



The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



Item 1 of the Draft Provisional Agenda

INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

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

Rome, Italy, 18-19 January 2010

BACKGROUND AND TERMS OF REFERENCE

I. INTRODUCTION

1. At its Third Session, the Governing Body requested

*“the Secretary to give priority to assisting users of the Standard Material Transfer Agreement to overcome any implementation problems such as those identified at the First Meeting of Experts on the Standard Material Transfer Agreement, including, subject to the availability of funds, through the convening of an Ad Hoc Advisory Technical Committee on the Standard Material Transfer Agreement and the Multilateral System, taking into account regional representation, according to the terms of reference as contained in the Annex to this Resolution”.*¹

2. The Terms of Reference established for the Committee by the Governing Body, reproduced in *Annex I* to this document, stipulates, *inter alia*, that:²

“The Ad Hoc Advisory Technical Committee will advise the Secretary on implementation questions raised by users of the Standard Material Transfer Agreement, which the Secretary brings to their attention on the basis of questions addressed and forwarded to the Secretary by Contracting Parties, international centres having signed agreements with the Governing Body under Article 15 of the Treaty and other users of the Standard Material Transfer Agreement.”

3. The *Ad Hoc* Advisory Technical Committee will, therefore, be an important mechanism in the course of providing the assistance to users as mandated by the Governing Body, as well as in the overall implementation of the Multilateral System. The present document contains some background information on the establishment of the Committee, the history of preparatory work on the SMTA and Multilateral System preceding the establishment of the Committee, the Terms of Reference and some possible modalities to enable it fulfil its mandate.

¹ Resolution 4/2009, paragraph 15.

² Annex to Resolution 4/2009, paragraph 1, IT/GB-3/09/Report.

II. BACKGROUND

4. The Multilateral System of Access and Benefit-sharing of the International Treaty is established by Part IV of the Treaty. The SMTA was adopted by the Governing Body of the Treaty at its First Session by Resolution 2/2006.³ By the same Resolution, the Governing Body requested the Secretary of the Treaty to review the implementation and operation of the Standard Material Transfer Agreement, and report to the Governing Body at its Third Session.⁴

5. Since the establishment of the Multilateral System of Access and Benefit-sharing (MLS) a large number of providers have begun to utilize the Standard Material Transfer Agreement (SMTA) of the Treaty to transfer material under the Treaty. Consequently, several technical and operational questions have been, and are being, raised by users of the system.

6. In light of the requests received from the First and Second Sessions of the Governing Body and users of the System and in light of the technical, operational questions that arise in the day-to-day operation of the Multilateral System worldwide, the Secretary felt that it would be useful for him to be able to consult international experts to advise him on technical issues that have arisen or might arise. The Secretary accordingly convened a meeting of experts from 22 – 23 July 2008 at the Secretariat of the Convention on Biological Diversity, Montreal Canada in order to consult them on the technical and legal matters that had been brought to his notice regarding the operation of the Standard Material Transfer Agreement and the Multilateral System generally, and to assist him in responding to Contracting Parties' requests and developing information packages on key elements of the Treaty, as a means to enhance their implementation activities.

7. The experts held extensive and in-depth legal and technical discussions on practical issues which directly affect the day-to-day operation of the Multilateral System and SMTA and which had been raised by various user-groups of the Multilateral System and Contracting Parties and adopted opinions on various issues.

8. The experts expressed satisfaction with the substantial progress that was made during the meeting in actually providing answers for many of the practical questions and issues that had arisen in the context of the SMTA and Multilateral System operation. Given the positive and productive spirit of the meeting of experts, the deliberations and their outcomes contributed to the continued success, effectiveness, transparency and legal certainty of SMTA and Multilateral System operations.

III. DOCUMENTATION AND PROCEEDINGS OF THE FIRST MEETING OF THE COMMITTEE

9. In establishing the Terms of Reference for the Committee, the Governing Body stipulated, *inter alia*, that “the Committee shall take into account implementation problems such as those identified at the First Meeting of Experts on the Standard Material Transfer Agreement.”⁵ The meeting of experts addressed several selected legal and technical issues and recommended follow-up on a number of them. A second meeting of the experts was planned but was not held due to budgetary and practical reasons.

³ Resolution 2/2006, paragraph 1

⁴ Resolution 2/2006, paragraph 2

⁵ Annex to Resolution 4/2009, paragraph 1, IT/GB-3/09/Report.

10. Following the decision of the Governing Body, this meeting will, in effect, continue the work started by First Meeting of Experts on the Standard Material Transfer Agreement, and benefit from the experiences gained from that meeting. The current meeting will, therefore, largely follow the same format of documentation and proceedings as the first meeting of experts. The way of working and expected outputs of the meeting will also follow the successful precedent of the First Meeting of Experts on the SMTA and Multilateral System. Accordingly, the Report of the meeting of experts is being made available to members of the *Ad Hoc* Advisory Technical Committee in the *Annex II* to this Document.

