



The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



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

REPORT

Introduction

1. The Third Meeting of the *Ad Hoc* Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System was held in New Delhi, India, from 26 to 28 June 2012. The list of participants is contained in *Appendix 4* to this Report.

Agenda Item 1. Opening of the meeting and Election of the Co-chairs

2. Mr Kent Nnadozie, Senior Treaty Support Officer, FAO, welcomed the members of the Committee and the observers to the meeting. He thanked the representatives of the government of India for their kind hospitality and outstanding logistical support, which made it possible to have the full membership attend this meeting. The meeting was the continuation of a long-standing and close relationship between India and the Treaty, exemplified by the number of senior officials of the government that attended the opening ceremony to welcome participants. Mr Nnadozie noted that the Governing Body, at its Fourth Session, reaffirmed the important role of this Committee for the proper functioning of the Multilateral System by reconvening it. He underscored that the agenda of the meeting contained many substantive items and hoped for positive and enabling outcomes to be referred to the Governing Body. He conveyed the apologies of Dr Shakeel Bhatti, Secretary of the Governing Body, for not having been able to attend the meeting.

3. Dr Atanu Purkayastha, Joint Secretary (Seeds), Government of India, and National Focal Point for the Treaty, remarked that India had been an active Contracting Party to the Treaty since its entry into force. He emphasized that many of the crops cultivated in India were essential to food security and noted the continuous need for active international collaboration for facilitated access and benefit-sharing for plant genetic resources for food and agriculture (PGRFA), for the benefit of mankind. He remarked that the Indian government had made practical arrangements to foster PGRFA activities in the country, including through the establishment of the Plant Variety Protection and Farmers' Rights Authority.

4. Dr S.K. Datta, Deputy Director General (Crop Science), Indian Council for Agricultural Research (ICAR), noted positively that the full attendance by Committee members testified to the commitment by the Treaty constituency to the implementation of the Multilateral System. He recalled that India had continuously benefited from the global flow of PGRFA. He hoped that this meeting of the Committee would be an opportunity to continue open dialogue on the implementation of the Multilateral System, for the benefit of both resource-poor and resource-rich farmers.

5. Dr P.L. Gautam, Chairperson, Plant Variety Protection and Farmers' Rights Authority, and Vice-Chair of the Governing Body (Asia Region), remarked that some of the Committee members had been among the delegates who had advanced the negotiations of the Treaty up to its approval by the FAO Conference in 2001. He noted that global interdependence with regard to PGRFA would remain central in the Treaty discourse and that the Treaty should not operate in isolation from other international agreements such as the Convention on Biological Diversity, the Nagoya Protocol on access and benefit-sharing and the Agreement on Trade-related Aspects of Intellectual Property Rights. He hoped that the work of the Committee would capitalise on the past achievements as well as continue building trust between providers and recipients of PGRFA.
6. Dr Peter Kenmore, FAO Representative in India, referred to the positive outcomes of the Rio+20 United Nations Conference on Sustainable Development in relation to zero hunger and food security. He affirmed that, in the light of global interdependence, declining biodiversity and the evolving international governance of food and agriculture, the Treaty would be a practical and efficient response to those challenges in the ambit of PGRFA. He noted that the work of the Treaty had made rapid and consistent progress, also thanks to the technical inputs made by this Committee into the Governing Body processes.
7. Dr Balakrishna Pisupati, Chairperson, National Biodiversity Authority of India, briefed the Committee on the forthcoming second meeting of the Intergovernmental Committee on the Nagoya Protocol, and noted that, in addition to international governance of biodiversity, national implementation of access and benefit-sharing frameworks, including the benefit-sharing components of such frameworks, would be a challenge that technical bodies, such as this Committee, should address when providing advice and guidance. By reviewing the experiences of India, Dr Pishupati highlighted that the practical interfaces between the Nagoya Protocol and the Treaty would have to be explored with a view to facilitating national implementation of the two agreements in a mutually supportive manner.
8. Mr Nnadozie drew attention to the need for the meeting to elect its officials. The meeting elected Messrs. Fernando Latorre Garcia (Europe Region) and Eng Siang Lim (Asia Region) as Co-Chairpersons to guide the proceedings of the meeting.

