



The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



Item 17 of the Provisional Agenda

FIFTH SESSION OF THE GOVERNING BODY

Muscat, Oman, 24 – 28 September 2013

REPORT ON THE OPERATIONS OF THE THIRD PARTY BENEFICIARY

EXECUTIVE SUMMARY

1. *The Third Party Beneficiary Procedures provide, in Article 9, that the Third Party Beneficiary shall submit to the Governing Body, at each of its Regular Sessions, a report containing information on a number of items regarding its operations in the biennium. By Resolution 5/2009 and Resolution 5/2011, the Governing Body requested the Secretary to provide, at each session of the Governing Body, a report in accordance with Article 9 of the Third Party Beneficiary Procedures.*
2. *In accordance with Article 9 of the Third Party Beneficiary Procedures and the request of the Governing Body, this document contains the report on the operations of the Third Party Beneficiary for the part of year 2011 that was not covered by the previous report to the Governing Body, and for the biennium 2012-2013. The document refers to a case of potential relevance to the Third Party Beneficiary. It includes information on the status of the Third Party Beneficiary Operational Reserve and the technical implementation of the Third Party Beneficiary Procedures.*
3. *The Governing Body is invited to take note of the developments on the above issues and 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.*

This document is printed in limited numbers to minimize the environmental impact of FAO's processes and contribute to climate neutrality. Participants are kindly requested to bring their copies to meetings and to avoid asking for additional copies.

TABLE OF CONTENTS

	<i>Para.</i>
I. Introduction	1–4
II. Potential case for the Third Party Beneficiary	5–8
III. Arrangements for the operation of the Third Party Beneficiary Procedures	9–14
IV. Status of the Third Party Beneficiary Operational Reserve	15–18
V. Technical implementation of the Third Party Beneficiary Procedures	19–33
VI. Possible elements of a decision by the Governing Body	34

*Appendix: Draft Resolution **/2013: Operation of the Third Party Beneficiary*

I. INTRODUCTION

1. At its Third Session, by Resolution 5/2009, the Governing Body adopted the Procedures for the Operation of the Third Party Beneficiary (Third Party Beneficiary Procedures).¹
2. Article 9 of the Third Party Beneficiary Procedures requires the Third Party Beneficiary to submit to the Governing Body, at each of its Regular Sessions, a report setting forth:
 - a) the number, and a summary, of cases where it received information regarding non-compliance with the terms and conditions of a Standard Material Transfer Agreement;
 - b) the number, and a summary, of cases where it initiated dispute settlement;
 - c) the number, and a summary, of disputes settled through amicable dispute settlement, mediation or arbitration;
 - d) the number, and a summary, of pending disputes;
 - e) any legal questions that appeared in the context of dispute settlement and that may require the attention of the Governing Body;
 - f) the expenditure from the Third Party Beneficiary Operational Reserve;
 - g) any estimate of the needs of the Third Party Beneficiary Operational Reserve in the forthcoming biennium;
 - h) any other relevant non-confidential information.
3. By Resolution 5/2009 and Resolution 5/2011, the Governing Body requested the Secretary to provide, at each Session of the Governing Body, a report in accordance with Article 9 of the Third Party Beneficiary Procedures.
4. This document responds to the requirement of the Third Party Beneficiary Procedures and the latest request of the Governing Body, and outlines the progress with and developments on the implementation of the Third Party Beneficiary Procedures since the Fourth Session of the Governing Body.

II. POTENTIAL CASE FOR THE THIRD PARTY BENEFICIARY

5. In January 2012, the ETC Group (Action Group on Erosion Technology and Concentration) published a report entitled *The Greed Revolution, Mega Foundations, Agribusiness Muscle in on Public Goods*.² The report contains, *inter alia*, information on a possible violation of the Treaty requirement for the Standard Material Transfer Agreement (SMTA) by two International Agricultural Research Centers (IARCs) of the Consultative Group on International Agricultural Research (CGIAR). Subsequent to the release of the report, the Secretary of the Governing Body received a letter from the ETC Group requesting to examine and further investigate the information presented in the report.
6. The alleged case of non-compliance with the Treaty conditions revolve around two agreements signed by the two IARCs with private sector entities, which may have resulted in the transfer of barley germplasm without the required SMTA, and/or in violation of other Treaty provisions concerning the availability of germplasm.
7. An initial and informal exchange of communications with the two IARCs occurred in February 2012 but did not clarify whether or to what extent the germplasm was transferred under the SMTA. After an FAO internal process of consultation, it was determined that more

¹ Annex to Resolution 5/2009.

