the way Centres manage their intellectual assets. The committee expressed its hope that they would all eventually be made consistent with the proposed policy.

The committee reconfirmed its previous decision to send the proposed policy and explanatory document to Anne Marie Izac, Ren Wang, the TMT, Alliance Executive and Alliance Board. The proposed IA policy will be the 'lead document' in a package of proposed policies and related legal instruments that have been developed in recent sessions of the GRPC for possible system-wide adoption.

### **Wednesday 23 September**

#### **G. Development in the patent area, especially related to plants**

Victoria presented an update of issues in the patent area. Notable events during the past six months include: 1) the appointment of new personnel at the USPTO including a new Commissioner of Patents, David Kappos, 2) *Bilski vs. the Patent Commissioner* will be heard by the U.S. Supreme Court this November, (a case which considers whether business methods are patentable subject matter), and 3) the effects of USA Supreme Court's 2008 ruling in the KSR case on subsequent patent cases, in 2009. For example, the KSR "obviousness" test was cited by the U.S. CAFC in declaring that the Enola patent claims should be overturned.

Victoria's presentation is included as *Appendix 4* to these minutes.

Orlando de Ponti provided an account of patenting trends and evolving positions within the Private Sector on the research exemption for plant breeding in patent laws

The committee recommended that someone from the CGIAR should attend the workshop "Enhancing Research Productivity through PPPs and Associated Needs for Product Stewardship and Liability." to be held by the, Alliance Deputy Executive (ADE) and the Private Sector Committee (PSC), in Zurich, November 11 - November 13, 2009.

#### **H. Assessment of Centres' impact concerning technology transfers as benefit-sharing and contributions to the implementation of farmers' rights**

Victoria introduced a first draft of a paper addressing both the impact of technology transfer as benefit sharing under the Treaty, and as contributions to the implementation of farmers' rights under the Treaty.

The committee reviewed the paper, and made recommendations for revisions. It was noted that during the four years of implementing the performance measurements, some 300 outcome statements have been accumulated including examples of germplasm use. Sirkka Immonen will forward those statements to CAS-IP. Victoria will consult and coordinate with different bodies developing publications of such studies.

Following a request by the ICWG-GR Executive, Victoria will circulate the draft paper to the Centres for comments/suggestions.

#### **J. Question and answer session regarding update papers**

The committee noted the importance to the Centres of public private partnerships. However, the committee expressed concern about the ongoing lack of clarity concerning the conditions under which centres will engage in such partnerships, noting, again, as under agenda item F, the proliferation of inconsistent guidelines, statements and practices across the CGIAR system. The committee underscored that that there must be very clear 'rules of the game' based on the mission of the CGIAR. The committee Chair will send a letter to Ren Wang highlighting the committee's concerns, and suggesting that the IA policy be presented by Ren at the beginning of the meeting co-organized by the ADE and private sector committee in November 2009, referred to under item G, above.

The committee discussed the ongoing negotiations of the International Regime under the aegis of the Convention on Biological Diversity. The committee noted with appreciation the plan to organize, through SGRP, a side event at the next meeting of the WG-ABS concerning sectoral approaches.

#### **I. Distributing materials for non-food/non-feed purposes**

Michael introduced changes made to the draft MTA for non-food/non-feed purposes following recommendations made by GRPC 25. The committee recommended a further, last set of revisions.

The committee noted that in 2010, there will be meetings of the Treaty's Ad Hoc Third Party Beneficiary Committee and the Ad Hoc Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System. It is possible that these groups will make decisions or recommendations concerning MTAs to be used by the Centres for distributions of PGR for non-food/non-feed uses. The Fourth Session of the Governing Body, in 2011, may also make relevant decisions. For these reasons, the committee stressed the importance of communicating to the Centres that the proposed policy and related MTA on Centres' distributions of PGRA for non-food/non-feed uses should be adopted on the understanding that it may be necessary to revise it in the future, in response to possible decisions or recommendations by these bodies.

#### **K and M (considered together). Legal and Policy Issues regarding plant, microbial, animal and tree genetic resources of particular relevance to the CGIAR**

Adam Drucker, Senior Economist, Bioversity, made a presentation on the principle findings of research he and colleagues undertook concerning the impact of climate change on international interdependence on animal genetic resources. The main points of his presentation are in Appendix 5.

Barbara Vicenti, Bioversity, made a presentation based on her research concerning use and exchange of tree genetic resources, and how countries interdependence on tree germplasm will be affected by climate change. The main points of her presentation are in Appendix 6.

Emile Frison introduced the paper entitled “ICWG-GR position paper - An integrated approach to genetic resources in support of the CGIAR’s mission“.

The committee considered the results of a survey of the Centres (conducted by the GRPC Secretariat in advance of the meeting) concerning the genetic resources policy-related challenges the Centres felt must be addressed in the next three years. The committee noted that most of the points raised are addressed by the proposed policy on IA and the proposed policy and MTA for non-food/non-feed uses. Bioversity will respond to Centres about particular issues raised as appropriate.

#### **Thursday 24 September**

##### **N. Update on the development of CAS-IP’s License Central**

Sebastian Poehlmann presented the ongoing work of CAS-IP on the development of a web-based contract development tool, called License Central, for use by the CGIAR Centres.

