



FOURTH INTER-SESSIONAL CONTACT GROUP MEETING ON THE REVISION OF THE INTERNATIONAL UNDERTAKING ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE, IN HARMONY WITH THE CBD: 12-17 NOVEMBER 2000

The Fourth Inter-sessional Contact Group Meeting on the revision of the International Undertaking on Plant Genetic Resources (IU), in Harmony with the Convention on Biological Diversity, was held in Neuchâtel, Switzerland, from 12-17 November 2000. Approximately 100 participants from 37 countries, one regional economic integration unit, four intergovernmental and two non-governmental observer organizations attended the meeting. Delegates continued negotiations on the Composite Draft Text, specifically on Articles 12 (Coverage of the Multilateral System), 14 (Benefit-sharing), 16 (Financial Resources), 17 (Governing Body) and Annex V (Conditions For Participation of International Institutions in the Multilateral System and Placing of International *Ex Situ* Collections in the Multilateral System). Delegates also heard presentations from the World Trade Organization and the Future Harvest Centres of the Consultative Group on International Agricultural Research.

Many delegates noted the slow pace of the meeting, which only dealt with two or three articles in significant depth, despite a much broader initial agenda. A large portion of the meeting was devoted to Article 16, where delegates agreed on most of its provisions. Several delegates thought that discussions on Article 14.2(d)(iv) on benefit-sharing from commercialized plant genetic resources for food and agriculture from the Multilateral System represented a step backward as the tentative understanding reached in Tehran at the third Contact Group meeting was re-opened and left unresolved. Finally, Articles 12 and 17 were addressed only briefly. Such slow progress called into question a scheduled extraordinary session of the Commission on Genetic Resources for Food and Agriculture for late January 2001, which was intended to complete and adopt the revised IU. The next steps remain unclear and await consideration by the FAO Council, which meets in Rome from 20-25 November 2000.

A BRIEF HISTORY OF THE PROCESS

THE FAO GLOBAL SYSTEM: The FAO established the inter-governmental Commission on Plant Genetic Resources in 1983. Renamed the Commission on Genetic Resources for Food and Agriculture (CGRFA) in 1995, the Commission is currently comprised of 166 countries, including the European Community. The CGRFA coordinates, oversees and monitors the development of the Global System for the Conservation and Utilization of Plant Genetic Resources for Food and Agriculture (PGRFA), which is comprised of the Commission itself and the non-binding International Undertaking on Plant Genetic Resources for Food and Agriculture (IU), the rolling Global Plan of Action (GPA) and the International Fund for Plant Genetic Resources, the World Information and Early Warning System, Codes of Conduct and Guidelines for the Collection and Transfer of Germplasm, the International Network of *Ex Situ* Collections under the auspices of FAO, and the international network of *in situ* conservation areas and crop-related networks.

THE INTERNATIONAL UNDERTAKING: The IU, the first comprehensive instrument on PGRFA, was established in November 1983 by FAO Conference Resolution 9/83. Its objective is to ensure that PGRFA are explored, collected, conserved, evaluated, utilized and made available for plant breeding and other scientific purposes. It was

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originally based on the principle that PGRFA should be "preserved ...and freely available for use, for the benefit of present and future generations" as part of the common "heritage of mankind." This principle, however, was subsequently subjected to "the sovereignty of States over their plant genetic resources" (FAO Resolution 3/91). Although a non-binding agreement, the IU was not adopted by consensus, as eight developed countries formally recorded reservations. Over the years, through a series of additional interpretive resolutions, the IU has achieved wider acceptance. To date, 113 countries have adhered to the IU, with Brazil, Canada, China, Japan, Malaysia and the US as notable exceptions.

In April 1993, the Commission considered the implications of the 1992 UN Conference on Environment and Development, and the Convention on Biological Diversity (CBD) in particular, for the IU. Recognizing that the CBD would play a central role in determining policy on PGR, the Commission agreed that the IU should be revised to be in harmony with the Convention. At its First Extraordinary Session, held in November 1994, the Commission reviewed a First Negotiating Draft, which incorporated three interpretative annexes into the IU, and provided a more rational structure, grouped into 14 articles.

SIXTH SESSION OF THE CGRFA: The CGRFA held its sixth session at FAO Headquarters in Rome in June 1995. In addition to its regular agenda, the Commission considered a Second Negotiating Draft, which included the comments made and alternative wording suggested by the Commission to the First Negotiating Draft. At this meeting, the Commission focused its discussions on Articles 3, 11 and 12 (pertaining to scope, access and farmers' rights, respectively), and undertook a first reading of the Preamble. Proposals made by the Commission were integrated into a Third Negotiating Draft.

SECOND EXTRAORDINARY SESSION OF THE CGRFA AND FOURTH INTERNATIONAL TECHNICAL CONFERENCE ON PGRFA: The CGRFA held its second extraordinary session (CGRFA-EX2) at FAO Headquarters in April 1996, in order to address several issues in preparation for the Fourth International Technical Conference on Plant Genetic Resources (ITCPGR-4), held in Leipzig, Germany, in June 1996. ITCPGR-4 agreed on an international programme for the conservation and utilization of PGRFA. Representatives of 148 States adopted the Leipzig Declaration, the Conference's key political statement, and a Global Plan of Action (GPA), the Conference's main substantive output.

THIRD EXTRAORDINARY SESSION OF THE CGRFA: The CGRFA held its Third Extraordinary Session (CGRFA-EX3) at FAO Headquarters in December 1996. Delegates considered a Third Negotiating Draft and returned to discussions on scope, access and farmers' rights. Although the meeting did not produce any new negotiated text, it did make progress on difficult and often divisive issues.

SEVENTH SESSION OF THE CGRFA: The CGRFA held its seventh session (CGRFA-7) at FAO Headquarters in May 1997. Delegates continued negotiations on the revision of the IU in two working groups, addressing scope, access and farmers' rights. Conceptual advances on facilitated access were most clearly reflected by the fact that most delegates agreed, in principle, to establish a Multilateral System (MS) to facilitate access to PGRFA. Work on farmers' rights began to move beyond entrenched positions with recognition by a number of EU countries and most of the developing countries, that farmers' rights are more than a concept.

FOURTH EXTRAORDINARY SESSION OF THE CGRFA:

The CGRFA held its fourth extraordinary session (CGRFA-EX4) at FAO Headquarters from 1-5 December 1997. Delegates considered a Fourth Negotiating Draft in one working group and one contact group. The working group addressed the revision and consolidation of IU text on: objectives; relationship of the IU with other international agreements; conservation, exploration, collection, characterization, evaluation and documentation of PGRFA; sustainable use of PGRFA; international cooperation; the GPA; the international network of PGRFA; global information systems on PGRFA; and farmers' rights.

The working group was able to produce consolidated text on all these issues. Concurrently, the contact group continued discussions on issues related to access and benefit-sharing. There was a major breakthrough as proposals for a MS to facilitate access to PGRFA through a list of major crops, yet to be determined, began to take shape. The first exchange of views on benefit-sharing was insightful, and the complexities of tackling the private/public sector interface and balancing IPR interests were acknowledged.

FIFTH EXTRAORDINARY SESSION OF THE CGRFA: The CGRFA held its fifth extraordinary session (CGRFA-EX5) at FAO Headquarters from 8-12 June 1998. Delegates continued discussions in an open-ended working group and a Chair's contact group. The working group reviewed Article 12 on farmers' rights. The contact group reviewed elements of Article 11 on access to PGRFA and introduced new text on benefit-sharing and financial arrangements.

Overall, the working group made little progress on the issue of farmers' rights. Fundamental differences divided key regional groups, particularly in relation to ascribing legal rights for farmers. The contact group made some progress on access, however, the relationship between facilitated multilateral access and intellectual property rights (IPR) continued to be problematic.

115TH FAO COUNCIL: The FAO Council held its 115th session in Rome from 23-28 November 1998. The Council recognized progress made to date and supported the hosting of an informal meeting of experts to address benefit-sharing, farmers' rights, the financial mechanism, the legal status of the revised IU, and other issues.

