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**SECOND MEETING OF THE CONTACT GROUP FOR THE DRAFTING OF  
THE STANDARD MATERIAL TRANSFER AGREEMENT**

**Alnarp, Sweden, 24-28 April 2006**

**THIRD PARTY BENEFICIARY, INCLUDING IN THE CONTEXT  
OF ARBITRATION**

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## I. INTRODUCTION

1. This Information Document has been prepared by the FAO Legal Office.
2. The Contact Group for the drafting of the Standard Material Transfer Agreement adopted the First Draft Standard Material Transfer Agreement on 25 July 2005<sup>1</sup>.
3. Under Article 12.5 of the Treaty, the Contracting Parties recognize that obligations arising under the Standard Material Transfer Agreement rest exclusively with the parties to the material transfer agreement<sup>2</sup>. As such, the Contact Group generally agreed that the Contracting Parties are not responsible for the enforcement of the Standard Material Transfer Agreement. It also recognised that Providers may have neither the capacity nor the willingness to monitor and/or enforce compliance by Recipients with the terms of the Standard Material Transfer Agreement, given that the benefits flow to the Multilateral System rather than to the Provider.
4. Having identified this problem and in its attempts to resolve it, the Contact Group looked first at the concept of agency. The Contact Group was of the opinion that, while such an approach would in principle be compatible with the Treaty it might not be practical<sup>3</sup>. The Contact Group then attempted to resolve the problem through the concept of “Third Party Beneficiary”, i.e. a person empowered with certain legal rights to protect the interests of the Multilateral System under the Standard Material Transfer Agreement.
5. This Information Document seeks to clarify a number of legal aspects regarding the inclusion of the concept of the Third Party Beneficiary in the Standard Material Transfer Agreement. In particular, it seeks to address two basic questions:
  - a. What institution should constitute the Third Party Beneficiary?
  - b. What provisions should be included in the draft Standard Material Transfer Agreement to accommodate a role for the Third Party Beneficiary?

## II. BACKGROUND

### **The concept of the Third Party Beneficiary in the International Treaty**

6. The expression “Third Party Beneficiary” is not to be found in the Treaty. Nevertheless the underlying concept is clearly established in the provisions dealing with the Multilateral System and the Standard Material Transfer Agreement. Under Article 12.4 of the Treaty, facilitated access is to be provided pursuant to a Standard Material Transfer Agreement. The Standard Material Transfer Agreement is to be between the Provider of the

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<sup>1</sup> CGRFA, 'Report of the Contact Group for the Drafting of the Standard Material Transfer Agreement', *CGRFA/IC/CG-SMTA-1/05 Rep* (Hammamet, 2005). Tunisia, 25 July 2005. See at <ftp://ext-ftp.fao.org/ag/cgrfa/cgmtal/smtalrepe.pdf>

<sup>2</sup> “Contracting Parties shall ensure that an opportunity to seek recourse is available, consistent with applicable jurisdictional requirements, under their legal systems, in case of contractual disputes arising under such MTAs, recognizing that obligations arising under such MTAs rest exclusively with the parties to those MTAs.”

<sup>3</sup> Defining the Provider as an Agent for the Third Party Beneficiary would give the latter the right to initiate dispute settlement proceedings. This would address the problem concerning the capacity or willingness of Providers to monitor and/or enforce compliance by Recipients with the terms of the Standard Material Transfer Agreement. However, it could also lead to the Third Party Beneficiary being held responsible for all of the obligations of the Provider under Article 6 of the First Draft Standard Material Transfer Agreement.

plant genetic resources for food and agriculture and the Recipient of those resources. The benefits under the Standard Material Transfer Agreement, including the monetary benefits on commercialisation, are not to flow to the individual Provider, but to the Multilateral System itself, for the ultimate benefit of farmers in all countries who conserve and sustainable use plant genetic resources for food and agriculture. In this sense the role of the Multilateral System as a Third Party Beneficiary under the Standard Material Transfer Agreement is expressly provided for in the Treaty.