² The report is available at the following url:

http://www.etcgroup.org/sites/www.etcgroup.org/files/ETComm108_GreedRevolution_120117.pdf

information would be needed on the legal status of such transferred germplasm in order to determine if the Third Party Beneficiary Procedures could be applied. Accordingly, following up to the initial discussions in 2012, the Secretary sent a communication in writing to the two IARCs in April 2013, requesting clarifications on a number of technical issues and inviting the two IARCs to settle the pending issues within an established time frame.

8. No response was received at the time of issuance of this document. However, additional relevant information would be issued as an Addendum to this document, as it becomes available, and reported at the Session of the Governing Body.

III. ARRANGEMENTS FOR THE OPERATION OF THE THIRD PARTY BENEFICIARY PROCEDURES

9. At its Fourth Session, the Governing Body approved *Mediation Rules* (Rules) to promote the effective functioning of the Third Party Beneficiary and provide for cost containment. It amended Article 6 of the Third Party Beneficiary Procedures and annexed the Rules to the Procedures. The Governing Body requested the FAO Director-General to bring the Procedures, as amended, to the attention of the relevant bodies of FAO, for approval.³

10. The Rules were referred to the Committee on Constitutional and Legal Matters (CCLM) at its Ninety-Third Session in September 2011. The CCLM noted that the Rules improve the procedures aimed at protecting the status of FAO, especially with regard to its immunity from every form of jurisdiction, as well as to any possible financial liability for FAO arising out of the exercise of the role of Third Party Beneficiary. In the view of the CCLM, the Rules reinforce the flexibility and efficiency of the overall system as successful mediation would contribute to further reducing costs and improving the Third Party Beneficiary Procedures. The CCLM endorsed the Rules together with the amended Procedures and so did the FAO Council at its Hundred and Forty-Third Session in November 2011.⁴

11. In conjunction with the approval of the Rules, the Governing Body requested the WIPO Arbitration and Mediation Center (WIPO Center) to act as Administrator of the Rules.⁵ The CCLM noted the request and appreciated the considerable experience in administering mediation procedures by the WIPO Arbitration and Mediation Center. It affirmed that such an arrangement would relieve FAO of the administrative burden connected to that role, at competitive costs.⁶

12. In December 2011, the Secretary of the Governing Body forwarded the Governing Body's invitation to the WIPO Director-General, who accepted it soon thereafter. Subsequently, the Treaty Secretariat and the WIPO Center appointed focal points for implementing the Rules and developed web pages on the respective websites with user-friendly information.⁷

13. In addition to the functioning of the Rules, the Secretary of the Governing Body took further steps to make the Third Party Beneficiary Procedures operational by promoting FAO internal arrangements for the carrying out of the related functions. After consultations with the FAO Legal Office, it was agreed that the Secretary would retain the main responsibility for facilitating the implementation of the functions related to the various steps in the Procedures by FAO (i.e. the initial gathering of information with regard to disputes; amicable dispute

³ Resolution 5/2011, paragraphs 3 and 4. The Resolution is available at the following url: <http://www.planttreaty.org/content/resolution-52011-operation-third-party-beneficiary>

⁴ Report of the Ninety-third Session of the Committee on Constitutional and Legal Matters, CL 143/4, paragraphs 4-10. The report is available at the following url: <http://www.fao.org/docrep/meeting/023/mc180e.pdf>. Report of the Council of the FAO, Hundred and Forty-third Session, CL 143/REP, paragraph 30. The report is available at the following url: <http://www.fao.org/docrep/meeting/024/mc783e.pdf>.

⁵ Resolution 5/2011, paragraph 6.

⁶ Report of the Ninety-third Session of the Committee on Constitutional and Legal Matters, ft. 4 above.

