CL 121/5-Sup.1

E

October 2001

منظمة الأغذية والزراعة للأمم المتحدة | 联合国粮食及农业组织 | Food and Agriculture Organization of the United Nations | Organisation des Nations Unies pour l'alimentation et l'agriculture | Organización de las Naciones Unidas para la Agricultura y la Alimentación

COUNCIL

Hundred and Twenty-first Session

Rome, 30 October - 1 November 2001

INTERNATIONAL UNDERTAKING ON PLANT GENETIC RESOURCES

INFORMATION PURSUANT TO RULE XXI.1 OF THE GENERAL RULES OF THE ORGANIZATION

TABLE OF CONTENTS

I. INTRODUCTION

Pursuant to Rule XXI.1 of the General Rules of the Organization, the Director-General, by a Circular State Letter sent on 1 August 2001, gave notice that a revised text of the International Undertaking on Plant Genetic Resources would be tabled at the Thirty-first Session of the Conference scheduled to meet from 2 to 13 November 2001. The Circular State Letter was accompanied by the Report of the Sixth Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture (25-30 June 2001), that contained the text of the Undertaking and the text of a draft Conference Resolution regarding interim arrangements for its implementation. The Circular State Letter was also accompanied by a *Report of the Director-General on the Technical, Administrative and Financial Implications of the International Undertaking on Plant Genetic Resources, as adopted by the Sixth Extraordinary session of the Commission on Genetic Resources for Food and Agriculture.*

Comments were received from the following FAO Members: Australia, Azerbaijan, Canada (two sets of comments), Chile, the European Community, Japan, Norway, The Former Yugoslav Republic of Macedonia, the United States of America and Venezuela. Comments were also received from the Russian Federation.

These comments were submitted for the consideration of the Committee on Constitutional and Legal Matters (CCLM), at its Seventy-second Session (8-10 October 2001), which reviewed the text of the Undertaking and the draft Conference Resolution.

The present document includes the text of the Circular State Letter, the Report of the Director-General and the comments received.

II. CIRCULAR STATE LETTER

1 August 2001

Text of the

International Undertaking on Plant Genetic Resources
Request for Comments by 21 September 2001

The Director-General of the Food and Agriculture Organization of the United Nations has the honour to refer to the Text of the International Undertaking on Plant Genetic Resources.

This text was adopted by the FAO Commission on Genetic Resources for Food and Agriculture at its Sixth Extraordinary Session held in Rome from 25-30 June 2001, at the conclusion of its negotiations undertaken in response to Resolution 7/93 of the Twenty-seventh Session of the Conference, which had requested the Director-General to provide a forum for negotiation among governments for the adaptation of the International Undertaking on Plant Genetic Resources, in harmony with the Convention on Biological Diversity. The International Undertaking on Plant Genetic Resources, as adopted by the Commission, is in Appendix B of the Report of its Sixth Extraordinary Session (document CGRFA-Ex6/01/REP), which is attached. Also attached is a Report of the Director-General on the Technical, Administrative and Financial Implications of the International Undertaking on Plant Genetic Resources.

The Commission requested the Director-General to transmit the Text of the International Undertaking to the Thirty-first Session of the Conference scheduled to meet in Rome from 2 to 13 November 2001, for its consideration and approval. The provisions of the Text as adopted by the Commission will also be reviewed by the FAO Committee on Constitutional and Legal Matters

(CCLM) at its Seventy-second Session in October 2001 and by the FAO Council at its Hundred and Twenty-first Session, from 30 October to 1 November 2001.

In accordance with Rule XXI.1(a) of the General Rules of the Organization, the attached Text is being submitted for comments and information and for such representations as Member Nations, Member Organizations, or Associate Members may wish to make.

In order that the comments may be collated in time for the forthcoming session of the FAO Conference, the Director-General would appreciate receiving them by 21 September 2001.

III. REPORT OF THE DIRECTOR-GENERAL ON THE ADMINISTRATIVE AND FINANCIAL IMPLICATIONS OF THE INTERNATIONAL UNDERTAKING ON PLANT GENETIC RESOURCES

Report of the Director-General on the Technical, Administrative and Financial Implications of the International Undertaking on Plant Genetic Resources, as adopted by the Sixth Extraordinary session of the Commission on Genetic Resources for Food and Agriculture (Rome, 24-30 June 2001)

1. The Sixth Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture (Rome, 24-30 June 2001) adopted the text of the International Undertaking on Plant Genetic Resources, as had been requested by the Council at its Hundred and Nineteenth and Hundred and Twentieth Sessions, and requested the Director-General to transmit it, through the Seventy-second session of the Committee on Constitutional and Legal Matters (1-2 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.

2. The Director-General is therefore circulating the Undertaking, in accordance with Rule XXI.1(a) of the General Rules of the Organization, with a request for comments and information on the matter and for such representations as Member Nations or Associate Members may wish to make. Rule XXI.1(a) also provides that the Director-General shall, at the same time, report on the technical, administrative and financial implications, of the Undertaking. The present document constitutes that Report.

3. In relation to the technical implications, Article 20 of the International Undertaking provides for the establishment of a Governing Body composed of all Contracting Parties. The functions of the Governing Body include, in particular (Article 20.3a) "*to provide policy direction and guidance to monitor, and adopt such recommendations as necessary for the implementation of this Undertaking ...*". Policy and technical matters regarding the implementation of the Undertaking will therefore be decided by the Governing Body, once that body is established, following the entry into force of the Undertaking.

4. The text of the Undertaking as adopted by the Commission on Genetic Resources for Food and Agriculture, is in line with the provisions of Article XIV of the FAO Constitution, except that, in Article 21.1, brackets still remain to be resolved, in the following sentence: "*The Secretary of the Governing Body shall be appointed by [the Director-General of FAO, with the approval of]the Governing Body*". The exact wording of this sentence, when agreed, may have implications as to whether the Undertaking can, in fact, be adopted under the provisions of Article XIV, and therefore the administrative and financial implications for the FAO.

5. Article 21 further provides that the Secretary shall be assisted by such staff as the Governing Body shall decide, and specifies that the administrative functions of the Secretary include to: *"(a) arrange for and provide administrative support for sessions of the Governing Body and for any subsidiary bodies as may be established; (b) assist the Governing Body in carrying out its functions, including the performance of specific tasks that the Governing Body may decide to assign to it; (c) report on its activities to the Governing Body"*.

6. The Undertaking also makes provision, Article 20.9, that sessions of the Governing Body should "*as far as possible be held back-to-back with the regular sessions of the Commission on Genetic Resources for Food and Agriculture*". Article 18.3 further provides that "*the Contracting parties shall cooperate with the Commission on Genetic Resources for Food and Agriculture of the FAO in its periodic reassessment of the state of the world's plant genetic resources for food and agriculture in order to facilitate the updating of the rolling Global Plan of Action ...*"

7. The secretariat of the Governing Body will need to draw upon a range of technical, legal and socio-economic expertise, and financial and administrative skills in carrying out its work. The multidisciplinary nature of the FAO can provide the necessary range of expertise within the various departments of the FAO, and as necessary, the secretariat can be strengthened by the internal transfer of staff, and the rationalization of existing structures.

8. Article 20.3 provides that the Governing Body shall: "*(d) adopt the budget of this Undertaking; (e) consider and establish subject to the availability of necessary funds such subsidiary bodies as may be necessary, and their respective mandates and composition; (f) establish, as needed, an appropriate mechanism, such as a Trust Account, for receiving and utilizing financial resources that will accrue to it for purposes of implementing this Undertaking*".

