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Items 3 and 4 of the Draft Provisional Agenda

COMMISSION ON GENETIC RESOURCES FOR FOOD AND AGRICULTURE ACTING AS INTERIM COMMITTEE OF THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

CONTACT GROUP FOR THE DRAFTING OF THE STANDARD MATERIAL TRANSFER AGREEMENT

Hammamet, 18-22 July 2005

EXPLANATORY NOTES ON THE FIRST DRAFT OF THE STANDARD MATERIAL TRANSFER AGREEMENT PREPARED BY THE SECRETARIAT

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INTRODUCTION

1. These Explanatory Notes are intended to be read in conjunction with the first draft Standard Material Transfer Agreement[1] prepared by the Secretariat for the first meeting of the Contact Group on the Drafting of the Standard Material Transfer Agreement, in accordance with the terms of reference for the Contact Group[2].

2. In order to facilitate consultation, the notes are arranged according to the numbering of the clauses in the draft Standard Material Transfer Agreement itself.
in the Standard Material Transfer Agreement.

[1] Document CGRFA/IC/CG-SMTA-1/05/2, *First draft of the Standard Material Transfer Agreement prepared by the Secretariat.*

[2] "The Secretariat of the Commission, with the support of the Legal Office, under the guidance and supervision of the Chair of the Contact Group in consultation with the Chairs of the Regional Groups and the Chair of the second meeting of the Interim Committee, shall prepare the first draft of the standard MTA, for consideration by the first meeting of the Contact Group."

EXPLANATORY NOTES ON THE FIRST DRAFT OF THE STANDARD MATERIAL TRANSFER AGREEMENT PREPARED BY THE SECRETARIAT

1. PREAMBLE

1a The text introduces the Treaty.

1b The text is drawn from Articles 1.1 and 3 of the Treaty.

1c The text is drawn from Article 9.1 of the Treaty.

1d The text is drawn from Article 10.1 of the Treaty.

1e The text is drawn from Article 10.2 of the Treaty.

1f The text is drawn from Articles 11.1 and 11.2 of the Treaty.

1g The text is drawn from Article 11.5 of the Treaty. Preambular paragraph 1f, which relates to the coverage of the Multilateral System, only reflects the provisions of Articles 11.1 and 11.2 of the Treaty. However, the coverage of the Multilateral System also includes plant genetic resources for food and agriculture listed in *Annex I* that are held in the *ex situ* collections of the International Agricultural Research Centres of the CGIAR and in the *ex situ* collections of other international institutions in accordance with Articles 15.1a and 15.5. Reference therefore needs to be made also to Article 11.5.

1h The text reflects Articles 12.4, 13.1 and 13.2 of the Treaty.

1i The text is drawn from Articles 12.2 and 12.4 of the Treaty.

2. PARTIES TO THE AGREEMENT

2.1 This provides that the agreement which is to be signed between the Provider and the Recipient is in conformity with the Standard Material Transfer Agreement. A distinction needs to be made between the Standard Material Transfer Agreement that will be adopted by the Governing Body and the individual agreement that will be signed by the Provider and Recipient. The individual agreement will be defined as “this Agreement”.

2.2 This provides for the name and address of the Provider and Recipient. Where the Provider or the Recipient of the material is not an individual, the name of the individual or legal person who takes responsibility for the provision/receipt of the material should be identified in [see “Notice” under other possible additional items shown below].

2.3 This expresses the legal agreement of the Parties and introduces the substantive provisions of the Agreement.

3. DEFINITIONS

3.1 The Expert Group on the Terms of the Standard Material Transfer Agreement recommended that definitions should be considered only after the substantive provisions of the Standard Material Transfer Agreement have been drafted. There are, however, a number of

definitions which appear to be necessary, which are not controversial. These are definitions for "*Governing Body*", "*Multilateral System*", "*Plant Genetic Resources for Food and Agriculture*" (drawn from Article 2 of the Treaty), and "*Genetic Material*" (drawn from Article 2 of the Treaty). These have been included in the draft Standard Material Transfer Agreement.

In addition, the Expert Group on the Terms of the Standard Material Transfer Agreement considered in depth the definitions for "*commercializes*" [3], "*product*" [4] and "*incorporates*" [5] and the identified options for these are included in the draft.