The committee welcomed the development of license central and recommended that additional funds should be made available to CAS-IP for further work on this tool.

##### **O, P. Review/update of the GRPC work plan, and adoption of main conclusions.**

The committee amended the GRPC work plan, which is attached as *Appendix 2* to these minutes.

##### **Q. AOB and next meeting**

The committee tentatively identified the week of 5-7 May, 2010, for GRPC 27, in Rome. N.B. It should be held after the first meeting of the Consortium Board, (which will likely take place in the last week of March, 2010).

**GENETIC RESOURCES POLICY COMMITTEE**  
**26<sup>th</sup> Session**  
**Biodiversity International**  
**Rome, Italy**  
**22-24 September 2009**  
**DRAFT AGENDA<sup>‡</sup>**

**Tuesday 22 September**

09:00 – 09:30 **A.** Welcome, introductions, logistics, adoption of agenda.

*(Introduced by Carlos Correa and Emile Frison)*

*Documents*

A.1. Agenda

A.2. Report on the ICWG-GR teleconference concerning  
GRPC 25 report and GRPC 26 agenda

09:30 – 10:00 **B.** Overview of activities from GRPC 25 work plan

*(Introduced by Michael Halewood)*

*Documents*

B.1. GRPC 25 work plan (annotated)

10:00 – 10:30 *Coffee/Tea break*

10:30 – 11:15 **C.** Report on the 3<sup>rd</sup> Session of the Governing Body of the  
International Treaty and intersessional activities

*(Introduced by Shakeel Bhatti)*

*Documents*

C.1 Report on GB3 from CGIAR observers

11:15 – 12:00 **D.** Report concerning next meeting of Commission on Genetic  
Resources for Food and Agriculture

*(Introduced by Dan Leskien)*

12:00 – 12:30 **E.** FAO/Biodiversity International/Treaty Secretariat Joint Programme  
on Treaty Implementation

*(Introduced by Michael Halewood)*

*Documents*

E.1 Update on activities

12:30 – 14:00 *Lunch*

14:00 – 15:30 **F.** Developing an explanatory document concerning the draft system-  
wide policy on intellectual assets

*(Introduced by Emile Frison)*

*Documents*

F.1 Draft explanatory document

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<sup>‡</sup> Version 18 September 2009, Reviewed by Chair and includes suggestions made by GRPC members

- F.2. Reglamento para el funcionamiento del consorcio sudamericano de maiz (CONSUMA)
- F.3. Revised hybrid rice consortium agreement
- F.4. Article “DuPont makes it move” in journal “Agriculture Today”.
- F.5. IRRI’s response to above article.
- F.6. SKEP guidelines
- F.7. Searching for a line in the sand: issues to consider concerning financial returns from recipients of Centres’ PGRFA under Development

15:30 – 16:00 *Coffee/Tea break*

16:00 – 17:30 **F.** Developing an explanatory document ... (cont’d)

Group dinner

### **Wednesday 23 September**

8:30 – 9:30 **G.** Patenting trends and evolving positions within the Private Sector on the research exemption for plant breeding in patent laws  
(*Introduced by Victoria Henson-Apollonio and Orlando de Ponti*)  
*Documents*  
G.1. Patenting trends, with special emphasis on developing countries

9.30 – 10.00 **H.** Assessment of Centres' impact concerning technology transfers as benefit-sharing, and contributions to the implementation of farmers' rights.  
(*Introduced by Victoria Henson-Apollonio*)  
*Documents*  
H.1. Draft paper

10:00 - 10:30 *Coffee/Tea break and Group photo*

10.30 – 11.00 **H.** Assessment of Centre’s impact concerning technology transfers ... (cont’d)

11:00 – 12:00 **I.** Distributing materials for non-food/non-feed purposes  
(*Introduced by Michael Halewood*)  
*Documents*  
I.1 Explanatory Notes  
I.2. Revised draft MTA for non-food/non-feed purposes (with track changes)  
I.3. Revised draft MTA for non-food/non-feed purposes (with track changes accepted)

12.00 – 12.30 **J.** Question and Answer session regarding update papers  
*Documents*

- J.1 Update on the development of an international regime on access and benefit-sharing
- J.2 CAS update on the Enola bean case and other patent cases  
(*Victoria Henson-Apollonio*)
- J.3 Updates on the Enola bean case and other patent cases  
(*Chee Yoke Ling*)
- J.4.Update on development of stewardship guidelines J.5.  
Update on CAS-IP's License Central

*12:30 – 14:00 Lunch*

14.00 – 14.30 **J.** Question and Answer session ... (continued)

14.30 – 15.15 **K.** Roundtable on additional genetic resources policy issues of relevance to the CGIAR  
(*Introduced by Carlos Correa*)

*15:15 – 15:45 Coffee/Tea break*

15:5 – 16.30 **L.** Future of the GRPC in the framework of the new CGIAR – suggestions to put to the Transition Management Team (TMT)  
(*Introduced by Carlos Correa, Emile Frison*)

*Documents*

L.1 Message to the CGIAR Chair from Carlos Correo

16: 30 – 17:30 **M.** Legal and policy issues regarding plant, microbial, animal and tree genetic resources  
(*Introduced by Michael Halewood*)

