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PROGRESS REPORT ON THE INTERNATIONAL UNDERTAKING ON PLANT GENETIC
 RESOURCES

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PROGRESS REPORT ON THE INTERNATIONAL UNDERTAKING ON PLANT GENETIC RESOURCES

I. INTRODUCTION

1. At the First Meeting of the Working Group of the Commission on Plant Genetic Resources, Rome, 2-3 June 1986, an analysis was presented of country reservations to the International Undertaking on Plant Genetic Resources and this was discussed in some detail. A full account of the discussion is included in the Report of the Working Group (cf. CPGR/87/3, paragraphs 5-14) and consequently the present document should be read in conjunction with that Report.

4. When the International Undertaking was adopted at the Twenty-second Session of the FAO Conference, held in November 1983, it was made clear that the Undertaking was not a legally binding international agreement. Thus, the various reservations, interpretations and understandings, expressed either verbally or in writing by Member Nations, are not to be considered "reservations" within the meaning given to that term under international law and are not binding on the other Member Nations. This emerges clearly from Article 11 of the Undertaking itself which provides that "at the time of adhering, Governments and institutions will advise the Director-General of FAO of the extent to which they are in a position to give effect to the principles contained in the Undertaking". The term "reservation" has been used commonly to refer to the statements of position and will therefore be used as well in the present document on the understanding that it is no more than a unilateral statement of position.

3. Extracts of reservations were reproduced in a document prepared for the First Session of the Commission in connection with Item 3 of its Agenda (cf. CPGR/85/3 Add.1, reflecting the position at 12 February 1985). Some additional reservations have been received by the Director-General since then from Argentina, Bulgaria, Belgium, Egypt, Hungary, Ireland, Israel and Poland, but they all fall into the same pattern as described hereinafter.

4. It will be recalled that at the time of the First Session of the Commission held in March 1985, 65 Member Nations plus 2 Non-Member Nations had responded officially to the Director-General's Circular State Letter of 6 April 1984 informing them of the establishment of the Commission.

59 Member Nations plus 1 Non-Member Nation adhered to the Undertaking at that stage, of which 17 expressed some form of reservation in respect thereof. Since that time, 24 additional Member Nations have responded, of which 21 have adhered, 8 of them with reservations. The total number of adherences was 81 at 24/11/1986, of which 25 include reservations.

5. An analysis of the various reservations shows that they may be divided into two main categories:

- Specific reservations which are limited to particular problems or items of limited scope; and
- General reservations of a broad scope which concern the non-application of certain basic provisions of the Undertaking.

II. SCOPE OF RESERVATIONS

(i) Specific reservations

6. Reservations of a specific and limited character have been expressed by four Member Nations. They do not affect the general application of the International Undertaking and are confined to very specific preoccupations of the Member Nations concerned (see the reservations expressed by Belgium, Egypt, Oman and Jamaica).

(ii) General reservations

7. General reservations may be sub-divided into two types, i.e. reservations concerning plant breeders' rights and special genetic stocks (Article 2.1(a) sub-paragraphs (i) and (v)), and those which relate to the principle of unrestricted availability of plant genetic resources (Articles 5 and 7).

8. A description of the concept of plant breeders' rights and of national legislation on this subject is contained in paragraphs 24 to 34 of the document before 'the Commission entitled "Status of Base and Active Collections of Plant Genetic Resources" (CPGR/87/5). Reservations dealing with plant breeders' rights (Article 2.1(a)(v)) have been expressed by 19 countries either in communicating to the Director-General their adherence to the Undertaking (Belgium, Denmark, Finland, France, Federal Republic of Germany, Hungary, Ireland, Israel, Netherlands, Norway, New Zealand, Oman, Poland, Sweden, United Kingdom and Zimbabwe)^{1/} or when informing the Director-General that the problem of plant breeders' rights was an obstacle to their adherence (Australia, Canada and U.S.A.). Moreover, on the same grounds, two countries reserved their position with respect both to the Resolution and to the International Undertaking at the Twenty-second Session of the Conference as a result of the same problem (Japan and Switzerland).

9. A number of reservations of broad scope have also been expressed on the principle of free exchange of plant genetic resources (Articles 5 and 7) (Argentina, Colombia, Cuba, Federal Republic of Germany, Jamaica, Mexico and Turkey)^{1/}. These countries have stated that their ability to make available plant genetic resources would have to be restricted in accordance with their laws or regulations.

III. FARMERS' RIGHTS

10. Any rights which might be recognized for farmers in connection with genetic material originating in a particular country would have to be linked to the question of the collection and transfer of genetic material in that country. No such concept is to be found at this juncture in national legislation which is available to the Organization.

1/ Extracts of most of these reservations (except Argentina, Belgium, Hungary, Ireland, Israel, Norway and Poland) are included in Add.1 to Document CPGR/85/3

11. It is understood to be the practice that the collection and expedition of such genetic material is arranged in agreement with the country where such material is found in situ and that specimens of all such material collected are furnished to the government concerned and often form the basis of national collections of plant genetic resources in certain developed countries.^{2/}

12. If the Commission considered that the question of "Farmers' rights" required further elucidation or emphasis, it could do either or both of the following:

(a) Endorse the procedure described in paragraph 1.1 above, in particular that specimens of plant genetic resources collected be furnished to the "in situ government";

(b) Request that members of the Commission supply to the Secretariat all relevant information concerning the legal concept of farmers' rights in their country (if such concept exists) with a view to the preparation of a study on the subject if the information received provides a sufficient basis therefore.

