

Developed by the Genetic Resources Policy Committee of the CGIAR¹

1. The importance of the Treaty

Access to plant genetic resources for food and agriculture (PGRFA) is vital to food security and sustainable agriculture. PGRFA differ from other genetic resources in that they are for the most part man-made² and have been widely exchanged throughout the world; as a consequence all countries and regions are now heavily inter-dependent on their continued exchange. The International Treaty on Plant Genetic Resources for Food and Agriculture (the Treaty) provides a framework for the conservation and sustainable use of PGRFA. Most importantly, it provides for a Multilateral System that will allow for facilitated access, with minimum transaction costs, to the PGRFA of the crops listed in Annex 1, which are among the most important to food security and in relation to which countries are most interdependent. The Multilateral System also provides for the fair and equitable sharing, through multilateral mechanisms, of benefits arising out of the use of this PGRFA. The Treaty is in harmony with the Convention on Biological Diversity (CBD), and responds to the special nature of PGRFA.

By Article 15 of the Treaty, the Centres and other international institutions holding *ex situ* collections of PGRFA are called upon to sign agreements with the Treaty's Governing Body with regard to these collections, in accordance with a set of terms and conditions covering **both** the Annex 1 crops and other PGRFA held in trust by the Centres. (Article 15 is included as an Annex to this paper)

For PGRFA held by the Centres and governed by the agreements with the Governing Body, the conditions established by the Treaty are the **only** conditions that govern the transfer of the materials, provided the Centres have signed such agreements. They are **not** to be applied **in addition** to any other conditions deriving from the implementation of the CBD. The same is the case for materials brought into the Multilateral System by Contracting Parties.

2. Concepts underlying the Treaty (including MS)

The Multilateral System of Access and Benefit-sharing for PGRFA has been set up by the Contracting Parties to the Treaty in the exercise of their sovereign rights over their genetic resources. The Multilateral System constitutes an agreement among the Contracting Parties on the terms to be applied to the exchange of PGRFA in the Multilateral System. Since those terms, which will be reflected in the standard Material Transfer Agreement (SMTA) to be adopted by the Governing Body, are established for all transactions, the Multilateral System avoids the need to negotiate Material Transfer Agreements on a bilateral basis. This makes individual transactions speedier and much less costly. The Multilateral System applies only to the exchange of PGRFA for use for research, breeding and training for food and agriculture.

For PGRFA under the Multilateral System, and in the case of the Centres for both Annex 1 materials and other materials covered by Article 15 of the Treaty, the

¹ The GRPC expresses its gratitude to Gerald Moore for his contributions to the preparation of this brief.

² The main exception is of course accessions of wild relatives of cultivated crops.

concept of “country of origin” is of no legal import in governing benefit-sharing. The benefits to be derived from the use of such materials flow multilaterally, through the mechanism established by the Governing Body, to farmers of all countries, rather than on a bilateral basis to an individual provider. In a sense, the origin of Annex 1 PGRFA can be said to be the Multilateral System itself, rather than any single country.

3. Process of negotiation of the Treaty, status of ratification and ongoing negotiations on its implementation

The Treaty was negotiated within the framework of the FAO Commission on Genetic Resources for Food and Agriculture³ including 167 countries and the European Union. The Treaty was adopted by “consensus”⁴ by the FAO Conference in 2001. The text of the Treaty thus reflects the will and understanding of the whole international community. To date some 72 countries and the European Community are Parties. This is a particularly fast rate of ratification, making it appear likely that the Treaty will eventually enjoy almost universal participation, in the same way as the CBD. The ongoing negotiations over the implementations of the Treaty, including the negotiations on the SMTA, at this stage similarly involve all countries and not just those that have already ratified the Treaty. Like the CBD, the Treaty is a framework agreement, and many implementation issues still remain under negotiation. These include the precise content of the SMTA, now being negotiated by the Intergovernmental Contact Group set up for that purpose. Unlike the CBD, which is to be implemented primarily by the individual Contracting Parties, many of the major outstanding issues regarding implementation of the Treaty will need to be settled on a multilateral basis by the Contracting Parties acting as the Governing Body to the Treaty.

