



The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



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Item 12.1 of the Provisional Agenda

FOURTH SESSION OF THE GOVERNING BODY

Bali, Indonesia, 14 – 18 March 2011

REPORT OF THE CHAIR OF THE *AD HOC* THIRD PARTY BENEFICIARY COMMITTEE

Note by the Secretary

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- i) *By Resolution 5/2009, the Governing Body adopted the Procedures for the Operation of the Third Party Beneficiary (Third Party Beneficiary Procedures), and requested the Secretary to develop operational guidelines for the commencement and management of amicable dispute resolution and mediation proceedings under the Third Party Beneficiary Procedures in order to promote the effective functioning of the Third Party Beneficiary.*
- ii) *The Governing Body also decided that the Ad Hoc Third Party Beneficiary Committee would reconvene in the biennium 2010-2011 in order to review and finalize the operational guidelines, for adoption by the Governing Body at this Fourth Session. The Committee held its meeting from 7 – 8 October 2010.*
- iii) *The present document contains the Report of the Chair of the Committee, Mr Javad Mozafari Hashjin, outlining the work of the Committee, as well the outputs of the meeting including the Committee's recommendations to the Governing Body. The full report of the meeting of Committee is also available for the information of the Governing Body.¹*
- iv) *The Governing Body is being invited to consider the Mediation Rules, as reviewed and finalized by the Committee, for adoption and to give any further guidance it considers appropriate for the effective operation of the Third Party Beneficiary. In this regard, possible elements of a Resolution are provided for consideration by the Governing Body.*
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¹ IT/TPBC-3/10/Report.

TABLE OF CONTENTS

	<i>Paras.</i>
I. Introduction	1-3
II. Issues considered by the Committee	4-7
III. Summary of the outputs of the meeting of the Committee	8-19
IV. Possible elements of a Resolution by the Governing Body	20-21

Appendix 1: Draft Rules for Mediation of a Dispute in Relation to a Standard Material Transfer Agreement

*Appendix 2: Draft Resolution **/2011: The Operation of the Third Party Beneficiary Procedures (Part I)*

I. INTRODUCTION

1. At its Third Session, the Governing Body approved the *Procedures for the Operation of the Third Party Beneficiary* (Third Party Beneficiary Procedures).² In so doing, the Governing Body requested the Secretary to develop operational guidelines for the commencement and management of amicable dispute resolution and mediation proceedings under the Third Party Beneficiary Procedures, in order to promote the effective functioning of the Third Party Beneficiary.
2. The Governing Body decided that the *Ad Hoc* Third Party Beneficiary Committee (the Committee) would reconvene in the biennium 2010-2011 in order to review and finalize the operational guidelines, for adoption by the Governing Body at this Fourth Session.
3. The Committee held its meeting from 7 – 8 October 2010. The present document outlines the work of the Committee, and contains the outputs of its meeting including recommendations to the Governing Body.

II. ISSUES CONSIDERED BY THE COMMITTEE

4. At its meeting, the Committee worked on the basis of *Draft operational guidelines for the commencement and management of mediation procedures*, which were prepared by the Secretary pursuant to the request of the Governing Body. In developing the operational guidelines, the Secretary sought technical support from relevant international organizations. The draft operational guidelines were elaborated with technical inputs and advice from the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO), and the United Nations Commission on International Trade Law.
5. The Third Session of the Governing Body had requested that both amicable dispute resolution and mediation proceedings be addressed. However, the Committee noted that the Third Party Beneficiary Procedures already contain, in Article 5, detailed procedures for the Third Party Beneficiary to follow in seeking amicable dispute resolution. The Committee was of the view that the procedures established under Article 5 provide for effective and cost-efficient action by the Third Party Beneficiary. For this reason, the Committee agreed not to engage in further work on the amicable dispute settlement phase, but rather to concentrate its efforts on the next phase, i.e. mediation.
6. The Committee considered how best the operational guidelines requested by the Governing Body might be structured in order to achieve efficient and cost-effective mediation proceedings. It concluded that, in the overall process of dispute settlement, placing emphasis on the mediation phase appeared to be the single most likely means of containing costs. In particular, mediation processes are usually time-efficient and flexible, and allow interest-based solutions to be explored and business relationships to be preserved.
7. The Committee considered that, for efficiency of process, and to avoid a major managerial investment, mediation procedures administered by an experienced and well-respected international body would be the optimal solution. Thus, the Committee agreed that, in the event that a dispute is not resolved amicably, it would be best for the Third Party Beneficiary to seek administered mediation for dispute settlement as the next step. To this end, the Committee determined that simple and clear mediation rules were necessary to facilitate this approach.

