



# The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



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<b>Item 12.3 of the Provisional Agenda</b>
<b>INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE</b>
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<b>REVIEW OF THE IMPLEMENTATION AND OPERATION OF THE STANDARD MATERIAL TRANSFER AGREEMENT</b>

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## REVIEW OF THE IMPLEMENTATION AND OPERATION OF THE STANDARD MATERIAL TRANSFER AGREEMENT

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### I. INTRODUCTION

1. The Standard Material Transfer Agreement was adopted at the First Session of the Governing Body, in accordance with Article 12.4 of the Treaty, by Resolution 2/2006, which also:

*“Request[ed] the Secretary of the Treaty to review the implementation and operation of the Standard Material Transfer Agreement, and report to the Governing Body at its third session, in particular on the benefit-sharing provisions and the modalities of payment;”*

and

*“Decid[ed] to review the levels of payment periodically, in conformity with Article 13.2d(ii) of the Treaty, starting from the third session of the Governing Body”.*

2. This document responds to those requests. It focuses specifically on the implementation and operation of the Standard Material Transfer Agreement, in particular by the parties to Standard Material Transfer Agreements, and does not consider other aspects of the Multilateral System, which are reviewed in a number of other documents, in particular, documents:

- IT/GB-3/09/11 Rev. 1, *Report of the Chair of the Third Party Beneficiary Committee*;<sup>1</sup>
- IT/GB-3/09/12, *Assessment of progress in the inclusion in the Multilateral System of plant genetic resources for food and agriculture held by natural or legal persons*; and
- IT/GB-3/09/13, *Review of the implementation of the Multilateral System*.

3. The document concludes by identifying possible elements of a Resolution of the Governing Body, regarding the implementation and operation of the Standard Material Transfer Agreement.

## II. IMPLEMENTATION AND OPERATION OF THE STANDARD MATERIAL TRANSFER AGREEMENT

### A. The governance role of Contracting Parties and the obligations of parties to the Standard Material Transfer Agreement

4. The Standard Material Transfer Agreement is a cornerstone of the Treaty’s Multilateral System of Access and Benefit-sharing, and the Governing Body periodically reviews its implementation and operation.

5. Each individual Standard Material Transfer Agreement is a separate and whole contract, and is established between the parties (the Provider and the Recipient) to that contract only. Each such contract, however, contains contractual obligations by which the parties agree that

*“[FAO],<sup>2</sup> acting on behalf of the Governing Body of the Treaty and its Multilateral System, is the third party beneficiary under this Agreement,”<sup>3</sup> and that “[FAO],*

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<sup>1</sup> IT/GB-3/09/11 Rev. 1 replaces IT/GB-3/09/11.

<sup>2</sup> Formal acceptance by FAO to act as the Third Party Beneficiary is pending the finalization of the Third Party Beneficiary Procedures. See IT/GB-3/09/11, *Report of the Chair of the Third Party Beneficiary Committee*.

<sup>3</sup> Article 4.3 to the Standard Material Transfer Agreement.

*representing the Governing Body and the Multilateral System, has the right, as a third party beneficiary, to initiate dispute settlement procedures regarding rights and obligations of the Provider and the Recipient under this Agreement”.*<sup>4</sup>

6. In this way, the rights of the Governing Body may be enforced, if necessary.

### **B. The role of the Standard Material Transfer Agreement in a distributed system**

7. The Treaty provides that the Standard Material Transfer Agreement must be used for every transfer of plant genetic resources for food and agriculture that are within the ambit of the Multilateral System. The Provider may be a Government institution, or a legal or natural person within the jurisdiction of a Contracting Party, in either the private and public sector, or an International Institution that has made an agreement with the Governing Body, under Article 15 of the Treaty. The Recipient may also be one of a very large range of private and public persons. In the sense that Providers under the Standard Material Transfer Agreement (the originators of Standard Material Transfer Agreements) are scattered around the world, and are not part of a single entity, the use of the Standard Material Transfer Agreement is part of a “distributed system”. Since this distributed system spans many languages, national and regional legal frameworks, and institutional structures, the maintenance of operational coherence across the system represents a major challenge, and will require active guidance by the Governing Body, and management of the operations of the Standard Material Transfer Agreement and the Multilateral System more generally.

