Food and Agriculture Organization of the United Nations

The International Treaty ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

Opinions and advice of the Ad Hoc Technical Advisory Committee on the Multilateral System and the Standard Material Transfer Agreement

The Habsburg Emperor Rudolf II as Vertummus,
by Giuseppe Arcimboldo, 1591. Skokloster Castle, Sweden

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Opinions and advice of the Ad Hoc Technical Advisory Committee on the Multilateral System and the Standard Material Transfer Agreement

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I. INTRODUCTION

The Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture established the *Ad Hoc Technical Advisory Committee on the Multilateral System and the Standard Material Transfer Agreement* (the Committee) through Resolution 4/2009, as an advisory and technical mechanism to assist the Secretariat in providing support to users of the Standard Material Transfer Agreement (SMTA) and the Multilateral System in the implementation of the Multilateral System.

The Committee held their first meeting in January 2010, during which they defined the scope of their work in relation to assistance to users in the implementation of the Multilateral System and the SMTA, and considered the role of the Secretariat in this regard. The Committee discussed several important aspects of implementation, such as the legal space for the national implementation of the Treaty; the identification of Plant Genetic Resources for Food and Agriculture (PGRFA) under the control of the Contracting Parties and in the public domain; the legal and administrative measures to encourage natural and legal persons to voluntarily place material in the Multilateral System; access to material in *in situ* conditions; scenarios in which the movement of PGRFA amounts to a "transfer" and, therefore, require the use of the SMTA; and the payment required to the Benefit-sharing Fund in case of the commercialization of a single Product.

At their second meeting in August 2010, the Committee dealt with the subject of initial and subsequent transfers of both PGRFA and PGRFA under development, including the use of the full text of the SMTA, the use of further conditions to the SMTA, and the need to notify subsequent recipients on the optional payment scheme under 6.11 of the SMTA. The Committee delved further into the practical and legal implications for natural and legal persons putting material into the Multilateral System, and developing a set of frequently asked questions and answers on this aspect. The Committee further elaborated their opinion on the issue of non-food/feed uses of PGRFA, including aspects of limitations on the use of the SMTA and multiple-use crops; the applicability of the Treaty to *in*

situ material under the management and control of Contracting Parties and in the public domain; and the possibility of making material available for direct use by farmers for cultivation.

The Committee held two meetings in the 2012-2013 biennium to discuss remaining agenda items – with a resumed session of the fourth meeting in April 2013 to deal with 'Options for reflecting clarifications or interpretation of the SMTA[1]'. The reports of the meetings were subsequently made available to the Fifth Session of the Governing Body as information documents.[2]

At its Third Meeting, generously hosted by the Government of India, the Committee advised and provided opinions on a number of questions: inclusion of material into the Multilateral System; non-food/non-feed uses of PGRFA; direct transfer to farmers for cultivation; legal space for the operation of the Multilateral System in the context of access and benefit-sharing regimes; the use of the SMTA in the transfer of PGRFA to affiliate companies; the restoration of breeding lines; and the definition of genera and species of *Annex I* crops.

In response to questions from users of the Multilateral System in the context of a project, the Committee advised on: monetary benefit-sharing obligation in not-for-profit projects; monetary benefit-sharing obligations, and the geographical extent of the restrictions triggering such obligations; the calculation of benefit-sharing payments at the point of sale of the product on the open market; and monetary benefit-sharing obligations in relation to the sale of hybrids.

As a point of general advice, 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 their own specific contexts.

At its Fifth Session, the Governing Body took note of the opinions and advice provided by the *Ad Hoc* Technical Advisory Committee on the Multilateral System and the SMTA at its third and fourth meetings as

1 IT/AC-SMTA-MLS Res4/13/Report, http://www.planttreaty.org/sites/default/files/AC_SMTA_4_Res_Report.pdf

2 IT/GB-5/13/Inf.3, Report of the Ad Hoc Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System. Available at: http://www.planttreaty.org/content/gb5

helpful guidance for Contracting Parties in implementing their obligations under the Treaty, and requested the Secretariat to make those opinions and advice easily available, including through its website, so that all users could benefit from the guidance.[3]

In preparing the current booklet, the Secretariat of the International Treaty has made no modifications to the opinions made by the Committee, with the exception of minor language edits spelling out acronyms and inserting cross-references.

In order to put some of the decisions into context, the Secretariat has opted to also provide the summaries of the major decisions adopted at each meeting. The chronological order has been complemented with an index of subjects. We hope that this material will simplify the use of the Standard Material Transfer Agreement and the operations of the Multilateral System for users and practitioners.

3 Resolution 1/2013 of the Fifth Session of the Governing Body of the Treaty Implementation of the Multilateral System (MLS) of Access and Benefit Sharing (ABS)

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II. SUMMARIES OF MAJOR DECISIONS PER MEETING

First Meeting

At its First meeting in January 2010, the *Ad Hoc* Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System:

a) Advised the Secretary to seek to answer as quick as possible and as many questions as possible received from the users so the users acquire a sense of the responsiveness of the System to their needs;

b) Advised the Secretary to establish a separate and dedicated email address on the Treaty website to which SMTA users can send full copies of the SMTAs so as to enable users to fulfill reporting requirements and to give the Governing Body an overview of SMTA use;

c) Advised the Secretary to finish work on the IT support tools for SMTA operations to facilitate use of the SMTA and SMTA reporting;

d) Encouraged the Secretariat to continue to compile notifications provided by the Contacting Parties regarding the inclusion of material under the Multilateral System and publish the information provided therein on the website of the International Treaty;

e) Agreed on a set of opinions regarding creating a legal space for the implementation of the Treaty in the context of access and benefit sharing, including a draft legislative provision which could be considered by the Contacting Parties to achieve this implementation aim (**OPINION 1**);

f) Emitted a set of opinions regarding the identification of plant genetic resources for food and agriculture under control and management of Contracting Parties, and in the public domain as provided for in Art. 11.2 of the Treaty (**OPINION 2**);

g) Developed an opinion regarding questions on the legal and administrative measures to encourage natural and legal persons to voluntarily place material in the Multilateral System as provided for in Art. 11.3 of the Treaty (**OPINION 3**);

h) Agreed on opinions regarding the practical and legal implications for natural and legal persons putting material into the Multilateral System as provide for in Art. 11.3 of the Treaty (**OPINION 4**);

i) Pronounced opinions on access to material in *in situ* conditions as provided for in Article 12.3h of the Treaty (**OPINION 5**);

j) Emitted opinions on if and when the movement of PGRFA might amount to "transfer" and "use" within the meaning of the Treaty to require the use of SMTA, in particular considered situations of material transferred to service providers and farmers (**OPINION 6**);

k) Was of the opinion that where a commercialised single Product incorporates either a single PGRFA accessed on more that one occasion or incorporates a number of different PGRFA being accessed, no cumulative payments are required. Instead, only one payment per such a single Product would be due to the benefit-sharing fund in either case, as provided for in Article 2 of Annex 2 of the SMTA.

