

# The Standard Material Transfer Agreement (SMTA)

## (Presentation 4)

### Introduction

The multilateral system facilitates the exchange of the plant genetic resources for food and agriculture (PGRFA) that are most important for food security and on which countries are most interdependent by setting out the terms and conditions on which that exchange will take place. The main content of these terms and conditions is set out in Part IV of the International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter ‘the Treaty’), in Articles 11, 12 and 13. These terms and conditions have been agreed to by the Contracting Parties in the exercise of their sovereign rights, on a multilateral basis, thus obviating the need (and transactional costs) of negotiating each exchange on a bilateral basis. The terms and conditions are incorporated in a standard material transfer agreement (SMTA) that was adopted by the governing body at its first session in June 2006. Article 12.4 of the Treaty requires that this SMTA be used for all transfers of PGRFA under the multilateral system.

The Treaty itself is an international agreement that is binding on its Contracting Parties under international law. The SMTA—as a contract between the individual provider of PGRFA and the recipient—is binding under normal contractual law. The SMTA is the tool for ensuring that the terms multilaterally agreed upon by the Contracting Parties are binding on the actual parties to transfers of PGRFA under the multilateral system.

### Summary of the negotiations of the SMTA

The text of the SMTA was negotiated over a period of two years during the period 2004 to 2006. The first stage was the convening of an expert group in Brussels in October 2004, which went over some of the major issues and compiled positions and proposals on those issues. The report of the expert group was considered by the Commission on Genetic Resources for Food and Agriculture acting as the Interim Committee for the International Treaty. At its second session in November 2004, the Interim Committee decided to set up a contact group to draft the text of the SMTA. The contact group met twice, in Hammamet, Tunisia, in July 2005 and again in Alnarp, Sweden, in April 2006. The final negotiations took place during the first session of the governing body in June 2006, and the final text of the SMTA was adopted on the last day of that first session.

Some of the main concerns in the negotiations were as follows:

- 1. Separating out the issues that should properly be in the SMTA as reflecting rights and responsibilities of the parties to the SMTA, as opposed to those of the Contracting Parties to the Treaty**

The drafters of the SMTA were keen to deal only with the rights and obligations of the parties to the SMTA as opposed to those of the Contracting Parties, realizing, however, that the framework for the SMTA was in fact the Treaty. Article 4.1 stresses that the SMTA is entered into within the framework of the multilateral system and that it is to be implemented and interpreted in accordance with the objectives and provisions of the Treaty.

## **2. Setting the level of payments for commercialization under the SMTA and the threshold for incorporating material from the multilateral system that would trigger payments**

In the end, the negotiators agreed on a payment level of 1.1% of the gross sales of the product, less 30% to cover expenses. They also agreed that there should be no threshold of incorporation of material from the multilateral system: the commercialization of products containing any material from the multilateral system, as evidenced, for example, by pedigree or notation of gene insertion, would be enough to trigger payments.

## **3. Resolving issues of compliance and enforcement of the SMTA**

On this issue, the negotiators agreed to empower the Food and Agriculture Organization of the United Nations (FAO), acting to protect the interests of the multilateral system as *third-party beneficiary* under the SMTA, to initiate procedures for settling disputes in the event of a violation of the conditions of the SMTA. International arbitration was chosen as the preferred means of dispute settlement in the event of failure of amicable means of dispute settlement or mediation, using general principles of law as the applicable law, including the Principles of International Commercial Contracts 2004 of the International Institute for the Unification of Private Law (UNIDROIT) (hereinafter ‘the UNIDROIT Principles’),<sup>1</sup> the objectives and relevant provisions of the Treaty and, when necessary for interpretation, the decisions of the governing body.

## **4. Reporting to the governing body**

The drafters of the SMTA chose to be cautious in the reporting requirements, leaving it to the governing body itself to express its expectations as to the format and content of reporting.

## **5. Transferring PGRFA under development between developers prior to commercialization**

The SMTA contains two paragraphs summarizing the rules applicable to PGRFA under development: basically, transfers of PGRFA under development are not to be categorized as commercialization sparking benefit sharing, although transfers may be subject to additional conditions other than those set out in the SMTA, including the payment of a monetary consideration.

Since its adoption in 2006, the SMTA has been used for the transfer of well over half a million samples of PGRFA by the centres of the Consultative Group on International Agricultural Research (CGIAR) alone, and by a number of countries as well. The latest report by the CG centres to the governing body at its third session, in June 2009, indicates widespread acceptance of the SMTA.<sup>2</sup>

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<sup>1</sup> See <http://www.unidroit.org/english/principles/contracts/main.htm> (accessed July 2010).

<sup>2</sup> See the report of the third session of the governing body of the Treaty, IT/GB-3/09/Report, Para. 39. Available on-line (accessed July 2010): <ftp://ftp.fao.org/ag/agp/planttreaty/gb3/gb3repe.pdf>.

## Summary of the standard material transfer agreement<sup>3</sup>

The SMTA itself is quite long, running to some 12 pages. The following is a summary of its contents:

### ***Parties to the SMTA***

The SMTA is entered into between the **provider** and the **recipient** of the PGRFA.

As representing the third-party beneficiary under the SMTA, the FAO has certain rights to request information from the provider and the recipient, to initiate procedures for dispute settlement and to request information from the provider and recipient in order to protect the interests of the multilateral system.

### ***Subject matter of the SMTA***

The subject matter of the SMTA is the **material being transferred under the SMTA**, as specified in Annex 1 of the SMTA, and the available information related to that material.

### ***General provisions***

The SMTA is to be **implemented and interpreted** in accordance with the objectives and provisions of the Treaty.

Parties to the SMTA are subject to **applicable legal measures adopted by the Parties to the Treaty** in conformity with the Treaty. In the cases of CGIAR centres, the agreements entered into with the governing body of the Treaty will be applicable.

### ***Rights and obligations of the provider***

Access to the PGRFA must be accorded **expeditiously and free of charge**, or at minimum cost.

All available **passport data** and, subject to applicable law, any other associated available non-confidential descriptive information must also be made available.

Access to **PGRFA under development**<sup>4</sup> is at the **discretion** of the developer during the period of development.

Access to PGRFA protected by **intellectual and other property rights** must be consistent with relevant international agreements and with relevant national laws.

