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COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

Ninety-third Session

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INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

MEDIATION RULES FOR THE EFFECTIVE FUNCTIONING OF THE THIRD PARTY BENEFICIARY PROCEDURES

BACKGROUND

1. This matter is being referred to the Committee on Constitutional and Legal Matters (CCLM) under the general mandate of the Committee, as set out in Rule XXXIV, paragraphs 3 and 4 of the General Rules of the Organization, and as a follow up to the review by the CCLM of Third Party Beneficiary Procedures, at its Eighty-eight Session in September 2009.

FAO ACTING AS THIRD PARTY BENEFICIARY IN THE CONTEXT OF THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

2. The International Treaty on Plant Genetic Resources for Food and Agriculture (IT-PGRFA) is an agreement concluded under Article XIV of the FAO Constitution. It entered into force in June 2004 and, to date, there are one hundred and twenty-seven Parties thereto. Part IV of the IT-PGRFA establishes a Multilateral System of Access and Benefit-sharing (MLS) in order to facilitate access to plant genetic resources for food and agriculture (PGRFAs) and share, in a fair and equitable way, the benefits arising from the utilization of these resources. The MLS covers PGRFAs listed in Annex I to the IT-PGRFA according to criteria of food security and interdependence, which are under the management and control of the Parties and in the public domain. Other PGRFAs can be included in the MLS on a voluntary basis. Facilitated access and benefit-sharing are provided pursuant to a "Standard Material Transfer Agreement" (SMTA), which is a standard contract approved by the Governing Body of the IT-PGRFA, containing a number of contractual terms and conditions applicable to providers and recipients of PGRFAs (i.e. individuals or legal entities within the territory

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of Parties). By concluding an SMTA, individual providers and recipients become bound to those contractual terms and conditions.

3. The Third Party Beneficiary (also referred to as TPB) is an entity designated by the Governing Body of the IT-PGRFA and which acts on behalf of the Governing Body itself and the MLS and ensures observance of the contractual conditions by the parties. In accordance with the SMTA, the Third Party Beneficiary is conferred the following rights:

- the right to request information to parties to the SMTA, as required by various provisions of the agreement (Article 4.4);
- the right to request that the appropriate information, including samples as necessary, be made available by parties to the SMTA, regarding their obligations (Article 8.3);
- the right to initiate dispute settlement procedures regarding rights and obligations of the parties to the SMTA (Articles 8.1; 8.2).

4. The Governing Body of the IT-PGRFA, at its first session in 2006, invited FAO to act as TPB to carry out the roles and responsibilities identified in the SMTA, under the direction of the Governing Body, and in accordance with the procedures to be established by the Governing Body.¹

5. By Circular State Letter (G/X/AGD-10) dated 22 December 2006, the Director-General of FAO informed Contracting Parties to the IT-PGRFA that he had given his agreement in principle for the Organization to act as the TPB foreseen in the SMTA. This agreement in principle was subject to formal approval, upon review of the procedures to be established by the Governing Body, defining the TPB roles and responsibilities.

6. At its Third Session, the Governing Body of the IT-PGRFA approved the “*Procedures for the Operation of the Third Party Beneficiary (Third Party Beneficiary Procedures)*”. In adopting the Third Party Beneficiary Procedures, the Governing Body requested the Director-General to bring the procedures to the attention of the relevant Governing Bodies of FAO, for formal approval.²

7. At its Eighty-eight session, the CCLM reviewed the document entitled “*International Treaty on Plant Genetic Resources for Food and Agriculture – Operation of the Third Party Beneficiary Procedures*”.³ The CCLM concluded that the procedures regarding the exercise by FAO of functions as TPB include adequate safeguards protecting the autonomy of the Organization and its immunity from every form of national jurisdiction, and ensured that FAO would not incur financial liabilities beyond the level of the Third Party Beneficiary Operational Reserve, which is established within the core administrative budget of the IT-PGRFA for the purpose of defraying costs and expenses which may be incurred by FAO in the fulfilment of its roles and responsibilities as TPB.⁴

8. Subsequent to the review of the Third Party Beneficiary Procedures by the CCLM, the FAO Council, at its One-Hundred-and-Thirty-seventh Session, approved the procedures, which are fully operational⁵. On that occasion, the Council underlined that the TPB mechanism provided an example of useful synergies between FAO and bodies established under Article XIV of the FAO Constitution.

9. At the time when the Governing Body of the IT-PGRFA approved the Third Party Beneficiary Procedures and forwarded them to the relevant Governing Bodies of FAO for approval, the Governing Body of the IT-PGRFA requested its Secretary to develop “*operational guidelines for the commencement and management of amicable dispute resolution and mediation proceedings under the*

¹ IT/GB-1/06/Report, Resolution 2/2006.

² IT/GB-3/09/Report, Resolution 5/2009.

³ CCLM 88/7.

⁴ CL 137/5, paras. 42 – 51.

⁵ *Report of the Council of FAO, Hundred and Thirty-seventh Session, Rome, 28 September -2 October 2009*, CL 137/REP, paragraph 59.

*Third Party Beneficiary Procedures in order to promote the effective functioning of the Third Party Beneficiary, which shall include appropriate cost containment measures*⁶. The idea underlying this request was that the initiation of adjudicatory procedures should intervene only after all other means had been exhausted.

