



Food and Agriculture
Organization of the
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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**

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

Geneva, Switzerland, 12-14 July 2016

**REPORT FROM THE FRIENDS OF THE CO-CHAIRS GROUP
ON ACCESS MECHANISMS AND PAYMENT RATES**

I. INTRODUCTION

1. Resolution 1/2015¹ of the Sixth Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture (Treaty) requested the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing (Working Group) *inter alia*:

“To invite written inputs or reports from all relevant stakeholders where needed and/or to establish small *ad hoc* Friends of the Co-Chairs groups, where needed, e.g. on user categories, on crop categories, on legal modalities, on payment rates, and on a termination clause, at the request of the Working Group or its Co-Chairs; the small *ad hoc* friends of the Co-Chairs groups would be requested to provide written input to the Co-chairs.”

2. A Friends of the Co-Chairs Group on Access Mechanisms and Payment Rates (FoCC Group) was established at the beginning of 2016. Its objectives were:

- To prepare information on options to incorporate multiple access mechanisms (single access vs. subscription system; mandatory or voluntary payments) in the revised Standard Material Transfer Agreement (SMTA);
- To prepare information on options to introduce a differentiated system of payment rates in the SMTA.

3. The membership of the FoCC is given in Annex 1. The terms of reference of this FoCC are provided in Annex 2.

4. The FoCC Group held two teleconferences and provided inputs to a set of questions proposed by the Group’s facilitator through email. It met in Rome to review and consider findings. The Group had available as background information, *inter alia*, the Reports of the four meetings of the Working Group, as well as the documentation prepared for these four meetings, including the Draft Revised

¹ *Measures to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing*

Standard Material Transfer Agreement (IT/OWG-EFMLS-4/15/3) and the Commentary on Structural Elements for the Development of a Subscription Model/System (IT/OWG-EFMLS-4/15/4).

5. The FoCC Group also took into account the Report from the Friends of the Co-Chairs Group on User and Crop Categories. The FoCC on User and Crop Categories noted the importance of providing its results to this Group given the linkages of matters being discussed by the two groups.

6. During the period when the FoCC Group was active, submissions on user and crop categories were received from the following Contracting Parties and institutions: Japan, India, European Seed Association (ESA), International Seed Federation (ISF), Quaker United Nations Office (QUNO). These submissions were made available to the FoCC Group at its meeting.

II. GENERAL CONSIDERATIONS

7. Since the entry into force of the Treaty the financial objectives for the Benefit-sharing Fund (BSF) have not been met. Until now the SMTA has demonstrated that it constitutes an insufficient basis for generating income for the BSF in a sustainable and predictable long-term manner.

8. At the current stage of the implementation of the Treaty, the focus on increasing monetary benefit-sharing is central to ensure funding for priority activities, plans and programmes for the conservation and sustainable use of PGRFA.

9. This will be a necessary element for improving the overall effectiveness of the Multilateral System.

10. Ideally, the Treaty should provide a holistic solution to access and benefit-sharing for all plant genetic resources for food and agriculture (PGRFA) and offer a compelling value proposition ensuring wide acceptance for users and providers of germplasm. The enhancement process needs to overcome the impasse where interesting material is not made available through the Multilateral System because there are no or too few monetary benefits, and there are no or too few monetary benefits because not enough interesting material is made available.

11. Since the Treaty became operational, the bilateral contractual approach based on the CBD does not appear to have generated any substantial benefit-sharing for non-Annex 1 crops. The Nagoya Protocol introduces new elements to the bilateral approach, but there is a low likelihood that they result in increased bilateral income from plant breeding.

12. Conservation, exchange and sustainable use of PGRFA is a collective challenge and responsibility. Every breeder –directly or indirectly– benefits from the conservation and sustainable use of this type of biodiversity. Plant genetic resources for food and agriculture are a global public good and act as an “insurance” to safeguard the future of breeding and food security rather than being a tradable asset which follows a supply-demand logic. This collective responsibility requires a collective effort from the breeders’ community and Contracting Parties to ensure the sustainability of the Treaty independently of the specific needs of individual companies or countries.