² Resolution 5/2009.

III. SUMMARY OF THE OUTPUTS OF MEETING OF THE COMMITTEE

8. The Committee noted that Article 6, *Mediation*, of the Third Party Beneficiary Procedures, which reflects Article 8.4b of the Standard Material Transfer Agreement (SMTA), does not provide for any specific set of mediation rules to be used. It was therefore possible for the Third Party Beneficiary to propose mediation rules tailored to the circumstances of the Treaty, and present an opportunity for the parties to a dispute to achieve an efficient solution at limited costs.

9. The Committee also noted that it would not be mandatory for any party to accept a set of mediation rules that the Third Party Beneficiary proposes, and that such rules could only be applicable with the mutual agreement of the parties to a dispute. Failing such an agreement, the parties to the dispute would remain free to select any other rules as may be mutually agreed.

10. The Committee reviewed and finalized draft *Mediation Rules* which, in the view of the Committee, were balanced and provided for impartial and neutral procedures and also promote the effective functioning of the Third Party Beneficiary. The Committee was of the view that these draft *Mediation Rules* would, in effect, constitute and satisfy the requirement for the draft operational guidelines for the commencement and management of mediation procedures requested by the Governing Body.

11. The Committee further agreed that in order to give proper effect to these rules, it would be necessary to amend Article 6 of the Third Party Beneficiary Procedures so as to incorporate the *Mediation Rules* into the Procedures and have one single document to guide the operation of the Third Party Beneficiary.

12. The Committee recalled that the Governing Body requested that the operational guidelines include appropriate cost containment measures. To that end, the Committee considered the Schedule of Fees provided by the WIPO Arbitration and Mediation Center for acting as Administrator, as contained in *Appendix 4* to the report of the Committee's meeting. It agreed that the WIPO Center's Schedule of Fees was extremely competitive and very favourable, compared to the prevalent rates obtainable elsewhere. The Committee, therefore, recommended that the Governing Body nominate the WIPO Arbitration and Mediation Center as the Administrator of the *Mediation Rules*.

13. The Committee noted that Article 8.4c the SMTA provides that, should mediation not result in a settlement:

“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 finally be settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with said Rules”.

14. In this context, the Committee considered the arbitration services of the WIPO Arbitration and Mediation Center. These include a fast-track arbitration process aimed at limiting costs, entitled “Expedited Arbitration”, with fixed costs for disputes involving amounts in dispute of less than US\$ 10 million. In both WIPO Expedited Arbitration and WIPO Arbitration, the schedules of fees were also found to be very competitive. The Committee further recommended that the Governing Body request, in the implementation of Article 7 of the Third Party Beneficiary Procedures, that Expedited Arbitration under WIPO Rules is first proposed by the Third Party Beneficiary to the other party or parties in the dispute.

15. In regard to the general functioning of the Third Party Beneficiary, the Committee noted that, in order to prevent any settlement that may be detrimental to the interests of the Multilateral System, it would be necessary for the Third Party Beneficiary to be notified of any dispute settlement proceedings that may be initiated by one of the two parties to an SMTA without the involvement of the Third Party Beneficiary. To this end, the Committee recommended that the

Governing Body note that a party to an SMTA initiating dispute settlement in accordance with Article 8 of the SMTA should immediately inform the Third Party Beneficiary. The Third Party Beneficiary should also be informed of any settlement that may have been reached in that regard.

16. The Committee reaffirmed the importance of appropriate and cost-effective electronic technologies to facilitate the work of the Third Party Beneficiary, including the submission, collection and storage of information provided to the Third Party Beneficiary by the parties to an SMTA in accordance with the decision of the Governing Body at its Third Session. The Committee further noted the work being carried out by the Secretariat to develop enabling information technology tools to be put at the disposal of users of the SMTA and recommended prioritizing completion of such work.