10. The *Ad Hoc* Third Party Beneficiary Committee of the IT-PGRFA (the Committee) was convened in the biennium 2010-2011 in order to finalize, on the basis of a draft prepared by the Secretary, the operational guidelines.

11. The Governing Body, at its Fourth Session in March 2011, endorsed the work of the Committee and approved the guidelines, in the form of Mediation Rules accompanying the Third Party Beneficiary Procedures, as well as amendments to the Third Party Beneficiary Procedures, which are now being referred to the CCLM.

RELEVANT FEATURES OF THE *MEDIATION RULES*

12. The Committee worked on the basis of “*Draft operational guidelines for the commencement and management of mediation procedures*”, prepared by the Secretary pursuant to the request of the Governing Body.⁷ In developing the guidelines, the Secretary sought technical support from relevant organizations, in particular from the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO), and the United Nations Commission on International Trade Law.

13. The Governing Body of the IT-PGRFA, at its Third Session, had requested that both amicable dispute resolution and mediation proceedings be addressed in the operational guidelines. However, the Third Party Beneficiary Procedures already contained, in Article 5, detailed procedures for the TPB to follow in seeking amicable dispute resolution. The Committee was of the view that the procedures established under Article 5 provided for effective and cost-efficient action by the Third Party Beneficiary. For this reason, the Committee did not engage in further work on the amicable dispute settlement phase, but rather concentrated its efforts on the next phase, i.e. mediation.

14. In the overall process of dispute settlement, placing emphasis on the mediation phase appears to be the single most likely means of containing costs. In particular, mediation processes are usually time-efficient and flexible, and allow interest-based solutions to be explored and business relationships to be preserved. For efficiency of process, and to avoid a major managerial investment, mediation procedures administered by an experienced and well-respected international body appear to be the optimal solution. Thus, in the event that a dispute should not be resolved amicably, it would be best for the TPB (i.e. FAO) to seek administered mediation for dispute settlement as the next step.

15. Article 6, on *Mediation*, of the Third Party Beneficiary Procedures, which reflects Article 8.4b of the SMTA, does not provide for any specific set of mediation rules to be used. It was therefore possible for the TPB to propose mediation rules tailored to the circumstances of the IT-PGRFA, presenting an opportunity for the parties to a dispute to achieve an efficient solution at limited costs.

16. The Mediation Rules foresee administered mediation. In this context, it should be recalled that, as reflected in Resolution 5/2009 of the Governing Body, the WIPO Arbitration and Mediation Center provided substantial technical assistance in the formulation of the Mediation Rules, which have drawn substantially on the existing WIPO Mediation Rules.⁸

17. As the Governing Body had considered cost containment measures as a priority in the development of procedures and rules for the TPB, the Schedule of Fees provided by the WIPO Arbitration and Mediation Center for acting as administrator of the mediation rules seems to be very

⁶ Resolution 5/2009, *cit.*

⁷ IT/TPBC-3/10/2

⁸ <http://www.wipo.int/amc/en/mediation/rules/index.html>

competitive: the administration fee is US\$ 500, and the mediator's fees are an hourly rate of US\$ 300, capped at an overall maximum of US\$ 10,000 in disputes involving amounts in dispute of up to US\$ 2.5 million, and a maximum of US\$ 20,000, when the amounts in dispute exceed US\$ 2.5 million.⁹ The Committee, in fact, agreed that the WIPO Center's Schedule of Fees is very favourable, compared to the prevalent rates obtainable elsewhere. Furthermore, it noted that the WIPO Center's mediation services are provided on a not-for-profit basis and have been acknowledged as effective and time and cost-efficient. About 75% of all the WIPO Center's mediation cases have resulted in party settlement, obviating the need to resort to other more expensive dispute resolution procedures.¹⁰ Generally speaking, mediation procedures have led to significantly advancing the conclusion of a case in time, with increased cost-control.

18. The *Mediation Rules* respond to other concerns expressed by the Governing Body of the IT-PGRFA and the CCLM. The CCLM is, in particular, invited to take note of its previous deliberations concerning the safeguards established within the Third Party Beneficiary Procedures with regard to the autonomy of FAO in exercising its functions, the protection of the privileges and immunities of FAO, especially its immunity from every form of jurisdiction, as well as any possible financial liability for the Organization arising out of the exercise of its role. Thus, the CCLM may wish to note that the established safeguards are not altered by the *Mediation Rules*. In addition, the CCLM is also invited to note that the spirit of the *Mediation Rules* is oriented towards efficiency and cost-containment. There is normally a sole mediator (by comparison arbitration can involve three arbitrators with attendant time and cost implications) and there is a possibility of using "evaluative mediation" in order to facilitate the settlement of a dispute before the adjudicatory phase (i.e. arbitration).¹¹ In addition, recourse to the WIPO Arbitration and Mediation Center as Administrator of the *Mediation Rules* relieves the TPB of the administrative burden connected to that role at competitive costs. Furthermore, the WIPO Arbitration and Mediation Center has considerable experience in administering mediation procedures. Finally, the *Mediation Rules* allow the TPB to propose to the parties of an SMTA dispute, a process for resolving such dispute that is balanced, and transparent. It is to be highlighted, however, that it is not mandatory for any party to an SMTA dispute to accept the set of mediation rules that the TPB proposes, and that such rules could only be applicable with the mutual agreement of the parties to such dispute. Failing such an agreement, the parties to the dispute would remain free to select any other rules as may be mutually agreed.

