

conference

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C 89/24
July 1989

FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS ROME

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Twenty-fifth Session

Rome, 11 - 30 November 1989

INTERPRETATION OF THE INTERNATIONAL UNDERTAKING ON PLANT GENETIC RESOURCES

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INTERPRETATION OF THE INTERNATIONAL UNDERTAKING ON PLANT GENETIC RESOURCES

I. INTRODUCTION

1. Following a proposal of the 3rd Session of the Commission on Plant Genetic Resources, the 95th Session of the Council approved a text for an agreed interpretation of the International Undertaking on Plant Genetic Resources and recommended a complementary draft resolution regarding farmers' rights for consideration and adoption by the Conference. The present document concentrates on these two items and provides the Conference with relevant background information for its decision. More detailed information on this and other recommendations of the 3rd Session of the Commission is available in the Report of this Session (CPGR/89/REP) as well as in paras. 69-84 of the Report of 95th Session of the FAO Council (CL 95/REP).

II. BACKGROUND INFORMATION: FAO GLOBAL SYSTEM ON PLANT GENETIC RESOURCES

2. At the request of its member countries, FAO has been developing since 1983 a global system to coordinate actions in the field of plant genetic resources. This system, which draws on FAO's long experience, and is in line with its overall mandate, includes (i) a legal framework, the International Undertaking on Plant Genetic Resources, (ii) an intergovernmental forum, the Commission on Plant Genetic Resources, and (iii) a financial mechanism, the International Fund for Plant Genetic Resources. The International Undertaking, the Commission and the Fund on Plant Genetic Resources cover the conservation and use of ex situ and in situ biological diversity in plant genes, genotypes and gene pools at molecular, population, species and ecosystem level. To date, 119 countries have either joined the Commission (96) or have agreed to adhere to the International Undertaking (89) or taken both steps (67).

(1) Commission on Plant Genetic Resources

3. The Commission on Plant Genetic Resources (established as a follow-up of Conference Resolution 9/83) is a unique international global forum, where countries which are donors or users of germplasm, or both, can discuss matters related to plant genetic resources on an equal footing, and monitor the implementation of the principles contained in the International Undertaking. Relevant technical assistance agencies, intergovernmental organizations, development banks, non-governmental organizations and private foundations attend the meetings as observers. Through its debates, the Commission aims to reach consensus on areas of global interest, and compromise in areas where there is disagreement. Activities can also be harmonized and responsibilities agreed upon.

4. The Commission has held three meetings (1985, 1987 and 1989) and dealt with a variety of technical, legal, financial and policy matters such as those related to monitoring the operation and arrangements referred to in the International Undertaking, supervising the International Fund, studying the implications of new biotechnologies on the safe conservation and free availability of germplasm, reviewing of FAO policies, programmes

and activities on plant genetic resources, and reviewing training needs, in situ and ex situ conservation, information, documentation and use of plant genetic resources.

5. During its Third Session (April 1989), the Commission, assisted by its Working Group, discussed and reached consensus on a number of important matters, making recommendations likely to influence for many years to come the policies, programmes and activities of FAO and other international, regional and national organizations. Some of the most significant recommendations made by the Commission and endorsed by the Ninety-fifth Session of the Council are: the periodical publication of a report on the State of the World's Plant Genetic Resources 1/, the establishment of Global Information and Early Warning Systems 2/, the preparation of a Code of Conduct for International Collectors 3/ and another one on Biotechnology as it relates to plant genetic resources 4/, actively monitoring the evolving new biotechnologies 5/, suggestions for the establishment of an Advisory Committee to the Commission 6/, and the most important ones, the adoption of an agreed interpretation of the International Undertaking and a draft Resolution on farmers' rights 7/.

(ii) International Undertaking on Plant Genetic Resources

6. The International Undertaking on Plant Genetic Resources was adopted by resolution 8/83 of the FAO Conference in 1983. The objective of this Undertaking is "to ensure that plant genetic resources of economic and/or social interest, particularly for agriculture, will be explored, preserved, evaluated and made available for plant breeding and scientific purposes". To date 89 States (88 Member Nations and one non-Member Nation) have adhered to the Undertaking. Of these, 61 States have adhered unconditionally and the other 28 subject to reservations. In addition, 30 of the States that have become members of the Commission on Plant Genetic Resources have not yet adhered to the International Undertaking; and some have indicated difficulties in adhering to the Undertaking because of a possible conflict between certain of the provisions of the Undertaking and their international obligations and existing national legislation. An analysis of these reservations and difficulties is presented below. At its Second Session, in 1987, the Commission called on its Working Group to propose an agreed interpretation of the Undertaking with a view to overcoming these difficulties and to improving participation in the Undertaking. The Appendixes of this document present the text for an agreed interpretation and a complementary draft resolution as prepared by the Working Group, amended by the Commission and approved by the Council.

