



Food and Agriculture  
Organization of the  
United Nations



**The International Treaty**  
ON PLANT GENETIC RESOURCES  
FOR FOOD AND AGRICULTURE

## Item 9.1 of the Provisional Agenda

### NINTH SESSION OF THE GOVERNING BODY

New Delhi, India, 19–24 September 2022

### Report on the Operations of the Third Party Beneficiary

#### Note by the Secretary

*In accordance with Article 9 of the Third Party Beneficiary Procedures and the corresponding request of the Governing Body at its Eighth Session, this document contains the report on the operations of the Third Party Beneficiary for the biennium 2020–2021. The document includes information on potential cases regarding compliance with the SMTA, the status of the Third Party Beneficiary Operational Reserve and the technical implementation of the Third Party Beneficiary Procedures through information technology tools.*

#### Guidance Sought

The Governing Body is invited to take note of the Report and provide any further guidance it considers appropriate for the continued effective operation of the Third Party Beneficiary.

## I. INTRODUCTION

1. At its Third Session, by Resolution 5/2009, the Governing Body adopted the *Procedures for the Operation of the Third Party Beneficiary* (Third Party Beneficiary Procedures).<sup>1</sup> FAO acts as the Third Party Beneficiary, in accordance with the *Third Party Beneficiary Procedures*.
2. Article 9 of the *Third Party Beneficiary Procedures* requires the Third Party Beneficiary to submit a report to the Governing Body at each of its Regular Sessions. The Governing Body at its Eighth Session requested the Secretary and FAO to continue providing such a report.<sup>2</sup>
3. This document constitutes the above report for the biennium 2020–2021 and, where so specified, for 2022 until the date of publication of this document.

## II. CASES FOR THE THIRD PARTY BENEFICIARY

4. According to Article 4.2 of the *Third Party Beneficiary Procedures*, 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 (SMTA) from the parties to the SMTA or any other natural or legal persons.
5. In the course of the Eighth Session of the Governing Body, the Third Party Beneficiary received a letter from civil society organizations referring to a patent application by an international institution (hereinafter referred to as “institution A”) and licensing practices of another international institution (hereinafter referred to as “institution B”). Both international institutions have signed agreements with the Governing Body under Article 15 of the International Treaty (Article 15 agreement).
6. The letter, indicated that the scope of the patent application by institution A comprises a trait, extracted from an accession available in the Multilateral System, for hybrid seed production. With regard to institution B, the practices described in the letter apply to hybrids licensed to seed companies, that would appear to have parentage from germplasm available in the Multilateral System. Purportedly, institution B makes the hybrid parents available for research and development without disclosing the parental line combinations of the licensed hybrids.
7. In the letter, it was claimed that the patent and the licensing scheme in question appear to contravene obligations related to the implementation of the Multilateral System, in particular with regard to intellectual property restrictions limiting access to germplasm, the SMTA and monetary benefit-sharing.
8. Based on information contained in the letter, the Third Party Beneficiary addressed a communication to the two concerned institutions requesting further information. The replies clarified the following.  
Reply from Institution A
9. Institution A reported on the status of the patent application at the national level in three countries, of which one has already granted a patent to Institution A. It clarified that the patent application refers to the introgression of a trait into elite varieties and the method to obtain such varieties. It further explained that the trait was found in a wild relative accession conserved in the international collection and was subject to the terms and conditions of the Multilateral System by virtue of the Article 15 agreement. Institution A also clarified that accessions of other wild species might have the genomic region/gene that can confer, and hence can be used to generate, the trait.
10. Institution A referred to Article 13.2(d) of the International Treaty, according to which “*recipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in*

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<sup>1</sup> Annex to Resolution 5/2009.

<sup>2</sup> Resolution 2/2019, paragraph 11.

*the form received from the Multilateral System*". Institution A stated that the patent application, and other patent applications it submitted, do not affect the obligations under the Article 15 agreement, as the institution continues to make the relevant accessions available according to the terms and conditions of the Multilateral System.

11. Institution A clarified that it uses the SMTA to distribute PGRFA under Development that it derives from germplasm under the Article 15 agreement.

12. Institution A also informed of its licensing policy, according to which it provides farmers and public sector organizations non-exclusive, royalty-free access to the elite cultivated germplasm that it develops. The developed germplasm contains the introgression of the patented trait. Institution A also provides private sector partners with non-exclusive royalty-bearing licenses on the same material.