Agenda Item 2. Adoption of the Agenda and Time Table

9. The meeting adopted its agenda, as given in *Appendix 1* to this Report.

Agenda Item 3. Status report on the implementation and operation of the SMTA and the Multilateral System

10. Mr Nnadozie reported on developments related to the Multilateral System, and highlighted the progress that had taken place in the operation of the Multilateral System since the last session of the Governing Body in March 2011.
11. He informed the Committee that the Secretariat had received a number of notifications of inclusions of PGRFA into the Multilateral System from both Contracting Parties and legal persons in the course of implementation of Benefit-sharing Fund projects.
12. Mr Nnadozie presented the information technology systems that facilitated SMTA operations in support of the Third Party Beneficiary's functions. The systems were completed and made available on-line to users of the Multilateral System, under the name of "Easy-SMTA".
13. He drew attention to two new policy instruments of the CGIAR Centers, of relevance to the Treaty and the Multilateral System, namely the "Policy on the Management of Intellectual Assets" (Policy) and the "CGIAR Principles on the Management of Intellectual Assets"

(Principles), recently approved by the CGIAR Consortium Board and the Fund Council respectively. He pointed out to relevant provisions in the two instruments, including on PGRFA under Development, and on conditions shaping access to intellectual assets.

14. He informed the Committee that information resources and training materials on the Multilateral System were assembled and made available on the Treaty's website.

15. In discussing the Secretary's Report, with regard to the inclusion of material into the Multilateral System, the Committee noted that, while not being mandatory under the Treaty, the notification of PGRFA that are in the Multilateral System, in writing, to the Secretariat is a useful practice that should be encouraged. The benefits of such notification included making information available to potential users of the System. The Committee also noted that some Contracting Parties may not have sent formal notifications to the Secretariat but chose to make information publicly available through other means, such as on-line databases. The Committee welcomed the action of some Countries that have recently deposited PGRFA in international genebanks. The Committee requested the Secretariat to provide available information for the next meeting of the Committee presenting the current practice of Contracting Parties and users of the Multilateral System as to the availability of information on PGRFA accessible under the SMTA.

16. Following some clarifications on the nature and scope of the CGIAR Policy and Principles on Intellectual Assets, the Committee requested the Secretariat to invite the Consortium Office of the CGIAR to provide a document, to be presented at the next meeting of the Committee, to assist it in understanding better those aspects of the Policy and the Principles that might have implications for the implementation of the Multilateral System by the CGIAR Centers, including in relation to PGRFA under Development, and the application of the SMTA.

17. The Committee requested the Secretariat to include the presentation on the status report on the implementation of the Multilateral System in the information documents for this meeting.

18. In regard to the substantive agenda items before it, the Committee clarified that it would carry out its tasks by providing advice to users of the Multilateral System through the Secretary and, where appropriate, interim opinions to users, for consideration and approval at the next session of the Governing Body.

Agenda Item 4. Non-food/non-feed uses of plant genetic resources for food and agriculture

19. The Committee considered document IT/AC-SMTA-MLS 3/12/2 and the report on this issue at its second meeting, as contained in the report (IT/AC-SMTA-MLS/2/10/Report). The Committee agreed on the opinion contained in *Appendix 2* to this Report.

20. The Committee also noted that the Material Transfer Agreement developed by the Genetic Resources Policy Committee of the CGIAR could result in substantial resources becoming available to the Multilateral System.

21. The Committee agreed that, unless the Governing Body otherwise decides, the issue would not require further consideration by the Committee.

Agenda Item 5. Transfer and use of plant genetic resources for food and agriculture under the Multilateral System: transfer to farmers for direct use for cultivation

22. The Committee considered document IT/AC-SMTA-MLS 3/12/3. It recalled and reaffirmed the opinion previously given on the issue with regard to the CGIAR Centers, as contained in *Appendix 7* to the report of its second meeting (IT/AC-SMTA-MLS 2/10/Report).

