



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 OF THE STANDING GROUP OF LEGAL EXPERTS:
OUTCOMES OF THE SECOND MEETING**

INTRODUCTION

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

2. The members of the SGLE are Mr. Olivier Rukundo, Prof. Gurdial Singh Nijar, Prof. Hiroji Isozaki, Mr. Gerald Moore (facilitator), Mr. Jorge Cabrera, Mr. Hojjat Khademi, and Ms. Indra Thind¹. The Legal Office of FAO is involved in the work of the SGLE through Ms. Annick van Houtte.

3. The SGLE held its first meeting on 14 and 15 November 2016, to provide legal opinions on the following questions:

Question 1: Can the Governing Body delete Article 6.8 without having to amend the Treaty, i.e., can the Governing Body revise the SMTA in accordance with the provisions of the Treaty in such a way that all payments under the SMTA are mandatory?

Question 2: Should all payments be mandatory, are there any provisions of the Treaty that would prevent the Governing Body stipulating different payment rates for different categories of products, in accordance to whether or not they are protected by intellectual property rights, and the nature of such protection (e.g. PVP, patents)?

Question 3: Would a SMTA that only contains a subscription system and has no option for single access, like that outlined in document IT/OWG-EFMLS-5/16/3, be in accordance with the provisions of the Treaty?

Question 4: Would the advance payment discussed in document IT/OWG-EFMLS-5/16/Inf.5 (paras. 25 and 30) be in accordance with the Treaty, in particular its Article 12.3b? If not, what would be the main questions that require further consideration?

Question 5: Could the Register provided for in document IT/OWG-EFMLS-5/16/3, p. 14 (Article 2 of Annex 3 to the second draft revised SMTA) be public, while respecting

¹ Ms. Indra Thind was not able to participate in the second meeting of the SGLE and Mr. Oliver Lewis participated in her place.

confidentiality laws? More specifically, which information could or should be public, and which information should or might not be public?

Question 6: Reviewing the advice from the *Ad Hoc* Technical Advisory Committee on the SMTA and the MLS on this matter (IT/AC-SMTA-MLS 2/10/Report, *Appendix 3*), would the restoration of germplasm to the original provider/providing country require the use of an SMTA?

4. The report of that meeting is provided in document IT/OWG-EFMLS-6/17/Inf.3, which also contains, in its Annex 2, the Terms of Reference of the SGLE.

5. In January 2017, the SGLE was requested by the Co-chairs to provide legal opinions on the following additional questions:

Question 7: On which basis can a protocol to the Treaty be adopted? Can such a protocol provide that the provisions of the Treaty apply to plant genetic resources for food and agriculture (PGRFA) not included in Annex I of the Treaty? If so, which provisions? Could such a protocol establish a new system similar to the Multilateral System, considering in particular Article 3 of the Treaty?

Question 8: Could Annex I of the Treaty be amended in such a way as to include all PGRFA? Which provisions of the Treaty would need to be amended, so that the Multilateral System contained all PGRFA? In which ways? Would an amendment of the Treaty lead to a situation that two different versions of the Treaty would be in force? If so, are there any possibilities to avoid such a situation or to minimize its impact? Could the Governing Body decide to limit itself to amending only specific provisions of the Treaty, thereby avoiding to open the whole text of the Treaty? What would be the legal nature of such a Governing Body decision and would it be an effective means to prevent Contracting Parties from requesting to open other parts of the Treaty, at a subsequent meeting of the Governing Body? Would there be other possibilities to limit the amendment of the Treaty to specific provisions of the Treaty, in a legally binding manner?

Supplement to Questions 7 and 8: Please identify possible implications of an expansion on the definition of “Plant Genetic Resources for Food and Agriculture” in Article 2 of the Treaty, as well as on the limitations to the use of PGRFA pursuant to Article 12 of the Treaty.

Question 9: The Working Group stressed the importance of ensuring that the revised SMTA be legally enforceable and include clear provisions on the consequences of non-compliance with the terms of the SMTA. Are you of the opinion that an arbitral tribunal could award remedies based on the SMTA and if so, based on which legal provisions? How could the enforceability of the provisions of the SMTA be improved?