13. Institution A specified that the value of the patented trait remains to be shown and that, in case such a value is demonstrated, negotiations with the private sector leading to any commercial value will be under the purview of benefit-sharing provisions of the SMTA. In cases where the trait is licensed for commercial use, institution A will ensure payments to the Benefit-sharing Fund.

14. In particular, in cases where the trait is licensed for use within a product developed by institution A that is not available without restriction for further research and breeding, mandatory benefit-sharing conditions in accordance with Article 6.7 of the SMTA will be applied. In cases where the product is available without restriction for further research and breeding, institution A will require licensees to make payments as per Article 6.8 of the SMTA. In cases where the trait is licensed for uses other than in a product developed by institution A or a derivative thereof, institution A will require payments to the Benefit-sharing Fund.

#### Reply from Institution B

15. Institution B confirmed that materials available in the Multilateral System may be used as parents in the development of hybrids and that, notwithstanding such use, the materials and the hybrids remain available for facilitated access under the Multilateral System and are not subject to restrictions for further research, breeding and training. Hybrids that the institution B breeds are commercialized by both private and public sector entities, which are granted the right to apply for release or commercialization authorizations. Under such licenses, institution B requires that no intellectual property restriction be sought, that would limit further research and breeding of the hybrids and the parental lines. Once commercialization takes place, the parental lines of the hybrids remain available for distribution under the SMTA.

16. Institution B clarified that elite inbred lines that may be derived from germplasm in its collection under the Multilateral System as well as from other partners' germplasm, are also utilized for the development of hybrids. Institution B regards the elite lines and the hybrids as its intellectual assets. The hybrids are licensed for commercialization through open calls and emails to public and private sector institutions in various geographical locations to facilitate the release of improved varieties in low- and middle-income countries and scale up the distribution of seeds to smallholder farmers. The rights licensed are non-exclusive in that institution B remains free to disseminate the parental lines and/or hybrids to any entity worldwide under the SMTA. Every license provides that the parental lines and hybrids of institution B shall remain available in all countries for research, breeding and training, and in the event of a national or regional food security emergency, for the duration of the emergency.

17. Institution B stated that, as the parental lines and the resulting hybrids being commercialized are available for further research, breeding and training via the SMTA, no mandatory benefit-sharing under Article 6.7 of the SMTA is triggered. Institution B also stated that, albeit it retains its ownership and legal rights as a breeder, only commercialization rights are granted to selected partners in specified territories and for a limited duration.

18. Institution B clarified that in one exceptional case involving inbred lines, it assigned ownership to the licensee in order to apply for plant breeder's right for exclusive commercialization in a country. The licensee agreed to contribute 1 percent of annual royalties earned on the sales to the Benefit-sharing Fund as a voluntary contribution. In another case, institution B authorized a licensee to apply for plant breeder's rights for commercialization of an advanced line developed by institution B in a country. The licensed advanced lines remain available to the public under the SMTA as PGRFA under Development.

#### Conclusion by the Third Party Beneficiary

19. Upon review of the information and explanations provided by Institution A and Institution B, the Third Party Beneficiary determined that there was no reason to believe that the obligations under a SMTA had not been complied with.

### **III. STATUS OF THE THIRD PARTY BENEFICIARY OPERATIONAL RESERVE**

20. The Financial Rules of the Governing Body stipulate that the Third Party Beneficiary Operational Reserve (Reserve) shall be maintained at a level to be determined by the Governing Body for each biennium. An adequate part of the contributions to the Core Administrative Budget is to be credited as a priority to the Reserve.

21. At its Eighth Session, the Governing Body decided to maintain the Reserve for the 2020–2021 biennium at the level of USD 283 280 and to review such a level at this Session.

22. At the date of this document, USD 270 337 or 95 percent of the amounts due to the Reserve, had been received from 82 Contracting Parties leaving a balance of USD 12 943 still payable.

23. Similarly to the previous biennium, the direct costs ensuing from the implementation of the *Third Party Beneficiary Procedures* in the current biennium were essentially those incurred to cover the contract for the hosting of the server by the United Nations International Computing Centre (UNICC). In the 2020–2021 biennium, this amounted to USD 11 664 charged on a quarterly basis as part of the Core Administrative Budget.