MONTREUX EXPERTS' MEETING: The meeting of experts was held in Montreux, Switzerland, from 12-22 January 1999. Participants attended in their personal capacity to discuss the IU's legal status, its structure, the MS, farmers' rights and financial resources. Based on the discussions, Chair Fernando Gerbasi (Venezuela) drafted a series of "Chairman's Elements" reflecting areas of broad consensus and providing a basis for continuing the negotiations.

There was general consensus that the IU should take the form of a legally-binding instrument and that its structure should be dynamic. The Chairman's Elements address: scope; objectives; national commitments, programmes and rural development policies; the MS, including components for facilitated access and benefit-sharing (coverage, facilitated access, equitable and fair sharing of benefits, and supporting components); farmers' rights; financial resources; a legally-binding instrument; and provisions for amending the IU and its annexes.

EIGHTH SESSION OF THE CGRFA: The CGRFA's eighth session was held in Rome from 19-23 April 1999. The Commission decided to continue negotiations on the IU's revision using a Composite Draft Text, and authorized the Chair to convene sessions of the Chair's Contact Group to advance negotiations on the basis of the Chairman's Elements derived from the Montreux meeting. The Chair's



Contact Group consists of 41 countries selected according to regional representation, and was formed to address the most contentious issues under debate. The Commission also authorized the Chair to request the FAO Director-General to convene an Extraordinary Session of the Commission to adopt the final text when appropriate, so that the results could be submitted, at the latest, to the 119th Session of the FAO Council in November 2000. Negotiations proceeded on Articles 11 (Multilateral System of Access and Benefit-sharing), 12 (Coverage of the MS) and 15 (Farmers' Rights). Significant progress was made on farmers' rights with the adoption of agreed text.

FIRST INTER-SESSIONAL CONTACT GROUP

MEETING: The first meeting of the Contact Group took place in Rome from 20-24 September 1999. The group focused on Article 14 (Benefit-sharing), on the basis of a submission by developing countries, addressing sub-articles on: exchange of information; access to and transfer of technology; capacity building; and the sharing of monetary benefits of commercialization. Consensus was reached on text for exchange of information, while text on access to and transfer of technology and its implications for IPR remained bracketed. On commercial benefit-sharing, the group generally recognized the link between the income derived from the commercial use of PGRFA and benefit-sharing, but there was insufficient time for review.

SECOND INTER-SESSIONAL CONTACT GROUP

MEETING: The second meeting of the Contact Group took place in Rome from 3-7 April 2000. The group continued a general discussion on Articles 13 (Facilitated Access), 14 (Benefit-sharing) and 16 (Financial Resources), and made some progress on clarifying positions and agreeing on text.

THIRD INTER-SESSIONAL CONTACT GROUP

MEETING: The third meeting of the Contact Group was held in Tehran, Iran, from 26-31 August 2000. The Contact Group continued negotiations on Articles 13, 14 and 16. The group made significant progress with a provisional package agreement on IPR and commercial benefit-sharing, which was subject to review by a few developed countries. Regions also submitted lists of crops for consideration under Annex I (List of Crops) with numbers ranging from nine to 287 crops.

REPORT OF THE CONTACT GROUP

The fourth Inter-sessional Contact Group Meeting on the Revision of the International Undertaking on Plant Genetic Resources (IU), in harmony with the CBD, was opened by Amb. Fernando Gerbasi (Venezuela), Chair of the CGRFA, on Sunday, 12 November, in Neuchâtel, Switzerland. Hans-Jörg Lehman, Head of the Staff Position Ecology, Federal Office of Agriculture of the Government of Switzerland, welcomed participants, expressing hope for progress and confidence that solutions could be found to satisfy all Parties. He discussed examples of projects at the national level addressing conservation and use of PGRFA, emphasizing the need for simplicity and transparency in reaching compromise at all levels. He further underscored the need for freedom of choice by Parties in defining and establishing financial contributions.

Chair Gerbasi extended thanks to the Governments of Belgium, Italy, Japan, the Netherlands, Norway, Sweden and Switzerland for their ongoing financial support of the IU. He noted the progress made by the third Inter-sessional Contact Group meeting in Tehran (26-31 August 2000) and the need for further progress to present a satisfactory report to the 119th FAO Council meeting (20-25 November 2000). He announced that the Sixth Extraordinary Session of the CGRFA would meet from 29 January - 9 February 2001 in Rome to finalize the revision

of the IU. He further noted the calendar of meetings that would then consider the revised IU, including the FAO's Committee on Legal and Institutional Measures (April 2001), the 120th FAO Council (June 2001) and the FAO General Conference (November 2001). Chair Gerbasi then proposed, and delegates adopted, a programme of work based on the Composite Draft Text (CGRFA/CG-4/00/2), beginning with Article 16 (Financial Resources), and followed by: Article 12, including Annex I (List of Crops); Article 13, specifically 13.2(a), 13.2(d), 13.2(f), 13.2(h), and 13.5; Article 14; a new article previously proposed by the European Union; Article 17; Article 20 (Amendments of the Undertaking); and, if time permitted, Article 21 (Amendments of Annexes).

That evening, Manfred Boetsch, Director of the Federal Office for Agriculture of the Government of Switzerland, again welcomed participants to Neuchâtel. He noted the IU's objective for the long-term security of food supplies and the need to find a common denominator for the agricultural, trade and environmental issues involved. He highlighted the Rome Declaration of 1996 and the need to develop and implement practices recognizing the multiple aspects of agriculture. He noted Switzerland's efforts to provide preferential tariffs for least developed countries and recognized domestic progress in sustainable agriculture based on market needs and use of marginal lands.

Delegates met in two sessions per day, convened two small working groups on Articles 14.2(d)(iv) and 16.4(d), held two informational sessions with representatives of the WTO and CGIAR Centres, and held a closing session on Friday, 17 November, to review their work. The following summary reviews the articles discussed in numerical rather than chronological order.

Editor's Note: As a matter of policy, the Earth Negotiations Bulletin does not directly attribute statements made by governments in informal negotiations when requested to do so.

ARTICLE 12 (COVERAGE OF THE MULTILATERAL SYSTEM)

CGIAR PRESENTATION: On Thursday, 16 November, a representative of the Consultative Group on International Agricultural Research (CGIAR) Future Harvest Centres noted the Group's mission to contribute to food security and poverty eradication in developing countries through research, partnerships, capacity building and policy support, and to promote environmentally sound and sustainable agriculture development. He outlined the CGIAR's structure (16 Centres - 13 in developing countries and 11 with genebanks), funding, organization and areas of work, which include: food crop conservation and improvement, livestock health and production, integrated natural resource management, aquatic resources, (agro-)forestry, socio-economic policy research and development of national systems. He noted that the Centres annually distribute more than 120,000 samples of wild varieties and landraces, and their breeding programmes distribute more than 500,000 samples of improved germplasm, mostly to developing countries. He noted agreements signed with the FAO, which designate that Centres hold designated germplasm in trust for the international community, make them available without restriction and prohibit intellectual property protection on accessed materials. He listed areas of benefit-sharing, including distribution of germplasm and improved materials, technology transfer, information sharing and capacity building.

Another representative of the CGIAR Centres noted that while flows of germplasm historically moved mainly from developing to developed countries, such trends have shifted over time. Based on several case studies, he highlighted that the ratio of samples accessed by developing countries to those provided by them has shifted from 4-



I during the CGIAR's peak period of collecting in the 1970s and 80s, to 60-1 in 1992, and to an estimated 100-1 today. He also noted significant crop interdependence, substantial flows within regions, larger flows from CGIAR improvement programmes, and fewer flows to the private sector. Of flows to the private sector, more go to developing countries. He also noted the CGIAR's role as a form of insurance for countries that have had to restore their collections. Subsequent discussion highlighted that developed countries access a higher percentage of wild varieties, as improved materials are generally bred in developing countries under different climatic conditions, as well as concern over application for intellectual property protection on distributed material, which is pending completion of the IU.