9. Article 19 of the Undertaking provides for the implementation of a funding strategy, with priority "*given to the implementation of plans and programmes for farmers in developing countries, especially in developing countries, especially in least developed countries, and in countries with economies in transition, who conserve and sustainable utilize plant genetic resources for food and agriculture*" (Article 19.5). By Article 20.3c, the Governing Body will "*adopt, at its first session, and periodically review the funding strategy for the implementation of the Undertaking, in accordance with the provisions of Article 19*". The funding strategy will mobilize extra-budgetary resources. If FAO is requested to provide substantive assistance in the implementation of the funding strategy, certain technical backstopping requirements could be covered by the Regular Programme, but extra-budgetary funds would be needed to meet the recurrent costs involved.

10. Article 21.4 provides that documentation for sessions of the Governing Body will be provided in the six languages of the United Nations, that is, with the inclusion of the Russian language. Article 36 similarly provides that the authentic text of the Undertaking will be established in the Russian language, as well as in the languages of the FAO. The use of Russian as a working language will have administrative implications for the budget of the Undertaking, in that the FAO has no Russian language translation capacity, and in that all costs in this regard will need to be met from the autonomous budget of the Undertaking.

11. Interim arrangements for the period before the entry into force of the Undertaking will be required. In adopting the Undertaking for transmission to the Thirty-first session of the Conference, the Commission on Genetic Resources for Food and Agriculture accordingly also forwarded to the Conference the draft of a resolution (given in *Appendix F* of document CGRFA-Ex 6/REP, the Report of the Commission's Sixth Extraordinary Session) for adoption in parallel with the Undertaking. This Resolution is still, however, in an early state of drafting, which makes it difficult to identify exactly what the administrative and financial implications may be for the FAO. The current text provides for a substantial programme of work in preparation for the entry into force of the Undertaking, for which adequate extra-budgetary resources would be required.

12. The present report may be updated in the light of comments and information provided by Member Nations or Associate Members and such representations as they may make in regard to administrative and financial implications of the International Undertaking, before the Thirty-first Session of the Conference considers the Undertaking for adoption.

IV. COMMENTS RECEIVED

AUSTRALIA

Australia refers to the request by the Director-General of the Food and Agriculture Organisation of the United Nations (FAO) of 1 August 2001, inviting country comments on the text of the International Undertaking on Plant Genetic Resources (the Undertaking), as adopted by the FAO Commission on Genetic Resources for Food and Agriculture at its Sixth Extraordinary Session, Rome 25-30 June 2001.

Australia notes that the text is to be considered for approval at the Thirty-first Session of the FAO Conference, 2- 13 November 2001. Australia also notes that in preparation for the Conference, the Undertaking will be reviewed by the FAO Committee on Constitutional and Legal Matters (CCLM) at its Seventy-second Session in October 2001 and by the FAO Council at its Hundred and Twenty-first Session, from 30 October to 1 November 2001.

Australia supports completing negotiation for an Undertaking which provides an open, fair and equitable system of exchange of plant genetic resources for food and agriculture which would promote a broad membership.

Considerable progress has been made in recent negotiations which have established a sound basis for finalising such a system of exchange. However, a small number of key provisions remain unresolved in the current text. Resolution of these provisions will determine whether or not the Undertaking provides for a workable system and is thus critical to its future success.

Australia considers any text presented for possible adoption by the FAO Conference has to be clear and enable an effective assessment to be made of the obligations created under the Undertaking.

In Australia's view the Conference is not the appropriate forum for the negotiation of complex technical matters. Therefore it is appropriate that all outstanding issues, including technical, legal, financial and administrative implications for the FAO are addressed before the Conference. Australia provides the following comments to assist in finalising the text of the Undertaking before its consideration during the Conference.

Legal matters for consideration of, and advice by, the CCLM

Australia considers the CCLM should provide a detailed analysis to governments on legal matters concerning the relationship of the Undertaking to the FAO.

The Report of the Director General on Technical, Administrative and Financial Implications acknowledges the Undertaking is considered to be in line with the provisions of Article XIV of the FAO Constitution, but raises an issue in relation to unresolved text on appointment of the Secretary to the Governing Body (Article 21.1).

Australia considers the CCLM should confirm the Undertaking meets the requirements of an agreement under Article XIV of the FAO Constitution. This would provide an important input to

consideration by the Conference on whether or not to adopt the Undertaking as an agreement in accordance with that Article of the FAO Constitution.

In the event the Undertaking text as drafted does not meet the requirements of Article XIV Australia would appreciate advice from CCLM on:

. what provisions do not meet the necessary requirements and reasons why they do not

. alternative options which would enable the necessary requirements to be met.

Australia notes the Undertaking text still contains bracketed text reflecting matters on which there is not yet agreement on the underlying policy principles. Australia considers the CCLM should not comment on these provisions beyond noting text remains bracketed and is subject to further negotiation. However, to the extent the CCLM considers this unresolved text raises matters relating to the application or interpretation of the FAO Constitution and other FAO rules, the CCLM should provide advice on such matters.

General comments on multilateral system

The key operational elements of the Undertaking revolve around the multilateral system of access to and benefit sharing of plant genetic resources for food and agriculture.

Australia supports key principles on which agreement for this system has been reached. The system of exchange, centred around public domain material, would be based on use of a material transfer agreement for continued plant breeding in line with normal commercial practice and in accordance with contract law. It follows that payments under such material transfer agreements should be commercially realistic and workable if the necessary research and plant breeding activities are not to be impaired. The determination of such payments are left for a future decision of the Governing Body.

The effectiveness, including the application of contract law, of this new system is contingent on resolution of key terms, including a definition for plant genetic resources for food and agriculture (Article 2) and the terms to be included in the material transfer agreement, especially the provision concerning intellectual property (Article 13.3 (d)). It is also contingent on how the Undertaking relates to other international agreements (Article 4).

The outcome on these matters will not only determine the scope and nature of obligations created by the Undertaking but also play an important part in informing future decisions of the Governing Body, including matters relating to the material transfer agreement and benefit sharing arising through the Undertaking. Without clarity on these matters it will be difficult to implement the Undertaking effectively and the future viability of the new multilateral system would be compromised from the outset.

Comments on unresolved text

<u>Article 2 Definition of 'plant genetic resource for food and agriculture'.</u>

At present, two alternative draft definitions have been proposed for the term 'plant genetic resources for food and agriculture' (PGRFA).

Australia considers it is important to ensure the definition of PGRFA is clear and unambiguous and that it is correctly tailored to meet the object and purposes of the Undertaking. Australia considers that neither of the alternative draft definitions of PGRFA proposed fulfil these requirements.

Australia therefore proposes the following language for consideration:

'"Plant genetic resources for food and agriculture" means any material of plant origin containing functional units of heredity of actual or potential value for food and agriculture.'

Article 13.3 (d) – Conditions of Access under the Multilateral System

The text proposed for article 13.3(d) provides as follows:

> *'(d) Recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, [or their genetic parts or components,][in the form] received from the Multilateral System;'*

In considering amendments to the text of article 13.3(d), it should be noted the Undertaking presently provides that the condition set out in this article will be included in the standard material transfer agreement that shall be developed by the Governing Body. Australia notes that it will be important therefore to ensure that the text of this article is clear and unambiguous in its scope and application.

It will be important also to ensure that an appropriate balance is maintained between guaranteeing continued access to PGRFA included in the Multilateral System, and preserving the ability of those carrying out research and development to adequately protect innovations developed using resources that have been accessed under the regime. In this regard, Australia supports the language contained in the second set of square-bracketed text (*[in the form received]*).

Australia considers that it is neither necessary nor desirable to adopt the language that has been proposed in the first set of square-bracketed text. In Australia's view, this language creates uncertainty and problems in the interpretation of the text.

Australia would, however, support the following language:

> *Recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, including genetic parts and components, in the form received from the Multilateral System, acknowledging that genetic parts and components that have been modified, for example through isolation and purification, may be patentable provided that the criteria for patentability are met.*

Australia's primary concern is to ensure that the final formulation of this provision is clear and enables Australia to continue to exercise its existing rights in accordance with domestic and international law. From an Australian perspective, it is essential that the final text allows continuation of our domestic policy permitting IP right protection for genetic material which meets relevant standards.

