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INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE
FIRST MEETING OF THE <i>AD HOC</i> THIRD PARTY BENEFICIARY COMMITTEE
Rome, Italy, 24-25 November 2008
DRAFT PROCEDURES TO BE FOLLOWED BY THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, ACTING AS THIRD PARTY BENEFICIARY, IN CARRYING OUT ITS ROLES AND RESPONSIBILITIES IDENTIFIED AND PRESCRIBED IN THE STANDARD MATERIAL TRANSFER AGREEMENT, UNDER THE DIRECTION OF THE GOVERNING BODY

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Appendix I: Procedures to be followed by the Food and Agriculture Organization of the United Nations acting as Third Party Beneficiary, in carrying out its roles and responsibilities as identified and prescribed in the Standard Material Transfer Agreement, under the direction of the Governing Body ('TPB Procedures')

Appendix II: Draft Resolution

I. INTRODUCTION

1. The Standard Material Transfer Agreement (SMTA) confers rights on the Third Party Beneficiary (TPB), in particular the right to initiate dispute settlement procedures regarding the rights and obligations of the Provider and the Recipient of a Material Transfer Agreement (as referred to in the SMTA).
2. By paragraph 8 of Resolution 2/2006 on the Standard Material Transfer Agreement (SMTA), the Governing Body, at its First Session, invited the Food and Agriculture Organization of the United Nations, to act as the Third Party Beneficiary to carry out the roles and responsibilities as identified and prescribed in the SMTA, under the direction of the Governing Body, in accordance with the procedures to be established by the Governing Body at the Third Session.¹
3. By circular state letter (G/X/AGD-10) dated 22 December 2006, the Director-General informed Contracting Parties of the International Treaty that he has given his agreement in principle for the Organization to act as the TPB foreseen in the SMTA. This agreement in principle is subject to formal approval, upon review of the procedures to be established by the Governing Body at the Third Session, defining the roles and responsibilities of the TPB.
4. At its Second Session, the Governing Body
"thanked the Director-General for having accepted in principle, its invitation for FAO to carry out, as the Third Party Beneficiary, the roles and responsibilities as identified and prescribed in the Standard Material Transfer Agreement, under its direction. It recognised that this acceptance was subject to formal approval upon review of the procedures to be established by the Governing Body" (para 61 of IT/GB-2/07/Report)
5. Furthermore, at its Second Session:
 62. *The Governing Body requested the Secretary to prepare draft text setting out the procedures to be followed by FAO, when carrying out its roles and responsibilities as the Third Party Beneficiary, taking into account, in particular, FAO's role as specialized agency of the United Nations, its privileges and immunities. It invited Contracting Parties, other governments and international organizations to comment on the draft text.*
 63. *The Governing Body decided to establish an Ad Hoc Third Party Beneficiary Committee, composed of seven representatives of Contracting Parties, with one representative nominated by each of the FAO Regions. The Committee's mandate is to consider the draft text prepared by the Secretary, and comments and submissions from Contracting Parties, other governments and international organizations. The Ad Hoc Committee shall prepare draft Third Party Beneficiary procedures to be submitted to the Governing Body at its next Session.*
 64. *The Governing Body invited the Director-General of FAO to bring to the attention of the relevant bodies of FAO, the Governing Body's invitation, together with the procedures, once elaborated by the Ad Hoc Third Party Beneficiary Committee, and endorsed by the Governing Body.*

¹ IT/GB-1/06/Report, p. 7.

6. In accordance with the request of the Governing Body, the Secretary prepared draft procedures and circulated them to Contracting Parties, other governments and international organizations for their comments.

7. This document provides a short summary of the roles and responsibilities of the TPB, as identified in the SMTA and elaborated in the draft text of the procedures prepared by the Secretary in accordance with the decision of the Governing Body. The document also contains a brief description of FAO's status as specialized agency of the United Nations, its privileges and immunities. *Appendix I* to this document contains the draft text of the procedures prepared by the Secretary in accordance with the decision of the Governing Body. *Appendix II* contains the draft resolution on the adoption of the procedures for consideration by the Governing Body.