⁷ <http://www.planttreaty.org/content/what-third-party-beneficiary>; <http://www.wipo.int/amc/en/center/specific-sectors/biodiversity/itprfa/>.

settlement; mediation; arbitration). The Secretary will copy the related correspondence to the FAO Legal Office for information, direct clearance or clearance upon any necessary consultation with other concerned units and departments, depending on progress with the dispute.

14. Concerning the list of experts from which the parties to an SMTA may appoint mediators or arbitrators in accordance with Article 8.4c of the SMTA and Articles 6.2 and 7.2 of the Third Party Beneficiary Procedures, the Governing Body, at its Fourth Session, had invited Contracting Parties to provide names of experts to be placed on the list in accordance with the criteria of expertise contained in Annex 2 of the Procedures.⁸ Following such invitation, the Secretary received a number of nominations, which were uploaded on the webpage of the Treaty together with relevant biodata.⁹

IV. STATUS OF THE THIRD PARTY BENEFICIARY OPERATIONAL RESERVE

15. The Financial Rules of the Governing Body stipulate that the Third Party Beneficiary Operational Reserve shall be maintained at a level to be determined by the Governing Body for each biennium. An adequate part of the contributions to the Core Administrative Budget is to be credited as priority to the Reserve.¹⁰

16. At its Fourth Session, the Governing Body further called upon 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.¹¹

17. The Governing Body established the level of the Reserve at USD 283,280.¹² As at 28 February 2013, the sum of USD 254,180, or 90% of the amounts due to the Third Party Beneficiary Operational Reserve, had been received from 57 Contracting Parties. The remaining balance of USD 29,100 remains due from 66 Contracting Parties.

18. At its Fourth Session, the Governing Body decided to review the level of the Reserve at this Fifth Session.¹³ In undertaking the review, the Governing Body may wish to consider that, so far, there has been no need to draw upon the Reserve, including for the potential case of non-compliance with the SMTA (see section II above). The Governing Body may, therefore, consider maintaining the Reserve at the current level, reviewing the same at its next session and, in conjunction with that, authorizing the Secretary to draw upon the Reserve as may be needed for the implementation of Third Party Beneficiary functions.

V. TECHNICAL IMPLEMENTATION OF THE THIRD PARTY BENEFICIARY PROCEDURES

19. At its Third Session, the Governing Body had decided that the Provider under an SMTA should:

- A. transmit a copy of the completed SMTA; or
- B. ensure that the completed SMTA is at the disposal of the Third Party Beneficiary as and when needed, state where the SMTA in question is stored, and how it may be obtained, and provide the following information:

⁸ Resolution 5/2011, paragraphs 13 and 14.

⁹ The list of experts is available at the following url: http://www.planttreaty.org/mediation_experts.

¹⁰ Rule VI.5, Financial Rules of the Governing Body.

¹¹ Resolution 5/2011, paragraph 16.

¹² Resolution 5/2011, paragraph 15.

¹³ *Id.*

- a) the identifying symbol or number attributed to the SMTA by the Provider;
- b) the name and address of the Provider;
- c) the date on which the Provider agreed to or accepted the SMTA, and in the case of shrink-wrap, the date on which the shipment was sent;
- d) the name and address of the Recipient, and in the case of a shrink-wrap agreement, the name of the person to whom the shipment was made;
- e) the identification of each accession in *Annex I* to the SMTA, and of the crop to which it belongs.

20. At its Third Session, the Governing Body had requested that the Third Party Beneficiary (i.e. FAO) at all times ensure the confidentiality of electronic data. This obligation comprises: industry-standard secured environment encryption during data transmission; secure hosting of the data store in the UN Information and Computing Centre (UNICC) in Geneva, Switzerland; and encryption of the data, with separate encryption in the data store of Provider's and Recipient's data, and of accession data.¹⁴

21. The Governing Body had also requested the Secretary to develop, in consultation with relevant organizations, appropriate and cost-effective processes to facilitate the submission, collection and storage of SMTA information in the implementation of Article 4.1 of the Third Party Beneficiary Procedures, and apply adequate measures to ensure the integrity of information and, where required, confidentiality of the information so provided.¹⁵