4. Nature of and process for consideration and adoption of the Agreements between the Centres and the Governing Body

The ex situ collections held in trust by the Centres are important to the Treaty. That importance is specifically recognized in Article 15 of the Treaty. The Centres, however, are international institutions having their own international legal personality. As such, they can be bound only with their own consent. It is for this reason that Article 15 of the Treaty envisages that the Centres will sign agreements with the Governing Body of the Treaty, placing the collections they hold in trust within the purview of the Treaty. The main content of the agreements is already set out in Article 15 of the Treaty. It is envisaged that the final text of the agreements will be agreed upon by the Governing Body during the course of its first session in June 2006. Thereafter the agreements will be submitted to the individual Centres. At that stage it will not be possible to introduce further changes to the agreements. The agreements will then be signed by the individual Centres, presumably by the Directors-General on the authorization of the Boards of Trustees.

³ The CGIAR was represented as an observer at all sessions of the negotiations.

⁴ The FAO Constitution requires that conventions and agreements under Article XIV be adopted by 2/3 majority vote. In the final vote, no country voted against the Treaty.

5. Implications for Centres of the Agreements with the Governing Body

The Agreements with the Governing Body are very important for the Centres⁵. For one thing, they will settle the issue, left outstanding under the CBD, of the status of the CG collections put together before the entry into force of the CBD. Indeed, this was one of the major reasons for the negotiation of the Treaty in the first place. Under Article 15 of the Treaty, which will be made applicable to the Centres' collections through the Agreements with the Governing Body, precise rules are set down for dealing with both Annex 1 and non-Annex 1 PGRFA held by the Centres. Many of the provisions set out in Article 15 of the Treaty are drawn from the provisions contained in the In Trust Agreements, including the provisions relating to the maintenance of the collections and the respective roles of the Centres and the Secretary of the Treaty.

In clarifying the status of the collections, and in recognizing their importance, the Treaty will also help to secure the continued viability of the collections, and the work of the Centres based on those collections⁶.

It is of course up to each Centre to exercise its right to agree or not agree to sign the agreement that would place the collection it holds within the purview of the Treaty. It should however be noted that under the so-called "In Trust Agreements", concluded between the Centres and FAO in 1994, the Centres have recognized that they are not the owners of the PGRFA they hold, and that they hold the germplasm for the benefit of the international community. Under the In trust Agreements, the Centres agreed to recognize the role of the FAO Commission on Genetic Resources for Food and Agriculture in setting policy for the international network of *ex situ* collections. That policy, and the conditions under which the collections will continue to be held, is now set out in Article 15 of the Treaty.

The In Trust Agreements with FAO were intended at the time to be interim agreements pending the conclusion of the international negotiations on the Treaty. As such, it is envisaged that the In Trust Agreements, which have been extended up to 26 October 2006, will be superseded by the new Agreements with the Governing Body. It is almost inconceivable that the FAO Commission would agree to renew the current In Trust Agreements, or indeed to negotiate new ones with terms different from those contained in Article 15 of the Treaty, should a Centre not sign the agreement with the Governing Body as envisaged in Article 15 of the Treaty. To do so would be to undermine the Treaty precisely at the time when the Commission wishes to encourage its implementation. Where individual Centres seek to remain outside the new agreements with the Governing Body and Article 15 of the Treaty, then the status and future viability of the collections would be very much in question.

⁵ The draft text of the Agreements, as considered by the Second meeting of the CGRFA Acting as the Interim Committee for the International Treaty in November, 2004, is included in Annex 1 to this note.

⁶ To a certain extent, this is recognized in the funding criteria of the Global Crop Diversity Fund, itself an essential element of the Funding Strategy of the Treaty, which will in effect require that individual Centres sign the agreements with the Governing Body if they are to be eligible to receive funding from the Trust.

6. Outstanding issues

As noted above, many important issues relating to the implementation of the Treaty still need to be resolved by the Governing Body. It may be expected that some of these issues may be resolved during the course of the negotiations of the SMTA. The following are some of the outstanding issues:

a. Transfers of PGRFA under the Multilateral System to non-parties.

