Introduction

The Multilateral System of Access and Benefit-Sharing (multilateral system) was created under the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA). The multilateral system embodies the key policy and legal concepts that shaped the negotiations of the Treaty, such as food security, sovereign rights of States over their own plant genetic resources for food and agriculture (PGRFA), intellectual property rights, and applies those concepts to an operational instrument of access and benefit-sharing that aims to serve the community of farmers and breeders worldwide.

In this chapter, we will try to describe the multilateral system ‘as is’, meaning as it was established in Part IV of the ITPGRFA. We will take readers through the nuts and bolts of the multilateral system, including its scope, operational solutions for access and benefit sharing, and governance mechanisms.

A (short) description of the multilateral system

The multilateral system is a global gene pool of crops and forages. It is global because it was established by state governments in a binding agreement of international law. To date, the ITPGRFA has a membership of 127 contracting parties, from all regions of the world. The multilateral system pools samples of genetic material from a set of crops, which are listed in Annex 1 to the ITPGRFA. These crops provide about 80 per cent of our food from plants.

Samples are included in the gene pool by the state governments and the institutions that they control. Samples also come into the gene pool from international institutions as well as from natural and legal persons – anyone, that is – within the jurisdiction of the contracting parties. These samples are pooled in that they are administered under a
common set of rules. These rules are contained in the ITPGRFA and further specified in a contractual instrument, namely the Standard Material Transfer Agreement (SMTA). The rules apply to individual transfers of these samples (for example, from a gene bank to a breeder) for certain purposes, namely the utilization and conservation for research, breeding and training for food and agriculture. The rules specify not only how to obtain access to the plant genetic material but also how to share the results of research and breeding on that material.

**Why was the multilateral system created?**

The multilateral system was created to address the specific features and needs of PGRFA in relation to access and benefit-sharing. The multilateral system is enshrined in the ITPGRFA, the objectives of which are the conservation and sustainable management of PGRFA as well as the fair and equitable sharing of the benefits arising from their use. These objectives are in harmony with the Convention on Biological Diversity (CBD). In fact, the ITPGRFA applies the general principles established in the CBD in ways that are particularly well suited to PGRFA.

The multilateral system constitutes a special regime in the context of the international principles of access to genetic resources and benefit-sharing dictated by the CBD. The CBD established a regime of access and benefit sharing based on the two principles of prior informed consent and mutually agreed terms. Prior informed consent is to be given by the country of origin of the resources or by the country that has acquired the resources under the Convention. The terms of such access shall be mutually agreed. The implementation of these two principles in the realm of the CBD oriented access and benefit sharing a bilateral perspective – that is, distinct agreements between individual providers and recipients with terms negotiated on a case-by-case basis.

Agriculture has characteristics and needs that do not fully fit into this logic. Agriculture has always been based on seed exchange. Farmers and farming communities have been swapping their crops, and the genes within their crops, since the beginnings of agriculture. Through 12,000 years of cultivation and exchange, many plant varieties for food and agriculture were, and continue to be, developed (Rose, 2003, 586). As a result, countries have become interdependent as they all depend very largely for food and agriculture on crops that have originated elsewhere. Today, drawing on the widest possible range of genetic resources to maintain and adapt those crops remains necessary for the sustainable production of food from plants (Moore and Tymowski, 2005, 2–6).

Agriculture needs an enabling access and benefit-sharing system that recognizes interdependence, triggers the sharing of genetic material of plant origin on a multilateral and facilitated basis and, most importantly, instills fairness into such a system and recognizes that the global pool to which access is facilitated is continuously enriched by the contributions of farmers worldwide. A practical and fair access and benefit-sharing system for PGRFA is to ensure that genetic resources continue to flow worldwide, while those individuals who conserve and develop those resources are adequately rewarded.
After the CBD, governments, in the exercise of their sovereign rights over their own biological resources, established a special system of access and benefit-sharing for PGRFA in order to devise and operate distinctive solutions to facilitate access to PGRFA and share the benefits produced by the use of these resources.

