



October 2008

Item 4 of the Draft Provisional Agenda
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
COMMENTS AND SUBMISSIONS FROM CONTRACTING PARTIES, OTHER GOVERNMENTS AND INTERNATIONAL ORGANIZATIONS ON THE DRAFT PROCEDURES FOR THE THIRD PARTY BENEFICIARY

1. The Governing Body of the Treaty requested the Secretariat to prepare a first draft of the Procedures for the Third Party Beneficiary and circulate the draft to Contracting Parties, other governments and international organizations for comments. The Secretariat sent notification NCP GB3 AH-TPB 1 accordingly.
2. This document contains the comments received. As to 20 November 2008, submissions were received from the following Contracting Parties:
 1. Peru
 2. Switzerland (received in two parts, both included)
 3. Uruguay
3. The comments have been compiled in *Annex 1*, in the form received, which also contains unofficial translation of comments that were received in languages other than English.
4. The *Ad Hoc* Third Party Beneficiary Committee is invited to consider these comments as requested by the Governing Body.

*Annex I***PERU**

Observaciones y Recomendaciones a la Propuesta de Procedimientos que debe seguir la Organización de las Naciones Unidas para la Agricultura y la Alimentación, en calidad de Tercera Parte Beneficiaria, en el desempeño de sus funciones y responsabilidades identificadas y estipuladas en el Acuerdo Normalizado de Transferencia de Material-ANTM.

1. La propuesta de procedimiento es acorde con lo estipulado en el Acuerdo Normalizado de Transferencia de Material-ANTM y las resoluciones del Órgano Rector del Tratado, para la Tercera Parte Beneficiaria; sin embargo, si bien la Tercera Parte Beneficiaria va a utilizar los recursos de su Fondo Fiduciario para el cumplimiento de éstas funciones, posteriormente debería de recuperarlos; esto podría hacerse viable en la medida que los costes y gastos sean cargados a la Parte (proveedor o receptor) que incumple el ANTM.
2. Como se va a tratar los casos de incumplimiento de lo establecido en el ANTM, si bien el ANTM establece que el derecho aplicable son los Principios para los Contratos Mercantiles Internacionales de la UNIDROT, 2004 (Artículo 4° del ANTM), estos son genéricos. Se va aplicar una sanción administrativa y/o de otra índole a la parte que ésta incumpliendo el ANTM, especialmente el receptor de los materiales genéticos, puesto que no es una parte del Tratado. El incumplimiento por parte de las Partes (países que son miembros) del Tratado ya ésta contemplado en el Tratado (Artículo 21° de la Observancia).

[UNOFFICIAL TRANSLATION

“Observations and Recommendations on the Proposed Procedures to be followed by the United Nations Organization for Food and Agriculture, as the Third Party Beneficiary, in discharging their duties and responsibilities identified and stipulated in the Standard Material Transfer Agreement - SMTA.

1. The proposed procedure is in accordance with the provisions of the Standard Material Transfer Agreement - SMTA and the resolutions of the Governing Body of the Treaty for the Third Party Beneficiary; however, although the Third Party Beneficiary will utilize the resources of its Trust Fund for compliance with these functions, it should recover these resources in a subsequent time; this could become viable to the extent that the costs and expenses are charged to the Party (supplier or receiver) that breaches the SMTA.
2. How to address cases of non-compliance with what is established in the SMTA, even though the law stipulates that the principles of international commercial contracts of UNIDROT, 2004 (Article 4 of the SMTA), are applicable to the SMTA; these are generic. An administrative sanction/ or other, will be applied to the party that is breaching the SMTA, especially the receiver of genetic materials, as it is not a party to the Treaty. The Non-compliance by the parties (countries that are members) of the Treaty is already dealt with in the Treaty (Article 21 on Compliance).”]

SWITZERLAND

Article 1.2

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.

In order to be coherent with the title of the draft text, other dispositions contained in the draft text, as well as with the text of the SMTA, we propose to put the word 'role' in its plural form, so that the article reads:

"FAO will administer its roles and responsibilities [..]."

Article 4.1

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.

The SMTA suggests that the TPB should be regularly informed by the Governing Body (GB) about the material transfer agreements entered into by any provider, and about transfers of material or of plant genetic resources for food and agriculture under development from a recipient to a subsequent recipient. In order to highlight this obligation of the GB to keep the TPB informed we propose to integrate the respective articles of the SMTA explicitly in the text, so that it would read:

"[...] in accordance with Articles 5e, 6.4b and 6.5c of the Standard Material Transfer Agreement."

New Article 4.1bis

Additionally to the TPB's right to request information and samples, as reflected in article 8.3 of the SMTA, which sets in only in the case of dispute settlement, i.e. when there is a reasonable suspicion of non-compliance, the TPB, according to article 4.4 of the SMTA, has a more general right to request information on the part of any recipient under an SMTA, which is specified in paragraph 3 of Annex 2 to the SMTA. In order to highlight this right of the TPB we propose to introduce a new article 4.1bis along the following lines:

"The Third Party Beneficiary may request the information contained in the annual reports regarding product sales and benefit-sharing payments that the Recipient under a Standard Material Transfer Agreement is required to submit to the Governing Body according to Paragraph 3 of Annex 2 to the Standard Material Transfer Agreement."

