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Item 8 of the Draft Provisional Agenda

INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

FIRST SESSION OF THE GOVERNING BODY

Madrid, Spain, 12-16 June 2006

REPORT OF THE CHAIR OF THE CONTACT GROUP FOR THE DRAFTING OF THE STANDARD MATERIAL TRANSFER AGREEMENT

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I. MEETINGS OF THE CONTACT GROUP

1. In adopting the International Treaty,[1] the FAO Conference requested the Commission on Genetic Resources for Food and Agriculture to act as Interim Committee for the Treaty, and decided to establish an Expert Group to develop and propose recommendations on the terms of the Standard Material Transfer Agreement. It requested the Interim Committee to prepare, for the consideration of the Governing Body, on the basis of the work of the Expert Group, "a draft Standard Material Transfer Agreement provided for in Article 12.4 [of the Treaty] for facilitated access, which shall include, *inter alia*, recommended terms for commercial benefit-sharing under Article 13.2d(ii)".

2. The Expert Group on the Terms of the Standard Material Transfer Agreement met in Brussels, at the invitation of the European Commission, from 4 to 8 October 2004. I had the honour to be elected Chair. At that meeting, we laid down the basic lines for the draft Standard Material Transfer Agreement.

3. We reported to the Second Meeting of the Interim Committee (Rome, 15 - 19 November 2004), which established the Contact Group for the Drafting of the Standard Material Transfer Agreement. I once again had the honour to be appointed Chair.

4. The Contact Group met twice: in Hammamet, Tunisia, from 18 to 22 July 2005, with financial support provided by the United States of America; and Alnarp, Sweden, from 24 to 28 April 2006, at the invitation of Sweden. That meeting adopted the draft text of the Standard Material Transfer Agreement that is now before you.[2]

5. We also benefited from two informal meetings, where key questions could be explored. Norway generously hosted one in Leangkollen in May 2005, and Switzerland hosted another in Morat in February 2006. These helped greatly in creating a coherent structure for the Standard Material Transfer Agreement.

6. I should like to thank all those who contributed to this work: the experts and representatives of regions in the Contact Group, who by their painstaking work have delivered to you the draft Standard Material Transfer Agreement; the donors who so generously provided the necessary funds and facilities, and who supported the participation of developing countries; and the secretariat of the Interim Committee, and their excellent group of consultant advisers and lawyers. A task of the complexity and magnitude of drafting the Standard Material Transfer Agreement could not have been achieved without the dedicated effort of all involved. I should, in particular, like to record my debt of gratitude to Gerald Moore, whose skill in turning complex ideas into effective legal text is unrivalled.

II. RECOMMENDATIONS OF THE CONTACT GROUP

7. I draw your attention to the recommendations of the Contact Group, which are contained in paragraph 14 of the *Report of the second meeting of the Contact Group for the Drafting of the*

[1] By Resolution 3/2001.

[2] Document IT/GB-1/06/6, *Draft Standard Material Transfer Agreement*.

Standard Material Transfer Agreement.[3] They deal largely with the actions that you may need to take to implement the Standard Material Transfer Agreement, once you have adopted it. The Contact Group also prepared for your consideration a resolution by which you may adopt the Standard Material Transfer Agreement. Such a resolution is able, as well, to deal with issues that cannot be dealt with in a contract between private persons, which is the nature of the Standard Material Transfer Agreement.

IV. DEVELOPMENTS SINCE THE LAST MEETING OF THE CONTACT GROUP

8. At Alnarp, we established a Legal Working Group, which reviewed the text for legal drafting consistency, and noted that noted a number of duplications and consistencies. It also advised on specific wordings. (See paragraph 28, below.) We did not, however, have time to incorporate its advice into the text. However, in my discussion of current text of the Standard Material Transfer Agreement, in *Annex 1* to this report, I take full account of the advice of the Legal Working Group. This will, I believe, considerably simplify the work of the Governing Body.

9. A number of the ideas on which the structure of the Standard Material Transfer Agreement before you is based were incompletely developed at Alnarp. I am pleased to say that discussions in and between the regions since Alnarp, and further analysis by the Secretariat and our consultant advisers and lawyers, have helped clarify the main outstanding issues, and possible areas of consensus.

10. Following Alnarp, I established a group of Friends of the Chair to allow me to draw on their wisdom in reporting to you. The Friends of the Chair met in Madrid, from 8 to 10 June, immediately preceding your meeting, and it is for that reason that I did not produce my report earlier for your consideration. In its preparation, I have drawn heavily on their advice.

III. MAIN OUTSTANDING ISSUES

11. The discussions within and between regions since the second meeting of the Contact Group, and in the Friends of the Chair Group have been very fruitful. They have encouraged me to put forward a number of **ideas** as to how the work on the Standard Material Transfer Agreement might now be completed.

12. I shall first identify what I see as the main "**packages of issues**", explain how the elements within each packet are inter-related, and suggest some possible ways in which compromises might be reached. In the body of my report, I shall deal only with the main ideas. I have, however, set out a more detailed analysis, with text that may be useful in achieving consensus, in *Annex 1* to my report.

13. We also noted that there are still a number of **inconsistencies and duplications** in the current draft, which will need to be resolved, if the Standard Material Transfer Agreement is to be a useful instrument for farmers, breeders and genebanks. In *Annex 1*, I therefore also offer some suggestions as to possible text to resolve these inconsistencies. Most of these suggestions take, as a starting point, the comments of the Legal Working Group established in Alnarp as a starting point.

[3] Document CGRFA/IC/CG-SMTA-2/06/REP.

Plant Genetic Resources for Food and Agriculture under development

14. The Treaty provides that "access to plant genetic resources for food and agriculture under development, including material being developed by farmers, shall be at the discretion of its developer, during the period of its development"[4] Text was submitted at Alnarp to reflect how this provision could be reflected in the Standard Material Transfer Agreement. However, the Legal Working Group at Alnarp itself recognized the need for further work on this concept, and on the definition of "Plant Genetic Resources for Food and Agriculture under Development". I am pleased to report that a detailed analysis of this concept was undertaken in the period since Alnarp, and clearer ideas and text have been proposed that appear to provide a possible basis for compromise, although there may be need for some further refinement of the final text.[5]

15. The main lines of the compromise suggested are:

- Benefit-sharing should apply only to the final Product sold on the open market, given that the sales price will reflect all the value added during the development process.

- The transfer of Plant Genetic Resources for Food and Agriculture under Development to other developers, as part of the development process, should be under the terms of the Standard Material Transfer Agreement, through a new Material Transfer Agreement, in order fully to protect the rights of the Multilateral System, and to avoid Material "leaking out" of the system.

- The new Material Transfer Agreement should respect the discretion of the developer with regard to access.

- The discretion of the developer, in transferring the Plant Genetic Resources for Food and Agriculture under Development, should extend to a right to set such additional conditions as he may require (including monetary payments) in addition to the Standard Material Transfer Agreement, to reflect the value that he has added.

- These transfers, during the period of development, should not be viewed as "commercialization" that triggers benefit-sharing, since all value added by any developer will in any case be reflected in the sales price of the final product.

16. **On the basis of the texts that have been circulating since Alnarp, I have suggested, in *Annex 1*, possible texts to embody these ideas in the Standard Material Transfer Agreement that countries may find useful in developing a final text, as well as some consequential amendments that may be required elsewhere in the text to maintain consistency.**

Definition of Product and the formula for payment

17. It has become clear to me that the issues of the definition of Product and the formula for payments are closely linked, and must be viewed as a package. The broader the definition of Product, the lower will be the rate of payment, and *vice versa*. The Alnarp text presents two options: the first being a **broader definition**, and the second a **narrower definition**, which would set a threshold for the incorporation in the Product of an identifiable trait of value, or, by pedigree, a percent of Material accessed from the Multilateral System. These issues have led to protracted discussions and are not easily resolved. **There are also central to the whole Standard Material Transfer Agreement.** There seems to be general agreement that levels of payment for materials

[4] Article 12.3e.