17:30 – 18:00 **N.** Presentation on License Central  
(*Introduced by Sebastian Poehlmann*)

#### **Thursday 24 September**

08:30 - 10:00 **O.** Review/update of the GRPC work plan  
(*Introduced by Emile Frison*)

*Documents*

N.1. Minutes GRPC 25

10:00 - 10:30 **P.** Adoption of main conclusions, action list and report

*10:30 - 11:00 Coffee/Tea break*

11:00 - 11:30 **P.** Adoption of main conclusions, action list and report (continued)

11:30 - 12:00 **Q.** AOB, next meeting, closing

*12:00- 13:30 Lunch*

**Appendix 2: GRPC Work Plan (as amended by GRPC 26)**

<b>Issue</b>	<b>Activity/Input</b>	<b>Outputs</b>	<b>Timetable</b>
Consultations with the legal experts at the Ad Hoc Technical Advisory Committee on the SMTA and MLS	The GRPC Secretariat will work closely with the Secretariat of the Governing Body to develop submissions to the Second International Expert Group Meeting.	Documents prepared for Expert Group Meeting	Whenever the meeting is held in 2010
Reporting on uses of the SMTA	Letter to centres from Treaty Secretary  Template finalization/adoption by genebanks  Reach-out to centre breeders	Letter to Centre DGs Finalized template  Awareness raising at level of AE and ADE	October 09  November/December  November onwards
Template with optional conditions for PGRFA under Development	Secretariat will develop next draft of the template after the intellectual assets policy has been adopted.	Revised draft template	After the proposed IA policy has been adopted.
Guidelines for Centres' acquisition of germplasm	Secretariat will forward the draft guidelines and draft GAA to the AE for approval via E-mail.	Proposed draft and policy in package of GRPC documents	In a package, for reference at meeting of Alliance meetings, at the end of October 09
Guidelines for the Centres' use of the SMTA	The Guide for the Centres' use of the SMTA will be further revised to include work on the template with optional conditions for PGRFA under Development, best practices for associated information, and system-wide policies on distributing materials for non-food/feed, acquiring new materials and intellectual assets if/when they are adopted.	Revised Guide	Sometime in 2010 or 2011 when GRPC proposed policies are either adopted or rejected or modified by appropriate bodies at system-wide level

<b>Issue</b>	<b>Activity/Input</b>	<b>Outputs</b>	<b>Timetable</b>
Including materials in the MLS	The GRPC Chair's report to the CGIAR will include a section encouraging CGIAR members to respond to the request, from the Secretary of the Treaty, for lists of collections of PGRFA that are included within the Treaty's multilateral system of access and benefit sharing.	Chair's report to the CGIAR	November 2009
Distributing materials for non-food/feed purposes	<p>Secretariat will finalize editing of the MTA following GRPC 26 comments</p> <p>The proposed policy document and proposed MTA will be included in package of outstanding proposed policies and legal instruments from the GRPC to Anne Marie Izac, Ren Wang, the TMT, Alliance Executive and Alliance Board</p> <p>Meanwhile, we will forward the proposed policy and related instruments to the Centres for their consideration/possible use</p>	<p>Revised draft MTA and explanatory document</p> <p>Final approval from Committee members on non objection basis</p> <p>Package of GRPC documents</p>	<p>October 15</p> <p>October 31</p> <p>November 09</p>
Guidance for Centres' research involving traditional knowledge	<p>To be included in package of GRPC documents referred to above.</p> <p>CAS-IP will prepare information document to be sent to WIPO and UN Permanent Forum for Indigenous Issues</p>	<p>GRPC package of documents</p> <p>message</p>	<p>October 2009</p> <p>November 09</p>
Policy on intellectual assets	Proposed policy and explanatory note included in GRPC package of documents referred to above.	GRPC package of documents	October 2009
Implementation of the IA policy	CAS-IP to conduct a survey of current and future capacity in legal and IP across the Centres.	Survey	Before GRPC 27, regardless of the status of the proposed IA policy

<b>Issue</b>	<b>Activity/Input</b>	<b>Outputs</b>	<b>Timetable</b>
Assessment of Centres' impact concerning: 1. technology transfers as benefit-sharing, and 2. contributions to the implementation of Farmers' Rights	CAS-IP will liaise with Science Council and others developing similar studies  CAS-IP will: circulate draft to ICWG-GR; revise document, etc	Revised paper for GRPC 27	Before GRPC 27
Stewardship and liability guidelines	Orlando de Ponti will follow the process, participate in the joint ADE and Private Sector committee meeting in Zurich, November 2009.	Presentation to GRPC	GRPC 27
Demand driven GRPC agenda setting process	Secretariat will continue to consult systematically with the ICWG-GR, AE.	Update papers GRPC by Secretariat  Message from the Chair	GRPC 27
Developments at CBD, WIPO, WTO, other bodies	Secretariat will prepare short update paper(s) summarizing relevant developments.  CGIAR Centres will be represented in relevant meetings.	Update papers	GRPC 27
Cartagena Protocol on Biosafety	Monitoring progress of the international meetings.	Update paper	GRPC 27
(Cross)-sectoral approaches to ABS	Secretariat will continue work with University of Louvain to develop paper on AMiGR to submit to the 12 <sup>th</sup> session of the Commission.  Bioversity will make contributions to Plant, AnGR sectoral papers for the Commission.  Lead development of paper, through SGRP, on impact of climate change on interdependence.	Papers finalized and submitted to the Commission GRFA	October 2009

