

October 2010



The International Treaty  
ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



**Item 6 of the Draft Provisional Agenda**

**THIRD MEETING OF THE *AD HOC* THIRD PARTY BENEFICIARY COMMITTEE**

**Rome, Italy, 7 & 8 October 2010**

**REPORT**

**Agenda Item 1. Opening**

1. The Chair of the *Ad Hoc* Third Party Beneficiary Committee (the Committee), Mr Javad Mozafari Hashjin (Near East), opened the meeting and welcomed the members of the Committee. The list of participants is attached as *Appendix 5* to this report.

2. The Secretary also welcomed the members of the Committee and reported on actions taken by the Secretariat to implement the requests of the Governing Body contained in Resolution 5/2009, on the Third Party Beneficiary Procedures. In particular, the Secretary had issued a Notification inviting Contracting Parties to identify experts for the list of experts for the consideration of parties to a Standard Material Transfer Agreement (SMTA) and the Third Party Beneficiary in appointing mediators and arbitrators in dispute settlement under Article 8 of the SMTA. Furthermore, work on the information technology tools foreseen by the Governing Body in Annex 2 of Resolution 5/2009 was underway for their completion. The Third Party Beneficiary Operational Reserve had also been established, as requested in Resolution 5/2009. He noted that, in preparing the working documents for the meeting of the Committee, the Secretariat had contacted a number of relevant organizations, including the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), and the World Intellectual Property Organization (WIPO), to seek inputs and advice. He expressed his gratitude for the inputs and information received during these informal consultations.

**Agenda Item 2. Adoption of the Agenda**

3. The Committee adopted its agenda, as given in *Appendix 1*.

**Agenda Item 3. Draft operational guidelines for the commencement and management of mediation procedures under the *Third Party Beneficiary Procedures***

4. The Committee worked on the basis of documents IT/TPBC-3/10/2, *Draft operational guidelines for the commencement and management of mediation procedures under the Third Party Beneficiary Procedures*, and IT/TPBC-3/10/2 Add. 1, *Addendum to Draft operational guidelines for the commencement and management of mediation procedures under the Third Party Beneficiary Procedures*, which had been prepared by the Secretary in accordance with the

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request of the Governing Body at its Third Session. It thanked the Secretary for the excellent quality of the documents, noting that in their preparation, he had consulted widely with the relevant institutions and organizations, and thanked those organizations that had provided comments and advice on the draft guidelines. It thanked, in particular, WIPO for contributing to the initial draft of the draft *Operational Guidelines for the commencement and management of mediation procedures under the Third Party Beneficiary Procedures*, and having kindly put Ms Eun-Joo Min of the Arbitration and Mediation Center of WIPO at the disposal of the Committee as an observer and resource person.

5. The Committee considered how best to implement its mandate and how best the operational guidelines requested by the Governing Body might be structured to achieve effective and cost-efficient mediation proceedings. The Committee agreed that it would be best for the Third Party Beneficiary to first explore administered mediation for dispute settlement, should negotiations fail. To this end, the Committee agreed that simple and clear mediation rules were necessary to facilitate this approach and finalized the draft rules accordingly.

6. The Committee reviewed and finalized the draft *Mediation Rules* under the Third Party Beneficiary Procedures, as given in *Appendix 2* to this report. It also finalized *Draft Resolution \*\*/2011*, by which the Governing Body could adopt them, as given in *Appendix 3* to this report.

7. The Committee recommended these draft Mediation Rules and the draft Resolution to the Governing Body, for its consideration and adoption at its Fourth Session.

8. The Committee also agreed that in order to give proper effect to these rules, it would be necessary to amend Article 6 of the *Third Party Beneficiary Procedures* so as to incorporate the *Mediation Rules* into the Procedures, and therefore recommended that the Governing Body consider an amendment to the Procedures, as reflected in the draft Resolution, and inform the Third Party Beneficiary accordingly.

9. The Committee recalled that, at its second meeting, it had “agreed that there was a need to contain the possible costs that would be involved in the operation of the Third Party Beneficiary, while at the same time ensuring its effectiveness”. It further recalled Resolution 5/2009 of the Governing Body, which requested that the Operational Guidelines to be finalized by the Committee “shall include appropriate cost containment measures”.

10. The Committee considered the Schedule of Fees provided by the WIPO Arbitration and Mediation Center for acting as Administrator, and contained in *Appendix 4* to this report. It agreed that the WIPO Center’s reduced Schedule of Fees was extremely competitive and very favourable, compared to the prevalent rates obtainable elsewhere. The Committee, therefore, recommended that the Governing Body nominate the WIPO Arbitration and Mediation Center as the Administrator of the Mediation Rules, in accordance with the Schedule of Fees.<sup>1</sup>

11. The Committee noted that the SMTA provides that, should mediation not result in a settlement:

“any party may submit the dispute for arbitration under the Arbitration Rules of an international body as agreed by the parties to the dispute. Failing such agreement, the dispute shall finally be settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with said Rules”.