11. At the end of its meeting, the First Meeting of Experts requested further studies and input papers on the specific issues it had considered. These papers were commissioned and will form part of the documentation for the present meeting. Additional issues or questions may, however, be included for advice by the Advisory Technical Committee on the basis of urgency or strategic importance to the use of the SMTA or the operation of the Multilateral System.

12. It is expected that, in the period between the first and second meetings of the Committee, members would assist in peer-reviewing the draft Options and Guide on practices, procedures and measures for the implementation of the Multilateral System, by commenting on initial draft elements of the Options and Guide. It is also expected that their comments would include documentation on the ways in which users address problems that arise, and on how to find solutions which help Contracting Parties. It should be noted that, although Committee members may provide their initial thoughts on the draft elements of the Options and Guide, they are not expected to provide comments at the first meeting but in the intersessional period according to a time-schedule set out in the cover note to the initial draft elements.

13. In establishing its Terms of Reference, the Governing Body further stipulated that “the *Ad Hoc* Advisory Technical Committee will report on the progress to the Secretary who will in turn report on this progress to the Fourth Session of the Governing Body”. As a result, outcomes of the meeting of the Committee will, in accordance with the guidance of the Governing Body, be presented by the Secretariat to the Fourth Session of the Governing Body.

14. Certain elements of the outcome of these deliberations will also form part of the comprehensive report on the SMTA to be prepared for the Fourth Session of the Governing Body as the participating experts will be requested, *inter alia*, to assist in the further collection of information and data.

Annex I

**TERMS OF REFERENCE FOR
THE *AD HOC* ADVISORY TECHNICAL COMMITTEE ON THE STANDARD
MATERIAL TRANSFER AGREEMENT AND THE MULTILATERAL SYSTEM**

1. The *Ad Hoc* Advisory Technical Committee will advise the Secretary on implementation questions raised by users of the Standard Material Transfer Agreement, which the Secretary brings to their attention on the basis of questions addressed and forwarded to the Secretary by Contracting Parties, international centres having signed agreements with the Governing Body under Article 15 of the Treaty and other users of the Standard Material Transfer Agreement. The *Ad Hoc* Advisory Technical Committee shall take into account implementation problems such as those identified at the First Meeting of Experts on the Standard Material Transfer Agreement.
2. The *Ad Hoc* Advisory Technical Committee will comprise up to two members designated by each Region and up to five technical experts, including representatives of the CGIAR. In inviting these technical experts to a meeting of the *Ad Hoc* Advisory Technical Committee, the Secretary will have regard of the specific nature of the questions brought to his notice and the expertise needed to address these. Experts will be identified with due attention to the knowledge and skills required, understanding of the International Treaty and its Multilateral System, impartiality, and geographical balance. There will be two Co-Chairs, one from a developing country and one from a developed country Contracting Party, who will be elected from the members of the *Ad Hoc* Advisory Technical Committee.
3. The *Ad Hoc* Advisory Technical Committee will hold up to two meetings subject to the availability of funds.
4. The *Ad Hoc* Advisory Technical Committee will prepare a report at the end of a meeting, with responses to matters brought to its attention, and, where necessary, opinions on specific questions. These reports will be made available as information documents to the Fourth Session of the Governing Body. Where necessary, the *Ad Hoc* Advisory Technical Committee should discuss and consider questions regarding the Standard Material Transfer Agreement and the Multilateral System that may need to be brought to the attention of the Governing Body through the Secretary.
5. The *Ad Hoc* Advisory Technical Committee will report on the progress to the Secretary who will in turn report on this progress to the Fourth Session of the Governing Body.

ANNEX II

IT/MOE-SMTA 1/08/REPORT

August 2008

INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE
FIRST MEETING OF EXPERTS ON THE STANDARD MATERIAL TRANSFER AGREEMENT AND THE MULTILATERAL SYSTEM OF THE TREATY
Montreal, Canada, 22– 23 July 2008
REPORT

1. Introduction

The First Meeting of Experts on the Standard Material Transfer Agreement and the Multilateral System of the Treaty was held in Montreal, Canada from Tuesday, 22 to Wednesday, 23 July 2008, hosted at the Secretariat of the Convention on Biological Diversity.

2. Opening of the meeting

The Secretary of the Governing Body, Mr Shakeel Bhatti, welcomed the experts and thanked them for their presence at the meeting. The list of participants is attached in *Appendix 7*. Mr Shakeel Bhatti highlighted the importance of this meeting and of the need for the effective operation of the Multilateral System (MLS) for the successful implementation of the Treaty.

He stated that this was the beginning of a positive, transparent and ongoing space for discussions for the effective implementation of the MLS and the Standard Material Transfer Agreement (SMTA), in the overall context of a successful implementation of the Treaty. He noted that the need and demand for this meeting had arisen from requests and inquiries received by the Secretary from Contracting Parties and other stakeholders in the MLS and SMTA. After informing the Bureau of the Governing Body and based on the Work Programme and Budget 2008/09 as well as the decisions and deliberations of the First and Second Sessions of the Governing Body, the Secretary forwarded the questions and issues he had received from Contracting Parties and stakeholders for technical analysis and advice to the experts. He recalled the criteria for the selection of the questions and issues for consideration by the experts, including:

- source, i.e. issues that are raised by Contracting Parties or stakeholders and referred to Secretariat;
- effect on the practical implementation of the MLS /SMTA;
- urgency, i.e. those that are the most immediate and urgent; and
- expediency – because of the level of technicality and the limited time available, some issues were deferred and will be tabled at future meetings, as necessary.