Article 4 Relationship to other International Agreements

Article 4 is intended to address the issue of the legal relationship between the Undertaking and other international instruments. The text that has been proposed for article 4 provides as follows:

> *[4.1 The provisions of this Undertaking will be implemented in harmony with the provisions of other existing international agreements relevant to the objectives of this Undertaking, in such a way that they are mutually supportive, with a view to achieving sustainable development.*
>
> *4.2 This Undertaking shall not be interpreted as implying a change in the rights and obligations of a Contracting Party under any existing international agreements, nor as being subordinate to them.]*

This text currently appears in square brackets as there was no agreement reached on the text of Article 4 during the last round of negotiations.

Australia considers that Article 4 should provide clear guidance on the relationship between the Undertaking and existing international agreements. In this respect, the article should confirm that the Undertaking exists alongside and complements the rights and obligations under existing international instruments. However, the text that has been proposed does not reflect this fundamental concern and creates uncertainty.

In Australia's view, the source of this uncertainty can be found in the language '*nor as being subordinate to them'* , where it appears in the proposed draft Article 4.2. In Australia's view, this language should be deleted. Australia considers also that it is necessary and appropriate for the text to be redrafted to reflect the position that the Undertaking would not affect the rights and obligations contained in other existing international instruments.

Accordingly, In Australia's view, the text should be amended to provide as follows:

> *4.1 The provisions of this Undertaking will be implemented in harmony with the provisions of other existing international agreements relevant to the objectives of this Undertaking, in such a way that they are mutually supportive, with a view to achieving sustainable development.*
>
> *4.2 The provisions of this Undertaking shall not affect the rights and obligations of any Party deriving from any existing international agreement.*

AZERBAIJAN

UN FAO addressed Ministry of Foreign Affairs of AR to submit the proposals of Azerbaijan Republic on International Undertaking on Plant Genetic Resources.

We inform that Azerbaijan has no claims and proposals to the text of the undertaking and kindly ask you to assist us in forwarding this information to the Secretariat of FAO by 21 September 2001.

CANADA

First Set of Comments

This is in reference to your request dated 1 August 2001, inviting comments on the text of this International Undertaking. Canada congratulates the FAO Commission on Genetic Resources for Food and Agriculture on the success of its Sixth Extraordinary Session in June 2001.

Canada is seeking an agreement that will encourage all countries to work together to conserve the Earth's plant genetic resources for food and agriculture, to use them sustainably in support of global food security for present and future generations, and to share the benefits of their use in a fair and equitable way.

Several years of negotiations have established a good basis for finalising such an agreement. However, in order to do so, the wording of a small number of significant provisions in the International Undertaking needs to be resolved to the satisfaction of all negotiating parties. To assist in this process, Canada would like to state our concerns regarding the current, square-bracketed text of articles 2, 4 and 13.3(d).

To begin, Canada considers it necessary to clarify the definition of the term "plant genetic resources for food and agriculture (PGRFA)" in the International Undertaking. As it stands, the bracketed definitions for PGRFA in Article 2 are not sufficiently precise or informative. Since

PGRFA is a critical term in this agreement, Canada considers it important that its definition should be as unambiguous as possible to avoid later misinterpretation.

Secondly, the relationship between the Undertaking and other international agreements, especially those that were in existence prior to the Undertaking's entry into force, needs to be better defined in Article 4. As a member of various international agreements, Canada would require that the Undertaking respect and be consistent with the obligations created under these other treaties.

Like several other countries, Canada is concerned about language in Article 13.3(d). Our country cannot accept any text in this Article that contravenes or limits our existing patent regime, with regard to the patenting of plant genetic material by innovators who satisfy the requisite national and international criteria for intellectual property rights. Possible changes to national intellectual property rights laws should not be envisaged in the revision of the International Undertaking, since it is not an appropriate forum for such consideration. Since, by definition, the Multilateral System for Access and Benefit Sharing (MS) would only include plant genetic resources for food and agriculture that are already in the public domain, no valid patent could be issued in Canada on the original, unaltered PGRFA received from the MS because the patentability criterion of novelty in the Canadian Patent Act would not be satisfied.

Concerning the coverage of the MS, Canada believes that it is important to include those crops that have strategic significance for global food security. Many countries did not accept that the MS should include all crops from the outset so, in the interests of compromise, Canada accepted that the MS should begin by covering a selected list of crops, including all crops of economic significance to our country. Canada would welcome the addition to the "List of Crops Covered under the Multilateral System", in Annex I, of crops that are of major significance to world food security and interdependence.

Finally, we have found what we suspect are secretarial glitches in the text which was adopted very late at night by the Commission on Genetic Resources:

Article 20.4: The introductory clause, "Subject to paragraph 7". In our final Plenary notes, Article 19.3 referred to para.6 which deals with membership rights of Member Organizations. Therefore the cross-reference should be to Art 20.6 and not to Art. 20.7, which deals with rules of procedure.

Article 20.6: This provision appears in square brackets, but our notes indicate that these brackets came off.

Article 24.3: our Plenary notes indicate that "All amendments" was changed to "Any amendment".

Canada believes that no one country can expect to preserve all of the genetic diversity required for all of its crops for all time; therefore, the best way to ensure the conservation of plant genetic resources and facilitate their use is through an appropriate international agreement. It is important to Canada that a compromise be found on the few remaining outstanding issues so that the final result encourages the participation of as many of the world's countries as possible.

Second Set of Comments

Canada's Comments to the Committee on Constitutional and Legal Matters concerning Revision of the International Undertaking on Plant Genetic Resources

A.- Text of the Undertaking: Points raised in the FAO Report

1. **Name of the Instrument**: The FAO Report recommends that the CCLM substitute "Undertaking" with "Convention". Canada supports this recommendation. "Convention" would better capture both the global ambit of this agreement and the fact that it is intended to be legally binding upon the Parties to it. Canada could support the title of the Convention proposed by the FAO Legal Report, namely, International Convention on Plant Genetic Resources for Food and

Agriculture, or simply Convention on Plant Genetic Resources for Food and Agriculture (International being presumed from the use of "Convention").

2. **Preamble, Establishment of the Undertaking within framework of FAO**: The FAO Report recommends the inclusion of a preambular paragraph declaring that the Undertaking is being established within the framework of the organisation. The FAO Report suggests that such a declaration is a mandatory feature of an Article XIV Agreement, stipulated by Rule XX1.1(c) and Part R of the principles and procedures. Canada would support the inclusion of such a preambular paragraph as this would provide greater certainty as to the nature of the relationship between the Undertaking and the FAO. Canada would propose the following language for consideration: "Desiring to conclude an international agreement within the framework of the Food and Agriculture Organisation of the United Nations, hereinafter referred to as FAO, under

Article XIV of the FAO Constitution." The language proposed by the FAO merely notes that the Undertaking is being concluded under Article XIV; Canada believes that preambular language should reflect the collective desire to conclude the Undertaking within the framework of the FAO. The language Canada is proposing has been used in another Article XIV agreement (Compliance on High Seas).

3. **Article 2**: Use of terms "plant genetic resources for food and agriculture" and "genetic material". Canada agrees the CCLM should note that the problems pending are not of a constitutional or legal nature.

4. **Relationship of the Undertaking to other International Agreements**: Canada would be opposed to deleting the square brackets. This was a matter of intense negotiation during the June meeting and there was no agreement as to language.

5. **Article 20.2: Governing Board -- Decisions by consensus** : Article 20.2 states that all decisions by the Governing Body shall be taken by consensus. The FAO report suggests the inclusion of language to the effect that "unless by consensus another means of arriving at a decision on certain matters is reached". Canada could support this suggestion as a means of explicitly stating what is the effect of Article 20.2, even though this is implicit in the text.