8. This has a number of implications for the implementation and operation of the Standard Material Transfer Agreement. The responsiveness of the Treaty system to the needs, requests and enquiries of users will be critical for its credibility, and provide the basis for its consistent use. The differing levels of understanding of the various players must be allowed for, and a general process of outreach and awareness-raising is required for this purpose. The goodwill and diligence of this wide range of players will be crucial in the effective implementation of the Standard Material Transfer Agreement.

9. A further characteristic of this distributed system is that the Multilateral System must also rely on persons who are not parties to these contracts, in particular the information system managers who “publish” and make available information on plant genetic resources for food and agriculture within the Multilateral System to potential users. The crucial importance of such information, without which the Multilateral System has no real existence or utility, is discussed in document IT/GB-3/09/13, *Review of the implementation of the Multilateral System*. These information system managers are often part of genebanks that are potential Providers of the material they document, but there are increasingly efforts to pool their information within cross-institutional search tools and portals, which will be of especial importance in the implementation of the Treaty’s Articles 16, *International Plant Genetic Resources Networks*, and 17, *The Global Information System on Plant Genetic Resources for Food and Agriculture*.

### **C. Measures taken by Contracting Parties for the implementation of the Standard Material Transfer Agreement**

10. The prime role of Contracting Parties in relation to the Standard Material Transfer Agreement is to provide the legal framework within which it can be used. Some Contracting Parties have brought to the notice of the Secretary the difficulty they are facing in harmonizing the provisions of the Treaty, and of the Standard Material Transfer Agreement, with their national legal systems. This means that they are yet not implementing facilitated access through the

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<sup>4</sup> Article 8.2 to the Standard Material Transfer Agreement.

Standard Material Transfer Agreement.<sup>5</sup> Others report that they are already using the Standard Material Transfer Agreement, but raise various questions regarding its interpretation and use.

11. Other measures that Contracting Parties need to take relate not to the Standard Material Transfer Agreement itself, but to the encouragement of natural and legal persons within their jurisdictions to include their materials within the Multilateral System, and therefore to distribute them through the Standard Material Transfer Agreement.<sup>6</sup>

#### **D. Dispute settlement and the Third Party Beneficiary**

12. The Standard Material Transfer Agreement contains procedures for the settlement of any dispute that may arise between a Provider and a Recipient.<sup>7</sup> However, the obligation to share benefits is not in favour of the Provider, but of the Multilateral System. A Provider, therefore, has no financial interest in initiating dispute resolution, should a Recipient not fulfil his obligations, and to do so could also mean incurring potentially substantial costs. The Standard Material Transfer Agreement therefore provides for a “Third Party Beneficiary” to be able to initiate dispute settlement, should this become necessary, in order to enforce the beneficial interest of the Multilateral System.<sup>8</sup>

13. The Governing Body, at its Second Session, established an *Ad Hoc* Third Party Beneficiary Committee to prepare draft Third Party Beneficiary Procedures to be submitted to the current session. This has been done; the *Ad Hoc* Committee has in this context also recommended the schedule of reporting foreseen in Article 5e of the Standard Material Transfer Agreement, and the items of information required. With the adoption of such Procedures, a key element in the operation of the Standard Material Transfer Agreement will have been set in place.<sup>9</sup>

#### **E. Use of the Standard Material Transfer Agreement by Providers**

14. There is as yet very little information on the use of the Standard Material Transfer Agreement by Providers, with the exception of the International Agricultural Research Centres of the Consultative Group on International Agricultural Research, and other International Institutions that have signed agreements with the Governing Body, in accordance with Article 15 of the Treaty, where full information on transfers of plant genetic resources for food and agriculture is posted on-line. A few Contracting Parties have provided information on the use of the Standard Material Transfer Agreement in providing access to plant genetic resources from their national systems. The paucity of information currently available is partly due to the fact that the Governing Body will not until its present session decide on a schedule of reporting, foreseen in Article 5e of the Standard Material Transfer Agreement:<sup>10</sup> once the schedule is in operation, more extensive information will progressively become available to the Governing Body.