<b>Issue</b>	<b>Activity/Input</b>	<b>Outputs</b>	<b>Timetable</b>
Patenting strategies	CAS-IP to write 3 page document on patenting trends, including focus on developing countries.	Short paper	GRPC 27
License Central	Message to CGIAR Director recommending additional funds for License Central.	Message	October 2009
GRPC report to CGIAR	Chair to report to Kathy Sierra, copied to the CGIAR members, including the package of documents	Chair's report	November 2009
GRPC in the Change Process	Message from GRPC Chair to Ren Wang about an opening presentation to the meeting with the private sector, 11-14 November, Zurich, on the proposed policy on IA	Letter to Ren Wang	October 2009

## Appendix 3

### **Introduction to the proposed *Policy of the Alliance of CGIAR Centres on Intellectual Assets***

#### *a) Background*

The *Policy of the Alliance of CGIAR Centres on Intellectual Assets* was developed by the Genetic Resources Policy Committee (GRPC) of the CGIAR in response to repeated requests from CGIAR centres, members and partners for clarity about the policy relevance, for the centres, of a range of developments including: the coming into force of the International Treaty on Plant Genetic Resources for Food and Agriculture; the agreements signed in 2006 between eleven of the centres and the Governing Body of the Treaty; unstable funding for the centres from traditional donors; the growing role of the private sector in agricultural research, and the likelihood of increased interaction and partnership between CGIAR centres and private companies which involve the transfer and use of proprietary materials in the development of centres' products.

The GRPC has a mandate to advise the Chair of the CGIAR with respect to, among other things, genetic resources-related issues, and the "modification and implementation of the Centres' IPR guiding principles and related policies." The composition of the GRPC gives it a uniquely diverse collective capacity, within the CG system, to take on this role. Its members are drawn from CG Centres, the CGIAR Science Council, civil society and farmers organizations, private industry, and developing and developed countries national agricultural research systems. FAO participates in all meetings as an observer; so does CAS-IP. Members and observers are specialists in genetic resources-related policy making and intellectual property law.

The policy (attached as Annex 1) is designed to replace the 'Guiding Principles for the Consultative Group on International Agricultural Research Centres on Intellectual Property and Genetic Resources,' 1996, (the 1996 Guiding Principles) which is the closest existing precursor to a system-wide policy concerning intellectual assets. There has been a gradual accretion, since 1996, of additional guidelines and statements at various levels within the CGIAR system, that are not consistent with the 1996 Guiding Principles leading to uncertainty, both inside and outside the CGIAR system, about what policies actually apply.<sup>§</sup> Therefore, any guidelines or statements that address how centres manage their intellectual assets should be developed or revised in accordance with this proposed policy.

While genetic resources and related information were the original focus for the development of this policy, the principles and norms established in it are equally applicable to all centres' intellectual assets. Therefore, for the sake of completeness, this policy extends to all centres' intellectual assets -- including improved

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<sup>§</sup> An analysis of the range of (sometimes inconsistent) policy guidelines and statements addressing how centres should manage their intellectual assets is set out in "Searching for a line in the Sand," a paper submitted to the 13<sup>th</sup> Meeting of the CGIAR Executive Council, October 2007, available at <[http://www.cgiar.org/exco/exco13/exco13\\_grpc\\_ip\\_guidelines.pdf](http://www.cgiar.org/exco/exco13/exco13_grpc_ip_guidelines.pdf)>

germplasm, technologies, software, information, publications, vaccines, databases, methodologies and know-how.

The objective of the policy is to establish common standards with respect to all intellectual assets, not just those assets which are, or could be, the subject of intellectual property rights. Even in the absence of IPRs, access to centres' intellectual assets may be limited by arrangements such as licenses and MTAs. in ways that may be equally or more restrictive than through IPRs or impair the publication of research results.

The policy does not address issues related to liability and stewardship. A system-wide policy addressing those issues should be developed in light of emerging issues including environmental and sustainability concerns, and increasing levels of interaction with the private sector.

The International Treaty and the 2006 agreements between the centres and the Treaty's Governing Body establish the conditions under which the Centres will distribute "in trust" materials from the *ex situ* crop and forage collections hosted by the centres. However, the Treaty and the agreements with the Governing Body leave considerable latitude with respect to the conditions under which suppliers will make PGRFA under Development (i.e., improved germplasm) available. The policy guides the centres on how they can exploit that flexibility.

#### *b) The main sections of the policy*

The section entitled 'General conditions of access to Centres' intellectual assets,' (paragraphs 1-3) concerns intellectual assets created by the Centres *which are not subject to restrictions from 'outside' the centres*, i.e., where the centre or centres concerned are 100% in control of how the asset is managed and distributed. In contrast, the section 'Incorporation of third party intellectual assets', (paragraph 4) addresses *situations where centres intellectual assets are encumbered by conditions originating from sources outside the CGIAR*, and as a result, centres may not be able to comply with the public availability standards established in paragraphs 1 and 2.