6. **Article 20.3(d): Governing Body Budget**: The FAO report suggests the inclusion of "autonomous" before "budget". Canada would support this inclusion to clarify that the Governing Body is dealing with the autonomous budget of the Undertaking and not one financed by the FAO and decided by the FAO Conference as part of the regular operations of the Organisation.

7. **Article 20.6: Governing Body: Member Organisations of FAO**: The FAO Report recommends removal of square brackets from what is a standard clause to deal with membership to the FAO of a regional economic integration organisation. Canada would support removal of the square brackets as proposed. Indeed, our recollection is that the square brackets were removed during the final negotiating session. The FAO Report also suggests that the phrases "... and fulfil their membership obligations..." and "mutatis mutandis" should be deleted arguing that membership obligations should be fulfilled in accordance with the Undertaking rather than the FAO Constitution and General Rules of the FAO. Canada questions whether the Undertaking creates any rights or obligations with respect to membership in the FAO. We would prefer that the language be maintained as is rather than delete reference to membership obligations, whilst retaining reference to membership rights.

8. **Article 21.1: Secretary, Appointment of Secretary**: The FAO Report suggests the removal of the square brackets as the text in square brackets is consistent with Article XIV. Canada would support the removal of the square brackets. It would be helpful if the CCLM could pronounce on whether the Undertaking could still be considered as an Article XIV agreement if the language in square brackets was deleted.

9. **Article 21.3: Secretary, Report to the Director-General**: The FAO Report recommends that "and to the Director-General" be added at the end of the chapeau of Article 21.3. Such language is necessary in order for the Undertaking to comply with Rule XXI.1(c) which requires that any

recommendations adopted or reports on activities by bodies established under an Article XIV Agreement be transmitted to the FAO D-G. Canada could agree with this proposal.

10. **Article 21.4 Secretary, Documentation in 6 languages**: The FAO Report merely notes that the use of Russian will have budgetary implications. Absent a decision by the Conference to the contrary, the costs connected with operating in Russian would need to be met out of the autonomous budget. The D-G of the FAO has noted this in his technical report that was sent out to Member States. It is not clear if there is a role here for the CCLM or that this is a decision to be taken at the Conference.

11. **Article 24: Amendments of the Undertaking. Power of the Council and Conference to disallow amendments**: The FAO Report notes that when appropriate Article XIV agreements contain a provision acknowledging the Council and Conference's power to disallow amendments. The Undertaking does not currently have such a provision and the question now confronting the CCLM is whether it would be appropriate to include such a provision in the Undertaking. In Rome, the FAO Legal Counsel explained the need for such a provision as a means of ensuring that decisions by bodies created under Article XIV agreements do not exceed or contradict principles set out in the FAO Constitution. Given the sensitivities expressed in Rome regarding the control that could be exerted by FAO members who are non-parties to the Undertaking, the inclusion of such a provision could be extremely problematic. Whilst the FAO may not have the ability to rescind amendments, presumably it has the ability to guide the actions of the Governing Body through the allocation of financial resources. In the unlikely event that the Governing Body decided to amend the Undertaking in a manner that would be contrary to FAO principles, the FAO could respond by suspending financing. Therefore, Canada does not see the need to add such a provision.

12. **Article 26, 27, 28 and 29: Ways of becoming party and entry into force**: The FAO Legal Counsel drafted these provisions at the request of the Committee of the Whole (COW). The COW was informed that these provisions were drawn from similar provisions in other treaties. Canada can agree to these provisions.

13. **Article 26, 27, 28, 29: Admission as contracting parties of States that are not FAO members**: The FAO Report questions whether an additional provision is necessary to require prior approval by the members of the Governing Body for any non-member FAO State. Necessity for inclusion of such a provision turns on whether the Undertaking establishes a commission or committee. The Report also notes that for the three Article XIV agreements creating a governing body (as opposed to a named commission) no such provision is included. There is no indication on what basis a commission/committee can be distinguished from a governing body, other than its appellation. Canada is not opposed to FAO's recommendation, but we would welcome clarification from the CCLM as to the respective characteristics of a commission/committee and a governing body, particularly as the draft resolution refers to an Interim Committee as opposed to an Interim Governing Body. Once it is clear what the revised Undertaking creates, the differences between each body (if more than one is created) should be detailed.

14. **Article 40: Authentic texts**: As the FAO Report notes, having Russian as one of the languages of the Undertaking will have financial implications. This concern has been pointed out by the Director-General in his technical report that was sent out to Member States. It is not clear what the role of the CCLM is with respect to this question.

B.- Text of the Draft Resolution

1. **Name of the Instrument**: As the FAO report rightly notes, the name of the Undertaking in the resolution should be amended to reflect whatever decision is taken with respect to its name.

2. **Preamble: Paragraph 8** of the preamble of the Draft Resolution ("Recalling further...") mentions that the legally binding instrument will be "closely linked to FAO". This should be

changed and harmonised with the proposed changes in the Undertaking's preamble (see herein-above point A.2) that mentions the undertaking is "within the framework of the FAO".

3. **Paragraph A.4**: The FAO Report notes this paragraph sets out a declaration of principle that does not depend on a "decision" by the Conference. The paragraph sets out the effect of having the Undertaking enter into force. If the text was deleted, as proposed by the FAO Counsel, this would have no effect on the effect of the Undertaking. Canada could support deletion of this provision or the other proposed alternative to substitute "welcomes" for "decides". If the latter option is pursued, Canada believes that some further changes will be required for grammatical consistency.

4. **Paragraph B.1**: The FAO Report suggests that to avoid duplication of efforts, the CCLM consider having the Commission on Plant Genetic Resources serving as the Interim Committee (raising again the question of how to distinguish between a committee, a commission and a governing body). The solution offered is to add text which would allow for the full participation of States that are not FAO Members but which are contracting Parties to the Undertaking. The Interim Commission on Phytosanitary Measures is offered as a precedent. Canada is not opposed to FAO's suggestion, but we would be grateful for clarification from the FAO Legal Counsel how this was addressed with Article XIV agreements which established governing bodies as opposed to commissions.

5. **Paragraph B.2**: The FAO Report suggests the deletion of the square brackets and the amendment of text within the brackets to read "consistent with applicable FAO rules". Canada could support this recommendation.

C.- Other Points

In reviewing the draft text, Canada also noted several discrepancies as to style and form. It would be grateful if these could be brought to the attention of the FAO Legal Counsel during the CCLM meeting, so that the CCLM could decide whether it wishes to recommend any other changes to the text.

1. **Article 1.2**: As the abbreviation "FAO" is used throughout the remainder of the text, it would be appropriate to provide the abbreviation in brackets after the reference to the "Food and Agriculture Organization".

2. **Article 4.1**: There should be a period (.) at the end of the paragraph.

3. **Article 5**: for Articles where there is only one paragraph, the paragraph is not numbered and the first line is indented (see Article 2 and 3). The style with respect to such Articles should be consistent throughout the text.

4. **Article 6 (a)-(f)**: Most of the subparagraphs begin with a capital letter, but (c) does not. Similarly, there should be "and" at the end of (e).

5. **Article 8**: (d) is not properly aligned.

6. **Article 9 heading**: there needs to be a space between "9" and "--".

7. **Article 10.2 (2nd line)**: This is only instance where PGRFA is capitalized. Is there a reason for this?

8. **Article 10.2 (b)**: add "and" at end of line

9. **Article 11.2**: "multilateral system" is not capitalized here, but with exception of Art 12.1 (see below) it is capitalized throughout the rest of the document. The lack of capitals may be justified here, however, as reference is only to "a" multilateral system and not to "the" multilateral system. See comments for Art 12.1 below.

10. **Article 12 (heading)**: there needs to be a space between "--" and "Coverage"

11. **Article 12.1**: In third line "multilateral system" should be capitalized for consistency with rest of text. Unlike Article 11.2, reference is being made here to a particular Multilateral System.

