



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**

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

Rome, Italy, 14-17 March 2017

**REPORT FROM THE FRIENDS OF THE CO-CHAIRS GROUP ON
SCOPE OF THE MULTILATERAL SYSTEM**

I. INTRODUCTION

1. At its Sixth Session, the Governing Body requested the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing (the Working Group) to “*elaborate options for adapting the coverage of the Multilateral System of Access and Benefit-sharing based on different scenarios and income projections.*”
2. At its fifth meeting, the Working Group considered the scope of the Multilateral System in relation to the scope of the Treaty. Some members thought that expanding the scope of Annex I would increase the attractiveness of the Multilateral System, and others that expanding the scope of the Multilateral System would require building commitment and trust among Contracting Parties and stakeholder groups, including by increasing user-based income to the Benefit-sharing Fund. The Working Group reconfirmed that it would discuss the matter further at its sixth meeting.
3. The Working Group requested the Co-Chairs to consider establishing a Friends of the Co-Chairs group (FoCC) on the Scope of the Multilateral System to map options for the Working Group to consider at its sixth meeting.
4. The Co-Chairs established the FoCC in late 2016 by inviting a regionally-balanced group of experts to take part in the discussions. The membership of the FoCC is given in Annex 1. The full terms of reference of this FoCC are provided in Annex 2.
5. The mandate of the FoCC was to prepare an analysis for the Working Group that maps options for adapting the coverage of the Multilateral System of Access and Benefit-sharing, including by:
 - Aligning the scope of the Multilateral System to that of the Treaty (“all PGRFA”), and the legal instrument that might be required, such as an amendment of, or a Protocol to, the Treaty;
 - Expanding the coverage of the Multilateral System to less than the full scope of the Treaty, for example by including more crops, through an appropriate legal instrument; and by
 - Analyzing the legal and political feasibilities of the options, and describing the conditions that would need to be met.
6. The FoCC Group was invited to prepare a short report to clearly identify, contrast and compare the various options, and the advantages and disadvantages of each. It should first identify the criteria by which the advantages and disadvantages of each option are to be evaluated. Specifically, the report should:

- Evaluate the advantages and disadvantages of:
 - expanding the coverage of the Multilateral System to all PGRFA, or
 - identifying specific crops or crop groups to be included in the Multilateral System, or
 - not changing the coverage of the Multilateral System.
- Evaluate the advantages and disadvantages of possible legal mechanisms for expanding the scope of the Multilateral System, through
 - amendment of the Treaty, or
 - adoption of a Protocol.
- In considering the expansion to all PGRFA,
 - review the definition of the term “PGRFA” in the context of the Treaty, and
 - delineate which categories and/or uses of crops would be covered by the expanded Multilateral System;
- Evaluate the impacts on both access and benefit-sharing for the various groups of users of the Multilateral System, and the extent to which the implementation of the Multilateral System with coverage expanded will be enforceable and effective, taking into account the objectives of the Treaty;
- Recommend to the Co-Chairs which options should be further pursued, and motivate its recommendations.

7. The members of the FoCC served in their personal capacity. Modesto Fernandez was requested by the Co-Chairs to act as facilitator for the FoCC, who prepared and circulated to the FoCC participants an initial working document to initiate the discussions of the group. The group had a series of emails exchanges to discuss each of the main themes suggested by the Co-Chairs and also held a telephone conference on 7 and 8 December 2016, in the form of bilateral phone calls between its facilitator and its members. A Summary of the discussions was circulated after the phone calls. The FoCC held one meeting in Rome, from 25 to 26 of January 2016.

II. GENERAL CONSIDERATIONS

8. The International Treaty is currently at a critical stage. The Governing Body’s decision to enhance the functioning of the Multilateral System has provided momentum to take the necessary measures to enhance the functioning of the Multilateral System. Changes arising from the enhancement process need to be implemented soon, in order to safeguard the Treaty. Any adaptation of the coverage of the Multilateral System should be guided by the vision and objectives of the Treaty, in particular the need to achieve sustainable agriculture and food security. Accordingly, the Multilateral System should not be seen in economic terms alone, but as a common responsibility, and be built on mutual trust between all stakeholders involved.

