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Продовольственная и
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Organización
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Unidas
para la
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y la
Alimentación

COMMITTEE ON CONSTITUTIONAL AND LEGAL MATTERS

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INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE – PROCEDURES FOR THE OPERATION OF THE THIRD PARTY BENEFICIARY

BACKGROUND

1. This matter is being referred to the Committee on Constitutional and Legal Matters (CCLM) following an invitation by the Governing Body of the International Treaty on Plant Genetic Resources for Food Agriculture (IT-PGRFA) and under Rule XXXIV, paragraphs 3 and 4 of the General Rules of the Organization, whereby the Director-General may refer to the CCLM specific items which may arise out of, among other matters the formulation, adoption, entry into force and interpretation of multilateral conventions and agreements concluded under Article XIV of the FAO Constitution; any other problems relating to conventions and agreements concluded under the aegis of the Organization and the legal and constitutional aspects of any other matters submitted to its attention by the Director-General.

2. Part IV of the IT-PGRFA establishes a Multilateral System of Access and Benefit-sharing (MLS). The Contracting Parties to the IT-PGRFA agreed to establish a multilateral system 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 on a complementary and mutually reinforcing basis. The MLS covers PGRFAs, listed in Appendix I to the IT-PGRFA, according to the criteria of food security and interdependence, which are under the management and control of the Contracting 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 contractual instrument approved by the Governing Body of the IT-PGRFA, containing a number of terms and conditions applicable to providers and recipients of PGRFAs within the territory of Contracting

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Parties. The IT-PGRFA sets forth some of these terms and conditions. One of these is that the provisions of the SMTA shall apply to the transfer of PGRFAs between a provider and a recipient, as well as to any successive transfers of those PGRFAs to subsequent recipients. Under the SMTA, FAO performs functions as Third-Party Beneficiary on behalf of the Governing Body of the Treaty and of the Multilateral System of Access and Benefit-sharing. This document reviews this matter.

THE STANDARD MATERIAL TRANSFER AGREEMENT

3. The Governing Body, at its first session in 2006, approved the text of the SMTA. As outlined above, the SMTA is essentially a contract between two parties, namely a provider and a recipient of PGRFAs, concluded under the framework of the IT-PGRFA, and setting forth a number rights and obligations for those individual providers and recipients of PGRFAs. Typically, parties to an SMTA are a genebank, which may have an international, regional or national status and a plant breeder. Under the terms of the IT-PGRFA and the SMTA, recipients may not claim any intellectual property or other rights which would limit facilitated access to the PGRFAs, or their genetic parts or components, in the form received from the MLS (Article 12, paragraph 3(d) of the IT-PGRFA; Article 6.2 of the SMTA). The IT-PGRFA requires a recipient who commercializes a product that is a PGRFA and incorporates material accessed from the MLS, to pay an equitable share of the benefits arising from the commercialization of that product, except whenever such a product is available without restriction to others for further research and breeding, in which case the recipient who commercializes the product shall be encouraged to make such payment (Article 13, paragraph 2(d)(ii) of the IT-PGRFA). The payment goes into a multilateral trust fund established by the Governing Body of the IT-PGRFA to receive and utilize accruing financial resources. The SMTA sets forth a corresponding payment obligation for the recipient and quantifies the amount of such a payment.

THE THIRD PARTY BENEFICIARY

4. The SMTA is the cornerstone of the MLS, the purpose of which is to establish uniform rules facilitating access to certain PGRFAs and fair conditions for the sharing of the benefits that are generated through that access. The SMTA is a legal instrument allowing obligations stemming from the IT-PGRFA to be passed from the first provider to a recipient and from this recipient to subsequent recipients by means of a contractual sequence. In substance, the individual agreements that are concluded in accordance with the standard terms and conditions of the SMTA are tools for the implementation of the MLS. Some of the obligations of the SMTA are provided for in favour of the MLS as a whole and not in the interests of either the individual provider or recipient. A situation arises where neither the provider nor the recipient would be willing to enforce those obligations. The monetary payment to be made by recipients who commercialize a product incorporating PGRFAs accessed from the MLS is an example of an obligation that the provider has no interest in enforcing, as the payment goes into a multilateral trust fund and not to the individual provider.

5. For this reason, in the context of the bilateral contractual relationship, the SMTA recognizes certain roles and responsibilities for the Third Party Beneficiary (TPB), an entity other than the two parties to the SMTA that represents the overall interests of the MLS in the execution of the contractual obligations.

6. The “Third Party Beneficiary” (TPB) is a legal concept derived from the English law of contracts based on which a person, who is not a party to a contract but for whose benefit the contract was concluded, has legal rights to enforce the contract. In this particular case, FAO acts on behalf of the Governing Body of the IT-PGRFA and the MLS.

7. By Article 4.3 of the SMTA, the provider and the recipient agree that an entity designated by the Governing Body of the IT-PGRFA and acting on behalf of the Governing Body itself and its MLS, is the TPB. Through the SMTA, the provider and the recipient agree to confer on the TPB:

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

FAO's ROLE AS THIRD PARTY BENEFICIARY

8. The Governing Body of the IT-PGRFA, at its first session in 2006, invited FAO to act as the TPB to carry out the roles and responsibilities as identified in the SMTA, under the direction of the Governing Body, in accordance with the procedures to be established by the Governing Body at its third session (Resolution 2/2006).

9. By circular state letter (G/X/AGD-10) dated 22 December 2006, the Director-General of FAO informed the Contracting Parties to the IT-PGRFA that he had given his agreement in principle for the Organization to act as the TPB, as 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 roles and responsibilities of the TPB.

10. At its second session in 2007, the Governing Body:

*"thanked the Director-General for having accepted in principle, its invitation for FAO to carry out, as the Third Party Beneficiary, the roles and responsibilities as identified and prescribed in the Standard Material Transfer Agreement, under its direction. It recognised that this acceptance was subject to formal approval upon review of the procedures to be established by the Governing Body"*¹.

11. At that session, the Governing Body also:

*"requested the Secretary to prepare draft text setting out the procedures to be followed by FAO, when carrying out its roles and responsibilities as the Third Party Beneficiary, taking into account, in particular, FAO's role as specialized agency of the United Nations, its privileges and immunities. It invited Contracting Parties, other governments and international organizations to comment on the draft text"*².

12. The Governing Body *"decided to establish an Ad Hoc Third Party Beneficiary Committee, composed of seven representatives of Contracting Parties, with one representative nominated by each of the FAO Regions. The Committee's mandate is to consider the draft text prepared by the Secretary, and comments and submissions from Contracting Parties, other governments and international organizations. The Ad Hoc Committee shall prepare draft Third Party Beneficiary procedures to be submitted to the Governing Body at its next Session."* It also

¹ IT/GB-2/07/Report, paragraph 61

² Ibid.

“invited the Director-General of FAO to bring to the attention of the relevant bodies of FAO, the Governing Body’s invitation, together with the procedures, once elaborated by the Ad Hoc Third Party Beneficiary Committee, and endorsed by the Governing Body”³.