13. It will be very challenging to enhance the Multilateral System by only tinkering with the details of the SMTA – it needs a more comprehensive overhaul. While the mandate provided to the Working Group is to focus on the revision of the SMTA, it should be stressed that the simplest, most cost-efficient and effective solution to increase income to the BSF would be through contributions by Contracting Parties. An example would be a contribution based on a percentage of seed sales on their territories, building on the Norwegian approach.

III. GOALS

14. The goals towards which the FoCC worked in considering improvements to the SMTA and the Multilateral System were:

- Increase income in a sustainable and predictable long-term manner (as foreseen in Resolution 2/2013)
- Improve attractiveness of the Multilateral System
 - Simplify procedures and minimize transaction costs both for users and administrators, including tracking and tracing;
 - Provide legal certainty, including by giving effect to the recognition by the Nagoya Protocol/CBD of the special nature of PGRFA, their distinctive features and problems needing distinctive solutions;
- Increase use of PGRFA for food security and sustainable agriculture

IV. CRITERIA FOR EVALUATING THE DIFFERENT OPTIONS FOR ENHANCING THE MULTILATERAL SYSTEM

15. The FoCC developed the following criteria for assessing the different options for enhancing the Multilateral System as compared to the present situation, in particular whether a particular option would

- be likely to provide a basis to effectively generate an adequate income stream (*income basis*);
- be more attractive for both users and providers than other options (*attractiveness*);
- provide an incentive to effectively make available the materials under the Multilateral System (*effective availability*);
- be simple, including by minimizing transaction costs for all users, providers and administrators and need for tracking and tracing (*simplicity*);
- facilitate the transfer of material among users of the MLS (*transfer*);
- provide directly or indirectly a way to deal with dematerialization in the use of PGRFA in benefit-sharing, recognizing the changes taking place in plant breeding (*dematerialization*);
- effectively promote the conservation and sustainable use of PGRFA (*conservation and sustainable use*);
- encourage the further development of the multilateral approach of the Treaty to deal with interdependence, the achievement of the Sustainable Development Goals related to world food security and facing climate change (*multilateralism*);
- avoid the necessity of any other legal instrument (*legal instrument*);
- when the option contains more than one access mechanism-, ensure the coherence of the option as a whole (*coherence*).

V. ASSESSMENT OF THE DIFFERENT OPTIONS FOR ENHANCING THE MULTILATERAL SYSTEM

16. There was general agreement within the FoCC on the importance of putting in place the Subscription System, with a view to improve the Multilateral System, including by enhancing the use of its material. The Subscription System should strive for simplicity and be easy to administer. The FoCC agreed to elaborate on the development of the Subscription System both as the only access mechanism (Subscription System – single option) and as part of a multi-option model in combination with an accession-based system (Multi-option model).

17. The FoCC also agreed that the coverage of the future MLS should be as broad as possible, to increase income to the BSF. It identified the political problem of a link between the willingness to amend the Multilateral System, both regarding access mechanisms and payment rates, and the willingness to agree on an expansion of Annex I. This problem could possibly be addressed by a “launch mechanism” as mentioned below in Section 7.

a. Voluntary versus mandatory payments

18. Voluntary contributions or donations to the BSF and the Treaty in general should be encouraged. However, it is important that a voluntary payment provision does not weaken the functioning of the system, in particular the mandatory payment scheme. The system should not be dependent on the goodwill of those making voluntary payments. The Multilateral System cannot rely on voluntary payments, if user-based income to the BSF is meant to be sustainable. Any voluntary contribution should be addressed outside the SMTA.