[5] The text of this analysis is set out in *Annex 2* to this report.

from the Multilateral System should be such as not to discourage use of the Multilateral System. On the other hand, it seems clear that breeders may be willing to pay substantially higher rates when identifiable traits of value from the Multilateral System have been incorporated in a Product.

18. It therefore seems to me that a possible compromise could be based on charging:

- A lower level of payment when a Product merely incorporates material from the Multilateral System, without an identifiable trait of value.

- A higher level of payment, when a Product incorporates an identifiable trait of value accessed from the Multilateral System.

19. **Having discussed this matter with a number of persons here in Madrid, I would suggest that the levels of payment could be negotiated within a range of 0.1% to 0.5% in the case of mere incorporation of material from the Multilateral System, and 1% to 5% in the case of an identifiable trait of value. However, I must stress that these are no more that my personal guesses as to the orders of magnitude under discussion, and are not to be seen as recommendations. This is a matter that resolved politically, although the final result must be acceptable both to providers and users of Materials from the Multilateral System.**

20. In practical terms, this could be achieved by having a broad definition of Product in Article 2 of the Standard Material Transfer Agreement, and setting out the two levels of payment in *Appendix 2* to the Standard Material Transfer Agreement. This would also have the advantage that, in any future review of the levels of payment, the Governing Body would only need to consider the content of *Appendix 2*, rather than several elements of the body of the Standard Material Transfer Agreement itself.

21. Similarly, Articles 6.7 and 6.11 provide a Recipient with an option between a payment based on a single accession, and a payment based on the overall sales by the Recipients of products of the crop in question. This, too, may be handled by incorporating the basic option in Article 6, and providing the alternative modalities of payment in *Appendix 2*.

22. The definition of "Sales" is also closely linked to the level of payment. There are at present two options under consideration, based on gross and net income respectively. Net income would be more complicated to calculate and easier to manipulate. It might be argued, however, that it better reflects commercial practice. Taking these considerations into account, it is suggested that the definition be based on gross income, but that, in the formula for payments in *Appendix 2*, a standard deduction of 30% be applied to cover the costs of discounts, returns and freight.

23. **I have suggested, in *Annex 1*, possible texts to embody these ideas in the Standard Material Transfer Agreement, which countries may find useful in developing a final text, as well as some consequential amendments that may be required elsewhere in the text to maintain consistency.**

Obligations to provide information, **etc.**

24. It seems clear that, while the Standard Material Transfer Agreement should encourage the exchange of information, it should not place unduly onerous burdens on a Recipient that may discourage the use of the Multilateral System, or be too difficult to enforce. Neither should it place onerous burdens on the Third Party Beneficiary. I would therefore recommend that the need for Article 6.3 be reviewed, recognizing that views are divided on this Article. I also think that, in Article 6.9, it might be acceptable to use the word, "shall" for the obligation of the Recipient with regard to information under Article 17 of the Treaty, and the formula, "be encouraged to", for

non-momentary benefits identified in Article 13.2 of the Treaty. This would place a mandatory requirement on the Recipient in the first case, while recognizing, in the second case, that Contracting Parties can encourage the Parties to the Standard Material Transfer Agreement to realize the relevant provisions of Article 13.2 of the Treaty.

25. For similar reasons, it may be preferable to adopt Option 2 of Article 4.3, which does not include the obligation to provide samples of any Product. The provision of samples would place a burden on the Treaty's Secretariat or the Third Party Beneficiary that is unlikely to be cost-effective.

Arbitration

26. There appears to be very general agreement on the use of binding arbitration in the Standard Material Transfer Agreement, although there may be a need to include wording in the preamble to ensure its compatibility with some countries' other international obligations. The Legal Working Group at Alnarp pointed out the need for absolute clarity in the provision on arbitration. I would therefore recommend that any compromise text be based on Option 2 of Article 8.3, with the inclusion of a reference to a "list of experts", from which the Parties to the Standard Material Transfer Agreement may choose their arbitrators, if they so wish.

27. **I have suggested, in *Annex 1*, possible texts to embody these ideas in the Standard Material Transfer Agreement that countries may find useful in developing a final text, as well as some consequential amendments that may be required elsewhere in the text to maintain consistency.**

Consistency

28. Throughout the text, there are a number of repetitions and inconsistencies of language, as was pointed out by the Legal Working Group at Alnarp. One example, as pointed out by the Legal Working Group, there are currently three provisions stating the right of the Third Party Beneficiary to initiate dispute settlement, and two provisions stating the right of the Parties to the Material Transfer Agreement to initiate dispute settlement. These provisions are expressed in slightly different terms, and this will create legal confusion unless resolved, and could, in all likelihood, stimulate pointless litigation.

29. If my recommendations with respect to Plant Genetic Resources for Food and Agriculture under Development and the definitions of Product and Sales are accepted, there will be a need to ensure that other text in the Standard Material Transfer Agreement (in particular, in the definitions section) is consistent with these ideas.

30. There is also be a need to ensure that the provisions under Article 1 dealing with Parties, and those under Article 10 dealing with Signature/Acceptance, be clarified and made consistent with the concept that the Provider should have the option of choosing between signature, "shrink-wrap" and "click-wrap" forms of acceptance. It will be necessary to spell out in the Standard Material Transfer exactly what the terms, "shrink-wrap" and "click-wrap" mean.

31. **In *Annex 1*, I have set out some amendments that may be required to maintain consistency in the text of the Standard Material Transfer Agreement.**

ANNEX 1

ANALYSIS OF THE CURRENT TEXT OF THE STANDARD MATERIAL TRANSFER AGREEMENT, WITH TEXT THAT MAY BE USEFUL IN ACHIEVING CONSENSUS AND IN RESOLVING INCONSISTENCIES AND DUPLICATIONS

1. Following discussions with the Friends of the Chair of the Contact Group, I here put forward, for the consideration of the Governing Body, my recommendations regarding possible substantive revisions to the text of the draft Standard Material Transfer Agreement adopted in Alnarp,[6] and especially those matters that remain in brackets. I have, in particular, tried to take into account the comments of the Legal Working Group that was established at Alnarp.

2. Although in the body of my report, I grouped Articles into "Packages" around ideas, I here discuss the text sequentially, for ease of reference.

Preamble

3. The Legal Working Group considered that it would be useful to record in the Preamble the adoption, by the Governing Body, of the Standard Material Transfer Agreement, as a background fact, and made suggestions regarding possible wording. I would recommend that this wording be accepted, and that an additional sentence be added, to relate the actual Standard Material Transfer Agreement to the provisions of Article 12.4 of the Treaty. The following is the text I would recommend.

> Article 12.4 of the Treaty provides that facilitated access under the Multilateral System shall be provided pursuant to a Standard Material Transfer Agreement and the Governing Body of the Treaty in its decision (*number*) of (*date*) adopted the Standard Material Transfer Agreement.

4. The Legal Working Group also considered that it would be legally inappropriate to include the preambular paragraph, "*Nothing in this Agreement shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under the Treaty and other international agreements*",[7] since the Standard Material Transfer Agreement is a contract between **private parties** and could not affect the rights and obligations of **sovereign States** under the Treaty. I would accordingly recommend the deletion of this paragraph. This may be a matter that could be handled in the Resolution that adopts the Standard Material Transfer Agreement.

5. During the meeting of the Friends of the Chair, the need was recognized for some clarification of the relationship between the Standard Material Transfer Agreement and the Treaty: this has been taken up in Article 4, General Provisions, below.

Article 1. Parties to the Agreement

Article 1.2

6. The Contact Group agreed that, for "shrink-wrap" and "click-wrap" Standard Material Transfer Agreements, contact information regarding the Provider and Recipient would not be entered textually into the Standard Material Transfer Agreement. I recommend that the wording

[6] Document IT/GB-1/06/6.