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<sup>1</sup> Should the WIPO Arbitration and Mediation Center not be nominated Administrator, and another Administrator sought, it would be necessary to negotiate a new schedule of fees.

12. In this context, the Committee also considered the arbitration services of the WIPO Arbitration and Mediation Center. These include a fast-track arbitration process aimed at limiting costs, entitled “Expedited Arbitration”,<sup>2</sup> with fixed costs for disputes involving amounts in dispute of less than US\$ 10 million. In both WIPO Expedited Arbitration and WIPO Arbitration, the schedules of fees were also found to be very competitive.<sup>3</sup>

13. The Committee further recommended that the Governing Body request, in the implementation of *Article 7* of the *Third Party Beneficiary Procedures*, that Expedited Arbitration under WIPO Rules is first proposed by the Third Party Beneficiary to the other party or parties in the dispute.

**Agenda Item 4. The application of the Third Party Beneficiary provisions and procedures to transactions related to non-Annex I material transferred with the SMTA**

14. The Committee considered document IT/TPBC-3/10/2, *Consideration of the issue of the application of the third party beneficiary provisions and procedures to transactions related to non-Annex I material transferred with the SMTA*.

15. A representative of the International Agricultural Research Centers of the Consultative Group on International Agricultural Research (CGIAR), Mr Michael Halewood, upon the invitation of the Committee, provided some background information and responded to questions put to him on the issue by the members. The Committee thanked Mr Halewood for being available to provide updates and explanations to the Committee.

16. Due to lack of time, the Committee was unable to discuss the matter in detail or arrive to any conclusions. However, the Committee acknowledged that the issue was a very important one for which clear feedback would need to be given to the Governing Body, as requested. It agreed that further consultations and inputs from the regions were required, and that members would gather these inputs so that the Committee could consider them prior the Fourth Session of the Governing Body, and report to the Governing Body accordingly. It, therefore, agreed to adjourn its meeting to dates to be confirmed by the Secretary, subject to adequate arrangements being made for it, back-to-back with the Fourth Session of the Governing Body.

17. The Committee acknowledged that the Centres of the CGIAR have been using the SMTA with explanatory footnotes to transfer all relevant plant genetic resources for food and agriculture since February 2007. It also noted that some Contracting Parties were using the SMTA text to transfer plant genetic resources for food and agriculture not listed in *Annex I* of the Treaty as well as those on the list. In order to achieve consistency in the inputs to be sought by the members, the Committee agreed that members should seek views, in both the case of the Centres and such Contracting Parties, on:

- i. what the legal implications of the use of the SMTA text for transfer material not listed in *Annex I* of the Treaty are;
- ii. what the implications for benefit-sharing are; and
- iii. what the implications for list of crops in *Annex I* of the Treaty are.

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<sup>2</sup> These rules are available at <http://www.wipo.int/amc/en/arbitration/expedited-rules/>.

<sup>3</sup> The schedules of fees are available at <http://www.wipo.int/amc/en/arbitration/fees/>.

### **Agenda Item 5. Draft Business Plan of the Governing Body**

18. Due to lack of time, the Committee was unable to discuss this issue in order to provide inputs to the further development of the draft Business Plan. It, however, agreed to consider it at the continuation of its meeting prior to the Fourth Session of the Governing Body and provide any suggestions it might have to the Bureau for the consideration of the Governing Body.

### **Agenda Item 6. Other Business**

19. The Committee also considered a number of matters that are essential for the operation of the Third Party Beneficiary Procedures.

#### **(i) Operations of the Third Party Beneficiary and Third Party Beneficiary Operational Reserve**

20. The Committee recalled that, at its second meeting, it had “agreed that there was a need to contain the possible costs that would be involved in the operation of the Third Party Beneficiary, while at the same time ensuring its effectiveness”. The Committee had also “noted the importance of a properly resourced Working Capital Reserve for the stability and sustainability of the Treaty and its functioning.”

21. The Committee noted that the Secretary had established the Third Party Beneficiary Operational Reserve as requested by the Governing Body at its Third Session, and that he had credited amounts to the Operational Reserve as a priority action in accordance with Rule 6.5 of the Financial Rules of the Governing Body. As at the end of September 2010, the sum of **USD 111,349** or **39%** of the amounts due to the Operational Reserve, had been received from **29 Contracting Parties**, based on an initial level of the Operational Reserve of **US\$283,280** considered by the Committee at its second meeting in March 2009.<sup>4</sup> The remaining balance of USD 171,931 remains due from 93 Contracting Parties. 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.

