



**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

IMPLEMENTING PROCEDURES FOR THE SUBSCRIPTION SYSTEM

Executive Summary

This document briefly explores the main elements of implementing procedures for the Subscription System, currently being discussed by the Working Group. It draws on the advice of the Standing Group of Legal Experts and on the recommendations from the Friends of the Co-chairs on Access Mechanisms and Payment Rates. The Working Group is invited to provide further guidance on these elements and to decide whether a more comprehensive document shall be prepared, including elements of a draft Resolution on implementing procedures for the Subscription System

I. INTRODUCTION

1. The Working Group is currently discussing a number of elements that relate to the functioning and implementation of the Subscription System, but go beyond the rights and obligations of the Provider and the Recipient under the Standard Material Transfer Agreement.
2. These elements are thus to be addressed outside the Standard Material Transfer Agreement.
3. At its fifth meeting, the Working Group made recommendations to the Co-chairs with a view to finalize the revised Standard Material Transfer Agreement, which includes a Subscription System, at its sixth meeting. Some of these recommendations explicitly refer to elements of the implementing procedures for the Subscription System, such as the Register of Subscribers or the administration of payments; others imply such elements.¹
4. This document briefly explores the main elements of the implementing procedures for the Subscription System. It draws on the advice of the Standing Group of Legal Experts, as well as on the recommendations from the Friends of the Co-chairs on Access Mechanisms and Payment Rates.

II. REGISTER AND CONFIDENTIALITY

5. The Working Group, at its fifth meeting, recommended to the Co-chairs to 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. It also recommended to improve clarity on who would hold the Register, check on its accuracy and monitor implementation of the Subscription System.²
6. The Standing Group of Legal Experts gave the following legal opinion on confidentiality of the information included in the Register.³

OPINION 5

1. The SGLE noted that there is no generally accepted international legal standard as to what is confidential information.
2. However, 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.
3. The SGLE underscored that the Register should only include other information if it is necessary for the functioning of the system that the Register is a part of. The SMTA should specify which information will be made public.
4. The SGLE further suggested that the Register be maintained and regularly updated according to procedures that need be developed.

7. The Register of Subscribers included in the *Third Draft Revised Standard Material Transfer Agreement*⁴ relates to the information mentioned in this legal opinion, namely full name of Subscribers, their contact details and the date at which the Subscriptions took effect.

¹ [IT/OWG-EFMLS-5/16/Report](#), para. 7.

² [IT/OWG-EFMLS-5/16/Report](#), para. 7.

³ [IT/OWG-EFMLS-6/17/Inf.3](#), Annex 1, Opinion 5.

⁴ [IT/OWG-EFMLS-6/17/3.1](#).

8. It is to be noted that the possible functions of the Register necessarily depend on the features of the Subscription System, both technically and legally. In this sense, its functions could range from purely containing a list of Subscribers, for information purposes, to implying a legal effect of entries in the Register in creating rights and obligations.⁵

9. The main function of the Register of Subscribers included in the *Third Draft Revised Standard Material Transfer Agreement* is to provide publicly accessible information on the names of Subscribers and their terms of Subscription. This follows from the features of the Subscription System provided for in the *Third Draft Revised Standard Material Transfer Agreement*, which mainly establishes a payment modality, rather than creating specific rights for the Subscriber that would go beyond the payment modality.

10. Subscribers, under the *Third Draft Revised Standard Material Transfer Agreement*, are obliged to immediately communicate any changes of the information to the Governing Body, through the Secretary. It is assumed that the Register will be maintained and checked for accuracy by the Secretary, without prejudice to the rights of the Third Party Beneficiary set forth in the Standard Material Transfer Agreement.

11. The Working Group may wish to discuss possible administrative procedures for the operation of the Register, to be adopted by the Governing Body, for clarity and transparency. In this regard, it may wish to consider the functions it envisages for the Register in the context of the Subscription System.

III. ADMINISTRATION OF PAYMENTS

12. In the Subscription System, under the *Third Draft Revised Standard Material Transfer Agreement*, the Subscriber is required to make annual payments by a certain date each year, for the previous calendar year (Article 3 of Annex 3). All payments are to be made in United States dollars into an FAO Trust Fund account, which was established in line with the Treaty. At the same time, the Subscriber has to submit a statement of account to the Secretary by a certain date, laying out information about the basis of such payments.

13. These terms of payment basically follow the provisions of the current Standard Material Transfer Agreement, adapted to the specific requirements of a Subscription System.

14. At its fifth meeting, the Working Group discussed the administration of payments, in order to further facilitate establishing a simple Subscription System that will be easy to use and easy to administer. In its Report, it recommended to the Co-chairs “to consider options for online systems and payments of subscriptions.”⁶

15. The Friends of the Co-chairs Group on Access Mechanisms and Payment Rates (FoCC) discussed the administration of payments in the context of possible payment structures for the Subscription System. One aspect was the collection of payments due under the Subscription System.

