

The Legal Status of ECPGR

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The ECPGR Executive Committee, at its second meeting in Maccaresse in October 2011 reviewed possible options for the future legal status of the ECPGR. These were, in general, to maintain the present status (i.e. ECPGR to operate within the legal framework of IPGRI without any separate legal status of its own); to become an international organization with its own independent legal status; and to set ECPGR up as a charitable organization under national law. The Executive Committee decided as follows:

Decision: Two options to be prepared in full detail, in addition to the existing status quo option:

- 1. Status quo;***
- 2. Continuing the present status, but obtaining an own legal status;***
- 3. Obtain full international agreement through a simplified procedure.***

In line with the above, the present report will consider in more detail the following three options, and the process that each would entail:

1. Maintaining the present situation where the ECPGR has no legal status of its own (legal personality) but operates within the legal framework of an existing legal institution. In practice this may entail staying with the present host institution (Bioversity International), or
 - a. seeking a new host institution at the national level; or
 - b. seeking a new host institution at the international level.

The paper will explore both options;

2. Establishing the ECPGR as a legal entity under national law, as a Non-Governmental Organization (NGO), or a charitable corporation or other not-for-profit company, with its own legal personality under national law;
3. Establishing the ECPGR as an international organization with its own legal personality under international law, through a simplified procedure that does not require that the establishment agreement be ratified by the member states.

It is to be noted that the second and third options do not preclude the new ECPGR from seeking a hosting arrangement with an existing institution at the

national or international level. The paper will explore the limits within which such a hosting arrangement could be sought.

Preliminary considerations relating to legal personality

It is noted that the three options outlined above entail a basic choice between maintaining the present situation where ECPGR has no legal personality of its own and operates entirely through a host institution, and ECPGR seeking its own legal personality so that it can contract and operate in its own name. Before entering into a detailed discussion of the three options, it may thus be useful to examine the advantages and disadvantages of the two alternatives. But first we should clarify the concept of legal personality.

The meaning and importance of legal personality

Legal personality can be defined as the capacity of a person or entity to hold rights and to take legal action under applicable law, whether this be national or international law.

Every natural person has legal personality, in this case legal personality under national law. It is what enables a natural person to function under national law, to contract, own a house and employ other persons.

Natural persons functioning as a group, for example associations or commercial enterprises, or international organizations, do not generally speaking have their own legal personality separate from the natural persons that are part of the group, unless they actively seek such a legal personality under the relevant system of laws, as for example by registering the group as a company or charitable corporation under national law, or as an international organization under international law.

In the absence of any separate legal personality for the group, then the natural persons that form that group are individually liable for the acts of the group. Alternatively, the group may choose to operate as part of another group that does have legal personality, and carry out its day-to-day functions drawing on the legal personality of the group of which it is part. This is the current situation of ECPGR, which operates as an integral part of Bioversity International and contracts, operates bank accounts and employs its staff in the name of Bioversity International.

A basic choice

It is obviously impracticable for the individual staff members of ECPGR to be liable for all contracts entered into by ECPGR. **This means that the basic choice for ECPGR lies between seeking its own legal personality and operating in its own name on the one hand, or operating as part of another organization and carrying out its operations drawing on the legal personality of that organization on the other hand.**

The advantages and disadvantages of ECPGR seeking its own legal personality and operating under that legal personality

Advantages	Disadvantages
<ul style="list-style-type: none"> To be able to sign contracts (agreements, MOUs, personnel contracts, projects, etc.) in its own name 	<ul style="list-style-type: none"> It will take time and effort (cost) to set up the necessary legal structure to give ECPGR its own legal personality.
<ul style="list-style-type: none"> To be able to open and operate its own bank account 	<ul style="list-style-type: none"> It will also take time and effort (cost) to establish the basic rules (staff regulations, financial regulations, operating procedures etc) for its operations.
<ul style="list-style-type: none"> To be able to submit project proposals, to participate as a formal partner in projects 	<ul style="list-style-type: none"> There will also be a cost in ECPGR providing its own support services, e.g. human resources management, computer support, auditing controls, etc, although these can be subcontracted to a hosting institution, or to an outside entity.
<ul style="list-style-type: none"> To obtain more visibility and an own identity. This would avoid confusion with the host; to represent ECPGR to donors and members, etc. 	<ul style="list-style-type: none"> There is a risk that the flexibility of ECPGR as a set-up might decrease; it might become a 'heavy' organization; it might be too costly to afford such a status.
<ul style="list-style-type: none"> To increase the accountability of the 'system', i.e. vis-a-vis the member countries, the Secretariat and possibly others 	

Option 1. Maintaining the present situation where the ECPGR has no legal personality of its own, but operates within the legal framework of an existing legal institution, drawing on the legal personality of that institution.