9. An enhanced Multilateral System will be an important mechanism to support countries efforts to reach the Sustainable Development Goals by 2030, in particular SDG 2 and 15, Aichi Biodiversity Target 13, and other commitments. More generally, expansion should contribute to increased human ability to respond to agricultural and environmental challenges in the next decades. The need to fulfill these commitments may provide additional stimulus for non-Party countries to join the Treaty.

10. The FoCC recommended that changes arising from the enhancement process should contribute to a simplification rather than further complication of the System, and be implemented as soon as possible.

11. The FoCC asserts that for the aim of ensuring food security multilateral ABS approaches to PGRFA are preferable to bilateral ones. A number of Contracting Parties may think that a bilateral approach would enable them to generate a substantial amount of financial benefits from PGRFA under their management and control, currently not listed in Annex I. However, the FoCC considered that the FoCC on Access Mechanisms and Payment Rates had already noted, at its first meeting, that “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. The FoCC agreed that keeping the status quo is not an option. The FoCC considered that the expansion should go hand in hand with an effective benefit-sharing package, seeking to increase user-based payments in a sustainable long-term manner, while retaining the non-monetary benefits identified under the MLS. Some members of the FoCC pointed out that some Contracting Parties may have problems in agreeing to the expansion as long as they feel that monetary benefit-sharing is not working adequately. The FoCC also recalled that the MLS was established to both facilitate access to PGRFA and to share in a fair and equitable way the benefits arising from their utilization, on a complimentary and mutually reinforcing basis.

13. Any further discussions on the expansion of the Multilateral System will need be mindful of advances in science and research. In this context, the FoCC recognized that the potential implications of the use of digital sequence information on plant genetic resources for the expansion of the coverage of the Multilateral System would be a particular subject in need of consideration.

14. To make more understandable to all Parties to the Treaty and stakeholders, the Working Group could propose the organization of a special event on digital sequence information for plant genetic resources, and possible implications for the Treaty.

15. Throughout this report the term “*all plant genetic resources for food and agriculture*” refers to plant genetic resources under the scope of the International Treaty “that are under the management and control of the Contracting Parties and in the public domain” as described in the provisions of the Multilateral System. The term *expansion of the Multilateral System* or *expansion of the coverage of the Multilateral System to include all PGRFA* are used throughout the report as a shortcut to applying the terms and conditions of the Multilateral System to plant genetic resources for food and agriculture other than those in Annex I of the International Treaty, as stated in Article 11.2.

16. Some members of the FoCC were of the opinion that expanding the scope of the MLS would only be politically feasible if it balanced a more general multilateral approach to benefit sharing applying to all use of PGRFA (e.g. a Subscription System) with enhanced access through the MLS, avoiding incentives for users to preferably use material accessed outside the MLS.

III. ANALYZING OPTIONS FOR EXPANDING THE COVERAGE OF THE MULTILATERAL SYSTEM

17. Based on the previous general considerations, the FoCC evaluated the advantages and disadvantages of expanding the coverage of the Multilateral System to “all PGRFA” or by identifying specific crops or crop groups to be included in the Multilateral System. The Tables 1 and 2 present an analysis of the advantages and disadvantages identified for expanding the coverage of the Multilateral System.

Table 1: Advantages and Disadvantages of expanding the coverage of the MLS to “all PGRFA”

Advantages	Disadvantages
<ul style="list-style-type: none"> • Broadest possible basis for access and benefit-sharing, including CWRs • In line with the full scope of the Treaty (Art. 3) • Avoid lengthy negotiations regarding individual crops • Potential for increased international funding for (currently) non-Annex I crops • Potential for increased activities in research, conservation and sustainable use • Potential for increased benefits, including non-monetary, for smallholder farmers • One time fix or a definitive solution to deciding on the expansion of the coverage of the MLS • Flexible in relation to changing crop use, food security challenges and technological developments • As an inclusive system, easier to manage administratively • Expanding the range and number of users of the Multilateral System • Could make a “Subscription System” more attractive.¹ 	<ul style="list-style-type: none"> • Clear understanding of “all PGRFA” is needed • Politically less likely to be agreed in the absence of an effective benefit-sharing system • Could reduce potential for bilateral benefit-sharing, whether monetary or non-monetary • Could reduce opportunities to negotiate non-monetary benefit-sharing on a bilateral basis • Would not by itself guarantee increased benefit-sharing.