The provider must periodically inform the Treaty's **governing body** about the SMTAs entered into.

### ***Rights and obligations of the recipient***

#### **General**

The material transferred is to be used or conserved only for **research, breeding and training** for food and agriculture. This does not include chemical, pharmaceutical and other non-food/feed industrial uses.

<sup>3</sup> Please note that this summary is provided for convenience only and does not constitute a legal document or have any legal status of its own. For an authoritative statement of their rights and obligations, users must turn to the SMTA itself (see Handout 31).

<sup>4</sup> 'PGRFA under development' is defined in Article 2: basically, it is PGRFA that is in the process of being developed into a product and which is not yet ready for commercialization on the open market.

**Intellectual property or other rights** that limit facilitated access to the material, or its genetic parts and components, in the form received from the multilateral system must not be claimed.

If recipients conserve the material supplied, they **must make the material and related information available to the multilateral system**, using the SMTA.

If recipients transfer the material to another person or entity, that transfer must also be subject to an **SMTA**, and the fact of transfer must be notified to the governing body. Once that has been done, recipients have no further obligations regarding the action of subsequent recipients.

### **PGRFA under development**

If recipients decide, in the exercise of their discretion, to transfer PGRFA under development, the transfer must be subject to the normal **SMTA**, but the parties may agree on additional conditions, including the payment of a monetary consideration. See the section on ‘Commentary on certain elements of the SMTA’, below, for a more detailed discussion.

### **Monetary benefit sharing**

If a new crop variety (a *product*<sup>5</sup>) that incorporates material accessed from the multilateral system, is **commercialized** and **the availability of the product for further research or breeding is restricted**, then the recipient is required to pay 1.1% of the sales of the product less 30% (i.e., 0.77%) to the benefit-sharing fund of the multilateral system. If availability is not restricted, then the payment is voluntary.

The recipient may opt for an alternative payment scheme that provides for payments at a discounted rate of 0.5% on the sales of all products belonging to the same crop.

See the ‘Commentary’ section below for a more detailed discussion of the provisions on monetary benefit sharing, including the alternative payment scheme.

### **Non-monetary benefit sharing**

The recipient is **required** to make all non-confidential **information** resulting from research and development carried out on the material accessed from the multilateral system available to the multilateral system through the information system provided for in Article 17 of the Treaty.

The recipient is **encouraged** to share non-monetary benefits resulting from **research and development** on the material, as identified in Article 13.2 of the Treaty, through the multilateral system. These non-monetary benefits may include exchange of information, access to and transfer of technology, capacity-building, and sharing of benefits of commercialization through partnerships in research and technology development.

After the expiration of the protection period of an **intellectual property right** on a product incorporating material accessed from the multilateral system, the recipient is encouraged to place a sample of that product into the multilateral system.

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<sup>5</sup> A ‘product’ is defined as PGRFA that incorporate the material accessed from the multilateral system or any of its genetic parts or components that are ready for commercialization, excluding commodities and other products used for food, feed and processing.

### **Applicable law**

The SMTA is to be governed by **general principles of law**, including the UNIDROIT Principles,<sup>6</sup> the objectives and the relevant provisions of the Treaty and, when necessary for interpretation, the decisions of the governing body.

### **Dispute Settlement**

Procedures for dispute settlement may be **initiated by the provider, by the recipient, or by FAO** representing the governing body and the multilateral system as third-party beneficiary under the SMTA. Disputes are to be resolved through **negotiation or mediation**. Failing this, the dispute may be referred by any party to **binding arbitration**, using agreed arbitration rules or (failing agreement) the Rules of Arbitration of the International Chamber of Commerce. Parties may choose arbitrators from the list of experts established by the governing body if they so wish.

### **Warranties**

The provider makes no warranties as to the safety of or title to the material being transferred.

### **Duration of the SMTA**

The SMTA remains in force so long as the Treaty remains in force.

### **Signature and acceptance**

The SMTA provides for three possible ways of expressing acceptance of the SMTA:

- **Signature by both parties**
- **Shrink-wrap acceptance:** i.e., where a copy of the SMTA is included in the packaging of the material and the recipient's acceptance of the material constitutes acceptance of the SMTA
- **Click-wrap acceptance:** i.e., where the agreement is concluded on the internet and the recipient accepts the terms and conditions of the SMTA by clicking on the appropriate icon on the website

## **Commentary on certain elements of the SMTA**

Before dealing with the administrative elements of filling out the SMTA, it is perhaps useful to clarify certain preliminary questions.

### **The nature of the SMTA**

The SMTA is a template. The terms and conditions of this template cannot be varied, but of course, each time the template is filled in, the agreement will be individualized, by including, for example, the names of the individual provider and recipient and their addresses and by listing in Annex 1 the PGRFA being transferred and related information.<sup>7</sup> It is for this reason that the SMTA speaks sometimes of the SMTA and sometimes of the material transfer agreement (MTA). An example can be found in Article 6.5a of the SMTA, where a recipient transferring PGRFA under development is required to 'do so under the terms and conditions of the Standard Material Transfer Agreement, through a new material transfer agreement'. In

<sup>6</sup> See <http://www.unidroit.org/english/principles/contracts/main.htm> (accessed July 2010).

<sup>7</sup> We will deal with this aspect more under the section on 'Filling out the SMTA' below.

this case, the SMTA (or, rather, the ‘terms and conditions of the SMTA’) is the template, and the ‘new material transfer agreement’ is the individualization of the template in a new context between new parties with, in some cases, different material being transferred.

### ***When should the SMTA be used?***

The Treaty, in Article 12.4, provides that ‘facilitated access’ shall be provided pursuant to the SMTA. In essence, this means that all transfers of PGRFA granting access to those PGRFA under the multilateral system for breeding, research or training must be by means of an SMTA.

This is not to say that **all** ‘transfers’ of Annex 1 PGRFA, in the sense of all batches of PGRFA sent from one entity to another, are for the purpose of ‘facilitated access’ and must therefore be by means of an SMTA.

