

COMMISSION ON PLANT GENETIC RESOURCES

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REVISION OF THE INTERNATIONAL UNDERTAKING

STAGE THREE: LEGAL AND INSTITUTIONAL OPTIONS

INTRODUCTION

1. At its First Extraordinary Session in November 1994, the Commission on Plant Genetic Resources (CPGR) agreed that the negotiations for the revision of the International Undertaking on Plant Genetic Resources (the Undertaking) should proceed in three stages. The first was the integration of the three interpretative annexes into the Undertaking and bringing it into harmony with the Convention on Biological Diversity (the Convention). The second was the consideration of the two issues of access to plant genetic resources, including access to collections acquired outside the Convention and the realization of farmers' rights. The third stage was to consider legal and institutional options, including, in particular, the legal status of the renegotiated undertaking and related institutional questions. The present document discusses these options.

OPTIONS FOR THE LEGAL STATUS OF THE RENEGOTIATED UNDERTAKING

2. There are basically four main options.

(i) Continuation of the present legal status of the Undertaking

3. The original Undertaking and its three annexes, were adopted by the FAO Conference as voluntary, non-legally binding instruments. Should Member Nations wish to preserve its non-legally binding nature, then the renegotiated Undertaking could be submitted to the FAO Conference, presumably at its Twenty-ninth Session in November 1997, for adoption in the same way as the original Undertaking and annexes.

4. Non-legally binding instruments are normally easier to agree upon than binding instruments. In the case of the International Undertaking, the reluctance of Member Nations to commit themselves to a legally binding instrument was due, at least in part, to the reservations that some Governments had regarding the compatibility of the International Undertaking with their own systems of plant breeders' rights, reservations which in a number of cases have been overcome through the adoption of the interpretative annexes. While voluntary instruments may be easier to adopt in international fora, they have concomitantly less impact on government or private sector behaviour, and provide less security for transactions involving substantial investments or other transfers of funds.

(ii) Adoption as a legally-binding agreement under Article XIV of the FAO Constitution

5. Article XIV of the FAO Constitution provides for the approval of global agreements related to food and agriculture by the FAO Conference and their submission to FAO Members for their acceptance. Agreements are normally adopted by the FAO Conference on the recommendation of a technical conference or series of technical meetings, such as those of the FAO Commission on Plant Genetic Resources. They enter into force on the deposit of the required number of acceptances in accordance with the provisions set down in the agreement. Under Article XIV of the Constitution, agreements may provide for participation also by non-member States, provided that they are members of the United Nations or a specialized agency or the International Atomic Energy Agency. Such agreements do not provide for participation by entities other than States.

6. Agreements under Article XIV of the FAO Constitution have the same legal force as other international agreements and can provide the same flexibility in respect of final clauses, acceptance procedures, etc.. In particular, they may provide for the normal procedure of signature and ratification by contracting parties. They may also provide for reservations to be made by individual contracting parties on such conditions as the agreement may determine. Since such agreements are adopted within the constitutional framework of FAO, they, and the institutions they establish, must remain linked to FAO in accordance with the provisions set out in the Basic Texts¹. On the other hand, the adoption of the revised International Undertaking as an agreement under Article XIV of the FAO Constitution would automatically ensure a measure of institutional and financial support from FAO.

7. Up to now, some 20 international agreements have been adopted under Article XIV of the FAO Constitution, ranging from the International Plant Protection Convention in 1951, to the Agreement for the establishment of the Indian Ocean Tuna Commission and the International Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas adopted by the last session of the Conference in 1993.

(iii) Adoption as a legally-binding agreement under the auspices of FAO but outside its constitutional framework

8. While explicit provision is made for the adoption of agreements under Article XIV of the FAO Constitution, it is still open for FAO to convene a diplomatic conference for the adoption of an international agreement outside the strict framework of the FAO Constitution. Indeed during the last two years some three such diplomatic conferences have been convened for the adoption of agreements outside the framework of FAO², as compared to two agreements adopted under the

¹ Part R of the Basic Texts. Required constitutional linkages include provisions regarding the appointment of the staff of any bodies established under the agreement, financial controls and powers of the FAO Conference with respect to the amendment of the agreement.