7. The concept of a Third Party Beneficiary is, therefore, implicit in the Treaty. However, Article 12.5 provides that: “*Contracting Parties shall ensure that an opportunity to seek recourse is available, consistent with applicable jurisdictional requirements, under their legal systems, in case of contractual disputes arising under such MTAs, recognizing that obligations arising under such MTAs rest exclusively with the parties to those MTAs.*” The question thus arises as to whether Article 12.5 would in any way preclude the bringing of an action by or on behalf of a Third Party Beneficiary.

8. The answer to this question would appear to be no. From a literal, if somewhat narrow, interpretation of the wording of Article 12.5, the restriction would apply only to “obligations” arising out of the Standard Material Transfer Agreement, and not “rights” arising out of those agreements. This is consonant with the general principles of contract law, under which the doctrine of “privity of contract” precludes the creation of obligations on the part of non-parties to a contract, although it would not necessarily preclude the creation of rights for third parties. This interpretation is also consonant with the objectives of the Treaty: it would hardly be consistent for the Treaty to create Third Party Beneficiary rights under the Standard Material Transfer Agreement but at the same time to preclude the enforcement of those rights.

9. Given that the concept of a Third Party Beneficiary is implicit in the Treaty and that the right of the Third Party Beneficiary to enforce its rights is not precluded by the wording of the Treaty, what remains to be determined is how the rights accorded to the Third Party Beneficiary under the Standard Material Transfer Agreement may be enforceable in practice.

### **The concept of third party beneficiary rights in national law**

10. Under normal principles of contract law, a contract binds only the parties to that contract, and creates rights only for those parties. This is known as the doctrine of “privity of contract”. It is in particular recognised that a contract cannot ever create legal obligations that are binding on a third party without his consent.

11. However, national contract law in many countries increasingly recognises that there are instances in which a contract may bestow rights on a third party<sup>4</sup>. An example would be where the parties to a contract agree among themselves to make a gift to a third party, or create an insurance in which the beneficiary is a third party to the insurance contract.

12. Under English law, for example, the general rule under common law was until recently that of the privity of contract, although there were cases, notably in the area of so-called trusts of the promise and cases of agency where such rights were recognised<sup>5</sup>. In 1999, new legislation was introduced in UK which specifically recognized third party rights<sup>6</sup>.

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<sup>4</sup> This is the case, for example in almost all states of the USA (see Corbin on Contracts, sections 772-781).

<sup>5</sup> See THE UK LAW COMMISSION, 'Privity of Contract: Contracts for the Benefits of Third Parties', (1996), Rep. No. LC242. See at <http://www.lawcom.gov.uk/docs/lc242.pdf>

<sup>6</sup> See Contracts (Rights of Third Parties) Act 1999

13. More generally speaking, where national systems of contract law recognise the enforceability of third party beneficiary rights, they will do so only where it is clearly the intention of the parties to create such legally enforceable rights, and where these rights and the legal holder of these rights are clearly defined in the contract.
14. The possibility for a contract to provide for enforceable third party beneficiary rights, however, is expressly and unambiguously recognised in the UNIDROIT Principles of International Commercial Contracts 2004<sup>7</sup>.
15. In view of the somewhat uncertain, and uneven, state of national law with respect to the enforcement of third party beneficiary rights, it is strongly recommended that, if the concept of the Third Party Beneficiary is to be introduced into the Standard Material Transfer Agreement, reference be made in Article 8 of the draft Standard Material Transfer Agreement, which is about the choice of applicable law of the contract, to a formula such as

*“... general principles of law as reflected in the UNIDROIT Principles of International Commercial Contracts ...”*<sup>8</sup>.

### **Relevant text of the First Draft Standard Material Transfer Agreement**

16. The First Draft Standard Material Transfer Agreement includes possible provisions regarding the Third Party Beneficiary in four articles. Under “General Provisions”, Article 5.2 states:

*[“The parties to this Agreement agree that the (legal person representing the Governing Body) as a third party beneficiary, has the right to monitor the execution of this Agreement and to initiate dispute resolution procedures in accordance with Article 9.2, in the case of a breach of this Agreement.”]*

Under “Rights and Obligations of the Provider”, Article 6.1(e) states:

*[“The provider shall notify the Third Party Beneficiary of the name and address of the parties, the Material transferred and the dates of the Agreement.”]*