17. The Committee noted that, as requested by the Governing Body at its Third Session, the Secretary had established the Third Party Beneficiary Operational Reserve, and that he had credited amounts to the Operational Reserve as a priority action in accordance with Rule 6.5 of the Financial Rules of the Governing Body. The Committee recommended that the Governing Body, again, call on Contracting Parties, States that are not Contracting Parties, intergovernmental organizations, non-governmental organizations and other entities to contribute periodically, as necessary, to the Third Party Beneficiary Operational Reserve, in order to maintain it at a level commensurate with the needs.

18. The Governing Body, at its Third Session, considered the SMTA being used by the International Agricultural Research Centres of the Consultative Group on International Agricultural Research and other relevant international institutions, for plant genetic resources for food and agriculture not included in *Annex I* of the International Treaty. In this context, the Governing Body further requested the Committee to consider the issue of the application of the Third Party Beneficiary provisions and procedures to transactions related to non-*Annex I* material transferred with the SMTA and report to the Fourth Session of the Governing Body.

19. Due to lack of time, the Committee was unable to discuss this issue in detail or arrive to any conclusions. However, the Committee acknowledged that the issue was a very important one for which clear feedback would need to be given to the Governing Body, as requested. It agreed that further consultations and inputs from the regions were required, and that members would gather these inputs so that the Committee could consider them prior to the Fourth Session of the Governing Body, and report to the Governing Body accordingly. It, therefore, proposed that the Secretary assess the availability of a date and facilities for the meeting to be held back-to-back with this Fourth Session of the Governing Body, and inform members of the Committee accordingly. The report of the Committee's continued meeting will be made available in-session to the Governing Body.

IV. POSSIBLE ELEMENTS OF A RESOLUTION BY THE GOVERNING BODY

20. The Committee prepared a draft Resolution, by which the Governing Body could adopt the *Mediation Rules* and a corresponding amendment to the Third Party Beneficiary Procedures, as well as take other relevant decisions. The draft *Resolution **/2011, Operation of the Third Party Beneficiary* is attached as *Appendix 2* to this document, for consideration and adoption by the Governing Body.

21. Attention is drawn to the further recommendation of the Committee regarding the arbitration services of the WIPO Arbitration and Mediation Center. The Governing Body is invited to request the Third Party Beneficiary, in the implementation of Article 7 of the Third Party Beneficiary Procedures, to first propose Expedited Arbitration under WIPO Rules to the other party or parties in the dispute.

Appendix 1

*Annex 2 to the Third Party Beneficiary Procedures***RULES FOR MEDIATION OF A DISPUTE IN RELATION TO A STANDARD MATERIAL TRANSFER AGREEMENT****(“MEDIATION RULES”)****Article 1****Scope of the Mediation Rules**

(a) These Mediation Rules give effect to Article 6, *Mediation*, of the *Third Party Beneficiary Procedures* approved by the Governing Body of the International Treaty.

(b) If a dispute has not been settled by amicable dispute settlement after the issuance of the summary of information and the notice referred to in Article 5, paragraph 2, of the *Third Party Beneficiary Procedures*, then the parties to the Standard Material Transfer Agreement and the Third Party Beneficiary may choose mediation through a neutral mediator pursuant to Article 6, paragraph 1, of the *Third Party Beneficiary Procedures* and to Article 8.4b of the Standard Material Transfer Agreement. If they choose mediation, they may agree that the mediation shall be carried out in accordance with these Mediation Rules, which are administered by [*the entity designated by the Governing Body*] (“the Administrator”).

Article 2**Request for Mediation**

(a) Either party to the Standard Material Transfer Agreement or the Third Party Beneficiary may file a Request for Mediation with the Administrator.

(b) The Request for Mediation shall contain or be accompanied by:

- (i) the names, addresses and telephone, telefax, e-mail or other communication references of the parties to the Standard Material Transfer Agreement and of the representative of the party filing the Request for Mediation; and
- (ii) a summary of the relevant provisions of the Standard Material Transfer Agreement that have not been complied with, and other relevant information (“Summary of Information”); and
- (iii) the signed “Acceptance of Mediation” (*Annex 1* to these Mediation Rules).

(c) The Administrator shall transmit a copy of these Mediation Rules, the Summary of Information and the Schedule of Fees applicable on the date of the request for Mediation to the

parties to the Standard Material Transfer Agreement, and to the Third Party Beneficiary, within fifteen (15) days of receipt of a Request for Mediation.

