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THIRD EXTRAORDINARY SESSION OF THE COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE: 9-13 DECEMBER 1996

The Third Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture (CGRFA-EX3) was held at FAO Headquarters in Rome from 9-13 December 1996. During the week-long meeting, delegates focused on Farmers' Rights, scope and access to genetic resources in relation to the revision of the International Undertaking (IU) on Plant Genetic Resources in harmony with the Convention on Biological Diversity (CBD). Building on the results of a two-day meeting of the Commission's standing Working Group, during which several countries put forward proposals, delegates confronted both the political and intellectual complexities of revising the International Undertaking.

Although the meeting technically constituted the third formal negotiating session for the revision of the IU, CGRFA-EX3 can be characterized as a constructive pre-negotiation exercise. The meeting did not produce any new negotiated text, but it did make progress on difficult and often divisive issues. Many delegations moved beyond political posturing in order to clarify the concerns and interests that underlie their different positions. A working group on Farmers' Rights allowed for the frank exchange of often conflicting views. The G-77, the EU and the US each tabled text on Farmers' Rights that will serve as the foundation for the Commission's future deliberations on this issue. CGRFA-EX3 also commissioned a "two-step" study setting out the various options for scope and access under a revised IU, and assessing the viability of these arrangements. Finally, the Commission agreed on arrangements for the continuation of its work on the IU. In particular, in agreeing to devote the first two days of the next Commission meeting to regional consultations, countries will be able to better consolidate their positions for the next round of negotiations.

A BRIEF HISTORY OF THE PROCESS

Plant genetic resources (PGR) constitute perhaps the most important part of biodiversity: the variation between and among food crops; the trees that supply timber, fuel, food and fodder; and the plants that provide oil, rubber, fiber, medicinal plants, etc. PGR

encompass the plants that have been carefully managed and nurtured by humans in farms, fields and forests throughout the world, as well as wild relatives of these plants. PGR provide plants with their particular characteristics including chemical composition, nutritional value, resistance to pests and diseases, and adaptation to particular environments.

No country is self-sufficient in PGR. For instance, North America is completely dependent upon other regions of the world for its supply of genetic diversity for its major food crops; sub-Saharan Africa is approximately 85 percent dependent on other parts of the world. Despite this interdependence, there is asymmetry in the availability of PGR, on the one hand, and the means to conserve them and benefit from them, on the other. It is the relatively "gene poor" countries that possess the financial and technical resources necessary to benefit from the use of PGR, most of which originate in developing countries. It is this North-South imbalance that has been both the driving force behind and the main obstacles to efforts to secure international access agreements.

THE FAO GLOBAL SYSTEM

In 1983, the FAO established the intergovernmental Commission on Plant Genetic Resources and adopted the non-

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binding International Undertaking on Plant Genetic Resources (IU). The Commission, renamed the Commission on Genetic Resources for Food and Agriculture (CGRFA) in 1995, is currently comprised of the 149 member States of the FAO. The Commission and the International Undertaking constitute the main institutional components of the Global System for the Conservation and Utilization of Plant Genetic Resources for Food and Agriculture, which also includes other international instruments and technical mechanisms being developed by the FAO.

At its most recent regular session, held in June 1995, the Commission concentrated on two issues in particular: negotiations for the revision of the International Undertaking (the focus of the first extraordinary session of the Commission in November 1994) and preparations for the Leipzig Conference (the focus of a second extraordinary session of the Commission in April 1996).

THE INTERNATIONAL UNDERTAKING: The International Undertaking, the first comprehensive agreement on PGR, was established in November 1983 as FAO Conference Resolution 9/83. Its objective is to ensure that plant genetic resources — especially species of present or future economic and social importance — are explored, collected, conserved, evaluated, utilized, and made available for plant breeding and other scientific purposes. It is based on the principle that PGR should be “preserved, and to be freely available for use, for the benefit of present and future generations” as part of the “heritage of mankind.” This principle, however, was subsequently subjected to “the sovereignty of States over their plant genetic resources” (Resolution 3/91).

Although a non-binding agreement, the IU was not adopted by consensus since eight developed countries formally recorded reservations. Over the years, through a series of additional interpretive resolutions, the IU has achieved wider acceptability. As of December 1996, 111 countries had adhered to the IU, with Brazil, Canada, China, Japan, Malaysia and the US as notable exceptions.

The thirteen years since the IU’s adoption have seen heightened interest in and awareness of the issue of biodiversity, culminating in the entry into force of the Convention on Biological Diversity in 1993. Advances in biotechnology and developments in related matters concerning intellectual property rights have added urgency, and further complications, to the need to further develop an international regime relating to the management of PGR. Countries are now looking anew at the IU as a possible vehicle for this purpose.

In April 1993, the CGRFA considered the implications of the 1992 UN Conference on Environment and Development (UNCED), and the CBD in particular, for the IU. Recognizing that the CBD would play a central role in determining policy on PGR, the CGRFA agreed that the IU should be revised to be in harmony with the Convention. To date, two sessions of the Commission included such negotiations: the First Extraordinary Session held in November 1994 and the Sixth Regular Session held in June 1995. At this last meeting, the Commission asked the Secretariat to prepare a “single consolidated text”, reflecting written submissions by countries. This Third Negotiating Draft (3ND) juxtaposes IU language with CBD language on related provisions.

SECOND EXTRAORDINARY SESSION OF THE CGRFA: The Second Extraordinary Session of the FAO Commission on Genetic Resources for Food and Agriculture (CGRFA-EX2) was held at FAO Headquarters in Rome from 22-27 April 1996. During this meeting, delegates addressed several issues in preparation for the Fourth International Technical Conference on Plant Genetic Resources. These included: the first comprehensive state-of-the-world report on plant genetic resources, which was forwarded to the Conference; and a heavily bracketed

Global Plan of Action, which was further consolidated by a two-day working group meeting held from 10-12 June in Rome.

ITCPGR-4: The Fourth International Technical Conference on Plant Genetic Resources (ITCPGR-4), meeting in Leipzig, Germany from 17-23 June 1996, agreed on an international programme for the conservation and utilization of plant genetic resources for food and agriculture (PGRFA). Representatives of 148 States adopted the Leipzig Declaration, the Conference’s key political statement, and a Global Plan of Action (GPA), the Conference’s main substantive output. Contentious issues, including financing and implementation of the GPA, technology transfer, Farmers’ Rights and access and benefit-sharing, were the subject of ongoing contact group consultations. Their resolution, adopted as a package by the final plenary, represented a careful compromise of strongly held positions. Delegates were also presented with the first comprehensive Report on the State of the World’s Plant Genetic Resources, and a progress report on the revision of the International Undertaking.

ELEVENTH SESSION OF THE WORKING GROUP: The Eleventh Session of the Working Group (WG-11) of the CGRFA was held at FAO Headquarters from 5-6 December 1996. Although WG-11 did not, as mandated by CGRFA-EX2, prepare a simplified text to serve as a basis for the Commission’s negotiations, it did address the issues of scope, access and benefit-sharing (Farmers’ Rights). Written proposals and papers were submitted by Brazil, France, the US, Canada and the International Plant Genetic Resources Institute (IPGRI). These served as the basis for further discussions at CGRFA-EX3.

REPORT OF CGRFA-EX3

The Third Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture (CGRFA-EX3) was officially opened by Commission Chair José M. Bolivar (Spain) who noted the spirit of compromise that prevailed during the meeting of the Working Group that preceded CGRFA-EX3. He expressed hope that the Commission would take significant steps toward achieving the objectives, which are in the genuine interest of the international community. Mr. Abdoulaye Sawadogo, Assistant Director-General of the FAO’s Agriculture Department, delivered an opening statement on behalf of the FAO Director-General. Welcoming new members to the Commission and observers from other UN organizations, IGOs and NGOs, he stated that the major task in 1997 would be to follow up Leipzig, particularly in terms of financing, implementing and monitoring the GPA as well as making progress on the revision of the IU. Delegates observed a minute of silence in memory of Mr. John Suich, who had led the UK delegation in previous meetings of the Commission.