For example, ‘transfers’ of PGRFA for black-box safety duplication are *not* transfers for the purpose of facilitated access for research, breeding or training and **would not need to be under the SMTA**. Indeed, they are not really ‘transfers’ in the sense used in the Treaty, in that depositing duplicate PGRFA samples in a black-box safety deposit does not imply any transfer of title over the samples—or any rights to use those samples for research, breeding or training. Similarly, ‘transfers’ of samples to research laboratories purely for the purpose of **testing**, as a **service contracted by the sender**, would not require an SMTA, provided that the research laboratory is not given any rights to use the samples for its own research or breeding programmes.

### ***Access to PGRFA under the multilateral system***

Where breeders access materials from an entity different from the one they work in, whether in their own countries or abroad, and where those materials form part of the multilateral system (e.g., because they are in a government genebank in a country that is a Contracting Party to the Treaty or an institution that has voluntarily included its materials in the multilateral system or they are accessed from a CGIAR centre or other international institution that has signed an agreement with the governing body), then the SMTA will normally be used.<sup>8</sup>

Where breeders access materials from their own collections or from the collections of their own institutions, then, with the exception of the CGIAR system, the materials will not normally be subject to the terms and conditions of the SMTA, unless, of course, those materials were previously obtained from the multilateral system under an SMTA.

The situation of PGRFA under the multilateral system used by a breeder working in a CGIAR centre is slightly different from that of other breeders. This is because the CGIAR centres are bound by agreements entered into with the governing body, which place all PGRFA held in their in-trust collections directly into the multilateral system. It is already a CGIAR systemwide policy that all products of CGIAR centre research that are PGRFA of crops listed in Annex 1 of the Treaty (PGRFA under the multilateral system) should be released subject to

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<sup>8</sup> It is not entirely clear from the wording of the Treaty whether internal transfers of Annex 1 material in the multilateral system within a country should be subject to the SMTA. Normally, a Treaty will apply only to transactions between Contracting Parties; however, there are arguments to support the idea that the Treaty should be interpreted as applying also to purely domestic transfers. For more details, see G. Moore and W. Tymowski. 2005. *Explanatory guide to the International Treaty on Plant Genetic Resources for Food and Agriculture*. IUCN, Gland, Switzerland and Cambridge, UK. P. 88. Available on-line (accessed July 2010): <http://data.iucn.org/dbtw-wpd/edocs/EPLP-057.pdf>.

the benefit-sharing provisions of the multilateral system. In implementation of that policy, all accessing of Annex 1 material from the CG centre's genebank by centre breeders will be deemed to be subject to the terms and conditions of the SMTA. Where Annex 1 material has been accessed by centre breeders from the centre genebank **prior to 1 January 2007**, products of that centre's research derived from such material will also be treated as covered by the terms and conditions of the multilateral system.

Recipients should note that where materials have been accessed from the multilateral system and retained, samples of those materials should be made available on request to other users of the multilateral system.

### ***What should be covered by the term 'PGRFA'?***

PGRFA are defined in the Treaty and in the SMTA as 'any genetic material of plant origin of actual or potential value for food and agriculture' (Treaty, Article 2; SMTA, Article 2). 'Genetic material' is in turn defined in the same articles as 'any material of plant origin, including reproductive and vegetative propagating material, containing functional units of heredity'.

The term 'PGRFA' obviously covers all breeding material, including land races, farmers' varieties, improved varieties, wild relatives and other material used in breeding.

The question is often raised as to whether this definition includes a range of products containing DNA or RNA, such as DNA libraries and DNA markers that are to be used purely as research tools and are not to be incorporated downstream in improved PGRFA.

The matter is one of a number of issues that might be referred to the Ad Hoc Technical Advisory Committee on the SMTA and the Multilateral System, which the governing body, at its third session, requested the secretariat to convene, and might eventually go before the governing body itself for consideration. In the meantime, the secretariat of the Treaty has recommended that in cases of doubt, the SMTA should be used.

### ***Non-Contracting Parties***

The Treaty provides that facilitated access to PGRFA under the multilateral system should be provided to other Contracting Parties using the SMTA. It is silent on how Contracting Parties should deal with non-Contracting Parties. This matter is left to the discretion of the Contracting Parties. Whether or not to use the SMTA for transfers to non-Contracting Parties will thus depend on the requirements, if any, of the Contracting Party concerned.

The CGIAR centres, however, have indicated their policy of using the SMTA for distributions of Annex 1 PGRFA to non-Contracting Parties as well.

### ***Purposes for which PGRFA may be made available***

The Treaty provides that facilitated access should be granted for the purposes of research, breeding and training for food and agriculture, and that such purposes should not include chemical, pharmaceutical and/or other non-food/feed industrial purposes. This provision is repeated in the SMTA itself. This means that the SMTA should be used only where the transfer is for these stated purposes. Transfers for other purposes that fall outside the scope of the multilateral system should be under a different form of material transfer agreement.

Whether or not PGRFA under the multilateral system are being transferred for pharmaceutical, medical or other non-food/feed industrial purposes rather than for food and

agriculture will sometimes be a matter on which a certain amount of judgement may need to be exercised. For example, there is rapidly increasing interest in the nutritional or medical properties claimed for certain special varieties of rice and other crops. In such cases, we will need to distinguish between improving diet with nutritionally superior varieties consumed as food in the normal way and varieties that are processed into a product sold as a nutraceutical or medicine.<sup>9</sup> For example, rice that is digested slowly is grown and marketed for diabetics and for labourers who need energy to be released from their food slowly throughout their working day and would presumably be normally categorized as a food—and therefore transferred subject to the SMTA. Similarly, one of the black rice varieties of Laos is grown in small plots when a woman is pregnant, in the belief that post-natal recovery is faster if it is consumed then. This would also seem to be a food, albeit with enhanced nutritional qualities.

In general, however, it is likely to be reasonably clear as to whether the use is for food and agriculture or for other uses. **In any case, the responsibility for complying with the restrictions as to use will lie with the recipient.**

Whether and how users should respond to such requests will be a matter for the national authorities in the country concerned to determine. Users should follow any national requirements set down in legislation on access and benefit sharing or other requirements.