With the recent adoption of the Nagoya Protocol on Access and Benefit Sharing and the Fair and Equitable Sharing of Benefits Arising from Their Utilization by the CBD Tenth Conference of the Parties in October 2010, the underpinning reasons for a multilateral system of facilitated access and benefit sharing for PGRFA have been reaffirmed. The special nature of agricultural biodiversity, its distinctive features and the problems needing distinctive solutions are recognized. The interdependence of all countries with regard to genetic resources for food and agriculture as well as their special nature and importance for achieving food security worldwide and for sustainable development of agriculture in the context of poverty alleviation and climate change, are also reaffirmed. In this regard, the fundamental role of the ITPGRFA is acknowledged, with a specific recognition of the multilateral system developed in harmony with the CBD.

What is the legal basis of the multilateral system?

The multilateral system was established under the ITPGRFA, which sets forth certain obligations for states that are contracting parties. The contracting parties have agreed that facilitated access to PGRFA under the multilateral system will be regulated by the conditions established in the ITPGRFA itself and have also agreed to take the necessary legal or other appropriate measures to provide such facilitated access to other contracting parties as well as to legal and natural persons under their jurisdiction. These obligations are the legal cornerstone of the multilateral system.

However, the legal basis of the multilateral system is not limited to states’ obligations under international law. Under the ITPGRFA, the contracting parties have agreed that the modality for providing facilitated access is a standard contract, namely the SMTA, which reproduces and defines in detail the relevant provisions of the ITPGRFA and projects them into the sphere of private law (meaning, the law that two parties to a contract create to regulate their transaction). The SMTA is the legal instrument that allows for the conditions of facilitated access pursuant to the ITPGRFA to be passed from states to natural and legal entities under their jurisdiction – that is, from a provider of PGRFA to a recipient. Hence, the multilateral system practically functions through a standard contract between two individuals or legal entities.

International law dictates the basic principles and rules of a system to administer an international public good, such as PGRFA, and the system is practically effected through a contractual instrument of private law, which projects a global system and its principles and rules into the individual transactions that occur under the system. An example of this intersection is in the SMTA provisions on applicable law. The applicable law to the SMTA includes the objectives and the relevant provisions of the ITPGRFA and, when necessary for interpretation, the decisions of the Governing Body, which is the forum grouping states that are contracting parties to the ITPGRFA.
What is in the multilateral system?

The scope of the ITPGRFA covers all PGRFA. However, the obligations that are in Part IV of the Treaty, which are those concerning the multilateral system, apply only to the PGRFA of certain crops and forages, which are listed in Annex 1 to the ITPGRFA. This list was developed according to the criteria of food security and interdependence. Thus, the multilateral system applies to the PGRFA of the crops and forages that are listed in Annex I to the ITPGRFA, and it ‘contains’ – albeit not physically in one place – these resources.

The multilateral system does not apply to all of the Annex I PGRFA that are in the territory of the contracting parties. It applies only to some of them – namely those that are ‘under the management and control’ of the Contracting Party and those that are ‘in the public domain’. When state governments negotiated the ITPGRFA, they were not in a position, politically, to commit to including resources that, for example, were subject to the rights of individuals and legal entities under national law (rights of any sort – for instance, the rights of local farming communities over resources on their territories). Thus, they limited the application of the multilateral system to resources that they could manage and control directly. In addition, they avoided using the ITPGRFA as a means of rewriting intellectual property rights laws (Halewood and Nnadozie, 2008). Materials in the public domain should be considered as those which are not the subject of intellectual property rights. As a result, the state governments have not committed to include resources in the multilateral system that are the subject matter of protection under intellectual property rights (see Chapter 9 in this volume).