12.1: This provision states that the MS shall cover PGRFA listed in Annex I. On 16 November, Chair Gerbasi recalled agreement on Article 12.1 and suggested deferring discussion on footnote (b), which states that this provision would be agreed pending adoption of Article 21 (Amendments of Annexes). One developing country proposed splitting Article 12.1 into two new sub-paragraphs, one specifying resources to be covered by the MS and stating that coverage of the MS shall be in accordance with applicable access laws and national legislation, and another stating that the criteria for inclusion of PGRFA in the MS be based on global food security and interdependence. One developed country raised a point of order stating that Article 12.1 had been adopted by consensus, *ad referendum*, and requested that the proposal be withdrawn. Chair Gerbasi said that additional proposals amounted to reopening the debate on the substance of this provision.

The developing country highlighted links between Articles 12 and 14 (Benefit-sharing in the MS) and explained that the purpose of her amendment was to balance both articles by referring to national law and access rights, noting a need to make the IU consistent with pending national legislation in her country. One developing country supported the concern to have a balance between access and financial resources, but rejected, along with another developing country, the proposed changes. Two developing countries stated that a conclusive proposal from the working group on Article 14.2(d)(iv), on commercial benefit-sharing, could allow the text to remain as is. The developing country making the proposal stated her understanding from Tehran that Articles 12 and 13 (Facilitated Access) would remain open for discussion in the absence of equal progress on other articles.

Following consultations, developed countries acknowledged that text in Article 12.1 was linked to provisions pending elsewhere, but refused to reopen the agreed text for negotiation. Developing countries stated that they shared the concern expressed by the delegate responsible for the proposal regarding the inter-relationship and balance among Articles 13, 14, 16 and 17 (Governing Body). Developing countries agreed to withdraw the proposal if a footnote could be inserted stating that completion of Article 12 depends on its harmonization with Articles 13, 14, 16 and 17. Delegates agreed, and the text was maintained.

12.2: This provision defines the material covered by the MS. On 16 November, Chair Gerbasi requested clarification on footnotes (c), (d) and (e), calling for further consideration of the CGIAR collections of PGRFA and how they could be addressed inclusively in the IU. A developing country recalled that the Contact Group accepted the footnotes of Article 12.2 during discussions on Article 13.4 in Tehran, not to restrict references to the CGIAR to a single place, but to address the CGIAR in a holistic manner. He noted that CGIAR collections would be addressed in: Articles 9.3 and 9.4, covering references to networks and international centers; Article 12; Article 13; Article 16; and Annex

V. On Article 12.2 and Annex V, he said that the CGIAR collections are central to circulation of PGRFA throughout the world and constitute an extremely important asset for the IU. He stated that the objective should be to maintain the collections' integrity, noting that the FAO-CGIAR Agreements' temporary legal nature calls for clarification under the MS. He noted the collections come primarily from developing countries and recognized the need to respect the rights of these countries in managing the collections. He explained that CGIAR collections cover crops not included in some regional lists proposed for the MS, and underscored the need for, *inter alia*: rules to address management of crops not included under the MS; revision of current material transfer agreements; and the possibility of a system to channel commercial benefits into a fund to support these Centres.

A regional group of developing countries submitted new proposals for Articles 12.2, 12.4 and Annex V. For Article 12.2, they proposed one paragraph to replace the existing two. The text of the provision, which is bracketed, includes two alternatives: the original text and a new provision noting that "Parties agree that the germplasm collections held in *ex situ* collections by the CGIAR Centres, and other international institutions shall be subject to the provisions of this IU and in accordance with the provisions of Annex V."

12.4: A proposed new Article 12.4, stating that "Parties agree that any alteration to Annex I and Annex V of this Undertaking shall only be possible with the consensus of all Parties to this IU," remains in brackets.

ARTICLE 14 (BENEFIT-SHARING)

This provision addresses the forms of benefit-sharing under the MS. In considering the issue delegates discussed the issue of consistency with WTO Agreements and, in their negotiations, addressed only Article 14.2(d)(iv).

WTO PRESENTATION: On Wednesday, 15 November, a WTO representative made a brief presentation and answered questions regarding issues related to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and IU Article 14.2(d)(iv) on mandatory commercial benefit-sharing for PGRFA from the MS, whose access has been restricted by intellectual property protection. She noted that interpreting the agreements and policy issues is the purview of WTO Member States. She highlighted the procedures of the WTO's Dispute Settlement Body (DSB), which helps to interpret areas of ambiguity or questions regarding implementation. Regarding patents, she explained that in the case of a dispute involving Article 14.2(d)(iv), a panel would examine whether the patents in question fulfill the conditions of novelty, an inventive step and industrial applicability. On permissible evidence for such a dispute, she noted that the panel would first examine the literal reading of the disputed provision and then, if necessary, look to the historical context of its negotiation.

She reviewed TRIPS Article 27.1, which states that patent rights shall be enjoyable without discrimination regarding the place of invention, field of technology or whether products are domestic or imported. She elaborated that the exception to this provision is detailed in TRIPS Article 27.3, which allows Members to exclude plants, animals and essentially biological processes from patenting if an effective *sui generis* system for their protection is provided. She noted that this is currently under discussion in the TRIPS Council. She explained that TRIPS Article 30 (Exceptions to Rights Conferred) allows for limited exceptions to the rights of a patent holder, provided they do not unreasonably conflict with exploitation of the patent or the interests of the patent holder.



Responding to questions on fields of technology, she noted that the Uruguay Round considered fields such as pharmaceuticals and agrochemicals, although current interpretations might differ. A delegate stated that the MS would only apply to a subset of a field, since the MS would not include all PGRFA. With regard to relations between agreements, she emphasized that newer agreements should be negotiated in a manner compatible with existing agreements, said relations with other international agreements should be clarified, and referenced provisions of the Vienna Convention on Treaties. Responding to questions regarding royalties on patented PGRFA under the MS and whether they could be exempted from patent provisions, she noted that TRIPS does not address royalties except for compulsory licensing, which is not relevant here. She stated that the issue of whether a tax might be a form of discrimination against patenting would have to be examined further by WTO members. Responding to a question of whether the provision for *sui generis* systems of protection under Article 27.3(b) could be an exception from non-discrimination obligations, she explained that there are different schools of thought on the issue. Regarding patenting of materials in the public domain, she noted safeguards within the patent system, specifically referring to the novelty criterion and examination of applications by patent offices.

She stated that she could not provide legal interpretation regarding questions on: whether the wording of IU Article 14.2(d)(iv) covers undisclosed information; whether the exceptions in TRIPS Article 27.3(b) provide leeway for placing conditions on patent holders; discrimination against sub-sets of fields of technology; and whether obligations for royalty payments would discourage patenting of PGRFA. Responding to a comment on TRIPS Article 8 (Principles), she stated that TRIPS Article 27.2 allows exceptions to protect public order or morality, while Article 8 serves as a general chapeau whose implementation must be consistent with TRIPS' more specialized provisions. One developing country noted that *a posteriori* fees on patents do not inhibit one's right to apply for patents.

Two countries asked FAO's legal counsel for an assessment of the conformity of Article 14.2(d)(iv) with TRIPS. The FAO legal counsel stated that he should stay neutral, but requested clarification from an independent expert. The expert said that the IU was not incompatible with language in TRIPS Article 27.1, stating that there would not be discrimination as to the place of invention, the field of technology and whether products are imported or locally produced; nor with TRIPS Article 28 (Rights Conferred) on the rights of the patent holder to exclude a third party. He stated that under Article 27.3(b) a country could subject a patent system to certain conditions like contributions or royalties. He noted that according to TRIPS Article 8.1, countries can adopt measures to protect public health and nutrition, and can therefore require contributions provided that they are consistent with TRIPS and the patent holders' rights. A developed country stated that interpretations of compatibility would differ from one lawyer to the next. He stated that the DSB could clarify this issue, but called for avoiding such a situation.

