



**Food and Agriculture
Organization of the
United Nations**



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

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INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE
FOURTH MEETING OF THE <i>AD-HOC</i> OPEN-ENDED WORKING GROUP TO ENHANCE THE FUNCTIONING OF THE MULTILATERAL SYSTEM
Rome, Italy, 2 October 2015
POSSIBLE OBJECTIVES AND ELEMENTS OF A PROTOCOL TO THE INTERNATIONAL TREATY

Executive Summary

Task (c) of the *Proposed Tasks for Further Work* in the Working Group's Report of its third meeting, which has been transmitted to the Governing Body as document IT/GB-6/15/6, foresees the preparation of a draft amendment of, or Protocol to, the Treaty, in order to complete the Subscription System, to encourage extensive use and therefore ensure income to the Benefit-sharing Fund, and to extend the Treaty's crop coverage.

The *Draft Revised Standard Material Transfer Agreement*, which the Working Group has requested (IT/OWG-EFMLS-4/15/3), contains in Annex 3 many provisions of a Subscription System. Based on the deliberations of the Working Group, the *Draft Revised Standard Material Transfer Agreement* identifies aspects of the System which, in order to be completed, would need to rely upon an international legal instrument, as reflected in Task (c) of the *Proposed Tasks for Further Work* agreed by the Working Group. The *Commentary on Structural Elements for the Development of a Subscription Model/System* (IT/OWG-EFMLS-4/15/3) in its Appendix 4 briefly lists some of the possible elements.

At the request of the Co-chairs in their wish to optimize results from the work of the Working Group, and in order to illustrate possible components of a potential instrument under Task (c), the present document contains possible basic elements and illustrative textual elements of the potential international legal instrument to complete the Subscription System. The elements listed take into account the submissions received by the Working Group and constitute a purely illustrative, non-agreed and non-exhaustive list, intended by the Co-chairs merely to illustrate the basic elements that could be considered by the Working Group to address Task (c) of the *Proposed Tasks for Further Work* and to complete the Subscription System.

I. INTRODUCTION

1. The *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System (the “Working Group”), in its Report to the Governing Body, has put forward a list of *Proposed Tasks for Further Work*,¹ covering the major elements of the package of measures to improve this aspect of the Treaty. As a first task (a and b), it wishes to elaborate the elements of a complete Subscription System, including consideration of payment rates, which has drawn much support from Contracting Parties and stakeholders. The draft elements of a functioning Subscription System have therefore been prepared, for consideration of the Working Group, and transmission to the Governing Body. The document *Draft Revised Standard Material Transfer Agreement*² is supported by an extensive analysis of what would still need to be decided and addressed.³

2. Task (c) foresees the preparation of a draft amendment of, or Protocol to, the Treaty, in order both to complete the Subscription System and to allow for an extension of the Treaty’s crop coverage. The Working Group, *inter alia*, has recommended to the Governing Body addressing the relationship with the implementation of the Nagoya Protocol. Legal certainty for plant breeding is a matter that members of the Working Group and the seed sector have highlighted as particularly important, since it is probably the most important single factor that could increase use of plant genetic resources for food and agriculture under the Treaty, and the Standard Material Transfer Agreement and the proposed Subscription System, and so provide a predictable source of user-based income to the Benefit-sharing Fund.

3. An amendment of the Treaty would require more than the revision of a few articles, and would mean, for example, revisiting definitions, and integrating the Subscription System into a framework that does not yet foresee it. Amending the Treaty to integrate a Subscription System would for legal reasons probably require an amendment of multiple provisions, the drafting of new articles and could, during the negotiations, lead to the opening of the Treaty as a whole. It might therefore lead to a wider revision of the Treaty and might thus extend the process of completing the Subscription System as foreseen in the Working Group’s Report. The negotiation of an instrument like a Protocol, distinct from the current Treaty, would be complementary to the Treaty, which text would remain unchanged. However, irrespective of which legal form the Governing Body might eventually chose for the international law instrument to complete the Subscription System, certain substantive elements would in any case have to be reflected in either instrument in order to complete the Subscription System. The present document focuses only on those elements.

4. A number of submissions received by the Working Group during this biennium discuss the possible objectives and modalities of a Protocol to the Treaty.⁴ They were taken into account in the preparation of this document.

5. In so far as concerns the substantive elements, an instrument for a Subscription System would need, at least, to: (1) define the rights of subscribers to receive on request all available material covered by the instrument and practical arrangements to this end; (2) provide for the public Register of Subscribers; (3) regulate relations amongst Subscribers, and between Subscribers and natural and legal persons who are not Subscribers; and (4) tailor such matters as dispute resolution to the specificities of the Subscription System.