#### ***General conditions of access to Centres' intellectual assets***

##### *Paragraph 1*

Paragraph 1 sets out the general rule that centres will make their intellectual assets globally available. However, the policy recognizes that there may be exceptional situations where the centres are unable to effectively disseminate, use or further develop an intellectual asset, and no other organization will do so either, unless it is granted exclusive rights to market the asset (or derivatives of it) in one or more territories, or for a certain use. The second part of paragraph 1 therefore allows centres to grant recipients various forms of exclusive rights to exploit intellectual assets, for limited periods of time, in defined territories or fields of use, with one important proviso: the agreed-to market segmentation must not affect the availability of the asset for "research and development in developing countries" as well as for advanced research institutes in developed countries (ARIs) that undertake work "in

support of the CGIAR mission.” In addition, when centres do grant exclusive rights of this nature, they must make it a matter of public record (following paragraph 5 of the proposed policy). Such disclosure is extremely important as a means of maintaining public trust.

The following examples illustrate how this provision could apply:

Example 1: A CGIAR centre identifies an effective, safe, biopesticide but does not have the resources (or mandate) to develop it for use by would-be beneficiaries. No other organization is willing to take over further development of the product on a non-exclusive basis. Company X on the other hand, is willing to further develop the biopesticide into a product suitable for use by farmers, but only on the condition that it has exclusive rights to market it in developed countries. The company is content that the product, once developed, can be commercialized by others in developing countries and that the intellectual asset remains available for research and development in developing countries and by ARIs in support of the CGIAR mission. Paragraph 1 would permit the centre to forge such an agreement with Company X, because it is “indispensable for the effective utilization or further improvement of Centres’ intellectual assets”.

Example 2: A CGIAR centre develops a promising crop variety, but does not have the resources to effectively disseminate it to farmers in developing country A. Country A’s national public research and extension agencies inform the centre that they too lack the means to get the variety out to farmers. There are a few small seed companies that are interested in marketing the variety in the country, but none of them is willing to even try unless they are granted an exclusive license to commercialize the variety in the country. In the absence of an exclusive license, the companies fear they will end-up undermining each others’ ability to recoup the modest financial gains that might be available through sales in the country. The proposed policy would permit the centre to grant a time-limited license to a single company to commercially market the variety in the country concerned. At the same time, however, pursuant to the proposed policy, the centre would still make the variety available to other recipients in country A for the purposes of research and development. This would facilitate potentially important further uses of the variety in pursuit of developing other improved materials. It would also allow other companies to ‘bulk up’ seeds to sell once the period of exclusivity was over.

### *Paragraph 2*

Paragraph 2 sets out the general rule that centres will not seek intellectual property rights over their intellectual assets. However, the policy recognizes that there may be exceptional situations where centres are unable to effectively use, disseminate or further develop an intellectual asset, and no other organization will do so either, unless the center-concerned or the recipient is able to obtain intellectual property protection over that asset. The second part of paragraph 2 therefore allows centres or recipients to seek, assert or obtain intellectual property rights over centres’ intellectual assets in such circumstances, subject to the proviso that the IP owner must not enforce its IP rights in ways that affect the availability of the asset for “research and development in developing countries as well as for ARIs in support of the CGIAR mission.” This rule would allow Company X, from Example 1, above, to seek patent

protection for the biopesticide in developed countries to prevent competitors from undermining their exclusive market position in those countries. It would also allow centres themselves to seek IP protection, so as to be in position to grant licenses in conformity with this policy. Concerning Example 2, above, the proposed policy would allow the company to seek IPRs within country A to enforce the conditions of their exclusive agreement with the centre against would-be commercial competitors (who might obtain the variety from sources other than the centre). In both cases, the centres would be required to publicly disclose the justification for seeking, or allowing others to seek, IPRs (pursuant to paragraph 5).

### *Paragraph 3*

Paragraph 3 builds upon the fact that the centres engage in research in furtherance of the CGIAR's mission, and not to make profits. There may well be circumstances where receiving financial compensation is consistent with, and could even help promote the mission of the CGIAR. Paragraph 3 simply states that centres must not divert their research agendas in return for financial compensation. To that end, they must not develop intellectual assets with the sole intention of obtaining financial or other forms of compensation.

### ***Incorporation of third party intellectual assets***

#### *Paragraph 4.*

Centres are increasingly reliant on other organizations' proprietary inputs into their own research activities. Sometimes centres will only be able to access those proprietary inputs by agreeing to conditions that limit the centre's ability to distribute the products of their research to recipients in developing countries for the purposes of research and development, or to ARIs in support of the CGIAR mission. The policy recognizes this possibility, and establishes minimum standards to help centres negotiate their way through these situations. In short, paragraph 4 states that while centres are able to enter into such agreements, before they do so, they must ensure that: 1) gaining access to the proprietary asset in question will make significant contributions to food security in those territories where the centres are able to distribute the asset concerned, and 2) the proprietary asset cannot be obtained from another source without the same restrictions. Again, centres entering into such agreements will need to make these kinds of arrangements a matter of public record (pursuant to paragraph 5)

Example: Company Y is willing to grant a license to a centre to use an intermediate technology in the development of crop varieties to be released by the Centre in smaller, poorer, developing countries in a region, but not the larger developing countries in the same region, not even for the purposes of research and development. In such cases, if the technology both a) contributes significantly to food security in the limited number of developing countries where it can be deployed by the center, and b) is not available from an alternative source under less restrictive conditions, this paragraph would allow the centre to enter into such arrangements.