19. All the options that the FoCC retained assumed that the Governing Body would require that all payments would be mandatory as provided for in Article 13.2d(ii), which also allows a differentiation with regard to users. The Governing Body could then set different rates for different products and users, and could decide to set the payment rate at 0% for certain products. Article 6.8 will therefore fall away.

b. Options assessed for enhancing the Multilateral System

20. The FoCC assessed the following options for enhancing the Multilateral System:

A. Subscription System as sole access mechanism

a. With current Annex I only;

OR

b. With all PGRFA;

21. The Subscription System will give access to (a) all PGRFA in the Annex I under the current MLS, or (b) all PGRFA, subject to an agreement to expand the scope of the MLS to the full scope of the Treaty, based on payment of an annual subscription fee, calculated as a percentage of the annual seed sales and licensing income. In both cases (a and b), the Subscription System could provide access (1) on a crop-by-crop basis or (2) to all PGRFA.

22. A subscription system may provide for a differential treatment of small scale users and users who access materials on a limited number of occasions (maximum of 10 accessions per year) and commit not to seek patent protection for products developed from material received. Since the subscription fee is a percentage of net seed sales and licencing income, non-commercial users, such as research institutions, will essentially receive a free subscription.

	a 1	a 2	b 1	b 2
Income basis	+	++	++	+++
Attractiveness - users	0	-	++	+
Attractiveness - providers	+	+	+	+
Effective availability	+	+	+	+
Simplicity	+	+	++	++
Transfer of material among users of the MLS	+	+	+	+
Dematerialization	+	+	+	+
Conservation and sustainable use	+	++	++	+++
Multilateralism	+	++	++	+++
Legal instrument	0	0	-	-
Coherence	n.a.	n.a.	n.a.	n.a.

23. This table suggests that a subscription system as sole access mechanism provides a larger basis for income generation, but actual income will be subject to attractiveness to users, which would be greatly improved by expansion of coverage to all PGRFA. This Subscription System can, in particular, have a positive effect on dealing with dematerialization and would have a positive effect on the further development of a multilateral approach to conservation and sustainable use of PGRFA. A question still to be resolved would be modalities to transfer material by subscribers to non-subscribers.

B. Subscription System combined with access to single samples through a revised 6.7

a. Subscription System with current Annex I only;

OR

b. Subscription System with all PGRFA;

24. The Subscription System under this option will be for all crops only. The revised 6.7 will provide access to individual accessions, which may be of particular interest to small and infrequent users.

25. Under this access mechanism, the Subscription System as described in a.2 and b.2 will be combined with a single access option through a revised 6.7 (options A ii and B ii in the table below). This option would require users to make (1) a non-refundable advance annual payment as of access (benefit-sharing fee), and (2) payments which are a percentage of sales and license income of products

developed from the accessed material. The advance annual payments are based on the average sales and license income for the respective crop to which the accession belongs. It will be deductible from those resulting from the sale of later products. Such advance payments will be made for X years or until a product is commercialized. A higher rate could be applied in cases the product is subject to patent protection.

	A ii	B ii
Income basis	+	++
Attractiveness - users	-	+
Attractiveness - providers	+	+
Effective availability	+	+
Simplicity	-	0
Transfer of material among users of the MLS	0	0
Dematerialization	0	0
Conservation and sustainable use	+	++
Multilateralism	+	++
Legal instrument	0	-
Coherence	--	--

26. This table suggests that the combination of a subscription system with a single access mechanism provides a larger basis for income generation, but actual income will be subject to attractiveness to users, which would be greatly improved by expansion of coverage to all PGRFA. This combined option however meets fewer criteria than the Subscription System as described above. The effectiveness of this combined option in terms of generating income is crucially dependent on the relative rates for the Subscription System and those applicable under the single access mechanism. A question to be resolved would be modalities to transfer material among users operating under one of these options and between them and recipients who have not adhered to any of the options.

VI. OPTIONS TO INTRODUCE A DIFFERENTIATED SYSTEM OF PAYMENT RATES

27. The FoCC held discussions on options to introduce a differentiated system of payment rates for both a Subscription System single option and a multi-option model. It agreed to consider on how a Subscription System could make space, *inter alia*, for different modalities of calculation of the benefit-sharing payments, such as differentiations as to users and whether there is restriction for further research and breeding, while keeping the System as simple as possible, in order to avoid a burdensome administration and leakages due to complexity.

a. Basis for the subscription fee

28. The subscription fee could have the following elements:

- a percentage of net seed sales;
- a percentage on license income (e.g. at least twice of the percentage applied to net seed sales).