15. The Standard Material Transfer Agreements issued by the Consultative Group on International Agricultural Research, and by most large-scale genebanks, are formed through the

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<sup>5</sup> See IT/GB-3/09/13, *Review of the implementation of the Multilateral System*.

<sup>6</sup> These are discussed in document IT/GB-3/09/12, *Assessment of progress in the inclusion in the Multilateral System of plant genetic resources for food and agriculture held by natural or legal persons*.

<sup>7</sup> There is no information to suggest that any such dispute settlement has yet occurred.

<sup>8</sup> The Third Party Beneficiary is empowered to act “on behalf of the Governing Body of the Treaty and its Multilateral System” (Article 4.3) “to initiate dispute settlement procedures regarding the rights and obligations of the Provider and the Recipient” (Article 8.2).

<sup>9</sup> The *Ad Hoc* Third Party Beneficiary Committee has recommended a schedule of reporting for the consideration of the Governing Body at this session (IT/GB-3/09/11 Rev. 1, *Report of the Chair of the Third Party Beneficiary Committee*).

<sup>10</sup> See IT/GB-3/09/11 and IT/GB-3/09/11 Rev. 1, *Report of the Chair of the Third Party Beneficiary Committee*.

“Click-wrap” mode,<sup>11</sup> that is, electronically over the Internet. This has the great advantage that the data are storable, transmissible and displayable at very low transaction costs.

16. A small number of signed, paper Standard Material Transfer Agreements have been sent to the Secretary. It is not always clear if these are the originals, or duplicates, and hence their legal status. Moreover, of those seen by the Secretary, a number were incorrectly or impartially completed, and some have modified articles, which is not in accordance with the provisions of the Treaty. Two inferences may be drawn from this:

a) that a considerable effort of awareness-raising and training will be required, if the Standard Material Transfer Agreement is to be used correctly; and

b) that, once the electronic technologies needed to receive requests for material from the Multilateral System and issue the Standard Material Transfer Agreement on-line have been developed and deployed, they have the inherent advantage of ensuring that these are correctly drawn up.

17. In this connection, it is worth noting that similar world-wide distributed systems linked to international treaties, such as WIPO's<sup>12</sup> systems for intellectual property filing, for example through electronic applications such as “PCT-Safe”, have very rapidly moved from paper transactions to electronic transactions in recent years. In this context, it should be noted that the UNCITRAL<sup>13</sup> Convention on the Use of Electronic Communications in International Contracts provides standards for the use of electronic contracts.<sup>14</sup>

18. There is as yet very little information on the use of “shrink-wrap” Standard Material Transfer Agreements.<sup>15</sup> None have yet come to the Secretary's attention.

19. In Article 6.4, the Standard Material Transfer Agreement also provides for notification to the Governing Body by a Recipient who transfers a Product under Development to a subsequent Recipient. No such notifications have been received, except that the International Agricultural Research Centres and other International Institutions are systematically recording this information for the products of their own research that use Materials from the Multilateral System. The Genetic Resources Policy Committee of the Consultative Group on International Agricultural Research has considered their practice in this regard, and has advised Centres to prefer to make such materials available to Recipients as normal Material from the Multilateral System, unless there is a specific reason for regarding them as Material under Development.

20. Article 15e of the Treaty provides that “*upon request by an IARC, the Secretary shall endeavour to provide appropriate technical support*”. Throughout the biennium, the Secretary has remained in close contact with the Centres, and collaborated with them in a variety of aspects of the implementation and operation of the Standard Material Transfer Agreement. The experience and information management skills of the International Agricultural Research Centres (particularly the International Rice Research Institute (IRRI)), as the largest users of the Standard Material Transfer Agreement, have been of great value in identifying and solving problems, and in counselling other potential Providers.

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<sup>11</sup> A “click-wrap” Standard Material Transfer Agreement is where the agreement is concluded on the Internet and the Recipient accepts the terms and conditions of the Standard Material Transfer Agreement by clicking on the appropriate icon on the website or in the electronic version of the Standard Material Transfer Agreement, as appropriate.

<sup>12</sup> The World Intellectual Property Organization.

<sup>13</sup> The United Nations Commission on International Trade Law.

<sup>14</sup> It provides that “A communication or a contract shall not be denied validity or enforceability on the sole ground that it is in the form of an electronic communication” (Article 8(1)).

