PROTECTING THE INTERESTS OF THE MULTILATERAL SYSTEM UNDER THE STANDARD MATERIAL TRANSFER AGREEMENT

The Third Party Beneficiary

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Introduction

The Standard Material Transfer Agreement (SMTA), like any other material transfer agreement (MTA), is basically a contract setting out the terms and conditions under which material will be transferred between the provider and the recipient of the material. While some of the parties to a particular SMTA may be state enterprises, the SMTA, like other MTAs, operates at the level of private contract law rather than international law. One of the basic principles of contract law is that a contract creates binding rights and obligations only as between the parties to the contract—this is known as the principle of privity of contract. The difference between the SMTA and a normal MTA is that plant genetic resources for food and agriculture (PGRFA) that are transferred under an SMTA are regarded as coming from the multilateral system on access and benefit sharing (multilateral system), and benefits under the SMTA flow not to the individual provider but to the multilateral system itself. Once in the multilateral system, the benefits are to be passed on to farmers, particularly in developing countries, in order to finance further efforts to conserve and use PGRFA sustainably. In this sense, the multilateral system is the real beneficiary of the benefit-sharing provisions of the SMTA rather than the parties to the SMTA themselves. The SMTA recognizes this fact by providing for the appointment of a third party beneficiary to represent the rights of the multilateral system and by giving this third party beneficiary the power to initiate dispute settlement action, including arbitration, in the event of a breach of the terms and conditions of the SMTA affecting those rights. In so doing, the SMTA also solves one of the major problems affecting access and benefit-sharing agreements in general, namely the capacity of developing countries, or individual institutions in developing countries, to enforce the terms of these agreements.

This chapter describes the development of the concept of the third party beneficiary in the context of the negotiations on the SMTA and examines its relationship with
the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), its status in national law and the way in which the concept is expressed in the SMTA. The chapter then looks at the implications of the concept for genetic resource agreements outside the scope of the ITPGRFA.

**The origins of the concept in the negotiations of the SMTA**

The drafting of the SMTA was carried out in three distinct phases. The first phase involved the initial consideration by a regionally balanced group of experts of the possible elements to be included in a standard material transfer agreement. The second phase concerned the negotiation of the first draft of the SMTA by countries that were members of the Food and Agriculture Organization’s (FAO) Commission on Genetic Resources for Food and Agriculture (CGRFA). The final phase comprised the negotiation of the SMTA by the contracting parties in the first session of the Governing Body of the ITPGRFA in June 2006 and its adoption during the closing plenary meeting.

**Phase 1: the Expert Group on the Terms of the SMTA (Expert Group)**

The concept of the third party beneficiary was first raised during the discussions of the Expert Group, which met in Brussels in October 2004 under the chairmanship of Lim Eng Siang from Malaysia. The Expert Group adopted firm recommendations only with respect to the process for taking forward the drafting of the SMTA. However, it also listed a number of options for possible elements to be included in the draft SMTA, together with general views on those options. These options were drawn up in the form of responses to a number of questions posed by the FAO’s CGRFA, acting as the Interim Committee for the ITPGRFA (CGRFA, 2004a).

Many of the views expressed during the meeting commented on the fact that benefits under the SMTA, including both monetary and non-monetary benefits, flowed to the multilateral system and not to the individual provider of the material (ibid. at para. 49 (first bullet point) and para. 50). Following this thought, one of the views expressed was that ‘[t]hird parties should be able to initiate dispute settlement’ (ibid. at para. 61 (point 9 on dispute resolution)). In the same connection, the legal adviser to the meeting ‘noted that, because there are third party beneficiaries under the MTA, through the Multilateral System it may be advantageous to allow for them to be represented in dispute settlement, which would be easier in international arbitration’ (ibid.). Quite separately, concerns were also expressed by the Expert Group regarding compliance control. Under ‘additional items’ to be included in the SMTA, a view was expressed that ‘[t]here should be a guarantor, to ensure that the obligations the recipient accepts are fulfilled’ (ibid. at point 10). It was these two strands of thought that were eventually to coalesce in the concept of the third party beneficiary.

