Implementation Guidelines

For the *CGIAR IA Principles on the Management of Intellectual Assets*

A. Background

Purpose of these Implementation Guidelines
The purpose of these Implementation Guidelines is to provide additional information and illustrations with regard to the *CGIAR Principles on the Management of Intellectual Assets* ("**CGIAR IA Principles**") to facilitate understanding of the CGIAR IA Principles, guide their interpretation and ensure their coherent implementation on an operational level. These Guidelines were approved by the CGIAR Consortium on 14 June 2013 and may be updated from time to time.

Objective of the CGIAR IA Principles
The CGIAR IA Principles mandate global accessibility of CGIAR research outputs as a general means to achieve impact. However, they also recognize that achieving impact sometimes requires restrictions to global accessibility. The CGIAR IA Principles therefore strive to reach a delicate balance between maintaining the founding value of global accessibility of CGIAR research outputs on the one hand, and proactively achieving targeted impacts by harnessing the power of Intellectual Property Rights ("**IP Rights**")[1] and licensing to better ensure that the outcomes of CGIAR research reach those who need them most, particularly small-scale farmers.

Status of the CGIAR IA Principles
The CGIAR IA Principles were adopted by the CGIAR Consortium and the Fund Council and are effective as of 7 March 2012 on an interim 2-year basis. They are part of the Common Operational Framework which applies to all funding and implementation aspects of the Strategy and Results Framework, including CGIAR Research Programs ("**CRPs**"), regardless of funding source or implementing entity. The CGIAR IA Principles replace the '*Guiding Principles for the CGIAR Centers on IP and Genetic Resources*' of 1996.

Scope of the CGIAR IA Principles
The CGIAR IA Principles establish common standards with respect to "*all intellectual assets produced or acquired by the Consortium and/or the Centers"*, including knowledge, publications and other information products, databases, improved germplasm, technologies, inventions, know-how, processes, software and distinctive signs, whether they are or not protected by IP rights ("**Intellectual Assets**").

B. Implementation Guidelines for specific sections of the CGIAR IA Principles

Farmers' Rights (Article 3)

Article 3.2 provides that "*the CGIAR seeks to be respectful of national and international efforts to protect and promote farmers' rights as envisaged by the Treaty and support the development of appropriate policies and procedures for their recognition and promotion*".

[1] '**Intellectual Property Rights**' means ownership rights (or applications for protection) of Intellectual Assets, whether registered or not, granted in any jurisdiction, including but not limited to, copyright and related rights, database rights, patents, industrial design rights, plant variety rights, trademarks and service marks, geographical indications, and trade secrets.

a) This means that Centers should comply, in the countries where they work, with applicable national laws protecting and promoting farmers' rights. The most common examples are access and benefit sharing laws, which require collectors to obtain the prior informed consent on mutually agreed terms from providers of genetic resources and associated traditional knowledge, including, in some cases, from indigenous and local peoples or peasants, farmers, individuals, etc[2]. Other examples of laws that may protect farmers' rights include plant variety protection laws, national seed regulations, laws concerning the land, resource and cultural rights of indigenous and or local peoples, and possibly even the national constitution. These national laws may be national initiatives or may implement international conventions to which the country is a party, such as the Convention on Biological Diversity ("**CBD**") and its Nagoya Protocol, the International Treaty on Plant Genetic Resources for Food and Agriculture ("**Treaty**") or the UPOV Conventions.

b) It also means that, whether or not there are national laws protecting and promoting farmers' rights in the countries where they work, Centers should, where possible, seek to work in ways that promote: the "*protection of traditional knowledge relevant to PGRFA*"; farmers' "*right to equitably participate in sharing benefits arising from the utilization of PGRFA*"; farmers' "*right to participate in making decisions, at national level, on matters related to the conservation and sustainable use of PGRFA*"; and farmers' right to "*save, use exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate*" (as stipulated by Article 9 of the Treaty).

   Below is a non-exhaustive list of practical actions that Centers could take, where appropriate, in this regard[3]:

   (i) When accessing Plant Genetic Resources for Food and Agriculture ("**PGRFA**") and/or associated traditional knowledge in the absence of access and benefit sharing laws, ensuring that the prior informed consent of farmers providing them has been given. This implies taking into account community protocols, if any, and proactively engaging the farmers to ensure that they understand the proposed uses of the PGRFA and/or the knowledge collected. This can be done with or through partners in the national agricultural research systems or other organizations with whom work is being carried out and, where possible, drafting written agreements[4] that reflect their prior informed consent and mutually agreed terms;

   (ii) Ensuring that research results (including characterized, evaluated and improved germplasm and useful information) are shared with farmers from whom PGRFA or associated information was accessed;

   (iii) Ensuring that publications referring to traditional knowledge give all appropriate credits to the holders/providers of such knowledge and disclose the source of such knowledge;

   (iv) Involving farmers as partners in research and development projects (which may include dedicating resources to strengthening the capacity of farmers to participate in such projects meaningfully);

[2] The terms describing the groups whose prior informed consent is required varies from law to law.

[3] For more information on measures that could be taken to protect and promote farmers' rights, please see the study commissioned by the Global Forum on Agricultural Research (GFAR) entitled "*Mechanisms by Which Centers of the CGIAR Consortium can support the development of appropriate policies and procedures for the recognition and promotion of Farmers' rights*" by Juanita Chaves Posada.

[4] For example a Material Acquisition Agreement.

(v) Building on and promoting farmers' local institutions and practices in research and development activities (e.g. by engaging in participatory breeding, supporting community-led initiatives in documenting their PGRFA and associated traditional knowledge in databases or registries, promoting local seed banks, working through and strengthening local seed systems);

(vi) Raising awareness among farmers' organizations about the availability of the PGRFA in genebanks and facilitate their access to such PGRFA through various outreach activities;

(vii) Involving farmer representatives in processes to determine research priorities and in the presentation of research outcomes in national fora;

(viii) Documenting efforts made by the Centers and partners to promote farmers' rights in the countries concerned, and sharing them to help inform farmers' rights-related policy development.

