Regulatory Framework of Material Transfer Agreement (MTA) Under Indonesian Laws

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ABSTRACT: The MTA provides for a contractual agreement between a provider and recipient of the material which content the rights and obligations of all parties, including third parties. In international law, the Convention on Biological Diversity (CBD) and FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) provides mandate to Contracting Parties have to enact laws and adopt policies regarding the MTA for negotiation between the recipient and provider of access to genetic resources based on profit-sharing agreement. Regulation MTA in Indonesia is covered in the Regulation of the Minister of Agriculture under Regulation of the Minister of Agriculture No. 15/Permentan/OT.140/3/2009 on Guidelines for Preparation of Material Transfer Agreement and Regulation of the Minister of Health No. 657/Menkes/Per/VIII/2009 on Delivery and Use of Clinical Specimens, Biological Materials and Content the information. This article aims to examine the provisions of MTA under international laws and Indonesian law, it will analyze to what extent MTA set out in Regulation of the Indonesian Minister of Agriculture No. 15/Permentan/OT.140/3/2009 and Indonesian Minister of Health No. 657/Menkes/Per/VIII/2009. Then this study will also give suggestion for additional terms due to any weaknesses of MTA regulations in Indonesia. MTA regulations provides many benefits for Indonesia as a state provider, especially in terms of the protection of intellectual property rights. Provider can cooperate to research and development on food, agriculture and health, with domestic or foreign researcher, providers gain benefit sharing on the sale or liscence of products produced from the contracted material. For local communities also gain profit from its commercialization of the collection or invention of material obtained in the region owned by local communities. Yet, the MTA regulations is considered can inhibit the development of research and invention, costly. MTA provision that allow the recipient to distribute the genetic material and its derivates to other parties raises possibility violation by the recipient and also will arise conflict on the third party. According to MTA regulations, the provider difficult to monitor and control the implementation of the agreement. Thus, It needs to be more detailed arrangements regarding intellectual property protection to limit the use of the transferred material, also need to be set separated on benefit sharing when both parties negotiate of MTA.

KEYWORDS: Material Transfer Agreement (MTA), Genetic Resources, Intellectual Property, Benefit Sharing, CBD, ITPGRFA, Indonesia, Provider and Recipient.

1. INTRODUCTION

The MTA defines the rights of the provider and the recipient with respect to the materials and any derivatives. The MTA provides for a contractual “agreement” between “a provider” of “material” and “a recipient” of that material.¹ MTA define the rights and obligations of all parties, including third parties, involved in a transfer of biological material. MTA can be used as convenient tools with which the citizens of developing countries can facilitate equitable collaborative research and development with genetic resources.²

Convention on Biological Diversity provides that “Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party”.³ This suggests the need for negotiation between the recipient and provider of access to genetic resources based on profit-sharing agreement. Convention on Biological Diversity was ratified by Indonesia in Act No. 5 of 1994. It entitles the State powers over natural resources. Thus, the authority to determine access to genetic resources is given to the Indonesian government.

¹ Annex 1 of the MTA ITPGRFA

² Daniel M. Putterman, 1996, *Model Material Transfer Agreement for Equitable Biodiversity Prospecting*, Heinonline, Citation: 7 Colo. J. Int'l Envtl. L. & Pol'y 149.

³ CBD Article 5.4

Regulatory Framework of Material Transfer Agreement (MTA) Under Indonesian Laws

Along with the protection of biodiversity under CBD, the International Treaty on Plant Genetic resources for Food and Agriculture (ITPGRFA) has also been established that access to genetic resources should be done using the standard Material Transfer Agreement SMTA for plants contained in Appendix 1.B.⁴ International Treaty on Plant Genetic resources for Food and Agriculture (ITPGRFA) has ratified by Indonesia in the Act No. 4 of 2006.

The characteristics of MTAs that make them particularly useful to citizens of developing countries wishing to encourage research and development with genetic resources.⁵ The CBD requires states to monitor the implementation of material transfer agreements. The monitoring can include applications for intellectual property rights relating to the material supplied. In addition, countries can encourage users to disclose the country of origin of plant genetic resources in their applications for intellectual property rights.⁶ It grants the recipient a licence to use the proprietary material and ensures that both parties understand how the materials can be used. MTAs govern issues such as ownership of derivatives and modifications of the materials, the transfer of risk, limits on use, confidentiality of information in relation to the materials and rights to inventions, and research results arising out of use of the materials.

In particular, material transfer agreement in Indonesia is regulated in MTA regarding plant genetic resources for food and agriculture that is regulated in the under Regulation of the Minister of Agriculture No. 15/Permentan/OT.140/3/2009 on Guidelines for Preparation of Material Transfer Agreement and Regulation of the Minister of Health No. 657/Menkes/Per/VIII/2009 on Delivery and Use of Clinical Specimens, Biological Materials and Content the information. This article aims to examine the provisions of MTA under international laws and Indonesian law, it will analyze to what extent MTA set out in Regulation of the Indonesian Minister of Agriculture No. 15/Permentan/OT.140/3/2009 and Indonesian Minister of Health No. 657/Menkes/Per/VIII/2009. Then this study will also give suggestion for additional terms due to any weaknesses of MTA regulations in Indonesia.