6. Besides those substantive elements to provide for the legal framework for a Subscription System, the Protocol could define the possible expansion of the Treaty’s crop coverage, to a

¹ The Report of the Working Group has been transmitted to the Governing Body as document IT/GB-6/15/6.

² IT/OWG-EFMLS-4/15/3, *Draft Revised Standard Material Transfer Agreement*.

³ IT/OWG-EFMLS-4/15/4, *Commentary on Structural Elements for the Development of a Subscription Model/System*.

⁴ IT/OWG-EFMLS-4/15/Inf.3, Appendix 4, and IT/OWG-EFMLS-3/15/Inf.3 Add.1, Appendix 4.

defined list of crops or, if so decided, to the full scope of the Treaty: all Plant Genetic Resources for Food and Agriculture.

7. Annex 3 of the *Draft Revised Standard Material Transfer Agreement* contains many of the provisions of a Subscription System, which could be part of a contract with the Subscriber (which Annex 3 would, in fact, be). The commentary identifies those elements of a Subscription System that would need to rely upon an international legal instrument, such as an amendment or Protocol. However, to ensure legal certainty, reducing transaction costs for plant breeding and increasing benefit-sharing, it would also be possible and perhaps preferable to bring all substantive elements into one international law instrument in a coherent manner, rather than to formulate the basic elements in a (private) contract. The structural and textual elements would be similar. It would also provide greater legal certainty, if the international instrument dealt together with the Subscription System, the Treaty's crop coverage, and the place of the Treaty's revised access and benefit-sharing provisions within the international legal framework governing access and benefit-sharing relating to plant genetic resources for food and agriculture. It would thus be a part of the International Regime on Access to Genetic Resources and Benefit-sharing.

8. The present document has been prepared at the request of the Co-Chairs to provide an elaboration and some illustrative textual elements exemplifying the structural components listed in Appendix 4 of IT/OWG-EFMLS-4/15/4, *Commentary on Structural Elements for the Development of a Subscription Model/System*. Once the framework and scope of a possible amendment or Protocol has been further elaborated concrete operational text could be prepared, should the Working Group so wish, drawing where possible on existing texts.

II. ELEMENTS THAT MIGHT BE INCLUDED IN A PROTOCOL⁵

9. This section describes possible elements and some illustrative draft sample texts for a Protocol to the Treaty. Similar elements could be considered in case an amendment of the Treaty were to be negotiated. However, this would most probably require revision of a number of Articles with the likely need to subject the entire Treaty to revision. Since the preparation of preliminary illustrative elements for such an amendment could only be based on further guidance from the Working Group, this section focuses on a possible Protocol to the Treaty.

Element 1: Preamble

10. The function of a Preamble to the Protocol, like the Preamble to the Treaty itself, would be to assist in the interpretation of the body of the agreement, by laying out the actual intent of the Parties in concluding the agreement. It would also situate the Protocol as a supplementary agreement, pursuant to Article XIV of the FAO Constitution.

11. To ensure a link between the Protocol and the Treaty, it would be appropriate to recall the objectives of the Treaty, in particular, the third objective: the fair and equitable sharing of benefits arising from the use of plant genetic resources for food and agriculture for sustainable agriculture and food security, in harmony with the Convention on Biological Diversity. Depending on the scope of the Protocol, as finally agreed, various provisions of the Treaty might also be rehearsed in the Preamble.

12. The Preamble could also situate the possible Protocol in relation to the Treaty itself, for example, as a completion of its objectives and scope, as well as to establish an instrument to

⁵ The elements discussed here are those identified in Appendix 4 of IT/OWG-EFMLS-4/15/4, *Commentary on Structural Elements for the Development of a Subscription Model/System*.

ensure the fair and equitable sharing of the benefits derived from the use of plant genetic resources for food and agriculture.