[7] Last paragraph of the Preamble.

of Article 1.2 be adjusted to reflect this, and that the meaning of the terms, "*shrink-wrap*" and "*click-wrap*", be clarified in the footnote. I accordingly recommend the following text.

> This Agreement is:
>
> BETWEEN: the provider or providing institution (*insert name and address of provider or providing institution, and name of authorized official, contact information for authorized official*)* (hereinafter referred to as "the Provider"),
> AND: the recipient or recipient institution (insert *name and address of recipient or recipient institution, and name of authorized official, contact information for authorized official*)* (hereinafter referred to as "the Recipient").
>
> ---
>
> *Footnote*: * Not applicable for "shrink-wrap" and "click-wrap" Standard Material Transfer Agreements.
>
> A "shrink-wrap" Standard Material Transfer Agreement is where a copy of the Standard Material Transfer Agreement is included in the packaging of the Material and the Recipient's acceptance of the Material constitutes acceptance of the terms and conditions of the Standard Material Transfer Agreement.
>
> A "click-wrap" Standard Material Transfer Agreement is where the agreement is concluded on the Internet and the Recipient accepts the terms and conditions of the Standard Material Transfer Agreement by clicking on the appropriate icon on the website or in the electronic version of the Standard Material Transfer Agreement, as appropriate.

Article 1.3

7. The Legal Working Group advised that, to the extent that Article 1.3 purports to create legal obligations for the Contracting Parties, then it would, in its view, be inconsistent with the nature of the Standard Material Transfer Agreement. I accordingly recommend that this paragraph be deleted. However, as in my comment on the Preamble, I strongly recommend that this matter be handled in the Resolution that adopts the Standard Material Transfer Agreement.

Article 2. Definitions

7. **"FAO"**: A definition of FAO will be necessary, as FAO is mentioned in the Preamble, and I recommend the following text:

> "**FAO**" means the Food and Agriculture Organization of the United Nations.

8. **"Material"**: I recommend that the definition of Material be moved from Article 3 to Article 2, as suggested by the Legal Working Group.

9. The Legal Working Group considered that the term, "Products under Development", was not clear and might eventually need to be defined. I would further suggest that the term, **"Products under Development"**, be revised to read **"Plant Genetic Resources for Food and Agriculture under Development"**, to align it with the wording of Article 12.3e of the Treaty, and to avoid possible confusion with term, **"Product"**. The following definition is recommended:

> **"*Plant Genetic Resources for Food and Agriculture under Development*"** means material derived from the Material that is not yet ready for commercialization and which the developer intends to further develop or to transfer to another person or entity for further development. The period of development for Plant Genetic Resources for Food and Agriculture under Development shall be deemed to have ceased when those resources are commercialized as a Product.

10. **"Product"**: There are at present two options for the definition of "Product". The first requires only that the Product incorporate Material of actual or potential value accessed from the Multilateral System. The second requires the incorporation of an identifiable trait of value, or 25% by pedigree of the Material. Reference to a percentage by pedigree could encourage breeders to breed beyond that percentage simply to avoid the extra cost of benefit-sharing. It may also be very difficult to calculate, if a breeding programme used a number of different accessions obtained from the Multilateral System or Plant Genetic Resources for Food and Agriculture under Development that incorporated Material from the Multilateral System. I therefore suggest a definition developed from the first option, but deleting the reference to "*actual or potential value*". The words, "*for commercialization*", have been added to differentiate "Products" that trigger benefit-sharing from "Plant Genetic Resources for Food and Agriculture under Development". The words, "*breeding line, breeding materials, genes,* etc", have been deleted, since these are considered to be Plant Genetic Resources for Food and Agriculture under Development. As recommended by the Legal Working Group, the words, "*as defined in Article 3*", are deleted, as they are contained in the definition of Material. The definition is now much simpler and follows the original concept in the Treaty.

11. As noted in the body of my report, I have suggested that different levels of payment should apply for Products (1) merely containing Material accessed from the Multilateral System and (2) containing traits of value. I recommend that these rates of payment be set out in *Appendix 2*, rather than incorporated in the definition of Product.

12. I recommend the following text:

> "***Product***" means a plant genetic resource for food and agriculture that incorporates the Material or any part thereof, excluding commodities, that is ready for commercialization.

13. **"Sales"**: There are at present two options under consideration, based on gross and net income respectively. Net income would be more complicated to calculate and easier to manipulate. It might be argued, however, that it is fairer. Taking these considerations and commercial practice into account, it is suggested that the definition be based on gross income, but that, in the formula for payments in *Appendix 2* to the Standard Material Transfer Agreement, a standard deduction of 30% be applied to cover the costs of discounts, returns and freight. I recommend the following text.

> **"*Sales*"** means the gross income resulting the commercialization of a Product or Products, by the Recipient, its affiliates, contractors, licensees and lessees.

14. **"To commercialize":** It is implicit in the concept of "Plant Genetic Resources for Food and Agriculture under Development" that the value added during the period of development will be reflected in the sales of the final product by the Recipient, its affiliates, contractors, licensees and lessees. I would therefore recommend that the words, "lease, or license", be deleted for this definition, and that the words, "on the open market", be added. The Legal Working Group noted the need to also cover the term, "Commercialization", within this definition. I therefore recommend the following.

> **"*To commercialize*"** means to sell a Product or Products for monetary consideration on the open market, and "commercialization" has a corresponding meaning.

Article 3. Subject Matter of the Material Transfer Agreement

15. As noted above, it is recommended that the definition of "*Material*" be moved to Article 2, Definitions.

16. The words, "*available related*", have been deleted, as recommended by the Legal Working Group, since the reference to Article 5(b) identifies the type of information concerned.

Article 4. General Provisions

Article 4.1

17. The Friends of the Chair suggested that the reference to "decisions of the Governing Body of the Treaty" would be more appropriately placed in Article 4.1, rather than in Article 7, on "Applicable Law", since the decisions of the Governing Body are not legally binding. The wording would then read as follows:

> This Agreement is entered into within the framework of the Multilateral System and shall be implemented and interpreted in accordance with the objectives and provisions of the Treaty, taking into account the decisions of the Governing Body of the Treaty.

Additional provisions in Article 4

18. The Friends of the Chair suggested that there should additional provisions clarifying the relationship between the Standard Material Transfer Agreement, the Treaty and the Governing Body. Following the discussions in the Friends of the Chair, I recommend the following additional paragraphs 4.2, 4.3 and 4.4

> 4.2 This Agreement is also entered into within the framework of the applicable legal measures and procedures adopted by the Contracting Parties to the Treaty, in particular those taken in conformity with Articles 4 of the Treaty.
>
> 4.3 The Governing Body will provide policy direction and guidance to monitor the operation of the Multilateral System and the implementation of the Standard Material Transfer Agreement.
>
> 4.4 The Governing Body has, in particular, established the procedures whereby ..., representing the Governing Body and the Multilateral System as the third party beneficiary under this Agreement may monitor the implementation of this Agreement and initiate dispute settlement where appropriate.

Article 4.2 (now to be renumbered)

19. As noted above, the Legal Working Group suggested that, for clarity, simplicity and ease of understanding for users of the Standard Material Transfer Agreement, this Article should be deleted, and the third party beneficiary be referred to by name, in the Standard Material Transfer Agreement. However, in my discussions following Alnarp, at least one region has indicated its desire that this be retained, and this would not change the substance of the text.

Article 4.3 (now to be renumbered)

20. In accordance with the views expressed in the Friends of the Chair meeting, I recommend that this Article be deleted, and the provisions dealing with the rights of the Third Party Beneficiary be dealt with in Article 8, Dispute Settlement.

- The right to initiate dispute settlement would be dealt with in Article 8.1, and
- The right to request relevant information would be dealt with in Article 8.2 below, where the wording is based on Option 2 of Article 4.3.