#### **(ii) List of experts under Article 8.4c of the Standard Material Transfer Agreement**

22. The Committee noted that, as envisaged in the Third Party Beneficiary Procedures, the Secretary had established 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.

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<sup>4</sup> Document IT/TPBC-2/09/2, *Information provided by the Secretary in response to requests from the Committee at its first session.*

**(iii) Progress report on the development of information systems to support the implementation of the Multilateral System**

23. The Secretariat updated the Committee on the latest developments on the information technology tools in support of the Multilateral System of Access and Benefit-sharing and, in particular, on the modules and applications related to the secure collection, management and storage of information related to the operations the Third Party Beneficiary.

24. The Committee commended the Secretary for having made significant progress in the development of appropriate and cost-effective electronic technologies to facilitate the work of the Third Party Beneficiary including the submission, collection and storage of information provided to the Third Party Beneficiary in accordance with the decision of the Governing Body at its Third Session.

25. The Committee suggested that it might be useful for the Secretariat to make a presentation on the information technology systems and tools to Contracting Parties during the Fourth Session of the Governing Body, possibly by convening a side-event, and to continue strengthening partnerships in this field with other international organizations and ongoing global initiatives. It also encouraged the Secretary to finalize the systems and tools taking into account language issues and different training needs.

26. The Committee further noted that the systems being developed provided appropriate and cost-effective tools, in the implementation of Article 4.1 of the Third Party Procedures, including measures to ensure the integrity and confidentiality of such information, and that the hosting of the datastore in the United Nations Information and Computing Centre (UNICC), as well as the technological security features already envisaged, would ensure that appropriate standards are met.

**Agenda Item 7. Adoption of the Report**

27. The Committee adopted its report.

**Closing of the meeting**

28. The Committee agreed that at the continuation of its meeting, it will consider what future roles, if any, it might play in the implementation and further development of the Third Party Beneficiary mechanism so that the Governing Body might consider them in its deliberations. Following a request from one of the regions, the Committee agreed to also examine how best the Governing Body might organize its various committees in order to further enhance their efficiency and cost-effectiveness, and make recommendations for the consideration of the Governing Body.

29. The Committee thanked the WIPO Mediation and Arbitration Centre, and UNCITRAL, for the support they had given, and requested them to continue supporting the work of the Treaty. The Committee further acknowledged the excellent technical inputs and advice that WIPO had provided.

30. The Committee thanked the Secretariat for the excellent work it had done in preparing and organizing the meeting of the Committee.

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*Appendix 1*

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IT/TPBC-2/09/1

October 2010

<b>Item 2 of the Agenda</b>
<b>INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE</b>
<b>THIRD MEETING OF THE <i>AD HOC</i> THIRD PARTY BENEFICIARY COMMITTEE</b>
<b>Rome, Italy, 7-8 October 2010</b>
<b>AGENDA</b>

1. Opening of the meeting
2. Adoption of the agenda
3. Draft operational guidelines for the commencement and management of mediation procedures under the *Third Party Beneficiary Procedures*
4. The application of the Third Party Beneficiary provisions and procedures to transactions related to non-*Annex I* material transferred with the SMTA
5. Draft Business Plan of the Governing Body
6. Other business
7. Adoption of report

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*Appendix 2*

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**INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES  
FOR FOOD AND AGRICULTURE**

**RULES FOR MEDIATION OF A DISPUTE IN RELATION TO A STANDARD  
MATERIAL TRANSFER AGREEMENT**

**(“MEDIATION RULES”)**

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**Article 1**

**Scope of the Mediation Rules**

(a) These Mediation Rules give effect to Article 6, *Mediation*, of the *Third Party Beneficiary Procedures* approved by the Governing Body of the International Treaty.

(b) If a dispute has not been settled by amicable dispute settlement after the issuance of the summary of information and the notice referred to in Article 5, paragraph 2, of the *Third Party Beneficiary Procedures*, then the parties to the Standard Material Transfer Agreement and the Third Party Beneficiary may choose mediation through a neutral mediator pursuant to Article 6, paragraph 1, of the *Third Party Beneficiary Procedures* and to Article 8.4b of the Standard Material Transfer Agreement. If they choose mediation, they may agree that the mediation shall be carried out in accordance with these Mediation Rules, which are administered by [*the entity designated by the Governing Body*] (“the Administrator”).

**Article 2**

**Request for Mediation**

(a) Either party to the Standard Material Transfer Agreement or the Third Party Beneficiary may file a Request for Mediation with the Administrator.