### **IV. TECHNICAL IMPLEMENTATION OF THE THIRD PARTY BENEFICIARY PROCEDURES**

24. At its Eighth Session, the Governing Body welcomed the functional and cost-effective information technology tools and infrastructure that the Secretary has developed to facilitate the submission, collection and storage of information in the implementation of Article 4.1 of the *Third Party Beneficiary Procedures*, and requested the Secretary to apply adequate measures to ensure the integrity and, where required, the confidentiality of information, while continuing the further development of the International Treaty information technology tools and infrastructure, including in accordance with the Vision and Programme of Work of the Global Information System (GLIS) of Article 17.<sup>3</sup>

25. In the 2020–2021 biennium, the development of Easy-SMTA for the submission, collection and storage of SMTA information focused on improving general data quality in the Easy-SMTA Data Store and adopting official UN maps.

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<sup>3</sup> Resolution 2/2019, paragraph 15.

26. Awareness raising and capacity building were conducted in 11 webinars being held in the biennium, including two in collaboration with DivSeek International, with a total of over 200 participants, including genebank managers, farmers, breeders, researchers, students and policymakers. In addition, the Secretariat promoted the adoption of GRIN-Global with its integrated SMTA reporting functionality. As a result of those activities, more Providers switched from in-house SMTA management solutions to Easy-SMTA in order to meet SMTA reporting requirements.

27. With regard to data integrity and confidentiality, the Easy-SMTA server, hosted at the UNICC in Geneva, Switzerland, was updated as a cluster configuration to improve reliability and performance. UNICC's System Administrators also implemented advanced security measures for the server.

28. The report made to the Governing Body at its Eighth Session included information on a confidentiality issue raised by a European genebank in connection with the communication of Recipient's identity and the application of the General Data Protection Regulation of the European Union. The Secretariat, in collaboration with FAO's Legal Office, clarified the status of FAO acting as Third Party Beneficiary and the purpose of the *Third Party Beneficiary Procedures*, which contributed to solving the issue without any deviation from the Procedures.

29. With regard to the integration with GLIS information technology tools and infrastructure, a new Easy-SMTA feature now allows Recipients of Click-wrap SMTAs, in which transferred samples are listed in Annex 1 using Digital Object Identifiers, to download the corresponding passport data, thus improving SMTA functionality and data quality.

30. In addition, the Nordic Genetic Resource Center developed an open-source library to support SMTA reporting. The library is available free of charge to all interested Providers.

31. Further information on the GLIS is available in the document, IT/GB-9/22/11, *Report on the Implementation of the Global Information System*.

## V. GUIDANCE SOUGHT

32. Without prejudice to any guidance the Governing Body may wish to give on the matters covered in this document, draft elements for a possible Resolution are provided in the *Appendix* to this document.

## DRAFT ELEMENTS FOR A RESOLUTION

(to be integrated into DRAFT RESOLUTION \*\*/2022 on Implementation and Operation of the Multilateral System of Access and Benefit-sharing)

### THE GOVERNING BODY,

**Recalling** that the Governing Body, at its Third Session, had approved the *Procedures for the Operation of the Third Party Beneficiary* (Third Party Beneficiary Procedures)<sup>4</sup> for the carrying out of the roles and responsibilities of Third Party Beneficiary as identified and prescribed in the Standard Material Transfer Agreement under the direction of the Governing Body;

**Recalling further** that, in accordance with Article 4.2 of the Third Party Beneficiary Procedures, 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 any natural or legal persons;

**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;

1. **Takes note** of the Report on the Operation of the Third Party Beneficiary and further **requests** the Secretary and FAO to continue providing, at each Session of the Governing Body, such a report;
2. **Stresses the importance** for the effective functioning of the Third Party Beneficiary, of Article 4.2 of the Third Party Beneficiary Procedures, according to which 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;
3. **Decides** to maintain the Third Party Beneficiary Operational Reserve for the 2022–2023 biennium at the current level of USD 283 280 and to review the same at its Tenth Session, and **calls** upon Contracting Parties that have not yet done so, intergovernmental organizations, non-governmental organizations and other entities to contribute to the Reserve;
4. **Authorizes** the Secretary to draw upon the Third Party Beneficiary Operational Reserve as may be needed for the implementation of the functions of the Third Party Beneficiary;
5. **Welcomes** the functional and cost-effective information technology tools and infrastructure that the Secretary has developed to facilitate the submission, collection and storage of information in the implementation of Article 4.1 of the Third Party Beneficiary Procedures and **requests** the Secretary to continue to apply adequate measures to ensure the integrity and, where required, the confidentiality of information.

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<sup>4</sup> Annex to Resolution 5/2009.