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Item 10 of the Provisional Agenda

INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

SECOND SESSION OF THE GOVERNING BODY

Rome, Italy, 29 October – 2 November 2007

EXPERIENCE OF THE CENTRES OF THE CONSULTATIVE GROUP ON INTERNATIONAL AGRICULTURAL RESEARCH (CGIAR) WITH THE IMPLEMENTATION OF THE AGREEMENTS WITH THE GOVERNING BODY, WITH PARTICULAR REFERENCE TO THE STANDARD MATERIAL TRANSFER AGREEMENT

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Annex 2: Experience of the CGIAR Centres with the SMTAs

I. Introduction

1. The following report summarises the experience of the International Agricultural Research Centres of the Consultative Group on International Agricultural Research (CGIAR Centres) with the implementation of the Agreements with the Governing Body of the Treaty, with particular reference to the Standard Material Transfer Agreement.

II. Signature of Agreements with the Governing Body and Alliance Statement

2. At its First Session, the Governing Body approved the model agreement between the Governing Body and the CGIAR Centres and other international institutions, and noted with pleasure that the CGIAR Centres would enter into these Agreements with the Governing Body in accordance with Article 15 of the Treaty. The Governing Body invited the Director General of FAO to sign the Agreements on its behalf.

3. Agreements between the Governing Body and the eleven CGIAR Centres holding in trust collections of germplasm were signed on 16 October 2006. At the time, the CGIAR Centres issued a Statement in which the Centres committed themselves to supporting and implementing the Treaty, and in particular, to working with the international community to build a strong and effective Multilateral System. In the Statement, the Centres indicated that they would apply the SMTA, as approved by the Governing Body, for all transfers of *Annex 1* plant genetic resources for food and agriculture (PGRFA) as from 1 January 2007. As stipulated by the Treaty, the Centres undertook to continue to apply the Material Transfer Agreement (MTA) currently in use for non-Annex 1 materials, until it is amended by the Governing Body at its Second Session. In the Statement, the Centres also took the opportunity to clarify the Centres' common understanding of certain provisions of the Agreements and to indicate some actions that the Centres would be taking to implement them. In so doing, the Centres are continuing the practice already established with the Joint Statements issued in connection with the signature and implementation of the "In Trust Agreements" entered into by the CGIAR Centres with FAO in 1994.

4. A copy of the Statement is attached at *Annex 1* to this report.

III. Date of implementation of the SMTA by Centres

5. As indicated in the Statement, most of the CGIAR Centres started using the SMTA on 1 January 2007. CIAT started using it on 3 January 2007, but did not distribute any materials on 1 and 2 January. CIMMYT started using the SMTA as of 14 January, but did not distribute any material in 2007 prior to that date. ICARDA started using the SMTA on 1 February 2007; no material was distributed prior to that date.

IV. Numbers of materials acquired under the SMTA as of 1 August 2007

6. During the period from 1 January to 1 August 2007, a total of 3,988 samples of germplasm were acquired. Most of these were acquired by IRRI (2,039 samples in 15 shipments from nine countries). CIMMYT acquired 1,890 samples, from germplasm developed by the centre that entered into its collections. CIP acquired 23 samples from one country (a Contracting Party to the Treaty); the SMTA appeared acceptable to the donor initially, but it has not been signed yet. Bioversity International acquired 36 samples. Four Centres reported that they had acquired no samples during this period. Further details are set out in the table in Annex 2 to this report.

V. Numbers of materials sent out under the SMTA as of 1 August 2007

7. A total of 97,669 samples were distributed under the SMTA during the period from 1 January to 1 August 2007. Of these, a high proportion, with the exception of distributions by IRRI¹ and CIP², consisted of improved materials sent out as PGRFA under Development³. These figures do not include internal transfers to breeding programmes within the individual Centres⁴. All such transfers are treated by the Centres concerned as being subject to the terms and conditions of the SMTA.

8. Further details are set out in the table in *Annex 2* to this report.

VI. Experience of the Centres with respect to the use of the SMTA

1. Concerns expressed by potential recipients

9. So far only three potential recipients have refused explicitly to accept materials under the SMTA. All three cases involved US companies or researchers. However one Centre (IITA) has reported that several persons who had requested germplasm failed to follow up with their requests after they were asked to sign the SMTA and to fulfil phytosanitary requirements, and that the use of the SMTA had considerably delayed the transfer of the germplasm in one case involving an USA recipient (by two months).