A representative of the World Intellectual Property Organization (WIPO) discussed: work on digital libraries documenting traditional knowledge in the public domain; the International Patent Classification Treaty and its relevance to fields of technology and agriculture; the application of copyright models to benefit-sharing for genetic resources; and an upcoming intergovernmental committee meeting to discuss issues of traditional knowledge, access and benefit-sharing, IPR and biotechnological inventions. An observer clarified a proposal made in Tehran that served as the basis for Article 14.2(d)(iv) on

binding and voluntary contributions by the commercial sector. Another observer voiced opposition to the possibility of patenting living organisms as contained within this provision.

14.2(d)(iv): This provision addresses mandatory payment of royalties for PGRFA accessed under the MS on which IPR or commercial protection restrict further access. At the third Contact Group Meeting in Tehran, delegates had reached a general understanding on this provision, noting that three regions had to consult their capitals. On Tuesday, 14 November, four developed countries noted that they could not accept the provision as it stands for reasons including, *inter alia*: potential conflicts with TRIPS (e.g., discrimination against fields of technology and impairment of enjoyment of patent rights); confusion over the provision's purpose (for royalty sharing, venture capital or compensation for material excluded from the MS); confusion over the meaning of "product" and "exploitation;" unresolved issues within Articles 12 and 13; concern over the means and costs of national implementation; potential contravention of Article 13 ensuring minimal costs for access and benefit-sharing; and relation to international agricultural research centers. Two countries objected to arguments regarding potential conflicts with TRIPS, noting that patent holders' privileges would not be infringed upon and that TRIPS has exceptions for discriminating against fields of technology, as well as plants and animals.

On Wednesday, 15 November, after a bureau meeting to consider the issue, Chair Gerbasi acknowledged that countries from three regions maintained their reservations on Tehran language for Article 14.2(d)(iv). Debate ensued over whether this language was open for negotiation. A regional group of developed countries stated that while they accepted the text on a general basis, they were willing to negotiate. Several developing countries emphasized their view that the text was not open for negotiation. A regional group of developed countries suggested, with support from a number of other countries, that delegates submit and consider written improvements to enhance or clarify the text, and, if no agreement could be reached, the text should remain as drafted. Chair Gerbasi then established a small group to evaluate written submissions.

On Thursday, 16 November, the small group met in morning, afternoon and late evening sessions.

On Friday, 17 November, the Chair of the small group submitted proposed improvements to the text, noting, *inter alia*: identical structure of language in paragraphs on both restricted and non-restricted PGRFA utilization; deletion of reference to commercial protection; replacement of a reference to the Governing Body with reference to Article 17.2; new language on identifying forms of IPR that restrict utilization for research and plant breeding; replacement of text stating "Parties agree that the rights-holder shall pay" with "Parties shall take measures, as appropriate, to encourage the rights-holder to pay"; deletion of reference to Article 16; use of "this provision" over "this obligation;" and a request that the Governing Body review Article 14.2(d)(iv) in its entirety. He said that four countries had expressed reservations on this text.

A developed country said that the text had two objectives: (1) to encourage the commercial sector to participate in the MS; and (2) to penalize those who in the course of recognizing their legal rights would restrict access to PGRFA from the MS. She said the group failed to find a way to address both issues together and suggested concentrating on how to encourage the commercial sector to participate through voluntary contributions. She stressed that implementation of a mandatory system would require tremendous resources for tracking



and effectively require the Governing Body to take decisions on IPR, which is outside its mandate. Developing countries stated that they would only accept the text proposed by the small group. One developed country supported the text pending approval from his capital, accepting it *ad referendum*. A number of other developed and developing countries supported the text, noting frustration over the lack of progress made. One delegate stated that the provision did not legislate on IPR, but outlined rules for participation in the MS.

One developing country noted the need to ensure that facilitated access is not impeded, including through the use of IPR. Two developed countries stated that only the WTO's DSB can state whether a provision is consistent with TRIPS and raised the question of what would happen if a dispute panel ruled that the IU was inconsistent with TRIPS. Another developing country noted that the DSB has to take decisions considering the overall legal context and that there has been no proof of how the provision would discriminate against a field of technology. One developing country pointed out the paradox that the WTO's DSB cannot provide advice on the provision's consistency until a dispute is raised, yet a dispute cannot be raised until the IU is completed. Two countries noted the possibility of non-Parties challenging the provision under the WTO's DSB. A developing country argued that negotiations cannot be dependent on the will of another international body with another area of competence.

Chair Gerbasi suggested renumbering the third paragraph of this provision, addressing a review of voluntary contributions for non-restricted protections on accessed PGRFA and the possibility of making such payments mandatory, as new Article 14.3. An observer noted that if the Governing Body eventually established a mandatory scheme, it would be contrary to plant breeders' rights under the International Convention for the Protection of New Varieties of Plants (UPOV). Chair Gerbasi proposed adopting the text and then deleting 14.2(d)(i) and (ii) on Party contributions as well as the Chairman's note in the original text. One developed country disagreed, stating that agreement on the text had not been reached since four countries had expressed reservations. Another expressed concern that more clarification was needed on objectives, purpose, benefit-sharing and contributions to the MS. A developed country requested the provision be bracketed since problems still remained on: possible TRIPS inconsistencies; reference to trade secrets; the order of the decision-making process; the mandatory nature of the language; and implementation. One participant proposed adding reference to countries with economies in transition. One developed country suggested consideration of Article 13.2(d), on restricting intellectual property protection on PGRFA from the MS, to address the problem of TRIPS compatibility in a holistic manner.

Developing countries stated that since there was no consensus, the original text from Tehran should remain. A group of developed countries stated that the small group had produced an improved text, which should be taken into account, and proposed postponing discussion until the next meeting. A group of developed countries, supported by developing countries, proposed using the new text but retaining the footnote from Tehran language stating that some countries required further consultation with their capitals. Three developed countries supported bracketing the new text and stated that the footnote must be reworded since the four countries had already consulted their capitals. Developing countries stated that they could not agree to bracket the text since it was a step backwards from the Tehran agreement. A group of developed countries agreed, and proposed that the footnote should

state that the situation has evolved and mention that if an agreement is reached in relation to Articles 14.2(b)(iii) and (iv), Articles 14.2(d)(i) and (ii) would be deleted, as included in the Chair's note from Tehran.

A developed country then proposed a footnote stating that four countries did not agree to the text. She also reiterated the need to bracket the text, but withdrew the request given opposition from developing countries. Delegates accepted this footnote along with another stating that two countries called for a reference to countries with economies in transition. They also agreed to keep the portion of the Chair's original note that Articles 14.2(d)(i) and (ii) would be deleted pending acceptance of Article 14.2(d)(iv).

The final provision states that: whenever PGRFA from the MS are covered by an IPR that restricts further access, the rights-holder shall pay an equitable royalty into the MS; for non-restrictive IPR, Parties shall encourage the rights-holder to pay a royalty into the MS; and the Governing Body shall review the provision within five years of the IU's entry into force, including the possibility of making the voluntary scheme for non-restrictive IPRs mandatory. The text also notes that a provision will be inserted into Article 17.2 calling for the Governing Body to identify IPRs that restrict utilization for research and plant breeding. Finally, it includes three footnotes stating that: four countries do not agree to the text of the provision; if agreement is reached on Articles 14.2(d)(iii) and 14.2(d)(iv) then Articles 14.2(d)(i) and 14.2(d)(ii) will be deleted; and two countries requested inclusion of countries with economies in transition.

ARTICLE 16 (FINANCIAL RESOURCES)

On Sunday, 12 November, Chair Gerbasi opened discussion on Article 16, which addresses financial provisions, including the funding strategy and arrangements. Parts of this article had been briefly discussed during the third Inter-sessional Contact Group meeting.

16.1: This provision addresses the development of a funding strategy under the IU. On 12 November, after one country noted difficulties during previous meetings in removing brackets from Parties' commitments to implement the funding strategy, delegates agreed to reconsider the provision following deliberations on the remainder of Article 16. On Thursday, 16 November, one developed country stated that she still could not accept the reference to implementation, which remains in brackets.

16.2: This provision states that the funding strategy's objectives shall be to enhance the availability, transparency, efficiency and effectiveness of providing financial resources, and includes three sub-items on the means of providing such resources. On 12 November, a developed country noted that the sub-items refer to ways and means, which are addressed in Article 16.4, and suggested their deletion. Delegates agreed to consider them under Article 16.4 and after some discussion, agreed to the existing text of Article 16.2 without the sub-elements.

