



COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

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INTERNATIONAL UNDERTAKING ON PLANT GENETIC RESOURCES

I. INTRODUCTION

1. The **International Undertaking on Plant Genetic Resources** (hereafter referred to as the Undertaking) was adopted by the Conference in November 1983 (Resolution 8/83¹). It was the first comprehensive instrument on plant genetic resources. A number of agreed interpretations of the Undertaking were subsequently adopted by the FAO Conference as Conference Resolutions in 1989 and 1991, and annexed to the Undertaking².

2. The Conference, at its session of November 1983 when the Undertaking was adopted, also adopted Resolution 9/83 requesting the Council to establish a Commission on Plant Genetic Resources in accordance with Article VI.1 of the Constitution and with the terms of reference defined by the Conference³. The Council, in November 1983, adopted Resolution 1/85 establishing the Commission on Plant Genetic Resources⁴.

¹ Twenty-second Session of the FAO Conference, Rome, 5-23 November 1983, C 83/REP, paras 275-285.

² *Conference Resolution 4/89: Agreed interpretation of the International Undertaking*. Twenty-fifth Session of the FAO Conference, Rome, 11-29 November 1989, paras 98-109;

Conference Resolution 5/89: Farmers' Rights. Twenty-fifth Session of the FAO Conference, Rome, 11-29 November 1989, paras 98-109;

Conference Resolution 3/91: Annex 3 to the International Undertaking on Plant Genetic Resources. Twenty-sixth Session of the FAO Conference, Rome, 9-27 November 1991, paras 102-104.

³ Twenty-second Session of the FAO Conference, Rome, 5-23 November 1983, C 83/REP, paras 286-287.

⁴ Eighty-fifth Session of the FAO Council, Rome, 24 November 1983, CL 85/REP, paras 12-15.

3. Subsequently, in November 1995, the Conference decided to broaden the mandate of the Commission on Plant Genetic Resources to cover all components of biodiversity of relevance to food and agriculture; it further decided that the Commission shall be known as the **Commission on Genetic Resources for Food and Agriculture**⁵ (hereafter referred to as the Commission). Following the request of the Conference, the Council adopted, in November 1995, the Statutes of the Commission⁶. The Commission has been monitoring all matters relating to the policy, programmes and activities of FAO in the area of genetic resources of relevance to food and agriculture, including the Undertaking.

II. BACKGROUND TO THE NEGOTIATIONS

4. In May 1992, the Agreed Text of the **Convention on Biological Diversity** was adopted in Nairobi, Kenya. In adopting the text of the Convention, countries adopted Resolution 3 of the Nairobi Final Act, which recognized that access to *ex situ* collections not acquired in accordance with the Convention, and Farmers' Rights, were outstanding matters which the Convention had not addressed, for which solutions should be sought within FAO's Global System on Plant Genetic Resources for Food and Agriculture, of which the Undertaking was the corner-stone⁷.

5. In June 1992, the **United Nations Conference on Environment and Development** called for the strengthening of the FAO Global System and its adjustment in line with the Convention on Biological Diversity, as well as for the realization of Farmers' Rights⁸.

6. At its session of November 1993, the **Conference** accordingly adopted Resolution 7/93, which requested "*the Director-General to provide a forum for negotiation among governments:*

- (a) *for the adaptation of the International Undertaking on Plant Genetic Resources, in harmony with the Convention on Biological Diversity,*
- (b) *for consideration of the issue of access on mutually agreed terms to plant genetic resources, including ex situ collections not addressed by the Convention, as well as*
- (c) *for the issue of the realization of Farmers' Rights*"⁹.

⁵ Twenty-eighth Session of the FAO Conference, Rome, 20-31 October 1995, C 95/REP, paras 65-69.

⁶ Hundred and Tenth Session of the FAO Council, Rome, 2-3 November 1995, CL 110/REP, paras 13-14.

⁷ *Nairobi Final Act of the Conference for the Adoption of the Agreed Text of the Convention on Biological Diversity*, done in Nairobi on 22 May 1992; and *Resolution 3: The interrelationship between the Convention on Biological Diversity and the Promotion of Sustainable Agriculture*, attached to the Final Act, in particular operative para 4.