Mr Bhatti emphasized that the participants were invited in their expert capacity and did not represent the Contracting Parties, institutions or other stakeholders that they might be affiliated with. Consequently, the advice provided by the experts did not bind Contracting Parties, the Secretariat or any stakeholder to the Treaty, but the legal and technical opinions arising from

the discussions would contribute significantly towards addressing the issues that have arisen in the course of the implementation of the SMTA and MLS. The Terms of Reference of the Experts, as contained in *Appendix 1*, indicate that the main purpose is to provide advice and suggestions that will enhance the effective operation of the Treaty's Multilateral System, and also to provide input in the development of Options and Guide that will assist Contracting Parties and other stakeholders in utilizing the Standard Material Transfer Agreement and fulfilling other relevant obligations related to the Multilateral System.

He thanked the Executive Secretary of the Convention on Biological Diversity (CBD), Mr Ahmed Djoghlaflaf, for offering to host the Meeting of Experts as part of the ongoing collaborative activities which fulfil the Treaty provisions in Articles 1, 19 and 20 for the attainment of the Treaty's objectives in close linkage to the Convention.

Mr Ravi Sharma, Officer in Charge, on behalf of Mr Ahmed Djoghlaflaf, Executive Secretary of the Convention on Biological Diversity, welcomed participants to the Secretariat of the Convention and stated that it was an honour for the Secretariat of the CBD to host the meeting. He noted the long history of collaboration between the CBD and FAO on a number of issues of common interest and expressed his pleasure that this collaboration had more recently broadened to the Secretariat of the International Treaty. He further stated that the Conference of the Parties to the Convention has recognised the important role that the International Treaty on Plant Genetic Resources for Food and Agriculture will have, in harmony with the Convention on Biological Diversity, for the conservation and sustainable utilization of this important component of agricultural biological diversity, for facilitated access to plant genetic resources for food and agriculture, and for the fair and equitable sharing of the benefits arising out of their utilization. Recalling that the Ninth Meeting of the Conference of Parties to the Convention had welcomed the offer of the Treaty Secretary to host a meeting of the Working Group on Access and Benefit-sharing in Rome, the Secretariat of the Convention was certain that the experiences from the implementation of the Treaty would be of benefit to the ongoing negotiations for an International Regime on Access and Benefit-sharing under the Convention.

3. Election of Chair

Mr Bhatti drew attention to the need for the meeting to elect its officials. The meeting elected Messrs. Bryan Harvey and Eng Siam Lim as Co-Chairpersons to guide the proceedings of the meeting. Mr Leontino Taveira was elected as the *Rapporteur*.

4. Adoption of the Agenda and Time Table

The meeting adopted its agenda, as given in *Appendix 2*.

5. Update on progress in the operation of the Standard Material Transfer Agreement (SMTA) and the Multilateral System

Mr Bhatti reported on developments related to the Multilateral System, and highlighted progress and activities that had taken place in the operation of the Multilateral System since the Second Session of the Governing Body in October 2007, and indicated that there will be a second meeting of the Experts later in the year. He also provided information on the status of ratification of the Treaty and inclusion of plant genetic resources for food and agriculture in the Multilateral System. As of 21 July 2008, 117 countries and the European Community had become Contracting Parties. He noted that there is a substantial gap in existing information on what material is available in the Multilateral System, on SMTA operations, and on what is happening in the

System, *vis-à-vis* the information that will be required by the Governing Body to take informed decision on the operation of the System. He pointed out that it is also in this regard that the experts could be most helpful in making information available to the Secretariat or otherwise assist in obtaining relevant information from their respective regions and institutions.

6. Contractual issues

Framework agreements

The meeting considered the issue of whether each transfer of material taking place in the context of an ongoing long-term research or breeding partnership has to be made under a separate SMTA, or whether *material transfer framework agreements* may be concluded by which the parties agree that all transfers or exchanges of material to be made among each other under the partnership arrangement or programme, is made pursuant to the terms and conditions of the SMTA.

The meeting considered document IT/MOE-SMTA 1/08/3 and agreed on the opinions and advice contained in *Appendix 3* of this Report in response to the set of questions and issues identified in the document.

Termination and applicable law

The meeting considered the issues raised in regard to how the question of termination of contract should be considered in the absence of a termination clause in the SMTA, including the effect on the rights and obligations of the parties, as well as the role of Governing Body decisions in the interpretation of the SMTA.

The meeting considered document IT/MOE-SMTA 1/08/4 and agreed on the opinions and advice contained in *Appendix 4* of this Report in response to the set of questions and issues identified in the document.

