

RESOLUTION 5/2009
PROCEDURES FOR THE THIRD PARTY BENEFICIARY

THE GOVERNING BODY,

Recalling that the objectives of the International Treaty on Plant Genetic Resources for Food and Agriculture are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security;

Recalling, that Part IV of the Treaty establishes a Multilateral System of Access and Benefit-sharing, which is efficient, effective, and transparent, both to facilitate access to plant genetic resources for food and agriculture, and to share, in a fair and equitable way, the benefits arising from the utilization of these resources, on a complementary and mutually reinforcing basis;

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;

Noting that the Governing Body, at its First Session, had invited the Food and Agriculture Organization of the United Nations ('FAO'), as the Third Party Beneficiary, to carry out the roles and responsibilities as identified and prescribed in the Standard Material Transfer Agreement, under the direction of the Governing Body, in accordance with procedures to be established at this Third Session;

Noting also that, in December 2006, the Director-General of FAO informed Contracting Parties to the Treaty of his agreement in principle for FAO to act as the Third Party Beneficiary foreseen in the Standard Material Transfer Agreement and that this agreement in principle was subject to formal approval, upon review of the procedures to be established by the Governing Body defining the roles and responsibilities of the Third Party Beneficiary;

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;

Noting further that the *Ad Hoc* Third Party Beneficiary Committee has prepared draft Third Party Beneficiary Procedures for the consideration of the Governing Body at this Session in accordance with its decision at the Second Session;

Thanking the Mediation and Arbitration Centre of the World Intellectual Property Organization (WIPO), the United Nations Commission on International Trade Law (UNCITRAL), and the International Chamber of Commerce (ICC), for their excellent technical advice to the Secretariat, and **welcoming** the offer of the WIPO Mediation and Arbitration Centre to provide additional technical advice and support to the Treaty, in particular in the development of the operational guidelines for the commencement and management of amicable dispute resolution and mediation proceedings;

1. **Adopts** these *Procedures for the Operation of the Third Party Beneficiary* ('Third Party Beneficiary Procedures'), as in *Annex 1* to this Resolution;
2. **Thanks** the Director-General of FAO for having agreed in principle that FAO shall act as the Third Party Beneficiary, and requests him to bring these procedures to the attention of the relevant bodies of FAO, for formal approval;
3. **Requests** the Secretary of the International Treaty 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;
4. **Incorporates** the Third Party Beneficiary Operational Reserve into the Core Administrative Budget and, for this purpose, **amends** the Financial Rules of the Treaty as given in *Appendix B* to this Report;
5. **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;
6. **Authorizes** the Secretary of the International Treaty, subject to the availability of financial resources, to draw upon the Third Party Beneficiary Operational Reserve, in order to implement, as appropriate, the Third Party Beneficiary Procedures;
7. **Requests** 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;
8. **Requests** the Secretary of the International Treaty to develop operational guidelines for the commencement and management of amicable dispute resolution and mediation proceedings under the Third Party Beneficiary Procedures in order to promote the effective functioning of the Third Party Beneficiary, which shall include appropriate cost containment measures. In developing the operational guidelines, the Secretary shall seek, as appropriate, technical support from relevant organizations, such as the WIPO Mediation and Arbitration Centre, and other relevant international organizations;
9. **Decides** that the current *Ad Hoc* Third Party Beneficiary Committee will reconvene in order to review and finalize the operational guidelines on the basis of a draft text prepared by the Secretary of the International Treaty in close cooperation with the FAO Legal Office, for adoption by the Governing Body at its Fourth Session;
10. **Decides** 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; and
11. **Requests** 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;
12. **Requests** 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;
13. **Stresses** the importance of having adequate regional representation and gender balance, in the placement of experts on the list;
14. **Decides** that the parties to the Standard Material Transfer Agreement shall provide to the

Governing Body and Third Party Beneficiary, in accordance with the relevant provisions of the Standard Material Transfer Agreement and in order for the Third Party Beneficiary to be able to effectively carry out its roles and responsibilities, the information contained in Parts III and IV of Annex 2 to the Third Party Beneficiary Procedures;

15. **Accordingly decides** that the information required in accordance with Article 5e of the Standard Material Transfer Agreement shall be provided according to the following schedule; at least once every two calendar years or within an interval that shall be, from time to time, decided by the Governing Body;

16. **Stresses** the importance of the Provider and the Recipient fulfilling their reporting obligations as foreseen in the Standard Material Transfer Agreement of the Treaty;

17. **Requests** the Secretary to develop, in consultation with relevant organizations, appropriate and cost-effective processes to facilitate the submission, collection and storage of such information in the implementation of Article 4.1 of the Third Party Beneficiary Procedures. In so doing, the Secretary shall apply adequate measures to ensure the integrity of information and, where required, confidentiality of the information so provided.