Under “Rights and Obligations of the Recipient”, Article 7.4 states:

*[“In the case that the Recipient obtains an intellectual property right on a Product that contains any genetic material or components received from the Multilateral System under this Agreement, the recipient will disclose this fact to the Third Party Beneficiary.”]*

Under “Dispute Resolution/Settlement”, Article 9.1 states:

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<sup>7</sup> Article 5.2.1 of section 2 of the UNIDROIT Principles of International Commercial Contracts 2004, entitled “Contracts in favour of third parties”, provides as follows: “(1) The parties (the “promisor” and the “promisee”) may confer by express or implied agreement a right on a third party (the “beneficiary”). (2) The existence and content of the beneficiary’s right against the promisor are determined by the agreement of the parties and are subject to any conditions or other limitations under the agreement.” Article 5.2.2, entitled “Third party identifiable”, provides that “The beneficiary must be identifiable with adequate certainty by the contract but need not be in existence at the time the contract is made.”. See UNIDROIT Principles of International Commercial Contracts 2004 at <http://www.unidroit.org/english/principles/contracts/principles2004/blackletter2004.pdf>

<sup>8</sup> In any case such a choice of law clause may be in line with the normal provisions applicable to contracts in which an international organization may be called upon to invoke arbitration proceedings.

*“Dispute settlement may [only] be initiated by the Provider or the Recipient[ or a person duly appointed to represent the interests of third party beneficiaries under this Agreement][ but acknowledge that this does not preclude the Governing Body from taking any action it deems appropriate if it considers that this Agreement has been breached].”*

In addition, the title of Article 9 is footnoted with the comment:

*“There may be a need to consider locus standi for the Third Party Beneficiary in this Article.”*

17. These different provisions in the First Draft Standard Material Transfer Agreement confer both monitoring and *locus standi* rights on “*the Third Party Beneficiary*”.

18. It will be seen from the Articles quoted in paragraph 15 above that there is inconsistent use of capital letters for the term “Third Party Beneficiary”, while Article 9.1 also uses to the term in the plural. This may simply reflect the fact that the draft is “work in progress” and, in this context, it is of note that there is inconsistency in the use of capital letters for a number of other terms in the First Draft Standard Material Transfer Agreement, including “Provider” and “Recipient”. Alternatively, it may mean that the Contact Group had in mind more than one Third Party Beneficiary. On the one hand, this might include the Multilateral System, as the first recipient of monetary benefits arising out of the Standard Material Transfer Agreement. On the other hand, the “*interests of third party beneficiaries*” recognized in Article 9.1 of the First Draft Standard Material Transfer Agreement, could be taken to refer to a broad category of subjects<sup>9</sup>, including Recipients, who will directly benefit from the facilitated access under the Multilateral System, and those who should receive monetary benefit-sharing under the funding strategy<sup>10</sup>.

19. However, this document only considers the issue from the point of view of the “Third Party Beneficiary”, intended as the legal person empowered to judicially enforce individual material transfer agreements with a view to ensuring the proper functioning of the Multilateral System. The “Third Party Beneficiary” is therefore considered as the legal person acting on behalf of the Governing Body in the context of the Standard Material Transfer Agreement dispute settlement mechanisms.

<sup>9</sup> In the Explanatory Notes to the First Draft Standard Material Transfer Agreement, the Expert Group put forward the following option: “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”. CGRFA “Explanatory Notes to the First Draft Standard Material Transfer Agreement”, CGRFA/IC/CG-SMTA-1/05/2 Add. 1 (Hammamet 2005). See at <ftp://ext-ftp.fao.org/ag/cgrfa/cgmta1/smta1w2a1e.pdf>

<sup>10</sup> See for example Article 18, subparagraph 5 of the Treaty: “*The Contracting Parties agree that priority will be given to the implementation of agreed plans and programmes for farmers in developing countries, especially in least developed countries, and in countries with economies in transition, who conserve and sustainably utilize plant genetic resources for food and agriculture.*” Specifically, Moore noted that “the payment required to be made by recipients of plant genetic resources under the Standard Material Transfer Agreement who commercialize a product incorporating plant genetic resources for food and agriculture access from the Multilateral System, where restrictions are placed on the future availability of the material for further research and breeding” constitute a clear example of third party beneficiary rights. Gerald Moore (2005), International Arbitration, Background Study Paper No. 25, p.11. See at <ftp://ext-ftp.fao.org/ag/cgrfa/BSP/bsp25e.pdf>