Genetic Resources for Food and Agriculture (Article 4)

a) PGRFA under the Treaty's Multilateral System

Centers support the Treaty and the Multilateral System set up by the Treaty to ensure the continued flow of the PGRFA that are most important for food security and on which countries are most interdependent. This Multilateral System provides facilitated access for such PGRFA when needed for research, breeding and training for food and agriculture and the sharing of benefits resulting from such access.

Accordingly, Centers provide facilitated access, within the framework of the Treaty, to the following PGRFA (both Annex 1[5] and non-Annex 1[6] materials), for the purposes of research, breeding and training for food and agriculture, under the Standard Material Transfer Agreement ("**SMTA**") adopted by the Governing Body of the Treaty:

- (i) all PGRFA held '*in trust*' by Centers in genebanks and placed within the purview of the Treaty under the agreements signed in 2006 by the hosting Centers and the Governing Body of the Treaty[7];
- (ii) all PGRFA received by a Center under the SMTA or under another legal instrument that allows the Member Center to redistribute the PGRFA under the SMTA; and
- (iii) breeding lines, genetic stocks and other materials developed/improved by a Center that incorporate material described in sub-sections (i) and (ii) above. Under the SMTA, Centers' developed/improved materials may be identified as PGRFA under development[8] and Centers may impose additional conditions to those set out in the SMTA, provided that such additional conditions are consistent with the SMTA and Article 6 '*Maximizing Global Accessibility and Impact*' of the CGIAR IA Principles.

---

5 Refers to Annex 1 of the Treaty.

6 In 2007, the Second Session of the Governing Body of the Treaty decided that the Centers would use the SMTA when distributing both Annex 1 materials, and non-Annex 1 materials collected before the entry into force of the Treaty.

7 On 16 October 2006, all Centers holding in-trust collections of PGRFA signed agreements with the Governing Body of the Treaty placing such collections within the purview of the Treaty see preamble of the CGIAR IA Principles.

8 Under the Treaty/SMTA, Centers may classify materials that are in the process of being developed/improved (e.g. breeding lines), that incorporate and are distinct from original material received from the multilateral system, as '*PGRFA under development*' when they are not ready for commercialization on the open market.

Centers must report all transfers of PGRFA made using the SMTA since January 2007[9] to the Governing Body of the Treaty. The form and content of such reports should comply with the instructions contained in the Governing Body's Resolution 5/2009[10], and the reports should be developed in accordance with the guidelines provided through the Treaty Secretariat[11]. In this regard, Centers are encouraged to develop in-house systems to report germplasm transfers which ensure compliance with the aforementioned requirements or to use the Easy SMTA tool developed by the Treaty Secretariat to assist providers generate SMTAs and report on-line to the Governing Body[12]. If Centers are uncertain about how to report, they can contact the Consortium Office and/or the Treaty Secretariat.

b) Genetic Resources for Food and Agriculture (plant and non-plant[13]) outside of the Treaty's Multilateral System

Centers may acquire such genetic resources and provide access to them where appropriate in accordance with applicable law, using Material Transfer Agreements that are consistent with the CGIAR IA Principles.

Sound Management of Intellectual Assets and IP Rights (Article 5)

Article 5 affirms CGIAR's commitment to the sound management of intellectual assets and IP Rights to further the CGIAR Vision.

Sound management of intellectual assets and IP Rights includes the following[14]:

a) **Agreements and contracts**: ensuring that all agreements and contracts, including confidentiality, partnership, collaboration, development, licensing, distribution, material transfer agreements, employment contracts, and grants, comply with the CGIAR IA Principles[15];

b) **Compliance**: complying with all terms set out in agreements with third parties;

c) **IP Portfolio**: maintaining a regularly updated IP portfolio, which should include as a minimum all IP Rights registered by the Center (e.g. trademarks, patents, plant variety rights);

d) **Laboratory notebooks**: appropriately and regularly maintaining and storing laboratory notebooks and supplementary records or their equivalent;

e) **Invention disclosure**: following an appropriate internal procedure for the disclosure of all discoveries, inventions, and new plant releases by Center staff (and, where relevant, visiting scientists, consultants, students or any other person operating on its behalf) to that Center;

f) **Pre-empting IP claims**: striving to take action where appropriate to pre-empt IP claims over their intellectual assets by third parties by promptly publishing their research results, by

[9] When Centers' agreements with the Governing Body came into force.
[10] See http://www.planttreaty.org/content/resolution-52009-procedures-third-party-beneficiary.
[11] See also the SGRP Guide for the CGIAR Centers' Use of the SMTA (2009).
[12] See https://mls.planttreaty.org/itt/.
[13] Some Centers hold research collections of non-plant taxa such as microbes, arthropods and animal tissues.
[14] It is recognized that Centers may need to build up capacity and will work towards this standard in 2013.
[15] See templates, clauses and drafting notes in CGIAR Consortium Legal/IP Network workspace - available to Network only (https://sites.google.com/a/cgxchange.org/clip-net/).

making their plant material publicly available, by providing, where relevant, information relating to prior disclosure and/or use to appropriate IP Offices[16]/PVR Offices or by any other means that improve access to Intellectual Assets by preventing IP claims by third parties;

g) **Regular audits**: carrying out Intellectual Asset audits as appropriate in order to identify relevant Intellectual Assets, ownership of those Intellectual Assets, and whether the Intellectual Assets are being used in a way that complies with the CGIAR IA Principles[17];

h) **Ownership of IP rights**: ensuring that, to the extent permitted by applicable law and in compliance with the CGIAR IA Principles, the IP Rights, if any, over the Intellectual Assets generated by the Consortium or Center's staff, visiting scientists, consultants, students, and any other person operating on their behalf, are owned, by the Consortium or that Center (for example through appropriate IP clauses in employment or consultancy agreements);

i) **IP due diligence**: using reasonable endeavors to engage in IP Rights due diligence particularly when activities such as product testing, development or commercialization are envisaged downstream. In such cases, several strategies, which may be combined, exist to reduce risk and obtain a manageable level of freedom-to-operate (FTO): (i) legal/IP management strategies, which consist in securing the IP Rights that are necessary for the development and delivery of products/services without infringing third party IP Rights (e.g. through license-in, cross-license, compulsory license or non assert covenants) or opposing the third party's IP rights; (ii) R&D strategies (e.g. modifying the product or inventing around); and (iii) business strategies (e.g. merge and/or acquire, wait and see, abandon project);

j) **Third party Intellectual Assets**: When accessing third party Intellectual Assets, ensuring that the rights and obligations acquired by the Center in relation to such Intellectual Assets are documented and understood;

k) **Policies and practices**: making their IP policies (and/or the CGIAR IA Principles) publicly available, and ensuring that these, as well as any other internal policies and practices comply with the CGIAR IA Principles and are updated when needed and implemented;

l) **Procedures**: ensuring that appropriate internal procedures are established and implemented to carry out the above;