AMENDMENTS TO THE *THIRD PARTY BENEFICIARY PROCEDURES*

19. Based on the recommendations of the Committee, the Governing Body of the IT-PGRFA at its Fourth Session, held in March 2011, approved, subject to approval by the relevant Governing Bodies of FAO, *Mediation Rules*. It also requested the WIPO Arbitration and Mediation Center as the Administrator of the *Mediation Rules*.

20. The Governing Body agreed that in order to give proper effect to the *Mediation Rules*, it would be necessary to amend Article 6 of the Third Party Beneficiary Procedures so as to incorporate the *Mediation Rules* into the Procedures and have one single, self contained document on the matter. The amendment to the Third Party Beneficiary Procedures is purely functional to creating space for the *Mediation Rules* within the Procedures and does not alter their rationale and structure. The full set of relevant rules documents include:

⁹ <http://www.wipo.int/amc/en/mediation/fees/index.html>

¹⁰ The website, <http://www.wipo.int/amc/en/center/caseload.html>, provides information on the WIPO mediation caseload and anonymized case examples.

¹¹ Article 11, b, of the *Mediation Rules*. In evaluative mediation, the mediator provides an evaluation of the dispute, which the parties are then free to accept or reject as the settlement of the dispute.

- 20.1. Part I of Resolution 5/2011, *Operation of the Third Party Beneficiary*, of the Governing Body of the IT-PGRFA, referring to the *Mediation Rules* and the corresponding amendment to the Third Party Beneficiary Procedures, is attached as Appendix 1 of this document.
- 20.2. The *Mediation Rules* approved by the Governing Body through Resolution 5/2011, are reproduced in Appendix 2 of this document.
- 20.3. The Third Party Beneficiary Procedures, including the amendment to Article 6, on *Mediation (shown in italics)*, are set out in Appendix 3 of this document.
- 20.4. The Schedule of Fees of the WIPO Arbitration and Mediation Center, acting as Administrator of the *Mediation Rules*, is attached as Appendix 4 of this document.

SUGGESTED ACTION BY THE COMMITTEE

21. The CCLM is invited to review this document and make such observations thereon as appropriate, noting that the Mediation Rules and revised Third Party Beneficiary Procedures were already adopted by the Governing Body of the IT-PGRFA. In this connection, the CCLM may wish to note that the views and concerns expressed on the occasion of its previous review of the matter were taken into account in the formulation of the Mediation Rules and result in an overall improvement of the Procedures in light of concerns expressed previously.
22. The CCLM is invited to endorse the Mediation Rules set out in Appendix 2 and the amendment to article 6 the Third Party Beneficiary Procedures set out in Appendix 3.

Appendix I

RESOLUTION 5/2011

OPERATION OF THE THIRD PARTY BENEFICIARY

THE GOVERNING BODY:

PART I: Mediation Rules

- (i) **Recalling** Resolution 5/2009, by which it adopted *Third Party Beneficiary Procedures* and requested the Director General to bring these procedures to the attention of the relevant bodies of FAO, for formal approval;
- (ii) **Recognizing** the important role of the Third Party Beneficiary in initiating and carrying out dispute settlement as provided for in the Standard Material Transfer Agreement;
- (iii) **Noting** that the Committee on Constitutional and Legal Matters and the Council of FAO had examined the *Third Party Beneficiary Procedures*, together with related amendments to the Financial Rules;
- (iv) **Noting further** that the Council, in considering the *Third Party Beneficiary Procedures*, had regarded these as an example of useful synergies between FAO and bodies established under Article XIV of the FAO Constitution, and approved the Third Party Beneficiary Procedures, which are now fully operational;
- (v) **Noting** that, as requested in Resolution 5/2009, the *Ad Hoc* Third Party Beneficiary Committee has prepared draft *Mediation Rules* for use in the context of Article 6 of the *Third Party Beneficiary Procedures*;
1. **Thanks** the Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) and the United Nations Commission on International Trade Law (UNCITRAL), for having provided technical support in the preparation of the *Mediation Rules*;
2. **Recognizes** that the *Mediation Rules* will promote the effective functioning of the Third Party Beneficiary and provide an opportunity for cost containment;
3. **Adopts** the *Mediation Rules*, as contained in the Appendix to this Resolution, and **amends** Article 6 of the *Third Party Beneficiary Procedures* by adding a paragraph to read as follows:
- The Third Party Beneficiary shall propose to the parties to the Standard Material Transfer Agreement that mediation be carried out in accordance with the Mediation Rules contained in Annex 2 to these Third Party Beneficiary Procedures.*
4. **Requests** the Director-General to bring the *Third Party Beneficiary Procedures*, as amended, to the attention of the relevant bodies of FAO, for approval;
5. For the settlement of a dispute under Article 8 of the SMTA, **requests** the Third Party Beneficiary to propose the *Mediation Rules*, to parties to the Standard Material Transfer Agreement proceeding to mediation under Article 8.4b of the Standard Material Transfer Agreement, and failing an agreement on the application of the *Mediation Rules*, to propose such other mediation rules as may be acceptable to the parties;