(b) The Request for Mediation shall contain or be accompanied by:

- (i) the names, addresses and telephone, telefax, e-mail or other communication references of the parties to the Standard Material Transfer Agreement and of the representative of the party filing the Request for Mediation; and
- (ii) a summary of the relevant provisions of the Standard Material Transfer Agreement that have not been complied with, and other relevant information (“Summary of Information”); and
- (iii) the signed “Acceptance of Mediation” (*Annex 1* to these Mediation Rules).

(c) The Administrator shall transmit a copy of these Mediation Rules, the Summary of Information and the Schedule of Fees applicable on the date of the request for Mediation to the parties to the Standard Material Transfer Agreement, and to the Third Party Beneficiary, within fifteen (15) days of receipt of a Request for Mediation.

### **Article 3**

#### **Acceptance of these Mediation Rules**

(a) A party to the Standard Material Transfer Agreement or the Third Party Beneficiary accepting mediation under these Mediation Rules shall sign the Acceptance of Mediation and return it to the Administrator.

(b) The parties to the mediation (“the Party” or the “Parties”)<sup>1</sup> are the parties to the Standard Material Transfer Agreement, and the Third Party Beneficiary that accept mediation in accordance with paragraph (a) of this Article.

(c) A party to the Standard Material Transfer Agreement that is not a Party to the mediation, in accordance with paragraph (b) of this Article, shall not be privy to any information, notifications or documents in the context of the mediation, if such mediation is held.

### **Article 4**

#### **Commencement of Mediation**

(a) Mediation shall commence on receipt of signed copies of the Acceptance of Mediation from the Parties, provided that such signed copies of the Acceptance of Mediation are received by the Administrator within thirty (30) days of the transmission by the Administrator of the documents in accordance with Article 2c of these Mediation Rules.

(b) On commencement of mediation, the Administrator shall consult with the Parties, in order to agree on the place of mediation, and the language to be used in mediation.

### **Article 5**

#### **Notices and Periods of Time**

(a) Any notice or other communication that may or is required to be given under these Mediation Rules shall be in writing and shall be delivered by expedited postal or courier service, or transmitted by telefax, e-mail or other means of telecommunication that provide a record thereof.

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<sup>1</sup> For the purposes of these Mediation Rules, the terms “Party” or “Parties” are used to refer only to parties to the mediation and not a party or the parties to the Standard Material Transfer Agreement or a Contracting Party to the Treaty.



(b) The address of the Administrator is provided in *Annex 2* of these Mediation Rules and may be changed at the discretion of the Administrator.

(c) A Party's last known residence or place of business shall be a valid address for the purpose of any notice or other communication in the absence of any notification of a change by that Party. Communications may in any event be addressed to a Party in the manner stipulated or, failing such a stipulation, according to the practice followed in the course of the dealings between the Parties.

(d) For the purpose of determining the date of commencement of a time limit, a notice or other communication shall be deemed to have been received on the day it is delivered or, in the case of telecommunications, transmitted in accordance with paragraphs (a), (b) and (c) of this Article.

(e) For the purpose of determining compliance with a time limit, a notice or other communication shall be deemed to have been sent, made or transmitted if it is dispatched, in accordance with paragraphs (a), (b) and (c) of this Article, prior to or on the day of the expiration of the time limit.

(f) For the purpose of calculating a period of time under these Mediation Rules, such period shall begin to run on the day following the day when a notice or other communication is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day that follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

(g) The Parties may agree to reduce or extend the periods of time referred to in these Mediation Rules.

(h) The Administrator may, at the request of a Party or on its own motion, extend or reduce the periods of time referred to in these Mediation Rules.

## **Article 6**

### **Appointment of the Mediator**

(a) If the Parties agree within seven (7) days of the commencement of the mediation on the person of the mediator, or have agreed on another appointment procedure, the Administrator shall appoint any mediator so selected, after confirming the requirements of Articles 8 and 9.

(b) If the Parties cannot agree within seven (7) days of the commencement of the mediation on the person of the mediator, or have not agreed on another appointment procedure, the mediator shall be appointed in accordance with the following procedure:

- (i) The Administrator shall as soon as possible send to each Party an identical list of candidates. Where possible, the list shall comprise the names of at least three candidates in alphabetical order. The list shall include or be accompanied by a statement of each candidate's qualifications. If the Parties have agreed on any particular qualifications, the list shall contain only the names of candidates that satisfy those qualifications.
  - (ii) Each Party shall have the right to delete the name of any candidate or candidates to whose appointment it objects and shall number any remaining candidates in order of preference.
  - (iii) Each Party shall return the marked list to the Administrator (without obligation to send a copy to the other Party or Parties) within seven (7) days after the date on which the list is received by it. Any Party failing to return a marked list within that period of time shall be deemed to have assented to all candidates appearing on the list.
  - (iv) Upon receipt by it of the lists from the Parties, the Administrator shall, taking into account the preferences and objections expressed by the Parties, invite a person from the list to be the mediator.
  - (v) If the lists that have been returned do not show a person who is acceptable as mediator to all Parties, the Administrator shall be authorized to appoint the mediator. The Administrator shall similarly be authorized to do so if a person is not able or does not wish to accept the Administrator's invitation to be the mediator, or if there appear to be other reasons precluding that person from being the mediator, and there does not remain on the lists a person who is acceptable as mediator to each Party.
- (c) Notwithstanding the provisions of paragraph (b), the Administrator shall be authorized to appoint the mediator if it determines in its discretion that the procedure described in that paragraph is not appropriate for the case.

