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FOR FOOD AND AGRICULTURE**

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**Report by the Chairman of Eleventh Session of the Working Group
of the Commission on Genetic Resources for Food and Agriculture.**

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**REPORT BY THE CHAIRMAN OF ELEVENTH SESSION OF THE WORKING
GROUP OF THE COMMISSION ON GENETIC RESOURCES
FOR FOOD AND AGRICULTURE**

Introduction

1. The Eleventh Session of the Working Group was held on 5 and 6 December 1996, with the participation of the following members: Australia, Brazil, Canada, Egypt, Ethiopia, France; Germany; India; Japan; Lesotho; Libya; Madagascar; Malaysia; Mexico; Peru; Sweden and Venezuela; the European Community also attended. As decided by the Commission at its Second Extraordinary Session, a number of countries participated as observers.: Argentina; Bolivia; Finland; Haiti; Honduras; Iraq; Ireland; Kenya; the Republic of Korea; Malta; Myanmar; New Zealand; Norway; Paraguay; Spain; Tanzania; the United Kingdom; Uruguay; and the United States of America. The Secretariat of the Convention on Biological Diversity (CBD) and the International Plant Genetic Resources Institute (IPGRI) also attended as observers. The Session was chaired by Dr. R.S. Paroda (India).
2. The Working Group noted that the Third Meeting of the Conference of the Parties to the Convention on Biological Diversity had called for the effective and speedy completion of the revision of the International Undertaking by countries, through the FAO Commission on Genetic Resources for Food and Agriculture¹. The Working Group also noted the successful outcome of the Leipzig Conference and the momentum that had been developed there.
3. The Working Group took note of a number of written submissions by Brazil, France and the United States of America, as well as of a secretariat non-paper, which was endorsed by a number of countries for use as a basis for discussions. As requested by the Working Group, these documents are appended to the present report. Canada and IPGRI also made papers available for information (CGRFA-Ex3/96/Lim. 3 and CGRFA-Ex3/96/Lim. 2 respectively).
4. The Working Group recalled that it did not have a negotiating mandate and that any proposals it made would be in addition to, and not in anyway replace, the Third Negotiating Draft. As requested by the Commission, the Working Group discussed the issues of Scope, Access and Farmers' Rights. The Working Group identified options, and noted various positions.
5. The Working Group requested its Chairman to briefly summarize the discussions, while recognising the difficulty of adequately covering the many complex points that had been raised. It was agreed that the report should address each of the three issues in turn, stressing however that they were inter-related.

Scope

6. With regard to the scope of the Undertaking (Article 3), there was general agreement that the Undertaking should apply to plant genetic resources for food and agriculture, with specific reference to food security. It was noted that the scope of any mechanism or mechanisms for access and benefit-sharing within the Undertaking might be narrower than the scope of the overall Undertaking, and that different approaches might apply to different categories of genetic resources. There was also some discussion as to whether forest genetic resources, or genetic resources for forestry, should or should not be included. A suggestion was made to postpone the consideration of the possible inclusion of such genetic resources to later date, following conclusion of discussions in other fora.

¹ The relevant decisions of the Third Meeting of the Conference of the Parties of the Convention on Biological Diversity were available.

7. The issue was raised as to whether the Undertaking should cover access to all plant genetic resources for food and agriculture, or whether it should focus only on access to those plant genetic resources for which there is global interest in maintaining unrestricted access.
8. It was noted that the scope of any agreement on access and benefit-sharing would involve resolving a number of issues:
 - whether the same arrangements should be made for various classes of genetic resources (such as material collected before and after the entry into force of the CBD; genera or species of differing importance for food security and/or for which there are different degrees of countries' interdependency; and material maintained under *in situ* and *ex situ* conditions) or whether separate arrangements were needed in each case;
 - whether or not such arrangement should apply to specific classes of genetic resources indicated in one or more lists, and if so what the criteria should be for the development of such a list or lists. (Should such lists be inclusive or exclusive? Would such lists be periodically modified, with the experience of their application over time? If a series of lists were developed, would all be closed, or should one remain open-ended, to cover otherwise undefined plant genetic resources for food and agriculture?); and
 - the arrangements that might be required for material not in the public domain.

Access

9. A number of options were considered with respect to access (Article 11).
10. One option provided for access in accordance with national legislation, and sharing out the benefits derived, on a multilateral basis, according to a mechanism to be established by the Commission. This would apply to a list of genera, covering both *in situ* and *ex situ* material, as well as material collected before and after the entry into force of the CBD. The list could be based on importance for world food security and great world-wide interdependence. There was wide agreement that this proposal might provide a useful starting point, although the disadvantages of limited inclusive lists were also stressed.²
11. Another option was to bring an indicative list of genetic resources which directly or indirectly contribute to food security within the scope of the agreement, while allowing countries to include or exclude material according to agreed criteria.
12. Various ways of developing lists were considered: (i) starting from a comprehensive list (such as that in Annex 1 of the Third Negotiating Draft), and excluding those taxa on which agreement could not be reached, or (ii) beginning from a short agreed list (such as those given in the appendices to this report) and agreeing on further genera to be included.
13. There was wide agreement that should a list be developed, provision should be made for countries voluntarily to designate additional materials under the agreement. Some countries in fact noted that they would be willing to designate all their plant genetic resources that are in the public domain. There was also agreement that any multilateral agreement should not preclude regional agreements with a more comprehensive scope.