6. **Requests** the Arbitration and Mediation Center of WIPO to act as Administrator of these *Mediation Rules*;
7. **Notes** that a party to a Standard Material Transfer Agreement initiating dispute settlement in accordance with Article 8 of the Standard Material Transfer Agreement should immediately inform the Third Party Beneficiary, and should also inform the Third Party Beneficiary of any settlement of the dispute that may have been reached;
8. **Recognizes** the importance for the functioning of the Multilateral System in general, and of the Third Party Beneficiary in particular, of effective information technology tools, and requests the Secretary to give priority to completing them, and putting them at the disposal of users of the Standard Material Transfer Agreement;
9. **Reiterates** the importance of maintaining sufficient resources to initiate dispute settlement, by fully funding the Third Party Beneficiary Operational Reserve, as a priority, in the context of Contracting Parties' contributions to the Treaty and its Core Administrative Budget, in accordance with Article 6.5 of the Financial Rules;
10. **Calls** on Contracting Parties, States that are not Contracting Parties, intergovernmental organizations, non-governmental organizations and other entities to contribute periodically, as necessary, to the Third Party Beneficiary Operational Reserve, in order to maintain it at a level commensurate with the needs.

Appendix 2*Annex 2 to the Third Party Beneficiary Procedures***RULES FOR MEDIATION OF A DISPUTE IN RELATION TO A STANDARD
MATERIAL TRANSFER AGREEMENT
("MEDIATION RULES")****Article 1****Scope of the Mediation Rules**

- (a) These Mediation Rules give effect to Article 6, *Mediation*, of the *Third Party Beneficiary Procedures* approved by the Governing Body of the International Treaty.
- (b) If a dispute has not been settled by amicable dispute settlement after the issuance of the summary of information and the notice referred to in Article 5, paragraph 2, of the *Third Party Beneficiary Procedures*, then the parties to the Standard Material Transfer Agreement and the Third Party Beneficiary may choose mediation through a neutral mediator pursuant to Article 6, paragraph 1, of the *Third Party Beneficiary Procedures* and to Article 8.4b of the Standard Material Transfer Agreement. If they choose mediation, they may agree that the mediation shall be carried out in accordance with these Mediation Rules, which are administered by [*the entity designated by the Governing Body*] ("the Administrator").

Article 2**Request for Mediation**

- (a) Either party to the Standard Material Transfer Agreement or the Third Party Beneficiary may file a Request for Mediation with the Administrator.
- (b) The Request for Mediation shall contain or be accompanied by:
- (i) the names, addresses and telephone, telefax, e-mail or other communication references of the parties to the Standard Material Transfer Agreement and of the representative of the party filing the Request for Mediation; and
 - (ii) a summary of the relevant provisions of the Standard Material Transfer Agreement that have not been complied with, and other relevant information ("Summary of Information"); and
 - (iii) the signed "Acceptance of Mediation" (*Annex 1* to these Mediation Rules).
- (c) The Administrator shall transmit a copy of these Mediation Rules, the Summary of Information and the Schedule of Fees applicable on the date of the request for Mediation to the parties to the Standard Material Transfer Agreement, and to the Third Party Beneficiary, within fifteen (15) days of receipt of a Request for Mediation.

Article 3

Acceptance of these Mediation Rules

(a) A party to the Standard Material Transfer Agreement or the Third Party Beneficiary accepting mediation under these Mediation Rules shall sign the Acceptance of Mediation and return it to the Administrator.

(b) The parties to the mediation (“the Party” or the “Parties”)¹ are the parties to the Standard Material Transfer Agreement, and the Third Party Beneficiary that accept mediation in accordance with paragraph (a) of this Article.

(c) A party to the Standard Material Transfer Agreement that is not a Party to the mediation, in accordance with paragraph (b) of this Article, shall not be privy to any information, notifications or documents in the context of the mediation, if such mediation is held.

Article 4

Commencement of Mediation

(a) Mediation shall commence on receipt of signed copies of the Acceptance of Mediation from the Parties, provided that such signed copies of the Acceptance of Mediation are received by the Administrator within thirty (30) days of the transmission by the Administrator of the documents in accordance with Article 2c of these Mediation Rules.

(b) On commencement of mediation, the Administrator shall consult with the Parties, in order to agree on the place of mediation, and the language to be used in mediation.

Article 5

Notices and Periods of Time

(a) Any notice or other communication that may or is required to be given under these Mediation Rules shall be in writing and shall be delivered by expedited postal or courier service, or transmitted by telefax, e-mail or other means of telecommunication that provide a record thereof.

(b) The address of the Administrator is provided in *Annex 2* to these Mediation Rules and may be changed at the discretion of the Administrator.

(c) A Party’s last known residence or place of business shall be a valid address for the purpose of any notice or other communication in the absence of any notification of a change by that Party. Communications may in any event be addressed to a Party in the manner stipulated or, failing such a stipulation, according to the practice followed in the course of the dealings between the Parties.