### ***Transparency.*** (Paragraph 5)

Public disclosure is the main means of assuring the general public that the centres are balancing their overarching commitment to the creation of international public goods, and the occasional need to grant limited forms of exclusivity or seek or allow others to seek intellectual property rights in support of the further development or dissemination of intellectual assets. Given the paramount importance of maintaining accessibility of those assets to developing countries, the policy stresses the importance of disclosure when such access is restricted.

***Dissemination of research results.*** (Paragraph 6)

In their role as producers of international public goods, it is critically important that the centres release their research results in a timely manner.

Furthermore, the centres should proactively seek outlets for their research and development results through open access means. For example, while more and more journals are adopting open access related policies, it is possible that some of the most prestigious journals are unlikely to do so soon. In such cases, the centres should seek ancillary means to ensure that important results are available through additional open access means.

***Preventing misappropriation.*** (Paragraphs 7 and 8)

Because the centres rarely seek intellectual property protection for their intellectual assets (of course, copyright vests automatically) it is possible that others may [seek to] misappropriate their assets. Paragraph 7 states that the Centres should seek to prevent such misappropriation through various forms of action. For example, centres should undertake various forms of defensive publication and include their publications in databases used by patent offices for prior art searches. They could also challenge IPR claims.

Paragraph 8 addresses the need for the centres to take measures to avoid unintended misappropriation of traditional knowledge. In this context, the policy makes a cross reference to the Centres Ethical Principles Relating to Genetic Resources, and underscores the content of a recent amendment to those principles concerning centres' use of traditional knowledge and partnerships with traditional knowledge holders.

*Annex 1:*

**GRPC proposal:**

**Policy of the Alliance of CGIAR Centres on Intellectual Assets\*\***

*Preamble*

The mission of the CGIAR is: To achieve sustainable food security and reduce poverty in developing countries through scientific research and research-related activities in the fields of agriculture, forestry, fisheries, policy, and environment. The policy on intellectual assets of the Alliance of International Agricultural Research Centres supported by the Consultative Group on International Agricultural Research (CGIAR) is driven by the mission of the CGIAR and the imperative that the products of the Centres' research should be available without restriction.

The Centres work with a wide range of partners, including national agricultural research systems (NARS), advanced research institutes (ARIs), civil society organizations, regional and international intergovernmental organizations and increasingly, private sector. The Centres are supported by funding from countries, international and regional organizations, and private entities. The Centres produce, manage and provide access to the products of their research and development for use by, and for the benefit of, the poor, especially farmers in developing countries.

Centres hold their in-trust collections of germplasm for the benefit of the world community, in accordance with agreements signed by Centres and the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture (International Treaty).<sup>††</sup>

*Objective*

The objective of this policy is to establish common standards and procedures for the CGIAR Centres regarding the acquisition, management and release of intellectual assets.

All policies of CGIAR Centres that affect the acquisition, management and release of intellectual assets shall conform with this policy.

*Definitions*

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\*\* Upon approval by the Alliance, this policy will replace the 'Guiding Principles for the Consultative Group on International Agricultural Research Centres on Intellectual Property and Genetic Resources,' 1996. It does not include issues relating to stewardship and liability. It is anticipated that separate policies will be developed to address those issues in the future.

<sup>††</sup> The text of these agreements is available at:

<http://www.sgrp.cgiar.org/InTrustCollections/Agreements/AgreementwithCentresfinal1.doc>

‘Intellectual assets’ refers to all products of research and development activities, including, but not limited to: improved germplasm, technologies, software, information, publications, vaccines, databases, methodologies and know-how.

‘Market segment’ refers to restrictions including territorial and/or field of use.

### ***General conditions of access to Centers’ intellectual assets***

1. The Centres will make their intellectual assets globally available without restriction, subject to the following exception:

When it is indispensable for the effective utilization or further improvement of Centres’ intellectual assets, the Centres may grant limited exclusivity for commercialization in a defined market segment, for a limited period of time, provided they continue to make the intellectual asset available, for research and development in developing countries as well as for ARIs in support of the CGIAR mission.

2. The Centres will not seek or assert intellectual property rights<sup>††</sup> over their intellectual assets, subject to the following exception:

When it is indispensable for the effective utilization or further improvement of Centres’ intellectual assets, the Centres may seek or assert or allow third parties to seek or assert intellectual property rights over the Centres’ intellectual assets, provided they continue to make the intellectual asset available for research and development in developing countries as well as for ARIs in support of the CGIAR mission.

3. The Centres will not use their intellectual assets with the sole intention to raise income.

The Centres may charge financial compensation in return for providing access to their intellectual assets, on the condition that this does not divert the Centres from their research agendas. However, the Centres will continue to make the intellectual asset available for research and development in developing countries as well as for ARIs in support of the CGIAR mission.