4. SUBJECT MATTER OF THE MATERIAL TRANSFER AGREEMENT/ MATERIAL TO BE TRANSFERRED

4.1 This follows the one recommendation of the Expert Group on the Terms of the Standard Material Transfer Agreement.[6]

5. GENERAL PROVISIONS

The Expert Group on the Terms of the Standard Material Transfer Agreement did not reach agreement on the need for inclusion of *General Provisions*.[7] Those that wanted General Provisions wanted it to deal with the issue of sovereignty, by specific reference to Articles 10.1 and 10.2 of the Treaty; the coverage of the Multilateral System, by reference to Articles 11.1 and 11.2, and Annex I of the Treaty; and "incorporation of material" from the Multilateral System, by inclusion of a reference to the origin of the material covered by the Material Transfer Agreement.

On the issue of sovereignty (Articles 10.1 and 10.2 of the Treaty), during the meeting of the Expert Group, the Legal Advisor noted that "*in legal terms, the sovereignty of states was not a concept to be introduced into substantive clauses of an MTA, which is a contractual agreement between natural or legal persons. It is more appropriately referred to in the Preamble.*" [8] Such a reference has been included in the draft Preamble, paragraph 1e.

On the issue of the coverage of the Multilateral System as set out in Articles 11.1 and 11.2, the Legal Office has pointed out that this issue is prior to the Standard Material Transfer Agreement and therefore is not properly an issue to be dealt with in the substantive provisions of the Agreement. In other words, the Standard Material Transfer Agreement will only be used for materials which are covered by the Multilateral System. From a legal point of view, reference to the coverage of the Multilateral System should more appropriately be made in the Preamble to the Standard Material Transfer Agreement. Such a reference has been included in draft Preambular paragraphs 1f and 1g.

On the issue of the incorporation of material, the Legal Office has pointed out that, from a legal point of view, the origin of material exchanged under the Standard Material Transfer Agreement can be said to be the Multilateral System, rather than individual countries. Under the Treaty the Contracting Parties have, in the exercise of their sovereign rights, agreed to establish a

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[3] Document CGRFA/IC/MTA-1/04/Rep, paragraphs 8 to 12.

[4] Document CGRFA/IC/MTA-1/04/Rep, paragraphs 13 to 15.

[5] Document CGRFA/IC/MTA-1/04/Rep, paragraphs 16 to 17.

[6] Document CGRFA/IC/MTA-1/04/Rep, paragraph 61, Subject matter of the MTA/Material to be transferred.

[7] Document CGRFA/IC/MTA-1/04/Rep, paragraph 61, General Provisions.

[8] Document CGRFA/IC/MTA-1/04/Rep, paragraph 61, General Provisions, ninth bullet point.

Multilateral System (Article 10.2 of the Treaty). In Article 12.3d, the Treaty refers to plant genetic resources for food and agriculture "in the form received *from* the Multilateral System" and in Article 13.2d(ii) it refers to "Plant genetic resources for food and agriculture accessed *from* the Multilateral System". In other provisions of the Treaty, reference is made to access *under* or *through* the Multilateral System. Nowhere is reference made to access from individual countries.

Accordingly, Articles 10.1, 10.2, 11.1 and 11.2 have been reflected primarily in the draft Preamble. The suggested wording of clause 5 is designed to allow these matters to be reflected in the substantive body of the Agreement, without making them the subject matter of an agreement between private parties.

One further suggestion of the Expert Group was that the General Provisions of the Standard Material Transfer Agreement should state who the owner of the material is. The Contact Group may wish to consider the question of ownership over the material provided, and the extent to which this issue needs to be reflected in the Standard Material Transfer Agreement.

6. RIGHTS AND OBLIGATIONS OF THE PROVIDER

6.1 The language used assumes that the Standard Material Transfer Agreement will be signed before supply of the genetic material. If it is decided to adopt a "shrink-wrap" approach, the language may need to be modified to make clear that the Standard Material Transfer Agreement accompanies the material.

6.1a The text is drawn from Article 12.3b of the Treaty.