**Phase 2: the Contact Group**

At its second meeting in November 2004, the CGRFA, acting as Interim Committee for the ITPGRFA, agreed on the establishment of a contact group to develop a draft
SMTA for consideration by the Governing Body (CGRFA, 2004b). The Contact Group held its first meeting in July 2005.

The notion of the third party beneficiary under the SMTA and its possible role in initiating dispute settlement was presented, in a background study paper, to this first session of the Contact Group by the Secretariat (Moore, 2005). The paper noted that many of the rights created by the SMTA – in particular, those relating to benefit sharing – would in fact be third party beneficiary rights, and looked at the mechanisms for according rights to initiate dispute settlement proceedings to the multilateral system as a third party beneficiary under the SMTA. In this connection, the paper also raised a possible alternative approach of defining the provider of PGRFA under the SMTA as an agent for the multilateral system.

This latter notion was taken up by the African Group in the first meeting of the Contact Group in Tunisia in July 2005. The African Group pointed out that under the multilateral system the providers of PGRFA in developing countries would have limited capacity or incentive to monitor and/or enforce compliance by recipients with the terms of the SMTA, given that the benefits flow to the multilateral system rather than to the providers. The African Group put forward the notion of the provider acting as an agent for the multilateral system as a possible solution that would at the same time protect the interests of the multilateral system while providing a guarantor to ensure that the obligations undertaken by the recipient were enforced. The notion was referred to a Legal Expert Group established by the Contact Group. Reporting back to the Contact Group, the Legal Expert Group advised that, while the concept of agency was compatible with the ITPGRFA, it foresaw some legal and practical difficulties in developing this approach. It identified the option of establishing third party beneficiary rights in the SMTA and empowering a legal entity to initiate legal action to enforce these rights as an alternative way of dealing with the underlying concern expressed by the African Group. The Contact Group included this latter option in the draft SMTA that it drew up.

Further work on the third party beneficiary concept was undertaken by the Secretariat of the CGRFA between the first and second meetings of the Contact Group, and a more detailed information document was submitted to the Contact Group at its second meeting in Sweden in April 2006 (CGRFA, 2006a). The document analysed the basis for the concept of the third party beneficiary in the Treaty, in national law and in the draft SMTA and discussed the questions of what institution could constitute the third party beneficiary and how the SMTA might be drafted to include a role for the third party beneficiary. With respect to this last question, the document looked at the definition of the third party beneficiary, its right to initiate dispute settlement, the scope of the rights to be protected, monitoring rights, locus standi and arbitration, and suggested appropriate wording.

The Contact Group, at its second meeting, accepted the concept of the third party beneficiary in principle, with the negotiations focusing on the scope of the rights to be protected, the degree of control to be exercised by the Governing Body over the third party beneficiary and the extent of any monitoring powers. These questions, including which organization was to be entrusted with the role of the third party
beneficiary, were left to the Governing Body to resolve at its first session in Madrid in June 2006 (CGRFA, 2006b, para. 14(d)).

**Phase 3: the Governing Body**

The negotiations on the SMTA in the Governing Body lasted the better part of one whole week. By the time this meeting was held, there was little questioning of the need for the concept of the third party beneficiary to be incorporated into the SMTA. As in the second session of the Contact Group, the negotiations focused on the scope of the rights to be protected and the extent of monitoring powers. In the end, the compromise reached was to define the rights to be protected somewhat broadly, but to limit monitoring mainly within the context of dispute settlement. The provisions of the SMTA relating to the third party beneficiary are described in more detail in the following sections.

**The third party beneficiary in the ITPGRFA**

The actual words ‘third party beneficiary’ are not to be found anywhere in the text of the Treaty. Nevertheless, the factual situation underlying this concept is clearly established in the provisions dealing with the multilateral system and the SMTA. Under Article 12.4 of the ITPGRFA, facilitated access is to be provided pursuant to a SMTA. This agreement is to be between the provider of the PGRFA and the recipient of these resources. However, the benefits under the SMTA, including the monetary benefits of commercialization, are not to flow to the individual provider but, rather, to the multilateral system itself for the ultimate benefit of farmers in all countries who conserve and sustainably use PGRFA. Essentially, then, the position of the multilateral system as a third party beneficiary under the SMTA is expressly provided for in the Treaty.