ORGANIZATIONAL MATTERS: Delegates adopted the provisional agenda and timetable (document CGRFA-EX3/96/1 and 2), containing the following items: continuation of negotiations for the revision of the IU; report of the Eleventh Session of the Working Group; continuation of negotiations; and other business, including follow-up to ITCPGR-4.

In addition to José Bolivar, who was elected Chair of the Commission at its sixth session in June 1995, the Commission elected Mr. Moorosi Raditapole (Lesotho) and Ms. Kristiane Herrmann (Australia) as first and second Vice-Chairs, respectively, and Mr. Fernando José Marroni de Abreu (Brazil) as Rapporteur.

The Commission then addressed the Report of the Working Group before opening the floor to formal statements in plenary, which continued for the rest of the day on Monday. The meeting then established two open-ended working groups. The Working Group on Farmers’ Rights, chaired by Mr. R. S. Paroda (India), held four sessions on Tuesday and Wednesday before reporting back to plenary on Thursday. The Working Group on Scope and

Access held two sessions on Tuesday, at the end of which the Chair, Mr. José Miguel Bolívar, established a “Friends of the Chair Contact Group” (FOC). This group met under the chairmanship of Dr. Bryan Harvey (Canada) for three sessions on Wednesday before reporting back to plenary on Thursday. On the basis of these plenary interventions, the meeting decided to reconvene an “expanded” FOC (on the basis of regional representation, also drawing on the original participants to ensure continuity) in parallel to plenary. This expanded Friends of the Chair Contact Group met for one session on Friday morning. Chair Harvey then presented the results of this second round of discussions in plenary on Friday afternoon.

REPORT OF THE WORKING GROUP

The Report of the Eleventh Session of the Working Group of the CGRFA (CGRFA-EX-3/96/3) was presented by its Chair, Mr. R. S. Paroda (India). Paroda noted that the Report included appendices containing written submissions by Brazil, France and the US. IPGRI and Canada had also made available information papers (CGRFA-EX3/96/LIM/2 and LIM/3, respectively).

Regarding scope (IU Article 3), the report noted that: there was general agreement that the IU should apply to PGRFA, with specific reference to food security; the scope of any mechanism for access and benefit-sharing might be narrower than the scope of the overall IU; consideration of the possible inclusion of forest genetic resources should be postponed, until the conclusion of discussions in other fora; the scope of any agreement on access and benefit-sharing would involve resolving a number of issues, such as determining whether the same arrangements should be made for various classes of genetic resources or only apply to specific ones.

Several options were considered with respect to access (IU Article 11), and related benefit-sharing, which might be provided on a multilateral basis, a bilateral basis or on a mixed basis. For instance, one option provided for the Commission to establish a mechanism for access to genetic resources in accordance with national legislation and benefit-sharing. Another option was to bring an indicative list of genetic resources that contribute to food security, while allowing countries to include or exclude material according to agreed criteria. There was general agreement that should a list be developed, provisions should be made for countries to voluntarily designate additional materials under the agreement. The report noted that the expansion of intellectual property rights (IPR) had both advantages and disadvantages with respect to access and benefit-sharing.

In considering the issue of Farmers’ Rights (FR) (IU Article 12), the report noted that: according to the present IU, the concept of FR was based on recognition of the past, present and future contribution of farmers in conserving, improving and making available PGRFA; a broader concept of FR appeared to be emerging, which may lead to an overall legal definition; and some elements of this definition would be more appropriately developed at the national level, and some countries are developing national mechanisms to promote FR.

A number of countries commented on the report presented by the Chair. BRAZIL noted that no general agreement was reached on either the scope of the IU or on access. On behalf of the African Group, ETHIOPIA, supported by ZIMBABWE and EGYPT, stated that FR should not be regarded as a concept; it is a reality which is being implemented in a number of countries. The US, supported by IRELAND, on behalf of the EU, stated that, as this was a Chair’s report, it was not to be edited and that comments by delegates could be reflected in the Commission’s report. In response, INDIA noted that contentious issues, such as the “concept” of FR, may need consideration by the Commission.

FORMAL STATEMENTS

The US expressed its commitment to making progress on the revision of the IU and that in light of the CBD, with its clear provisions for sovereignty over natural resources and access on mutually agreed terms, it is necessary to examine where further multilateral rules are needed. The US supported focusing only on those resources for which there is an agreed global interest in maintaining open access. BRAZIL called for the establishment of a facilitated access regime for PGR that constitutes the basis for human world food production, but noted that agreements on access and scope are dependent on progress on the issue of FR. CHINA stated that lack of funding and technology has affected developing countries’ conservation and utilization of PGR, the historic foundation of farming communities. CHINA further asserted that developed countries have a responsibility and an obligation to compensate the contribution of farmers since genetic resources are mainly held in developing countries.

CANADA underscored its report, which surveys benefits in relation to food security. Given that the CBD underscores the fair and equitable sharing of benefits through access, transfer, and by appropriate funding, its report attempts to illustrate how benefits can be shared in ways that are in keeping with the CBD. MALAYSIA underscored that the IU was being revised in the context of a changing global economy based on free market forces and increasing privatization, and called for benefit-sharing between those that “improve” genetic resources and those that provide genetic resources “for improvement”. MEXICO highlighted two key items with regard to the IU that required resolution — *ex situ* collections prior to the CBD and Farmers’ Rights — noting that although this last issue is controversial, it raises important legal, political and ethical issues that must be addressed. Mexico concluded that benefit-sharing, which is linked to access, scope and FR, will require balancing benefits and obligations on both sides.

Noting that FR is no longer a concept but a reality, ZIMBABWE underscored the importance of empowering women, who represent the majority of farmers in Africa. Their indigenous knowledge should be developed not through expropriation into formal R&D systems but rather through FR and benefits. COLOMBIA asserted that the revision of the IU was part of a process designed to establish a new international order for more balanced and fair agricultural developments, based on the recognition of indigenous people and FR. Any attempt to establish a free-access regime without compensation would be in contravention rather than harmony with the CBD. EGYPT objected to separating FR from scope and access, and urged all members to reach a joint agreement on all three issues in a fair and equitable manner.

The EU stressed the need for basic agreement on scope, access and FR as follows: with regard to scope, the IU should cover all PGRFA, with an emphasis on those resources that contribute to world food security; provisions for access should be based on mutually-agreed terms that cover all material; and benefit-sharing should stress the multiplicity of benefits that can be shared, particularly through the use of existing mechanisms such as the FAO Global System, CBD, UNDP, World Bank, UNEP and the Consultative Group on International Agricultural Research (CGIAR). Expressing hope that a revised IU will become a protocol under the CBD, SWEDEN stated that harmonization will require addressing every CBD article, not just Article 15 on access. Further noting that the erosion of PGRFA is caused primarily by unsustainable farming systems, SWEDEN called the CBD’s Third Conference of the Parties’ (COP-3) decision on agricultural biodiversity a “breakthrough” in intergovernmental negotiations that should guide the revision of the IU.

Noting that the Leipzig Conference would facilitate progress here, FRANCE outlined its proposal for access according to a two-pronged approach in which parties would designate, on a species-by-species basis, materials for international networks, and access to non-designated materials would be negotiated on a case-by-case basis. VENEZUELA noted that the implications of PGR for food security necessitated the implementation of the IU as soon as possible, and stated that FR must also be recognized as more than a concept since it is also interlinked with issues of access and technology transfer.