### III WHAT INSTITUTION CAN CONSTITUTE THE THIRD PARTY BENEFICIARY?

20. In general terms, the Third Party Beneficiary can be identified as being the Multilateral System<sup>11</sup>. However, in legal terms, this is not enough, since the Multilateral System does not have any legal personality and thus could not appear in court to enforce its rights. In legal terms, the Third Party Beneficiary must be a legal entity that has the capacity to take legal action.

21. Similarly, the Governing Body of the Treaty, which oversees the operation of the Multilateral System, also lacks its own separate legal personality. The Treaty, and hence its Governing Body, is established under Article XIV of the FAO Constitution and the FAO Council has determined that such bodies do not have their own legal personality and must draw on the legal personality of FAO<sup>12</sup>. As a consequence, the Governing Body does not have the capacity to undertake *directly* certain legal actions in its own name, including the initiation of legal action in courts or tribunals.

22. There are, consequently, two options available to the Governing Body with regard to which institution might constitute the Third Party Beneficiary: the FAO; or a new legal entity established specifically for this purpose.

#### **FAO as the Third Party Beneficiary**

23. The fact that the Governing Body does not have the capacity to undertake *directly* legal action does not represent, *per se*, a problem. Contracting Parties acting as the Governing Body of the Treaty are sovereign and could ask FAO, which does possess its own legal personality and capacity to sue, to undertake the required actions on its behalf. Indeed this is the normal way in which Article XIV bodies operate in the context of the FAO Constitution.

24. For FAO to take on the responsibility of acting on behalf of the Governing Body, as Third Party Beneficiary, in protecting the interests of the Multilateral System under the Standard Material Transfer Agreement would require the agreement of the Director-General.<sup>13</sup> Taking on this responsibility would be subject to certain preconditions regarding the way, and forums, in which this responsibility would be exercised. For example, it may be difficult for the Organization to undertake to bring actions in national courts, which would require the Organization to renounce its immunity. FAO, on the contrary, would be able to accept international arbitration, as it and other international organizations normally do for the settlement of disputes.

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<sup>11</sup> One could also identify “farmers of all countries etc.” as being the ultimate beneficiaries of the Standard Material Transfer Agreement. However, in the interests of legal certainty, as noted above, it is probably not prudent to look beyond the Multilateral System itself. In this sense the Multilateral System would act as a trustee for the ultimate benefit of the farmers of all countries.

<sup>12</sup> Moreover, no provision is made in the Treaty for the Governing Body to have its own legal personality under international law.

<sup>13</sup> Conventions and agreements establishing bodies under Article XIV of the FAO Constitution, such as the Governing Body of the Treaty, are adopted by the Conference or the Council of FAO. The legal status of such bodies has to be seen in such a way as to reconcile their requirement of functional autonomy with the fact that they are placed under and operate within the framework of FAO. Such bodies take advantage of acting through FAO or drawing on the legal capacity of FAO. FAO therefore has the ultimate formal responsibility for the legal acts of the Governing Body. In cases where decisions of the Governing Body to undertake legal action have implications for the Organization as a whole and its membership at large, such decisions are to be reported to the Organization, which should be given an adequate opportunity to express its view.

### **Establishment of a new legal entity as Third Party Beneficiary**

25. A new legal entity could be established for the purpose of carrying out the functions of the Third Party Beneficiary as an independent international organization. In this case, FAO would not be held responsible for the enforcement of the Standard Material Transfer Agreement and the international organization, or enforcement agency, would operate under its own specific mandate. The legal steps that would be required to establish such an enforcement agency are the following:

- a) The drafting of an Establishment Agreement;
- b) The drafting of a Constitution; and
- c) The Drafting of a Relationship Agreement between the enforcement agency and the Governing Body of the Treaty.