8. Comments and submissions received from Contracting Parties, other governments and international organizations are contained in Document IT/TPBC-1/08/3. Additional information materials are provided to the Committee, which it might find useful in its deliberations.

II. ROLES AND RESPONSIBILITIES OF THE THIRD PARTY BENEFICIARY

9. By Article 4.3 of the SMTA, Parties to a Material Transfer Agreement (MTA) agree that an entity designated by the Governing Body and acting on behalf of the Governing Body of the Treaty and its Multilateral System is the TPB. The entity so designated is the FAO. Through the SMTA the Provider and the Recipient agree to confer on the TPB:

- the right to request the appropriate information as required in Articles 5e, 6.5c, 8.3 and Annex 2, paragraph 3 to the MTA (Article 4.4);
- the right to request that the appropriate information, including samples as necessary, be made available by the Provider and the Recipient, regarding their obligations in the context of the MTA (Article 8.3);
- the right to initiate dispute settlement procedures regarding rights and obligations of the Provider and the Recipient (Article 8.1; 8.2).

10. Accordingly, the role and responsibilities of the TPB cover the gathering of information and the initiation of dispute settlement procedures regarding rights and obligations of the Parties of the MTA.

11. While the SMTA also gives the TPB the power to initiate dispute settlement procedures, paragraph 8 of Resolution 2/2006 on the Standard Material Transfer Agreement states that the TPB should carry out its roles and responsibilities "under the direction of the Governing Body."

12. The TPB Procedures will establish how the powers of the TPB are exercised to engage in dispute settlement and how the direction of the Governing Body may be given in general or in particular cases or circumstances.

13. In practice and in order to promote efficiency, the procedures could provide that the extent of the powers of the TPB vary with the stage of the dispute settlement process. The TPB Procedures could, for example, confer unlimited discretionary powers on the TPB for the initiation of amicable dispute settlement, and require that specific substantive and/or procedural conditions be met before the TPB may initiate mediation or arbitration. This has been taken into account in the current draft.

14. The Treaty itself encourages a consensual approach as a principle of interaction and compliance generally. As a result, there is a need for greater emphasis on the initial stages of dispute resolution which involves negotiations between the parties. Furthermore, taking into account the financial implications of later stage processes of mediation and arbitration, it would be

financially prudent to seek to settle disputes as early in the process as possible through negotiation and mediation such that arbitration becomes only a last resort option.

III. GENERAL PROVISION OF THE PROCEDURES TO BE FOLLOWED BY FAO, AS THIRD PARTY BENEFICIARY

15. The draft TPB Procedures addresses administrative procedures as well as financial implications regarding:

- (1) the initial gathering of information in regard to disputes;
- (2) amicable dispute settlement;
- (3) mediation; and
- (4) arbitration.

16. Under the SMTA, amicable dispute settlement is different from mediation and arbitration, in that no mediator or arbitrator is involved in it. The main difference between mediation and arbitration is that mediation is party-controlled and ends successfully only if the parties reach an agreement, whereas arbitration ends with an award made by an arbitrator or arbitral tribunal which is binding on the parties.

17. Closely linked with reporting requirements is the question to what extent dispute settlement procedures may be kept confidential. As they allow parties to disclose information without it being made public, confidentiality provisions may increase the chance of resolving disputes by negotiations or mediation. As the dispute settlement procedures are private, the parties can, in principle, agree to keep the proceedings and any results confidential. However, this strict approach to confidentiality is to be balanced with the TPB's need for information.

18. The ICC Rules of Arbitration to which the SMTA refers disputes, as *ultima ratio*, provide that the work of the ICC Court of Arbitration is confidential, but do not contain any obligations on the parties to keep the arbitration, any related documents or the award confidential. The SMTA does not require confidential treatment of disputes, nor does it rule out confidentiality agreements, *e.g.*, concerning the existence of a dispute, of disclosures made during the dispute settlement procedure or of the award of an arbitration. Confidentiality agreements are a common feature of arbitration procedures.² Therefore, the interest in access to dispute-related information must be carefully weighed against the interests of Recipients and Providers in keeping certain dispute-related information, such as names, confidential.