(d) For the purpose of determining the date of commencement of a time limit, a notice or other communication shall be deemed to have been received on the day it is delivered or, in the case of telecommunications, transmitted in accordance with paragraphs (a), (b) and (c) of this Article.

(e) For the purpose of determining compliance with a time limit, a notice or other communication shall be deemed to have been sent, made or transmitted if it is dispatched, in accordance with paragraphs (a), (b) and (c) of this Article, prior to or on the day of the expiration of the time limit.

¹ For the purposes of these Mediation Rules, the terms “Party” or “Parties” are used to refer only to parties to the mediation and not a party or the parties to the Standard Material Transfer Agreement or a Contracting Party to the Treaty.

(f) For the purpose of calculating a period of time under these Mediation Rules, such period shall begin to run on the day following the day when a notice or other communication is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day that follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

(g) The Parties may agree to reduce or extend the periods of time referred to in these Mediation Rules.

(h) The Administrator may, at the request of a Party or on its own motion, extend or reduce the periods of time referred to in these Mediation Rules.

Article 6

Appointment of the Mediator

(a) If the Parties agree within seven (7) days of the commencement of the mediation on the person of the mediator, or have agreed on another appointment procedure, the Administrator shall appoint any mediator so selected, after confirming the requirements of Articles 8 and 9.

(b) If the Parties cannot agree within seven (7) days of the commencement of the mediation on the person of the mediator, or have not agreed on another appointment procedure, the mediator shall be appointed in accordance with the following procedure:

- (i) The Administrator shall as soon as possible send to each Party an identical list of candidates, selected from the list of experts established by the Governing Body in accordance with Article 8.4 c) of the Standard Material Transfer Agreement. Where possible, the list shall comprise the names of at least three candidates in alphabetical order. The list shall include or be accompanied by a statement of each candidate's qualifications. If the Parties have agreed on any particular qualifications, the list shall contain only the names of candidates that satisfy those qualifications.
- (ii) Each Party shall have the right to delete the name of any candidate or candidates to whose appointment it objects and shall number any remaining candidates in order of preference.
- (iii) Each Party shall return the marked list to the Administrator (without obligation to send a copy to the other Party or Parties) within seven (7) days after the date on which the list is received by it. Any Party failing to return a marked list within that period of time shall be deemed to have assented to all candidates appearing on the list.
- (iv) Upon receipt by it of the lists from the Parties, the Administrator shall, taking into account the preferences and objections expressed by the Parties, invite a person from the list to be the mediator.
- (v) If the lists that have been returned do not show a person who is acceptable as mediator to all Parties, the Administrator shall be authorized to appoint the mediator. The Administrator shall similarly be authorized to do so if a person is not able or does not wish to accept the Administrator's invitation to be the mediator, or if there appear to be other reasons precluding that person from being the mediator, and there does not remain on the lists a person who is acceptable as mediator to each Party.

(c) Notwithstanding the provisions of paragraph (b), the Administrator shall be authorized to appoint the mediator, from the list mentioned in paragraph (b) (i) above, if it determines in its discretion that the procedure described in that paragraph is not appropriate for the case.

Article 7
Nationality of the Mediator

- (a) An agreement of the Parties concerning the nationality of the mediator shall be respected.
- (b) If the Parties have not agreed on the nationality of the mediator, such mediator shall, in the absence of special circumstances such as the need to appoint a person having particular qualifications, be a national of a country other than the countries of the Parties, if different.

Article 8
Impartiality and Independence

- (a) The mediator shall be impartial and independent.
- (b) The prospective mediator shall, before accepting appointment, disclose to the Parties and the Administrator any circumstances that might give rise to justifiable doubt as to the mediator's impartiality or independence, or confirm in writing that no such circumstances exist.
- (c) If, at any stage during the mediation, new circumstances arise that might give rise to justifiable doubt as to the mediator's impartiality or independence, the mediator shall promptly disclose such circumstances to the Parties and the Administrator.

Article 9
Availability, Acceptance and Notification

- (a) The mediator shall, by accepting appointment, be deemed to have undertaken to make available sufficient time to enable the mediation to be conducted and completed expeditiously.
- (b) The prospective mediator shall accept appointment in writing and shall communicate such acceptance to the Administrator.
- (c) The Administrator shall notify the Parties of the appointment of the mediator.

Article 10
Representation of Parties and Participation in Meetings

- (a) The Parties may be represented or assisted by persons of their choice, including in their meetings with the mediator.
- (b) Immediately after the appointment of the mediator, the names and addresses of persons authorized to represent a Party, and the names and positions of the persons who will be attending the meetings of the Parties with the mediator on behalf of that Party, shall be communicated by that Party to the other Party or Parties, the mediator and the Administrator.

Article 11
Conduct of the Mediation

- (a) The mediation shall be conducted in the manner agreed by the Parties. If, and to the extent that, the Parties have not made such agreement, the mediator shall, in accordance with these Mediation Rules, determine the manner in which the mediation shall be conducted.

(b) If at any stage of the mediation, the Parties so agree, the mediator shall provide an evaluation of the dispute. Such evaluation may take the form of a written document, which the Parties are free to accept or reject as the settlement of the dispute.

(c) Each Party shall cooperate in good faith with the mediator to advance the mediation as expeditiously as possible.