IP Focal Point: ensuring that each Center has an IP Focal Point who will carry out the tasks indicated under Article 8 (a) below.

Maximizing Global Accessibility and Impact (Article 6)

Article 6 sets out the key principle that "*Intellectual Assets produced or acquired by the Consortium and /or the Centers shall be managed in ways that maximize their global accessibility*" (i.e. with the least restrictions to global accessibility as possible).

Negotiations with third parties should be conducted in a way to ensure that such Intellectual Assets have the greatest impact in furtherance of the CGIAR Vision. This may, in certain cases, require restrictions to global accessibility (cf. Articles 6.2-6.3) or the taking out of IP Rights (cf. Article 6.4).

[16] For example, ICRISAT has a long-standing relationship with the European Patent Office (EPO) in which ICRISAT provides research reports to the EPO for inclusion in their Non-Patent Literature Database.

17 See http://www.iphandbook.org/handbook/chPDFs/ch05/ipHandbook-Ch%2005%2006%20Blakeney%20IP%20Audits.pdf for more information on audits.

With regard to PGRFA, the Treaty and the agreements with the Treaty Governing Body leave considerable latitude with respect to the conditions under which suppliers may make PGRFA under Development (e.g. improved germplasm) available.

Prompt Dissemination of Research Results (Article 6.1)

General rule. Under Article 6.1, "*The Consortium and the Centers shall promptly and broadly disseminate their research results*". The timeframe for dissemination may vary according to the type or nature of the research results, among other factors. See CGIAR Open Access Policy[18] and Center policies for details on open access for information products.

Exceptions. The general rule of open accessibility is "*subject to confidentiality obligations as may be associated with restrictions permitted under Articles 6.2 and 6.3 or subject to limited delays to seek IP Rights under Article 6.4*".

Example 1: an invention may be kept confidential for a limited period of time in order to allow the filing of a patent application. Indeed, confidentiality of the invention prior to the filing of a patent application is a requirement in most countries. In this respect, filing a provisional patent application is a fast way of establishing a filing date, thereby permitting the invention to be disclosed without delay.

Procedure. Before Intellectual Assets at the Center level are publicly disclosed, such public disclosure should be approved following the Center's internal approval procedure.

Limited Exclusivity Agreements (Article 6.2)

In certain cases, Limited Exclusivity Agreements are necessary for research products /services to reach target beneficiaries.

General rule. The Consortium and/or the Centers may grant exclusive licenses for the commercialization of the Intellectual Assets they produce **(**Limited Exclusivity Agreements**)** if the following conditions are met:

1) the exclusivity is necessary for the further improvement of such Intellectual Assets or to enhance the scale or scope of impact on target beneficiaries, in furtherance of the CGIAR Vision

2) the exclusivity is as limited as possible:
   a. in duration,
   b. in territory and/or
   c. in field of use

3) there is a Research Exemption clause: the Intellectual Assets remain available (either free-of-charge (except for actual costs or reasonable processing fees) or at a reasonable cost):
   - in all countries
   - for non-commercial research conducted by public sector organizations (i.e. government entities, such as national governments, national agricultural research institutions, publicly

[18] to be developed in 2013

funded international agriculture research centers, and publicly funded educational institutions) in furtherance of the CGIAR Vision.

4) there is an Emergency Exemption clause: the Intellectual Assets remain available (either free-of-charge (except for actual costs or reasonable processing fees) or at a reasonable cost):
   - in all countries
   - in the event of a national or regional Food Security Emergency for the duration of the emergency ('*Food Security Emergency*' means a food security related occurrence that poses imminent threat of a significant loss of human life and which is declared an "emergency" by a national government or a multilateral and internationally recognized institution based on generally accepted benchmarks, such as the '*level 4 emergency*' or '*level 5 catastrophe*' categories of the Integrated Food Security Phase Classification (IPC) (available at www.ipcinfo.org)).

NB: The conditions mentioned above (1-4) do not need to be fulfilled if the Intellectual Assets incorporate Third Party Intellectual Assets that impose downstream restrictions on global accessibility (in this case, only the conditions listed under Article 6.3 need to be fulfilled).

Example 2: Exclusivity limited in time and territory (in *developed countries* only) - to develop and market a biopesticide

A Center 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* (geographically-limited exclusivity, an example of market segmentation) for a certain period of time. Company X is content that the product, once developed, can be commercialized by others *in developing countries* and that the intellectual asset remains available for research by public sector organizations in support of the CGIAR Vision, and in all countries, free-of-charge, in the event of a national or regional Food security Emergency.

Article 6.2 would permit the Center to conclude such an agreement with Company X because exclusivity is "*necessary for the further improvement of the Center's intellectual assets, in furtherance of the CGIAR Vision*" and the other conditions are also fulfilled.

Example 3: Exclusivity limited in time and territory (exclusivity in *a developing country* only) - to market a crop variety

A Center develops a promising crop variety, but does not have the resources to effectively disseminate it to farmers in developing country X. Country X's national public research and extension agencies inform the Center 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 Country X, 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 other's ability to recoup the modest financial gains that might be available through sales in the country.