10. In only a few cases have Centres reported concerns expressed by potential recipients regarding the SMTA and its use. In cases where concerns have been expressed by potential recipients, these have related to the following:

- a. Lack of a threshold level of incorporation of Multilateral System PGRFA both for the triggering of mandatory payments and for the termination of such payments;
- b. Concern over bureaucratic requirements for tracking any release, coupled with the obligatory payments;
- c. Concern over the possibility and legal implications of transfers between potential recipients and their parent companies in other countries;
- d. Duration of benefit sharing in case of restrictions for further research and breeding;
- e. Concern over the length and complexity of the SMTA;
- f. Ambiguities in the meaning of the provisions on IPRs and uncertainties over what can be patented; and
- g. Concern over the use of the SMTA for the transfer of improved germplasm for further research and breeding (as PGRFA under Development).

11. Regarding the concerns expressed with respect to the duration of mandatory benefit-sharing, it is the understanding of the Centres that the obligation will cease when the Product

¹ Improved materials were sent out by IRRI only when it could identify an ancestor from the in trust collection, otherwise the material was sent out as normal PGRFA (i.e. not as PGRFA under Development).

² CIP distribution of PGRFA under Development is very low in 2007: this is temporary and due to upgrades in internal CIP systems. Usually CIP's distribution of PGRFA under Development is much higher than unimproved PGRFA.

³ For ICARDA, 14,442 samples were sent but using previous MTAs since the material was improved material and not designated material in the in trust collection. ICARDA will use the SMTA for material under development with dispatch of International Nurseries in Fall 2007.

⁴ CIP, for example, reports internal transfers of 1,712 accessions, of which 130 were PGRFA under Development.

becomes available without restriction, whether through the expiration of the period of patent protection or otherwise.

2. Views on the use of the SMTA expressed by the Centres

12. Centres have necessarily a limited experience with the use of the SMTA to date. The CGIAR system as a whole is very much on the learning curve in this regard. However, the following points have been raised by individual Centres:

a. Integrity of the “shrink-wrap” SMTA

The “shrink-wrap” option for the form of acceptance of the SMTA remains essential for routine germplasm distribution operations. However, some Centres have noted that shipments are often opened by customs, postal, drug enforcement and/or phytosanitary inspectors before the material reaches the proper recipient. It has been suggested by one Centre that one option could be to place the SMTA into a clear envelope within the shipment box with a second shrink-wrap label sealing the envelope.

b. Length and complexity of the SMTA

One Centre has noted that the size of the SMTA (i.e. number of pages) is an issue, partly because the Centre concerned includes SMTAs in both English and the appropriate language of the recipient. As a consequence, often the paper weighs more than the seed. Smaller and more compact versions of the SMTA would be helpful.

c. PGRFA under Development

- i. As a general principle, most Centres⁵ are distributing improved materials developed by their own breeding programmes under the SMTA, even though the original material from which the breeders' lines have been developed were not themselves acquired under the SMTA. This is in line with the common policy adopted by the CGIAR Alliance in May 2004 which required Centres making available products of Centres' research to do so subject to the benefit-sharing provisions of the SMTA to be adopted by the Governing Body of the Treaty. Improved materials from the breeding programmes are generally distributed as PGRFA under Development.
- ii. Some Centres having large breeding programmes have pointed out that to physically attach a new SMTA to each batch of breeders' lines exchanged during the course of a particular breeding programme would be extremely cumbersome, time consuming, costly and inefficient. Breeders' lines are constantly being exchanged to and fro with other breeders in the breeding programme, including Centres, NARS and other related breeders, for selection, testing and further improvement.
- iii. As a practical solution, Centres with large breeding programmes are being advised that they may wish to include in their framework agreements with breeders and institutions cooperating in breeding programmes wording along the following lines:

“All exchanges of breeder's lines and other plant genetic resources under development under the breeding programme are subject to the terms and conditions set out in the Standard Material Transfer Agreement adopted by the Governing Body of the International Treaty on Plant Genetic Resources for Food and

⁵ ICARDA will use the SMTA for material under development with dispatch of International Nurseries in Fall 2007

Agriculture at its First Session in June 2006, provided that Article 5a of the SMTA shall not apply. Inventories accompanying each shipment shall be deemed to constitute Annex 1 of the SMTA. A copy of the SMTA is attached to this framework agreement.”