2. MTA UNDER INTERNATIONAL LAW

The international community gave expression to the need to ensure the conservation and sustainable use of plant genetic resources with the adoption of the Convention on Biological Diversity (CBD), the FAO International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).⁷ The objectives of both the CBD and ITPGRFA are conservation, sustainable use, appropriate access, and fair and equitable sharing of the benefits arising out of the use of genetic resources.⁸ The FAO Treaty and the CBD provide a comprehensive framework for the conservation and sustainable use of plant genetic resources. Both legal instruments require the Contracting Parties to take general measures, including but not limited to the enhancement of the application of traditional cultural practices that are compatible with the sustainable use of plant genetic resources.⁹

The United Nations Convention on Biological Diversity recognizes sovereign rights of national governments over genetic resources, there has been a call for a recognition of "local" sovereignty over these resources at the level of rural communities.¹⁰ The Biodiversity Act providing a broad framework, regulating all aspects of biodiversity conservation and use. Article 15(4) of the CBD envisages that where access is granted it will be subject to mutually agreed terms. Currently the conventional form of access agreement is the Material Transfer Agreement (MTA). A number of the provisions of the CBD refer to the equitable sharing of benefits arising from the utilisation of the genetic resources of a signatory.¹¹ Article 15(7) requires each Contracting Party to "take legislative, administrative or policy measures, as appropriate" and in accordance with a number of specified provisions of the Convention, "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".

An important rationale for the Act was to resolve the fragmented nature of biodiversity-related legislation; to facilitate cooperation between the different levels of government (national, provincial and local); and to give effect to constitutionally

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⁴ See ITPGRFA annex 1

⁵ Daniel M. Putterman, *Ibid*

⁶ Abeba Tedasse, *Material Transfer Agreements on Teff and Vernonia – Ethiopian Plant Genetic Resources*, Journal of Politics and Law, Vo. 2, No. 4, December, 2009.

⁷ The CBD was adopted at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil, in 1992 and entered into force on 29 December 1993. The 1983 FAO International Undertaking was adopted as a non-binding conference resolution (FAO Resolution 8/83), which later became the FAO Treaty in November 2001 and entered into force on 29 June 2004.

⁸ Convention on Biological Diversity, Art. 1 and ITPGRFA Art. 1. Concerning the requirement of sustainability see CBD Art. 6(a) and see FAO Treaty Art. 6(2)(f).

⁹ ITPGRFA Art. 4 and Art. 6(1). Convention on Biological Diversity, Art. 6 and Art. 10(c).

¹⁰ CBD Article 15

¹¹ Michael Blakeney, 2005, *Proposal for the Disclosure of Origin of Genetic Resources in Patent Applications*, Queen Mary Intellectual Property Research Institute, Queen Mary University of London.

Regulatory Framework of Material Transfer Agreement (MTA) Under Indonesian Laws

protected environmental rights.¹² Access to genetic resources assigns to national governments the authority to determine such access, which is subject to the prior informed consent of the provider country and the fair and equitable sharing of benefits. Recognizing both the sovereign rights and the inter-dependence of countries over their plant genetic resources for food and agriculture, the International Treaty establishes a multilateral system that aims to facilitate access and benefit sharing.¹³

The plant genetic resources for food and agriculture (ITPGRFA), the Food and Agriculture Organisation of the United Nations addressed some of these concerns in the Treaty from June 29, 2004, providing for: "...the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the *Convention on Biological Diversity*, for sustainable agriculture and food security" (art.1.1).¹⁴ Shall be provided pursuant to a standard material transfer agreement (MTA), which shall be adopted by the Governing Body and contain the provisions of Articles 12.3a, d and g, as well as the benefit-sharing provisions set forth in Article 13.2d (ii) and other relevant provisions of this Treaty, and the provision that the recipient of the plant genetic resources for food and agriculture shall require that the conditions of the MTA shall apply to the transfer of plant genetic resources for food and agriculture to another person or entity, as well as to any subsequent transfers of those plant genetic resources for food and agriculture. If access to biological material has been provided in pursuance of Article 12.2 and Article 12.3 of the ITPGRFA, a copy of the standard material transfer agreement (SMTA) stipulated in Article 12.4 shall be enclosed with the patent application instead of the aforementioned information.¹⁵

Thus, in this treaty the contracting parties agree that for facilitated access to plant genetic resources for food and agriculture will be made national legislation or in the absence of such legislation, governing body may set its provision. The provisions shall be provided pursuant to a standard material transfer agreement (MTA), which shall be adopted by the Governing Body and other relevant provisions of this Treaty. Contracting Parties shall ensure that an opportunity to seek recourse is available, consistent with applicable jurisdictional requirements, under their legal systems, in case of contractual disputes arising under such MTAs, recognizing that obligations arising under such MTAs rest exclusively with the parties to those MTAs.¹⁶ In emergency disaster situations, the Contracting Parties agree to provide facilitated access to appropriate plant genetic resources for food and agriculture in the Multilateral System for the purpose of contributing to the re-establishment of agricultural systems, in cooperation with disaster relief coordinators.¹⁷

3. MTA UNDER INDONESIAN LAW

The rights and obligations derived from this framework of the ITPGRFA and the CBD are addressed to the Contracting Parties, so that the obligations, strategies, policies and measures are to be implemented at national level.¹⁸ The Contracting Parties have to enact laws and adopt policies accordingly. The details of the measures taken by different countries may differ, depending on the need, capacity and choice of each country. Indonesia is a party to the CBD and to the FAO Treaty. In order to fulfil its obligations under these treaties, Indonesia has adopted Act No. 5 of 1994 On Ratification of the United Nations Convention On Biological Diversity and Act No. 4 of 2006 On Ratification of the International Treaty on Plant Genetic Resources for Food and Agriculture.