Articles 4.3 and 5.1

It is our understanding that the articles 4.3 and 5.1 largely reflect the same content, namely that of article 8.3 of the SMTA. Article 8.3 of the SMTA being under the heading of 'Dispute settlement', we propose to merge the two articles – in order to avoid duplication - so that article 4.3 would be deleted and the new article 5.1 would read:

"[..], it may request that the appropriate information, including samples as necessary, be made available by the Parties in accordance with Article 8.3 of the Standard Material Transfer Agreement, regarding their obligations in the context of the Standard Material Transfer Agreement."

Article 7.1

We are of the opinion that it is not the role of the Bureau of the GB to give advice to the TPB in matters of dispute settlement. Furthermore, the SMTA does not provide for such a role for the Bureau of the GB either. We therefore propose to delete the last part of the sentence in article 7.1 – ‘upon consultation with the Bureau of the Governing Body’ - so that it would end after ‘Standard Material Transfer Agreement’.

Article 4.2 (and article 9a)

The Third Party Beneficiary may receive and use information on cases of possible non-compliance with the [..].

In order for the TPB to be in a position to use information at an early stage of possible problems in implementing the SMTA, and not only once that non-compliance with the SMTA is established, we propose to delete the words ‘on cases’. Besides, this is the wording also used in article 5.1 of the Draft. The same modification should be made in article 9a.

Article 5.2

*According to article 8.4a of the SMTA the **Parties** have to attempt in good faith to resolve the dispute by negotiation, whereas, in the draft, this task was attributed to the TPB. According to our understanding, the TPB has mainly to **facilitate** dispute resolution between parties. We therefore propose to change the wording accordingly, by adding the highlighted wording below:*

“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 assist the Parties in their 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:”

Articles 10 and 11

The use of the words "FAO" and "TPB" seems somehow inconsistent in these two articles and compared to the rest of the draft. We therefore propose to replace "FAO" by "TPB" in article 10 and the first mention of "TPB" by "FAO" in article 11.

URUGUAY

Uruguay desea hacer llegar las siguientes consideraciones generales sobre la Creación y Funcionamientos de la Tercera Parte Beneficiaria, según se acordó en el Acuerdo de Transferencia de Material del TIRFAA.

En primer lugar, en el documento no se establece cómo se llevaría a cabo el registro de las transferencias de materiales. Se entiende sobre la alternativa de disponer por parte del Órgano de Gobierno de la información sobre reclamos de las Partes Contratantes, pero es importante que la Tercera Parte Beneficiaria disponga de la información de las transferencias efectuadas, porque si no sería responsabilidad de los países el hecho de hacer un seguimiento sobre la utilización del material transferido. Si la Tercera Parte Beneficiaria no dispone de la información sobre cuando es reclamado un Derecho de Propiedad Intelectual que restringe el acceso, los países en desarrollo no están en condiciones de hacer el seguimiento correspondiente, y por lo tanto, aunque estuviera el mecanismo de reclamo, no sería factible utilizarlo. Disponer de un ruterio de utilización del material transferido permite la trazabilidad de ese material; máxime si se está solicitando confidencialidad sobre el uso y manejo de esa base de datos. Si no se tiene acceso libre a dicha base, la Tercera Parte Beneficiaria es

la garantía entonces de cómo y quién utiliza el material transferido, y la responsable del monitoreo correspondiente.

En segundo lugar, preocupa el Fondo que se crearía, cómo se cubren los costos, y cómo se asegura el financiamiento de la tarea a llevar a cabo por la Tercera Parte Beneficiaria, porque si está supeditado a la aparición de dinero pero no asegurado, su función está condicionada y no podrá ser cumplida cabalmente. El que la Tercera Parte Beneficiaria cumpla su función condiciona el funcionamiento del Acuerdo de Transferencia de Materiales, toda vez que es parte del mismo.

Se deben instrumentar y asegurar los mecanismos necesarios, tanto en recursos financieros como en recursos humanos suficientes, con el soporte informático y administrativo necesario. De crearse este Fondo, debe establecerse claramente cómo se asegura su financiamiento, cómo se manejaría, cómo se asegura su mantenimiento, y cuáles serían las responsabilidades de FAO y su contribución.

[UNOFFICIAL TRANSLATION

“Uruguay wishes to convey the following general considerations on the establishment and functioning of the Third Party Beneficiary, following what was agreed in the Standard Material Transfer Agreement of the ITPGRFA.

Firstly, the document does not establish how the registration of material transfer agreements will be done. One can understand the alternative that is given to the Governing Body to have access on information concerning complaints from Contracting Parties, but it is important that the TPB has the information on the transfers already done, otherwise the monitoring of the use of the transferred material will have to be the responsibility of countries. If the TPB has no information regarding the claims of intellectual property rights which restrict access, developing countries will not be able to monitor these activities, and therefore even though a claim mechanisms was established, it would be difficult to apply it. The existence of a mechanism to track the use of the transferred material allows the traceability of such material, especially if confidentiality has been requested over the use and management of such database. If there is no free access to such database, the TPB will be then the guarantee regarding how and who uses de transferred material and will be responsible of its monitoring.

Secondly, regarding the Fund that will be established, there are concerns related with how the costs will be covered and how the functioning of the TPB will be ensured; considering that the role of the TPB will be conditioned by the existence of such non-secure funds, the TPB will not be able to fulfil its responsibilities properly. The fact that the TPB can fulfil its role will be essential for the implementation of the Material Transfer Agreement, as the TPB is part of the Agreement.

It is necessary to ensure the availability of financial and human resources, as well as the necessary administrative and technological information support. If such Fund is established, it is necessary to have clarity regarding how to ensure its funding, how it will be managed, how to ensure its long term functioning, and which will be the responsibilities of FAO and its contribution to it.”]