Second Meeting

At its Second meeting in August 2010,[4] the *Ad Hoc* Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System:

a) Suggested that it would be useful to make public the types of questions that the Secretariat had been receiving on a regular basis on the operations of the Multilateral System and the answers that had been provided, so that others might benefit from them;

b) Suggested the possible integration of the frequently asked questions and answers on the SMTA that CGIAR Centres have developed with the ones developed by the Secretariat for the sake of efficiency and its presentation to the Committee for advice and input;

c) Agreed on a set of opinions regarding the possibility of putting restrictions on the further transfer of Plant Genetic Resources for Food and Agriculture under Development to a third party, when transferring said material under an SMTA as provided for in Articles 6.5, 6.5a and 6.6 of the SMTA (**OPINION 7**);

d) Ponded on a clear understanding of the concept of restoration and emitted an opinion regarding whether restoration of germplasm to the original provider has to be under the SMTA (**OPINION 8**);

e) In relation to the transfer of Plant Genetic Resources for Food and Agriculture (Art. 6.4 of the SMTA) and of Plant Genetic Resources for Food and Agriculture under Development (Art. 6.5 of the SMTA) to a subsequent recipient, the Committee agreed that the new material transfer agreement required by these articles must contain the full text of the SMTA, and only the full text, without modification or deletion;

f) Further to the transfer to a subsequent recipient of Plant Genetic Resources for Food and Agriculture and/or of Plant Genetic Resources for Food and Agriculture under Development, the Committee was of the opinion that the Recipient now acting as Provider should indicate to the subsequent recipient that s/he is required to accept the alternative payment scheme for the Plant Genetic Resources for Food and

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Agriculture under Development in question; and (b) the subsequent recipient must accept these conditions;

g) Dealt in more depth with the practical and legal implications for natural and legal persons putting material into the Multilateral System, and was of the opinion that there were various ways in which to carry out this, and by which such material could be considered "in" the Multilateral system. These are:

   i. Providing a recipient with a sample of material of one of the crops in Annex 1 to the Treaty, which has been adequately and publicly documented, under a duly completed SMTA, creating thereby an obligation on the Recipient and any subsequent recipients to sequentially enact a chain of SMTAs and fulfil the rights and obligations, as they pass the Material on to others.

   ii. A person has undertaken (by notification to the Secretary of the Treaty or equivalent public statement) to provide it to others, on request, through the SMTA.

   iii. Donating it to an institution that has already undertaken to hold material within the Multilateral System, such as a national or international genebank.

h) Developed a series of frequently asked questions and answers to the issue of the practical and legal implications for natural and legal persons putting material into the Multilateral System (**ADVICE 1**);

i) Emitted further opinions on the issue of non-food/feed uses of plant genetic resources for food and agriculture, including aspects of limitation on the use of the SMTA and multiple-use crops (**OPINION 9**) and noted that the draft material transfer agreement developed by the Genetic Resources Policy Committee (GRPC) of the Consultative Group on International Agricultural Research for non food/feed uses could result in substantial resources becoming available to the Multilateral System and may provide a useful reference for those interested in using it;

j) Re-affirmed its opinion that the provisions of Article 12.3h of the Treaty apply to material under the management and control of Contracting Parties, and in the public domain, and consequently, that the scope of possible future standards established by the Governing Body under Article 12.3h should be limited to *in situ* material that is under

the management and control of Contracting Parties, and in the public domain;

k) Regarding making available material for direct use by farmers for cultivation, it was of the opinion that it did not fall within the purpose for which PGRFA shall be made available under the Multilateral System. Nonetheless, CGIAR Centres and other International Institutions:

   i. Have the right to make PGRFA developed from materials acquired from the Multilateral System (improved material) as developers of such materials;

   ii. May make available material held in trust to farmers for direct use;

   iii. Can make available to farmers for direct cultivation PGRFA received under the SMTA as unimproved material as long as there is a separate express permission from the provider allowing for such distribution;

   iv. Would not require such a permission in the case of germplasm being restored to farmers that originally provided it;

   v. Should not use the SMTA for transfer to farmers for direct cultivation. Instead a statement such as "This material can be used by the recipient directly for cultivation, and can be passed on to others for direct cultivation." could be used for the transfer;

   vi. Should use both the SMTA and a statement giving express permission for cultivation in cases where the transfer of PGRFA is for both research and breeding and for direct cultivation, or where the transfer for either one or the other purposes is unclear.

Third Meeting

At its Third meeting in June 2012,[5] the *Ad Hoc* Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System:

a) Noted that, while not being mandatory under the Treaty, the notification to the Secretariat of plant genetic resources for food and agriculture (PGRFA) that are in the Multilateral System is a useful practice that should be encouraged (**ADVICE 2**);

b) Agreed on an opinion previously emitted on non-food/non-feed uses of PGRFA **(OPINION 9)**;

c) Reaffirmed the opinion previously given to CGIAR Centers with regard to the transfer to farmers of PGRFA under the Multilateral System for direct use for cultivation, and, in considering the applicability of that opinion to other providers and recipients, agreed on a further opinion **(OPINION 10)**;

d) Advised on a series of aspects related to a creating legal space for the Treaty in the context of access and benefit sharing regimes, such as the Nagoya Protocol, which include possible model provisions that may be inserted in national access and benefit-sharing legislation (**ADVICE 3**);

e) Pointed out 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;

f) Advised on: a) the operation of the monetary benefit-sharing obligation in not-for-profit projects under Article 13 of the Treaty (**ADVICE 4**); b) the relationship between the monetary benefit-sharing obligation and the geographical extent of the restrictions triggering such obligations (**ADVICE 5**); c) the calculation of benefit-sharing payments at the point of sale of the product on the open market (**ADVICE 6**); d) the monetary benefit-sharing obligation in relation to the sale of hybrids (**ADVICE 7**);

g) Advised on the transfer of PGRFA to affiliate companies and SMTA concluded on behalf of affiliate companies as well as transfers to other units of the same company or institution (the same legal person), and

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stated that these would not have to take place under SMTA, and that transfers to commercial partners and affiliates that are different legal persons would have to be made through SMTA, regardless of the territorial location of the partners and affiliates (**ADVICE 8**);

h) Advised on: a) the use of SMTA in the case of restoration of breeding lines (**ADVICE 9**); b) elements to approach genera and species of *Annex I* crops (**ADVICE 10**);

i) Noted that a practical way to approach the issue of PGRFA listed 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 also 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*.