## **Article 7**

### **Nationality of the Mediator**

- (a) An agreement of the Parties concerning the nationality of the mediator shall be respected.
- (b) If the Parties have not agreed on the nationality of the mediator, such mediator shall, in the absence of special circumstances such as the need to appoint a person having particular qualifications, be a national of a country other than the countries of the Parties, if different.

## **Article 8**

### **Impartiality and Independence**

- (a) The mediator shall be impartial and independent.

(b) The prospective mediator shall, before accepting appointment, disclose to the Parties and the Administrator any circumstances that might give rise to justifiable doubt as to the mediator's impartiality or independence, or confirm in writing that no such circumstances exist.

(c) If, at any stage during the mediation, new circumstances arise that might give rise to justifiable doubt as to the mediator's impartiality or independence, the mediator shall promptly disclose such circumstances to the Parties and the Administrator.

## **Article 9**

### **Availability, Acceptance and Notification**

(a) The mediator shall, by accepting appointment, be deemed to have undertaken to make available sufficient time to enable the mediation to be conducted and completed expeditiously.

(b) The prospective mediator shall accept appointment in writing and shall communicate such acceptance to the Administrator.

(c) The Administrator shall notify the Parties of the appointment of the mediator.

## **Article 10**

### **Representation of Parties and Participation in Meetings**

(a) The Parties may be represented or assisted by persons of their choice, including in their meetings with the mediator.

(b) Immediately after the appointment of the mediator, the names and addresses of persons authorized to represent a Party, and the names and positions of the persons who will be attending the meetings of the Parties with the mediator on behalf of that Party, shall be communicated by that Party to the other Party or Parties, the mediator and the Administrator.

## **Article 11**

### **Conduct of the Mediation**

(a) The mediation shall be conducted in the manner agreed by the Parties. If, and to the extent that, the Parties have not made such agreement, the mediator shall, in accordance with these Mediation Rules, determine the manner in which the mediation shall be conducted.

(b) If at any stage of the mediation, the Parties so agree, the mediator shall provide an evaluation of the dispute. Such evaluation may take the form of a written document, which the Parties are free to accept or reject as the settlement of the dispute.

- (c) Each Party shall cooperate in good faith with the mediator to advance the mediation as expeditiously as possible.
- (d) The mediator shall be free to meet and to communicate separately with a Party on the clear understanding that information given at such meetings and in such communications shall not be disclosed to the other Party or Parties without the express authorization of the Party giving the information.
- (e) As soon as possible after being appointed, the mediator shall, in consultation with the Parties, establish a timetable for the submission by each Party to the mediator and to the other Party or Parties of a statement summarizing the background of the dispute, the Party's interests and contentions in relation to the dispute and the present status of the dispute, together with such other information and materials as the Party considers necessary for the purposes of the mediation and, in particular, to enable the issues in dispute to be identified.
- (f) The mediator may at any time during the mediation suggest that a Party provide such additional information or materials as the mediator deems useful.
- (g) Any Party may at any time submit to the mediator, for consideration by the mediator only, written information or materials that it considers to be confidential. The mediator shall not, without the written authorization of that Party, disclose such information or materials to the other Party or Parties.

## **Article 12**

### **Role of the Mediator**

- (a) The mediator shall promote the settlement of the issues in dispute between the Parties in any manner that the mediator believes to be appropriate, but shall have no authority to impose a settlement on the Parties.
- (b) The mediator or a Party to the dispute may propose that one or more independent experts be consulted to report on specific issues. Terms of reference should be established for such expert in consultation between the mediator and the Parties. Any such experts shall be required to sign an appropriate confidentiality undertaking in accordance with Article 16 of these Mediation Rules.

## **Article 13**

### **Termination of the Mediation**

The mediation shall be terminated within six months of the commencement of mediation, or any shorter period of time agreed on by the Parties. The mediation shall be terminated by the following means:

- (i) by the signing of a Settlement Agreement by the Parties covering any or all of the issues in dispute between the Parties;

- (ii) by the decision of the mediator if, in the mediator's judgment, further efforts at mediation are unlikely to lead to a resolution of the dispute; or
- (iii) by a written declaration of a Party at any time sent to the other Party or Parties, the Administrator and the mediator.

