Mutually supportive implementation of the Nagoya Protocol and the Plant Treaty: Scenarios for consideration by national focal points and other interested stakeholders.

The objectives of the Convention on Biological Diversity (CBD) and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) are basically identical – the conservation and sustainable use of genetic resources and the equitable sharing of benefits derived from their use. However, the access and benefit sharing (ABS) systems that these agreements require member states to implement are very different in orientation. The ITPGRFA creates a multilateral system of access and benefit sharing (MLS) whereby countries agree to virtually pool and share the genetic resources of 64 crops and forages listed in Annex 1 of the ITPGRFA for agriculture and food-related purposes. The CBD and its Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (NP) create mechanisms for the negotiation and enforcement of bilateral ABS agreements.

Although the CBD/NP and the ITPGRFA/MLS are meant to be implemented in mutually supportive ways, many actors involved in national policy development and implementation are uncertain about how to do this in practice. In most countries, different lead agencies have responsibility for implementing the respective agreements and they have not had sufficient opportunities to coordinate their activities. The agency responsible for implementing the CBD/NP often has a low level of familiarity with the ITPGRFA and vice versa. Many policy actors perceive 'grey areas' where it is not clear which regulatory system should apply, and the different lead agencies often do not have mechanisms in place to allow them to work together to address these uncertainties in their day-to-day operations.

The scenarios presented in this collection are designed to help national focal points, competent authorities and others to work through the grey areas, so that they can develop clearly articulated, mutually supportive approaches to implementing the ITPGRFA and the Nagoya Protocol.

Each scenario teases-out issues that frequently arise when countries are putting systems in place to operationalize both the agreements. In all of the scenarios it is assumed that the countries concerned are Parties to the Nagoya Protocol and the ITPGRFA.

These first seven scenarios were developed based on inputs from more than 60 people, including both national focal points for the ITPGRFA and the Nagoya Protocol from 20 countries and experts drawn from seed companies, farmer organizations, national and international gene banks, universities, etc. They first worked through the scenarios in a participatory workshop setting. Their collective responses were then synthesized and expanded upon and recirculated for comments and approval, and published as part of a discussion paper in 2015. They have since been revised, where necessary, to take into account more recent developments. It is anticipated that additional scenarios will be published, as part of this series, in the future, based on additional research and capacity building activities. It may happen that future events will surpass some of the analysis set out in these scenarios. In such cases, the publishers may revise and republish scenarios to replace earlier versions (clearly marked to avoid confusion).

One final caveat by way of introduction: the content of these scenarios does not constitute legal advice and must not be relied upon as such. When in doubt, one should always seek guidance from the national focal point, national competent authorities, and if necessary independent policy and legal experts.

[1] Halewood M. (editor). 2015. Mutually Supportive Implemenation of the Plant Treaty and the Nagoya Protocol: A Primer for National Focal Points and Other Stakeholders. Discussion Paper. Bioversity International.

Bioversity International has supported national implementation of the ITPGRFA multilateral system for several years under the aegis of the FAO/Bioversity/Treaty Secretariat Joint Programme for Capacity Building. The ABS Capacity Development Initiative has supported national implementation of the ABS provisions of the CBD and its Nagoya Protocol since 2006. The two organizations have joined together, in close collaboration with the Secretariats of the CBD and the ITPGRFA, to support countries to develop mechanisms for the mutually supportive national implementation of both agreements. More recently, they have also been working with regional organizations such as the African Union and the ASEAN Center for Biodiversity.

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Brief introduction to access and benefit-sharing under the International Treaty on Plant Genetic Resources for Food and Agriculture and the Nagoya Protocol of the Convention on Biological Diversity

Photo: Seed fair in Nakaseke, Uganda to raise awareness of traditional varieties of beans. Credit: Bioversity International/I.Lopez-Noriega

The scenarios presented in this collection are written for people who are already familiar with the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), the Convention on Biological Diversity (CBD) and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (Nagoya Protocol). However, we include this introductory section to provide some of the most relevant background to help newcomers to this subject area.

The ITPGRFA and the Multilateral System of Access and Benefit-sharing

The ITPGRFA came into force in 2004 and as of July 2017, it had 144 Contracting Parties, including the European Union. Pursuant to the ITPGRFA, Contracting Parties agree to take actions with respect to conserving, exploring, collecting, characterizing and documenting plant genetic resources for food and agriculture (PGRFA), to promote the sustainable use of those resources and to promote farmers' rights, pursuant to national policy measures.

Most importantly for the purposes of these scenarios, the ITPGRFA creates the multilateral system of access and benefit-sharing (MLS), through which Contracting Parties agree to provide facilitated access to PGRFA of 64 crops and forages included in Annex I of the ITPGRFA 'for utilization and conservation for research, breeding and training for food and agriculture, provided that such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses.' Annex I PGRFA that are 'under the management and control of Contracting Parties and in the public domain' are automatically included in the MLS. Contracting Parties also undertake to create policy incentives for natural and legal persons within their borders to voluntarily include additional PGRFA of Annex I crops and forages in the MLS. A third source of germplasm in the MLS is international institutions that sign agreements with the Governing Body of the ITPGRFA to place their 'in trust' collections under the ITPGRFA's framework.[1] Contracting Parties also agree to cooperate in developing a global PGRFA information system through which, among other things, recipients agree to share non-confidential scientific information about PGRFA they have obtained through the MLS.

[1] Pursuant to their 2006 agreements with the Governing Body, they also agreed to include non-annex I materials they hold in trust under the Treaty framework. The Second Session of the Governing Body in 2009 confirmed it was appropriate for the CGIAR Centres to use the SMTA to distribute those materials.