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Fourth Meeting

At its Fourth Meeting in November 2012, the *Ad Hoc* Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System:

a) Suggested that the Secretariat provide an update on the development of and progress with the implementation of technology support to the Multilateral System to the Governing Body at its next Session;

b) Requested the Secretariat to continue monitoring and participating in the relevant processes related to the Nagoya Protocol and the Convention on Biological Diversity;

c) Restated that the scope of the Treaty is all PGRFA, and that the Governing Body, therefore, has the mandate and authority to decide and carry out work on all matters within this scope, including any further work on access and benefit-sharing for PGRFA;

d) Requested the Secretariat to follow the process of development of implementation guidelines to the *Principles on the Management of Intellectual Assets of the Consultative Group on International Agricultural Research*;

e) With regard to possible model provisions that may be inserted in national access and benefit-sharing legislation to create space for the operation of the Multilateral System, it proposed a text for consideration and further recommendation to interested Contracting Parties by the Governing Body;

f) Considered the question of whether a genebank can collect, conserve and distribute samples of plant varieties protected by plant breeder's rights and also the possibility of including material protected by intellectual property rights in the Multilateral System (**ADVICE 11**);

g) Considered whether the SMTA is to be used in cases where the transfer of Annex I plant material is for subsequent sale of the plant material (**ADVICE 12**);

h) With regard to the issue of fees for germplasm distribution, it examined whether the "minimal cost involved" as referred to in Article 12.3(b) of the Treaty may be considered as including the transaction costs

of germplasm distribution and the cost of producing and conserving germplasm, and concluded that the factors involved in calculating fees should be limited as far as possible, thus to cover only mailing or shipping costs and not germplasm producing and conservation costs (**ADVICE 13**);

i) Further recommended that the issue of unreasonable requests in terms of scope or quantity of germplasm could be considered by the Governing Body at its next Session.

III. OPINIONS

OPINION 1: CREATING LEGAL SPACE FOR THE IMPLEMENTATION OF THE TREATY IN THE CONTEXT OF ACCESS AND BENEFIT-SHARING

At its first meeting, the Committee examined possible model provisions that could be included in national laws so as to provide legal space for the implementation and operation of the Multilateral System.

The *Ad Hoc* Advisory Committee noted that:

- Access and benefit sharing (ABS) measures adopted by a number of countries at the national level may, in some cases, interfere with obligations of these countries under the International Treaty on Plant Genetic Resources for Food and Agriculture; and
- There might be other regulations (for instance, phytosanitary measures) that may impact the operation of the Multilateral System.

In this regard, the Committee expressed the following opinions:

- Contracting Parties need to ensure that no substantive or procedural rules unduly hinder the functioning of the Multilateral System.
- In order to avoid that national laws on access and benefit-sharing conflict with the obligations of Contracting Parties under the International Treaty, national laws could include a provision that exempts access to and transfers of PGRFA covered by the Multilateral System from their scope.
- Such a provision might be drafted along the following lines:

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 of the crops covered by the Treaty shall only be subject to the conditions set out in Part IV of the said Treaty.

The implementation of the Multilateral System does not and should not exempt providers or recipients of material from the Multilateral System from complying with standard national laws or regulations regarding, for instance, plant health or phytosanitary measures.

The *Ad Hoc* Advisory Committee took note of the ongoing negotiations of an 'International regime' on access and benefit-sharing, under the auspices of the Convention on Biological Diversity. The Committee encouraged the Secretariat to continue working with the Secretary of the CBD, and to continue monitoring the negotiations. It further stressed that it would be important for Contracting Parties participating in those negotiations, to seek that the international regime does not interfere with any obligations countries have under the International Treaty.

The Committee recalled FAO Conference Resolution 18/2009 which invites the Conference of the Parties of the Convention on Biological Diversity and its Ad Hoc Open-ended Working Group on Access and Benefit-sharing to explore and assess options for the International Regime on Access and Benefit-sharing that allow for adequate flexibility to acknowledge and accommodate existing and future agreements relating to access and benefit-sharing developed in harmony with the Convention on Biological Diversity.

Regarding legal space for the Treaty and its Multilateral System in particular, in the context of access and benefit-sharing frameworks, the Committee emphasized at its Third Meeting 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.

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 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.

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"***

At its Fourth meeting, the Committee stressed the need to promote coordination at the national level, in particular between respective national focal points of the Treaty and the Convention on Biological Diversity so that they could harmonize their views and adopt a more comprehensive approach to access and benefit-sharing.

It also recommended that efforts should continue to be made to facilitate regular interactions among other relevant actors involved in the national implementation processes of both agreements, such as farmers and farmers' organizations, NGOs and the private sector, including through convening meetings.

OPINION 2: IDENTIFICATION OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE (PGRFA) UNDER THE MANAGEMENT AND CONTROL OF CONTRACTING PARTIES AND IN THE PUBLIC DOMAIN

The *Ad Hoc* Technical Advisory Committee noted that under Article 11.2 of the Treaty all PGRFA of crops and forages listed in Annex 1 of the Treaty that are "under the management and control of the Contracting Parties and in the public domain" are automatically part of the Multilateral System. The Committee also noted that the legal situation as to what should be regarded as material under the management and control of the Contracting Party and in the public domain may well vary from country to country. It recognized the desirability of a coherent approach in the application of these concepts, which are at the heart of the Multilateral System.