Regarding the multilateral system of access and benefit sharing the Contracting Parties recognize the sovereign rights of states over their own plant genetic resources for food and agriculture, including that the authority to determine access to those resources rests with national governments and is subject to national legislation. The CBD requires states to monitor the implementation of Material Transfer Agreements (MTA). The monitoring can include applications for intellectual property rights relating to the material supplied.¹⁹ In addition, countries can encourage users to disclose the country of origin of plant genetic resources in their applications for intellectual property rights.

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¹² Peter-Thobias Stoll, *Access to GRs and Benefit Sharing – Underlying Concepts and the Idea of Justice*. Ebook Genetic Resources, Traditional Knowledge & the Law. Earthscan in the UK and USA in 2009, p. 5.

¹³ Graham Dutfield, 2004, *Intellectual Property, Biogenetic Resources And Traditional Knowledge*, Earthscan: London UK.

¹⁴ Charless Lawson, *Intellectual property and the material transfer agreement under the International Treaty on Plant Genetic Resources for Food and Agriculture*, European Intellectual Property Review, E.I.P.R. 2009, 31(5), 244-254.

¹⁵ Jorge Cabrera Medaglia et al, *The Intercase between the Nagoya Protocol on ABS and the ITPGRFA at the International Level: Potential Issues for Consideration in Supporting Mutually Supportive Implementation at the National Level*, Fridtjof Nansen Institute 2013, Lysaker, Norway.

¹⁶ Gerald Moore and Witold Tymowski, 2005, Explanatory Guide to the *International Treaty on Plant Genetic Resources for Food and Agriculture*, IUCN Environmental Policy and Law Paper No. 57. Gland, Switzerland and Cambridge, UK. xii +212 pp. ISBN: 2-8317-0819-2.

¹⁷ *Ibid*

¹⁸ Abeba Tadesse Gebreselassie, *Material Transfer Agreements on Teff and Vernonia – Ethiopian Plant Genetic Resources*, Journal of Politics and Law, Vo. 2, No. 4, December, 2009.

¹⁹ See Bonn Guidelines, Provision 55.

Regulatory Framework of Material Transfer Agreement (MTA) Under Indonesian Laws

3.1. Act No. 5 of 1994 On Ratification of the United Nations Convention On Biological Diversity

Indonesia had ratified the United Nations Convention on Biological Diversity with Act No. 5 of 1994 on August 1, 1994. It aims to provide warranty that the Government of Indonesia may raise cooperation in the field of science technical both intersectoral government and with the private sector, domestic and abroad. The presence of this legislation is also aimed at the development and handling of biotechnology so that Indonesia did not become release test event has engineered organisms biotechnology by other countries; development funding for research and development of Indonesia's biodiversity. By becoming a member of the CBD, Indonesia will undertake the development of international cooperation for capacity increasing in the conservation and utilization of biodiversity.

By ratifying this Convention is expected that Indonesia will not lose sovereignty of natural resources biodiversity. The Convention recognizes that states, has the sovereign right to exploit natural resources for sustainable biodiversity in line with the state of the environment and in accordance with the development policies and their responsibilities so as not damage the environment. The importance of Indonesian biodiversity to support the survivality of people not only in Indonesia but also in maintaing the balance and sustainability of our globe.²⁰ By becoming a party to the CBD means the Indonesian government supports cooperation to facilitate access to genetic resources by providing policies that support an attempt to provide the fair and equitable sharing of the benefits arising from the utilisation of genetic resources.

Genetic resources are defined as meaning "genetic material of actual or potential value".²¹ The term "genetic material" is then defined in Article 2 to mean "any material of plant, animal, microbiological or other origin containing functional units of heredity". Thus the Convention would apply to seeds and cuttings and DNA extracted from a plant, such as a chromosome, gene, plasmid or any part of these such as the promoter part of a gene.²²

Indonesia as a provider of genetic resources, a Contracting Party may want to consider establishing a national focal point to coordinate and implement access agreements with other States and private entities. There are three primary advantages to creating a focal point. First, it could inform potential users of a Party's genetic resource access rules and regulations. Second, access determinations can be streamlined to avoid delays. Third, arbitrary decision making is more likely to be avoided. A focal point, then, could be one practical measure a Party might take to ensure that access to genetic resources is facilitated and is not restricted.²³

3.2. Act No. 4 of 2006 On Ratification of the International Treaty on Plant Genetic Resources for Food and Agriculture

Indonesia ratified the International Treaty on Plant Genetic Resources for Food and Agriculture with Act No. 4 of 2006 on March 20, 2006. Indonesia is a party of the agreement ITPRFGA, so the implications for the obligations related to the implementation of a multilateral system of plant genetic resources that form the system of access and benefit-sharing between parties with the minimum reciprocal rights. So that Indonesia is obliged to provide access to the relevant genetic resources to others, ensures in domestic law that standards MTA that have been set can be applied, the application the equitable of benefits sharing from the utilization of genetic resources which are accessible Multilateral, provide information and facilities about the utilization of GR listed the Multilateral System, shall apply intellectual property rights protection attached to the genetic resources of plant, or technology information which is received from the Multilateral System.