Annex

PROCEDURES FOR THE OPERATION OF THE THIRD PARTY BENEFICIARY (‘THIRD PARTY BENEFICIARY PROCEDURES’)

Article 1

Designation of Third Party Beneficiary

1. The Food and Agriculture Organization of the United Nations (‘FAO’) shall act as Third Party Beneficiary of the Standard Material Transfer Agreement under the direction of the Governing Body.
2. FAO will administer its roles and responsibilities under these Procedures in accordance with the Basic Texts of FAO and in particular FAO’s Financial Regulations, Rules and directives of its Governing Bodies.
3. Nothing in these Procedures shall be deemed a waiver of FAO’s privileges and immunities.

Article 2

Scope

These Procedures apply to the Third Party Beneficiary, when carrying out its roles and responsibilities as identified and prescribed in the Standard Material Transfer Agreement referred to in Article 12.4 of the International Treaty on Plant Genetic Resources for Food and Agriculture, under the direction of the Governing Body.

Article 3

Principles

1. The Third Party Beneficiary shall act on behalf of the Governing Body of the International Treaty and its Multilateral System of Access and Benefit-sharing, as foreseen in the Standard Material Transfer Agreement.
2. The Third Party Beneficiary shall perform its roles and responsibilities effectively, in a transparent, cost-effective, expeditious and, to the extent possible, in a non-adversarial manner.

Article 4

Information

1. The Governing Body shall make available to the Third Party Beneficiary the information provided to it, in accordance with the provisions of the Standard Material Transfer Agreement.
2. 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. The information shall only be used for the purposes of initiating dispute settlement procedures under the Standard Material Transfer Agreement.
3. The Third Party Beneficiary has the right to request that the appropriate information, including samples as necessary, be made available by the parties, regarding their obligations in accordance with Article 8.3 of the Standard Material Transfer Agreement.
4. Except as may be required in the settlement of disputes and for the purposes specified in

Article 9 of these Procedures, and unless otherwise agreed by the parties to the Standard Material Transfer Agreement, information received by the Third Party Beneficiary shall be treated as confidential.

Article 5 **Amicable dispute settlement**

1. Where the Third Party Beneficiary has received information on possible non-compliance with the obligations of the parties under a Standard Material Transfer Agreement, it may request information in accordance with Article 8.3 of the Standard Material Transfer Agreement.

2. If the Third Party Beneficiary has reason to believe that obligations under a Standard Material Transfer Agreement may not have been complied with, it shall attempt in good faith to resolve the dispute by negotiation in accordance with Article 8.4a of the Standard Material Transfer Agreement and, in doing so, will send in writing to the parties to the Standard Material Transfer Agreement:

(a) a summary of the relevant provisions of the Standard Material Transfer Agreement which may not have been complied with, and other relevant information ('summary of information');

(b) a notice requesting the party that may not have complied with the Standard Material Transfer Agreement or the parties to the Standard Material Transfer Agreement to attempt, in good faith, to resolve the dispute not later than six months after the issuance of the summary of information and the notice.

Article 6 **Mediation**

1. If the dispute cannot be resolved by negotiation within six months after the issuance of the summary of information and the notice referred to in Article 5, paragraph 2 above, or any shorter period of time agreed on by the parties to the dispute, the Third Party Beneficiary shall commence or encourage the parties to the Standard Material Transfer Agreement to commence mediation proceedings through a neutral third party mediator, to be mutually agreed in accordance with Article 8.4b of the Standard Material Transfer Agreement.

2. The Third Party Beneficiary may propose as neutral third party mediator an expert from the list established by the Governing Body in accordance with Article 8.4c of the Standard Material Transfer Agreement.

Article 7 **Arbitration**

1. If a dispute has not been resolved by mediation within six months of the commencement of the mediation or any shorter period of time agreed on by the parties to the dispute, or if it otherwise appears that the dispute cannot be resolved within twelve months after the issuance of the summary of information and the notice referred to in Article 5, paragraph 2 above, the Third Party Beneficiary may submit the dispute for arbitration in accordance with Article 8.4c of the Standard Material Transfer Agreement.

2. The Third Party Beneficiary may propose as arbitrator an expert from the list established by the Governing Body in accordance with Article 8.4c of the Standard Material Transfer Agreement.