Article 4.4 (now to be renumbered)

21. It is recommended that Article 4.4 become Article 8.3, since it deals entirely with dispute settlement. In addition, I recommend that the reference to the legal person "*representing the Governing Body and the Multilateral System as the third party beneficiary under this Agreement*" be used consistently throughout the document.

Article 5. Rights and Obligations of the Provider

Articles 5(c) and 5(d)

22. In these Articles, I recommend that the brackets be removed and the wording retained, since the texts are taken verbatim from the Treaty. I note, however, that Article 5(c) could be deleted, since there is full provision for Plant Genetic Resources for Food and Agriculture in my proposed texts.

Articles 5(e)

23. The Legal Working Group commented on the ambiguity introduced by referring to Material Transfer Agreements here, rather than a **Standard** Material Transfer Agreements. The term "*Material Transfer Agreements*" would include all material transfer agreements entered into, even for material not accessed from the Multilateral System. I accordingly recommend that the word, "*Standard*", be inserted in the text.

Article 6. Rights and Obligations of the Recipient

Article 6.3

24. The Legal Working Group questioned the need for the words, "*that contains any genetic material or components received from the Multilateral System under this Agreement"*, given that these are already included in the definition of **"**Product". See also my recommendation on Article 4.4, regarding consistency of the reference to the Third Party Beneficiary.

Article 6.4

25. On the recommendation of the Legal Working Group, I recommend that the word, "*supplied*", be deleted as superfluous. See also my recommendation Article 3, regarding consistency of the use of the reference to "information".

Article 6.5

26. On the recommendation of the Legal Working Group, I recommend that the words, "*supplied under this Agreement*", be deleted, as superfluous,

Article 6.6

27. The discussions in the Friends of the Chair meeting indicate that the analysis and suggestions in the note prepared by Gerald Moore, entitled *Plant Genetic Resources for Food And Agriculture under Development*, may be acceptable to all regions, subject, perhaps, to some further refinement of the wording of the final text: the note is in *Annex 2* to my report, in English only. That analysis incorporates the recommendation of the Legal Working Group, that the words, "*Third Party Transferee*" be replaced by *"Subsequent Recipient*", to bring the text into line with Article 6.5. I accordingly recommend that Options 1 and 2 of Articles 6.6 and 6.6bis be replaced by the following text.

6.6 In the case that the Recipient transfers a Plant Genetic Resource for Food and Agriculture under Development to another person or entity, the Recipient shall:

a) do so under the terms and conditions of the Standard Material Transfer Agreement, through a new material transfer agreement, provided that Article 5(a) of the Standard Material Transfer Agreement shall not apply;

b) identify, in *Appendix 1* of the new material transfer agreement, the Material received from the Multilateral System, and specify that the Plant Genetic Resources for Food and Agriculture under Development being transferred are derived from the Material;

c) notify the Governing Body, in accordance with Article 5(e); and

d) have no further obligations regarding the actions of any subsequent recipient.

6.6bis Entering into a material transfer agreement under paragraph 6.6 shall be without prejudice to the right of the parties to attach additional conditions, relating to further product development, including, as appropriate, the payment of monetary consideration.

6.6ter The transfer of Plant Genetic Resources for Food and Agriculture under Development, whether or not the transfer is subject to the payment of monetary consideration, shall not constitute "commercialization" within the meaning of Article 2.

Article 6.7

28. In line with the recommendations of the Legal Working Group, I recommend that the wording be simplified, as given below. All the words deleted are already included in the definition of "**Product**". The words, "*not available without restriction*", have been put **in bold**, to highlight the difference between the wording of Articles 6.7 and 6.8. As noted below under Article 6.11, there may be a need to include wording in Article 6.7 to refer to the two options available to the Recipient.

In the case that the Recipient commercializes a Product, and where such Product is **not available without restriction** to others for further research and breeding, the Recipient shall, subject to Article 6.9, pay a fixed percentage of the Sales of the commercialized Product into the mechanism established by the Governing Body for this purpose, in accordance with *Appendix 2* to this Agreement. The Recipient may choose between the two options for modality of payment.[8]

Article 6.8

29. I recommend that the words, "*available without restriction*", be put in bold to highlight the difference between the wording of Articles 6.7 and 6.8, and that the term, "*voluntary payments*", be put in the singular, in line with Treaty language, as in the text below.

In the case that the Recipient commercializes a Product and where that Product is **available without restriction** to others for further research and breeding, the Recipient is encouraged to make a voluntary payment into the mechanism established by the Governing Body for this purpose in accordance with *Appendix 2* to this Agreement.

[8] See my comments on Article 6.11.

Article 6.9

30. This Article contained a number of issues in brackets, which I shall address separately.

- The information referred to in this Article will be in the hands of the Recipient, a private person, on whom the obligation to make it available falls. In order for Contracting Parties to fulfil their obligations under Article 13 of the Treaty, they may wish to ensure that the Recipient make it available. For the remainder of the paragraph, the formula, "*are encouraged to*", is preferred over the word, "*shall*", since it may be difficult and cumbersome to enforce.

- I would recommend that the wording of the first sentence be modified to identify clearly the non-confidential information that is being referred to (that is, that resulting from research and development carried out on the Material), and to ensure that other benefit-sharing is also carried out through the Multilateral System, and not bilaterally.

- Once the period of intellectual property protection is passed, the material comes into the public domain. If the material is in the management and control of a Contracting Party, it will automatically come into the Multilateral System. If it is in private hands, it may be reasonable to require that Products that have benefited from material accessed from the Multilateral System be put back to that Multilateral System. This would require a sample to be deposited in a collection that is part of the Multilateral System. It should be borne in mind that, in practice, such Products, once they have gone out of intellectual property protection, would otherwise tend to be withdrawn from the market and become unavailable for future breeding and research.

- I recommend that the wording of the provision be revised to eliminate superfluous wording already contained in definitions (such as Material "*obtained from the Multilateral System*").

31. Taking these considerations into account, I recommend the following wording.

> The Recipient shall make available to the Multilateral System, through the information system provided for in Article 17 of the Treaty, all non-confidential information that results from research and development carried out on the Material, and is encouraged to share through the Multilateral System non-monetary benefits expressly identified in Article 13.2 of the Treaty that result from such research and development. After the expiry or abandonment of the protection period of an intellectual property right on a Product that incorporates the Material, the Recipient is encouraged to place a sample of this Product into a collection that is part of the Multilateral System, for research and breeding.

Article 6.10

32. I recommend that the term, "*Product*", be put in the singular, as a simple grammatical correction. The words deleted are already contained in the definition of "*Material*". The text would read as follows.

> A recipient who obtains intellectual property rights on any Product developed from the material, and assigns such intellectual property rights to a third party, shall transfer the obligations under articles 6.7 and 6.8 of this agreement to that third party.

Article 6.11 As noted in paragraph 21 of the body of my report, I recommend that the text provided during the Friends of the Chair meeting be incorporated in *Appendix 2*, below, and I provide a text to do so in my comments of that item.

33. The following revised text of the Article was provided to the Friends of the Chair, and it was agreed that it should replace the current text. However, as I noted in paragraph 21 of the body of my report, I would recommend that it would be more proper to include it in *Appendix 2*, since it deals with a modality of payment. I have done so, in the text that accompanies my comments my comments on *Appendix 2*. (The Articles that follow would then need to be renumbered, but I have not done so in this analysis, so as not to confuse matters.) As noted above under Article 6.7, there may be a need to include wording in Article 6.7 to refer to the two options available to the Recipient. The Recipient may choose between the two options for modality of payment.