12. **Article 12.1**: The reference should be to Article 1, not Article I (numeric rather than roman numeral)

13. **Article 12.5**: CGIAR should be spelt out as this is the first reference to it. Also, does "international institutions" need to be capitalized? It is in Article 16.5 and text should be consistent.

14. **Article 13.3 (a)**: when the order of the terms “utilization” and “conservation” was inversed during the Commission’s June 2001 session, the preposition should have been changed in consequence. Change the preposition “in” before “research” to “for”. The negotiators' intention was to set up a system which would facilitate the sharing of the genetic resources. Using "in" could be interpreted as providing access only for the duration of the research, breeding or training. As such, no recipient could obtain the material unless it was used immediately and could do so only for the duration of the research, breeding or training. The material may have to be returned (or destroyed) upon completion of the research, breeding or training. Using "for" makes it clear that a recipient, such as a gene bank, can obtain material and conserve it for use at a later date or for preservation purposes. It would avoid the interpretation that the material would need to be returned (or destroyed) upon completion of the research, breeding or training.

15. **Article 13.3 (e)**: this subparagraph is not aligned with the others.

16. **Article 13.3 (g)**: should there be "and" at the end of this provision?

17. **Article 13.4**: "paragraph" should be replaced with "Article" for internal consistency.

18. **Article 13.4**: should "material transfer agreement" be capitalized? Note that it is in Art 14.2d(ii), but that reference is to "the" MTA.

19. **Article 14.2**: should the sub-subparagraphs (i) -(iv) be further indented, so that they do not align with the subparagraphs?

20. **Article 14.2d (heading)**: misaligned

21. **Article 14.2d(ii), 2nd para**: in the first line, there should be a "," after "meeting".

22. **Article 14.2d(iii)**: this subparagraph is misaligned

23. **Article 15**: as per Article 5 (one paragraph Article) -- first line should be indented.

24. **Article 16.1**: "IARCS" should be "IARCs" -- for consistency

25. **Article 16.1 (a)**: this is only sub-paragraph to end with ";" rather than a "." Is this intentional?

26. **Article 16.1 (b)**: should sub-subparagraphs (i)-(iv) be indented?

27. **Article 16.1 (b)(iii)**: should there be an "and" at the end of this provision?

28. **Article 16.1 (d)**: "of the FAO" should be added after "Commission on Genetic Resources for Food and Agriculture". This is for consistency with Article 18.3

29. **Article 16.1 (e), (f), (g)**: Reference should be to "Secretary" not "Secretariat". For consistency with Article 21.

30. **Article 16.2**: phrase "of the Consultative Group on International Agricultural Research" is redundant here and could be deleted. Or, if preference is to maintain reference, the abbreviation CGIAR could be used.

31. **Article 16.2**: reference to "Secretariat" should be changed to "Secretary"

32. **Article 16.4**: first line should be indented.

33. **Article 18.3/Article 19.3**: Reference is made in 18.3 to "rolling" GPA, whereas in 19.3 no such reference is made. For consistency, “rolling” should be inserted into Art. 19.3.

34. **Article 20.3 (a)**: this entire subparagraph needs to be indented, not just the first line.

35. **Article 20.3 (n)**: should "international institutions" be capitalized. See Article 16.5 where the phrase is capitalized.

36. **Article 20.4**: "paragraph 7" should be changed to "Article 20.6" in order to be correct and for consistency in style.

37. **Articles 22, 26, 27, 28, 31, 32, 35, 36**: first line should be indented (see Article 5)

38. **Article 29.2**: If you contrast the punctuation in this provision with that in 29.1, the Secretariat has corrected the punctuation in 29.1 but failed to do so in 29.2. In the first line of 29.2, there should be a comma (,) between "accepts" and "approves". Similarly in the final line, there should be a comma (,) between "acceptance" and "approval".

39. **Annex II, Article 1**: Reference should be to "Secretary" not "Secretariat"

CHILE

DOCUMENT REVIEW
COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE
SIXTH EXTRAORDINARY SESSION
ROME, ITALY 25 - 30 JUNE 2001

GENERAL COMMENTS

We have are no major observations regarding the document as a whole, but Annex 1 and Appendix E need further elucidation. Article 12.2 (Coverage of the Multilateral System) reads "The Multilateral System, as identified in Article 12.1, shall include **all** plant genetic resources for food and agriculture listed in Annex 1". Our comment refers to the fact that the list is made up of genera, without detailing the species. This causes problems for countries that have species under these genera that are unique and that constitute a valuable plant genetic resource (endemic species).

Also, Article 13.3 (d) should be made to read "Recipients shall not claim any intellectual property rights over genetic materials or their parts if obtained through the Multilateral System". We presume this item is still under discussion.

SPECIFIC COMMENTS

Annex 1: LIST OF CROPS COVERED UNDER THE MULTILATERAL SYSTEM

We generally agree with the proposed list, but consider that the species that would be available also should be defined, in addition to the genus; or rather, that we as a country should be able to exclude those plant genetic resources (at species level) that are endemic to Chile.

In this regard, the document is not clear-cut in its definition of species or limits of free access, as shown by the fact that the list is based on genera (a genus can have many species). This might be particularly relevant in the case of the genera of legume and grass forages listed in the Annex. For example, the genus *Festuca* (grass) is followed by 6 species, while Chile has identified 28 such species, including 5 that are endemic. The same applies to the genus *Atriplex* (forage) which only lists 2 species, while 28 such species have been recorded in Chile, of which 13 are endemic. We only wish to know if this is taken into account in the Undertaking.

On the other hand, we cannot object to the inclusion of *Fragaria chiloensis*, *Prosopis chilensis* and *Prosopis alba*, for example. These species exist in Chile but also in neighbouring countries, and any exclusion from the list (Annex 1) would have to be agreed regionally.

Another instance where objection is not warranted concerns the species making up Chile's potato genetic resources. As above, these species are also shared with neighbouring countries, although in the specific case of Chile they have developed local strains that constitute a unique heritage - the chilota potato, for example, for which there is gene bank with some 600 accessions. This matter should perhaps be examined in more detail.

Appendix E. In view of the above, it might also be in Chile's specific interest to exclude *Lycopersicon chilense* and *L. Peruvianum* because of their high value, but as these species are shared with other countries, this would only be possible if exclusion were agreed at regional level.

Under the same proposal, we recommend that, in the case of the genus *Carica* mentioned in Appendix E, an exception be made for *Carica chilensis*, as this is an endemic species of high potential value.

EUROPEAN COMMUNITY

The European Community and its Member States wish to thank the Director-General of FAO for his letter of 1 August 2000 attached to the report of the Sixth Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture and his report on the technical, administrative and financial implications of the International Undertaking on Plant Genetic Resources. We believe that considerable progress has been made and that adoption of the International Undertaking during the Conference in November is now within reach. However, a number of important issues still need to be resolved.

As stated by the European Community and its Member States at the Sixth Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture (see Appendix C of the report), negotiations on the list in Annex 1 are not closed - this list is still open for inclusion of other crops.

The European Community and its Member States have always clearly identified the list of crops covered by the multilateral system as a fundamental element: we consider it the very essence of the International Undertaking. The absence from this list of a significant number of crops of major importance to world food security would prevent the Undertaking from fulfilling its basic objectives. The list needs to be extended.

Before the Conference, therefore, further consultations and negotiations are needed on the crops identified in the lists in Appendix E of the report of the Sixth Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture.

Final adherence of the European Community and its Member States to the International Undertaking will depend on a satisfactory conclusion of negotiations on the contents of the list.

The European Community and its Member States also consider the other unresolved matters to be equally important and critical (definition of PGRFA, article 4, article 13.3 (d) and article 19.4 (d)).

In conclusion, we believe that it should be possible to find solutions to these outstanding matters. We acknowledge that it is the duty of each of us to seek solutions through bilateral and, as far as possible, multilateral discussions. We wish to assure you that we, for our part, shall make every possible effort to reach a satisfactory conclusion during the Conference.