7. SMTA Operations

Transfer of Plant Genetic Resources for Food and Agriculture (PGRFA) under the SMTA

The meeting considered the various issues concerning when a movement of PGRFA might amount to “transfer” within the meaning of the Treaty to require the use of the SMTA.

The meeting considered document IT/MOE-SMTA 1/08/4 and agreed on preliminary opinions and advice in response to the questions contained in the document and requested further analysis to facilitate finalization at the next meeting.

Uses of Plant Genetic Resources for Food and Agriculture (PGRFA) under the SMTA

The meeting considered how to distinguish, in practice, between purposes of use of PGRFA in the operation of the SMTA and whether an SMTA is required for providers to make PGRFA available to farmers and others for direct use for cultivation.

The meeting considered document IT/MOE-SMTA 1/08/5 and agreed on preliminary opinions and advice in response to the questions contained in the document and requested further analysis to facilitate finalization at the next meeting.

8. Reporting and information in the operation of the Multilateral System

The meeting considered the various issues arising in the context of the information needs of the Governing Body for the operation of the MLS, and the reporting requirements of the Treaty and the SMTA.

The meeting considered document IT/MOE-SMTA 1/08/8 and agreed on the preliminary opinions and advice contained in *Appendix 5* of this Report in response to the set of questions and issues identified in that document, and agreed to defer its finalization to the next meeting.

9. Legal, policy and other measures for national and regional implementation of the Multilateral System

The meeting considered various issues arising in the context of legal, policy and other measures for national and regional implementation of the Treaty. In particular, the experts analyzed what sorts of measures Contracting Parties could take to encourage natural and legal persons within their jurisdictions to include PGRFA in the Multilateral System; which effective measures interested Contracting Parties, other governments and entities could take to identify or include material in the Multilateral System; and what additional legal, policy and other measures are needed for national and regional implementation of the Multilateral System. It was agreed that where parties have or are in the process of instituting legislative measure on access and benefit-sharing, adequate space should be created for the implementation of the Multilateral System and the Treaty in general.

The meeting considered document IT/MOE-SMTA 1/08/7 and agreed on the opinions and advice contained in *Appendix 6* of this Report in response to the set of questions and issues identified in that document.

10. Draft options and guide on practices, procedures and measures for the implementation of the Multilateral System

The experts considered document IT/MOE-SMTA 1/08/9 and agreed that they would make inputs and provide whatever material and information they could, in their personal capacity, in the course of the development of the Options and Guide. It was also agreed that the experts will provide any other additional technical support they could, in their individual capacities, to the Secretariat towards the preparation of the Options and Guide.

The experts also encouraged the Secretariat to further seek information from National Focal Points and promote collaboration with the respective experts.

11. Finalization of legal and technical opinions

The meeting finalized the legal and technical opinions contained in *Appendices 3 to 6*. The meeting agreed that legal and technical opinions and advice on outstanding issues as well as any additional issues that might be identified by the Secretariat will be finalized and consolidated at the next meeting for the Secretary to utilize or forward to the Governing Body, as appropriate.

12. Follow-up from the meeting and future work

It was agreed that the Secretariat should again make arrangements for additional input papers and information on the items identified for further work at the next meeting based on the input papers considered at the present meeting.

The experts agreed that they will assist in any way they could before the next meeting in providing general advice to the Secretary and comments and inputs on the preparation of the draft Options and Guide.

13. Other business

The meeting experts identified and considered a number of questions regarding PGRFA put by commercial companies into the Multilateral System:

1. Would the company forego any rights over its own material, by putting it into the MLS?
2. If it lost material, could it ask for it back without an SMTA?
3. If a variety such as the Binche potato (now 50 years old) were put into the MLS, would it be possible for the company to continue using it.

The meeting of experts was of the opinion that what is put into the Multilateral System is a physical sample of material, not a variety, or the whole material sampled, unless the contributor chooses to include all his holding of it. Therefore:

1. A company is not obliged to put its entire holdings of a particular material into the MLS, since inclusion occurs at the accession level, and it may continue to use the part it retains, without by any obligations under the MLS.
2. Once a particular sample is in the MLS, the company could only get part of that sample back under an SMTA. It was noted that, for this reason, when the Netherlands Centre for Genetic Resources accepts a material from a company, it divided it, and maintains a sub-sample physically separate and outside the MLS, in order to meet any request from the contributor for return of a sample without by an SMTA.
3. Even if a sample of a variety such as Binche is put into the MLS, the owner of the remaining material may do what he wills with it.

The experts also noted the following *ad hoc* questions which had been submitted by a Contracting Party to the meeting and agreed to consider them at the next meeting;

- i) What happen with genetic material of an *Annex I* plant which has been accessed from a non-Party under more restrictive conditions than the SMTA? What does happen with the material derived? Does it fall under the MLS? Could it be accessed under the SMTA with the result that it does not comply anymore with the conditions fixed by the original provider?
- ii) In case of transfer of material under development, will it be possible under the SMTA to put restrictions on the further transfer of this material to a third party?
- iii) How should the list of material under the MLS be made publicly available? Through the National database or through EURISCO?
- iv) How should the number of accessions under one SMTA be notified and to whom?
- v) What should be done in case of repatriation of genetic resources in the country of origin? Do we need to use the SMTA?