<sup>15</sup> A “shrink-wrap” Standard Material Transfer Agreement is where a copy of the Standard Material Transfer Agreement is included in the packaging of the Material, and the Recipient's acceptance of the Material constitutes acceptance of the terms and conditions of the Standard Material Transfer Agreement.

21. It should be noted that, in addition to Contracting Parties, a number of potential Providers and Recipients in the public and private sectors have also brought to the attention of the Secretariat various legal and technical questions regarding the interpretation of their rights and obligations under the Standard Material Transfer Agreement. This uncertainty is probably limiting the number of such persons willing to make Materials available, or to receive Materials, through a Standard Material Transfer Agreement.

22. During the 2008/09 biennium, and in preparation for the Third Session of the Governing Body, the Secretary accordingly consulted international technical experts<sup>16</sup> on technical and legal matters that had been brought to his notice regarding the operation of the Standard Material Transfer Agreement and the Multilateral System generally, and to assist him in responding to Contracting Parties' requests and developing information packages on key elements of the Treaty, as a means to enhance their implementation activities.<sup>17</sup> It is proposed that the Secretary again seek such advice in the coming biennium, and for that purpose convene an *Ad Hoc* Technical Committee on the Standard Material Transfer Agreement and the Multilateral System, provision for which has been made in the draft Programme of Work and Budget.<sup>18</sup> The Secretariat will also continue to collaborate with interested national Providers and International Institutions in developing information support tools for the electronic management of the Standard Material Transfer Agreement and related reporting, with the aims of reducing transaction costs in the operations of the Multilateral System for Providers and Recipients and facilitating the use of the Standard Material Transfer Agreement; promoting consistency of implementation and operations across all Contracting Parties; and facilitating the work of the Secretariat and the Third Party Beneficiary, while containing costs.<sup>19</sup>

#### F. Obligations of Recipients

23. Recipients have obligations that are separate to those of Providers. In particular, by Article 6.11h, they must, if they choose to opt for the alternative, crop-based payment modality under Article 6.11 and *Annex 3* of the Standard Material Transfer Agreement, notify the Governing Body.

24. At the time of preparing this document, the Secretary has received three such notifications.

25. Because this payment modality is crop-based, it is necessary for a Recipient opting for it to specify for which crop or crops he accepts it. Since *Annex 1* to the Standard Material Transfer Agreement under which they Recipient received Materials may have included a number of crops, this cannot always be deduced from the Standard Material Transfer Agreement itself. The Governing Body may therefore wish to clarify that a Recipient who opts for the crop-based payment modality, by submitting *Annex 4* to the Standard Material Transfer Agreement, duly signed, should at the same time specify to which crop or crops it applies.

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<sup>16</sup> IT/GB-3/09/4, *Report by the Secretary*.

<sup>17</sup> IT/GB-2/07/Report, *Report of the Second Session of the Governing Body*, paragraph 65.

<sup>18</sup> Draft Terms of Reference for the *Ad Hoc* Technical Committee are in *Appendix 1* to the current document.

<sup>19</sup> As noted in *Annex 4* of document IT/GB-3/09/21, donor funds have already been made available for this activity in the forthcoming biennium.

### III. BENEFIT-SHARING

#### A. Non-monetary benefit-sharing

26. Contracting Parties have obligations under Articles 13.2 a, b and c of the Treaty to exchange information regarding those plant genetic resources for food and agriculture that are under the Multilateral System; provide and facilitate access to technologies for their conservation, characterization evaluation and use; and give priority to relevant capacity-building.

27. Article 6.9 of the Standard Material Transfer Agreement contains separate, contractual obligations on the Recipient:

*“The Recipient shall make available to the Multilateral System, through the information system provided for in Article 17 of the Treaty, all non-confidential information that results from research and development carried out on the Material, and is encouraged to share through the Multilateral System non-monetary benefits expressly identified in Article 13.2 of the Treaty that result from such research and development. After the expiry or abandonment of the protection period of an intellectual property right on a Product that incorporates the Material, the Recipient is encouraged to place a sample of this Product into a collection that is part of the Multilateral System, for research and breeding”.*

28. To be of value to the original Provider of the material in question, and to plant breeders everywhere, such information must be returned, not to the Secretariat of the Treaty, but to the Provider, who must then associate it with the plant genetic resources in question, in a publicly consultable information system.

