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Item 3.1 of the Provisional  
Agenda

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**COMMISSION ON PLANT GENETIC RESOURCES**

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**REVISION OF THE INTERNATIONAL UNDERTAKING**

**STAGE I: INTEGRATION OF THE ANNEXES AND HARMONIZATION WITH THE CONVENTION ON BIOLOGICAL DIVERSITY**

**(FIRST DRAFT IN A POSSIBLE NEW STRUCTURE)**

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**REVISION OF THE INTERNATIONAL UNDERTAKING**

**STAGE I: INTEGRATION OF THE ANNEXES AND HARMONIZATION WITH  
THE CONVENTION ON BIOLOGICAL DIVERSITY**

**(FIRST DRAFT IN A POSSIBLE NEW STRUCTURE)**

**I. INTRODUCTION**

1. The background and mandate followed in preparing the draft text of the consolidated International Undertaking is explained in document CPGR-Ex1/94/3, "Mandate, Context, Background and Proposed Process". Only the first stage in the step-by-step process of revision of the Undertaking recommended by the Commission is here addressed: the integration of its annexes into the main text of the Undertaking, and bringing it into harmony with the Convention on Biodiversity. Documents CPGR-Ex1/94/5 deals with stage II of the process, conditions of access to germplasm, and the realization of Farmers' Rights. For a full understanding of the issues involved, these three complementary documents should be read in conjunction.

2. This document presents the restructured version, as requested by the Working Group at its ninth session, of the first draft of the consolidated text of the International Undertaking. The Commission must decide upon which version of the text to work, early in its consideration of this item. The background to the preparation of these two documents is given in paragraphs 2 to 7 of document CPGR-Ex1/94/4. The description of the type-setting conventions used is given in paragraph 8. These paragraphs will not be repeated here, to avoid duplication, but should be consulted, whichever text is adopted.

3. The following additional points should be noted:

- i. In preparing the restructured text, the outline given in section III of that document has been followed. The texts of the revised Undertaking, the commentaries by the secretariat, and the commentaries of the Working Group, are substantially the same as those given there.
- ii. Chapters, articles and sub-articles have been numbered anew. There is thus no correspondence between the numeration of the text in CPGR-Ex1/94/4 and that in the present document. Internal cross-references within the document and the commentaries have also been changed.
- iii. Certain of the Working Group's commentaries were made on articles as a whole, and some of these articles have been split up in the restructured text. To preserve the commentaries of the Working Group, such commentaries are grouped in Annex 1 to the present document.
- iv. SOME EXTRA FOOTNOTES HAVE BEEN ADDED, RELATIVE TO THE PROCESS OF RESTRUCTURING. SO THAT THESE MAY BE IDENTIFIED, THEY ARE GIVEN IN SMALL CAPITALS, SUCH AS USED HERE.

4. Since the numbering of the articles in this restructured version is substantially different from the numbering in the original Undertaking, it was felt useful to provide the concordance given in section II below, which identifies the origin of all articles. These were drawn from four resolutions of the FAO Conference, as follows:

<i>Text</i>	<i>Resolution</i>
The International Undertaking	8/83
Annex 1	4/89
Annex 2	5/89
Annex 3	3/91

**II CONCORDANCE BETWEEN THE ORIGINAL TEXTS  
OF THE INTERNATIONAL UNDERTAKING AND ITS ANNEXES,  
AND THE REVISED TEXT IN A POSSIBLE NEW STRUCTURE**

<i>Revised text Article</i>	<i>Resolution</i>	<i>Original Article</i>
Preamble (a)	4/89	Preamble, 1st introductory para.
(b)	3/91	Introductory para. (a)
(c and d)	5/89	Introductory paras. (b) and (c)
(e and f)	3/91	"Recognizing" (b) and (c)
(g to j)	3/91	"Considering" (a) to (d)
(k to m)	8/83	"Considering" (a to c)
(n to p)	5/89	"Considering" (b) to (d)
(q)	4/89	"Further recognizing"(a) and"endorses"
(r)	3/91	"Recognizing" (d)
1.1	8/83	Article 1
2.1 (a)	8/83	Article 2.1 (c)
(b)	8/83	Article 2.1 (b)
(c)	8/83	Article 2.1 (e)
(d)	5/89	"Endorses"
(e)	8/83	Article 2.1 (d)
(f)	8/83	Article 2.1 (a)
2.2	4/89	Para. 5 (a)
3	8/83	Article 2.2
4.1	8/83	Article 11
4.2	4/89	Para. 5 (b)
4.3	-	New text
4.4	8/83	Article 10
4.5	4/89	Para. 1
5.1 and 5.2	8/83	Article 3.1 and 3.2
6.1	8/83	Article 4.1
6.2	8/83	Article 4.3
7	8/83	Article 6
8.1	8/83	Article 7.1, introductory para.
8.2 and 8.3	8/83	Article 7.1 (c and d)
8.4	8/83	Article 7.1 (g)
8.5 and 8.6	8/83	Article 7.1 (h) i and ii
9.1 and 9.2	8/83	Article 7.1 (a and b)
9.3	8/83	Article 7.2
10.1 and 10.2	8/83	Article 7.1 (e and f)
10.3	8/83	Article 4.2
11.1	3/91	"Endorses" para. 1
11.2	8/83	Article 5
11.3	4/89	Para. 2
11.4	3/91	"Endorses" para. 2
12.1	4/89	Para. 3
12.2	5/89	"Endorses",

12.3	4/89
13	8/83
14.1 to 14.4	8/83
14.5	4/89
14.6 to 14.8	3/91

from 2nd sentence on  
Para. 4, first two sentences  
Article 9  
Article 8  
Para. 4, from 2nd sentence on  
"Endorses" para. 3 to 5

### III FIRST ANNOTATED DRAFT OF THE REVISED TEXT IN A POSSIBLE NEW STRUCTURE

#### Comments by the Working Group

A number of comments of the Working Group concerned terminology that should be used, as appropriate, throughout the text of the International Undertaking. Suggestions made included the following:

- The terminology for countries adhering to the revised International Undertaking should be "the parties".
- "Conservation", not "preservation", should be used, or "conservation, in situ, (including on-farm) and ex situ".
- The concept of "sustainable use" should be introduced, to follow the usage in the Conference on Biological Diversity.
- "IBPGR" should be replaced by "IPGRI".