While the concept of a third party beneficiary is, therefore, implicit in the ITPGRFA, nothing is said as to how the interests of the third party beneficiary are to be protected. Indeed, Article 12.5 of the Treaty provides that:

> Contracting Parties shall ensure that an opportunity to seek recourse is available, consistent with applicable jurisdictional requirements, under their legal systems, in case of contractual disputes arising under such MTAs, recognizing that obligations arising under such MTAs rest exclusively with the parties to those MTAs [emphasis added].

The question thus arises as to whether the last clause of Article 12.5 would in any way preclude the bringing of an action by, or on behalf of, a third party beneficiary. The answer to this question would appear to be no. From a literal, if somewhat narrow, interpretation of the wording of Article 12.5, the restriction would apply only to ‘obligations’ arising out of the SMTA and not to ‘rights’ arising out of these agreements. This reasoning is consonant with general principles of contract law, which would preclude absolutely the creation of obligations on the part of non-parties to a
contract, while not necessarily precluding the creation of rights for third parties. It could also be argued that in a sense a third party beneficiary is in fact a party to the agreement, albeit on a different standing to the provider and the recipient, and, consequentially, with more limited rights. Both of these interpretations would be consonant with the objectives of the ITPGRFA – it would hardly be consistent for the Treaty to create third party beneficiary rights under the SMTA and, at the same time, to preclude the enforcement of these rights.

Given that the concept of a third party beneficiary is implicit in the ITPGRFA and that the right of the third party beneficiary to enforce its rights is not precluded by the wording of the Treaty, what remains to be determined is how the rights accorded to the third party beneficiary under the SMTA may be enforceable in practice.

The concept of third party beneficiary rights in national law

As noted earlier, the principle of privity of contract means that a contract binds only the direct parties to that contract and creates rights only for those parties. It is recognized, in particular, that a contract cannot ever create legal obligations that are binding on a third party without his or her consent. However, national contract law in many countries increasingly recognizes that there are some instances in which a contract may bestow rights on a third party. An example would be where the parties to a contract agree among themselves to make a gift to a third party or to create an insurance in which the beneficiary is a third party to the insurance contract.

Under English law, for example, the general rule under common law was until recently that of the privity of contract, although there were cases – notably in the area of so-called trusts of promise and cases of agency – where third party rights were recognized (UK Law Commission, 1996). In 1999, new legislation was introduced in the United Kingdom that specifically recognized third party rights (UK Office of Public Sector Information, 1999).

More generally speaking, where national systems of contract law recognize the enforceability of third party beneficiary rights, they will do so only where it is clearly the intention of the parties to create such legally enforceable rights and where these rights and the legal holder of these rights are clearly defined in the contract.

While the state of national law on the recognition of third party rights may not perhaps be clear in all countries, the possibility for a contract to provide for enforceable third party beneficiary rights is expressly and unambiguously recognized in the Principles of International Commercial Contracts, which were adopted by the International Institute for the Unification of Private Law (UNIDROIT) in 2004. It was partly for this reason that reference was made explicitly to the UNIDROIT Principles in Article 7 of the final version of the SMTA in dealing with the choice of applicable law.

The third party beneficiary in the SMTA

The provisions dealing with the third party beneficiary are set out in two separate places in the SMTA. Under Article 4 on General Provisions, paragraph 3 provides
that ‘the parties to this Agreement agree that (the entity designated by the Governing Body), acting on behalf of the Governing Body of the Treaty and its Multilateral System, is the third party beneficiary under this Agreement.’ The rights to monitor the performance of the SMTA are set out in paragraph 4 of Article 4, which reads as follows: ‘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.’ At first sight, both of these provisions appear somewhat limited and rather unexciting: for the most part, they merely allow the third party beneficiary to request appropriate information on matters that providers or recipients are already required to report to the Governing Body. The third party beneficiary will already have access to the information provided to the Governing Body on these matters, and, indeed, the Governing Body is expressly required to ensure that the information is passed on to the third party beneficiary. What Article 4.4 does add is the right of the third party beneficiary to request this information in its own right and to request it in cases where the provider or the recipient has neglected or refused to provide the appropriate information to the Governing Body.