13. The *Ad hoc* committee which met twice between the second and third sessions of the Governing Body of the IT-PGRFA elaborated the Procedures for the Operation of the Third Party Beneficiary (TPB Procedures) with the assistance of the Secretariat of the IT-PGRFA and in close consultation with the FAO Legal Office. The Governing Body of the IT-PGRFA, at its third session from 1 to 5 June 2009, approved the TPB Procedures.

14. Appendix 1 to this document contains the Resolution of the Governing Body of the IT-PGRFA approving the TPB Procedures. Appendix 2 contains the text of the TPB Procedures. Appendix 3 contains the Financial Rules of the IT-PGRFA, which were amended to include funds for the operation of the TPB. Amendments to the Financial Rules appear in double underline. Appendix 4 contains the text of the SMTA.

POSSIBLE IMPLICATIONS FOR FAO ARISING FROM ITS ROLE AS THIRD PARTY BENEFICIARY

15. The SMTA confers upon FAO the two-fold role of gathering information; and initiating dispute settlement procedures regarding rights and obligations of parties to the SMTA.

16. The information-gathering role does not seem to present any potential issue which would affect the interests of, or involve risks for the Organization, as it would simply result in a series of communications with the parties to the SMTA. On the contrary, the right to initiate dispute settlement is defined in some detail in the TPB and would present implications with respect to:

- (a) the autonomy of the Organization;
- (b) the protection of privileges and immunities, especially its immunity from national jurisdiction; and
- (c) any financial liabilities for the Organization.

17. The TPB Procedures specify the two-fold role of the TPB by establishing a system of progressive escalation in handling instances of non-compliance ranging from (i) the initial gathering of information with regard to disputes; to (ii) amicable dispute settlement; (iii) mediation; and finally (iv) arbitration.

18. Information gathering allows the Organization to become fully aware of a possible case of non-compliance. Where FAO has received information on a possible instance of non-compliance with the terms and conditions of an SMTA, it may, acting as TPB, request additional information from the parties.

19. If the information so gathered leads FAO to believe that a possible case of non-compliance might have occurred, FAO may propose that amicable settlement of the dispute be attempted, which in practice consists of informal negotiations. FAO may send, in writing, to the parties to the SMTA, a summary of the relevant provisions of the agreement which may not have been complied with together with other relevant information as well as a notice requesting the

³ IT/GB-2/07/Report, paragraphs 62; 63; 64.

party that may not have complied with the SMTA, 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.

20. If the dispute cannot be resolved by negotiation, FAO shall commence or encourage the parties to the SMTA to commence mediation proceedings through a neutral mediator to be agreed by the parties. FAO may also propose as a neutral mediator an expert from a list established by the Governing Body of the IT-PGRFA.

21. If a dispute has not been resolved by mediation within six months of the commencement of the mediation or if it otherwise appears that the dispute cannot be resolved within twelve months after the issuance of the initial notice, the TPB may submit the dispute to arbitration. Article 8.4c of the SMTA gives flexibility to parties to the dispute as to the choice of rules of arbitration, with a default option for the International Chamber of Commerce Rules of Arbitration.

22. The TPB Procedures recognize the autonomy of FAO in the implementation of such procedures and, in particular, in the assessment of such situations. Under the TPB Procedures, the Governing Body of the IT-PGRFA imparts directions on the exercise of the role of the TPB. In particular, the TPB Procedures establish a system of reporting on administrative, interpretative and financial matters to the Governing Body of the IT-PGRFA (Article 9 of the TPB Procedures). However, reporting does not impinge on the autonomy of the Organization. Article 1.2 of the TPB Procedures provides that “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.”

23. The TPB Procedures are designed in order to recognize and protect the privileges and immunities of FAO. Under Article 1.3 of the TPB Procedures, nothing in the Procedures shall be deemed to constitute a waiver of those privileges and immunities. From the point of view of privileges and immunities, it is also to be noted that the law applicable to the SMTA is the General Principles of Law, including the UNIDROIT Principles of International Commercial Contracts 2004, to the exclusion of any national law (Article 7 of the SMTA).

24. Finally, the TPB Procedures contains a number of provisions on costs, thus ensuring that the Organization would not incur costs from its resources. Article 8 of the TPB Procedures reads as follows:

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, 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.

25. The Financial Rules of the IT-PGRFA have been amended to incorporate the Third Party Beneficiary Operational Reserve in the core administrative budget of the IT-PGRFA. Hence, there is a specific reserve in the budget of the IT-PGRFA, which is built to meet the costs that FAO will incur in exercising the TPB role, with a mechanism to call for additional funds by Contracting Parties to the IT-PGRFA in case of shortages. It is also to be noted that the Governing Body of the IT-PGRFA, in approving the TPB Procedures, has clearly recognized 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;”
(Resolution 5/2009).

26. In light of the above, it can be said that the TPB Procedures recognize the three key issues that FAO will have to consider when exercising the TPB role and build safeguards and mechanisms to protect the Organization. Furthermore, it is the overall philosophy of the TPB Procedures that seems to facilitate the exercise of the TPB role by FAO.

27. The IT-PGRFA itself generally encourages a consensual approach as a principle of interaction and compliance. As a result, the TPB Procedures place great emphasis on the initial stages of dispute resolution, involving negotiations between the parties and mediation. In these initial stages of dispute resolution, actions are mainly of an administrative nature; the issue of privileges and immunities is not at stake and costs can be effectively contained. Arbitration is the stage at which actions could bear policy implications; privileges and immunities may be relevant, especially the need to ensure that the Organization would not be subject to any national legal system and substantial costs could be incurred. In the TPB Procedures, arbitration becomes only a last resort option in cases where the process of amicable negotiation and mediation have failed to reach their goal. There is, therefore, a flexible but structured process of progressive escalation which, through information, amicable dispute settlement and mediation, should allow for the settlement of disputes without the need to resort to the adversarial and adjudicatory phase of arbitration.

28. The emphasis on the consensual and non-adjudicatory approach to dispute resolution is also confirmed by the fact that the Governing Body of the IT-PGRFA, in approving the TPB Procedures, mandated the Secretary of the IT-PGRFA, in consultation with the *ad hoc* committee that elaborated the TPB Procedures, to develop:

“Operational guidelines for the commencement and management of amicable dispute resolution and mediation proceedings under the Third Party Beneficiary Procedures in order to promote the effective functioning of the Third Party Beneficiary, which shall include appropriate cost containment measures.”
(Resolution 5/2009).

29. These guidelines will be drafted in collaboration with UN institutions, such as the WIPO Mediation and Arbitration Centre, and UNCITRAL. It is expected that the guidelines will assist FAO in efficiently and successfully managing the non-adversarial and non-adjudicatory phases of dispute settlement.

SUGGESTED ACTION BY THE COMMITTEE

30. The CCLM is invited to review this document, with particular reference to the TPB Procedures described therein and make such observations thereon as appropriate.