### ***Incorporation of third party intellectual assets***

4. Centres may only enter into agreements concerning the use of intellectual assets of third parties subject to IPRs or contractual rights that restrict the availability of the resulting products for commercialization, research or development in developing countries when: a) the intellectual asset the Centre is producing will result in significant improvements to food security and or poverty alleviation in the countries where it can be made available, and, b) no equivalent intellectual asset is available from other sources under no or less restrictive conditions.

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<sup>††</sup> Concerning copyright, which normally vest automatically upon the creation of a ‘work’, see paragraph 6 below.

### ***Transparency***

5. The Centres will promptly make public the justification for, and describe the conditions of, their granting limited exclusivity, or seeking or asserting (or allowing third parties to seek or assert) intellectual property rights (other than copyright) over their intellectual assets, particularly when availability in developing countries is affected. Centres will also make public the justification for entering into agreements described in paragraph 4.

### ***Dissemination of research results***

6. The Centres will publish their research and development results in a timely manner and in a way that allows open access. This includes results of research and development that is carried out by the Centre itself, or in partnership with another organization. The Centres will allow the reproduction and distribution of their copyrighted works by third parties without the need to obtain permission from the Centres, provided that proper citation is made and the work is not altered.

### ***Preventing misappropriation***

7. The Centres should take action, as appropriate, to pre-empt intellectual property claims over their intellectual assets by others without the Centres' authorization.


8. The Centres shall abide by the 'CGIAR's Ethical Principles Relating to Genetic Resources,'<sup>§§</sup> and shall respect the rights of traditional knowledge holders by seeking their prior informed consent for the documentation, use and publication of information associated with their traditional knowledge, consistent with national and international law.

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<sup>§§</sup> These guidelines can be found in SGRP. 2003. Booklet of CGIAR centre policy instruments, guidelines and statements on genetic resources, biotechnology and intellectual property rights, version II, July 2003. SGRP, Rome, Italy [online]. Available from: <http://www.biodiversityinternational.org/publications/pdf/1178.pdf>

## Patents and Plants: Update for the GRPC 26

V. Henson-Apollonio, CAS-IP




### Pending U.S. Supreme Court Cases:




- *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008) (*en banc*)
  - Are business methods patentable?
  - Far-reaching implications, so called “software patents”. Lots of “software” patents in agbiotech, breeding schemes, etc.
  - Set for argument in the U.S. Supreme Court for Nov 9, 2009
  - 49 Amicus curiae briefs filed

### US Supreme Court cases:




- The “KSR” decision has had a major impact on the way lower courts and the USPTO looks at obviousness.
  - For example, in the Enola case the Federal Circuit Court (CAFC) said in its judgment against Proctor:
  - “To do so he [Proctor] followed normal and well-established agricultural methods and techniques for doing that. See *KSR Int’l v. Teleflex Inc.*, 550 U.S. 398, 418 (“a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.”) He does not contend that he devised or applied new or unexpected techniques in reproducing the beans.”

### “KSR” effect, continued




- *In re Kubin*;
  - On Apr. 3, the CAFC ruled that Amgen’s patents were “obvious to try” regarding the DNA sequence of a gene associated with the immune response
  - *In probably the most significant aspect of its holding, the court rejected Kubin and the amici’s argument that KSR should not be applied to an unpredictable art such as molecular biology.* –from, “Law360”; [http://www.jenner.com/files/tbl\\_s20Publications%5CRelatedDocumentsPDFs1252%5C2525%5CUnderstanding%20The%20Effects%20Of%20In%20Re%20Kubin.pdf](http://www.jenner.com/files/tbl_s20Publications%5CRelatedDocumentsPDFs1252%5C2525%5CUnderstanding%20The%20Effects%20Of%20In%20Re%20Kubin.pdf)

### Many personnel changes at the USPTO:



- New Undersecretary of Commerce for Intellectual Property and Director of the USPTO –**David Kappos**, formerly patent council at IBM and active in the “Peer-to-Patent” initiative
- Robert Stoll to be nominated to Commissioner of Patents, after the retirement of 35-year veteran of the USPTO, John Doll. –Bob Stoll is also a career employee. However, he does not have the examination experience that John has.

### U.S. Federal Circuit Court cases:



- Warning that Jurisprudence can be difficult to predict:
  - A lower court’s decision overturned by the Fed. Circuit Court
  - “Claim construction: --*Sanofi-Aventis U.S. LLC v. Sandoz, Inc.*, the CAFC disagreed with a lower court’s (District Court in New Jersey) decision that the two claims in this patent were invalid on the basis of the language of the claim. The lower court’s decision was overturned by the Fed. Circuit Court

## *Appendix 5*

### *Impact of climate change on international interdependence related to animal genetic resources*

Adam Drucker, Senior Economist, Bioversity, made a presentation on the principal findings of research he and colleagues at ICARDA, ILRI and Wageningen undertook to develop a paper concerning the impact of climate change on international interdependence related to animal genetic resources. Among the issues he highlighted were the following:

AnGR genetic erosion under current conditions is significant. Data regarding actual gene flow is poor but South-North flows are relatively small particularly when compared with flows North-North, North-South and South-South. The main livestock-relevant environmental impacts of climate change are related to changes in disease challenge, changes in fodder and water availability, land degradation and the speed of climate change relative to livestock and forage evolutionary adaptation. Other sources of dynamic change (e.g. urbanization, human population growth, globalization, increasing demand and affluence, emerging disease challenges and biotechnology development) will also play an important role in AnGR country interdependence.