III. RESERVATIONS TO THE UNDERTAKING

7. Many of the reservations to the Undertaking are concerned with the interaction between the requirements of free availability of plant genetic resources set out in Articles 1 and 5 of the Undertaking and the definition

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- 1/ CPGR/89/REP para. 15 and CL 95/REP para. 75.
 - 2/ CPGR/89/REP para. 16 and CL 95/REP para. 75.
 - 3/ CPGR/89/REP para. 21 and CL 95/REP para. 77.
 - 4/ CPGR/89/REP para. 54 and CL 95/REP para. 77.
 - 5/ CPGR/89/REP para. 52 and CL 95/REP para. 76.
 - 6/ CPGR/89/REP paras. 19 and 20 and CL 95/REP para. 78.
 - 7/ CPGR/89/REP paras. 55 to 61 and CL 95/REP paras. 72, 83 and 84.

of plant genetic resources set out in Article 2.1 of the Undertaking. The definition which is based on technical considerations, includes cultivated varieties (cultivars) in current use, newly developed varieties and special genetic stocks (including elite and current breeders' lines and mutants), as well as obsolete and primitive cultivars and wild and weed species.

8. A number of countries have argued that the free availability of cultivated varieties and special genetic stocks cannot be guaranteed, because of existing plant breeders' rights. Cultivated varieties as defined in Article 2.1(a)(i) of the Undertaking, it is argued, may be protected under plant breeders' legislation. Most countries with plant breeders' legislation are also members of the International Convention for the Protection of New Varieties of Plants, the objective of which is to protect plant breeders' interests. The free transfer of such material by national authorities, it is said, would be incompatible with both the domestic legislation and the obligations under the above international convention. Special genetic stocks within the meaning of Article 2.1(a)(v) of the Undertaking, while not covered directly by the convention may have been developed by commercial organizations in order to breed a new variety for which they could seek legal protection; such commercial organizations would have an interest in resisting further dissemination of these materials to other breeders.

9. Given this situation, a number of countries, mainly developed and "technology rich" countries, have proposed that the provisions of the Undertaking regarding free availability of plant genetic resources should not apply to cultivated varieties or special genetic stocks but only to obsolete and primitive cultivars and wild and weedy species. Countries rich in the latter gene resources consider that it would be unfair if their resources were to be freely available, while lines which are developed from them are regarded as private property and excluded from the regime of free exchange.

10. Other, mainly developing, countries have expressed more general reservations regarding free availability of wild and cultivated plant genetic resources, based on concerns of national sovereignty or the desire to protect certain species of special economic interest to the country. They have further stated that their cultivated landraces should not be considered as just natural resources, but as the result of thousands of years of work through which farmers have domesticated, genetically improved and conserved these materials. Some of these countries have indicated verbally and in writing that their reservations concerning free availability would be reconsidered if the negotiations for an agreed interpretation of the Undertaking should lead to a satisfactory result, especially as concerns the recognition of farmers' rights and the establishment of a global mechanism to ensure compensation.

11. Finally, a number of developing countries informed FAO that while subscribing fully to the objectives of the Undertaking, they would not adhere to it since they would be unable to fulfill the proposed obligations to collect, evaluate and preserve genetic resources because of lack of financial, technical and scientific resources.

12. Since 1985 the Commission and its Working Group have repeatedly discussed the reservations to the International Undertaking and possible conflicts with national legislations in both developed and developing countries and considered several possible courses of action, including the possibility of amending the International Undertaking. For practical and legal reasons the Commission, at its Second session in 1987, chose to pursue the approach of an agreed interpretation rather than the amendment of the Undertaking as a way of improving participation and achieving wider acceptance of the Undertaking. It was recognized that this interpretation should be aimed at avoiding possible conflicts with national legislation and policies by taking fully into account the rights and obligations of donors of germplasm and donors of technology, while preserving the principle of full availability of germplasm.

IV. INTERPRETATION OF THE UNDERTAKING. RECOGNITION OF PLANT BREEDERS' AND FARMERS' RIGHTS

13. In accordance with the request of the Commission, the Working Group discussed this matter at its Third Session and recommended to the Commission a text for an agreed interpretation of the International Undertaking together with a complementary draft resolution on farmers' rights. Both texts were considered by the Third Session of the Commission and with suggested amendments considered by an ad hoc meeting of its Working Group. The Working Group in consultation with the authors of the amendments proposed to the Commission a new version. Subsequently the Session of the Commission discussed, achieved consensus and approved:

- 1) a text for an agreed interpretation of the International Undertaking, recognizing both plant breeders' rights and farmers' rights (Appendix 1); and
- ii) a draft resolution endorsing the concept of farmers' rights (Appendix 2)

and "requested the Director-General of FAO to submit the agreed interpretation and draft resolution through the Council to the next session of the Conference."