(d) The mediator shall be free to meet and to communicate separately with a Party on the clear understanding that information given at such meetings and in such communications shall not be disclosed to the other Party or Parties without the express authorization of the Party giving the information.

(e) As soon as possible after being appointed, the mediator shall, in consultation with the Parties, establish a timetable for the submission by each Party to the mediator and to the other Party or Parties of a statement summarizing the background of the dispute, the Party's interests and contentions in relation to the dispute and the present status of the dispute, together with such other information and materials as the Party considers necessary for the purposes of the mediation and, in particular, to enable the issues in dispute to be identified.

(f) The mediator may at any time during the mediation suggest that a Party provide such additional information or materials as the mediator deems useful.

(g) Any Party may at any time submit to the mediator, for consideration by the mediator only, written information or materials that it considers to be confidential. The mediator shall not, without the written authorization of that Party, disclose such information or materials to the other Party or Parties.

Article 12

Role of the Mediator

(a) The mediator shall promote the settlement of the issues in dispute between the Parties in any manner that the mediator believes to be appropriate, but shall have no authority to impose a settlement on the Parties.

(b) The mediator or a Party to the dispute may propose that one or more independent experts be consulted to report on specific issues. Terms of reference should be established for such expert in consultation between the mediator and the Parties. Any such experts shall be required to sign an appropriate confidentiality undertaking in accordance with Article 16 of these Mediation Rules.

Article 13

Termination of the Mediation

The mediation shall be terminated within six months of the commencement of mediation, or any shorter period of time agreed on by the Parties. The mediation shall be terminated by the following means:

- (i) by the signing of a Settlement Agreement by the Parties covering any or all of the issues in dispute between the Parties;
- (ii) by the decision of the mediator if, in the mediator's judgment, further efforts at mediation are unlikely to lead to a resolution of the dispute; or
- (iii) by a written declaration of a Party at any time sent to the other Party or Parties, the Administrator and the mediator.

Article 14

Mediation Termination Notices

Upon the termination of the mediation, the mediator shall promptly send to the Administrator a Mediation Termination Notice in writing, indicating that the mediation is terminated and shall indicate the date on which it terminated, whether or not the mediation resulted in a settlement of the dispute and, if so, whether the settlement was full or partial. The mediator shall send to the Parties a copy of the notice so addressed to the Administrator.

Article 15

Dispute Resolution Termination Notice

If the Mediation Termination Notice indicates that the Parties reached a settlement, the Administrator shall send a Dispute Resolution Termination Notice to the other Party or Parties, terminating the dispute resolution process.

Article 16

Confidentiality

- (a) No recording of any kind shall be made of any meetings of the Parties.
- (b) Each person involved in the mediation, including, in particular, the mediator, the Parties and their representatives and advisors, any independent experts, and any other persons present during the meetings of the Parties with the mediator, shall respect the confidentiality of the mediation and may not, unless otherwise agreed by the Parties and the mediator, use or disclose to any outside party any information concerning, or obtained in the course of, the mediation. Each such person shall sign an appropriate confidentiality undertaking prior to taking part in the mediation.
- (c) Unless otherwise agreed by the Parties, each person involved in the mediation shall, on the termination of the mediation, return, to the Party providing it, any brief, document or other materials supplied by a Party, without retaining any copy thereof. Any notes taken by a person concerning the meetings of the Parties with the mediator shall be destroyed on the termination of the mediation.
- (d) Unless otherwise agreed by the Parties, the mediator and the Parties shall not introduce as evidence or in any manner whatsoever in any judicial or arbitration proceeding:
 - (i) any views expressed or suggestions made by the other Party or Parties with respect to a possible settlement of the dispute;
 - (ii) any admissions and statements made by a Party in the course of the mediation;
 - (iii) any proposals made or views expressed by the mediator;
 - (iv) any evaluation of the dispute made by the mediator, pursuant to Article 11b of these Mediation Rules, or any parts or contents thereof;
 - (v) the fact that a Party had or had not indicated willingness to accept any proposal for settlement made by the mediator or by the other Party or Parties.
- (e) The Administrator, the mediator and the Third Party Beneficiary shall keep any Mediation Termination Notice, Dispute Resolution Notice, and Settlement Agreement confidential and shall not, without the written authorization of the Parties, disclose either the existence or the result of the

mediation to any person, except where its disclosure is necessary for purposes of implementation and enforcement.

(f) Notwithstanding the provisions of paragraph (e) of this Article, the Administrator may, however, include information concerning the mediation in any aggregate statistical data that it publishes concerning its activities, provided that such information does not reveal the identity of the Parties or enable the particular circumstances of the dispute to be identified.

(g) Notwithstanding the provisions of paragraph (e) of this Article, the Third Party Beneficiary may, however, include information concerning the mediation in its report to a session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, pursuant to Article 9, *Reporting*, of the *Third Party Beneficiary Procedures*, provided that such information does not reveal the identity of the Parties or enable the particular circumstances of the dispute to be identified.

Article 17

Role of the Mediator in Pending or Future Proceedings

Unless required by a court of law or authorized in writing by the Parties, the mediator shall not act in any capacity whatsoever, otherwise than as a mediator, in any pending or future proceedings, whether judicial, arbitral or otherwise, relating to the subject matter dealt with in the mediation proceedings.

