



The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



Item 12.2 of the Provisional Agenda

FOURTH SESSION OF THE GOVERNING BODY

Bali, Indonesia, 14 – 18 March 2011

REPORT ON THE OPERATIONS OF THE THIRD PARTY BENEFICIARY

Note by the Secretary

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- i) *The Third Party Beneficiary Procedures, adopted by the Governing Body at its Third Session provide, in Article 9, that “the Third Party Beneficiary shall submit to the Governing Body, at each of its Regular Sessions, a report setting forth” information on a number of items regarding its operations in the previous biennium. By Resolution 5/2009, the Governing Body requested “the Secretary of the International Treaty to provide, at each session of the Governing Body, a report in accordance with Article 9 of the Third Party Beneficiary Procedures”.*
- ii) *This document contains the report on the operations of the Third Party Beneficiary for the biennium 2009/10, in accordance with the Article 9 of the Third Party Beneficiary Procedures, and the request of the Governing Body, and includes updates on the establishment of the Third Party Operational Reserve; the establishment of the list of experts to act as mediators and arbitrators as envisaged under Article 8.4c of the Standard Material Transfer Agreement; and the technical implementation of the Third Party Beneficiary.*
- iii) *The Governing Body is being invited to note the developments on the above issues 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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*Appendix: Draft Resolution **/2011: Operation of the Third Party Beneficiary (Part II)*

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, 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 request of the Governing Body, and outlines the progress with and developments in the implementation of the Third Party Beneficiary Procedures since the Third Session of the Governing Body.

II. APPROVAL OF THE THIRD PARTY BENEFICIARY PROCEDURES BY FAO

5. In adopting the Third Party Beneficiary Procedures, the Governing Body thanked the Director-General of FAO for having agreed in principle that FAO shall act as the Third Party Beneficiary, and requested him to bring the procedures to the attention of the relevant bodies of FAO, for formal approval.²
6. As requested by the Governing Body and in accordance with the FAO Basic Texts, the FAO Committee on Constitutional and Legal Matters (CCLM) and the FAO Council examined the Third Party Beneficiary Procedures as approved by the Governing Body, together with related amendments to the Financial Rules.
7. The CCLM examined whether the exercise of Third Party Beneficiary functions involved risks for FAO from the point of view of the autonomy of the Organization, the protection of its privileges and immunities, especially its immunity from national jurisdiction and any financial

¹ Annex to Resolution 5/2009.

² Resolution 5/2009, paragraph 2.

liabilities. The CCLM noted the rights, roles and responsibilities of FAO acting as the Third Party Beneficiary under the Standard Material Transfer Agreement (SMTA).

8. The CCLM observed that the SMTA establishes a flexible system of progressive escalation in handling instances of non-compliance with the SMTA and that the applicable law is the general principles of law, including the UNIDROIT Principles of International Commercial Contracts 2004, the objectives and relevant provisions of the International Treaty and, where necessary for interpretation, the decisions of the Governing Body.

9. The CCLM further noted that the Third Party Beneficiary Procedures, in light of Resolution 5/2009 of the Governing Body, include a set of financial provisions that ensure that FAO would not incur liabilities in excess of the funds available in the Third Party Beneficiary Operational Reserve.

10. The CCLM concluded, therefore, that the procedures regarding the exercise by FAO of Third Party Beneficiary functions include adequate safeguards protecting the autonomy of the Organization and its immunity from every form of national jurisdiction, and ensure that FAO would not incur financial liabilities beyond the level of the Third Party Beneficiary Operational Reserve.

11. The FAO Council underlined that this mechanism provides an example of useful synergies between FAO and bodies established under Article XIV of the Constitution. The FAO Council confirmed the decision of the CCLM and approved the Third Party Beneficiary Procedures, which are now fully operational.³

III. FINANCIAL OPERATION OF THE THIRD PARTY BENEFICIARY

12. At its Third Session, the Governing Body requested the Secretary to establish the Third Party Beneficiary Operational Reserve, for the purpose of defraying costs and expenses that may be incurred by the Third Party Beneficiary in the fulfilment of its roles and responsibilities under the Third Party Beneficiary Procedures. The Governing Body also amended its Financial Rules for this purpose, and established, within the General Fund for the Core Administrative Budget, the Third Party Beneficiary Operational Reserve.

13. The Financial Rules of the Governing Body, as amended, 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.⁴

14. To operationalize the Reserve following the request of the Third Session of the Governing Body, the Secretary established a separate account within the General Fund for contributions.

15. At its Third Session, the Governing Body 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.⁵

16. At its third meeting, the *Ad Hoc* Third Party Beneficiary Committee (the Committee) noted that the Secretary had established the Third Party Beneficiary Operational Reserve as

³ Report of the Council of FAO, Hundred and Thirty-seventh Session, Rome, 28 September -2 October 2009, CL 137/REP, paragraph 59.

⁴ Rule VI.5, Financial Rules of the Governing Body.

⁵ Resolution 5/2009, paragraph 5.

requested by the Governing Body, and that he had credited amounts to the Reserve as a priority action in accordance with the Financial Rules of the Governing Body.

17. As at 30 November 2010, the sum of over USD 155,000, or 56% of the amounts due to the Third Party Beneficiary Operational Reserve, had been received from thirty-four (34) Contracting Parties, based on an initial level of the Operational Reserve of USD283,280 considered by the Committee at its second meeting in March 2009. The remaining balance of USD 171,931 remains due from eighty-eight (88) Contracting Parties.