Article 3

Acceptance of these Mediation Rules

(a) A party to the Standard Material Transfer Agreement or the Third Party Beneficiary accepting mediation under these Mediation Rules shall sign the Acceptance of Mediation and return it to the Administrator.

(b) The parties to the mediation (“the Party” or the “Parties”)¹ are the parties to the Standard Material Transfer Agreement, and the Third Party Beneficiary that accept mediation in accordance with paragraph (a) of this Article.

(c) A party to the Standard Material Transfer Agreement that is not a Party to the mediation, in accordance with paragraph (b) of this Article, shall not be privy to any information, notifications or documents in the context of the mediation, if such mediation is held.

Article 4

Commencement of Mediation

(a) Mediation shall commence on receipt of signed copies of the Acceptance of Mediation from the Parties, provided that such signed copies of the Acceptance of Mediation are received by the Administrator within thirty (30) days of the transmission by the Administrator of the documents in accordance with Article 2c of these Mediation Rules.

(b) On commencement of mediation, the Administrator shall consult with the Parties, in order to agree on the place of mediation, and the language to be used in mediation.

Article 5

Notices and Periods of Time

(a) Any notice or other communication that may or is required to be given under these Mediation Rules shall be in writing and shall be delivered by expedited postal or courier service, or transmitted by telefax, e-mail or other means of telecommunication that provide a record thereof.

(b) The address of the Administrator is provided in *Annex 2* to these Mediation Rules and may be changed at the discretion of the Administrator.

¹ For the purposes of these Mediation Rules, the terms “Party” or “Parties” are used to refer only to parties to the mediation and not a party or the parties to the Standard Material Transfer Agreement or a Contracting Party to the Treaty.

(c) A Party's last known residence or place of business shall be a valid address for the purpose of any notice or other communication in the absence of any notification of a change by that Party. Communications may in any event be addressed to a Party in the manner stipulated or, failing such a stipulation, according to the practice followed in the course of the dealings between the Parties.

(d) For the purpose of determining the date of commencement of a time limit, a notice or other communication shall be deemed to have been received on the day it is delivered or, in the case of telecommunications, transmitted in accordance with paragraphs (a), (b) and (c) of this Article.

(e) For the purpose of determining compliance with a time limit, a notice or other communication shall be deemed to have been sent, made or transmitted if it is dispatched, in accordance with paragraphs (a), (b) and (c) of this Article, prior to or on the day of the expiration of the time limit.

(f) For the purpose of calculating a period of time under these Mediation Rules, such period shall begin to run on the day following the day when a notice or other communication is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day that follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

(g) The Parties may agree to reduce or extend the periods of time referred to in these Mediation Rules.

(h) The Administrator may, at the request of a Party or on its own motion, extend or reduce the periods of time referred to in these Mediation Rules.

Article 6

Appointment of the Mediator

(a) If the Parties agree within seven (7) days of the commencement of the mediation on the person of the mediator, or have agreed on another appointment procedure, the Administrator shall appoint any mediator so selected, after confirming the requirements of Articles 8 and 9.

(b) If the Parties cannot agree within seven (7) days of the commencement of the mediation on the person of the mediator, or have not agreed on another appointment procedure, the mediator shall be appointed in accordance with the following procedure:

- (i) The Administrator shall as soon as possible send to each Party an identical list of candidates. Where possible, the list shall comprise the names of at least three candidates in alphabetical order. The list shall include or be accompanied by a statement of each candidate's qualifications. If the Parties have agreed on any particular qualifications, the list shall contain only the names of candidates that satisfy those qualifications.

- (ii) Each Party shall have the right to delete the name of any candidate or candidates to whose appointment it objects and shall number any remaining candidates in order of preference.
 - (iii) Each Party shall return the marked list to the Administrator (without obligation to send a copy to the other Party or Parties) within seven (7) days after the date on which the list is received by it. Any Party failing to return a marked list within that period of time shall be deemed to have assented to all candidates appearing on the list.
 - (iv) Upon receipt by it of the lists from the Parties, the Administrator shall, taking into account the preferences and objections expressed by the Parties, invite a person from the list to be the mediator.
 - (v) If the lists that have been returned do not show a person who is acceptable as mediator to all Parties, the Administrator shall be authorized to appoint the mediator. The Administrator shall similarly be authorized to do so if a person is not able or does not wish to accept the Administrator's invitation to be the mediator, or if there appear to be other reasons precluding that person from being the mediator, and there does not remain on the lists a person who is acceptable as mediator to each Party.
- (c) Notwithstanding the provisions of paragraph (b), the Administrator shall be authorized to appoint the mediator if it determines in its discretion that the procedure described in that paragraph is not appropriate for the case.