#### PREAMBLE<sup>1</sup>

#### THE CONFERENCE<sup>2</sup>

Recognizing that

- (a)<sup>3</sup> Plant genetic resources are a common heritage of mankind to be preserved, and to be freely available for use, for the benefit of present and future generations;<sup>4</sup>

#### Commentary by the secretariat

The original wording of the Undertaking relating to "heritage of mankind" was based on a concept previously used in the Convention concerning the Protection of World Cultural and Natural Heritage, adopted under the sponsorship of UNESCO in 1972. This concept, as used in the UNESCO Convention, was not intended to exclude in any way either the overriding sovereign rights of the State over natural or man-made sites located on its territory, or private property rights existing under national law. The United Nations Convention on the Law of the Sea of 1982, on the other hand, used the concept of "the common heritage of mankind" to refer to the sea-bed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. In the Undertaking, as in the UNESCO Convention, the use of the concept does not entail the exclusion of sovereign rights, as clarified by Resolution 3/91 (see paragraph (b) below) or of rights of private property under national law. For its part, the Convention on Biological Diversity does not refer at all to the concept of "heritage of mankind", but rather to the "common concern of mankind". In order

1 The following preamble draws together the preambular paragraphs of the resolutions adopting the Undertaking and its three annexes. While some editing has been done to eliminate obvious repetition, there will clearly be a need to shorten the Preamble at some stage in the revision process. See also the Preamble of the Convention on Biological Diversity (CBD).

2 See commentary to Paragraph 4.2

3 Letters in brackets are given to aid identification in the draft only.

4 Resolution 4/89; see also resolution 8/83, article 1.

to harmonize this text with the language of the Biodiversity Convention, the Commission may wish either:

- a) to delete "freely" in the third line so as to make this paragraph of the Undertaking clearly compatible with the principle of access on mutually agreed terms as set out in the Biodiversity Convention; or
- b) to recast the whole paragraph, using wording closer to that of the Biodiversity Convention, for example, along the following lines:

*"The conservation and availability for use of plant genetic resources, for the benefit of present and future generations, are a common concern of mankind".*

Comments by the Working Group

*A view was expressed that "Common concern" should be used in lieu of "heritage of mankind", as proposed in para (b) of the Commentary by the secretariat.*

- (b) **The concept of mankind's heritage, as applied in the International Undertaking on Plant Genetic Resources, is subject to the sovereignty of the States over their plant genetic resources;<sup>5</sup>**

Commentary by the secretariat

*If paragraph (a) above is redrafted and the concept of "heritage of mankind" deleted, paragraph (b) could be modified in order to state simply that:*

*"States have sovereign rights over their plant genetic resources".*

- (c) **Full advantage can be derived from plant genetic resources through an effective programme of plant breeding, and that, while most such resources, in the form of wild plants and old land races, are to be found in developing countries, training and facilities for plant survey and identification, and plant breeding, are insufficient, or even not available in many of those countries;<sup>6</sup>**
- (d) **Plant genetic resources are indispensable for the genetic improvement of cultivated plants, but have been insufficiently explored, and in danger of erosion and loss;<sup>7</sup>**
- (e) **The availability of plant genetic resources and the information, technologies and funds necessary to conserve and utilize them, are complementary and of equal importance;<sup>8</sup>**

5 Resolution 3/91. See the Preamble (para. 4) and article 3 of the CBD.

6 Resolution 5/89

7 Resolution 5/89

8 Resolution 3/91.

Comments by the Working Group

Suggestions were made for the following underlined changes:

- "... utilize them sustainably.";
- "... information, technologies, research ..."

- (f) All nations can be contributors and beneficiaries of plant genetic resources, information, technologies and funds;<sup>9</sup>
- (g) The best way to guarantee the maintenance of plant genetic resources is to ensure their effective and beneficial utilization in all countries;<sup>10</sup>

Comments by the Working Group

A suggestion was made to replace "effective and beneficial utilization ..." by "sustainable use".

- (h) The farmers of the world have, over the millennia, domesticated, conserved, nurtured, improved and made available plant genetic resources, and continue to do so today;<sup>11</sup>

Comments by the Working Group

A view was expressed that line one should read "The farmers' and breeders ..."

- (i) Advanced technologies and local rural technologies are both important and complementary in the conservation and utilization of plant genetic resources;<sup>12</sup>

Comments by the Working Group

A suggestion was made to replace "both" by "equally" in the first line.

- (j) *In situ* and *ex situ* conservation are important and complementary strategies for maintaining genetic diversity;<sup>13</sup>

Considering that

- (k) The international community should adopt a concrete set of principles designed to

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9 Resolution 3/91.

10 Resolution 3/91.

11 Resolution 3/91.

12 Resolution 3/91.

13 Resolution 3/91.

promote the exploration, preservation, documentation, availability and full use of relevant plant genetic resources essential to agricultural development;<sup>14</sup>

Comments by the Working Group

A suggestion was made to add "evaluation" and "characterization", after the word, "documentation".

- (l) It is the responsibility of governments to undertake such activities as are needed to ensure the exploitation, collection, conservation, maintenance, evaluation, documentation and exchange of plant genetic resources in the interest of all mankind; to provide financial and technological support to institutions engaged in such activities; and to ensure the equitable and unrestricted distribution of the benefits of plant breeding;<sup>15</sup>

Comments by the Working Group

Suggestions were made for the following underlined changes:

- "It is the collective responsibility ..."
- "... Governments to organize, provide for, and undertake such activities as ..."
- "... to provide financial, research and technological support ..."
- "... engaged in such activities; to share technology for the enhancement and sustainable use of plant genetic resources; and to ensure..."

- (m) Progress in plant breeding is essential to the present and future development of agriculture; and the establishment or strengthening of plant breeding and seed production capabilities, at the national, sub-regional and regional levels, is a prerequisite to making efficient use of international cooperation in the exploration, collection, conservation, maintenance, evaluation, documentation and exchange of plant genetic resources;<sup>16</sup>
- (n) The majority of these plant genetic resources come from developing countries, the contribution of whose farmers has not been sufficiently recognized or rewarded;<sup>17</sup>

14 Resolution 8/83

15 Resolution 8/83. See also para. 5 of the Preamble of the CBD.

16 Resolution 8/83

17 Resolution 5/89.

Comments by the Working Group

A view was expressed that the drafting of this paragraph was negative, and that it should be restated positively, stressing the importance of traditional and local communities in conserving germplasm.