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These included:

- that lengthy negotiations as to what should be included in a list may be needed.
- that the genetic resources needed for future food security needs could not be predicted
- that a limited list would exclude plants of importance for local food security. In this context the need for a diverse diet for food security was noted.
- that it might mitigate against the promotion of the use of under-utilized crops, as per the GPA, and more generally against the need to promote the use of a wider range of crops in agriculture in order to contribute to agrobiodiversity.

14. It was noted that *ex situ* collections of genetic resources may be held by institutions which are autonomous of governments, including in the private sector. The question of authority to enter into binding international obligations on behalf of such institutions was raised. In this context, it was suggested that the objectives of the agreement could be promoted through a network of participating institutions. Access within such a network would be on mutually agreed terms, whether unrestricted or not, and participants could share the costs and benefits: specific arrangements might need to be made with respect to institutions outside the network. The question was raised as to whether such institutions could be brought within the legal framework of the Undertaking. This would in part depend on the form in which the revised Undertaking was cast. The risks posed by over-regulation, in any arrangements, were noted
15. The relationship between access, benefit-sharing and intellectual property rights (IPRs) was also discussed, and it was noted that the expansion of IPRs had both advantages and disadvantages. It was considered that any agreement would need to respect property, including IPRs. The need was noted to promote equity by developing a mechanism that would ensure that providers of genetic resources share in the benefits derived from products based upon them, especially in cases where these are protected under IPRs. The concept of Farmers' Rights was considered relevant in this context.
16. Access and related benefit-sharing, it was noted, might be provided on (i) a multilateral basis; (ii) a bilateral basis; and (iii) on a mixed multilateral and bilateral basis. It was pointed out that any such agreements would constitute an agreement on mutually agreed terms, in accordance with the CBD. It was noted that benefits would not be limited to financial transfers, but would also include access to, and the exchange of, genetic resources, technologies and information.

Farmers' Rights

17. In considering the issue of Farmers' Rights (Article 12), it was noted that, according to the present Undertaking, the concept of Farmers' Rights was based on the recognition of the past, present and future contribution of farmers in conserving, improving and making available plant genetic resources for food and agriculture, and that these rights were intended to ensure full benefits to farmers, and the support of the continuation of their contributions, as well as the attainment of the overall purpose of the International Undertaking. It was noted that the existing agreements for the implementation of Farmers' Rights made provision for establishing an international fund on plant genetic resources to support plant genetic conservation and utilization programmes, particularly in developing countries.
18. It was also noted that, more recently, a broader concept of farmers' rights, which included a number of new elements, appeared to be emerging. It was suggested that farmers' rights, in fact, constituted a set of separate rights, the elements of which needed to be unfolded and further defined, which may lead to an overall legal definition. Some such elements, it was felt, would more appropriately be developed at national level, and it was noted that several countries were in fact developing national mechanisms to promote Farmers' Rights. In this context, the relevance of the so-called "farmers' privilege" to use farm-saved seed was stressed.
19. It was suggested that precise mechanisms should be developed to allow farmers and farmers' communities, to participate fully in the benefits derived from the improved use of Plant Genetic Resources for Food and Agriculture.

Closing

20. In conclusion, the Working Group expressed the hope that the deliberations that had been held would facilitate the process of negotiations by the Commission on these critical and very important issues. The urgency of resolving all relevant concerns through constructive discussions, consultations and negotiations was also highlighted, in order to have the revised Undertaking in place at the earliest opportunity. The Chairman stressed that it had been a matter of great privilege for him to have worked with such an enlightened Working Group, and he wished to place on record his appreciation for the excellent cooperation extended by all its members, the observers and the secretariat, in facilitating its work.

FIRST DOCUMENT SUBMITTED BY THE UNITED STATES OF AMERICA

I. Introduction

The attached U.S. submission to the FAO Commission and Working Group outlines USG thinking as we focus on the three areas which have been identified as central to this stage of the Undertaking's re-negotiation: Article 3 (Scope); Article 11 (Availability of Plant Genetic Resources), and Article 12 (Farmers' Rights). The U.S. does not believe that the scope of the undertaking can be understood in the abstract; instead we see it as determined by the coverage of its substantive provisions.