⁸ *Report of the United Nations Conference on Environment and Development*, Rio de Janeiro, Brazil, 3-14 June 1992, Chapter 14, in particular para 14.60.

⁹ Twenty-seventh Session of the FAO Conference, Rome, 6-24 November 1993, C 93/REP, paras 105-108.

III. THE NEGOTIATIONS

7. Negotiations began at the Commission's First Extraordinary Session in November 1994, and continued at three regular and five extraordinary sessions until 30 June 2001. In addition, under the advice of the Commission and with the support of the Council, other meetings were dedicated to the negotiations, namely an "*Informal Expert Meeting*" as well as six intersessional meetings of the "*Chairman's Contact Group*"¹⁰ that had been established to facilitate the negotiations¹¹.

8. Progress in the negotiations has been regularly reported to **the Conference of the Parties to the Convention on Biological Diversity**, which has repeatedly confirmed, in all its meetings since the inception of the negotiations, its support for the Undertaking in order to address the special needs of agricultural biodiversity¹².

9. The **Council and the Conference** monitored the process of the negotiations and stressed the high priority given to completing them¹³. In particular the **Council, in June 1999**, "*appealed to countries to show flexibility and a spirit of compromise and to maintain and increase the momentum so that the revised Undertaking might, at the latest,*

¹⁰ The Contact Group comprised 40 countries and the European Community.

¹¹ These are the **sessions of the Commission and meetings of the Informal Expert Meeting and of the Contact Group** dealing with the negotiation of the Undertaking, in chronological order:

First Extraordinary Session (Rome, 7-11 November 1994); Sixth Regular Session (Rome, 19-30 June 1995); Second Extraordinary Session (Rome, 22-27 April 1996); Third Extraordinary Session (Rome, 9-13 December 1996); Seventh Regular Session (Rome, 15-23 May 1997); Fourth Extraordinary Session (Rome, 1-5 December 1997); Fifth Extraordinary Session (Rome, 8-12 June 1998); Informal Expert Meeting (Montreux, 19-22 January 1999); Eighth Regular Session (Rome, 19-23 April 1999); First Intersessional Meeting of the Contact Group (Rome, 20-24 September 1999); Second Intersessional Meeting of the Contact Group (Rome, 3-7 April 2000); Third Intersessional Meeting of the Contact Group (Tehran, 26-31 August 2000); Fourth Intersessional Meeting of the Contact Group (Neuchâtel, 12-17 November 2000); Fifth Intersessional Meeting of the Contact Group (Rome, 5-10 February 2001); Sixth Intersessional Meeting of the Contact Group (Spoleto, 22-28 April 2001); Sixth Extraordinary Session (Rome, 25-30 June 2001).

¹² In particular, in **November 1995** the Conference of the Parties "*recognizing the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions..., declares its support for the process engaged in the FAO Commission on Plant Genetic Resources..., especially through ... adaptation of the International Undertaking on Plant Genetic Resources in harmony with the Convention...*" (*Decision II/15*, Second Meeting of the Conference of the Parties to the Convention on Biological Diversity, Jakarta, Indonesia, 6-17 November 1995). In **November 1996** the Conference of the Parties "*affirms its willingness to consider a decision by the Conference of the Food and Agriculture Organization of the United Nations that the International Undertaking should take the form of a protocol to this Convention once revised in harmony with this Convention...*" (*Decision III/11*, para 18. Third Meeting of the Conference of the Parties to the Convention on Biological Diversity, Buenos Aires, Argentina, 4-15 November 1996. See also para 19). In **May 1998** it "*urges that the momentum in the intergovernmental negotiations of the revision of the International Undertaking in harmony with the Convention should be maintained...*" (*Decision IV/6*, para 8. Fourth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Bratislava, Slovakia, 4-15 May 1998). Finally, in **May 2000** the Conference of the Parties, following the formulation utilised by the FAO Conference in November 1999, "*... affirms its willingness to consider a decision by the Conference of the Food and Agriculture Organization of the United Nations that the International Undertaking become a legally binding instrument with strong links to both the Food and Agriculture Organization of the United Nations and the Convention on Biological Diversity, and calls upon Parties to coordinate their positions in both forums*". (*Decision V/26*, paras 8, Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Nairobi, Kenya, 15-26 May 2000. See also *Decision V/10*, in particular para 2).