SOUTH AFRICA described its introduction to PGR issues as an “eye-opener”, particularly since it had been isolated from the FAO for many years. Although SOUTH AFRICA had been involved with the activities of many international agricultural organizations, these activities have been of a technical nature. The FAO, on the other hand, appears to be extremely politically loaded, making it difficult to follow the debates on technical issues without proper insight and prior knowledge of the political nuances, emotional and ideological sentiments and economic aspirations of the various players. INDIA agreed with the interventions by developing countries, in particular Malaysia, Brazil and the African Group, and called on the Commission to carry out its work in conformity with the decisions reached at COP-3 and the mandate of the CBD as follows: to focus on scope and agricultural biodiversity for ensuring food security; to address access in bilateral and multilateral terms; and to acknowledge that FR was no longer a concept but a reality.

GHANA supported China, Malaysia and Zimbabwe on the issue of FR, noted the lack of funding in developing countries for the sustainable use of genetic resources, and called for a provision in the IU that would make funds available for *ex situ* and *in situ* conservation. BOLIVIA noted that the progress made at Leipzig provided momentum for deliberations on the revision of the IU, and that this must be done in harmony with the CBD.

PERU noted the interrelationship between the issues of scope and access and FR and that the future work of the Commission should take into account the decisions from COP-3 and be in harmony with the objectives of the CBD.

GERMANY stated that the main objective of the Commission should be to maintain and strengthen cooperative activities for PGRFA and sustainable benefit-sharing that are ongoing at the regional and national levels. Noting the important changes in the world economy, GERMANY called for the involvement of the private sector. JAPAN underscored the importance of using PGRFA as a basis for meeting the present and future needs for food security, and noted that the IU will become a strong tool in the “post-CBD” era. JAPAN further noted that, with regard to scope, the provisions of the CBD should not be applied retroactively to PGR, and that FR are merely a conceptual issue and cannot be placed in the same category as Plant Breeders’ Rights (PBR), which have a firm legal IPR basis.

The CBD SECRETARIAT then presented the COP-3 decisions of particular relevance to CGRFA-EX3. The decision on agricultural biodiversity calls for the effective and speedy revision of the IU in harmony with the CBD. While noting that the legal status of a revised IU had not yet been decided, the COP affirmed its willingness to consider a decision by the FAO Conference “that the revised International Undertaking should take the form of a protocol.” The decision on access to genetic resources urges the rapid conclusion of the negotiation for the adaptation of the IU in harmony with the CBD, in particular providing solutions regarding access to *ex situ* collections not acquired in accordance with the Convention.

ITALY’S NATIONAL ACADEMY OF SCIENCES underscored the paradox that while knowledge of biotechnology

and of groups of genes is increasing, their extinction is occurring more rapidly. In briefing the delegates on the submission of an appeal written by himself and the M.S. Swaminathan Research Foundation to concerned scientists throughout the world (since signed by 900 scientists and experts, and presented to the World Food Summit), the representative urged scientists who are advisers to their governments to join in this effort to recognize the importance of biodiversity for food and agriculture and to promote the principles of the CBD.

The International Union for the Protection of New Varieties of Plants (UPOV) underscored a growing list of member States who are developing countries. Outlining farmer’s privilege legislation under the UPOV Convention, the representative stated that: while farmer’s privilege is implicit under the 1978 Act, it is specifically referred to as an option available to member States under the 1991 Act; and member States can restrict breeders’ rights so long as it is within “reasonable limits” in order to allow a farmer to produce his own seed for use in the next growing season.

The Rural Advancement Fund International (RAFI), on behalf of non-industry-affiliated NGOs, stated that the revised IU should include agriculture in its totality and should provide for the most full and free exchange of germplasm possible, considering that the key to global food security is local conservation, development and use of GR. Further asserting that non-adherence to the IU means no access, RAFI stated that the core conditions for access must include FR, no IPR and benefit-sharing. VIA CAMPESINA asked the Commission to bring about a broad-based consultation process, as stated in the Leipzig report, with producers’ organizations, peasants, indigenous people and farmers at the national, regional and international levels. Stating that such a process would allow farmers to participate with governments in the development of implementing policies for the rights of their peoples, VIA CAMPESINA then outlined 11 principles on which the international community should recognize FR.

GRAIN stated that a fundamental and integral part of FR is the right of farmers and local communities to fully participate in the shaping, definition and implementation of the measures and legislation of FR at the national and international levels, as well as in the development, implementation and review of the IU.

SCOPE AND ACCESS

WORKING GROUP ON SCOPE AND ACCESS: When the Working Group on Scope and Access convened on Tuesday delegates had before them: the Third Negotiating Draft (3ND) of the Revision of the International Undertaking on Plant Genetic Resources; the Report of the Chair of the Eleventh Session of the Working Group of the CGRFA (WG-11 Report contained in CGRFA-EX3/96/3), including an appendix containing submissions by the US, France and Brazil; an informal paper presented by the European Community and its member States; an information paper by Canada, “Benefits of the Use of Genetic Resources in Agriculture” (CGRFA-EX3/96/LIM/3); and a study by IPGRI on “Options for Access to PGR and the Equitable Sharing of Benefits Arising from their Use” (CGRFA-EX3/96/LIM/2).

Although the Chair noted general agreement for his proposal, consistent with previous CGRFA decisions on this matter — to use 3ND as a starting point for discussions on scope (Article 3 of the IU) and access (Article 11 of the IU) — delegates deliberated the order in which to address these issues. The US proposed starting with a specific rather than general consideration of scope by addressing the scope of the IU’s access provisions in Article 11. In so doing, delegates could determine whether the IU should seek to cover all situations in which access to PGRFA is sought (as highlighted in the EU paper) or only a sub-set of situations, such as those in which there is a global interest in open access rather than

on mutually agreed terms (MAT). This would allow for consideration of a broad access regime or a narrower one.

The EU called for a clear division of work between scope and access, and proposed starting with the scope provisions of the IU. MALAYSIA expressed its preference for commencing with scope, noting that IPGRI's study set out a way to explore the definition of scope, which could then be incorporated into legal language. BRAZIL expressed support for the US proposal to start with the scope of access provisions in Article 11, on the basis that it would allow delegates to identify what type of resources they were prepared to agree on. Reminded by the EU that it represented 15 member States, the Chair stated that the WG would first consider scope.

BRAZIL stated that it could be more "flexible" in its consideration of scope if access was addressed first. The Chair asked whether delegates might want to reconsider their decision in light of a conclusion in the WG-11 Report to the effect that in order to define scope, a number of other issues, including access, would need to be decided first.

GERMANY explained that the EU distinguished between two different scopes: one regarding the overall IU (encompassing a framework for activities such as conservation and sustainable use), which the EU wishes to be wide; the other regarding arrangements for access. Arguing that it would be easier to agree on the former scope, GERMANY stated that the latter should be discussed later. The US responded that for the EU's proposal to have the desired effect, one need not have a general scope article. Indeed, the US argued that general scope articles often raised legal questions regarding the coverage of operative provisions of agreements, and that the norm was to apply different degrees of scope to different provisions.

Asserting that the activities under the different provisions of the IU are interlinked and that their scopes should not differ, CANADA deplored a "retreat" to previous positions given that the WG-11 discussions had been so fruitful. Emphasizing the urgency of moving forward, CANADA suggested first discussing scope as it applied to Article 11, with both the expectation that the scope of that article will likely apply to all other IU provisions and the understanding that other delegations may have differing views. The EU later agreed to first discuss access without prejudice to scope. In an attempt to move discussion forward on access arrangements, NEW ZEALAND stated that the objectives of the agreement could best be promoted through a network of participating institutions, based on mutually agreed terms, and recorded in appropriate contracts.