With respect to availability of genetic resources covered by the revised Undertaking, we propose that the provisions of the Undertaking relate to those genetic resources for which there is global interest in maintaining unrestricted access. (Over-regulation of access to plant germplasm has the potential to affect negatively everyone as all countries are dependent to a considerable degree on germplasm originating outside their borders. Countries which may lack adequate germplasm collections and strong research capacity may be particularly affected.) The Undertaking thus would not seek to establish procedures and obligations for all situations in which access is requested from a party to the agreement. Instead, it would secure open access to germplasm in the active collections of national genebanks and international agricultural research centers (IARCs) that was or is: 1) acquired prior to entry into force of the CBD; 2) acquired without qualifications as to distribution conditions after this date but prior to entry into force of the undertaking; or 3) acquired after entry into force of the CBD but is included on a core list of major food crops and forages essential to food security. (The question of who - *e.g.*, the country in whose territory the IARC is located, the IARC itself, or the FAO, under whose auspices it operates - has the authority to undertake binding international obligations on behalf an IARC is a complex one and must be addressed if the Undertaking is to be drafted and function effectively.)

Access to other germplasm would be left to the bilateral or contractual realm, where mutually agreed terms, including benefit-sharing, could be negotiated. Countries could, however, declare their intent to provide unrestricted access to additional categories of genetic resources when they ratified the Undertaking. The U.S. would hope to do so and to encourage others to follow suit.

With respect to farmers' rights, the U.S. believes that, consistent with the emphasis on farmers' conservation and sustainable use activities in FAO Conference Resolution 5/89, these provisions of the undertaking should be addressed as in Section D of our proposal. As specified in the proposal the U.S. believes that it is the responsibility of national governments to determine how best to encourage farmers' efforts to conserve and use sustainably plant genetic resources.

II. Outline of relevant Undertaking provisions

- A. The access provisions of the Undertaking should apply to:
1. Active collections of the International Agricultural Research Centers (IARCS) which hold plant germplasm collections, and
 2. Active collections of national genebanks.

B. The Undertaking would impose an obligation to provide open access to:

1. Germplasm acquired by IARCs and national genebanks prior to entry into force of the Convention on Biological Diversity (CBD; December 29, 1993);
2. Germplasm acquired by IARCs and national genebanks after entry into force of the CBD but prior to entry into force of the revised International Undertaking, except where the acquisition was/is subject to terms which impose specific conditions, e.g., terms which relate the transfer of acquired germplasm to the CBD, in which case such transfer shall be consistent with those terms and conditions; and
3. Germplasm (genus level) of listed, staple food crops and forages (see Table 1), acquired by IARCs and national genebanks after entry into force of the revised International Undertaking.

C. The Undertaking would stipulate that, upon ratification, countries could make a declaration stating that they would provide unrestricted access to additional categories of plant genetic resources.

D. Given the central importance of farmers' conservation efforts to global food security, national governments could support farmers' conservation and sustainable use activities through the establishment or strengthening of, *inter alia*, national germplasm systems; programs which preserve and improve native germplasm; initiatives which promote the use of, and research into, crops which currently are not widely used; and activities which help to control erosion of arable land. These objectives could be addressed in part through allocation by national governments of benefits they have received from contractual arrangements relating to genetic resources.

Promotion of farmers' conservation and sustainable use activities should also continue to be encouraged through existing international programs in partnership with national governments. Support for new conservation and development initiatives that directly benefit farmers should also be considered, e.g., *in situ* conservation and development initiatives developed under the Global Plan of Action which recommend on-farm management activities as well as access to germplasm for the purpose of restoring plant genetic resources, where possible and appropriate, to areas from where they have been lost.

Each party to the International Undertaking should where appropriate make efforts to provide adequate financial resources to support farmers' conservation efforts without restricting or distorting trade. In mobilizing sufficient financial resources to support such conservation initiatives, each party should seek full use and qualitative improvement of all national, bilateral, and multilateral funding sources and mechanisms, using consortia, joint programs and parallel financing, and shall seek to involve private sector funding sources and mechanisms, including those of non-governmental organizations.

TABLE 1

LISTED CROPS ESSENTIAL TO GLOBAL FOOD SECURITY

We suggest that the list of those crops be as follows:

A.

Wheat	Rice
Maize	Chickpea
Sorghum	Bean (Phaseolus)
Millet	Cowpea (Vigna)
Rye	Faba Bean
Oat	Soybean
Barley	Pigeon Pea
Yam	Peanut
Potato	Lentil
Tanier	Pea
Taro	Sweet Potato
Cassava	Banana and Plantain
Coconut	

B. Forages

**ANNEX TO THE FIRST DOCUMENT SUBMITTED
BY THE UNITED STATES OF AMERICA**

Article 3

The Undertaking seeks to facilitate unrestricted access to specified germplasm and farmers' efforts to conserve and use sustainably plant genetic resources for food and agriculture in order to secure global food security for present and future generations.