Article 7

Nationality of the Mediator

- (a) An agreement of the Parties concerning the nationality of the mediator shall be respected.
- (b) If the Parties have not agreed on the nationality of the mediator, such mediator shall, in the absence of special circumstances such as the need to appoint a person having particular qualifications, be a national of a country other than the countries of the Parties, if different.

Article 8

Impartiality and Independence

- (a) The mediator shall be impartial and independent.
- (b) The prospective mediator shall, before accepting appointment, disclose to the Parties and the Administrator any circumstances that might give rise to justifiable doubt as to the mediator's impartiality or independence, or confirm in writing that no such circumstances exist.

(c) If, at any stage during the mediation, new circumstances arise that might give rise to justifiable doubt as to the mediator's impartiality or independence, the mediator shall promptly disclose such circumstances to the Parties and the Administrator.

Article 9

Availability, Acceptance and Notification

(a) The mediator shall, by accepting appointment, be deemed to have undertaken to make available sufficient time to enable the mediation to be conducted and completed expeditiously.

(b) The prospective mediator shall accept appointment in writing and shall communicate such acceptance to the Administrator.

(c) The Administrator shall notify the Parties of the appointment of the mediator.

Article 10

Representation of Parties and Participation in Meetings

(a) The Parties may be represented or assisted by persons of their choice, including in their meetings with the mediator.

(b) Immediately after the appointment of the mediator, the names and addresses of persons authorized to represent a Party, and the names and positions of the persons who will be attending the meetings of the Parties with the mediator on behalf of that Party, shall be communicated by that Party to the other Party or Parties, the mediator and the Administrator.

Article 11

Conduct of the Mediation

(a) The mediation shall be conducted in the manner agreed by the Parties. If, and to the extent that, the Parties have not made such agreement, the mediator shall, in accordance with these Mediation Rules, determine the manner in which the mediation shall be conducted.

(b) If at any stage of the mediation, the Parties so agree, the mediator shall provide an evaluation of the dispute. Such evaluation may take the form of a written document, which the Parties are free to accept or reject as the settlement of the dispute.

(c) Each Party shall cooperate in good faith with the mediator to advance the mediation as expeditiously as possible.

(d) The mediator shall be free to meet and to communicate separately with a Party on the clear understanding that information given at such meetings and in such communications shall not be

disclosed to the other Party or Parties without the express authorization of the Party giving the information.

(e) As soon as possible after being appointed, the mediator shall, in consultation with the Parties, establish a timetable for the submission by each Party to the mediator and to the other Party or Parties of a statement summarizing the background of the dispute, the Party's interests and contentions in relation to the dispute and the present status of the dispute, together with such other information and materials as the Party considers necessary for the purposes of the mediation and, in particular, to enable the issues in dispute to be identified.

(f) The mediator may at any time during the mediation suggest that a Party provide such additional information or materials as the mediator deems useful.

(g) Any Party may at any time submit to the mediator, for consideration by the mediator only, written information or materials that it considers to be confidential. The mediator shall not, without the written authorization of that Party, disclose such information or materials to the other Party or Parties.

Article 12

Role of the Mediator

(a) The mediator shall promote the settlement of the issues in dispute between the Parties in any manner that the mediator believes to be appropriate, but shall have no authority to impose a settlement on the Parties.

(b) The mediator or a Party to the dispute may propose that one or more independent experts be consulted to report on specific issues. Terms of reference should be established for such expert in consultation between the mediator and the Parties. Any such experts shall be required to sign an appropriate confidentiality undertaking in accordance with Article 16 of these Mediation Rules.

Article 13

Termination of the Mediation

The mediation shall be terminated within six months of the commencement of mediation, or any shorter period of time agreed on by the Parties. The mediation shall be terminated by the following means:

- (i) by the signing of a Settlement Agreement by the Parties covering any or all of the issues in dispute between the Parties;
- (ii) by the decision of the mediator if, in the mediator's judgment, further efforts at mediation are unlikely to lead to a resolution of the dispute; or

- (iii) by a written declaration of a Party at any time sent to the other Party or Parties, the Administrator and the mediator.