Article 8 Expenditure

1. The Secretary of the Governing Body shall, as necessary, draw upon the Third Party Beneficiary Operational Reserve to cover all costs and expenses incurred by the Third Party Beneficiary in carrying out its roles and responsibilities in accordance with these Procedures, provided that FAO, acting as the Third Party Beneficiary, shall not incur any liabilities in excess of the funds available in the Third Party Beneficiary Operational Reserve.
2. Before initiating mediation and arbitration in accordance with Articles 6 and 7 above, the Secretary shall assess the adequacy of funds available within the Third Party Beneficiary Operational Reserve. To this end, the Secretary shall prepare an estimated budget for the dispute settlement in question, covering, where relevant, both the current and following biennia.
3. If adequate funds are not available for activities foreseen within the current biennium, the Secretary shall inform Contracting Parties of the additional funds required within the current biennium and six months of the following biennium, and call for immediate additional voluntary contributions to the Third Party Beneficiary Operational Reserve.

Article 9 Reporting

The Third Party Beneficiary shall 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.

Article 10 Amendments

These procedures may be amended by a decision of the Governing Body.

Article 11 Entry into force

These procedures and any amendments thereto shall enter into force upon decision by the Governing Body and the approval of the competent bodies of FAO.

Annex 2

OPERATIONS OF THE THIRD PARTY BENEFICIARY

Part I. Criteria for the nomination of experts

- a) Highest professional qualities, qualification and expertise in relevant fields;
- b) Reputation for independence, fairness, competence and integrity;
- c) Appropriate language skills;
- d) Expressed willingness to accept the role of mediator, arbitrator or expert in dispute settlement in relation to the Treaty's Multilateral System.

Part II. Procedures for nomination of experts

- a) Contracting Parties are invited to make nominations, at any time. Such persons will automatically be included in the list.
- b) Professionals wishing to be included in the list are invited to put themselves forward. The Secretary will authorize inclusion in the list.
- c) The Secretary of the International Treaty may invite professionals to put their name forward, in particular in order to secure wide geographical representation and gender balance, and language proficiency, as well as wide coverage of relevant technical areas, and of relevant experience.
- d) All nominees to the list must meet the criteria of Part I (a)-(d) notwithstanding their nomination by a Contracting Party, their self-identification or their identification by the Secretary.

Part III. Information to be provided to the Governing Body by parties to the SMTA

For the purpose of carrying out its roles and responsibilities in accordance with the Third Party Beneficiary procedures, the Third Party Beneficiary shall need the following information provided by the parties to the Standard Material Transfer Agreement (SMTA).

- A.** The Provider transmitting a copy of the completed SMTA,
or
- B.** In the event that the Provider does not transmit a copy of the SMTA
 - i. ensuring that the completed SMTA is at the disposal of the Third Party Beneficiary as and when needed;
 - ii. stating where the SMTA in question is stored, and how it may be obtained; and
 - iii. providing 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 Standard Material Transfer Agreement, 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.
- iv. The Third Party Beneficiary shall at all times ensure the confidentiality of electronic data. This obligation comprises :
- Industry-standard secured environment encryption during data transmission;
 - Secure hosting of the datastore in the UN International Computing Centre (UNICC), Geneva; and
 - Encryption of the data, with separate encryption in the datastore of Provider and Recipient data, and of accession data.

Access to the datastore shall be strictly restricted to the Third Party Beneficiary, in the context of the possible initiation of dispute settlement. The Third Party Beneficiary shall not provide any data to any other person, except to the persons who need to know in the context of dispute settlement, and dispute settlement proceedings shall, in accordance with normal commercial practice, be confidential.

C. The Recipient shall:

- a) when transferring material to a subsequent Recipient, it shall do so in accordance with Articles 6.4 or 6.5 of the SMTA, as appropriate;
- b) submit to the Governing Body, when appropriate, an annual report, in accordance with *Annex 2.3* of the SMTA;
- c) in case of opting for the payment modality provided for under Art 6.11h, notify the Governing Body;
- d) make available to the Multilateral System non-confidential information.

Part IV. Information to be provided to the Third Party Beneficiary

When triggered under Article 4.2 of the Third Party Beneficiary Procedures, both parties shall provide information stipulated under Article 8.3 of the SMTA.

Both parties to the SMTA shall provide to the Third Party Beneficiary upon its request appropriate information, including samples as may be necessary, regarding their obligations in the context of the Material Transfer Agreement in question.

Except as may be required in the settlement of disputes and for the purposes specified in Article 9 of the Third Party Beneficiary Procedures, and unless otherwise agreed by the parties to the SMTA, information received by the Third Party Beneficiary shall be treated as confidential.