23. The Committee considered the applicability of that opinion with regard to other providers and recipients of PGRFA. The Committee specially noted that, consistent with the opinion given on this issue at its second meeting, there is no problem with recipients making available to farmers, PGRFA that they have developed from materials acquired from the Multilateral System. This is their prerogative as developers of the material. The Committee felt that problems 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. If material acquired from the Multilateral System under the SMTA is to be made available for direct use for cultivation, this would require the express permission of the provider that included the PGRFA in the Multilateral System. When making PGRFA available for direct use for cultivation only, the SMTA would not be the appropriate instrument to use.
24. The Committee agreed on the opinion as contained in *Appendix 3* to this Report.
25. The Committee agreed that, unless the Governing Body otherwise decides, the issue would not require further consideration by the Committee.

Agenda Item 7. Updating of the SMTA in the context of reporting obligations of parties

26. The Committee considered document IT/AC-SMTA-MLS 3/12/4. After discussing the updates to the SMTA that were forwarded to the Governing Body at its Fourth Session, the Committee agreed that the Secretariat should prepare, in collaboration with the FAO Legal Office, a working document for its next meeting, containing options for the reflection of the updates to the SMTA, an analysis of such options, and, as one of the options, draft explanatory notes that could accompany the SMTA. Members of the Committee should also consult within their regional groups and bring forward proposals for addressing the updating of the SMTA.

Agenda Item 8. Creating legal space for the International Treaty in the context of access and benefit-sharing regimes

27. The Committee considered document IT/AC-SMTA-MLS 3/12/5, regarding legal space for the Treaty and its Multilateral System in particular, in the context of access and benefit-sharing frameworks. The Committee was given an update from the representative of Bioversity International regarding the capacity building project for the implementation of the Treaty which, among other activities, was assisting selected developing country Contracting Parties with the harmonious implementation of the Treaty and the Nagoya Protocol. The Committee noted that Contracting Parties, many of whom lack capacity, would benefit from the continued provision of support and advice that could assist them in fulfilling their obligations under the respective agreements in a coherent manner.

28. The Committee emphasized that a necessary step for Contracting Parties to implement the Multilateral System would be to determine what PGRFA of *Annex I* crops and forages are under the management and control of the government, and in the public domain.

29. The Committee was of the view that nothing in the Nagoya Protocol would prevent Contracting Parties to the Treaty that will also be Parties to the Nagoya Protocol from implementing the Treaty and its Multilateral System. The Committee emphasized that practical and harmonious interfaces between general access and benefit-sharing requirements and the operation of the Treaty and its Multilateral System have to be created in positive and constructive ways, both nationally and internationally. In that regard, the Committee encouraged the Secretariat of the Treaty to continue its collaboration with the Secretariat of the Convention on Biological Diversity and, based on available resources, to promote the establishment of a joint

group of experts to compile a checklist of issues that are important in achieving mutual supportiveness between the two instruments.

30. The Committee emphasized the need for the continued interaction between the different constituencies of the Treaty and the Convention on Biological Diversity, especially at the national level in the course of their implementation. It also agreed to continue reviewing the matter of the interface between the two agreements as the situation evolves and countries gain more experience in such implementation.

31. With regard to possible model provisions that may be inserted in national access and benefit-sharing legislation, the Committee considered the following new draft text, for further consideration by the Committee at its next meeting:

“Pursuant to the obligations established by the International Treaty on Plant Genetic Resources for Food and Agriculture, access to and the transfer of plant genetic resources for food and agriculture covered by the Treaty, and sharing the benefits arising from their utilization, should only be subject to the conditions set out in the said Treaty, as applicable”

Agenda Item 8. Commercialization of a product under the Multilateral System in the context of not-for-profit projects under Article 13 of the International Treaty

32. The Committee considered document IT/AC-SMTA-MLS 3/12/6, in relation to agenda items from 8 to 11. The Committee recalled that, in accordance with its terms of reference, any advice or opinion given by the Committee to users of the Multilateral System, although meant to offer practical guidance to users of the System, should not be considered authoritative.