16.3: This provision addresses periodically establishing a target for the funding strategy. On 12 November, a developed country questioned the utility of including reference to a funding target, stating that such a figure is purely hypothetical since the funding strategy also relates to other organizations and their budgets over which the IU's Governing Body has no control. He also noted that negotiations to agree on such a target would be difficult and time-consuming. A number of developing countries supported reference to a target because it serves as a guide for developing the funding strategy. One participant stressed the importance of a funding target to communicate the IU's financial needs to potential donors, and cited the example of upcoming negotiations on replenishing the Global Environment Facility (GEF). A group of developed countries proposed deleting



reference to the GPA and its related financial requirements. Several delegates objected, noting that reference to the GPA indicates priority areas for funding.

A developed country proposed language for Article 16.3 stating that the IU's Governing Body would periodically establish a target for consideration by funding sources to mobilize funding for priority activities. A number of participants supported such language with the omission of a reference to consideration by funding sources. Delegates then debated language on developing a target for the funding strategy or simply defining a funding target. Several participants noted that establishing a target for a funding strategy includes more than a funding target, which would only be a monetary figure. Some developing countries stressed the importance of identifying a monetary value. Delegates finally agreed to language stating, "In order to mobilize funding for priority activities, plans and programmes, in particular in developing countries and countries with economies in transition, and taking the GPA into account, the Governing Body shall periodically establish a target for such funding."

16.4: On Monday, 13 November, developing countries requested a general discussion on Article 16 with a view to creating a proposal for consideration later in the day. The discussion generally focused on Article 16.4.

A developed country related the provisions of Article 16 to elements in the "Financial Resources" section of the Chairman's Elements derived from the Montreux Meeting, which separates the commitment to a funding strategy into several sub-elements. The first sub-element on contributions from international organizations corresponds to Article 16.4(a). The second sub-element, which addresses country contributions to implement agreed plans and programmes under the IU, corresponds to Article 16.4(c). The third sub-paragraph addressing private sector contributions is linked to both Article 16.4(d) and (f). A fourth sub-element addressing national allocations to implement national PGRFA programmes is linked to Article 16.4(e).

Later that afternoon, developing countries presented a new proposal for Article 16, which called for, *inter alia*, establishing a funding mechanism under the Governing Body for receiving and utilizing resources in Article 16.4(a) and replacing reference to ensuring resources in Article 16.4(c), with reference to obtaining resources. A number of developed countries expressed appreciation for the proposal, but preferred the original from the Composite Draft Text.

After debate on which text to use, Chair Gerbasi called on delegates to work from the original text. A developed country supported elements of the new proposal, including creating some kind of funding mechanism under the Governing Body, but noted inconsistencies in references to all resources in Article 16.4(a) and predictable and agreed resources in Article 16.4(c). Another developed country expressed concern that the new text envisions a mechanism as a way to channel all contributions of resources. She noted that the IU would be supported by a wide variety of sources, including project-by-project contributions where a company, NGO or research center would enter into collaboration with other Parties, involving transfer of knowledge, benefit-sharing and capacity building, but not necessarily funding. A developing country clarified that the mechanism would govern only the funds that accrue or are contributed under the IU's provisions, and would not apply to resources that governments would provide through other multilateral and bilateral arrangements.

A group of developed countries proposed language stating that the allocation of resources depends on measures taken by Parties within the governing bodies of relevant international mechanisms, funds and bodies to implement plans and programmes addressing the GPA. A developing country opposed this formulation since it did not refer to a funding mechanism. With some debate on the interpretation of the Chairman's Elements from the Montreux Meeting, Chair Gerbasi called for separate discussions on a funding mechanism in 16.4(a) and funds from other international bodies in 16.4(c).

16.4(a): This provision addresses the allocation of resources under the MS. On 12 November, several developed countries stressed the difficulty of Parties to assume commitments that apply to independent bodies, and suggested language on "endeavoring to facilitate" the allocation of predictable and agreed resources. A number of developing countries preferred text stating that Parties "shall take appropriate measures to ensure" the allocation of resources.

A developing country cautioned against defining too broadly the inclusion of independent organizations and bodies. A developed country noted that possible funding sources go beyond individual governments, and emphasized the need to encourage governments to influence bodies such as the CGIAR and the GEF in a respectful and effective manner, without attempting to govern organizations not under the direct control of the Parties. One participant emphasized the need for language that would give strong signals to international organizations regarding the need for predictable funding. A developing country suggested, with support from a developed country, that Parties and international organizations be addressed separately.

Another participant noted that later in this sub-paragraph, a bracketed reference to Parties under the IU reaffirming their commitments to provide new and additional resources under the CBD could preclude non-Parties to the CBD. Chair Gerbasi highlighted a footnote stating that such language would be moved to a parallel resolution at the time of the IU's adoption, and then relegated these issues to a small group. The group met later in the evening but was unable to reach agreement, with reference to ensuring resources remaining a major point of contention.

On 13 November, developing countries tabled their new proposal for Article 16.4(a), underscoring the need to establish a funding mechanism under the IU. A number of developed countries opposed reference to a funding mechanism, since it was not agreed in the Montreux Elements, and said that a funding strategy would be more appropriate. Developing countries stated that since the agreed Montreux Elements refer to contributions, there should be a funding mechanism controlled by the Governing Body to decide how to utilize these resources. They argued that absence of a funding mechanism implied lack of commitment to the IU, and one delegate emphasized that an IU without funds or a mechanism to secure and manage them would be ineffective.

A developed country questioned how a funding mechanism would work and stated that other international funds already exist. Developing countries responded that resources from other international organizations can only be complementary to resources flowing directly into the IU, and questioned how organizations such as the GEF and the CGIAR, whose resources are already strained, could provide adequate resources to the IU. Another developed country questioned whether having a bank account to manage funds mandated a separate mechanism, and raised issues of linkages with other organizations and integration of a funding strategy.



A developed country proposed language on establishing a mechanism for receiving and utilizing financial resources that may be contributed to implement the IU. Developing countries generally supported placing such language under Article 17.2, thereby reflecting the duties of the Governing Body, but also stressed the need for reference to a mechanism in Article 16 to reflect the commitment to providing funds to such a mechanism.

Delegates then debated how to merge the regional proposal on funding from other international bodies with related provisions from the developing country proposal. Some delegations supported language stating that such resources apply only to plans and programmes under the IU, not to priority areas of the GPA. The Contact Group debated language on whether the purpose of such measures would be to “ensure due priority and attention to” or “obtain” allocation of predictable resources, and considered text qualifying the types of measures that Parties would take in that regard. Developing countries generally preferred “effective” and “necessary” measures, whereas developed countries generally preferred “appropriate” measures. However, two developed countries objected to “necessary” measures, since such a term connotes *a priori* completion of an action, which cannot be guaranteed. Some developing countries proposed language on necessary and appropriate measures to ensure due priority and attention to the effective allocation of predictable and agreed resources. Further discussion was deferred.

On 14 November, three developed countries said that after consultation with their capitals, they could accept the text as proposed the previous day. The final text states that “Parties shall take the necessary and appropriate measures within the governing bodies of relevant international mechanisms, funds and bodies to ensure due priority and attention to the effective allocation of predictable and agreed resources for the implementation of plans and programmes under the IU.”

16.4(b): This provision states that effective implementation of the IU by developing countries and countries with economies in transition depends on the allocation of predictable and agreed resources mentioned in Article 16.4(a). On 12 November, one developed country noted the work of many developing countries in conserving their PGRFA at their own expense and, supported by two other developed countries, proposed recognizing this by stating that their implementation will be assisted by and not dependent on the provision of resources. Several participants proposed deleting reference to “predictable” and “agreed” in order to consider resources coming from external sources and not exclusively those from Parties. A developed country noted that language in Article 16.4(e) requires all Parties to provide financial support for national activities according to their capabilities, and proposed text stating that the allocation of financial resources for developing countries would be proportional to the priority they accord to capacity building for PGRFA within their national plans and programmes.