#### **Article 14**

##### **Mediation Termination Notices**

Upon the termination of the mediation, the mediator shall promptly send to the Administrator a Mediation Termination Notice in writing, indicating that the mediation is terminated and shall indicate the date on which it terminated, whether or not the mediation resulted in a settlement of the dispute and, if so, whether the settlement was full or partial. The mediator shall send to the Parties a copy of the notice so addressed to the Administrator.

#### **Article 15**

##### **Dispute Resolution Termination Notice**

If the Mediation Termination Notice indicates that the Parties reached a settlement, the Administrator shall send a Dispute Resolution Termination Notice to the other Party or Parties, terminating the dispute resolution process.

#### **Article 16**

##### **Confidentiality**

- (a) No recording of any kind shall be made of any meetings of the Parties.
- (b) Each person involved in the mediation, including, in particular, the mediator, the Parties and their representatives and advisors, any independent experts, and any other persons present during the meetings of the Parties with the mediator, shall respect the confidentiality of the mediation and may not, unless otherwise agreed by the Parties and the mediator, use or disclose to any outside party any information concerning, or obtained in the course of, the mediation. Each such person shall sign an appropriate confidentiality undertaking prior to taking part in the mediation.
- (c) Unless otherwise agreed by the Parties, each person involved in the mediation shall, on the termination of the mediation, return, to the Party providing it, any brief, document or other materials supplied by a Party, without retaining any copy thereof. Any notes taken by a person concerning the meetings of the Parties with the mediator shall be destroyed on the termination of the mediation.

(d) Unless otherwise agreed by the Parties, the mediator and the Parties shall not introduce as evidence or in any manner whatsoever in any judicial or arbitration proceeding:

- (i) any views expressed or suggestions made by the other Party or Parties with respect to a possible settlement of the dispute;
- (ii) any admissions and statements made by a Party in the course of the mediation;
- (iii) any proposals made or views expressed by the mediator;
- (iv) any evaluation of the dispute made by the mediator, pursuant to Article 11b of these Mediation Rules, or any parts or contents thereof;
- (v) the fact that a Party had or had not indicated willingness to accept any proposal for settlement made by the mediator or by the other Party or Parties.

(e) The Administrator, the mediator and the Third Party Beneficiary shall keep any Mediation Termination Notice, Dispute Resolution Notice, and Settlement Agreement confidential and shall not, without the written authorization of the Parties, disclose either the existence or the result of the mediation to any person, except where its disclosure is necessary for purposes of implementation and enforcement.

(f) Notwithstanding the provisions of paragraph (e) of this Article, the Administrator may, however, include information concerning the mediation in any aggregate statistical data that it publishes concerning its activities, provided that such information does not reveal the identity of the Parties or enable the particular circumstances of the dispute to be identified.

(g) Notwithstanding the provisions of paragraph (e) of this Article, the Third Party Beneficiary may, however, include information concerning the mediation in its report to a session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, pursuant to Article 9, *Reporting*, of the *Third Party Beneficiary Procedures*, provided that such information does not reveal the identity of the Parties or enable the particular circumstances of the dispute to be identified.

## **Article 17**

### **Role of the Mediator in Pending or Future Proceedings**

Unless required by a court of law or authorized in writing by the Parties, the mediator shall not act in any capacity whatsoever, otherwise than as a mediator, in any pending or future proceedings, whether judicial, arbitral or otherwise, relating to the subject matter dealt with in the mediation proceedings.

**Article 18**  
**Administration Fee**

(a) The Request for Mediation shall be subject to the payment to the Administrator of an administration fee, the amount of which shall be fixed in accordance with the Schedule of Fees applicable on the date of the Request for Mediation, when they are sent to the Parties, pursuant to Article 2(c) of these Mediation Rules.

(b) The administration fee shall not be refundable.

(c) No action shall be taken by the Administrator on a Request for Mediation until the administration fee has been paid.

(d) If a Party who has filed a Request for Mediation fails, within seven (7) days after a reminder (normally to be sent within 3 weeks of the receipt of the request for mediation) in writing from the Administrator, to pay the administration fee, it shall be deemed to have withdrawn its Request for Mediation.

**Article 19**  
**Fees of the Mediator**

(a) The amount and currency of the fees of the mediator and the modalities and timing of their payment shall be fixed by the Administrator, after consultation with the mediator and the Parties.

(b) The amount of the fees shall be reasonable and, unless the Parties and the mediator agree otherwise, be calculated on the basis of the hourly indicative rate set out in the Schedule of Fees applicable on the date of the Request for Mediation, and taking into account the amount in dispute, the complexity of the subject matter of the dispute and any other relevant circumstances of the case.