The Recipient may opt as per *Appendix 2* to apply the following modality of payment into the mechanism established by the Governing Body under article 19.3f of the Treaty:

a) The Recipient shall pay … % of the sales of any Products, whether or not they are available without restriction, and of the sales of any other products that are Plant Genetic Resources for Food and Agriculture belonging to the same crop or crops, as set out in Annex 1 to the Treaty, to which the Material referred to in Appendix 1 to this Agreement belongs. Payment shall be made in accordance with the banking instructions set out in paragraphs 2 and 3 of Appendix 2 to this Agreement.

b) The Recipient shall be waived from payments due under article 6.7 of this Agreement.

c) The Recipient shall notify the Governing Body that he has opted for this modality of payment.

d) When the Recipient transfers Plant Genetic Resources for Food and Agriculture under development, the transfer shall be made on the condition that the subsequent recipient shall pay into the mechanism established by the Governing Body under article 19.3f of the Treaty … % of the sales of any Product derived from such products, whether the Product is available or not without restriction.

e) At least six months before the expiry of a period of ten years counted from the date of signature of this Agreement and, thereafter, six months before the expiry of subsequent periods of five years, the Recipient may notify the Governing Body of his decision to opt out from the application of this article as of the end of any of those periods. In the case the Recipient has entered into other Standard Material Transfer Agreements, the ten years period will commence on the date of signature of the first Standard Material Transfer Agreement where an option for this article has been made.

f) After the date in which the application of this article has ceased, the Recipient shall make payments calculated in accordance with paragraph (a), with regard to any Product that incorporates Material received during the period in which this article was in force, where such Product is not available without restriction.

g) Where the Recipient has entered or enters in the future into other Standard Material Transfer Agreements in relation to Material belonging to the same

crop[s], the Recipient shall only pay into the referred mechanism the percentage of sales as determined in accordance with this Article or the same article of any other Standard Material Transfer Agreement. No cumulative payments will be required.

Article 7. Applicable Law

34. There are three options in the current text. There is little difference of substance between Options 1 and 3. The Legal Working Group recommended Option 3. The reference to decisions of the Governing Body as being applicable law, in Option 2 could create legal difficulties, as the decisions of the Governing Body are not binding law. It was suggested in the Friends of the Chair meeting that the reference to decisions of the Governing Body could be moved to Article 4, General Provisions, as in my recommendation for Article 4.1, above. The reference to national law would create difficulties, and the law to be applied is not specified (would this be the law of the Provider, the Recipient or the place where the contract was executed?). The Legal Working Group recognized the importance of having a clear choice of law provision in the Standard Material Transfer Agreement. It considered that without a clear provision on choice of law, the Parties could be forced into lengthy disputes as to which body of law would be applicable to any dispute arising out of the Standard Material Transfer Agreement, in accordance with national systems of private international law. In the light of the above, I recommend the following text.

The applicable law shall be General Principles of Law as reflected in the UNIDROIT Principles of International Commercial Contracts 2004, taking into account the objectives and relevant provisions of the Treaty.

8. Dispute Settlement

35. The Legal Working Group recommended the title of the Article and relevant references be "Dispute Settlement", rather than "Dispute Resolution".

Article 8.1

36. As I noted in my comments on Article 4.3, I recommend that this Article be revised to cover the rights of the Third Party Beneficiary to initiate dispute settlement. In addition, I recommend that the provisions of Article 8.2 (which, as pointed out by the Legal Working Group, redundantly deal with the same subject matter) be incorporated in Article 8.1. There are a number of matters to be addressed.

- I recommend that that the words "*and acting exclusively at the direction of the Governing Body*" be deleted. This is a matter that is more appropriately dealt with in a decision of the Governing Body, which would grant powers to the Third Party Beneficiary, and set out the procedures whereby those powers should be exercised.

- I would recommend that the first alternative phrase ("*on the issue of a recipient's compliance with payment obligations under Article 6.7*") be deleted, and the second alternative phrase be modified to read as follows: "*in the case of a breach of an obligation under this Agreement, including in particular the Recipient's payment obligations under Article 6.7 and 6.9*".

37. I accordingly recommend the following text.

8.1 The Parties to this Agreement agree that ..., representing the Governing Body and the Multilateral System as third party beneficiary under this Agreement, has the right, as a

> third party beneficiary, to initiate dispute settlement procedures in the case of a breach of an obligation under this Agreement, including in particular the Recipient's payment obligations under Article 6.7 and 6.9.

New Article 8.2

38. As noted above, it was suggested in the Friends of the Chair meeting that the parts of Article 4.3 that deal with the request for and provision of information be moved to Article 8, Dispute Settlement, as a new Article 8.2, since this information would be requested in the context of dispute settlement only. I recommend that a new final sentence be included, to reflect the view expressed in the Legal Working Group, that the **right to request** should be accompanied by an **obligation to provide** information requested. I therefore recommend that the Article 8.2 read as follows.

> ..., representing the Governing Body and the Multilateral System as the Third Party Beneficiary, has the right to request that the relevant information be made available by the Provider and the Recipient, regarding their obligations in the context of this Agreement. Any information so requested shall be provided by the Provider or the Recipient, as the case may be.

New Article 8.3

39. As I recommended in my comment on Article 4.4, this Article (which reserves the rights of the Provider and of the Recipient to initiate dispute settlement) is better placed as a new Article 8.3, which I would recommend read as follows:

> The rights granted above to ..., representing the Governing Body and the Multilateral System as the Third Party Beneficiary under this Agreement, do not prevent the Provider and the Recipient from exercising their rights under this Agreement.

Old Article 8.3, now new Article 8.4

40. Options 1 and 2 seem to have a similar intention, with the exception of the reference to a Panel of Experts. Option 2 has been preferred as being clearer in its wording. For example, it would be necessary to allow the Parties to choose another arbitration forum, if there is agreement between the Parties on this, and to provide for a default forum if there is no such agreement. The need for certainty on the default mechanism to be used in the event of disagreement between the Parties was pointed out expressly by the Legal Working Group. Regarding the Panel of Experts, it has been pointed out to me that there is a need to avoid creating too many permanent bodies. The "Panel" would in any case be a "list" of experts, and it is therefore recommended that the term, "list of experts", be used. It would be possible for the Governing Body to establish such a list of experts to function within the arbitration system, in particular where the International Chamber of Commerce arbitration is concerned. In other words, the Parties could be given the facility of choosing arbitrators, or the presiding or sole arbitrator, from the list established by the Governing Body. In any case, it would not be desirable to force the Parties to choose only from the list of experts. It would therefore be quite legally appropriate to provide for the establishment of the list by decision of the Governing Body, rather than in the Standard Material Transfer Agreement. I recommend that the Article read as follows.

> Any dispute arising from this Agreement shall be settled in the following manner:
>
> a) Amicable dispute settlement: The parties shall attempt in good faith to settle the dispute by negotiation.

(b) Mediation: If the dispute is not resolved by negotiation, the parties may choose mediation through a neutral third party mediator, to be mutually agreed.

(c) Arbitration: If the dispute has not been settled by negotiation or mediation, any party may submit the dispute for arbitration under the Arbitration Rules of an international body as agreed by the parties to the dispute. Failing such agreement, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with the said Rules. Either party to the dispute may, if it so chooses, appoint its arbitrator from such list of experts as the Governing Body may establish for this purpose; both parties, or the arbitrators appointed by them, may agree to appoint a sole arbitrator, or presiding arbitrator as the case may be, from such list of experts. The result of such arbitration shall be binding.

10. Signature/Acceptance

41. There will also be a need to ensure that the provisions of Article 10 of the Standard Material Transfer Agreement, which deal with Signature/Acceptance, be clarified and made consistent with the concept that the Provider should have the option of choosing between signature, "shrink-wrap" and "click-wrap" forms of acceptance. I recommend the following form of words.

Option 1 –Signature*

I, (*Full Name of Authorized Official*), represent and warrant that I have the authority to execute this Agreement on behalf of the Provider and acknowledge my institution's responsibility and obligation to abide by the provisions of this Agreement, both by letter and in principle, in order to promote the conservation and sustainable use of plant genetic resources for food and agriculture.

Signature.....Date.....
Name of Provider ……...