6.1b The text is drawn from Article 12.3c of the Treaty.

6.1c One suggestion of the Expert Group was to include the provisions of Article 12.3e, referring to access to plant genetic resources for food and agriculture under development being at the discretion of the developer. If the Provider of the material is also the developer, then it clear that his or her agreement to access has already been given and there would thus be no need for this provision. However, if the Provider is not the developer, then the inclusion of this provision would act as a warranty that the material has been provided with the agreement of the developer.

6.1d The text is drawn from Article 12.3f of the Treaty. However, Article 12.3f notes that access to genetic material protected by intellectual and other property rights shall be consistent with relevant international agreements, and with relevant national law. This would not seem to place an obligation on the Provider, but rather on the Recipient. It may therefore be more appropriate to include a provision in clause 7.6 of the draft Standard Material Transfer Agreement. This matter and a possible wording are taken up in the Explanatory Note on clause 7.6.

6.2 Further guidance is needed as to how a reference to Article 12.3h of the Treaty might be reflected in this part of the draft Standard Material Transfer Agreement. Article 12.3h deals with the means of collection of genetic material from *in situ* conditions and provides for the application of relevant national law or such standards as may be set by the Governing Body. A standard approach to this, which would be required for the Standard Material Transfer Agreement, is not, therefore, possible. The issue is one, however, that the Governing Body may wish to consider outside the context of the Standard Material Transfer Agreement.

6.3 – 6.5 Articles 13.2a, 13.2b(i) and 13.2b(iii) of the Treaty place obligations on Contracting Parties and not on parties to the Standard Material Transfer Agreement. From a legal point of view, these matters should more appropriately be reflected in the Preamble to the Standard Material Transfer Agreement, in the same way as the issue of the recognition of

sovereignty has been dealt with (see Explanatory Note on clause 7.1). Such a reference has been included in the draft Preamble, paragraph 1h.

6.6 Article 12.4 provides that where the Recipient passes on genetic material received from the Multilateral System to third parties, the Recipient shall do so only under the terms of the Standard Material Transfer Agreement. Therefore, while this issue relates to the provision of genetic material, it would be more appropriately dealt with under the rights and obligations of the Recipient (see clause 7.8 of the draft Standard Material Transfer Agreement).

7. RIGHTS AND OBLIGATIONS OF THE RECIPIENT

7.1 As noted under General Provisions above, during the meeting of the Expert Group, the Legal Advisor noted that "*in legal terms, the sovereignty of states was not a concept to be introduced into substantive clauses of an MTA, which is a contractual agreement between natural or legal persons. It is more appropriately referred to in the Preamble.*"[9] Such a reference is included in the draft Preamble, paragraph 1d.

7.2 The text is drawn from Article 12.3a of the Treaty.

7.3 One option proposed by the Expert Group was that Article 12.3b be included in the clauses on the rights and obligations of the Recipient. However, Article 12.3b provides for "*access to be accorded expeditiously, without the need to track individual accessions and free of charge, or, when a fee is charged, it shall not exceed the minimal cost involved*". This would appear to be an obligation on the Provider, rather than the Recipient, and suitable language is included in clause 6.1a of the draft Standard Material Transfer Agreement. Where the Recipient passes on genetic material received from the Multilateral System to third parties, the Recipient shall do so only under the terms of the Standard Material Transfer Agreement. In such a case, the Recipient automatically becomes a Provider in terms of clause 6 of the draft Standard Material Transfer Agreement.

7.4 Article 12.3c of the Treaty imposes an obligation upon the Provider and not upon the Recipient. Text reflecting this obligation has therefore been set out in clause 6.1b.

7.5 The text is drawn from Article 12.3d of the Treaty.

7.6 More guidance is required on how this provision might be incorporated in the draft Standard Material Transfer Agreement. One suggestion from the Expert Group was that the provisions of Article 12.3f should be included in this part of the draft Agreement under obligations of the Recipient. Article 12.3f provides that "Access to plant genetic resources for food and agriculture protected by intellectual and other property rights shall be consistent with relevant international agreements, and with relevant national laws." This implies that the rights of intellectual property holders and other property holders as recognized under international agreements and national laws would be protected by this provision, and that the property right holder could therefore impose conditions on the use of the material. If this is a correct interpretation, then a possible wording for the Agreement could be "Genetic material that is supplied under this Agreement and which is protected by intellectual and other property rights shall be used only in a manner that is consistent with relevant international agreements, and with relevant national laws." Such a provision, however, might be seen as going further than the wording of Article 12.3f, as introducing an element of bilateral conditions into the Standard Material Transfer Agreement and running counter to other provisions of Article 12.3, such as Article 12.3b.

