



## HIGHLIGHTS FROM THE OPEN-ENDED WORKING GROUP ON THE INTERNATIONAL UNDERTAKING 30 OCTOBER 2001

The 121st Session of the Council of the UN Food and Agricultural Organization (FAO) convened today at FAO Headquarters in Rome, Italy. Under its consideration of constitutional and legal matters, the Council agreed to establish an Open-ended Working Group to conclude negotiations on the International Undertaking on Plant Genetic Resources for Food and Agriculture (IU). The Working Group convened in afternoon and evening sessions to discuss outstanding items under: Article 2 (Use of Terms), 4 (Relationship with Other International Agreements), 13 (Facilitated Access to Plant Genetic Resources for Food and Agriculture [PGRFA] within the Multilateral System [MS]), 19 (Financial Resources) and the draft resolution for the IU's adoption. The Working Group follows an informal Friends of the Chair meeting, which met on 25, 26 and 29 October 2001, to discuss these and other issues.

### FAO COUNCIL

FAO Council Chair Sjarifudin Baharsjah (Indonesia) opened the session. FAO Director-General Jacques Diouf noted that 800 million people do not have adequate access to food—the most basic human right. He urged progress toward the goals of the World Food Summit and in sustainable agriculture.

Under discussion on constitutional and legal matters, the Chair of the Committee on Constitutional and Legal Matters (CCLM), Moussa Bocar Ly (Senegal) reviewed the work of the Committee's 72nd Session, which met from 8-10 October 2001. Regarding the IU, Council Chair Baharsjah proposed establishing an Open-ended Working Group to conclude the negotiations on the IU for adoption by the upcoming FAO Conference. The US, commenting on the Working Group's terms of reference, requested the opportunity to introduce new text in certain areas. The Council agreed to establish the Working Group with Amb. Fernando Gerbasi (Venezuela) as its chair.

### OPEN-ENDED WORKING GROUP ON THE IU

Chair Gerbasi convened the first session of the Open-ended Working Group on the IU. He noted that the text approved by the sixth Extraordinary Session of the CGRFA had been forwarded to the CCLM, which declared that it was in accord with FAO Article XIV and proposed minor modifications contained in document CL 121/5. Chair Gerbasi then presented a revised draft, entitled "The International Treaty on Plant Genetic Resources for Food and Agriculture," incorporating discussions from the Friends of the Chair meeting.

CUBA, on behalf of the G-77/CHINA, with the RUSSIAN FEDERATION, urged delegates to consider only bracketed language and avoid reopening agreed text. BELGIUM, on behalf of the EC and its Member States (EU), called for consideration of the list of crops in Annex I and analysis of the resolution to be presented to the FAO Conference. The US hoped to add language that would enable all to sign the treaty. AUSTRALIA stressed upholding rights and obligations of Parties to other treaties.

**ARTICLE 2:** Delegates considered newly revised definitions for: PGRFA, defined as any genetic material of plant origin of actual or potential value for food and agriculture; and genetic resources, defined as any material of plant origin, including reproductive and vegetative propagating material, containing functioning units of heredity. Chair Gerbasi also noted new text in the chapeau stating that for the purpose of this treaty, terms would not cover trade in commodities. MEXICO, with URUGUAY, requested clarification on "commodities." CANADA responded that the reference avoids confusion between genetic resources, such as seeds, and commodities that are food products.

Many countries supported the revised definitions. Regarding genetic material, the US proposed replacing reference to reproductive and vegetative propagating material with reference to reproductive or vegetative propagating material. ARGENTINA, BRAZIL, IRAN, MALAYSIA and PHILIPPINES opposed. Chair Gerbasi, supported by the G-77/CHINA and the RUSSIAN FEDERATION, proposed that one country's disagreement could be expressed in a footnote, and the US objected. AUSTRALIA suggested deferring decision pending discussion on Article 13.2(d). Chair Gerbasi declined, stating that the text would be forwarded with a footnote to the FAO Conference for decision.

**ARTICLE 4:** Regarding Article 4, on the treaty's relationship with other international agreements, BRAZIL, with ANGOLA and ARGENTINA, proposed removing brackets from the existing text. The EU, supported by BULGARIA, ETHIOPIA, NORWAY and SWITZERLAND, proposed deleting the provisions and including preambular language similar to that in other international agreements, recognizing that "this treaty and other international agreements in the field of trade and environment are mutually supportive." AUSTRALIA noted that it could not accept preambular language, and, supported by ARGENTINA, CANADA and the US, proposed language stating that "nothing in this treaty shall affect the rights and obligations of the Contracting Parties under other international agreements." NORWAY stated that this would subordinate the treaty to other international agreements.

IRAN noted that developing countries are generally the suppliers of PGRFA and thereby are concerned that their rights be protected and that this agreement not be subordinated to other

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agreements. NORWAY proposed that preambular language from the Cartagena Protocol on Biosafety could be added, "emphasizing that this treaty shall not be interpreted as implying a change in rights and responsibility of a Party under any existing agreements," and "understanding that the above recital is not intended to subordinate this treaty to other agreements." BRAZIL also noted the possibility of using the existing text, while deleting language on implying no change in the rights and obligations under existing agreements or being subordinate to them.

Chair Gerbasi suggested that countries hold informal consultations on the proposed options.