All MLS materials are transferred using the standard material transfer agreement (SMTA) adopted by the ITPGRFA Governing Body in 2006. The SMTA includes mandatory financial benefit-sharing clauses and prohibits recipients from seeking rights that would limit access to materials 'in the form received, from the multilateral system.' Providers of materials under the SMTA are obliged to report their transfers to the Secretariat of the ITPGRFA; this information is stored in a confidential database that can be accessed by the Food and Agriculture Organization of the UN (FAO), which represents the third party beneficiary interests of the MLS, with the authority to monitor transactions and initiate dispute settlement actions in the event of suspected non-compliance by recipients with SMTA conditions, ranging from amicable dispute settlement to binding international arbitration.

The Nagoya Protocol

The Nagoya Protocol came into force in 2014 and had 100 Parties, including the European Union, as of July 2017.

The Nagoya Protocol's obligations are focused on three aspects:

- Access – users seeking access to genetic resources must get permission from the provider country (known as prior informed consent or PIC), unless otherwise determined by that country. The Protocol's provisions on access go beyond the CBD by providing for the establishment of clear and transparent procedures for access in order to create greater legal certainty. Furthermore, where indigenous peoples and local communities (IPLCs) have an established right to grant access to genetic resources, Parties are to take measures with the aim of ensuring that the prior informed consent of the IPLCs is obtained for access to such resources.
- Benefit-sharing – providers and users must negotiate an agreement to share benefits resulting from the use of a genetic resource (known as mutually agreed terms or MAT).
- Compliance – the Protocol obliges each Party to put systems in place to require users in their jurisdictions to comply with the ABS requirements of the country providing access to genetic resources. To support compliance, the Protocol also provides for monitoring of the utilization of genetic resources, which is done primarily through checkpoints and the internationally recognized certificate of compliance.

The Protocol also addresses traditional knowledge associated with genetic resources. Parties are required to take measures with the aim of ensuring that traditional knowledge associated with genetic resources that is held by IPLCs is accessed with the prior informed consent of those IPLCs and that mutually agreed terms have been established.

The Nagoya Protocol establishes an ABS Clearing-House for the sharing of information on ABS. The Clearing-House also contributes to improving clarity, transparency and legal certainty. It plays a central role in monitoring the utilization of genetic resources. A permit submitted to the ABS Clearing-House constitutes an internationally recognized certificate of compliance. Checkpoints collect or receive information related to the utilization of genetic resources from users. The information collected or received by the checkpoint is then submitted to the ABS Clearing-House, which transmits it to the country that provided access to the genetic resources, enabling verification that the MAT are being complied with.

The international community's call for implementing the ITPGRFA and the Nagoya Protocol in coordinated, mutually supportive ways

There are numerous cross-references between the CBD, the Nagoya Protocol and the ITPGRFA recognizing their complementarity and expressing Contracting Parties' collective intention that they should be implemented in mutually supportive ways. A number of the preambular paragraphs of the Nagoya Protocol recognize and recall the importance of the ITPGRFA and the MLS and the fact that they are in harmony with the CBD. Article 4 of the Nagoya Protocol states that the 'Protocol does not apply for the Party or Parties to the specialized [ABS] instrument in respect of the specific genetic resources covered by and for the purposes of that specialized instrument.' It also states that the Nagoya Protocol shall be implemented in a mutually supportive manner with other international instruments relevant to it. The text of the CBD's COP decision X/1 (2010) adopting the text of the Nagoya Protocol states that the ITPGRFA is one of the 'complementary instruments' that 'constitutes' the overarching International Regime on access and benefit-sharing (along with the CBD, the Nagoya Protocol and the Bonn Guidelines).

Older decisions of the CBD COP that were taken during the negotiations of the ITPGRFA (for example, CBD COP decision V/26) recognized the importance of the ongoing negotiations of the MLS under the aegis of the FAO's Commission on Genetic Resources for Food and Agriculture (CGRFA) and taking them into account in the context of the work of the COP on ABS. The ITPGRFA explicitly states in Article 1 that its objectives are in harmony with the CBD and that they will be attained by linking it closely with the FAO and the CBD. The ITPGRFA's Governing Body has adopted resolutions calling on its own Contracting Parties to consider ratifying the Nagoya Protocol and implementing it in mutually supportive ways with the MLS; it has also called on national focal points for both the CBD/NP and the ITPGRFA to enhance their collaboration as well as on the Secretariats of both instruments to work closely together. The Sixth Session of the Governing Body of the ITPGRFA welcomed the collaboration between the two Secretariats, Bioversity International, the ABS Capacity Development Initiative, the African Union and other stakeholders on mutually supportive implementation of both agreements (resolution 7/2015).

Before proceeding, it is important to note that, unless specifically otherwise noted, the scenarios are based on the assumption that the countries concerned have ratified both the ITPGRFA and the Nagoya Protocol.

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SCENARIO A

Biofuels Solutions Incorporated

Photo: Sorghum growing in front of mango tree on farm, Ghana. Credit: Bioversity International/C. Zanzanaini

A.1. You are the director of a national genebank with a well-known sorghum collection. You receive a request from Biofuels Solutions Inc. asking for a number of sorghum accessions for use in their research and development programme. What are your options? What rules apply? How do you ultimately resolve the issue?

A.2. You have received samples of maize under the SMTA for use in your organization's breeding programme. You have conserved copies of those materials. You receive a request from Biofuels Solutions Inc. for samples of that conserved material. What rules apply? What do you do?

Photo: Women selecting chillis for market/food industry, Peru. Credit: Bioversity International/X. Scheldeman

Photo: Maize diversity on display at COP 10 - Convention on Biological Diversity, Nagoya, Japan, 2010. Credit: Bioversity International/N. Capozio

Regarding A.1: Request for sorghum germplasm from national genebank

The genebank director needs to consider a series of questions to determine how to proceed:

- Is sorghum one of the crops listed in Annex I of the ITPGRFA?