Article 11

1. States Party to the Undertaking shall take measures to provide unrestricted access to the following germplasm when it is held in the active collections of their national genebanks:

a. germplasm acquired prior to entry into force of the Convention on Biological Diversity (CBD);

b. germplasm acquired after entry into force of the CBD but prior to entry into force of the Undertaking, except where the acquisition was subject to terms which impose specific conditions, in which case access to the germplasm shall be provided consistent with those terms; and

c. germplasm (genus level) of the staple food crops and forages listed below acquired after entry into force of the Undertaking.

2. States Party to the Undertaking shall further facilitate unrestricted access to the germplasm identified in sub-paragraphs a, b and c of paragraph 1 when it is held in the active collection of any International Agricultural Research Center located in their territory.

Article 12

1. States and Regional Economic Integration Organizations (REIOs) Party to the Undertaking shall take measures to promote the efforts of their farmers to conserve and use sustainably plant genetic resources for food and agriculture through the establishment or strengthening of mechanisms including:

a. national germplasm systems;

b. programs which preserve and improve native germplasm;

c. initiatives that promote the use of, and research into, crops which are not widely used; and

d. activities that help to control the erosion of arable land.

2. Establishment or strengthening of the mechanisms described in paragraph 1 may be facilitated through allocation by States and REIOs Party to the Undertaking of any benefits they receive from contractual arrangements relating to access to plant genetic resources for food and agriculture.

3. States and REIOs Party to the Undertaking should continue to work with relevant international programs to further farmers' activities to conserve and use sustainably plant genetic resources for food and agriculture activities and should also consider particular support for conservation and sustainable use initiatives that directly benefit farmers.

4. States and REIOs Party to the Undertaking should make appropriate efforts to mobilize adequate financial resources to support farmers' activities to conserve and use sustainably plant genetic resources for food and agriculture without restricting or distorting trade. In this regard, they should seek the full use and qualitative improvement of all national, bilateral and multilateral funding sources and mechanisms and the involvement of private sector sources and mechanisms, including those of non-governmental organizations.

LISTED CROPS ESSENTIAL TO GLOBAL FOOD SECURITY

A.

Wheat	Rice
Maize	Chickpea
Sorghum	Bean (Phaseolus)
Millet	Cowpea (Vigna)
Rye	Faba Bean
Oat	Soybean
Barley	Pigeon Pea
Yam	Peanut
Potato	Lentil
Tanier	Pea
Taro	Sweet Potato
Cassava	Banana and Plantain
Coconut	

B. Forages

**SECOND DOCUMENT SUBMITTED BY
THE UNITED STATES OF AMERICA**

**PROPOSAL FOR A FRAMEWORK TO FOCUS THE DISCUSSION OF THE
COMMISSION**

Addressing the following questions is, we believe, the best way to help the Commission make progress on the drafting of articles 3, 11, and 12 of the Undertaking.

The first question that should be asked and discussed is:

Should the Undertaking set forth comprehensive or different types of rules to address all circumstances in which access is sought to pgrfa, or focus only on resources for which there is agreed global interest in maintaining unrestricted access?

The following questions are then relevant whether a broad or narrow Undertaking is chosen.

- 1) Should the rules of the Undertaking apply only to collections in certain locations, e.g. national or international collections, and /or to certain sub-collections in these locations?
- 2) Should they be further tailored to the date of their acquisition by the provider of the resources?
- 3) Should they apply to only certain sorts of genetic resources in the specified locations?
- 4) Should they apply to only resources being collected for one purpose rather than another?
- 5) Should the Undertaking also promote national and/or multilateral efforts to facilitate farmers' conservation and sustainable use activities?
- 6) Should the Undertaking promote innovation in plant breeding and otherwise protect plant breeders' interests?
- 7) Should the Undertaking set up a distinct multilateral regime for protection of traditional and indigenous, including farmer, knowledge related to biodiversity or to pgrfa in particular?
- 8) If the Undertaking's obligations relate to international collections such as the CGIAR centers, who would have to become Party to the agreement in order to ensure they were carried out?

9) If the Undertaking were to provide for ratification or accession or some other form of participation by international organizations, ngo's, farming or indigenous communities, or other non-state entities that may or may not be subjects of international law, how would the Undertaking define the relationship between these entities and the States Party?

The following questions are relevant only if a broad Undertaking is chosen.

1) If the Undertaking applies to pgrfa other than those where there is agreement on unrestricted access, what specific benefits-sharing requirements could be imposed as a condition for access?

a) Should there be an obligation on the person or entity seeking access to a particular resource to share any of the benefits derived from any later acquisition of rights to the exclusive use of a product generated using the resources?

b) If so, with whom should the benefits be shared?