IV. IMPROVING PARTICIPATION IN THE UNDERTAKING

13. The Working Group emphasized that every effort should be made to reach a negotiated solution to the problems raised, in particular, by the reservations of a general scope. The ultimate objective was to achieve the widest possible adherence to the International Undertaking whilst reducing to an absolute minimum the reservations thereto.

14. Three courses of action would appear to be open:

Recognition of Status quo;

Agreement on an interpretation of the Resolution;

Amendment of the Resolution.

2/ cf. Section 5.2 of Document CPGR/87/5

(i) Recognition of Status quo

15. If the Commission were to conclude that it would not be desirable to amend the International Undertaking on Plant Genetic Resources (Annex to Conference Resolution 8/83), it could recommend that the 1987 Conference take note of the problems raised by the reservations of a number of Member Nations in respect, in particular, of plant breeders' rights and the principle of unrestricted exchange and reiterate the desirability of Member Nations accepting fully the Undertaking in its present form. Whilst this solution would, of course, be no more than recognition by the Conference of the status quo, it should be recalled that Article 11 of the Undertaking does allow Member Nations to state the extent to which they can give effect to the principles contained in the Undertaking. Thus, adherence by such Member Nations is not foreclosed although it does have the effect of limiting to some extent the scope of application of the Undertaking.

(ii) Interpretation of the Resolution

16. Another solution would be to seek an agreed interpretation of the International Undertaking. This solution might commend itself to the Conference since it could lead to wider acceptance of the Undertaking whilst, at the same time, not requiring that the latter be amended. In respect of the problem of plant breeders' rights, the agreed interpretation could be along the lines of the "understanding" expressed by the Federal Republic of Germany when it adhered to the Undertaking. Such an understanding would recognize that a Member Nation's base collections did not normally include either cultivated varieties in current use and newly developed varieties or special genetic stocks (including elite and current breeders' lines and mutants) as specified in Article 2.1(a), sub-paragraphs (i) and (v) respectively, and that, consequently, such plant genetic resources would not be covered by the Undertaking.

17. As concerns the problem of free access to plant genetic resources, an agreed interpretation could be sought also along the lines of the "understanding" communicated by the Federal Republic of Germany. Such an interpretation would have two aspects:

- (a) the principle of unrestricted availability of plant genetic resources as set forth in Article 1 of the Undertaking would apply only to the extent that it were not restricted by the Undertaking itself, including Article 11 thereof; ^{3/}

- (b) it would be understood that Article 5 ^{4/} of the Undertaking is intended to cover only such plant genetic resources which the Government of a Member Nation adhering to the Undertaking may dispose of under its national laws and regulations.

(iii) Amendment of the Resolution

18. The most far-reaching approach would be to amend the Undertaking. This could also be the most satisfactory solution if it brought about a significant widening in adherence, and in the membership of the Commission, without sacrificing any of the essential elements of the Undertaking.

19. Since the Undertaking was adopted by the FAO Conference, only the Conference could modify it. Before launching the procedures required to change the text, it would be necessary to ensure that the modifications envisaged would in fact bring about the desired result of wider adherence. Any process of review and revision set in train by the Commission should therefore allow for the consultation and to some extent perhaps even the participation of those nations which are not members of the Commission, but which play an important role in the field of plant genetic resources. If the Commission wishes to pursue this option further, the Director-General will be ready to put forward some specific suggestions as to how the matter might be handled.

3/ In respect of Article 11, see paragraphs 2 and 15 above.

4/ Article 5 sets forth provisions on the availability of plant genetic resources.

20. A technical/legal problem would arise if the Undertaking were amended, but this could be solved rather easily if the amendment (or amendments) were accepted by all Member Nations and not merely the simple majority required under Rule XII.3(a) of the General Rules of the Organization. If all Member Nations agreed to the amendment by consensus, it could be considered that their prior adherence to the Undertaking was thus extended to include the amendment (or amendments) adopted. Were this not to be the case, the position in respect of the Undertaking could become extremely complicated since there would then be at least two categories of Member Nations adhering to the Undertaking: Member Nations adhering to the Undertaking in its original form and Member Nations adhering to the Undertaking in its amended form. Such a situation would have to be avoided since it would compromise the success of the Undertaking.

21. In respect of the problem of plant breeders' rights, the most direct solution would consist in suppressing sub-paragraph (v) of Article 2.1(a). Were this not to be acceptable, variants could be sought to attenuate the effect of the inclusion of "special genetic stocks" within the definition of "plant genetic resources".

22. As concerns the problem of free access (i.e. the principle of unrestricted availability) agreement might have to be reached on amendments to Articles 1 and 5 of the Undertaking. Of course, the wording of Article 1 as it now stands is already permissive to a certain extent since it recognizes the principle that plant genetic resources "... should be available without restriction" rather than establishing a strict requirement that such resources "must" be made available without restriction. Consequently, it might not be necessary to amend Article 1 or, alternatively, one could envisage the possibility of simply attenuating the principle as now expressed by amending it to read that plant genetic resources should be available without restriction to the extent that this is possible [under applicable national law]". Corresponding amendments could be made to Article 5 of the Undertaking.