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l'agriculture

Organización
de las
Naciones
Unidas
para la
Agricultura
y la
Alimentación

Item 4 of the Draft Provisional Agenda

COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE

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BACKGROUND DOCUMENTATION PROVIDED BY THE INTERNATIONAL ASSOCIATION OF PLANT BREEDERS FOR THE PROTECTION OF PLANT VARIETIES (ASSINSEL)

During the Fifth Extraordinary Session of the Commission (8-12 June 1998), ASSINSEL circulated a document entitled *ASSINSEL position on plant genetic resources for food and agriculture and the equitable sharing of benefits arising from their use*, which had been adopted by its General Assembly in Monte Carlo on 5 June 1998. In its *Report*, the Commission “noted the interesting position expressed by FIS/ASSINSEL (International Seed Trade Federation/International Association of Plant Breeders), that could facilitate negotiations”. The present document has been submitted by ASSINSEL to clarify its position. It is available in the language in which it was submitted.

A MULTILATERAL AGREEMENT FOR PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

AN ASSINSEL VIEWPOINT

Farmers, breeders and scientists have traditionally relied on open access to genetic resources, including improved commercialized varieties protected under the UPOV Convention. Since the entry into force of the Convention on Biological Diversity (CBD) there is evidence that the principles of the sovereign rights of nations over their genetic resources and of benefit-sharing, in the absence of an international agreement, are leading to growing restrictions on the exchange of genetic resources. This is, at present, and will certainly be, in the short and medium terms, far more damaging to public research, small breeding companies, and developing countries poor in genetic and financial resources, than to large countries and medium and large seed companies.

In addition, this state of affairs is less worrying for commercial plant breeders, because:

- ✓ centres of origin are often of lesser importance than centres of secondary diversification that have developed with the movement of peoples over millennia. For any given crop, centres of secondary and sometimes tertiary diversification exist in all countries where the crop is of economic importance, often far from the original area of domestication.
- ✓ for most species, the genetic diversity in landraces and wild species are resources of limited present value for breeding purposes. Such resources require a great deal of time and effort to explore and find potentially useful traits for integration into improved varieties. Breeders cannot usually justify paying significant amounts of money for access to exotic germplasm that has not been thoroughly evaluated, and which has not yet been enhanced, or adapted to the specific agricultural environments for which farmers, who are the breeders' customers, are seeking new, better adapted and more productive varieties.
- ✓ new technologies, and the development of "genomics", will provide an alternative to the use of exotic germplasm in the development of new resistance and quality traits.

Nonetheless, ASSINSEL considers that, from a public interest point of view, the current state of affairs is detrimental to the maintenance of genetic resources, and considers it paradoxical that the entry into force of the CBD has been counter-productive in this regard.

ASSINSEL also considers that the *Global Plan of Action on Plant Genetic Resources for Food and Agriculture*, adopted unanimously in Leipzig in June 1996, was a step in the right direction and that its implementation will require the establishment of a multilateral agreement among countries on access to PGRFA and the equitable sharing of the benefits arising from their use.

One of the conditions for the acceptance of such a multilateral agreement is the confirmation of the fund provided for by FAO Resolution 3/91, in order to implement farmers' rights, fund which will support PGRFA conservation and utilization programmes.

Among the many obstacles in the international discussions, two in particular regard plant breeders: farm-saved seed and the "appropriation" of biodiversity. As a contribution to facilitating progress, breeders consider that:

- ✓ As far as farm-saved seed are concerned, article 15 of the UPOV Convention clearly states (i) that the breeder's rights shall not extend to acts done privately and for non-commercial purposes and (ii) that each contracting party [to UPOV] may, within reasonable limits and

subject to the safeguarding of the legitimate interests of the breeder, restrict the breeder's rights in relation to any variety in order to permit farmers to use for propagating purposes, on their own holdings, the product of the harvest they have obtained by planting, on their own holdings [a] protected variety.

That clearly means that subsistence farmers are not affected by plant breeder's rights, and that it is obviously wrong or misleading to say that UPOV and UPOV-like systems impact on their liberty.

As far as commercial farmers are concerned, each country or block of countries has the possibility of finding solutions adapted to their particular socio-economic circumstances within the provisions for possible exceptions in the UPOV Convention.

In addition, it must be stressed that farmers would continue to have the choice between protected and unprotected varieties, as well as the possibility of saving, using and selling seed from unprotected varieties.

- ✓ With regard to the "appropriation" of genetic diversity, ASSINSEL considers that, in the case of UPOV or UPOV-like systems, which represent the vast majority of protection titles in the world, there is absolutely no appropriation of genetic diversity, insofar as:
- the right granted to the breeders is limited in time (averaging between 18 to 20 years);
 - no right is granted over the genome of the species but on a specific individual plant variety in the development of which the breeder has invested. The global biodiversity of the species remains totally available;
 - thanks to the breeders' exception, the variety to which the title has been granted is freely available for further breeding and the result of such further breeding is freely marketable, as long as the newly developed variety is not a simple "plagiarism" of the initial variety. The obligation to avoid plagiarism of course favours biodiversity, because it prevents the marketing of varieties that are too closely related. In fact, plant breeders create biodiversity.

