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# The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



## Item 8 of the Draft Provisional Agenda

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

Brasília, Brazil, 31 August – 2 September 2010

### “TRANSFER” AND “USE” OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE UNDER THE STANDARD MATERIAL TRANSFER AGREEMENT - TRANSFER TO FARMERS FOR DIRECT USE FOR CULTIVATION<sup>1</sup>

## 1. INTRODUCTION

1. At its first meeting, the *Ad Hoc* Advisory Committee on the Standard Material Transfer Agreement and the Multilateral System (‘the Committee’)<sup>2</sup>, in the context of transfer and use of plant genetic resources for food and agriculture (PGRFA) under the Standard Material Transfer Agreement (SMTA), requested a working document to discuss the question as to the extent to which the Contracting Parties, International Agricultural Research Centers of the Consultative Group on International Agricultural Research (CG Centres) and other International Institutions that have concluded agreements with the Governing Body of the International Treaty under Article 15 can make PGRFA available directly to farmers for their direct use for cultivation, and whether such transfers should be under the SMTA. This working document further explores the issue. It has been developed based on inputs received from Bioversity International.

## 2. PRELIMINARY CONSIDERATIONS

2. There appears to be agreement in principle, in particular amongst the CG Centres, on the utmost importance for farmers to be able to receive material directly from the Multilateral System of Access and Benefit-sharing (Multilateral System), both for research and breeding, and for direct use for cultivation. It is also the ultimate aim of the International Treaty that PGRFA should be available for farmers to use in improving sustainable agriculture and ensuring food security.

3. In the statement issued by the Alliance of CG Centres at the time of signature of the agreements with the Governing Body in 2006, the Alliance voiced its understanding that the agreements would not prevent the Centres from making PGRFA from the Multilateral System

<sup>1</sup> In accordance with the request of the *Ad Hoc* Advisory Committee, 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.

<sup>2</sup> Rome, 18-19 January 2010.

directly available to farmers or others for cultivation, as is the current practice, whether this is unimproved or improved PGRFA<sup>3</sup>.

4. While it is expected that most stakeholders would share these views in principle, multiple aspects of such transfers are to be considered. It is important not to lose sight of the ultimate goal of the International Treaty. But it is also necessary to ensure that the International Treaty is implemented in a transparent and internally consistent manner.

5. Direct use by farmers for cultivation does not fall within the purposes for which PGRFA shall be made available under the Multilateral System through the SMTA. While this would seem to preclude the use of the SMTA for transfers of PGRFA for the purpose of direct use for cultivation, this does not necessarily preclude making PGRFA from the Multilateral System directly available to farmers for direct use under some other contractual arrangement.

6. The rights of the Contracting Parties and CG Centres, as signatories of Article 15 agreements, to make PGRFA available to farmers for direct use can be analysed in relation to the different types of PGRFA, and the rights of other parties over those PGRFA.

7. Both the Contracting Parties and the CG Centres would retain the right to make PGRFA available to farmers for direct use, except where, and to the extent that, this would impinge on the rights of other parties, including the providers of such PGRFA under the SMTA.

### **3. MAKING IMPROVED PGRFA AVAILABLE TO FARMERS FOR DIRECT USE**

8. There would appear to be no disagreement regarding the possibility for CG Centres and indeed the right of Contracting Parties to make improved material they have developed from material acquired from the Multilateral System, available to farmers for direct use for cultivation. This would be one of their prerogatives as developers of the new material. Indeed making improved material widely available would seem to be one of the primary objectives of the Multilateral System. However, in neither case does it seem that the SMTA would be the appropriate legal instrument to be used.

### **4. MAKING PGRFA THAT HAVE NOT BEEN IMPROVED AVAILABLE TO FARMERS FOR DIRECT USE**

9. Making PGRFA that have not been improved by the CG Centres or Contracting Parties themselves available for direct use for cultivation in the form received would appear to raise other issues, depending on the provenance of the PGRFA concerned.