I, (*Full Name of Authorized Official*), represent and warrant that I have the authority to execute this Agreement on behalf of the Recipient and acknowledge my institution's responsibility and obligation to abide by the provisions of this Agreement, both by letter and in principle, in order to promote the conservation and sustainable use of plant genetic resources for food and agriculture.

Signature.....Date.....
Name of Recipient……...

Option 2 – Shrink-wrap Standard Material Transfer Agreements*

The Material is provided conditional on acceptance of the terms of this Agreement. The provision of the Material by the Provider and the Recipient's acceptance and use of the Material constitutes acceptance of the terms of this Agreement.

Option 3 – Click-wrap Standard Material Transfer Agreement*

◊ I hereby agree to the above conditions.

FOOTNOTE: * The Provider may choose the form of acceptance most appropriate for it. Where the Provider chooses signature, only the wording in Option 1 will appear in the Standard Material Transfer Agreement. Similarly where the Provider chooses either shrink-wrap or click-wrap only the wording in Option 2 or Option 3, as appropriate, will appear in the Standard Material Transfer Agreement. Where the "click-wrap" form is chosen, the Material should also be accompanied by a written copy of the Standard Material Transfer Agreement.

Appendix 1, List of Materials Provided

42. The Legal Working Group recommended the following change of wording, since the definition of "*Material*" does not cover the associated information.

This Appendix contains a list of the Material provided under this Agreement, the associated information referred to in Article 5(b).

This information is either provided below or can be obtained at the following website: (*URL*).

The following information is included for each Material listed: all available passport data and, subject to applicable law, any other associated, available, non-confidential descriptive information.

(*List*)

Appendix 2, Payment of Benefit-Sharing

42. As I suggested above, in regard to the definition of "Sales", the basis of formula for payments in this Appendix is gross income, with a standard deduction of 30% to cover the costs of discounts, returns and freight. Clause 1(b) has been deleted, since any value obtained by the purchaser will be reflected in any payment to the Recipient, and that payment will be included in the calculation of benefit-sharing payments to be made by the Recipient. There is no need to repeat the exemption included in paragraph 1(a).

43. The bracketed paragraph referring to licence fees has been deleted, since the value of any sales by the lessee will be reflected in the license fee, and that license fee would be included in the calculation of benefit-sharing payments to be made by the Recipient.

44. As noted in the body of my report, I recommend that two options for the modality of payment be given in *Appendix 2*. The Recipient may choose from them

Option 1: Payment on a case-by-case basis, for Products that incorporate Material from the Multilateral System. (The text for this option derives from the text currently in *Appendix 2*.) This option also provides, as I proposed in body of my report, for two levels of payment:

- A lower level of payment when a Product merely incorporates material from the Multilateral System, without an identifiable trait of value.

- A higher level of payment, when a Product incorporates an identifiable trait of value accessed from the Multilateral System.

Option 2: Payment on the basis of a percentage of sales by the Recipient of any Products, whether or not they are available without restriction, and of the sales of any other products that are Plant Genetic Resources for Food and Agriculture belonging to the same crop or crops, as set out in *Annex 1* to the Treaty, to which the Material referred to in *Appendix 1* to this Agreement belongs. (The text for this option is substantially the same as that provided during the meeting of the Friends of the Chair, to replace Article 6.11.) If the Recipient chooses this option, he will be required to signify this to the Secretary of the Treaty, through the return of the signed form, which is in the Annex to this option.

45. I recommend the following text for *Appendix 2*.

The Recipient may opt for one of two options for modality of payment into the mechanism established by the Governing Body under article 19.3f of the Treaty

Modality of payment

Option 1

1. If a Recipient, its affiliates, contractors, licensees, and lessees, commercializes a Product or Products, then the Recipient shall pay:

(a) for a Product that incorporates material from the Multilateral System, without an identifiable trait of value, … percent (… %) of the gross income from that Product, less thirty percent (30%);

(b) for a Product that incorporates an identifiable trait of value accessed from the Multilateral System, … percent (… %) of the gross income from that Product, less thirty percent (30%);

except that no payment shall be due on any Product or Products that:

(a) are available without restriction to others for further research and breeding in accordance with Article 2 of this Agreement;

(b) are sold or traded as a commodity.

2. Where a Product contains Plant Genetic Resources for Food and Agriculture accessed from the Multilateral System under two or more Standard Material Transfer Agreements, only one payment shall be required under sub-paragraph 1 above. If that Product incorporates an identifiable trait of value accessed from the Multilateral System, then payment shall made at the rate give in sub-paragraph 1(b) above.

Option 2

1. The Recipient shall pay … percent (… %) of the sales of any Products, whether or not they are available without restriction, and of the sales of any other products that are Plant Genetic Resources for Food and Agriculture belonging to the same crop or crops, as set out in *Annex 1* to the Treaty, to which the Material referred to in *Appendix 1* to this Agreement belongs.

2. The Recipient shall be waived from payments due under article 6.7 of this

Agreement. The Recipient shall notify the Governing Body that he has opted for this modality of payment, by signing and returning to the Secretary of the Governing Body the form below.

3. When the Recipient transfers Plant Genetic Resources for Food and Agriculture under development, the transfer shall be made on the condition that the subsequent recipient shall pay into the mechanism established by the Governing Body under a Article 19.3f of the Treaty … percent (… %) of the sales of any Product derived from such products, whether the Product is available or not without restriction.

4. At least six months before the expiry of a period of ten years counted from the date of signature of this Agreement and, thereafter, six months before the expiry of subsequent periods of five years, the Recipient may notify the Governing Body of his decision to opt out from the application of this article as of the end of any of those periods. In the case the Recipient has entered into other Standard Material Transfer Agreements, the ten years period will commence on the date of signature of the first Standard Material Transfer Agreement where an option for this article has been made.

5. After the date in which the application of this article has ceased, the Recipient shall make payments calculated in accordance with sub-paragraph 1 above, with regard to any Product that incorporates Material received during the period in which this article was in force, where such Product is not available without restriction.

6. Where the Recipient has entered or enters in the future into other Standard Material Transfer Agreements in relation to Material belonging to the same crop[s], the Recipient shall only pay into the referred mechanism the percentage of sales as determined in accordance with this article or the same article of any other Standard Material Transfer Agreement. No cumulative payments will be required.

Form to be returned to the Secretary of the Governing Body, for Option 2

I, (*full name of Recipient or Recipient's Authorized Official*), declare to opt for payment in accordance with Article 6.9 of this Agreement.

Signature.....Date.....

Timing and Mode of Payment

1. The Recipient shall submit to the Governing Body, within sixty (60) days after each calendar year ending December 31st, an annual report setting forth: the Sales of the Product or Products by the Recipient, its affiliates, contractors, licensees and lessees, for the twelve (12) month period ending on December 31st;

(a) the amount of the payment due; and

(b) information that allows for the identification of any restrictions that have given rise to the benefit-sharing payment.

2. Payment shall be due and payable upon submission of each annual report. All payments due to the Governing Body shall be payable in (*specified currency*) for the

account of (*the Trust Account or other mechanism established by the Governing Body in accordance with Article 19.3f of the Treaty*).

PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE UNDER DEVELOPMENT

Introduction

1. Article 12.3e of the International Treaty provides that "*Access to plant genetic resources for food and agriculture under development, including material being developed by farmers, shall be at the discretion of its developer, during the period of its development*".

2. This provision is derived from a similar provision contained in Annex III to the International Undertaking, which provided "*that breeders' lines and farmers' breeding material should only be available at the discretion of their developers during the period of development"*. It should be noted that the International Undertaking provided for access to all plant genetic resources, "*free of charge, on the basis of mutual exchange or on mutually agreed terms*", including "*special genetic stocks (including elite and current breeders' lines and mutants)*".

3. The intent of the provision in the International Undertaking was clearly to protect the legitimate interests of breeders, who may wish to restrict access "at their discretion" to breeders lines they are developing, during the course of their development.

