



منظمة الأغذية
والزراعة
للأمم المتحدة

联合国
粮食及
农业组织

Food
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the
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des
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Unies
pour
l'alimentation
et
l'agriculture

Organización
de las
Naciones
Unidas
para la
Agricultura
y la
Alimentación

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Item 10 of the Provisional Agenda

INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

SECOND SESSION OF THE GOVERNING BODY

Rome, Italy, 29 October – 2 November 2007

DRAFT PROCEDURES FOR THE THIRD PARTY BENEFICIARY

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**PROCEDURES TO BE FOLLOWED BY THE FOOD AND AGRICULTURE
ORGANIZATION OF THE UNITED NATIONS, ACTING AS THIRD PARTY
BENEFICIARY**

I. INTRODUCTION

1. The Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, at its First Session held in Madrid, Spain, from 12 to 16 June 2006, adopted the Standard Material Transfer Agreement (SMTA)
2. The SMTA is a model contract for providers and recipients of plant genetic resources, and consequently any contract following the SMTA creates rights and obligations for the parties who have concluded the contract. The SMTA also confers rights on the Third Party Beneficiary, in particular the right to initiate dispute settlement procedures regarding the rights and obligations of the provider and the recipient of a Material Transfer Agreement (as referred to in the SMTA). The concept of the Third Party Beneficiary, though not explicitly mentioned, is implicit in the International Treaty, since the benefits under the SMTA, including monetary and other benefits of commercialization, are not to flow to the individual provider but to the Multilateral System.
3. In approving the SMTA, the Governing Body, by operative paragraph 8 of Resolution 2/2006 on the Standard Material Transfer Agreement (SMTA), invited the Food and Agriculture Organization of the United Nations, *“as the Third Party Beneficiary, to carry out the roles and responsibilities as identified and prescribed in the SMTA, under the direction of the Governing Body, in accordance with the procedures to be established by the Governing Body at its next Session.”*¹
4. By circular state letter (G/X/AGD-10) dated 22 December 2006, the Director-General informed Contracting Parties of the International Treaty that he has given his *“agreement in principle”* for the Organization to act as the Third Party Beneficiary foreseen in the SMTA. This *“agreement in principle”* is subject to formal approval, upon review of the procedures to be established by the Governing Body at this session, defining the roles and responsibilities of the Third Party Beneficiary.

II. PRESENT SITUATION

5. The Governing Body, in the above-mentioned operative paragraph 8 of Resolution 2/2006, expressed the intention to establish *“at its next session”* the procedures to be followed by FAO in carrying out the roles and responsibilities of the Third Party Beneficiary as prescribed in the SMTA. However, the Governing Body did not give any instructions or guidance with regard to the Third Party Beneficiary procedures nor did it request the Secretariat to prepare any specific documentation on this issue.
6. This information note briefly reviews some aspects the Governing Body may wish to consider in the process of establishing the Third Party Beneficiary procedures.

¹ IT/GB-1/06/Report, p. 7.

III. ROLES AND RESPONSIBILITIES OF THE THIRD PARTY BENEFICIARY

7. By Article 4.3 of the SMTA, parties of a Material Transfer Agreement (MTA) agree that FAO is the Third Party Beneficiary on behalf of the Governing Body and its Multilateral System. Through MTA the provider and the recipient agree specifically to confer on FAO:

- the right to request the appropriate information as required in Articles 5e, 6.5c, 8.3 and Annex 2, paragraph 3 to the MTA (Article 4.4);
- the right to request that the appropriate information, including samples as necessary, be made available by the provider and the recipient, regarding their obligations in the context of the MTA (Article 8.3);
- the right to initiate dispute settlement procedures regarding rights and obligations of the provider and the recipient (Article 8.1; 8.2).

8. In short, the role and responsibilities of the Third Party Beneficiary cover the gathering of information and the initiation of dispute settlement procedures regarding rights and obligations of the parties of the MTA.

IV. DISCRETIONARY POWERS OF THE THIRD PARTY BENEFICIARY

9. The SMTA gives the Third Party Beneficiary the right to, but does not oblige it to initiate dispute settlement procedures. However, the Third Party Beneficiary has to exercise its discretionary powers under “*under the direction of the Governing Body,*” as stated in operative paragraph 8 of Resolution 2/2006 on the Standard Material Transfer Agreement.

10. The Third Party Beneficiary Procedures may direct the activities of the Third Party Beneficiary in various ways. The Third Party Beneficiary could be given unlimited discretionary powers to exercise its right to investigate violations of MTAs and to engage in dispute settlement. Alternatively, the Third Party Beneficiary Procedures could provide that the Third Party Beneficiary exercise its rights only upon explicit request by the Governing Body (or its Bureau), on a case-by-case basis.

11. The Third Party Beneficiary Procedures could also establish specific substantive and procedural conditions and procedures to be followed by the Third Party Beneficiary when carrying out its roles and responsibilities. The extent of discretionary powers, and the conditions and procedures to be followed could also vary with the stage of the dispute settlement procedure. The Third Party Beneficiary Procedures could, for example, confer unlimited discretionary powers on the Third Party Beneficiary for the initiation of amicable dispute settlement, and require that specific substantive and/or procedural conditions be met before the Third Party Beneficiary may initiate mediation or arbitration.

V. POSSIBLE ADMINISTRATIVE PROCEDURES TO BE FOLLOWED BY FAO, AS THIRD PARTY BENEFICIARY

12. Third Party Beneficiary Procedures could address administrative procedures regarding:

- (1) the gathering of information;
- (2) amicable dispute settlement;
- (3) mediation; and
- (4) arbitration.