29. While it is clear that the research projects of the International Agricultural Research Centres and other International Institutions, and the research networks that they have established, which use, characterize and evaluate plant genetic resources for food and agriculture, do result in the research and development information generated being made publicly available, there is no information on the practice of other Recipients.

30. There is, as yet, no case of the expiry or abandonment of the protection period of an intellectual property right on a Product that incorporates Material received under a Standard Material Transfer Agreement.

#### B. Monetary benefit-sharing, and modalities of payment

31. The Standard Material Transfer Agreement provides for two modalities of payment, from which the Recipient may choose:

(a) for individual Products developed from Material received, on a mandatory basis, in accordance with Article 6.7 and *Annex 2*, when these are not available without restriction to others for further research and breeding; and on a voluntary basis, in accordance with Article 6.8, when they are; and

(b) in accordance with Article 6.11 and *Annex 3*, on a mandatory basis, at a discounted rate, for all of a company's Products of a particular crop, whether or not these derive from material received under a Standard Material Transfer Agreement, from the time that a Recipient elects for this option under Article 6.11 of the Standard Material Transfer Agreement.

32. No payments, mandatory or voluntary, have yet been made under either of these modalities.

33. It is unlikely that substantial payments will accrue under modality (a) for some time, because of the long period of time required to develop a plant variety. If modality (b) is chosen, however, the payments in question will accrue immediately, and at a relatively predictable rate.

34. The announcement by Norway that it will make an additional annual payment of 0.1% of the value of all seeds sold in its territory will have a similar effect. Norway has already made its first additional annual payment, for 2008, in the sum of US\$ 77,000. Norway estimates that, “if we all contribute a similar percentage from sales of our seeds, the Treaty’s benefit-sharing fund would have some US\$ 20 million a year”.<sup>20</sup>

35. The Standard Material Transfer Agreement contains no information on the currency in which payments should be made. A note by the Secretariat to *Annex 2*, paragraph 4, of the Standard Material Transfer Agreement states: “*The Governing Body has not yet considered the question of currency of payment. Until it does so, Standard Material Transfer Agreements should specify United States dollars (US\$)*”. The Governing Body may now wish to confirm that payments should be made in US dollars.

#### IV. INFORMATION MANAGEMENT

36. This review of the implementation and operation of the Standard Material Transfer Agreement shows the important role of information management in implementing the Standard Material Transfer Agreement and in ensuring consistency in its operation, across the wide range of users. The reporting obligations within the Standard Material Transfer Agreement all relate to benefit-sharing, and to enabling the functioning of the Third Party Beneficiary, should it become necessary to initiate dispute settlement.

37. The *Ad Hoc* Third Party Beneficiary Committee, in addition to recommending the schedule of reporting foreseen in Article 5e of the Standard Material Transfer Agreement, has also identified the items of information that need to be at the disposal of the Third Party Beneficiary in order to be able to initiate dispute settlement, should this become necessary.<sup>21</sup> It has further recommended that Providers may fulfil their reporting obligations either by providing a copy of the Standard Material Transfer Agreement, or by providing these items of information and stating where the Standard Material Transfer Agreement is stored, and how it may be obtained.

38. Whatever the decisions of the Governing Body, a considerable quantity of information will need to be maintained and made available to the Third Party Beneficiary, held either by the Secretariat or in the distributed network of Providers.

39. In so far as Providers maintain data, they assume a considerable burden and responsibility to maintain it adequately, whether on paper (in the case of signature), or as electronic data (in the case of click-wrap and shrink-wrap). A provider who maintains electronic data may need to employ technological measures to ensure that the information is not altered from the time it was first generated in its final form.<sup>22</sup>

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<sup>20</sup> [ftp://ftp.fao.org/ag/agp/planttreaty/news/noti005\\_en.pdf](ftp://ftp.fao.org/ag/agp/planttreaty/news/noti005_en.pdf).

<sup>21</sup> See IT/GB-3/09/11 Rev. 1, *Report of the Chair of the Third Party Beneficiary Committee*.