At the present time, the ECPGR functions as an integral part of Bioversity International. This means that ECPGR contracts with outside persons and entities through the medium of Bioversity International, drawing on its legal personality, and ECPGR staff have the status of staff members of Bioversity International.

ECPGR could continue the present arrangement with Bioversity International or seek a new hosting arrangement with an existing institution at either the national or international level.

a) Seeking a new hosting arrangement with a national institution

Process

Should ECPGR enter into a hosting arrangement with a national institute, then ECPGR would become an integral part of that national institute and would draw on the legal personality of that institute in just the same way as it does at present with Bioversity International. This is of course assuming that ECPGR does not obtain its own separate legal personality, as for example by being incorporated as an independent charitable or other not-for-profit national organization under national law (see below).

The actual terms and conditions of the hosting arrangement should preferably be set out in a formal written agreement or memorandum of understanding, between the Chair of the Executive Committee of ECPGR and the hosting institution. It is suggested that any such agreement or memorandum of understanding should cover at least the following points:

1. That the host institute would provide a legal framework for the operations of ECPGR, and allow ECPGR to contract and use bank accounts in the name of the host institution, drawing on its legal personality;
2. That the hosting institute would provide adequate accommodation and working and support facilities for ECPGR;
3. That the host institution should hire the staff of ECPGR as employees of the host institute, and provide them with the necessary salaries, pensions and other forms of social security¹;
4. That the host institute would fully respect the independent governance structures of ECPGR, and not seek to influence the activities of ECPGR other than through those governance structures;

¹ The staff of ECPGR will have to be employed under some contract of employment, and their status will have to be clear to the national authorities of the host state, including for example the immigration and labour authorities. This is something that ECPGR itself cannot do, if it does not have legal personality and thus the capacity to enter into employment contracts under national law.

5. The charges to be made by the hosting institute for providing hosting services.

Advantages and disadvantages

The following are the advantages and disadvantages of the option of seeking a hosting arrangement for the ECPGR Secretariat with an existing national institute:

Advantages	Disadvantages
<ul style="list-style-type: none"> • Seeking a hosting arrangement for ECPGR with an existing national institute, particularly if that national institute is a partner in ECPGR activities, would have the advantage of keeping ECPGR within the scope of the present arrangements, i.e. without bringing in an extraneous organization. 	<ul style="list-style-type: none"> • It would, however have the disadvantages of subjecting the ECPGR Secretariat to an element of possible control or influence by an individual national member of ECPGR.
	<ul style="list-style-type: none"> • The ECPGR and its staff would also lose any privileges and immunities currently enjoyed under the hosting arrangements with Bioversity International.
	<ul style="list-style-type: none"> • In case new staff needs to be employed this might have to be done locally and there might be no warranty that the kind of multi-lingual staff with international experience is available.

b) Seeking a new hosting arrangement with an international institution

Process

As noted above the ECPGR Secretariat is currently hosted by Bioversity International, although the terms and conditions of that hosting arrangement are not set out in any formal written agreement or Memorandum of Understanding. Should the ECPGR Executive Committee decide to renew the present hosting arrangement or to seek a new hosting arrangement with another international institution, it is suggested that the terms of such hosting arrangement should be set out in a formal letter of agreement, or Memorandum of Understanding, signed by the hosting institution and the Chair of the Executive Committee of the ECPGR.

Possible candidates for new hosting arrangements at the international level, in addition to **Bioversity International**, could include for example **FAO** or the **Global Crop Diversity Trust**, in view of the close correlation of the mandates of all three organizations and their relevance for the work of ECPGR. Further details on each of these international organizations are set out in the Annex to this paper.

Should ECPGR enter into a hosting arrangement with an international institution, then ECPGR would become an integral part of that international institution and would draw on the legal personality of that institution in just the same way as it does at present with Bioversity International. This is of course assuming that ECPGR does not obtain its own separate legal personality, as for example by being established as an international organization under international law (see below).

It is suggested that the minimum terms and conditions for the hosting of the ECPGR Secretariat without its own legal status by an existing international organization should include the following:

1. That the host international organization would provide a legal framework for the operations of ECPGR, and allow ECPGR to contract and use bank accounts in the name of the host institution, drawing on its legal personality as recognized by the host government in its headquarters agreement;
2. That the hosting international organization would provide adequate accommodation and working and support facilities for ECPGR;
3. That the host international organization should hire the staff of ECPGR as officials of the host institute, and provide them with the necessary salaries, pensions and other forms of social security;
4. That the host institute would fully respect the independent governance structures of ECPGR, and not seek to influence the activities of ECPGR other than through those governance structures;
5. The charges to be made by the hosting institute for providing hosting services.