DRAFT SAMPLE

The Parties to this Protocol,

- Being Contracting Parties to the International Treaty on Plant Genetic Resources for Food and Agriculture, hereinafter referred to as “the Treaty”,
- Recalling the objectives of the Treaty and recalling, in particular, that the third objective of the Treaty is the fair and equitable sharing of benefits arising from the use of plant genetic resources for food and agriculture for sustainable agriculture and food security;
- Recalling Article 3 of the Treaty which provides that the Treaty relates to plant genetic resources for food and agriculture;
- [Recital indicating the reasons for concluding this Protocol to the Treaty]
- [Noting that the Protocol shall be a supplementary agreement in the meaning of Article XIV of the Constitution of the Food and Agriculture Organization of the United Nations]
- [Noting that none of the provisions of the Protocol shall be construed as waiving or altering any rights or obligations that the Parties to the Protocol have under the Treaty]

Have agreed as follows:

Element 2: Objectives

13. It is not legally certain that objectives separate to those of the Treaty would be required in such a Protocol. On the other hand, it would also be possible to rehearse the objectives of the Treaty, and complement these with the more specific objectives of the Protocol itself. Protocols of other treaties and conventions often refer to the objectives of the respective treaty or convention.⁶

Element 3: Definitions, use of terms⁷

14. The relationship of definitions specific to the Protocol, and those in the Treaty itself and the Standard Material Transfer Agreement, as revised, requires careful consideration. A number of the definitions in the Treaty may need to be further specified or amended in the Protocol, and a set of further Protocol-specific definitions may be needed, for example, of the “Subscription System”, and its elements.

15. In this context, it is recalled that the Treaty itself contains very few definitions, and that many terms are not explicitly defined, such as “Multilateral System”. A similar approach could be taken in case of the Protocol.

⁶ See, for example, the Preamble of the Nagoya Protocol to the Convention on Biological Diversity.

⁷ Ibid., Appendix 1, “Definitions”.

DRAFT SAMPLE

- For the purpose of this Protocol, the definitions contained in Article 1 of the Treaty shall apply.
- In addition:
 - i. “Governing Body” means the Governing Body of the Treaty;
 - ii. “Treaty” means the International Treaty on Plant Genetic Resources for Food and Agriculture, adopted by Conference of the Food and Agriculture Organization of the United Nations on 3 November 2001;
 - iii. “Party” means, unless the context otherwise indicates, a Party to this Protocol.

Element 4: Relationship between the Protocol and the Treaty

16. If the Governing Body decides to opt for an independent legal instrument like a Protocol to the Treaty, rather than an amendment to the Treaty, it will be important to clarify the relationship between the Protocol and the Treaty, and consequently the nature of the Protocol itself. Depending on the decision by the Governing Body, the Protocol would then have to determine the relationship of its provisions to the relevant provisions under the Treaty.⁸

17. The relationship is a complex legal matter, which will require careful drafting with the participation of legal experts, and are probably best addressed once substantive provisions of the Protocol have been agreed upon.

Element 5: Scope and coverage

18. Task (c) of the *Proposed Tasks for Further Work* foresees the extension of the Treaty’s crop coverage, potentially to the scope of the Treaty itself, namely all plant genetic resources for food and agriculture, as set forth in Article 3 of the Treaty, or to a defined list of crops. How this would be done, and what would be covered, is a matter on which substantive and political agreement has not yet been achieved, as is reflected in the bracketed text of Task (c).

19. In any case, it will be particularly important to avoid grey areas and overlaps that could lead to a lack of clarity and certainty regarding those resources to which the Treaty itself applies, and those to which the possible Protocol applies, particularly if there are substantive differences in the rights and obligations of users of these two sets of plant genetic resources for food and agriculture.

20. Should the decision be to extend the crop coverage to the Treaty’s full scope, that is, all plant genetic resources for food and agriculture, one possible formulation for the scope of the Protocol might be “plant genetic resources for food and agriculture that are not included in the Multilateral System of access and benefit-sharing under Article 11 of the Treaty”. Such a definition by exclusion would avoid potential overlap of the two sets of material, and would determine the relationship of the Protocol’s coverage to the coverage of the Treaty’s Multilateral System. The goal of the Working Group being to have an enhanced Multilateral System, rather than multiple Systems, the Protocol would then need to stipulate any of the Treaty’s provisions governing the Multilateral System that would be extended to plant genetic resources for food and agriculture that the Protocol will govern.

⁸ For the differences between an amendment of the Treaty, and Protocol to the Treaty, see IT/OWG-EFMLS-3/15/Inf. 4, part IV and IT/OWG-EFMLS-2/14/4, part III.C.

DRAFT SAMPLE

This Protocol applies to plant genetic resources for food and agriculture, which are not included in the Multilateral System of access and benefit-sharing under Article 11 of the Treaty.