-- If with the country or countries constituting the native habitat of the resource, how is this to be determined?

c) If more than one country is involved (provided parental lines and or characterization or improvement), how are allocation and valuation to be determined?

d) Should there be a requirement on the person or entity to whom/which access is granted to oblige anyone to whom he or she gives the genetic resource to undertake similar benefits-sharing obligations?

e) How could the Undertaking ensure that benefits that are shared are used to encourage farmers' conservation and sustainable use activities?

f) What would the likely transaction costs be of setting up such multilateral benefit-sharing rules and administering their determination and valuation aspects?

g) By whom would the administration be accomplished?

DOCUMENT SUBMITTED BY FRANCE

Scope of the International Undertaking on Plant Genetic Resources : from « species of interest for food and agriculture » to « genetic resources of interest for food and agriculture »

It has been proposed that the scope of the revised International Undertaking should be based on plant genera listed in an annex of the Undertaking. At first sight, this proposal appears clear and simple, but it would probably result in endless debates between experts on its content. The utility for food and agriculture may not be identified most adequately at the species and genera level, and limiting the future scope of the undertaking to a list established at the date of its signature seems very restrictive considering potential evolutions : diversification of the uses of species to answer new needs and requests, utilization of new species.

The revised International Undertaking has to make possible the use of plant genetic resources to answer food and agricultural needs, as they are currently identified, but also as they will appear in the future.

Current uses of plant genetic resources for food and agriculture are broadly well identified at the global scale, but they don't always correspond to the specific priorities of local agrosystems or communities, especially in enclosed or fragilized ecosystems, that are sometimes heavily dependent of « marginal » (at the global scale) species.

Furthermore, future uses of plant genetic resources for food and agriculture are currently unpredictable. They are the result of evolutions in food needs (changes, that may be drastic, in food habits due to demographic, economical or cultural factors, such as urbanization), of ecological constraints (soil and water quality degradation), and of scientific advances, both in traditional agronomy (better management of crop associations and crop production systems to reduce negative impacts of inputs) and in biotechnology (especially through a better control of transgenic methods). It seems impossible to determine exclusively the uses of a crop, and to identify a priori the potential contribution of a plant to the improvement of food and agriculture.

Restricting the scope of the International Undertaking to the species currently considered as priorities may lead the international scientific community to ignore other potentially interesting genetic resources. In this context, *it seems more relevant to consider « genetic resources useful for the improvement of food and agriculture » than « priority species for food and agriculture ».*

Article 3 could be drafted that way : « This Undertaking relates to plant genetic resources for food and agriculture as a basis for meeting present and future needs for the growing world population. »

Access to / availability of genetic resources for food and agriculture under the International Undertaking

Considering that the « genetic resources » level is more relevant than the « species » or « genera » level for food and agriculture, we propose to settle the issue of access/availability by identifying, within each species, different classes of genetic material.

First class : designated material - unrestricted access through an international network of collections.

This material, whatever the species considered, ought to be genetically diversified and free of any intellectual property rights.

It would be the responsibility of each party to the Undertaking to designate, within the following categories, and species by species, the material, (genetically diversified and free of intellectual property rights), it places in this class :

- cultivars
- populations and land races located on the national territory
- progenitors known in the international scientific community for their interesting contribution to selection
- original material obtained by prospections on the national territory, including wild relatives
- material known for the presence of identified genes
- material, poorly characterized but considered as a genetic resource, hardly collectable or available.

Parties of the International Undertaking might also decide to include in its scope original material obtained through prospections in another country, should its conservation in its center of origin not be provided adequately.

Each party would put in place a procedure for the designation of this material, that would best correspond to its national system of plant genetic resources conservation (functions of, and relations between the partners involved, including the state), and to the legal system governing the conservation and utilization of genetic resources on its territory.

Some countries have already collections or genebanks that could be included in this class. The designated material of International Agricultural Research Centers placed under the auspices of the FAO would also be part of this class.

It would be necessary to begin the designation of genetic material to place in this international network within the species of major interest for food security, that could be listed in an indicative annex to the Undertaking.

Second class : Non-designated material - negotiated access.

The genetic material under intellectual property rights, or not designated, would be dealt with on a bilateral basis, or otherwise negotiated, between the parties involved.

This way of defining the access may appear at first sight more complicated than on the basis of a list of species or genera. However, it will probably be easier to achieve an international consensus on such an approach than on a restricted list, that could hardly take into account the priorities and specificities of agriculture all over the world.

DOCUMENT SUBMITTED BY BRAZIL

Brazil understands that in this exercise our main concern is to guarantee continued world food security. In that sense, it is our position that the scope of the revised International Undertaking should be limited to those genera that constitute the basis of human world food consumption. All the other genera fall under the dispositions of the Convention on Biological Diversity.

Furthermore, in order to justify a multilateral agreement, the genera covered by the Undertaking should include only those that are object of great interdependence worldwide.

These were the two criteria which guided the elaboration of the list below.

We hope that this will be understood as an important contribution towards achieving consensus in our discussion concerning the scope and access of the revised International Undertaking.