JAPAN

At its Sixth Extraordinary Session of the Committee on Genetic Resources for Food and Agriculture held in June this year, the draft text of the revised International Undertaking on Plant Genetic Resources was adopted. The Government of Japan expressed its reservation on the draft text adopted at that meeting, considering that the draft text still contains many wording which either give rise to divergent views among the Contracting Parties or are unclear. Based on its close examination of the text conducted after that meeting, the Government of Japan submits its major comments as follows. The points raised therein are of critical importance to Japan and in case the following comments are not duly reflected to the final text of the revised International Undertaking, it would be difficult for the Government of Japan to participate in the revised International Undertaking.

(N.B. The Following comments are not necessarily exhaustive. Additional comments could be forwarded as a result of further in-depth examination, if necessary.)

Article 2

The present wording of the definition of "plant genetic resources for food and agriculture", can be interpreted to cover all plant origin materials, including not only seeds and seedlings, but also harvested materials, as the scope of application of this International Undertaking. Such definition is not appropriate because the scope for application of this International Undertaking will become excessively broad. Therefore, the definition of "plant genetic resources for food and agriculture" must be modified to cover seeds, seedlings and plants only.

Article 12.2

The Government of Japan understands that Article 12.2 stipulates the obligation to provide access, under the framework of the Multilateral System(MLS), to the plant genetic resources for food and agriculture that are under the management and control of the central government of each Contracting Party and that are available to the public. It considers that, the local governments, independent administrative entities and other entities belonging to private sector are not subject to the legal obligation to provide all of their genetic resources.

In case that the local governments and non-governmental entities are to be legally obliged to provide their plant genetic resources, Japan will have a difficulty in joining the MLS for the legal constraints of its national legislations.

Article 13.3(d)

It is the Government of Japan's understanding that, during the negotiation process, all the Contracting Parties have reached a consensus that the recipients shall not claim any intellectual property or other right on the plant genetic resources they obtain as long as such resources remain as they are. The words "in the form" should be maintained without bracket in order to reflect more clearly this consensus.

If Article 13.3(d) were to exclude any possibility to obtain intellectual property or other right for the gene-related invention deriving from the plant genetic resources gained through the MLS, the application of the Article could be incompatible with other existing international agreements such as TRIPS and is also inconsistent with Japan's intellectual property legislations. Therefore, the words "or their genetic parts or components" should be deleted.

Article 13.3(g)

The Government of Japan has no objection to the requirement for the recipient of the plant genetic resources obtained through the MLS to continue to make available such genetic resources under the MLS. However, it would not be appropriate if Article 13.3(g) provided legal obligation for the recipient to conserve such genetic resources continuously. The Government of Japan would like to have confirmation that the provisions of the Article do not imply such obligation for the recipient.

Article 16

With regard to the plant genetic resources for food and agriculture held in trust by the International Agriculture Research Centres (IARCs), Article 16.1 stipulates that the Governing Body sign agreements with IARCs. However, Article 20, does not authorize the Governing Body to sign such agreement. It seems more appropriate to enable the Secretary to sign such agreement with the approval of the Governing Body. Therefore, the Government of Japan proposes to add the following provisions in Article 21: "The Secretary may, with the approval of the Governing Body, sign agreements with the IARCs regarding the plant genetic resources for food and agriculture held in trust by the IARCs.

Article 19.4(d)

The rationale for requiring the Contracting Parties to "avoid subsidies" remains unclear. If such requirement intends to avoid trade-distorting effect of subsidies, the issue should be discussed under the WTO and not under this International Undertaking. Therefore, the words "and avoiding subsidies" should be deleted.

Articles 27 and 28

Both Articles 27 and 28 provide that the States entitled to deposit their instruments of ratification, acceptance, approval or accession are "Members and non-Members (of FAO) referred to in Article 26". However, the usual practice in concluding multilateral legal instruments suggests that Article 27 is presumably to cover only the "States signed this International Undertaking in accordance with Article 26", and that the coverage of Article 28 extends to "all Members of FAO and any 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 Agency". For the sake of clarity, these Articles should be amended accordingly. Otherwise, Article 28 may be interpreted to mean that those States which have failed to sign this Undertaking can never join this Undertaking.

NORWAY

Letter from the Royal Ministry of Agriculture

Norway would like to refer to the letter of 4. April 2001 sent to the Director-General from the Minister of Agriculture and the letter of 6. April 2001 signed by three Norwegian Ministers to Minister colleges in each of the member countries of the Commissions Contact group. Please find attached a copy of this last letter referred to. The additional comments below will underline our points made on the issues still outstanding in the adopted text.

List of crops

In conformity with the position of the European Region Norway would support the extension of the list of crops in annex 1. As many food and feed crops as possible should be included. We would emphasise the need for a balanced list. Important food and feed crops that only one region or country have reservation against should be revisited for possible addition to the list of Annex 1. This will be important for the acceptance and implementation of the final Undertaking and also as we believe, for the food security for the poor.

IPRs/definitions

Norway considers it important to have a text limiting IPRs also on parts and components of PGRFA for a number of reasons:

1. It will act as an incentive for countries, breeding companies and genebanks considering

making material available to the multilateral system if they know that there is no scope under the IU for IPRs limiting options (for the Parties having made such material available) to use genetic parts or components from this material at a later stage.

2. Given the fact that the backbone of the multilateral system now is material in the public domain, it is even more important to avoid any possibilities of "leakage"of material (or options for use) from the system.

3. By creating a MLS with open exchange Governments have chosen to interpret and implement the CBD in a way relevant to the needs of this sector, while at the same time being fully within the framework of the CBD provisions. There are good reasons to argue that when access is made more easy than under "regular" CBD provisions (prior informed consent, mutually agreed terms etc.), the threshold for getting IPR protection limiting others' access should be raised in a corresponding manner, since countries providing material under the MLS will not have any saying over whether such IPRs should be granted or on what kind of mutually agreed terms should govern the exchange of material. In the same way that a MLS represents a sensible interpretation/implementation of CBD in the agricultural sector, restrictions on IPRs on parts of components would be a sensible interpretation/implementation of IPR law in this sector.

Relationship with other agreements

Norway believes that there is no need for an article that establishes a hierarchy between this agreement and other relevant international agreements as in Article 4. Norway could however accept text in the preamble referring to the need for compatibility between this and other International Agreements. The reference to subsidies as in paragraph 19.4.d should be deleted, as this is an issue that falls outside the scope of this undertaking.

FAO Constitution

Norway could accept the text in Paragraph 20.6 and place the Undertaking within the frame of the Constitution and General Rules of FAO, in the understanding that the Governing Body is given sufficient flexibility and autonomy for its operations.

Norway would like to stress the importance of giving high priority to urgent finalization of the negotiations and the need to promote increased political awareness during the limited time frames. We would like to reconfirm our commitment to participate in finalizing these negotiations this autumn, at its latest during the FAO Conference, as this may be the last opportunity for the FAO to finalize the revision of this undertaking.

(signed) (signed)
Carl Erik Semb Grethe H. Evjen
Assisting Director Adviser

Letter from the Royal Ministry of Foreign Affairs

Oslo, 6 April 2001

We are writing to you to express our deep concern about the current negotiations in FAO to establish a revised, legally binding International Undertaking on Plant Genetic Resources for Food and Agriculture. The aim of the negotiations is to establish legally binding rules for open access to plant genetic resources for food and agriculture (PGRFA). These rules will apply to the use of such resources for scientific purposes and for plant breeding, to the conservation of this material and to the fair and equitable sharing of benefits arising from the use of PGRFA. In this

way, the International Undertaking will contribute to the implementation of the UN Convention on Biological Diversity.

If these negotiations fail, long term food security will suffer. If they are not finalized this spring, there is a real danger that the negotiations will break down. This letter is being distributed to relevant ministers from the countries that are represented in the contact group conducting the negotiations. We believe that strong political involvement is needed in order to bring these negotiations to as successful conclusion.