Article 6.2 would permit the Center to grant a time-limited exclusive license with a Research and Emergency Exemption to a single company to commercially market the variety in the country concerned, because this would be "*necessary to enhance the scale or scope of impact on target beneficiaries, in furtherance of the CGIAR Vision*". The Center would still be able to make the variety available to public sector

organizations in all countries for research (including breeding) purposes which would facilitate potentially important further uses of the variety in pursuit of developing other improved materials. Other companies could also '*bulk up*' seeds for sale once the period of exclusivity is over. The Center would also have the right to make the variety available in all countries, free-of-charge, in the event of a national or regional Food security Emergency.

Example 4: Exclusivity limited to field-of-use – to develop and market test kits
A Center develops laboratory reagents that also have the potential of being used as diagnostic tools (test kits) for the detection of certain parasites. The Center is not in the "*test kit*" business. A private sector company, which is in the "*test kit*" business, is interested in developing and commercializing such test kits – which would further the CGIAR Vision - and would be able to sell them much more cheaply than the Center ever could. The company is willing to undertake this provided that it is granted an exclusive license for five years over the reagents *for the purpose of making test kits* ("*field-of-use*" restriction) to ensure that its investment in initiating the production of these kits is profitable for its business. Because this is a field-of-use exclusivity, the reagents would still be available *for other uses* by anyone. The company is content with the Research and Emergency Exemptions (i.e. that the reagents would remain available for research by public sector organizations in support of the CGIAR Vision, and in all countries, free-of-charge, in the event of a national or regional Food Security Emergency).

Exceptions. Centers may, in certain cases, conclude Limited Exclusivity Agreements that do not contain the Research and/or the Emergency Exemptions mentioned above, if this is justified by compelling reasons and they have obtained the prior approval of the Consortium. To obtain such approval, the Center's IP Focal Point (listed in Annex 1 attached) shall submit a written request to the Consortium's IP Focal Point:

- (i) showing that the exclusivity is "*necessary for the further improvement of such Intellectual Assets or to enhance the scale or scope of impact on target beneficiaries, in furtherance of the CGIAR Vision*", and is "*as limited as possible in duration, territory and/or field of use*",
- (ii) explaining the reasons for the requested deviation which need to be compelling (in making this determination, the Consortium may take into account the source of funding, the potential for impact, the alternative means of access to the Intellectual Assets, the opportunity cost, etc.) and
- (iii) showing that the deviation does not jeopardize the furtherance of the CGIAR Vision.

Example 5: Need to request authorization from the Consortium to deviate from the Research and Emergency Exemptions:
A Center grants a time-limited license to a private sector partner to develop and test a new method of plant breeding which will make it much simpler for breeders to select plants from the field with the desired characteristics and is applicable and affordable for breeders in both the developed and the developing world. The private sector partner refuses the Research and Emergency Exemptions (i.e. refuses that the intellectual assets remain available for research by public sector organizations in support of the CGIAR Vision, and in all countries, free-of-charge, in the event of a national or regional Food security Emergency) and has included in the agreement that the Center cannot enter into non-commercial or commercial licenses without the prior approval of the private sector partner. This deviation from the Research and Emergency Exemptions would need to be submitted to the Consortium for prior

approval. The Center would need to show that the license is as limited as possible in scope, that the reasons for the requested deviation were compelling (for example that the private sector partners refused to accept these exemptions during the negotiation and that the Center was not able to find another partner with the required expertise who was willing to accept them) and that the deviation does not jeopardize the furtherance of the CGIAR Vision (for example, that the private sector partners is willing, once the new method is developed and tested, to make it available in the developing world in a way that is affordable to breeders).

The Consortium shall have 30 days from notification to approve or reject any such requests.

Procedure. Centers should have a proper procedure in place to ensure, prior to the conclusion of each Limited Exclusivity Agreement, that such agreement fulfills the conditions mentioned above.
N.B.: With regard to PGRFA within the purview of the Treaty, Centers should also ensure that their Limited Exclusivity Agreements comply with the relevant provisions of the Treaty.

Incorporation of Third Party Intellectual Assets – Restricted Use Agreements (Article 6.3)

Accessing and using third party Intellectual Assets is essential to conduct the best research in furtherance of the CGIAR Vision. When providing such access and use, third parties may sometimes impose downstream restrictions on the global accessibility of the resulting intellectual assets (such as exclusivity, confidentiality, etc.). In certain cases, it is appropriate to accept these downstream restrictions.

General rule. "*The Consortium and/or the Centers may enter into agreements for the acquisition and use of third party Intellectual Assets that restrict the global accessibility of the products/services resulting from the use of such Intellectual Assets for commercialization, research and development*" (Restricted Use Agreements), if the following conditions are fulfilled:

1) "*they are, to the best of their knowledge, unable to acquire equivalent Intellectual Assets from other sources under no or less restrictive conditions*",

2) "*the products/ services that are intended to result from the use of such third party Intellectual Assets will further the CGIAR Vision in the countries where they can be made available*",

3) and "*the Consortium and/or the Centers shall use their best efforts to ensure that such third party Intellectual Assets are only used in relation to, or incorporated into, such intended products/services*"[19].

NB: In the case of Restricted Use Agreements (in which third party Intellectual Assets are acquired and used), only the conditions mentioned above need to be fulfilled (i.e., the Center does not need to fulfill the conditions for limited Exclusivity Agreements under Article 6.2, including with regards to the Consortium approval procedure concerning Limited Exclusivity Agreements that do not contain the Research and/or the Emergency Exemptions).

Example 6:
A Center was able to obtain a license from Company A to use an intermediate technology (sequence useful for marker-assisted selection) to select a crop variety to be

[19] For example, Centers shall use best practices in field, greenhouse, laboratory, and livestock structure management to reduce the risk of unintended contamination of CGIAR biological materials by/with third party Intellectual Assets.

released by the Center in certain countries in a region where the Center already works, but not in other countries, not even for research purposes. In this case, if the technology both a) contributes to food security ("*furthers the CGIAR Vision*") in the limited number of developing countries where it can be made available by the Center, and b) is not available from an alternative source under no or less restrictive conditions, Article 6.3 would allow the Center to enter into such an arrangement.