The answer to this first question is straightforward: sorghum is an Annex I crop.

- Are the PGRFA in question under the management and control of the Contracting Party concerned and in the public domain (and, therefore, automatically included in the MLS)?

Since the material requested is in the national genebank, it is likely 'under the management and control' of the Contracting Party and 'in the public domain' and, therefore, is automatically included in the MLS.[1]

- Is Biofuels Solutions Inc. requesting the sorghum accessions for the purposes of 'food and agriculture'?

Given the name of the company requesting the material – Biofuels Solutions Incorporated – it is likely that it will not use the materials for the purposes set out in the ITPGRFA and for which Contracting Parties undertake to provide facilitated access – that is, for the 'utilization and conservation for research, breeding and training for food and agriculture' and not for 'chemical, pharmaceutical and/or other non-food/feed industrial uses.' (Article 12(3)(a) of the ITPGRFA and Article 6.1 of the SMTA).

If the genebank director is sure the company is going to use the materials for non-food/feed purposes, she should not transfer it using an SMTA and she should instead take steps to ensure that the request is made and considered under the laws implementing the Nagoya Protocol. If the genebank director has doubts, she could request additional information from the access seeker. She should also draw the attention of Biofuels Solutions to the relevant sections of the SMTA wherein recipients undertake to use the transferred PGRFA for 'utilization and conservation for research, breeding and training for food and agriculture, provided that such purpose does not include chemical, pharmaceutical and/or other non-food/feed industrial uses.' If the recipient uses materials received under the SMTA for non-food/feed I purposes, this would break the terms of the contract.

Regarding A.2: Request for maize germplasm previously received under the SMTA

Recipients of materials under the SMTA who voluntarily conserve them are required to provide facilitated access to such materials under the terms and conditions of the ITPGRFA (subject to conditions such as having enough of the material 'stocked' to be able to share samples).

As in the case of Scenario A.1 above, given the name of the requesting company – Biofuels Solutions Incorporated – the provider in this case should consider whether the recipient will use the materials for the purposes of 'research breeding and training for food and agriculture'.

[1] Genebank managers – or any providers, for that matter – who are uncertain about whether certain PGRFA are included the MLS, can ask themselves, or higher authorities, a number of questions to ascertain the status of material. These issues are examined in more depth in Scenario G (Genebanker's Uncertainty) and are not examined here.

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SCENARIO B

In situ materials

Photo: Sprouting coconuts on the forest floor, Osa Peninsula, Costa Rica. Credit: Bioversity International/C. Zanzanaini

You have been designated as your country's competent national authority under the regulatory regime for implementing the Nagoya Protocol.

B.1. You receive a request to collect samples from coconut trees that grow along the country's publicly owned beaches. How do you respond?

B.2. There are wild relatives of teff and cassava growing in some nationally protected areas. An agricultural research organization in another ITPGRFA member state has written requesting permission to organize a collecting mission to gather samples of these plants. What are your options? What rules apply? How, ultimately, do you reply? Why?

Regarding B.1: Coconuts on the beach

The Nagoya Protocol's competent national authority must consider a few threshold questions to ascertain which set of rules applies for this request:

- Are coconuts one of the crops listed in Annex I of the ITPGRFA?

The answer to this question is straightforward: coconuts are an Annex I crop.

- Are the PGRFA in question under the management and control of the Contracting Party concerned and in the public domain (and, therefore, automatically included in the MLS)?

If the beaches are under national government jurisdiction, it is likely that the coconut genetic resources are under its management and control. It seems that in most countries, the germplasm would be considered to be automatically included in the MLS.[1] In such cases, the Nagoya Protocol competent national authority could refer the requestor to the National ITPGRFA Focal Point and/or the agency managing the area concerned following the established procedures in the country.

[1] There are also some countries (for example, Costa Rica) that have come to the conclusion that, in their own national circumstances, only ex *situ* collections can be interpreted to be 'under the management and control of the Contracting Parties and in the public domain' and thus eligible for automatic inclusion in the MLS.

Photo: Tef or teff, a staple grain in Ethiopia used to make injera (local flat bread). Credit: Bioversity International/C. Zanzanaini

In federated states, depending on the national constitution, it could be that the management of some (or possibly all) lands are under the jurisdiction of subnational governments (for instance, provinces or regions), with the result that the national government may not manage and/or control PGRFA in these areas. It is also possible that national governments may have ceded management and control over PGRFA on public lands to communal administrations, indigenous peoples and local communities, or farmers or even to companies as part of natural resources/ protected areas co-management schemes. These issues require careful consideration of the administrative and constitutional arrangements in the Contracting Party concerned.

- What other land management or environment protection rules currently exist that may regulate how the coconuts are managed and/or accessed?

Assuming the coconuts are located in a country where *in situ* PGRFA can be considered to be 'under the management and control' of the Contracting Party and in 'the public domain', Article 12.3(h) of the ITPGRFA specifies that access to *in situ* PGRFA is also subject to other national laws. Presumably, these laws would address issues related to:

- the management of the government lands in question (often protected areas),
- sustainable collecting,
- the collector involving or working entirely through national organizations/competent authorities,
- mandatory deposits of samples in national collections, and so on.

As a result of the combined application of these laws and the ITPGRFA, if and when a decision is made to allow collecting, the PGRFA will eventually need to be transferred under the SMTA. Simultaneous application of these different rules will require close cooperation between the competent authorities involved.

If the requestor is located in a country that is not a Contracting Party of the ITPGRFA, it is up to the provider country to decide whether to make the material available using the SMTA or to refuse and enter into a separate bilateral agreement with the requestor subject to the laws implementing the Nagoya Protocol. Many Contracting Parties of the ITPGRFA distribute their material to recipients in both Contracting Parties and non-Contracting Parties using the SMTA.