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[9] Document CGRFA/IC/MTA-1/04/Rep, paragraph 61, General Provisions, ninth bullet point.

7.7 The text is drawn from Article 12.3g of the Treaty.

One suggestion from the Expert Group on the Terms of the Standard Material Transfer Agreement was that recipients should, upon request, give back a sample of the material, if still available, should it be needed by the provider. It was noted that this might be covered by Article 12.3g, which is the basis of the text proposed for clause 7.7. However it is to be noted that this would require the Standard Material Transfer Agreement to be used, including the benefit sharing provisions of Article 13.2d(ii).

7.8 The text is drawn from Article 12.4 of the Treaty.

7.9 – 7.13 Articles 13.2, 13.2b, 13.2c, 13.2d(i) and 13.2d(ii) of the Treaty place obligations on Contracting Parties and not on parties to the Standard Material Transfer Agreement. See Explanatory Notes on clauses 6.3 – 6.5, and paragraph 1h of the draft Preamble.

7.14 – 7.15 The Expert Group on the Terms of the Standard Material Transfer Agreement identified the following possible options for level, form and manner of monetary benefit sharing:[10]

- An annual payment, which is a fixed percentage of the net sales of propagating material of the product.
- Three alternative options: (a) a practical system, in which a certain percent of annual net sales during the period from the first sale to the end date of the IPR protection is paid; (b) a theoretical system, in which a fixed percent of gross profit should be paid, while such profit is generated; (c) an un-fixed-rate system, in which an amount of payment should be calculated on the basis of licence fees, taking into account the contribution rate of the plant genetic resources for food and agriculture to the end product, and the contribution rate of the end product to the licence fee. This system allows each contractor to the Standard MTA to determine the level of licence fee according to his commercial practices.
- An upfront payment, when incorporating or when offering for sale;
- A fixed percentage of sales.
- An amount proportional to incorporation.
- An amount proportional to the significance/value [of the genetic material incorporated]
- A set percentage of the net sales of the products obtained from using the plant genetic resources for food and agriculture from the multilateral system.
- The natural or legal person holding the license to market a plant genetic resource for food and agriculture accessed through the Multilateral System will pay a fixed percentage of monetary benefits arising from the plant genetic resources for food and agriculture, based on the commercial value of the marketable products produced by the plant genetic resources for food and agriculture.

On the question of whether different levels of payment should be established for various categories of recipients who commercialize such products or for different sectors and, if so, what those levels, various categories of recipients and sectors should be, the Expert Group identified the following options: [11]

- All developers of products using plant genetic resources for food and agriculture from the Multilateral System should pay the same rate.

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[10] Document CGRFA/IC/MTA-1/04/Rep, paragraphs 25 to 32.

[11] Document CGRFA/IC/MTA-1/04/Rep, paragraphs 33 to 42.

- There should be two categories: (1) developing countries; (2) developed countries; and two classes of user: (1) seed-producing institutions – companies that produce seed from plant genetic resources for food and agriculture accessed from the Multilateral System, and restrict its use; and (2) farmers, who would not have to make any payment.
- The following should be exempt from payment: (1) publicly funded research institutes that are engaged in providing access to plant genetic resources for food and agriculture essential for food security in developing countries; (2) recipients engaged in research and development for purposes of technology transfer to small farmers in developing countries; and (3) recipients in developing countries who provide the plant genetic resources for food and agriculture.
- No categories of recipients are needed.
- Three categories: (1) small farmers; (2) publicly funded research institutions; (3) those big businesses that are specialised in research and development. The first two categories should be exempt.
- Four categories: (1) small-holder farmers, who continue traditional breeding; (2) research and development institutes that develop seeds for those small-holder farmers and are not profit-motivated, but are service–driven; (3) commercial breeders who produce seed that is not prevented from flowing to researchers and breeders, as defined in the Treaty; (4) commercial breeders that restrict the seed they produce. The first two categories should not be required to pay, and the two categories of commercial breeders should have different levels of payment.
- As the previous option, but differentiating between developing and developed countries.
- Payments would not be expected, if the amount to be paid falls below a certain threshold level.
- Crops can be divided into two categories for levels of payment: (1) autogamic crops, such as rice; (2) allogamic crops, such as some vegetables; without distinction between public and private sectors.
- All users who hold commercialization licences for the marketing of plant genetic resources for food and agriculture, including all types of plant genetic resources for food and agriculture, whether a variety or any other form of genetic material.