- (o) The farmers, especially those in developing countries, should benefit fully from the improved and increased use of the natural resources they have preserved;<sup>18</sup>

Comments by the Working Group

A suggestion was made to add the underlined words "farmers and breeders".

- (p) There is a need to continue the conservation (*in situ* and *ex situ*), development and use of the plant genetic resources in all countries, and to strengthen the capabilities of developing countries in these areas;<sup>19</sup>
- (q) ~~The~~ This International Undertaking on Plant Genetic Resources constitutes a formal framework aimed at ensuring conservation, use and availability of plant genetic resources, and that it is intended to lay the basis for an equitable and, therefore solid and lasting, global system;<sup>20</sup>

Comments by the Working Group

A suggestion was made to refer to "sustainable use" in the second line and to delete "and availability".

- (r) Conditions of access to plant genetic resources need further clarification;<sup>21</sup>

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18 Resolution 5/89. See also para. 12 of the Preamble and article 8 (j) of the CBD.

19 Resolution 5/89. See para. 7 of the Preamble of the CBD.

20 Resolution 4/89.

21 This text, drawn from Resolution 3/91, has been retained in view of the decision by the Commission on Plant Genetic Resources at its Fifth Session, that consideration be given to the issue of access on mutually agreed terms to plant genetic resources, including *ex situ* collections not addressed by the Convention on Biological Diversity, as well as to the issue of implementation of Farmers' Rights.

Comments by the Working Group on the last sub-article

*A view was expressed that this clause should be deleted.*

Comments by the Working Group on the Preamble as a whole

*A number of suggestions were made for ideas that might be inserted in the Preamble:*

- *Plant genetic resources for food and agriculture form part of global biodiversity but are, at the same time, largely the result of human activity.*
- *Plant genetic resources have great potential for meeting basic human needs. (Reference should be made to Resolution 3 of the Nairobi Final Act: "The Conference ... recognizing the basic and continuing needs for sufficient food, shelter, clothing, fuel, ornamental plants and medicinal products for peoples of the world ..." and "... recognizing the benefits from the care and improvement by the peoples of the world of animal, plant and microbial genetic resources to supply those basic needs and from the institutional research on and development of those genetic resources ...")*
- *Plant genetic resources have already been partly lost, and other parts are in danger of extinction. They are therefore in need of conservation.*
- *Mention should be made of the Convention on Biological Diversity, and the principle of national sovereignty over plant genetic resources should be re-affirmed.*
- *No country is self-reliant in terms of plant genetic resources, but depends on the plant genetic resources of other countries, and on their technologies, for their more effective conservation, improvement, and sustainable use. International cooperation is therefore needed.*
- *The possibility of developing countries "adding value" to their plant genetic resources, by effective programmes of plant breeding, should be referred to. The need for the transfer of technology, and for new and additional resources should be mentioned.*
- *The importance of on-farm and ex situ conservation should be noted.*
- *Conservation and sustainable use should be linked.*

*A further suggestion was made to delete items (c), (e), (f), (n) and (r), as they were "simply declarations". Para. (j) could be split into two separate items, as in the case of paras. 10 and 11 of the preamble of the Convention on Biological Diversity. Conservation ex situ should complement conservation in situ. Items (b), (m) and (q) could go into the operative part of the text.*

Has agreed as follows:

## CHAPTER I. INTRODUCTION

### Article 1 - Objective

1.1 The objective of this Undertaking is to ensure that plant genetic resources of economic and/or social interest, particularly for agriculture, will be explored, preserved, evaluated and made available for plant breeding and scientific purposes. This Undertaking is based on the universally accepted principle that plant genetic resources are a heritage of mankind and consequently should be available without restriction.<sup>22</sup>

#### Commentary by the secretariat

*Harmonization with the language used in the Convention on Biological Diversity may also require changes to this Article. The following suggested rewording may be considered:*

- a) *to delete the second sentence of the article ("This Undertaking...without restriction"). and*
- b) *to include a new paragraph (which should become Article 1.2) based on the wording set out in Article 5.1 of the International Code of Conduct for Plant Germplasm Collection and Transfer. A possible text would be:*

*"This Undertaking is to be implemented in harmony with the Convention on Biological Diversity and other legal instruments protecting biological diversity or parts thereof".*

*The following ideas might also be considered for possible incorporation into the objective(s), as they are present in the Convention on Biological Diversity: (i) sustainable use/utilization of plant genetic resources; and (ii) equitable sharing of benefits derived from plant genetic resources.*

#### Comments by the Working Group

*A suggestion was made to revise the text proposed in the secretariat's comments for a new article 1.2, to end as follows: "... other legal instruments concerning the conservation and sustainable use of biological diversity and its components".*

*A view was expressed that instead of "mankind", "humanity" should be used, and that the full text needed reconsideration.*

*A suggestion was made to revise the text as follows:*

*"The objectives of this Undertaking, to be pursued in accordance with the Convention on Biological Diversity, are the conservation and sustainable use of plant genetic resources for food and agriculture, and the fair and equitable sharing of the benefits arising out of their utilization".*

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22 See article 1 of the CBD.

Article 2 - Definitions<sup>23</sup>

2.1 In this Undertaking:

- (e) (a) "active collection" means a collection which complements a base collection, and is a collection from which seed samples are drawn for distribution, exchange and other purposes such as multiplication and evaluation;
- (b) "base collection of plant genetic resources" means a collection of seed stock or vegetative propagating material (ranging from tissue cultures to whole plants) held for long-term security in order to preserve the genetic variation for scientific purposes and as a basis for plant breeding;

*Comments by the Working Group*

*A suggestion was made to add the underlined: "... as a basis for plant breeding, and not normally used for distribution".*

- (e) (c) "centre" means an institution holding a base or active collection of plant genetic resources, as described in Article 7 9.

