

September 2013



# 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

### UPDATED INFORMATION ON A POTENTIAL CASE FOR THE THIRD PARTY BENEFICIARY

#### ***EXECUTIVE SUMMARY***

1. *This document comprises the addendum referred to in paragraph 9 of the document, IT/GB-5/13/19 Report on the Operations of the Third Party Beneficiary, and contains additional information on a potential case for the Third Party Beneficiary. This follows from communication in writing, in accordance with the Third Party Beneficiary Procedures, to parties concerned, and their response with additional information and statements.*
2. *The additional information on the case is provided, in addition to a request for the guidance of the Governing Body for addressing a general question of implementation emerging from the case.*

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## I. UPDATED INFORMATION ON THE POTENTIAL CASE FOR THE THIRD PARTY BENEFICIARY

1. In the document, *IT/GB-5/13/19 Report on the Operations of the Third Party Beneficiary* the Governing Body was informed of a potential case for the Third Party Beneficiary, involving two International Agricultural Research Centres (IARCs). The case revolves around two agreements, 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. Following informal exchange of communications and a formal communication in writing, in accordance with the Third Party Beneficiary Procedures, to the two concerned institutions, they have recently provided additional information and statements.

2. The additional information and statements of relevance to the purpose of this report clarify that part of the germplasm in question was transferred through SMTAs, although no details on the concluded SMTAs were furnished. Another part of the germplasm, including material designated as part of the Multilateral System by one of the concerned institutions, was (and is still being) considered as material under development and, as such, the institution concerned considered that need not mandatorily distributed under the SMTA. In addition, one of the concerned institutions was of the view that, regardless the status of the material, an agreement covering research, breeding and commercialization substitutes the need to conclude SMTAs.

## II. APPLICABILITY OF THE THIRD PARTY BENEFICIARY PROCEDURES

3. It is to be noted that the functions of the Third Party Beneficiary can be exercised only in cases of non-compliance with the terms and conditions of the SMTA by parties thereto, as set forth in the text of the SMTA itself.<sup>1</sup> Accordingly, from the information so far available in the case, the Third Party Beneficiary would have a right to act only in regard to the part of the germplasm that was effectively transferred with SMTAs, for the purpose of ascertaining whether the recipient has been in compliance with the terms and conditions of the relevant SMTAs. Consequently, regarding the part of the germplasm that was not transferred with an SMTA, the Third Party Beneficiary would technically have no mandate to exercise its functions.

4. In addressing the issues that arise in regard to the latter part, it is worth considering whether it is appropriate to have recourse to the dispute settlement provisions of the agreement concluded between each IARC and FAO, on behalf of the Governing Body, pursuant to Article 15 of the Treaty.<sup>2</sup> According to the agreement, the IARCs undertake to distribute *Annex I* material that they hold in accordance with the provisions of Part IV of the Treaty (i.e. under the rules of the Multilateral System).<sup>3</sup> Accordingly, if it is deemed that that part of the germplasm distributed without the SMTA ought to have been transferred under the SMTA, the assertion of the IARC to the contrary raises a possible situation of dispute for which the dispute settlement provisions of the agreement could be activated.

## III. QUESTION OF GENERAL IMPLEMENTATION

5. As indicated above, one of the concerned institutions asserts that the status of some transferred germplasm is that of “material under development” (that is, material generated by the institution’s breeding programme from crosses including both designated and non-designated parental germplasm, i.e., the former in-trust material that is now part of the Multilateral System

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<sup>1</sup> Article 8.2 of the SMTA.

<sup>2</sup> Article 7 of the agreement (“Any dispute concerning the implementation of this Agreement, which cannot be settled by negotiations between the Parties to this Agreement, shall be settled by arbitration in accordance with the procedures set out in Part I of Annex III to the Treaty, except that the references to the Director-General of FAO shall be replaced by references to the Secretary-General of the Permanent Court of Arbitration”).

<sup>3</sup> Article 2.a of the agreement.

based on the agreement with the Governing Body). Hence, in order to determine whether the SMTA ought to have been used for the transfer, it is necessary to examine and clarify what is meant by “plant genetic resources under development” in this case.

6. The apparent issue in question arise from the Treaty normative setting as no definition of “plant genetic resources under development” is provided in the Treaty in relation to Article 12.3a), according to which plant genetic resources under development, including material developed by farmers, shall be at the discretion of its developer, during the period of its development. However, a definition is provided in the SMTA where “plant genetic resources under development” are considered as material derived from the Material (i.e., material received with an SMTA), 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. The definition also provides that the period of development shall be deemed to have ceased when those resources are commercialized as a product.

7. The SMTA specifies that, in the case that the recipient of the material received with an SMTA transfers such material during the development phase (i.e., as plant genetic resources under development) to another person or entity, he or she shall do so under the SMTA, without prejudice to the right to attach additional conditions to the SMTA, relating to further product development, including, as appropriate, the payment of monetary consideration. In the SMTA, the recipient shall identify the material originally received with the previous SMTA.<sup>4</sup>

8. From the above provisions of the SMTA, any material received through the SMTA must be transferred with the SMTA whether or not such material is under development, in the meaning that the SMTA assigns to it. In this regard, the question that arises in light of the circumstances and related issues described above is the following: can material held by the IARC and designated as forming part of the Multilateral System be considered, for the purpose of transfer of such material during its development phase, as equivalent to material received by a recipient with an SMTA? If this is the case, then the SMTA is to be used for the transfers of such material in its development phase.

#### **IV. GUIDANCE SOUGHT**

9. The Governing Body is invited to take note of the developments concerning the potential case for the Third Party Beneficiary, and provide any guidance it considers necessary. In particular, would the Governing Body wish the Secretariat to invoke the dispute settlement provisions of the Agreement between the FAO, on behalf of the Governing Body, as explained above?

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<sup>4</sup> Articles 6.5 and 6.6 of the SMTA.