4. The intent of Article 12.3e of the Treaty appears to be similar. In essence, it seems clear that the intent of Article 12.3e is to allow for certain discretionary powers of the developer over plant genetic resources for food and agriculture accessed from the Multilateral System during the period that he is still working on that material, but where the material has not yet been developed into a product that is ready for commercialisation on the open market.

5. In this connection, the following questions arise:

a) What does plant genetic resources for food and agriculture under development mean?

b) What is the extent of the discretionary powers?

c) When does the period of development end?

d) Can the plant genetic resources for food and agriculture under development be transferred to another developer during the period of development?

e) If the material is so transferred during the period of development, what should be the legal instrument under which it should be transferred?

f) If the material is transferred for monetary consideration during the period of development, would this constitute the commercialisation of a Product within the meaning of Article 13.2d(ii), thus triggering payments to the Multilateral System?

g) What would be the situation where genes are isolated from the plant genetic resources for food and agriculture accessed from the Multilateral System and used to produce a new Product that is a plant genetic resource for food and agriculture, or alternatively to produce a new Product that is not a plant genetic resource for food and agriculture?

6. In answering these questions, it will be necessary to look first at the wording of the Treaty, second at the objectives of the Treaty and in particular of the Multilateral System, and third at commercial practice within plant breeding.

a) What does plant genetic resources for food and agriculture under development mean?

7. Article 12.3e does not define the term "Plant Genetic Resources for Food and Agriculture under Development". However, it is clear from the wording of Article 12.3e, that the term does not refer to the **original material** as accessed from the Multilateral System, but rather to **the material that is being developed**, but which has not yet reached the state of development where it is a final product that can be sold on the open market. In this sense, plant genetic resources for food and agriculture under development is material **derived from** the Material accessed from the Multilateral System and hence distinct from the Material **as received from** the Multilateral System. As the material is "under development", it will be continually changing its nature until the development has been completed.

b) What is the extent of the discretionary powers?

8. It is clear that the discretionary powers provided for in Article 12.3e include first and foremost, the power of the developer to **not grant access** to the plant genetic resources for food and agriculture under development until such time as he has completed that development. It is unclear from the literal wording of Article 12.3e whether the discretionary powers could also extend to the terms under which access is granted, if access is indeed granted. To clarify this, and indeed subsequent questions, it may be necessary to look at the practice of breeders in the light of the objectives of the Treaty.

9 It is a normal, though not necessarily common, practice of breeders to commence development of material, and then to transfer that material with other breeders for further development. Sometimes these transfers will be free. On other occasions, the transfers may be subject to monetary consideration and/or other conditions. In normal commercial practice, this will usually take the form of an agreement for the payment of royalties on the sales of the final product as derived from the material transferred. **It is not common commercial practice for there to be any "up-front" payment for such transfers**. By the nature of the breeding process, these transfers tend to be closed transactions (and can often be closely guarded trade secrets) between one breeder and another. In the practice of the CGIAR Centres, breeders' lines are routinely developed by the Centres and then distributed to national agricultural research systems (NARS) for further development. Normally this is not in exchange for any monetary consideration, although the transfers are always subject to further conditions relating, for example, to intellectual property protection, or the making available to the Centre of information obtained on the material.

10. In view of the above practice, it would seem clear that the discretion of the developer must extend, beyond the mere act of making the material available, to the conditions under which it should be made available. If the discretion did not include the power to impose other conditions, including for example, on the future payment of royalties, and on intellectual property conditions, then the present system of breeding, both in the private sector and in public institutions such as the CGIAR Centres, could not continue to function. It does not seem reasonable to interpret the Treaty as being intended to have this effect.

c) When does the period of development end?

11. Article 12.3e does not specify when the period of development should end. It may seem reasonable to interpret the provision as indicating that the period of development should end **when the developer says it has ended**. But this interpretation is open to **two criticisms**. **First** it

is subjective, does not provide any objective criteria and may thus open the way to abuses. **Second,** it does not allow for the possibility of the period of development continuing through the development efforts of a second or subsequent developer. There is thus a **need for a more objective criterion** to determine when the development period is concluded.

12. Given the above definition of the term plant genetic resources for food and agriculture under development, it would seem reasonable to incorporate the same elements into the determination of when the period of developed may be considered to have ended. Following this approach, then, **the period of development for plant genetic resources for food and agriculture under development may be deemed to have ceased when those resources are commercialised as a final Product on the open market.**

13. Using the term ,"Product", in this sense would also indicate the need to avoid the use of the term "product" in the name used for plant genetic resources for food and agriculture under development.

d) Can the plant genetic resources for food and agriculture under development be transferred to another developer during the period of development?

14. While Article 12.3e does not deal explicitly with this question, it does seem clear that where material is transferred for further development, it will remain plant genetic resources for food and agriculture under development and according access to it will remain within the discretion of the developer. This reflects the breeding practice, both in the private sector and in the public sector as in the CG Centres. **There is nothing in the Treaty that would indicate that there must be only one developer.** In breeding practice there may be a whole cycle of developers involved in the development of a final product. The case of the CGIAR Centres passing on breeding lines to NARS for final development and commercialisation is one example.

e) If the material is so transferred during the period of development, what should be the legal instrument under which it should be transferred?

15. **Article 12.4 of the Treaty provides that subsequent transfers of plant genetic resources for food and agriculture accessed from the Multilateral System shall be subject to the conditions of the Standard Material Transfer Agreement.** The material, even if under development, is still within the Multilateral System. However, since it is plant genetic resources for food and agriculture under development, access to that material is subject to the discretionary powers of the developer. It would therefore be **inconsistent with Article 12.3e** to apply to the plant genetic resources for food and agriculture under development the condition in the Standard Material Transfer Agreement that requires that **access be accorded to the material expeditiously and free of charge**. **These conditions would of course continue to be applicable to the material originally accessed from the Multilateral System,** but not to the plant genetic resources for food and agriculture that is under development and hence distinct from the material originally received from the Multilateral System.

f) If the material is transferred for monetary consideration, would this constitute the commercialisation of a Product within the meaning of Article 13.2d(ii), thus triggering payments to the Multilateral System?

16. Article 13.2d(ii) of the Treaty provides that "a recipient who commercialises a product that is a plant genetic resource for food and agriculture and that incorporates material accessed from the Multilateral System" shall make payments to the Multilateral System as a form of benefit-sharing, in certain circumstances. Whether or not the transfer of plant genetic resources for food and agriculture under development for monetary consideration would constitute commercialisation within the meaning of Article 13.2d(ii), will depend essentially on the **definition of the term "Product". This term is not defined in the Treaty itself and is thus**

open for interpretation by the Governing Body in the context of the Standard Material Transfer Agreement. The question then is what the arguments are for or against defining plant genetic resources for food and agriculture under development as being a Product, the commercialisation of which would trigger benefit-sharing.

17. It has been argued that since transfers between developers are almost by definition closed transactions that restrict availability of the plant genetic resources for food and agriculture under development during the period of development, then it makes sense to target these transactions for benefit-sharing, particularly where the final product may be commercialised in ways that do not restrict further availability for research and breeding (such as under plant varietal protection), and thus would not generate any mandatory benefit-sharing. Under this argument, requiring mandatory benefit-sharing for transfers between developers would generate income for the Multilateral System that may otherwise be unavailable, and generate it at an earlier stage without waiting for commercialisation of the final product.