**Article 20**  
**Deposits**

(a) The Administrator may, at the time of the appointment of the mediator, require each party to deposit an equal amount as an advance for the costs of the mediation, including, in particular, the estimated fees of the mediator and the other expenses of the mediation. The amount of the deposit shall be determined by the Administrator.

(b) The Administrator may require the Parties to make supplementary deposits in equal shares.

(c) If a Party fails, within seven (7) days after a reminder in writing from the Administrator, to pay the required deposit, the mediation shall be deemed to be terminated. The Administrator shall,

by notice in writing, inform the Parties and the mediator accordingly and indicate the date of termination.

(d) After the termination of the mediation, the Administrator shall render an accounting to the Parties of any deposits made and return any unexpended balance to the Parties or require the payment of any amount owing from the Parties.

## **Article 21**

### **Costs**

(a) Upon termination of the mediation proceedings, the Administrator fixes the costs of the mediation and gives written notice thereof to the Parties. The term “costs” includes:

- (i) The fees of the mediator;
- (ii) The travel and other expenses of the mediator;
- (iii) The costs (including fees, travel and other expenses) of any independent expert appointed in accordance with Article 12 of these Mediation Rules;
- (iv) Such other expenses as are necessary for the conduct of mediation proceedings, such as the cost of meeting facilities.

(b) The costs, as defined above, are borne equally by the Parties unless the Parties have agreed otherwise or the settlement agreement provides for a different apportionment. All other expenses incurred by a Party are borne by that Party.

## **Article 22**

### **Exclusion of Liability**

Except in respect of deliberate wrongdoing, the mediator and the Administrator shall not be liable for any act or omission in connection with any mediation conducted under these Mediation Rules.

## **Article 23**

### **Waiver of Defamation**

The Parties, and, by accepting appointment, the mediator agree that any statements or comments, whether written or oral, made or used by them or their representatives in preparation for or in the course of the mediation shall not be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this Article may be pleaded as a bar to any such action.



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*Annex 1*

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**Acceptance of Mediation**

Article 8.4b of the Standard Material Transfer Agreement provides that “[i]f the dispute is not resolved by negotiation, the parties may choose mediation through a neutral third party mediator, to be mutually agreed.”

Having received from the Administrator [*the entity designated by the Governing Body*]:

- (a) a Summary of Information relative to a dispute under a Standard Material Transfer Agreement, in accordance with Article 2b(ii) of the *Rules for Mediation of a Dispute in Relation to a Standard Material Transfer Agreement* and Article 5, paragraph 2, *Amicable Dispute Settlement*, of the *Third Party Beneficiary Procedures*, and
- (b) a copy of the *Rules for Mediation of a Dispute in Relation to a Standard Material Transfer Agreement*,

The undersigned party hereby accepts mediation in relation to this dispute in accordance with the above-mentioned *Mediation Rules*.

The undersigned party accepts that, unless the Parties to the mediation agree otherwise, the costs of the mediation shall be borne in equal shares by the Parties to the mediation, in accordance with Article 21 of the above-mentioned *Mediation Rules*.

Signature: ..... Date: .....

Name of Signatory: .....

Name of party to the Standard Material Transfer Agreement in dispute, or the Third Party Beneficiary: .....

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1. The signed Acceptance of Mediation is to be returned to:

[Name and address of the Administrator [*entity designated by the Governing Body*]]

2. If the Administrator has received no acceptance of mediation from a Party within fifteen (30) days of its transmission of the Summary of Information and the copy of the above mentioned *Mediation Rules*, such party is deemed to have opted not to accept mediation.

3. Please note that the consequences of not accepting mediation include the following:

- Even if you do not accept mediation, mediation may nevertheless proceed between the other party to the Standard Material Transfer Agreement and the Third Party Beneficiary, provided that they accept mediation. You would not be a Party in such mediation and would not be privy to any information, notifications or documents in the context of such mediation, if such mediation is held, in accordance with Article 3c of the above mentioned *Mediation Rules*.
- In accordance with Article 8.4c of the Standard Material Transfer Agreement, if the dispute has not been settled by negotiation or mediation, any party may submit the dispute for arbitration under the Arbitration Rules of an international body as agreed by the parties to the dispute. Failing such agreement on the applicable Arbitration Rules, the dispute, if submitted to arbitration, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with said Rules.

4. If you have any questions, please contact the [*entity designated by the Governing Body*] by email at: [email address].