Element 6: Harmony with the Convention on Biological Diversity and its Nagoya Protocol

21. The Treaty and the Convention on Biological Diversity (CBD) and its Nagoya Protocol are in harmony, one with another. Nonetheless, the seed sector has stressed that, for any arrangements in the revised Standard Material Transfer Agreement, and, in particular, the Subscription System, to be attractive to users on the one hand, and to generate user-based income for the Benefit-sharing Fund on the other hand, it is crucial to create legal certainty on the status of materials not obtained under contracts established in accordance with the CBD.

22. At present, plant breeders are obliged to provide evidence that materials they have used were obtained in conformity with the CBD. While the Nagoya Protocol recognizes the role of the Treaty and its Multilateral System, there is less legal certainty regarding other materials to which contracts established under the CBD do not apply, particularly when they are used in breeding in conjunction with materials accessed under a Standard Material Transfer Agreement.

23. This is particularly important, as one objective of the proposed Subscription System is that Subscribers would not need to track the use of materials in breeding, or use Standard Material Transfer Agreements to exchange materials with other Subscribers.

24. As the submissions to the Working Group show, the reversal of the burden of proof, such that the Treaty applies to a Subscriber's materials, unless shown otherwise, is seen as one key functions of the Protocol, which should provide for the harmonious practical application of all the international legal instruments applicable to plant breeding. In the context of developing a complete Subscription System, it is therefore proposed that a certificate confirming a plant breeder's status as a Subscriber, or the listing of a Subscriber in the official, public Register of Subscribers, be considered as an Internationally Recognized Certificate of Compliance under the Nagoya Protocol.

25. Clear legal drafting, once the key concepts have been clarified, will be essential.

Element 7: Establishment of the Subscription System, in the context of the Treaty's access and benefit-sharing approach⁹

26. The submissions received, which describe a possible Protocol, suggest that the Protocol should provide the legal framework for a complete, self-standing Subscription System, covering both materials to which the Multilateral System currently applies, and materials of the expanded crop coverage, with as coordinated a set of procedures, rights and obligations as possible. Annex 3 of the *Draft Revised Standard Material Transfer Agreement* already contains a number of elements of such a system and might, *mutatis mutandis*, be drawn upon in drafting this element of the Protocol. For this reason, it would probably be advisable to adopt any revised Standard

⁹ See IT/OWG-EFMLS-4/15/4, *Commentary on Structural Elements for the Development of a Subscription Model/System*, textbox 3, *Implementing key aspects of the Subscription Model/System*.

Material Transfer Agreement and the Protocol together, so that they may be drafted to be fully coherent and adopted as complementary parts of a fully coherent system.

27. Besides provisions as to who may subscribe, and how, the basic rights of Subscribers to have access to the full set of genetic resources to which the Treaty and its Protocol apply, and the rights and obligations relating to the exchange of materials amongst Subscribers and with non-Subscribers, might be provided for in this element.

28. However, it would appear wise to provide for the Governing Body, perhaps acting as the Meeting of the Parties to the Protocol, to be able to stipulate and keep under review the precise terms and conditions of the Subscription System, and the mechanisms by which they would be implemented, as is currently the case with the Standard Material Transfer Agreement.

DRAFT SAMPLE

The Parties agree to establish a Subscription System, which shall facilitate the exchange of plant genetic resources for food and agriculture and constitute a mechanism for monetary benefit-sharing.

All natural and legal persons [under the jurisdiction of any Party to this Protocol] shall have the right to subscribe, in written form, to the Subscription System.

The [Governing Body serving as the Meeting of the Parties to this Protocol] shall decide whether a Subscription shall cover [a crop or crops], [all crops covered by the Subscription System], or [whether a potential Subscriber shall have the choice between a Subscription covering [a crop or crops] and a Subscription covering [all crops covered by the Subscription System]].

[Provision on monetary benefit-sharing (“subscription fee”).]

[...]

The [Governing Body serving as the Meeting of the Parties to this Protocol] shall, at its first meeting, agree on the terms and conditions of the Subscription System.