The experts proposed that at the second meeting a short session be held to consider further *ad hoc* questions for confirmation of existing practices.

The experts also agreed to submit further questions to the Secretariat for compilation and for their consideration at the next meeting. They undertook to assist the Secretary at the next meeting in developing appropriate answers to these questions.

The experts expressed satisfaction of the substantial progress that was made during the meeting in actually providing answers for many of the practical questions and issues presented for their consideration.

14. Date and venue of next meeting

The next meeting will be held at the beginning of November 2008 or later.

15. Adoption of the Final Report

The meeting adopted this report.

16. Closing of the meeting

The experts expressed thanks to the Secretariat of the Convention on Biological Diversity for providing the venue and suitable facilities for the meeting, and thanked the Secretariat for the excellent preparation it had made and the documentation for the meeting.

APPENDIX 1

MEETING OF EXPERTS ON THE STANDARD MATERIAL TRANSFER AGREEMENT AND THE MULTILATERAL SYSTEM OF THE TREATY**TERMS OF REFERENCE***Background*

1. The Multilateral System of Access and Benefit-sharing of the International Treaty is established by Part IV of the Treaty. The Standard Material Transfer Agreement (SMTA) was adopted by the Governing Body of the Treaty at its First Session by Resolution 2/2006.⁶ By the same Resolution, the Governing Body requested the Secretary of the Treaty to review the implementation and operation of the Standard Material Transfer Agreement, and report to the Governing Body at its Third Session.⁷ In light of such requests received from the First and Second Sessions of the Governing Body and users of the System and in light of the technical, operational questions that arise in the day-to-day operation of the Multilateral System worldwide, the Secretary felt that it would be useful for him to be able to consult international experts to advise him on technical issues that have arisen or might arise. Given the executive and management authority of the Secretary and after informing the Bureau of the Governing Body, the Secretary is consulting experts, including through convening meetings, in order to receive in-depth technical advice on the operation of the SMTA and the Multilateral System until a definitive guidance is given by the Governing Body.

2. This approach derives both from the decisions and deliberations of the First and Second Sessions of the Governing Body and what needs to be done in preparation of the Third Session, especially gathering information on the operation of the system⁸ and reviewing the operation of the SMTA.⁹ Furthermore, the Work Programme and Budget for the 2008-09 Biennium of the Treaty, considered by the Governing Body, provides for the experts to peer review a draft of Options and a Guide on practices, procedures and measures that respect the spirit of the Treaty within different legal systems, policy areas, sectorial contexts, including documentation on the ways in which they address problems that arise and find solutions which help Contracting Parties.

3. The Bureau of the Governing Body noted that the Secretary may consult international experts and convene such other meetings that are necessary to assist in the implementation of the Treaty and to effectively carry out the decisions of the Governing Body, and the specific proposal to convene the meeting of international experts on the Multilateral System and SMTA operations.

⁶ Resolution 2/2006, paragraph 1

⁷ Resolution 2/2006, paragraph 2

⁸ At the Second Session of the Governing Body, the Governing Body requested the Secretary to gather information on the progress in the inclusion of plant genetic resources in the Multilateral System and requested him to develop information packages on key elements of the Treaty as a means to enhance implementation activities.

⁹ At the First Session of the Governing Body, the Governing Body requested the Secretary of the Treaty to review the implementation and operation of the SMTA, and report to the Governing Body at its Third Session, in particular on the benefit-sharing provisions and the modalities of payment;

Terms of reference

4. In light of the foregoing, the terms of reference of the international experts are to assist the Secretary in:
- research and analysis on the Multilateral System and SMTA operations;
 - gathering information on Multilateral System and SMTA operations;
 - developing information packages to enhance implementation activities;
 - preparing responses to questions from users, or from prospective users, of the system;
 - peer-reviewing and commenting on draft Options and a Guide on practices, procedures and measures that respect the spirit of the Treaty within different legal systems, policy areas, sectorial contexts, including documentation on the ways in which they address problems that arise and find solutions which help Contracting Parties;
 - such other related activities in respect of which the Secretary may, from time to time, request assistance.
5. The result of this work will be presented by the Secretariat to the Third Session of the Governing Body.

APPENDIX 2

FIRST MEETING OF EXPERTS ON THE STANDARD MATERIAL TRANSFER AGREEMENT AND THE MULTILATERAL SYSTEM OF THE TREATY**Montreal, Canada, 22– 23 July 2008****AGENDA**

- Opening of the Meeting
1. Election of the Co-chairs and *Rapporteur*
 2. Adoption of the provisional agenda and time-table
 3. Update on progress in the operation of the Standard Material Transfer Agreement (SMTA) and the Multilateral System
 4. Contractual issues
 - Framework agreements
 - Termination and applicable law
 5. SMTA Operations
 - Transfer of PGRFA under the SMTA
 - Uses of PGRFA under the SMTA
 6. Reporting and information needs in the operation of the Multilateral System
 7. Legal, policy and other measures for national and regional implementation of the Multilateral System
 8. Draft options and guide on practices, procedures and measures for the implementation of the Multilateral System
 9. Follow-up from the meeting and future work:
 - Comments on Draft options and guide
 - Report to the Third Session of the Governing Body on the implementation and operation of the Standard Material Transfer Agreement
 - Inter-sessional advice to the Secretary
 10. Finalization of legal and technical opinions
 11. Other business
 12. Date and venue of next meeting
 13. Adoption of the Final Report
 14. Closing of the meeting

