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REVISION OF THE INTERNATIONAL UNDERTAKING ON PLANT GENETIC RESOURCES: LEGAL AND INSTITUTIONAL OPTIONS

CONTENTS

	<i>Paras.</i>
1. Introduction	1
2. Options for the legal status of the renegotiated Undertaking, in harmony with the Convention on Biological Diversity	2
(i) Continuation of the present legal status of the Undertaking	3-5
(ii) Adoption as a legally binding agreement under Article XIV of the FAO Constitution	6-8
(iii) Adoption as a legally binding agreement under the auspices of FAO but outside its constitutional framework	9
(iv) Adoption as a legally binding Protocol to the Convention on Biological Diversity	10-14
(v) Adoption as a legally binding Agreement for the Implementation of the Convention on Biological Diversity in the Area of Plant Genetic Resources for Food and Agriculture	15-18
3. Institutional options for the renegotiated Undertaking	19
A Governing Body	20
Scientific and Technical Body	21
Secretariat	22-25
4. Implementing mechanisms	26
Financial mechanisms	27-30
5. Action by the Commission	31

1. Introduction

1. At its First Extraordinary Session in November 1994, the Commission on Plant Genetic Resources, now renamed the Commission on Genetic Resources for Food and Agriculture (CGRFA) 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. It is a development of the options paper presented to the Sixth Commission in June 1995 as document CPGR6/95/9, though not yet discussed by the Commission.

2. Options for the legal status of the renegotiated Undertaking, in harmony with the Convention on Biological Diversity

2. There are basically five 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, hopefully at its Thirtieth Session in November 1999, 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 initial 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 most cases have been either withdrawn or otherwise overcome through the adoption of the interpretative annexes.

5. 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. If the revised Undertaking is to provide for assured access to plant genetic resources and benefit-sharing under a multilateral system, including financial mechanisms, then it may well be necessary to think in terms of a legally binding instrument.

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

6. 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 Genetic Resources for Food and Agriculture. 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, although such participation in some form or other would not be precluded, e.g., through participation in a scheme set out in an annex or protocol to the agreement.

7. 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 Texts.¹ 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.

8. Up to now, some 13 international agreements have been adopted under Article XIV of the FAO Constitution, ranging from the International Plant Protection Convention in 1951, amended in 1997, 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 FAO Conference in 1993.

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

9. 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 seven years some six such diplomatic conferences have been convened for the adoption of agreements outside the framework of FAO,² as compared to two agreements adopted under the aegis of Article XIV of the Constitution.³ 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

10. 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 the Parties to the Convention. Protocols are subject to substantially the same procedures of signature, ratification, acceptance, approval or accession as the Convention itself.

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 Regional Convention on Fisheries Cooperation Among African States Bordering the Atlantic Ocean (1991), Agreement for the establishment of the Intergovernmental Organization for Marketing Information and Cooperation Services for Fishery Products in Africa (INFOPECHE) (1991), Agreement for the establishment of the Near East Plant Protection Organization (NEPPO) (1993), Constitution of the Centre for Marketing Information and Advisory Services for Fishery Products in the Arab Region (INFOSAMAK) (1993), Constitution of the Centre for Marketing Information and Advisory Services for Fishery Products in Latin America and the Caribbean (INFOPESCA) (1994), and the Convention for the Establishment of the Lake Victoria Fisheries Organization (1994).

³ See paragraph 8 above.

11. It would thus be legally possible for a renegotiated Undertaking to be adopted as a Protocol to the Convention on Biological Diversity.

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

13. Adoption of the revised Undertaking as a Protocol to the Convention on Biological Diversity would ensure harmonisation 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 case.⁴ It would also inevitably impart more of an environmental, as opposed to the present agricultural, flavour to the revised Undertaking.

