



**Food and Agriculture
Organization of the
United Nations**



The International Treaty
**ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE**

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Item 8 of the Provisional Agenda

SIXTH SESSION OF THE GOVERNING BODY

Rome, Italy, 5 – 9 October 2015

Report on the Operations of the Third Party Beneficiary

Executive summary

In accordance with Article 9 of the Third Party Beneficiary Procedures and the request of the Governing Body at its Fifth Session, this document contains the report on the operations of the Third Party Beneficiary for the biennium 2014-2015. The document contains updates on the case of relevance to the Third Party Beneficiary that the Secretary had reported on at the Fifth Session of the Governing Body.

In response to the request made by the Governing Body at its Fifth Session, the document provides information on, and analysis of, the practice of CGIAR Centers and other Article 15 signatory institutions in relation to plant genetic resources for food and agriculture under development.

The document also includes information on the status of the Third Party Beneficiary Operational Reserve and the technical implementation of the Third Party Beneficiary Procedures through the daily operations of the Easy-SMTA Data Store, including in the context of the ongoing operations of the Multilateral System information infrastructure.

Guidance sought

The Governing Body is invited to give any further guidance it considers appropriate:

- a) for the effective operation of the Third Party Beneficiary; and
- b) in relation to plant genetic resources under development and the application of Part IV of the International Treaty.

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TABLE OF CONTENTS

	<i>Para.</i>
I. Introduction	1–4
II. Case for the Third Party Beneficiary	5–8
III. Practices regarding Plant Genetic Resources for Food and Agriculture under Development	9–26
IV. Status of the Third Party Beneficiary Operational Reserve	27–31
V. Technical operations of the Third Party Beneficiary Procedures	32–35
VI. Possible elements of a decision by the Governing Body	36

Appendix: Draft elements for a Resolution (to be integrated into DRAFT RESOLUTION
**/2015 on the Multilateral System)

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. By Resolution 5/2009, Resolution 5/2011 and Resolution 11/2015, 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.
3. In relation to a potential case for the Third Party Beneficiary, the Governing Body at its Fifth Session requested the Secretary, in consultation with the Bureau of the Sixth Session, to explore the practice of the International Agricultural Research Centres of the CGIAR (CGIAR Centres) in relation to plant genetic resources for food and agriculture under development (PGRFAuD) and the application of Article 15.1a of the Treaty, and to report back to this Session.²
4. This document responds to the above requests of the Governing Body.

II. CASE FOR THE THIRD PARTY BENEFICIARY

5. At the Fifth Session of the Governing Body, the Third Party Beneficiary reported on a possible case involving two CGIAR Centers. The case centered on the transfer of germplasm to third parties in violation of Treaty conditions.
6. In the course of the current biennium, FAO acting as the Third Party Beneficiary initiated the alternative dispute resolution process foreseen by the Third Party Beneficiary Procedures. The Third Party Beneficiary sought additional information from the two Centres, which clarified their actions in relation to the transfer of germplasm at issue. Upon subsequent informal consultations, a number of clarifying and corrective actions have been initiated in order to apply the legal provisions governing the transfer of germplasm. These actions concern: a) shrink-wrap SMTAs concluded between the two Centers; b) new SMTAs covering retroactively all the transfers to the recipients; c) any available information on the possible release for commercialization of varieties developed based on the transferred germplasm.
7. The Third Party Beneficiary is expected to receive final detailed information regarding the above.
8. At its Fifth Session, the Governing Body recalled that, in accordance with Article 4.2 of the Procedures, the Third Party Beneficiary may receive information on possible non-compliance with the obligations of the provider and the recipient under an SMTA from the parties to such an SMTA or any other natural or legal person. Accordingly, it stressed the importance of the provisions of Article 4.2 for the effective functioning of the Third Party Beneficiary.³ In the current biennium, the Third Party Beneficiary did not receive any information on possible cases of non-compliance with an SMTA, from any source.