APPENDIX 3

OPINION No. 1 (part 1)

**FIRST MEETING OF EXPERTS ON THE STANDARD MATERIAL TRANSFER AGREEMENT AND THE MULTILATERAL SYSTEM OF THE TREATY
Montreal, 22– 23 July 2008****CONTRACTUAL ISSUES
Framework agreements
Termination and applicable law****Regarding Material Transfer Framework Agreements****1. Are there situations in which it would be useful to conclude material transfer framework agreements?**

It would be relatively rare. However, there may be cases involving high volumes of transfers between organizations where administrative efficacy would be served by creating such agreements.

2. What are the legal requirements which material transfer framework agreements would have to meet to be fully compatible with the Treaty and the SMTA?

The overall guiding principle is that the chain of obligations between providers and recipients must not be broken, allowing recipients to avoid the benefit sharing provisions of the SMTA.

There may be more than one way to construct/construe a framework agreement.

One possibility is that the SMTA can itself be seen as a framework agreement between a provider and a recipient. More than one shipment of materials may be sent from a single provider to a single recipient pursuant to the same SMTA. In such cases, each new shipment would constitute an amendment to Annex 1 to the SMTA.

Another possibility arises in situations where a number of partner organizations are engaged in joint research projects. Such projects are often governed by consortium agreements setting out the objectives of the research, partners' contributions, and so on. These cooperation agreements could also include clauses establishing that parties agree that all transfers within the joint project will be subject to the terms and conditions of the SMTA as annexed to the agreement, and that the full text of the SMTA would not then need to accompany each transfer.

In both cases, the inventories that accompany each shipment would be deemed to constitute Annex 1 (or an amendment of Annex 1) of the SMTA. The inventory document would have to include all of the information that is currently anticipated in Annex 1 of the SMTA, including details of MLS ancestors of PGRFA under Development and the identity of the individual providers and recipients. It should also include the date of sending those materials, and

recipients should maintain independent records of when they received each shipment.¹⁰ Finally, the inventory document should refer to the specific SMTA or multiparty framework agreement pursuant to which the transfers are being made (in case one of the organizations concerned has signed more than one such material transfer framework agreement).

In both cases, the transfers would need to be reported on periodic bases to the Governing Body.

The period of time covered by material transfer framework agreements should not exceed [a year or two]. There is a risk that, if they cover longer periods of time, functionaries in the organizations concerned may lose sight of, or never be made aware of, the framework agreements. One of the advantages of needing to accept the SMTA by signing, clicking and or receiving it shrink-wrapped for each transfer is that it reminds the people involved in the use of the materials of their obligations/freedoms.

3. What needs to be done and which information needs to be gathered in preparation for the Second Meeting of Experts?

Members of the expert group will bring multiparty material transfers framework agreements to the Secretariat.

4. Which aspects of this question, if any, need to be sent to the Governing Body and what options should be presented for its consideration?

No decision of the Governing Body is required. It would be useful to bring to the Governing Body's attention that the expert group considered the issue and confirmed the opinions set out in this document.

¹⁰ Article 10 of the SMTA requires signatories to hard copies of the SMTA to provide the date of their signatures. Web based systems for 'click wrap' acceptance would also presumably note the relevant dates. Shrink wrap has the date built into the system of transfer, with the date of acceptance being the date of receipt of the material. With a material transfer framework agreement, the moment of offer and acceptance takes place upon the forging of the agreement. Nonetheless, it may be important to know, shipment-by-shipment, when the actual physical transfers of materials under the material transfer framework agreement takes place.

APPENDIX 4

OPINION No. 1 (part 2)

**FIRST MEETING OF EXPERTS ON THE STANDARD MATERIAL TRANSFER AGREEMENT AND THE MULTILATERAL SYSTEM OF THE TREATY
Montreal, 22– 23 July 2008****CONTRACTUAL ISSUES****Framework agreements****Termination and Applicable law****Regarding Termination and Applicable Law****Context**

1. As the SMTA is a private contract, it stipulates the rights and obligations of the parties to the Agreement. In this context:
 - (a) it is quite common for contracts to include provisions detailing the circumstances in which a party to a contract may terminate the contract, e.g. in the case of breach of contractual obligations by the other party. The SMTA does not include a termination provision.
 - (b) Article 7 of the SMTA provides that the applicable law shall be General Principles of Law, including the UNIDROIT Principles of International Commercial Contracts 2004, the objectives and the relevant provisions of the Treaty, and when necessary for interpretation, the decisions of the Governing Body.
2. With reference to these clauses, some prospective users of the SMTA, in particular users in the private sector, have brought the following contract law question to the attention of the Secretariat.