<sup>22</sup> Articles 9(4) and 9(5) of the UNCITRAL Convention on the Use of Electronic Communications in International Contracts provide as follows:

“4. Where the law requires that a communication or a contract should be made available or retained in its original form, or provides consequences for the absence of an original, that requirement is met in relation to an electronic communication if:

- (a) There exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and
- (b) Where it is required that the information it contains be made available, that information is capable of being displayed to the person to whom it is to be made available.



40. If the Standard Material Transfer Agreement or the relevant data is transmitted to the Secretariat for storage, Providers are relieved of this responsibility. Electronic data is relatively cheaply managed, provided it is received in a standard form that can be handled with minimum human intervention. The Third Party Beneficiary Committee noted that the Secretariat has worked with Providers interested in managing their own data and reporting electronically, in particular with the International Rice Research Institute, EMBRAPA (the Brazilian Agricultural Research Corporation), and the Malaysian Agricultural Research and Development Institute (MARDI), in Malaysia. It also noted that the technologies developed in this way will be at the disposal of all Contracting Parties and natural and legal persons acting as Providers of Material from the Multilateral System, should they wish to use them, or adapt them to their particular needs, which will greatly simplify their reporting tasks.

41. Should the Secretariat receive large quantities of data on paper, or as discursive data in any form, the transaction costs of managing it will be considerably greater, and require dedicated staff resources. In this context, the on-going development by the Secretariat of relevant information technologies aims not only to assist users to reduce the transaction costs arising from their implementation of the Standard Material Transfer Agreement and from meeting their reporting obligations, but also to contain to a minimum the costs of the information management responsibilities of the Secretariat and the Third Party Beneficiary. The initial investment in such systems will result in substantial lower long-term recurrent costs.

## V. PERIODIC REVIEW OF THE LEVELS OF PAYMENT

42. In line with Article 13.2d(ii) of the Treaty, the Governing Body agreed on “*the level, form and manner of the payment, in line with commercial practice*” in its First Session, and incorporated these in the Standard Material Transfer Agreement.

43. The Article further provides that:

*“The Governing Body may, from time to time, review the levels of payment with a view to achieving fair and equitable sharing of benefits, and it may also assess, within a period of five years from the entry into force of this Treaty, whether the mandatory payment requirement in the MTA shall apply also in cases where such commercialized products are available without restriction to others for further research and breeding”.*

44. By Resolution 2/2006, the Governing Body decided “*to review the levels of payment periodically, in conformity with Article 13.2d(ii) of the Treaty, starting from the Third Session of the Governing Body.*” However, the current paucity of information regarding the implementation of the Standard Material Transfer Agreement would make such a review during the current Session impractical. The Governing Body may therefore wish to again postpone this review until a later session, and decide on the preparatory process for this review.

45. While the Governing Body may, in accordance with this Article, review the levels of payment at any time, a decision regarding the possibility of applying mandatory payments in cases where commercialized products are available without restriction is time-bound, unless the Governing Body decides to postpone the assessment and decision.

46. The Treaty entered into force on 29 June 2004. The five-year period therefore expires on 28 June 2009, unless the Governing Body decides to postpone this review. Should it so wish, the

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“5. For the purposes of paragraph 4 (a):

(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any endorsement and any change that arises in the normal course of communication, storage and display; and

(b) The standard of reliability required shall be assessed in the light of the purpose for which the information was generated and in the light of all the relevant circumstances,”

Governing Body may wish to schedule such a review, and indicate the preparatory work it requires.

## **VI. CONCLUSIONS: THE CURRENT STATE OF IMPLEMENTATION AND OPERATION OF THE STANDARD MATERIAL TRANSFER AGREEMENT**

47. The use of the Standard Material Transfer Agreement for the facilitated exchange of plant genetic resources for food and agriculture must be seen in the overall context of the state of implementation of the Multilateral System. As the *Review of the implementation of the Multilateral System*<sup>23</sup> notes, there is currently a dearth of information regarding what plant genetic resources are “in” the Multilateral System, in the sense of being adequately documented for use by plant breeders. The exceptions to this situation are the collections of the International Institutions, and those of a number of developed country Contracting Parties.