III. PRACTICES REGARDING PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE UNDER DEVELOPMENT

Background

9. At its Fifth Session, in the context of the potential case for the Third Party Beneficiary, the Governing Body requested the Secretary, in consultation with the Bureau of this Session of

¹ Annex to Resolution 5/2009.

² IT/GB-5/13/Report, para. 43.

³ Resolution 11/2013, para. 4.

the Governing Body, to explore the practice of the CGIAR Centers in relation to PGRFAuD and the application of Article 15.1a of the Treaty, which requires that PGRFA listed in Annex 1 of the Treaty and held by the Centers be made available in accordance with the provisions set out in Part IV of the Treaty.⁴

10. The Secretariat developed a questionnaire for the consideration of the Bureau, and, following its review, transmitted it to the eleven CGIAR Centers and, in addition, the other six international institutions which signed Article 15 Agreements. The Secretary circulated the questionnaire on 27 April 2015, with copy to the CGIAR Consortium Office, and requested replies by 15 May. At the date of preparation of this document, the Secretary received nine replies, from eight CGIAR Centers and one other international institution. In the next paragraphs of this section, this document clarifies the approach followed in the questionnaire and presents an overview of the practices regarding PGRFAuD, as described in the replies to the questionnaire.

The legal provisions

11. PGRFAuD are regulated in the Treaty and the SMTA. The legal provisions were reproduced in the questionnaire, as they necessarily constitute the fundamental parameters for exploring the existing practices. Although the legal texts of reference present certain complexities, the Secretary followed them and, applying a prudent approach for guidance to be provided exclusively by the Governing Body and Contracting Parties, avoided offering any guidance.⁵

12. In the SMTA, **PGRFA under Development** are defined as "*material derived from the **Material**, and hence distinct from it, that is not yet ready for **commercialization** and which the developer intends to further develop or to transfer to another person or entity for further development*".

13. **Material** is the PGRFA specified in Annex 1 to the SMTA (thus, that are transferred by a Provider to a Recipient with an SMTA). **Commercialization** is defined as selling a **Product** for monetary consideration on the open market. Commercialization shall not include any form of transfer of **PGRFA under Development**. **Product** is defined as PGRFA "*that incorporate the **Material** or any of its genetic parts or components that are ready for commercialization*".

14. In Article 5 (rights and obligations of the **Provider**), the SMTA establishes that access to **PGRFA under Development**, including material being developed by farmers, shall be at the discretion of its developer, during the period of its development (Article 5 c)). Analogous provisions are in Article 12.3 e) of the Treaty.

15. In Article 6.5 (rights and obligations of the **Recipient**), the SMTA establishes that in the case that the Recipient transfers **PGRFA under Development** to another person or entity, the Recipient shall: a) do so under the terms and conditions of the SMTA; b) identify, in Annex 1 to the SMTA, the **Material** received from the **Multilateral System**, and specify that **PGRFA under Development** being transferred are derived from the **Material**; c) notify the Governing Body, in accordance with Article 5 e); and d) have no further obligations regarding the actions of any subsequent recipient.

16. In Article 6.6, the SMTA establishes that entering into a new SMTA under Article 6.5 shall be without prejudice to the right of the parties to attach additional conditions, relating to further product development, including, as appropriate, the payment of monetary consideration.

Questions regarding PGRFAuD

17. The questionnaire articulated six questions on the following:

⁴ Report of the Fifth Session of the Governing Body, para. 43. The report is available at <http://www.planttreaty.org/content/report-fifth-session-governing-body>.

⁵ In the paragraphs of this sub-section, the use of the **bold** font as made in the SMTA, is reproduced.

