



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**

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

Rome, Italy, 14–17 March 2017

**THIRD DRAFT REVISED STANDARD MATERIAL TRANSFER AGREEMENT:
METHODOLOGY USED IN ITS PREPARATION**

Executive Summary

At its fifth meeting, the Working Group considered the *Second Draft Revised Standard Material Transfer Agreement: Co-Chairs' proposal*. It agreed to continue to work on the basis of this draft. It accordingly identified those Articles of the SMTA where there are no major problems, and those where some technical and formulation matters need to be addressed.

The Working Group, in section 4 of its *Report, Elaboration of a full Draft Revised Standard Material Transfer Agreement focusing especially on the development of a Subscription System*, provided recommendations to the Co-chairs, with a view to finalizing the revised SMTA that includes a Subscription System, at its sixth meeting. The Working Group also invited Contracting Parties and stakeholders to submit inputs.

The Co-chairs accordingly identified a number of key questions that arose from the Working Group's guidance, and addressed these, for advice, to the Friends of the Co-chairs Groups, and to the Standing Group of Legal Experts. The Co-Chairs have considered all these inputs and advice, as well as the guidance of the Working Group, in preparing this *Third Draft Revised Standard Material Transfer Agreement*.

This document shows the methodology followed, and in particular how the guidance of the Working Group was implemented.

I. INTRODUCTION

1. At its fifth meeting, The Working Group considered the *Second Draft Revised Standard Material Transfer Agreement: Co-Chairs' proposal*.¹ It agreed to continue to work on the basis of this draft. It accordingly identified those Articles of the SMTA where there are no major problems, and those where some technical and formulation matters need to be addressed.

2. The Working Group, in section 4 of its *Report*,² *Elaboration of a full Draft Revised Standard Material Transfer Agreement focusing especially on the development of a Subscription System*, provided recommendations to the Co-chairs, with a view to finalizing the revised SMTA that includes a Subscription System, at its sixth meeting. The Working Group also invited Contracting Parties and stakeholders to submit inputs.³

3. The Co-chairs accordingly identified a number of key questions that arose from the Working Group's guidance, and addressed these, for advice, to the Friends of the Co-chairs Groups, and to the Standing Group of Legal Experts.⁴ The report on these consultations is contained in *Enhancing the Functioning of the Multilateral System: Note by the Co-chairs*.⁵ The Co-Chairs have considered all these inputs and advice, as well as the guidance of the Working Group, in preparing this *Third Draft Revised Standard Material Transfer Agreement*.

II. METHODOLOGY FOLLOWED IN THE PREPARATION OF THE THIRD DRAFT REVISED SMTA

4. The *Second Draft Revised Standard Material Transfer Agreement* was a simplification of the *First Draft Revised Standard Material Transfer Agreement*,⁶ which had been presented to the fourth meeting of the Working Group. However, the guidance of the Working Group at its fifth meeting has, in effect, requested the reintroduction for consideration of a number of the matters that were provided for in the *First Draft*, as alternative options. As a matter of principle, therefore, text inserted in the *Second Draft* from the *First Draft* has wherever possible been drawn on, as it has already been seen by the Working Group: such text is washed in blue. Text has occasionally been drawn, as well, from the current SMTA: such text is washed in pink.

5. The conventions followed to indicate changes to the text of the *Second Draft*, and to text imported from the *First Draft* and current SMTA, are as follows:

1. Text deleted is indicated as ~~struck through~~.
2. Text inserted is indicated by double underlining.
3. Square brackets [], indicate either text that has not been agreed, or alternative versions of text.

¹ IT/OWG-EFMLS-5/16/3, *Second Draft Revised Standard Material Transfer Agreement Co-Chairs' Proposal*

² IT/OWG-EFMLS-5/16/Report.

³ IT/OWG-EFMLS-6/17/Inf. 7, *Submissions from Contracting Parties and Stakeholders on Matters to be Discussed in the Sixth Meeting of the Working Group*.