In considering the meaning of these concepts, the Committee agreed that the Vienna Convention on the Law of Treaties, which requires a literal interpretation of treaty provisions, should be followed.[6]

The Committee was of the opinion that the expression "*under the management*" means that a Contracting Party has the power to undertake acts of conservation and utilization in relation to the material: it refers to the capacity to determine how the material is handled and not to the legal rights to dispose of the PGRFA. The ordinary meaning of "*control*' in this context focuses on the legal power to dispose of the material. In other words, it is not sufficient that the PGRFA be 'managed' by a Contracting Party (e.g. through conservation in a genebank); it must also have the power to decide on the treatment to be given to such resources.[7]

The Committee considered that the expression, "*of the Contracting Parties*", obviously includes material held by structures of the central national administration, such as government departments and national genebanks. It may or may not cover material held by autonomous or quasi-

6 Article 31.1 of the Vienna Convention on the Law of Treaties provides that "[A] treaty shall be interpreted on good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in the light of its object and purpose."

7 It should be noted that Article 11 does not refer to the "property", 'ownership' or 'possession' of the PGRFA. Paragraphs 2 and 3 in Article 11 refer to "holders" and those "who hold", respectively. In relation to the resources possessed by the CGIAR Centres, the term "held" is also used (article 15.1).

autonomous entities normally considered to be part of the national plant genetic resources system. Likewise, special issues may arise in the case of Federal States. There is an expectation on the part of Contracting Parties that all such material, that is not automatically included, should be brought within the Multilateral System through positive action.[8]

The Committee noted that the expression, "PGRFA under the management and control of the Contracting Parties", encompasses both PGRFA in *in situ* condition and that held *ex situ*.

On the term, "*in the public domain*", the Committee noted that there were two possible meanings. One meaning is the concept of public property under administrative law. The other meaning refers to material or information that is not subject to intellectual property rights. The Committee considered that the concept of "public domain", as used in article 11.2 of the Treaty, should be understood in the context of intellectual property law.

PGRFA under the management and control of the Contracting Parties, and in the public domain, are part of the MLS without any declaration or notification. However, actual use of material depends on information being made public about what materials are available and where they may be accessed, along with related non-confidential information.

8 The Committee noted that the Governing Body of the Treaty, at its Third Session, had encouraged 'Contracting Parties, as appropriate, in reporting on their plant genetic resources for food and agriculture in the Multilateral System, to provide information on the collections of legal persons not part of the government, whom they regard as forming part of their national plant genetic resources systems and who are willing to make such information available', Resolution 4/2009, available at ftp://ftp.fao.org/ag/agp/planttreaty/gb3/gb3repe.pdf.

OPINION 3: LEGAL AND ADMINISTRATIVE MEASURES TO ENCOURAGE NATURAL AND LEGAL PERSONS TO VOLUNTARILY PLACE MATERIAL IN THE MULTILATERAL SYSTEM

Under Article 11.3 of the International Treaty, Contracting Parties agreed "*to take appropriate measures to encourage natural and legal persons within their jurisdiction who hold plant genetic resources for food and agriculture listed in* Annex I *to include such plant genetic resources for food and agriculture in the Multilateral System*".

Several Contracting Parties and other stakeholders have asked the Secretariat what sort of measures Contracting Parties could take to encourage natural and legal persons within their jurisdictions to include *Annex I* plant genetic resources for food and agriculture in the Multilateral System.

In the opinion of the *Ad Hoc* Advisory Committee, the decision on what measures to establish under Article 11.3 of the International Treaty is left to the discretion of Contracting Parties. Those measures may include, but are not be limited to, financial or fiscal incentives to holders of material (e.g. eligibility for public funding schemes). They might also consist of policy and legal measures, administrative actions setting up domestic procedures for inclusions, or awareness raising efforts (especially at the level of farmers).

The *Ad Hoc* Advisory Committee considered the sample letter of inclusion, currently being used to notify the Secretariat of Contracting Parties' material in the Multilateral System, or material included by natural and legal persons in the Multilateral System, and agreed to review it at the next meeting. It encouraged the Secretariat to continue to compile the notifications of inclusion of material in the Multilateral System and publish the information contained therein on the website of the International Treaty.

OPINION 4: PRACTICAL AND LEGAL IMPLICATIONS FOR NATURAL AND LEGAL PERSONS PUTTING MATERIAL INTO THE MULTILATERAL SYSTEM

The *Ad Hoc* Advisory Committee considered the meaning of "putting material in the Multilateral System", and agreed that the concept involved (a) making information on the material placed in the Multilateral System public, so that potential recipients might request it, and (b) a commitment to make the material available upon request, in accordance with the provisions of the Treaty and by use of the SMTA. It could also be possible to put material into the Multilateral System by transferring it to the collection of a national genebank of a Contracting Party, or the genebank of an international institution that has concluded an agreement with the Governing Body, under Article 15 of the Treaty.

In regard to natural and legal person wishing to put material in the Multilateral System, the *Ad Hoc* Advisory Committee agreed that there are various effective means by which natural and legal persons could include material in the Multilateral System such as: notification to the Treaty Secretariat or an equivalent public statement, and, in the case of *ex situ* material, by transferring the material to a genebank whose collections are part of the Multilateral System.

With regard to the notification of inclusion, the *Ad Hoc* Advisory Committee raised a number of questions and issues. The Committee agreed that further examination of all these questions was required, and recommended that a further paper be prepared, in collaboration with relevant stakeholders, in particular the industry, which would raise and examine relevant legal issues and practical questions arising from natural and legal persons putting material into the Multilateral System. The paper would form the basis for the preparation of a short, user-friendly and practical explanatory note that might be made available to those considering putting material into the Multilateral System.

The *Ad Hoc* Advisory Committee also recommended that the Treaty Secretariat provide more information, in the paper, on the recipients of project funding from the Global Crop Diversity Trust, or the Benefit-Sharing Fund, as well as the legal provisions requiring such recipients to make material, covered by the project funding, available under the terms of the Multilateral System. An example was given of a Contracting Party, which has followed the same approach, details of which will be provided at the next meeting.