Under Article 12.4 ITPGRFA states that for facilitated access, in accordance with Articles 12.2 and 12.3 above, shall be provided pursuant to a standard material transfer agreement (MTA), which shall be adopted by the Governing Body and contain the provisions of Articles 12.3a, d and g, as well as the benefit sharing provisions set forth in Article 13.2d(ii) and other relevant provisions of this Treaty, and the provision that the recipient of the plant genetic resources for food and agriculture shall require that the conditions of the MTA shall apply to the transfer of plant genetic resources for food and agriculture to another person or entity, as well as to any subsequent transfers of those plant genetic resources for food and agriculture.²⁴ Material transfer agreements (MTAs) can be used as convenient tools with which the citizens of developing countries can facilitate equitable collaborative research and development with genetic resources. One for the transfer of genetic resources to noncommercial or nonprofit research institutions and the other for transfer to commercial or "for-profit" companies.²⁵

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²⁰ Hayyan ul Haq, 2006, Managing Uncertainty And Complexity In The Utilization Of Biodiversity Through The Tailor Made Inventor Doctrine And Contract Law. Centre for Intellectual Property Law (CIER), Molengraaff Institute for Private Law, Utrecht University.

²¹ Article 2 of CBD

²² Michael Blakeney, *Ibid*

²³ Lyle Glowka, Françoise Burhene, 1994, *A Guide to the Convention on Biological Diversity*. The FAO Global System for the Conservation and Utilization of Plant Genetic Resources (page 78-83)

²⁴ See ITPGRFA article 10.1, 12.2, 12.3 and 12.4 regarding Facilitated access to plant genetic resources for food and agriculture within the Multilateral System of acces and benefit sharing.

²⁵ Daniel M. Putterman, *Ibid*

Regulatory Framework of Material Transfer Agreement (MTA) Under Indonesian Laws

3.3. Critical Analysis of MTA Regulations in Indonesia

Indonesia in particular has two guidelines governing the material transfer agreement. The first, is the MTA regarding plant genetic resources for food and agriculture that is regulated in the Indonesian agriculture minister in the Regulation of the Minister of Agriculture under Regulation of the Minister of Agriculture No. 15/Permentan/OT.140/3/2009 on Guidelines for Preparation of Material Transfer Agreement. The second is MTA concerning clinical specimens and biological materials in the regulation of the Indonesian health minister under Regulation of the Minister of Health No.. 657/Menkes/Per/VIII/2009 about Delivery and Use of Clinical Specimens, Biological Materials and Content The information. Both of these regulations provide guidance on making the MTA contract between the recipient and the provider in the domestic or abroad, this contract for the purpose of research and development either non-commercial or commercial.

First, regarding Regulation of the Minister of Agriculture No. 15/Permentan/OT.140/3/2009 on Guidelines for Preparation of Material Transfer Agreement hereinafter referred to as the “regulation of Agriculture Minister”). This regulation is a guide in the preparation of the implementation of the MTA for the Unit / Unit scope of the body for Agricultural Research and Development. The MTA to facilitate access of genetic resources for basic and applied research. Besides, the MTA is the basis for determining the provider states and local communities rights. These guidelines establish for the purpose to protect genetic resources and their derivatives from Indonesia and to ensure that research and development and application of technology does not cause harm to human health and safety, preservation of the environment, social harmony and safety of the nation.

The subject matters of MTA is The Plant Genetic Resources for Food and Agriculture specified in Annex 1 to those Agreement and the available related information referred to in Article 5b and in *Annex 1* are hereby transferred from the Provider to the Recipient subject to the terms and conditions set out in those Agreement. In this regulation, Model of MTA for foreign based on consideration of article 12.4 ITPGRFA. The Treaty provides that facilitated access under the Multilateral System shall be provided pursuant to a Standard Material Transfer Agreement, and the Governing Body of the Treaty, in its Resolution 1/2006 of 16 June 2006, adopted the Standard Material Transfer Agreement.

Second, Regulation of the Minister of Health No. 657/Menkes/Per/VIII/2009 about Delivery and Use of Clinical Specimens, Biological Materials and Content of information (hereinafter referred to as the “regulation of Health Minister”). This regulation provides the agreement on transfer a clinical specimen and/or biological material or content of the information between two organizer or agency or States, in which the first party provider state and the second party as recipient state.

The purpose of this provision is to provide protection to the public, researchers, implementers and health care facilities as well as research and development institute of the dangers of spread and health problems cause infection diseases new emerging and re-emerging, including its abuse as weapons and biological weapons materials; provide great benefits for the potential of found and used the science and technology for countermeasure new emerging infectious diseases and re-emerging; provide a scientific basis for the implementation of health programs that have an impact on Public Health Emergency of international Concern / PHEIC both in national or international level. The Subject Matter of MTA under this regulation is clinical specimens, progeny, and modified derivatives of the biological specimens and/or data as described in Appendix B, which shall be an integral part of the agreement.

