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**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**

**ENHANCING THE FUNCTIONING OF THE MULTILATERAL SYSTEM:  
NOTE BY THE CO-CHAIRS ON THE OUTCOMES OF THE FRIENDS OF THE  
CO-CHAIRS GROUPS AND THE STANDING GROUP OF LEGAL EXPERTS**

**Note by the Secretary**

At its fifth meeting, the Working Group provided a number of recommendations to the Co-chairs on the preparations for its sixth meeting, including on seeking advice from Friends of the Co-chairs groups and from a Standing Group of Legal Experts. It also made recommendations to the Co-chairs with a view to finalizing the revised Standard Material Transfer Agreement, which shall include a Subscription System, at its sixth meeting.

This note has been prepared by the Co-Chairs to provide an overview of the outcomes of the work of the Friends of the Co-chairs groups and of the Standing Group of Legal Experts that they have established. Moreover, the note contains conclusions that the Co-chairs draw from this work, as well as their recommendations to the Working Group, in order to further facilitate discussions at the sixth meeting.

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GROUPS AND THE STANDING GROUP OF LEGAL EXPERTS**

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***Background***

1. The Working Group, at its fifth meeting, provided a number of recommendations to the Co-Chairs regarding preparations for its sixth meeting, including with regard to intersessional work needed to facilitate further consideration of the scope of the Multilateral System and to resolve legal questions that have emerged during the enhancement process.

2. The Working Group provided also the following recommendations to the Co-Chairs, with a view to finalizing the revised SMTA, which includes a Subscription System, at its sixth meeting:

- Consider whether the subscription should be for all PGRFA in the Multilateral System or for individual crops or crop groups in the Subscription System;
- Consider the possibility of a single act for subscription with further transfers of material requiring an SMTA;
- Improve legal certainty and clarity on the process for and periodicity of future amendments to the SMTA;
- Explore whether the Register of subscribers could be public while respecting confidentiality, possibly including information on subscribers' sales, and in this context explore potential methodologies;
- Improve clarity on who would hold the Register, check on its accuracy and monitor implementation of the Subscription System;
- Consider the payment rate and explore what should be the basis for the calculation of the subscription;
- Consider introducing differentiation in the payment rates of the Subscription System according to:
  - Whether it is based on a user's entire portfolio in the Multilateral System or for individual products within a crop or crop group;
  - Whether the Products are restricted or not;
  - Whether exemptions or a deferred payment schedule would need to be provided for users with turnover below a certain threshold;
  - Whether differentiated payment rates would create incentives or disincentives.
- Clarify surviving rights and obligations on withdrawal/termination, in particular in relation to PGRFA under Development and their transfer to third parties;
- Consider termination by the Third Party Beneficiary of the subscription on non-performance by a subscriber;
- Consider options for online systems and payments of subscriptions;
- Examine the feasibility of the Subscription System and consider whether the Subscription System as proposed is consistent with the Treaty.

3. The Working Group agreed not to delete Articles 6.7, 6.8 of the current SMTA at this stage, but to discuss the following principles, also reflected in its report:

- All payments to be mandatory, while differentiating between Products available with and without restriction to others for further research and breeding;
- Exemption from payments for certain categories of users;
- Non-refundable upfront advance payments under any single accession-based option, in order to ensure immediate income to the BSF and to make it easier to balance payment levels under this option and under the Subscription System.

4. A number of legal questions related to the consistency of the revised SMTA with the text of the Treaty were raised by members of the Working Group. These questions needed to be resolved at the next meeting of the Working Group.

5. The Working Group recommended to further consider the need and practicability of information requirements in Annex 1 of the revised SMTA.

6. 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.

### ***Response of the Co-chairs***

7. In response to the recommendations to the Co-chairs, the Co-chairs requested the two Friends of the Co-chairs groups on Access Mechanisms and payments Rates, and on the Termination Clause respectively to finalise their work.

8. At the suggestion of the Working Group, they also established a new Friends of the Co-chairs group on the Scope of the MLS, as well as a Standing Group of Legal Experts, the latter composed of representatives of the regions. The groups were provided with Terms of Reference developed by the Co-chairs in consultation with the Secretariat.