Article 18

Administration Fee

(a) The Request for Mediation shall be subject to the payment to the Administrator of an administration fee, the amount of which shall be fixed in accordance with the Schedule of Fees applicable on the date of the Request for Mediation, when they are sent to the Parties, pursuant to Article 2(c) of these Mediation Rules.

(b) The administration fee shall not be refundable.

(c) No action shall be taken by the Administrator on a Request for Mediation until the administration fee has been paid.

(d) If a Party who has filed a Request for Mediation fails, within seven (7) days after a reminder (normally to be sent within 3 weeks of the receipt of the request for mediation) in writing from the Administrator, to pay the administration fee, it shall be deemed to have withdrawn its Request for Mediation.

Article 19

Fees of the Mediator

(a) The amount and currency of the fees of the mediator and the modalities and timing of their payment shall be fixed by the Administrator, after consultation with the mediator and the Parties.

(b) The amount of the fees shall, unless the Parties and the mediator agree otherwise, be calculated on the basis of the hourly indicative rate set out in the Schedule of Fees applicable on the date of the Request for Mediation in accordance with Article 20(a) of these Mediation Rules, and taking into account the amount in dispute, the complexity of the subject matter of the dispute and any other relevant circumstances of the case.

Article 20

Deposits

- (a) The Administrator may, at the time of the appointment of the mediator, require each party to deposit an equal amount as an advance for the costs of the mediation, including, in particular, the estimated fees of the mediator and the other expenses of the mediation. The amount of the deposit shall be determined by the Administrator.
- (b) The Administrator may require the Parties to make supplementary deposits in equal shares.
- (c) If a Party fails, within seven (7) days after a reminder in writing from the Administrator, to pay the required deposit, the mediation shall be deemed to be terminated. The Administrator shall, by notice in writing, inform the Parties and the mediator accordingly and indicate the date of termination.
- (d) After the termination of the mediation, the Administrator shall render an accounting to the Parties of any deposits made and return any unexpended balance to the Parties or require the payment of any amount owing from the Parties.

Article 21

Costs

- (a) Upon termination of the mediation proceedings, the Administrator fixes the costs of the mediation and gives written notice thereof to the Parties. The term “costs” includes:
- (i) The fees of the mediator;
 - (ii) The travel and other expenses of the mediator;
 - (iii) The costs (including fees, travel and other expenses) of any independent expert appointed in accordance with Article 12 of these Mediation Rules;
 - (iv) Such other expenses as are necessary for the conduct of mediation proceedings, such as the cost of meeting facilities.
- (b) The costs, as defined above, are borne equally by the Parties unless the Parties have agreed otherwise or the settlement agreement provides for a different apportionment. All other expenses incurred by a Party are borne by that Party.

Article 22

Exclusion of Liability

Except in respect of deliberate wrongdoing, the mediator and the Administrator shall not be liable for any act or omission in connection with any mediation conducted under these Mediation Rules.

Article 23

Waiver of Defamation

The Parties, and, by accepting appointment, the mediator agree that any statements or comments, whether written or oral, made or used by them or their representatives in preparation for or in the course of the mediation shall not be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this Article may be pleaded as a bar to any such action.

Annex I

Acceptance of Mediation

Article 8.4b of the Standard Material Transfer Agreement provides that “[i]f the dispute is not resolved by negotiation, the parties may choose mediation through a neutral third party mediator, to be mutually agreed.”

Having received from the Administrator [the entity designated by the Governing Body]:

- (a) a Summary of Information relative to a dispute under a Standard Material Transfer Agreement, in accordance with Article 2b(ii) of the *Rules for Mediation of a Dispute in Relation to a Standard Material Transfer Agreement* and Article 5, paragraph 2, *Amicable Dispute Settlement*, of the *Third Party Beneficiary Procedures*, and
- (b) a copy of the Rules for Mediation of a Dispute in Relation to a Standard Material Transfer Agreement,

The undersigned party hereby accepts mediation in relation to this dispute in accordance with the above-mentioned *Mediation Rules*.

The undersigned party accepts that, unless the Parties to the mediation agree otherwise, the costs of the mediation shall be borne in equal shares by the Parties to the mediation, in accordance with Article 21 of the above-mentioned *Mediation Rules*.

Signature: Date:

Name of Signatory:

Name of party to the Standard Material Transfer Agreement in dispute, or the Third Party Beneficiary:
.....

1. The signed Acceptance of Mediation is to be returned to:

[Name and address of the Administrator *[entity designated by the Governing Body]*]

2. If the Administrator has received no acceptance of mediation from a Party within thirty (30) days of its transmission of the Summary of Information and the copy of the above mentioned *Mediation Rules*, such party is deemed to have opted not to accept mediation.

3. Please note that the consequences of not accepting mediation include the following:

Even if you do not accept mediation, mediation may nevertheless proceed between the other party to the Standard Material Transfer Agreement and the Third Party Beneficiary, provided that they accept mediation. You would not be a Party in such mediation and would not be privy to any information, notifications or documents in the context of such mediation, if such mediation is held, in accordance with Article 3c of the above mentioned *Mediation Rules*.