In this article, the MTA will be divided into two objectives, namely the transfer of material for “non-commercial or non-profit” research institutions and to transfer for “commercial or profit” companies. I would highlight and analysis some important points regarding the provisions in both regulatory of the MTA as following:

Ownership of Materials

Under MTA, provider has obligations to undertakes that the Material is transferred in accordance with the following provisions of the Treaty. Access shall be accorded expeditiously, without the need to track individual accessions and free of charge, or, when a fee is charged, it shall not exceed the minimal cost involved; all available passport data and, subject to applicable law, any other associated available non-confidential descriptive information.

Both of regulations of MTA states that the recipient should acknowledges that rights, title and interests of the Material are the property of the provider and the provider shall retain ownership of the materials. Thus, the recipient shall not claim any intellectual property or other rights that limit the facilitated access to the Material provided under the Agreement, or its genetic parts or components, in the form received from the Multilateral System. Under regulation of Health Minister provides possibility that the ownership of the materials will be further negotiated by both parties according to the prevailing laws and regulations.

Related to plant genetic resources for food and agriculture which associated with traditional knowledge as a community heritage, regulation of Agricultural Minister includes the ownership of local community. Local community is the parties who signed and approved the MTA contract on the grounds that they are the rightful owners of the traditional knowledge which is entitled to the collection of genetic material resources taken from them.

Use of Materials

Standard MTA under Agriculture Minister states the recipient should 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

Regulatory Framework of Material Transfer Agreement (MTA) Under Indonesian Laws

chemical, pharmaceutical and/or other non-food/feed industrial uses.²⁶ In line with regulations of MTA for food and agriculture, standard MTA under Health Minister states that second party (recipient) has agreed to use the Materials and Modifications solely for the purposes as formulated in the research plan/protocol.

Provision MTA under Health Minister gives obligation to recipient not to transfer, distribute, release, or disclose by any means, either international or accidental, the materials or modifications to, or the use thereof, to any other party, except for the sole purpose of the research plan under the supervision of the scientists.²⁷ In addition, it provides regarding return of materials and modifications. Recipient has agreed to return any and full unused Materials, Modifications and all the data, records and result derived from the material to the first party within two weeks after the study is completed. It aims to limit the recipient in the use of materials transferred after the research is completed. For MTA with foreign parties or commercial enterprises, it govern on compliance mechanisms against tracking system. Tracking system of clinical specimen, biological materials and / or content of information made by the National Commission of Infectious Disease Research as efforts data collection and the facts when occur dispute between the provider and recipient are both derived from domestic.

Standard MTA under Agriculture Minister differentiate MTA application for commercial and non-commercial purposes. For non commercial purposes, MTA is to be used for the transfer of biological material to noncommercial organizations, such as academic researchers, government institutions, or private research institutes. The purpose of this transfer is to facilitate basic, collaborative research. Exclusive rights to study particular samples are not guaranteed with this agreement because the purpose of the research is not to secure monopoly rights to commercially valuable compounds but to facilitate a public good, namely basic and transparent scientific research.²⁸ For MTA non commercial purpose, the recipient is not allowed to disseminate or distribute the material and its derivatives to the other party, recipients promise not to use the material for commercial purposes, and do not get the intellectual property rights over the material. Ownership of inventions that were created as a result of activities conducted on the material will be determined in accordance with the invention. Recipient can divert material or invention to third party only for research after obtaining written permission from the provider giver and local communities. Recipient shall notify the provider or local communities on the transfer to the third party in writing and shall record all of the transfer.

MTA for commercial purpose, the recipient is allowed to distribute the genetic material and its derivatives to other parties, Propagate the genetic material in any form, Send the genetic material to other location. So, it means that the recipient may transfer genetic resources to third parties not signatory to these agreements. It could create a potential conflict interest should non-exclusive users of genetic resources inadvertently transfer samples to competing private sector firms. MTA should require recipients to seek prior written approval from providers before transferring samples to any third party. This control may be necessary to maintain the exclusivity guaranteed under MTA for commercial purpose to private sector recipients.

Intellectual Property

Convention on Biological Diversity introduced national sovereign rights to genetic resources as an attempt to compromise between primary owners and users of these resources (Rosendal, 2000). A parallel process produced the Trade-Related aspects of Intellectual Property Rights (TRIPS) agreement under the World Trade Organisation (WTO), with the main objectives to harmonise, strengthen and expand the scope of intellectual property rights (IPR) protection in all technological fields.²⁹

Standar MTA under agriculture minister states in the case of transfer of genetic material with intellectual property rights on it, the recipient has the right to request exclusive or non exclusive license. In the case of transfer of genetic material with no intellectual property rights on it, and the recipient who is going to apply for intellectual property rights shall obtain written approval from the provider following the agreed terms. In the case of the recipient modify the genetic material and/or its derivatives, and the recipient who is going to apply for IPR and granted: (a) the right shall be mutually owned and (b) the recipient provide permanent sub license, non exclusive and royalty free license to the provider.

Under health minister regulation, the provision regarding Intellectual Property states that the second party (recipient) acknowledges that the materials or modifications are maybe the subject of patent application. Nothing in this agreement grants any implied or expressed licence or right under any patents or any know-how or trade secrets or other proprietary rights to use the Materials or modifications or any product or process related thereto for profit making or commercial purposes, including but not limited to, production, sale, screening or drug design.

