

June 2012



The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



Item 5 of the Draft Provisional Agenda

THIRD MEETING OF THE *AD HOC* ADVISORY TECHNICAL COMMITTEE ON THE STANDARD MATERIAL TRANSFER AGREEMENT AND THE MULTILATERAL SYSTEM

New Delhi, India, 26-28 June 2012

TRANSFER AND USE OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE UNDER THE MULTILATERAL SYSTEM: TRANSFER TO FARMERS FOR DIRECT USE, AND FOR RESEARCH, BREEDING AND TRAINING¹

I. INTRODUCTION

1. The list of issues that the Governing Body mandated this Committee to consider includes the transfer of plant genetic resources for food and agriculture (PGRFA) under the Multilateral System of Access and Benefit-sharing (Multilateral System) to farmers for direct use, and for the purposes of research, breeding and training.²
2. The Committee first considered the issue at its first meeting, where it requested a working document to discuss the question as to the extent to which the Contracting Parties, CGIAR Centres and other international institutions that have concluded agreements with the Governing Body under Article 15 of the International Treaty can make PGRFA available directly to farmers for their direct use for cultivation, and whether such transfers should be under the SMTA.³ The Committee dealt with the issue more extensively at its second meeting.⁴
3. This document revisits the elements that were put forward in the background documents for the previous meetings of the Committee⁵, and the considerations made by the Committee at its

¹ In accordance with the request of the *Ad Hoc* Technical Advisory Committee and the Terms of Reference established by the Governing Body, this document was prepared for the exclusive purpose of facilitating the Committee's deliberations. Any opinion or position expressed in the document is not to be attributed to the Secretariat of the International Treaty on Plant Genetic Resources for Food and Agriculture.

² IT/GB-4/11/Report, Resolution 4/2011, Annex, *List of issues to be considered by the Ad Hoc Technical Advisory Committee on the Standard Material Transfer Agreement and the Multilateral System*. The report is available at <http://www.planttreaty.org/content/gb4>.

³ IT/AC-SMTA-MLS 1/10/Report, Appendix 7. The report is available at http://www.planttreaty.org/sites/default/files/ac_smta_mls1_repe.pdf.

⁴ IT/AC-SMTA-MLS/2/10/Report, paras. 36-47. The report is available at http://www.planttreaty.org/sites/default/files/ac_smta_mls2_repe.pdf.

⁵ IT/AC-SMTA-MLS 1/10/8, *Transfer and use of PGRFA under the SMTA*, available at http://www.planttreaty.org/sites/default/files/ac_smta_mls1_w8e.pdf; IT/AC-SMTA-MLS 2/10/7, *Transfer and use of PGRFA under the SMTA: transfer to farmers for direct use for cultivation*, available at http://www.planttreaty.org/sites/default/files/ac_smta_mls2_w7e.pdf.

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second meeting. Since the Governing Body requested the Committee to consider the issue from both the aspects of transfer for direct use, and transfer for research, breeding and training, this document reflects this two-fold approach.

II. BACKGROUND

4. The Committee initially addressed the issue by dealing with the meaning of “transfer” under the Standard Material Transfer Agreement (SMTA), and more precisely transfer entailing possession of the material. It is only in cases of transfer entailing possession that an SMTA is to be used, with the caveat that an SMTA might not be required in cases where the purpose of the transfer is not utilization and conservation for research, breeding and training for food and agriculture.

5. This might be the case of direct transfer to farmers for direct use, where direct use means direct use for cultivation, and the question pertains to the purpose of the transfer.

6. The Committee examined the issue mostly by considering the legal situation and the practice of the International Agricultural Research Centres of the Consultative Group on International Agricultural Research (CGIAR Centres). So far, the practice of the CGIAR Centres has been based on the consideration that, although the agreements entered into between the CGIAR Centres and the Governing Body under Article 15.1 of the International Treaty do not address the issue of direct cultivation, the “Statement of the Centres regarding implementation of the agreements between the Centres and the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture”, issued on 16 October 2006, contained the following declaration:

It is also understood that nothing in Article 2[of the Agreement] will prevent the Centres from making PGRFA from the Multilateral System directly available to farmers or others for cultivation, as is the current practice, whether this is unimproved or improved PGRFA⁶.