- iv. Centres would then not need to use a separate SMTA for each individual transfer of breeder’s lines or other PGRFA under Development with the context of the ongoing breeding programme covered by the framework agreement. They would of course need to fulfil the reporting requirements under the SMTA with respect to the materials listed as being transferred under Annex 1 of the SMTA.

d. Possible additional conditions for transfers of PGRFA under Development

Article 6.6 of the SMTA provides for the right of the Parties to the SMTA to attach additional conditions, relating to further product development when entering into an SMTA for PGRFA under Development, including, as appropriate, the payment of monetary consideration. The Centres are in the process of developing guidelines with respect to additional conditions for SMTAs transferring PGRFA under Development. One provision that is likely to be included in such additional conditions will be the requirement that the recipient will provide the Centre directly with any evaluation data collected concerning the Material.

e. Definition of “Material” in the SMTA

Article 6.5 b) requires the Recipient to “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”. In this context, the Centres have noted that the capitalization of the term “Material” denotes that the term is defined in Article 3 of the SMTA as meaning the PGRFA specified in Annex 1 to the SMTA, i.e. the material being transferred under the SMTA in question. It is the understanding of the Centres that the “material” referred to in Article 6.5 b) is in fact the material originally received from the Multilateral System and not the Material (PGRFA under Development) actually being transferred under the SMTA. If this understanding is correct, the Governing Body may wish to consider recommending the inclusion of an explanatory footnote in the SMTA to this effect, in order to avoid confusion for future recipients of PGRFA under Development.

f. Transfers of PGRFA as part of a service provision

- i. Some Centres have raised the problem of dispatch of materials strictly for the purpose of laboratory analysis or other services on behalf of the Centre. It is understood that such dispatches are not transfers of PGRFA for use for research, breeding or training, within the meaning of the Treaty, and that the use of the SMTA for such dispatches is not appropriate. Indeed, the delivery of material for such service purposes specifically does not authorize its use for research, breeding or training, transfer to others by the service provider, or retention or use by the service provider after the service is provided. The contract for such services contains wording to that effect.
- ii. Where material is to be sent for both service purposes and for use for the recipient’s own training, breeding and research, the material is being sent with the SMTA in addition to the service contract provisions.

g. Other Matters

Article 5 e) of the SMTA provides that the Provider of PGRFA under the SMTA shall periodically inform the Governing Body about the Material Transfer Agreements entered into, according to a schedule to be established by the Governing Body. The Centres would appreciate some guidance from the Governing Body as to the schedule to be followed in reporting, and the preferred format for reports.

3. Information that has come to the knowledge of individual Centres regarding implementation of the SMTA by partners, including NARS

13. To date, the experience of the Centres indicates a limited use of the SMTA on the part of partners from whom they receive materials or with whom they work. One Centre in particular has commented that “the lack of understanding and awareness seems almost universal. Everyone is confused – ARIs and NARS alike. We receive frequent requests for specific information or for training courses.”⁶ A number of Centres have reported similar requests from national programmes for technical assistance implementing the Treaty, and the multilateral system of access and benefit sharing in particular.

VII. System-wide activities regarding implementation of SMTA

14. The Centres have adopted a system-wide approach to their implementation of the Agreements with the Governing Body and in particular the SMTA. This has included the development of a Guide for the CGIAR Centres’ Use of the Standard Material Transfer Agreement, and a series of Frequently Asked Questions (FAQs) on the Treaty and the SMTA. Copies of the Guide and FAQs will be made available for participants at the Governing Body Session. In addition, a series of awareness raising/training activities with genetic resources programmes and breeders are being coordinated on a system-wide basis (including within the framework of the Generation Challenge Programme).

15. The Centres are also participating actively in the FAO/Bioversity International Project on the Information Technology Support for The Implementation of the Multilateral System of Access and Benefit-Sharing. Work is also proceeding on the development of a one step ordering system for the CGIAR System.

VIII. Conclusions and recommendations

16. The above report is submitted for the information of the Governing Body. The attention of the Governing Body is drawn in particularly to:

- a. The need for guidance from the Governing Body as to the schedule to be followed in reporting, and the preferred format for reports; and
- b. The proposed practice of the CGIAR Centres in developing framework agreements for the transfer of PGRFA under Development among partners in established breeding programmes, as a means of developing more efficient means of implementing the Multilateral System, without endangering the integrity of the SMTA, and its possible extension to include framework agreements with regular customers.