9. These groups all undertook their work according to their Terms of Reference, and reported on the outcome of their work to the Co-chairs. The reports have been made available by the Secretariat to the members of the Working Group as Information Documents. All these reports will be made available to the Working Group, at its sixth meeting.

10. The Friends of the Co-chairs Groups provided a number of clear recommendations that together helped the Co-chairs to reduce the vast amount of options suggested by various Working Group members, Parties to the Treaty and stakeholders and to steer in the direction of a relatively simple model. It is the conviction of the Co-chairs that any proposed new form for the Multilateral System and any new Standard Material Transfer Agreement should be as simple as possible in order to be transparent for all Parties, and for all providers and users of genetic resources of the Multilateral System.

11. Recommendations and motives of the FoCC groups to opt for these recommendations that in the view of the Co-chairs may form the skeleton for a new MLS and a new SMTA are cited below.

12. Furthermore, the following opinions of the SGLE further guided the Co-chairs in their consideration of the recommendations:

- The SGLE considered that the SMTA could be revised to make all payments mandatory, by deleting Article 6.8 of the SMTA or revising it; in both cases, it would be necessary to revise Article 6.7 of the SMTA accordingly.

- The SGLE was of the opinion that the Governing Body has the power to define categories of recipients, *inter alia*, according to different products and the types of intellectual property rights, if any, that they assert over their products; the Governing Body may establish different levels of payment for these categories.
- The SGLE considered, as a general principle, that the setting up of a public Register should not raise particular legal issues related to confidentiality if the contents of the Register are limited to the full name, contact details and the date at which the Subscription took place.

### ***The scope of the MLS***

13. The FoCC on Scope of the MLS agreed that keeping the status quo regarding the coverage of the MLS is not a desirable option. However, expansion of the MLS must go hand-in-hand with an effective benefit-sharing package. The FoCC analysed various mechanisms to expand the Multilateral System and concluded that the most promising and simplest solution 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. through a revised SMTA).

14. Based on the analysis made by the FoCC, the Co-Chairs conclude that (1) there are more advantages and less disadvantages if the expansion of the MLS is done to match the coverage of the MLS to the full scope of the Treaty so that it covers “all” PGRFA and (2) an amendment of the Treaty should not be our first choice for expansion of the Multilateral System but developing a Protocol to the Treaty is a preferable option. The SGLE considered that a protocol could be adopted, consistent with international law and precedents, and as provided for in Article XIV of the FAO Constitution. It also 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. Finally, the SGLE also provided an opinion on options to amend the Treaty to include non-Annex I PGRFA. In this context, it noted that 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.

### ***The features and provisions of the new SMTA***

15. The three FoCC groups dealing with a review of aspects of the SMTA provided the following advice.

16. Crop groups. The grouping of crops into categories is considered not to be desirable by the FoCC on Crop Groups and User Categories, since:

- Categories or groupings are not clearly associated with specific characteristics associated with either crops or users (e.g. realization of benefits from use of genetic resources of an individual crop, specific features always associated with identified user groups);
- The introduction of categories would, of necessity, be associated with increased complexity because of the need to develop sub-categories based on other unlinked criteria;
- The division into categories would inevitably have to be arbitrary rather than ‘natural’. Any groupings used should as far as possible be clear and distinct and easily identifiable and understood, which is not the case in categorizing on the basis of crops.

17. Access mechanisms. Most participants in the FoCC on Access Mechanisms and Payment Rates concluded that it would be more complex to effectively balance payment rates, if users are given a choice of both a single sample access option and a Subscription System option, given all the other parameters suggested in the Working Group. As Co-Chairs we conclude from the analysis made by the FoCC:

- That only the Subscription System option should be available;
- That the number of parameters be reduced;
- In particular, that there should be a single rate for both protected and unprotected Products (freely available for use by others or not). The additional value created by protection would anyway be captured, if the basis for a subscriber's payments is all its annual sales. The Subscription System would thereby reflect the difference in value of protected and unprotected products. Moreover, tracking and monitoring different payment rates would be burdensome, and make the system more difficult to operate.