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*Annex 2*

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**Address of the Administrator**

Address of the Administrator:

[INSERT]

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*Appendix 3*

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**DRAFT RESOLUTION \*\*/2011****OPERATION OF THE THIRD PARTY BENEFICIARY**

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**THE GOVERNING BODY:**

- (i) **Recalling** Resolution 5/2009, *Procedures for the Third Party Beneficiary*, by which it adopted *Third Party Beneficiary Procedures* and requested the Director General to bring these procedures to the attention of the relevant bodies of FAO, for formal approval;
- (ii) **Recognizing** the important role of the Third Party Beneficiary in initiating and carrying out dispute settlement as provided for in the Standard Material Transfer Agreement;
- (iii) **Noting** that the Committee on Constitutional and Legal Matters and the Council of FAO had examined the *Third Party Beneficiary Procedures*, together with related amendments to the Financial Rules;
- (iv) **Noting further** that the Council, in considering the *Third Party Beneficiary Procedures*, had regarded these as an example of useful synergies between FAO and bodies established under Article XIV of the FAO Constitution, and approved the Third Party Beneficiary Procedures, which are now fully operational;
- (v) **Noting** that, as requested in Resolution 5/2009, the *Ad Hoc* Third Party Beneficiary Committee has prepared draft *Mediation Rules* for use in the context of Article 6 of the *Third Party Beneficiary Procedures*;
  - 1. **Thanks** the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) and the United Nations Commission on International Trade Law (UNCITRAL), for having provided technical support in the preparation of these *Mediation Rules*;
  - 2. **Recognizes** that these *Mediation Rules* will promote the effective functioning of the Third Party Beneficiary and provide an opportunity for cost containment;
  - 3. **Adopts** these *Mediation Rules*, and amends Article 6 of the *Third Party Beneficiary Procedures* by adding a paragraph to read as follows:
    - 2. *The Third Party Beneficiary shall propose to the parties to the Standard Material Transfer Agreement that mediation be carried out in accordance with the Mediation Rules contained in Annex 2 to these Third Party Beneficiary Procedures.*
  - 4. **Requests** the Director-General to bring the *Third Party Beneficiary Procedures*, as amended, to the attention of the relevant bodies of FAO, for approval;

5. For the settlement of a dispute under Article 8 of the SMTA, **requests** the Third Party Beneficiary to propose these *Mediation Rules*, to parties to the Standard Material Transfer Agreement proceeding to mediation under Article 8.4b of the Standard Material Transfer Agreement, and failing an agreement on the application of the *Mediation Rules*, to propose such other mediation rules as may be acceptable to the parties;
6. **Requests** the Arbitration and Mediation Center of WIPO to act as Administrator of these *Mediation Rules*;
7. **Notes** that a party to a Standard Material Transfer Agreement initiating dispute settlement in accordance with Article 8 of the Standard Material Transfer Agreement should immediately inform the Third Party Beneficiary, and should also inform the Third Party Beneficiary of any settlement of the dispute that may have been reached;
8. **Recognizes** the importance for the functioning of the Multilateral System in general, and of the Third Party Beneficiary in particular, of effective information technology tools, and requests the Secretary to give priority to completing them, and putting them at the disposal of users of the Standard Material Transfer Agreement;
9. **Reiterates** the importance of maintaining sufficient resources to initiate dispute settlement, by fully funding the Third Party Beneficiary Operational Reserve, as a priority, in the context of Contracting Parties' contributions to the Treaty and its Core Administrative Budget, in accordance with Article 6.5 of the Financial Rules;
10. **Calls** 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.

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*Appendix 4*

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**Schedule of Fees**

**As applicable in accordance with Articles 20 and 21 of the Rules for Mediation of a Dispute in Relation to a Standard Material Transfer Agreement.\***

(All amounts are in United States dollars)

<b>Type of Fee</b>	<b>Amount in Dispute</b>	<b>Fees</b>
<b>Administration Fee</b>	Up to \$ 2.5 M	\$ 500
	Over \$ 2.5 M	\$ 1,000
<b>Mediator Fees</b>	Up to \$ 2.5 M	Unless the Parties agree otherwise, a rate of \$ 300 per hour as agreed by the Administrator in consultation with the Parties and the mediator, capped at a maximum of \$ 10,000.
	Over \$ 2.5 M	Unless the Parties agree otherwise, a rate of \$ 300 per hour as agreed by the Administrator in consultation with the Parties and the mediator, capped at a maximum of \$ 20,000.

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\* Any changes to the Schedule of Fees will be announced on the website of [the entity designated by the Governing Body] at: [URL].

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*Appendix 5*

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**LIST OF PARTICIPANTS**

<b>AFRICA Region</b>	<p><b>Ms Maria Antonieta COELHO</b> Associate Professor Faculty of Law, University A. Neto Centro Nacional de Recursos Fitogenéticos Prédio Centro Nacional de Investigação Científica Luanda, Angola Cell: +244 92 505 2060</p>
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