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The International Treaty
ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

Item 9 of the Draft Provisional Agenda

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

Brasília, Brazil, 31 August – 2 September 2010

NON-FOOD/NON-FEED INDUSTRIAL USES OF PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE[1]

1. INTRODUCTION

1. The first meeting of this Committee[2] requested a working document on non-food/feed industrial uses in the context of the International Treaty and the Standard Material Transfer Agreement (SMTA). This document provides an analysis of the relevant legal provisions and is presented to the Committee for consideration.

2. Article 12.3a of the International 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. 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.*

3. Accordingly, 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. Article 12.3a of the International Treaty defines the *purposes* for which material in the Multilateral System of Access and Benefit-sharing (Multilateral System) should be supplied under the facilitated access regime. Consistently with the said article, article 6.1 of the SMTA limits the possible uses of the material received to "research, breeding and training for food and agriculture". Hence, uses by the recipient for other purposes, such as "chemical, pharmaceutical and/or other non-food/feed industrial uses", would amount to a breach of the SMTA.

[1] In accordance with the request of the *Ad Hoc* Advisory Committee, this document was prepared for the exclusive purpose of facilitating the Committee's deliberations. Any opinion or position expressed in the document is not to be attributed to the Secretariat of the International Treaty on Plant Genetic Resources for Food and Agriculture.

[2] Rome, 18-19 January 2010.

5. There are two distinct aspects in the International Treaty provisions and in the SMTA clause mentioned above: a) the *activities* that may be undertaken (research, breeding and training), and b) the *final uses* of the PGRFA (food and agriculture, or chemical, pharmaceutical and/or other non-food/feed industrial uses). This analysis concentrates on the second aspect.

3. TRANSFER OF MATERIALS FOR USES OTHER THAN FOOD AND AGRICULTURE

6. The negative obligation established by article 12.3a must be understood in the specific context of article 12.3a, as provided by article 11 and other provisions in article 12 of the International Treaty[3]. The reading of article 12.3a in its context indicates that 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 (including the admitted purposes for use of the materials) are met. If access were required for other purposes, Contracting Parties would not be obliged to supply PGRFA under the facilitated access regime.

7. This does not mean, however, that Contracting Parties could not distribute materials for purposes other than food and agriculture if they so wished, since the International Treaty does not limit the sovereign rights of a Contracting Party[4] to distribute materials under its control. In other words, Contracting Parties *can but are not obliged* under the International Treaty to distribute materials in the MLS for such other purposes under *facilitated access* conditions.

8. Contracting Parties may, hence, distribute materials in the Multilateral System for purposes other than food and agriculture subject to the specific requirements they may establish. If they are parties to the Convention on Biological Diversity (CBD), they should provide access subject to prior informed consent and terms and conditions agreed upon with the recipient. Article 12.3a of the International Treaty leaves any Contracting Party freedom to require, if it so wishes, participation in the benefits arising from the commercial exploitation of the accessed material, in accordance with applicable national access legislation.

9. Although the intention of the proponents of article 12.3a probably was to preserve the possibility of applying prior informed consent and mutually agreed terms of benefit-sharing for access to materials for purposes other than those permitted under the Multilateral System, the fact is that a Contracting Party may decide under which conditions it would transfer materials for other uses. Thus, it may decide to apply a regime of facilitated access comparable to that articulated under the Multilateral System, including the same type of benefit-sharing as that contained in the SMTA.

4. APPLYING THE SMTA LIMITATION ON USE

10. Recipients of PGRFA under the SMTA are bound by the express limitation imposed by article 6.1 of the SMTA. Acceptance of this article makes it unnecessary to obtain an additional declaration from the recipient on intended use. A legally enforceable contractual provision is stronger than any declaration that could be issued by the recipient.

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[3] The interpretations suggested in this document are based on the interpretive method codified in articles 31 and 32 of the Vienna Convention on the Law of the Treaties ("the Vienna Convention"), particularly article 31.1: "*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*".

[4] See article 10 of the International Treaty.

11. A Contracting Party, moreover, is not required under the International Treaty or, acting as a provider of PGRFA under the SMTA, to request the recipient a statement about the intended uses of the material. If the recipient signs an SMTA, he will be bound by its terms and conditions.

12. Similarly, neither the International Treaty nor the SMTA imposes on potential providers of PGRFA under the Multilateral System an obligation to ascertain the purpose for which material is to be used. It must also be borne in mind that the end use crops (food and feed, or non-food and non-feed industrial uses) produced from materials accessed from the Multilateral System are not predictable at the time breeding takes place, but are usually defined by market factors at the time the crops are sold. It is therefore difficult, probably impossible, to know the final use, no matter for the reason for which breeding is undertaken. Certain uses may also not be "industrial", for example, the use of straw for animal bedding, and hence not clearly covered by the exclusion provisions.

13. However, where the party requesting material informs the potential provider that the intended use is non-food/feed, or when its is clear that the requested material is intended for non-food/non-feed purposes[5], the potential provider, under a general obligation of due diligence, should refuse facilitated access and take the required steps to ensure that the terms and conditions established by the respective Contracting Party for the distribution of materials for non food/feed are applied, as appropriate.

14. Moreover, nothing would prevent a Contracting Party from incorporating into national legislation implementing the International Treaty, provisions imposing on potential providers in its jurisdiction a general obligation of due diligence to prevent likely violations of the SMTA. This should not put, however, an excessive burden on potential 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.

15. Situations may arise in which a recipient under an SMTA decides, after signature thereof, to embark on non-food/feed uses of the received material. National legislation implementing the International Treaty might create an obligation on the recipient to submit, before undertaking such uses, a written request for the use of the received PGRFA for non-covered uses, and to enter into an agreement for that purpose in accordance with the applicable national legislation.