7. The reference to “current practice” suggests that the CGIAR Centres do not intend to change the practice by which they made available PGRFA for direct cultivation. In the statement, there is no indication about the use of the SMTA for that purpose.

8. It is worth noting that under the Agreements signed in 1994 between FAO and the CGIAR Centres, access for direct cultivation was also not explicitly mentioned. There was nothing in the Material Transfer Agreement (MTA) used by the Centres under those Agreements that excluded access for such a purpose⁷. However, in adopting the Interim MTA for the Centres at its Ninth Session (October 2002), the FAO Commission on Genetic Resources for Food and Agriculture agreed on the following footnote to article 4.⁸

This does not prevent the recipients from releasing the material for purposes of making it directly available to farmers or consumers for cultivation, provided that the other conditions set out in this MTA are complied with.⁹

⁶ Available at

http://www.cgiar.org/pdf/CGIAR%20Alliance%20statement%20on%20Implementation%20Agree_October2006.pdf.

⁷ The CGIAR Centres adhered, under those agreements, to ‘a policy on plant genetic resources which is based on the unrestricted availability of germplasm held in their genebanks’ (Preamble).

⁸ Article 4 states: ‘The recipient may utilize and conserve the material for research, breeding and training for food and agriculture and may distribute it to other parties provided such other parties are also willing to accept the conditions of this agreement’.

⁹ The Commission’s report is available at

<http://www.fao.org/DOCREP/MEETING/008/Y8004E/Y8004E00.HTM>

9. However, the footnote addressed the situation of subsequent transfers by a recipient of materials under an MTA, and suggested that a new MTA would have to be concluded (“provided that the other conditions set out in this MTA are complied with”).

10. It is a fact that the CGIAR Centres distribute material directly to farmers. More frequently, however, the CGIAR Centres distribute material to public and private organizations that multiply seeds (or other reproductive material) for distribution and or commercialization. In the majority of the latter cases, recipients, mostly national agricultural research organizations (NAROs), engage in some form of further development (e.g. selection) of the material before making it available to farmers for direct use. The Genetic Resources Policy Committee of the CGIAR Centres recommended using the SMTA in those cases.¹⁰

11. Consequently, an initial distinction can be made between transfers for direct use by farmers, on the one hand, and transfers to NAROs for further breeding and subsequent transfer for cultivation, on the other. The case for the use of the SMTA seems clear in the latter situation, as the transfer is intended or leads to activities expressly covered by the Multilateral System and, in fact, the SMTA.

12. The CGIAR Centres make further differentiations in relation to the different types of PGRFA, and the rights of other parties over those PGRFA. With regard to types of PGRFA, the CGIAR Centres make improved material they have developed from material acquired from the Multilateral System, available to farmers for direct use. This is deemed to be one of their prerogatives as developers of the new material.

13. Making PGRFA that have not been improved by the CGIAR Centres available for direct use in the form received raises an issue depending on the rights of other parties over those PGRFA. The CGIAR Centres make PGRFA available to farmers for direct use, except where, and to the extent that, this would impinge on the rights of the providers of such PGRFA. In cases where PGRFA have not been received by the CGIAR Centres under an SMTA, the CGIAR Centres make those PGRFA available to farmers for direct use.

14. The problem arises where material is received by CGIAR Centres under an SMTA. The SMTA is a contractual instrument, and under that instrument the material is being made available “solely for the purpose of utilization and conservation for research, breeding and training”. Under the normal rules of interpretation, this would not include direct use for cultivation. The problem is not merely one of legal nicety, since some, though not all, providers of germplasm may have difficulties in having their material released for direct cultivation by farmers in other countries. This would apply to both providers of PGRFA originally found in farmers’ fields, as well as to commercial providers of improved materials.