18. User categories. The FoCC on Crop Groups and User Categories considered that no satisfactory separation of user groups can be established given the complex and interconnected nature of use and the multiple roles that different types of user often play. A possible alternative would be the development of a classification of users of MLS materials based on the degree to which they derive commercial benefit from this use. The classification could be based on levels of turnover or seed sales. The FoCC on Access Mechanisms and Payment Rates recommended the Co-Chairs that any subscriber that commercializes a Product as defined in the SMTA shall be obliged to make payments, and that no exemptions be provided for in the text of the SMTA.

19. No upfront payment option. The Standing Group of Legal Experts reviewed the legal possibility of a *non-refundable upfront advance payment option* and has given an opinion that such a payment would not be in conformity with the Treaty, if it were mandatory. In its previous meeting, the FoCC had reviewed the possibility of combining a non-refundable upfront advance payment option with a single sample access option (such as Article 6.7 of the current SMTA), if a single sample access were offered in addition to a Subscription System. It was informed that the Standing Group of Legal Experts had reviewed the legal possibility of a non-refundable upfront advance payment option and had given an opinion that such a payment would not be in conformity with the Treaty, if it were mandatory. The FoCC therefore took note of the background document that had been prepared, and did not discuss non-refundable upfront advance payment in any detail.

20. Termination clause. In the textual advice of the FoCC on a Termination Clause, the subscription continues indefinitely, until the recipient/subscriber voluntarily withdraws from it in full compliance with the withdrawal clause, including by giving written notice. In addition, the subscriber cannot withdraw from the subscription before a minimum period of time has passed. The FoCC group was not able to make a joint recommendation on the actual minimum time. Finally, the subscriber is required to continue making mandatory benefit sharing payments for a fixed number of years after it has withdrawn from its subscription. The FoCC group was not able to make a joint recommendation on the actual number of years. However there is a conceptual link between the minimum duration of the subscription under article 4.2 and the fixed period of continued benefit sharing under article 4.3. The shorter the minimum period of initial subscription, the longer the fixed period of continued benefit sharing, or vice versa. Finally, the group considered, but had no consensus opinion on the question whether termination conditions for PGRFA and PGRFA under Development should/could be different.

21. Payment rates. If (1) only the subscription system is established to access PGRFA in the MLS, (2) subscription is only to all crops, and (3) no distinction is made between protected and unprotected products, a single payment rate would be feasible, e.g. at the level of 0.1% of all product sales. Any differentiation by access mechanism, crop groups, or type of protection would automatically result in the need to attain balanced payment rates.

### ***The launch mechanism***

22. The FoCC on Access mechanisms and Payment Rates agreed that the concept of a Launch Mechanism could provide a framework for the implementation of the Subscription System, which could attract the support of both providers and users of plant genetic resources, and help in concluding the negotiations to enhance the Multilateral System.
23. The FoCC accordingly recommended to the Co-Chairs that the technical, legal and administrative matters involved in adopting a Launch Mechanism be considered in more detail.
24. The FoCC on Scope recommended that the development of a Protocol could be one of the measures of the package to enhance the functioning of the Multilateral System. It noted that the expansion of the coverage of the Multilateral System is insufficient to resolve all challenges to maximum functioning of the Treaty, unless it is connected to other measures, including in particular those related to benefit-sharing. It follows from such recommendations that because of its built-in conditions, the Launch Mechanism might make it possible to reach an agreement on a new SMTA, better ensuring the flow of benefits to the Benefit-Sharing Fund, and on a Protocol expanding the coverage of the MLS between the Parties to the Treaty.

### ***Finance projections***

25. The FoCC on Access Mechanisms and Payment Rates also made an attempt to predict future annual income to the benefit-sharing funds based on user payments. Whereas these predictions provide an enormous range from 1.5 million USD (all crops less maize and soy and vegetables against a payment rate of 0.016%) to 76 million USD (all crops against a payment of 0.16%) and only feature theoretical maximum income, it is clear that the lower end options would not result in any meaningful user-based financial contributions to the benefit-sharing fund.