Regarding B.2: Wild relatives in protected areas

Many of the considerations that were relevant for scenario B.1 are relevant to this scenario as well.

- Are wild relatives of teff and cassava listed in Annex I of the ITPGRFA?

Teff is not included in Annex I. The same is true for most of the species of cassava. Annex I states that only *Manihot esculenta* is included in the MLS. Usually, *Manihot esculenta* is used to describe domesticated cassava. However, one subspecies of *Manihot esculenta* is a wild relative - that is, *M. esculenta* subspecies *flabellifolia*.

- Are the PGRFA in question under the management and control of the Contracting Party and in the public domain (and therefore automatically included in the MLS)?

Likely yes, given that they are found in a national protected area.

- What other land management or environment protection rules currently exist that may regulate how the PGRFA in question are managed and/or accessed?

If the requirements of these other land management or environment protection rules are met, then samples of the *Manihot esculenta* subspecies *flabellifolia* can ultimately be transferred to the requesting party using the SMTA.

Access to the teff and the other cassava wild relatives may be subject to national rules for implementation of the Nagoya Protocol (assuming the request is for the purposes of utilization as defined in the Nagoya Protocol).[2]

[2] Issues related to the relevant scope of the ITPGRFA/MLS and Nagoya Protocol – and the possibility that neither might apply -- are addressed in Scenario D (Farmers' collective wants to share with another farmers' collective in another country).

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SCENARIO C

Legal space

Photo: Rice varieties from the community seed bank in Raipur, India. Credit: Bioversity International/A. Gupta

You are the head of a national crop genebank. You have received a request from a researcher in a neighbouring country for samples of some chickpeas from your collection. Your country acceded to the CBD in 1998 and ratified the ITPGRFA in 2003 and the Nagoya Protocol in 2013.

C.1. There is no national law implementing any of these agreements.

C.2. There is a national access and benefit-sharing law from 2000 that says all access to any genetic resources in the country must be subject to the PIC of the competent authority appointed by the minister of the environment and must include a number of mandatory benefit-sharing terms that are not consistent with the SMTA.

For both cases (C.1 and C.2), what do you do? Why?

Photo: Rice fields in Nepal. Credit: Bioversity International/B. Saugat

Photo: Andean grain diversity on display in Puno, Peru. Credit: Bioversity International/A. Camacho

Regarding C.1: No implementation-related laws

This is still a fairly common scenario in reality. Many countries do not have laws, regulations or administrative mechanisms implementing the CBD, the Nagoya Protocol or the ITPGRFA, despite having ratified them years previously. In such cases, the genebank head may actually know that the material requested should be available under the ITPGRFA, for example, but is still not sure how to act in the absence of policy, legal and administrative measures clearly establishing her right to consider the requests and provide the materials concerned.

Is the material in the MLS?

The head of the genebank needs to consider two threshold questions:

- Is chickpea one of the crops listed in Annex I of the ITPGRFA?

Yes.

- Are the PGRFA in question 'under the management and control' of the Contracting Party concerned and 'in the public domain' (and, therefore, automatically included in the MLS)?

The PGRFA are being held in the national genebank so the answer to this question is also likely to be yes although this is something the genebank manager needs to be sure of, as explored in Scenario G (Genebanker's Uncertainty).

Does the genebank head need a national law to go ahead and make MLS material available using the SMTA?

Having determined that the chickpea PGRFA are part of the MLS, the genebank manager should ask herself: Do I have authority to act? Does there need to be an implementing law first to be able to use the SMTA? Or can I go ahead in the absence of a national law?

The ITPGRFA does not explicitly require new measures to be put in place. Most of the countries that are currently actively providing PGRFA under the MLS did not feel the need for new legal enactments empowering genebank managers (or anyone else for that matter) to be providers. It is enough in these countries that: the country has ratified the Treaty; there is no law prohibiting them from acting; and the material in the national genebanks is clearly included material in the MLS. In these countries, the genebank manager should feel confident that she may act and that no one can or will challenge her authority for having decided to provide materials pursuant to the Treaty (i.e., using the SMTA). In many countries, genebanks already had the discretion – before ratifying the ITPGRFA – to distribute PGRFA from the genebank if these resources were under the management and control of the government and in the public domain. Ratification of the ITPGRFA did not change this so they do not need a new policy enactment or law to be able to make those materials available using the SMTA.

However, in some countries the genebank manager may not feel comfortable making the decision without higher level authorization. She would need to consult people higher up in the national system in order to get the required assurance, starting with immediate supervisors, and depending on the circumstances, higher level authorities in the lead agency or ministry. In some cases, there may be mechanisms for inter-departmental/ministerial consultations that can

- either provide an interim 'green light' to the genebank manager so that she has the discretion to make decisions with respect to subsets of PGRFA in the genebank, or
- send a clear message that she should not proceed and must wait for some form of positive policy enactment confirming her ability to act.

Again, the appropriate form and content of these measures will depend upon the political and legal cultures of the countries concerned. They could range from national legislation to ministerial decrees to regulations to guidelines to statements issued from relevant government officials.

Regarding C.2: Conflicting obligations?

The entry-level question in this case involves which legal obligation takes precedence: the older national law or the more recently ratified international agreement? The answer depends upon the political and legal systems of the countries concerned.

In some countries, pursuant to the national constitution (for example, Cameroon and South Africa) or to national legislation (for example, Nepal), ratified international agreements have direct application in national law and take precedence over pre-existing domestic laws concerning the same subject matter. In such countries, national authorities are obliged to act in conformity with these international obligations and to encourage/allow/require constituents to do the same, even if there is no positive legal enactment associated with the implementation of these international agreements. If the genebank manager is located in such a country, one hopes that she will have received communications from a higher authority confirming her capacity to act. If not, she may need to initiate such communications. Presumably, once her request for guidance makes its way to the appropriate authority, she will receive instructions to act in conformity with the country's obligations under the ITPGRFA.

