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COMMISSION ON PLANT GENETIC RESOURCES

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NOTE ON THE LEGAL SIGNIFICANCE OF TERMS RELATED TO THE STATUS OF PLANT GENETIC RESOURCES

1. At its Fourth Session held in Rome from 15 to 19 April 1991, the Commission on Plant Genetic Resources suggested that the Secretariat prepare a note *"defining the legal significance of the terms: national sovereignty, free access does not mean free of charge, and exchange on mutually agreed terms, as they apply to germplasm exchange, and identifying any difficulties these may present in relating to unrestricted access to plant genetic resources"* (CPGR/91/REP, Para. 101).

I. NATIONAL SOVEREIGNTY

2. Under international law sovereignty is the supreme, absolute power of the State. Sovereignty embraces the rights and attributes which a State possesses in its territory, to the exclusion of all other States, and in its relations with other States.

3. According to the classical doctrine of sovereignty, a State is under no limitation in the exercise of its authority. In order to bring the notion of sovereignty more into line with the existing interdependence of States, however, the principles of mutual respect of sovereignty and of so-called *auto-limitation* have been recognized. Thus, sovereignty is absolute except as the State respects the sovereignty of other States and except as a State itself agrees to the limitation of its own sovereignty.

4. Sovereignty has a particular relevance in environmental matters. The last twenty years have witnessed a growing understanding and acceptance of the global nature of environmental issues. Many complex environmental problems can only be solved by the States through respect of other States' sovereignty and through auto-limitation.

5. On the one hand, international law today recognizes and preserves each State's sovereignty over its natural wealth and resources. In this respect, Resolution 1803 of the General Assembly of the United Nations adopted on 14 December 1962 states that *"due care [should be] taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources"*. On the other hand, the 1972 United Nations Conference on the Human Environment held in Stockholm attempted to define the relationship between a nation's freedom of action over its natural resources and its responsibility to prevent extraterritorial damage: *"States have, in accordance with the*

Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or areas beyond the limits of national jurisdiction" (Principle 21).

6. The issue of sovereignty is of crucial importance as regards plant genetic resources and, in general, biological diversity. Annex 3 to the International Undertaking on Plant Genetic Resources, adopted at the Twenty-Sixth Session of the FAO Conference by Resolution 3/91, affirms that *"nations have sovereign rights over their plant genetic resources"* (First point endorsed). The Convention on Biological Diversity of 1992 reaffirms that *"States have sovereign rights over their own biological resources"* (Preamble; see also Article 15.1). However, it also incorporates Principle 21 of Stockholm into Article 3, limiting the exercise of such sovereignty.

7. In negotiating provisions regulating access to genetic resources, a number of countries place stress on national sovereignty over their natural resource base, while other countries emphasize the concept of access to genetic resources as heritage of mankind. The three concepts ("sovereignty", "access to plant genetic resources" and "heritage of mankind") are closely related.

8. The concept of the heritage of mankind appears in the Convention concerning the Protection of the World Cultural and Natural Heritage, adopted under the sponsorship of UNESCO in 1972. The concept embodies recognition of the fact that the natural and man-made sites that make up the world heritage are located within national territories and are thus subject to the overriding sovereignty of States in whose territories they are located, as well as, in some cases, to property rights derived from national legislation. Despite these essential characteristics, the conservation of this heritage is of fundamental concern to all nations, which undertake to assist in its conservation through the establishment of an international fund and intergovernmental institutions to oversee the conservation mechanisms and the use of international funds by the State concerned.

9. The International Undertaking on Plant Genetic Resources, as first adopted at the Twenty-Second Session of the FAO Conference by Resolution 8/83, links "heritage of mankind" and access or availability by proclaiming that the Undertaking is *"based on the universally accepted principle that plant genetic resources are a heritage of mankind and consequently should be available without restriction"* (Article 1).

10. Following the International Undertaking, plant genetic resources have often been described as "heritage of mankind". The concept implies two essential ideas: (i) the heritage should be preserved for the use of present and future generations, and (ii) it should be freely available for the benefit of all peoples. In this connection, responsibility of States should be considered not only at the interstate level but also, for the sake of future generations, within each State.