The scenario modeling approach used suggests that the portfolio of breeds needed/demanded by society will change as a result of increased demand and the environmental impacts of climate change (Scenario 1 – “livestock portfolio change”) and that the livestock gene pool will be smaller than it is today because of current losses and the continued process of globalisation (Scenario 2 – “gene pool reduction”). The potential impacts of these scenarios suggest an increased need for the large-scale movement of livestock breeds in search of more appropriate climatic zones and increased demand for the remaining breeds. An example was presented of current AnGR interdependence in the West Asia North Africa region, a region whose harsh climate may be representative of future climates in other countries.

Hence, it may be expected that countries will increasingly need to obtain genetic resources more adapted to the new climatic conditions from outside of their borders and that the most needed germplasm will be from regions and countries that currently face the harshest climatic conditions (many of which are poorer, undergoing rapid social and economic change, and have poorly characterised AnGR). Nevertheless, it should be appreciated that AnGR country inter-relatedness is not something new. Current exchange is largely regulated through sanitary regulations. Only a few countries implement AnGR exchange restrictions in national biodiversity laws based on the Convention for Biological Diversity (CBD). There are also significant differences from the PGR situation (e.g. no large ex-situ collections of Southern germplasm being accessed and commercialised by Northern companies). Given the importance of exchange of AnGR for livestock sector and breed development, and the historical interdependence between countries and regions, there may appear to be less urgency for the further regulation of exchange of AnGR other than harmonisation of zoo-sanitary regulations. However, there

remains a clear dichotomy of views between Northern and Southern stakeholders regarding the need for benefit sharing arrangements.

In terms of policy implications, global climate change numbers hide complex spatial patterns of changes but regardless of the specific direction of change, potential impacts raise policy issues/concerns and have particular policy implications associated with them. A series of potential policy instrument options that could be developed to address such issues can therefore be identified, thereby supporting informed and evidence-based decision-making in international fora relevant to animal genetic resources (AnGR). These include:

- Developing procedures for access and benefit sharing, including Prior Informed Consent
- Regulation of export and import of AnGR
- Support for both conservation (in vivo and in vitro) and improvement of indigenous AnGR.
- Precautionary cryoconservation
- Special provisions for indigenous AnGR in animal disease control acts
- Improved understanding of the economics of genetic resource conservation and sustainable use and the
- Development of decision-support tools that allow conservation priorities to be set

## Appendix 6

### *Use and exchange of tree genetic resources and how countries' interdependence on tree germplasm will be affected by climate change.*

Barbara Vinceti, Bioversity, made a presentation based on research conducted by herself and Jarkko Koskela, concerning use and exchange of tree genetic resources and how countries interdependence on tree germplasm will be affected by climate change.

- Movement of tree germplasm has a long history but comprehensive data is unavailable on either past or current introductions. Information on movement of tree germplasm is available, although still fragmented, only for selected groups of tree species with a significant commercial value (eg., tropical and subtropical pines, acacias, eucalypts, teak).
- Forest reproductive material has been introduced from multiple sources and, in many cases, introductions have been poorly documented. Some of the landraces have originated from a narrow genetic base that could, for example, have contributed to the poor performance.
- The increasing interest in native tree species reported for Central American countries has contributed to increase the demand of planting material of these species but it is not sure whether they will replace demand of exotic species, especially for most large-scale plantations.
- The supply of forest reproductive material is generally insufficient to meet the demand. In other cases, problems in germplasm distribution are the most significant factors that make supply to user insufficient to meet the demand (eg., National Tree Seed Centres are estimated to have delivered less than 10% of the smallholder demand for tree seedlings and seed).
- International cooperation and exchange of germplasm is important in order to ensure wide access to valuable genotypes. Increasing difficulties (e.g. higher costs, lack of access) to move FRM for research purposes is posing serious limitations to the selection and appropriate use of FRM. Large amounts of FRM are moved through the trade sector and they are not necessarily documented or certified. Movement of FRM is especially linked to commercial plantations and demand is growing.
- Local and international rules and regulations are the most significant constraints to the movement of FRM, especially those linked to biosafety issues. Phytosanitary requirements in particular are different from country to country and for different types of material moved.
- There are no specific initiatives on ASB that cover forest genetic resources. The only initiative known regards the European Nordic countries, involved in an initiative that started very recently and is exploring these issues. However, the concerns of the experts who contributed to this report are more linked to the constraints related to the adoption of the CBD, which limits the movement of material for research purposes.
- With regard to expectations on future international interdependency on FGR in the face of climate change, the limited data on movement of FGR do not allow to draw conclusions about the extent to which climate change was an influential variable (along with other variables such as land-use changes, major plantation efforts, and market developments) driving these exchanges.