BRAZIL asserted that the first question should be whether the IU should address access to all PGRFA or only focus on a limited group for which there is global interest in maintaining unrestricted or facilitated access. Noting that the former approach has previously resulted in deadlock because not all types of PGRFA are seen by all countries as requiring the same type of access and benefit-sharing, BRAZIL underscored the achievability of an agreement, on mutually agreed terms, on access and benefit-sharing for a list of PGRFA that are important to world food security. CANADA called for a more ambitious agreement and challenged delegates to outline their rationale for wishing to exclude specific crops from the IU. The US stated that a list should not apply to areas where is agreement on unrestricted access, but should be confined to germplasm held in active collections of international centres and national genebanks when it is acquired prior to the entry into force of the CBD or acquired post-CBD but pre-revised IU, for which no conditions have been specified. ETHIOPIA, supported by MALAYSIA and the EU, stated that the IU should encompass access to all PGRFA because any list might restrict the future expansion of human food needs. COLOMBIA asserted that

access to PGRFA would need to be accompanied by access to corresponding technology and legally-protected material, as addressed in the CBD. Cautioning against attempts to renegotiate the basic principles underlying CBD Article 15 (access to genetic resources), MALAYSIA stated its willingness to discuss pre-CBD collections.

CANADA identified two types of scope: biological scope (e.g., covered crops) for which delegates had proposed either a limited list or no limitations unless justified on the basis of objection to other crops being included; and temporal scope (e.g., pre- or post-CBD). On this basis, CANADA suggested that delegates focus on language in Article 3 but in application to Article 11. In response to NORWAY's objection to a restrictive list, BRAZIL explained that its criteria for inclusion in the list — world food security and interdependence — justified clear multilateral terms of access and benefit-sharing.

Recalling CANADA's challenge to countries to outline any objections to specific crops, the UK noted that COP-3 would not have called for the CGRFA to reach a speedy conclusion to revising the IU if Parties had deemed the issues to have been adequately addressed by the CBD.

In response to GERMANY's statement that food security was achieved mainly in the "farmer's field", BRAZIL noted that international agreements do not preclude countries or regions from negotiating agreements to ensure access to promote the sustainable use of regionally or locally important crops. He hoped this concern would be converted into financing the GPA's chapter on under-utilized crops.

Noting that human consumption is not based solely on PGR, FRANCE stated the IU should be as broad as possible, proposing that every country identify which material would be subject to free and unrestricted access. He further stated a proliferation of access regimes, through the creation of categories at local, national and regional and international levels, would not facilitate access in accordance with CBD Article 15.2.

The US cited the UN Convention on the Law of the Sea (UNCLOS) as a legal precedent for a regime that allows for the amendment of lists over time in accordance with scientific change.

On behalf of the African Group, TANZANIA stated that access should be open to all PGRFA, but would not automatically be free and that rules of access would need to be negotiated. COLOMBIA stated that ease of access and food security should not undermine the CBD's benefit-sharing provisions.

CANADA underscored the need to come to a multilateral agreement that will facilitate access for the broadest scope of crops under the terms of the CBD and in respect of national laws on property. In response to CANADA's query as to whether Brazil might be willing to consider a longer list initially (given that delegations might have different ideas as to which crops might meet the two criteria), BRAZIL responded that they are open to suggestions.

ARGENTINA stated that Resolution 3 of the Nairobi Final Act, which called for the harmonization of the IU in line with the CBD, underscored the promotion of sustainable agriculture, not food security. AUSTRALIA stated that although it could appreciate the apparent logistical simplicity of lists, the exclusion of pre-CBD *ex situ* collections would create a highly ambiguous situation, and called for the scope to be "all-embracing". The US proposed adding specificity to discussions on access provisions, by asking if there be one set of rules or different sets of rules for different sets of PGRFA. GERMANY stated that the EU paper provides for a broad, flexible and multilateral system within which institutions and countries would designate all the PGR in the collections, subject to exceptions. In response to BRAZIL's query as to whether

this represented the final EU proposal that appeared to be more of a compilation rather than a coordination of positions, FRANCE responded that it was not yet definitive but rather an informal paper designed to advance discussions.

On behalf of developing countries of Asia, MALAYSIA stated that if such a list were agreed, it would be necessary to discuss conditions to facilitate multilateral access to PGR necessary for food security. TANZANIA concurred, noting that it would only be possible for Article 15.2 to truly facilitate multilateral access if national sovereignty is respected. Noting that the CBD's recognition of sovereignty over natural resources does not grant property rights over genetic resources, CANADA stated that the UN system allowed for national governments to exercise sovereignty while entering into multilateral agreements. In response to a similar contention by the US that agreement on multilateral rules on access could only build on Article 15's provisions regarding mutually agreed terms, MALAYSIA maintained that the terms of access under a multilateral agreement would need to implement Article 15. Expressing concern that terminology such as "open" and "unrestricted" could be imposed on nations in such a way as to hamper national legislation, TANZANIA stated that the African Group wanted to negotiate the terms of access under a multilateral agreement according to CBD Article 15.

ANGOLA, on behalf of the African Group, and MALAYSIA, on behalf of the developing countries of Asia, each tabled text that builds upon a pre-existing proposal for new wording in Article 3.1 of the 3ND. While the African proposal underscores species of economic and social importance having actual or potential value, the Asian proposal underscores agricultural crops of economic and social importance and having great interdependence among countries. Both proposals state that access to PGRFA shall be subject to national sovereignty and legislation, and linked with Farmers' Rights, technology transfer and benefit-sharing. JAPAN objected to including these issues in articles on scope, noting that they should be addressed in an article on objectives. Noting that it builds upon text from the CBD, CUBA supported the text proposed by ANGOLA, and requested that it be considered as a compromise. CANADA proposed that reformulation of Article 3.1, which makes links with elements of the IU not discussed by the CGRFA since November 1994, be postponed until delegates had completed consideration of Article 11.

At the beginning of the second session of the Working Group on Scope and Access, those countries who made submissions to the WG-11 Report outlined their proposals. Noting that the central question regarding access is whether the IU should seek to establish a comprehensive set of rules or whether to narrow the IU provisions on access to those genetic resources for which there is global interest in maintaining unrestricted access, the US stated its support for the latter option. In response to MALAYSIA's call for a clear understanding of the term "unrestricted access", the US explained that it meant "without conditions," but should be applied in only in specific circumstances. CANADA, MALAYSIA and the US deliberated whether the patenting of a gene sequence from an International Agricultural Research Centre or the inclusion of a patented gene in accessions in national or international collections would affect the availability of the germplasm from which it was derived. The US expressed concern that a focus on the most difficult scenarios would ignore the significant benefits from open access to the genetic resources of major food crops. ETHIOPIA noted a consensus among countries on the desire for access, but also on the need for compromise so as to ensure fair terms of access and benefit-sharing for all owners and users.

The UK expressed concern that the discussion on IPRs was getting into areas beyond the competence of the CGRFA, noting

the COP-3 decision on access, which requests the CGRFA to cooperate with the WTO through its Committee on Trade and Environment in exploring the linkages between CBD Article 15 and relevant articles of the WTO agreement on Trade-Related Intellectual Property (TRIPs).

Citing a document regarding access issues for consideration in Stage II of the revision of the IU (CGPR/6/95/8 Supp), which notes that the CBD provides for the right of access by other Parties subject to prior informed consent (PIC) and mutually agreed terms, ANGOLA asked whether "unrestricted" meant "free". The US maintained that the important point was that any benefits gained from restricting access to genetic resources that are widely held all over the world, far beyond their centres of origin, are outweighed by the benefits to potential users of freely available material. The US added that addressing certain cases in which global interest is such that access can be mutually agreed is not inconsistent with the CBD but rather builds upon it. COLOMBIA stated that in several Commission background papers, unrestricted was defined as "permanently available", but noted that such access required several conditions that are linked to benefit-sharing. CANADA added that the 3ND emphasizes that access shall be unrestricted for "research, breeding and educational purposes" but does not refer to commercial purposes. MALAYSIA complimented Canada for actually outlining some of the conditions for access and noted that conditions could also be discussed in line with CBD Article 15.2. Noting that the distinction made by Canada is inspired by patents and *sui generis* regimes, COLOMBIA stated another *sine qua non* for access, often required by access legislation, is access to information pertinent to the handling and use of PGR and participation by the country of origin in research on these genetic resources.