In other countries, the situation is the opposite, with pre-existing national laws taking precedence over more recent international commitments, if the latter have not been domesticated through various forms of positive legal enactment. This is the case in some Pacific Island states, for example. In this situation, the genebank manager could take her case to the competent authority for the implementation of the ABS provisions under the CBD and the Nagoya Protocol and see if it is possible to get permission to make the materials available using the SMTA. In many countries, there is little awareness of the ITPGRFA within the lead agencies for the Nagoya Protocol and vice versa. So this effort will often require a considerable amount of information sharing, awareness raising and communications between higher-level operatives in the respective lead agencies.

In the long run, it will be necessary to make amendments to the national ABS law implementing the CBD provisions on ABS in order to accommodate the provisions of the Nagoya Protocol and to create space for the operation of the multilateral system of the ITPGRFA, for example, by creating an exemption for the regulation of access to Annex I materials and possibly to develop additional mechanisms to authorize for providers to act in conformance with the country's obligations under the ITPGRFA.

An increasing number of countries are considering new laws to implement the Nagoya Protocol. These exercises provide opportunities to recognize and create space for the operation of the ITPGRFA.

Photo: Andean grains. Credit: Bioversity International/A. Camacho

Photo: Diversity fair in Bhutan. Credit: Bioversity International/R.Vernooy

Who has the authority to sign the SMTA?

A key point to note, for both of these cases and for all legal and political situations, is that the SMTA is a contract, which commits both sides of the contract to certain obligations. When a genebank manager provides material with a SMTA, she provides it on behalf of the legal entity that employs her (the genebank or its parent organization), not as an individual acting in her own capacity. That is, the legal responsibility for compliance rests with the organization. Thus, as a purely internal organizational matter, the genebank manager must first establish who in the organization is authorized by the organization to sign contracts on behalf of the organization. The genebank manager may be the person authorized to sign any contract on behalf of the organization or, for the special case of SMTAs, she may be given authority to accept SMTAs on behalf of the organization or may have to route every SMTA through the organization's contracts management office or equivalent. It may also be noted that the process of clarifying internal lines of authority may help ensure compliance with national regulations.

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SCENARIO D

Farmers' collective wants to share with another farmers' collective in another country

Photo: Community seed bank inaugurated by Ann Tutwiler, India (13th march 2015). Credit: Bioversity International/A. Gupta

You work with a farmers' collective that maintains a collection of maize seeds (an Annex I crop). Another farmers' group in another country with which you have close ties has asked you for some samples. Your country has ratified the ITPGRFA (which says that Parties will take policy measures to encourage voluntary inclusions of materials in the MLS) as well as the CBD and the Nagoya Protocol. Your farmers' collective just wants to share the seed and does not care particularly what legal instrument it uses to send the materials. Can it just send the materials to the farmers group using the SMTA? Or some other instrument? Does it need to get permission first? If so, why? From whom?

There is no one single correct answer on which legal regime applies, or how they apply. The answer depends partly on the political and legal systems of the countries concerned and partly on the roles of the state and non-state actors in the process. There are four ways the situation could ultimately be resolved as described in the following enumerated subsections.

1. *The farmers send the materials themselves using an SMTA.* This could be the outcome if the maize seeds are not considered to be automatically included in the MLS (because they are under the management and control of the farmers' collective), and the country has adopted a policy to allow/encourage farmers' groups, civil society organizations and companies to voluntarily provide Annex I PGRFA using the SMTA following its commitment to provide incentives for natural and legal persons to voluntarily include Annex I PGRFA in the MLS. If the country has an ABS law implementing Nagoya that extends to all PGRFA that are not automatically included in the MLS, it may be necessary for the farmers' collective to get permissions from the competent national authority to provide the material using the SMTA (unless there is already legal space/ permission for them to do so explicitly created under that law).

   Note that in some countries – for example, Ethiopia and Burkina Faso – all PGRFA in the country, including that which is located in farmers' fields, is considered to be under the control and management of the national government. In such cases, the collective's maize collection would arguably be automatically included in the MLS.

Photo: Diverse varieties of at a diversity fair, Bolivia. Credit: Bioversity International/P. Bordoni

1. *The farmers' collective deposits the maize PGRFA in their country's national genebank, which subsequently sends samples to the farmers' collective in the recipient country, using the SMTA.* As in the first approach described above, this constitutes a voluntary inclusion of the materials into the MLS by the farmers. It ensures the long-term conservation of the material in the genebank and allows the government to shoulder the associated costs. It assumes that the national genebank has the resources to increase the size of its collection and to distribute the extra material.

2. *The materials are sent using an access and benefit-sharing agreement negotiated pursuant to measures implementing the Nagoya Protocol.* This would be the case where the materials are not considered to be automatically included in the MLS and falls instead under the CBD/NP (assuming the intended use is regulated under national measures implementing the Nagoya Protocol). The difference in this case is that the farmers and or the national competent authority prefer to develop an ABS agreement de nuovo, including a different package of rights and obligations than those included in the SMTA. Whether the two farmers' collectives can negotiate this agreement between themselves or whether the competent national authority of the provider country needs to be involved will depend on the measures implementing Nagoya Protocol that are in place in the provider country.

3. *The farmers send the materials themselves subject to whatever terms and instruments they decide are most appropriate, without any requirements pursuant to the ITPGRFA or the Nagoya Protocol.* It could be that neither the ITPGRFA or the Nagoya Protocol applies to this exchange, and that therefore the farmers collectives can agree to whatever terms they choose, including possibly not using any form of MTA. Again, as considered in paragraphs above, the materials likely are not automatically included in the MLS. Furthermore the Nagoya Protocol may not apply if (as is the case in many countries) traditional exchanges between farmers are exempted from national ABS laws. Indeed, Article 12.4 of the Nagoya Protocol states that 'Parties … shall, as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the Convention'.