Procedure. Centers should have a proper procedure in place to ensure, prior to the conclusion of each Restricted Use Agreement, that such agreement fulfills the conditions mentioned above (under Article 6.3).
N.B.: With regard to PGRFA within the purview of the Treaty, Centers should also ensure that their Restricted Use Agreements comply with the relevant provisions of the Treaty.

IP Rights (Article 6.4)

Article 6.4 affirms the CGIAR's commitment "*to the prudent and strategic use of IP Rights*". This covers all types of IP Rights, whether or not they vest automatically.

a) Where IP Rights vest automatically (e.g. copyright, moral rights, database rights, etc.), this means that, to the extent possible, IP rights should be asserted in a way that maximizes and preserves global access. This is consistent with Article 6.1, which mandates prompt and broad dissemination of Intellectual Assets as a general rule (see explanation under Article 6.1).

b) Where IP Rights do not vest automatically:

- In the case of patents and/or plant variety protection ("**PVP**"), Centers shall "*carefully consider whether to register/apply for (or allow any third party to register/apply for)*" them. Such registration/application must be "*necessary for the further improvement of such Intellectual Assets or to enhance the scale or scope of impact on target beneficiaries, in furtherance of the CGIAR Vision*".

  When considering whether to register or apply for a patent or PVP, Centers should follow an internal evaluation procedure to ensure that the application/registration is necessary. It is strongly recommended that a written evaluation report be developed, containing at least the following: the strategy for development, dissemination and/or commercialization; the reasons for the application (e.g. whether defensive or offensive), the cost, the countries where protection would be sought, the potential partners involved, the alternative measures, if any, that could be taken, the benefits that are expected from protection, and the risks that may result from an absence of protection. The nature of "*necessary*" will vary from case to case.

Example 7:
Continuing from Example 2 above (biopesticide example), Article 6.4 would allow the Center to apply for patent protection over the biopesticide *in developing countries* so that the Center would be in a position to grant licenses to commercialize the product under relevant terms (e.g. preferential terms). Company X could also file for patent protection over the biopesticide *in developed countries* to prevent competitors from undermining its exclusive market position in those countries.

Example 8:
Continuing from Example 3 above (varietal development), Article 6.4 would allow the company to seek Plant Variety Protection (PVP) within country X to enforce the conditions of their exclusive agreement with the Center against would-be commercial

competitors.

Centers do not usually seek Plant Variety Protection (PVP) or patent protection themselves on the products of their research. They do however sometimes allow others to do so with regards to products derived from Center lines. This would be subject to the terms of the SMTA under the Treaty, which requires payment into a fund in the event the products that are commercialized are restricted for further research and breeding.

- With regard to trademarks, Centers are encouraged to seek protection for their names and logos in order to protect the goodwill and reputation associated with their use[20], and consider whether to register distinctive marks and signs (e.g. trademarks) for the products and/or services that they produce.

All arrangements regarding ownership and/or licensing of IP Rights made by Centers should be consistent with the CGIAR IA Principles.

Fees (Article 7)

Article 7 acknowledges that Centers are allowed, under certain circumstances, to charge "*reasonable financial fees, beyond actual costs and reasonable processing fees, in return for providing access to their […] Intellectual Assets*".

Decisions to charge fees beyond actual costs and reasonable processing fees should be made on a case-by-case basis, taking into account factors such as: the market rates (if any) for similar intellectual assets, the potential value to the recipient and the recipient's ability to pay, the total cost to the Center in creating or collecting those assets, the cost (in time and money) to the recipient of obtaining those assets elsewhere, the present or future relationship (if any) with the recipient, the context in which the recipient requires the assets, etc.

N.B.: The right to charge fees "*does not apply to Plant Genetic Resources for Food and Agriculture "held in-trust by Centers and placed within the purview of the Treaty, [and for other material received with SMTA]for which facilitated access shall be provided in accordance with the Treaty*", i.e. free-of -charge or, when a fee is charged, for a fee that does not exceed the minimal cost involved.

According to Article 7.3, "*any revenue generated from Intellectual Asset management [needs to be used] in line and to support the CGIAR Vision*", and use of such revenue should be transparently reported in the regular financial reports.

Example 9: A Center develops a new process of drying grain that is more effective and energy efficient than standard processes. This new Intellectual Asset involves the use of a special insulated material that can be sealed effectively and a low cost moisture detector that allows the farmer to know when the grain has reached the correct moisture content. It is envisaged that the public sector partners will act as the distribution network for the technology.
However, in order for the process to be effective, public sector participants need to attend a 2-day training course in order to fully understand the process and to learn how

[20] Centers who have international intergovernmental organization status are encouraged to seek special protection for their names and logos as permitted under Article 6ter (1)(b) of the Convention of Paris, in order to protect the goodwill and reputation associated with their use.

to troubleshoot when things are not going as planned. The Center can charge for the actual cost of the material and the moisture meter, and could charge above actual costs and processing fees to the public sector participants for the training course in order to ensure that the Intellectual Asset is used appropriately.

Example 10: A Center has developed an interactive Smartphone application that contains valuable farming information and helps the farmer to decide on the best agronomic practices for his farm. The application is available at no charge to the public sector extension workers who are using it to provide recommendations to farmers in areas that they serve.
A retail agricultural input supplier would like the Center to develop a customized version of the application that includes the same information but links it to specific products that the company sells. The supplier's intent is to use its field agents and stores to help the farmers make decisions using the tool and to supply the farmers with products that they need to implement these decisions.
The Center can charge reasonable financial fees beyond actual costs to develop the customized version, as well as maintenance fees in subsequent years for software updates, as long as the revenue generated is then used in line with and to support the CGIAR Vision.

Capacity (Article 8)

a) **Capacity/ IP Focal Point**. Article 8.1 provides that "*the Consortium and Centers are expected to have the capacity required for the proper implementation of these CGIAR IA Principles*".