- a) the criterion applied for determining whether PGRFAuD are distinct from the original germplasm;
- b) the definition that the Centre adopts for material which the Centre, as a Recipient under Article 6.5 of the SMTA, has developed from material received by a Provider with an SMTA, and which the Centre wishes to provide to others in the exercise of its discretion as developer; the conditions under which the Centre transfers such germplasm;
- c) as a further specification of the question above, the definition of “received from the Multilateral System” that the Centre uses when transferring material under Article 6.5 of the SMTA, in order to comply with the obligation to identify the source material from which the transferred material derive;
- d) based on the definition of “received from the Multilateral System”, the conditions under which the Centre distributes material under development such as breeding lines that do not have any ancestor “received from the Multilateral System”;
- e) the practice regarding accessions, which the Centre held “in trust” according to the 1994 Agreement with the FAO Commission and since 2006 as Provider based on the Article 15 Agreement with the Governing Body (in particular, to verify whether these accessions are managed differently from material acquired with the SMTA by the Centre as Recipient and subsequently developed);
- f) the practice, if any, regarding the transfer of material under development for purposes that may not qualify as research, breeding and training for food and agriculture (i.e. outsourcing tests / evaluation / data collection; commercial use; direct use by farmers).

Responses to the questionnaire

18. Regarding the distribution of PGRFAuD, the practice resulting from the questionnaire is to utilize the SMTA for the transfer of breeding lines, genetic stocks and other materials developed/improved by a Center that are distinct by changes in morphology, phenology, genetic makeup and that:

- (i) incorporate germplasm previously held “in trust” by Centers in genebanks and placed within the purview of the Multilateral System under the Article 15 agreements; or
- (ii) incorporate germplasm received by a Centre under the SMTA or under another legal instrument that allows the Centre to redistribute the germplasm under the SMTA.⁶

19. The prevailing practice by the Centres is to avail themselves of the flexibility offered by Article 5 c) and Article 6.6 of the SMTA. Most of the Centres require additional conditions when they transfer PGRFAuD that belong to the two categories above. Some Centres exercise their discretion by requesting another MTA, to be concluded alongside with the SMTA that Article 6.5 prescribes. The questionnaire did not request any detailed information on the additional conditions (or the additional MTA), although one Centre voluntarily made such information available and another Centre provided a description of the additional conditions. Hence, it is not possible to fully address the consistency of the additional conditions (or the additional MTA)

⁶ With regard to CGIAR Centres, this is in line with the Implementation Guidelines for the CGIAR Principles for the Management of Intellectual Assets. The guidelines are available at: https://library.cgiar.org/bitstream/handle/10947/2846/Implementation_Guidelines_-_For_the_CGIAR_IA_Principles_on_the_Management_of_Intellectual_Assets.pdf?sequence=1.

The non-CGIAR institution that replied to the questionnaire, had listed the germplasm to be considered as available under the Multilateral System, in an Annex to the Agreement with the Governing Body. Reportedly, PGRFAuD that incorporate the listed germplasm, are distributed with the SMTA.

with the SMTA, including in regard of the continued ability by the Centre to distribute with the SMTA the original germplasm that PGRFAuD derive from.

20. Most of the Centres apply a different MTA to germplasm under development that do not incorporate material belonging to the two categories above. One Centre voluntarily applies the SMTA to such germplasm in the spirit of implementation of the Multilateral System.

21. Although the terms “received from the Multilateral System” are found by one Centre to be an imprecise formulation (the receipt of the Material per se is a physical receipt from the Provider, not from the Multilateral System), such terms are generally interpreted as received with rights and obligations to conserve, use and make available germplasm under the Multilateral System.

22. In relation to Article 6.5 of the SMTA, the majority of the replies to the questionnaire indicate that the provisions regarding the identification in the SMTA of the original material “received from the Multilateral System” are *not* followed. Some respondents, including the Centres that do not require additional conditions pursuant to Article 6.6 of the SMTA, do not identify Multilateral System ancestors in Annex I to the SMTA.

23. A Centre pointed to one textual ambiguity in Article 6.5 of the SMTA. Since **Material** is defined as the PGRFA specified in Annex 1 to the SMTA, i.e. germplasm that is transferred in one instance of an SMTA, the term "**Material that is PGRFA under Development**" is a contradiction in terms. It means germplasm that is simultaneously itself and derived and distinct from itself.