¹³ In particular, Hundred and Sixteenth Session of the FAO Council, Rome, 14-19 June 1999, CL 116/REP, paras 43-49; Thirtieth Session of the FAO Conference, Rome, 12-23 November 1999, C 99/REP, paras 60-67; Hundred and Nineteenth Session of the FAO Council, Rome, 20-25 November 2000, CL 119/REP, paras 27-31; and Hundred and Twentieth Session of the FAO Council, Rome, 18-23 June 2001, CL 120/REP, paras 51-56.

be submitted to the Hundred and Nineteenth Session of the Council in November 2000”.¹⁴ The **Conference, in November 1999**, “confirmed that the negotiations on the revision of the International Undertaking would proceed on the basis that the Undertaking would take the form of a legally-binding instrument, closely linked to FAO and the Convention on Biological Diversity”, and “requested that the text of the revised International Undertaking be finalized, as planned, for submission to the Hundred and Nineteenth Session of the Council in November 2000”¹⁵.

10. In view of the inability to finalize the negotiations by November 2000, the **Council, in November 2000**, “reaffirmed its commitment to the finalization of the revised International Undertaking within the auspices of FAO”, and “requested [the Chairman of the Commission] to convene, in consultation with the Director-General and subject to the availability of funding, further sessions of the Contact Group as required, followed by a negotiating session of the Commission to finalize and agree upon the text of the International Undertaking for submission to the Thirty-first Session of the Conference in November 2001”¹⁶. Subsequently, **in June 2001, the Council** “recalled the request of the Hundred and Nineteenth Session of the Council to submit the text to the Thirty-first Session of the FAO Conference in November 2001”¹⁷.

11. Finally, **in June 2001, the Commission** “adopted the text of the International Undertaking on Plant Genetic Resources”, and “requested the Director-General to transmit it, through the Seventy-second session of the Committee on Constitutional and Legal Matters (8-9 October 2001) and the Hundred and Twenty-first session of the Council (30 October-1 November 2001), to the Thirty-first Session of the Conference (2-13 November 2001), for its consideration and approval”¹⁸.

12. At the same time, “In adopting the text of the International Undertaking, the Commission also forwarded to the Thirty-first session of the Conference the draft of a resolution, to be considered for adoption in parallel with the International Undertaking, regarding interim arrangements for its implementation”¹⁹.

IV. ISSUES FOR CONSIDERATION BY THE CCLM

13. Rule XXXIV.3 (b) of the General Rules of the Organization provides that the CCLM considers specific items referred to it by the Council or by the Director-General

¹⁴ Hundred and Sixteenth Session of the FAO Council, Rome, 14-19 June 1999, CL 116/REP, para 49.

¹⁵ See Thirtieth Session of the FAO Conference, Rome, 12-23 November 1999, C 99/REP, paras 64 and 66. The Conference wording of November 1999 regarding character and links of the Undertaking was used in May 2000 by the Conference of the Parties to the Convention on Biological Diversity in its Decision V/26, para 8 (Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity, Nairobi, Kenya, 15-26 May 2000). The exact wording used in May 2000 by the Conference of the Parties to the Convention on Biological Diversity is reported in footnote 12 of the present document.

¹⁶ Hundred and Nineteenth Session of the FAO Council, Rome, 20-25 November 2000, CL 119/REP, para 31.

¹⁷ Hundred and Twentieth Session of the FAO Council, Rome, 18-23 June 2001, CL 120/REP, para 55.

¹⁸ *Report of the Sixth Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture* (Rome, 25-30 June 2001), para 6. The text of the Undertaking is in Appendix B to such report.

¹⁹ *Report of the Sixth Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture* (Rome, 25-30 June 2001), para 8. The text of draft resolution is in Appendix F to such report.

which may arise out of, inter alia, the formulation, adoption, entry into force and interpretation of multilateral conventions and agreements concluded under Article XIV of the FAO Constitution. On the assumption that the Undertaking will be concluded within the framework of FAO, the CCLM is requested to review the text of the Undertaking, as adopted at the Sixth Extraordinary Session of the Commission in June 2001 and attached to its report as Appendix B.