Another reason for which potentially neither the ITPGRFA nor the Nagoya Protocol (or their implementing measures) could apply in this case would be that the intended use by the recipient farmers' collective is not within the scope of the either instrument. This could be the case if the recipient farmers' collective only wants to use the maize seeds for direct use in production, which is not one of the purposes of use covered by the MLS. The same argument can also made with respect to the scope of the Nagoya Protocol. In the Nagoya Protocol, '"[u]tilization of genetic resources' means to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology" (Article 2(c)). It could be argued that direct use of seed for agricultural production and harvesting does not involve 'research and development on the genetic and/or biochemical composition' of the varieties of the crop in question, and therefore, accessing seed for this purpose would not fall under the scope of the Nagoya Protocol.[1] If national ABS measures are consistent with this interpretation, then access to the farmers' collective seeds for those purposes would not be subject to any form of access regulation, and the farmers could make any agreement they wished (subject of course to other laws that might apply, e.g. phytosanitary laws).

Of course, even if this interpretation of the scope of 'utilization' were universally agreed upon, countries could still choose to regulate access to genetic resources for a broader variety of uses. In such cases, user countries could decide not to monitor and enforce agreements that were made under this broader scope, their obligation being limited to monitoring 'utilization' under the Protocol.

[1] In the 'Elements to Facilitate Domestic Implementation of Access and Benefit-sharing for Different Subsectors of Genetic Resources for Food and Agriculture' welcomed by the CGRFA and included in the report of its 15th Regular Session, 19-23 January 2015, paragraph 46 states: "If the activities triggering access provisions are limited to "utilization" within the meaning of the Nagoya Protocol, certain typical uses of GRFA, for example the growing of seeds for subsequently using the harvested products for human consumption clearly do not qualify as utilization and therefore do not trigger the application of access provisions." Available at http://www.fao.org/3/a-mm660e.pdf (Accessed 29 October 2016). Similarly, the non-binding 'Guidance document on the scope of application and core obligations of Regulation No. 511/2014 of the European Parliament and Council on the compliance measures for users from the Nagoya Protocol' states that 'Given that the mere planting and harvesting of seeds or other reproductive material by a farmer does not involve research and development, this is outside the Regulation's scope" (at p 8). (Available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016XC0827(01)) (Accessed 15 October 2017).

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SCENARIO E

Smallholder farmer as provider

Photo: Farmer in rice fields, Ghana. Credit: Bioversity International/C. Zanzanaini

You are a smallholder farmer who intercrops maize, common bean, banana and coffee.

E.1. The local extension officer from the sub-district office of the national agricultural research organization comes to your house explaining that she is conducting a collecting mission as part of a large research programme involving local, national and international research and development organizations. They are looking into ways to improve these crops so that they perform better under changing climate conditions, both in your country and abroad. She asks if you have seeds or cuttings that you are willing to share.

E.2. A seed breeding company representative stops by and asks you for seeds or cuttings of some of the plants he finds interesting.

E.3. The local extension officer comes by with a master's student working for the national genebank. They ask if they can have some seeds and cuttings to deposit in the genebank.

What do you do in each case? What rules apply?

In most countries, as discussed in Scenario D (Farmers' collective wants to share with another farmers' collective in another country), materials in farmers' fields and community genebanks would not be considered to be managed and controlled by the national government and, therefore, not automatically included in the MLS. This analysis assumes that the farmer is in such a country and that she has not yet put her material voluntarily into the MLS.[1] Accordingly, all three scenarios would likely be governed by the laws that implement the Nagoya Protocol, assuming that the uses of the materials would fall within the scope of the Nagoya Protocol.

[1] If such PGRFA are considered to be in the management and control of the national government, then the Annex I crops in this example (maize, common bean, banana) would be in the multilateral system, and facilitated access would need ultimately to be provided either by the farmers directly (as per Scenario D.1, point 1) or from a genebank where they deposit the material (as per Scenario D.2, point 2), or through new collections from *in situ* conditions (as addressed in Scenario B: In situ Materials). The requests for non-Annex I materials would be addressed pursuant to authority/national laws associated with the implementation of the Nagoya Protocol unless exceptional provisions exist for such materials to be made available under the SMTA.

Photo: Farmers harvesting potatoes on Bolivian hillside. Credit: Bioversity International/P. Bordoni

If, like many European countries, the farmer's country has opted not to put in place systems for requiring prior informed consent from a competent national authority for access to genetic resources, the farmers can agree to provide the materials on whatever terms are satisfactory to them. (Assuming, of course, that they have the right to provide it in the first place.) If, on the contrary, the law specifies that other authorities need to be involved in developing and approving ABS agreements, then the farmer and access seekers in the three examples will need to follow the related procedures. The law may require that PIC and MAT be provided by the community of which the farmer is a member and not just by individual farmers. If so, both the farmer and access seekers should approach the appropriate community authority. The law may also require additional conditions for accessing traditional knowledge of the farmer (or farming community) associated with the use of the genetic resources involved.

Frequently, individual farmers approached by people who are interested in their crops are willing to provide samples for free. Indeed, they are often flattered to be asked. Farmers generally know very little, or nothing at all, about ABS laws and their attendant rights and obligations. So they are generally unaware of the fact that they have a legal basis for withholding access unless they are content with the terms that the collector offers. Ideally, the countries which regulate access to genetic resources held by farmers will have programmes to raise farmers' awareness about their legal rights in this regard, and provide assistance to farmers who are approached.