11. The resurgent assertion of national sovereignty has led to a shift from *"heritage"* of mankind towards *"common concern"* of mankind. For the same reason, Annex 3 to the International Undertaking on Plant Genetic Resources, adopted at the Twenty-Sixth

Session of the FAO Conference by Resolution 3/91, tried to circumscribe the concept of heritage by clearly recognizing that *"the concept of mankind's heritage is subject to the sovereignty of the states over their plant genetic resources"*.

12. The shift from "common heritage" of mankind was also clear during the negotiations for the Convention of Biological Diversity. According to this Convention, *"the conservation of biological diversity is to be seen as a common concern of humankind"* (Preamble).

II. FREE ACCESS, FREE OF CHARGE, MUTUALLY AGREED TERMS

13. The International Undertaking on Plant Genetic Resources makes the following statements:

- a) Plant Genetic Resources *"should be available without restriction"* (Article 1). Annex I to the Undertaking adds that plant genetic resources are *"to be freely available for use"* (First paragraph).
- b) The policy of adhering Governments will be *"to allow access to samples of such resources, and to permit their export, where the resources have been requested for the purpose of scientific research, plant breeding or genetic resources conservation. The samples will be made available free of charge, on the basis of mutual exchange or on mutually agreed terms"*. (Art. 5)

14. The Undertaking is therefore based on the principle of "availability without restriction". The last sentence of Article 5 indicates three possible ways of making samples available, namely: (i) free of charge; (ii) on the basis of mutual exchange; (iii) on mutually agreed terms. To make samples available free of charge is only one of the three ways.

15. The use of the expressions "available free of charge" or "freely available" may lead to some misunderstanding because "free" may mean "without payment" or "unconstrained" (not subject to restrictions or to the will of another person). In the Undertaking "free" or "freely" should be understood as "not subject to restrictions". The essential issue at stake in the Undertaking is the "availability of the resources" or the "free access to the resources" without any arbitrary restriction. This means, for example, that the resources would be considered to be freely available or under free access even if a reasonable payment had to be made for them. Annex I of the Undertaking has made this clear by pointing out that *"the term free access does not mean free of charge"* (Annex I, 5 a).

16. The Convention on Biological Diversity reaffirms that *"the authority to determine access to genetic resources rests with the national governments and is subject to national legislation"* (Art. 15.1). However, the exercise of a States' sovereignty over its plant genetic resources is constrained by its obligation, as a Party under the Convention, to

"endeavour to create conditions to facilitate access to genetic resources" and "not to impose restrictions which run counter to the objectives of this Convention" (Art. 15.2). Article 15.4 adds that "access, where granted, shall be on mutually agreed terms".

17. Where a State grants access to its genetic resources "on the basis of mutual exchange" (Undertaking, Art. 5) the State is entitled to get access to other States' resources on a reciprocal basis. Where a State grants access to its genetic resources "on mutually agreed terms" (Undertaking, Art. 5, and Convention on Biological Diversity, Art. 15.4), the State is entitled to receive an agreed payment or compensation according to the benefits derived from such resources. Access to genetic resources should generate reciprocal benefit to both sides of the agreement. "Mutually agreed terms" might mean, inter alia, participation in the benefits of products derived from such resources or transfer of biotechnology.

III. IMPLICATIONS FOR THE INTERNATIONAL UNDERTAKING

18. Some aspects or expressions of the International Undertaking might need to be discussed in order to address the difference in emphasis between the International Undertaking and the Convention on Biological Diversity. Annex 3 to the International Undertaking on Plant Genetic Resources recognizes that conditions of access to plant genetic resources need further clarification.

19. In any case, any revision of the Undertaking should be a step-by-step process. The possibility of transforming the International Undertaking into a legally binding instrument was considered premature by the Commission on Plant Genetic Resources at its fourth Session in April 1991 (CPGR/91/REP, 81) and, subsequently, by the FAO Council at its Ninety-ninth Session in June 1991. The Commission, however, considered that it might be appropriate for the Undertaking to become a protocol to the Convention on Biological Diversity. Such a move towards a re-negotiation of the Undertaking in this sense would necessarily require further thinking on the FAO role in the biodiversity issue.