14. The CCLM is also requested to review the Draft Conference Resolution regarding adoption of the Undertaking and interim arrangements for its implementation. This Draft Resolution, proposed at the same Sixth Extraordinary Session of the Commission in June 2001 and attached to its report as Appendix F, is to be considered for adoption by the Conference in parallel with the Undertaking.

15. In reviewing the text of the Undertaking and the Draft Resolution, the CCLM may find helpful the considerations presented in the following paragraphs.

V. TEXT OF THE UNDERTAKING²⁰

V.1. GENERAL COMMENTS

16. The Basic Texts of the Organization impose certain constraints on the contents of agreements concluded under Article XIV of the Constitution. The attention of the CCLM is drawn, in particular, to Article XIV itself, to Rule XXI of the General Rules of the Organization, and to Part R of the Basic Texts (hereafter referred to as Part R). All such constraints, and their different legal authority which depends on the legal source from which they derive, were discussed in depth and at length at several stages of the negotiations of the Undertaking, in particular during meetings held in April and June 2001²¹.

17. Article XIV of the Constitution.

None of the constraints imposed by Article XIV would seem to present problems with the text as it stands, other than to the extent indicated specifically below.

18. Rule XXI of the General Rules of the Organization.

Rule XXI deals with Conventions and Agreements, and sets out a number of procedures to be followed in respect of Article XIV bodies in their preparation. In this connection, of particular interest is Rule XXI.1(c) which reads:

“The Conference or the Council, after having considered any representations that may have been made to it or comments submitted by Member Nations and Associate Members, and any comments from the United Nations, and any specialized agency, or other

²⁰ In adopting the text of the Undertaking and the draft resolution for the consideration of the Thirty-first session of the Conference, statements were made by the European Union and Japan. See *Report of the Sixth Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture* (Rome, 25-30 June 2001), para 9, Appendix C (European Union) and Appendix D (Japan).

²¹ A Legal Group met during the Sixth Intersessional Meeting of the Contact Group (Spoleto, 22-28 April 2001). The work done by the Legal Group in Spoleto was completed by the Committee of the Whole during the Sixth Extraordinary Session of the Commission (Rome, 25-30 June 2001).

international organizations, may approve only such conventions, agreements, supplementary conventions or agreements as contain provisions to the effect that:

- (i) any international body or machinery to be set up or any activity to be undertaken under such convention, agreement, supplementary convention or agreement is within the framework of the Organization;*
- (ii) recommendations adopted and reports on activities carried out by any such body shall be transmitted to the Director-General of the Organization”*

19. Part R of the Basic Texts.

Part R sets out some principles and procedures to be adhered to in the preparation of conventions and agreements concluded under Article XIV, in order to ensure consistency and uniformity. However, it is stated in the introduction to Part R that “*the intention was not to lay down too rigid rules since obviously the text of the various conventions and rules of procedure must be drafted in the light of the desired objectives*”²². Accordingly, many of the requirements in Part R are policies to be followed “*where appropriate*”²³ and are not necessarily mandatory requirements. Consequently, it would be open to the Conference to adopt an Agreement that does not strictly conform in all aspects with the policies set out in Part R.

Many of the issues raised in Part R are of a formal nature and have been addressed in the Undertaking in accordance with the terms established in Part R. Attention however is drawn below to those provisions of the Undertaking which could raise legal issues in relation to the provisions of Part R.

V.2. COMMENTS ON SPECIFIC LEGAL POINTS

20. Name of the Instrument. The term “*Undertaking*” is not one normally used in respect of a binding international agreement. Furthermore, Part R states that “*such treaties concluded under Article XIV of the Constitution as are of a worldwide scope shall in future be designated by the term ‘convention’, while the others shall be designated by the term ‘agreement’*”²⁴. The CCLM might therefore wish to consider substituting for “*Undertaking*” the term “*Convention*”. This would also assist in avoiding confusion between the old status of the Undertaking, as a voluntary instrument, and its new status as a binding international instrument.

21. In addition, given the objectives of the future instrument as set out in Article 1 as well as the frequent reference in the text to “*plant genetic resources for food and agriculture*”, the future instrument could be denominated “*International Convention on Plant Genetic Resources for Food and Agriculture*”, so that its scope becomes apparent already in the title.