⁶ Communication from IRRI.

Annex 1

STATEMENT OF THE CGIAR 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

1. The Centres of the Consultative Group on International Agricultural Research warmly welcome the signing of Agreements with the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture in regard to the *ex situ* collections described in Article 15 of the Treaty. With the signing of these Agreements, the Centres commit themselves to supporting and implementing the Treaty, and in particular, to working with the international community to build a strong and effective Multilateral System.

2. The Centres note that, with the adoption of the Standard Material Transfer Agreement (SMTA) by the Governing Body at its First Meeting, the stage is now set for the full implementation of the Multilateral System. The Centres will apply the SMTA, as approved by the Governing Body, for all transfers of Annex 1 plant genetic resources for food and agriculture (PGRFA) as from 1 January 2007. As stipulated by the Treaty, for non-Annex 1 materials, the Centres will continue to apply the Material Transfer Agreement (MTA) currently in use until it is amended by the Governing Body at its second Session.

3. This statement clarifies the Centres' common understanding of certain provisions of the Agreements and indicates some actions that the Centres will be taking to implement them.

A. WITH RESPECT TO ARTICLE 2 OF THE AGREEMENTS DEALING WITH THE RIGHTS AND OBLIGATIONS OF THE PARTIES:

Non-Contracting Parties

4. It is understood that nothing in Article 2 of the Agreement will prevent the Centres from making available PGRFA held by it to non-Contracting Parties. The Centres will use the SMTA for distributions of Annex 1 PGRFA to non-Contracting Parties, and the Material Transfer Agreement (MTA) currently in use until it is amended by the Governing Body at its second Session for transfers of non-Annex 1 PGRFA. Centres will also apply the conditions of Article 2(b)(ii) to the return of samples of plant genetic resources to non-Contracting Parties.

Availability of PGRFA for cultivation

5. It is also understood that nothing in Article 2 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 PGRFA.

Compliance (Article 2 (b) (iv))

6. When Centres have reasonable grounds to believe that a recipient has violated the terms of a MTA, it will undertake the following actions in response to the perceived violation, in addition to any dispute resolution mechanisms set up under the approved MTA:

1. The Centre will request a written explanation. Upon failure to receive a satisfactory and timely explanation from the recipient, the Centre will notify the recipient

that a violation is thought to have occurred and request the recipient to conform to the requirements set out in the MTA.

2. When the Centre continues to have reasonable grounds to believe that a violation of the provisions of the MTA has occurred, it will promptly inform the Governing Body of the Treaty through its Secretariat and IPGRI of the perceived violation and any follow-up action. Where the violation is with respect to the provisions on intellectual property rights, the Centre will notify the intellectual property rights-granting authority in the relevant country of the possibility that the MTA has been violated, and bring to their attention the fact that the grant of intellectual property rights may, therefore, have been inappropriate in the case of the material obtained from the Centre.

3. In regard to the above, the Centres will work in close cooperation with the Secretariat of the Governing Body of the Treaty.

4. Reports from the Centres concerning perceived violations of the MTA will be presented to the Governing Body at its regular sessions, through IPGRI, on the actions taken in accordance with 1 and 2 above.

7. The procedures described above will also be applied in respect of violations or perceived violations of SMTAs relating to PGRFA listed in Annex 1 of the Treaty.

***Obligations of Centres to make plant genetic resources for food and agriculture available
(Article 2 (a) and (b))***

8. Under the terms of this provision, the Centres “undertake to make plant genetic resources for food and agriculture available for the purpose of utilization and conservation for research, breeding and training for food and agriculture”. It is implicit in this undertaking that users will make reasonable requests for these purposes, and that the undertaking of the Centres in this regard would not, as under their previous agreements with FAO, extend to the fulfilment of unreasonable requests.