22. At its Fourth Session, the Governing Body noted that the Secretary had developed, in consultation with relevant organizations, appropriate and cost-effective processes to facilitate the submission, collection and storage of information in the implementation of Article 4.1 of the Third Party Beneficiary Procedures, and further requested the Secretary to continue applying adequate measures to ensure the integrity of information and, where required, confidentiality of the information so provided.¹⁶

23. Following such request by the Governing Body, the Secretariat completed the development of information technology systems that facilitated the submission, collection and storage of SMTA information in the implementation of Article 4.1 of the Third Party Beneficiary Procedures. The systems were further developed, tested and made available on-line to users of the SMTA, under the name of "Easy-SMTA".¹⁷

24. In order to assist potential and actual Providers and Recipients under the SMTA, Easy-SMTA combines the SMTA generating and reporting functions, which enable data to flow into a secure Data Store, with two additional tools. The first tool is the Online SMTA Generating and Reporting (OSGR), which supports the full SMTA workflow with functions for the generation, revision and acceptance of new SMTAs as well as for the reporting to the Governing Body on concluded SMTAs.

25. The second tool is the Online Reporting Form (ORF), which exclusively addresses the reporting to the Governing Body on concluded SMTAs, with options corresponding to those of the generating tool.

26. Compared to previous tools, the system has a new design and workflow to guide users in an intuitive step-by-step process. It also offers several additional functions, such as the uploading of spreadsheet files listing the *Annex I* material being transferred, which clearly facilitates the

¹⁴ Resolution 5/2009, paragraph 14; *Annex 2 to the Third Party Beneficiary Procedures*, Part III.

¹⁵ Resolution 5/2009, paragraph 17.

¹⁶ *Id.*.

¹⁷ <https://mls.planttreaty.org>

conclusion of and reporting on SMTAs. The Secretariat has also developed an integrated help function in each page of the system and an external help system that can be consulted online.¹⁸

27. The Secretariat has also worked during 2013 on the development of a tool which facilitates the voluntary reporting to the Governing Body of the information contained in Annex 4 of the SMTA by the Recipient, through electronic means. Thanks to this tool, Recipients can easily report on the crop-based payment scheme under Article 6.11 of the SMTA. The tool has been developed as an additional form to Easy-SMTA, thus benefiting from the infrastructure already in use.

28. Easy-SMTA has been deployed online in the six official languages of the Treaty and announced in May 2012 with the publication of a notification on the Treaty's website, issued in English, French and Spanish.¹⁹

29. In addition to several individuals, some IARCs of the CGIAR have utilized the functions of Easy-SMTA, and so have a number of public genebanks of Contracting Parties, mainly in Europe and North America. To date, more than one million accessions have been reported through electronic means into the data store that is connected to Easy-SMTA.

30. Based on the experience accumulated in assisting with the reporting process, the Secretariat has also developed an XML-based integration protocol to facilitate the automated reporting by major SMTA users, including some IARCs.

31. A number of Contracting Parties have also reported through Easy-SMTA on non-*Annex I* material which was transferred using material transfer agreements analogous to the SMTA. Such information was entered into the system at the discretion of the concerned Contracting Parties. The process neither involved extra costs nor constituted an additional burden to the system, since such system is largely automated.

32. The Secretariat has worked on the elaboration of Easy-SMTA user's manuals, which are currently available in English and Spanish, while the French and Arabic versions are being finalized at the time of issuance of this document. In the course of 2012, the Secretariat has also produced a set of brochures and presentations and, upon request, has made several live demonstrations, mostly by using teleconference facilities or at no cost. The brochures and presentations explain the main concepts related to the reporting and the different functions of the tools. National Focal Points and other Treaty stakeholders can utilize the brochures, presentations and manuals to raise awareness among potential or actual users of the SMTA, and to provide them with training and support.²⁰

33. During the current biennium, the costs related to the development and maintenance of the system have been covered with funds voluntarily provided by one Contracting Party, namely Spain. The Governing Body may wish to express its gratitude to this Contracting Party and encourage all Contracting Parties and other potential donors to support the development and maintenance of the system, or consider integrating the operation of the system as a maintenance function under the Core Administrative Budget. Additional information is provided in the document, *Financial Report on progress of the Work Programme and Budget for the 2012-2013 Biennium* (IT/GB-5/13/24).²¹