FRANCE explained that although protected varieties could not be sold directly, they could be used for research and breeding purposes, even privately, and this could be the subject of unrestricted access. Stating that there is no reason to have a harsher access regime for genetic resources than for PGR, FRANCE noted that although one cannot claim rights on genetic resources, it is possible to claim them on the results of research and then go on commercialize them. COLOMBIA asserted that the current strengthening of intellectual property regimes can run counter to the establishment of easy access. The US noted that it would be closer to the CGRFA's area of expertise if it posed the same questions from a different angle. Assuming unrestricted meant "not subject to conditions", the Commission could discuss categories of germplasm for which access is sought and the purposes for doing so.

FRIENDS OF THE CHAIR CONTACT GROUP: At the end of the second session, Chair Bolivar called for the creation of a small contact group of the "Friends of the Chair" (FOC) to be comprised of Brazil, Colombia, Angola, Ethiopia, Tanzania, Malaysia, Japan, Canada, the US, Poland and an EC representative. The FOC would meet in order to specify conclusions in light of the discussions in the Working Group on Scope and Access. The FOC, as initially constituted, met for three sessions under the chairmanship of Dr. Bryan Harvey (Canada), who presented the first Report of the Friends of the Chair's Contact Group (CGRFA-EX3/96/WGSA/1) to plenary on Thursday. The report outlined a list of options to be discussed in order to make progress in developing consensus text and is organized according the following questions:

- What would the objectives of/justifications for facilitating access through a multilateral agreement?
- To what genetic resources, in which locations, would such facilitated access apply? and
- How would access be facilitated?

The report also noted that several submissions to the FOC, including those made by the African Group and Australia, as well as those made to WG-11 by the EU, the US, France and Brazil, be added to the 3ND.

PLENARY: The International Plant Genetic Resources Institute (IPGRI) summarized the major findings of "Options for Access to PGR and the Equitable Sharing of Benefits Arising from their Use" (CGRFA-EX3/96/LIM/2), a study commissioned by CGRFA on the feasibility of possible systems for the exchange of PGRFA as well as the transaction costs likely to be incurred in the various system options. The study proposes that a mixed multilateral/bilateral option may be appropriate in certain circumstances, for example to promote benefit-sharing in the event of commercialization. In assessing the "web of different systems", the study notes that a current example of a multilateral system is the Consultative Group on International Agricultural Research (CGIAR). The study suggests that in the absence of agreement on a multilateral system, countries will work towards some form of multilateral exchange (e.g., regional cooperation or networks) due to the transaction costs of operating bilaterally.

Several delegations expressed appreciation for IPGRI's presentation, noting that it provided both food for thought, and a sounding board for either clarifying or articulating their own positions. In the ensuing discussion, the EU stated that the IPGRI had clarified scope in distinguishing between PGR for food and agriculture and PGR for pharmaceuticals. BRAZIL noted that the presentation had reinforced its understanding that genetic resources are subject to various forms of collaboration from bilateral to multilateral. CANADA highlighted the accommodation of bilateral arrangements within a global exchange system, and suggested that IPGRI consider the transaction costs of the various proposals on prior informed consent. MEXICO recommended that IPGRI provide a more precise description of materials held in International Centres in order to ensure their availability to humankind. COLOMBIA explained that the current networks in Latin America are ill-suited to a multilateral agreement, and called for new systems and a study on the technical, legal and economic implications of exchanges between public authorities and the private sector. The US stated that the international community has an interest in making existing networks work, and that it is essential to keep costs down and rules simple in devising any multilateral system.

The International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL) underscored three key issues in the implementation of both the IU and the CBD: maintenance of and access to PGR; use of effective technologies; and protection of intellectual property. He explained that industry's need for high, short-term returns on investment meant that the private sector could not ensure adequate long-term maintenance of PGR. He noted that industry recognized that free access did not necessarily mean cost-free access.

GHANA underscored that genebanks continue to degenerate due to years of fruitless negotiations and the absence of networks in West and Central Africa. SWEDEN was encouraged by ASSINSEL's concern regarding genetic erosion. FRANCE noted the "goodwill" and willingness of plant breeders to participate in national conservation strategies on PGR.

ETHIOPIA stated that countries might better evaluate the advantages and disadvantages of various multilateral agreements if these were presented according to a "package" of scenarios on scope and access: wide scope and unrestricted access; wide scope and restricted access; limited scope and unrestricted access; or limited scope and restricted access. The US stated that a "matrix" presenting a variety of possibilities on scope and access would clarify some of the benefits of open and unrestricted access and

would allow for move forward, starting with international collections and then "broadening" from this "small" area. Noting Ethiopia's proposal to examine the costs and benefits of various options, FRANCE suggested developing a programme of work that would put future discussion on a new and better footing. Recognizing that the atmosphere of the meeting had improved, delegates deliberated how to proceed and eventually agreed to reconvene the FOC contact group, which would be extended to accommodate two representatives from each region, also drawing on the original participants to ensure continuity.

On Friday morning, the FOC Chair presented the results of this second round of discussions in report (CGRFA-EX3/96/WGSA/1/Add.1) which, allowing for numerous amendments proposed by delegates during plenary discussions, served as the basis for the Commission's decision on Scope and Access.

The report noted that although the FOC used Ethiopia's proposal for developing a matrix on scope and access as a basis for its deliberations, even a multi-dimensional matrix could not cover all important aspects, given the complexity of the issues involved. Therefore, the Commission recommended that IPGRI, in conjunction with the FAO Secretariat, carry out a study in two steps: a characterization of options on scope and access (to be completed by 31 January 1997 and circulated to the Commission for comments); and a "notional assessment" of the "pros and cons" of each option as well as of their viability. The study will draw on the issues raised on scope and access in the first report of the FOC (CGRFA-EX3/96/WGSA/1) as well as regional and country papers submitted to WGSA and WG-11. It was also suggested that the transaction costs of prior informed consent arrangements should also be studied. The final study will need to be completed in time to be of use to delegates in their preparations for CGRFA-7 in May 1997.

FARMERS' RIGHTS

The Working Group on Farmers' Rights, chaired by Mr. R. S. Paroda, met for four sessions on Tuesday and Wednesday. In its consideration of a revision of IU Article 12 on Farmers' Rights, the Working Group had before it the Third Negotiating Draft (3ND), the WG-11 Report and its annexes, a Secretariat non-paper, and a draft submitted by the EU. The Chair emphasized that the Working Group's task was not to revisit the entire IU, but to address the related issues that pertain to FR. He drew attention to the many legal issues involved, the relation of FR to the other Working Group's discussion on scope and access, and emphasized the necessity of harmonizing the IU with the CBD.

The Working Group on Farmers' Rights began its deliberations with a general discussion on IU Article 12. Rephrasing the FAO Legal Counsel's equation of FR to a "bundle of rights" as "a bundle of issues," the US noted that FR remains ill-defined, and emphasized the need to give careful consideration to the terms used in defining "rights." Reiterating its position from Leipzig, that FR must be related to national rather than international actions, the US stated that the exercise of rights is nationally determined, and that international law protects the rights of individuals as opposed to groups. To avoid circular discussion, the US stated that FR should not focus on terminology but should be addressed within the context of the IU and, specifically Article 12. In response to a question posed by ZIMBABWE, the US stated that existing multilateral regimes, such as the World Trade Organization (WTO), the World Intellectual Property Organization (WIPO) and the International Union for the Protection of New Varieties of Plants (UPOV), could protect traditional, indigenous and farmers' knowledge.