⁴ The full reports of the Friends of the Co-chairs Groups (FoCCs) are contained in documents IT/OWG-EFMLS-6/17/Inf.4, *Report of the Friends of the Co-Chairs on Access Mechanisms and Payment Rates*, and IT/OWG-EFMLS-6/17/Inf.6, *Report of the Friends of the Co-Chairs on a Termination Clause*. The legal opinions of the Standing Group of Legal Experts are in documents IT/OWG-EFMLS-6/17/Inf.3, *Report of the Standing Group of Legal Experts: outcomes of the first meeting*, and IT/OWG-EFMLS-6/17/Inf.3Add.1, *Report of the Standing Group of Legal Experts: outcomes of the second meeting*). Submissions by Contracting Party Regions and stakeholders are compiled in document IT/OWG-EFMLS-6/17/Inf.7.

⁵ IT/OWG-EFMLS-6/17/7, *Enhancing the Functioning of the Multilateral System: Note by the Co-chairs on the outcome of the Friends of the Co-chairs Groups and the Standing Group of Legal Experts*

⁶ IT/OWG-EFMLS-4/15/3, *Draft Revised Standard Material Transfer Agreement*.

4. In order to avoid confusion, Articles 6.7 to 6.11 were not renumbered when they were moved or deleted. It is recommended that the renumbering of Articles be undertaken in the context of a legal reading.
5. Reference to Articles in this document are to the current SMTA, as numbered there.

III. RESPONSE TO THE GUIDANCE OF THE WORKING GROUP, AND STRUCTURE OF THE THIRD DRAFT REVISED SMTA

6. The structure of the *Third Draft Revised SMTA* responds to the guidance of the Working Group, as specified in section 4 of the Report of its fifth meeting.
 1. The Working Group wished to improve the placement of the Subscription System within the structure of the SMTA, to give the correct prominence to the Subscription System. Article 6.11 has accordingly been placed before the optional Articles 6.7 and 6.8, and 6.7/6.8REV, without renumbering the Articles, in order to avoid confusion.
 2. The Standing Group of Legal Experts was consulted regarding the proposed structures of the Subscription System, in relation to consistency with the Treaty, and is of the opinion that the stand-alone Subscription System could be compatible with the Treaty.⁷ The Subscription System is provided for through a revised Article 6.11 and Annex 3.
 3. Whereas the *Second Draft* contained only a Subscription System, the Working Group requested the retention, at this stage, of Articles 6.7 and 6.8. They have accordingly been reintroduced, in brackets.
 4. The Working Group also requested the consideration of possible differentiation of payment rates, which are to be mandatory, between Products available with and without restriction to others for further research and breeding. This has been introduced, as an option, through a new draft Article 6.7/6.8REV, reflected in Option 1 in *Annex 2*, and, for the Subscription System, Article 3.2 of *Annex 3*.
 5. Various minor changes required for consistency with the re-introduction of Article 6.7 or 6.7/6.8REV have been made.
 6. The Working Group also wished to consider whether the Subscription System should apply to all Plant Genetic Resources for Food and Agriculture, or to individual crops or crop groups. Textual provision has been introduced for both options. In particular, it is presumed that, while the Subscription System covers all crops, different payment rates will apply to different groups of crops, to reflect breeding and marketing realities. If rates take into account such breeding and marketing realities, this is likely to be an incentive for subscribing. No attempt has been made to stipulate what these groups should be, or the rates for each.⁸
 7. The Working Group requested a single act of Subscription, with further transfers of material requiring an SMTA. The *Third Draft* provides for a single act of Subscription, namely the Registration Form in *Annex 4*. The text is based on the *First Draft*. Article 6.11 has been modified to concord with the modalities of acceptance of the Registration Form.
 8. The process for and periodicity of future amendments to the SMTA's Subscription System, as well as the implications for Recipients and Subscribers, is addressed in Article 1.3 of *Annex 3*.
 9. The Working Group asked whether the Register of Subscribers could be public while respecting confidentiality, possibly including information on Subscribers' sales. The Standing Group of Legal Experts was consulted, and its advice as to what information

⁷ IT/OWG-EFMLS-6/17/Inf.3, *Report of the Standing Group of Legal Experts, Opinion 3*.