Element 8: Provision for the establishment, and the function of, an International Register of Subscribers¹⁰

29. The Protocol should formally establish an internationally recognized public International Register of Subscribers. The Register would be a main structural element of the Subscription System, so as to create the legal rights and obligations of the Subscribers within the Subscription System, as a part of the overall international access and benefit-sharing framework for genetic resources, and against third parties. For example, those transferring plant genetic resources for food and agriculture to a Subscriber should be able to rely on the information contained in the International Register. As noted in paragraph 25 above, a further major function of the Register would be to provide legal certainty to users with regard to their obligations under the CBD and its Nagoya Protocol. The effect of registration *erga omnes* would be specified within the Protocol and thus recognized in the context of the International Regime of Access to Genetic Resources

¹⁰ *Idid.*, paragraph 31, and textbox 3.

and Benefit-sharing¹¹ under Article 4 of the Nagoya Protocol. Registration would also be a mechanism to increase corporate accountability as is the case with international registers of other international legal instruments.¹²

30. This element of the Protocol would need to set out the minimum information that shall be contained in the Register and its Registration Form. It might also specify potential conditions for refusal and invalidation of the registration. It might further specify possible conditions for the cancellation of the subscription by the Subscriber. It must also specify the period of validity of a registration and the conditions of renewal of the registration by the Subscriber. The provision should specify transparency and public accessibility of the Register, including in electronic form, so that the Register is easily searchable and accessible by all Subscribers and the general public. It might also identify data subject to confidentiality, as is currently the case under the Data Store of the Multilateral System in the context of the Third Party Beneficiary Procedures.

DRAFT SAMPLE

An International Register is hereby established as part of the Subscription System under this Protocol.

It shall serve as a means for users to subscribe to the Subscription System.

It shall provide public access to non-confidential information relevant to the functioning of the Subscription System under this Protocol.

It shall be searchable by any member of the public.

Element 9: Provision for ensuring the effective sharing of benefits derived from the use of plant genetic resources for food and agriculture

31. One decision yet to be taken is whether the Subscription System should be the sole option for users, or whether users should continue to be offered an individual sample access option, as provided for in Article 6.7 of the current Standard Material Transfer Agreement, and, in this case, how the relationship of the two options should be conjugated.

32. Moreover, based on the economic analysis of the use of plant genetic resources for food and agriculture, it appears that user-based income will only ever be one, and possibly a modest, constituent of a set of mandatory and voluntary income streams to the Benefit-sharing Fund. This element of the Protocol could therefore place the user-based income within this larger picture, which includes, for example, the possible development of a mechanism of contributions by Contracting Parties, to ensure sustainable and predictable income (task (d) of the *Proposed Tasks for Further Work*). Document IT/OWG-EFMLS-4/15/Inf.5 explores a proposal for developing a possible mechanism for contributions by Contracting Parties to the Benefit-Sharing Fund.

33. The Treaty already contains mechanisms such as the establishment of a target for funding (Article 18.3), reviews of the effectiveness of its access and benefit-sharing provisions (Articles 11.4 and 13.2d(ii)), and periodic review of its Funding Strategy (Article 19.3(c)), and similar provisions might form part of this element of the Protocol.

¹¹ Decision X/1, Conference of the Parties to the Convention on Biological Diversity, preamble, paragraph 5.

¹² For example, see preambular paragraph 2, Protocol on Pollutant Release and Transfer Registers under the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998).

DRAFT SAMPLE¹³

The Parties agree to establish a mechanism for contributions by Parties as follows:

- the mechanism will ensure sustainable and predictable income to the Benefit-sharing Fund;
- the mechanism shall cover the shortfall between financial resources arising from the Subscription System and the established funding targets.

Element 10: Institutional Provisions

34. This element could take as a starting point the texts of Part VII of the Treaty, *Institutional Provisions, mutatis mutandis*. The texts and provisions of these Articles need not be slavishly followed, and the drafting should serve primarily the Governing Body's aims in adopting a Protocol with *inter alia* the elements described above.

35. Moreover, a number of additional matters might also be considered in this part of a Protocol, such as a clause to enable the provisional application of the Protocol, pending its entry into force, as has been done in some other treaties.¹⁴ The draft Protocol might draw on the relevant provisions of such treaties. This could considerably speed up the implementation of the decisions and objectives embodied in the Protocol, and the rate at which user-based income would become available.

III. CONCLUSIONS

36. The purpose of this document was to provide the Working Group with a preliminary overview of the possible contents of a Protocol, whose principal objective would be to establish a Subscription System for plant genetic resources for food and agriculture.

37. The elements described in this document as possible elements of a Protocol, an instrument distinct from the Treaty, could also be the subject of an amendment of the Treaty itself. A proposal for an amendment would identify the clauses of the Treaty, which would need to be amended and the additional clauses which the Treaty should contain.

¹³ Based on the information contained in document IT/OWG-EFMLS-4/15/Inf.5, *Exploring a proposal to develop a mechanism of contributions by Contracting Parties to the Benefit-Sharing Fund*.

¹⁴ IT/OWG-EFMLS-3/15/Inf. 4., paragraphs 40–41.