The Treaty makes no specific provisions on how transfers to non-Parties should be treated. The Treaty, however, in describing the operation of the Multilateral System, through the SMTA, makes no exception for non-parties, with the implication that SMTAs will need to be issued in all transfers to non-parties. These, of course, provide for benefit-sharing by the recipient, no matter from what country. The Governing Body may in due course provide more specific guidance on this matter.

b. Definition of products triggering benefit sharing under the MS

The Governing Body, within the context of the negotiations on the standard MTA is still to decide on the definitions to be given to the terms “products”, “incorporation” and “commercialisation” in triggering benefit-sharing under the Multilateral System.

c. Other issues related to SMTA

There are, of course, a number of further issues relating to the SMTA that will need to be resolved during the ongoing negotiations on the SMTA, including the issues of the level, form and manner of payments to be made under Article 13.2.d.(ii) of the Treaty, and the scope of what is meant by PGRFA “under development” pursuant to Article 12.3.e.

7. Positions to be taken by the Centres with respect to outstanding issues

Under Article 15 of the Treaty, the Centres will be required to apply the provisions of Part IV of the Treaty to the transfer of Annex 1 PGRFA under the Multilateral System. This will include not only the textual provisions in question, but also the interpretations placed on outstanding issues by the Contracting Parties acting collectively within the Governing Body, including those matters resolved during the course of the negotiations on the SMTA. Interpretations agreed upon collectively within the framework of the Governing Body would as a matter of principle need to be adopted by consensus of the Contracting Parties, like other decisions of the Governing Body. As a general principle, it is strongly suggested that the Centres follow any such interpretations agreed upon by the Contracting Parties, and not attempt to formulate their own interpretations of the Treaty. Indeed, matters of interpretation of an international agreement are always viewed as being within the prerogative of the Parties to that agreement. The Centres would of course be free to adopt their own interpretations on matters within the exclusive purview of the Centres and on which no collective interpretations have been adopted by the Contracting Parties.

8. Specific issues for the Centres

a. Products of Centre research

As noted above, the Contracting Parties have not yet decided on the scope and implications of the concept of “PGRFA under development” or on definition of “products” for the purpose of triggering benefit-sharing under the Multilateral System. If the Contracting Parties do decide, perhaps in the context of the negotiations on the SMTA, on such matters, then the Centres should follow these decisions. Even if the Contracting Parties take no such decision, or decide otherwise, there would be no bar to the Centres voluntarily treating the material as being covered by the benefit sharing provisions of the Treaty. The current policy of the Centres as endorsed by the CBC and CDC in 2004 is to treat “interim” products, such as advanced or elite lines the material as being covered by the benefit sharing provisions of the Treaty.⁷ This policy does not exclude Centers from entering into additional agreements for their breeding efforts, consistently with their mandate to generate products and knowledge to benefit the resource poor and the developing world.

b. Restoration of samples collected by the Centres on request

Non-Annex 1 material

Article 15 of the Treaty, as reflected in Article 2 of the draft Agreement with the Governing Body, provides that Centres should restore samples of the PGRFA of **non-Annex 1** crops⁸ collected from *in situ* conditions on request to a **Contracting Party** in which it was collected from *in situ* conditions without an MTA. The draft agreement does not deal with the situation of samples being returned to **non-parties**. This is normal, as the Treaty does not deal in general with relations with non-parties. Since the provisions regarding non-Annex 1 material apply only to the Centres and not to Contracting Parties in general, the Centres will be free to adopt their own interpretation of how they should treat non-parties in this respect. It is proposed that the Centres announce in the statement to be made at the time of adoption by the Governing Body of the Agreement with the Centres, that the Centres will treat non-parties in the same way as Contracting Parties in this respect and will restore samples on request without an MTA.

Annex 1 material

Article 15 of the Treaty, as reflected in Article 2 of the draft Agreement with the Governing Body, provides that Centres should make Annex 1 PGRFA available in accordance with the conditions of the Multilateral System, and thus subject to the SMTA. In principle this would apply also to the restoration of samples of the PGRFA collected from *in situ* conditions, whether they are held by Centres or Contracting Parties to the Treaty, since the countries that negotiated the Treaty did not consider it necessary to make any special exception for this situation.