### ***PGRFA under development***

The term ‘PGRFA under development’ is defined in Article 2 of the SMTA. Basically, they are PGRFA that are in the process of being developed into a product and are thus derived and distinct from original material from the multilateral system, but are not yet ready for commercialization on the open market. Breeders do not have to make these materials publicly available. They have complete discretion as to whether to keep them to themselves, to release them, to seek intellectual property protection over them or to commercialize them. And that discretion is recognized in both the Treaty and the SMTA itself. If recipients decide, in the exercise of their discretion, to transfer PGRFA under development, the transfer must be subject to the normal SMTA, except that the obligation to make the material available expeditiously and without payment (Article 5a) will not apply. The parties to the SMTA may agree on additional conditions relating to further product development, including, as appropriate, the payment of any monetary consideration.<sup>10</sup> However, transfers of PGRFA under development will not count as commercialization for the purpose of monetary benefit sharing, even if payments are made for the transfer.

In filling out the SMTA for PGRFA under development, in Annex 1 to the SMTA under which it is being sent out, users will need to do the following:

- identify the material as being PGRFA under development
- specify that the PGRFA under development being transferred are derived from material accessed from the multilateral system (and hence are distinct from that material)

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<sup>9</sup> The definition of ‘nutraceutical’ is taken here as ‘a product produced from foods but sold in pills, powders, (potions) and other medicinal forms not generally associated with food’ rather than as including foods such as ‘bio’ yoghurts and fortified breakfast cereals.

<sup>10</sup> The whole question of what additional conditions the CG centres should impose on the transfer of PGRFA under development is currently under consideration by the Genetic Resources Policy Committee (GRPC). It is envisaged that standard conditions will be circulated to centres at a later date.

- identify the material originally received from the multilateral system from which the PGRFA are derived

Finally, as with all SMTAs, the provider must notify the governing body of the transfer.

See the section entitled ‘Filling out the SMTA’, below, for the precise wording to be used.

### ***Mandatory benefit sharing under the SMTA***

Article 6.7 of the SMTA provides that where a recipient of PGRFA from the multilateral system develops a new product from that PGRFA, protects the new product in such a way that it is no longer available for further research and breeding, and commercializes it, then he or she is required to make a payment into the fund established under the multilateral system: the so-called benefit-sharing fund. The level of the payment to be made is set at 1.1% of the sales of the product less 30% (i.e., a net rate of 0.77%) of the gross income resulting from the commercialization of the product.

The following points need to be clarified to fully understand the system of mandatory payments:

1. Payments are due only where four conditions are met:
  - a. **The product incorporates material originally accessed from the multilateral system.** In this connection, it should be noted that the recipient is not authorized under the SMTA to commercialize the material accessed from the multilateral system in the form originally received.
  - b. **The product developed must be a plant genetic resource for food and agriculture.** In other words, payments are only due on the sale of genetic resources as genetic resources, and not on the sale of commodities such as flour made from the new product.
  - c. **The product is commercialized.** No payments are due unless and until the product is actually sold, e.g., for the purpose of multiplication and distribution, even if patent protection is taken out over the product.
  - d. **The product is protected in such a way as to be unavailable for further research and breeding without restriction.** Just taking out plant varietal protection of the type provided under the International Union for the Protection of New Varieties of Plants (UPOV) would not in general meet this condition, since protected varieties are still available for research and breeding. In some countries, even products protected by patents may still be available for research and breeding (as, for example, under the new French and German legislation) although the commercialisation of products developed from such research and breeding may be restricted. In other countries, such as the USA, utility patents would preclude the use of the protected product for further research and/or breeding without a licence from the patent holder, a restriction that would trigger mandatory benefit sharing where the product is commercialized.

Restrictions on availability are not limited to patent protection: the SMTA provides that other forms of restriction, such as contractual obligations, licence restrictions or technological restrictions, like genetic use restriction technologies (GURTs), may be sufficient to trigger mandatory payments.

Where the product once commercialized is available without restriction (as, for example, a variety protected under UPOV-type varietal protection legislation that does not restrict further availability for research and breeding), then the recipient is merely **encouraged** to make a payment to the multilateral system and is **not required** to do so.

6. The default system under the multilateral system is that material accessed from the multilateral system, and products developed from that material, should continue to be available to users in the multilateral system without restriction for further research and breeding. Where material is taken out of the multilateral system, then compensation must be paid to the benefit-sharing fund of the multilateral system.
7. The reason the level of the payment is set at a percentage of gross sales less 30% is to allow for the deduction of normal sales expenses, such as discounts. During the negotiations, it was considered unfair to base the royalties on gross income without taking into account normal trade deductions, and it was decided that the benefit-sharing rate should be based on the moneys actually received by the seller. On the other hand, it was thought that the formula for calculating net sales income should be objective and easily verifiable. Hence, the 30% deduction from gross sales income, which was considered to be in line with commercial practice.
8. The mandatory payments are not cumulative. If a payment has already been made and the product is sold to a further user, the second user is not required to make a further payment.
9. Similarly, if several different accessions are acquired from the multilateral system and crossed in order to develop a single new product, only one payment will need to be made.<sup>11</sup> The recipient will not be required to make payments corresponding to each of the different accessions obtained from the multilateral system that went into the development of the new product.
2. Where all the requirements for mandatory payments are met, recipients are required to make an annual report to the governing body within 60 days after the end of each calendar year, listing the sales of the product for the past year and indicating the amount of the payments due as well as information on the restrictions placed on availability of the product. Payments are to be made to the following account maintained by FAO:

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<sup>11</sup> The wording of paragraph 2 of Annex 2 is not entirely clear on this point. The provision reads as follows: ‘Where a Product contains a Plant Genetic Resource for Food and Agriculture accessed from the Multilateral System under two or more material transfer agreements based on the Standard Material Transfer Agreement only one payment shall be required under paragraph 1 above.’ This seems to indicate that where a breeder makes a repeat order of the same material from the multilateral system, then only one payment is due. However, making such a repeat order would be a very rare and normally unnecessary occurrence. Making cumulative payments on each and every accession from the multilateral system that is used in breeding a new product would also be prohibitive, given that the use of 60 or so accessions in breeding a new variety is not unusual. For these reasons, it would seem that the wording of the Spanish version of the SMTA, which refers to plant genetic **resources** (in the plural) for food and agriculture accessed from the multilateral system under two or more SMTAs, rather than **a plant genetic resource** (in the singular) is the correct version. The Spanish language version of the SMTA reads as follows: ‘Cuando un Producto contenga recursos filogenéticos para la alimentación y la agricultura a los que se haya tenido acceso al amparo del sistema multilateral en virtud de dos o más acuerdos de transferencia de material basados en el Acuerdo normalizado de transferencia de material, solamente se requerirá un pago con arreglo al párrafo 1 supra.’