Intellectual Property Rights (IPR) of the genetic material and testing material resulting from the material is owned by provider. Then the recipient shall not claim any intellectual property or other rights that limit the facilitated access to the Material

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²⁶ Right and Obligations of the Recipient Article 6.1 Standard MTA for Foreign Under Agriculture Minister.

²⁷ Use of Material Article 3 Standard MTA under Health Minister.

²⁸ Danniell M. Putterman, *Ibid.* p. 153

²⁹ Ingrid Olesen, Access to and protection of aquaculture genetic resources — Structures and strategies in Norwegian aquaculture,

Regulatory Framework of Material Transfer Agreement (MTA) Under Indonesian Laws

provided under this Agreement, or its genetic parts or components, in the form received from the Multilateral System. In the event the recipient and/or third party apply for any form of IPR over derivatives of the materials, the recipient and/or third party guarantees:

- to grant to the provider a permanent sub-licensable, non-exclusive, and royalty free license of any IPR resulting from or derived from provider material for purpose of research, and
- to grant to provider a sub-licensable, non-exclusive license of any IPR resulting from or derived from provider material on fair and reasonable terms for application in industrialized countries and at zero royalty for application at developing countries.

Benefit Sharing

The fair and equitable sharing benefit is addressed by Article 15.7 CBD and other provisions. From more detailed perspectives it becomes clear that those provisions are not confined to a sharing of result, products, commercialization and other positive outcomes of the processing and her use of Genetic Resources.³⁰ If the material and modification patented and commercialized, it must be agreed over in MTA on benefit sharing. The distribution of benefits with an agreement to provide the benefits for all parties involved in the process of receiving and processing the material. Benefit-sharing agreements (BSAs) must be entered into with both categories of stakeholders and, in addition, a material transfer agreement (MTA) must be entered into with stakeholders who give access to the indigenous biological resources.³¹ Under material transfer agreement for commercial purposes, recipients are required to provide compensation to the provider. Recipients are also required to give a percentage (royalty) of total revenue due to the commercialization of products resulting from material is transferred, and other benefits as mentioned in the MTA.

MTA under Agriculture Minister govern that benefit sharing from commercialization of the product developed using transferred genetic material shall be arranged and mutually agreed in a separate agreement which is as part of this MTA.³² The benefit sharing required by the MTA depends on whether the recipient restricts the further “research and breeding” uses of the product being commercialized:

- Where the product that incorporates material is available *with* restrictions, “the Recipient shall pay a fixed percentage of the Sales of the commercialized Product into the mechanism established by the Governing Body” being “one point-one percent (1.1 %) of the Sales of the Product or Products less thirty percent (30%)” (Annex 2) or an alternative discount rate “based on the Sales of any Products and of the sales of any other products that are Plant Genetic Resources for Food and Agriculture belonging to the same crop” of “zero point five percent (0.5%) of the Sales of any Products and of the sales of any other products that are Plant Genetic Resources for Food and Agriculture belonging to the same crop” (Annexes 3 and 4).
- Where the product that incorporates material is available *without* restrictions, “the Recipient is encouraged to make voluntary payments into the mechanism established by the Governing Body”. This alternative will not apply where the alternative discount rate has been chosen (Annexes 3 and 4).

Furthermore, a recipient who obtains intellectual property rights on any Products developed from the Material or its components, obtained from the Multilateral System, and assigns such intellectual property rights to a third party, shall transfer the benefit-sharing obligations of this Agreement to that third party.³³ This requirement for the MTA is presumably to ensure that the benefit-sharing obligations that are derived from intellectual property over the commercialisation of PGRFA incorporating materials accessed from the Multilateral System are not exhausted by transferring those rights to a third party. This is likely to be vital where there are real monetary benefits following from PGRFA accessed from the Multilateral System. It is not clear, however, how those monetary benefits might be recovered where the recipient fails to transfer the benefit-sharing obligations.

However, MTA regulation of Health Minister only states that when clinical specimens, biological materials and/or content the information or derivatives which be patented and commercialized then the MTA must be with benefit sharing agreement. No more detailed provisions concerning the form of sharing, the amount of profit sharing and distribution to third parties as provided in the MTA under Agriculture Minister. Thus, the provisions of the MTA on clinical specimens, biological materials and/or content the information and derivatives adopted MTA under Agriculture Minister that has been corresponding with International law.

Local Communities

Article 8J CBD envisaged the “equitable sharing” of benefits with indigenous and local communities, arising out of the use of the traditional knowledge, innovations and practices of those communities. MTAs incorporate mechanisms allowing local

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³⁰ Peter Tobias Stoll, *Ibid*

³¹ Rachel Wynberg and Mandy Taylor, *Finding a Path Through the ABS Maze – Challenges of Regulating Access and Benefit Sharing in South Africa*, Ebook Genetic Resources, Traditional Knowledge & the Law. Earthscan in the UK and USA in 2009, p. 208.

³² MTA regulation under Agriculture Minister for commercial purpose.

³³ Article 6.10 Rights and Obligations of the Recipient MTA for foreign under Agriculture Minister.