Some of the powers given to the third party beneficiary are more substantive and far reaching. One article that is referred to in Article 4.4 gives rather broad powers to the third party beneficiary to monitor performance by the parties of their obligations under the SMTA in general, albeit in the context of dispute settlement. Article 8.3 gives the third party beneficiary ‘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’ and requires the provider and the recipient to provide the information or samples requested. In fact, the powers given to the third party beneficiary under Articles 4.4 and 8.3 are a very real basis for monitoring compliance by the parties with their obligations under the SMTA. Indeed, some developing countries were keen to see the powers of the third party beneficiary expanded with respect to monitoring. Other countries preferred to limit the scope of these powers. The final wording reflects the compromise reached in the negotiations in the Governing Body that while the powers could be quite far-reaching they should be linked primarily to dispute settlement and exercised primarily in this context.

The main powers of the third party beneficiary are set out in Article 8, which deals with dispute settlement. Article 8.1 provides that dispute settlement may be initiated by the entity designated by the Governing Body (the third party beneficiary) acting on behalf of the Governing Body and its multilateral system as well as by the provider or the recipient. The rights that can be protected are defined very broadly in Article 8.2 as ‘rights and obligations of the provider and the recipient under this Agreement’ (the SMTA). While the natural focus may well be on the benefit-sharing obligations of the recipient, these rights and obligations would also relate, for example, to the obligation of the provider to give expeditious access to plant genetic resources in the multilateral system free of charge or at the minimal cost involved. It would also cover the provider’s obligations with respect to the provision of available information on the plant genetic resources being provided as well as the reporting requirements on SMTAs entered into. From the recipient’s point of view, it would cover, for
example, obligations regarding the type of use to which the plant genetic resources are put as well as the restrictions on the claiming of intellectual property rights over the material received.

The dispute settlement procedures that are to be used are set out in Article 8.4 in an escalating scale and include negotiation, mediation through a neutral third party that has been mutually agreed upon, and arbitration. Arbitration can be under the arbitration rules of any international body agreed upon by the parties to the dispute. Where the parties are unable to agree, then the rules of arbitration of the International Chamber of Commerce are set as the default arbitration procedure. The provisions on arbitration are also interesting in that they provide for the establishment of a list of experts by the Governing Body, from whom either party may appoint its arbitrator or from whom both may agree to appoint a sole arbitrator or presiding arbitrator as appropriate.

A good deal of discussion during the negotiations focused on the degree of direction that would be given by the Governing Body to the third party beneficiary in carrying out its functions. In the end, it was accepted that this was a matter that should be settled between the Governing Body and the third party beneficiary rather than between the parties to the SMTA. As such, it would be more appropriately dealt with in a resolution of the Governing Body addressed to the entity designated as the third party beneficiary and defining its mandate.

During the negotiations in the Governing Body, there was a certain amount of reticence on the part of some contracting parties when it came to actually naming the entity to undertake the role of third party beneficiary. This hesitation was probably a reflection of the parties’ natural preference for leaving open options to change the entity selected should the need arise. In fact, the Governing Body had little choice in the matter, as had already been pointed out in the information document on the concept of the third party beneficiary presented to the Contact Group at its second meeting by the Legal Office of the FAO. As pointed out in this chapter, the real third party beneficiary is undoubtedly the multilateral system itself. However neither the multilateral system nor the Governing Body possess legal personality—whatever entity was to be designated to represent the third party beneficiary rights of the multilateral system would have to have its own legal personality and the capacity to take legal action to protect those rights. Indeed, the only two practical options open to the Governing Body would be to invite the FAO to undertake this responsibility given that the ITPGRFA was set up within the framework of the FAO Constitution or to set up a new entity with its own legal personality for this purpose. Obviously, the latter option would have presented considerable legal and institutional complications.

In the last moments of its first session, the Governing Body decided to invite:

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.