31. Without prejudice to such views as it may hold, the CCLM is, in particular, invited to take due note of the safeguards that are established within the TPB Procedures with regard to the autonomy of the Organization in exercising its functions, the protection of the privileges and

immunities of the Organization, especially its immunity from every form of jurisdiction, as well as any possible financial liability of the Organization arising out of the exercise of its role. Subject to such views as the CCLM may hold, the Committee is invited to note that the established safeguards appear to be adequate to preserve the status and interests of the Organization.

APPENDIX I

RESOLUTION 5/2009 PROCEDURES FOR THE THIRD PARTY BENEFICIARY

THE GOVERNING BODY,

Recalling that the objectives of the International Treaty on Plant Genetic Resources for Food and Agriculture ('the Treaty') are the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security;

Recalling, that Part IV of the Treaty establishes a Multilateral System of Access and Benefit-sharing, which is efficient, effective, and transparent, both to facilitate access to plant genetic resources for food and agriculture, and to share, in a fair and equitable way, the benefits arising from the utilization of these resources, on a complementary and mutually reinforcing basis;

Recalling that under Article 12.4 of the Treaty, facilitated access to the Multilateral System shall be provided pursuant to a Standard Material Transfer Agreement adopted by the Governing Body at its First Session;

Recalling that under Article 13.2, benefits arising from the use, including commercial, of plant genetic resources for food and agriculture under the Multilateral System shall be shared fairly and equitably through the mechanisms specified under that Article;

Noting that the Governing Body, at its First Session, had invited the Food and Agriculture Organization of the United Nations ('FAO'), as the Third Party Beneficiary, to carry out the roles and responsibilities as identified and prescribed in the Standard Material Transfer Agreement, under the direction of the Governing Body, in accordance with procedures to be established at this Third Session;

Noting also that, in December 2006, the Director-General informed Contracting Parties of the Treaty of his agreement in principle for FAO to act as the Third Party Beneficiary foreseen in the SMTA and that this agreement in principle was subject to formal approval, upon review of the procedures to be established by the Governing Body defining the roles and responsibilities of the Third Party Beneficiary;

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;

Noting further that the Ad Hoc Third Party Beneficiary Committee has prepared draft Third Party Beneficiary Procedures for the consideration of the Governing Body at this Session in accordance with its decision at the Second Session;

Thanking the WIPO Mediation and Arbitration Centre, the United Nations Commission on International Trade Law (UNCITRAL), and the International Chamber of Commerce (ICC), for their excellent technical advice to the Secretariat, and welcoming the offer of WIPO Mediation and Arbitration Centre to provide additional technical advice and support to the Treaty, in particular in the development of the operational guidelines for amicable dispute resolution and mediation proceedings;

1. **Adopts** these Procedures ('Third Party Beneficiary Procedures'), as in Annex 1;
2. **Thanks** the Director-General of FAO for having agreed in principle that FAO shall act as the Third Party Beneficiary, and requests him to bring these procedures to the attention of the relevant bodies of FAO, for formal approval;
3. **Requests** the Secretary of the Governing Body to establish the "Third Party Beneficiary Operational Reserve", for the purpose of defraying costs and expenses that may be incurred by the Third Party Beneficiary in the fulfilment of its roles and responsibilities under the Third Party Beneficiary Procedures;
4. **Incorporates** the Third Party Beneficiary Operational Reserve into the Core Administrative Budget and, for this purpose, **amends** the Financial Rules of the Treaty as given in Appendix B to this Report;
5. **Calls** upon 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;
6. **Authorizes** the Secretary of the Governing Body, subject to the availability of financial resources, to draw upon the Third Party Beneficiary Operational Reserve, in order to implement, as appropriate, the Third Party Beneficiary Procedures;
7. **Requests** the Secretary to provide, at each session of the Governing Body, a report in accordance with Article 9 of the Third Party Beneficiary Procedures;
8. **Requests** the Secretary to develop operational guidelines for the commencement and management of amicable dispute resolution and mediation proceedings under the Third Party Beneficiary Procedures in order to promote the effective functioning of the Third Party Beneficiary, which shall include appropriate cost containment measures. In developing the operational guidelines, the Secretary shall seek, as appropriate, technical support from relevant organizations, such as the Mediation and Arbitration Centre of the World Intellectual Property Organization (WIPO), and other relevant international organizations;
9. **Decides** that the current Ad Hoc Third Party Beneficiary Committee will reconvene in order to review and finalize the operational guidelines on the basis of a draft text prepared by the Secretary in close cooperation with the FAO Legal Office, for adoption at the Fourth Session of the Governing Body;
10. **Decides** to establish a list of experts from which the parties to a Standard Material Transfer Agreement may appoint mediators and arbitrators in accordance with the Third Party Beneficiary Procedures; and
11. **Requests** the Secretary to invite Contracting Parties to provide names of experts to be placed on the list in accordance with the criteria of expertise;
12. **Requests** the Secretary to establish a mechanism on the Treaty's website, where the nomination form for inclusion in the list of experts could be obtained, and invite nominations through the website;
13. **Stresses** the importance of having adequate regional representation and gender balance, in the placement of experts on the list;

14. **Decides** that the parties to the SMTA shall provide to the Governing Body and Third Party Beneficiary, in accordance with the relevant provisions of the SMTA and in order for the Third Party Beneficiary to be able to effectively carry out its roles and responsibilities, the information contained in Parts III and IV of Annex 2;

15. **Accordingly decides** that the information required in accordance with Article 5e of the SMTA shall be provided according to the following schedule; at least once every two calendar years or within an interval that shall be, from time to time, decided by the Governing Body;

16. **Stresses** the importance of the Provider and the Recipient fulfilling their reporting obligations as foreseen in the SMTA;

17. **Requests** the Secretary to develop, in consultation with relevant organizations, appropriate and cost-effective processes to facilitate the submission, collection and storage of such information in the implementation of Article 4.1 of the Third Party Beneficiary Procedures. In so doing, the Secretary shall apply adequate measures to ensure the integrity of information and, where required, confidentiality of the information so provided.

APPENDIX II

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 Treaty and its Multilateral System, as foreseen in the Standard Material Transfer Agreement.
2. The Third Party Beneficiary shall perform its roles and responsibilities effectively, in a transparent, cost-effective, expeditious and, to the extent possible, 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 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, 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

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 may invite professionals to put their names 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 *Annex 2*, 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 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 Standard Material Transfer Agreement 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 Standard Material Transfer Agreement 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*, 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 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, 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 GB;
- 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 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.

APPENDIX III

FINANCIAL RULES

Rule I Applicability

- 1.1 These rules shall govern the financial administration of the Treaty.
- 1.2 The Financial Regulations of the FAO shall apply, *mutatis mutandis*, to all matters not specifically dealt with under the Treaty or the present Rules.

Rule II The Financial Period

The financial period shall be two calendar years, coinciding with the financial period of FAO.