33. In response to the first question posed by the experts of the WEMA project, the Committee considered whether the SMTA could be interpreted such that a philanthropic project would not be subject to the mandatory monetary benefit-sharing provisions of Article 13.2(d)(ii) of the Treaty. The Committee was of the view that, as the Treaty makes no exemptions for such projects, the obligations of Article 13.2(d)(ii) of the Treaty apply. The nature of the project (whether public, private, or not-for-profit) has no relevance to these obligations.

Agenda Item 9. Availability without restriction for further research and breeding under the Multilateral System: geographical extent of the restriction

34. In response to the second question posed by experts of the WEMA project, the Committee considered whether the requirement for mandatory monetary benefit-sharing under Article 6.7 of the SMTA would only be based on sales of products for which a restriction to others for further research and breeding applies, or would also be based on sales of products in other jurisdictions, where there is no such restriction. The Committee considered that, as mandatory monetary benefit-sharing is linked to the restriction for further research and breeding on the commercialized product, the quantification of the related payments would be based on jurisdictions where such restriction exists.

Agenda Item 10. Commercialization of a product under the Multilateral System: calculation of benefit-sharing payments

35. In response to the third question posed by experts of the WEMA project, the Committee considered whether the calculation of benefit-sharing payments could be made, pursuant to

Articles 6.7 and 6.8 of the SMTA, at points in the production and distribution chain prior to the final sale of seed by agro-dealers to farmers. The Committee was of the view that, as the SMTA defines “commercialization” in relation to a sale on the open market, the related monetary benefit-sharing obligations would apply at the point of such commercialization.

Agenda Item 11. Availability without restriction for further research and breeding under the Multilateral System: sale of hybrids

36. In response to the fourth question posed by experts of the WEMA project, the Committee considered whether, in cases where a genetic trait protected by intellectual property rights or contractual limits on use, is introduced to a hybrid that is also marketed in an unprotected non-modified form, the restriction on the use of the modified form would affect the unmodified form and, as such, lead to mandatory monetary benefit-sharing. The Committee considered that the monetary benefit-sharing obligation on commercialization is only triggered by restrictions on further research and breeding. The Committee also considered that the un-modified form may constitute a product in itself and would therefore be unaffected, or considered separately from the product in respect of which the restrictions are imposed.

Agenda Item 12. Transfer of plant genetic resources for food and agriculture to affiliate companies and SMTA concluded on behalf of affiliate companies

37. The Committee considered document IT/AC-SMTA-MLS 3/12/7. The Committee agreed that there is need to preserve the integrity of the Multilateral System and to avoid creating large administrative burdens in terms of verifying levels of controls within companies. The Committee reviewed its previous opinion on transfer of PGRFA that are in the Multilateral System to affiliate companies and advised that:

- transfer 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, the SMTA should be used.
- transfer of PGRFA to commercial partners and affiliates that are different legal persons would have to be made with the SMTA, regardless of the territorial location of the partners and affiliates.

38. The Committee also considered that the SMTA would provide flexibility as to the designation of “recipient”, and that affiliate companies may be named in the SMTA.

Agenda Item 13. Other business and miscellaneous questions

39. The Committee considered document IT/AC-SMTA-MLS 3/12/8, regarding the following miscellaneous questions.

Restoration of breeding lines

40. In relation to the specific case, as described in the above document, the Committee considered that, unless there would be evidence that the person requesting restoration of the material was the original breeder, the SMTA would have to be utilized.