10. With regard to PGRFA not received under an SMTA, it is to recall that under Part IV of the International Treaty, Contracting Parties have agreed to grant facilitated access to Annex 1 PGRFA to other Contracting Parties or entities within their jurisdiction where the access is requested for the purpose of research, breeding or training. Under the Article 15 agreements signed by the CG Centres with the Governing Body, CG Centres are similarly under an obligation to make Annex 1 PGRFA they hold “available in accordance with the provisions set out in Part IV of the Treaty.” (Article 2(a))

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<sup>3</sup> While not dealing directly with the release of material by the CG Centres themselves, the Interim Material Transfer Agreement approved by the Commission on Genetic Resources for Food and Agriculture for use by the CG Centres pending the adoption of the Standard Material Transfer Agreement, contained a footnote indicating that the wording of the MTA would not prevent the recipients from releasing the material received for purposes of making it directly available to farmers and consumers for cultivation, provided that the other conditions set out in the MTA were complied with.

11. Part IV of the International Treaty sets out the terms under which facilitated access is to be granted to material in the Multilateral System, including the use of the SMTA. Facilitated access must be granted as of right to Contracting Parties or entities within their jurisdiction where the access is requested for the purpose of research, breeding or training. Access can of course be requested for other purposes, including commercialization and direct use. However, access other than for research, breeding or training, cannot be demanded as a right under the International Treaty.

12. 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. Under the normal rules of interpretation, any such limitation would need to be expressly provided for in the International Treaty, and cannot be implied without such express wording.

13. Similarly it can be argued that the wording of Article 2(a) of the Article 15 agreements signed by the CG Centers with the Governing Body would not have the effect of prohibiting the CG Centres from making material from the former “in trust” collections available to farmers for direct use for cultivation. Indeed the CG Centres historically have always made material available for other purposes, including direct use, and have always defended this practice. As noted above, in signing the agreements with the Governing Body, the CG Centres recorded their understanding to that effect. Historically, most of the material held by the Centres in their “in trust” collections was collected on the understanding to make it freely available. *A fortiori*, the wording of Article 2(a) of the agreements with the Governing Body would not seem to constitute a restriction to the practice of CG Centres to make Annex 1 PGRFA available for purposes other than research, breeding or training, if the material was originally received under an agreement that expressly allowed for such material to be made available for such purposes.

14. With regard to PGRFA received under an SMTA, the main problems would appear to arise where material is received by CG Centres or Contracting Parties 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 to this problem might be to request the express permission of the provider to make the material available to farmers for direct use for cultivation. Any such express permission would need to be legally separate from the SMTA. The SMTA is a standard contract, the terms and conditions of which cannot be changed to fit individual circumstances. However, as noted above, 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, as noted by this Committee at its first meeting, 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 CG Centres are involved.

17. One of the *modus operandi* of the CG 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.

#### 4. CONCLUSIONS

18. The following are the conclusions flowing from the above analysis.

a) It may be considered an accepted practice of the CG Centres, not altering the integrity of the Multilateral System, and a right of Contracting Parties, to make improved material they have developed from material acquired from the Multilateral System available to farmers for direct use. This is indeed a fundamental objective of the Multilateral System.

b) CG Centres and other international institutions that have signed Article 15 agreements with the Governing Body may make unimproved material from their collections available to farmers for direct use with the following distinctions.

c) Material received under the SMTA can be made available to farmers for direct use 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 in the countries from which it was originally collected from *in situ* conditions.

e) Material distributed for direct use 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 in the form received by the recipient directly for cultivation.”

f) Where material is transferred for both research and breeding and for direct use, 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 should be used, except of course in cases where the germplasm is being restored to farmers in the countries from which it was originally collected from *in situ* conditions.

19. The Committee is invited to make its deliberations on the subject, as deemed appropriate, taking into due consideration the importance of ensuring that PGRFA do reach the farmers for their use in improving sustainable agriculture and ensuring food security.