In the case of patenting, the situation is slightly different even if, as in the case of plant breeders' rights, the words "appropriation of biodiversity" are greatly exaggerated.

In line with their socio-economic development, it is now possible in a few countries - mainly in the USA but also in Australia and Japan - to patent plant varieties. In most countries, it is also possible to patent biotechnological inventions, when stringent criteria have been met. Plant breeders need strong protection, and consider that patent protection, when available, is justified and legitimate. As in the case of plant breeder's rights, the protection concerns a specific cultivar and/or a specific trait, for a limited period. It is therefore not justified to speak of the appropriation of biodiversity. However, there is a difference between patents and plant variety protection (PVP) since, contrary to varieties protected by PVP, the new improved patented material is not immediately available for further breeding and, therefore, is not available for immediate benefit sharing. For this reason, ASSINSEL members are ready to study the possibility of balancing the resulting lack of immediate availability by participating, when the results of a breeding/research programme which includes genetic resources provided by *in situ* or *ex situ* gene banks are patented, in the fund to be established by governments, as decided in FAO resolution 3/91, and implicitly acknowledged in the *Global Plan of Action*.

Such financial participation should be based on the material transfer agreement provisions of a multilateral agreement on PGRFA.

In the light of the above considerations, ASSINSEL recommends the establishment of a Multilateral Agreement on Access to Genetic Resources for Food and Agriculture and the Equitable Sharing of the benefits arising from their use.

The scope of the agreement should include all genetic resources of importance to present and future food security, and agriculture in general, at the level of genera and species: food crops, including vegetables and fruits, forage crops, and mixed industrial/food crops. For each genus and species, the genetic resources should comprise wild relatives, landraces, obsolete varieties, and commercial varieties that are in the public domain. (For the list of genera and species, see CGRFA/IUND/4, Rev.1, pp. 40-43).

The agreement should include pre- and post-CBD, and *in situ* and *ex situ*, collections. (The inclusion of the pre-CBD collections is acceptable only if the other principles contained in this document are accepted).

For maximum practicality, all materials covered by the agreement should be “freely” available, under similar terms of access, recognizing that “free access” does not mean “without cost”. In addition, in the case of *in situ* collections, in particular of wild relatives, the country of origin should facilitate the organization of collecting missions, on mutually agreed terms.

The Material Transfer Agreement (MTA) should include the following provisions:

- ✓ The recipient will neither claim legal ownership nor apply for intellectual property protection over the germplasm received, *per se*. Such protection should be impossible, or very difficult to obtain, the criteria for protectability not having being met.
- ✓ The material supplied may be used by the recipient without restriction for breeding and research purposes.
- ✓ Plant varieties developed from the material may be protected, if the criteria of protectability are met, by plant breeder’s rights, or any other *sui generis* system consistent with the UPOV Convention, or by patent, according to national law.
- ✓ Cells, organelles, genes or molecular constructs isolated from the material may be protected by the recipient through patents, if the criteria for patentability are met.
- ✓ In case of protection under UPOV-like systems, the free access to the new varieties for further research is the contribution to benefit-sharing.
- ✓ In case that the results of the research are patented, the recipient should pay to the multilateral agreement fund (the Resolution 3/91 or 3/91-like fund) a certain amount of royalties, to be accepted on a contractual basis. However, it is necessary to note the difficulties of fixing the level of royalties:
 - It is extremely difficult to determine the contribution to the final product, which may be small, of the germplasm supplied, and hence of establishing an objective basis for calculating benefits.
 - The difficulty involved in evaluating benefits fairly late in product development raise another potential problem. Companies might not support a requirement to negotiate benefit-sharing late in the research and development process, which gives the germplasm provider the opportunity of blocking the commercialization of the protected product, thus

jeopardizing the investment already made. One option would be to determine a range of minimum and maximum benefit levels, binding on all members, that would apply where the provider and user were unable to reach an agreement.

In addition to the multilateral agreement, bilateral agreements should be possible in exceptional cases: bilateral approaches may be more appropriate, for instance, when a small number of countries have, or need, access to genetic diversity of a particular species or group of species, and/or when highly costly and specialized research gives a strong competitive advantage to a single institution or limited number of institutions. Such conditions may prevail in the case of certain industrial crops, such as, for example, rubber.

For these reasons, ASSINSEL, whilst preferring a broad multilateral agreement, acknowledges the necessity to keep open the possibility of bilateral agreements. However, any such bilateral agreements should be established according to guidelines defined within the overall framework of the multilateral agreement.