16. The FoCC was of the opinion that the Secretariat would have difficulties in carrying out this task with its current level of financial resources and limited human resources. It suggested that one option could be for Contracting Parties to make payments based on annual seed sales in their territory, which the government could find in whatever way they wished, including by collecting payments from seed sellers. It noted, however, that governments may have difficulties to collect payments based on a private law contract, to which they are not a party. Nevertheless,

⁵ See for example the *First Draft Revised Standard Material Transfer Agreement*, [IT/OWG-EFMLS-4/15/3](#), which provided for the possibility of transfers without a Standard Material Transfer Agreement between Subscribers, as long as both were listed on the Register (Articles 3 and 4 of Annex 3). Document [IT/OWG-EFMLS-4/15/4](#), *Commentary on Structural Elements for the Development of a Subscription System*, in Textbox 3, contains further explanations on the possible role of the Register in the Subscription System.

⁶ [IT/OWG-EFMLS-5/16/Report](#), para.7.

the FoCC considered this to be a voluntary modality that individual Contracting Parties may wish to use.⁷

17. In its effort to make the Subscription System attractive for users, the Working Group at its fifth meeting held preliminary discussions on possible online payment systems that could make it easier for the Subscriber to make the required annual payments.

18. When further discussing this matter at its sixth meeting, the Working Group may wish to consider that since neither the Treaty or its Multilateral System, nor the Governing Body, possess legal personality, an online payment system would have to be set-up by drawing on the legal personality of FAO. The Working Group may consequently wish to request the Secretary to further explore this matter with FAO, so that a comprehensive picture of possibilities of online payment systems could be provided by the time the Governing Body meets. This could also include possible linkages to existing tools, such as EasySMTA, and to the Treaty website.

19. In this context, the Working Group may wish to consider that an online payment system could also be coupled with an online reporting modality, so that Subscribers could submit their statements of account before or when making payments.

20. Finally, it might also be important to discuss whether these modalities shall be available to all Recipients or only to Subscribers, in case the Working Group should decide that the revised Standard Material Transfer Agreement shall contain payment options other than the Subscription System.

IV. TRANSFER OF MATERIAL

21. The Working Group, at its previous meetings, discussed the need to reduce tracking or tracing of plant genetic resources for food and agriculture accessed through the Subscription System, as a means to simplify procedures and reduce transaction costs while providing legal and accounting certainty.⁸

22. The need to track and trace primarily follows from obligations of the Subscriber relating to reporting, making payments and further transferring plant genetic resources for food and agriculture accessed through the Subscription System (or plant genetic resources for food and agriculture developed from the material accessed through the Subscription System), including after withdrawal.

23. The degree to which these issues should preferably be dealt with in the Standard Material Transfer Agreement itself or rather be stipulated separately, depends largely on the envisaged features of the Subscription System.⁹

24. Since the Standard Material Transfer Agreement predominantly concerns the transfer of material from the Provider to the Recipient, the relationship between Subscribers, as well as the relationship between a Subscriber and a non-Subscribers could be part of the implementing procedures for the Subscription System.

25. In this sense, the implementing procedures could clarify any difference that the Working Group may decide to make between transfers of materials between Subscribers compared to transfers of materials from a Subscriber to a non-Subscriber. Also, they could stipulate any additional rights that it decides the Subscriber should have, compared to the Recipient under a

⁷ [IT/OWG-EFMLS-6/17/Inf.4](#), *Second Report from the Friends of the Co-chairs Group on Access Mechanisms and Payment Rates*, paras. 14 and 15.

⁸ [IT/OWG-EFMLS-1/14/Report](#), para. 16; [IT/GB-6/15/6 Rev.2](#), *Consolidated Report on the Deliberations of the Ad Hoc Open-Ended Working Group to Enhance the Functioning of the Multilateral System, During the 2014–2015 Biennium*, Addendum.

⁹ The administration of payments, including related reporting, are discussed in Section III of this document.

potential single access option, but which it decides not to include in the text of the revised Standard Material Transfer Agreement itself.¹⁰

26. The Working Group may wish to consider in this regard that the Subscription System provided for in the *Third Draft Revised Standard Material Transfer Agreement* mainly establishes a payment modality, rather than rights for the Subscriber that would go beyond a payment modality. With a view to reduce tracking or tracing of plant genetic resources for food and agriculture accessed through the Subscription System, as a means to simplify procedures and reduce transaction costs while ensuring legal and accounting certainty, the Working Group may wish to consider the modalities of transfers it envisages for the Subscription System, as well as additional elements of the relationships between Subscribers and between Subscribers and non-Subscribers. It may also wish to include in its considerations the discussions it has on the expansion of the coverage.

V. GUIDANCE SOUGHT

27. The Working Group is invited to consider the information contained in this document and request the Co-chairs to prepare, with support of the Secretary, a more comprehensive document for submission to the Seventh Session of the Governing Body, possibly including elements of a draft Resolution on implementing procedures for the Subscription System. A draft Resolution could also address further measures to implement the revised Standard Material Transfer Agreement that are not strictly related to the Subscription System, but that have been discussed by the Working Group, such as exemptions from the obligation to receive material under a Standard Material Transfer Agreement, for example by certain categories of users or in case of restoration of germplasm.

¹⁰ See also [IT/OWG-EFMLS-4/15/3](#), *Draft Revised Standard Material Transfer Agreement*, Annex 3 Article 4 (“Access to and Transfer of Materials Covered by the Subscription”); [IT/OWG-EFMLS-4/15/4](#), *Commentary on Structural Elements for the Development of a Subscription Model/System*, Textbox 3.