Underscoring the fact that the CBD recognizes the role of indigenous groups and local communities in maintaining and

developing biodiversity, ETHIOPIA, on behalf of the African Group, noted that individuals form groups and that if the individual is worth protecting under international law, then groups are worthy of even greater protection. ZIMBABWE added that in Africa indigenous knowledge has evolved through generations, and these generations constitute communities. INDIA emphasized that it is only within developed countries that individual rights are considered the only rights worthy of protection.

Although SWEDEN stressed the special responsibility vested with the international community concerning FR, since they were first launched in the IU, it supported the US's interpretation of FR as a "bundle of issues", and proposed: a ranking of issues related to implementation; an analysis of the legal implications of the collective rights associated with these issues; and identifying the most appropriate agency to address them. BRAZIL identified three measures for implementation of FR: the establishment of an international *sui generis* system to address areas not covered by UPOV and WIPO; the development of national legislation for this purpose; and an international mechanism to harmonize these national laws. Expressing its rejection of an interpretation of FR as a new fundamental human right, CANADA sought clarification on the definition of FR, and stressed the necessity of harmonization with national legislation. NORWAY categorized FR as an extension of IPR, and stressed the need to avoid discussing legal implications and to focus on operationalizing FR.

In the context of this debate, the FAO Legal Adviser noted that there is no precise definition for FR due to the difficulties in identifying the group affected. Originally, the term "vested in the international community" was used in an effort to provide a level of concreteness. He noted that the revision of the IU has brought broad recognition of FR, but also uncertainty as to the proper approach for implementation. In recent years, he explained that many strands of FR have emerged: "bundle of rights"; the use of a multilateral mechanism and fund to implement FR; the recognition of farmers' privilege; the protection of informal innovations; *sui generis* systems, and compensation to farmers for the use of PGR that they have developed. Several delegates suggested that this list be explored to see how FR are dealt with in each instance and how they enhance the IU.

FRANCE noted that the rights of groups and communities were not only complex, but far exceeded the framework of the meeting. One of the principles of UN is that States, not groups, be represented. If FR is pursued as an IPR or *sui generis* system, it should be covered by other fora, such as WIPO. FRANCE favored any measures that would promote access by farmers from the South, as it would contribute to implementing their rights and making them partners in sustainable development. CHINA supported international recognition of farmers' historical contribution to the conservation and utilization of genetic resources, explaining that developing countries will be the major beneficiaries of this contribution, and that lack of financial resources and know-how in developing countries has ultimately affected food security.

In response to requests by SWEDEN, BRAZIL AND FRANCE that relevant organizations participate in the discussion on FR, the WTO read passages on the contribution of genetic material by countries and communities from a recently "unrestricted" document that outlined the WTO Secretariat's views on the interface between the CBD and the TRIPs agreement.

GAMBIA expressed surprise that delegates were raising issues concerning FR since FR was developed initially to deal with the deficiencies in plant breeders rights and intellectual property rights. The AFRICAN GROUP reasoned that if the entire population can be represented on one extreme it can also be done at the other, and called for an expression of international will to recognize the

contribution of farming communities. MALAYSIA reminded the Working Group of its mandate to determine the mechanism for multilateral action that should be taken, and suggested using the proposal to establish the "International Fund" as a guide for determining general principles and priorities. ZIMBABWE asserted that FR are a matter of justice, whether environmental, social or economic issues were involved.

The UK explained that although groups can have legal identities through cooperatives, societies and other means, the danger in debating on an international level is that it employs a top-down approach that may not be helpful to the farmers themselves. Although an enabling framework may be called for at the international level, real action and implementation should be taken at the national level.

COLOMBIA said that the origin of the concept of FR pertains to the international community, and therefore should be addressed internationally as well as nationally. COLOMBIA also called for a national legal framework of *sui generis* legislation for the acknowledgment of FR, and strongly supported the maintenance of the farmers' privilege in IPR legislation, particularly with regard to patents. INDIA addressed the debate of community versus individual rights by referring to the EC, which is now given a seat next to all other countries, as evidence that a group can achieve legal recognition.

AUSTRALIA determined that the major issue is how to deal with FR in a legally-binding instrument and, given that it was not clear that the Working Group had agreed to text in the revised IU that would include FR, it was necessary to decide which principles would be included in the revised IU.

ARTICLE 12: Following this general discussion on Farmers' Rights, delegates proceeded to address IU Article 12 point-by-point. In addressing the individual points relating to FR, the Working Group used the 3ND as the basis for discussions. SWEDEN, supported by the US, noted the necessity of a consensus IU, and proposed a list of the relevant issues that could be used as the basis for preparations for negotiations at next meeting.

In discussing the title of IU Article 12, "Farmers' Rights", CANADA, supported by AUSTRALIA and the US, refused to commit to the language "Farmers' Rights" until the overall content of the article was finalized. EGYPT agreed to revisit this issue later but felt that an article titled "Farmers' Rights" was needed. INDIA said that the text could remain in brackets because FR is mentioned elsewhere.

ARTICLE 12.1: The Working Group then addressed IU Article 12.1, which recognizes the contribution that farmers of all regions have made to the conservation and development of PGR, which constitutes the basis of plant production throughout the world, and which forms the basis for the concept of FR. Suggestions were made by a number of delegates concerning language and replacement text was proposed.

FRANCE stated that FR should not remain in the IU since it may be considered ambiguous and encouraged the Working Group to determine the concepts, such as "a common heritage of humankind" and "benefit-sharing", that lie behind FR. SWEDEN noted that the CBD introduced an alternative to FR such that if the IU is harmonized with the CBD, there will be both a national (the sovereignty over natural resources) and an international (the rights of farmers) component. CANADA, stressing that while it did not contest the importance of recognizing the contribution of farmers, asked if the creation of a set of rights in a legally-binding treaty was appropriate since it raised questions that could not be addressed by a treaty. Although NORWAY agreed with the concept of FR, it noted that its categorization as a political or legal concept must be decided by each government and, in the meantime, the language should remain in brackets. This motion was supported

by JAPAN, CHINA, the US, BRAZIL, the AFRICAN GROUP and ZIMBABWE.

INDIA, supported by ZAMBIA and ALGERIA, expressed frustration at what appeared to be a potentially watered down document. ALGERIA stressed that a mandate had been given to the Working Group to have preliminary discussions and that sending brackets to the plenary would only present diversions.

ARTICLE 12.2: The WG expressed general support for the EU text regarding IU Article 12.2, which states that FR 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...”. The US expressed the need to look to other fora, such as WIPO, WTO, and UPOV. CANADA was concerned about language that would result in a serious drain of financial resources if rights were vested nationally but funds were provided internationally. The AFRICAN GROUP noted that although this was a replacement of international law with national law, it did not change the fact that there are international dimensions to what the farmers do, and if action is needed at all levels the wording should be changed to reflect this.

ZIMBABWE stated that the IU cannot abrogate international responsibility solely to the national governments. Both international and national law must take responsibility at the appropriate level. Furthermore, in supporting the continuation of the contribution of farmers, it is necessary to recognize farmers’ knowledge and their ownership of it. The portion of this knowledge that has a scientific basis should be recognized as a discipline in its own right and should be developed at all levels.

The EU suggested using the alternative wording that it had presented in its text. NEW ZEALAND noted that each country has a different perception of what a farmer is, let alone FR, and therefore it supported Articles 12.1 and 12.2 of the EU proposal without modifications, noting that they reflected careful consideration of international law. SWEDEN expressed the need to harmonize the text with the CBD by adding “Farmers’ Rights” and removing the words “indigenous communities.”