The FAO made it known that it was prepared in principle to accept this responsibility, provided that proper procedures were drawn up by the Governing Body defining the roles and responsibilities that would be involved. The Governing Body welcomed this decision at its second session, which was held in October/November 2007, and decided to: (1) mandate the secretary to prepare a draft text setting out the procedures to be followed by the FAO when acting as the third party beneficiary, taking into account its role as a UN specialized agency and its privileges and immunities and (2) to set up an ad hoc third party beneficiary committee composed of representatives of the contracting parties in order to consider the draft text as well as comments received from contracting parties and to finalize the draft procedures for submission to the Governing Body at its third session in 2009. The Governing Body invited the Director-General to bring these matters to the attention of the relevant bodies of the FAO, including its invitation to take on the role of third party beneficiary and the procedures endorsed by the Governing Body (ITPGRFA, 2007, paras 61–64).

Finally, at its third session in June 2009, the Governing Body formally adopted the Procedures for the Operation of the Third Party Beneficiary, which will come into force once they are approved by the competent bodies of the FAO (ITPGRFA, 2009, para. 42 and Resolution 5/2009 at Appendix A.5). The procedures provide that the FAO shall act as the third party beneficiary under the SMTA under the direction of the Governing Body. Under the procedures, it will seek to resolve disputes over possible non-compliance with the obligations under the SMTA first by negotiation and, if this fails, then by mediation. Only in the event of a failure to resolve the dispute by mediation within a period of six months, may the third party beneficiary submit the dispute to arbitration. All expenses incurred are to be charged to the third party beneficiary operational reserve to be set up by the Governing Body. To enable it to carry out its roles and responsibilities, the third party beneficiary is to have access to information on the SMTAs entered into, which is to be provided by the parties to those SMTAs. These reporting requirements have now been formally laid down by the Governing Body at its third session in June 2009 (ibid., Resolution 5/2009).

At this session, the Governing Body also took other major decisions to formalize the legal and institutional framework for the operations of the third party beneficiary. These decisions include the establishment of a third party operational reserve to fund its operations, to be filled from voluntary contributions from contracting parties and to be drawn upon by the ITPGRFA’s Secretariat, and the establishment of a list of experts from which parties to the SMTA may appoint mediators and arbitrators. Operational guidelines for the commencement and management of amicable dispute resolution proceedings are to be drawn up by the ITPGRFA’s Secretariat for consideration by the Third Party Beneficiary Committee. One of the interesting issues in this regard is the extent to which the Governing Body itself may be involved in the initiation of dispute settlement procedures and the extent to which such decisions will be left to the Treaty’s Secretariat. On the one hand, there may be a need to ensure that action is not delayed by political considerations, while, on the other hand, the airing of disputes in a political forum could provide an important impetus for the resolution of some disputes regarding non-compliance.
While the legal and institutional framework is thus well on its way to being finalized, the effectiveness of the scheme will depend on how well it can be made to operate in practice. On this aspect, of course, the jury is still out. Given the need to establish credibility in the system, great care will need to be taken in the selection and management of the first cases.

**Implications of the concept for other fora**

In one sense, the concept of the third party beneficiary under the SMTA is peculiar to the circumstances of the SMTA and the multilateral system. Under the multilateral system, all transfers of PGRFA have to be subject to the SMTA, which is an agreement between an individual provider of PGRFA and an individual recipient, albeit containing standard terms negotiated by the contracting parties to the ITPGRFA on a multilateral basis. However, the SMTA differs from other MTAs in that the PGRFA being transferred are recognized as being pooled and, in this sense, as having their origins in, and flowing from, the multilateral system itself rather than from any individual provider. Similarly, the benefits arising from the use of PGRFA in the multilateral system flow not to the individual provider but, rather, to the multilateral system itself. Since individual providers will not be obtaining any benefits directly from the recipient under the SMTA, there is thus little or no incentive for those providers to take costly legal action to enforce the terms of the SMTA. As the PGRFA is transferred on to subsequent recipients, who themselves become providers in the chain of transfers, the incentive to enforce compliance becomes even more tenuous. The concept of the third party beneficiary stems from this very particular situation and addresses a particular need in particular circumstances.