The fact that governments could not commit to include PGRFA that they do not manage and control does not mean that the multilateral system’s gene pool is precluded for those resources. The ITPGRFA foresees the possibility for natural and legal entities holding Annex I PGRFA to voluntarily place them in the system. Furthermore, governments have agreed to take measures to encourage those holders to include those resources. As an incentive to do so, the ITPGRFA also provides that, within a certain timeline, the Governing Body should assess the progress of including these PGRFA in the multilateral system and that, following this assessment, the Governing Body should decide whether access shall continue to be facilitated to those natural and legal persons that have not included them.

The multilateral system is not only constituted by PGRFA from national collections and territories, but also ‘contains’ PGRFA that are in the international gene banks of the International Agricultural Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR). The IARCs have been collecting PGRFA from farmers fields for many decades, and have been holding and distributing those PGRFA in trust for the benefit of the international community since 1994. With the advent of the ITPGRFA, the contracting parties have recognized the importance of these collections for the objectives of the Treaty and have called upon the IARCs to make them available under the terms and conditions of the multilateral system. Accordingly, the IARCs, and a number of other international
institutions holding plant germplasm, signed agreements with the Governing Body of the Treaty. As a result, Annex I PGRFA that the IARCs maintain in their gene banks are accessible through the SMTA. The Governing Body authorized the IARCs to also apply the SMTA for distributing non-Annex I PGRFA that were collected before the entry into force of the ITPGRFA (FAO, 2007, para. 28).20

Not all the uses of PGRFA that are in the multilateral system are covered by the rules of the system. Would-be recipients cannot, as a right, request materials through the multilateral system for a limitless range of potential uses. Facilitated access through the multilateral system is for the purposes of ‘utilization and conservation for research, breeding and training for food and agriculture’ (Article 12.3(a) of the ITPGRFA). Such purposes do not include chemical, pharmaceutical and/or other non-food/feed industrial uses.21 In substance, the contracting parties are obliged to grant facilitated access under the multilateral system only in cases where access is requested for certain purposes. If access is requested for other purposes, the contracting parties can apply different conditions from those of the multilateral system.

How does access work?

In practice, the multilateral system works as a common pooling, distributing and benefit-sharing system for the PGRFA that it covers. Access to such resources is facilitated in the sense that those who want to access the genetic material in the system do not need to negotiate access agreements on a case-by-case basis with national competent authorities. Instead, the resources are available to anyone who wants them under a standard contract, i.e. the SMTA. Contracting parties must ensure that the standard contract is applied to all transfers of PGRFA in the multilateral system by the natural and legal entities under their jurisdiction. The use of the SMTA cuts out all of the costs involved in the bilateral process for the benefit of farmers and gene bank managers who typically provide the genetic material and for the plant breeders and researchers who typically seek access to this material to improve it.

The text of the SMTA was negotiated over the course of two years through an intergovernmental process (Lim and Halewood, 2008) and was approved by the Governing Body of the ITPGRFA at its first session in 2006 (FAO, 2006). The terms and conditions of the SMTA have four basic objectives: (1) speeding up access; (2) creating a chain of SMTAs when the accessed material is transferred by the original recipient to someone else; (3) ensuring that access to another sample of the same type and kind remains possible to others under the same terms and conditions; and (4) recognizing that, once the accessed material is changed by the recipient (for instance, by plant breeding), such a recipient can decide not to make it available for facilitated access.

Thus, access is to be accorded expeditiously, without the need to track individual accessions (that is, individual samples of PGRFA that are transferred through the SMTA) and free of charge.22 If the recipient conserves PGRFA accessed under the
The logic underpinning benefit sharing in the multilateral system revolves around the following points. Since PGRFA in the multilateral system are treated as pooled goods, there is no individual owner with whom individual contracts for access and benefit sharing must be negotiated. As such, benefits resulting from their use do not go back to the provider. Rather, they must be shared in multilateral ways. The ITPGRFA recognizes that facilitated access to PGRFA is in itself a major benefit, making it possible for farmers, plant breeders and researchers, in both the public and private sectors, to have access to the widest possible range of PGRFA.