The conditions of access to the genera included in this list would be facilitated, according to national legislation, and would apply to genetic materials found both in situ and ex situ, irrespective of their date of collection, before or after the entry into force of the Convention.

The benefits arising out of the utilization of the genera included in this list would be shared, on a multilateral basis, according to a mechanism to be established by the Commission.

**CROPS/GENERA OF BASIC IMPORTANCE FOR HUMAN WORLD FOOD
CONSUMPTION**

CROPS

Rice¹
Oat^{3/5}
Rye^{3/5}
Barley^{3/5}
Millets²
Maize^{1/5}
Sorghum²
Wheat^{1/5}
Groundnut^{3/5}
Cowpea⁴
Pea^{3/5}
Beans²
Lentil³
Soybean^{1/5}
Potato^{1/5}
Sweet potato²
Yams⁴
Cassava²
Banana and plantain^{1/5}
Orange^{1/5}
Sugar cane^{1/5}
Sugar beet^{2/5}
Pumpkin⁴
Tomato^{3/5}
Coconut^{3/5}

GENERA

Oryza
Avena
Secale
Hordeum
Panicum/pennisetum/Setaria
Zea
Sorghum
Triticum
Arachis
Vigna
Pisum
Phaseolus
Lens
Glycine
Solanum
Ipomoea
Dioscorea
Manihot
Musa
Citrus
Saccharum
Beta
Cucurbita
Lycopersicon
Cocos

1 Primary importance at world level.
2 Primary importance at regional level.
3 Secondary importance at world level.
4 Secondary importance at regional level.
5 *Commodities* of great importance.

REVISION OF THE INTERNATIONAL UNDERTAKING:
NON-PAPER FOR INFORMAL DISCUSSION PURPOSES ONLY

Introduction

The Commission on Genetic Resources for Food and Agriculture, at its Second Extraordinary Session in April 1996, requested its Working Group to prepare a simplified draft text which could serve to provide a focus for future negotiations in the Commission on the revision of the International Undertaking, and in particular on the three issues of scope, access to genetic resources, and sharing of benefits (realization of Farmers' Rights).

The present non-paper has been prepared by the Secretariat, in consultation, inter alia, with the International Plant Genetic Resources Institute (IPGRI), as a possible source of ideas on which FAO members may wish to draw when considering the matter of formulating a simplified text in the Working Group. For this purpose, it seeks to provide possible elements for a simplified text that is neutral as to substance and approach, but which could provide a framework which could encompass the positions of stake-holders.

Scope

Comment

At present, there are a number of viewpoints on the issue of the scope of the proposed revision of the International Undertaking. Some countries wish to see the International Undertaking covering all plant genetic resources for food and agriculture. Others wish to see the International Undertaking confined more narrowly to collections acquired after the entry into force of the Convention on Biological Diversity, or to certain designated species.

The possible elements for a Simplified Negotiating Text would try to draw together these viewpoints and provide a framework for future negotiations by -

- (a) providing a broad scope for the general provisions of the International Undertaking; while
- (b) allowing for different categories of plant genetic resources to be treated in different ways for the purposes of access and benefit sharing.

The concept of differentiated categories could be achieved through the device of a number of annexes. Which plant genetic resources should be in one category or another would, of course be a matter for negotiation, at the time of negotiation of the revision of the International Undertaking. Flexibility could also be left for periodic revision of the annexes.

Possible elements for a Simplified Text

Article 3 - Scope

3.1 *Except as otherwise specified, this [Undertaking] applies to plant genetic resources for food and agriculture. [It does not apply to forest genetic resources][, with the exception of wild relatives of cultivated plants and fruit or seeds used as food.]*

3.2 *Conditions of access and benefit sharing shall be specific to the categories of plant genetic resource described in the respective annexes to this [Undertaking].*

3.3 *The benefits to be derived under this [Undertaking] are part of a reciprocal system, and are limited to the Parties to this [Undertaking].*

3.4 *This [Undertaking] is to be implemented in harmony with the Convention on Biological Diversity and other relevant international agreements.*

ACCESS TO PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

Comment

In the negotiations so far, some countries have taken the position that access to plant genetic resources for food and agriculture should be governed on a multilateral basis. Others have taken the view that access, at least to those resources covered by the Convention on Biological Diversity should be essentially on a bilateral basis. Others foresee the possibility of an international agreement on mutually agreed terms of access that would allow for benefit sharing between the countries of origin and countries using the genetic resources.