48. It also appears that both Contracting Parties and individual public and private sector bodies are experiencing difficulties in interpreting the Standard Material Transfer Agreement, which is therefore not being used as widely as it should be, with the implication either that access remains limited, or that materials are being provided without a Standard Material Transfer Agreement. The implementation of the Standard Material Transfer Agreement is at a critical stage. Unless this situation is addressed rapidly, it is likely to lead to momentum being lost; practices not in line with the Treaty and the Standard Material Transfer Agreement taking root, with growing legal and administrative confusion; effective access remaining minimal (except for collections of the International Institutions and certain developed country genebanks); and an overall weakening of the Treaty.

49. It is therefore proposed that a special effort be devoted in the forthcoming biennium to overcoming these problems, by rapidly addressing technical, legal and operational questions raised by users of the Standard Material Transfer Agreement and Contracting Parties; building capacity, raising awareness and promoting the exchange of experiences among those responsible for implementing the Standard Material Transfer Agreement at national level, particularly in developing countries; and documenting best practices. The Secretariat will also continue to collaborate with interested national Providers and International Institutions in developing information support tools for the electronic management of the Standard Material Transfer Agreement and related reporting and information management.

50. The information on the implementation and operation of the Standard Material Transfer Agreement is currently very scant, except as far as concerns the International Agricultural Research Centres of the Consultative Group on International Agricultural Research and other International Institutions. If the reporting schedule in accordance of Article 5e of the Standard Material Transfer Agreement is adopted at this session,<sup>24</sup> and capacity-building is effective, more useful information may become available in the next biennium.

51. By Resolution 2/2006, the Governing Body decided “*to review the levels of payment periodically, in conformity with Article 13.2d(ii) of the Treaty, starting from the Third Session of the Governing Body.*” Given the current paucity of information regarding the implementation of the Standard Material Transfer Agreement, Governing Body may therefore wish to postpone its first review of the levels of payment to a later session, and decide on the preparatory work it requires.

52. The Governing Body may wish to re-schedule the review of whether the mandatory payment requirement shall also apply in cases where commercialized products are available without restriction to others for further research and breeding to a later Session, and decide on the preparatory work it requires.

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<sup>23</sup> Document IT/GB-3/09/13.

<sup>24</sup> IT/GB-3/09/11, *Report of the Chair of the Third Party Beneficiary Committee.*

## VII. DRAFT ENABLING RESOLUTION

53. A draft enabling resolution for actions the Governing Body may wish to take in relation to the Standard Material Transfer Agreement follows:

### RESOLUTION X/2009

#### Implementation and operation of the Standard Material Transfer Agreement

*Convinced* of the crucial importance for the Treaty of the Standard Material Transfer Agreement, as the instrument for the facilitated exchange of plant genetic resources for food and agriculture, and the source of monetary benefit-sharing;

*Concerned* that little information is as yet available on its implementation and operation;

#### The Governing Body:

- i) *Requests* all Contracting Parties to take the policy, legal and administrative measures necessary for their national plant genetic resource systems, and natural and legal persons within their jurisdictions, to be able to use the Standard Material Transfer Agreement to provide facilitated access to plant genetic resources for food and agriculture;
- ii) *Stresses* the importance of assisting developing countries in this process;
- iii) *Urges* developed country Contracting Parties to provide appropriate assistance to developing countries, bilaterally, or through established multilateral frameworks;
- iv) *Requests* the Secretary to give priority to assisting users of the Standard Material Transfer Agreement to overcome any legal, technical and operational problems, including through the convening of an *Ad Hoc* Technical Committee on the Standard Material Transfer Agreement and the Multilateral System; capacity-building, awareness-raising and promoting the exchange of experiences among those responsible for implementing the Standard Material Transfer Agreement at national level, particularly in developing countries; and the development, and deployment on request, of information support tools for the electronic management of the Standard Material Transfer Agreement and related reporting;
- v) *Decides* to again review the levels of payment with a view to achieving fair and equitable sharing of benefits at its [\*\*\*] Session;
- vi) *Requests* the Secretary to follow-up actively, to obtain the necessary information;
- vii) *Decides* to postpone the review of whether the mandatory payment requirement shall also apply in cases where commercialized products are available without restriction to others for further research and breeding to its [\*\*\*] Session;
- viii) *Welcomes* the decision of Norway to make an additional annual payment of 0.1% of the value of all seeds sold in its territory;
- ix) *Appeals* to other Contracting Parties to take similar decisions, with the aim of providing the Treaty's benefit-sharing fund with substantial and reliable resources;
- x) *Decides* that Recipients opting for the crop-based payment modality under Article 6.11 of the Standard Material Transfer Agreement, by submitting *Annex 4* to the Standard Material Transfer Agreement, duly signed, should at the same time specify to which crop or crops it applies;