The ITPGRFA identifies and makes a provision for a wide range of non-monetary benefit sharing, including the exchange of information, the access to, and transfer of, technology, and capacity building. These forms of benefit-sharing are largely based on general obligations of state governments under the ITPGRFA. However, monetary benefit sharing remains central in the multilateral system, and innovative solutions have been introduced in the ITPGRFA and translated into contractual obligations in the SMTA. The recipients of material under the SMTA are subject to the following benefit-sharing scheme:

A recipient who commercializes a product that is a plant genetic resource for food and agriculture and that incorporates material accessed from the Multilateral System, shall pay … an equitable share of the benefits arising from the commercialization of that product, except whenever such a product is available without
restriction to others for further research and breeding, in which case the recipient who commercializes shall be encouraged to make such payment.\(^{28}\)

In a nutshell, the mechanism is devised to work in these terms: providers make genetic material available; recipients work on this material through research and breeding; once the material reaches the product stage as PGRFA (for example, a new plant variety is generated and this variety contains genetic material accessed under the multilateral system) and if such a product is commercialized, part of the generated revenue is shared. However, the revenue is shared mandatorily only in cases where the research and breeding on the commercialized product is restricted. If research and breeding are still free (typically because there is no restriction on the product due to intellectual property rights or because the consent of the right holder for acts of research and breeding is not required), the monetary benefits are shared voluntarily.\(^{29}\)

The ITPGRFA sets forth the basic structure of monetary benefit sharing under the multilateral system, but it is the SMTA that defines how much is to be shared. The recipient has two alternative options for monetary benefit sharing: either he or she pays 0.77 per cent on the net sales of the commercialized (and restricted) product for a period corresponding to the duration of such restriction (for instance, 20 years in the case of intellectual property rights-based restrictions), or he pays 0.5 per cent on the sales of all PGRFA products of the same crop to which the accessed material belongs.\(^{30}\) In the latter case, the recipient pays regardless of the restrictions for further research and breeding on the products, and for a period of ten years, which is renewable. He or she obtains, in return for this greater payment obligation, access to all of the genetic material of that crop in the multilateral system – that is, he can obtain more material of the same crop from others under separate SMTAs but will have to pay only once.

SMTA-generated monetary benefits flow into a multilateral fund – namely the Benefit-Sharing Fund.\(^{31}\) This fund is also open to direct contributions from the contracting parties, the private sector, non-governmental organizations and other sources, such as institutional donors (FAO, 2006, Appendix F, paras 2.1(d)–(e)). Under the ITPGRFA, the state governments agreed that benefits arising from the use of PGRFA that are shared under the multilateral system would flow primarily to farmers, especially in developing countries, who conserve and use PGRFA in a sustainable manner. Accordingly, the Governing Body, in the context of a general funding strategy for the ITPGRFA, has determined that financial resources in the benefit-sharing fund be allocated to three main priorities, namely: (1) information exchange, technology transfer and capacity building; (2) managing and conserving PGRFA on-farm; and (3) the sustainable use of PGRFA (FAO, 2007, Appendix D.1).

Resources in the Benefit-Sharing Fund are under the direct control of the Governing Body, which means that the contracting parties decide how much to allocate, to whom and for what, and also how much the fund is expected to capitalize within a certain period of time. In practice, calls for proposals under the Benefit-Sharing Fund are open on a regular basis, so that any governmental or non-governmental organization,
including gene banks and research institutions, farmers and farmers’ organizations and regional and international organizations, based in countries that are eligible contracting parties, may apply for grants (FAO, 2007, Appendix D.2). The results of those projects funded through these grants (typically, PGRFA that are managed and conserved on-farm and information generated from these projects) go back into the multilateral system, thus creating a complete loop whereby PGRFA are accessed and improved, the benefits of those improvements that are shared go to conserve and use in a sustainable manner more PGRFA, which, in turn, are made available for facilitated access (FAO, 2009, Appendix A.3).