A. Termination

The SMTA does not include a termination clause. What happens when a party terminates the contract, e.g. in the case of breach of contractual obligations by the other party?

Although the SMTA does not include a termination provision, MTAs may be terminated. According to Article 7.3.1 of the UNIDROIT Principles of International Commercial Contracts 2004, a party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance.

Paragraph 2 of Article 7.3.1 UNIDROIT Principles 2004 includes a non-exhaustive list of circumstances which are relevant to the determination of whether a failure to perform an obligation amounts to fundamental non-performance.

These are:

- (a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;
- (b) strict compliance with the obligation which has not been performed is of essence under the contract;
- (c) the non-performance is intentional or reckless;
- (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;
- (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

Section 3 of chapter 7 of the UNIDROIT Principles 2004 further details the procedures applicable to termination, particular the notification requirement (Article 7.3.2 UNIDROIT Principles 2004), and specifies the effects of termination in Article 7.3.5.

While parties to the SMTA would have the right to terminate the MTA in specific circumstances, termination does not affect Article 8 of the SMTA on dispute settlement

Of particular interest is in that respect Article 7.3.5.(3) of the UNIDROIT Principles 2004:

Termination does not affect any provision in the contract for the settlement of disputes or any other term of the contract which is to operate even after termination.

and restitution (Art. 7.3.6.):

On termination of the contract either party may claim restitution of whatever it has supplied, provided that such party concurrently makes restitution of whatever it has received. If restitution in kind is not possible or appropriate allowance should be made in money whenever reasonable.

Non-performance would also give the aggrieved part the right to damages (Art. 7.4.1). Thus, on termination of the MTA the provider and the recipient could still initiate the dispute settlement procedure, as set out in Article 8 of the SMTA, which would also allow to reach a conclusion with regard to MTA obligations that continue to operate.

B. Applicable law

3. A clear distinction needs to be made between Contracting Parties of the International Treaty, i.e. States acting in the exercise of their sovereign rights, and recipients and providers of material who are parties of an SMTA. Contracting Parties of the International Treaty are bound by the International Treaty. Parties of the SMTA are bound by the terms and conditions of the SMTA. Article 7 of the SMTA confirms this important distinction between civil law involving the

relationship between parties of the SMTA and public international law applicable to the relationship between the Contracting Parties of the Treaty, by specifying as applicable law only the general principles of law, including the UNIDROIT Principles 2004, the *objectives* and the *relevant* provisions of the International Treaty. The decisions of the Governing Body are applicable when necessary for the interpretation.

The SMTA specifies in Article 7 as applicable law the General Principles of Law, including the UNIDROIT Principles of International Commercial Contracts 2004, the objectives and the relevant provisions of the Treaty, and when necessary for interpretation, the decisions of the Governing Body. Chapter 4 of the UNIDROIT Principles of International Commercial Contracts 2004, on interpretation contains detailed rules on interpretation.

Conclusions

Even though the SMTA does not include a Termination clause, the applicable law (UNIDROIT Principles 2004) provides that

- a. Parties to the SMTA have the right to terminate the contract, whereby termination does not affect any provisions in the contract for the settlement of disputes;
- b. either party has the right to claim restitution of whatever it has received;
- c. any aggrieved party has the right to damages for any non-performance.

APPENDIX 5

OPINION No. 3

**FIRST MEETING OF EXPERTS ON THE STANDARD MATERIAL TRANSFER AGREEMENT AND THE MULTILATERAL SYSTEM OF THE TREATY
Montreal, 22– 23 July 2008****Reporting and information needs in the operation of the Multilateral System**

The Expert Group considered the importance of information for the Multilateral System and for the Governing Body in monitoring its implementation, as well as the questions that would need to be addressed, for two purposes: (1) what material has been brought into the Multilateral System, and by whom, and (2) what and how information regarding Standard Material Transfer Agreements entered in to might be addressed.

Fuller information on these two questions would assist the Expert Group in considering the other issues before it.

Plant Genetic Resources for Food and Agriculture include:

- (a) The Plant Genetic Resource for Food and Agriculture of Contracting Parties specified in the Treaty's Article 11.2;
- (b) The Plant Genetic Resource for Food and Agriculture held by the IARCs and other relevant International Institutions and brought voluntarily into the Multilateral System, in terms of the Treaty's Article 15;
- (c) Plant Genetic Resource for Food and Agriculture brought voluntarily into the Multilateral System by natural and legal persons under the jurisdiction of Contracting Parties, in terms of the Treaty's Article 11.3;
- (d) The Materials that Recipients of Material from the Multilateral System are obliged to make available to the Multilateral System, under the Standard Material Transfer Agreement's Article 6.3, if they maintain them; and
- (e) Plant Genetic Resource for Food and Agriculture brought voluntarily into the Multilateral System by other holders, in the implementation of the Treaty's Article 11.2, and Governing Body Resolution 2/2006.