29. A percentage of a technology fee, if accounted for separately, shall be paid by the user, unless such fee relates to a non-PGRFA trait.

b. Basis for payment under the single access mechanism

The non-refundable advance payment

30. Is calculated through a percentage of the average net seed sales and license income over past three years prior to accession, in the crop where the accession belongs to.

Product based payment

31. The payment will have the following elements:

- a percentage of net seed sales;
- a percentage on license income (e.g. at least twice of the percentage applied to net seed sales).

32. A percentage of a technology fee, if accounted for separately, shall be paid by the user, unless such fee relates to a non-PGRFA trait.

Additional payment in case of a product that restricts access

33. An additional percentage shall be payable in case a product is not available without restriction to others for further research and breeding. A simple track and trace mechanism should be put in place in this case.

c. Balancing the rates between subscription and single access

34. A balanced ratio between the rates applicable under the subscription system and the single access mechanism is fundamental for the success of a combined option that includes a single access mechanism. The FoCC considered that the rate for the single access mechanism should be five to ten times higher than the subscription fee.

VII. CONCLUSIONS AND FINAL RECOMMENDATIONS

35. An enhancement of the Multilateral System is possible. All payments under the SMTA would need to be mandatory. Provided the access mechanism(s) and the payment rates are balanced and coherent, a sustainable source of income for the BSF will be generated. The FoCC did not yet address the question of absolute rates, but recognized that they affect the attractiveness of the system to users and its ability to generate increased funding for benefit-sharing under the Treaty.

36. Pursuant to the mandate given to the Working Group, the proposed solutions would not require an amendment of the Treaty or a separate international legal instrument, except in the case of a possible expansion of the MLS to the full scope of the Treaty.

37. The FoCC came to the conclusion that a subscription system for all PGRFA would meet most of the criteria necessary for a new system to generate additional income to the BSF and promote the conservation and sustainable use of PGRFA. The FoCC also believed that the issue of capturing value from dematerialized use of PGRFA could be addressed by a subscription system based on payment for all products.

38. A combination of a subscription system with a single access mechanism could increase user acceptance as compared to a single subscription system. However, the FoCC considered that the

combined option meets fewer of the assessment criteria than the single subscription system. In addition, it is likely to increase complexity and raises questions that would still need to be analysed in more detail.

39. The FoCC identified the need for a possible “launch mechanism”, which would involve binding commitments from both users and providers of PGRFA, as well as from governments, in order to enable mutual trust and to ensure that the system is acceptable to all stakeholders and will be immediately effective on entry into operation of an enhanced Multilateral System.

40. The FoCC was of the strong opinion that direct and substantial financial support from Contracting Parties would be needed. Although the majority of the FOCC believe that the proposed model will lead to enhanced user-based payment, it has to be recognized that the model is based on assumptions which may or may not turn out to be correct. User-based contributions to the BSF will depend on many factors. Some are intrinsic, related to the attractiveness of the model, and therefore within the sphere of influence of the Contracting Parties. Others are extrinsic and related – for example – to the development of breeding technology and the seed industry. Especially these factors are outside the sphere of influence of the Contracting Parties and essentially also unpredictable. This causes an uncertainty for any benefit-sharing model which solely relies on user-based payments. In consequence, the FoCC emphasizes the need to consider substantial contributions by Contracting Parties to ensure a predictable and sustainable flow of income to the BSF. In this context, measures have been proposed such as the amendment of Article 18 of the Treaty for direct contributions by Contracting Parties to the BSF or substantial increase in donors' contribution to the BSF, Crop Trust, CGIAR, NGOs for project-based material sourcing as well as bilateral and regional material sourcing projects; or a mandatory payment by Contracting Parties consisting of a flat rate on sales of seeds and other propagation material in their territories.

Rome, 31 May 2016

**APPENDIX 1: MEMBERSHIP OF THE FRIENDS OF THE CO-CHAIRS GROUPS ON
ACCESS MECHANISMS AND PAYMENT RATES²**

Carlos Correa (Facilitator)

Director of the Center for Interdisciplinary Studies on Industrial Property and Economics, at the Law Faculty, University of Buenos, and Special Advisor on Intellectual Property and Trade of the South Centre, Geneva.