18. **However, this argument does not take into account the following considerations:**

i. It is normal commercial practice that plant genetic resources for food and agriculture under development is subject to restricted access and to trade secrecy. This is essential to any private sector breeding programme.

ii. In recognition of this, restrictions on availability of plant genetic resources for food and agriculture under development are expressly foreseen under Article 12.3e of the Treaty, and are of a different nature to restrictions on the availability of the final product.

iii. Restrictions on availability of plant genetic resources for food and agriculture under development are only of a temporary nature only, and since they are provided for under the Treaty, it is difficult to argue that they could trigger mandatory benefit-sharing on their own. Mandatory benefit-sharing is triggered under the Treaty only where the final product is commercialised subject to restrictions on further availability.

iv. In any case, under normal commercial practice, few if any tangible benefits are generated during the period of development. In fact, most transfers of plant genetic resources for food and agriculture under development, for which monetary consideration is involved, are subject to royalty payments that are only triggered by, and calculated on, the sales of the final product. It is much less common for plant genetic resources for food and agriculture under development to be sold outright to another breeder for a fixed sum and, where this happens, the consideration tends to be relatively small.[9]

[9] Background Study Paper No. 27, *Commercial practice in the use of plant genetic resources for food and agriculture*, para. 28 and 29:

"28. Genetic resources that simply widen a company's gene pool but are without identified properties of interest have essentially no commercial value, as they require long-term investment and the return on that investment is risky. Much material, including pre-bred material, is available free from the public sector. Payment, if any, for exotic and unadapted material, and even pre-bred materials, will normally not exceed a nominal fee, such as US$ 5-20.

29. The value of material will increase with characterization and evaluation, if there is an indication of a trait or characteristic of potential commercial interest. Primarily in the vegetable area, if pre-bred material shows a potential value, lump sums in the range of US$ 5,000 to 50,000 may be paid for a limited number of pre-bred lines, in advanced development stage, which require only another 2-3 years development before commercialization. Such material will normally be obtained on a nonexclusive basis. There will normally be no prohibition of seeking intellectual property protection for research results. Royalty rates will normally not be paid."

v. All costs of developing a final product, including any royalty payment or fixed sum, made to acquire a plant genetic resources for food and agriculture under development from another breeder, would be reflected in the price of the final product. Any benefit-sharing payment based on the sales of the final product would, therefore, also capture the value of a royalty or fixed payment.

vi. Since under normal commercial practice, transfers of plant genetic resources for food and agriculture under development are closed transactions and often regarded as closely held trade secrets, it would be difficult and disruptive of the breeding practice to require these transactions to be disclosed, and, in effect, to tax them.

g) What would be the situation where genes are isolated from the plant genetic resources for food and agriculture accessed from the Multilateral System and used to produce a new Product that is a plant genetic resource for food and agriculture, or alternatively to produce a new Product that is not a plant genetic resource for food and agriculture?

19. Concerns have been raised over the way in which biotechnology would be treated in the context of plant genetic resources for food and agriculture under development.

20. No problems would appear to arise where the biotechnology is used to produce a final Product that is a plant genetic resource for food and agriculture. For example, where a gene is isolated and then incorporated into a Product that is a plant genetic resources for food and agriculture, the commercialisation of the final Product will trigger benefit-sharing under Article 13.2d(ii), and in many cases is likely to trigger mandatory payments. In any case, the final sales income generated by the commercialisation of the final Product that is a plant genetic resources for food and agriculture will reflect the entire value added during the development process. There will therefore be no need to look separately at the individual steps within the development process from the point of view of benefit-sharing.

21. The only potential problem lies with the isolation of a gene that is then incorporated into a Product that is **not** a plant genetic resource for food and agriculture, e.g. where a gene is isolated and then incorporated across kingdoms into an animal species. According to the strict wording of Article 13.2d(ii), the commercialisation of a Product that is not a plant genetic resource for food and agriculture would not trigger any benefit-sharing. The question then arises whether any "benefits" generated during the development cycle should not rather be shared during the product development cycle rather than waiting for the stage of commercialisation of the final product where that final Product, by reason of not being a plant genetic resources for food and agriculture, falls outside the Multilateral System.

22. The answer to this question would appear to be that the accessing and use of plant genetic resources for food and agriculture for such purposes would in any case fall outside the scope of the Multilateral System of access and benefit-sharing. In other words, a "developer" or researcher who intends to use plant genetic resources for food and agriculture for the purpose of isolating genes for incorporation into a non-plant genetic resources for food and agriculture Product, such as an animal species, albeit a farm animal species, cannot demand facilitated access to the plant genetic resources for food and agriculture under the Multilateral System for that purpose? Such purposes fall outside the scope of the Treaty, and, in fact, he would have to bargain for it on separate mutually agreed terms with the Provider.

23. **The argument unpinning this view would run as follows:**

i. Access under the Multilateral System is guaranteed for the purpose of utilisation and conservation for research, breeding and training for food and agriculture only;

ii. Accessing material for use in producing a cross kingdom product, i.e. a Product that is not a plant genetic resource for food and agriculture, is certainly not breeding;

iii. Where the final product is a farm animal, it could be argued that such a use falls under the heading of research for food and agriculture;

iv. But it is clear that the whole system of access and benefit-sharing is set up to deal with access that ends up with a final product that is a plant genetic resources for food and agriculture: Article 13.2d(ii) makes that clear;

v. Since there is no provision for benefit-sharing for non-plant genetic resources for food and agriculture products, it is clear that the negotiators of the Treaty did not intend them to be covered by the Multilateral System of access and benefit sharing;

vi. This means that we should interpret the words used in Article 12.3a as a whole, and in light of the other words used in that provision. In other words, research means for the purpose of breeding or training, and not for the purpose of isolating a gene and using it to create cross-kingdom product.

vii. This is indeed clearly stated in Article 10.2 of the Treaty which states that the Multilateral System is set up both to facilitate access to plant genetic resources for food and agriculture, and to share the benefits arising from the utilisation of these resources (i.e. plant genetic resources for food and agriculture).

24. This is not to say that a researcher cannot access plant genetic resources for food and agriculture for the purpose of isolating genes and using them in the development of non-plant genetic resources for food and agriculture Products. It is merely to say that this is not a use for which the Treaty provides facilitated access under the Multilateral System. For such uses, just as for other uses such as pharmaceutical or non-food industrial uses, it will be necessary to seek access on mutually agreed terms under the Convention on Biological Diversity. If one tries to design the Standard Material Transfer Agreement to cover such uses, this will risk destroying the whole Standard Material Transfer Agreement.

Conclusions

25. In view of the above, it would seem more appropriate and consistent with the objectives of the Treaty, to view the Treaty as creating, in its Article 12.3e, a special regime for plant genetic resources for food and agriculture under development. The material under development is part of the Multilateral System, but while it is under development it is subject to certain discretionary powers of the developer or developers, including the power to restrict access, not to the original material, but to the material being developed, and the power to set special conditions on the transfer of that material during the period of development. Once the final product is commercialised on the open market, however, it will be subject to the normal rules of Article 13.2d(ii) regarding benefit-sharing.

Elements of a special legal regime

26. The elements that could be included in the special regime and expressed in the Standard Material Transfer Agreement could be as follows:

- A definition of "Plant Genetic Resources for Food and Agriculture under Development" as being plant genetic resources for food and agriculture developed from the Material that is not yet ready for commercialisation on the open market and which the developer

intends to further develop or to transfer to another person or entity for further development;

- A requirement that transfers of plant genetic resources for food and agriculture under Development shall be subject to the provisions of the Standard Material transfer Agreement, provided that Article 5(a) shall not apply;

- A recognition that the transfer of plant genetic resources for food and agriculture under Development under the provisions of the Standard Material Transfer Agreement would not preclude the Parties from agreeing on other conditions relating to participation in the development of the plant genetic resources for food and agriculture, including the payment of monetary consideration;

- Exemption of the transfer from the rules relating to mandatory monetary payments. Payments would be applicable only to the commercialisation of the final product on the open market and not to transfers within the product development cycle.

NOTE: Texts to incorporate the elements of the special legal regime in the Standard Material Transfer Agreement have been incorporated in *Annex 1* to the present report of the Chair of the Contact Group, in the form of (1) a definition of the term, "Plant Genetic Resources for Food and Agriculture under Development", and (2) the suggested text for Articles 6.6, 6.6bis, and 6.6ter.