December 2009

The International Treaty
ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

Item 5.3 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

"TRANSFER" AND "USE" OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE UNDER THE STANDARD MATERIAL TRANSFER AGREEMENT

I. CONTEXT

1. The Standard Material Transfer Agreement (SMTA) was adopted by the Governing Body of the Treaty at its First Session by Resolution 2/2006,[1] pursuant to Article 12.4 of the Treaty. Since then, a large number of providers have been utilizing the SMTA to transfer material under the Treaty and its Multilateral System.

2. In the course of transactions arising from their various activities or operations, users of the Multilateral System grant access to, and "transfer" or send plant genetic resources for food and agriculture (PGRFA) to other persons, institutions or entities for a wide variety of "uses".

3. 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.*

4. For the technical maintenance of PGRFA collections within the broad ambit of uses provided for by the SMTA, Providers often need to facilitate the physical movement of material for purposes of testing, irradiation, security deposits, including blackbox deposits, and similar technical services. In the context of facilitating such movement of material for technical purposes and services, users of the Multilateral System have identified questions to the Secretary about the meaning of the terms "transfer" and "use" in the SMTA.

[1] Resolution 2/2006, paragraph 1

II. QUESTIONS OR ISSUES

5. In this context, the International Agricultural Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR) as well as other stakeholders brought to the attention of the Secretariat the question whether the physical movement of material for testing, irradiation, security deposits, including blackbox deposits, and similar services constitutes a "transfer" in the meaning of the SMTA and the Treaty.

6. Similarly, the questions were raised as to (a) how to distinguish in practice between purposes of use of PGRFA in the operation of the SMTA; and (b) whether an SMTA is required for providers to make PGRFA available to farmers and others for direct use for cultivation.

7. These questions were forwarded to the first meeting of experts on the SMTA by the Secretary. 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, as well as 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.

8. The meeting agreed on preliminary opinions and advice in response to these questions and requested further analysis to facilitate finalization at the next meeting.

9. Pursuant to this request, the Secretariat commissioned an input paper on the above issue in order to facilitate discussions, and the provision of advice and opinion. The paper is attached as an *Annex* to this document.

III. ADVICE SOUGHT

10. The Committee's advice is sought on:

(a) what types of transactions involving plant genetic resources for food and agriculture might not constitute a "transfer" within the meaning of the Treaty and thus not require the application of the SMTA;

(b) 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;

(c) what needs to be done and which information gathered in preparation for the second meeting of the Committee, if there is no immediate solution; and

(d) which aspects of these questions need to be sent to the Governing Body and what options should be presented for its consideration.

ANNEX

"TRANSFER" AND "USE" UNDER THE SMTA

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Definition of the problem

In the course of transactions between parties engaged in activities related to plant genetic resources for food and agriculture (PGRFA), genetic resources are moved or "transferred" between or to them for a wide variety of purposes and contexts, ranging from security deposits to actual breeding and research.

An important question for the operation of the Multilateral System (MLS) is whether the physical movement of material for testing, irradiation, security deposits, including blackbox deposits, and similar service constitutes a "transfer" in the meaning of the SMTA and the International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter 'the Treaty') . If the reply were affirmative, an SMTA should be used to implement such transfers, with the ensuing obligations on the parties.

A separate but connected question is whether an SMTA is required for providers to make PGRFA available to farmers and others for direct use for cultivation. The opinions expressed on this issue seem to be divergent, as illustrated by the discussions at the First meeting of experts on the Standard Material Transfer Agreement and the Multilateral System of the Treaty (Montreal, 22–23 July 2008). Divergences seem to reflect different concerns: on the one hand, the burden that may be put on farmers if they were obliged to enter into SMTAs when receiving materials for direct cultivation, and the fears of 'leakages' from the MLS if such agreements were not established, on the other.

Analysis

The word 'transfer' is used in the Treaty in three different contexts, referring to

a) The supply of materials in the framework of the SMTA (article 12.4);
b) The transfer of technology (e.g. article 13.2(b))
c) The 'evacuation or transfer' of materials in case the orderly maintenance of *ex situ* collections held by International Agricultural Research Centres (IARCs) is impeded or threatened, including by *force majeure* (article 15.1(g)).[2]

The very object of the SMTA, as reflected in its title, is the *transfer* of materials. This is the meaning apparent in several provisions of the Agreement: article 2 (definition of "Plant Genetic Resources for Food and Agriculture under Development" and of "To commercialize"), article 3, article 5, article 6.4, 6.5 and 6.10, and Annex 3, where the word 'transfer' or 'transferred´ are used.