² Agreements for the establishment of the Near East Plant Protection Organization (NEPPO), INFOPESCA, and the Lake Victoria Fisheries Organization.

aegis of Article XIV of the Constitution³. Agreements adopted in this way do not necessarily need to be linked to FAO in any formal way, although of course they can be so linked if required. They also offer more flexibility to the contracting parties from the point of view of timing, in that they can be concluded at any time, without necessarily awaiting a session of the biennial FAO Conference. While they thus offer more flexibility to contracting parties in so far as institutional options are concerned, the procedures for their adoption are more costly, involving the convening of a separate diplomatic conference. They also do not entail the automatic institutional and financial commitment of FAO as with agreements concluded within the framework of the FAO Constitution. Diplomatic conferences for the adoption of international agreements can be convened by the FAO Conference or Council or by the Director-General on the authority of the Conference or Council.

(iv) Adoption as a legally binding Protocol to the Convention on Biological Diversity

9. Article 28 of the Convention on Biological Diversity provides for the adoption of Protocols to the Convention. Protocols must be adopted by the Conference of Parties to the Convention. Protocols are subject to substantially the same procedures of signature, ratification, acceptance, approval or accession as the Convention itself.

10. It would thus be legally possible for a renegotiated Undertaking to be adopted as a Protocol to the Convention on Biological Diversity. Indeed the FAO Conference appears to have already envisaged this possibility in its Resolution no. 7/93, under which the Conference "suggests that the outcome {of the negotiations on the revision of the International Undertaking} be submitted to the International Technical Conference and to the Conference of the Parties to the Convention on Biological Diversity."

11. However any such decision would have to be taken first by the negotiating parties to the revised Undertaking, the Commission on Plant Genetic Resources and the appropriate Governing Body of FAO and ultimately by the Conference of Parties to the Convention on Biological Diversity itself.

12. Adoption of the revised Undertaking as a Protocol to the Convention on Biological Diversity would ensure harmonization of action taken under the revised Undertaking with that taken by the Contracting Parties under the Convention. It would also facilitate access to common financial mechanisms. On the other hand, it may also tend to restrict the institutional options open to the contracting parties to those provided by the Convention, although this may not necessarily be the case⁴.

INSTITUTIONAL OPTIONS FOR THE RENEGOTIATED UNDERTAKING

13. To a great extent, the institutional options will be dependent on the approach taken towards the legal status of the renegotiated Undertaking. Whatever its legal status, the renegotiated Undertaking will probably require all or any of the following institutions:

³ See paragraph 7 above.

⁴ See below paras 13-18.

A Governing Body

14. At present the "Governing Body" of the Undertaking is the FAO Conference, acting on the advice of the FAO Council and, more particularly, the FAO Commission on Plant Genetic Resources. If the renegotiated Undertaking retains its status as a voluntary undertaking adopted by the FAO Conference, then the "Governing Body" will likely remain unchanged. Similarly, if the renegotiated Undertaking is adopted as a legally binding Agreement under Article XIV of the FAO Constitution, then the Governing Body would be formed by the FAO Conference, or rather those members of FAO who are Parties to the new Agreement, presumably acting on the advice of a specialized body such as the Commission on Plant Genetic Resources. In practice this would mean that the main focus of the substantive discussions would tend to remain with the Commission on Plant Genetic Resources. If, on the other hand, the Undertaking becomes a Protocol to the Convention on Biological Diversity, or a free-standing agreement, then the "Governing Body" of the renegotiated Undertaking will be formed automatically by the Parties to the Protocol or Agreement itself. In either case, there would seem to be a need to establish some form of institutional links in the renegotiated Undertaking between, on the one hand, the Conference of Parties to the Convention on Biological Diversity, or an eventual Protocol on Plant Genetic Resources, where intergovernmental responsibility lies for biological diversity in general, and, on the other hand, FAO and its Commission on Plant Genetic Resources, which has special competence in the area of plant genetic resources.