Who maintains the multilateral system?

The Governing Body, which is comprised of the states that are contracting parties to the ITPGRFA, is the main entity responsible for the policy guidance of the multilateral system. Intergovernmental technical committees that are established by the Governing Body play a fundamental supporting role. They work intersessionally (that is, in the period between one session of the Governing Body and the following one) to deal with technical and operational matters and report to the Governing Body. They also provide users of the multilateral system, including providers and recipients under the SMTA, with guidance and assistance. The Ad Hoc Advisory Committee on the SMTA and the multilateral system, which was created by the Governing Body at its third session in 2009 (FAO, 2009, Annex), advises on implementation questions raised by users of the SMTA.

The Ad Hoc Committee on the Funding Strategy, among other matters, advises on the disbursing and reporting procedures for recipients of financial resources under the benefit-sharing fund (FAO, 2009).

Although it creates a direct line of communication with users of the system, the work of these technical committees does not diminish the power and prerogatives of the Governing Body, which remains central in terms of guidance of the multilateral system. However, it proves the recognition by contracting parties that in order for the machinery of the multilateral system to serve properly the community of users, practical and detailed guidance is needed on a constant basis.

The Food and Agriculture Organization of the United Nations (FAO) also plays a role in maintaining the multilateral system. As the SMTA is the trigger of the access and benefit-sharing mechanisms of the multilateral system, some of the obligations in the SMTA are set forth in favour of the multilateral system as a whole and are not in the interest of either the individual provider or recipient. As a result, neither the provider nor the recipient would be willing to enforce these obligations. The monetary payment to be made by the recipients is an example of an obligation that the provider has no interest in enforcing, since the payment goes into a multilateral trust fund and not to the individual provider. It is for this reason that, in the context of the bilateral contractual relationship, the SMTA recognizes certain roles and responsibilities for the Third Party Beneficiary, which is an entity other than
the two parties to the SMTA that represents certain interests in the execution of the contractual obligations. The FAO, on behalf of the Governing Body, is the Third Party Beneficiary under the ITPGRFA. The Governing Body, at its first session in 2006, invited the FAO to act as the Third Party Beneficiary to carry out the roles and responsibilities, as identified in the SMTA, under the direction of the Governing Body and in accordance with the procedures established by the Governing Body. The FAO accepted this invitation, and the Governing Body, at its third session, approved the Third Party Beneficiary procedures to guide the FAO in the exercise of its facilitating functions for dispute settlement under the SMTA.

How do we know what happens within the multilateral system?

The tracking of material is not required under the multilateral system. However, simple reporting obligations are established in the SMTA in order to transmit information to the Governing Body, which, through this information, can effectively monitor the operation of the multilateral system and, in particular, the operation of the SMTA, while maintaining standards of confidentiality for each individual transaction. Much of the information to be reported by parties to the SMTA is required specifically in order to enable the Third Party Beneficiary to initiate dispute settlement under the SMTA. The SMTA requires the provider to inform the Governing Body about the individual material transfer agreements that it has entered into. This information shall be made available by the Governing Body to the Third Party Beneficiary, which keeps it secure and confidential. An initial recipient, who transfers the material originally received and thus acts as provider to a subsequent recipient, has the exact same obligation. If the recipient has modified the material originally received from the multilateral system and decides to transfer it (as ‘PGRFA under development’), he or she must identify the original material in the SMTA and notify the Governing Body.

A further set of reporting obligations relates to monetary benefit sharing for products developed from PGRFA obtained from the multilateral system. The SMTA requires a recipient who is obliged to make payments to submit to the Governing Body an annual report on the sales of the product, the amount of the payment due and the information that allows for the identification of any restrictions that have given rise to the benefit-sharing obligation. If the recipient opts for the crop-based alternative payment scheme, he or she must notify the Governing Body of such choice and submit an annual report to the Governing Body on the sales of all of the products belonging to the crop and the amount of the payment that is due.