OPINION 5: IN-SITU MATERIAL AND THE MULTILATERAL SYSTEM: STANDARDS FOR ACCESS

Article 12.3h of the International Treaty provides as follows:

Without prejudice to the other provisions under this Article, the Contracting Parties agree that access to plant genetic resources for food and agriculture found in in situ *conditions will be provided according to national legislation or, in the absence of such legislation, in accordance with such standards as may be set by the Governing Body.*

The *Ad Hoc* Technical Advisory Committee noted that these provisions apply to material under the management and control of Contracting Parties and observed that there are sets of concerns in operationalizing the provisions of the Treaty in this regard:

National legislation

- Some authorities are uncertain as to whether additional specific national standards need now be developed. The Committee noted that this was not the case, and that many Contracting Parties already have the capacity with their domestic frameworks to allow access in accordance with the Treaty.
- In many cases, *in situ* materials in the Multilateral System are in protected areas, national parks, *etc.*, managed by other authorities outside the agricultural sector. It is therefore important that Contracting Parties ensure adequate coordination between the agricultural ministry and relevant authorities. The aim of such coordination should be to remove impediments to facilitated access in accordance with the conditions of the Multilateral System.

In this context, the *Ad Hoc* Technical Advisory Committee was of the opinion that:

- Article 12.3h has to be considered in the context of access and benefit-sharing for PGRFA.
- Article 12.3h applies to plant genetic resources for food and agriculture under the management and control of Contracting Parties and in the public domain.

- Many Contracting Parties already have the capacity within their domestic frameworks to provide facilitated access in accordance with the Multilateral System, and Article 12.3h should not be seen as preventing the provision of such access.
- For these materials, national legislation is not a pre-condition precedent in order to provide facilitated access, in accordance with the provisions of Article 12.

Institutional responsibilities

In many cases, *in situ* materials in the Multilateral System are found in protected areas, national parks, *etc*., managed by other authorities outside the agricultural sector. It is therefore important that Contracting Parties ensure adequate coordination between the agriculture ministry and other relevant authorities. The aim of such coordination should be to remove impediments to facilitated access in accordance the provisions of the Multilateral System.

Standards for access under Article 12.3h

The Committee noted that the Governing Body has not yet decided to initiate the preparation of standards for access to plant genetic resources for food and agriculture found in *in situ* conditions.

The Committee recommended that:

- The Secretary of the Governing Body, in cooperation with the Secretariat of the Commission on Genetic Resources for Food and Agriculture and Bioversity International, identify the elements of possible standards.
- In this exercise, particular attention should be paid to the possibility of referring to relevant provisions of the existing *International Code of Conduct on Plant Germplasm Collecting and Transfer*, as interim standards.
- The results of this work should be presented to the next meeting of the Committee.

The Committee recommended that the Secretary of the Governing Body maintain close coordination with Secretary of the Commission on Genetic Resources for Food and Agriculture on all matters related to standards of relevance to Article 12.3h, recognising the need to avoid duplication of efforts.

The Committee agreed that it would be useful if the Secretariat could prepare a background paper on these issues to facilitate discussions at the next meeting of the Committee.

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OPINION 6: TRANSFER AND USE OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE UNDER THE STANDARD MATERIAL TRANSFER AGREEMENT (SMTA)

Transfers to service providers

The *Ad Hoc* Technical Advisory Committee considered situations wherein Multilateral System material is transferred to services providers who will conduct analyses or any other services on the material, on contract or any other arrangements, for the provider, and not for any other purposes. The *Ad Hoc* Technical Advisory Committee was of the opinion that in cases where materials under the Multilateral System are transferred to service providers, the person transferring them has the obligation to exercise 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.

In such cases, it would not be appropriate to use the Standard Material Transfer Agreement (SMTA). Instead, the provider of the material should exercise due diligence in order to ensure that the service provider destroys the material or returns the material after the conclusion of the service. If the service provider wishes to use the material further for conservation and utilization for research, training and breeding, it should be made available under the SMTA.

Transfers to farmers

The Committee agreed that ultimately, the use of PGRFA by farmers is the best way of conserving, sustainably using and developing crop and forage diversity. To this end the committee members acknowledged the key importance of farmers being provided access to material through the MLS.

The problem highlighted by the Committee concerned difficulties associated with distributing materials to farmers using a written and signed SMTA, particularly small farmers in developing countries. The SMTA will not be in the language of many of those farmers. And if it were, many of them could not read it in any case. Expecting them to use the SMTA when they themselves pass it on to other farmers seems highly impractical.

The Committee requested the Secretariat to commission a paper on possible ideas on practical ways to pass material to farmers that are consistent with the objectives of the Treaty and the Multilateral System, for consideration at the next meeting.

OPINION 7: RESTRICTIONS ON FURTHER TRANSFER OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE UNDER DEVELOPMENT

The Committee considered whether it is possible to put restrictions on the further transfer of this material to a third party, when transferring Plant Genetic Resources for Food and Agriculture under Development under an SMTA. The Committee concluded that the Provider has the discretion to decide who may access such materials. It further concluded that he has the right to oblige the Recipient, if he so wishes, not to transfer these Plant Genetic Resources for Food and Agriculture under Development to a third party. It noted that such additional conditions would, in normal commercial practice, be confidential, and contained in a separate document that does not need to be transmitted to the Governing Body.

This conclusion is based on the following elements.

A Recipient of a Plant Genetic Resources for Food and Agriculture under Development is not obliged to make those materials available under an SMTA, on request. Article 6.5 of the SMTA (which regulates the transfer of Plant Genetic Resources for Food and Agriculture under Development) provides that such resources shall be transferred "under the terms and conditions of the Standard Material Transfer Agreement, through a new material transfer agreement". Article 6.5a further provides "that Article 5a of the Standard Material Transfer Agreement shall not apply". Article 5a, which contains an obligation on a Recipient of Plant Genetic Resources for Food and Agriculture to make these available to others, therefore does not operate in the case of a transfer of Plant Genetic Resources for Food and Agriculture under Development.

Article 6.6 of the SMTA allows a Provider to attach additional conditions to the transfer of Plant Genetic Resources for Food and Agriculture under Development:

Entering into a material transfer agreement under paragraph 6.5 shall be without prejudice to the right of the parties to attach additional conditions, relating to further product development ...

From the above provisions of the SMTA, it is clear that a person holding or transferring Plant Genetic Resources for Food and Agriculture under Development may refuse access to them. Moreover, as every transfer of a

Plant Genetic Resources for Food and Agriculture under Development in the chain of development that may lead to a commercialized product is to be effected in accordance with Article 6.5 of the SMTA, all the subsequent Recipients enjoy this right.

The developer (or the chain of developers) of Plant Genetic Resources for Food and Agriculture under Development therefore has unlimited discretion as to whether or not to make these resources available, from their initial transfer until the time of the commercialization of a Product that incorporates them.