Account Name: FAO Trust Fund (USD) (GINC/INT/031/MUL, IT-PGRFA  
(Benefit-sharing)  
 Bank Name: HSBC New York  
 452 Fifth Ave.  
 New York, NY 10018, USA  
 Swift/BIC: MRMDUS33  
 ABA/Bank Code: 021001088  
 Account No. 000156426

10. Neither the Treaty nor the SMTA is explicit about how long the mandatory payments should be made. It would, however, seem clear from the sense of the mandatory benefit-sharing provision that payments should be made for only as long as the restrictions on availability for further research and breeding are in effect. In the case of patents, the normal maximum duration would be 20 years.

### **The alternative payment scheme under the SMTA**

Article 6.11 lists an alternative payment scheme that recipients of material under the SMTA may opt for. Recipients who opt for this alternative scheme are required to do so by a written and signed notification to the governing body;<sup>12</sup> otherwise, the option is not valid. Those that choose the alternative payment scheme are automatically exempted from the normal payments due under Article 6.7.

The rationale for the alternative payment scheme is twofold:

- First, it presents a way of getting money into the benefit-sharing fund up front, without having to wait the normal cycle of breeding development that normally lasts for 10 to 12 years.
- Second, it makes it easier for the recipient breeder to keep track of its obligations and to simplify the paperwork involved in the SMTA system, while taking advantage of a discounted payment rate.

Remember that the normal payment scheme requires recipients to pay 1.1% of the sales of the product less 30% (i.e., 0.77%). The alternative payment scheme provides for the following:

- Payments are calculated at a discounted rate of 0.5% over the period of validity of the option (10 years renewable).
- Payments are on both the sales of products incorporating material accessed from the multilateral system and the sales of other products belonging to the same crop as that material.
- Payments are to be made whether or not the product is available without restriction.
- Payments made under this option replace the normal payments due under the SMTA and any subsequent SMTA entered into during the period of validity of the option.

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<sup>12</sup> Notifications should be sent to  
 The Governing Body  
 c/o The Secretary, International Treaty on Plant Genetic Resources for Food and Agriculture  
 Food and Agriculture Organization of the United Nations  
 I-00100 Rome, Italy

- Once the period of validity of the option has ended, recipients are required to make payments on products in accordance with the normal payment scheme, except that products derived from material accessed from the multilateral system during the period of validity of the option will continue to be charged at the discounted rate of 0.5%.
- If a recipient assigns intellectual property rights over products developed from material accessed from the multilateral system or its components to a third party, the recipient must also transfer the benefit-sharing obligations to that third party along with the intellectual property rights.
- Payments should start on the date on which the SMTA has been concluded, whether through signature by both parties or by ‘click-wrap’ or ‘shrink-wrap’ acceptance, provided that the recipient has sent a written notification to the governing body of his or her choice of the alternative payment scheme (see Annex 4 of the SMTA).
- Payments under the alternative payment scheme are to be made ‘during the period of validity of the option’, which runs for 10 years from the date of signature or other acceptance of the SMTA.

### ***The law applicable to the SMTA***

Contracts normally provide for the choice of the law to be applied for the interpretation of the contract and for the resolution of disputes related to that contract, particularly where the contracts are international in nature. In the case of normal commercial contracts, this may be the national law of one of the parties to the contract, the law of the place where the contract was concluded or the law of some other jurisdiction with which the parties are familiar and which offers protection of their rights. In the case of the SMTA, Article 7 provides that the applicable law will 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**’.

There were several reasons for choosing this particular formula for the applicable law during the negotiations of the SMTA.

One of the reasons was the desire of the negotiators to ensure some consistency in the application and interpretation of the SMTA, which would be lost if, for example, the choice were to be the law of one of the parties to the SMTA, or the place where the SMTA was concluded, and it would, of course, be difficult to choose the law of a particular country in such an internationally negotiated contract. It was very much for the same reasons that the negotiators chose to specify international arbitration as the form for settling final disputes.

Another important reason for choosing general principles of law over any national system of law was connected to the role of FAO as the third-party beneficiary under the SMTA, representing the interests of the multilateral system. FAO, as a United Nations specialized agency, cannot normally submit itself to the law or judicial jurisdiction of any national legal system. The normal choice of law and judicial jurisdiction in any contract entered into by a UN agency is the general principles of law (to the exclusion of any national law) and arbitration. The provisions in the SMTA on choice of applicable law and on international arbitration should therefore be seen together as enabling FAO to perform the role of third-party beneficiary under the SMTA.

To give more substance to the rather vague concept of general principles of law, the negotiators of the SMTA chose to make special reference to the UNIDROIT Principles.<sup>13</sup> Those principles provide a general set of rules applicable to the formation and interpretation of commercial contracts, including the recognition of the enforceability of third-party beneficiary rights and the rights of the parties to terminate contracts. The reference to the relevant provisions of the Treaty and, when necessary for interpretation, the decisions of the governing body, also reflect the desire of the negotiators to give due weight to the international and technical nature of the SMTA and the role of the governing body in overseeing its implementation. It also reflects their desire to see the development of a consistent body of international law applicable to the interpretation and implementation of the SMTA.

### ***The third-party beneficiary under the SMTA***

As noted above, the UNIDROIT Principles recognize the power of parties to a contract to accord rights under the contract to a third-party beneficiary. This concept is essential to the functioning of the SMTA.

Normally a contract accords rights and obligations only to the parties to the contract. This is usually the case with material transfer agreements for the transfer of plant genetic resources that are negotiated on a bilateral basis and provide for sharing benefits with the provider of the resources.

The SMTA, on the other hand, differs substantially from other material transfer agreements in that the benefits under the SMTA accrue not to the individual provider of the germplasm, but to the multilateral system as a whole, i.e., to all Contracting Parties collectively. Thus non-confidential information resulting from research and development carried out on the material provided under the SMTA is to be provided not to the individual provider but to the multilateral system, itself, through the information system provided for under Article 17 of the Treaty. Similarly, the mandatory and voluntary payments provided for under the SMTA are to be made, not to the provider, but to the multilateral system through the benefit-sharing fund.