¹⁸ <http://planttreaty.org/content/itt-help-system>

¹⁹ The English version of the notification is available at the following url:
http://www.planttreaty.org/sites/default/files/NCP_MLS_EASY_SMTAMay2012_en.pdf

²⁰ The training materials can be accessed from the homepage of Easy-SMTA and at the following url:
<http://planttreaty.org/content/additional-resouces>

²¹ The *Ad Hoc* Technical Advisory Committee on the Standard Material Transfer Agreement and the Multilateral System suggested the Secretary to provide an update on the development of and progress with the implementation of technology support to the Multilateral System, including the amount and modalities of funding it, to the Governing Body at this Fifth Session (IT/AC-SMTA-MLS/4/Report, paragraph 10; the report is available at this Session of the Governing Body as information document n.3).

VI. POSSIBLE ELEMENTS OF A DECISION BY THE GOVERNING BODY

34. Without prejudice to any further guidance the Governing Body may wish to give for the operation of the Third Party Beneficiary, elements of a Resolution are provided in the *Appendix* to this document, to facilitate the deliberations of the Governing Body.

DRAFT RESOLUTION **/2013
OPERATION OF THE THIRD PARTY BENEFICIARY

THE GOVERNING BODY,

- (i) **Recalling** that under Article 12.4 of the Treaty, facilitated access to the Multilateral System shall be provided pursuant to a Standard Material Transfer Agreement adopted by the Governing Body at its First Session; and that under Article 13.2 of the Treaty, benefits arising from the use, including commercial, of plant genetic resources for food and agriculture under the Multilateral System shall be shared fairly and equitably through the mechanisms specified under that Article;
- (ii) **Recalling further** that the Governing Body, at its Third Session, had approved the Third Party Beneficiary Procedures for the carrying out of the roles and responsibilities of Third Party Beneficiary as identified and prescribed in the Standard Material Transfer Agreement under the direction of the Governing Body and, at its Fourth Session, the Mediation Rules to promote the effective functioning of the Third Party Beneficiary and provide an opportunity for cost containment;
- (iii) **Recalling further** that, in accordance with Article 4.2 of the Third Party Beneficiary Procedures, the Third Party Beneficiary may receive information on possible non-compliance with the obligations of the provider and recipient under a Standard Material Transfer Agreement from any natural or legal persons;
- (iv) **Recognizing further** that the Third Party Beneficiary will require adequate financial and other resources and that FAO acting as Third Party Beneficiary shall not incur any liabilities in excess of the funds available in the Third Party Beneficiary Operational Reserve;

Hereby,

1. **Thanks** the FAO Council and other relevant bodies of FAO for formally approving the Mediation Rules and the correspondingly amended Third Party Beneficiary Procedures;
2. **Further thanks** the Arbitration and Mediation Center of WIPO for having agreed to act as Administrator of the Mediation Rules;
3. **Notes** the Report on the Operation of the Third Party Beneficiary and **thanks** FAO and the Secretary for providing the report in accordance with Article 9 of the Third Party Beneficiary Procedures, and further **requests** the Secretary to continue providing, at each session of the Governing Body, such a report;
4. **Stresses** the importance for the effective functioning of the Third Party Beneficiary, of Article 4.2 of the Third Party Beneficiary Procedures, according to which the Third Party Beneficiary may receive information on possible non-compliance with the obligations of the provider and recipient under a Standard Material Transfer Agreement from any natural or legal persons;
5. **Decides** to maintain the Third Party Beneficiary Operational Reserve for the 2014-2015 biennium at the current level of USD 283,280, and to review same at its Sixth Session;
6. **Authorizes** the Secretary to draw upon the Third Party Beneficiary Operational Reserve as may be needed for the implementation of the functions of the Third Party Beneficiary;
7. **Calls** upon 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;

8. **Welcomes** the functional and cost-effective information technology tools that the Secretary has developed to facilitate the submission, collection and storage of information in the implementation of Article 4.1 of the Third Party Beneficiary Procedures, and **thinks** the Government of Spain for the generous financial support to the development of such tools;
9. **Requests** the Secretary to continue applying adequate measures to ensure the integrity of information and, where required, confidentiality of the information provided in the implementation of Article 4.1 of the Third Party Beneficiary Procedures.