Question 10: What is the most adequate term for what has been discussed so far as a “termination clause”, but for which one of the Friends of the Co-chairs Groups has suggested to use the term “withdrawal clause” instead?

Question 11: Will the Third Party Beneficiary have to agree on the amendments that the Working Group suggests for the SMTA as contained in document IT/OWG-EFMLS-5/16/3?

6. The SGLE therefore held its second meeting on 14 and 15 February 2017 and developed its legal opinions on these questions as set out in *Annex 1*. The Agenda of the meeting is given in *Annex 2*; the list of participants is given in *Annex 3*.

ANNEX 1: LEGAL OPINIONS**OPINION 7**

On which basis can a protocol to the Treaty be adopted? Can such a protocol provide that the provisions of the Treaty apply to plant genetic resources for food and agriculture (PGRFA) not included in Annex I of the Treaty? If so, which provisions? Could such a protocol establish a new system similar to the Multilateral System, considering in particular Article 3 of the Treaty?

Relevant Provision(s) of the FAO Basic Texts:

Article XIV of the FAO Constitution, Rule XXI of the General Rules of the Organization

Relevant Provision(s) of the Treaty:

Article 23, Article 24

Legal opinion:

1. The Treaty does not explicitly provide for the adoption of protocols, but neither does it preclude their adoption. In the absence of any express prohibition, the SGLE considered that a protocol could be adopted, consistent with international law and precedents², and as provided for in Article XIV of the FAO Constitution.
2. Article XIV of the FAO Constitution sets out the procedures for adopting supplementary conventions or agreements.³
3. Article XIV of the FAO Constitution does not refer to “protocols”, but to “supplementary conventions or agreements”. The SGLE considered that any of these terms would be legally available.
4. As between the parties to a protocol, such protocol could amend the Treaty or it could supplement the provisions of the Treaty.
5. The SGLE considered that, if the intent is to amend the Treaty, it would be preferable to follow the amendment procedures set out in Articles 23 and 24 of the Treaty.
6. The SGLE considered that a supplementary protocol or agreement could provide that the provisions of the Multilateral System apply to PGRFA not included in Annex I to the Treaty, or could establish a system similar to the Multilateral System for non-Annex I PGRFA.
7. The relationship between the Treaty and protocol would need to be clear in the protocol. Such a protocol would bind only the parties to it. Any obligations assumed by the parties to the protocol should not derogate from their obligations under the original Treaty.
8. The SGLE considered that the extension of the provisions of the Multilateral System to cover PGRFA not listed in Annex I would not raise any concerns of consistency with the objectives of the CBD and its Nagoya Protocol.

² The SGLE discussed numerous precedents.

³ The procedures set out in Article XIV of the FAO Constitution refer to the supplementary conventions or agreements being proposed by a “technical meeting or conference, comprising Member Nations”. This could be either the Governing Body itself or a group of Contracting Parties.

OPINION 8

Could Annex I of the Treaty be amended in such a way as to include all PGRFA? Which provisions of the Treaty would need to be amended, so that the Multilateral System contained all PGRFA? In which ways? Would an amendment of the Treaty lead to a situation that two different versions of the Treaty would be in force? If so, are there any possibilities to avoid such a situation or to minimize its impact? Could the Governing Body decide to limit itself to amending only specific provisions of the Treaty, thereby avoiding to open the whole text of the Treaty? What would be the legal nature of such a Governing Body decision and would it be an effective means to prevent Contracting Parties from requesting to open other parts of the Treaty, at a subsequent meeting of the Governing Body? Would there be other possibilities to limit the amendment of the Treaty to specific provisions of the Treaty, in a legally binding manner?