That said, there is another aspect of the concept of the third party beneficiary that addresses a more widespread need that is not restricted to the transfer of PGRFA under the multilateral system. This is the need felt by many developing countries for some mechanism for guaranteeing compliance with MTAs. Compliance is a particular problem for the SMTA, which calls for particular solutions. But it is also a more general problem for MTAs covering other genetic resources — a problem that has been exercising the minds of the contracting parties to the Convention on Biological Diversity (CBD) for example.²¹ It is hoped that the concept of the third party beneficiary and the empowerment of an international institution such as the FAO to initiate legal action through dispute settlement procedures to protect the integrity of the multilateral system will help to resolve this problem for the contracting parties to the ITPGRFA. Perhaps some aspects of this approach may prove useful to help resolve the problem in other fora, such as the negotiations on access and benefit sharing under the CBD. However, first it would be necessary to identify interests arising under MTAs that could properly be categorized as multilateral.

**Conclusions**

The third party beneficiary is an innovative concept introduced into the SMTA to solve the problems of compliance arising from the fact that benefits arising from the
The use of PGRFA transferred under the SMTA flow to the multilateral system itself rather than to the individual parties to the SMTA. The FAO has accepted in principle to represent the interests of the third party beneficiary under the SMTA and, in particular, to initiate dispute settlement procedures where necessary to protect those interests. In undertaking these responsibilities, the FAO will act under the direction of the Governing Body. The procedures for the operation of the third party beneficiary have now been established by the Governing Body at its third session, and an operational reserve is being set up to finance those operations. How well the system will operate in practice remains to be seen.

While the concept of the third party beneficiary has been designed to deal with the particular problems raised by the multilateral nature of the SMTA, it also responds to a more deep-seated need on the part of developing countries for an institutional mechanism to guarantee compliance with SMTA obligations. Similar needs have been expressed by developing countries in other fora, such as the CBD. However, whether the concept can be extended to MTAs for other genetic resources may depend on the identification of the multilateral interests to be protected under those MTAs.

Notes

2 The benefits include payments on the commercialization of products incorporating material accessed from the multilateral system and information resulting from research and development carried out on the material.
4 The terms of reference of the Contact Group are set out in Appendix C to the report.
5 The reports of the Legal Export Group were delivered orally by the chairman, although informal written copies were provided to the various regions.
6 The Legal Working Group pointed out that the agency proposal might lead to a principal being held responsible for all of the obligations of the provider under Article 6, while this was clearly not the intention. It also noted that the agency proposal might be perceived as interfering with the sovereignty of the contracting parties.
7 The Contact Group’s text was as follows:

5.2 The parties to this Agreement agree that the (legal person representing the Governing Body), as a third party beneficiary, has the right to monitor the execution of this Agreement and to initiate dispute resolution procedures in accordance with Article 9.2, in the case of a breach of this Agreement.

5.3 The monitoring and locus standi rights, referred to in Article 5.2, include but are not limited to, the rights to:

(a) request samples of any Product from the Provider and the Recipient, and information relating to the execution of their obligations under Articles 6.1 and 7.1, 7.2, 7.4, 7.5, 7.6, 7.7, 7.10, 7.11 and 7.13, including statements of account;
(b) initiate dispute resolution procedures in conformity with Article 9 of this Agreement, in the case of a breach of the obligations referred to in paragraph (a) above.
5.4 The rights granted to the (legal person representing the Governing Body) above do not prevent the Provider and the Recipient from exercising their rights under this Agreement.

9.1 Dispute settlement may [only] be initiated by the Provider or the Recipient [or a person duly appointed to represent the interests of third party beneficiaries under this Agreement] [but acknowledging that this does not preclude the Governing Body from taking any action it deems appropriate if it considers that this agreement has been breached].

8 The information document was prepared by the Legal Office of the Food and Agriculture Organization (FAO) of the United Nations, in consultation with the Secretariat of the ITPGRFA and Bioversity International.

9 The description of the basis for the concept in the ITPGRFA and in national law presented later in this chapter draws much on the information document submitted to the Contact Group.

10 The Contact Group adopted a recommendation calling on the Governing Body to establish the operational procedures necessary to enable the third party beneficiary to carry out the role assigned to it in the Standard Material Transfer Agreement (SMTA).