²² Part R of the BasicTexts, Preamble.

²³ See, for example, the principles governing amendments. “*Conventions and agreements shall contain, when appropriate, provisions reflecting the following principles:...*”, Part R of the Basic Texts, Appendix, A.8

²⁴ Part R of the Basic Texts, Appendix, A.1.

22. Preamble. Establishment of the Undertaking within the framework of FAO. Rule XXI.1(c) of the General Rules of the Organization provides that the Conference “... may approve only such conventions, agreements, supplementary conventions or agreements as contain provisions to the effect that: (i) any international body or machinery to be set up or any activity to be undertaken under such convention, agreement, supplementary convention or agreement is within the framework of the Organization; ...” This mandatory provision is reinforced by Part R, which provides that “the preamble shall always specify that the convention or agreement is established within the framework of the Organization”²⁵. As presently drafted, the Undertaking does not actually refer anywhere to the fact that it is established within the framework of the Organization or that it has been formulated under Article XIV.

23. The Undertaking is closely connected with FAO under several perspectives: its scope is within the competence of FAO; it was negotiated in 1983, monitored since that date by an FAO commission, and has now been revised, all within the framework of the Organization; FAO has provided its Secretariat and has supported all activities relating to the Undertaking; the governing bodies of FAO as well as the Conference of the Parties of the Convention on Biological Diversity have expressly confirmed that it should be closely linked with FAO and that the negotiations should be finalized within the auspices of FAO. The CCLM may therefore consider adding to the preamble a clause to ensure that the relationship with FAO is put beyond doubt. In line with expressions utilized in other Article XIV agreements, such a clause could be, for example: “Noting that this Undertaking has been concluded under Article XIV of the FAO Constitution” or “Noting that this Undertaking has been concluded within the framework of FAO”.

24. Article 2: Use of terms. Definition of plant genetic resources for food and agriculture. This text has been left in square brackets. The problem still pending is of a technical nature rather than of a legal one.

25. Article 2: Use of terms. Definition of genetic material. This has been left in square brackets but does not raise any major legal problems regarding the constraints imposed by the Basic Texts.

26. Article 4: Relationship of this Undertaking with other international agreements. The purpose of this clause (still in brackets), which has precedents in preambular language in the Rotterdam Convention and in the Cartagena Protocol²⁶, is to assist in the

²⁵ Part R of the Basic Texts, Appendix, A.5.

²⁶ **Rotterdam Convention on the prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention)**, done at Rotterdam on 10 September 1998. See preambular paras which read:

- “Recognizing that trade and environmental policies should be mutually supportive with a view to achieving sustainable development,
- Emphasizing that nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection,
- Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements, ...”

Cartagena Protocol on Biosafety to the Convention on Biological Diversity, adopted as supplementary agreement to the Convention on 29 January 2000. See the last three preambular paras which read:

- “Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,

interpretation and application of this Agreement. There are broadly similar provisions found in other international agreements. This clause does not raise any major legal problems or, at least, would allow for a reasonable interpretation. The CCLM may wish to suggest the deletion of the brackets or, alternatively, the use of preambular language based on the Rotterdam Convention and the Cartagena Protocol.

27. Article 13: Facilitated access. The text of Art. 13.3 (d) remains in square brackets but it does not raise any legal problems regarding the character of Article XIV agreements.

28. Article 19: Financial resources. The language of Article 19.4 (d) “[and avoiding subsidies]” does not raise any legal problems.

29. Article 20.2: Governing Body. Decisions by consensus. Article 20.2 states that all decisions of the governing body shall be taken by consensus. This does not in itself raise a fundamental legal problem but the CCLM might wish to note that it would most probably be useful to add a phrase to the following effect: “*unless by consensus another means of arriving at a decision on certain matters is reached*”. For instance, the Rules of Procedure, to be approved by consensus, could foresee matters on which a decision could be taken by majority or by qualified majority. This would give the body the means to avoid deadlock in its decision making processes, at least in some matters (for example, in elections).