Scientific and Technical Body

15. At present no specific scientific and technical body is set up under the Undertaking. The role of providing scientific and technical advice is in practice performed by the Commission on Plant Genetic Resources itself and its Working Group. A technical role in the collection, conservation, maintenance, evaluation, documentation, exchange and use of plant genetic resources is also accorded under the Undertaking to the CGIAR Centres and in particular the International Plant Genetic Resources Institute (IPGRI). Under the Convention on Biological Diversity, this role is allocated to a Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA). The SBSTTA however is made up of participants from all Parties to the Convention and acts for the Convention as a whole. Its existence would presumably not foreclose the possibility of a specific technical body for any protocol adopted under the Convention, participation in which would be, again presumably, limited to the membership of the protocol itself. Alternatively, provision could be made for reliance on scientific and technical advice to be provided by an existing body separate from the membership of the protocol, in the same way, for example, as a fisheries management body such as the North-East Atlantic Fisheries Commission relies on independent scientific advice from the International Council for the Exploration of the Sea (ICES).

16. In this connection, some consideration will need to be given to the role under a revised International Undertaking to be accorded to the CGIAR Centres in general and the IPGRI in particular. Under the present Undertaking, reference is made to the present international arrangements being carried out under the auspices of institutions supported by the CGIAR, in particular IBPGR (IPGRI), for the exploration, collection, conservation, maintenance, evaluation, documentation, exchange and use of plant genetic resources. These arrangements are to be further

developed and, where necessary, complemented in order to develop a global system. And IPGRI is to pursue and develop its present activities. within its terms of reference, in liaison with FAO.

17. The activities of the CGIAR Centres, and in particular IPGRI, will be of particular practical importance to the attainment of the objectives of any renegotiated Undertaking. IPGRI has already formally "subscribe{d} to the principles of the International Undertaking and {has committed itself to} "collaborate with FAO in its implementation..."⁵. More recently, IPGRI and the other CGIAR Centres have agreed to place their collections of germplasm collected over the years under the auspices of FAO and to recognize the intergovernmental authority of the FAO Commission on Plant Genetic Resources in connection with policy with respect to those collections. They remain, however, independent and autonomous bodies subject to their own systems of governance and funding. Options will need to be considered for ensuring close linkage between the activities and policies of the CGIAR Centres and the parties to the renegotiated Undertaking and, in particular, of ensuring the continued availability of the technical expertise accumulated by those Centres.

Secretariat

18. At present, while no specific provision is made in the Undertaking for a Secretariat, secretariat functions are in practice provided by FAO through the Secretariat to the FAO Commission on Plant Genetic Resources. Were the renegotiated Undertaking to retain the status of a voluntary Undertaking adopted by the FAO Conference, or an agreement under Article XIV of the FAO Constitution, then these arrangements would automatically continue to apply in practice, and could be reflected legally in the new instrument. Parties to a free-standing agreement would of course be free to choose such new secretariat arrangements as they may wish.

19. Under the Convention on Biological Diversity, provision is made for the designation of a secretariat from amongst existing competent international organizations, and at the first meeting of the Conference of Parties, the United Nations Environment Programme (UNEP) has been designated to provide the secretariat for the Convention, with the participation of FAO and UNESCO through the secondment of officers in their own fields of specialization. Under Article 14 of the Convention, the Secretariat to the Convention is also required "to perform the function assigned to it by any protocol". This, however, would not preclude the designation by a particular protocol of a separate technical secretariat for that protocol, where specialized technical competence may be required. Nor, *a fortiori*, would it preclude an arrangement such as the obverse of the present secretariat arrangements for the Convention on Biological Diversity, whereby, for example, the Secretariat could be provided by FAO or UNESCO, with the participation of UNEP, or indeed any shades of joint participation by a number of agencies. In this context it is to be noted that under an increasing number of international agreements specialized units have in practice been set up to service protocols dealing with specialized subjects⁶.