Table 2: Advantages and Disadvantages of expanding the coverage of the MLS only to some additional PGRFA

Advantages	Disadvantages
<ul style="list-style-type: none"> • Stepwise approach, possibly by individual decisions of the GB • Might be politically more likely to be agreed by all CPs • A measurable justification for inclusion of certain crops possibly based upon interdependence and other metrics that currently are not contemplated on the Treaty text • Potential for increased funding for the additional (non-Annex 1) PGRFA identified • Potential for increased international research for the additional (non-Annex 1) PGRFA identified. 	<ul style="list-style-type: none"> • May require complex and lengthy negotiations for uncertain limited gains • Likely requires multiple negotiations. • May not by itself guarantee increased benefit-sharing • Less funding for crops not included in the limited expanded coverage.

¹ See Resolution 1/2015 for a reference to the Governing Body request to the Working Group on the elaboration of a full draft revised SMTA focusing especially in the Subscription System.

IV. POSSIBLE LEGAL MECHANISMS FOR EXPANDING THE COVERAGE OF THE MULTILATERAL SYSTEM

18. The FoCC analyzed different possibilities for enabling the expansion of the coverage of the Multilateral System, and mainly an amendment of the Treaty, a Protocol to the Treaty and maintaining the *status quo* which currently enables voluntary measures to include material in the Multilateral System by both CP and non-CPs.

19. Tables 3 to 4 present an analysis of the advantages and disadvantages identified for the most suitable ways to expand the coverage of the MLS.

Table 3: Advantages and Disadvantages of expanding through an amendment of the Treaty

Advantages	Disadvantages
<ul style="list-style-type: none"> • Possibility to address additional Treaty articles when concerns are raised. 	<ul style="list-style-type: none"> • May open the Treaty to re-negotiation • Requires 2/3 of CPs for its entry into force • Creates a period of political and operational uncertainty during re-negotiation, until entry into force • Creates a situation where two versions of the Treaty are in force.

Table 4: Advantages and Disadvantages of expanding through a new protocol to the Treaty

Advantages	Disadvantages
<ul style="list-style-type: none"> • Does not open up Treaty fully to re-negotiation • Number of countries to enter into force to be established in the Protocol. 	<ul style="list-style-type: none"> • Ratification could be politically more complicated in some jurisdictions • Possible need for national implementing measures.

20. The FoCC understands from earlier legal comments from legal experts that amending the coverage of the Multilateral System would require amendment to the Treaty. Once the Governing Body initiates an amendment to the Treaty, the risk is that many articles of the International Treaty could be called into question. If this happens, the negotiations could be lengthy, burdensome and politically difficult. Further, the Treaty stipulates that 2/3 of the Contracting Parties would need to ratify a Treaty amendment, previously agreed by consensus, for it to enter into force. We note that further legal clarification is desired in order to determine whether additional options are possible (e.g., whether the Governing Body could decide to limit itself to amending only specific provisions of the Treaty avoiding opening the whole text of the Treaty).

21. A Protocol to the International Treaty could focus on a specific objective, mainly extending the terms and conditions of the Multilateral System to non-Annex 1 crops, together with a mechanism that effectively links access to the obligation to share the benefits derived from use. A Protocol could be applied to all PGRFA or a subset of negotiated PGRFA. It could also establish a framework to

empower the Governing Body to regularly expand the crop coverage. The Protocol could stipulate the number of Contracting Parties required for it to enter into force.