Rule III The Budget

- 3.1 The Budget shall cover income and expenditures for the financial period to which it relates, and shall be presented in United States dollars.
- 3.2 The Budget shall include the programme of work for the financial period, and such information, annexes or explanatory statements as may be requested by the Governing Body.
- 3.3 The Budget shall comprise the following parts:
- a) The Core Administrative Budget, relating to:
 - the amount provided for the Treaty in the Regular Programme of Work and Budget of the FAO under Rule V.1a;
 - the voluntary contributions of Contracting Parties under Rule V.1b;
 - the voluntary contributions of States that are not Contracting Parties, of inter-governmental organizations, of non-governmental organizations and other entities, under Rule V.1c; and
 - funds carried over under Rule V.1h, and miscellaneous income, including interest derived from the investment of funds held in trust under Rule V.1i.
 - b) Special Funds, relating to additional voluntary contributions by Contracting Parties, and voluntary contributions by States that are not Contracting Parties, by inter-governmental organizations, by non-governmental organizations and other entities:
 - for agreed purposes, under Rules V.1d and e;
 - to support the participation of representatives of developing country Contracting Parties and of Contracting Parties with economies in transition in the Governing Body and its subsidiary bodies, under Rules V.1f and V.1g.

3.4 The draft Budget shall be prepared by the Secretary and shall be circulated to Contracting Parties not less than six weeks before a regular session of the Governing Body.

3.5 The Core Administrative Budget for the financial period shall provide for Administrative Expenditures under the Treaty including expenses of the Secretariat.

3.6 The Secretary may make transfers within each of the main appropriation lines of the approved Core Administrative Budget. The Secretary may also make transfers between such appropriation lines up to limits that the Governing Body may set as appropriate.

Rule IV Appropriations

4.1 After the Core Administrative Budget has been adopted, the appropriations therein shall, subject to Rule III.6, constitute the authority for the Secretary to incur obligations and make payments for the purposes for which the appropriations were voted and up to the amounts so voted, provided that commitments shall be covered by related contributions received or funds available in the Working Capital Reserve, subject to the provisions of Rule VI.4, and interest earned on funds held in trust.

4.2 The Secretary may incur obligations and make payments under Rules V.1d and V.1e, in accordance with guidelines established by the Governing Body, or for purposes specified by agreement between the contributor and the Secretary, from the date at which the contributions are received.

4.3 The Secretary may incur obligations and make payments under Rules V.1f and V.1g to support the representatives of developing country Contracting Parties and of Contracting Parties with economies in transition in the Governing Body and its subsidiary bodies, in accordance with relevant decisions of the Governing Body, subject to funds being available.

4.4 Any unliquidated prior year obligation relating to voluntary contributions shall at the end of the financial period be cancelled or where an obligation remains a valid charge, retained for future disbursement.

Rule V Provision of Funds

5.1 The resources of the Treaty shall comprise:

- a) Upon approval by the Governing Bodies of FAO, the amount provided for the Treaty in the Regular Programme of Work and Budget of the FAO;
- b)

Option 1 for V.1b

[Voluntary contributions to the Core Administrative Budget from Contracting Parties based on such indicative scale of contributions as shall be adopted by the Governing Body by consensus, based on the scale of contributions adopted from time to time by the United Nations, adjusted so as to ensure [that no developing country Contracting Party shall be required to pay more than any developed country Contracting Party ensuring] that no Contracting Party contributes less than 0.01 per cent of the total, that no one contribution exceeds 22 per cent of the total and that no contribution from a least developed country Contracting Party exceeds 0.01 per cent of the total];

OR

Option 2 for V.1b

[Voluntary contributions to the Core Administrative Budget from Contracting Parties for the purposes of administration and implementation of the Treaty in general;]⁴

- c) Voluntary contributions to the Core Administrative Budget from States that are not Contracting Parties, from inter-governmental organizations, from non-governmental organizations or other entities, for the purposes of administration and implementation of the Treaty in general;
- d) Other voluntary contributions made by the Contracting Parties in addition to those under c) above to be used in accordance with guidelines established by the Governing Body, or for purposes specified by agreement between the contributor and the Secretary;
- e) Other voluntary contributions made by States that are not Contracting Parties, by inter-governmental organizations, by non-governmental organizations or other entities in addition to those under c) above to be used in accordance with guidelines established by the Governing Body, or for purposes specified by agreement between the contributor and the Secretary;
- f) Voluntary contributions made by the Contracting Parties to support the participation of representatives of developing country Contracting Parties and of Contracting Parties with economies in transition in the Governing Body and its subsidiary bodies;
- g) Voluntary contributions made by States that are not Contracting Parties, by inter-governmental organizations, by non-governmental organizations or other entities, to support the participation of representatives of developing country Contracting Parties and of Contracting Parties with economies in transition in the Governing Body and its subsidiary bodies;
- h) The uncommitted balance of voluntary contributions from previous financial periods carried forward;
- i) Miscellaneous income, including interest derived from the investment funds held in trust, in accordance with Rule V.7;
- j) Mandatory and voluntary contributions pursuant to Article 13.2 of the Treaty, and
- k) Voluntary contributions from any source to implement the Funding Strategy provided for in Article 18 of the Treaty.

⁴ *Note by the Secretariat of the International Treaty on Plant Genetic Resources for Food and Agriculture (IT-PGRFA):* There are two drafting texts for Rule V.1b; option 1 foresees voluntary contributions “based on [an] indicative scale of contributions”; option 2 does not foresee such a scale of contributions. Brackets are maintained around Rules V.2, V.4 and V.5, because these depend entirely on which option is adopted for Rule V.1b.

[5.2 In respect of contributions made pursuant to Rule V.1b:

- a) Contributions for each calendar year are expected on or before 1 January of that year;
- b) Each Party shall, as far in advance as possible of the date due for the contribution, inform the Secretary of the contribution it intends to make and of the projected timing of that contribution.]⁵

5.3 Contracting Parties that are not Members of FAO shall contribute towards the amount provided for the Treaty in the FAO Regular Programme of Work and Budget in a proportionate amount to be determined by the Governing Body.

[5.4 For determining the indicative annual contributions of each Contracting Party, the assessed contribution for such Contracting Party for the financial period pursuant to Rule V.1b above, shall be divided into two equal instalments, one of which is payable in the first calendar year and the other in the second calendar year of the financial period.]⁶

[5.5 At the beginning of each calendar year the Secretary shall inform Contracting Parties of their indicative annual contributions to the budget.]⁷

5.6 All contributions to the Administrative Budget shall be paid in United States dollars or its equivalent in a convertible currency. Where a contribution is paid in a convertible currency other than United States dollars, the applicable rate shall be the bank currency conversion rate in effect on the day the payment is made.

5.7 Contributions not immediately required shall be invested at the discretion of the Director-General of FAO. The resulting income shall be credited to the specific Trust Fund from which the invested moneys derive.