In addition, on the question of whether to exempt small farmers in developing countries and in countries with economies in transition from the payments and, if so, who qualifies as such as a small farmer, the Expert Group identified the following options: [12]

- No farmers will be required to contribute to the Multilateral System. Therefore, there is no need to qualify "farmers". The owner of a technology or variety who restricts its use will be responsible to pay into the Multilateral System a percentage of the royalty received from the commercialization of such a product. Farmers who are owners of such technology will pay. Anybody else, who does not restrict the use of a given technology, is encouraged to contribute on a voluntary basis to the Multilateral System.
- Due to the different levels of economic development in different countries, the concept of "small farmer" varies between countries. The amount of land owned, or the level of income, can be used to classify small farmers. Only those classified as small farmers, on the basis of national legislation, can be exempt from payment.
- Small farmers in developing countries and countries with economies in transition are those (1) who produce predominately to meet family needs and the sale of surpluses to meet other livelihood needs; and (2) exist as a unit that resides on the farm, or near a farming area, managed by the family.

[12] Document CGRFA/IC/MTA-1/04/Rep, paragraphs 43 to 47.

- No category of recipient should be exempt from compulsory monetary benefit-sharing, if they qualify for such payment according to Article 13.2d(ii). There is no need to define "small farmers".
- (1) Small farmers, as defined in the option in [the third bullet point of this paragraph], should be exempt from payment; (2) those who produce primarily for the market should be requested to pay voluntarily; (3) those who control the seed, commercialize it, and prevent access by others should make mandatory payments.

Furthermore, on the question of how will monetary and other benefits be defined, for the purposes of the Standard Material Transfer Agreement, the Expert Group identified the following options:[13]

- Monetary benefits can be defined as a percentage of royalties received by the owner of the technology. Other benefits arising from commercialization could come from donations and voluntary contributions. Other mechanisms, such as educative measures and marketing strategies, linked to conservation of genetic material, could be used as options for contributions.
- (1) A seed company that restricts access should compulsorily pay a percentage of its sales. (2) A seed company that does not restrict access should be encouraged to contribute a certain percentage of its sales. (3) Commercial farmers who are not small farmers (as defined in the option in [third bullet point of the preceding paragraph of the present document]) should also be requested on a voluntary basis to contribute a certain percentage of their sales. (4) Research and development activities for capacity-building should be carried out in a country that contributes to the Multilateral System and that has been identified by the Governing Body as in need of capacity-building. (5) Wherever the research and development for capacity-building takes place, there should be participation of experts from countries that need capacity-building, as identified by the Governing Body. (6) When so requested, free or facilitated access to improved varieties should be provided.
- One of the ways by which benefits are to be defined is through cash payments to the providers of plant genetic resources for food and agriculture, to support the management and use of the plant genetic resources for food and agriculture of the relevant communities.
- For the purposes of Article 13.2d, the benefits of commercialization upon which a payment to the Multilateral System should be based are defined as a percentage of net revenue received from the sale, lease or licence of a product derived from plant genetic resources for food and agriculture accessed from the Multilateral System.
- For the purposes of the Standard Material Transfer Agreement, monetary and other benefits are to be considered according to Article 13.2d(ii). This means that the Standard Material Transfer Agreement can only encompass, on a compulsory basis, monetary benefits in line with Article 13.2d(ii).
- One of the options for other benefits of commercialization could be equity in the share-holding of a product, through, for example, joint ventures, arising from improvements in the plant genetic resources for food and agriculture accessed from the Multilateral System, in accordance with Article 13.2d(ii).