⁷ It should be noted that benefit sharing under the Treaty will be mandatory only where the following four main conditions are met: material has been accessed from the Multilateral System; the material has been incorporated into a product; the product has been commercialized; and restrictions have been placed, through certain forms of patent or otherwise, on the availability of the product for further research, breeding or training. In such cases, a proportion, to be determined by the Governing Body, of the benefits must be paid to the Multilateral System.

⁸ At this time, principally groundnuts, soya, tropical forages and some species of cassava.

As noted above, the notion of the pooling of Annex 1 PGRFA under the Multilateral System, wherever they come from and the sharing of benefits derived from their use on a multilateral basis are at the very heart of the Multilateral System. These are the rules that have been adopted by consensus as applicable to the transfer of Annex 1 PGRFA by Contracting Parties as well as by the Centres from the In Trust collections: no country has expressed any concern over this matter during the negotiations of the Treaty, or in subsequent negotiations on its implementation.

As noted above, the Governing Body may well provide more specific guidance on the subject of the transfer of PGRFA to non-parties. If the Contracting Parties do provide such specific guidance, then the Centres should naturally follow it. If the Contracting Parties take no decision at all on the matter, then the Centres would be free to adopt their own practice in this respect. In this context, it is suggested that the Centres may in any case wish to use the SMTA for transfers to non-parties, to simplify transfers and to avoid discrimination against Contracting Parties to the Treaty.

If the Contracting Parties decide to address the question of restoration of samples of Annex 1 PGRFA collected from *in situ* conditions, the CGIAR observer should work to ensure that clarification is provided about the general rule and possible exceptions, if any.. It is to be noted that the decision will be applicable to Contracting Parties as well as the Centres.

c. Requests for material for non-food or agriculture uses

It is to be noted that the terms and conditions of the Multilateral System are applicable only to transfers of Annex 1 PGRFA for the purpose of research, breeding and training for food and agriculture. Transfers for other purposes is outside the scope of the Treaty.

d. Methods of expressing acceptance of SMTA (shrink-wrap approach)

The Contracting Parties still have to take a decision on whether written signatures will be required on all SMTAs. At present it is possible that the SMTA will provide, on an optional basis, for either written signature or some other way of expressing consent to be bound, such as the shrink-wrap approach currently used by the Centres. The CGIAR observer should continue to make known the strong preference of the Centres in favour of the shrink-wrap approach for the transfer of materials held by the Centres, at future meetings of the Contact Group charged with the negotiation of the SMTA.

e. The status of ‘designated’ accessions under the International Treaty

Under the International Treaty, Centres will no longer ‘designate’ accessions to be held “in trust” as they currently do pursuant to the In Trust Agreements of 1994. Article 15 of the International Treaty provides that the in trust collections, i.e. those PGRFA that have already been designated as being held “in trust”, should be brought within the purview of the Treaty by means of agreements signed with the Governing Body by the Centres concerned. It is important, therefore, as the date for signing the agreements with the Governing Body approaches (probably in June,

2006), that Centres are absolutely clear about which of their materials are designated and held in trust and which are not.

9. Benefit-sharing under Article 13.2.d(ii) and UPOV

UPOV has already made known its views that the provisions of the UPOV 1991 Act regarding essentially derived varieties would not constitute a restriction on availability of protected varieties for further research and breeding. National laws implementing either UPOV 1978 or UPOV 1991 would thus not have the effect of triggering mandatory benefit-sharing in terms of Article 13.2.d(ii) of the Treaty.

10. Conclusions

The Centres are invited to consider the above points in reaching their decisions regarding signature of the Agreement with the Governing Body. Should the Centres wish for further clarification on any particular points, the Secretariat of the GRPC will be happy to oblige. Meanwhile, the CGIAR representative to ongoing negotiations concerning the implementation of the Treaty should continue to keep the Centres fully informed on any developments of relevance to these issues.