18. The Committee therefore 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.

19. At its Third Session, the Governing Body authorized the Secretary, subject to the availability of financial resources, to draw upon the Reserve, in order to implement, as appropriate, the Third Party Beneficiary Procedures.⁶

20. As at 30 November 2010, no information regarding cases of non-compliance with the terms and conditions of an SMTA has been received by the Secretariat of the Treaty. Hence, there has been no need to draw on the Reserve for funds to be utilized for initiation of dispute settlement. The Governing Body may, therefore, wish to maintain the level of the Reserve at the current level and review the same at its next session.

IV. LIST OF EXPERTS UNDER ARTICLE 8.4C OF THE STANDARD MATERIAL TRANSFER AGREEMENT

21. By Resolution 5/2009 of the Governing Body,

Decide[d] to establish a list of experts from which the parties to a Standard Material Transfer Agreement may appoint mediators and arbitrators in accordance with the Third Party Beneficiary Procedures;

Request[d] the Secretary of the International Treaty to invite Contracting Parties to provide names of experts to be placed on the list in accordance with the criteria of expertise contained in Annex 2 to the Third Party Beneficiary Procedures;

Request[d] the Secretary of the International Treaty to establish a mechanism on the Treaty's website, where the nomination form for inclusion in the list of experts could be obtained, and invite nominations through the website.

22. In accordance with the request of the Governing Body, the Secretary invited Contracting Parties, through a notification dated 20 October 2010, to provide names of eligible experts to be added on the list established by the Governing Body. The notification as well as the mechanism for the submission of nominations are now available on the Treaty's website. The Secretary also issued a communication on the Treaty's website for professionals who are interested in being included in the list to put their names forward.

23. Subsequent to the issuance of the notification, the Secretary has received a number of submissions from Contracting Parties. As at 30 November 2010, the names of ten (10) experts

⁶ Resolution 5/2009, paragraph 6.

from eight (8) countries have been provided for the list, and these will be posted on the Treaty's website.

24. At its third meeting, the Committee noted that, as envisaged in the Third Party Beneficiary Procedures, the Secretary had activated the list of experts from which parties to a dispute under an SMTA may nominate mediators or arbitrators, and encouraged the Secretary to publicise the notification as widely as possible. It also recommended that the Governing Body, again, call on Contracting Parties to nominate eligible candidates to the list.

V. TECHNICAL IMPLEMENTATION OF THE THIRD PARTY BENEFICIARY PROCEDURES

25. At its Third Session, the Governing Body 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:
 - 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.

26. The Governing Body 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.⁷

27. The Governing Body 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.⁸

28. To meet the above requests, the Secretariat signed a project agreement with UNICC to host the data store, including infrastructure support, operating system administration, system monitoring, backup and restore.

29. Based on the use cases elaborated by a focus group of information technology specialists and the advice given by a legal focus group (both focus groups were established by a technical consultation held in December 2008), the Secretariat finalized the design of the data store, including an uploading interface, to facilitate implementation of the reporting requirements by

⁷ Resolution 5/2009, paragraph 14; *Annex 2 to the Third Party Beneficiary Procedures*, Part III.

⁸ Resolution 5/2009, paragraph 17.

parties to the SMTA, in accordance with the above instructions of the Governing Body.⁹ Utilization of information submitted through the data store will allow the Third Party Beneficiary to carry out its roles and responsibilities, in particular for the initiation of dispute settlement.

VI. POSSIBLE ELEMENTS OF A DECISION BY THE GOVERNING BODY

30. The following are elements of a Resolution which the Governing Body may wish to consider, and give any further guidance it considers appropriate for the operation of the Third Party Beneficiary:

⁹ The datastore can be accessed at the following web address: <http://mls.planttreaty.org/>

DRAFT RESOLUTION **/2011 (PART II)¹⁰**OPERATION OF THE THIRD PARTY BENEFICIARY****THE GOVERNING BODY:**

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;

Recalling 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;

Recalling further that the Governing Body, at its Third Session, adopted the Third Party Beneficiary Procedures and requested the Director-General of FAO to bring these procedures to the attention of the relevant bodies of FAO, for formal approval;

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;

- i) **Thanks** the FAO Council and other relevant bodies of FAO for formally approving the Third Party Beneficiary Procedures, thereby making the Third Party Beneficiary fully operational;
- ii) **Notes** the Report on the Operation of the Third Party Beneficiary and **thanks** FAO and the Secretary for providing the report in accordance with the Third Party Beneficiary Procedures, and further **requests** the Secretary to continue to provide, at each session of the Governing Body, a report in accordance with Article 9 of the Third Party Beneficiary Procedures;
- iii) **Notes** that, in accordance with Resolution 5/2009, the Secretary has invited Contracting Parties to nominate experts and has also established the mechanism for the nomination of experts to the list from which the parties to a Standard Material Transfer Agreement may appoint mediators and arbitrators in accordance with the Third Party Beneficiary Procedures;
- iv) **Further invites** Contracting Parties to provide names of experts to be placed on the list in accordance with the criteria of expertise contained in Annex 2 to the Third Party Beneficiary Procedures;
- v) **Decides** to maintain the Third Party Beneficiary Operational Reserve for the 2012/2013 biennium at the current level of USD283,280, and to review same at its Fifth Session;
- vi) **Further 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;

¹⁰ Note by the Secretary. This draft Resolution will be merged with the draft Resolution contained in Document IT/GB-4/10/14, Report of the Chair of the Ad Hoc Third Party Beneficiary Committee, after its consideration and adoption by the Governing Body.

- vii) *Notes that the Secretary has 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 **requests** the Secretary to continue applying adequate measures to ensure the integrity of information and, where required, confidentiality of the information so provided.*