*Comments by the Working Group*

*A view was expressed that it was necessary to specify whether an international, regional or national centre was intended.*

- (d) "Farmers' Rights" mean rights arising from the past, present and future contributions of farmers in conserving, improving, and making available plant genetic resources, particularly those in the centres of origin/diversity.<sup>24</sup>

*Comments by the Working Group*

*A view was expressed that the following words should be included in the definition of Farmers' Rights: "... for the entitlement of farmers to continue their efforts for the conservation of these resources, and continue their use".<sup>25</sup>*

- (d) (e) "institution" means an entity established at the international or national level, with or without legal personality, for purposes related to the exploration, collection, conservation, maintenance, evaluation or exchange of plant genetic resources;

23 THE DEFINITIONS IN SUB-ARTICLE 2.1 HAVE BEEN PUT IN ALPHABETICAL ORDER, AS IS USUAL IN SUCH TEXTS. See article 2 of the CBD.

24 Resolution 5/89.

25 See article 12.2 of this document, which already includes this concept.

Comments by the Working Group

A suggestion was made to add the underlined: "... maintenance, documentation, evaluation ..."

- (a) (f) "plant genetic resources" means the reproductive or vegetative propagating material of the following categories of plants:
- i. cultivated varieties (cultivars) in current use and newly developed varieties;
  - ii. obsolete cultivars;
  - iii. primitive cultivars (land races);
  - iv. wild and weed species, near relatives of cultivated varieties;
  - v. special genetic stocks (including elite and current breeders' lines and mutants);

Commentary by the secretariat on article 2.1 as a whole

The Commission may wish to consider the incorporation of other definitions, contained in the Convention on Biological Diversity and the Code of Conduct for Germplasm Collecting and Transfer, such as the following:

- "Ex situ conservation" means the conservation of plant genetic resources outside their natural habitat

- "In situ conservation" means the conservation of plant genetic resources in the areas which they have naturally evolved and, in the case of cultivated species or varieties, in the surroundings where they have developed their distinctive properties".

Comments by the Working Group

A view was expressed that "reproductive or vegetative propagating material" should be understood as covering material derived from modern biotechnology, and that the definition in this clause would need to be reconsidered in the light of the revised text, and would depend on the agreed scope.

A suggestion was made to add the underlined words: "... material, which may be used to produce improved varieties". Another suggestion was that the text should refer to "... material of actual or potential value".

A view was expressed that, if forest resources were to be covered, this should be made explicit. For forest resources, a distinction might be made between those actually used by foresters, and those merely present; a better definition of "ex situ" was therefore needed.

A view was also expressed that forestry should not be covered.

A view was expressed that the question of whether medicinal plants should be covered was a fundamental issue that required negotiation.

A view was also expressed that the scope of the revised Undertaking should be plant genetic resources for food and agriculture.

A suggestion was also made that a new sub-article be added: "(vi) DNA stocks".

A further suggestion was made to define plant genetic resources as "plants, parts of plants, or cellular lines".

A suggestion was also made to use "heritage" or "unused" cultivars, in the place of "obsolete", in sub-clause (ii), and "traditional" for "primitive" in sub-clause (iii).

**2.2 It is understood that the term "free access" does not mean free of charge.<sup>26</sup>**

Commentary by the Secretariat

Given that the term "free access" is not actually used in the Undertaking, and that the principle of "mutually agreed terms" is to be applied in accordance with the Convention on Biological Diversity, the Commission may wish to consider deleting paragraph 2.2. in its entirety. Alternatively, if the Commission considers it desirable to maintain the substance of Resolution 4/89, the text could be reformulated to refer to the concept of "freely available" which is used in the Preamble to the Undertaking. A possible reformulation could read as follows:

"It is understood that "freely available" ("free access") does not mean available free of charge".

Comments by the Working Group

The view was expressed that this article should be revised. The view was also expressed that it could be deleted.

<sup>26</sup> Resolution 4/89. See article 15 of the CBD.

Comments by the Working Group as a whole

*A suggestion was also made to add the definition of "in situ conditions", from the Convention on Biological Diversity", as proposed in the commentary.*

*In connection with the definition of ex situ conservation in the commentary, the view was expressed that this could be improved by adding "under human intervention and security". Another suggestion was made to add a final phrase, "in the country of origin or elsewhere".*

*A suggestion was also made that the definition of intellectual property rights, both under UPOV and GATT (TRIPs) needed to be reflected.*

*It was suggested to include a new sub-clause defining "breeders' rights" in balance with (d) "farmers' rights", and to define "on-farm conservation" at an appropriate place in Article 2.*

Article 3 - Scope

2.2 3.1 This Undertaking relates to the plant genetic resources described in para. 2.1 (f), of all species of economic and/or social interest, particularly for agriculture at present or in the future, and has particular reference to food crops.

Comments by the Working Group

*A view was expressed that a simple, new draft, was required, that should be based on the concept of plant genetic resources for food and agriculture.*

Article 4 - Nature of the Undertaking and Relationship with other Legal Instruments

4.1 At the time of adhering, Governments and institutions will advise the Director-General of FAO of the extent to which they are in a position to give effect to the principles contained in the Undertaking. At yearly intervals, they will provide the Director-General of FAO with information on the measures that they have taken or propose to take to achieve the objective of this Undertaking.

Comments by the Working Group

*A suggestion was made to add a mechanism for the involvement of the Conference of the Parties to the Conference on Biological Diversity. A view was expressed that the various institutional roles would need further discussion.*

4.2 The benefits to be derived under the this International Undertaking are part of a reciprocal system, and should be limited to countries adhering to the International

## Undertaking.<sup>27</sup>

### Commentary by the secretariat

The Undertaking and its Annexes use different terminology to refer to the "parties" adhering to it, including the following (REFERENCES ARE TO THE NUMBERING IN THE PRESENT DOCUMENT): "countries", as in Article 4.2, "governments", as in Article 5.1, "States", as in Article 12.1, and "Governments and institutions", as in Article 14.3. The Commission may wish to consider the harmonization of this terminology at this stage. One possibility might be to use throughout the term "Parties", and to define the term as referring to "Governments and institutions adhering to the Undertaking". This would also bring the wording of the Undertaking more in line with that of the Convention on Biological Diversity.

### Comments by the Working Group

A view was expressed that, depending on the rest of the negotiation, this sub-article might prove to be self-evident, and drop away.

A view was also expressed that sub-article 4.2 might become a new and separate article, and that yet another article on juridical arrangements might be needed.

