

# Plant Patenting, Benefit Sharing and the Law Applicable to the Food and Agriculture Organisation Standard Material Transfer Agreement

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The Food and Agriculture Organization (FAO) International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) should make an enormous contribution to international equity in terms of the way plant genetic resources are transferred and agricultural research is conducted. However, its implementation remains a critical challenge for the majority of the developing countries. The literature has focused on access and benefit sharing discussions from the standpoint of public international law and the interaction between international regimes. By contrast, the original contribution of this article is to address the question of the applicable law to the Standard Material Transfer Agreement (SMTA). The SMTA is an essential operational mechanism of the ITPGRFA implementation. However, it operates as an international commercial contract, which creates specific rights and obligations between the parties under private law. This article considers the choice of law clause contained in the SMTA, its reference to the UNIDROIT Principles of International Commercial Contracts and the supplementary use of national law. It concludes that arbitrators may supplement non-national and international standards with substantive law principles of domestic origin only in three narrow exceptions, namely the following cases: (1) national “mandatory” provisions; (2) gaps within applicable non-national and international standards; and (3) additional choice of law clauses inserted by the parties in accordance with article 6.6 of the SMTA. The applicable law to the SMTA and the balance between non-national, international and national standards will play an important role in defining both the scope and the impact of benefit sharing on international equity in agriculture.

**Keywords** plant genetic resources for food and agriculture; access and benefit sharing; material transfer agreement; applicable law

The Food and Agriculture Organization (FAO) International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) should make an enormous contribution to international equity in terms of the way plant genetic resources are transferred and agricultural research is conducted, especially if the latter involves the use of modern biotechnologies.<sup>1</sup> However, its implementation remains a critical challenge for the majority of the developing countries.

Insufficient investments and limited human, technical and institutional capacity may constrain the application of science and technology to agricultural development. This has severe implications for agricultural production, environmental management, food security and poverty reduction. As part of the efforts to achieve