19. The draft TPB procedures also provide for the Governing Body to receive certain information from the TPB with regard to violations of MTAs or the status of pending dispute settlement procedures.

Information gathering

20. While the SMTA does not require the TPB to monitor compliance with the obligations arising from the MTA, it confers the right on the TPB to receive information and samples from the Provider and the Recipient (Article 4.4; 8.3 SMTA). The SMTA also requires information to be made available to the TPB by the Governing Body. Such information includes:

² The WIPO Arbitration Rules (Articles 73-76), for example, specifically protect the confidentiality of the existence of the arbitration, any disclosures made during that procedure, and the award. No comparable provisions exist in the ICC Rules of Arbitration to which Article 8.4c SMTA refers, as *ultima ratio*.

- periodic information by providers about MTAs entered into (Article 5e SMTA);
- notifications of transfers of plant genetic resources for food and agriculture under development to another person or entity, in accordance with Article 5e (Article 6.5);
- annual reports in accordance with *Annex 2*, paragraph 3 of the SMTA.

21. Article 2b (iv) of the Agreements concluded under Article 15 of the Treaty,³ provides that Centres are to take appropriate measures, in accordance with their capacities, to maintain effective compliance with the conditions of the MTAs, and shall promptly inform the Governing Body of cases of non-compliance. However, the SMTA does not specify that information on cases of non-compliance should also be made available to and could be used by the TPB. This information will be made available to the TPB through the Procedures.

22. The possibility of the TPB initiating dispute settlement procedures largely depends on the information made available to the TPB. Appropriate arrangements need therefore to be made for it to have ready and non-costly access to information to assist its effectiveness.

Amicable dispute settlement (Article 8.4a SMTA)

23. The SMTA gives no instructions as to how the negotiations referred to in Article 8.4a should be conducted. The draft TPB Procedures therefore define a procedure the TPB could follow, in order to reach an amicable agreement. The draft TPB Procedures, for example, specify a deadline the TPB should set for replies to its requests for consultations in good faith.

Mediation (Article 8.4b SMTA)

24. If a dispute is not resolved amicably, the parties of an MTA may choose mediation through a neutral third party mediator, to be mutually agreed (Article 8.4c SMTA). The SMTA does not go into any detail with regard to the second step of dispute resolution, the mediation facilitated by a mediator. While, with regard to arbitration, the SMTA refers to the Rules of Arbitration of the International Chamber of Commerce (ICC),⁴ there is no reference in the SMTA to the ICC rules covering mediation, the Amicable Dispute Resolution Rules (ICC ADR Rules).⁵ Presumably, the parties may agree on how to proceed at this stage. Thus the SMTA offers considerable flexibility to the parties in determining their own procedures, taking into account financial implications and enforceability of arbitral awards. However, the ICC ADR Rules include provisions which cover the situation in which there is no prior agreement of the parties to refer to them. In such cases, a party may unilaterally file a request for mediation pursuant to Article 2.B ICC ADR Rules. Thus, the TPB could use the ICC ADR Rules or any other agreed Rules to initiate mediation, once all attempts to resolve the dispute in good faith by negotiation have failed. The TPB would send a written request for mediation to the ICC or other relevant body and the ICC or that body would inform the opposing party of the request for mediation and request the party to inform it as to whether it agrees or declines to participate in the mediation.

25. With regard to the designation of a mediator, the draft TPB Procedures mandates the TPB to propose an expert from the list of experts to be established by the Governing Body for arbitration purposes (see Article 8.4c SMTA). Under the ICC ADR Rules, where the TPB and the other party or parties cannot agree on a mediator or the jointly designated mediator does not agree to serve, the ICC or any other agreed institution would appoint the mediator.

³ For an overview of these agreements, see http://www.fao.org/ag/planttreaty/art15_en.htm

⁴ Article 8.4c SMTA

⁵ See http://www.iccwbo.org/drs/english/adr/pdf_documents/adr_rules.pdf.