4.3 This Undertaking is to be implemented in harmony with the Convention on Biological Diversity and other legal instruments protecting biological diversity or parts thereof.<sup>28</sup>

4.4 This Undertaking is without prejudice to any measures taken by Governments -in line with the provisions of the International Plant Protection Convention, adopted in Rome on 6 December 1951 - to regulate the entry of plant genetic resources with the aim of preventing the introduction or spread of plant pests.

4.5 Plant Breeders' Rights, as provided for under the International Convention for the Protection of New Varieties of Plants (the UPOV Convention) (~~International Union for the Protection of New Varieties of Plants~~) are not incompatible with the this International Undertaking;<sup>29</sup>

### Commentary by the secretariat

The reference to UPOV (the International Union for the Protection of New Varieties of plants) has been replaced by a reference to the UPOV Convention itself, on which plant breeders' rights are based, to make the reference more correct legally.

The UPOV Convention was revised in 1991. Changes introduced in the revised Convention include the possibility of protecting particular plant varieties by means of both plant breeders' right and other forms of intellectual property protection (notably patents), and the introduction of the concept of "essentially derived varieties". The revised UPOV Convention also transforms the way in which the rights of farmers

27 Resolution 4/89.

28 THIS TEXT IS ADDED TO ENSURE COMPLEMENTARITY WITH THE CBD AND THE OTHER RELEVANT LEGAL INSTRUMENTS, AS PART OF STEP I.

29 Text adopted by Resolution 4/89. It refers to the UPOV Convention, as revised in 1978. See articles 16.2, 5 and 22.1 of the CBD.

to re-use farm-saved seeds on their own land are expressed. These rights previously depended upon a generally agreed interpretation of the term, "production for purposes of commercial marketing", which would exclude from the scope of the Convention the re-use of farm-saved seed of protected varieties by farmers on their own lands. The expression, "production for purposes of commercial marketing, has now been widened to read "Production or reproduction", and an optional clause allows individual Contracting Parties to restrict breeders' rights in order to permit farmers to use, for propagating purposes, on their own holdings, the product of the harvest which they have obtained by planting the protected variety on their own holdings. In effect, this downgrades the "farmer's privilege" from a universally accepted principle to an exception. It puts the burden of establishing the "farmer's privilege" upon individual Contracting Parties.

Comments by the Working Group

A suggestion was made to use "... are compatible with this International Undertaking..." instead of "... are not incompatible with this International Undertaking...", and to add "... The same should apply to the revised UPOV Convention and article 27 of TRIPs/GATT".

A view was also expressed that this text should only refer to UPOV 1978.

A suggestion was also made to transfer the content of this sub-article to a new article, on relationships with other legal instruments.

A view was expressed that the link between farmers' rights and plant breeders' rights should be strengthened.

A view was also expressed that the terms employed in the CBD, "fair and equitable sharing of benefits", and "subject to national legislation", should be introduced.

**CHAPTER II: EXPLORATION, CONSERVATION AND SUSTAINABLE  
USE<sup>30</sup> OF GENETIC RESOURCES**

Article 5 - Exploration and Collection of Plant Genetic Resources

Comments by the Working Group

A suggestion was made that the title should include the underlined words: "Exploration for, and Management of Plant Genetic Resources".

Another suggestion was made that the title should include the underlined words: "Exploration, Management and Conservation of Plant Genetic Resources".

3.1 5.1 Governments adhering to this Undertaking will organize or arrange for missions of

30 In this chapter, the Commission may wish to introduce, as appropriate, the concept of "sustainable use", in the light of article 10 of the CBD.

exploration, conducted in accordance with recognized scientific standards, to identify potentially valuable plant genetic resources that are in danger of becoming extinct in the country concerned, as well as other plant genetic resources in the country which may be useful for development but whose existence or essential characteristics are at present unknown, in particular:<sup>31</sup>

Comments by the Working Group

*A suggestion was made to add the underlined words: "... will, where appropriate, organize or arrange ..." Another suggestion was to add the following underlined words: "... organize, arrange or encourage ..."*

*A suggestion was also made to add "Under the provisions of the Code of Conduct for the Exploration, ..."*

- (a) known land races or cultivars in danger of becoming extinct due to their abandonment in favour of the cultivation of new cultivars;
- (b) the wild relatives of cultivated plants in areas identified as centres of genetic diversity or natural distribution;
- (c) species which are not actually cultivated but may be used for the benefit of mankind as a source of food or raw materials (such as fibres, chemical compounds, medicine or timber).

Comments by the Working Group

*A suggestion was made to remove the example "... (such as fibres, chemical compounds, medicine or timber)".*

3-2 ~~5.2~~ Special efforts will be made, in the context of Article 3.1, where the danger of extinction of plant species is certain, or is likely, having regard to circumstances such as the clearance of vegetation from tropical rain forests and semi-arid lands with a view to the expansion of cultivated areas.<sup>32</sup>

Comments by the Working Group

*A view was expressed that this sub-article should refer not to "... tropical rain forests..." but to "... all types of forests ... , including boreal and temperate".*

Article 6 - Conservation, Evaluation and Documentation of  
Plant Genetic Resources

31 See articles 7 and 12 (b) of the CBD.

32 See article 8 of the CBD.

Comments by the Working Group

*A suggestion was made to change the word, "preservation", in the title, to "conservation" (THIS HAS BEEN DONE); and to add "characterization" immediately afterwards.*

4-1 6.1 Appropriate legislative and other measures will be maintained and, where necessary, developed and adopted to protect and preserve the plant genetic resources of plants growing in areas of their natural habitat in the major centres of genetic diversity.<sup>33</sup>

Comments by the Working Group

*A number of suggestions were made to reword "... in areas of their natural habitat ...", as "in situ", "in situ conditions", or "in their natural habitat".*

*A suggestion was also made to add the underlined words: "... major centres of genetic diversity, including those conserved on farm."*

*A further suggestion was made to end the sentence with the underlined words: "developed and adopted to conserve and sustainably manage plant genetic resources in their natural habitat".*

4-3 6.2 Appropriate measures will also be taken with respect to plant genetic resources held, outside their natural habitats, in gene banks or living collections of plants. Governments and institutions adhering to this Undertaking will, in particular, ensure that the said resources are conserved and maintained in such a way as to preserve their valuable characteristics for use in scientific research and plant breeding, and are also evaluated and fully documented.<sup>34</sup>