14. Should the revised Undertaking have already been adopted as a legally binding agreement under Article XIV of the FAO Constitution or as a free-standing agreement, the possibility should not be excluded of transforming such an agreement at a later stage into a protocol to the Convention on Biological Diversity, in the same way as may be envisaged for other agreements already in existence, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) or the Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention). However, this would mean that the agreement would need first to go through the full adoption, acceptance and entry into force procedures as an Article XIV agreement or a free-standing agreement, and then to go through separate adoption, ratification and entry into force procedures as a Protocol to the Convention on Biological Diversity.

(v) Adoption as a legally binding Agreement for the Implementation of the Convention on Biological Diversity in the Area of Plant Genetic Resources for Food and Agriculture

15. A further possible option might be to adopt the revised Undertaking as a legally binding instrument in implementation of the Convention on Biological Diversity, or certain specified articles thereof, in the area of plant genetic resources for food and agriculture. Under this option the legally binding instrument could be adopted either as a Convention or other Agreement under Article XIV of the FAO Constitution or at a diplomatic conference under the auspices of FAO but outside its constitutional framework. In this sense, the fifth option may also be viewed as a sub-option of options (ii) and (iii).

16. The most recent example of such an “implementing agreement” would be the 1995 UN Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the UN Fish Stocks Agreement). As its title suggests, that agreement implements and amplifies certain provisions of the UN Law of the Sea Convention, while retaining its own separate and distinct legal identity, without being an integral part or protocol thereof.

17. The “implementing agreement” option represents a midway solution between that of a protocol to the Convention on Biological Diversity and a free-standing agreement. It would on the one hand ensure that the implementing agreement is in full harmony and consistency with the Convention, while at the same time allowing greater flexibility both from the point of view of the Parties to the agreement and the institutional implications. So far as the parties are concerned, the Convention on Biological Diversity requires that States may not become parties to a protocol unless they are at the same time parties to the

⁴ See below paras 22-25.

parent Convention.⁵ No such restriction would necessarily apply in the case of an implementing agreement, and indeed, this was one of the advantages of the approach in the case of the UN Fish Stocks Agreement, where a number of influential countries were not yet parties to the UN Convention on the Law of the Sea. The “implementing agreement” approach would also allow more flexibility in the governance and secretariat servicing of the legally binding instrument, in that all such arrangements could be set out in the implementing agreement itself, without restrictions imposed by the Convention on Biological Diversity. It would not, however, preclude use of the same institutional mechanisms should this prove desirable.

18. The “implementing agreement” approach would also require the sequential agreement of both the negotiating parties to the revised Undertaking, the Commission on Genetic Resources for Food and Agriculture and the appropriate Governing Body of FAO, and the Contracting Parties to the Convention on Biological Diversity.

3. *Institutional options for the renegotiated Undertaking*

19. 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:

A Governing Body

20. 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 Genetic Resources for Food and Agriculture. 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 those Members of FAO and other eligible states that are party to the new agreement, or if - as in the case of the 1993 FAO Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (the FAO Compliance Agreement) - no specific provision is made for a separate governing body of parties, by the FAO Conference, presumably acting on the advice of a specialized body such as the Commission on Genetic Resources for Food and Agriculture. 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 would normally 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 the 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 Genetic Resources for Food and Agriculture, which has special competence in the area of plant genetic resources. If the approach of an “implementing” agreement were to be adopted, then the options would be open, depending on whether the agreement is adopted under Article XIV of the Constitution, or outside the constitutional framework of FAO.

Scientific and Technical Body

21. 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 Genetic

⁵ Convention on Biological Diversity, Article 32.

Resources for Food and Agriculture itself and its Intergovernmental Technical Working Group on Plant Genetic Resources for Food and Agriculture. If the revised Undertaking is adopted as a legally binding agreement under Article XIV of the FAO Constitution, or as a free-standing agreement, it may confirm this role of the Commission and its Working Group, or provide for a separate Scientific and Technical Body to be established by the governing body of the revised Undertaking. The scientific and technical body could be composed of members of the governing body itself, or set up as an expert panel. In either case the body could draw upon scientific and technical input from appropriate bodies such as FAO and other intergovernmental organizations, as well as research institutions, notably the International Plant Genetic Resources Institute (IPGRI) and the other Centres of the Consultative Group on International Agricultural Research (CGIAR). 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. If the revised Undertaking were to be adopted as a protocol to the Convention, it would be open to the parties to establish a specific technical body for that protocol.