If we do not succeed, then, for the first time in human history, there could be strict control of seeds and plants across national borders. Throughout history, the exchange of seeds and plant material has contributed enormously to human development in all parts of the world. Today all continents depend to a large extent upon utilizing plants that have originated in other parts of the words. If such an exchange is now restricted, research and development will suffer and improvements in major food crops will slow down. The availability of genetic material that provides "crop insurance" against pests, diseases and climate change could be seriously reduced. Lack of conservation facilities in many countries could lead to a serious reduction in agricultural biodiversity.

We urge all members of the contact group to work for a fair and workable system for the continued open exchange of plant genetic resources between countries. It will be necessary for all countries to make some compromises. We believe that the following principles are crucial for a binding agreement:

If the system we are creating is to allow for the open exchange of plant genetic material, it must include provisions to ensure that this material continues to be available for everyone. No one should be able to claim any kind of right over plant genetic material that could restrict access to this material or its parts or components.

Claiming exclusive rights over improved PGRFA is a different matter. Access to improved plant genetic material will be a major benefit of the new agreement, a benefit that will be shared by all. However, some kinds of exclusive rights will lead to limitation of other's access to such improved breeding material, thereby also limiting benefits to be shared. We believe that in such cases benefits should be shared by way of royalty payments by the holders of the rights into a multilateral fund for this purpose.

In our view, food security will be best served by a multilateral system for facilitated exchange, in which as many food crops as possible are included. If any food crops are excluded, this would adversely affect food security for the poor. In particular, we would strongly warn against creating a "two-tier" system for exchange of genetic material that is now managed within the CGIAR system. Any restrictions on exchange of CGIAR-managed material will undoubtedly be bad news for the poorest and least food secure populations of the poorest countries.

We are convinced that an International Undertaking based on these principles could play a major role in promoting world food security. If there is political will, this can be achieved. However, time is crucial. Let us all take the necessary steps to ensure that the revision of the International Undertaking is finalized this spring.

(signed)
Anne Kristin Sydnes
Minister of International Development

(signed)
Siri Bjerke
Minister of the Environment

(signed)
Bjarne Håkon Hanssen
Minister of Agriculture

RUSSIAN FEDERATION

I have the honour to inform the FAO Secretariat that the Russian Federation has no observations to the agreed [text] by the Sixth Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture paras of the text of the International Undertaking on Plant Genetic Resources.

As to the paras of the text still remaining in brackets, the Russian Federation will set out from the joint position on them of the European Regional Group.

Referring to the draft Resolution concerning the adoption by the FAO Conference of the International Undertaking Undertaking on Plant Genetic Resources and Interim Arrangements for its Implementation, the Russian Federation would like to stress its total disagreement with the contents of the brackets in para 2, part B of the text.

Maintaining the words "consistent with FAO Rules of Procedure" will exclude the Russian Federation from full-member participation in the activities of the Interim Committee. That's why the Russian Federation will insist on scrapping the above-mentioned words from para 2.

THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

The Ambassador to FAO, Dr. Ivan Angelov, has the honor to enclose his comment on the above mentioned subject. The suggestions are written with bolded italics.

- **Point 3:** In relation with the technical implications, Article 20 of the International Undertaking provides for establishment of a Governing Body composed of ***genetic resources, food and agriculture experts*** of all Contracting Parties.

- **Point 4:** *"The secretary of the Governing Body shall be appointed by /* ***the Governing Body with the approval of the General Director of FAO /.***

UNITED STATES OF AMERICA

This responds to Note LE-65 issued by the FAO Secretariat on August 1, 2001, requesting comments on the text of the International Undertaking on Plant Genetic Resources that emerged from the deliberations of the Sixth Extraordinary Session of the FAO Commission on Genetic Resources for Food and Agriculture, June 25-30, 2001.

As a preliminary matter, we wish to note that the United States is pleased by the significant progress that has been made in these negotiations. However, we wish to underscore that the accelerated schedule of negotiations at the Sixth Extraordinary Session -- including a series of sessions running very late into the night -- did not permit thorough consultations with capitals. Accordingly, we consider the text to have been adopted by the Commission on an *ad referendum* basis, and we reserve the right to raise issues regarding any portion of the text -- bracketed or unbracketed -- at the upcoming meetings of the FAO Council and Conference. In reviewing the text in its entirety, we have also identified certain gaps that need to be addressed, as indicated below.

The comments that follow are grouped into three areas: (1) the Report of the Director-General on the Technical, Administrative and Financial Implications of the International Undertaking on Plant Genetic Resources; (2) bracketed provisions of the current text; and (3) other comments on the current text.

I. Report of the Director-General

General: The Report fails to discuss how the creation of the Undertaking may affect the role within the FAO of the Commission on Genetic Resources for Food and Agriculture.

Para 1: We believe that the wording of this paragraph is not accurate in describing the status of the draft Undertaking. We recommend that it be revised as follows (changes indicated in bold):

"The Sixth Extraordinary Session of the Commission on Genetic Resources for Food and Agriculture (Rome, 24-30 June 2001) adopted the text of the International Undertaking on Plant Genetic Resources **with five provisions remaining in brackets and requested that it be transmitted to the Thirty-First Session of the Conference (2-13 November) for its consideration, notwithstanding that the text has not been finalized,** as had been requested by the Council at its Hundred and Nineteenth and Hundred and Twentieth Sessions. **The Commission** requested the Director-General to transmit it **to the Conference** through the Seventy-second Session of the Committee on Constitutional and Legal Matters (1-2 October 2001) and the Hundred and Twenty-first Session of the Council (30 October-1 November 2001), **where recommendations for finalizing the text can be considered."**

Para 4: We believe that the logic of the last sentence in this paragraph is inverted. It is not that the wording of the quoted sentence in Article 21.1 may have implications as to whether the Undertaking may be adopted under the provisions of Article XIV of the FAO Constitution. Rather, a decision should first be taken on whether the Undertaking is to be adopted under the provisions of Article XIV, then the language in Article 21.1 can be crafted accordingly. The United States supports adoption under Article XIV.

Para 11: This paragraph refers to interim arrangements for the period before the entry into force of the Undertaking, as well as the Draft Resolution (Appendix F) that the Commission referred to the Conference for its consideration. As the Draft Resolution was considered only in the waning hours of the Commission's June meeting, there was little opportunity at that time to review it carefully. Our view is that the Resolution should be procedural and should not attempt to repeat, or to renew negotiation of, substantive issues in the text of the Undertaking. We have a number of concerns about the Draft Resolution, and intend to raise those issues at the Conference. At this time, however, without prejudice to other issues we may raise, we wish to highlight the following with regard to the Draft Resolution:

- The Preamble is unbalanced, and contains language that is unnecessary in a Resolution of this type.
- Paragraph A.4 should be deleted. This is not something that the Conference can appropriately "decide". That the Undertaking establishes a new framework for cooperation in this area is self-evident. The Undertaking will be binding on Parties pursuant to its own terms.
- Paragraph B.3(b) requires elaboration regarding the terms of reference for and the composition of the expert group that will consider terms for the standard Material Transfer Agreement.

II. Bracketed portions of the text

Article 2: Definition of "plant genetics resources for food and agriculture".

The United States finds the second bracketed alternative unacceptable because, among other things, it would require a Party to manage and provide facilitated access to isolated genes, DNA/RNA sequences, organelles and any other plant genetic parts and components that fall within the purview of Annex I, something the U.S. Government and, we assume, other governments are not physically or technically equipped to do. For example, if "genetic parts and components" were deemed to be a discrete manifestation of PGRFA, like "reproductive and

vegetative propagating material", a Party would be obligated to: "survey and inventory" such genetic parts and components (Article 6.1(a)); "monitor the maintenance of the viability, degree of variation, and access to" such genetic parts and components (Article 6.1(f)); and "facilitate access" to such genetic parts and components (Article 13.1). Moreover, the definition in the second bracketed alternative would not make sense in certain portions of the text, e.g., Article 8.2(a) (international cooperation directed to "establishing or strengthening the capabilities of developing countries and countries with economies in transition with respect to conservation and sustainable use" of PGRFA); and Article 13.3(h) (PGRFA "found in *in situ* conditions").