22. The possible conflict with the Nagoya Protocol could be overcome if the expansion of the scope of the MLS is done to cover all PGRFA that are under the management and control of the Contracting Parties and in the public domain, because the Nagoya Protocol already mentions its compatibility with the International Treaty and the recognition of the special characteristics of PGRFA.² Once the Multilateral System is expanded to “all PGRFA for food and agriculture”, possible conflicts with the Nagoya Protocol on ABS should be easier to resolve. Assuming that not all CPs would immediately join the new system by ratifying an amendment or protocol, the legal implications of Nagoya Article 4.4 for such a mixed system require further clarification.

23. If neither an Amendment nor a Protocol is used, expansion will rely on Contracting Parties voluntarily making their non-Annex 1 crops available under SMTAs. Some members of the FoCC noted the current ABS national laws may make such voluntary contributions impossible without changes in national legislation. Other members of the FoCC noted that this is a national issue that could be addressed nationally rather than internationally.

² The FoCC would like to recall the following Recitals of the Preamble to the Nagoya Protocol:

“Recognizing the importance of genetic resources to food security, public health, biodiversity conservation, and the mitigation of and adaptation to climate change,

Recognizing the special nature of agricultural biodiversity, its distinctive features and problems needing distinctive solutions,

Recognizing the interdependence of all countries with regard to genetic resources for food and agriculture as well as their special nature and importance for achieving food security worldwide and for sustainable development of agriculture in the context of poverty alleviation and climate change and acknowledging the fundamental role of the International Treaty on Plant Genetic Resources for Food and Agriculture and the FAO Commission on Genetic Resources for Food and Agriculture in this regard, [...]

Recalling the Multilateral System of Access and Benefit-sharing established under the International Treaty on Plant Genetic Resources for Food and Agriculture developed in harmony with the Convention”,

as well as its Article 4.4:

“This Protocol is the instrument for the implementation of the access and benefit-sharing provisions of the Convention. Where a specialized international access and benefit-sharing instrument applies that is consistent with, and does not run counter to the objectives of the Convention and this Protocol, this Protocol does not apply for the Party or Parties to the specialized instrument in respect of the specific genetic resource covered by and for the purpose of the specialized instrument.”

IV. FINAL RECOMMENDATIONS

24. The FoCC on the Scope of the MLS made the following recommendations to the Co-Chairs of the Working Group to enhance the Multilateral System:
1. The wider the coverage of the MLS, the greater the potential for the Treaty to contribute to Contracting Parties' to meet the Sustainable Development Goals, and other commitments related to food security, and sustainable agriculture and biodiversity, while recognizing that there are potential political constraints involved in the expansion of the coverage of the MLS unless and until more benefit-sharing has been secured.
 2. The two main options discussed to expand the coverage are the incorporation of additional crops or preferably to match the coverage of the MLS to the full scope of the Treaty so that it covers "all" PGRFA.
 3. The expansion of the coverage of the Multilateral System must be done in such a manner to ensure the effective linkage to the benefit sharing aspects of the Treaty. Some members felt that changes will be required to the benefit-sharing package of the Treaty as well, taking the necessary measures to develop a sound and efficient mechanism to ensure that monetary benefit-sharing is fully linked to the expansion of the coverage of the Multilateral System. Measures adopted should guarantee that non-monetary benefits and monetary benefit-sharing outside the benefit-sharing fund continue and be made available.
 4. The most promising and simplest solution for a way forward to expand Treaty MLS coverage is the development and adoption of a protocol under the framework of the Treaty together with other measures to ensure enhanced monetary benefit-sharing (e.g., revSMTA).
 5. The development of a Protocol could be one of the measures of the package to enhance the functioning of the Multilateral System. This group only dealt with the expansion of the coverage of the Multilateral System, which is insufficient to resolve all challenges to maximum functioning of the Treaty, unless it is connected to other measures to enhance the MLS functioning which are beyond the terms of reference of the FoCC.
 6. The Standing Group of Legal Experts could be asked to provide further legal advice on:
 - a. Whether an amendment of the Treaty would lead to a situation that two different versions of the Treaty could be in force; and if so, whether there are any possibilities to avoid this. If such a mixed system cannot be avoided, what would be the implications of Nagoya Article 4.4?
 - b. Whether the Governing Body could decide to limit itself to amending only specific provisions of the Treaty thus avoiding opening the whole text of the Treaty.
 7. If the Governing Body fails to reach consensus on expanding the coverage of the Multilateral System through a legal instrument, the availability of PGRFA in the MLS could perhaps be improved by ensuring the full implementation of Article 11 of the MLS, including Article 11.4 of the Treaty, and encouraging the voluntary use of the SMTA for all PGRFA including current non-Annex 1 crops.