24. Regarding the transfer of PGRFAuD for trials and tests, the common practice is to conclude a service agreement and not to apply the SMTA, on condition that the germplasm is either destroyed or returned after the trials or tests. In cases of direct transfer to farmers for cultivation, the previous advice given by the *Ad Hoc* Committee on the SMTA and the Multilateral System is noted but the practice varies among the respondents, with the prevalent use of the SMTA in cases where the status of the recipient for the purpose of the transfer is not clear, or where due diligence by the Centre in respect of the status of the recipient or the purpose of the transfer are considered as overly burdensome. In the few cases where PGRFAuD are transferred for commercialization, the status of the germplasm is changed to Product that is available without restriction to further research and breeding.

Issues for possible consideration

25. The replies to the questionnaire point to two issues for further information gathering and clarification within the community of Article 15 signatory institutions:

- a) additional conditions that are attached to the transfer of PGRFA under Development, and investigating whether they are consistent with the terms and conditions of the SMTA;
- b) practices and rationale concerning the identification of Multilateral System ancestors of PGRFA under Development.

26. In the light of the above, the Governing Body may wish to:

- (i) welcome the clarity provided by the respondent CGIAR Centres regarding use of the SMTA for transfers of PGRFA under Development that: incorporate germplasm previously held “in trust” and placed within the purview of the Multilateral System under the Article 15 Agreements; or incorporate germplasm received by a Centre under the SMTA or under another legal instrument that allows the Centre to redistribute the germplasm under the SMTA;
- (ii) request the Secretariat, in cooperation with CGIAR Centres and other CGIAR relevant institutions and mechanisms, to:

- gather information on the content of additional conditions attached to the transfer of PGRFA under Development;
- explore ways of facilitating the implementation of the obligation of Article 6.5 of the SMTA to identify material received from the Multilateral System in Annex 1 to the SMTA;
- report back on the above to the Governing Body at its Seventh Session.

IV. STATUS OF THE THIRD PARTY BENEFICIARY OPERATIONAL RESERVE

27. The Financial Rules of the Governing Body stipulate that the Third Party Beneficiary Operational Reserve (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.⁷
28. At its Fifth Session, the Governing Body decided to maintain the Reserve for the 2014-2015 biennium at the level of USD 283,280, and to review such a level at this Session.⁸
29. At the date of this document, USD 269,694 or 95.2% of the amounts due to the Reserve, had been received from seventy-two Contracting Parties leaving a balance of USD 13,586 still payable.
30. At its Fifth Session, the Governing Body requested the Secretary to provide detailed information on the use of resources for the purposes of implementation of the Third Party Beneficiary Procedures, as part of the information accompanying the Financial Statements that are made available to Contracting Parties.⁹
31. The direct costs ensuing from the implementation of the Third Party Beneficiary Procedures are essentially those incurred to cover the contract for the hosting of the SMTA server by the United Nations International Computing Centre. For the 2014-15 biennium, this amounts to USD 51,000 (USD 6,375 charged on a quarterly basis as part of the Core Administrative Budget).

V. TECHNICAL IMPLEMENTATION OF THE THIRD PARTY BENEFICIARY PROCEDURES

32. At its Fifth Session, the Governing Body welcomed the functional and cost-effective information technology tools that the Secretary has developed to facilitate the submission, collection and storage of SMTA information in the implementation of Article 4.1 of the Third Party Beneficiary Procedures (i.e. Easy-SMTA) and thanked the Government of Spain for the generous financial support to the development of such infrastructure. The Governing Body requested the Secretary to continue applying adequate measures to ensure the integrity of information and, where required, confidentiality of the information provided.¹⁰
33. In order to implement the guidance received by the Governing Body, the further development of Easy-SMTA as part of the information architecture of the Multilateral System in the past biennium focused on the following areas:
- a) Facilitation of reporting, through an XML-based protocol for system-to-system integration and a batch reporting option intended for smaller Providers;

⁷ Rule VI.5, Financial Rules of the Governing Body.