In this sense, then, the multilateral system is the third-party beneficiary under the SMTA. The SMTA recognizes this fact and empowers FAO as the appointed third-party beneficiary to enforce the rights of the multilateral system under the SMTA. Essential to that enforcement are the right to request appropriate information from the parties to the SMTA and the right to initiate procedures for settling disputes. Appropriate procedures for the exercise by FAO of its role as third-party beneficiary under the SMTA were adopted at the third session of the governing body in June 2009.

### ***Dispute settlement under the SMTA***

As noted above, the SMTA's provisions on dispute settlement are linked very much to the need to develop a consistent body of international precedent in the interpretation and implementation of the SMTA and to the special needs of the third-party beneficiary.

Dispute settlement may be initiated by the parties to the SMTA themselves. But it may also be initiated by the third-party beneficiary.

Article 8 of the SMTA provides for a series of procedures for settling disputes, ranging from negotiation through mediation to binding arbitration using the arbitration rules of an international body agreed upon by the parties. If the parties fail to agree, the dispute is to be

<sup>13</sup> See: [www.unidroit.org/english/principles/contracts/main.htm](http://www.unidroit.org/english/principles/contracts/main.htm) (accessed July 2010).

settled in accordance with the rules of arbitration of the International Chamber of Commerce, with the arbitral award to be binding on the parties. If necessary, arbitral awards can be enforced in national courts.

The process of dispute settlement, together with the time limits for each step, is spelled out in more detail in the third-party beneficiary procedures adopted by the governing body. These procedures provide for establishing a list of experts, reporting information on SMTAs necessary for the work of the third-party beneficiary, establishing an operational reserve to support that work and developing operational guidelines for approval by the governing body at its next session.<sup>14</sup>

### ***Additional items***

Article 9 of the SMTA provides that the provider makes no warranties as to the safety of or title to the material transferred under the SMTA, or as to its quality, viability or purity. The recipient assumes full responsibility for compliance with the recipient's national quarantine and biosafety regulations.

It also provides that the SMTA is to remain in force as long as the Treaty remains in force. In this connection, it is to be noted that the UNIDROIT Principles referred to above provide for the circumstances under which the SMTA may be terminated by the parties. These are basically where there is a fundamental breach of their obligations by either the provider or the recipient.

## **Enforcement of the SMTA**

### ***Enforcement by the parties to the SMTA***

Mention has already been made of the rights of the parties to initiate dispute settlement under the SMTA. In the event of the recipient's failure to fulfil its obligations under the SMTA, the provider can always resort to these procedures. However, as noted earlier, the provider might have only a limited interest in initiating such action, given that the benefits under the SMTA flow to the multilateral system rather than to the individual provider.

Where a recipient receives material under the SMTA and then passes it on to subsequent recipients, the recipient is required to do so under a new SMTA and to notify the governing body that it has done so. But it will have no further obligations or responsibility regarding the actions of a subsequent recipient.

In view of the above, it is clear that the responsibility of the parties for the enforcement of the SMTA is limited. The CGIAR centres have voluntarily assumed a greater degree of responsibility with respect to enforcement, as will be seen below.

### ***Enforcement by the CGIAR centres***

Article 2(b)(iv) of the agreement between the CGIAR centres and the governing body of the Treaty provides that the centres are to take appropriate measures, in accordance with their capacity, to maintain effective compliance with the conditions of the material transfer agreements for non-Annex 1 material and shall promptly inform the governing body of cases of non-compliance. It should be noted that the provision in question covers only the transfer of non-Annex 1 material, although the centres have volunteered to take similar measures for Annex 1 material.

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<sup>14</sup> See the report of the third session of the governing body of the Treaty, IT/GB-3/09/Report, Resolution 5/2009. Available on-line (accessed July 2010): <ftp://ftp.fao.org/ag/agp/planttreaty/gb3/gb3repe.pdf>.

In the statement setting out their understanding of the meaning of the agreements signed with the governing body, the CGIAR centres undertake to take the following steps when faced with instances of non-compliance:

1. **The centre will request a written explanation.** If no satisfactory explanation is received, the centre will notify the recipient that a violation is thought to have occurred and will request the recipient to conform to the requirements set out in the material transfer agreement.
2. If the matter is not resolved at this stage, **the centre will inform the governing body of the Treaty (through its secretariat) and Bioversity International of the perceived violation.**
3. Where the violation is with respect to the provisions on intellectual property rights, **the centre will notify the granting authority for intellectual property rights in the relevant country** of the possibility that the material transfer agreement has been violated and will bring to their attention the fact that the grant of intellectual property rights might, therefore, have been inappropriate in the case of the material obtained from the centre.
4. In regard to the above, the **centres will work in close cooperation with the secretariat of the governing body of the Treaty.**
5. **Reports from the centres concerning perceived violations of the SMTA will be presented to the governing body at its regular sessions, through Bioversity International,** on the actions taken in accordance with 1 and 2 above.

These procedures will also be applied in regard to violations or perceived violations of SMTAs relating to PGRFA listed in Annex 1 of the Treaty.

## Acceptance of the SMTA

As noted above, the SMTA provides for three possible ways of expressing acceptance: signature, click-wrap acceptance and shrink-wrap acceptance.

