

July 2010



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

REPATRIATION OF GERMPLASM¹

1. INTRODUCTION

1. At its first meeting, the *Ad Hoc* Technical Advisory Committee on the Standard Material Transfer Agreement and the Multilateral System² requested a working document on repatriation of germplasm. The present document responds to this request and is based on inputs received from Bioversity International.
2. The actual term “repatriation” is not used in the International Treaty. For the purposes of this document, “repatriation” is taken to mean the return or restoration of germplasm from an *ex situ* collection to the country from which it was originally provided, including germplasm that has been collected from *in situ* conditions.

2. PROVISIONS RELEVANT TO REPATRIATION CONTAINED IN THE INTERNATIONAL TREATY

3. Two separate articles of the International Treaty are relevant to repatriation issues. These are: i) Article 15, which deals with the collections held by the International Agricultural Research Centres of the Consultative Group on International Agricultural Research (CG Centres), and the content of the agreements to be entered into between those CG Centres and other International Institutions with the Governing Body of the International Treaty; and ii) Article 12, which deals with the terms and conditions for the transfer of plant genetic resources for food and agriculture (PGRFA) under the Multilateral System of Access and Benefit-sharing.
4. Under Article 15.1(b) (ii), “*The Contracting Parties in whose territories the plant genetic resources for food and agriculture have been collected from in situ conditions are to be provided with samples of such plant genetic resources for food and agriculture on demand, without any*

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.

*MTA*³.³ It is to be noted that this provision covers only PGRFA of crops and forages “*other than those listed in Annex I of [the] Treaty and collected before its entry into force*”.

Under Article 15.1(a), PGRFA of *Annex I* crops and forages are to “*be made available by the Centres “in accordance with the provisions set out in Part IV of [the] Treaty.”*”

Both these provisions are incorporated word for word into the existing agreements between the CG Centres, and other International Institutions, and the Governing Body of the International Treaty.

5. Under Article 12.4, “*facilitated access, in accordance with Article 12.2 and 12.3 above, shall be provided pursuant to a standard material transfer agreement (MTA), which shall be adopted by the Governing Body ...*”

Article 12.6 provides that “*In emergency disaster situations, the Contracting Parties agree to provide facilitated access to appropriate plant genetic resources for food and agriculture in the Multilateral System for the purpose of contributing to the re-establishment of agricultural systems, in co-operation with disaster relief co-ordinators.*”

6. Repatriation was dealt with in the 1994 “In Trust” Agreements between the CG Centres and FAO. Under Article 10 of those agreements, the Centres were required to ensure that, where samples of germplasm and/or related information were transferred to other persons or institution, those persons or institution, and any further entity receiving samples of the designated germplasm from such person or institution would be bound by the conditions set out in the agreement. This passing on of the conditions would not apply to the repatriation of germplasm to the country that provided such germplasm.

3. ANALYSIS OF THE TREATY PROVISIONS ON REPATRIATION

7. The above provisions state as a general rule that facilitated access to *Annex I* PGRFA is to be provided pursuant to the Standard Material Transfer Agreement (SMTA). No exemption is made for the repatriation of *Annex I* PGRFA. One possible interpretation of the International Treaty provisions would therefore be that where *Annex I* material is repatriated to Contracting Parties (or indeed to non-Contracting Parties), the transfer should take place under the SMTA. This interpretation, however, raises the broader question as to whether repatriation of germplasm should be considered to be an act of “facilitated access”, thus requiring the use of the SMTA.

8. For the CG Centres, it is clear in any case that the repatriation of non-*Annex I* PGRFA to the Contracting Party from whose territory the PGRFA has been collected from *in situ* conditions is to be without any material transfer agreement.

9. Should repatriation be considered an act of facilitated access? The notion of sovereign rights of States over their own PGRFA, set out in Article 10 of the Treaty, and the reference to the fact that it is in the exercise of these sovereign rights that the Contracting Parties have set up the Multilateral System to facilitate access to PGRFA, would appear to favour an interpretation that the repatriation of germplasm is not an act of facilitated access to that germplasm. Where PGRFA are repatriated to the country that has sovereign rights over them, such a restriction would seem incompatible with those sovereign rights. The notion of “repatriation” would seem to imply that the country to which they are repatriated should retain full sovereign rights.

10. If such an interpretation were to be adopted, however, it would be necessary to be clear on the precise coverage of the concept of “repatriation”, lest the integrity and legal certainty of the Multilateral System be compromised.

³ Emphasis added

4. EMERGENCY DISASTER SITUATIONS

11. Quite independently of the above analysis, it is to be noted that Article 12.4 of the International Treaty requires the SMTA to be used for “facilitated access, in accordance with Articles 12.2 and 12.3” and does not in this context refer also to Article 12.6, which deals with emergency disaster situations. This could be interpreted as indicating that the SMTA does not have to be used for the repatriation of PGRFA in emergency disaster situations. At first sight, this would seem a sensible interpretation in situations of emergency disaster.

12. However, it should be noted that the wording of Article 12.6 is broader than just “repatriation” of PGRFA and in fact covers facilitated access to all appropriate PGRFA in the Multilateral System, although the reference to the “purpose of contributing to the re-establishment of agricultural systems” would appear to emphasize the notion of repatriation. The wording of Article 12.6 is at the same time narrower, in that it covers only repatriation and other transfers “in emergency disaster situations”. The provision of appropriate PGRFA in emergency disaster situations is not expressly limited to recipients from Contracting Parties.

5. OPTIONS FOR THE TREATMENT OF THE ISSUE OF REPATRIATION

13. The following are possible options for the treatment of the issue of repatriation of PGRFA of *Annex I* crops and forages, which could be viewed as being compatible with the wording of the International Treaty:

- (a) Require all repatriation of PGRFA of *Annex I* crops and forages to be subject to acceptance of the SMTA;
- (b) Require all repatriation of PGRFA 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 repatriation as an act of facilitated access requiring the use of the SMTA.

14. A consistent application of interpretation under b) above would require that all transfers of PGRFA in such situations, and not just repatriation of germplasm, do not need to be accompanied by an SMTA.

15. The interpretation under c) above would be consistent with the practice of many Contracting Parties and with the previous practice of the CG Centres as reflected in the “In trust” agreements with FAO of 1994. As noted above, such an interpretation would require a clear definition of the concept of “repatriation” lest the integrity of the Multilateral System be undermined.

6. A POSSIBLE DEFINITION OF THE CONCEPT OF “REPATRIATION” OR “RESTORATION”

16. The most obvious case of repatriation would appear to be 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 also the situation contemplated in Article 15.1(b)(ii) of the International Treaty in respect of non-*Annex I* PGRFA held by the CG Centres.

17. The concept could also be extended to cases where PGRFA 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 PGRFA is then lost: the germplasm is then restored to the original genebank or other collector concerned. In the possible definition set out below, the words relating to this case have been placed in brackets.

18. In all cases, it would seem that the term “restoration” might reflect the situations more closely and be less liable to misinterpretation. A possible definition covering all situations could be the following:

“Restoration” means the return of samples of PGRFA to the competent authority of the country where they were collected from *in situ* conditions [or to the legal or natural person that placed the PGRFA in the Multilateral System].”

7. CONCLUSIONS

19. This *Ad Hoc* Committee is invited to consider the analysis in this document, including the three options presented under paragraph 13 above, and a possible definition of the term “restoration”, as provided in paragraph 18 above.