In general, a hosting arrangement of this sort would not be difficult to put in place, and indeed could be up and running within a matter of months.

Advantages and disadvantages

The following are the main advantages and disadvantages of the option of seeking a hosting arrangement for the ECPGR Secretariat with an existing international institution:

Advantages	Disadvantages
<ul style="list-style-type: none"> • It would obviate any need to seek an independent international status for ECPGR, since ECPGR and its staff would automatically enjoy the existing status of the hosting organization; 	<ul style="list-style-type: none"> • It may have the disadvantages of being seen as subjecting ECPGR and its Secretariat to an element of possible control or influence by the hosting international organization
<ul style="list-style-type: none"> • It would align ECPGR with an international organization operating with a parallel and consistent mandate; 	
<ul style="list-style-type: none"> • It would allow the ECPGR and its staff to enjoy international privileges and immunities with minimum time and effort; 	
<ul style="list-style-type: none"> • It would present opportunities for efficiencies in the operation of both the ECPGR and the hosting organization, through, for example, the work of both entities on PGRFA conservation and availability and information systems. 	
<ul style="list-style-type: none"> • It would allow the Secretariat to (continue to) operate as an honest broker and to maintain the necessary freedom of operation under the supervision of the Executive Committee 	

Option 2. Establishing the ECPGR as a legal entity under national law

Process

Under this option, ECPGR would be established as a Non-Governmental Organization (NGO) or other not-for-profit corporation under national law. This is quite a quick and simple operation and would provide ECPGR and its Secretariat with its own legal status (legal personality) in a relatively short time, i.e. within a period of 6 to 8 months. Some potential host countries, such as the

Netherlands and Switzerland, are well known for offering attractive conditions for NGOs or other charitable or not-for-profit corporations with international mandates. The Global Fund to Fight Aids, Tuberculosis and Malaria (the Global Fund), is an example of a not-for-profit corporation established under Swiss Law, while the former International Development Law Institute (now re-established as the International Development Law Organization “IDLO”) is an example of a not-for-profit corporation (Stichting) established under Dutch law.

The normal process for establishing an NGO or other not-for-profit organization under national law would entail the following:

1. Initial discussions with the registering agency, including discussions regarding tax exemptions and other types of special treatment.
2. The drawing up of the legal documents for the establishment of the NGO or other not-for-profit corporation. This will normally take the form of a Memorandum and Articles of Association, or Statutes in the case of Switzerland.
3. The registration of the establishment documents with the national registry office of the chosen jurisdiction;
4. The payment of the incorporation fees;
5. A first formal Meeting of the Members of the NGO or other not-for-profit corporation.

Advantages and disadvantages

The advantages and disadvantages of this option are the following:

Advantages	Disadvantages
<ul style="list-style-type: none"> • It is a quick and cheap process to establish the legal structure 	<ul style="list-style-type: none"> • As an independent entity, there will be a cost of time and effort in establishing the basic rules and conditions (staff regulations, financial regulations, operating

	procedures, pensions, etc.) for its operations.
<ul style="list-style-type: none"> Establishment as a national entity will provide ECPGR with its own legal personality and enable it to submit project proposals, contract in its own name, hire its own staff, open its own bank accounts and carry out its operations in its own name. 	<ul style="list-style-type: none"> There will also be a cost in ECPGR providing its own support services, e.g. human resources management, computer support, auditing controls, etc, although these can be subcontracted to a hosting institution, or to an outside entity.
<ul style="list-style-type: none"> If ECPGR as a national entity is registered as a charitable or other not-for profit organization, it will be entitled to tax exemption on its income and assets. 	<ul style="list-style-type: none"> Any tax exemption and other privileges and immunities negotiated with the host country will be limited to that host country. As ECPGR is unlikely to hold funds or receive income in any other country than the host country, this is unlikely to pose any particular difficulties.
<ul style="list-style-type: none"> ECPGR could try to negotiate a headquarters agreement with the host state providing for other privileges and immunities, but this is not usual or easy to achieve without having the status of an international organization. 	<ul style="list-style-type: none"> Tax exemption will not normally extend to taxes on the salaries and other emoluments paid to ECPGR staff, unless a separate headquarters agreement is entered into with the host state providing for such additional exemption.
	<ul style="list-style-type: none"> The negotiation of a headquarters agreement and its entry into force is normally a fairly lengthy process that can take anything from one to seven years, depending on the host country.

As noted above, the establishment of ECPGR as an NGO or other not-for-profit corporation under national law would not preclude the negotiation of hosting arrangements with an existing national or international institution. In such cases, the hosting arrangements would normally be limited to the provision of working accommodation and facilities, since the ECPGR Secretariat would be able to operate and conduct its business in its own name. If a hosting arrangement is sought with an international institution, it should be pointed out that the status of ECPGR as a separate legal entity under national law would make it difficult or impossible for ECPGR or its staff to be accorded privileges and immunities through the hosting institution. This

would be possible only if ECPGR were to operate as an integral part of the hosting institution.