Regulatory Framework of Material Transfer Agreement (MTA) Under Indonesian Laws

communities to claim ownership of their traditional knowledge. The purpose of these agreements is to enable basic or applied research and development with genetic resources while defining source country and local community rights to the material.³⁴ MTA under Agriculture Minister states regarding the local community who have the right over the collection or invention of material obtained in the region owned by local communities legally. Before acquiring intellectual property rights to jointly owned inventions or licensing these inventors, the recipient must seek the written consent of provider or local community. A similar condition applies to inventions owned by the provider. It relates to the ownership of genetic resources owned by a local community, so they have right for compensation of the research from development and commercialization of genetic resources that has been agreed.

The provisions regarding the rights of local communities are only contained in the MTA to plant genetic resources for food and agriculture and not set out in health minister regulations. This is due to that object agreement (material) of the MTA is a clinical specimen and biological material that belongs to the state health institutions and is not associated with genetic resources held by a local community. Thus the material ownership, intellectual property rights and benefit sharing does not apply to the MTA over clinical specimen and biological material.

In the use of material genetic resources or invention inherent with traditional knowledge belongs to the local community is the responsibility of the provider and the recipient to provide the local community rights in accordance with the provisions. In addition to the ownership, profit sharing, local communities are entitled to receive a report/research monitoring at least once every six months.

Publication

Both of regulations of MTA states that any publication the results of research is right both the provider and recipient. Under Agriculture Minister states that the recipient agrees to acknowledge the provider's contribution in any publications citing the study findings on the material. The use of any data, results, or concept, derived from use of the materials in presentations, abstracts, publications, grants, or other means of disseminations by the recipient shall require expressed written consent from the provider.³⁵

The bligation to include the provider's name in any published results gives benefit to provider for commercial and non-commercial. Non-commercial, it will be a means to strengthen the position of the provider (state) as the owner of the material, preventing the misuse of material utilization unilaterally by the recipient and to open the opportunities for cooperation on transfer material to research with others. Commercially it will open a research collaboration opportunities with various parties to obtain profit.

Dispute Settlement

The MTA provides for dispute settlement and identifies the applicable laws, while the Treaty requires contracting parties to "...ensure that an opportunity to seek recourse is available, consistent with applicable jurisdictional requirements, under their legal systems, in case of contractual disputes arising under such MTAs, recognizing that obligations arising under such MTAs rest exclusively with the parties to those MTAs".³⁶

Both of MTA regulations under Agriculture Minister and Health Minister provides that any dispute arising from the MTA shall be resolved in the following manner: Amicable dispute settlement, If the dispute is not resolved by negotiation, the parties may choose mediation, If the dispute has not been settled by negotiation or mediation, any party may submit the dispute for arbitration under the Arbitration Rules of an international body as agreed by the parties to the dispute. Failing such agreement, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with the said Rules.

The presence of MTA regulations in Indonesia provides many advantages, both for Indonesia and for the world community. With the availability of the provisions of MTA this means Indonesia has implemented its obligations as a member of the CBD and ITPGRFA to provide facilitate access to other countries in the field of transfer material on food, agriculture and health in accordance with the provisions of the multilateral system under ITPGRFA. There are several advantages for regulation of MTA in Indonesia.

MTA can encourage research and development activities on food, agriculture and health both in the domestic or outside the country, so increasing of inventions in the field of food, agriculture and health. This is expected to support the insufficient food and health needs of the world, and to realize the world of biological conservation.

Indonesia as a developing country that is rich in genetic resources gain some advantages. Indonesia as the provider of material has the recognition and protection over ownership and intellectual property on a matter. This can prevent the theft of genetic resources and materials by other countries. In addition, the provider gain profit sharing from the product that resulted from material (MTA for commercial purposes). Another advantage is, increasing research and development of food, agriculture and health in

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³⁴ Danniell M. Putterman, *Ibid.* p. 151

³⁵ Form MTA complete point 7 under Health Minister

³⁶ International Treaty PGRFA art.12.5

Regulatory Framework of Material Transfer Agreement (MTA) Under Indonesian Laws

Indonesia to continue studies that ever conducted by recipient. Then, the benefits for the recipient is opening the opportunity to gain access using the material on food, agriculture and health for research and inventions for the benefit of their country.

However, there are some opinions about the unfavorable effects with the MTA regulations in a country, as following:

1. MTA provision limits any intellectual property that will also limit the facilitated access to the material provided under MTA or their parts or components. As mentioned in the standard MTA that "The Recipient shall not claim any intellectual property or other rights that limit the facilitated access to the Material provided under this Agreement, or its genetic parts or components, in the form received from the Multilateral System".