Several developing countries objected to these amendments, noting their reliance on such resources. One proposed maintaining the existing language of Article 16.4(b), which would immediately be followed by the text of Article 16.4(e) to accommodate the concerns regarding inclusion of external resources. A regional group proposed compromise language stating that implementation of the IU and relevant national plans and programmes by developing countries and countries with economies in transition will “depend in part” on the allocation of resources referenced in Article 16.4(a). Highlighting the fact that the original text is generally taken from the CBD, one delegate questioned whether this language was appropriate. He noted that the

IU’s goal is to serve national food security interests, whereas remuneration received by developing countries in foregoing commercial exploitation of genetic resources serves a global interest under the CBD.

On 14 November, a developed country proposed that implementation depend “in part” on allocation of resources. A developing country noted the insufficiency of some countries’ own resources to implement the GPA and opposed reducing the importance of developed country contributions. Another developing country suggested that implementation “depend primarily on” effective allocation of resources.

Several developed countries noted that reference to a funding target in Article 16.3 did not indicate that only developed countries would provide funding, and that while the CBD refers to global interests, the IU addresses national interests. One observed that the extent to which any country can implement its commitments depends on all Parties, and proposed deleting reference to developing countries and countries with economies in transition.

A developing country said that the commitment of developed countries to help developing countries should be reflected. Another developing country acknowledged that all countries are making contributions, but stressed that developed countries should contribute more in terms of financial resources because developing countries are contributing genetic resources. One participant reminded delegates that developing countries alone do not bear the burden of providing access. Another conceded that all must assume an obligation to implement the GPA, and suggested that the text should address developing countries without excluding the role of developed countries.

Chair Gerbasi proposed, and some developed countries supported, adding a reference to developed country Parties following text on effective allocation. One developing country cautioned against shifting the focus away from developing countries. Another recalled Agenda 21’s agreed principle on common but differentiated responsibilities. Three delegates supported text addressing both developing and developed countries. Two developed countries then proposed language stating that developing countries will ensure that the priority they accord to building capacity in PGRFA shall be expressed in their own plans and programmes. A developing country remarked that this proposal could imply linkages between prioritization and allocation of resources under the IU. Delegates finally agreed on language proposed by a developed country and amended by Chair Gerbasi.

The provision states, “The extent to which developing country Parties and countries with economies in transition will effectively implement their commitments under this IU will depend on the effective allocation, particularly by developed country Parties, of resources referred to in this Article. Developing country Parties and Parties with economies in transition will accord due priority in their own plans and priorities, to building capacity in PGRFA.”

16.4(c) (FORMERLY 16.4(e)): This provision requires Parties to provide financial support for national activities according to their capabilities. On 13 November, Chair Gerbasi restated a developing country proposal that this provision should be placed after Article 16.4(b) on the IU’s implementation by developing countries and countries with economies in transition.

On 14 November, some developing countries and a group of developed countries supported reformulation of the developing country proposal on this provision and its new placement following Article 16.4(b). A developed country noted that the purpose of this provision differs from that of 16.4(b), and called for a clear commitment from developing countries on the priority they give to national activities if



they expect to receive funds. A developing country agreed to insert a reference to providing financial resources. One developed country, supported by developing countries, proposed deleting the amendment, noting that the new placement and an earlier suggestion to specify “each” Party could create problems for Parties with federal systems. Several other developed countries preferred its inclusion. Another developed country noted that the Montreux Elements reference Party contributions to implement national priorities. Another country noted that similar language was accepted under the CBD without such a clause.

This provision, which was agreed, states, “Each Party agrees to undertake, and provide financial resources for, national activities for the conservation and sustainable use of PGRFA in accordance with its national capabilities and financial resources.” A footnote was added stating that one delegate reserved her right to consult with her capital.

16.4(d) (FORMERLY 16.4(c)): This provision addresses contributions by developed country Parties to implement the GPA. On 13 November, noting parallel language in the CBD, one developed country expressed reservations regarding the omission of the word “may” before text stating that developed country Parties provide financial resources. A developing country responded that this deletion was intended to strengthen the commitment. A developed country and two developing countries supported reference to “may provide” financial resources on the condition of a clear commitment in Article 16.4(a), to parallel language in the CBD.

Two developing countries supported deleting reference to directing funding through bilateral and regional channels, since the IU is a multilateral system. One developing country opposed the deletion, and another noted that inclusion of this reference would restrict multilateral and other sources. A developing country supported stronger language in Article 16.4(a) or (b) on committing resources from multilateral organizations, so that this article focuses on resources through “bilateral and regional” channels.

On 14 November, several developed countries expressed difficulty in commenting on new language for this provision as proposed by a group of developing countries, since references to a funding mechanism had not been agreed to in preceding paragraphs. Several developing countries said that reference to a funding mechanism here could be linked to Article 17 (Governing Body). Several other developing countries called for deletion of reference to bilateral and regional channels in the original text, and inclusion of a general reference to a funding mechanism. A developed country underscored the importance of including all channels for financial resources. One developing country elaborated that although all channels are important, bilateral and regional contributions should not override creation of the MS. Several developed countries explained that bilateral contributions could be used to leverage multilateral sources. The developing country responded that he supported existing bilateral mechanisms, but here they were perceived as inhibiting the creation of the MS, which Parties could depend on and control. Some developed countries responded that language supporting a more comprehensive system reflected CBD Article 20.3.

One delegate expressed concern that funneling all contributions through the MS would become costly, diverting funds from project activities. A developing country clarified that such a mechanism would channel some financial resources but not those of direct bilateral or regional programmes. Another delegate emphasized the need to consolidate funds in a single place. A number of countries highlighted the distinction between funds for administration and substantive

resources for programmes and contributions directly funneled to the IU. Chair Gerbasi suggested that the FAO budget be increased to cope with ordinary expenses.

A developed country noted that the financial system would be supplied by resources from benefit-sharing and voluntary contributions, and restated that developed countries do not want a funding mechanism. Developed and developing countries debated whether voluntary contributions, countries’ contributions, a funding mechanism and a funding strategy were consistent with the Montreux Elements. One developing country noted these Elements constitute guidelines open to interpretation and negotiation, and a developed country asserted that the question of a fund was rejected in Montreux. Another remarked that if developing countries want national contributions to be compulsory, delegates would not reach agreement. A developing country questioned why genetic resources should be placed in the MS on a mandatory basis when countries’ contributions remain voluntary. A regional group of developed countries refuted the notion that developed countries provide only financial resources while developing countries mainly provide genetic resources. Noting lack of progress, Gerbasi convened a small group to continue discussion.

On 16 November, the Chair of the small group stated that a text was generally agreed, except for several brackets. He noted that the unresolved points were: whether to include reference to multilateral channels to provide resources; the fact that the channels providing resources shall include a “Trust Account” under the authority of the Governing Body; and the institutional links between this Trust Account and the FAO. Developing countries stated their general agreement if multilateral channels were included and reference to the Trust Account was replaced by a mechanism to be referred to in Article 17.2. Delegates agreed to delete reference to the FAO.

This provision, which was agreed, states that “developed country Parties also provide, and developing country Parties and Parties which are countries with economies in transition avail themselves of, financial resources for the implementation of this IU through bilateral and regional and multilateral channels. Such channels shall include the mechanism referred to in Article 17.2.”

16.4(e) (FORMERLY 16.4(d)): This sub-article deals with the provision of financial benefits arising from commercialization and thus refers to Article 14.2(d) on commercial benefit-sharing. On 13 November, two developed countries questioned whether these benefits could be predictable. A developing country answered that annual contributions proportional to patented crops [Article 14.2(d)(i)] and annual contributions according to the UN Scale of Assessments [Article 14.2(d)(ii)] are predictable, whereas royalties paid by right-holders using PGRFA from the Multilateral System [Article 14.2(d)(iv)] are not predictable.