Genera and species of Annex I crops

41. The Committee noted that a practical way to approach the issue of PGRFA in *Annex I* would be to adopt the crop-based approach, i.e. to consider whether the material is part of the gene pool of the crop listed in *Annex I*, regardless of taxonomical issues. The Committee noted that *Annex I* is organised by crops, with the other two columns being either exclusionary or indicative, but still based on the crop list. In addition, the Committee advised to consider the provisions of Article 11.2 of the Treaty as well as the definition of “Plant Genetic Resources for Food and Agriculture” in the Treaty, in the consideration of what falls under *Annex I* of the Treaty.

Handbook to the implementation of the Multilateral System

42. The Committee requested that the Secretariat continue updating the Handbook with decisions of the Governing Body as well as with experiences of Contracting Parties and CGIAR Centres.

Other business

43. The Committee requested that, when it receives specific questions relevant to the operation of the Multilateral System and the SMTA, the Secretariat provide the background and formulate the question of general application to be tabled before the Committee.

44. The Committee encouraged providers and recipients of PGRFA to build the capacity of their own legal and policy advisors for the implementation of the SMTA and their obligations under the Multilateral System, in the light of their own specific circumstances.

Agenda Item 14. Adoption of the Report

45. The Committee adopted this Report.

Agenda Item 15. Closing of the meeting

46. During the brief closing ceremony, the Co-Chairpersons of the Committee, on behalf of the members, thanked the Government of India for hosting the meeting, and for the hospitality and excellent facilities, as well as the logistical support that contributed to the success of the meeting.

47. Dr S. Ayyappan, Director General, Indian Council of Agricultural Research & Secretary, Department of Agricultural Research and Education, Ministry of Agriculture, Government of India, conveyed his expressions of hope for the Treaty to enable facilitated access to plant germplasm, and increase the capacity of farmers, researchers and policy makers.

48. Mr A. Bahuguna, Secretary (Agriculture & Cooperation), Ministry of Agriculture, Government of India, congratulated the participants on the positive outcomes of the meeting and highlighted the need for the Treaty to recognize the contribution of farmers to the conservation and development of PGRFA, through benefit-sharing.

49. Prof. R.B. Singh, President, National Academy of Agricultural Sciences, India, highlighted the positive role that FAO and the institutions, such as the International Treaty, established under it are playing in addressing some of the most important global challenges facing humanity, including food insecurity and climate change, and thanked the participants for their work.

50. The members of the Committee thanked the Secretariat for the excellent preparations it had made, in particular for the documentation for the meeting.

Report Appendix I

THIRD MEETING OF THE <i>AD HOC</i> ADVISORY TECHNICAL COMMITTEE ON THE STANDARD MATERIAL TRANSFER AGREEMENT AND THE MULTILATERAL SYSTEM OF THE TREATY

New Delhi, India, 26 – 28 June 2012

AGENDA

1. Opening of the meeting and election of the Co-Chairs
2. Adoption of the agenda and time table
3. Report on the implementation of the Standard Material Transfer Agreement (SMTA) and the Multilateral System of Access and Benefit-sharing (Multilateral System), including on policy developments
4. Non-food/non-feed uses of plant genetic resources for food and agriculture (PGRFA)
5. Transfer and use of PGRFA under the Multilateral System: transfer to farmers for direct use for cultivation
6. Updating of the SMTA in the context of reporting obligations of parties
7. Creating legal space for the International Treaty in the context of access and benefit-sharing regimes
8. Commercialization of a product under the Multilateral System in the context of not-for-profit projects under Article 13 of the International Treaty
9. Availability without restriction for further research and breeding under the Multilateral System: geographical extent of the restriction
10. Commercialization of a product under the Multilateral System: calculation of benefit-sharing payments
11. Availability without restriction for further research and breeding under the Multilateral System: sale of hybrids
12. Transfer of PGRFA to affiliate companies and SMTA concluded on behalf of affiliate companies
13. Other business and miscellaneous questions
14. Adoption of the report
15. Closing of the meeting

Report Appendix 2

OPINION**NON-FOOD / NON-FEED USES OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE*****Transfer of plant genetic resources for food and agriculture for non-food/feed uses***