In the light of the above, the Committee considered that a Provider may, in the exercise of his discretion under Article 6.5a of the SMTA, require a Recipient to exclude another person from access to his Plant Genetic Resources for Food and Agriculture under Development, in transferring such resources. This requirement would form part of the "additional conditions" that, in accordance with Article 6.6 of the SMTA, a Provider may attach to the transfer of Plant Genetic Resources for Food and Agriculture under Development.

The purpose of Article 6.6 of the SMTA is to make possible normal commercial practice regarding sales of improved material and commercial cooperation in the seed sector, in such a way that Products may be developed, from which the Benefit-sharing Fund may benefit at the time of their commercialization. The Committee recognised that normal commercial practice includes the ability of the purchaser of an improved material, or of breeders cooperating in the development of an improved material, to exclude others from access to their material. The inability to do so might make such cooperation impossible.

The Committee considered that nothing in the SMTA requires the additional terms imposed by a Provider of Plant Genetic Resources for Food and Agriculture under Development on a Recipient to be publicly disclosed. While, in accordance with Articles 6.5 and 5e of the SMTA, the Provider is obliged to transmit certain information to the Governing Body, when transferring Plant Genetic Resources for Food and Agriculture under Development, this information does not include the additional conditions. Moreover, Annex 2, Part III (iv) of Resolution 5/2009 of the Governing Body provides that the information that is transmitted shall at all times be maintained in strict confidentiality, and that access to the data shall be strictly restricted to the Third Party Beneficiary, in the context of the possible initiation of dispute settlement.

OPINION 8: RESTORATION OF GERMPLASM

The Committee was of the opinion that the term "restoration" typically refers to situations where plant genetic resources for food and agriculture of Annex I crops and forages are requested for restoration to the provider or the competent authority of the territory from which they were originally collected. The Committee noted that some provisions of the Treaty are relevant to restoration issues. These are: i) Article 15.1(a) and Article 15.1(b)(ii); and ii) Article 12.4 and Article 12.6.

Based on the analysis of those Treaty provisions as provided in document AC-SMTA-MLS 2/10/9, the Committee recognized that there were three possible options for the treatment of the issue of restoration of plant genetic resources for food and agriculture of Annex I crops and forages, which could be viewed as being compatible with the wording of the Treaty:

a. Require all restoration of plant genetic resources for food and agriculture of Annex I crops and forages to be subject to acceptance of the SMTA;

b. Require all restoration of plant genetic resources for food and agriculture of Annex I crops and forages to be subject to acceptance of the SMTA with the exception of material transferred in emergency disaster situations for the purpose of re-establishing agricultural systems;

c. Not treat restoration as an act of facilitated access requiring the use of the SMTA.

The Committee noted that the interpretation under c) above would be consistent with the practice of many Contracting Parties and international institutions. The Committee was of the view that the restoration of germplasm should not be considered an act of facilitated access requiring the use of the SMTA. However, such an interpretation would require a clear understanding of the concept of "restoration" lest the integrity of the Multilateral System be undermined.

The Committee considered that the most obvious case of restoration is where germplasm has been collected from in situ conditions in a country and conserved in a collection outside the country, and the original germplasm has been lost in some way: the germplasm is then restored to the competent authority of the country concerned. This is the situation contemplated in Article 15.1(b)(ii) of the Treaty in respect of non-Annex 1 plant genetic resources for food and agriculture held by the CGIAR Centres.

The Committee also considered that any definition of "restoration" should also cover the restoration of breeding material that has been developed by national programmes. It further considered that the concept should also be extended to cases where plant genetic resources for food and agriculture held by a genebank or other collector, including material held by a natural or legal person, is placed voluntarily in the Multilateral System and is made available to another genebank or other collector, and the original plant genetic resources for food and agriculture is then lost: the germplasm is then restored to the original genebank or other collector concerned.

An understanding covering all situations could be the following:

> **"Restoration" in practice means the return of samples of plant genetic resources for food and agriculture to the Provider or the competent authority of the territory in which they were collected from in situ conditions or which bred the plant genetic resources for food and agriculture in its programmes or to the legal or natural person that placed the plant genetic resources for food and agriculture in the Multilateral System."**

The Committee recommended that the Secretary present its opinion to the Governing Body for consideration.

OPINION 9: 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

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.*

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.

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

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.*

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.

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

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.*

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.

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.

OPINION 10: TRANSFER AND USE OF PLANT GENETIC RESOURCES UNDER THE MULTILATERAL SYSTEM – TRANSFER BY PROVIDERS AND RECIPIENTS, OTHER THAN THE CONSULTATIVE GROUP FOR INTERNATIONAL AGRICULTURAL RESEARCH (CGIAR) CENTRES AND OTHER 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 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.

IV. ADVICE PROVIDED BY THE COMMITTEE

ADVICE 1: THE PRACTICAL AND LEGAL IMPLICATIONS FOR NATURAL AND LEGAL PERSONS PUTTING MATERIAL INTO THE MULTILATERAL SYSTEM – FREQUENTLY ASKED QUESTIONS

1. What exactly is meant by "putting material" into the Multilateral System?

    - Putting material into the Multilateral System, in one sense, means identifying specific accessions, lines, races or varieties, and undertaking to make a sample of these available, on request, under an SMTA.

    - When a sample of one of these is then provided to a Recipient under an SMTA, this creates obligations on the part of the Recipient that mean that this sample, in the form received, and as modified by that Recipient, or subsequent Recipients, is legally part of the Multilateral System. So only individual samples are put into the Multilateral System.

    - A natural or legal person may also very easily and effectively put material into the Multilateral System by providing it to an institution that already has an obligation to make materials it holds available under the Multilateral System, such as a national genebank in a Contracting Party, or an International Institution that has concluded an agreement with the Treaty to do so.

2. Can the person putting material into the Multilateral System continue to use it, without being bound by the conditions of the SMTA?

    - Undertaking to make samples of material available under the Multilateral System, providing them under an SMTA, or giving a sample or samples to an institution that has undertaken to make material available under the Multilateral System, in no way limits a natural or legal person's normal freedom to operate with the rest of that material.

- If a natural or legal person who has provided material under an SMTA has, for example, lost the original material, he may request a sample of that material from the person to whom it was provided, and receive it back without an SMTA being used.

