



**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

**EXPANSION OF THE ACCESS AND BENEFIT-SHARING PROVISIONS
OF THE TREATY**

Executive Summary

The Working Group decided, at its fifth meeting, to have further discussions on the expansion of the access and benefit-sharing provisions of the Treaty at its sixth meeting. This document provides an overview of the options for expanding the Treaty's crop coverage and of the legal modalities for implementing the expansion. It builds on the recommendations of the Friends of the Co-chairs on the Scope of the Multilateral System and on the advice of the Standing Group of Legal Experts, and takes into account a number of documents that were prepared for previous meetings of the Working Group on this matter. The Working Group is invited to consider the options and legal modalities and to provide guidance on which of them it wishes to recommend to the Governing Body for its further consideration.

I. INTRODUCTION

1. The Working Group had initial discussions on the expansion of the access and benefit-sharing provisions of the Treaty at its previous meetings.¹ Considering the inputs received from Contracting Parties and stakeholders,² as well as information provided in a number of background studies and documents on value and income projections, and on options and modalities of expansion,³ it proposed for its further work, the preparation of a draft instrument extending the crop coverage, in harmony with enhanced benefit-sharing provisions.⁴ By Resolution 1/2015, the Governing Body consequently requested the Working Group to elaborate options for adapting the coverage of the Multilateral System based on different scenarios and income projections.⁵

2. At the fifth meeting, some members of the Working Group were of the view that expanding the scope of Annex I of the Treaty would increase the attractiveness of the Multilateral System, and others felt that expanding the scope of the Multilateral System would require building commitment and trust between Contracting Parties and with stakeholder groups, including by increasing user-based income to the Benefit-sharing Fund.⁶

3. The Working Group accordingly decided to have further discussions on the expansion of the access and benefit-sharing provisions of the Treaty at its sixth meeting.

4. As proposed by the Working Group at its fifth meeting,⁷ the Co-chairs established a Friends of the Co-chairs Group on the Scope of the Multilateral System (FoCC Scope) to map options for adapting the coverage of the Multilateral System. This should include, *inter alia*, consideration of 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. The FoCC Scope was also requested to consider the possibility of an expansion to less than the full scope of the Treaty, for example by including more crops, through an appropriate legal instrument. Finally, it was requested to analyse the legal and political feasibilities of the options, and to describe the conditions that would need to be met.

5. As also recommended by the Working Group, the Co-chairs established the Standing Group of Legal Experts (SGLE) to provide legal opinions on questions arising from the meetings of the Working Group and from the work of the various Friends of the Co-chairs groups.

6. This document summarizes the options for expanding the Treaty’s crop coverage and reviews the legal modalities for doing so. It builds mainly on the recommendations and advice of

¹ [IT/OWG-EFMLS-1/14/Report](#), paras. 14 and 15; [IT/OWG-EFMLS-2/14/Report](#), paras. 16Bis to 19; [IT/OWG-EFMLS-3/15/Report](#), para. 21; [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*, para. 22.

² [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*; [IT/OWG-EFMLS-5/16/Inf.3](#), *Compilation of Submissions from Contracting Parties and Relevant Stakeholders*.

³ See for example, [IT/OWG-EFMLS-2/14/3](#), *Synoptic Study 1: Estimating Income To Be Expected From Possible Changes In The Provisions Governing The Functioning Of The Multilateral System*; [IT/OWG-EFMLS-2/14/4](#), *Policy and Legal Study on the Feasibility and Effects of Changes to the Multilateral System*; [IT/OWG-EFMLS-3/15/Inf.4](#), *Expansion of the Access and Benefit-sharing Provisions of the International Treaty: Legal Options*; [IT/OWG-EFMLS-5/16/5](#), *Enhancing the Functioning of the Multilateral System: Measures Beyond the Elaboration of the Revised Standard Material Transfer Agreement. Note by the Co-Chairs; Identifying Benefit Flows. Studies on the Potential Monetary and Non-Monetary Benefits Arising from the International Treaty on Plant Genetic Resources for Food and Agriculture* (FAO, 2013) (<http://www.fao.org/docrep/019/i3439e/i3439e.pdf>);

⁴ [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*, para. 22.