Szonja Csörgő

Director IP & Legal Affairs, European Seed Association. Szonja is working with European plant breeders and seed companies and represent their views in a number of topics, including biodiversity. She is involved in several working groups at EU level dealing with ABS and has been following the WG MLS since the beginning.

Felicitas Katepa-Mupondwa

Director, Research, Development & Technology, Saskatoon Research Centre, Agriculture and Agri-Food Canada.

Michael Kock

Head IP for Syngenta International AG, Switzerland. European and Swiss Patent Attorney. Michael has 20 years' experience in the seeds and plant biotech industry and is responsible for IP and CBD related matters in a large multinational seed company based in Switzerland.

Alwin Kopse

Head of International Sustainable Agriculture Unit, Swiss Federal Office for Agriculture, and member of the ERG delegation to the WG MLS. Alwin was a member of the Swiss delegation during the negotiations of the International Treaty and member of the ERG Delegation during the negotiations of the SMTA.

Lim Eng Siang

Retired officer from the Ministry of Agriculture, Malaysia. He represented Malaysia in the negotiation of the ITPGRFA and the SMTA.

Carla Pascale Medina,

Secretaría de Agricultura, Ganadería y Pesca Ministerio de Agricultura, Ganadería y Pesca, Buenos Aires, Argentina

Pierre du Plessis

Senior Consultant at the Centre for Research Information Action in Africa - Southern African Development and Consulting in Windhoek, Namibia. He has worked on ABS for 17 years, was a lead negotiator for the African Group on the Nagoya Protocol, is on the FAO CGRFA TTLE on ABS, was the lead author on the African Union Guidelines for a Coordinated Implementation of the Nagoya Protocol in Africa and has represented Namibia in CBD, NP, ITPGRFA and WIPO IGC meetings.

² Ms. Felicitas Katepa-Mupondwa and Mr. Lim Eng Siang were not able to participate at the in-person meeting of the Group and have not adhered to the final recommendations of the report.

**APPENDIX 2: TERMS OF REFERENCE OF THE FRIENDS OF THE CO-CHAIRS GROUPS
ON ACCESS MECHANISMS AND PAYMENT RATES**

Objectives

In order to make it more attractive for users to access PGRFA from the MLS:

1. To prepare information on options to incorporate multiple access mechanisms (single access vs. subscription system; mandatory or voluntary payments) in the revised SMTA;
2. To prepare information on options to introduce a differentiated system of payment rates in the Standard Material Transfer Agreement. `

Mandate

To enable Contracting Party and seed sector representatives discuss the inclusion in the revised SMTA of differentiated access mechanisms, and of payment rates, allowing differentiation according to user category, crop category and access mechanism. The FoC will work under the assumption that each of these differentiations may be made, i.e. the proposed text should accommodate access both under a future subscription system and under current single access mechanisms.

Foreseen composition

Facilitator: Carlos Correa

Szonja Csörge

Felicitas Katepa-Mupondwa

Michael Kock

Alwin Kopse

Em Siang Lim

Carla Pascale Medina

Pierre du Plessis

Ways of operation

The FoCC will base its work on the outcomes of the work of the FoCC on User and Crop Categories (reporting deadline March 31, 2016). The FoCC will have its own facilitator who will receive support from the Secretariat to prepare the written output that will be presented to the Co-Chairs and other specific tasks as needed. Mainly electronic exchanges are foreseen. A meeting of two days may be needed. Communication will be in English only. At the request of the FoCC members, the Co-Chairs are available at all times for advice or participation in the discussions. It is expected that payment rates will be amongst the last matters to be decided on the revised SMTA. The FoCC Group will mainly address the issues regarding access mechanisms during the period preceding the fifth meeting of the Working Group and further discuss payments rates after that meeting.

Reporting deadline

The reporting deadline, only on access mechanisms, will be May 31, 2016.