Article 14

Mediation Termination Notices

Upon the termination of the mediation, the mediator shall promptly send to the Administrator a Mediation Termination Notice in writing, indicating that the mediation is terminated and shall indicate the date on which it terminated, whether or not the mediation resulted in a settlement of the dispute and, if so, whether the settlement was full or partial. The mediator shall send to the Parties a copy of the notice so addressed to the Administrator.

Article 15

Dispute Resolution Termination Notice

If the Mediation Termination Notice indicates that the Parties reached a settlement, the Administrator shall send a Dispute Resolution Termination Notice to the other Party or Parties, terminating the dispute resolution process.

Article 16

Confidentiality

- (a) No recording of any kind shall be made of any meetings of the Parties.
- (b) Each person involved in the mediation, including, in particular, the mediator, the Parties and their representatives and advisors, any independent experts, and any other persons present during the meetings of the Parties with the mediator, shall respect the confidentiality of the mediation and may not, unless otherwise agreed by the Parties and the mediator, use or disclose to any outside party any information concerning, or obtained in the course of, the mediation. Each such person shall sign an appropriate confidentiality undertaking prior to taking part in the mediation.
- (c) Unless otherwise agreed by the Parties, each person involved in the mediation shall, on the termination of the mediation, return, to the Party providing it, any brief, document or other materials supplied by a Party, without retaining any copy thereof. Any notes taken by a person concerning the meetings of the Parties with the mediator shall be destroyed on the termination of the mediation.
- (d) Unless otherwise agreed by the Parties, the mediator and the Parties shall not introduce as evidence or in any manner whatsoever in any judicial or arbitration proceeding:
 - (i) any views expressed or suggestions made by the other Party or Parties with respect to a possible settlement of the dispute;

- (ii) any admissions and statements made by a Party in the course of the mediation;
 - (iii) any proposals made or views expressed by the mediator;
 - (iv) any evaluation of the dispute made by the mediator, pursuant to Article 11b of these Mediation Rules, or any parts or contents thereof;
 - (v) the fact that a Party had or had not indicated willingness to accept any proposal for settlement made by the mediator or by the other Party or Parties.
- (e) The Administrator, the mediator and the Third Party Beneficiary shall keep any Mediation Termination Notice, Dispute Resolution Notice, and Settlement Agreement confidential and shall not, without the written authorization of the Parties, disclose either the existence or the result of the mediation to any person, except where its disclosure is necessary for purposes of implementation and enforcement.
- (f) Notwithstanding the provisions of paragraph (e) of this Article, the Administrator may, however, include information concerning the mediation in any aggregate statistical data that it publishes concerning its activities, provided that such information does not reveal the identity of the Parties or enable the particular circumstances of the dispute to be identified.
- (g) Notwithstanding the provisions of paragraph (e) of this Article, the Third Party Beneficiary may, however, include information concerning the mediation in its report to a session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, pursuant to Article 9, *Reporting*, of the *Third Party Beneficiary Procedures*, provided that such information does not reveal the identity of the Parties or enable the particular circumstances of the dispute to be identified.

Article 17

Role of the Mediator in Pending or Future Proceedings

Unless required by a court of law or authorized in writing by the Parties, the mediator shall not act in any capacity whatsoever, otherwise than as a mediator, in any pending or future proceedings, whether judicial, arbitral or otherwise, relating to the subject matter dealt with in the mediation proceedings.

Article 18

Administration Fee

(a) The Request for Mediation shall be subject to the payment to the Administrator of an administration fee, the amount of which shall be fixed in accordance with the Schedule of Fees applicable on the date of the Request for Mediation, when they are sent to the Parties, pursuant to Article 2(c) of these Mediation Rules.

(b) The administration fee shall not be refundable.

(c) No action shall be taken by the Administrator on a Request for Mediation until the administration fee has been paid.

(d) If a Party who has filed a Request for Mediation fails, within seven (7) days after a reminder (normally to be sent within 3 weeks of the receipt of the request for mediation) in writing from the Administrator, to pay the administration fee, it shall be deemed to have withdrawn its Request for Mediation.