Further guidance is required on the above issues before they can be translated into text for the draft Standard Material Transfer Agreement.

7.16 The Expert Group discussed the issue of when a product would be considered to be available without restriction to others for further research and breeding.[14] The concept of being "available

[13] Document CGRFA/IC/MTA-1/04/Rep, paragraphs 48 to 53.

[14] Document CGRFA/IC/MTA-1/04/Rep, paragraphs 18 to 24.

without restriction" will need to be clarified. This could be done in this section of the Standard Material Transfer Agreement, as in this draft, or it could be presented as a definition in clause 3 of the draft Standard Material Transfer Agreement.

7.17 One option proposed by the Expert Group was that Article 12.6 be included in this part of the Standard Material Transfer Agreement. However, this Article provides for Contracting Parties, rather than parties to the Standard Material Transfer Agreement, to provide facilitated access to appropriate plant genetic resources for food and agriculture in emergency disaster situations. There is no provision in the Treaty that would place an obligation on natural or legal persons to provide facilitated access in emergency disaster situations. However, in many cases plant genetic resources for food and agriculture will be passing from Contracting Parties to natural or legal persons. The Governing Body may therefore wish to consider the question whether the Contracting Parties should take measures to ensure that this obligation is passed on to such natural and legal persons. A related issue on return of a sample of material to the Provider in considered in the Explanatory Note to clause 7.7.

8. INTERPRETATION (APPLICABLE LAW/JURISDICTION)

8.1 The text reflects the suggestion made by the Expert Group on the Terms of the Standard Material Transfer Agreement, which referred to General Principles of Law[15], the International Treaty, and decisions of the Governing Body. This suggestion is linked to the option of international arbitration. The Legal Office advises that there are dangers of divergences in the interpretation of the obligations under the Standard Material Transfer Agreement if a reference was to be made to national law and courts. The suggested draft of clause 8.1 would also allow for a greater position of influence for the Governing Body itself in the development of interpretations. No other options were put forward at the Expert Group. However it would seem implicit in the option put forward by the Expert Group of recourse to an internal legal forum that the possibility of using national law was also to be envisaged. In the event that the application of national law is considered, then it would be necessary to consider whether this should be the law of the country of the Provider, the law of the country of the Recipient or some other law.

9. DISPUTE RESOLUTION/SETTLEMENT

9.1 The Expert Group on the Terms of the Standard Material Transfer Agreement identified a number of options: that dispute settlement may only be initiated by the Provider or the Recipient of the genetic material, or that this may also be initiated by interested natural or legal persons. The Expert Group also put forward a similar option in slightly different wording: "Third parties should be able to initiate dispute settlement". In this context, the Legal Advisor to the Expert Group noted that "*because there are third party beneficiaries under the MTA, through the Multilateral System, it may be advantageous to allow for them to be represented in dispute settlement, which would be easier in international arbitration*".[16] The alternative texts set out in clause 9.1 reflect these various options. If it is decided to allow interested natural and legal persons to initiate dispute settlement, it may be necessary to define what is meant by "interested natural or legal persons". If it is decided to provide for the initiation of dispute settlement by a person duly appointed to represent the interests of third party beneficiaries under the Agreement, then it would

[15] Reference to General Principles of Law to the exclusion of national laws is standard usage in the case of arbitration clauses in agreements entered into by organizations of the United Nations system. Reference is also made to General Principles of Law in the model International Chamber of Commerce arbitration clause. In the ICC context, explicit reference is also made to the UNIDROIT Principles of International Commercial Contracts. See www.unidroit.org.

[16] Document CGRFA/IC/MTA-1/04/Rep, paragraph 61, 9, Dispute Resolution/Settlement, eighth bullet point.

be necessary to define the body that would appoint such person and the context in which that person would be empowered to act.