1. *Article 12.3a* of the Treaty provides that: *Access shall be provided solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture, provided that such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses.*
2. Based on this provision, Contracting Parties are only obliged to provide plant genetic resources for food and agriculture (PGRFA) under the facilitated access regime established by the Multilateral System when the conditions set out in *Article 12.3a* are met. Contracting Parties are not obliged by the Treaty to distribute materials in the Multilateral System under facilitated access conditions for purposes other than for utilization and conservation for research, breeding and training for food and agriculture.
3. Contracting Parties and international institutions have the freedom to decide under which instrument and conditions access to materials in the Multilateral System to be provided for non-food/feed uses. The Committee also considered that, if so wished by a Contracting Party or an international institution, access for non-food/feed may be provided under conditions similar, *mutatis mutandis*, to those applicable under the SMTA, including the payment obligations.

The limitation on use in the SMTA

4. *Article 6.1* of the SMTA provides that: *The Recipient undertakes that the Material shall be used or conserved only for the purposes of research, breeding and training for food and agriculture. Such purposes shall not include chemical, pharmaceutical and/or other non-food/feed industrial uses.*
5. Recipients of PGRFA under the SMTA are bound by the express limitation imposed by these provisions. Acceptance of the SMTA makes it unnecessary to obtain an additional declaration from the party requesting material on intended use.
6. However, in cases where the party requesting material informs the prospective provider that the intended use is non-food/feed, or when it is otherwise obvious that the requested material is intended for non-food/feed purposes, the Committee believed that the prospective provider, under a general obligation of due diligence, is not obliged to provide facilitated access and should take the required steps to ensure that the terms and conditions that the respective Contracting Party that may have established for the distribution of materials for non-food/feed uses are applied. This should, however, not put an excessive burden on prospective providers, such as the need to undertake an investigation about the current or intended activities of the requesting party, such that would hamper the effective and efficient functioning of the Multilateral System.

Multiple-use crops

7. The second sentence of *Article 12.3a* of the Treaty reads as follows: *In the case of multiple-use crops (food and non-food), their importance for food security should be the determinant for their inclusion in the Multilateral System and availability for facilitated access.*

8. This provision, in referring to multiple-use crops (food and non-food), deals with the coverage of the Multilateral System and presupposes that multiple-use PGRFA are included in the list contained in Annex I of the Treaty. In the views of the Committee, these provisions imply that multiple-use crops should be transferred under the facilitated access regime when intended for food/feed and that, consequently, use of the SMTA is required in these cases. Accordingly, multiple-use materials of Annex I crops and forages should be transferred under an SMTA whenever their intended use is food/feed.

9. Whenever a recipient receives samples of multiple-use crops for non-food/feed purposes, the instrument under which he received them should bind him to an obligation to sign an SMTA in case the material is subsequently used for food and agriculture or Plant Genetic Resources for Food And Agriculture under Development are to be transferred for use for food and agriculture.

Report Appendix 3

OPINION**TRANSFER AND USE OF PLANT GENETIC RESOURCES UNDER THE
MULTILATERAL SYSTEM – TRANSFER BY PROVIDERS AND RECIPIENTS,
OTHER THAN CGIAR CENTRES AND OTHER INTERNATIONAL INSTITUTIONS,
TO FARMERS FOR DIRECT USE FOR CULTIVATION**

1. Recipients have the right to make plant genetic resources for food and agriculture (PGRFA) under development or product they have developed from PGRFA acquired from the Multilateral System available to farmers for direct use.
2. Providers that voluntarily include material in the Multilateral System maintain the right to make this material available to farmers for direct use for cultivation, subject to national legislation and requirements.
3. PGRFA received under the Standard Material Transfer Agreement (SMTA) can be made available to farmers for direct use for cultivation only if there is a separate express permission allowing for such distribution from the provider that included such material in the Multilateral System.
4. No such permission would be required where germplasm is being restored to farmers that originally provided it.
5. 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.”
6. 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.

Report Appendix 4

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