30. Article 20.3 (d): Governing Body. Budget. A function of the Governing Body is to adopt the budget. In addition to the financial resources needed for the implementation of the funding strategy, as set out in Article 19 and in Art. 20.3 (c), other resources are necessary for the operation of the Secretariat and the Governing Body. The Undertaking being an Article XIV convention, there are three possibilities for its operation: (1) that it be entirely financed by the Organization, (2) that, in addition to being financed by the Organization, it may undertake cooperative projects financed by contracting parties, and (3) that in addition to being financed by the Organization, it have an additional autonomous budget²⁷. The Undertaking would most probably fall within the third category (additional autonomous budget), which would allow for both more autonomy from FAO and administrative and logistic support by the Organization. Article 20.3 (d) seems to refer to such additional “*autonomous budget*” and not to the part financed by FAO that is decided by the FAO Conference as part of the regular budget of the Organization. It would therefore be appropriate to consider adding the word “*autonomous*” before “*budget*”.

31. Article 20.6: Governing Body. Member Organizations of FAO. Article 20.6 is still in square brackets but this is mainly for the reason that there was not time left to consider it. This is a standard clause to deal with the membership in FAO of a regional economic integration organization, in particular how responsibility is distributed between such integration organization and the members of that organization. In line with Article XIV.3(b), the clause should be maintained, although the expressions “*...and fulfil their*

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- *Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,*
 - *Understanding that the above recital is not intended to subordinate this Protocol to other international agreements, ...”*

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Part R of the Basic Texts, Appendix, B.33.

membership obligations...” and “*mutatis mutandis*” should be deleted. In fact, the membership obligations should rather be fulfilled in accordance with the provisions of the Undertaking.

32. Article 21.1: Secretary. Appointment of the Secretary. The square brackets in Article 21.1 were not removed by the meeting, but may be deleted. In fact, the words in square brackets fully comply with Part R which provides that the Secretary shall be appointed by the Director-General although, in cases of bodies with autonomous budget, the basic texts may specify that the Secretary shall be appointed “*after consultation with, or with the approval or concurrence of, the members of the body concerned*”²⁸. As regards the recruitment of other staff mentioned at the end of Article 21.1, the wording does not present any major legal problem, provided that, in accordance with Article VIII of the FAO Constitution, such staff is appointed by Director-General. Any cost not approved specifically in the FAO budget should be covered by the autonomous budget.

33. Article 21.3: Secretary. Report to the Director-General. Rule XXI.1(c) of the General Rules of the Organization provides that the Conference “*may approve only such conventions, agreements, supplementary conventions or agreements as contain provisions to the effect that: ... (ii) recommendations adopted and reports on activities carried out by any such body shall be transmitted to the Director-General of the Organization*”. In order to comply with this mandatory provision, the expression “*and to the Director-General*” could be added at the end of the chapeau of Article 21.3²⁹.

34. Article 21.4: Secretary. Documentation in 6 languages. It will be noted that Russian is one of the languages of the United Nations while not one of the languages of FAO. This has budgetary implications. In particular, in the absence of a decision of the Conference to the contrary, the costs connected with operating in Russian would need to be met out of the autonomous budget.

35. Article 24: Amendments of the Undertaking. Power of the Council and Conference to disallow amendments. The attention of the CCLM is drawn to the provisions of Part R, which requires that:

“Conventions and agreements shall contain, when appropriate, provisions reflecting the following principles:

(a) Amendments to all conventions and agreements concluded under Article XIV of the Constitution shall be reported to the Council which shall have the power to disallow them if it finds that such amendments are inconsistent with the objectives and purposes of the Organization or the provisions of the Constitution. If the Council considers it desirable, it may refer these amendments to the Conference which shall have the same power. In addition, such amendments shall be subject to prior approval by at least a two-thirds majority of all the parties to the convention or agreement. Amendments to conventions

²⁸ Part R of the Basic Texts, Appendix, B, 32 (iii).