[2] For the purposes of this paper, only the uses in a) and c) are relevant.

In all cases 'transfer' (or 'transferred') suggests *handing over materials from one party to another*, in the sense of making over their *possession*[3], except in the case of articles 15.1(g) of the Treaty as well as article 6.10 of the SMTA, where 'transfer' is not utilized with regard to materials but to the benefit-sharing *obligations* provided for under the SMTA.

This interpretation seems consistent with the ordinary meaning[4] of the word "transfer", which is neither defined in the Treaty nor in the SMTA.[5] It should be borne in mind, however, that the SMTA covers transfers of materials 'solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture' (article 12.3(a)).

Two implications follow from this analysis:

1) The SMTA is intended to apply to 'transfers' of materials that entail a change in their possession.

2) The SMTA does not need to be used in cases where the purpose of the transfer is *not* utilization and conservation for research, breeding and training for food and agriculture. This is because the Contracting Parties are not obliged to grant facilitated access under the MLS in these cases (even if the transfer implies giving a third party possession of the material).

Options to address these issues

1) Transfer without possession

Option 1: no SMTA is used

If, as suggested, it is understood that under the SMTA 'transfer' implies that the recipient will be able to undertake, on its own, acts of research, breeding and training for food and agriculture, that concept seems to exclude movements of materials from one person (or entity) to another that does not entail handing over possession, such as when it is done for

- field testing;
- specific services, e.g. induced mutation, conservation;
- blackbox duplication, regeneration.

[3] **Despite that 'possession' is a considerably ambiguous term, it is generally understood to require occupancy of a land, or apprehension or taking of a thing, with the intent or conviction of acting as owner (*animus possidendi*).**

[4] In accordance with article 31.1 of the Vienna Convention on the Law of the Treaties, '[A] treaty shall be interpreted in 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'.

[5] According to the *Concise Oxford Dictionary* '[T]o transfer' means to 'convey, remove, hand over (thing, etc. *from* person or place *to* another); make over possession (of property, ticket, rights, etc. *to* person). 'Transfer' (as a noun) means 'transferring or being transferred; conveyance of property or right, document effecting this' (Oxford University Press, 1989, p. 1137).

It is worth noting that the Genetic Resources Policy Committee (GRPC) of the CGIAR discussed (23rd Session, 18-20 March 2008) whether an SMTA should be used in cases where the Centres contracted seeds multiplication as a service:

> The committee noted that it was not aware of instances of the Centres entering into multiplication contracts, other than in situations where the multiplication was carried out as a service contract for the Centre concerned and the material was returned to the Centre without any transfer to third parties taking place. For such service contracts, the SMTA need not be used, because the material is being returned to the Centre. For all other distributions of PGRFA, the Centres should use the SMTA[6].

Option 2: SMTA is used

Concerns about 'leakage' of materials from the MLS may induce the use of the SMTA including in cases where the recipient does not become their 'possessor'. Many of the SMTA provisions, however, would be irrelevant in these cases, as long as the transferee does not intend to conserve or utilize the material for research or breeding, except as agreed upon with the transferor, or to the extent that the latter has not authorized the further transfer of the materials to other parties.

Option 3: case-by-case analysis

Another option would be to consider the particular conditions under which a transfer for a service is made, and the extent to which there is a risk of 'leakage' from the MLS. For instance, an SMTA may not be required when the transferor can effectively bar the transferee (service provider) from undertaking activities covered by an SMTA and from passing the material on.

The application of this option may require information and legal analysis that may not be readily available in most circumstances. It is also unclear who could conduct such analysis and bear the cost. A more straightforward approach (as indicated in Option 1 or 2) would seem more suitable to achieve the Treaty's objective of promoting the sustainable use of PGRFA (article 6).

2) Transfer with possession

As noted, the transfer of materials may be made for purposes other than those specified in the Treaty and the SMTA, such as

- transfers of PGRFA to farmers for direct use;
- transfers to organizations such as seed companies that multiply and distribute (sometimes commercialize) the material as seed.

[6] The minutes of GRPC 23rd. are available at http://www.cgiar.org/pdf/grpc_23rd_meeting_minutes.pdf.