15. One possible solution that has been conceived is to request the express permission of the provider to make the material available to farmers for direct use for cultivation. Any such express permission is to be legally separate from the SMTA, as the SMTA is a standard contract, the terms and conditions of which cannot be changed to fit individual circumstances. However, in this context, there is nothing that would prevent a provider giving its express permission for the use of material outside the framework and terms and conditions of the SMTA.

16. There are, however, two complicating factors associated with this suggested approach. First, the provider will need to have the legal authority to give express permission for the use of the material for purposes other than those covered by the SMTA. Second, it is sometimes difficult in practice to distinguish between transfer for direct use and transfer for research and breeding where transfers to farmers are concerned, particularly where those farmers are small-scale farmers in developing countries, and particularly where transfers from CGIAR Centres are involved.

¹⁰ The Committee was dissolved in 2010. The minutes of its 23rd meeting are available at http://www.cgiar.org/pdf/grpc_23rd_meeting_minutes.pdf

One of the *modus operandi* of the CGIAR Centres is to provide germplasm to farmers and allow them to continue the process of selection and evaluation, without precluding the direct use of the material in the form provided. In some situations, as for example in the case of participatory breeding activities, the distribution is clearly predominantly for the purpose of research and breeding. In other cases, where for example, the material is supplied for the purpose of restoration of lost landraces, the element of direct use may predominate.

III. ANALYSIS

17. The analysis can be articulated around two questions. Do CGIAR Centres have the right to distribute PGRFA, which are under the terms and conditions of the Multilateral System, to farmers for direct use for cultivation? If so, do they have to use the SMTA or make other arrangements?

18. With regard to the first question, it will be recalled that under Part IV of the International Treaty, Contracting Parties have agreed to grant facilitated access to *Annex I* PGRFA to other Contracting Parties or entities within their jurisdiction where access is requested for the purpose of research, breeding or training. Under the Article 15 agreements signed with the Governing Body, CGIAR Centres are similarly under an obligation to make PGRFA they hold under the terms and conditions of the Multilateral System “available in accordance with the provisions set out in Part IV of the Treaty” (Article 2(a)). Hence, facilitated access must be granted where the access is requested for the purpose of research, breeding or training, including by farmers. But, access can of course be requested for other purposes, including direct use for cultivation.

19. While direct use for cultivation is not a use for which facilitated access can be requested, this does not necessarily prevent the release of material for direct use for cultivation, *a fortiori* where this is in accordance with the objectives of the Treaty and is necessary for the fulfilment of the mandate of the institutions concerned.¹¹ Considering that farmers play a key role in the conservation and improvement of PGRFA, facilitating access to materials for direct cultivation may be seen as consistent with the International Treaty’s objective to promote the sustainable use of PGRFA.

20. Moreover, as a general principle, the fact that Contracting Parties have agreed to grant facilitated access to certain PGRFA for certain purposes in no way limits the rights of those Contracting Parties to make that material available for other purposes, including for the purpose of direct use for cultivation. Similarly, it could be argued that the wording of Article 2(a) of the Article 15 agreements signed by the CGIAR Centres with the Governing Body would not have the effect of prohibiting the CGIAR Centres from making material from the former “in-trust” collections available to farmers for direct use for cultivation.

21. With regard to the second question, since article 12.3(a) of the International Treaty does not refer to “direct use for cultivation”, and hence direct use by farmers for cultivation does not fall within the purposes for which PGRFA shall be made available by facilitated access under the Multilateral System through the SMTA, this would also seem to preclude the use of the SMTA for transfers of PGRFA for the purpose of direct use for cultivation.

22. At the practical level, CG Centres have contended that the use of the SMTA may create a practical barrier for the access to PGRFA by farmers, given the complexity of the agreement and the possible reluctance by farmers to accept obligations they do not fully understand. The likelihood that farmers require the signature of a new SMTA, if it were applied, for further transfers of the materials is very low, given the informality that prevails in the exchange of seeds. The risk that farmers claim or assert intellectual property rights over materials received is very

¹¹ G. Moore and W. Tymowski (2005), *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture*, IUCN, p. 90, available at <http://app.iucn.org/dbtw-wpd/edocs/EPLP-057.pdf>.

low.¹² Though, it may also be argued that these considerations would only apply to small farmers, since industrial farmers or farmers' organizations may benefit from legal advice and possess the resources to implement the SMTA and that, in the absence thereof, they might seek or assert intellectual property rights which might be in contradiction to the provisions of the Treaty.