On 14 November, delegates considered the developing countries’ proposed text, which states, “Parties undertake to provide the financial benefits arising from 14.2(d).” Three developed countries requested bracketing the provision until Article 14.2(d), on commercial benefit-sharing, is resolved. Two supported discussion of related issues in Articles 12 and 13 impacting this provision. A group of developed countries proposed alternative language stating that Parties agree that the equitable royalties accruing from the sharing of benefits arising from commercialization according to Article 14.2(d)(iv) shall be incorporated into the funding strategy.

This provision remained unresolved as the discussion turned to Article 14.2(d)(iv). Both texts remain bracketed.



16.4(f): This provision addresses voluntary contributions from Parties, the private sector and other organizations. On 13 November, several developed countries suggested that a developing country proposal from the third Contact Group meeting, calling for voluntary contributions from food processing industries benefiting from PGRFA (contained in a footnote of Article 14.2), should be linked to Article 16.4(f). A group of developing countries noted their support for a cross-reference in this provision, as long as the proposal remained in Article 14. Another developing country agreed, arguing that the principle of Article 14 (Benefit-sharing) differs from that of Article 16 (Financial Resources). A developed country proposed text stating that the Governing Body shall consider a strategy to promote voluntary contributions referred to in Article 16.4(f).

An observer stressed the importance of clearly funding the GPA and the IU with predictable and agreed, as well as new and additional resources, given the importance of food as a basic human right. She highlighted the danger of relying on voluntary funds to secure such a right, and suggested that simply requiring voluntary or charitable contributions from the private sector could set a poor precedent.

On 15 November, a group of developed countries proposed adding text stating that the Governing Body shall consider modalities of a strategy to promote such contributions. Several developing countries preferred to place this amendment in Article 17.2, on the functions of the Governing Body, but after some discussion the original text with the proposed addition was agreed.

The provision states that voluntary contributions may also be provided by Parties, the private sector, non-governmental organizations and other sources, and that Parties agree that the Governing Body shall consider the modalities of a strategy to promote such contributions.

16.5 (NEW ARTICLE): *Editor's Note: The old Article 16.5 was deleted and a reference was added in Article 17.2(i).* On 15 November, a group of developing countries proposed language for a new subparagraph under Article 16.4 on supporting farmers in developing countries. Several developed countries proposed, and all agreed, to consider the text as new Article 16.4 *bis* (renumbered later as Article 16.5). One country proposed including reference to countries with economies in transition. Delegates then engaged in extensive debate on: the UN classification of developing countries, least developed countries, countries with economies in transition and the OECD classification of low income countries; their inclusion; their location within the text; and parallel formulation in other articles. The final text states that "priority support will be given to the implementation of agreed plans and programmes in support of farmers in developing countries, especially least developed countries, and countries with economies in transition, embodying lifestyles relevant to the conservation and sustainable utilization of PGRFA." A footnote was added stating that for four countries prioritization of categories will be determined by negotiations on Article 4 (Relationship of the Undertaking with Other International Agreements).

ARTICLE 17 (GOVERNING BODY)

17.2: This provision lists the different functions of the Governing Body to promote the full implementation of the IU. On 16 November, Chair Gerbasi proposed adoption of a new provision in Article 17.2 relating to the mechanism as proposed on 13 November by a developed country during the discussion on Article 16. Delegates agreed and the new provision was added as new 17.2(h). The subsequent provisions were renumbered accordingly. On 15 November, an addition was made to Article 17.2(i) to reference old Article 16.5.

17.2(h): This new provision states that the Governing Body shall "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 the IU."

17.2(i) (FORMERLY 17.2(h)): This provision addresses cooperation with other relevant international organizations. On 13 November, a developing country suggested that old Article 16.5, stating that the Governing Body shall develop arrangements with other relevant financial institutions and organizations to secure their participation in the funding strategy, be addressed in Article 17. Two delegates supported retaining the provision in Article 16, given the importance of coordinating among a number of financial mechanisms and identifying how incoming financial resources should be utilized. On 15 November, Chair Gerbasi recalled the proposal of the developing country and noted that it duplicated old Article 17.2(h). A developed country proposed deleting Article 16.5 and adding a reference to old Article 17.2(h). Delegates agreed, and accepted the final text for new provision 17.2(i) (formerly 17.2(h)), stating that the Governing Body shall "establish cooperation with other relevant international organizations on matters covered by this Undertaking, including their participation in the funding strategy."

ANNEX V (CONDITIONS FOR PARTICIPATION OF INTERNATIONAL INSTITUTIONS IN THE MS AND PLACING OF INTERNATIONAL EX SITU COLLECTIONS IN THE MS)

On 16 November, some developing countries presented a proposal on Annex V as related to discussions on Article 12.2. A delegate from the group proposing the revised annex outlined the main changes from the version in the Composite Draft Text. He noted that the first article now states that the annex shall include all international institutions holding PGRFA. He explained that the second article now states that: access to material listed in Annex I in such collections would be subject to the same provisions as those under the MS; non-Annex I material would be subject to a material transfer agreement under conditions established for the MS and with the Party providing the material and would also include prohibitions on providing access to third parties; and the international institution would inform the providing Party when access to germplasm and/or related information was granted. He stated that the third article includes a provision stating that collections will be in the trust of international centers by means of a standardized agreement with the providing country. He closed by noting that new language in the fifth article transfers responsibilities listed under the FAO to the MS Secretariat and the Governing Body. The proposal was distributed to delegates for future consideration.

CLOSING SESSION

Chair Gerbasi noted that he will submit a report to the FAO Council, which meets from 20-25 November 2000, on the Contact Group's progress, as contained in FAO Document CL119/7. He stated that while the document expresses that the process is close to completion and requests funds for an Extraordinary Session of the CGRFA, his impression was that the Contact Group is far from completing its work. He said that he would advise the Council that the issue should be considered by the next regular meeting of the CGRFA (April 2001) in order to assess the situation and the mandate given to the Contact Group.

One country asked whether the FAO Council could take a decision without going through the CGRFA, to which the FAO Secretariat noted that the CGRFA actually provided the Group's mandate and the Council only ratified it. Several delegates stated that progress had been made, especially on Article 16, and expressed the need to continue,



requesting further meetings of the Contact Group to continue negotiations. Chair Gerbasi noted that it was not his intention to throw in the towel, but rather to reflect that the CGRFA needs to consider how best to progress in the negotiations.

A group of developed countries presented the Neuchâtel Declaration for adoption by all delegates. After Chair Gerbasi noted that two paragraphs did not reflect the actual progress of the meeting, the text was reviewed on the basis of suggestions made by one developing country. The final declaration states that the members of the Contact Group:

- held in-depth discussions and comprehensive negotiations on the key articles of the IU;
- made significant progress on the critical issue of the financial provisions of the MS;
- stated that the issue of benefit-sharing arising from commercialization needs further clarification;
- welcomed the advice of WTO and WIPO representatives;
- heard a presentation by representatives of the CGIAR Centres, which could play a major role in the MS;
- committed themselves to bringing the negotiations to a successful completion as soon as possible; and
- thanked the Swiss Government and People for their hospitality.

A representative of the host government expressed his gratitude to the delegates for the open-mindedness and the work they achieved. Chair Gerbasi stated that some progress had been made on Article 16, but expressed his regret that they could not go further on other provisions. Several delegates thanked the host government and Chair Gerbasi, and reiterated their interest in continuing the negotiations. After reviewing the text of the finalized articles, brief additions and minor amendments were made. Chair Gerbasi then adjourned the meeting at 6:30 pm.

A BRIEF ANALYSIS OF THE CONTACT GROUP MEETING

Delegates left Neuchâtel with mixed emotions. Many viewed the process as having moved backwards from the tentative breakthroughs of Tehran. Others seemed assured that enough progress had been made to warrant further meetings of the Contact Group, especially since the FAO Council, which meets from 20-25 November 2000, will provide the initial indications as to where the process will go. The meeting's first days struggled with financial matters under Article 16, and by mid-week delegates had made significant progress on the article. However, problematic discussions during the group's initial attempts to discuss Article 14.2(d)(iv) on commercial benefit-sharing and Article 12 on the scope of the MS compromised the momentum gained from the outcome of Tehran. This brief analysis will examine the difficulties encountered during the meeting at both the level of conceptual foundation and technical detail, and then address where the process goes from here.