Where does the multilateral system stand at present?

The multilateral system has started functioning. PGRFA are being distributed under the SMTA worldwide by the IARCs. A number of contracting parties have also
started using the SMTA to grant access to PGRFA that they consider as incorporated into the multilateral system, and so have some private PGRFA holders. Financial contributions from various entities have been made into the Benefit-Sharing Fund and, thanks to those contributions, two calls for proposals have been opened to date. Through these calls, financial resources have been allocated by the Governing Body to fund projects in developing countries. Governmental and non-governmental organizations, including gene banks and research institutions, farmers and farmers’ organizations and regional and international organizations have received grants under the Benefit-Sharing Fund.

The governance mechanisms of the multilateral system are also progressing, through assessments of the current status of the system and policy guidance. As the multilateral system has established a functional system that needs to process numerous transactions involving PGRFA by institutions and individuals, in a practical and coherent manner, and as the Governing Body is to impart policy guidance not only at the macro level but also at the micro level of the operations under the system, the Governing Body needs to know how the system is working and how the system instruments are being applied. This is why the efforts of the various ITPGRFA stakeholders are concentrating on ensuring that an adequate flow of information reaches the Governing Body.

There are three detectable categories of information through which the Governing Body is articulating its guidance (FAO, 2009). The first category relates to the implementation of the multilateral system in terms of scope and actual availability of PGRFA. Since the multilateral system is a virtual gene pool, it can only work insofar as its potential users have the ability to know what is in it, what genetic material they can access and where this genetic material comes from. As a result, the Governing Body has stressed the importance of documenting all of the PGRFA within the multilateral system, so that they can be accessed. The Governing Body has also requested all contracting parties to report on their PGRFA that are in the multilateral system, and to take measures to make information on these resources available to the potential users of the multilateral system.

The second category relates to the inclusion of PGRFA in the multilateral system by natural and legal persons within the jurisdiction of the contracting parties, which is essential in order for the Governing Body to make an assessment on the progress of such inclusions and to decide whether access will be granted to those who have not included their material in the system.

The third category relates to the implementation and operation of the SMTA. The Governing Body has realized that, for the system to work on a large scale, all contracting parties are to take the policy, legal and administrative measures necessary for their national plant genetic resource systems, and for the natural and legal persons within their jurisdictions, to be able to use the SMTA in order to provide facilitated access to PGRFA.

A number of stakeholders are already providing the Governing Body with such information, from contracting parties that have issued a list of the materials that they consider to be available under the SMTA, often by linking this information to
publicly available databases – to private entities that have voluntarily placed their own PGRFA in the multilateral system, and to the IARCs that have published accurate and informative statistics on transfers of PGRFA under the SMTA (SGRP, 2009).

Conclusion

The multilateral system is not static, rather, continually evolving. It evolves because it expands in size, as holders agree to make plant genetic material available under the terms and conditions of the SMTA and new gene bank accessions of crops and forages listed in Annex 1 are incorporated into the system. It also evolves because its functioning is to adapt to users’ need. Indeed, the evolution of the multilateral system takes place at four levels: at the international level under the aegis of the Governing Body, which groups the state contracting parties to the ITPGRFA; at the level of international organizations that manage and provide access to international collections under the policy guidance of the Governing Body; at the national level, where governments manage national public collections of plant genetic material and implement their obligations through domestic legal and administrative measures; and at the users’ level, where providers and recipients exchange and use material.