14. Both texts were then submitted to the ninety-fifth session of the Council (June 1989) as part of document CL 95/14 "Outcome of the Third Session of the Commission on Plant Genetic Resources". The Council, with some members indicating that they were yet to finalize their position:

- (i) "welcomed in particular the proposals for an agreed interpretation of the International Undertaking to ensure the unrestricted availability of germplasm which recognize the rights of both donors of funds and technologies and donors of germplasm to be compensated through the simultaneous and parallel recognition of plant breeders' and farmers' rights. It recognized that this agreed interpretation was intended to lay the basis for an equitable and lasting global system for sharing the costs and benefits of the world's plant genetic resources." (CL 95/REP. para 72)

(ii) "approved the text of the agreed interpretation of the International Undertaking and recommended the draft Resolution regarding farmers' rights for consideration and adoption by the Conference." (CL 95/REP. para 83)

(iii) "recommended to the Conference that both the agreed interpretation of the International Undertaking and the eventual Conference Resolution become annexes to the International Undertaking, facilitating the withdrawal of reservations which countries might have made with regard to the Undertaking, and securing the adherence of others." (CL 95/REP. para 84)

15. The Conference is therefore invited to adopt the texts of both the agreed interpretation of the International Undertaking and draft Resolution on farmers' rights and to decide that they become annexes to the International Undertaking on Plant Genetic Resources.

Appendix 1

AGREED INTERPRETATION OF THE INTERNATIONAL UNDERTAKING

The objective of the agreed interpretation is to achieve greater acceptance of the International Undertaking, and to strengthen the conservation, use and availability of germplasm, through mechanisms recognizing and legitimizing the rights to be compensated of both germplasm donors and donors of funds and technology. This has been accomplished through the simultaneous and parallel recognition of plant breeders' rights and farmers' rights. The agreed interpretation set forth hereinafter is intended to lay the bases for an equitable, and therefore solid and lasting, global system, and thereby to facilitate the withdrawal of reservations which countries may have made with regard to the International Undertaking, and to secure the adherence of others.

- (a) Plant breeders' rights as provided for under UPOV are not incompatible with the International Undertaking;
- (b) a state may impose only such minimum restrictions on the free exchange of materials covered by Article 2.1(a) of the International Undertaking as are necessary for it to conform to its national and international obligations;
- (c) states adhering to the Undertaking recognize the enormous contribution that farmers of all regions have made to the conservation and development of plant genetic resources, which constitute the basis of plant production throughout the world, and which form the basis for the concept of farmers' rights;
- (d) the adhering states consider that the best way to implement the concept of farmers' rights is to ensure the conservation, management and use of plant genetic resources, for the benefit of present and future generations of farmers. This could be achieved through appropriate means, monitored by the Commission on Plant Genetic Resources, including in particular the International Fund for Plant Genetic Resources, already established by FAO. To reflect the responsibility of those countries which have benefitted most from the use of germplasm, the Fund would benefit from being supplemented by further contributions from adhering governments, on a basis to be agreed upon, in order to ensure for the Fund a sound and recurring basis. The International Fund should be used to support plant genetic conservation, management and utilization programmes, particularly within developing countries, and those which are important sources of plant genetic material. Special priority should be placed on intensified educational programmes for biotechnology specialists, and strengthening the capabilities of developing countries in genetic resource conservation and management, as well as the improvement of plant breeding and seed production.

It is understood that:

- (i) the term "free access" does not mean free of charge, and
- (ii) the benefits to be derived under the International Undertaking are part of a reciprocal system, and should be limited to countries adhering to the International Undertaking.

DRAFT RESOLUTION ON FARMERS' RIGHTS

THE CONFERENCE

Recognizing that:

- (a) plant genetic resources are a common heritage of mankind to be preserved, and to be freely available for use, for the benefit of present and future generations;
- (b) full advantage can be derived from plant genetic resources through an effective programme of plant breeding, and that, while most such resources, in the form of wild plants and old landraces, are to be found in developing countries, training and facilities for plant survey and identification, and plant breeding, are insufficient, or even not available in many of those countries;
- (c) plant genetic resources are indispensable for the genetic improvement of cultivated plants, but have been insufficiently explored, and are in danger of erosion and loss;

Considering that:

- (a) in the history of mankind, unnumbered generations of farmers have conserved, improved and made available plant genetic resources;
- (b) the majority of these plant genetic resources come from developing countries, the contribution of whose farmers has not been sufficiently recognized or rewarded;
- (c) the farmers, especially those in developing countries, should benefit fully from the improved and increased use of the natural resources they have preserved;
- (d) there is a need to continue the conservation (in situ and ex situ), development and use of the plant genetic resources in all countries, and to strengthen the capabilities of developing countries in these areas;

Endorses the concept of farmers' rights (Farmers' Rights mean rights arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources, particularly those in the centres of origin/diversity. These rights are vested in the International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers, and supporting the continuation of their contributions, as well as the attainment of the overall purposes of the International Undertaking) in order to:

- (a) to ensure that the need for conservation is globally recognized and that sufficient funds for these purposes will be available;

- (b) to assist farmers and farming communities, in all regions of the world, but especially in the areas of origin/diversity of plant genetic resources, in the protection and conservation of their plant genetic resources, and of the natural biosphere;
- (c) to allow farmers, their communities, and countries in all regions, to participate fully in the benefits derived, at present and in the future, from the improved use of plant genetic resources, through plant breeding and other scientific methods.