Arbitration (Article 8.4c SMTA)

26. If a dispute has not been settled by negotiation or mediation, the TPB or any one of the parties may submit the dispute for arbitration under the Arbitration Rules of an international body as agreed by the parties to the dispute (Article 8.4c SMTA). Thus, with regard to the arbitration rules, the SMTA offers considerable flexibility to the parties in determining their own procedures, taking into account financial implications and enforceability of arbitral awards. If the parties fail to agree on the arbitration body, the dispute would be finally settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with these Rules.

27. The SMTA envisages the establishment of a list of experts by the Governing Body. The experts can serve as arbitrators, if appointed by the parties to the dispute. The draft TPB Procedures provide that the TPB should propose experts from the list to be established by the Governing Body.

IV. FAO'S STATUS AS SPECIALIZED AGENCY OF THE UNITED NATIONS, ITS PRIVILEGES AND IMMUNITIES

28. FAO is a United Nations specialized agency, accountable to the FAO Conference of member governments and enjoys certain privileges and immunities.

29. Article XVI of the FAO Constitution provides as follows:

1. *The Organization shall have the capacity of a legal person to perform any legal act appropriate to its purpose which is not beyond the powers granted to it by this Constitution.*
2. *Each Member Nation and Associate Member undertakes, insofar as it may be possible under its constitutional procedure, to accord to the Organization all the immunities and facilities which it accords to diplomatic missions, including inviolability of premises and archives, immunity from suit and exemptions from taxation.*

30. As a legal person, FAO may therefore take steps outlined in the draft TPB procedures taking into account its privileges and immunities.

V. FINANCIAL IMPLICATIONS

31. As the Third Party Beneficiary acts "on behalf of the Governing Body" (Article 8.1 SMTA), the budget of the Treaty will need to provide the TPB with adequate financial resources to cover costs and fees related to dispute settlement procedures. The ICC Rules provide standard costs for both administrative expenses and arbitrators' fees. These are set out in Appendix III to the ICC Rules of Arbitration.

32. It is suggested that the Governing Body establish a special Trust Fund to cover costs that may be incurred in carrying out activities and actions related to the functions of the TPB.

VI. CONCLUSION

33. The *Ad Hoc* Third Party Beneficiary Committee is invited:

- (i) *to consider comments and submissions from Contracting Parties, other governments and international organization;*

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- (ii) to review the draft TPB Procedures in the Appendix I to this document for submission to the Governing Body for its consideration at the Third Session;*
 - (iii) to review the draft Resolution for the adoption of the draft Third Party Beneficiary Procedures by the Governing Body contained in the Appendix II to this document for submission to the Governing Body for its consideration at the Third Session;*
 - (iv) to consider any further recommendations that may be necessary or appropriate to be made to the Governing Body regarding the TPB Procedures or any aspect or their operation;*
 - (v) to consider the possible establishment of criteria of expertise for inclusion of individuals to the list of mediators or arbitrators, if established by the Governing Body.*

Appendix I

DRAFT PROCEDURES TO BE FOLLOWED BY THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, ACTING AS THIRD PARTY BENEFICIARY, IN CARRYING OUT ITS ROLES AND RESPONSIBILITIES IDENTIFIED AND PRESCRIBED IN THE STANDARD MATERIAL TRANSFER AGREEMENT, UNDER THE DIRECTION OF THE GOVERNING BODY ('TPB 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 role 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, 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 Treaty and its Multilateral System, 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, 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 and use information on cases of non-compliance with the terms and conditions of the Standard Material Transfer Agreement from the Provider or Recipient ('Parties') under the Standard Material Transfer Agreement or other natural or legal persons.

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 the context 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 terms and conditions of 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 the terms and conditions of 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 notice referred to in Article 5, paragraph 2 above, 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 8.4.b 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 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 (b) above, the Third Party Beneficiary may submit the dispute for arbitration in accordance with Article 8.4c of the Standard Material Transfer Agreement upon consultation with the Bureau of the Governing Body.

