



Food and Agriculture  
Organization of the  
United Nations



**The International Treaty**  
ON PLANT GENETIC RESOURCES  
FOR FOOD AND AGRICULTURE

**INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES  
FOR FOOD AND AGRICULTURE**

**EIGHTH MEETING OF THE AD HOC OPEN-ENDED WORKING GROUP TO  
ENHANCE THE FUNCTIONING OF THE MULTILATERAL SYSTEM**

**Rome, Italy, 10–12 October 2018**

**REPORT OF THE STANDING GROUP OF LEGAL EXPERTS:  
OUTCOMES OF THE THIRD MEETING**

## INTRODUCTION

The Standing Group of Legal Experts (SGLE) was established by the Co-chairs of the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing (Working Group), as recommended by the Working Group at its fifth meeting.

The members of the SGLE are Mr. Olivier Rukundo<sup>1</sup>, Prof. Gurdial Singh Nijar<sup>2</sup>, Prof. Hiroji Isozaki, Mr. Gerald Moore (facilitator), Prof. Jorge Cabrera, Mr. Hojjat Khademi, and Ms. Indra Thind<sup>3</sup>. The Legal Office of FAO is involved in the work of the SGLE through Ms. Annick van Houtte.

The Report of the first meeting of the SGLE, held on 14 and 15 November 2016 in Rome, Italy, is provided in the document, IT/OWG-EFMLS-6/17/Inf.3, which also contains, in its Annex 2, the Terms of Reference of the SGLE. The Report of the second meeting, held on 14 and 15 February 2017 in Rome, Italy, is contained in the document, IT/OWG-EFMLS-6/17/Inf.3 Add.1.

In early October 2017, the SGLE was requested by the Co-chairs of the Working Group to provide legal opinions on the following additional questions, in preparation for the Seventh Session of the Governing Body, to be held from 30 October to 3 November 2017:

Question 12: Please provide your general assessment on the draft text for an amendment to Annex I of the International Treaty, proposed by the Co-chairs in the document, IT/GB-7/17/31, Appendix 1, Annex 3. Please provide alternative suggestions for amending Annex I of the International Treaty in such a way as to give the Governing Body the capacity to decide on expanding the coverage of the Multilateral System without requiring ratification, acceptance or approval of Contracting Parties for each such expansion. Please indicate alternative legal modalities for expanding the crop coverage by amending the Treaty, but with minimal changes to the main text of the Treaty.

<sup>1</sup> Mr. Olivier Rukundo was not able to participate in the third meeting of the SGLE.

<sup>2</sup> Prof. Gurdial Singh Nijar did not participate in the third meeting of the SGLE.

<sup>3</sup> Ms. Neha Sheth Lugo participated in place of Ms. Indra Thind in the third meeting of the SGLE.

Question 13: Please provide an appropriate and legally sound definition of the term “sales” that could be incorporated into the revised SMTA proposed by the Working Group in the document, IT/GB-7/17/7, Appendix 2.

The SGLE therefore held its third meeting on 17 October 2017 and developed its legal opinions on these questions as set out in *Annex 1*. The list of participants is given in *Annex 2*. Given the limited time available, the SGLE met virtually, through a teleconference and subsequent discussion by email.

**ANNEX 1: LEGAL OPINIONS****Question 12**

**Please provide your general assessment on the draft text for an amendment to Annex I of the International Treaty, proposed by the Co-chairs in the document, IT/GB-7/17/31, Appendix 1, Annex 3. Please provide alternative suggestions for amending Annex I of the International Treaty in such a way as to give the Governing Body the capacity to decide on expanding the coverage of the Multilateral System without requiring ratification, acceptance or approval of Contracting Parties for each such expansion. Please indicate alternative legal modalities for expanding the crop coverage by amending the Treaty, but with minimal changes to the main text of the Treaty.**