Rule VI Funds

6.1 All contributions and other receipts shall be placed in Trust Funds administered by FAO.

6.2 With respect to the Trust Funds referred to in Rule VI.1, FAO shall maintain the following Funds:

- a) A General Fund, to which shall be credited receipts of all contributions made by Contracting Parties under Rule V.1b, Rule V.1c, and the uncommitted balance of voluntary contributions carried forward under Rule V.1h;
- b) Special Funds, for purposes consistent with the objectives and the scope of the Treaty, to which shall be credited receipts of all contributions made by Contracting Parties under Rule V.1d, and by States that are not Contracting Parties, by intergovernmental organizations, by non-governmental organizations, or other entities, under Rule V.1e;

⁵ Note by the IT-PGRFA Secretariat: Rule V.2 would apply in the case of there being no indicative scale of assessment.

⁶ Note by the IT-PGRFA Secretariat: Rule V.4 would apply in the case of there being an indicative scale of assessment.

⁷ Note by the IT-PGRFA Secretariat: Rule V.5 would apply in the case of there being an indicative scale of assessment.

c) A Fund to support the participation of representatives of developing country Contracting Parties and of Contracting Parties with economies in transition in the Governing Body and its subsidiary bodies, to which shall be credited all contributions made by Contracting Parties under Rule V.1f and by States that are not Contracting Parties, by inter-governmental organizations, non-governmental organizations or other entities, in accordance with Rule V.1g;

6.3 In addition, with respect to Rules V.1j and V.1k, upon request by the Governing Body, FAO shall maintain a Trust Account or Accounts, as provided for in Article 19.3f of the Treaty, to implement Article 18 of the Treaty, and to receive the funds foreseen in Article 13.2 of the Treaty.

6.4 Within the General Fund there shall be maintained a working capital reserve at a level to be determined from time to time by the Governing Body by consensus. The purpose of the working capital reserve shall be to ensure continuity of operations in the event of a temporary shortfall of cash. Drawdowns from the working capital reserve shall be restored from contributions as soon as possible.

6.5 Within the General Fund there shall be maintained a Third Party Beneficiary Operational Reserve at a level to be determined for each biennium by the Governing Body by consensus, to which shall be credited as priority an adequate part of contributions under Rule V.1b, Rule V.1c, and the uncommitted balance of voluntary contributions carried forward under Rule V.1h. The purpose of the Third Party Beneficiary Operational Reserve shall be to cover all costs and expenses incurred by the Third Party Beneficiary in carrying out its roles and responsibilities, in accordance with the Third Party Beneficiary Procedures.

Rule VII Reimbursement

The Trust Funds referred to in Rule VI.1 shall make provision for Project Servicing Costs to reimburse FAO for the administrative and operational support services provided to the Governing Body, its subsidiary bodies, and the Treaty Secretariat, under such terms as may, from time to time, be established by the Governing Bodies of the FAO.

Rule VIII Accounts and Audit

8.1 The accounts and financial management of all funds governed by the present rules shall be subject to the internal and external auditing procedures of FAO.

8.2 During the second year of the financial period FAO shall provide the Contracting Parties with an interim statement of accounts for the first year of the financial period. FAO shall also, as soon as practicable, provide to the Contracting Parties a final certified statement of accounts for the full financial period.

Rule IX Amendments

Amendments to these Rules may be adopted by consensus. Consideration of proposals of amendments to these rules shall be subject to Rule V of the Rules of Procedure and documents on the proposals shall be circulated in accordance with Rule V.7 of the Rules of Procedure, and in no case less than 24 hours prior to their consideration by the Governing Body.

Rule X
Over-riding Authority of the Treaty

In the event of any conflict between any provision of these rules and any provision of the Treaty, the Treaty shall prevail.

Rule XI
Entry into force

These Rules and any amendments thereto shall come into force upon their approval by consensus by the Governing Body unless, by consensus, the Governing Body decides otherwise.

SOURCE AND USE OF MONEYS, AND TRUST FUND STRUCTURE

REFERENCE IN RULE V	CORE ADMINISTRATIVE BUDGET	TRUST FUND STRUCTURE RULE VI
Rule V.1a	The amount provided for the Treaty's Core Administrative Budget in the FAO Regular Programme of Work and budget	
Rule V.1b	Voluntary contributions by Contracting Parties for the purposes of administration and implementation of the Treaty in general	GENERAL FUND <i>Income in the biennium</i> Rule VI.2a <i>includes the</i> <i>Working Capital Reserve</i> Rule VI.4 <u>and the</u> <u>Third Party Beneficiary</u> <u>Operational Reserve</u> <u>Rule VI.5</u>
Rule V.1c	Voluntary contributions by states that are not Contracting Parties, from IGOs, or NGOs or other entities, for the administration and implementation of the Treaty in general	
Rule V.1h	The uncommitted balance of voluntary contributions carried forward	
Rule V.1i	Miscellaneous income, including interest derived from investment of the funds in the General Trust Fund	
SPECIAL FUNDS		
Rule V.1d	Other voluntary payments by Contracting Parties, for purposes agreed between the contributor and the Secretary	MULTIDONOR FUND <i>where agreed with donor</i> ----- SEPARATE FUNDS <i>where required by donor</i> Rule VI.2b
Rule V.1e	Other voluntary payments by Contracting Parties, by IGOs, or NGOs or other entities for purposes agreed between the contributor and the Secretary	
Rule V.1f	Voluntary payments by Contracting Parties to support the participation of developing countries	FUND TO SUPPORT THE PARTICIPATION OF DEVELOPING COUNTRIES Rule VI.2c
Rule V.1g	Voluntary payments by contributions by states that are not Contracting Parties, from IGOs, or NGOs or other entities, to support the participation of developing countries	

BENEFIT-SHARING IN ACCORDANCE WITH ARTICLE 13.2 OF THE TREATY**Rule V.1j**

Mandatory and voluntary contributions pursuant to Article 13.2d

Rule V.1k

Contributions from international mechanisms, funds and bodies

BENEFIT-SHARING FUND

Rule VI.3

APPENDIX IV

STANDARD MATERIAL TRANSFER AGREEMENT

PREAMBLE

WHEREAS

The International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter referred to as “the **Treaty**”)⁸ was adopted by the Thirty-first session of the FAO Conference on 3 November 2001 and entered into force on 29 June 2004;

The objectives of the **Treaty** are the conservation and sustainable use of **Plant Genetic Resources for Food and Agriculture** and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security;

The Contracting Parties to the **Treaty**, in the exercise of their sovereign rights over their **Plant Genetic Resources for Food and Agriculture**, have established a **Multilateral System** both to facilitate access to **Plant Genetic Resources for Food and Agriculture** and to share, in a fair and equitable way, the benefits arising from the utilization of these resources, on a complementary and mutually reinforcing basis;

Articles 4, 11, 12.4 and 12.5 of the **Treaty** are borne in mind;

The diversity of the legal systems of the Contracting Parties with respect to their national procedural rules governing access to courts and to arbitration, and the obligations arising from international and regional conventions applicable to these procedural rules, are recognized;

Article 12.4 of the **Treaty** provides that facilitated access under the **Multilateral System** shall be provided pursuant to a Standard Material Transfer Agreement, and the **Governing Body** of the **Treaty**, in its Resolution 1/2006 of 16 June 2006, adopted the Standard Material Transfer Agreement.