- xi) Decides* that payments due under the Standard Material Transfer Agreement should be made in US dollars, calculated at the market rate in effect on the day that the payment is made.

**APPENDIX 1**  
**DRAFT TERMS OF REFERENCE**  
**FOR**  
**THE *AD HOC* TECHNICAL COMMITTEE ON THE STANDARD MATERIAL**  
**TRANSFER AGREEMENT AND THE MULTILATERAL SYSTEM**

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***Background***

The Treaty's Standard Material Transfer Agreement is at a critical stage of implementation, where potential Providers and Recipients of Materials from the Multilateral System are bringing to the notice of the Secretary a variety of technical and operational questions regarding their obligations and responsibilities. This is to be expected, because the use of the Standard Material Transfer Agreement is a distributed function that spans many languages, national and regional legal frameworks, and institutional structures. It is necessary to work with users of the Standard Material Transfer Agreement and relevant national authorities on a day-to-day basis, in order to help resolve such matters as they arise. The responsiveness of the Treaty system to the needs, requests and enquiries of users will be critical for its credibility, and provide the basis for its consistent use. A failure to address such questions as they arise will not only slow down the process by which Providers of Materials from the Multilateral System are putting in place procedures to receive requests and provide Materials through the Standard Material Transfer Agreement, but will also result a number of anomalous and incorrect procedures taking root, threatening the coherence of the Multilateral System. Once they have taken root, it will be increasingly difficult to correct them.

In seeking to reply to questions brought to his attention, the Secretary regularly consults technical and legal experts. He has also convened meetings of groups of experts, in which a broader technical consensus regarding such questions can be sought. The following Terms of Reference will apply to any such meeting that the Secretary convenes during the 2010/11 biennium.

***Terms of Reference***

1. The *Ad Hoc* Technical Committee will discuss technical, operational and legal questions raised by users of the Standard Material Transfer Agreement, which the Secretary brings to their attention, and provide him with opinions about these, and advice as to how they may be addressed. It will also advise on the development of guides, compendiums of best practices, *etc.*
2. The number of experts invited to a meeting will usually be between ten and twenty. In inviting technical experts to a meeting of the *Ad Hoc* Technical Committee, the Secretary will have regard of the specific nature of the questions brought to his notice and the expertise needed to address these. Experts will be identified with due attention to the knowledge and skills required, understanding of the Treaty and its Multilateral System, impartiality, and geographical balance. Stakeholder groups with an interest in the questions to be addressed may also be invited.
3. The *Ad Hoc* Technical Committee will prepare a report at the end of a meeting, with responses to matters brought to its attention, and, where necessary, opinions on specific questions. These reports will be also be made available as information documents to sessions of the Governing Body.
3. Specifically, the *Ad Hoc* Technical Committee will assist the Secretary in:
  - a) Research and analysis on the operations of the Standard Material Transfer Agreement and the Multilateral System;

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- b) Gathering information on the operations of the Standard Material Transfer Agreement operations;
  - c) Developing information packages to enhance implementation of the Standard Material Transfer Agreement;
  - d) Preparing responses to questions from users, or from prospective users, of the system, and from Contracting Parties;
  - e) Identifying questions regarding the Standard Material Transfer Agreement and the Multilateral System that may need to be brought to the attention of the Governing Body;
  - f) Peer-reviewing and commenting on draft guides and compendiums of information on procedures, measures and best practices to implement the Standard Material Transfer Agreement, taking into account the different legal systems and policy contexts in which it functions; and
  - g) Addressing other related questions, in respect of which the Secretary may, from time to time, request assistance.