It is up to the individual parties to the SMTA to agree on the form of acceptance to be used in each individual case. For example, providers or recipients in some jurisdictions may find it unacceptable to consent to be bound by the SMTA without the signature of an authorized official. In such cases, where a provider or recipient has made this feeling known, the SMTA should be sent to them for signature, deleting or crossing out the other choices from the SMTA, and leaving only the following signature blocks from the SMTA adopted by the Treaty's governing body:

**ARTICLE 10 — SIGNATURE/ACCEPTANCE**

*I, (Full Name of Authorized Official), represent and warrant that I have the authority to execute **this Agreement** on behalf of the **Provider** and acknowledge my institution's responsibility and obligation to abide by the provisions of **this Agreement**, both by letter and in principle, in order to promote the conservation and sustainable use of **Plant Genetic Resources for Food and Agriculture**.*

Signature \_\_\_\_\_ Date \_\_\_\_\_

Name of the **Provider** \_\_\_\_\_

*I, (Full Name of Authorized Official), represent and warrant that I have the authority to execute **this Agreement** on behalf of the **Recipient** and acknowledge my institution's responsibility and obligation to abide by the provisions of **this Agreement**, both by letter and in principle, in order to promote the conservation and sustainable use of **Plant Genetic Resources for Food and Agriculture**.*

Signature \_\_\_\_\_ Date \_\_\_\_\_

Name of the **Recipient** \_\_\_\_\_

**Filling out the SMTA**

As noted above, the terms and provisions of the SMTA must not be changed, but the SMTA does contain elements that must be tailored to suit the individual shipment. One of these elements, the form of acceptance, has already been covered. This section describes the other individualized elements.

**Name and address of the provider and recipient (Article 1.2, page 1)**

No explanations are required. The names and addresses are those of the **provider** or **providing institution** and of the **recipient** or **recipient institution**. For material being sent out by a CGIAR centre or other institution, the provider should be listed as the CGIAR centre or other institution and not the individual officer concerned. Similarly, where material is being sent to a research institute, the recipient should normally be the research institute itself and not a particular individual. The footnote to Article 1.2 indicates that it is not necessary to include the names and addresses of the provider and recipient where the 'shrink-wrap' or 'click-wrap' form of agreement is used. Despite this, it is suggested that where an SMTA is generated on the internet, a copy of the final SMTA, including the names and addresses, should be included with the samples on delivery.

**Acceptance clause**

Note that only the clause representing the mode of acceptance chosen by the parties to the SMTA should appear in the final SMTA filled out by the provider. The other clauses should be deleted in accordance with the instructions set out in the footnote to Article 10 of the SMTA.

Where the SMTA is to be signed by both parties, then one copy, signed by the recipient, should be returned to the provider, and the recipient should be instructed accordingly.

In accordance with the third-party beneficiary procedures adopted by the governing body in 2009, the provider is required to send a copy of the SMTA to the governing body for the information of the third-party beneficiary or, failing that, to provide certain information on the

SMTA and the material transferred.<sup>15</sup> Reports are to be made at least once every two calendar years or at such other intervals as may be decided by the governing body. The secretariat has provided a website to facilitate providers reporting SMTAs entered into.<sup>16</sup>

The only time the recipient is required to communicate with the governing body as recipient at this time is if it decides to opt for the alternative payment scheme in Article 6.11 of the SMTA. This is apart from its obligations to make non-confidential information available to the multilateral system, and is also apart from the annual reports that it will need to make on sales of products and amounts of payments due under Article 6.7 of the SMTA. Of course, if it passes the material received under the SMTA on to a subsequent recipient, it becomes in effect a provider of the material and will be required to notify the governing body accordingly.

### **Annex 1**

Annex 1 must specify the material included in the shipment. The precise format of Annex 1 is not defined, but the following criteria must be met:

- Annex 1 must include a list of the material contained in the shipment. Each sample should be identified by a unique identifier that distinguishes that sample from all other such samples—typically, an accession ID for genebank accessions (‘accession *number*’ in the multi-crop passport descriptors) or other appropriate unique ID for breeding lines. A variety name alone would not be adequate, although most users also expect to see a variety name or other descriptive designation (‘accession *name*’ in the multi-crop passport descriptors).
- Under Article 5b of the SMTA, it is also necessary to provide ‘all available passport data and, subject to applicable law, any other associated, available, non-confidential descriptive information’ for each packet of seed or seedling material in the shipment. The provider has two options for providing this information: (a) include it in Annex 1 to the SMTA or (b) publish it online in a web page and type the URL of the web page in Annex 1. In either case,
  - passport data should follow international standards set out in the FAO-IPGRI multi-crop passport descriptors, and
  - in providing descriptive information, providers might wish to take into account the standards set out in the relevant ‘descriptors’ for the crop concerned, although these should not be viewed as prescriptive. In general, the requirement is for ‘all available data’ to be provided.

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<sup>15</sup> This includes the following:

- a) the identifying symbol or number attributed to the SMTA by the provider
- b) the name and address of the provider
- c) the date on which the provider agreed to or accepted the SMTA and, in the case of shrink-wrap, the date on which the shipment was sent
- d) the name and address of the recipient and, in the case of a shrink-wrap agreement, the name of the person to whom the shipment was made
- e) the identification of each accession in Annex I to the SMTA and of the crop to which it belongs

The provider is also required to ensure that the completed SMTA is at the disposal of the third-party beneficiary, as and when needed, and to state where the SMTA in question is stored and how it may be obtained.

<sup>16</sup> See <http://mls.planttreaty.org/> (accessed July 2010).

- For transfers of PGRFA under development, under Article 6.5b of the SMTA, the provider must identify, in Annex 1, the material received from the multilateral system and must specify that the PGRFA under development being transferred are derived from that material. That is, the provider must
  - list PGRFA under development separately from other PGRFA,
  - list all known ancestors of the PGRFA under development that are in the multilateral system and which are not PGRFA under development, and
  - specify that the PGRFA under development are derived from PGRFA in the last list.

The following is a suggested layout for Annex 1, illustrated using an example of an actual entry prepared by the International Rice Research Institute (IRRI) in the format currently used by IRRI. In this example, only skeletal information is given in Annex 1 itself, and the recipient is referred to the IRRI website for more detailed information. IRRI has found this format to be the most acceptable to both IRRI as a provider as well as to recipients. Otherwise, Annex 1 tends to get too long. The text is specific to this example and will be different for different SMTAs.

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## *Annex 1*

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### LIST OF MATERIALS PROVIDED

This *Annex* contains a list of the **Material** provided under **this Agreement**, including the associated information referred to in Article 5(b).

This information is either provided below or can be obtained at the following website:

[www.iris.irri.org/smta/listEntriesData.do?studyId=-320&method=listEntriesData&smtaId=SMTA0306](http://www.iris.irri.org/smta/listEntriesData.do?studyId=-320&method=listEntriesData&smtaId=SMTA0306)

The following information is included for each **Material** listed: all available passport data and, subject to applicable law, any other associated, available, non-confidential descriptive information.