The possible elements for a Simplified Negotiating Text would try to draw together these viewpoints and provide a framework for future negotiations by providing for separate regimes of access and benefit sharing for different categories of plant genetic resources, as identified in annexes to the Undertaking. The text could, in particular, provide for the following:

(i) A first category to which access and benefit sharing would be on a **multilateral** basis only. This could include, for example, plant genetic resources designated by juridical status, e.g. plant genetic resources acquired before the entry into force of the Convention on Biological Diversity, particularly where the countries of origin cannot be clearly identified. It could also include species with larger interdependency among countries that are essential for food and agriculture (e.g. wheat, rice, maize etc.). Plant genetic resources in this category could, for example, be made freely available for research and plant breeding to those countries that are parties to the Undertaking. The sharing of benefits could be achieved through a periodical contribution/fee/royalty to an international funding mechanism for the implementation of Farmers' Rights. This could represent a common denominator or "core" of plant genetic resources that all -

parties agree to place under a multilateral regime

- (ii) A second category to which access and benefit sharing would be on a purely **bilateral** basis on mutually agreed terms. This would be essentially a list of species which parties wish to exclude from the principle of non-restricted availability both for research and for commercialization purposes, essentially for national interests. This could include, for example, industrial/cash crops that are not essential for food security, whose genetic resources are mainly concentrated in one or a limited number of neighbouring countries, such as rubber, coffee and black pepper. The extent to which the International Undertaking should provide a framework for this access, e.g. in order to reduce transaction costs, would be for the countries negotiating the revision of the International Undertaking to determine.

- (iii) A third category to which access and benefit sharing would be on a combined **multilateral/bilateral** basis. In principle, the plant genetic resources could be made available for research and plant breeding to parties that voluntarily accept the provision of the revised Undertaking for this category of germplasm, with provisions for the sharing of benefits resulting from any commercialization. This could include, for example, a guaranteed system of access under which access to the plant genetic resources listed in the annex could be obtained on a multilateral basis, subject to an agreed mechanism for the sharing of benefits derived from any commercial development with the country or region of origin on a bilateral basis. In this context, the concept of "commercial development" could be limited to plant genetic resource products or processes protected by patents or other intellectual property rights. Material transfer agreements or other mechanisms to trace the original material may be necessary for enforceability. This would, in essence, presumably cover all plant genetic resources for food and agriculture not covered by the first two categories. However, countries could always decide on a different default category.

The revised Undertaking could provide a flexible framework where countries would be able to review periodically the efficiency of the three regimes and to move species/taxa from one category to another, as appropriate.

The text could also allow for countries in a particular region to enter into regional arrangements within the framework of the Undertaking.

Possible elements for a Simplified Text

Article 11 - Availability of Plant Genetic Resources for Food and Agriculture

- 11.1** *The Parties to this [Undertaking] recognize the sovereign rights of States over their plant genetic resources, including the authority to determine access to those resources[, in accordance with the Convention on Biological Diversity].*
- 11.2** *The Parties agree to grant other Parties to this [Undertaking], access to the plant genetic resources listed in Annexes I, II and III to this International Undertaking for research and plant breeding purposes in accordance with the following provisions:*
- (a)** *access to plant genetic resources listed in Annex I to this [Undertaking] shall be subject to the fulfilment by the applicant Party of its obligations under Article ** of this [Undertaking] with respect to the International Fund established under that Article [and its obligations with respect to the transfer of technology and the results of research and development under Article **];*
 - (b)** *access to plant genetic resources listed in Annex II to this Undertaking shall be on bilateral basis on terms to be mutually agreed upon between the applicant Party and the Party providing the plant genetic resources;*
 - (c)** *access to plant genetic resources listed in Annex III to this Undertaking shall be -*
 - (i)** *subject to the fulfilment by the applicant Party of its obligations under Article ** of this [Undertaking], with respect to the International Fund established under that Article [and its obligations with respect to the transfer of technology and the results of research and development under Article **];*
 - (ii)** *subject to an undertaking by the applicant Party that it will share equitably, with the country or countries of origin of the plant genetic resources, or, where the country or countries or origin cannot be readily identified, with the International Fund established under Article **, the benefits arising from any commercial development of the plant genetic resources in accordance with the provisions of Article **;*
- 11.3** *Prior to being granted access, applicants for access shall meet the requirements set out in any generally agreed international standards, including in particular the FAO Code of Conduct for Collecting and Transfer of Plant Germplasm.*
- [11.4** *Access to proprietary breeders' lines and farmers' varieties under development will be at the discretion of their developers during the period of their development, provided that the exercise of this discretion does not run counter to the objectives of this Undertaking.]*

Farmers' Rights

Comment

The original concept of Farmers' Rights, as adopted by the FAO Conference in its Resolutions Nos. 5/89 and 3/91, envisaged that those rights would be realized multilaterally through an international fund, the proceeds of which could be used to support plant genetic conservation and utilization programmes.

Further concepts proposed during the discussions of the Commission would encompass also the establishment of *sui generis* systems for the protection and compensation of informal innovations in the area of plant genetic resources and the protection of the so-called "farmers' privilege" under the UPOV Convention.

The possible elements for a Simplified Negotiating Text would try to draw together these concepts in a single Article.