⁵ [IT/GB-6/15/Report](#), Appendix A, page 1.

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

⁷ [IT/OWG-EFMLS-5/16/Report](#), para. 19.

these two expert groups. It also considers relevant information contained in documents that were prepared for the previous meetings of the Working Group.

II. OPTIONS FOR EXPANDING THE COVERAGE

7. The Working Group has not yet decided which option to expand the access and benefit-sharing provisions of the Treaty it wishes to explore further, and ultimately recommend to the Governing Body for its consideration. In its discussions, the Working Group considered both an expansion to the full scope of the Treaty, to cover all plant genetic resources for food and agriculture, and the possibility of an expansion to a defined list of crops.⁸

8. The FoCC Scope evaluated the advantages and disadvantages of expanding the coverage of the Multilateral System to all plant genetic resources for food and agriculture on the one hand, and by identifying specific crops or crop groups to be included in the Multilateral System, on the other hand.

9. Some of the advantages of an expansion to all plant genetic resources for food and agriculture identified by the FoCC Scope are, that it would lead to the broadest possible basis for access and benefit-sharing, including crop wild relatives; be in line with the full scope of the Treaty (Article 3); avoid lengthy negotiations regarding individual crops; be flexible in relation to changing crop use, food security challenges and technological developments; provide for an inclusive system that would be easier to manage administratively; and make a Subscription System more attractive. Some of the disadvantages would be the need for a clear understanding of the term “plant genetic resources for food and agriculture” and that it could be less likely to be agreed upon in the absence of an effective benefit-sharing system.⁹

10. Advantages of an expansion only to some additional plant genetic resources for food and agriculture identified by the FoCC Scope, on the other hand, included, that it would provide for a stepwise approach, possibly by individual Governing Body decisions; that it might politically be more likely to be agreed by all Contracting Parties; and that there could be a measureable justification for inclusion of certain crops, possibly based on interdependence and other metrics that currently are not contemplated in the Treaty text. Some of the disadvantages identified by the FoCC Scope would be that it may require complex and lengthy negotiations for uncertain limited gains; likely require multiple negotiations; and provide less funding for crops not included in the limited expanded coverage.¹⁰

11. The FoCC Scope recommended that the wider the coverage, the better it would be for Contracting Parties to meet the Sustainable Development Goals related to food security and sustainable agriculture. At the same time, however, the FoCC Scope recognized the potential political constraints involved in the expansion of the coverage and emphasized the need to ensure that the expansion is effectively linked to the benefit-sharing aspects of the Treaty.¹¹

12. In this context, it is noted that the Friends of the Co-chairs on Access Mechanisms and Payment Rates considered the establishment of the Launch Mechanism. The main aim of the Launch Mechanism is to overcome the reluctance of a number of countries, who may only agree to the expansion of the Treaty’s crop coverage after benefit-sharing has been shown to work, and of a number of other countries, who maintain that adequate, user-based income for the Benefit-

⁸ [IT/OWG-EFMLS-2/14/Report](#), para. 18; [IT/OWG-EFMLS-3/15/Report](#), para. 21; [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*, para. 22.

⁹ [IT/OWG-EFMLS-6/17/Inf. 5](#), *Report of the Friends of the Co-Chairs on the Scope of the Multilateral System*, para. 17, Table 1.

¹⁰ [IT/OWG-EFMLS-6/17/Inf. 5](#), *Report of the Friends of the Co-Chairs on the Scope of the Multilateral System*, para. 17, Table 2.