Relevant Provision(s) of the Treaty:

Article 11, Article 23, Article 24

Legal opinion:

1. The SGLE considered that the provisions dealing with the Multilateral System could be amended, in accordance with Articles 23 and 24 of the Treaty, so as to cover all PGRFA. This could be done by amending Annex I to include all PGRFA. Alternatively, it could be done by deleting Annex I, and all references to Annex I in the Treaty. In either case, consequential amendments may be needed, e.g. to Articles 11 and 15 of the Treaty.
2. The above amendments could lead to a situation that two different versions of the Treaty would be in force, since the amendments would enter into force only for the two thirds of the Contracting Parties that have ratified, accepted or approved such amendments, and for other Contracting Parties only as they ratify, accept or approve them. There is no feasible way of avoiding this situation, if not all Contracting Parties ratify, accept or approve the amendments. The amendments may need to include clear provisions dealing with this situation. In particular, the interaction between Contracting Parties who are only parties to the original Treaty, and those who are bound by the amendment, would need to be clear.
3. The Governing Body could adopt a decision to set in motion a process to amend only certain provisions of the Treaty. However, this would not limit the right of a Contracting Party to propose any amendment to the Treaty under Article 23.1 of the Treaty at any time.

SUPPLEMENT TO OPINIONS 7 AND 8

Please identify possible implications of an expansion on the definition of “Plant Genetic Resources for Food and Agriculture” in Article 2 of the Treaty, as well as on the limitations to the use of PGRFA pursuant to Article 12 of the Treaty.

Relevant Provision(s) of the Treaty:

Article 2, Article 12.3a

Relevant Provision(s) of the SMTA:

Article 6.1

Legal opinion:

1. The SGLE understood this question as meaning that it should identify possible implications, if the crop coverage is expanded, for the definition of PGRFA in Article 2 of the Treaty, and for limitations to the use of PGRFA pursuant to Article 12.3a of the Treaty.
2. The desired scope of the definition of PGRFA is more a technical or policy question than a legal question on which the SGLE could opine. To change the definition, an amendment to the Treaty would be needed. The SGLE noted that if the definition were to be amended, this could affect provisions throughout the Treaty, and not only those regarding the Multilateral System.
3. An expansion to include all PGRFA would, in itself, not have any implications regarding the definition of PGRFA in Article 2 of the Treaty. In addition, the same use restrictions would apply to both Annex I material and to all additional PGRFA in any expanded crop coverage.
4. The SGLE noted that the Treaty recognizes that certain crops may have multiple uses including non-food/feed uses. Specifically, Article 12.3a provides: “In the case of multiple-use crops (food and non-food), their importance for food security should be the determinant for their inclusion in the Multilateral System and availability for facilitated access.” However, the SGLE also noted that Article 12.3a is clear that facilitated access under the Multilateral System “shall be provided solely for the purpose of utilization and conservation for research, breeding and training for food and agriculture, provided that such purpose does not include chemical, pharmaceutical and/or non-food/feed industrial uses.” Moreover, Article 6.1 of the SMTA similarly makes clear to recipients that the material “shall be used or conserved only for the purposes of research, breeding and training for food and agriculture. Such purposes shall not include chemical, pharmaceutical and/or other non-food/feed industrial uses.”
5. The SGLE noted that any use other than that provided for in Article 6.1 of the SMTA would contravene Article 6.1 of the SMTA, and would expose the Recipient to appropriate enforcement action by the Provider or the Third Party Beneficiary.

OPINION 9

The Working Group stressed the importance of ensuring that the revised SMTA be legally enforceable and include clear provisions on the consequences of non-compliance with the terms of the SMTA. Are you of the opinion that an arbitral tribunal could award remedies based on the SMTA and if so, based on which legal provisions? How could the enforceability of the provisions of the SMTA be improved?

Relevant Provision(s) of the Treaty:

Article 12.4, Article 12.5, Article 13.2.d(ii)

Relevant Provision(s) of the SMTA:

Article 4.3, Article 4.4, Article 7, Article 8

Legal opinion:

1. The provisions of the current and revised SMTAs⁴ are legally enforceable, and action can be taken to enforce the SMTA through arbitration, including by the Third Party Beneficiary. It is to be noted that the SMTA provides that the result of arbitration is to be binding.
2. The SMTA makes reference in its applicable law provision to the UNIDROIT Principles, which specifically recognize the rights of the Third Party Beneficiary.
3. The SMTA provides that the parties may choose their arbitral tribunal, and failing agreement on which tribunal to choose, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce.
4. If a recalcitrant party fails to respond to the request for arbitration, the Rules of the ICC provide that the arbitration may nevertheless proceed and may lead to a binding award.
5. Enforcement of arbitral awards can be sought before national courts, including, as appropriate, in accordance with the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards).
6. In addition, Article 12.5 of the Treaty provides that the “Contracting Parties shall ensure that an opportunity to seek recourse is available, consistent with applicable jurisdictional requirements, under their legal systems, in case of contractual disputes arising under [the SMTA], recognizing that obligations arising under [the SMTA] rest exclusively with the parties to [it].”
7. An arbitral tribunal constituted under the SMTA may effectively award remedies as specified in the UNIDROIT Principles, which provide for a range of monetary and non-monetary remedies under Chapter 7.
8. The SGLE recognized that the availability of information is relevant to transparency and compliance with the obligations under the SMTA. The SGLE noted that in the context of the revision of the SMTA the Contracting Parties could consider whether to clarify the scope of Article 4.4 of the SMTA with respect to the provision of information regarding performance with all obligations of the parties under the SMTA, including in particular information regarding use of material in terms of Article 6.1 of the SMTA, and whether the Provider could also request this information. The SMTA

⁴ The SGLE did not examine the Third Draft Revised SMTA in detail.

provides that the Third Party Beneficiary has the authority to request information under Articles 4.4 and 8.3 of the SMTA.⁵

9. As no cases have yet been brought to arbitration under the SMTA, there is no practical information regarding problems that might arise regarding the enforceability of the SMTA, and consequently regarding whether there is a need to improve enforceability of the SMTA.

⁵ The authority of the Third Party Beneficiary to request information under Article 8.3 of the SMTA is located as part of an article dealing with dispute settlement.

OPINION 10

What is the most adequate term for what has been discussed so far as a “termination clause”, but for which one of the Friends of the Co-chairs Groups has suggested to use the term “withdrawal clause” instead?

Relevant Provision(s) of the Treaty:

Article 12.4, Article 13.2.d(ii), Article 32

Relevant Provision(s) of the SMTA:

Article 7, Article 9

Legal opinion:

1. The SGLE noted that the use of both terms may be appropriate, depending on the context. The SGLE noted that the UNIDROIT Principles use the term “termination” in connection with non-performance. The term “termination” can also be used in other situations involving ending a contract. The SGLE noted that where a Subscriber decides to end only its participation in the Subscription System, the rest of its obligations as a Recipient under the revised SMTA⁶ will continue. In such a case, the term “withdrawal” may be more appropriate. In either case, rights and obligations of the parties and the Third Party Beneficiary surviving termination or withdrawal need to be clearly set out. The SMTA should be consistent in how it uses these terms.

⁶ The SGLE did not examine the Third Draft Revised SMTA in detail.

OPINION 11

Will the Third Party Beneficiary have to agree on the amendments that the Working Group suggests for the SMTA as contained in document IT/OWG-EFMLS-5/16/3?

Relevant Provision(s) of the Treaty:

Article 12.4, Article 13.2.d(ii)

Relevant Provision(s) of SMTA :

Article 4, Article 7, Article 8

Legal opinion:

1. The SGLE noted that FAO had agreed to perform the role of Third Party Beneficiary under the SMTA. The SGLE is of the opinion that if the rights and obligations of the Third Party Beneficiary are substantially changed, it would be appropriate for FAO to reconfirm its acceptance of this role. The powers of FAO would not extend beyond renewing or not renewing its acceptance of its role as Third Party Beneficiary.

ANNEX 2: AGENDA

Meeting of the Standing Group of Legal Experts
in support of the
Ad Hoc Open-ended Working Group to Enhance the Functioning of the
Multilateral System of Access and Benefit-sharing

Rome, Italy, 14 – 15 February 2017

FAO HQ, Queen Juliana Room (B-324)

AGENDA

14 February

10:00 - 10:15 Welcome and adoption of the Agenda

10:15 - 13:00 Discussion and initial analysis of Questions 1 to 3

13:00 - 14:00 Lunch break

14:00 - 17:30 Discussion and initial analysis of Questions 4 and 5

17:30 - 19:00 Preparation of draft written opinions on Questions 1 to 5

20:00 Dinner

15 February

10:00 - 13:00 Discussion of draft written opinions on Questions 1 to 5

13:00 - 14:00 Lunch break

14:00 - 17:30 Finalization of written opinions and advice on further legal questions, if needed

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