Article 2: Definition of "genetic material".

The United States supports retention of the bracketed text, which was the recommendation of the Definitions Working Group.

Article 4:

The United States believes it is essential to have an effective savings clause in the Undertaking. We do not support the text in brackets.

Article 13.3(d):

The United States supports retention of the existing text, with the deletion of the phrase "or their genetic parts or components".

The United States will not support the adoption of text that is contrary to our domestic intellectual property laws. The interpretation advanced by countries that advocate inclusion of "or their genetic parts or components" is at odds with U.S. law in this area. We would also point out that, to the extent that certain countries seek to prohibit the claiming of intellectual property rights on PGRFA other than PGRFA in the form received through the Multilateral System (i.e., on PGRFA that incorporates material accessed through the Multilateral System), this would effectively negate the commercial benefit-sharing provisions in Article 14, since commercialization would no longer be feasible. Finally, it is worth noting that restrictions on the exercise of intellectual property rights would discourage private sector investment and public sector research in the development of new varieties, to the detriment of all Parties and at the expense of global food security.

Article 19.4(d):

The United States believes that the reference to subsidies is unnecessary in this context (the conservation and sustainable use of PGRFA), and we would support its deletion.

Article 20.6 and 21.1:

The language in these provisions can be resolved once a decision is taken on whether the Undertaking will be adopted under the provisions of Article XIV of the FAO Constitution. As indicated above, the United States supports adoption under Article XIV.

III. Other comments on the text

V. Substantive issues

Preamble:

Delegates had very little time at the June meeting to consider the Preamble, which was presented for the first time only in the final hours of the session. Having had an opportunity now to consider this text more carefully, we recognize that the Preamble is unbalanced in that it devotes considerable attention to farmers' rights yet fails to acknowledge properly the important contribution that plant breeders, and the exercise of intellectual property rights, make to the conservation and sustainable use of PGRFA and the goal of global food security. We therefore

believe that additional preambular language to that effect needs to be inserted, and we are prepared to work with other delegations in developing appropriate language.

Article 12.1 and Annex I:

The United States has serious concerns over the List as it currently stands, given the exclusion of certain major crops that are important to world food security. We understand, from the conclusion of the Commission meeting in June, that discussion of Annex I is not yet complete, and we believe this must be addressed before the text can be finalized.

Article 12:

In order to clarify an ambiguity in the text, we believe it is necessary to insert a new Article 12.6 as follows:

> "Establishment of the Multilateral System shall not preclude a Contracting Party, or legal or natural persons under its jurisdiction, from making a request outside the scope of this Undertaking for access to PGRFA listed in Annex I, nor shall it preclude another Contracting Party from providing such PGRFA in response to such a request. It is understood that any such transaction would involve no rights of facilitated access under this Undertaking, but rather would be subject to such terms as may be mutually agreed."

Article 14.2(d)(ii):

The provisions on commercial benefit-sharing raise a number of significant legal and policy questions, and this text is still being reviewed by the U.S. Government and by U.S. industry. We intend to comment further on this issue at the Council and Conference.

New Article in Part VII:

The United States believes it is necessary to include an essential security provision, similar to that in GATT 1994. We propose the following:

> **"Nothing in this Undertaking shall be construed to prevent a Contracting Party from taking any action that it considers necessary for the protection of its essential security interests."**

VI. Editorial comments

Article 6.1: In the chapeau, delete the comma after "promote".

Article 10.2: In the chapeau, "Plant Genetic Resources for Food and Agriculture" should not be capitalized. (Elsewhere in the text it is not.)

Article 11.2: "multilateral system" should be capitalized.

Article 13.3(g): Insert "made" immediately before "available".

Article 13.3(h): Change "will" to "shall". (To be consistent with usage elsewhere in the text.)

Article 14.2(b)(ii): After "commercial ventures", the word "on" does not fit, and should be replaced with "concerning" or "relating to".

Article 14.2(b)(iii): This provision is so convoluted as to be almost incomprehensible. Here is a suggested revision, preserving the same terms but putting them in a more coherent order:

> "Access to and transfer of technology as provided in (i) and (ii) above, including that protected by intellectual property rights, shall be provided and/or facilitated under fair and most favorable terms, including on concessional and preferential terms where mutually agreed, to developing country Contracting Parties, in particular to least developed countries and to countries with economies in transition, inter alia, through partnerships in research and development under the Multilateral System. Such access and transfer shall be provided and/or facilitated in particular in the case of technologies for use in conservation as well as technologies for the benefit of farmers in developing country Contracting Parties, especially

in least developed countries and in countries with economies in transition. Such access and transfer shall be provided on terms which recognize and are consistent with the adequate and effective protection of intellectual property rights."

Article 14.2(d)(iii): Since this provision (relating to potential disputes arising under the MTAs) pertains not just to commercial benefit-sharing, but also to certain conditions of access, it might more appropriately be moved to become a new Article 13.5, immediately following the paragraph that introduces the use of the standard MTA (renumbering as 13.6 the existing 13.5) .

Article 14.4: Change "will" to "shall".

Article 14.6: Change the second "shall" to "would". (Since this describes potential voluntary contributions.)

Article 16.1(b), chapeau: In the first sentence, replace "MTA" with "material transfer agreement (MTA)", since the term has not previously been introduced. In the second sentence, delete "agreement by".

Article 16.5: "International Institutions" should not be capitalized. (See usage in Article 12.5.)

Article 19.4(b): In the second sentence, change "will" to "shall".

Article 20.4: Replace "paragraph 7" with "paragraph 6".

Article 21.1: It should be clarified who appoints the staff.

Article 22: Articles on "compliance" in multilateral environmental agreements are generally understood to pertain to the fulfillment by Contracting Parties of their international obligations. As Article 14.2(d)(iii) makes clear, obligations arising under the Material Transfer Agreements (MTAs) identified in Article 13.4 rest exclusively with the parties to those contracts, and not with Contracting Parties, i.e., governments (except where a government is itself a party to the MTA). Therefore, if the second sentence of Article 22 is intended to relate to implementation of the MTAs, it should be moved, perhaps to Article 20.3 ("Governing Body"), where it could form a new subparagraph (o).

Article 25.2 and 25.3: These provisions were drafted under the assumption that amendments to the Undertaking under Article 24 would require something less than consensus. However, it was agreed, in Article 20.2, that all decisions of the Governing Body shall be taken by consensus. Consequently, Article 25.3 is now unnecessary, and in Article 25.2 the phrase "Except as otherwise provided for" can be deleted. In addition, with these changes, it would seem more appropriate to change the title of Article 25 to simply "Annexes".

Article 29.1: Change "lodged" to "deposited", the customary treaty term. Also, replace "Members of FAO" with "Member States of FAO" since, as provided in Article 30.2, instruments deposited by Member Organizations are not counted for this purpose.

Article 29.2: Insert a comma after "accepts" in the first line, and after "acceptance" in the second and fourth lines.

Article 32: Insert a comma after "Undertaking".

Article 34.1: Does the principle set forth in Article 30.2 apply equally here? That is, in determining whether the number of Contracting Parties has dropped below forty, are Member Organizations of FAO counted or not?

Article 34.2: Change "that" to "when".

VENEZUELA

In reply to your communication LE-65 of 1/8/2001 and after consultation with the relevant national bodies, I have the honour to inform you that the Government of the Bolivarian Republic of Venezuela has no objections to endorsement of the text of the International Undertaking on Plant Genetic Resources, in the belief that it meets our domestic needs for facilitated access to genetic resources for food and agriculture.