Article 19

Fees of the Mediator

(a) The amount and currency of the fees of the mediator and the modalities and timing of their payment shall be fixed by the Administrator, after consultation with the mediator and the Parties.

(b) The amount of the fees shall be reasonable and, unless the Parties and the mediator agree otherwise, be calculated on the basis of the hourly indicative rate set out in the Schedule of Fees applicable on the date of the Request for Mediation, and taking into account the amount in dispute, the complexity of the subject matter of the dispute and any other relevant circumstances of the case.

Article 20

Deposits

(a) The Administrator may, at the time of the appointment of the mediator, require each party to deposit an equal amount as an advance for the costs of the mediation, including, in particular, the estimated fees of the mediator and the other expenses of the mediation. The amount of the deposit shall be determined by the Administrator.

(b) The Administrator may require the Parties to make supplementary deposits in equal shares.

(c) If a Party fails, within seven (7) days after a reminder in writing from the Administrator, to pay the required deposit, the mediation shall be deemed to be terminated. The Administrator shall, by notice in writing, inform the Parties and the mediator accordingly and indicate the date of termination.

(d) After the termination of the mediation, the Administrator shall render an accounting to the Parties of any deposits made and return any unexpended balance to the Parties or require the payment of any amount owing from the Parties.

Article 21

Costs

(a) Upon termination of the mediation proceedings, the Administrator fixes the costs of the mediation and gives written notice thereof to the Parties. The term “costs” includes:

- (i) The fees of the mediator;
- (ii) The travel and other expenses of the mediator;
- (iii) The costs (including fees, travel and other expenses) of any independent expert appointed in accordance with Article 12 of these Mediation Rules;
- (iv) Such other expenses as are necessary for the conduct of mediation proceedings, such as the cost of meeting facilities.

(b) The costs, as defined above, are borne equally by the Parties unless the Parties have agreed otherwise or the settlement agreement provides for a different apportionment. All other expenses incurred by a Party are borne by that Party.

Article 22

Exclusion of Liability

Except in respect of deliberate wrongdoing, the mediator and the Administrator shall not be liable for any act or omission in connection with any mediation conducted under these Mediation Rules.

Article 23

Waiver of Defamation

The Parties, and, by accepting appointment, the mediator agree that any statements or comments, whether written or oral, made or used by them or their representatives in preparation for or in the course of the mediation shall not be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this Article may be pleaded as a bar to any such action.

Annex 1

Acceptance of Mediation

Article 8.4b of the Standard Material Transfer Agreement provides that “[i]f the dispute is not resolved by negotiation, the parties may choose mediation through a neutral third party mediator, to be mutually agreed.”

Having received from the Administrator [*the entity designated by the Governing Body*]:

- (a) a Summary of Information relative to a dispute under a Standard Material Transfer Agreement, in accordance with Article 2b(ii) of the *Rules for Mediation of a Dispute in Relation to a Standard Material Transfer Agreement* and Article 5, paragraph 2, *Amicable Dispute Settlement*, of the *Third Party Beneficiary Procedures*, and
- (b) a copy of the *Rules for Mediation of a Dispute in Relation to a Standard Material Transfer Agreement*,

The undersigned party hereby accepts mediation in relation to this dispute in accordance with the above-mentioned *Mediation Rules*.

The undersigned party accepts that, unless the Parties to the mediation agree otherwise, the costs of the mediation shall be borne in equal shares by the Parties to the mediation, in accordance with Article 21 of the above-mentioned *Mediation Rules*.

Signature: Date:

Name of Signatory:

Name of party to the Standard Material Transfer Agreement in dispute, or the Third Party Beneficiary:

1. The signed Acceptance of Mediation is to be returned to:

[Name and address of the Administrator [*entity designated by the Governing Body*]]

2. If the Administrator has received no acceptance of mediation from a Party within thirty (30) days of its transmission of the Summary of Information and the copy of the above mentioned *Mediation Rules*, such party is deemed to have opted not to accept mediation.

3. Please note that the consequences of not accepting mediation include the following:

- Even if you do not accept mediation, mediation may nevertheless proceed between the other party to the Standard Material Transfer Agreement and the Third Party Beneficiary, provided that they accept mediation. You would not be a Party in such mediation and would not be privy to any information, notifications or documents in the context of such

mediation, if such mediation is held, in accordance with Article 3c of the above mentioned *Mediation Rules*.