3. Must a person undertaking to make material available under the Multilateral System, and wishing to continue to use it, divide those resources into (1) a part for the Multilateral System, and (2) a part for its own use?

    - No, because that person is not bound by the conditions of an SMTA for this material.

4. What are the basic obligations of someone putting material into the Multilateral System, by informing the Secretary of the Treaty?

    - The person undertakes, for specific plant genetic resources for food and agriculture (information about which he provides to the Secretary at the same time as the notification of making them available) to:

        - Provide a sample of these resources to any person requesting them under the Multilateral System, through an SMTA,
        - Include all available passport data and any other associated available non- confidential descriptive information, and
        - Provide the sample free of charge, or at a minimal cost.

The person should publicly provide adequate information on these resources, for plant breeders who are thinking of using them, for example, on a website. Such descriptions should ideally include the information on the FAO/IPGRI Multicrop Passport Descriptor List.

5. Is there an obligation to maintain forever material put into the Multilateral System?

    - No, but, in practical terms, if for any reason specific plant genetic resources for food and agriculture are no longer available, the person is requested to inform the Secretary, and correct any publicly available information.

6. May materials of crops be provided under an SMTA?

    - The Treaty provides that only crops in Annex I to the Treaty are in

the Multilateral System. Nothing, however, prevents non-Annex I materials to be provided under the same terms and conditions as Annex 1 crops, through use of the SMTA, as a number of Contracting Parties and International Institutions are doing.

7. Are Plant Genetic Resources for Food and Agriculture under Development in the Multilateral System?

   - The SMTA provides that access to Plant Genetic Resources for Food and Agriculture under Development shall be at the discretion of its developer, during the period of its development.
   - Plant Genetic Resources for Food and Agriculture under Development refers to Material that has been received under a previous SMTA (and is therefore in the Multilateral System), not to material held by a breeder that has not been received under an SMTA, and which is still in a development stage.

8. Can the person putting material into the Multilateral System transfer the same material to (1) other units of his company or institution, or (2) commercial partners and affiliates without using the SMTA?

   - 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.

9. May one discriminate between persons requesting material, and supply it to some and not to others?

   - The basic principles of the Treaty requires that all persons under the jurisdiction of a Contracting Party who request a sample of material under the Multilateral System should be treated equally, and not discriminated against.

10. May one transfer material put into the Multilateral System to a Recipient in a non- Contracting Party?

    - Yes, nothing in the Treaty or the SMTA prevents it, but there is no

obligation to do so.

11. Can a person under the jurisdiction of a state that is not a Contracting Party to the Treaty put material into the Multilateral System?

- Nothing in the Treaty or the SMTA prevents it, though the national legislation of a State that is not a Contracting Party to the Treaty may do so.

12. Can material protected by intellectual property rights be put into the Multilateral System?

- Yes, provided that the basic principle of the Multilateral System—that all material in it should be freely available to others for research, breeding and training for food and agriculture—is respected. Intellectual property rights that are not compatible with such free access would need to be waived, for the material to be transferred under an SMTA.

13. What are the reporting obligations?

- There are no reporting obligations, apart from the normal reporting obligations of a Provider under an SMTA, for natural and legal persons putting material in the Multilateral System.
- When transferring Material under an SMTA, the person doing so acts as a Provider, and accepts the reporting obligations of the SMTA, namely that in accordance with Article 5e, the Provider shall periodically inform the Governing Body about the Material Transfer Agreements entered into, at least once every two calendar years. This may be done by either:

(A) Transmitting a copy of the completed SMTA,

or

(B) Ensuring that the completed SMTA is at the disposal of the Third Party Beneficiary as and when needed;

stating where the SMTA in question is stored, and how it may be obtained; and

providing the following information:

  - The identifying symbol or number attributed to the SMTA by the

Provider;

- The name and address of the Provider;
- The date on which the Provider agreed to or accepted the SMTA, and in the case of shrink-wrap, the date on which the shipment was sent;
- The name and address of the Recipient, and in the case of a shrink- wrap agreement, the name of the person to whom the shipment was made;
- The identification of each accession in Annex I to the SMTA, and of the crop to which it belongs.

If the Provider chooses Option B, there is a legal obligation to keep the relevant information safe and unaltered. Under both options, where there is a physically signed SMTA, the signed document should be kept.

If a natural or legal person has given a sample to an institution that has already undertaken to hold material within the Multilateral System, that institution is responsible for reporting on any SMTA under which it makes this material available.

14. Does a Provider incur any liability for Material distributed?

    - No. By Article 9 of the SMTA, "The Provider makes no warranties as to the safety of or title to the Material, nor as to the accuracy or correctness of any passport or other data provided with the Material. Neither does it make any warranties as to the quality, viability, or purity (genetic or mechanical) of the Material being furnished. The phytosanitary condition of the Material is warranted only as described in any attached phytosanitary certificate. The Recipient assumes full responsibility for complying with the recipient nation's quarantine and biosafety regulations and rules as to import or release of genetic material."

15. Does a Provider have a responsibility for the subsequent actions of a Recipient?

    No.

16. Can a Provider terminate an SMTA?

    - No, an SMTA remains in force so long as the Treaty remains in force.

17. What are the rights and obligations of a Provider, in relation to dispute settlement?

The SMTA provides that "Dispute settlement may be initiated by the Provider". However, the Provider has no obligation to initiate a dispute. The Third Party Beneficiary would therefore act for the Treaty, and initiate a dispute, if necessary.

- A Provider would be under an obligation to provide the SMTA to the Third Party Beneficiary, if this has not already been done.
- The Third Party Beneficiary has the right to request that the appropriate information, including samples as necessary, be made available by the Provider, regarding its obligations in the context of the SMTA. There is, however, no obligation on a Provider of a material under the Multilateral System to maintain samples of materials provided.

18. If a legal person is wound up, sold, or subdivided, are obligations transferred?

- If a legal person is wound up, and resources are to be discarded, the holder is invited to offer them to a national, regional or international genebank.
- If a legal person is sold or subdivided, the resulting companies may wish to reconfirm their undertaking to the Secretary, depending on who now has ownership of the material in question.
- If a legal person is subdivided, provision should be made for any relevant records relating to SMTAs issued, and any remaining reporting obligations, to be transferred to one of the successor entities.