²⁹ It is worth mentioning that the *International Plant Protection Convention*, adopted in 1997 under Article XIV of the FAO Constitution, does not contain the provisions concerning the transmission of reports to the Director-General as set out in Rule XXI.1(c) of the General Rules of the Organization.

and agreements which do not provide for the establishment of a body shall be submitted to an advisory committee prior to consideration by the Council.”³⁰

36. In the negotiations, it was decided that the requirement regarding the Council’s and Conference’s “*power to disallow*” should not be mentioned in the text of the Undertaking. The basic reason for this was the concern about FAO Members that are not parties to the Undertaking being able to influence the decision making procedures of the parties. The absence of such a provision will not conflict with Article XIV. Part R reflects the policy of the organization but it is open to the Conference to approve an agreement that does not in all respects meet the requirements of Part R. Indeed Part R itself anticipates the fact that it may not be appropriate in every situation to include such a provision for it states that such provision shall be included “*when appropriate*”.

37. Articles 26, 27, 28, 29. Ways of becoming party and entry into force. These Articles were inserted at the last meeting to meet a request for the inclusion of the traditional final clauses found in international agreements, instead of the more simple method of adoption of an agreement by the Conference or the Council, followed by acceptance. These clauses do not raise any particular problems as regards the different ways of becoming Party to the Undertaking, although particular attention should be drawn to the possible double meaning of “*signature*” (namely just the signing of the agreement without becoming a party and subject to ratification, or the signing with the intention and power to become a party by such signature).

38. Articles 26, 27, 28, 29. Admission as contracting parties of States that are not FAO Members. These Articles deal also with the admission as contracting parties of States that are not Members of FAO but are Members of the United Nations or any of its specialized agencies or of the International Atomic Energy Agency³¹. Article XIV.3(b) of the FAO Constitution provides that “*Conventions, ... shall contain provisions concerning In the case of conventions, agreements, supplementary conventions and agreements establishing commissions or committees, participation by non-member States of the Organization that are members of the United Nations, any of its specialized agencies or the International Atomic Energy Agency or by regional economic integration organizations other than Member Organizations, shall in addition be subject to prior approval by at least two-thirds of the membership of such commissions or committees*”. The present text of the Undertaking does not contain this provision of the Constitution regarding the participation of States that are not Members of FAO subject to prior approval by a two-thirds majority of the members of the commission or committee.

39. In this connection, the CCLM may wish to consider whether the Undertaking should contain such provision. The question could be raised whether the Governing Body of the Undertaking may be considered a commission or committee under the terms of Article XIV.3(b). In this respect, the CCLM may wish to note that, out of the fifteen conventions and agreements concluded under Article XIV, twelve³² have been specifically

³⁰ Part R of the Basic Texts, Appendix, A.8.

³¹ It is to be noted that 10 parties to the Convention on Biological Diversity are not Members of FAO, and 9 Members of FAO are not parties to the Convention on Biological Diversity.

³² **The twelve conventions or agreements are:** *Agreement for the Establishment of the Asia-Pacific Fishery Commission* (1948); *Constitution of the International Rice Commission* (1948); *Agreement for the Establishment of a General Fisheries Commission for the Mediterranean* (1949), amended text approved by FAO Council at its 113th Session (November 1997); *Constitution of the European Commission for the*

concluded for the establishment of a commission. The remaining three, not specifically concluded for the establishment of a commission, do not contain the provision in question although two of them have a governing body³³. In view of the above, the CCLM may consider that the fact that the Undertaking does not contain the provision is not incompatible with Article XIV.

40. Article 36: Authentic texts. See comments on Article 21.4 – Documentation in 6 languages.

VI. TEXT OF THE DRAFT RESOLUTION

41. The Draft Resolution has two operative parts. Part A refers to the adoption of the Undertaking, to the period of opening for signature, and to the invitation to FAO Member and to States that are not Members of FAO but are Members of the United Nations or any of its specialized agencies or of the International Atomic Energy Agency, to become parties. Part B deals with interim arrangements for the implementation of the Undertaking. The text of the Draft Resolution does not seem to cause major legal problems.

42. Name of the instrument. The name in the Draft Resolution should be changed to “*Convention*”, if so is done in the text of the Undertaking.

43. Paragraph A.4. The intention and meaning of this paragraph are unclear. The paragraph contains a declaration of principle that does not depend from a “*decision*” of the Conference but from the Undertaking itself, once it has entered into force, and that is applicable only to contracting parties. Article 8 of the Undertaking, for instance, refers specifically to national commitments and international cooperation. The CCLM may consider to suggest the deletion of the paragraph or the substitution of the term “*decides*” for the term “*welcomes*”.