26. Although this option is theoretically feasible, there are a number of reasons that would support retaining the role within FAO. First, the establishment of a separate enforcement agency with international legal personality would face immediate costs (e.g. set-up and staffing costs). Second, even if all Contracting Parties were willing to join the new organization, the process of ratification could take considerable time. Third, non-Contracting Parties might not necessarily accept the intervention of an outside enforcement agency, while the actions of FAO mandated by the Governing Body would be beyond question.

## **IV. HOW MIGHT THE STANDARD MATERIAL TRANSFER AGREEMENT BE DRAFTED TO ACCOMMODATE A ROLE FOR THE THIRD PARTY BENEFICIARY?**

### **Definition of the Third Party Beneficiary**

27. It will be important to be clear in the identification of the organization appointed to exercise the third party beneficiary rights. One possible way would be to introduce a definition of the “Third Party Beneficiary” into Article 3 of the draft Standard Material Transfer Agreement. However, such a definition may not be necessary, and indeed may serve only to complicate the Standard Material Transfer Agreement. It may be simpler and more understandable to jump straight to the statement of the rights of dispute settlement and monitoring in which it can be clearly stated who will be exercising those rights.

28. From a legal point of view, it may be clearer to deal separately with dispute settlement and monitoring. In practice, of course, the two will inevitably be linked, in that certain powers of monitoring may be necessary to support the initiation of legal action.

### **The rights of the Third Party Beneficiary to initiate dispute resolution/settlement**

29. One possible approach could be to introduce the following wording into Article 9 of the draft Standard Material Transfer Agreement, possibly as paragraph 9.1.bis:

“9.1.bis. [FAO<sup>14</sup>], acting on behalf of the Governing Body of the Treaty and its Multilateral System, as third party beneficiary under this Agreement, shall have the right to initiate dispute settlement procedures under this Article to protect the rights set out in Paragraph 1(ter) of this Article.”

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<sup>14</sup> Or other body appointed to exercise the rights of the third party beneficiary.

This paragraph would then replace the option reflected in existing Article 9.1<sup>15</sup> It would also replace Article 5.3(b). Article 5.3 could then deal only with monitoring rights.

**The rights the Third Party Beneficiary may be empowered to protect through dispute settlement**

30. The Standard Material Transfer Agreement must also be clear about the rights the Third Party Beneficiary may be empowered to initiate legal action to protect. In the case of the obligation to make monetary payments to the Multilateral System in accordance with Article 7.10 of the First Draft Standard Material Transfer Agreement, the Provider has no interest in enforcing the obligation of the Recipient. The Third Party Beneficiary rights to be protected should, therefore, include this as a minimum. However, there may be cases where the interests of the Provider and the Third Party Beneficiary overlap, such as the provisions regarding intellectual property rights (Article 7.2 of the First Draft Standard Material Transfer Agreement) or other aspects of facilitated access. The Contact Group may wish to consider whether the rights of the Third Party Beneficiary should be extended to such issues. On a similar note, the Contact Group may also wish to consider the enforcement of monitoring rights of the Third Party Beneficiary (see paras. from 32 to 36 below).

31. To reflect this, a new Article 9.1.ter could be introduced into the Draft Standard Material Transfer Agreement as follows:

*“9.1.ter. The rights in respect of which [FAO<sup>16</sup>] may initiate dispute settlement procedures under paragraph 1bis of this Article shall be as follows:*

- a. The right to receive mandatory payments under Article \*\* of this Agreement; and*
- b. The monitoring rights under Article \*\* of this Agreement; and*
- c. \*\*\*”*

**Monitoring rights**

32. In order that it may monitor compliance with the particular obligations that it is empowered to protect, it may be necessary to establish a mechanism to ensure the flow of information about individual material transfer agreements to the Third Party Beneficiary.

33. The First Draft Standard Material Transfer Agreement contains provisions that provide for the flow of information from the Provider<sup>17</sup> and the Recipient<sup>18</sup> to the Third Party Beneficiary: the fulfilment of these obligations should ensure the continuous flow of information about individual material transfer agreements, which can form the basis for monitoring. Following the logic of the suggestion made above in paragraph 27, the reference to “the Third Party Beneficiary” in both cases could be replaced by a reference to [FAO<sup>19</sup>].