⁵ Memorandum of Understanding on Programme Cooperation between FAO and IBPGR, dated 21 September 1990.

⁶ One example is the regional centre for combating oil pollution emergencies (Regional Oil Combating Centre) set up in Malta under the aegis of IMO which in effect performs the substantive functions of a secretariat in respect of the Protocol concerning Co-operation in Combatting Pollution of the Mediterranean Sea by Oil and other Harmful Substances in Cases of Emergency adopted under the Barcelona Convention on the Protection of the Mediterranean Sea from Pollution of 1976. Similar centres have been set up under

20. It is to be noted that the selection of secretariat and the place of meeting of normal sessions of the Governing Body may well have a strong influence on the character of the Governing Body and the tone and thrust of its discussions. Thus maintenance of the present Convention secretariat arrangements would accentuate the environmental flavour of any plant genetic resources protocol, while closer involvement of FAO would accentuate agricultural and developmental interests.

Financial mechanisms

21. At present the Undertaking contains rather vague wording regarding financial mechanisms under the rubric of Article 8, Financial Security. More detailed, but still general, provisions are contained in the annexes to the Undertaking, including a reference to an International Fund to be established for the implementation of Farmers' Rights.

22. A renegotiated Undertaking will obviously need to include firmer provisions with respect to financial mechanisms, if the Undertaking is to achieve its objectives. The general question will arise as to whether and to what extent, the renegotiated Undertaking should provide for independent and autonomous financial mechanisms, or, on the other hand, draw on existing financial mechanisms, such as those provided for under the Convention on Biological Diversity. The answer to this question will, of course, be dependent to a large degree on the approach adopted with respect to the legal status of the renegotiated Undertaking.

23. The Convention on Biological Diversity in its Article 21 provides for the establishment of a mechanism for the provision of financial resources to developing country Parties for the purposes of the Convention on a grant or concessional basis. No final decision has yet been taken by the Conference of Parties to the Convention regarding the financial mechanism, which continues to be provided on an interim basis by the Global Environment Facility of the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP) and the International Bank for Reconstruction and Development (World Bank). Were the renegotiated Undertaking to be adopted as a protocol to the Convention on Biological Diversity, then it could be expected that the financial mechanism established under the Convention, or a dedicated window thereof, would be utilized as the financial mechanism for such a protocol, although legally there would be no impediment to providing for a separate fund. Should the renegotiated Undertaking be adopted within the framework of FAO, or as a free-standing agreement, the possibility would still exist, subject of course to the agreement of the Conference of Parties, of drawing on the financial mechanism set up under the Convention. Use could also be made of the Global Environmental Facility, or a window thereof, independent of and parallel to its use, on an interim basis, by the Convention. Provision could, of course, also be made for an independent and autonomous financial mechanism to be established under the renegotiated Undertaking, whether this should take the form of a fund fed from governmental contributions, a mechanism linked in some way to access to plant genetic resources or the benefits to be derived from their use, or any combination of the above. In this context, the various options discussed in document CPGR-Ex1/94/5 are relevant.

protocols adopted under the Kuwait Convention for Co-operation on the Protection of the Marine Environment from Pollution of 1978 and the Regional Convention for the Conservation of the Red Sea and the Gulf of Aden Environment in 1982. The possibility of a separate protocol secretariat was also discussed in connection with the Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer.

CONCLUSIONS AND SUGGESTED ACTION BY THE COMMISSION

24. The above information and analysis is submitted for the consideration of the Commission in connection with its discussions in Stage III of the negotiations for the revision of the International Undertaking.