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The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



Item 12 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 OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE UNDER THE MULTILATERAL SYSTEM TO AFFILIATE COMPANIES¹

INTRODUCTION

1. The Secretariat received enquiries from users regarding the transfer of plant genetic resources for food and agriculture (PGRFA) under the Multilateral System to affiliate companies. The issues raised in those enquiries are contained in this document and presented to the Committee for advice and guidance.

THE QUESTIONS

2. An international vegetable seed company (affiliate company) is part of a consortium consisting of several affiliates that are located in different countries. All the affiliates are subsidiaries of a holding company. The affiliate company has obtained PGRFA under the SMTA and intends to transfer those PGRFA to other affiliates of the same holding. As a company belonging to a bigger consortium under which the same policies and procedures are applied, the question is whether those subsequent transfers are to be made under new SMTAs and, hence, to be notified to the Governing Body pursuant to article 6.4 of the SMTA. Reportedly, the affiliate company informs the other affiliates of the conditions of the SMTA and these conditions are routinely followed by those affiliates.

3. A second enquiry, on a similar issue, was received from an international genebank. A group of affiliate companies, which are separate legal entities, in different locations, have asked the international genebank that they be collectively named as a single recipient in the SMTA. Is this legally feasible? If so, is there any obligation of due diligence on the part of the provider (i.e. the international genebank) to verify whether the group member to which the shipment is sent has sufficient legal control over its affiliates to ensure that they will all honour their obligations under the SMTA?

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.

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PRELIMINARY ANALYSIS

4. Two of the key concerns that have arisen in the discussions regarding the transfer of PGRFA in the Multilateral System (i.e. under the SMTA) are:
- (a) avoiding the imposition of burdens that may hamper rather than facilitate access to PGRFA; and
 - (b) ensuring that there are no gaps that may lead to the ‘leakage’ of material from the Multilateral System, including gaps that may jeopardize the sharing of monetary and other benefits.
5. Both concerns require a balanced approach that recognises the need to find solutions that are consistent with the Treaty and effective in achieving its intended objectives, while taking into account the range of factors pertinent to the different situations and interests of stakeholders.
7. The first question relates to the obligation of an affiliate company to notify the Governing Body of transfers of material previously accessed under the SMTA to affiliates belonging to the same holding company. In this regard, it will be recalled that the Committee, at its second meeting, addressed the issue of transfer of material to affiliates in the context of the practical and legal implications for natural and legal persons putting material into the Multilateral System. The Committee was of the opinion that:
- *Transfers to other units of the same company or institution (the same legal person) need not be made under the SMTA. If these units transfer the material outside the same company or institution, in response to a request under the Multilateral System, an SMTA should be used.*
 - *Transfers to commercial partners and affiliates (different legal persons) as part of normal business practice may be made without the use of an SMTA.²*
8. The first point above does not apply to the case under consideration, as it deals with intra-company transfers. The second point covers situations like the one under consideration, where the affiliates are different legal persons.

There are a number of factors that may be relevant under this scenario, which the Committee may wish to consider in giving its opinion in more detailed terms, including:

- whether the affiliates are located in different countries, since the risk of leakage may be higher in the case of transboundary transfers that could necessitate the conclusion of new SMTAs as an essential measure to protect the interests of the Multilateral System;
- whether there is a possibility that the affiliates may subsequently transfer the material outside of the network of affiliates, in which case it might be desirable that the affiliates are clearly made aware that the material was obtained under an SMTA and that such material should not subsequently be transferred without another SMTA;
- whether the original recipient exercises due diligence, on a regular basis, to ensure that the material does not move to third parties without an SMTA, while bearing in mind that any subsequent SMTAs with third parties would have to be concluded by the original recipient (i.e. the affiliate company that originally accessed the material under the SMTA); and
- what the purpose of the “internal” transfer to affiliates is. If the purpose of the “internal” transfer is for research, breeding and training for food and agriculture, then there seems to be enough justification for concluding a new SMTA³

² IT/AC-SMTA-MLS/2/10/Report, Appendix 6. The report is available at http://www.planttreaty.org/sites/default/files/ac_smta_mls2_repe.pdf.

12. In consideration of the range of relevant factors, as outlined above, and the complexity of the interactions of these factors in the different possible cases, the Committee is invited to consider the possible approaches to address the issue, in response to the question. This might include the position that each time material is transferred, within or outside the territory that the transferor is located, to a separate legal entity, regardless of the status of such legal entity within a consortium or network of affiliates, a new SMTA is concluded, except in case of transfer to service providers, as previously advised by this Committee. This would entail the related obligation to notify the Governing Body of each transfer.

13. The second question presents a variant to the scenario described above in that the holding company intends to sign the SMTA on behalf of its affiliates, such that internal transfers to and between the affiliates would occur without the SMTA and that subsequent transfers to third parties may be effected by one of the affiliates with the SMTA.

14. In this case, an initial consideration would entail the prior determination whether the holding company has the legal powers to conclude a contract, such as the SMTA, on behalf of its affiliates. In this regard, a question that might arise is whether the prospective provider needs to exercise due diligence by verifying the existence of such legal powers. Furthermore, whether the provider should also exercise due diligence to verify that the holding company to which the shipment may be sent has sufficient legal control over its affiliates to ensure that they will all honour their obligations under the SMTA. Additional issues for consideration might also relate to all the factors outlined above for the first questions (for instance, if the affiliates are located in different countries, or what the chances are that those affiliates would subsequently transfer the material to third parties).

16. In consideration of the range of relevant factors, the Committee is invited to consider the possible approaches to addressing the issue, in response to the question. Taking into account the need to preserve the integrity of the Multilateral System and at the same time address the practical exigencies facing users, such approaches might include the option of:

- a) advising that the holding company concludes the SMTA autonomously and then transfers the material to affiliates using new SMTAs; or
- b) recommending that a statement in writing be made by the holding company, separate from the SMTA, committing to inform the affiliates of the terms and conditions of the SMTA and requiring them to transfer the material through the holding company and not autonomously.

³ See also the previous advice of the Committee on transfer to service providers. IT/AC-SMTA-MLS 1/10/Report, Appendix 7.

If, on the other hand, the physical movement of material occurs to receive a specific service on the material from a service provider (such as analysis, testing, multiplication, and similar services), the movement of the material might not constitute a “transfer” in the meaning of the SMTA, and in those cases the SMTA should not be necessary, provided that:

- where materials under the Multilateral System are transferred to service providers, the company exercises due diligence to ensure that the service provider does not use the material in any ways other than stipulated in the agreement for those services;
- the company exercises due diligence in order to ensure that the service provider destroys the material or returns the material after the conclusion of the service; and
- it is stated in the service contract or in any ancillary documentation that if the service provider wishes to use the material further for conservation and utilization for research, training and breeding, an SMTA shall be concluded.