Secretariat

22. 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 Genetic Resources for Food and Agriculture. 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.

23. 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 the Parties, the United Nations Environment Programme (UNEP) was designated to provide the secretariat for the Convention, with the participation of FAO and the United Nations Educational, Scientific and Cultural Organization (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 subjects.⁶

⁶ One example is the regional centre for combating oil pollution emergencies (Regional Oil Combating Centre) set up in Malta under the aegis of the International Maritime Organization (IMO) which in effect performs the substantive functions of a secretariat in respect of the Protocol concerning Co-operation in Combating 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 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. It is understood that the retention of existing secretariat arrangements is also being contemplated if agreements such as CITES or the Ramsar Convention are to be brought within the framework of the Convention on Biological Diversity as protocols.

24. If the approach of an “implementing agreement” to the Convention on Biological Diversity were to be adopted, then there would in principle be full flexibility for the parties to the implementing agreement to structure the secretariat arrangements for that agreement as they may wish, without any restrictions.

25. 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.

4. *Implementing mechanisms*

26. A technical implementing role in the collection, conservation, maintenance, evaluation, documentation, exchange and use of plant genetic resources is accorded under the Undertaking to national and regional institutions supported by the CGIAR, in particular IPGRI.⁷ These activities will be of particular practical importance to the attainment of the objectives of any renegotiated Undertaking. More recently, the relevant CGIAR Centres, and other networks, have placed their collections of designated germplasm under the auspices of FAO as part of the International Network of *Ex Situ* Collections and recognized the intergovernmental authority of the FAO Commission on Genetic Resources for Food and Agriculture in connection with policy with respect to those collections.⁸ They remain, however, autonomous bodies subject to their own systems of governance and funding. Options will need to be considered for ensuring the continued availability of the technical expertise accumulated by those Centres, and for ensuring close linkage between the implementing activities of the CGIAR Centres at the technical level and the intergovernmental policy direction role of the parties to the renegotiated Undertaking, based possibly on the development of the contractual link already established under the agreements between FAO and the various CGIAR Centres.⁹

Financial mechanisms

27. 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.

28. 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. A general concern may be to provide some dedicated mechanism or window of an existing mechanism that would overcome the problem of competition between agricultural and environmental interests. Additionally the question arises as to whether the renegotiated Undertaking should have a single mechanism such as the Global Environment Facility (GEF) or a window

⁷ International Undertaking, Article 7.

⁸ Agreements between the International Agricultural Research Centres and FAO Placing Collections of Plant Germplasm under the Auspices of FAO, 26 October 1994.

⁹ *Idem*.

thereof, draw upon multiple channels¹⁰ through a facilitating mechanism (analogous to the Global Mechanism of the Convention to Combat Desertification (CCD), or some combination thereof.

29. 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 the Parties to the Convention regarding the financial mechanism, which continues to be provided on an interim basis by the GEF of the United Nations Development Programme (UNDP), 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 the Parties, of drawing on the financial mechanism set up under the Convention. Use could also be made of the GEF, 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.

30. If the approach of an “implementing agreement” were to be adopted, then the parties would again be free to choose the extent to which they would wish to draw upon the financial mechanism established under the Convention on Biological Diversity, subject of course to the agreement of the Parties to that Convention, or to establish specific and distinct financial mechanisms under the agreement itself.

5. *Action by the Commission*

31. The above is presented for the information of the Commission in making its choices as to the legal status of the revised Undertaking.

¹⁰ In this context it should be noted that the Common Fund for Commodities also provides funds for research on the improvement of specific plant genetic resources at the request of the intergovernmental commodity groups concerned.