Option 3. Establishing the ECPGR as a legal entity under international law

Process

Establishing a new international organization is a process that takes a considerable amount of time and effort.

The normal process is to draw up a draft establishment agreement in consultation with relevant stakeholders, adopt the establishment agreement at a conference of plenipotentiaries representing the member countries of ECPGR and open the agreement for signature and ratification. Experience has shown that this process can be quite lengthy and can take up to 8 or 9 years, even if it is possible to get agreement amongst the states concerned. There is in any case certain reluctance among states to set up new international organizations.

The process can be shortened quite considerably by adopting a simplified procedure of an establishment agreement that can be brought into force on signature alone, thus avoiding the delays inherent in ratification. This simplified procedure was adopted for the Agreement for the Establishment of the **Global Crop Diversity Trust**, which entered into force on signature by seven states without the need for ratification. There are however limitations in adopting this approach. Normally states are not willing to agree to bring such an establishment agreement into force without going through the process of ratification if the agreement provides for such elements as privileges and immunities for the organization and its staff, or for financial or other obligations that may require legislation. To ensure appropriate privileges and immunities will require that the organization enter into a headquarters agreement with the host state providing for them. The Global Crop Diversity Trust for example has only just recently succeeded in negotiating an appropriate headquarters agreement with its new host state after some 8 years under interim hosting arrangements with FAO and Bioersity International and conducting its operations through their legal frameworks. In the case of the ECPGR, the negotiation of a headquarters agreement would need to be supplemented through letters of agreement with individual member governments committing them to make available the necessary funds for the operation of ECPGR.

In summary, the process for establishing ECPGR as an independent international organization under a simplified procedure would entail the following steps:

1. Drawing up a draft establishment agreement in consultation with concerned stakeholders;
2. Convening a conference of plenipotentiaries representing member countries of ECPGR to consider and adopt the establishment agreement. The establishment agreement would provide for its entry into force on signature by a certain specified number of ECPGR member countries;
3. Opening the adopted text for signature by member countries of ECPGR;
4. Negotiating a headquarters agreement with the host country for ECPGR;
5. Drawing up the basic rules and regulations for ECPGR, including staff regulations, financial regulations, social security provisions etc.

Advantages and disadvantages

The advantages and disadvantages of establishing ECPGR as an international organization with its own legal personality under international law under a simplified procedure are the following:

Advantages	Disadvantages
<ul style="list-style-type: none"> • It would provide ECPGR with the legal status of an international organization with its own legal personality under international law 	<ul style="list-style-type: none"> • The process of establishing ECPGR as an international organization would likely be very time-consuming and quite costly
<ul style="list-style-type: none"> • Establishment as an international organization will provide ECPGR with its own legal personality and enable it to submit project proposals, contract in its own name, hire its own staff, open its own bank accounts and carry out its 	<ul style="list-style-type: none"> • It is unclear whether member countries in ECPGR would be prepared to go through the time and effort to establish ECPGR and an independent international organization.

operations in its own name.	
<ul style="list-style-type: none"> • ECPGR could negotiate a headquarters agreement with the host state providing for tax exemption for its income and assets and other privileges and immunities for itself and its staff, 	<ul style="list-style-type: none"> • Even if ECPGR is successfully established as an international organization under a simplified procedure, it will still be necessary to negotiate a headquarters agreement with the host government providing for privileges and immunities for the new organization and its staff. The negotiation of a headquarters agreement and its entry into force is normally a fairly lengthy process that can take anything from one to seven years, depending on the host country.
	<ul style="list-style-type: none"> • As an independent entity, there will be a cost of time and effort in establishing the basic rules and conditions (staff regulations, financial regulations, operating procedures, pensions, etc.) for its operations.
	<ul style="list-style-type: none"> • There will also be a cost in ECPGR providing its own support services, e.g. human resources management, computer support, auditing controls, etc, although these can be subcontracted to a hosting institution, or to an outside entity

As with the option of establishing ECPGR as a legal entity under national law, the option of establishing ECPGR as an entity with its own legal personality under international law does not preclude the possibility of entering into a hosting arrangement with the national or international institution, either as a short term approach or as a longer term option. Indeed, as already noted above, this was the approach taken by the Global Crop Diversity Trust.

Conclusions

The above summary of possible options is presented as a guide for decision making regarding the most appropriate legal status for ECPGR. Each of the options reviewed has its own advantages and disadvantages. Which option

most closely reflects the interests of ECPGR will essential depend on the vision that the ECPGR has of the future role of ECPGR and its Secretariat.