Each **Material** listed in this annex is identified by an ID that uniquely identifies the sample, followed in parentheses by a variety name or other designation associated with the **Material**.

The **Materials** listed below are PGRFA other than **PGRFA under Development**.

IRGC 6303 (ASD7)	IRGC 12507 (ARC 10550)
IRGC 6663 (MUDGO)	IRGC 15609 (RATHU HEENATI)
IRGC 8978 (BABAWEE)	IRGC 16130 (BASMATI)
IRGC 11730 (RATHU HEENATI)	

The **Materials** listed below are **PGRFA under Development**, provided at the discretion of the developer in accordance with Article 5(c). Each is derived from one or more of the ‘Ancestral MLS germplasm’ listed underneath.

IRIS 71-1234440 (IR 79913-B-115-B)	IRIS 71-1234471 (IR 79913-B-143-B)
IRIS 71-116195 (IR 79913-B-11-B)	IRIS 71-116077 (IR 79913-B-154-B)
IRIS 71-117605 (IR 79913-B-124-B)	IRIS 71-1234486 (IR 79913-B-156-B)
IRIS 71-1234459 (IR 79913-B-133-B)	IRIS 71-1234488 (IR 79913-B-158-B)
IRIS 71-117649 (IR 79913-B-139-B)	IRIS 71-1234493 (IR 79913-B-161-B)

The ‘Ancestral (Original) MLS germplasm’ listed below comprise germplasm accessed from the Multilateral System by means of an SMTA, or germplasm from former ‘in trust’ collections, or other germplasm now treated as subject to the Multilateral System; each is an ancestor of one of more of the **PGRFA under Development** listed above.

IRTP 18210 (IR 55419-04)	IRTP 5551 (SIGADIS)
IRTP 23013 (WAY RAREM)	IRTP 1050 (C 4-63)
IRTP 12936 (IR 12979-24-1 (BROWN))	IRTP 837 (IR 879-314-2)
IRTP 7034 (UPL RI 5)	IRTP 13053 (BPI 76)
IRTP 10584 (IR 12979-24-1)	IRTP 387 (CARREON)
IRTP 195 (IR 8)	IRTP 199 (IR 26)
IRTP 15161 (ARIAS)	IRGC 35 (PETA)
IRGC 123 (DEE-GEO-WOO-GEN)	

The following table shows an alternative, where more information can be given. (See definitions of headings, below.)

Material provided					For PGRFA under Development only: Ancestral (Original) MLS germplasm <sup>1</sup>	
ID	Origin	PGRFA under development? <sup>2</sup>	Variety or other designation	Pedigree	ID	Origin
		Yes/No				

1 Ancestral (Original) MLS germplasm may include germplasm accessed from the multilateral system by means of an SMTA, or germplasm from former ‘in-trust’ collections or other collections now treated as subject to the multilateral system.

2 **Materials** marked with a ‘Yes’ are provided as PGRFA under development, which are provided at the discretion of the developer in accordance with Article 5(c) and subject to the terms of Article 6.5 and 6.6 of the standard material transfer agreement. In accordance with Article 6.5(b), the germplasm in the multilateral system from which they are derived is identified under ‘Ancestral MLS germplasm’.

- **ID of material provided:** This is an identifier uniquely identifying *the sample* being provided, distinguishing it from other samples of the same line or variety held elsewhere. For example, it might be the holding genebank’s accession ID or an ID assigned by the breeder. It should not be a variety name or an identifier from another genebank or breeding collection.
- **Origin of material provided:** This is the country or institute where the material was bred (for bred samples) or collected (for samples collected from *in situ* conditions). If the material was bred in your institute, this will be your institute. Note that if you obtained the sample from elsewhere, this will not necessarily be the same as the country or institute from which you obtained it.
- **PGRFA under development?** A sample may be transferred as ‘PGRFA under Development’ if it was bred, is still under development (i.e., is not a commercially released variety) and contains in its pedigree at least one line that is now part of the multilateral system.
  - Materials being transferred as PGRFA under development should be marked as such with a ‘Yes’ and with, in the two right-most columns, a list of all known ancestral MLS germplasm.
  - Materials not under development should be indicated with a ‘No’ and the two right-most columns should be left blank, even if these materials are known to have MLS ancestors.
- **Variety or other designation:** This is for the name of the variety or breeding line, or previous genebank accession ID or collector’s ID.
- **Pedigree:** Fill in the pedigree of the material, in as much detail as you know. Leave this column blank for materials collected from *in situ* conditions and not subsequently modified through breeding or selection.

- **ID of ancestral MLS germplasm:** Where PGRFA under development have been derived from material originally accessed from the multilateral system, the ancestral germplasm listed in the multilateral system and used in their development to date should be identified. Similarly, where PGRFA under development have been derived from material originally accessed from the ‘in-trust’ collection of a CGIAR centre before 1 January 2007, or from another collection now treated as part of the multilateral system, the CGIAR centre should normally identify the ancestral germplasm used in their development to date.

## **Annex 2**

In accordance with the instructions given in the note by the secretariat, set out in footnote 6 of Annex 2, SMTAs should specify the currency as United States dollars (US\$) until such time as the governing body decides otherwise.

### **Monitoring and reporting**

The SMTA requires the parties to the SMTA to report certain information to the governing body, as provider or as recipient. These reporting commitments are summarized below:

- **The provider:** Under Article 5(e), the provider is required to report periodically to the governing body, through the secretariat, on what germplasm has been sent with the SMTA. (See above for information on the content and periodicity of the reports.)
  - This commitment also applies to germplasm that was originally obtained under an SMTA and is now being passed on to a subsequent recipient (Article 6.4(b)).
  - It also applies to material that is distributed as PGRFA under development derived from germplasm in the multilateral system (Article 6.5(c)).
- **Recipient:** A recipient who becomes liable to make payments resulting from the commercialization of products derived from germplasm in the multilateral system is required under Annex 2, paragraph 3 of the SMTA to submit annual reports on sales of the products.
  - Alternatively, under Article 6.11 of the material transfer agreement, a recipient may choose a different form of payment, in which case, under Article 6.11(h), the recipient is required to notify the governing body of the choice of this option.