MONTREUX ELEMENTS – THE ART OF INTERPRETATION: Delegates frequently referred back to the Chairman's Elements that had been agreed upon in Montreux. The observation that there will be as many interpretations as there are lawyers seemed quite apropos. Of a general nature, the terms and concepts included within the Elements, such as the nature of the funding strategy and country contributions, were often debated as their literal meaning was counterposed against wider conceptual implications. Such interpretation was further complicated as the delegates present at Montreux sought to

provide the larger context of the meeting's discussions, whereas those not having attended based their impressions strictly on the Elements' text. Conceptual difficulties also arose over the nature of a "funding mechanism." Would it simply be a bank account to hold incoming funds or something larger and more complex like the GEF? Arguments based on "harmonization with the CBD" were also thrown about widely without much clarity in terms of what the scope or limits of such harmonization actually entail.

Such interpretive difficulties were also apparent in discussions regarding the WTO and TRIPS. Debate on the review of Article 27.3(b) in the TRIPS Council has gone round and round with only gradual movement forward, signaling the difficulties of trying to interpret the implications of TRIPS for the IU. Questioning the potential amount of funds arising from such commercial benefit-sharing, a few delegates regretted tendencies to politicize this debate, since it draws attention away from the IU's core areas of importance. Looking ahead, some expected conceptual difficulties over differences regarding the exact nature of the MS' scope, especially on privately held crops, not to mention the need to define key terms within the IU.

NEUCHÂTEL – DEVIL IN THE DETAILS: As the debate became more specific, one expert noted that the devil is in the details. Delegates spent significant amounts of time debating the technical aspects of funding strategies, UN classifications for developing countries and the finer procedural points of reservations, footnotes and what constitutes agreed text. Delegates also struggled with how to approach a fundamentally integrated set of issues where scope, facilitated access, benefit-sharing, financial resources and the Governing Body's functions are all interlinked. Finding the balance and making progress presents a key difficulty, as delegates continually noted that changes in one article had implications for their interests in another. One observer likened the process to trying to swim out of a whirlpool – ultimately you wind up swimming in circles in an effort not to get sucked down.

The tension between trade and environment again reared its ugly head with fundamental differences in opinion on whether the provision on commercial benefit-sharing and IPR might violate the TRIPS Agreement and whether this was in the competence of the IU or solely that of TRIPS. Debate within the Contact Group raised but did not address practical questions about non-Parties to the IU raising disputes within the WTO, national implementation of the provision or how the IU could discriminate against a field of technology.

If the WTO's Dispute Settlement Body (DSB) cannot provide interpretation until there is a legal dispute over the IU's consistency with TRIPS, and if there cannot be a dispute before the IU is completed, then how can such questions of consistency be resolved? Similarly, if the DSB actually does rule against the IU, even taking its specialized mandate into account, what are the ultimate implications? Elsewhere, the Cartagena Protocol on Biosafety contains ambiguities regarding implementation of the precautionary principle with regard to the WTO's Agreement on Sanitary and Phyto-sanitary Measures. Ultimately, innovation in international environmental law has its growing pains and the perfect may be the enemy of the good.

Input from the WTO, CGIAR and the TRIPS experts clarified the complexity of the issues, and delegates appreciated the increased openness of the process. The question remains how to translate this openness into wider public concern. The meeting again revealed the benefits of smaller groups and their ability to concentrate on areas of agreement and potential solutions, avoiding overly political



exchanges. While able to clarify and delineate issues and concerns, such groups still ultimately face the problems of how to overcome political impasses.

ALL ROADS LEAD TO ROME: The fate of the IU now returns to Rome and the meeting of the FAO Council, which will review the Contact Group's progress. Originally envisioned as a one- or two-meeting process, many in the Contact Group hoped they add two more meetings to the slate to bring the negotiations to a close. An Extraordinary Meeting of the CGRFA originally intended for late January is now beyond consideration, and others are setting their sites on the next meeting of the FAO Conference in November 2001.

The prolonged history of the negotiations begs the question: What are the incentives for countries within these negotiations? Some expressed fear that over the years the negotiating process may have lost sight of the original altruistic need to address food security, since questions continually arose as to how the IU's implementation would have an impact on national realities, such as federal systems and national IPR or access legislation.

Ultimate resolution of this process is a matter of political will. However, political will is often impelled by public concern, which in the case of the IU, has waned severely over the past six years. The negotiations of Kyoto Protocol to the Climate Change Convention and the Cartagena Protocol on Biosafety came to a successful ending amid waves of political urgency. The IU must generate a new wave of public concern at all levels if it is to come to its long-awaited conclusion.

THINGS TO LOOK FOR

119TH FAO COUNCIL: The FAO's 119th Council will meet from 20-25 November 2000, at FAO Headquarters in Rome. For more information, contact: FAO; tel: +39-6-5705-2287; fax: +39-6-5705-3369; Internet: <http://www.fao.org/UNFAO/Bodies/council/cl119/cl119-e.htm>

WTO COMMITTEE ON TRADE AND ENVIRONMENT: This committee will meet from 21-22 November 2000, at WTO Headquarters in Geneva. For more information, contact: WTO; tel: +41-22-739-51-11; fax: +41-22-739-54-58; Internet: <http://www.wto.org>

COUNCIL FOR TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS: The TRIPS Council will hold its next meeting from 27 November - 1 December 2000, at WTO Headquarters in Geneva. For more information, contact: WTO; tel: +41-22-739-51-11; fax: +41-22-739-54-58; Internet: <http://www.wto.org>

THE FIRST MEETING OF THE INTERGOVERNMENTAL COMMITTEE FOR THE CARTAGENA PROTOCOL ON BIOSAFETY: ICCP-1 will meet from 11-15 December 2000, in Montpellier, France. For more information, contact the CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@biodiv.org; Internet: <http://www.biodiv.org/biosafe/protocol/iccp/iccp1/>

CBD LIAISON GROUP ON AGRICULTURAL BIODIVERSITY AND THE ECOSYSTEM CONSERVATION GROUP: These groups will meet from 24-26 January 2001, in Rome. For more information, contact the CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@biodiv.org; Internet: <http://www.biodiv.org>

FAO/WHO EXPERT CONSULTATION ON EVALUATING FOOD SAFETY: SCIENCE AND ETHICS: The consultation will be held from 29-31 January 2001, in Rome. For more information, contact: FAO; tel: +39-6-5705-2753; fax: +39-6-5705-6347; Internet: <http://www.fao.org>

INFORMAL CONSULTATION ON THE PROPOSED GLOBAL STRATEGY FOR PLANT CONSERVATION: The consultation will be held on 11 March 2001, in Montreal, Canada. For more information, contact: the CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@biodiv.org; Internet: <http://www.biodiv.org>

SIXTH MEETING OF THE SUBSIDIARY BODY FOR SCIENTIFIC, TECHNICAL AND TECHNOLOGICAL ADVICE: SBSTTA-6 will meet from 12-16 March 2001, in Montreal, Canada. For more information, contact: the CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@biodiv.org; Internet: <http://www.biodiv.org/sbstta6/>

PANEL OF EXPERTS ON ACCESS AND BENEFIT SHARING: This panel will meet from 19-22 March 2001, in Montreal, Canada. For more information, contact: the CBD Secretariat; tel: +1-514-288-2220; fax: +1-514-288-6588; e-mail: secretariat@biodiv.org; Internet: <http://www.biodiv.org>

16TH SESSION OF THE COMMITTEE ON AGRICULTURE: The COAG will hold its 16th Session from 26-30 March 2001, in Rome, Italy. For more information, contact: FAO; tel: +39-6-5705-2287; fax: +39-6-5705-3369; Internet: <http://www.fao.org>

NINTH SESSION OF THE COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE: CGRFA-9 will meet from 23-27 April 2001, in Rome. For more information, contact: FAO; tel: +39-6-5705-2287; fax: +39-6-5705-3369; Internet: <http://www.fao.org>