¹¹ [IT/OWG-EFMLS-6/17/Inf. 5](#), *Report of the Friends of the Co-Chairs on the Scope of the Multilateral System*, para. 24.

sharing Fund can only be achieved if and once the Treaty's crop coverage has been expanded, preferably to all plant genetic resources for food and agriculture.¹²

III. LEGAL MODALITIES

13. At its previous meetings, the Working Group considered modalities, by which the Governing Body could decide to expand the Treaty's crop coverage. These are adoption of (1) an amendment of the Treaty under its Articles 23 and 24; and (2) a supplementary agreement to the Treaty, pursuant to Article XIV of the FAO Constitution, such as a protocol.¹³

14. Should the Governing Body decide to expand the Treaty's crop coverage by amending the definition of the scope of the Multilateral System in Article 11 of the Treaty or by amending the list of Annex I, the amendment procedures of Articles 23 and 24 of the Treaty would apply. This would include the options to expand the current list in Annex I, or to remove Annex I, both of which are being discussed by the Working Group.¹⁴

15. The text of any proposed amendment shall be communicated to Contracting Parties by the Secretary at least six months before the session at which it is proposed for adoption. All amendments shall only be made by consensus of the Contracting Parties present at the session of the Governing Body. No exceptional presence quorum would be required. Amendments adopted by the Governing Body are operative until disallowed by the Council of FAO, in case it finds that such amendments are inconsistent with the objectives and purposes of FAO or the provisions of the FAO Constitution. The Council may also decide to refer the amendments to the FAO Conference, which shall have the same power.¹⁵

16. According to the SGLE opinion, such amendments could consequently 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. The SGLE did not see any feasible way of avoiding this situation, if not all Contracting Parties ratify, accept or approve the amendments, and suggested that any amendments include clear provisions dealing with this situation.¹⁶

17. The SGLE also pointed out that the Governing Body could adopt a decision to set in motion a process to amend only specific provisions of the Treaty. However, this would not limit the right of a Contracting Party to propose any other amendment to the Treaty under its Article 23.1 at any time.¹⁷

18. Should the Governing Body, on the other hand, rather decide to expand the Treaty's crop coverage by adopting a supplementary agreement to the Treaty, for example a protocol, it could

¹² [IT/OWG-EFMLS-6/17/Inf.4](#), *Report of the Friends of the Co-chairs on Access Mechanisms and Payment Rates*, paras. 25-34.

¹³ [IT/OWG-EFMLS-2/14/Report](#), para. 17; [IT/OWG-EFMLS-3/15/Report](#), para. 21; [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*, para. 22.

¹⁴ [IT/OWG-EFMLS-2/14/4](#), *Policy and Legal Study on the Feasibility and Effects of Changes to the Multilateral System*, paras. 56-70; [IT/OWG-EFMLS-3/15/Inf.4](#), *Expansion of the Access and Benefit-sharing Provisions of the International Treaty: Legal Options*, paras. 21-24.

¹⁵ [IT/OWG-EFMLS-2/14/4](#), *Policy and Legal Study on the Feasibility and Effects of Changes to the Multilateral System*, para. 58; [IT/OWG-EFMLS-3/15/Inf.4](#), *Expansion of the Access and Benefit-sharing Provisions of the International Treaty: Legal Options*, para. 23.

¹⁶ [IT/OWG-EFMLS-6/17/Inf.3 Add.1](#), *Report of the Standing Group of Legal Experts: outcomes of the second meeting*, Annex 1, Opinion 8.