9. For example, sound management practices as well as practical or even biological constraints (such as seed availability or the health status of a sample) may at times limit the ability of centres to provide plant genetic resources for food and agriculture for the purposes spelled out above. It is understood that Centres will have to use some discretion in determining the size and number of samples to be provided at any given time to a particular recipient. Centres may not be able to distribute seed or other materials immediately when such distributions would reduce stocks below accepted levels for conservation purposes, or when the request is for such a number of samples or quantity of a particular accession as to make it financially or technically impossible for the Centre to meet the request in full, or make it impossible for the Centre to meet requests from others. In such cases, the Centre may ask that the recipient cover all or part of the costs of multiplying the relevant accessions. In cases of limited supplies, immediate availability of materials cannot be guaranteed. Such availability will follow a process of multiplication. Recipients might be advised that they may need to undertake their own seed multiplication when existing sample sizes are small (such as in the case with many accessions of wild relatives) or when demand for a particular sample exceeds supply.

10. In particular, multiplying woody species accessions and supplying materials of vegetatively propagated species can involve very time-consuming and expensive procedures.

While Centres endeavour to supply materials free of cost, in such circumstances it would be unreasonable to expect that Centres could guarantee unlimited quantities or immediate availability of all germplasm. At their discretion, Centres may request that users cover all or part of the costs involved in multiplication.

11. In filling requests for material for conservation purposes alone, users are invited to note the Global Plan of Action's objectives of "safeguarding as much existing unique and valuable diversity as possible in *ex situ* collections," while reducing "unnecessary and unplanned redundancy in current programmes."

12. In cases when a Centre cannot fully or immediately meet a request, the Centre will enter into a discussion with the requesting entity to develop and agree upon a plan and schedule for the supply of materials. This process might establish an agreed list of accessions to which priority would be given.

13. Centres cannot distribute samples that do not meet health or quarantine standards, or whose transfer could pose the danger of a spread of pests or disease. In distributing samples, the Centres will comply with all relevant international and national legislation and regulations regarding phytosanitary, biosafety and other relevant standards and procedures.

B. WITH RESPECT TO ACCEPTANCE OF THE SMTA:

14. The Centres welcome the clarification in the SMTA that the parties to the SMTA may choose to signify their acceptance of the SMTA in the "click-wrap" and/or "shrink-wrap" form. While the footnote to Article 1.2 of the SMTA provides that the insertion of the name and address of the Provider and Recipient is not required ("applicable") for shrink-wrap and click-wrap SMTAs, the Centres wish it to be known that, in the interests of transparency and greater enforceability of the SMTAs, they will in practice, on a voluntary basis, be including this information in click-wrap agreements, (the insertions will be generated electronically) and in shrink-wrap agreements that accompany transfers of ordered material.

Centro Internacional de Agricultura Tropical (CIAT)

Centro Internacional de Mejoramiento de Maíz y Trigo (CIMMYT)

Centro Internacional de la Papa (CIP)

International Center for Agricultural Research in the Dry Areas (ICARDA)

International Crops Research Institute for the Semi-Arid Tropics (ICRISAT)

International Institute of Tropical Agriculture (IITA)

International Livestock Research Institute (ILRI)

International Plant Genetic Resources Institute (IPGRI)

International Rice Research Institute (IRRI)

The Africa Rice Center (WARDA)

World Agroforestry Centre (ICRAF)

*Annex 2***EXPERIENCE OF THE CGIAR CENTRES WITH THE SMTAS**

	Acquisitions	Shipments	Countries	Transfers normal PGRFA	Transfers PGRFA under Development	Total transfers	Shipments	Countries	Rejections
Bioversity	36			85		85		6	0
CIAT	0					747	26		0
CIMMYT	1,890 ⁷	na	1	5,585	20,957	26,542	15		2
CIP	23 ⁸	1	1	1,324	63	1,387	34	24	
ICARDA	0			6,554	⁹	6,554	54		0
ICRAF	No Annex 1 material								
ICRISAT	0			1,178	15,662	16,840	233	22	0
IITA	0					5,423	23	6	0
ILRI	0					406	92	9	
IRRI	2,039	15	9	23,484	12,166	35,650	321	88	1
WARDA	0					4,035	35		0
TOTALS	3,988	16	11¹⁰	38,210	48,848	97,669	833	155¹⁰	3

⁷ Samples of germplasm developed by CIMMYT breeding programmes and acquired by genebank.

⁸ SMTA not yet signed.

⁹ 14,442 samples of PGRFA under Development were transferred using the old MTA since the material was not designated material in the in trust collection. ICARDA will now be using the SMTA for transfers of improved material as from Fall 2007.

¹⁰ Total does not distinguish whether new countries or repeat distributions to the same individual countries.