⁸ Note by the IT-PGRFA Secretariat: as suggested by the Legal Working Group during the Contact Group for the Drafting of the Standard Material Transfer Agreement, defined terms have, for clarity, been put in bold throughout.

ARTICLE 1 — PARTIES TO THE AGREEMENT

1.1 The present Material Transfer Agreement (hereinafter referred to as “**this Agreement**”) is the Standard Material Transfer Agreement referred to in Article 12.4 of the **Treaty**.

1.2 **This Agreement** is:

BETWEEN: (*name and address of the provider or providing institution, name of authorized official, contact information for authorized official**) (hereinafter referred to as “the **Provider**”),

AND: (*name and address of the recipient or recipient institution, name of authorized official, contact information for authorized official**) (hereinafter referred to as “the **Recipient**”).

1.3 The parties to **this Agreement** hereby agree as follows:

ARTICLE 2 — DEFINITIONS

In **this Agreement** the expressions set out below shall have the following meaning:

“**Available without restriction**”: a **Product** is considered to be available without restriction to others for further research and breeding when it is available for research and breeding without any legal or contractual obligations, or technological restrictions, that would preclude using it in the manner specified in the **Treaty**.

“**Genetic material**” means any material of plant origin, including reproductive and vegetative propagating material, containing functional units of heredity.

“**Governing Body**” means the **Governing Body** of the **Treaty**.

“**Multilateral System**” means the **Multilateral System** established under Article 10.2 of the **Treaty**.

* *Insert as necessary. Not applicable for shrink-wrap and click-wrap Standard Material Transfer Agreements.*

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.

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.

“Plant Genetic Resources for Food and Agriculture” means any **genetic material** of plant origin of actual or potential value for food and agriculture.

“Plant Genetic Resources for Food and Agriculture under Development” means material derived from the **Material**, and hence distinct from it, that is not yet ready for **commercialization** and which the developer intends to further develop or to transfer to another person or entity for further development. The period of development for the **Plant Genetic Resources for Food and Agriculture under Development** shall be deemed to have ceased when those resources are **commercialized** as a **Product**.

“Product” means **Plant Genetic Resources for Food and Agriculture** that incorporate⁹ the **Material** or any of its genetic parts or components that are ready for **commercialization**, excluding commodities and other products used for food, feed and processing.

“Sales” means the gross income resulting from the **commercialization** of a **Product** or **Products**, by the **Recipient**, its affiliates, contractors, licensees and lessees.

“To commercialize” means to sell a **Product** or **Products** for monetary consideration on the open market, and **“commercialization”** has a corresponding meaning. **Commercialization** shall not include any form of transfer of **Plant Genetic Resources for Food and Agriculture under Development**.

ARTICLE 3 — SUBJECT MATTER OF THE MATERIAL TRANSFER AGREEMENT

The **Plant Genetic Resources for Food and Agriculture** specified in *Annex 1* to **this Agreement** (hereinafter referred to as the **“Material”**) and the available related information referred to in Article 5b and in *Annex 1* are hereby transferred from the **Provider** to the **Recipient** subject to the terms and conditions set out in **this Agreement**.

ARTICLE 4 — GENERAL PROVISIONS

4.1 **This Agreement** is entered into within the framework of the **Multilateral System** and shall be implemented and interpreted in accordance with the objectives and provisions of the **Treaty**.

4.2 The parties recognize that they are subject to the applicable legal measures and procedures, that have been adopted by the Contracting Parties to the **Treaty**, in conformity with the **Treaty**, in particular those taken in conformity with Articles 4, 12.2 and 12.5 of the **Treaty**.¹⁰

⁹ As evidenced, for example, by pedigree or notation of gene insertion.

¹⁰ In the case of the International Agricultural Research Centres of the Consultative Group on International Agricultural Research (CGIAR) and other international institutions, the Agreement between the Governing Body and the CGIAR Centres and other relevant institutions will be applicable.

4.3 The parties to **this Agreement** agree that (*the entity designated by the **Governing Body***),¹¹ acting on behalf of the **Governing Body** of the **Treaty** and its **Multilateral System**, is the third party beneficiary under **this Agreement**.

4.4 The third party beneficiary has the right to request the appropriate information as required in Articles 5e, 6.5c, 8.3 and *Annex, 2 paragraph 3*, to **this Agreement**.

4.5 The rights granted to the (*the entity designated by the **Governing Body***) above do not prevent the **Provider** and the **Recipient** from exercising their rights under **this Agreement**.

ARTICLE 5 — RIGHTS AND OBLIGATIONS OF THE PROVIDER

The **Provider** undertakes that the **Material** is transferred in accordance with the following provisions of the **Treaty**:

- a) Access shall be accorded expeditiously, without the need to track individual accessions and free of charge, or, when a fee is charged, it shall not exceed the minimal cost involved;
- b) All available passport data and, subject to applicable law, any other associated available non-confidential descriptive information, shall be made available with the **Plant Genetic Resources for Food and Agriculture** provided;
- c) Access to **Plant Genetic Resources for Food and Agriculture under Development**, including material being developed by farmers, shall be at the discretion of its developer, during the period of its development;
- d) Access to **Plant Genetic Resources for Food and Agriculture** protected by intellectual and other property rights shall be consistent with relevant international agreements, and with relevant national laws;
- e) The **Provider** shall periodically inform the **Governing Body** about the Material Transfer Agreements entered into, according to a schedule to be established by the

¹¹ *Note by the IT-PGRFA Secretariat*: by Resolution 2/2006, the Governing Body “invite[d] the Food and Agriculture Organization of the United Nations, as the Third Party Beneficiary, to carry out the roles and responsibilities as identified and prescribed in the Standard Material Transfer Agreement, under the direction of the Governing Body, in accordance with the procedures to be established by the Governing Body at its next session”. Upon acceptance by the FAO of this invitation, the term, “the entity designated by the Governing Body”, will be replaced throughout the document by the term, “the Food and Agriculture Organization of the United Nations”.

Governing Body. This information shall be made available by the **Governing Body** to the third party beneficiary.¹²

ARTICLE 6 — RIGHTS AND OBLIGATIONS OF THE RECIPIENT

6.1 The **Recipient** undertakes that the **Material** shall be used or conserved only for the purposes of research, breeding and training for food and agriculture. Such purposes shall not include chemical, pharmaceutical and/or other non-food/feed industrial uses.

6.2 The **Recipient** shall not claim any intellectual property or other rights that limit the facilitated access to the **Material** provided under **this Agreement**, or its genetic parts or components, in the form received from the **Multilateral System**.

6.3 In the case that the **Recipient** conserves the **Material** supplied, the **Recipient** shall make the **Material**, and the related information referred to in Article 5b, available to the **Multilateral System** using the Standard Material Transfer Agreement.