In accordance with Article 8.4c of the Standard Material Transfer Agreement, if the dispute has not been settled by negotiation or mediation, any party may submit the dispute for arbitration under the Arbitration Rules of an international body as agreed by the parties to the dispute. Failing such agreement on the applicable Arbitration Rules, the dispute, if submitted to arbitration, shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with said Rules.

4. If you have any questions, please contact the [*entity designated by the Governing Body*] by email at: [email address].

Annex 2
Address of the Administrator

Address of the Administrator:

[INSERT]

Appendix 3**PROCEDURES FOR THE OPERATION OF THE THIRD PARTY BENEFICIARY
(‘THIRD PARTY BENEFICIARY PROCEDURES’)****Article 1****Designation of Third Party Beneficiary**

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

Article 2**Scope**

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

Article 3**Principles**

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

Article 4**Information**

1. The Governing Body shall make available to the Third Party Beneficiary the information provided to it, in accordance with the provisions of the Standard Material Transfer Agreement.
2. The Third Party Beneficiary may receive information on possible non-compliance with the obligations of the provider and recipient under a Standard Material Transfer Agreement from the parties under the Standard Material Transfer Agreement or any other natural or legal persons. The information shall only be used for the purposes of initiating dispute settlement procedures under the Standard Material Transfer Agreement.
3. The Third Party Beneficiary has the right to request that the appropriate information, including samples as necessary, be made available by the parties, regarding their obligations in accordance with Article 8.3 of the Standard Material Transfer Agreement.
4. Except as may be required in the settlement of disputes and for the purposes specified in Article 9 of these Procedures, and unless otherwise agreed by the parties to the Standard Material

Transfer Agreement, information received by the Third Party Beneficiary shall be treated as confidential.

Article 5 Amicable dispute settlement

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

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

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

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

Article 6 Mediation

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

2. *The Third Party Beneficiary shall propose to the parties to the Standard Material Transfer Agreement that mediation be carried out in accordance with the Mediation Rules contained in Annex 2 to these Third Party Beneficiary Procedures.*

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

Article 7 Arbitration

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

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

Article 8 Expenditure

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

Article 9 Reporting

The Third Party Beneficiary shall submit to the Governing Body, at each of its Regular Sessions, a report setting forth:

- (a) the number, and a summary, of cases where it received information regarding non-compliance with the terms and conditions of a Standard Material Transfer Agreement;
- (b) the number, and a summary, of cases where it initiated dispute settlement;
- (c) the number, and a summary, of disputes settled through amicable dispute settlement, mediation or arbitration;
- (d) the number, and a summary, of pending disputes;
- (e) any legal questions that appeared in the context of dispute settlement and that may require the attention of the Governing Body;
- (f) the expenditure from the Third Party Beneficiary Operational Reserve;
- (g) any estimate of the needs of the Third Party Beneficiary Operational Reserve in the forthcoming biennium;
- (h) any other relevant non-confidential information.

Article 10 Amendments

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

Article 11 Entry into force

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

Annex I to the Third Party Beneficiary Procedures

OPERATIONS OF THE THIRD PARTY BENEFICIARY

Part I. Criteria for the nomination of experts

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

Part II. Procedures for nomination of experts

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

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

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

- A. The Provider transmitting a copy of the completed SMTA,
or
- B. In the event that the Provider does not transmit a copy of the SMTA
 - i. ensuring that the completed SMTA is at the disposal of the Third Party Beneficiary as and when needed;
 - ii. stating where the SMTA in question is stored, and how it may be obtained; and
 - iii. providing the following information:
 - a) The identifying symbol or number attributed to the SMTA by the Provider;
 - b) The name and address of the Provider;
 - c) The date on which the Provider agreed to or accepted the Standard Material Transfer Agreement, and in the case of shrink-wrap, the date on which the shipment was sent;
 - d) The name and address of the Recipient, and in the case of a shrink-wrap agreement, the name of the person to whom the shipment was made;
 - e) The identification of each accession in *Annex I* to the SMTA, and of the crop to which it belongs.
 - iv. The Third Party Beneficiary shall at all times ensure the confidentiality of electronic data. This obligation comprises :
 - Industry-standard secured environment encryption during data transmission;
 - Secure hosting of the datastore in the UN International Computing Centre (UNICC), Geneva; and
 - Encryption of the data, with separate encryption in the datastore of Provider and Recipient data, and of accession data.

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

C. The Recipient shall:

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

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

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

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

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

Appendix 4**WIPO ARBITRATION AND MEDIATION CENTER****Schedule of Fees**

As applicable in accordance with Articles 18 and 19 of the *Rules for Mediation of a Dispute in Relation to a Standard Material Transfer Agreement*.*

(All amounts are in United States dollars)

Type of Fee	Amount in Dispute	Fees
Administration Fee	Up to \$ 2.5 M	\$ 500
	Over \$ 2.5 M	\$ 1,000
Mediator Fees	Up to \$ 2.5 M	Unless the Parties agree otherwise, a rate of \$ 300 per hour as agreed by the Administrator in consultation with the Parties and the mediator, capped at a maximum of \$ 10,000.
	Over \$ 2.5 M	Unless the Parties agree otherwise, a rate of \$ 300 per hour as agreed by the Administrator in consultation with the Parties and the mediator, capped at a maximum of \$ 20,000.