11 The Principles of International Commercial Contracts 2004 were adopted by the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) in 2004. They differ from the 1994 version of the principles in a number of ways, including, in particular, the inclusion for the first time of the recognition of third party rights. UNIDROIT is an independent intergovernmental organization whose purpose is to study the needs and methods for modernizing, harmonizing and coordinating private and, in particular, commercial law as between states and groups of states. UNIDROIT was originally set up in 1926 as an auxiliary organ of the League of Nations and, following the demise of the league, was re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute. At present, some 60 states are party to the statute. The 2004 principles were adopted by consensus by the UNIDROIT Governing Council.

12 Article 7 provides that ‘[t]he 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, where necessary for interpretation, the decisions of the Governing Body.’ The General Principles of Law were chosen mainly to avoid the difficulties of deciding on a particular body of national law, whether this is a named national body of law, such as that of Switzerland, or a generic choice, such as the law of the provider, the law of the recipient or the law where the SMTA was entered into. The Governing Body also took into account the difficulties that the FAO, which was invited to serve as the third party beneficiary under the SMTA, would have, as an organization of the UN system, in submitting itself to any system of national law under arbitration proceedings. All agreements entered into by the FAO that have a choice of law clause provide for General Principles of Law as the applicable law.

13 Article 5e of the SMTA provides for notification by the provider of the SMTAs entered into; Article 6.5c provides for notification of transfers of plant genetic resources for food and agriculture under development; and paragraph 3 of Annex 2 provides for notifications regarding sales of products by the recipient, its affiliates, contractors, licensees and lessees as well as amounts of payments due and information allowing for the identification of restrictions that give rise to benefit-sharing payments.

14 Article 5e provides as follows: ‘The Provider shall periodically inform the Governing Body about the Material Transfer Agreements entered into, according to a schedule to be established by the Governing Body. This information shall be made available by the Governing Body to the third party beneficiary.’

15 Article 8.3 provides as follows: ‘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.'

16 The applicable law for the arbitration is to be General Principles of Law, including the UNIDROIT Principles of International Commercial Contracts 2004, the objectives and the relevant provisions of the ITPGRFA, and, when necessary for interpretation, the decision of the Governing Body (Article 7).

17 See CGRFA (2006a) and note 7 earlier in this chapter.

18 Since the ITPGRFA is concluded under Article XIV of the FAO Constitution (www.fao.org/docrep/003/x8700e/x8700e01.htm#14 (last accessed 10 October 2010)), the usual practice would be for the Governing Body to draw on the legal personality of the FAO itself in all matters requiring the exercise of legal personality.

19 In Circular State Letter no. G/X/AGD-10, dated 22 December 2006, the director-general of the FAO communicated to the contracting parties his ‘agreement in principle’ for the organization to act as the third party beneficiary foreseen in the STMA. This agreement in principle is subject to formal approval, upon review of the procedures to be established by the Governing Body at its next session, defining the roles and responsibilities of the third party beneficiary.

20 The providers of material under the SMTA are required to provide the Governing Body once every two calendar years with the following:

- a copy of the completed SMTA; or
- in the event that the Provider does not transmit a copy of the SMTA:
  - ensuring that the completed SMTA is at the disposal of the third party beneficiary as and when needed;
  - stating where the SMTA in question is stored and how it may be obtained; and
- providing the following information:
  - the identifying symbol or number attributed to the SMTA by the provider;
  - the name and address of the provider;
  - the date on which the provider agreed to or accepted the SMTA and, in the case of shrink wrap, the date on which the shipment was sent;
  - 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;
  - the identification of each accession in Annex I to the SMTA and of the crop to which it belongs.

21 Convention on Biological Diversity (CBD), 31 ILM 818 (1992). There have been many discussions in the Conference of the Parties to the CBD on the difficulties facing providers of genetic materials in enforcing the terms of MTAs in foreign countries. A number of developing countries engaged in the negotiations for the establishment of an international regime on access and benefit sharing have called for mechanisms of compliance and observance, including instruments for legal sanctions. See, for example, CBD (2004) and CBD (2005).

References