- In accordance with Article 8.4c of the Standard Material Transfer Agreement, 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 on the applicable Arbitration Rules, the dispute, if submitted to arbitration, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with said Rules.

4. If you have any questions, please contact the [*entity designated by the Governing Body*] by email at: [email address].

Annex 2

Address of the Administrator

Address of the Administrator:

[INSERT]

Appendix 2

DRAFT RESOLUTION **/2011 (PART I)³**OPERATION OF THE THIRD PARTY BENEFICIARY**

THE GOVERNING BODY:

- (i) **Recalling** Resolution 5/2009, *Procedures for the Third Party Beneficiary*, by which it adopted *Third Party Beneficiary Procedures* and requested the Director General to bring these procedures to the attention of the relevant bodies of FAO, for formal approval;
- (ii) **Recognizing** the important role of the Third Party Beneficiary in initiating and carrying out dispute settlement as provided for in the Standard Material Transfer Agreement;
- (iii) **Noting** that the Committee on Constitutional and Legal Matters and the Council of FAO had examined the *Third Party Beneficiary Procedures*, together with related amendments to the Financial Rules;
- (iv) **Noting further** that the Council, in considering the *Third Party Beneficiary Procedures*, had regarded these as an example of useful synergies between FAO and bodies established under Article XIV of the FAO Constitution, and approved the Third Party Beneficiary Procedures, which are now fully operational;
- (v) **Noting** that, as requested in Resolution 5/2009, the *Ad Hoc* Third Party Beneficiary Committee has prepared draft *Mediation Rules* for use in the context of Article 6 of the *Third Party Beneficiary Procedures*;
 - 1. **Thanks** the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) and the United Nations Commission on International Trade Law (UNCITRAL), for having provided technical support in the preparation of these *Mediation Rules*;
 - 2. **Recognizes** that these *Mediation Rules* will promote the effective functioning of the Third Party Beneficiary and provide an opportunity for cost containment;
 - 3. **Adopts** these *Mediation Rules*, and amends Article 6 of the *Third Party Beneficiary Procedures* by adding a paragraph to read as follows:
 - 2. *The Third Party Beneficiary shall propose to the parties to the Standard Material Transfer Agreement that mediation be carried out in accordance with the Mediation Rules contained in Annex 2 to these Third Party Beneficiary Procedures.*

³ Note by the Secretary. This draft Resolution will be merged with the draft Resolution contained in Document IT/GB-4/10/15, *Report on the operations of the Third Party Beneficiary*, after its consideration and adoption by the Governing Body.

4. **Requests** the Director-General to bring the *Third Party Beneficiary Procedures*, as amended, to the attention of the relevant bodies of FAO, for approval;
5. For the settlement of a dispute under Article 8 of the SMTA, **requests** the Third Party Beneficiary to propose these *Mediation Rules*, to parties to the Standard Material Transfer Agreement proceeding to mediation under Article 8.4b of the Standard Material Transfer Agreement, and failing an agreement on the application of the *Mediation Rules*, to propose such other mediation rules as may be acceptable to the parties;
6. **Requests** the Arbitration and Mediation Center of WIPO to act as Administrator of these *Mediation Rules*;
7. **Notes** that a party to a Standard Material Transfer Agreement initiating dispute settlement in accordance with Article 8 of the Standard Material Transfer Agreement should immediately inform the Third Party Beneficiary, and should also inform the Third Party Beneficiary of any settlement of the dispute that may have been reached;
8. **Recognizes** the importance for the functioning of the Multilateral System in general, and of the Third Party Beneficiary in particular, of effective information technology tools, and requests the Secretary to give priority to completing them, and putting them at the disposal of users of the Standard Material Transfer Agreement;
9. **Reiterates** the importance of maintaining sufficient resources to initiate dispute settlement, by fully funding the Third Party Beneficiary Operational Reserve, as a priority, in the context of Contracting Parties' contributions to the Treaty and its Core Administrative Budget, in accordance with Article 6.5 of the Financial Rules;
10. **Calls** on Contracting Parties, States that are not Contracting Parties, intergovernmental organizations, non-governmental organizations and other entities to contribute periodically, as necessary, to the Third Party Beneficiary Operational Reserve, in order to maintain it at a level commensurate with the needs.