Comments by the Working Group

*A suggestion was made to replace "... outside their natural habitats, in gene banks or living collections of plants ...", by "ex situ".*

*A suggestion was also made that "plant breeding" should be specified as "non-profit plant breeding".*

*A further suggestion was made to add, at the end of the sub-article: "Such documentation should be regularly reviewed. There should be transparency in the dissemination of such information".*

### CHAPTER III. INTERNATIONAL COOPERATION

#### Article 6-7 - General International Cooperation<sup>35</sup>

6 7.1. International cooperation will, in particular, be directed to:

33 See articles 6 and 10 of the CBD.

34 See article 9 of the CBD.

35 See article 5 of the CBD.

- (a) establishing or strengthening the capabilities of developing countries, where appropriate on a national or sub-regional basis, with respect to plant genetic resources activities, including plant survey and identification, plant breeding and seed multiplication and distribution, with the aim of enabling all countries to make full use of plant genetic resources for the benefit of their agricultural development;
- (b) intensifying international activities in preservation, evaluation, documentation, exchange of plant genetic resources, plant breeding, germplasm maintenance, and seed multiplication. This would include activities carried out by FAO and other concerned agencies in the UN System, it would also include activities of other institutions, including those supported by the CGIAR. The aim would be to progressively cover all plant species that are important for agriculture and other sectors of the economy, in the present and for the future;<sup>36</sup>

Comments by the Working Group

*A suggestion was made to add the underlined words in the last sentence: "...plant species that are important for food and agriculture ..."*

*A further suggestion was made to add the underlined words in the first sentence: "...conservation, evaluation, characterization, documentation, exchange of plant genetic resources, germplasm maintenance, and seed multiplication, in order to progressively cover all plant species that are important for agriculture and other sectors of the economy". The second and third sentences might then be deleted.*

- (c) supporting the arrangements outlined in Article 7-9, including the participation in such arrangements of governments and institutions, where appropriate and feasible;
- (d) considering measures, such as the strengthening or establishment of funding mechanisms, to finance activities relating to plant genetic resources.

Article 7-8 - Role of International Organizations<sup>37</sup>

7.8.1 The present international arrangements, being carried out under the auspices of FAO and other organizations in the United Nations System, by national and regional institutions and institutions supported by the CGIAR, in particular the IBPGR, for the exploration, collection, conservation, maintenance, evaluation, documentation, exchange and use of plant genetic resources will be further developed and, where necessary, complemented in order to develop a global system ~~so as to ensure that:~~

7.1(e) 8.2 The activities of the centres that are related to the exploration, collection, conservation, maintenance, rejuvenation, evaluation and exchange of plant genetic resources will be carried out with due account being taken of scientific standards;

36 See also articles 17 and 18 of the CBD.

37 See article 5 of the CBD. SOME MINOR GRAMMATICAL CHANGES HAVE BEEN MADE IN THE TEXT OF THIS ARTICLE. THEY ARE INDICATED BY STRIKING-OUT AND SHADING.

Comments by the Working Group

A suggestion was made to introduce the underlined word: "... conservation, maintenance, evaluation, training and exchange of ...", and to remove the word, "rejuvenation".

7.1 (d) ~~8.3~~ Sufficient support in funds and facilities will be provided, at the national and international levels, to enable the centres to carry out their tasks;<sup>38</sup>

7.1 (g) ~~8.4~~ The IBPGR will pursues and develops its present activities, within its terms of reference, in liaison with FAO;

Comments by the Working Group

A suggestion was made to reword "... in liaison with FAO ..." as "... in partnership with FAO ..."

7.1 (h) i: ~~8.5~~ The general expansion and improvement of related professional and institutional capability within developing countries, including training within appropriate institutions in both developed and developing countries, is will be adequately funded; and.

7.1 (h) ii: ~~8.6~~ The overall activity within the Undertaking will ultimately ensures a significant improvement in the capacity of developing countries for the production and distribution of improved crop varieties, as required to support major increases in agricultural production, especially in developing countries.

Comments by the Working Group

A suggestion was made to replace "... production and distribution of ...", by "... the development and sustainable use of ..."

Article 9 - The International Network of Genebank Collections<sup>39</sup>

7.1 (a) ~~9.1~~ ~~there develops~~ An internationally coordinated network of national, regional and international centres, including an international network of base collections in gene banks, under the auspices or the jurisdiction of FAO, that have assumed the responsibility to hold, for the benefit of the international community and on the principle of unrestricted exchange, base or active collections of the plant genetic resources of particular plant species, will be developed;

38 See article 20 of the CBD.

39 See article 9(e) of the CBD. SOME MINOR GRAMMATICAL CHANGES HAVE BEEN MADE IN THE TEXT OF THIS ARTICLE. THEY ARE INDICATED BY STRIKING-OUT AND SHADING.

Comments by the Working Group

A suggestion was made to delete "... under the ... jurisdiction of FAO ..." and "... on the principle of unrestricted exchange, ..." Another suggestion was that the phrase "... the principle of unrestricted exchange ..." be replaced by "... the principle of mutual exchange on agreed-upon terms".

A suggestion was also made to add the underlined words at the end of the clause: "... active collection of the plant genetic resources of particular plant species of interest to agriculture and food production". Another suggestion was that the end of this clause read instead "... plant genetic resources of particular interest to food and agriculture".

A view was expressed that mention should be made of the need for duplicate safety.

7.1 (b) 9.2 The number of such centres will be progressively increased so as to achieve as complete a coverage as necessary, in terms of species and geographical distribution, account also being taken of the need for duplication, of the resources to be safeguarded and preserved;

7.2 9.3 Within the context of the global system any Governments or institutions that agree to participate in the Undertaking, may, furthermore, notify the Director-General of FAO that they wish the base collection or collections for which they are responsible to be recognized as part of the international network of base collections in gene banks, under the auspices or the jurisdiction of FAO. The centre concerned will, whenever requested by FAO, make material in the base collection available to participants in the Undertaking, for purposes of scientific research, plant breeding or genetic resource conservation, free of charge, on the basis of mutual exchange or on mutually agreed terms.

Comments by the Working Group

A suggestion was made to delete "... free of charge ..."