⁸ An attempt of create crop group banding was made in a submission to the fourth meeting of the Working Group, which is contained in Appendix 2 of document IT/OWG-EFMLS-4/15/Inf.3, *Submissions Received by the Working Group During the Biennium, in Preparation for the Subscription System and the Draft Revised Standard Material Transfer Agreement*.

could be made public is implemented in Article 2 of *Annex 3*. It is presumed that the Secretariat would maintain the Register. Provision for information to be treated as confidential is included on both options for *Annex 2* and Article 3.5 of *Annex 3*.

10. The Working Group requested clarification of surviving rights and obligations on withdrawal/termination, in particular in relation to Plant Genetic Resources for Food and Agriculture under Development and their transfer to third parties. The Friends of the Co-chairs on a Termination Clause considered these matters at some length, without arriving at a single recommendation. An alternative bracketed text that takes into account their considerations has accordingly been inserted in Article 4 of *Annex 3*. The Friends of the Co-chairs on a Termination Clause also prepared some suggestions for provision for withdrawal in Article 9 (which would refer to acceptance of the payment option under Article 6.7, or 6.7/6.8REV, should this be maintained in addition to the Subscription System), without reaching agreement. An attempt to reflect these considerations has been inserted as new Articles 9.2–9.4.⁹
11. The Working Group wished to consider termination of Subscription on non-performance by a Subscriber. Provision for this has been made in a new Article 4.5 of *Annex 3*.
12. The Standing Group of Legal Experts was of the opinion that a mandatory non-refundable upfront advance payment (which would relate to the payment option involved in access to a single sample, contained in Article 6.7 or 6.7/6.8REV) would not be in accordance with the Treaty.¹⁰ It was not considered by the Friends of the Co-chairs on Access Mechanisms and Payment Rates, and is not provided for in the text of the *Third Draft Revised SMTA*.
13. The Friend of the Co-chairs on Access Mechanisms and Payment Rates also advised that no exception from the obligation to receive material under an SMTA could be written into the SMTA itself.¹¹ This is different, however, from the possible exemption from payment when annual sales do not reach a certain threshold, which the Working Group has discussed on a number of occasions. Moreover, the CGIAR has pointed out the importance of such a clause in making possible its work with NARS and small seed producers. Article 3.3 of *Annex 3* has accordingly been introduced.

7. In addition to the above, the Working Group raised a number of questions that cannot yet be reflected in the *Third Draft Revised SMTA*:

1. It requested consideration of payment rates and an exploration of what should be the basis for the calculation of payments in the Subscription System. The Friends of the Co-chairs on Access Mechanisms and Payment Rates considered these matters in some detail, and commented on them in their report,¹² but they require decisions, ultimately of the Governing Body, before they can be included in the SMTA, as revised. Place-holders for rates are given, under the different options provided in the *Third Draft Revised SMTA*.
2. It also requested consideration of options for online systems and payments of subscriptions. These are not matters for the SMTA itself, but concern the practicalities of

⁹ IT/OWG-EFMLS-6/17/Inf.6, *Report of the Friends of the Co-Chairs on a Termination Clause*, paras. 22 to 28 and Appendix 2.

¹⁰ IT/OWG-EFMLS-6/17/Inf.3, *Report of the Standing Group of Legal Experts, Opinion 4*.

¹¹ IT/OWG-EFMLS-6/17/Inf.4, *Report of the Friends of the Co-Chairs on Access Mechanisms and Payment Rates*, para. 12.

¹² IT/OWG-EFMLS-6/17/Inf.6, *Report of the Friends of the Co-Chairs on a Termination Clause*, paras. 8–9, 16–24 and Appendix 1.

its administration. Some preliminary considerations are contained in *Implementing Procedures for the Subscription System*.¹³

3. It recalled that Resolution 1/2015 requested consideration of issues regarding genetic information associated with the material accessed from the Multilateral System. The document *Consideration of issues regarding genetic information associated with material accessed from the Multilateral System: note by the Co-Chairs*¹⁴ has been prepared in response to this request.

8. The Working Group will need to make practical and timely arrangements for the draft of the revised Standard Material Transfer Agreement resulting from its work to be subjected to a thorough overall legal reading and drafting, before it is transmitted to the Governing Body for adoption at its Seventh Session.

¹³ IT/OWG-EFMLS-6/17/4.

¹⁴ IT/OWG-EFMLS-6/17/Inf. 8.