⁸ Resolution 11/2015, para. 5.

⁹ Resolution 11/2013, para. 9.

¹⁰ Resolution 11/2013, para. 8 and para. 10.

- b) Adaptation of the system to user needs (e.g. internal monitoring of SMTAs issued by the Provider's regional offices);
- c) Data quality monitoring and improvement;
- d) Improvements to data analysis and representation;
- e) Improved support to Provider's documentation; and
- f) Regular system security enhancements.¹¹

34. As of May 2015, all CGIAR Centres adopted Easy-SMTA to report electronically. A similar choice was made by other major Providers such as CePaCT of the SPC, AVRDC, EMBRAPA, INRA of France, INIA of Spain, Wageningen CGR, National Botanic Garden of Belgium and *Zemedelsky vyzkumny ustav Kromeriz, s.r.o.* of the Czech Republic.

35. Easy-SMTA offers potential for progressive integration into the informatics infrastructure of the Global Information System and the Multilateral System, which is being strategically designed to deliver information services to users. The infrastructure, and the resulting business processes can expand the range of such services, such as providing Permanent Digital Object Identifiers for a broad range of PGRFA data, in order to facilitate the advanced downstream use of germplasm, and thereby provide additional value for users of the Treaty systems.¹²

VI. POSSIBLE ELEMENTS OF A DECISION BY THE GOVERNING BODY

36. Without prejudice to any guidance the Governing Body may wish to give on the matters covered in this document, draft elements of a Resolution are in the *Appendix* to this document.

¹¹ More information on Easy-SMTA is contained in document IT/GB-6/15/8, *Report on the Implementation of the Multilateral System*.

¹² See document IT/GB-6/15/7, *Vision Paper for the Development of the Global Information System*, in particular paragraphs 22-23.

APPENDIX

DRAFT ELEMENTS FOR A RESOLUTION**(to be integrated into DRAFT RESOLUTION **/2015 on the Multilateral System)****I. Regarding the operation of the Third Party Beneficiary****THE GOVERNING BODY:**

Recalling 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;

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;

Recognizing 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;

1. **Notes** the Report on the Operation of the Third Party Beneficiary and further **requests** the Secretary and FAO to continue providing, at each Session of the Governing Body, such a report;
2. **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 the parties under the Standard Material Transfer Agreement or any other natural or legal persons;
3. **Decides** to maintain the Third Party Beneficiary Operational Reserve for the 2016-2017 biennium at the current level of USD 283,280, and to review same at its Seventh Session, and **calls** upon Contracting Parties that have not done so yet, intergovernmental organizations, non-governmental organizations and other entities to contribute to the Reserve;
4. **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;
5. **Welcomes** the functional and cost-effective information technology tools and infrastructure 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 **requests** the Secretary to apply adequate measures to ensure the integrity and, where required, confidentiality of information, while continuing the further development of the Treaty information technology tools and infrastructure.

II. Regarding the practice of CGIAR Centres for Plant Genetic Resources for Food and Agriculture under Development

THE GOVERNING BODY:

Recalling the provisions of Article 15.1 a) of the International Treaty;

Recalling further the provisions of Articles 6.5 and 6.6 of the SMTA;

1. *Welcomes* the use by CGIAR Centres of the SMTA for transfers of PGRFA under Development that: incorporate germplasm previously held “in trust” and placed within the purview of the Multilateral System under the Article 15 Agreements with the Governing Body; or incorporate germplasm received by a Centre under the SMTA or under another legal instrument that allows the Centre to redistribute the germplasm under the SMTA;
2. *Requests* the Secretariat, in cooperation with CGIAR Centres and other CGIAR relevant institutions and mechanisms, to: a) gather information on the content of additional conditions attached to the transfer of PGRFA under Development; b) explore ways of facilitating the implementation of the obligation of Article 6.5 of the SMTA to identify material received from the Multilateral System in Annex 1 to the SMTA; c) report back on the above to the Governing Body at its Seventh Session.