Gathering of information

13. While the SMTA does not require the Third Party Beneficiary to monitor compliance with the obligations arising from the MTA, it confers the right on the Third Party Beneficiary to receive information and samples from the provider and the recipient (Article 4.4; 8.3 SMTA). The SMTA does not mention other sources or types of information, except the information made available to the Third Party Beneficiary by the Governing Body. Such information includes:

- periodic information of providers about MTAs entered into (Article 5e SMTA);
- notifications of transfers of plant genetic resources for food and agriculture under development to another person or entity, in accordance with Article 5e (Article 6.5);
- annual reports in accordance with *Annex 2*, paragraph 3 of the SMTA.

14. Article 2b (iv) of the Agreements signed under Article 15 of the International Treaty by the International Agricultural Research Centres and other relevant international institutions with the Governing Body,² provides that Centres are to take appropriate measures, in accordance with their capacities, to maintain effective compliance with the conditions of the MTAs, and that they shall promptly inform the Governing Body of cases of non-compliance.

Amicable dispute settlement (Article 8.4a SMTA)

15. Under the SMTA, amicable dispute settlement is different from mediation and arbitration, in that no third party is involved in it. The main difference between mediation and arbitration is that mediation is party-controlled and ends successfully only if the parties reach an agreement, whereas arbitration ends with an award made by an arbitrator or arbitral tribunal which the parties may or may not agree with.

16. The SMTA gives no instructions as to how the negotiations referred to in Article 8.4a should be conducted. The Third Party Beneficiary Procedures could therefore define a procedure the Third Party Beneficiary should follow, in order to reach an amicable agreement.

Mediation (Article 8.4b SMTA)

17. If a dispute is not resolved by negotiation, the parties of an MTA may choose mediation through a neutral third party mediator, to be mutually agreed (Article 8.4c SMTA). The SMTA does not go into any detail with regard to the second step of dispute resolution, the mediation facilitated by a mediator. While, with regard to arbitration, the SMTA refers to the Rules of Arbitration of the International Chamber of Commerce (ICC),³ there is no reference in the SMTA to the ICC rules covering mediation, the Amicable Dispute Resolution Rules (ICC ADR Rules).⁴ However, the ICC ADR Rules include provisions which cover the situation in which there is no prior agreement of the parties to refer to them.

18. With regard to the designation of a mediator, the Third Party Beneficiary Procedures could give guidance as to how the Third Party Beneficiary should choose a neutral mediator. The Procedures could, for example, mandate the Third Party Beneficiary to propose an expert from the list of experts to be established by the Governing Body for arbitration purposes (see Article 8.4c SMTA).

² For an overview of these agreements, see http://www.fao.org/ag/planttreaty/art15_en.htm

³ Article 8.4c SMTA

⁴ See http://www.iccwbo.org/drs/english/adr/pdf_documents/adr_rules.pdf.

Arbitration (Article 8.4c SMTA)

19. If a dispute has not been settled by negotiation or mediation, the Third Party Beneficiary or the opposing Party may submit the dispute for arbitration under the Arbitration Rules of an international body as agreed by the parties to the dispute (Article 8.4c SMTA). Thus, with regard to the arbitration rules, the SMTA offers considerable flexibility. If the parties fail to agree on the arbitration body, the dispute would be finally settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with these Rules.

20. The SMTA envisages the establishment of a list of experts by the Governing Body. The experts can serve as arbitrators, if appointed by the parties to the dispute. The Third Party Beneficiary Procedures may provide that the Third Party Beneficiary propose experts from the list to be established by the Governing Body.

VI. FINANCIAL IMPLICATIONS

21. As the Third Party Beneficiary acts “*on behalf of the Governing Body*”(Article 8.1 SMTA), the core administrative budget of the Treaty will need to provide the Third Party Beneficiary with adequate financial resources to cover all costs, including administrative costs and arbitration fees, incurred by FAO for servicing as Third Party Beneficiary. The ICC Rules provide standard costs for both administrative expenses and arbitrators’ fees.⁵

VII. GUIDANCE SOUGHT FROM THE GOVERNING BODY

22. The Governing Body may wish to
- thank the Director-General for having accepted in principle, subject to formal approval upon review of the procedures to be established by the Governing Body, the Governing Body’s invitation to FAO to carry out, as the Third Party Beneficiary, the roles and responsibilities as identified and prescribed in the SMTA, under the direction of the Governing Body, in accordance with the procedures to be established by the Governing Body;
 - express its views and provide guidance on the procedures to be followed by FAO when acting as Third Party Beneficiary;
 - request its Secretariat to prepare, on the basis of this guidance, draft text setting out the procedures to be followed by FAO, when carrying out its roles and responsibilities as Third Party Beneficiary, taking into account, in particular, FAO’s role as specialized agency of the United Nations, its privileges and immunities;
 - establish an *Ad Hoc* Third Party Beneficiary Committee, composed of seven representatives of Contracting Parties, with one representative nominated by each of the FAO Regions, with the mandate to consider the draft text prepared by the Secretariat and to agree on a proposal to be submitted to the Governing Body, at its next Session. The meetings of this Committee would be subject to the availability of funds;
 - invite the Director-General to bring to the attention of the relevant bodies of FAO the Governing Body’s invitation together with the procedures elaborated by the *Ad Hoc* Third Party Beneficiary Committee and endorsed by the Governing Body, for their acceptance, and to forward them to the Governing Body for approval.

⁵ See *Appendix III* to the ICC Rules of Arbitration.