A view was also expressed that "... wherever requested by FAO ...", and "... free of charge ..." would need reconsideration, in the light of the Convention on Biological Diversity.

Article 10 - The World Information and Early Warning System on Plant Genetic Resources<sup>40</sup>

7.1 (e) 10.1 A global information system, under the coordination of FAO, relating to plant genetic resources maintained in the aforementioned collections, and linked to systems established at the national, sub-regional and regional levels, will be developed on the basis of relevant arrangements that already exist;

Commentary by the secretariat

40 SOME MINOR GRAMMATICAL CHANGES HAVE BEEN MADE IN THE TEXT OF THIS ARTICLE. THEY ARE INDICATED BY STRIKING-OUT AND SHADING.

*The Commission may wish to give consideration to updating the wording in this paragraph, by replacing the words "a global information system" with the words "a World Information and Early Warning System". The latter name was used by the Commission at its fifth session to avoid confusion with the "Global System on PGR", and with the "Global Information and Early Warning System" on food security.*

7.1 (f) **10.2** Early warning will be given to FAO, or to any institution designated by FAO, of any hazards that threaten the efficient maintenance and operation of a centre, with a view to prompt international action to safeguard the material maintained by the centre;

4.2 **10.3** Measures will be taken, if necessary through international cooperation, to ensure the scientific collection and safeguarding of material in areas where important plant genetic resources are in danger of becoming extinct on account of agricultural or other development.<sup>41</sup>

## CHAPTER IV. ACCESS TO GENETIC RESOURCES AND FARMERS' RIGHTS

### Article 11 - Availability of Plant Genetic Resources

**11.1 Governments and institutions adhering to this Undertaking recognize that nations States have sovereign rights over their plant genetic resources**<sup>42</sup>.

5 **11.2** It will be the policy of adhering Governments and institutions having plant genetic resources under their control to allow access to samples of such resources, and to permit their export, where the resources have been requested for the purposes of scientific research, plant breeding or genetic resource conservation. The samples will be made available: (i)<sup>43</sup> free of charge, (ii) on the basis of mutual exchange, or (iii) on mutually agreed terms.<sup>44</sup>

#### Commentary by the secretariat

*The formulation of last sentence of this paragraph has, in the past, led to some confusion as to the conditions of access provided for in the Undertaking. Resolution 4/89, in stating that "free access" does not mean "free of charge", makes it clear that this formulation was intended to refer to three alternatives. This has been clarified in the present formulation.*

*However, this paragraph, which deals with the modalities for access to samples, may need to be reconsidered and/or interpreted in the light of the principle of "access on mutually agreed terms" set out in the Convention on Biological Diversity.*

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41 See articles 5, 7 and 8 of the CBD.

42 Based on Resolution 3/91. "Nations" has been substituted by "States" in order to be consistent with the language used in Resolution 4/89 and in the Preamble of Resolution 3/91, and with Article 15.1 of the Convention on Biological Diversity. See article 3 of the CBD.

43 The additions to the text, shown shaded, are for clarification only as referred to in the commentary.

44 See articles 1, 15 and 16 of the CBD.

A specific reference to the Convention may be considered convenient here, in order to ensure full compatibility with the text of the Convention. The following phrase could be added at the end of article 11.2:

*"... subject to the rights and obligations provided for by the Convention on Biological Diversity".*

Comments by the Working Group

*A suggestion was made to add "... on the basis of prior informed consent" after "... samples of such resources, ..." and to use "transfer" instead of "export".*

**11.3** A state may impose only such minimum restrictions on the free exchange of materials covered by Article 2.1 (f) of the **this** International Undertaking as are necessary for it to conform to its national and international obligations;<sup>45</sup>

Comments by the Working Group

*A suggestion was made to reword the article in the terms used on article 15.2 of the CBD.*

**11.4** **that** Breeders' lines and farmers' breeding material should only be available at the discretion of their developers during the period of development.<sup>46</sup>

**Article 12 - Farmers' Rights<sup>47</sup>**

**12.1** States adhering to the **this** undertaking recognize the enormous contribution that farmers of all regions have made to the conservation and development of plant genetic resources, which constitute the basis of plant production throughout the world, and which form the basis for the concept of Farmers' Rights;<sup>48</sup>

Comments by the Working Group

*A suggestion was made that this matter be transferred to the preamble.*

**12.2** These Farmers' Rights are vested in the International Community, as trustee for present and future generations of farmers, for the purpose of ensuring full benefits to farmers, and supporting the continuation of their contributions, as well as the attainment of the overall purposes of **this** the International Undertaking) in order to:

<sup>45</sup> Resolution 4/89. See articles 1, 15 and 16 of the CBD.

<sup>46</sup> Resolution 3/91.

<sup>47</sup> See article 8 (j) of the CBD.

<sup>48</sup> Resolution 4/89.

Comments by the Working Group

*A view was expressed that countries may choose to exercise part of their national sovereignty through a multilateral system.*

*Another view was expressed that the vesting of farmers' rights required further discussion. The institutions to be involved would also need to be negotiated.*

- (a) ensure that the need for conservation is globally recognized and that sufficient funds for these purposes will be available;<sup>49</sup>

Comments by the Working Group

*A suggestion was made that the underlined word be added: "... sufficient funds will be made available"*

- (b) assist farmers and farming communities, in all regions of the world, but especially in the areas of origin/diversity of plant genetic resources, in the protection and conservation of their plant genetic resources, and of the natural biosphere;

Comments by the Working Group

*A suggestion was made that "protection and conservation" should read "sustainable use and development".*

- (c) allow farmers, their communities, and countries in all regions, to participate fully in the benefits derived, at present and in the future, from the improved use of plant genetic resources, through plant breeding and other scientific methods.<sup>50</sup>

Comments by the Working Group

*It was suggested that the text be modified to read: "... recognize and ensure the rights of farmers, their communities and countries, in all regions, to fully share in the benefits ..."*

**12.3 The adhering states consider that the best way to implement the concept of Farmers' Rights is to ensure the conservation, management and use of plant genetic resources, for the benefit of present and future generations of farmers. This could be achieved through appropriate means, monitored by the Commission on Plant Genetic Resources, including in particular the international fund for plant genetic resources, already established by FAO.<sup>51</sup>**

49 See article 20 of the CBD.

50 Resolution 5/89.

51 Based on Resolution 4/89. The reference to a "Fund" already established by FAO has been eliminated in order to be consistent with the text approved by Resolution 3/91, reproduced below.