Whereas the role of intellectual property in the MTA is a concern that intellectual property should not limit "facilitated access" to the Multilateral System's PGRFA; and a means of capturing value from the development and commercialisation resulting from the "facilitated access" to the Multilateral System's PGRFA. This role, however, appears to be significantly complicated by the context of the MTA itself.³⁷ The MTA attempts to take advantage of intellectual property by seeking to appropriate some of the benefits generated from commercialising a product that incorporates some of the material accessed from the Multilateral System, while limiting its potential adverse effects on "facilitated access" to material in the Multilateral System. This creates a quandary too much intellectual property may limit the usefulness of the Multilateral System and too little intellectual property may deliver inadequate benefits. As the analysis in this article shows, intellectual property has significant potential to either enhance or undermine the Treaty's and MTA's objectives.³⁸

2. Studies on MTA provide further understanding about the effects of regulation and formalization for the researcher or recipient: They argued that after the MTA signed, some of its provisions may interfere with academic freedom. Recipients may lose the freedom to continue a line of research because they no longer own their inventions made through the use of the material. They may encounter delays or denial of permission to publish research results using the received material. One company representative reported that her firm expressed interest in only 100 MTAs out of some 2000 requests processed annually, but those 100 agreements are always approved. That is why the most frequent block to negotiating MTAs is not monetary costs but other terms and conditions of the agreement.³⁹

Mowery and Ziedonis (2007) who investigated the role of material transfer agreements (MTAs) in biomedical research at the University of Michigan, concluded that MTAs do not hinder research and development (i.e. patenting and licensing) despite the concerns that MTAs cause additional transaction costs. Moreover, he reported that MTA linked patents were more widely cited than a control set of non MTA patents. By contrast, Walsh et al. (2007) found that a substantial proportion of MTAs in biomedical research include reach-through rights' agreements that increase the restrictions on use of materials and incur time delays.⁴⁰

3. Difficult for providers to supervise or control the realization of confidential information, the use of materials in research, research reports, especially from overseas recipient. A requirement in the ABS national law or in an agreement that the provider be informed when value is realized and a fresh contract negotiated at every such stage, or when there is a different use of the resource, may not overcome the problem. It is difficult to track the resource from access until a product is realized, especially where there is a long time lag. Developing countries often lack the capacity to ascertain the potential value of the benefits, as well as to track and monitor the research and development activity.⁴¹ Abuse of the agreement would likely arise if there is no clear control mechanism. Thus there should be a clear mechanism on monitoring the implementation of the agreement.

4. CONCLUSION

MTA is a binding written contract between parties that governs the use of material. Under MTA regulations, the provider has full ownership; the recipient holds them in trust. Transfer is governed by contract, ideally specifying the term of the transfer, how the materials may and may not be used, and other related issues, such as confidentiality. In addition, an MTA may contain licensing provisions for the transfer of embedded intellectual property (IP) rights (patent rights).

Indonesian MTA regulations provides many benefits for Indonesia as a state provider, especially in terms of the protection of intellectual property rights. In terms of the MTA with non-commercial purpose, provider can cooperate with domestic or foreign researcher in terms of research, the results of which can be shared between the provider and recipient. If, in the progress recipient

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³⁷ Charles Lawson *Ibid* p. 12

³⁸ Charles Lawson *Ibid* p. 15

³⁹ Victor Rodriguez, 2008, *Governance of Material Transfer Agreements*, Departement of Managerial Economics, Khatholieke Universiteit Leuven, Strategy and Innovation, Naamsestraat 69, B-3000, Leuven, Belgium. Technology in Society 30 (2008) 122-128.

⁴⁰ Eric W. Welch et al, 2013

⁴¹ Gurdial Singh Nijar, 2010, Incorporating Traditional Knowledge in an International Regime on Access to Genetic Resources and Benefit Sharing: Problems and Prospects, European Journal of International Law 1 May 2010 Eur J Int Law (2010) 21 (2): 457. Oxford University Press 2010.

Regulatory Framework of Material Transfer Agreement (MTA) Under Indonesian Laws

find the invention can be patented, then the provider entitled to benefits in the form of royalty or patent ownership. The MTA for commercial purposes, providers gain benefit sharing on the sale of products produced from the contracted material. Recipient also entitled to develop the material under study and give license to other parties. Furthermore, the local communities gain profit from its commercialization of the collection or invention of material obtained in the region owned by local communities.

In addition to providing benefits for providers, recipients and third party, the MTA regulations is considered can inhibit the development of research and invention by some of the parties due to tight regulations and restrictive covenants in the agreement. Provisions to limit intellectual property can also limit utilization of facilitated access and it is considered to be contrary to the multilateral system (under ITPGRFA) which prohibits to limit facilitated access.

The weaknesses on MTA regulations that allow the recipient to distribute the genetic material and its derivatives to other parties (MTA for commercial) raises possibility violation by the recipient to misuse the material which is transferred to another party and take great benefit from results of the invention without providing information or benefit to the provider. Also, possibly, conflict will arise on the third party for the right to use the material without prior agreement. To prevent this, the MTA should require recipients to seek prior written approval from providers before transferring samples to any third party. Other weaknesses in the regulation of the MTA, especially in Indonesia is difficult for providers to monitor and control the implementation of the agreement, as well as to explore the extent to which the use of the material is not misused, moreover the recipient is a foreign party. Thus, it needs clear regulations regarding mechanism of tracking and reporting of development of research.

MTA models which are set out in Indonesian regulation are flexibility and simplicity, recognizing the need of researchers, conservationists, and community development workers in developing countries to have basic legal protection when dealing with requests to share genetic resources. This means that the MTA could still be negotiated between the parties. There needs to be more detailed arrangements regarding intellectual property protection to limit the use of the transferred material, also need to be set separated on benefit sharing, so that the benefits between the provider and recipient equitable.

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