23. On the other end, concerns about "leakage" of material through transfers for direct use might suggest the need to use the SMTA in the case of direct cultivation, despite the fact that no reference is made in the Treaty to transfers for that purpose. It may be argued that farmers are also breeders and that, in the last resort, transfers for direct cultivation would necessarily lead to some form of breeding. In other words, although transfers for direct cultivation are not covered by the Multilateral System, they create the risk of "leakage" of material that is in the Multilateral System and this would justify the use of the SMTA.

24. Consequently, these arguments may lead to the application of a flexible approach, according to which the CGIAR Centres, acting as providers, should require the signature of the SMTA where there is a reasonable probability that the material will be used by farmers, in particular industrial farmers or farmers' organizations, for research or breeding. This would require, however, the provider's capacity to assess the circumstances of each case and its willingness to bear the corresponding costs of exercising this sort of due diligence.

IV. ISSUES FOR CONSIDERATION BY THE COMMITTEE

25. The Committee, at its second meeting, noted the importance of making available material for use for cultivation in farmers' fields, but also noted that direct use by farmers for cultivation did not fall within the purposes for which PGRFA shall be made available under the Multilateral System through the SMTA.

26. The Committee agreed that there would be no problem with CGIAR Centers and other international institutions under Article 15 making available to farmers PGRFA that they have developed from materials acquired from the Multilateral System. This was their prerogative as developers of the material.

27. The Committee also considered that there would be no legal problem with the CGIAR Centers and other international institutions making material available to farmers for direct use where that material was held in trust.

28. In the views of the Committee, the problems would arise with making available for direct use for cultivation materials that have been received under the SMTA, since the terms of the SMTA require that the use of the material be restricted to research, breeding and training.

29. In general, the Committee concluded that if material acquired from the Multilateral System under the SMTA was to be made available for direct use for cultivation, this would require the express permission of the provider who transferred it to the CGIAR Centres or other international institutions.

30. The Committee also considered that, when making PGRFA available for direct use for cultivation only, the SMTA would not be the appropriate instrument to use.

31. The Committee issued a note for guidance to CGIAR Centers and other international institutions that have signed agreements with the Governing Body under Article 15 of the Treaty on making available PGRFA for direct use for cultivation, with the following points:

- a) CGIAR Centers have the right to make improved material they have developed from PGRFA acquired from the Multilateral System available to farmers for direct use.

¹² These considerations would also apply in the case of transfer to farmers for research, breeding and training.

- b) CGIAR Centers may make PGRFA in their collections available to farmers for direct use for cultivation where those PGRFA were held in trust.
- c) PGRFA received under the SMTA can be made available to farmers as unimproved material for direct use for cultivation only if there is a separate express permission from the provider allowing for such distribution.
- d) No such permission would be required where germplasm is being restored to farmers that originally provided it.
- e) PGRFA distributed to farmers for direct use for cultivation should not be transferred with the SMTA. They should be transferred with a statement that the material can be used directly for cultivation. The following is a suggested wording for the statement: *“This material can be used by the recipient directly for cultivation, and can be passed on to others for direct cultivation.”*
- f) Where PGRFA are transferred for both research and breeding and for direct use for cultivation, or where it is unclear whether the transfer is for one or the other purposes, then both the SMTA and the statement giving express permission for direct use for cultivation should be used, except in cases where the germplasm is being restored.

V. CONCLUSION

32. The Committee is invited to examine this issue further and, taking into account the state of implementation of the Multilateral System, provide any advice or opinion that is appropriate in the circumstances.

33. In particular, the Committee is invited to examine whether its advice would apply not only to CGIAR Centres and other Article 15 signatories but to Contracting Parties as well.