Comments by the Working Group

A view was expressed that the text was too narrow: it might read not "...for the benefit of present and future generations of farmers ...", but "... for the benefit of all humankind".

A view was expressed that there was a question as to whether farmers' rights derived from (i) the provision of material, or (ii) the activity of having selected, and continuing to select material.

## CHAPTER V. INSTITUTIONAL AND FINANCIAL ARRANGEMENT

### Article 13 - Intergovernmental Body, Monitoring of Activities and Related Action by FAO

9-1 **13.1** FAO will keep under continuous review the international situation concerning the exploration, collection, conservation, documentation, exchange and use of plant genetic resources.

Comments by the Working Group

A suggestion was made to add a mention of the activities of IPGRI in this sub-article.

9-2 **13.2** FAO will, in particular, establish an intergovernmental body to monitor the operation of the arrangements referred to in Article 7-8, and to take or recommend measures that are necessary or desirable in order to ensure the comprehensiveness of the global system and the efficiency of its operations in line with the Undertaking.<sup>52</sup>

Comments by the Working Group

A suggestion was made to replace "... an intergovernmental body ..." by "... the FAO Commission on Plant Genetic Resources..."

9-3 **13.3** In the performance of its responsibilities outlined in Part II of this Undertaking, FAO will act in consultation with those Governments that have indicated to FAO their intention to support the arrangements referred to in Articles 7-8, 9 and 10<sup>53</sup>.

52 The intergovernmental body referred to in this paragraph is the Commission on Plant Genetic Resources.

53 THE TEXT OF SECTION 8 IN THE OLD STRUCTURE HAS TO BE REDISTRIBUTED TO THE NEW SECTIONS 8, 9 AND 10.

Article-8 14 - Financial Security<sup>54</sup>

8-1 14.1 Adhering Governments, and financing agencies, will, individually and collectively, consider adopting measures that would place activities relevant to the objective of this Undertaking on a firmer financial basis, with special consideration for the need of developing countries to strengthen their capabilities in genetic resource activities, plant breeding and seed multiplication.

*Comments by the Working Group*

*A suggestion was made to add the underlined words: "... on a firmer long-term financial basis ..."*

8-2 14.2 Adhering Governments, and financing agencies, will, in particular, explore the possibility of establishing mechanisms which would guarantee the availability of funds that could be immediately mobilized to meet situations of the kind referred to in Article 7-10.1 (b).

8-3 14.3 Adhering Governments and institutions, and financing agencies, will give special consideration to requests from FAO for extra-budgetary funds, equipment or services needed to meet situations of the kind referred to in Article 7-10.1 (b).

8-4 14.4 The funding of the establishment and operation of the international network, in as it imposes additional costs on FAO, in the main will be funded from extra-budgetary resources.

14.5 To reflect the responsibility of those countries which have benefitted most from the use of germplasm, the international fund referred to in article 14.6 of this Undertaking would benefit from being supplemented by further contributions from adhering governments, on a basis to be agreed upon, in order to ensure for the fund a sound and recurring basis. The fund should be used to support plant genetic conservation, management and utilization programmes, particularly within developing countries, and those which are important sources of plant genetic material. Special priority should be placed on intensified educational programmes for biotechnology specialists, and strengthening the capabilities of developing countries in genetic resource conservation and management, as well as the improvement of plant breeding and seed production.<sup>55</sup>

54 See articles 12, 20 and 21 of the CBD.

55 Based on Resolution 4/89. The changes made are intended to ensure consistency with the wording in article 12. Capital letters used in the original to refer to the international fund have been eliminated.

*Comments by the Working Group*

*A suggestion was made to add the underlined word in the first sentence: "... which have already benefitted most ..."*

*A suggestion was made to change "... and those which are important sources of plant genetic resources", in the second sentence, to "... and those which are countries of origin of plant genetic resources".*

**14.6 that Farmers' Rights will be implemented, in particular, through an international fund on plant genetic resources which will support plant genetic conservation and utilization programmes, particularly, but not exclusively, in the developing countries.**<sup>56</sup>

*Comments by the Working Group*

*A suggestion was made to delete "... but not exclusively ..."*

**14.7 that The effective conservation and sustainable utilization of plant genetic resources is a pressing and permanent need, and, therefore, the resources for the international fund as well as for other funding mechanisms should be substantial, sustainable and based on the principles of equity and transparency;**<sup>57</sup>

**14.8 that Acting through the Commission on Plant Genetic Resources, the donors of genetic resources, funds and technology will determine and oversee the policies, programmes and priorities of the fund and other funding mechanisms, with the advice of the appropriate bodies.**<sup>58</sup>

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56 Resolution 3/91.

57 Resolution 3/91.

58 Resolution 3/91.

ANNEX 1

COMMENTS MADE BY THE WORKING GROUP ON ARTICLES AS A WHOLE IN THE TEXT OF THE FIRST DRAFT, BEFORE THE IMPOSITION OF A NEW STRUCTURE

Comments by the Working Group on old article 5 as a whole

*A view was expressed that Article 5 raised fundamental issues that needed to be negotiated, and that Article 5 should recognize national sovereignty, and the consequent need for mutually agreed terms of access. In this context, it was suggested that the article should include a negotiated common understanding for the development of national sui generis systems for plant variety protection, in line with the provisions of GATT/TRIPs. The realization of farmers' rights would be an element in this, and it was suggested that UPOV be associated in this process.*

*A suggestion was made that farmers' rights were an important concept in the national context.*

*A suggestion was also made that the question of the availability of information on plant genetic resources should be included in this article, or form a separate article.*

Comments by the Working Group on old article 6 as a whole

*A view was expressed, in connection with Article 6, that it needed some redrafting, and that rights arising from sovereignty over plant genetic resources, and from specific activities in support of the objectives of the International Undertaking, should be distinguished.*

*A suggestion was also made that sub-articles 6.4, 6.5 and 6.6 should constitute a separate article, with the words, "other funding mechanisms" and "with the advice of the appropriate bodies", either deleted, or their meaning specified.*

Comments by the Working Group on old article 8 as a whole

*A view was expressed that institutional questions would need discussion.*