6.4 In the case that the **Recipient** transfers the **Material** supplied under **this Agreement** to another person or entity (hereinafter referred to as “the **subsequent recipient**”), the **Recipient** shall

- a) do so under the terms and conditions of the Standard Material Transfer Agreement, through a new material transfer agreement; and
- b) notify the **Governing Body**, in accordance with Article 5e.

On compliance with the above, the **Recipient** shall have no further obligations regarding the actions of the **subsequent recipient**.

6.5 In the case that the **Recipient** transfers a **Plant Genetic Resource for Food and Agriculture under Development** to another person or entity, the **Recipient** shall:

- a) do so under the terms and conditions of the Standard Material Transfer Agreement, through a new material transfer agreement, provided that Article 5a of the Standard Material Transfer Agreement shall not apply;

¹² *Note by the IT-PGRFA Secretariat:* The Standard Material Transfer Agreement makes provision for information to be provided to the **Governing Body**, in the following Articles: 5e, 6.4b, 6.5c and 6.11h, as well as in *Annex 2*, paragraph 3, *Annex 3*, paragraph 4, and in *Annex 4*. Such information should be submitted to:

The Secretary
International Treaty on Plant Genetic Resources for Food and Agriculture
Food and Agriculture Organization of the United Nations
I-00100 Rome, Italy

- b) identify, in *Annex 1* to the new material transfer agreement, the **Material** received from the **Multilateral System**, and specify that the **Plant Genetic Resources for Food and Agriculture under Development** being transferred are derived from the **Material**;
- c) notify the **Governing Body**, in accordance with Article 5e; and
- d) have no further obligations regarding the actions of any **subsequent recipient**.

6.6 Entering into a material transfer agreement under paragraph 6.5 shall be without prejudice to the right of the parties to attach additional conditions, relating to further product development, including, as appropriate, the payment of monetary consideration.

6.7 In the case that the **Recipient commercializes a Product** that is a **Plant Genetic Resource for Food and Agriculture** and that incorporates **Material** as referred to in Article 3 of **this Agreement**, and where such **Product** is not **available without restriction** to others for further research and breeding, the **Recipient** shall pay a fixed percentage of the **Sales** of the **commercialized Product** into the mechanism established by the **Governing Body** for this purpose, in accordance with *Annex 2* to **this Agreement**.

6.8 In the case that the **Recipient commercializes a Product** that is a **Plant Genetic Resource for Food and Agriculture** and that incorporates **Material** as referred to in Article 3 of **this Agreement** and where that **Product** is **available without restriction** to others for further research and breeding, the **Recipient** is encouraged to make voluntary payments into the mechanism established by the **Governing Body** for this purpose in accordance with *Annex 2* to **this Agreement**.

6.9 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.

6.10 A **Recipient** who obtains intellectual property rights on any **Products** developed from the **Material** or its components, obtained from the **Multilateral System**, and assigns such intellectual property rights to a third party, shall transfer the benefit-sharing obligations of **this Agreement** to that third party.

6.11 The **Recipient** may opt as per *Annex 4*, as an alternative to payments under Article 6.7, for the following system of payments:

- a) The **Recipient** shall make payments at a discounted rate during the period of validity of the option;
- b) The period of validity of the option shall be ten years renewable in accordance with *Annex 3* to **this Agreement**;

- c) The payments shall be based on the **Sales** of any **Products** and of the sales of any other products that are **Plant Genetic Resources for Food and Agriculture** belonging to the same crop, as set out in Annex 1 to the **Treaty**, to which the **Material** referred to in *Annex 1* to **this Agreement** belongs;
- d) The payments to be made are independent of whether or not the **Product** is **available without restriction**;
- e) The rates of payment and other terms and conditions applicable to this option, including the discounted rates are set out in *Annex 3* to **this Agreement**;
- f) The **Recipient** shall be relieved of any obligation to make payments under Article 6.7 of **this Agreement** or any previous or subsequent Standard Material Transfer Agreements entered into in respect of the same crop;
- g) After the end of the period of validity of this option the **Recipient** shall make payments on any **Products** that incorporate **Material** received during the period in which this Article was in force, and where such **Products** are not **available without restriction**. These payments will be calculated at the same rate as in paragraph (a) above;
- h) The **Recipient** shall notify the **Governing Body** that he has opted for this modality of payment. If no notification is provided the alternative modality of payment specified in Article 6.7 will apply.

ARTICLE 7 — APPLICABLE LAW

The applicable law shall be General Principles of Law, including the UNIDROIT Principles of International Commercial Contracts 2004, the objectives and the relevant provisions of the **Treaty**, and, when necessary for interpretation, the decisions of the **Governing Body**.

ARTICLE 8 — DISPUTE SETTLEMENT

8.1 Dispute settlement may be initiated by the **Provider** or the **Recipient** or the (*the entity designated by the **Governing Body***), acting on behalf of the **Governing Body** of the **Treaty** and its **Multilateral System**.

8.2 The parties to **this Agreement** agree that the (*the entity designated by the **Governing Body***), 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**.

8.3 The third party beneficiary has the right to request that the appropriate information, including samples as necessary, be made available by the **Provider** and the **Recipient**, regarding

their obligations in the context of **this Agreement**. Any information or samples so requested shall be provided by the **Provider** and the **Recipient**, as the case may be.

- 8.4 Any dispute arising from **this Agreement** shall be resolved in the following manner:
- a) Amicable dispute settlement: The parties shall attempt in good faith to resolve the dispute by negotiation.
 - b) Mediation: If the dispute is not resolved by negotiation, the parties may choose mediation through a neutral third party mediator, to be mutually agreed.
 - c) Arbitration: 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, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with the said Rules. Either party to the dispute may, if it so chooses, appoint its arbitrator from such list of experts as the Governing Body may establish for this purpose; both parties, or the arbitrators appointed by them, may agree to appoint a sole arbitrator, or presiding arbitrator as the case may be, from such list of experts. The result of such arbitration shall be binding.

ARTICLE 9 — ADDITIONAL ITEMS

Warranty

9.1 The **Provider** makes no warranties as to the safety of or title to the **Material**, nor as to the accuracy or correctness of any passport or other data provided with the **Material**. Neither does it make any warranties as to the quality, viability, or purity (genetic or mechanical) of the **Material** being furnished. The phytosanitary condition of the **Material** is warranted only as described in any attached phytosanitary certificate. The **Recipient** assumes full responsibility for complying with the recipient nation's quarantine and biosafety regulations and rules as to import or release of **genetic material**.

Duration of Agreement

9.2 **This Agreement** shall remain in force so long as the **Treaty** remains in force.

ARTICLE 10 — SIGNATURE/ACCEPTANCE

The **Provider** and the **Recipient** may choose the method of acceptance unless either party requires **this Agreement** to be signed.

Option 1 –Signature*

I, (*Full Name of Authorized Official*), represent and warrant that I have the authority to execute **this Agreement** on behalf of the **Provider** and acknowledge my institution's responsibility and obligation to abide by the provisions of **this Agreement**, both by letter and in principle, in order to promote the conservation and sustainable use of **Plant Genetic Resources for Food and Agriculture**.