**Relevant Provision(s) of the Treaty:**

Article 11, Article 23, Article 24

**Legal opinion:**

1. The SGLE considered the proposal prepared by the Co-chairs for the amendment of *Annex I* to the Treaty.<sup>4</sup> It discussed about the compatibility of this proposal with Article 11 of the Treaty and, as an option, the possibility of revising Article 24 of the Treaty, which governs amendments to its Annexes,<sup>5</sup> rather than incorporating the amendment rules in *Annex I* itself.
2. The SGLE considers that, while a modification of Article 24.2 would perhaps be the most appropriate way to introduce new rules for amending *Annex I*, the proposal by the Co-chairs, including to list additional crops in *Annex I* in the future, is compatible with the provisions of the Treaty and the general rules of public international law. In that case the SGLE considered it would provide more legal clarity if the proposal noted that it superseded Article 24.2 in respect of amendments to *Annex I*.
3. The SGLE also considers that, on the basis of the submission by the Government of Switzerland to the Seventh Session of the Governing Body for an amendment to *Annex I* to the Treaty,<sup>6</sup> the proposal by the Co-chairs meets the procedural requirements of Articles 23 and 24.2 of the Treaty. The SGLE recognizes that the Governing Body has been requested to decide on amending the Treaty with the purpose of enlarging the coverage of the MLS. Since the Governing Body is not bound to adopt a proposal as submitted, an agreed amendment based on the Co-chairs' text can be considered a development of the proposal in the Swiss submission and, therefore, to fulfil the referred requirements.
4. The SGLE considers the Co-chairs' text, as a proposed amendment to *Annex I*, to be more in line with the proposal put forward by the Government of Switzerland and accordingly with the procedural requirements set forth in Articles 23 and 24.2 of the Treaty, than a possible amendment to Article 24.2.

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<sup>4</sup> As contained in the document, [IT/GB-7/17/31](#), Appendix 1, Annex 3.

<sup>5</sup> The following text (suggested by the SGLE Facilitator but not discussed by the SGLE), could be an illustrative example of draft text for this alternative:

Article 24 - Annexes

24.1 The annexes to this Treaty shall form an integral part of this Treaty and, subject to paragraph 3 of this Article, a reference to this Treaty shall constitute at the same time a reference to any annexes thereto.

24.2 The provisions of Article 23 regarding amendments to this Treaty shall apply to the amendment of Annex II.

24.3 Amendments to Annex I shall be adopted by consensus of the Contracting Parties present at a session of the Governing Body and shall enter into force for all Contracting Parties on the ninetieth day after the date of adoption of the amendments, or at such other time or times, or in accordance with such other procedure, as may be set out by the Governing Body. Any Contracting Party may propose amendments to Annex I. The text of any proposed amendment shall be communicated to Contracting Parties by the Secretary at least six months before the session at which it is proposed for adoption.

<sup>6</sup> IT/GB-7/17/8, *Proposal for an Amendment of the International Treaty*.

### Question 13

Please provide an appropriate and legally sound definition of the term “sales” that could be incorporated into the revised SMTA proposed by the Working Group in the document, IT/GB-7/17/7, Appendix 2.

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#### Relevant Provision(s) of the Treaty:

Article 13.2.d(ii)

#### Relevant Provision(s) of the SMTA

Article 2, Article 6.7, Article 6.11, Annex 2, Annex 3

#### Relevant Provision(s) of the draft revised SMTA proposed by the Working Group (IT/GB-7/17/7, Appendix 2)

Article 2, Article 6.7, Article 6.11, Article 6.11bis, Article 6.11ter, Annex 2, Annex 3

#### Legal opinion:

1. The SGLE noted the concerns expressed by some members of the Working Group about the practical implications of the definition of the term “sales” in the current SMTA for the Recipient, who appeared to be under an obligation to monitor the commercial activity of a variety of contract partners. This would be even more of a concern with regard to the subscription option in the revised SMTA proposed by the Working Group to the Governing Body.
2. The SGLE considers that the term “sales” may include both gross income from selling PGRFA by the Recipient and its affiliates, as well as income from granting licenses to third parties. With such a definition the Recipient would not be bound to monitor and report sales by contractors, licensees, etc. but only to apply the relevant royalty rate to the income received from them.
3. The SGLE considers that, on balance, it is preferable to have one definition of “sales” for the whole SMTA, rather than one for the option linked to single access and another one for the Subscription System.
4. The SGLE accordingly suggests the following formulation for the definition of the term “sales” to replace the current definition in Article 2 of the revised SMTA:

“Sales” means the gross income received by the **Recipient** or **Subscriber** and their respective affiliates, resulting from the **commercialization** of any **Product** under [the Option/article XX] or of any products that are **Plant Genetic Resources for Food and Agriculture** belonging to the same crop(s) that are subject to the **Subscription**, including any income from the sale of seeds and plant materials and income in the form of license fees.

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