The uses of the collected materials may be important to the farmer and factor into his or her decision to provide (or not provide) the materials. It will also be important to the competent national authority, if it has to be involved, following applicable national laws. In Scenario E.1, the material will be used in crop improvement programmes to meet the needs of farmers in their own countries. The recipients are scientists in public research consortia of the sort that often make their research products freely available to national programmes. These will likely serve as incentives for the farmer to provide samples. It seems likely, in Scenario E.1 and E.3, following the regular course of events, that the collected material will end up in the national genebank and from there be made available to third parties. This may appeal to the farmer or it may not. Under Scenario E.2, the collector is a private company, and there are no details about the kind of research the material will be used for, where, and how the company will make its research results available.

In all three scenarios (E1. E.2 and E.3) there are a range of decisions that farmers could make. They could decide to make the material available using the SMTA, thereby effectively introducing it voluntarily into the multilateral system. Or they could consider developing alternative agreements with other conditions, for example, getting information back about research results, getting free samples back of improved materials that are eventually developed, and getting training for how to use the new materials, or royalty payments if the material is commercialized, etc.

There is clearly a need for institutional support for the farmer to be able to participate meaningfully in his/her communications and negotiations with the collector. Extension workers are in a good position, if they receive training, to at least start the process of sensitizing the farmers and identifying situations where they will need additional support from the specialized agencies. The same applies to local civil society organizations, farmers' organizations and even municipal offices. The requirement for having the competent national authorities finalize the ABS agreements is to provide a safety check that someone has spent sufficient time with the farmer to help him understand his rights and to back him up in his negotiations with the collectors. Depending on where the collected materials are destined to end up in the genebanks and, subsequently, be distributed through the MLS, they could be moving from one regulatory system (under the Nagoya Protocol) to another (the MLS under the ITPGRFA). Such efforts should involve coordinated participation and technical support from the experts involved in the implementation of both systems.

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SCENARIO F

Reporting transfers

Photo: Farmers involved in Seeds for Needs project in Ethiopia show off the durum wheat seeds they have multiplied. 40kg from just 1.5kg. Credit: Bioversity International/C.Zanzanaini

In the last six months you have sent samples of both Annex I and non-Annex I materials from collections hosted by the national genebank and national public breeding programmes to recipients outside the country. Where do you report those transfers? How?

Photo: Accessions and seed bank storage of tropical fruit species, the Philippines. Credit: Bioversity International/E. Dulloo

Photo: Diverse common bean varieties in Seed fair in Saraguro, Ecuador. Credit: Bioversity International/J. Coronel

Reporting on PGRFA transferred using the SMTA

Article 5(e) of the SMTA requires the provider to notify the Governing Body of the ITPGRFA of the transfer. This requirement applies whenever material is transferred using the SMTA, whether or not it belongs to the crops listed in Annex I of the ITPGRFA.

The information is to be submitted via the Secretary of the ITPGRFA and, according to Resolution 5/2009 of the Governing Body, shall be provided at least once every two years. The ITPGRFA's Secretariat developed a software – Easy SMTA – which providers can use to generate SMTAs and report electronically to the Governing Body.

Reporting on PGR where access was granted using a permit or its equivalent (and not the SMTA)

The genebank may receive requests for purposes other than those covered by the ITPGRFA and SMTA, for example, for non-food/feed purposes (see scenario A). In such cases, if the intended use of the material is regulated by the Nagoya Protocol, and the country requires prior informed consent for access to genetic resources, then the country must also put in place measures to issue access permits and notify the ABS Clearing-House (see http://absch.cbd.int).

Only officially designated representatives of Parties can submit information on permits to the ABS Clearing-House. They do this through common formats on the ABS Clearing-House web site.

Information on permits that is published in the ABS Clearing-House constitutes an internationally recognized certificate of compliance.

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SCENARIO G

Genebanker's uncertainty

Photo: Bioversity International's in vitro banana collection at the International Transit Centre, Leuven, Belgium. Credit: Bioversity International/N. Capozio

You are the head of the national genebank. Your genebank holds a wide range of both Annex I and non-Annex I materials that have been collected over the last 20 years.

G.1. You are pretty sure that most, probably all, of the Annex I material in the genebank is in the MLS. But something is holding you back from distributing samples of that material using the SMTA. What is holding you back? How can you get to the bottom of the issue so you feel comfortable making decisions when you get requests?

G.2. There are crop improvement programmes for both Annex I and non-Annex I crops in the country, which are supported through partnerships (including germplasm and knowledge exchange) with research organizations outside the country. The national genebank supports these crop improvement programmes by acquiring, conserving and evaluating a diverse range of germplasm of those same crops. As part of its activities, the genebank also provides diversity to genebanks and breeders outside the country working on the same crops. You use the SMTA for Annex I materials, but you do not know what legal instrument to use when you are distributing the non-Annex I PGRFA to recipients both inside and outside the country. As luck would have it, you are having lunch tomorrow with the national focal points for the ITPGRFA and for the CBD/Nagoya Protocol. You hope that you can urge them to come to a policy decision with respect to requests for non-Annex I PGRFA in the genebank. You will need to give them a thorough briefing before they can decide. What are their options? What do you advise is the best way forward? Why? Are there circumstances under which you would provide a different opinion?

Photo: A yellow long bean variety in a community seed bank in Kiziba, Uganda. Credit: Bioversity International/A. Sidhu

Regarding G.1: Why hesitate?

The genebank manager's lingering discomfort – despite fairly high levels of certainty – can be attributed to concerns about needing to justify her actions in light of the fact that genetic resources issues are highly politicized in her country. This discomfort is heightened by the fact that in many countries there are significant legal consequences, including criminal charges – under other laws, such as national ABS laws – for providing access to genetic resources improperly.

Some of the genebank manager's uncertainties may be attributable to issues considered in other scenarios and will not be repeated here.

The genebank manager may need to consider a number of different questions to help overcome her uncertainties.

Are all the Annex I materials in the collection actually included in the MLS?