<sup>15</sup> i.e. the words “ or a person duly appointed to represent the interests of third party beneficiaries under this Agreement”

<sup>16</sup> Or other body appointed to exercise the rights of the third party beneficiary

<sup>17</sup> Article 6 of the First Draft Standard Material Transfer Agreement states:

*“[(e) The provider shall notify the Third Party Beneficiary of the name and address of the parties, the Material transferred and the date of the Agreement.]”*

<sup>18</sup> Article 7 the First Draft Standard Material Transfer Agreement states:

*“[7.4 In the case that the Recipient obtains an intellectual property right on a Product that contains any genetic material or components received from the Multilateral System under this Agreement, the recipient will disclose this fact to the Third Party Beneficiary.]”*

<sup>19</sup> Or other body appointed to exercise the rights of the third party beneficiary.

34. Another provision having the function of ensuring the flow of information on individual material transfer agreements to the Governing Body is contained in paragraph 2 of *Appendix 2* of the First Draft Standard Material Transfer Agreement<sup>20</sup>, which states:

*“[2. 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 [Gross income from][Net 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, and the amount of the payment due[, in conformity with Articles 7.10 and 10.4].”*

35. Again, following the same logic, the reference to “the Governing Body” could be substituted by a reference to [FAO<sup>21</sup>].

36. In the case of the Third Party Beneficiary under the Standard Material Transfer Agreement, it may also be necessary to provide for certain powers to request further information from the recipient, and perhaps also from the Provider under the Standard Material Transfer Agreement, in order to give the Third Party Beneficiary some standing with the parties themselves. The basis for these rights is already set out in Article 5.2 and 5.3 of the First Draft Standard Material Transfer Agreement. In line with the logic suggested above, these provisions could be redrafted to read as follows:

*“[5.2 The parties to this Agreement agree that [FAO<sup>22</sup>], acting on behalf of the Governing Body of the Treaty and its Multilateral System, as third party beneficiary under this Agreement, shall have the right to monitor the execution of this Agreement.*

*5.3 The monitoring rights referred to in Article 5.2 include but are not limited to, rights to request samples of any Product from the Provider and the Recipient, and information relating to the execution of their obligations under articles 6.1 and 7.1, 7.2, 7.4, 7.5, 7.6, 7.7, 7.10, 7.11 and 7.13, including statements of account.”]*

### **The locus standi of the Third Party Beneficiary and the appropriateness of choosing arbitration for dispute settlement**

37. This issue relates to the right of the Third Party Beneficiary as a litigant to act or be heard<sup>23</sup>. Ultimately and independently from the considerations connected to the juridical personality of the Third Party Beneficiary, the *locus standi* for the Third Party Beneficiary will be determined by the law applicable to the Standard Material Transfer agreement, and to the dispute settlement procedures set out in that agreement.

38. With respect to the choice of applicable law for the entire Standard Material Transfer Agreement, reference has already been made for the desirability of choosing, among other sources of applicable law, the “*general principles of law as reflected in the UNIDROIT Principles of International Commercial Contracts*”, which clearly recognize the rights of third parties.

<sup>20</sup> See Document: CGRFA/IC/CG-SMTA-1/05/REPORT <ftp://ext-ftp.fao.org/ag/cgrfa/cgmta1/smta1repe.pdf>

<sup>21</sup> Or other body appointed to exercise the rights of the third party beneficiary.

<sup>22</sup> Or other body appointed to exercise the rights of the third party beneficiary.

<sup>23</sup> The latin terms ‘*locus standi*’ are incorporated in the First Draft of the Standard Material Transfer Agreement. In this document, they are utilized in their descriptive meaning. It may be advisable not to insert them in the final text of the Standard Material Transfer Agreement and apply modern legal terminology (e.g. ‘standing’).