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 Trust Fund to cover all costs and expenses incurred by the Third Party Beneficiary in carrying out its role and responsibilities.

2. FAO shall not be required to commence or continue the performance of its role and responsibilities of Third Party Beneficiary under these Procedures until the respective costs and expenses have been covered by the Third Party Beneficiary Trust Fund and it shall not be required to assume any liability in excess of the funds paid to that effect.

3. All financial accounts and statements of the Third Party Beneficiary Trust Fund shall be expressed in United States dollars and be subject exclusively to the internal and external auditing procedures laid down in the Financial Regulations, Rules and directives of FAO.

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 of cases where it received information regarding non-compliance with the terms and conditions of a Standard Material Transfer Agreement;
- (b) the number of cases where it initiated dispute settlement;
- (c) the number of disputes settled through amicable dispute settlement, mediation or arbitration;
- (d) the number 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 Trust Fund;
- (g) any estimate of the needs of the Third Party Beneficiary Trust Fund in the forthcoming biennium;
- (h) any other relevant non-confidential information.

Article 10 Amendments

These procedures may be amended by mutual agreement between the Governing Body and FAO.

Article 11 Entry into force

These Rules shall enter into force upon adoption by the Governing Body and the agreement by the Third Party Beneficiary, as stipulated in Article 2, to act as Third Party Beneficiary.

Appendix II

**DRAFT RESOLUTION X/2009
THE THIRD PARTY BENEFICIARY PROCEDURES**

THE GOVERNING BODY:

- (i) **Recalling** that the objectives of the International Treaty on Plant Genetic Resources for Food and Agriculture (the Treaty) 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;
- (ii) **Recalling**, that, in furtherance of the objectives of conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of benefits arising out of their use, 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, in order to receive the full support of the International Community;
- (iii) **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;
- (iv) **Recalling** Resolution 2/2006, by which the Governing Body, at its First Session, adopted the Standard Material Transfer Agreement (SMTA);
- (v) **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 (TPB), 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;
- (vi) **Noting** also that, in December 2006, the Director-General informed Contracting Parties of the Treaty of his agreement in principle for FAO to act as the TPB foreseen in the SMTA 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 TPB;
- (vii) **Noting** further that the Governing Body, at its Second Session, invited the Director-General of FAO to bring to the attention of the relevant bodies of FAO, the Governing Body's invitation, together with the procedures, once elaborated by the Ad Hoc Third Party Beneficiary Committee, and endorsed by the Governing Body.
- (viii) **Noting** further that the Ad Hoc Third Party Beneficiary Committee has elaborated draft Third Party Beneficiary Procedures for the consideration of the Governing Body at this Session;

1. **Adopts** these *Procedures* ('TPB Procedures'), as in Appendix XX;

2. **Thanks** the Director-General of FAO for having agreed that FAO shall act as the Third Party Beneficiary, and request him to now confirm this agreement and bring it to the attention of the relevant bodies of FAO, together with the procedures, as appropriate;
3. **Establishes**, in accordance with Rule VI.2.b of the Financial Rules of the Governing Body, a special trust fund to be entitled the “Third Party Beneficiary Trust Fund” for the purpose of defraying all costs and expenses that may be incurred by the Third Party Beneficiary in the fulfilment of its roles and responsibilities under the TPB Procedures.
4. **Calls** upon Contracting Parties, other governments and institutions to contribute periodically, as necessary, to the Third Party Beneficiary Trust Fund, in order to maintain it at a level commensurate with the needs;
5. **Authorizes** the Secretary of the Governing Body to draw upon the Third Party Beneficiary Trust Fund, in order to implement, as appropriate, the TPB Procedures;
6. **Requests** the Secretary to provide, at each session of the Governing Body, a report as foreseen in the TPB Procedures; and
7. **Decides** to establish a list of experts from which the Parties to a Standard Material Transfer Agreement may appoint arbitrators in accordance with Article 8.4 (c) of the Standard Material Transfer Agreement. The names of experts shall be placed on the list in accordance with the criteria of expertise to be agreed upon by the Governing Body.