Signature..... Date.....
Name of the **Provider**

I, (*Full Name of Authorized Official*), represent and warrant that I have the authority to execute **this Agreement** on behalf of the **Recipient** and acknowledge my institution's responsibility and obligation to abide by the provisions of **this Agreement**, both by letter and in principle, in order to promote the conservation and sustainable use of **Plant Genetic Resources for Food and Agriculture**.

Signature..... Date.....
Name of the **Recipient**.....

Option 2 – Shrink-wrap Standard Material Transfer Agreements*

The **Material** is provided conditional on acceptance of the terms of **this Agreement**. The provision of the **Material** by the **Provider** and the **Recipient's** acceptance and use of the **Material** constitutes acceptance of the terms of **this Agreement**.

Option 3 – Click-wrap Standard Material Transfer Agreement*

I hereby agree to the above conditions.

* Where the **Provider** chooses signature, only the wording in Option 1 will appear in the Standard Material Transfer Agreement. Similarly where the **Provider** chooses either shrink-wrap or click-wrap, only the wording in Option 2 or Option 3, as appropriate, will appear in the Standard Material Transfer Agreement. Where the "click-wrap" form is chosen, the **Material** should also be accompanied by a written copy of the Standard Material Transfer Agreement.

Annex 1

LIST OF MATERIALS PROVIDED

This *Annex* contains a list of the **Material** provided under **this Agreement**, including the associated information referred to in Article 5b.

This information is either provided below or can be obtained at the following website: (*URL*).

The following information is included for each **Material** listed: all available passport data and, subject to applicable law, any other associated, available, non-confidential descriptive information.

(*List*)

Annex 2

RATE AND MODALITIES OF PAYMENT UNDER ARTICLE 6.7 OF THIS AGREEMENT

1. If a **Recipient**, its affiliates, contractors, licensees, and lessees, **commercializes** a **Product** or **Products**, then the **Recipient** shall pay one point-one percent (1.1 %) of the **Sales** of the **Product** or **Products** less thirty percent (30%); except that no payment shall be due on any **Product** or **Products** that:

- (a) are **available without restriction** to others for further research and breeding in accordance with Article 2 of **this Agreement**;
- (b) have been purchased or otherwise obtained from another person or entity who either has already made payment on the **Product** or **Products** or is exempt from the obligation to make payment pursuant to subparagraph (a) above;
- (c) are sold or traded as a commodity.

2. Where a **Product** contains a **Plant Genetic Resource for Food and Agriculture** accessed from the **Multilateral System** under two or more material transfer agreements based on the Standard Material Transfer Agreement only one payment shall be required under paragraph 1 above.

3. The **Recipient** shall submit to the **Governing Body**, within sixty (60) days after each calendar year ending December 31st, an annual report setting forth:

- (a) the **Sales** of the **Product** or **Products** by the **Recipient**, its affiliates, contractors, licensees and lessees, for the twelve (12) month period ending on December 31st;
- (b) the amount of the payment due; and
- (c) information that allows for the identification of any restrictions that have given rise to the benefit-sharing payment.

4. Payment shall be due and payable upon submission of each annual report. All payments due to the **Governing Body** shall be payable in *United States dollars (US\$)*¹³ for the following account established by the **Governing Body** in accordance with Article 19.3f of the **Treaty**¹⁴:

**FAO Trust Fund (USD) GINC/INT/031/MUL,
IT-PGRFA (Benefit-sharing),
HSBC New York, 452 Fifth Ave., New York, NY, USA, 10018,
Swift/BIC: MRMDUS33, ABA/ Bank Code: 021001088,
Account No. 000156426**

¹³ *Note by the IT-PGRFA Secretariat:* 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\$).

¹⁴ *Note by the Secretariat:* This is the Trust Account provided for in Article 6.3 of the Financial Rules, as approved by the Governing Body at its First Session (*Appendix E* to IT/GB-1/06/Report).

Annex 3

TERMS AND CONDITIONS OF THE ALTERNATIVE PAYMENTS SCHEME
UNDER ARTICLE 6.11 OF THIS AGREEMENT

1. The discounted rate for payments made under Article 6.11 shall be zero point five percent (0.5 %) of the **Sales** of any **Products** and of the sales of any other products that are **Plant Genetic Resources for Food and Agriculture** belonging to the same crop, as set out in Annex 1 to the **Treaty**, to which the **Material** referred to in *Annex 1* to **this Agreement** belong.
2. Payment shall be made in accordance with the banking instructions set out in paragraph 4 of *Annex 2* to **this Agreement**.
3. When the **Recipient** transfers **Plant Genetic Resources for Food and Agriculture under Development**, the transfer shall be made on the condition that the **subsequent recipient** shall pay into the mechanism established by the **Governing Body** under Article 19.3f of the **Treaty** zero point five percent (0.5 %) of the **Sales** of any **Product** derived from such **Plant Genetic Resources for Food and Agriculture under Development**, whether the **Product** is **available or not without restriction**.
4. At least six months before the expiry of a period of ten years counted from the date of signature of **this Agreement** and, thereafter, six months before the expiry of subsequent periods of five years, the **Recipient** may notify the **Governing Body** of his decision to opt out from the application of this Article as of the end of any of those periods. In the case the **Recipient** has entered into other Standard Material Transfer Agreements, the ten years period will commence on the date of signature of the first Standard Material Transfer Agreement where an option for this Article has been made.
5. Where the **Recipient** has entered or enters in the future into other Standard Material Transfer Agreements in relation to material belonging to the same crop[s], the **Recipient** shall only pay into the referred mechanism the percentage of sales as determined in accordance with this Article or the same Article of any other Standard Material Transfer Agreement. No cumulative payments will be required.

Annex 4

**OPTION FOR CROP-BASED PAYMENTS UNDER THE ALTERNATIVE PAYMENTS
SCHEME UNDER ARTICLE 6.11 OF THIS AGREEMENT**

I (full name of **Recipient** or **Recipient's** authorised official) declare to opt for payment in accordance with Article 6.11 of **this Agreement**.

Signature.....

Date.....¹⁵

¹⁵ In accordance with Article 6.11h of the Standard Material Transfer Agreement, the option for this modality of payment will become operative only once notification has been provided by the **Recipient** to the **Governing Body**. The signed declaration opting for this modality of payment must be sent by the **Recipient** to the **Governing Body** at the following address, whichever method of acceptance of **this Agreement** (signature, shrink-wrap or click-wrap) has been chosen by the parties to **this Agreement**, and whether or not the **Recipient** has already indicated his acceptance of this option in accepting **this Agreement** itself:

The Secretary,
International Treaty on Plant Genetic Resources for Food and Agriculture
Food and Agriculture Organization of the United Nations
I-00100 Rome, Italy

The signed declaration must be accompanied by the following:

- The date on which **this Agreement** was entered into;
- The name and address of the **Recipient** and of the **Provider**;
- A copy of Annex 1 to **this Agreement**.