It recognized that very little information would be available for the third meeting of the Governing Body, and suggested the following:

- That the Expert Group consider, at its next meeting, a draft format that Contracting Parties might wish to use, to report on the various categories of Plant Genetic Resources for Food and Agriculture in the Multilateral System, in accordance with their obligations under the Treaty. This format could eventually be integrated into the Options and Guide on Practices, Procedures and Measures for the Implementation of the Multilateral System.
- That a paper with draft guidelines by which Contracting Parties could report on the full range of bodies that are natural and legal entities in the public sector making Plant

Genetic Resources for Food and Agriculture available to the Multilateral System be prepared for consideration at the second meeting of the Expert Group, and the information systems documenting the materials involves, for the Governing Body at its next session.

- That the Governing Body request information on measures Contracting Parties are taking or could take to encourage Plant Genetic Resource for Food and Agriculture held by natural and legal entities in the public sector to be brought into the Multilateral System. The next meeting of the Expert Group should consider an analysis of such measures, in order that a paper on this question could be sent to the Governing Body at its third session.
- That the Governing Body request commercial companies and other entities not in the public sector to bring Plant Genetic Resources for Food and Agriculture into the Multilateral System and indicate the type of material involved, with the modalities to access it. This could be done directly or through industry and stakeholder associations. The Secretariat should consult industry associations and other relevant entities to suggest how this might most practically be done, and report to the next meeting of the Expert Group. The Governing Body, at its next session, could also request Contracting Parties to sensitize their national associations on this matter.
- A number of questions, including of confidentiality, are involved in how Recipients of Material from the Multilateral System can continue to make it available, and it was suggested that this be considered in the context of developing the IT support system.
- The Secretariat was requested to provide a briefing on the current status of the IT support system to the next meeting of the Expert Group.

In considering information that might be necessary in the operation of the Multilateral System:

- The question of confidentiality of certain information was crucial, and the Secretariat was requested to provide the next meeting of the Expert Group with a proposal for the process whereby a system could be developed to achieve this.
- The Secretariat should provide a list of the possible items of information that the Governing Body might require, and for what purposes it might require them, in order for the Multilateral System, including the Third Party Beneficiary, to work efficiently, for consideration by the next meeting of the Expert Group.

APPENDIX 6

OPINION No. 4

**FIRST MEETING OF EXPERTS ON THE STANDARD MATERIAL TRANSFER AGREEMENT AND THE MULTILATERAL SYSTEM OF THE TREATY
Montreal, 22– 23 July 2008****Legal, policy and other measures for the national and regional implementation of the Multilateral System**

The Expert Group considered the need for the provision of legal space for the Treaty within general national legislation regarding access to genetic resources. This could be affected by allowing for special treatment of Plant Genetic Resource for Food and Agriculture within such general legislation. The Expert Group, at its next meeting, should receive and input paper with possible model provisions creating such legal space. It recommended that the Governing Body stress the need for coherence and mutual supportiveness between the Treaty and relevant international instruments, particularly the CBD.

The Expert Group examined the implications of natural and legal persons bringing Annex 1 material into the MLS, on a voluntary basis. Since the Treaty does not apply directly to them, and if they have not received the materials under an SMTA, they would have no legal obligations other than those they subsequently enter into as Providers under an SMTA. The next meeting of the Expert Group could review a short explanatory note that might be given to those considering putting material into the MLS, to clarify the situation. One possible way of their avoiding administrative burdens might be for them to offer the material to a national or international genebank, as is very often the practice. Contracting Parties, by the provisions of the Treaty, are required to remove any obstacles, and, if necessary, provide the necessary legal and administrative measures to allow natural and legal persons to voluntarily place material in the MLS, and make them available to Recipients. It would also be useful if the Secretariat could document current good practices in this regard, for review by the Expert Group at its next session.

The Expert Group noted that, in accordance with Treaty Articles 12.3h and 11.2, Annex I PGRFA found in *in situ* conditions, which is under the management and control of a Contracting, and in the public domain, are automatically in the MLS. By Article 11.3, Contracting Parties should encourage the placing of other *in situ* materials in the MLS, by their holders. They noted that Article 12.3h provides that access to such resources is to be provided in accordance with national legislation, or in the absence of such legislation, with such standards as may be set by the Governing Body. Since no such standards have yet been set, the Expert Group agreed that the Secretariat should provide its next session with an initial review of the changes that may be required to the existing Code of Conduct on Germplasm Collecting and Transfer, at its next session.

The Expert Meeting discussed the concept of PGRFA under the management and control of Contracting Parties, and in the public domain. It noted that there were currently divergences in the interpretation being given to this concept in different Contracting Parties, which could result in inconsistencies in the application of the Treaty. The experts recommended that the Secretariat carry out a review of relevant practice in this regard, if possible, for review at its next session. The Expert Group suggested further examination of how to set up information systems that allow the most efficient and effective implementation of the Multilateral System, for example, by identifying the most appropriate sample of material in the Multilateral System within a country.

APPENDIX 7

LIST OF PARTICIPANTS

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AGREEMENT AND THE MULTILATERAL SYSTEM OF THE TREATY
Montreal, 22– 23 July 2008**

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