9.2 The Expert Group on the Terms of the Standard Material Transfer Agreement identified two main options for dispute resolution/settlement: reference to arbitration or reference to national courts. This view was endorsed by the Legal Advisor to the Expert Group, who explained that "*there are two possible ways of dispute settlement, both of which are legally valid under the Treaty. The first of these is reference to national courts or other national legal forums. The second of these is arbitration, including international arbitration. A question to be considered is whether it is desirable to have a number of divergent legal opinions coming from national authorities. International Arbitration would make possible a more consistent interpretation.*"[17] The Legal Advisor further noted that "*it was up to the Contracting Parties to decide the opportunities for recourse to be made available, including both resort to national courts and arbitration. For the Contracting Parties, in the exercise of their sovereign rights, to provide for binding international arbitration, would not, in his opinion, be contrary to the provisions of Article 12.5. In any case, it would still be open to parties to the MTA to have recourse to national courts to enforce international arbitration decisions, should this prove necessary*."[18]

If it is decided to provide for recourse through national courts, it would be necessary to identify whether this should be through the national courts of the Provider or the Recipient.

9.3 – 9.4 One option identified by the Expert Group was that the compliance procedures of Article 21 and the dispute settlement procedures of Article 22 should be taken into account when establishing the dispute resolution/settlement procedures of the Standard Material Transfer Agreement. However, Articles 21 and 22 relate to compliance by Contracting Parties with their obligations under the Treaty, and the settlement of disputes between Contracting Parties respectively. They do not relate to compliance, by parties to the Standard Material Transfer Agreement, with their obligations under the Standard Material Transfer Agreement.

10. ADDITIONAL ITEMS

Warranty

10.1 The text is drawn from the material transfer agreement currently used by the International Agricultural Research Centres of the CGIAR.

Duration of Agreement

10.2 The Expert Group on the Terms of the Standard Material Transfer Agreement suggested the inclusion of a time-frame for the Standard Material Transfer Agreement.

Entire Agreement

10.3 The Expert Group on the Terms of the Standard Material Transfer Agreement suggested the inclusion of a clause which made clear that the Standard Material Transfer Agreement was the entire agreement between the Provider and the Recipient.

[17] Document CGRFA/IC/MTA-1/04/Rep, paragraph 61, 9. Dispute Resolution/Settlement, first bullet point.

[18] Document CGRFA/IC/MTA-1/04/Rep, paragraph 61, 9. Dispute Resolution/Settlement, fifth bullet point.

Guarantor

10.4 One suggestion from the Expert Group on the Terms of the Standard Material Transfer Agreement was that a guarantor should be identified to ensure that the Recipient met their obligations. It is not clear how this might be introduced into the Standard Material Transfer Agreement. It would be necessary to identify who, or which institution, should act as guarantor. In this context, the possibility of a person being appointed by some institution of the Treaty to initiate dispute settlement proceedings to protect the interest of the Multilateral System as a third party beneficiary under the Standard Material Transfer Agreement (see discussion in the Explanatory Note to clause 9.1) would appear to encompass at least some aspects of the concept of a guarantor. More guidance is required on this.

Following the Material

10.5 One suggestion from the Expert Group on the Terms of the Standard Material Transfer Agreement was that the issue of how material will be followed may need to be addressed in the Standard Material Transfer Agreement. Any further consideration of this issue will need to take into account the provisions of Article 12.3 b of the Treaty states that "*Access shall be accorded expeditiously, without the need to track individual accessions ...*".

Return of Sample to Provider

10.6 See *Explanatory Note* to clause 7.7.

OTHER POSSIBLE ADDITIONAL ITEMS NOT IDENTIFIED BY THE EXPERT GROUP MIGHT INCLUDE:

Notice

This could set out the name and address of the Provider and Recipient to which any notice or other document can be served, should this be necessary at a date after the supply of the plant genetic resources for food and agriculture.

Force majeure

This might set out any necessary actions should either Party to the Agreement be unable to comply with its terms for reasons beyond its control. Such actions could include notification of a *force majeure* event and its impact on the Party's ability to comply with the Agreement to the other Party.

Assignment

This could specify the extent, if at all, to which the rights or the obligations under the Standard Material Transfer Agreement may be assigned or transferred.

Liability in law

It may be appropriate to include a provision excluding or limiting the liability of the Provider of plant genetic resources for food and agriculture under the Multilateral System for eventual damages caused by the material.