The interactions among these four levels pose some challenges to the future growth system. These challenges revolve around the governance mechanism of the multilateral system. An intergovernmental forum is required to make complex technical decisions that must be informed, based on data coming not only from the governments but also from other entities (for example, the IARCs and natural and legal persons). The governance mechanisms of the multilateral system are such that the micro level (that is, the users) and the macro level (that is, the Governing Body) are directly connected. As seen above, this connection is particularly apparent in the case of the SMTA. It reproduces some provisions of the ITPGRFA (an instrument of international law that establishes obligations for states) and was approved by the Governing Body, but it is used as a means of creating contractual obligations between legal persons within the jurisdiction of these states. The Governing Body manages such contractual instrument with the advice of a technical committee, on the basis of the experience and the needs of the users. To what extent will state governments accept that the decisions of an intergovernmental body (decisions that, according to the ITPGRFA, are taken by consensus) directly reach users within their jurisdiction and, thereby, bypass the regulatory ‘filters’ of national authorities and reduce the margin of discretion that government authorities normally enjoy? If national authorities continue accepting, and, if so, under what limitations, that the gene pool of the multilateral system is governed by an agreed set of internationally agreed rules, and that these rules may be adjusted, or even partially redefined, collectively at the international level and based on the experiences that come directly from the users of the system, the overall design of the multilateral system will prove to be right. If the mechanics of the system are administered efficiently by the Governing Body collectively, with concrete and practical responses to the needs that users have, access to
PGRFA will be facilitated on a global scale, and benefit sharing for farmers in developing countries will be substantial.

Otherwise, the multilateral system runs the risk of losing its multilateral and functional dimensions and dissolving into the experimental dimension of a first global effort to redress the shortcomings of bilateralism in access and benefit-sharing for genetic resources for food and agriculture.

Through an examination of its policy and legal infrastructure, we have highlighted the innovative solutions for access and benefit-sharing that the multilateral system proposes. These innovations are based on the management of an international public good through a contractual instrument and the enshrining of such a contractual instrument into an international treaty that is governed by state contracting parties. These innovations inevitably bear the risk of failure if they are not managed progressively. The governance of the multilateral system, through the Governing Body and its technical committees, is complex but dynamic enough to accommodate the adaptations and evolutions of the system that the users for which the system has been designed may require. If it stands the challenges of adaptation and evolution, the multilateral system will have a long and prolific life.

Notes

2 For information on the ITPGRFA, see www.planttreaty.org/mls_en.htm (last accessed 15 May 2011).
4 Ibid., Article 1.1.
5 Convention on Biological Diversity, 31 ILM 818 (1992) [CBD]. The close relationship between the CBD and the ITPGRFA has its origin in the mandate for the negotiation of the Treaty, given by the Conference of the Food and Agriculture Organization (FAO) in 1993 following an invitation made at the Nairobi conference in 1992, which included the issues of access to plant genetic resources for food and agriculture on mutually agreed terms. The Treaty provides that its objectives are to be pursued by closely linking the Treaty to the FAO and the CBD as well as by the cooperation of the Governing Body with the Conference of the Parties to the CBD. ITPGRFA, supra note 1, Articles 1.2, 19.3(f), (g) and (l).
6 Indeed, the Conference of the Parties to the CBD recognizes ‘the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions’. CBD, supra note 3, Decision II/15 of the Conference of the Parties, www.biodiv.org/decisions/default.aspx?m=COP-02& id = 7088& lg = 0 (last accessed 15 April 2011).
7 The following are the basic provisions of the CBD on access to genetic resources and benefit sharing:

   Article 15.1: Authority to determine access to genetic resources rests with the national governments and is subject to national legislation.
   Article 15.4: Access, where granted, shall be on mutually agreed terms.
   Article 15.5: Access to genetic resources shall be subject to prior informed consent of the contracting party providing such resources.
   Article 15.7: Contracting parties shall take legislative, administrative or policy measures with the aim of sharing in a fair and equitable way the results of research
and development and the benefits arising from the commercial and other utilization of genetic resources with the contracting party providing such resources.