Different options may be considered to deal with these situations, having in view that the Contracting Parties are not prevented by the Treaty from distributing PGRFA in the MLS for direct cultivation, and that, if they do so, *they are not obliged to do so under facilitated access conditions*.

Option 1: no SMTA is used

In these cases, the question about the applicability of an SMTA is not linked to the concept of 'transfer', since the recipient is put in possession of the materials, as in the case of a transfer under the SMTA. The key issue is that the materials are not used for research, breeding or training, that is, for the purposes specifically permitted under the SMTA.

Article 12.3 (a) does not refer to the concept of 'cultivation'. This omission may be interpreted as indicating that the Treaty intentionally excluded cultivation from the scope of the facilitated access under the MLS[7].

The IUCN's *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture* suggested the following interpretation of article 12.3(a) in relation to the issue of direct cultivation:

> A possible interpretation, that would not run counter to either the actual wording of the Article 12.3(a) or the objectives of the Treaty, could be that while direct use for cultivation is not a use for which facilitated access can be demanded, this would not prevent the release of material for direct use for cultivation where this is in accordance with the objectives of the Treaty and is necessary for the fulfilment of the mandates of the institutions concerned. This may happen more and more often as genebanks provide a safe haven for material used on-farm that is becoming increasingly threatened[8].

The *Guide* does not indicate that the transfers for direct use should be subject to the establishment of an SMTA.

The way in which this issue was considered in the case of the CGIAR Centres may provide useful insights. Although the agreements entered into between the Centres of the CGIAR (hereinafter 'the Centres') and the Governing Body do not address the issue of direct cultivation, the 'Statement of the Centres regarding implementation of the agreements between the Centres and the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture', issued on 16 October 2006, noted that:

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[7] The negotiating parties expressly used the concept of cultivation in article 7.2 (b) of the Treaty regarding international cooperation.

[8] G. Moore and W. Tymowski (2005), *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture*, IUCN, p. 90, available at http://app.iucn.org/dbtw-wpd/edocs/EPLP-057.pdf.

> It is also understood that nothing in Article 2 will prevent the Centres from making PGRFA from the Multilateral System directly available to farmers or others for cultivation, as is the current practice, whether this is unimproved or improved PGRFA[9].

The reference to 'current practice' suggests that the Centres did not intend to change the way in which they used to make available PGRFA for direct cultivation. There is no indication about the use of the SMTA for that purpose.

Arguments supporting the non-use of the SMTA in these cases may be articulated as follows:

-The Treaty does not establish a clear obligation regarding the use of the SMTA in cases of transfer of materials for direct cultivation. Arguably, a literal interpretation of the Treaty, in accordance with the Vienna Convention on the Law of the Treaties, would not allow an expansion of the Contracting Parties' obligations beyond what they have consented in the text.

-Farmers play a key role in the conservation and improvement of PGRFA.Facilitating access to materials for direct cultivation may be seen as consistent with the Treaty's objective to promote the sustainable use of PGRFA.

-The use of the SMTA may create a practical barrier for the access to PGRFA by farmers, given the complexity of the agreement and the possible reluctance by farmers to accept obligations they do not fully understand.

-The likelihood that farmers require the signature of a new SMTA, if it were applied, for further transfers of the materials is very low, given the informality that prevails in the exchange of seeds.

-The risk that farmers claim or assert intellectual property rights (IPRs) over materials received is very low.

-As discussed below, the case of direct transfer to farmers may be distinguished from situations in which transfer is made to NARS or to seed companies that multiply and eventually commercialize the material as seed.

Option 2: SMTA is used

Concerns about 'leakage' of materials through transfers for direct use might suggest the need to use the SMTA in the case of direct cultivation, despite the fact that no reference is made in the Treaty to transfers for that purpose.

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[9] Available at http://www.cgiar.org/pdf/CGIAR%20Alliance%20statement%20on%20Implementation%20Agree_October2006.pdf. Article 2(a) of the agreements stipulates that 'Plant genetic resources for food and agriculture listed in *Annex I* of the Treaty and held by the Centre shall be made available in accordance with the provisions set out in Part IV of the Treaty'.