16. Finally, when a party receives a material under an SMTA, and subsequently develops and sells a product incorporating that material, it is not his responsibility to monitor or limit the uses that a third party purchasing the product, or the crop grown form the product, might apply (e.g. the industrial extraction of a pharmaceutical or chemical component). The recipient cannot be made liable for non-food/feed uses of such products or crops. When he transfers the material received the under the SMTA to a third party, he is only bound to sign a new SMTA to pass on the obligations he originally assumed[6].

5. MULTIPLE USE CROPS

17. Although the second sentence of article 12.3a of the International Treaty refers to the case of 'multiple-use crops (food and non-food)', these provisions deal with the *coverage* of the Multilateral System, and not with the possible object of the SMTA. These provisions presuppose that multiple-use PGRFA are included in the list contained in Annex I of the International Treaty, and may be regarded as reinforcing the exclusion spelled out in the first sentence of article 12.3a. At the same time, the second sentence implies that multiple-use crops should be transferred under the *facilitated access* regime when intended for food/feed and that, consequently, the use of the SMTA is required in these cases. As it is impossible to predict the end use of a multiple-use crop,

[5] This is the case, for instance, where the recipient ostensibly operates in the area of industrial chemicals or pharmaceuticals.

[6] See article 6.4 of the SMTA.

the SMTA should always be used in such cases, without which the rights of the Treaty and its MLS cannot be protected.

18. The SMTA does not specifically address the issue of multiple-use crops, which has become particularly relevant in view of the growing use of some crops to produce bio-fuels. In reality, with the development of biotechnology and other techniques, practically any crop may be given dual or multiple us, and as noted above, the end use is frequently not a decision of the breeder, but of the market at the time a crop is sold.

19. The issue of distribution of multiple-use crops has been addressed in the context of the International Agricultural Research Centres of the Consultative Group on International Agricultural Research (CG Centres). The work of the Genetic Resources Policy Committee (GRPC) of the CG Centres may be deemed as useful by this Committee for its deliberations.

20. At its 21st session, the GRPC agreed upon the following key points for deciding what material transfer agreement the Centres should use when transferring material that will be used for non-food/feed purposes:

> a. When a recipient indicates that it will use the material for multiple purposes, including both food/feed and non-food/feed purposes, the CG Centres should provide the material using the SMTA. The onus is on recipients to use materials for the purposes articulated in the SMTA. Where it is not clear what the use of received materials will be, the CG Centres should use the SMTA.
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> b. Where it is clear that the material will be used principally for non-food/feed purposes, the CG Centres should supply materials accessed by them prior to the entry into force of the CBD (1993) using an amended version of the current interim MTA, updated to include the same benefit-sharing conditions as those included in the SMTA.
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> c. Regarding materials accessed by the Centres after 1993, the CG Centres must ensure that they received those materials on the condition that they can be distributed by the CG Centres for research (and direct use).[7]

21. Further, at its 23rd session, the GRPC reaffirmed the principle that the MTA for distributing materials for purposes other than conservation, research or training for food and agriculture should be based, as much as possible, on the text of the SMTA[8]. It also recommended the use of a "Germplasm Acquisition Agreement for materials not included in the International Treaty's Multilateral System of Access and Benefit-Sharing", with an additional optional clause, when the "Centres want to be able to redistribute any material for non-food/feed research or direct use, including materials otherwise in the MLS"[9]. The GRPC finally endorsed a model MTA generally based on the SMTA but adapted to non-food/feed uses. The proposed MTA stipulates that the recipient will not use the received material for the purposes set out in the International Treaty. However, it establishes a payment obligation by the recipient on the same terms and conditions set out by the SMTA[10], but without the intervention of the Third Party Beneficiary.

6. CONCLUSIONS

[7] Minutes of the 21st Session of the GRPC, p. 7-8, available at http://www.cgiar.org/pdf/grpc_21st_meeting_april2007.pdf

[8] See the minutes of the 23rd Session of the GRPC, p. 6, available at http://www.cgiar.org/pdf/grpc_23rd_meeting_minutes.pdf. The GRPC requested the Secretariat "to develop the draft MTA. The draft policy and associated MTA will be referred to the AE for consideration/approval. The committee also decided that the matter should be brought to the attention of the group of legal experts being convened by the Secretariat of the Governing Body" (ibidem).

[9] See the minutes of the 23rd Session of the GRPC, p. 18-19.

[10] Under the proposed MTA, payment should be made, as in the case of the SMTA, to the mechanism established by the Governing Body in accordance with Article 19.3f of the International Treaty.

22. The following main conclusions may be drawn from the previous analysis.

- Contracting Parties are not obliged under the International Treaty to distribute materials in the Multilateral System for purposes other than food/feed under facilitated access conditions.

- Multiple-use materials should be transferred under an SMTA whenever their intended use is food/feed.

- Even when materials within the Multilateral System are accessed for non-food/non-feed industrial uses, the recipient should be required to accept an SMTA, which would apply to any agricultural use of the resources they may make of these resources, because if this is not done, the relevant rights of the Treaty to benefit-sharing cannot be enforced.

- Contracting Parties have the freedom to determine under which instrument and conditions access to materials in the Multilateral System could be provided for non-food/feed uses.

- However, if so wished by a Contracting Party, access for non-food/feed may be provided under conditions similar, *mutatis mutandis*, to those applicable under the SMTA, including the payment obligation of article 6.7.

23. In the light of these conclusions, this Committee may consider approaching the Governing Body to develop and recommend a model MTA to be voluntarily applied by Contracting Parties for non-food/feed uses of materials in the Multilateral System, including a royalty payment on the same terms and conditions set out in the SMTA. The adoption and effective use of this type of MTA could generate additional funds for the implementation of the benefit sharing provisions of the International Treaty.