39. With respect to the procedural law governing dispute settlement, the flexibility that international arbitration offers may be an advantage.<sup>24</sup> For example, the 1998 Rules of Arbitration of the International Chamber of Commerce allow parties to determine the rules of proceedings to be applied to the dispute (article 15) thus leaving ample room to the parties of a Material Transfer Agreement to recognize the standing of a Third Party Beneficiary to be a claimant under the dispute resolution procedure<sup>25</sup>. A possible arbitration clause to be inserted in Article 9.2(c) of the draft Standard Material Transfer Agreement could read as follows:

*"(c) If not resolved by mediation, all disputes arising out of or in connection with the present Agreement shall be finally settled under the Rules of Arbitration of [the International Chamber of Commerce<sup>26</sup>] by one or more arbitrators appointed in accordance with the said Rules."*

40. With regard to the standing of the Third Party Beneficiary, a possible form of wording that could be included as Article 9.3 in the draft Standard Material Transfer Agreement to make it clear could be as follows:

*"9.3 The Parties hereby agree that [FAO<sup>27</sup>] shall have standing to sue in any arbitration proceedings brought under this Article in accordance with this Agreement."*

41. For the benefit of the Contact Group, the various suggested text changes to the First Draft Standard Material Transfer Agreement have been summarised in the Appendix to this document.

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<sup>24</sup> For an explanation of the advantages that arbitration presents in the context of the Standard Material Transfer Agreement, see Gerald Moore (2005), cit. at footnote no. 9.

<sup>25</sup> See *Rules of Arbitration of the International Chamber of Commerce* at <http://www.iccwbo.org/court/english/arbitration/rules.asp>

<sup>26</sup> Or any other arbitration body that will be chosen.

<sup>27</sup> Or other body appointed to exercise the rights of the third party beneficiary.

## APPENDIX

## THIRD PARTY BENEFICIARY

POSSIBLE TEXT FOR INCLUSION IN THE FIRST DRAFT STANDARD  
MATERIAL TRANSFER AGREEMENT

This appendix summarizes the suggested changes to the First Draft Standard Material Transfer Agreement in order to reflect the role of the Third Party Beneficiary. New text is indicated in bold.

Article 5 GENERAL PROVISIONS

- Replace Article 5.2 and Article 5.3(a) with the following text:

**“5.2 The parties to this Agreement agree that [FAO], acting on behalf of the Governing Body of the Treaty and its Multilateral System, as third party beneficiary under this Agreement, shall have the right to monitor the execution of this Agreement.**

**5.3 The monitoring rights referred to in Article 5.2 include but are not limited to, rights to request samples of any Product from the Provider and the Recipient, and information relating to the execution of their obligations under articles 6.1 and 7.1, 7.2, 7.4, 7.5, 7.6, 7.7, 7.10, 7.11 and 7.13, including statements of account.”**

- Delete Article 5.3(b)

Article 8 APPLICABLE LAW INTERPRETATION

- Replace Article 8.1 (Option 2) with the following text:

**“The applicable law shall be general principles of law as reflected in the UNIDROIT Principles of International Commercial Contracts, taking into account the objectives and relevant provisions of the International Treaty on Plant Genetic Resources for Food and Agriculture.”**

Article 9 DISPUTE RESOLUTION/SETTLEMENT

- Delete the words *“or a person duly appointed to represent the interests of third party beneficiaries under this Agreement”* in Article 9.1.

- Insert Article 9.1.bis:

**“9.1.bis. [FAO], acting on behalf of the Governing Body of the Treaty and its Multilateral System, as third party beneficiary under this Agreement, shall have the right to initiate dispute settlement procedures under this Article to protect the rights set out in Paragraph 1(ter) of this Article.”**

- Insert Article 9.1.ter:

**“9.1.ter. The rights in respect of which [FAO] may initiate dispute settlement procedures under paragraph 1bis of this Article shall be as follows:**

- a. **The right to receive mandatory payments under Article \*\* of this Agreement; and**
- b. **The monitoring rights under Article \*\* of this Agreement; and**
- c. **\*\*\*”**

➤ Replace Article 9.2(c) with the following text:

**“(c) If not resolved by mediation, all disputes arising out of or in connection with the present Agreement 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.”**

➤ Insert Article 9.3:

**“9.3 The Parties hereby agree that [FAO] shall have standing to sue in any arbitration proceedings brought under this Article in accordance with this Agreement.”**