ADVICE 2: INCLUSION OF MATERIAL INTO THE MULTILATERAL SYSTEM

With regard to the **inclusion of material** into the Multilateral System and its availability, 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

and suggested that more efforts should be made by both natural and legal persons and Contracting Parties to supply such information. 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.

Note by the Secretariat:

It informed the Committee to have 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.

ADVICE 3: CREATING LEGAL SPACE FOR THE INTERNATIONAL TREATY IN THE CONTEXT OF ACCESS AND BENEFIT-SHARING REGIMES - MODEL PROVISIONS TO CREATE SPACE FOR THE OPERATION OF THE MULTILATERAL SYSTEM

Regarding legal space for the Treaty and its Multilateral System in particular, in the context of access and benefit-sharing frameworks, the Committee emphasized at its Third Meeting 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.

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 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.

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**"*

At its Forth meeting, the Committee stressed the need to promote coordination at the national level, in particular between respective national focal points of the Treaty and the Convention on Biological Diversity so that they could harmonize their views and adopt a more comprehensive approach to access and benefit-sharing.

It also recommended that efforts should continue to be made to facilitate regular interactions among other relevant actors involved in the national implementation processes of both agreements, such as farmers and farmers' organizations, NGOs and the private sector, including through convening meetings.

ADVICE 4: COMMERCIALIZATION OF A PRODUCT UNDER THE MULTILATERAL SYSTEM IN THE CONTEXT OF NOT-FOR-PROFIT PROJECTS UNDER ARTICLE 13 OF THE INTERNATIONAL TREATY

In response to the questions posed by the experts of a non-profit project, the Committee first 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 would apply. The nature of the project (whether public, private, or not-for-profit) has no relevance to these obligations.

ADVICE 5: AVAILABILITY WITHOUT RESTRICTION FOR FURTHER RESEARCH AND BREEDING UNDER THE MULTILATERAL SYSTEM: GEOGRAPHICAL EXTENT OF THE RESTRICTION

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.

ADVICE 6: COMMERCIALIZATION OF A PRODUCT UNDER THE MULTILATERAL SYSTEM: CALCULATION OF BENEFIT-SHARING PAYMENTS

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.

ADVICE 7: AVAILABILITY WITHOUT RESTRICTION FOR FURTHER RESEARCH AND BREEDING UNDER THE MULTILATERAL SYSTEM: SALE OF HYBRIDS

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.

ADVICE 8: TRANSFER OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE TO AFFILIATE COMPANIES AND SMTA CONCLUDED ON BEHALF OF AFFILIATE COMPANIES

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.

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.

ADVICE 9: RESTORATION OF BREEDING LINES

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.

ADVICE 10: GENERA AND SPECIES OF ANNEX I CROPS

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.

ADVICE 11: COLLECTION, CONSERVATION AND DISTRIBUTION THROUGH THE SMTA OF SAMPLES OF PLANT VARIETIES PROTECTED BY PLANT BREEDER'S RIGHTS

Regarding considered the question as to whether a genebank can collect, conserve and distribute samples of plant varieties protected by plant breeder's rights, without the right holder's consent, using the SMTA, in the jurisdiction where the plant breeder's rights apply and in other jurisdictions. The Committee also considered the question in relation to the possibility of including material protected by intellectual property rights in the Multilateral System.

The Committee recalled the opinion it had given on a related issue at its second meeting in September 2010. The advice of the Committee was that it is possible for such material to be put in the Multilateral System, provided that the basic principle of the Multilateral System – that all material in it should be freely available to others for research, breeding and training for food and agriculture – is respected. In the view of the Committee, intellectual property rights that are not compatible with such free access would need to be waived, for the material to be transferred under an SMTA.

The Committee confirmed its previous advice and considered that the specific question posed in the document IT/AC-SMTA-MLS 4/12/6 would be outside of the operation of the Multilateral System, and thus not relevant to the mandate of the Committee.

ADVICE 12: TRANSFER OF ANNEX I PLANTING MATERIAL FOR SUBSEQUENT SALE

The Committee considered whether the SMTA is to be used in cases where the transfer of *Annex I* planting material, after multiplication, is requested to a provider for the purpose of subsequent sale of the planting material.

The Committee considered that, the purpose of the transfer being commercial sale, the transaction would not take place under the Multilateral System and, hence, it would not be mandatory to use the SMTA.

ADVICE 13: FEES FOR GERMPLASM DISTRIBUTION: MINIMAL COST INVOLVED

The Committee considered whether the "minimal cost involved", in the sense of Article 12.3(b) of the Treaty and Article 5a) of the SMTA, may be considered as including the transaction costs of germplasm distribution or as also including the cost of producing and conserving germplasm.

Recalling the spirit of the Treaty and the text of the relevant provisions, the Committee was of the opinion that the factors involved in calculating fees should be limited as far as possible, thus to cover only mailing or shipping costs and not germplasm producing and conservation costs.

V. OTHER IMPORTANT CONSIDERATIONS

First Meeting of the Committee (2010)

CONSIDERATION 1. SCOPE OF WORK OF THE COMMITTEE

The Committee agreed on concentrate its work on addressing questions and issues raised by users and sent to the Secretariat, which have major legal and policy implications.

CONSIDERATION 2. ROLE OF THE SECRETARIAT

The Committee noted that the Secretary is in a position to provide answers to questions and issues raised by users, which do not present major legal or policy implications.

CONSIDERATION 3. NATIONAL SECTORIAL COORDINATION FOR THE MANAGEMENT AND FACILITATED ACCESS OF *IN SITU* MATERIAL

In relation to access to *in situ* material, the Committee stressed the importance of adequate coordination between the agricultural ministry of the Contracting Parties and any other relevant authorities outside of the agricultural sector managing *in situ* materials to remove impediments to facilitated access in accordance with the conditions of the Multilateral System.

Third Meeting of the Committee (2012)

CONSIDERATION 4. OPTIONS FOR UPDATING THE SMTA

The Committee requested a document containing options considering updates of the SMTA, an analysis of such options, and, as one of the options, draft explanatory notes that could accompany the SMTA.

During the Fourth Meeting of the Committee (2012) the Committee agreed to suspend the discussion so that members could consult within their regional groups prior to resuming the discussions and make proposals for addressing the clarifications to the SMTA.

VI. INDEX OF TOPICS

Commercialization of a Product

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Secretariat

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Restoration

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