The text could provide first for the establishment and implementation of an international fund (in accordance with FAO International Resolution 3/91) or a distinct window of existing funds and develop its operational mechanism to ensure conservation and sustainable use of plant genetic resources, traditional farmers' knowledge, access to new technologies and equitable sharing of benefits derived from the products obtained through the use of plant genetic resources for the benefit of present and future generations of farmers.

Provisions and obligations relating to the financing of the international fund or window for the implementation of Farmers' Rights would need to be negotiated and agreed upon. So also will be the provisions related to the purposes and priorities of the funding, which should presumably follow the rolling Global Plan of Action as adopted at Leipzig.

The Text could also provide for the taking of measures to assist farmers and farming communities, and to support research and training and the transfer of technology, for measures to protect the rights of farmers and farming communities to share equitably in benefits derived from the utilization of plant genetic resources they provide, including the necessary measures to make such measures practicable, and for the development of systems that would establish and protect their rights in the area of traditional knowledge, informal innovations and traditional practices. It could also provide for the protection by countries, primarily through the enactment of national legislation, of the rights of farmers and their communities to keep, use, exchange, share and market their seeds and plant reproductive material, including the right to re-use farm-saved seed known as the "farmer's privilege." The possibility of furthering some of these objectives through the development of so-called "*sui generis*" systems could be referred to.

The simplified text could encourage the Parties, in taking the measures referred to above, to ensure that both diversity among plant varieties (e.g. Regulations on denomination of origin for marketing local varieties/landraces), and diversity within each variety (e.g. by requiring a minimum percentage of polymorphism in commercial varieties) are promoted. For varieties with less

commercial interest, Regulations on farmers as curators of the environment may be a useful example.

Possible elements for a Simplified Text

*Article ** - Farmers' Rights*

12.1 The Parties to this [Undertaking], recognizing the enormous contribution that farmers of all regions of the world, and particularly in the centres of origin and crop plant diversity, have made to the conservation and development of plant genetic resources, which constitute the basis of food and agricultural production throughout the world, recognize Farmers' Rights and undertake to promote their implementation in accordance with the provisions of this Article, for the purpose of ensuring full benefits to farmers, supporting the continuation of their contributions and promoting the attainment of the overall purposes of this [Undertaking].

12.2 As a means for the implementation of Farmers' Rights through multilateral action, the Parties to this [Undertaking] agree to establish an international fund for plant genetic resources or a distinct window of existing funding mechanisms in accordance with the following provisions, and to ensure that appropriate arrangements are made for the farmers and farming communities providing plant genetic resources to share equitably in the benefits derived from the Fund:

- (a) [purposes of the Fund];*
- (b) [contributions to / resourcing of / the Fund (registration fees)];*
- (c) [expenditures from the Fund].*

12.3 The Parties shall oversee the policies, programmes and priorities of the Fund established under the preceding paragraph and of other funding mechanisms in order to achieve the purposes of this [Undertaking].

12.4 The Parties to this [Undertaking] shall take the necessary measures, including, as appropriate, legislative measures, to assist farmers and traditional communities, especially in the areas of origin/diversity of plant genetic resources, in the conservation and sustainable utilization of their plant genetic resources and to support research and training activities and the transfer of technologies for this purpose, with the full participation of the farmers and farming communities concerned.

12.5 In order to ensure that farmers and farming communities share equitably in the benefits derived from the utilization of plant genetic resources provided by them, the Parties to this [Undertaking] shall take the necessary measures, including, as appropriate, legislative measures, to -

- a) *identify and record, as appropriate, varieties of plant genetic resources provided by farmers and farming communities; and require disclosure of the origin of plant genetic resources utilized in the development of protected varieties;*
- b) *ensure that appropriate arrangements are made in accordance with the provisions of Article 11 [Access] that provide for the farmers and farming communities providing plant genetic resources to share equitably in the benefits arising from the use of those resources; and*
- c) *recognize and protect traditional rights of farmers and their communities to keep, use, exchange, share and market their seeds and plant reproductive material, including the right to re-use farm-saved seed under the International Convention on the Protection of New Varieties of Plants¹.*

12.6 In order to ensure that farmers and farming communities share equitably in the benefits derived from the utilization of their traditional knowledge, innovations and practices developed by them, the Parties shall -

- a) *develop and adopt ["sui generis"] systems for the protection of knowledge, innovations and practices of farmers and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of plant genetic resources;*
- b) *facilitate as appropriate the adaptation of traditional farmers' knowledge, know how and practices, to wide use and, as appropriate, support with modern technologies as appropriate and promote their wider application, with the prior informed consent of the farmers and farming communities concerned;*
- c) *ensure that farmers and farming communities share equitably in the benefits arising from the utilization of such knowledge, innovations and practices.*

12.7 In taking the measures referred to in this Article, the Parties shall seek, where possible, to promote the conservation and further development of both intervarietal and intravarietal diversity of plant genetic resources.

¹ The so-called "farmer's privilege".

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