This means that the Consortium and Centers should have designated personnel or consultants in charge of ensuring compliance with the CGIAR IA Principles. It is recommended that these personnel or consultants be either qualified in law and/or IP/technology transfer and that they be provided with adequate training and resources to enable them to properly implement the CGIAR IA Principles.

The Consortium and the Centers should also each have an officially-designated IP Focal Point which is the single point of contact between the Consortium and the Centers for all matters related to the implementation of the CGIAR IA principles. *See list of IP Focal Points in Annex 1 which may be updated from time to time.*

The Center IP Focal Points will, in particular:

- Receive communications from the Consortium IP Focal Point with regard to the implementation of the CGIAR IA Principles;
- Submit the Center IA Reports to the Consortium IP Focal Point, as well as any additional information requested by the Consortium (such as what information in the Center IA Report may be made public in the CGIAR IA Report); and
- make any request for deviations from the Research and Emergency Exemptions under Article 6.2.2.

The Consortium IP Focal Point will, in particular:

- Answer questions regarding the implementation or interpretation of the CGIAR IA Principles;
- Communicate consent or rejection of any request for deviations under Article 6.2.2;
- Submit the Consolidated IA Report to the FC IP Group; and
- Submit the CGIAR IA Report to the Fund Council.

b) **Network**. Article 8.2 provides that the "*Consortium is expected to provide a mechanism to ensure more effective and consistent management of Intellectual Assets and IP Rights through the sharing of knowledge and leveraging of experience, the provision of training and the development of relevant tools and templates*". For this purpose, the Consortium facilitates a network of Legal/IP professionals in the Consortium for which it: (i) organizes an annual Network meeting, (ii) provides on-line training, (iii) sends information updates, (iv) provides tools and templates through an intranet site, and (iv) offers other additional support as funding may permit.

c) **Funding.** Article 8.3 provides that "*The CGIAR funders are expected to provide adequate resources to support such capacity, including through both budget resources for the Consortium Board and Consortium Office and full cost recovery arrangements under the CRPs and other research proposals to implement the SRF*". This means that the costs for implementing the CGIAR IA Principles should be acknowledged and included in the overall assessment of costs of a CRP or costs of the Consortium Office, etc. incorporated into the various budgets as an eligible expense (Consortium Office, CRP, etc.) to be funded by the CGIAR Fund.

Implementation (Article 9)

a) **Effective date.** The CGIAR IA Principles are effective as of 7 March 2012. As the CGIAR IA Principles are part of the Common Operational Framework, they are incorporated by reference, as of 7 March 2012, in the Joint Agreement, Consortium Performance Agreements, Program Implementation Agreements and any downstream sub-agreement (Program Participant Agreement, etc.), whether such agreements are concluded before or after 7 March 2012.

Example 11: The CGIAR IA Principles are incorporated by reference in a Program Participant Agreement concluded by a Lead Center and a CRP Program Participant on 1 September 2013.

The CGIAR IA Principles shall however only apply to the agreements, or amendments of renewal, extension or involving additional funding, concluded with third parties after 7 March 2012.

Example 12: The CGIAR IA Principles do not apply to an agreement entered into between a Center and a third party in 2011 (i.e. before 7 March 2012). However, if the agreement is subsequently renewed, extended (unless the time extension is minor to allow for the completion of previously planned activities without any new funding obligation or new activities) or amended to take into account additional funding in April 2012 (i.e. after 7 March 2012), the CGIAR IA Principles will apply to it and the agreement should be reviewed accordingly.

b) Article 9.2 provides that the Consortium and the Centers are "*responsible for the management of their respective Intellectual Assets*". This means that they need to put in place both the capacity to comply with the CGIAR IA Principles, and adequate procedures to ensure compliance.

Reporting (Article 10)

a) **Center Board assurance of compliance.** This assurance should be provided by each Center's IP Focal Point to the Consortium's IP Focal Point by the end of April of each year, and should cover the preceding year[21].

> **Example 13:** *"ILRI's Board of Trustees hereby declares that ILRI has, in year x, complied with the CGIAR Principles on the Management of Intellectual Assets, and in particular with the provisions of Article 5 on the sound management of Intellectual Assets and the requirements laid down in Article 6".*

b) **Center IA Report.** This report should be provided by each Center's IP Focal Point to the Consortium's IP Focal Point by the end of February[22] of each year, and should cover the preceding year. It should be prepared in accordance with the template contained in Annex 3 hereto.

Centers need to ensure that any confidentiality obligations in contracts with third parties do not prevent them from reporting and providing information that may be required under this Article.

> **Example 14:** If a partner, when negotiating a Limited Exclusivity Agreement, insists that the terms of the license remain confidential and refuses that they be disclosed in the Center IA Report, the Center will not be able to conclude such a Limited Exclusivity Agreement.

As provided in Articles 10.1.3 and 10.2.3, the Consortium and the Fund Council Intellectual Property Group ("**FC IP Group**") will treat all information contained in these reports as confidential, except for the information in the parts of the Center IA Reports that are designated as non-confidential in the template contained in Annex 3 herein or in the Center IA Report. In this regard, if any Center IA Report contains confidential information, the Consortium will ensure, prior to submitting the Consolidated IA Report to the FC IP Group, that all FC IP Group members[23] have signed a non-disclosure agreement.

c) **CGIAR IA Report.** This report should be provided by the Consortium to the Fund Council by 15 May[24] of each year, and should cover the preceding year. It should be prepared in accordance with the template contained in Annex 4 hereto. This report will be made public.

d) **Public disclosure.** Article 10.4 provides that "*CGIAR is committed to the dual and equally important principles of (i) recognizing the legitimate interests of the private sector and other partners to maintain and protect confidential information and (ii) observing the need for transparency and accountability with respect to the use of public sector funds and activities financed in connection therewith*".

CGIAR recognizes the important role of transparency which should only be limited by the need to protect legitimate research partner interests in proprietary technology, trade secrets and competitively sensitive commercial terms.

This means that Centers need to:

- use their best efforts to make publicly available, within the context of their own communication strategy at the project level, key information regarding the Limited

[21] For 2013, the date is 15 June.
[22] For 2013, the date is 15 May.
[23] See list of FC IP Group members in Annex 2 hereto.
[24] For 2013, the date is end of August.