### ***Conclusions of the Co-chairs***

26. Based on the advice of the four FoCCs and the SGLE, the Co-chairs have arrived at the following conclusions.
- a. The notion that funds accruing to the Benefit-sharing Fund (BSF) were not meeting expectations, and that in particular user-based payments into the BSF were not forthcoming, led the Governing Body to decide that a Working Group was to be established to enhance the functioning of the MLS. The Co-chairs therefore concluded that any package of proposed measures should secure to the extent possible a predictable and sustainable flow of income to the BSF as a *conditio sine qua non*.
  - b. In order to establish predictable and sustainable income to the BSF, all user-based payments would have to be mandatory, since the continued option of access to PGRFA in the MLS resulting in only voluntary payment obligations will prevent such increased and sustained income to the BSF being realised.
  - c. The Co-chairs also noted the advice of the FoCC on Scope that – the condition above being fulfilled – an expansion of the coverage of the MLS to all PGRFA under the management and control of the CPs and in the public domain, was to be preferable, although a stepwise increase in the coverage of the MLS with specific crops or crop groups was not entirely ruled out.
  - d. The Co-chairs concluded that an expansion of the coverage of the MLS cannot be seen separate from an effective package of measures that will increase income to the BSF.
  - e. From the work of the FoCC on Access Mechanisms and Payment Rates the Co-chairs concluded that predictable and sustainable income to the BSF would be a goal that would be difficult to realise if more than a single access mechanism would be available for users

of MLS materials. They also recalled that the Governing Body had concluded that a subscription system would be the preferred access mechanism for materials in the MLS. In combining these two inputs the Co-chairs therefore also concluded that a subscription system should preferably be the only access mechanism to materials in the MLS. The Co-chairs look forward to further deliberations of the Working Group on the issue.

- f. The Co-chairs noted that a number of Contracting Parties and stakeholders from industry opposed the idea of a subscription system forming the only access mechanism. They understood that this position was justified by the expectations that different users may seek either regular and repeated access to larger numbers of PGRFA in the MLS, or only single and incidental access to a limited number of accessions, and that a subscription system as the only access mechanism would not accommodate the latter category of users. In addition, a single event access mechanism would allow to set different payment levels for resulting Products either or not freely available for further research, breeding and training by third parties. The Co-chairs considered that it would be necessary and possible to design a subscription system in such a way that it would take away the concern that in particular small and medium enterprise might be disadvantaged by a single access mechanism in the form of a subscription system. The Co-chairs look forward to further deliberations of the Working Group on the issue.
- g. Payment categories and exemptions. In order to accommodate users only seeking limited use to PGRFA in the MLS, a threshold could be created in the subscription system setting a relatively low payment rate for any users seeking access to less than a given number of accessions over a given time frame. The Co-chairs also noted that the FoCC on Access Mechanisms and Payment Rates considered exemption from payments for users with a yearly financial benefit-sharing obligation (amount due) below a certain threshold, to avoid administration of very small contributions to the BSF, and furthermore noted that stakeholders considered that a turnover of US\$ 1 or 2 million per year could well present such threshold.
- h. Crop categories. It has been noted by the FoCC on Access Mechanisms and Payment Rates that it may be not well feasible to set different payment rates to different crop groups. It did not address the proposal that access should be by individual crop or crop group. The Co-chairs felt that in order to reach an enhanced functioning of the MLS, while keeping complexity down to the maximum extent, the establishment of crop categories would therefore not be advisable. They also considered that the establishment of crop categories would complicate the future expansion of the coverage of the MLS, since such expansion would require a revision of the number and composition of crop categories.
- i. Termination. The Co-chairs noted the highly useful work of the FoCC on the Termination Clause. They also noted that whereas this group suggested a detailed procedure for termination, it had not agreed on relevant time-frames, i.e. for the minimum time period after which termination would become possible, and for the time period during which payment obligations would continue to apply. They also noted that the FoCC on Termination did not agree over the question whether payment obligations after termination would also continue to apply for PGRFA under development.
- j. Further discussions will be needed before the Governing Body on the new rates for the SMTA.
- k. The Co-chairs also noted that the total of user-based payments is unlikely under any condition to reach the amount needed to effectively operate the BSF.

***Recommendations of the Co-chairs***

27. The above conclusions have led the Co-chairs to conclude that sufficient and coherent building blocks to enhance the functioning of the MLS are currently available to the Working Group to finalise its work on the SMTA and to submit a coherent package of measures enhancing the functioning of the MLS to the Governing Body, in combination with (1) a proposed legal instrument to enhance the coverage of the MLS, (2) a draft agreement for a Launch Mechanism and (3) a set of Implementing Measures, for all of which text needs to be elaborated.