Annex I material can be included in the MLS either automatically or by virtue of being voluntarily included by a natural or legal person. According to the ITPGRFA (Article 11.2), Annex I PGRFA that are 'under the management and control of Contracting Parties and in the public domain' are automatically included in the MLS. The genebank manager may need assistance in interpreting how these terms apply to the materials in her genebank. It appears to be widely accepted that 'under the management' refers to a Contracting Party's 'capacity to determine how the material is handled' and 'control' refers to the 'legal power to dispose of the material.' 'Contracting Parties' refers to structures of central natural administrations such as government departments and national genebanks. Special issues may arise in the case of federated states, when determining if the national government delegates the power to manage and control the material. It also appears to have been fairly widely accepted that 'public domain' refers to PGRFA that are not subject to intellectual property protections.[1]

If the genebank manager ascertains that the material is 'under the management and control' of the national government, she still needs to consider if it is subject to IP protections. Only a very small percentage, if any, of the PGRFA in a national genebank would be subject to IP rights. Usually, a genebank manager will know if an accession is subject to an IP right. If she has doubts, she can check with the national plant variety protection or patent offices to be sure.

Does she have the authority to decide how material in the genebank is handled?

The manager needs to consider whether the genebank, operating under the authority of the national government, has the right to determine how the accession is handled or whether the issue should be directed to someone else to decide. The genebank manager can look to the conditions under which the materials were introduced to the genebank. In most cases, given the history and function of national genebanks, it is likely the materials were acquired on the condition that the genebank can distribute them to others. However, if uncertainties remain, the genebank manager would need to investigate further:

- Sometimes genebanks make agreements to hold materials under 'black box' conditions – that is to say, to conserve them on behalf of depositors subject to the condition that they do not distribute them or use them for their own research purposes. Such materials would not be under the management or control of the genebank in the sense intended by the ITPGRFA.
- Some countries have ABS laws requiring collections of PGRFA from indigenous peoples and local communities to be subject to the PIC and MAT of the national authorities and/or of the indigenous peoples or local community concerned. If a PGRFA

[1] See, among other sources, the opinions of the *Ad Hoc* Technical Advisory Committee on the Multilateral System and the Standard Material Transfer Agreement (Committee). At its Fifth Session, the Governing Body took note of the opinions and advice provided by the Committee as helpful guidance for Contracting Parties in implementing their obligations under the Treaty (Resolution 1/2013). For more information about the *Ad Hoc* Technical Advisory Committee on the Multilateral System and the Standard Material Transfer Agreement, see http://www.fao.org/3/a-i4578e.pdf (accessed 5 August 2017).

in the genebank was collected from a local community after such a law came into force, and the collection agreement did not include permission to pass the material on to third parties, it would appear that the genebank manager/Contracting Party would not have 'control' over this material. Thus, access to those materials would need to be negotiated with the original providers of those materials to the genebank, subject to ABS agreements developed under the authority of the implementing legislation of the CBD and the Nagoya Protocol. The genebank manager would need to communicate that message to the access seeker and/or pass on the request to the original provider and competent national authority.

Regarding G.2: Non-Annex 1 PGRFA

Contracting Parties to the ITPGRFA have no obligations to provide facilitated access to non-Annex I materials. They have the discretion/legal right to develop ABS agreements as providers of such materials pursuant to national laws implementing the Nagoya Protocol. However, there may be cases – such as in this scenario – when it may make sense to make non-Annex I materials available using the SMTA. Some questions to consider in making this decision include:

- Are there significant benefits that could be gained by developing bilateral ABS agreements for the non-Annex I materials rather than transferring them using the SMTA?
- If so, do those benefits outweigh the benefits that would be gained through the crop improvement programme overall if the SMTA is used?
- Which sets of benefits are the most likely to actually materialize?
- Are the project partners open to developing new ABS agreements under the project, or will the prospect of having to negotiate such agreements discourage them, and possibly drive them away?
- Will the transaction costs on the genebank to develop new agreements for non-Annex I materials be sustainable over the longer run?

Such an analysis could contribute to a conclusion whether it is useful to use the SMTA for non-Annex I materials for the life of the project or for all similar projects in the future. Ideally, these questions will have been considered when developing national ABS policies and laws and the flexibility and legal space will exist to enable the genebank manager to make the material available using the most appropriate type of agreement. (Scenario C: Legal Space addresses this issue in more detail.)

Photo: Farmers involved in participatory plant breeding of rice in Nepal. Credit: Bioversity International/B.Sthapit

Photo: Accessions at the National Agrobiodiversity Centre in Korea. Credit: Bioversity International/E. Dulloo

There are several Contracting Parties that have decided to use the SMTA when making available some or all non-Annex I crops and forages (e.g. Germany and the Netherlands). These countries do not have conflicting ABS measures (as considered in Scenario C.2: Conflicting obligations) and it is clear in their national systems that access to non-Annex I PGRFA can be granted using the SMTA.

In the longer term, the country could explore developing its own semi-standardized ABS agreement for non-Annex I materials for use in such circumstances, an approach that is encouraged under Article 19 of the Nagoya Protocol. Such agreements could include terms that are not in the SMTA, that are potentially appealing to both the providers and recipients. They could potentially contribute to lowering transaction costs as they could be shared with partners in the early stages of project development as a well-developed starting point for negotiations that is pre-approved by competent national authorities. The Commission on Genetic Resources for Food and Agriculture (CGRFA) has adopted a programme of work that includes exploring draft model clauses for ABS laws and related instruments concerning PGRFA. While still in its early stages, the CGRFA's work should ultimately provide useful resources to assist countries as they think through their implementation options. Clearly all of these approaches require close communication, cooperation and trust between the lead agencies for the ITPGRFA, the CBD/NP and the actual providers and recipients of materials in the country concerned.

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