Exclusivity Agreements and Restricted Use Agreements they have concluded (this can be done through press releases, web notices, blogs, reports, solicited (public) correspondence, etc.); and

- provide links to, or copies of, such key information, within a reasonable time period following public disclosure, to the Consortium Office (by sending an email to cgiar@cgiar.org). The Consortium, at the request of the Fund Council, has agreed to maintain a publicly-accessible page on www.cgiar.org consolidating such key information.

Annex 1: List of Consortium IP Focal Points - last updated June 2013

(to be updated from time to time)

Consortium Office	Perset	Elise	General Counsel	e.perset@cgiar.org
In Elise's absence	Muchiri	Moses	Legal Officer	m.muchiri@cgiar.org
AfricaRice	Kumashiro	Takashi	Program Leader	t.kumashiro@cgiar.org
Bioversity	Halewood	Michael	Head - Policy Research & Support Unit	m.halewood@cgiar.org
CIAT	Jaramillo	Virginia	IP Lawyer	m.v.jaramillo@cgiar.org
CIFOR	Kanowski	Peter	Deputy Director General	p.kanowski@cgiar.org
CIMMYT	Roa	Ana Carolina	IP Manager	c.roa@cgiar.org
CIP	Rodrigo	Michelle	Head of Grants and Contracts Unit	m.rodrigo@cgiar.org
ICARDA	Amri	Ahmed	Head of GR Section	a.amri@cgiar.org
ICRAF	Kariuki	Elizabeth	Head of Contracts and Grants	e.m.kariuki@cgiar.org
ICRISAT	Rao	B Hanumanth	Manager, Intellectual Property	b.hanumanth@cgiar.org
IFPRI	Governey	David	Director of Finance and Admin	d.governey@cgiar.org
IITA	Koper	Hilde	Head of Project Administration Office	h.koper@cgiar.org
ILRI	Opati	Linda	IP & Legal Counsel	l.opati@cgiar.org
IRRI	Quaite-Randall	Elsie	IP Manager	e.quaite-randall@irri.org
IWMI	Amarasekera	Pradeepa	Legal and Contracts Officer	p.amarasekera@cgiar.org
WorldFish	Alonso	Carlos	Head of Finance and Administration	c.alonso@cgiar.org

Annex 2: List of members of the FC IP Group - last updated February 2013

(to be updated from time to time)

The FCIP Group is composed of the three following members:

- Bram de Jonge (Wageningen University)
- Paul Figueroa (USAID)
- Maria Sampaio (Embrapa);

As well as the following alternate:

- ISPC Representative (to be determined)

Annex 3: Template for the annual Center IA Reports
(to be updated from time to time)

This template sets out the format for the Center IA Reports that Centers submits to the Consortium each year by the end of February regarding their implementation of the CGIAR IA Principles during the preceding year (cf. Articles 10.1.2 and 10.1.3 of the CGIAR IA Principles)**.**

I. <u>General information regarding the implementation of the CGIAR IA Principles during the preceding year</u> (NOT CONFIDENTIAL)

1. Legal/IP capacity at the Center;
2. Any new or updated IP –related policies;
3. Center's updated IP portfolio (containing at a minimum all IP Rights registered by the Center, or by third parties working with or on behalf of Centers; e.g. trademarks, patents, plant variety rights);
4. Any relevant information showing that the requirements laid down in Article 5 of the CGIAR IA Principles have been met;
5. Any relevant highlights, trends, cases studies, practices etc. that the Center would like to show case or share.

II. <u>Information regarding each Limited Exclusivity Agreement, Restricted Use Agreement and IP Application that was concluded/made during the preceding year</u> (CONFIDENTIAL, unless marked as non-confidential by the Center which is strongly encouraged as per Article 10.4 of the CGIAR IA Principles)

- **For a Limited Exclusivity Agreement:**
  1. <u>General information</u>:
     Indicate <u>title</u> of the agreement; name and address of contracting <u>parties</u>; <u>date</u> of conclusion of the agreement (and its effective date if different) and the <u>duration</u> of the agreement;
  2. <u>Description of the project to which the agreement relates</u>, including its purpose;
  3. <u>Description of the exclusivity arrangements, including the Intellectual Asset(s) involved, the target beneficiaries,</u> the rationale for how target beneficiary markets are reached through market segmentation and/or how any geographies are reached through splitting territories (including how boundaries are formulated); any market terms associated with the developed products/services (e.g., whether they will be provided royalty-free or at "*reasonable cost*" and, in this case, any information, if available, on how cost will be calculated) and the duration of the exclusivity;
  4. <u>Justifications showing that requirements of Article 6.2 are met</u>:
     - Explain why the exclusivity is necessary:
       - either "*for the further improvement*" of the Intellectual Assets produced, in furtherance of the CGIAR Vision,
       - or to "*enhance the scale or scope of impact on target beneficiaries, in furtherance of the CGIAR Vision*";
     - Demonstrate that the exclusivity is "*as limited as possible*" (in duration, territory and/or field of use);
     - Specify that the agreement contains a Research Exemption and indicate how the Intellectual Assets remain available, free-of-charge (except for actual costs or reasonable processing fees) or at a reasonable cost, in all countries for non-

commercial research conducted by public sector organizations[25] in furtherance of the CGIAR Vision; alternatively, if the agreement does not contain a Research Exemption, please include the request for deviation and the approval by the Consortium of such deviation under Article 6.2.2., or provide particulars concerning the third party restrictions permitted under Article 6.3.

- Specify that the agreement contains an Emergency Exemption and indicate how the Intellectual Assets remain available, free of charge (except for actual costs or reasonable processing fees) or at a reasonable cost, in all countries, in the event of a national or regional Food Security Emergency[26] for the duration of the emergency; alternatively, if the agreement does not contain a Research Exemption, please include the request for deviation and the approval by the Consortium of such deviation under Article 6.2.2., or provide particulars concerning the third party restrictions permitted under Article 6.3.