The US supported consideration of the EU text but added that until issues pertaining to scope and access were determined, it would be impossible to determine benefits. Although the EU text was closer to the CBD, it too has some definitional problems that will need to be resolved in the future. INDIA expressed its willingness to consider the EU proposal.

ARTICLE 12.3: During the third session of the WGFR, delegates discussed IU Article 12.3, which concerns the best way to implement FR. The EU, supported by the US and CHINA, suggested that the main expressions of FR be moved to the preamble, and that mechanisms related to monitoring be addressed in a separate article on the IU in its entirety. The AFRICAN GROUP expressed similar views, but stated that the idea of “sustainability” should be reflected in the preamble. A number of paragraphs from the Secretariat’s non-paper were proposed by delegates. However, the US reasoned that, although the language could be changed to fit the article, there were more appropriate fora for addressing IPR issues. The AFRICAN GROUP responded that these other fora may not be inclusive of all the countries, such as UPOV, and that issues important to agriculture should be addressed in the IU so that all member States can participate. BRAZIL supported the AFRICAN GROUP on IPR, suggesting that the Commission was the right fora to facilitate the process, although in consultation with all other relevant fora. In response to a warning by ZIMBABWE that the US should not mislead the Working Group, the US reiterated its position that, “where appropriate”, these issues should be addressed in the relevant fora that are currently negotiating legally-binding instruments on these issues,

and added that it was clear that an IPR regime could not be administered by the FAO.

OTHER ISSUES: The Working Group revisited its discussions of a definition on FR and the Chair highlighted the Secretariat’s revised three-page paper containing the submissions from the Working Group. SWEDEN, supported by the US, NORWAY, the AFRICAN GROUP, ZIMBABWE and MALAYSIA, rejected the strategy of attempting to formulate a precise legal definition of FR as too complicated, and suggested that when institutionalizing a topic in a treaty, it should be done in an operative article, laying down the commitments. The AFRICAN GROUP, supported by ZIMBABWE and MALAYSIA, added that it may be convenient to define FR in the future.

In resuming deliberations on IU Article 12, the Chair directed the members of the Working Group to bring their views together, although they were not required to agree on a final view or begin negotiations. Following distribution of a Secretariat paper summarizing earlier deliberations, the Chair reopened the floor for discussion. Noting that the Working Group was not prepared to negotiate further on IU Article 12.1, the US, supported by SWEDEN, the EU and AUSTRALIA, suggested sending the different proposed texts to the plenary. The US added that the Working Group was still putting ideas on the table, and that these views should be compiled in a document so that countries could reflect and further develop their positions.

BRAZIL announced that the G-77 had prepared a consolidated proposal from developing countries for IU Articles 12.1 and 12.2, although the AFRICAN GROUP reserved the right to revise the common text that constituted the developing countries proposal.

After the delegates discussed the G-77 proposal, FRANCE attempted to clarify the confusion concerning the presentation to the plenary and proposed that all the texts tabled in the Working Group could replace the relevant parts of the 3ND. Although this suggestion was supported by the US and CANADA, EGYPT said such a decision should be left to the plenary. The UK, supported by MEXICO, noted that the Working Group did not have the mandate to delete text. MEXICO also noted that the issues of FR and scope and access are interlinked and that decision must be left to the plenary.

PLENARY: In presenting his report to plenary on Thursday, the Chair of the Working Group on Farmers’ Rights stressed that the discussions were a pre-negotiation exercise intended to flag important issues that should be considered by the Commission in its future deliberations. Noting that the most important outcome of the WGFR was that alternative texts had been tabled by the EU, the US, and “developing countries”, the Chair called on the Commission to determine the status of the new submissions vis-à-vis Article 12, as presented in 3ND. FRANCE, supported by the US, favored replacing Articles 12.1 and 12.2, as presented in 3ND, with the relevant comments made by the WG, but noted that Article 12.3 should remain. CHINA announced that a revised draft of the combined developing countries’ proposal was being distributed.

In response to CANADA’s disappointment over the stronger tone of the new developing country proposal, the AFRICAN GROUP explained that the compilation of the positions of the developing country regions had been done quickly in an effort to be constructive, but that this process had been incomplete. They stressed that there was no new wording added and that the new proposal should not be interpreted as a destructive move by the developing countries; it was intended to be an editorial effort.

The Commission agreed that Article 12 of 3ND would be replaced by the texts presented in the Working Group on Farmers’ Rights. ETHIOPIA, supported by SWEDEN, stressed the importance of consultations, particularly at the national level, in

addressing FR, and recommended that in the process of consultations, only those directly concerned — the farming community itself and agencies that work on farmers issues — should be included. AUSTRALIA, supported by SWEDEN and the US, and the AFRICAN GROUP suggested that WTO, WIPO, UPOV and the CBD be invited to report to future meetings of the Commission.

CLOSING PLENARY

The final plenary went well into Friday night as delegates deliberated the draft report of the meeting, as presented by the Rapporteur, Mr. Fernando José Marroni de Abreu (Brazil). After lengthy debate on the status of several formal statements made during the meeting, delegates agreed to append statements on behalf of the FAO Director-General and the CBD Secretariat in their entirety to the report, and to highlight the presentation by IPGRI, while removing reference to the ASSINSEL presentation.

On the basis of discussions in the penultimate session of the plenary, the Commission finalized arrangements for the next regular meeting of the Commission, scheduled for May 1997. Following the opening session, during which the Commission would elect an extended Bureau (to allow for complete regional representation) and address other organizational matters, regional groups would meet throughout the remainder of Thursday and Friday in order to discuss and reach agreement on regional proposals. During the weekend, the Secretariat would compile and translate the various texts proposed, with the Bureau consolidating them, where possible.

Emphasizing the need to expedite and focus negotiations for revising the IU, countries were invited to make additional submissions for circulation at the next meeting. The Secretariat will also invite the WTO, WIPO, UPOV and the CBD to transmit relevant background documentation, within their respective areas of competence, especially related to access and benefit-sharing with regard to PGR and agricultural biodiversity. A number of countries emphasized the need for countries and regions to clarify and define their positions, particularly with respect to scope, access and Farmers' Rights. This could involve national and regional consultations with all stakeholders, including farmers, local communities, women's groups and NGOs.

On the basis of the first *ad hoc* expert working group on animal genetic resources convened by the FAO in January 1997, which will consider the possible establishment of an intergovernmental sectoral working group, the Commission will consider, for the first time, the issue of animal genetic resources. Finally, the Commission agreed that the question of follow-up to ITCGR-4 and the revision of the cost estimates of the Global Plan of Action should be taken up by CGRFA-7.

Following the termination of interpretation services at 1:30 am, delegates continued deliberations in English. Noting his lack of fluency in this language, Chair Bolivar invited Vice-Chair Kristiane Herrmann (Australia) to chair the remainder of the meeting.

On behalf of Spanish-speaking countries, COLOMBIA stated that the interruption of interpretation services was unacceptable because it precluded equal participation in discussions and decisions of the meeting, and called for the meeting to come to an end. Following brief consultations and a trilingual statement by FRANCE in Spanish, French and English requesting that the report register its protest, the meeting resumed and the Commission adopted the report at 3:30 am on Saturday morning.

A BRIEF ANALYSIS OF THE MEETING

Although CGRFA-EX3 was officially the third negotiation session for the revision of the International Undertaking (IU), it was the first meeting entirely dedicated to the subject. As a result, CGRFA-EX3 reflected a pre-negotiation phase, in which delegates are still defining the range of issues to be addressed and identifying common areas of agreement and disagreement. Indeed, delegations displayed a marked reluctance to engage in negotiations. Several observers noted that this reluctance was symptomatic of either holiday distraction or "conference fatigue", since most delegates had attended either the third meeting of the Conference of the Parties (COP-3) for the Convention on Biological Diversity (CBD) in Buenos Aires or the World Food Summit in Rome only weeks before.