It is interesting to note that under the Agreements signed in 1994 between FAO and the Centres, access for direct cultivation was not explicitly mentioned. There was nothing in the Material Transfer Agreement (MTA) used by the Centres under such Agreements that excluded access for such a purpose[10]. However, in adopting the Interim MTA for the Centres at its Ninth Session (October 2002), the Commission agreed on the following footnote to article 4[11]:

> This does not prevent the recipients from releasing the material for purposes of making it directly available to farmers or consumers for cultivation, provided that the other conditions set out in this MTA are complied with[12].

This footnote addresses the situation of *subsequent* transfers by a recipient of materials under an MTA, and suggests ('provided that the other conditions set out in this MTA are complied with') that a new MTA would have to be established.

The use of an SMTA when the CGIAR Centres distribute materials in Annex I of the Treaty for direct cultivation was also discussed at the 23rd Session (18-20 March 2008) of the Genetic Resources Policy Committee (GRPC). The Committee made the following considerations:

> Sometimes the Centres distribute materials directly to farmers. More frequently, however, the Centres distribute material to public and private organizations that multiply seeds (or other reproductive material) for distribution and or commercialization. The committee noted that in the majority of cases, recipient NARS actually do engage in some form of further development (e.g., selection) of the material before making it available to farmers for direct use. In these cases the Centres should use the SMTA when transferring the materials to the NARS[13].

This commentary suggests that a distinction can be made between transfers for direct use by farmers, on the one hand, and transfers to NARS for further breeding and subsequent transfer for cultivation, on the other. The case for the use of the SMTA seems clear in the latter situation, as the transfer is intended or leads to activities expressly covered by the MLS (and the SMTA). The same would apply to transfers to seed companies, since, by definition, they are involved in research and breeding activities.

Option 3: case-by-case analysis

It may be argued that farmers are also breeders and that, in the last resort, transfers for direct cultivation would necessarily lead to some form of breeding. It may also be argued that the considerations made in Option 1 only apply to small farmers, since big farmers or farmers'

[10] The Centres adhered, under those agreements, to 'a policy on plant genetic resources which is based on the unrestricted availability of germplasm held in their genebanks' (Preamble).

[11] Article 4 states: 'The recipient may utilize and conserve the material for research, breeding and training for food and agriculture and may distribute it to other parties provided such other parties are also willing to accept the conditions of this agreement'.

[12] The Commission's Report is available at http://www.fao.org/DOCREP/MEETING/008/Y8004E/Y8004E00.HTM.

[13] The minutes of GRPC 23rd. are available at http://www.cgiar.org/pdf/grpc_23rd_meeting_minutes.pdf.

organizations may benefit from legal advice and possess the resources to implement the SMTA and that, in the absence thereof, they might seek or assert IPRs in contradiction to the Treaty.

These arguments may lead to the application of a flexible approach, according to which the provider should require the signature of the SMTA where there is a reasonable probability that the material be used for research or breeding. This would require, however, the provider's capacity to assess the circumstances of each case and its willingness to bear the corresponding costs.

Implications for Contracting Parties and the MLS

It is important to bear in mind that the Governing Body has not been entrusted with the authority to expand the obligations contracted by the Parties. A series of gaps and ambiguities in the Treaty (inevitable result, in some cases, of difficult compromises) require, however, clarifications about the way in which some obligations must be implemented.

The discussion on the issues of 'transfer' and 'use' under the SMTA gives rise to two types of concerns: (a) avoiding the imposition of burdens that may restrain rather than facilitate access to PGRFA and be detrimental to the objective of promoting the (sustainable) use of PGRFA; and (b) closing down the gaps that may lead to the 'leakage' of materials from the MLS, including in a way that jeopardizes the sharing of monetary and other benefits of commercialization (article 13.2(d) of the Treaty). Both concerns are legitimate and there is a need to find solutions that are consistent with the Treaty and effective in achieving its intended objectives.

The analysis made above suggests different options to deal with the concept of 'transfer' where the material is handed over without the intention of conveying rights or possession thereof, as well as when the transfer is intended to permit the recipient to undertake direct cultivation.

The possibility of 'leakage' is limited when the material is transferred for the purpose of a service, provided that it effectively remains under the control of the transferor.

Transfers for direct cultivation are not covered in the Treaty (and the SMTA) but create the risk of 'leakage'. Different perceptions about the likelihood of such 'leakage' and its overall impact on the functioning of the MLS, may lead to preferences for different options, as suggested above.