5. Public disclosure:
   Indicate whether there have been any public communications of key information regarding the Limited Exclusivity Agreement as per sub-section d) of the section on Reporting (article 10) above, and if so, confirm that all such communications have been made available to the Consortium Office.

- **For a Restricted Use Agreement:**
  1. General information:
     Indicate title of the agreement; name and address of contracting parties; date of conclusion of the agreement (and its effective date if different) and the duration of the agreement;
  2. Description of the project to which the agreement relates, including its purpose and the third party intellectual assets that are acquired and used under the agreement
  3. Description of the downstream restrictions to the global accessibility of the products/services resulting from their use (e.g. any confidentiality and/or exclusivity arrangements, etc.)
  4. Justifications showing that requirements of Article 6.3 are met:
     - Indicate that, to the best of the Center's knowledge, no equivalent Intellectual Assets were available from other sources under no or less restrictive conditions;
     - Explain how "*the products/ services that are intended to result from the use of such third party Intellectual Assets will further the CGIAR Vision in the countries where they can be made available*";
     - Describe any measures taken to ensure that the third party Intellectual Assets are only used in relation to, or incorporated into, such intended products/services.
  5. Public disclosure:
     Indicate whether there have been any public communications of key information regarding the Restricted Use Agreement as per sub-section d) of the section on Reporting (article 10) above, and if so, confirm that all such communications have been made available to the Consortium Office.

[25] **Public sector organizations** means government entities, such as national governments, national agricultural research institutions, publicly funded international agriculture research centers, and publicly funded educational institutions.

[26] '**Food Security Emergency'** means a food security related occurrence that poses imminent threat of a significant loss of human life and which is declared an "*emergency*" by a national government or a multilateral and internationally recognized institution based on generally accepted benchmarks, such as the '*level 4 emergency'* or '*level 5 catastrophe'* categories of the Integrated Food Security Phase Classification (IPC) (available at www.ipcinfo.org).

- **For an IP Application (registration/application for patent or plant variety protection):**
    1. General information:
       Indicate type of IP (patent/plant variety protection); name; type of filing (including any provisional application); territory where protection was sought; duration; name of applicant and inventors/breeders, and when the IP Application is made by a Center, the approximate costs involved.
    2. Description of protected subject matter
    3. Description of project to which the application relates
    4. Justifications showing that requirements of Article 6.4 are met:
       Explain how the IP Application was "*necessary for the further improvement of the Intellectual Assets or to enhance the scale or scope of impact on target beneficiaries, in furtherance of the CGIAR Vision*"
    5. Status of the application and progress of prosecution

Annex 4: Template for the CGIAR IA Report
(to be updated from time to time)

This template sets out the format for the CGIAR IA Report, which is a high level report submitted by the Consortium to the Fund Council by the end of May of each year regarding the implementation of the CGIAR IA Principles during the preceding year. The CGIAR IA Report is developed by the Consortium after consultation with the Centers involved and the FC IP Group. The CGIAR IA Report is made available to the public (cf. Article 10.3 and 10.4 of the CGIAR IA Principles).

1. Legal/IP capacity in Consortium Office and Centers

2. Brief description of Consortium Legal/IP Network activities (e.g. meetings; the development of tools and best practices; training, etc.)

3. General and aggregated information on the Limited Exclusivity Agreements, Restricted Use Agreements or IP Applications that were concluded/ made by the Consortium and the Centers, subject to any confidentiality obligations of the Consortium and/or the Centers (e.g. number of Limited Exclusivity Agreements entered into by Centers, and broadly, what these agreements are anticipated to enable Centers to achieve; what type of markets are covered, average duration of exclusivity; examples derived from specific agreements if such information is or can be made public);

4. The number of PVPs registered and their general justifications;

5. The number and title of patent applications and grants and their general justifications;

6. Any relevant highlights, trends, comments regarding implementation of the CGIAR IA Principles (e.g. successes, challenges, areas for improvement), etc.

Annex 5: Glossary of defined terms

CGIAR Vision: to reduce poverty and hunger, improve human health and nutrition, and enhance ecosystem resilience through high-quality international agricultural research, partnership and leadership.

CBD: the Convention on Biological Diversity.

Centers: the CGIAR Consortium members.

Center IA Report: Center report submitted annually to the Consortium regarding the implementation of the Principles during the preceding year (cf. Article 10.1.2 of the CGIAR IA Principles).

CGIAR IA Principles: the *CGIAR Principles on the Management of Intellectual Assets*.

CGIAR IA Report: high level report submitted annually to the Fund Council regarding the implementation of the Principles during the preceding year (cf. Article 10.1.3 of the CGIAR IA Principles).

Consolidated IA Report: consolidated report made available by the Consortium to the FC IP Group annually (cf. Article 10.2 of the CGIAR IA Principles).

CRPs: CGIAR Research Programs.

FC IP Group: Fund Council Intellectual Property Group established by the Fund Council with the role, membership, rights and obligations set forth in Annex 1 of the CGIAR IA Principles

Intellectual Assets: knowledge, publications and other information products, databases, improved germplasm, technologies, inventions, know-how, processes, software and distinctive signs, whether they are or not protected by IP rights.

Intellectual Property Rights or IP Rights: ownership rights (or applications for protection) of Intellectual Assets, whether registered or not, granted in any jurisdiction, including but not limited to, copyright and related rights, database rights, patents, industrial design rights, plant variety rights, trademarks and service marks, geographical indications, and trade secrets.

IP Application: registration/application for a patent or plant variety protection.

Limited Exclusivity Agreements: agreements entered into by the Consortium and or the Centers granting limited exclusivity for commercialization of the respective Intellectual Assets they produce

PGRFA: Plant Genetic Resources for Food and Agriculture.

Restricted Use Agreements: agreements entered into by the Consortium and/or the Centers for the acquisition and use of third party Intellectual Assets that restrict the global accessibility of the products/services resulting from the use of such Intellectual Assets for commercialization, research and development.

SMTA: standard material transfer agreement.

Treaty: Treaty on Plant Genetic Resources for Food and Agriculture.