9 Ibid., preamble, paras 14, 15 and 18.
10 ITPGRFA, supra note 1, Articles 12.1 and 12.2.
11 Ibid., Article 12.4.
12 SMTA, supra note 3, Article 7.
13 ITPGRFA, supra note 1, Article 3.
14 Ibid., Article 11.1.
15 The criteria and processes that led to the list of crops and forages in Annex I to the ITPGRFA are explained in Chapter 16 of this volume.
16 ITPGRFA, supra note 1, Article 11.2.
17 Ibid., supra note 1, Article 11.3.
18 Ibid., Article 11.4.
19 Ibid., Article 11.5.
20 Ibid., Article 15.1(b).
21 Ibid., supra note 1, Article 12.3(a). Correspondingly, Article 6.1 of the SMTA provides that ‘[t]he Recipient undertakes that the Material shall be used or conserved only for the purposes of research, breeding and training for food and agriculture. Such purposes shall not include chemical, pharmaceutical and/or other non-food/feed industrial uses.’
22 ITPGRFA, supra note 1, Article 12.3(b); SMTA, supra note 3, Article 5(a).
23 Ibid., supra note 1, Article 12.3(g); SMTA, supra note 10, Article 6.4.
24 Ibid., supra note 1, Article 12.3(d); SMTA, supra note 10, Article 6.2.
25 Ibid., supra note 1, Article 12.3(e); SMTA, supra note 10, Article 6.5.
26 Ibid., supra note 1, Article 13.1.
27 Ibid., Article 13.1(a)-(c).
28 Ibid., Article 13.2(d)(ii); SMTA, supra note 10, Article 6.7.
29 SMTA, supra note 10, Article 6.8.
30 The ITPGRFA, supra note 1, prescribed that, at its first meeting, the Governing Body of the Treaty would determine the level, form and manner of the payment, in line with commercial practice (Article 13.2(d)(ii)). Accordingly, the Governing Body, at its first meeting, approved the text of the SMTA, whose provisions define the amount and modalities of payments. See Annexes 2 and 3, and Article 6.11 of the SMTA for the rate and modalities of payment.
31 ITPGRFA, supra note 1, Article 19.3(f).
32 Ibid., supra note 1, Article 19.3(a), lists as a function of the Governing Body to: ‘(a) provide policy direction and guidance to monitor, and adopt such recommendations as necessary for the implementation of this Treaty and, in particular, for the operation of the Multilateral System.’
33 The ‘third party beneficiary’ is a legal concept derived from the English law of contracts based on which a person, who is not a party to a contract but for whose benefit the contract was concluded, has legal rights to enforce the contract.
34 The third party beneficiary procedures specify the two-fold role of the FAO acting as third party beneficiary by establishing a system of progressive escalation, which consists of: (1) the initial gathering of information with regard to disputes; (2) facilitation of amicable dispute settlement; (3) initiation of mediation; and (4) initiation of arbitration. The third party beneficiary is dealt with more extensively in Chapter 9 of this volume.
35 ITPGRFA, supra note 1, Article 12.3(b); SMTA, supra note 3, Article 5(a).
36 SMTA, supra note 3, Article 5(e). The Governing Body determined that providers have two options for fulfilling their reporting obligations, as follows: (1) by transmitting a copy of the completed SMTA or (2) by ensuring that the completed SMTA is at the
disposal of the third party beneficiary, stating where the SMTA in question is stored and how it may be obtained and providing a series of data contained in the SMTA itself. In the same resolution, the Governing Body also decided that the information required from the provider shall be communicated at least once every two calendar years (FAO, 2009).

37 SMTA, supra note 3, Article 6.4.
38 Ibid., Article 6.5.
39 Ibid., Article 6.7.
40 Ibid., Article 6.11.
41 A list of materials that are considered as being included in the multilateral system and available under the SMTA is available at www.planttreaty.org/inclus_en.htm (last accessed 15 May 2011).

References