¹⁷ [IT/OWG-EFMLS-6/17/Inf.3 Add.1](#), *Report of the Standing Group of Legal Experts: outcomes of the second meeting*, Annex 1, Opinion 7.

do so on the basis of Article XIV of the FAO Constitution, while keeping the text of the Treaty unchanged.¹⁸

19. According to Article XIV of the FAO Constitution, a supplementary agreement may be proposed by a technical meeting or conference comprising Member Nations, which in the view of the Standing Group of Legal Experts could be either the Governing Body itself or a group of Contracting Parties.¹⁹ The agreed text of the supplementary agreement would be submitted to the Council for adoption, by at least two thirds of its membership. The supplementary agreement will enter into force as provided for therein. It could also be applied provisionally, pending its entry into force, if so provided in the agreement itself or agreed by the negotiating States.²⁰

20. The SGLE considered that a supplementary agreement could provide that the provisions of the Multilateral System apply to plant genetic resources for food and agriculture not included in Annex I to the Treaty; alternatively, it could establish a system similar to the Multilateral System for such plant genetic resources for food and agriculture.²¹ In both cases, neither the definition of the Multilateral System in the Treaty, nor Annex I to the Treaty, would be amended.

21. The SGLE further considered that the expansion of the provisions of the Multilateral System to cover plant genetic resources for food and agriculture not listed in Annex I would not raise any concerns of consistency with the objectives of the Convention on Biological Diversity and its Nagoya Protocol.²²

22. Based on an analysis of the advantages and disadvantages of amending the Treaty and of adopting a supplementary agreement, the FoCC Scope, in its recommendations to the Co-chairs, opined that the most promising and simplest solution to expand the Treaty's crop coverage would be the development and adoption of a protocol under the Treaty, together with other measures to ensure enhanced monetary benefit-sharing, such as the adoption of a revised Standard Material Transfer Agreement.²³

IV. GUIDANCE SOUGHT

23. The Working Group is invited to consider the information contained in this document and to decide, which of the options to expand the benefit-sharing provisions of the Treaty, as well as which of the legal modalities, it wishes to recommend to the Governing Body for its further consideration.

24. The Working Group is also invited to provide guidance to the Co-Chairs for any additional documents it may wish to be prepared for the consideration of the Governing Body at its Seventh Session, including any other inter-sessional processes that may be useful in ensuring the effective consideration of the issue by the Governing Body.

¹⁸ [IT/OWG-EFMLS-2/14/4](#), *Policy and Legal Study on the Feasibility and Effects of Changes to the Multilateral System*, paras. 60-65; [IT/OWG-EFMLS-3/15/Inf.4](#), *Expansion of the Access and Benefit-sharing Provisions of the International Treaty: Legal Options*, paras. 25-41. The SGLE is of the opinion that in the absence of any express prohibition in the Treaty, a supplementary agreement could be adopted, consistent with international law and precedents, and as provided for in Article XIV of the FAO Constitution ([IT/OWG-EFMLS-6/17/Inf.3 Add.1](#), *Report of the Standing Group of Legal Experts: outcomes of the second meeting*, Annex 1, Opinion 7).

¹⁹ [IT/OWG-EFMLS-6/17/Inf.3 Add.1](#), *Report of the Standing Group of Legal Experts: outcomes of the second meeting*, Annex 1, Opinion 7, footnote 3.

²⁰ [IT/OWG-EFMLS-2/14/4](#), *Policy and Legal Study on the Feasibility and Effects of Changes to the Multilateral System*, paras. 60-62; [IT/OWG-EFMLS-3/15/Inf.4](#), *Expansion of the Access and Benefit-sharing Provisions of the International Treaty: Legal Options*, paras. 35-37, 40-41.

²¹ [IT/OWG-EFMLS-6/17/Inf.3 Add.1](#), *Report of the Standing Group of Legal Experts: outcomes of the second meeting*, Annex 1, Opinion 7, para. 6.

²² [IT/OWG-EFMLS-6/17/Inf.3 Add.1](#), *Report of the Standing Group of Legal Experts: outcomes of the second meeting*, Annex 1, Opinion 7, para. 8.

²³ [IT/OWG-EFMLS-6/17/Inf. 5](#), *Report of the Friends of the Co-Chairs on the Scope of the Multilateral System*, para. 24.

25. Finally, the Working Group may wish to ensure consistency among the various draft texts it will prepare for consideration of the Governing Body at its Seventh Session.