APPENDIX 1: MEMBERSHIP OF THE FRIENDS OF THE CO-CHAIRS GROUP ON SCOPE OF THE MULTILATERAL SYSTEM

Nestor Altoveros

Lamis Chalak

Campbell Davidson

Tashi Dorji

Modesto Fernandez (Facilitator)

Geoff Hawtin

Anke van den Hurk

El Tahir Ibrahim

Colin Khoury

Monica Martinez

Thomas Meier

Pierre du Plessis

Zeze Sampaio (represented at the physical meeting by Simone Ferreira)

Amar Tahiri

APPENDIX 2: TERMS OF REFERENCE OF THE FRIENDS OF THE CO-CHAIRS GROUP ON SCOPE OF THE MULTILATERAL SYSTEM

Objectives

The Governing Body has requested the Ad Hoc *Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing* (the Working Group) to “elaborate options for adapting the coverage of the Multilateral System of Access and Benefit-sharing based on different scenarios and income projections.”

At its fifth meeting, the Working Group considered the scope of the Multilateral System in relation to the scope of the Treaty. Some members thought that expanding the scope of Annex I would increase the attractiveness of the Multilateral System, and others that expanding the scope of the Multilateral System would require building commitment and trust among Contracting Parties and stakeholder groups, including by increasing user-based income to the Benefit-sharing Fund. The Working Group reconfirmed that it would discuss the matter further at its sixth meeting.

The Working Group requested the Co-Chairs to consider establishing a *Friends of the Co-Chairs group (FoCC) on the Scope of the Multilateral System* to map options for the Working Group to consider at its sixth meeting.

Mandate

The mandate of this FoCC is to prepare a report for the Working Group that maps options for adapting the coverage of the Multilateral System of Access and Benefit-sharing, including by:

- Aligning the scope of the Multilateral System to that of the Treaty (“all PGRFA”), and the legal instrument that might be required, such as an amendment of, or a Protocol to, the Treaty;
- Expanding the coverage of the Multilateral System to less than the full scope of the Treaty, for example by including more crops, through an appropriate legal instrument; and by
- Analyzing the legal and political feasibilities of the options, and describing the conditions that would need to be met.

Output

The FoCC Group will submit a short report to the Co-Chairs of the Working Group by 28 February 2017. This report should be analytical, and clearly identify, contrast and compare the various options, and the advantages and disadvantages of each. It should first identify the criteria by which the advantages and disadvantages of each option are to be evaluated, and apply these systematically. Wherever possible, the resulting analysis should be presented in tabular form. Specifically, the report should:

- Evaluate the advantages and disadvantages of:
 - expanding the coverage of the Multilateral System to all PGRFA, or
 - identifying specific crops or crop groups to be included in the Multilateral System, or
 - not changing the coverage of the Multilateral System.
- Evaluate the advantages and disadvantages of possible legal mechanisms for expanding the scope of the Multilateral System, through
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- delineate which categories and/or uses of crops would be covered by the expanded Multilateral System;
- Evaluate the impacts on both access and benefit-sharing for the various groups of users of the Multilateral System, and the extent to which the implementation of the Multilateral System with coverage expanded will be enforceable and effective, taking into account the objectives of the Treaty;
- Recommend to the Co-Chairs which options should be further pursued, and motivate its recommendations.

Ways of operation

The members of the FoCC will serve in their personal capacity, and will not represent any particular Contracting Party or stakeholder. The FoCC will have its own facilitator, who will receive support from the Secretariat to prepare the report that will be presented to the Working Group, and undertake other tasks as needed. The FoCC will meet in Rome for two days in the second half of January 2017. Most of the work of the FoCC will rely on electronic communication. The working language will be in English. The Co-Chairs are available at all times for advice, and will participate in the discussions.