Others attributed their hesitance to negotiate to something more substantive: the realization that revising the IU in harmony with the Biodiversity Convention would require, as one delegate put it, "radical reform". Those delegates who proposed importing language directly from the CBD were quickly reminded that this was not a "cut and paste" exercise.

One observer noted that the inertia of the meeting was inversely proportionate to the urgency of the need to address *ex situ* collections acquired prior to the entry into force of the CBD. The challenging nature of this issue is highlighted by the fact that CBD Article 15.3 on access to plant genetic resources does not address post-CBD collections. One delegate interpreted this to mean that the Biodiversity Convention effectively gave up on collections which preceded its entry into force. There was general concern for clarity on this issue — noting that the Commission could not afford to "paper over" political differences as the CBD did. While some delegates see the IU revision process as an attempt by developing countries to operationalize the benefit-sharing provisions of the CBD, others see it as an attempt by industrialized countries to revise the CBD according to the IU.

WORKING GROUPS

While most observers would have predicted greater progress on scope and access, and very little on FR, in fact the reverse occurred. Many delegates expressed surprise that a common approach on FR was reached so quickly. However, many delegates in the Working Group on Farmers' Rights noted that the issues of FR and scope and access are inter-linked, and that there can be no agreement on FR without simultaneous agreement on scope and access.

FARMERS' RIGHTS: Although a few countries expressed frustration that nothing substantive was achieved, compared to the Third Negotiating Draft (3ND), where there were many diverging positions, the Working Group was able to produce three consolidated proposals: one presented by all the developing countries; one by the EU, which had previously been unable to present a common position; and another by the US, the most vocal in its reluctance to recognize any form of Farmers' Rights.

Overall, the Working Group's dynamics were positive and there seemed to be an understanding that pre-negotiation discussions were in order. In this light, there was a willingness to explore the issues associated with FR from both national and international perspectives, building on understandings reached at the Leipzig Conference. Together the delegates developed a framework that will be used as a launch pad for further discussions.

The most contentious discussion concerned the actual definition of FR. Most countries agreed that FR has not been defined adequately by the FAO and that it is unclear what it is in fact a right to. There was also a realization that countries view the notion of FR from different perspectives based on their own legal systems' recognition of groups versus individuals. This is a genuine

problem for many countries since recognizing Farmers' Rights may have extraordinary economic and social consequences. On the other hand, some countries perceive the recognition of groups to be a natural evolution of international law. In reality, there are very few countries that have been successful at incorporating FR into domestic legislation. Many countries also disagreed on the proper fora for addressing FR, including whether the FAO was the appropriate agency to administer such a scheme.

The concept of FR was recognized with the adoption of resolutions C5/89 in 1989 and C5/91 in 1991, which provided for the implementation of FR through an international fund on PGR. However, with the entry into force of the CBD, the focus shifted from PGR as the "common heritage of mankind" to the concepts of benefit-sharing (Article 1) and the sovereign rights of States over their natural resources (Article 15). The result is that the use of both national legislation and an international approach appears to be the direction that the discussions on FR will take.

SCOPE AND ACCESS: Throughout deliberations in plenary, an open-ended working group and a "Friends of the Chair" contact group, delegates made preliminary progress on outlining the various options for scope and access. Since there are so many different access regimes around the world, both private and public, bilateral and multilateral, it is difficult to conceptualize how the system as a whole might operate. Several participants noted the absence of clarity on how the various components of a system for the exchange of PGRFA, might link together. For example, what would be the conditions for access and benefit-sharing? Would these differ for different kinds of PGRFA? How would benefit-sharing link to Farmers' Rights? How would different national regimes, with private and public actors participate in a harmonized international regime? Without a vision of how these components interact, observers noted, it is difficult for negotiators to allow room for their negotiating positions on component issues such as scope to shift.

Countries will not only need to understand the rationale for each others' positions, they will need to better evaluate their own interests. Perhaps this is why Ethiopia's proposal to devise a scenario of options regarding scope and access, dubbed the "matrix" approach by the US, was widely considered to be a "breakthrough" at the meeting. Appealing in its simplicity, the proposal would allow countries to conduct a cost-benefit analysis for each option. As one delegate put it, once countries can calculate their interests regarding various access arrangements, they will be in a better position to bargain.

Solutions that provide conceptually coherent and institutionally implementable definitions of scope, access, benefit-sharing and Farmers' Rights is an intellectual, political, legal and managerial challenge. Since the science and technology are evolving, countries' negotiating positions are still politically far apart, legal issues remain unresolved and the human and financial implications of implementing any of the proposed solutions are far from clear. This proposal by IPGRI, although somewhat controversial, was considered by many delegates to be thought-provoking. Indeed, the presentation by IPGRI and the ensuing discussion resembled a university seminar rather than an intergovernmental meeting. Their attempts to articulate positions on these complex matters forced delegates to grapple with these issues, and enabled them the better to appreciate the complexities involved. Delegates went beyond the political posturing that resulted in impasse at previous meetings that addressed the IU, in order to explore the interests and concerns that underlie their own and others' positions.

REGIONAL PARTICIPATION

Many delegates agreed that one of the major achievements of this meeting was the way in which developing countries, in particular the African Group, came together to consolidate their positions into a coherent proposal reflecting the interests that are more specific to their region. In contrast, many noted the apparent lack of EU coordination. One observer commented that the EU's request for an expanded "Friends of the Chair" was based on a desire for some European countries to represent themselves directly as internal differences continued to persist within the region.

Another positive aspect of this meeting was near-universal country participation. For instance, the Secretariat explained that at the first extraordinary session of the Commission, there were more members on the US delegation than representatives of all the African countries combined. Several participants noted that this enhanced participation was a reflection of the momentum of Leipzig, COP-3 and the World Food Summit.

NEXT STEPS

It was noted that the reflective mood that prevailed during the meeting allowed delegates to ask fundamental questions about what the IU should achieve. As a result, once actual negotiations get underway, delegates will have a firmer foundation on which to make greater progress. Nevertheless, efforts will need to be intensified in the lead up to COP-4 in May 1998, if the Commission is to respond to COP-3's call for the speedy and effective completion of the revision of the IU.

Governments will need to do their homework if they are to return to the table with concrete proposals in the next round of negotiations. Some expressed hope that as delegates gain more technical knowledge, positions may begin to converge.

Whereas the Commission was once, as one delegate described, a "limited forum", its deliberations have now sparked the interest of powerful organizations like the WTO and WIPO. In formally inviting input from these organizations at its next meeting, numerous delegates expressed the belief that the Commission is asserting itself as a political player. The Commission's decision to formalize links with other multilateral bodies, to facilitate intersessional work, and to dedicate the first two days of its next session to regional consultations all contribute to laying a solid foundation on which to launch a serious intergovernmental negotiation process for the revision of the International Undertaking in harmony with the Convention on Biological Diversity.

THINGS TO LOOK FOR

The following is a list of related FAO meetings that will be held in the coming months. For more information, contact FAO, Viale delle Terme di Caracalla, 00100 Rome, Italy; tel.: +39(6) 52251; fax: +39(6) 52253152; Home Page: <http://www.fao.org>.

AD HOC OPEN-ENDED WORKING GROUP ON ANIMAL GENETIC RESOURCES: This meeting will be held at FAO Headquarters in Rome from 7-9 January 1997.

FAO COMMISSION ON AGRICULTURE (COAG): This meeting will be held at FAO Headquarters in Rome from 7-11 April 1997.

SEVENTH SESSION OF THE FAO COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE: This meeting is scheduled for May 1997 at FAO Headquarters in Rome. For additional information see <http://web.icppgr.fao.org>.