44. Paragraph B.1. During the interim period there will be the Commission and the “*Interim Committee*”. In order to save resources and to avoid duplication of efforts, the CCLM may wish to consider the possibility that the Commission act also as the Interim Committee. While the Commission so acts, allowance should be made for the full participation of States that are not FAO Members but which are contracting parties to the

Control of Foot-and-Mouth Disease (1953); Convention Placing the International Poplar Commission within the framework of FAO (1959); Agreement for the Establishment of a Commission for Controlling the Desert Locust in the Eastern Region of its Distribution Area in South-West Asia (1963); Agreement for the Establishment of a Commission for Controlling the Desert Locust in the Central Region (1965); Agreement for the Establishment of a Commission for Controlling the Desert Locust in North-West Africa (1970); Agreement for the Establishment of a Regional Animal Production and Health Commission for Asia and the Pacific (1973); Agreement for the Establishment of the Indian Ocean Tuna Commission (1993); Agreement for the Establishment of the Regional Commission for Fisheries (RECOFI) (1999); Agreement for the Establishment of a Commission for Controlling the Desert Locust in the Western Region (2000).

³³

The three conventions or agreements are: *Plant Protection Agreement for the Asia and Pacific Region (1955); Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas (1993); International Plant Protection Convention (1951), new revised text approved by FAO Conference at its 29th Session (November 1997).* Both the Plant Protection Agreement for the Asia and Pacific Region and the International Plant Protection Convention have a governing body to which all contracting parties are automatically admitted as members.

Undertaking³⁴. A precedent may be found in the role of the Interim Commission on Phytosanitary Measures, where “*membership is open to all Members of FAO and to such non-member States as are contracting parties to the IPPC*”³⁵.

45. Paragraph B.2. The square brackets could be deleted. However, the text within the brackets should be amended to read: “*consistent with applicable FAO rules*”.

46. Paragraph B.3. Part of the text in (a) and the whole (b bis) are still under negotiation. The text, as it stands now, does not cause any major legal problem. The letters should be reordered.

VII. SUGGESTED ACTION BY THE CCLM

47. The CCLM is invited to review the text of the Undertaking, as adopted at the Sixth Extraordinary Session of the Commission in June 2001, as well as the text of the Draft Conference Resolution, as proposed by the Commission at the same Session, with a view to determine whether they are consistent with the Basic Texts of the Organization and are set out in a proper legal form. The CCLM may wish to recommend that the texts of the Undertaking and the Draft Resolution, together with its comments, be submitted to the Council, at its Hundred and Twenty-first Session in October-November 2001, for endorsement and subsequently to the Conference, at its Thirty-first Session in November 2001, for approval (in the case of the Undertaking) and for adoption (in the case of the Resolution).

* * *

³⁴ It is to be noted that “*At the request of the Russian Federation, the Commission noted that the paragraph B2 of the draft resolution would need to be finalized so as to allow states that were not members of FAO, but which had signed the International Undertaking, to participate as members of the Interim Committee on the International Undertaking on Plant Genetic Resources*”. See Report of the Sixth Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture, Rome, 25-30 June 2001, para 8.

³⁵ See “*International Plant Protection Convention*” (IPPC), a convention concluded under Article XIV of the FAO Constitution. The new revised text of this Convention was approved by the FAO Conference in November 1997. At the same time the Conference established the *Interim Commission on Phytosanitary Measures* under Article VI.1 of the FAO Constitution (See Twenty-ninth Session of the FAO Conference, Rome, 7-18 November 1997, C 97/REP, paras 126-135). It is to be mentioned, however, that, according to Part R of the Basic Texts, “*membership in the commissions and committees provided for in Article VI of the Constitution shall not be open to non-member nations of the Organization*” (Part R of the Basic Texts, Appendix, B.23). As regards the continuation of the Secretariat of the *Interim Commission on Phytosanitary Measures*, the Conference agreed “*that the present Secretariat to the IPPC shall continue until the amendments come into force and until then shall provide secretariat services to the Interim Commission*” (See Twenty-ninth Session of the FAO Conference, Rome, 7-18 November 1997, C 97/REP, para 135, number 9).