**ARTICLE 13.3(d):** In Article 13.3(d), on IPR and facilitated access under the MS, delegates debated two bracketed options. The first, supported by MALAYSIA and THAILAND, states that recipients shall not claim any IPR that limits facilitated access to PGRFA, or their genetic parts or components, in the form received from the MS. The second, supported by the EU and IRAN, adds that modified PGRFA may be the object of IPR, provided that criteria for such rights are met. ARGENTINA, BRAZIL, NORWAY, URUGUAY and VENEZUELA preferred this option but could accept either one.

ANGOLA proposed a third option, preventing IPR that restrict access particularly on any genetic material as found in nature, even if isolated, and acknowledging IPR provided that they are the results of innovations that produce new plant products and that other criteria for such rights are met. BRAZIL, COLOMBIA, CUBA, ETHIOPIA and IRAN supported this compromise language, while CANADA and the US opposed.

AUSTRALIA, with CANADA and the US and opposed by IRAN, proposed a fourth option acknowledging that where national law so permits, recipients may claim IPR to innovations derived from PGRFA or their genetic parts or components. BULGARIA suggested adding text to Australia's proposal as a fifth option, specifying that every IPR claim would be subject to recognition by the Governing Body.

CANADA proposed a sixth option, stating that facilitated access to PGRFA or their genetic parts or components would be ensured by the impossibility of recipients to claim any IPR over these resources in the form they were at the time they were included in the MS.

IRAN proposed a seventh option, merging the proposals from Angola and Australia, stating that recipients may not claim IPR that limit facilitated access and acknowledging that innovations derived from such PGRFA may be the objects of IPR provided that facilitated access shall not be limited.

ZAMBIA, with CANADA, MALAYSIA and NORWAY, reminded delegates that Article 13 concerns facilitated access to genetic material, not patenting of components. SWITZERLAND, with CANADA, proposed deleting the entire provision. RWANDA requested clarity on which material could fall under IPR. Gerbasi said that the first option was the only viable one and appealed to delegates to accept it. CHINA and POLAND agreed. IRAN and COLOMBIA stipulated deletion of reference to "in the form." JAPAN proposed leaving both options in brackets.

Chair Gerbasi suspended discussion to allow for regional consultations. After informal regional discussions, CUBA on behalf of the G-77/CHINA, agreed to work on the basis of the first option.

**ARTICLE 19.4(d):** In the evening, delegates discussed bracketed text in Article 19.4(d), on avoiding subsidies, in a provision on providing financial resources for national activities for conserving and sustainably using PGRFA. The EU, JAPAN, MALAYSIA, NORWAY, PERU, SWITZERLAND and THAILAND supported deleting bracketed language. The EU noted that the provision focuses on conservation and sustainable use, and THAILAND noted that subsidies should be addressed under WTO Agreements.

PERU highlighted the need to be able to subsidize the conservation of genetic resources. AUSTRALIA, with BRAZIL and URUGUAY, supported retaining the language, noting that approximately \$350 billion is spent on domestic and international trade subsidies, which could also lead to the distortion of PGRFA exchanges under the treaty. The EU stated that this language introduced trade issues inconsistent with the rest of the text.

Highlighting concerns over previous proposals on Article 4, BRAZIL, with ARGENTINA and CUBA, proposed language on avoiding trade-distorting measures. CUBA noted similar language in the Commission on Sustainable Development. AUSTRALIA proposed referencing production measures within Brazil's proposal and also expressed willingness to be more flexible regarding language on subsidies if appropriate text was integrated into Article 4.

CANADA highlighted language in the chapeau of Article 2 on terms not being intended to cover trade in commodities, and, supported by BULGARIA, proposed language stating that these financial resources shall be used to ends consistent with this treaty. The EU and NORWAY expressed conditional acceptance. AUSTRALIA stated that the proposal does not address domestic subsidies.

Chair Gerbasi stated that the text would remain bracketed.

**DRAFT RESOLUTION:** Delegates then addressed outstanding items in the draft resolution for the adoption of the treaty. Regarding two bracketed preambular provisions, one referring to Farmers' Rights and the other to the contributions of plant breeders and IPR, Chair Gerbasi noted provisional agreement on Farmers' Rights and plant breeders during the Friends of the Chair discussions. The US highlighted the positive role of IPR in the IU's benefit-sharing provisions. Delegates then agreed to remove the brackets from both provisions.

Regarding a provision on preparing a draft standard MTA for facilitated access taking into account recommendations of a proposed expert group, BRAZIL proposed modifying reference to the consideration of the expert group's recommendations and shifting a reference to Article 13.4. Following discussion, delegates agreed to take the expert group's recommendations into account as appropriate. Regarding the formulation of the MTA, delegates discussed whether to reference Article 13 in general or Article 13.4 specifically. Following discussion, they agreed to text referencing the MTA "provided for in Article 13.4."

### IN THE CORRIDORS

Amid the flurry of activity surrounding the FAO Council and Conference, the usual experts assembled in a last effort to clear remaining brackets from the IU's text. To some, the gathering of the Friends of the Chair seems to have reinforced lack of consensus on the key outstanding items, with some observing that the Working Group's discussions often mirrored those already held by the Friends of the Chair and in previous Contact Group meetings.

Others maintain optimism that with positions so clearly defined, it is now high time for the group to prove that this painstakingly negotiated treaty has not been undertaken in vain. With the proverbial witching hour at hand, the questions riffing through the corridors include: how much can the group accomplish before Saturday's planned signing ceremony? what might be put to a vote by the Conference? and could discussions even be prolonged into next week?

### THINGS TO LOOK FOR

**WORKING GROUP:** The Open-ended Working Group will meet at 10:00 am in the Green Room to reconsider Articles 13.3(d) and 19.4.