

August 2017



Food and Agriculture  
Organization of the  
United Nations



**The International Treaty**  
ON PLANT GENETIC RESOURCES  
FOR FOOD AND AGRICULTURE

**INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES  
FOR FOOD AND AGRICULTURE**

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

**Rome, Italy, 5–7 September 2017**

**DRAFT CO-CHAIRS' PROPOSAL FROM THE OUTCOMES OF THE  
MEETINGS OF THE *AD HOC* OPEN-ENDED WORKING GROUP TO  
ENHANCE THE FUNCTIONING OF THE MULTILATERAL SYSTEM**

**Executive Summary**

This document contains a draft of the Co-chairs' proposals from the outcomes of the deliberations of the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System (Working Group) during the 2016-2017 biennium to the Governing Body.

This document is presented as a working document to the seventh meeting of the Working Group, in order to provide guidance to the discussions. The proceedings and conclusions reached by the Working Group in this meeting will be incorporated in the meeting report, whereas the Co-chairs will consider the views of the Working Group at this meeting when finalizing their draft proposals to the Governing Body. They will remain solely responsible for their document to the Seventh Session of the Governing Body.

The Co-chairs recommend to the Working Group to develop a draft Resolution for consideration and adoption by the Governing Body at its Seventh Session, or to mandate the Co-chairs to do so, based on the outcomes of this meeting.

## I. INTRODUCTION

1. The Governing Body has given the mandate to the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System (Working Group) to develop a package of measures for consideration by the Governing Body, in order to increase user-based payments and contributions to the Benefit-Sharing Fund in a sustainable and predictable long-term manner, and to enhance the functioning of the Multilateral System by additional measures. For more details see the two relevant Governing Body Resolutions 2/2013 and 1/2015.

2. The Working Group has met seven times since its establishment in 2013, considered studies coordinated by the Secretariat, and took into account the reports of a number of expert groups that the Co-chairs had established, based on Resolution 1/2015 and a request by the Working Group. It also took note of the advice of the Standing Group of Legal Experts established by the Co-chairs following a recommendation by the Working Group at its fifth meeting, in which specialists from all regions were represented. The Working Group has made considerable progress in outlining possible improvements to the functioning of the Multilateral System, including by developing a draft text for a new and revised Standard Material Transfer Agreement (SMTA). The Report of the sixth meeting of the Working Group, which has been made available to the Governing Body in document IT/GB-7/17/7, *Report of the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System*, contains the draft revised SMTA, as proposed by the Working Group to the Governing Body.

3. Furthermore, the Co-chairs received advice from the participants in a recent informal meeting, bringing together participants with a Contracting Party background as well as participants from various stakeholder groups. The meeting was hosted by the Government of Switzerland and organized by the Co-chairs at the recommendation of the Working Group. It allowed the Co-chairs to directly engage private sector companies in its deliberations and to be informed by their views and positions, in particular regarding the conditions for the successful establishment of the Subscription System, issues of legal concern, and the outline of a growth plan as detailed below.

## II. THE PACKAGE OF MEASURES

4. The Working Group was requested to propose to the Governing Body a package of measures for the enhancement of the Multilateral System which aims at (1) **enhancing benefit-sharing** – through an agreement on arrangements for an adequate, sustainable flow of contributions to the Benefit-Sharing Fund (user-based and others), and (2) **enhancing access** – through an agreement on how to expand the crop coverage of the Multilateral System.

5. The Co-chairs have noted that the Contracting Parties and stakeholder groups share a common vision on the need to strengthen the Treaty and its Multilateral System. Taking this notion as a perspective, the Co-Chairs strongly believe that a negotiation breakthrough is possible in the Seventh Session of the Governing Body, which should be able to bridge between any remaining different positions of the Contracting Parties and stakeholder groups. This should be followed by a short and effective process to rapidly move into implementation of the enhanced Multilateral System.

6. In this document the Co-chairs wish to highlight major features of the package of measures that has been developed by the Working Group and to provide their recommendations to the Governing Body. These features have been elaborated in the draft revised SMTA, which still contains many unresolved issues, that has been submitted to the Governing Body in conjunction with the report of the Working Group in document IT/GB-7/17/7, *Report of the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System*. In addition, the Co-chairs have based their recommendations on discussions in the Working Group and in other forums on the outlines of a launch mechanism for the successful introduction of the package of measures.

7. The elements of a package of measures that are discussed in more detail below in this document include

- the mechanisms to access PGRFA from the Multilateral System, in particular through the new Subscription System
- the possible rates under which material can be accessed from the Multilateral System
- conditions for the withdrawal from the Subscription System and a possible expiration of obligations
- issues of legal clarity
- a process for the expansion of the scope of the Multilateral System, and
- the relation to the use of digital sequence information.

8. A number of these elements will have to be incorporated in the new and revised SMTA, whereas other elements require separate decision-making by the Governing Body. The Co-chairs anticipate that – to that effect - the Governing Body may wish to consider and adopt a Resolution regarding the package of measures in which a new and revised SMTA and the Growth Plan (see below Chapter IV) have been incorporated.

9. What follows below are the recommendations of the Co-chairs, having heard the views and positions of the members of the Working Group, Contracting Parties and stakeholder representatives. Whereas the Working Group has not necessarily agreed on these issues or on the recommendations of the Co-chairs, the Co-chairs find it essential to point out the way forward to a resolution of remaining outstanding issues and a successful conclusion of the negotiations by the Governing Body. To this end, the Co-chairs have attempted to find compromise between various positions taken in the last biennium by Contracting Parties and stakeholders.

### III. RECOMMENDATIONS FOR THE NEW AND REVISED SMTA

#### A. MECHANISMS TO ACCESS PGRFA FROM THE MLS

10. The Governing Body has noted that no user-based payments following from the obligations of the current SMTA have flown to the Benefit-Sharing Fund. A major explanation for this development has been the fact that Article 6.8 of the current SMTA provides for voluntary payments on a Product that is a Plant Genetic Resource for Food and Agriculture (PGRFA) and that incorporates material from the Multilateral System where that Product is available without restriction to others for further research and breeding. Therefore, the revised newly adopted SMTA when adopted should only provide access to PGRFA under conditions of mandatory payments. Article 6.8 of the current SMTA should be amended to that effect.

11. In line with the decision of the Governing Body to elaborate a full draft revised SMTA focusing especially on the development of a Subscription System, the Co-chairs propose that the new and revised SMTA should contain provisions creating such Subscription System under conditions that make it attractive to potential users. In addition, the Co-chairs propose that the new and revised SMTA facilitates occasional access to small numbers of material in the Multilateral System for users that have not subscribed to the Subscription System. The Co-chairs recommend to set a maximum of 10 accessions on a yearly basis. The provisions of the Subscription System have been mainly incorporated in Annex 3 to the draft revised SMTA, whereas occasional use should be facilitated through revised Articles 6.7 and 6.8. Stakeholders representing major users of material in the Multilateral System have been consulted to verify the assumptions regarding attractiveness of access reflected above, and have individually and informally expressed that a Subscription System as currently elaborated as part of a full package of measures may attract major interest and use by the private sector.

12. A differentiation in payment rates has been foreseen on Products that are not available and that are available without restriction to others for further research and breeding respectively. For this purpose, the Co-chairs propose that Articles 6.7 and 6.8 be modified to allow a

differentiation between payments for Products that are not available and those that are available without restriction for further research and breeding, respectively.

13. For reasons of cost efficiency, payments by any subscriber that should have to pay less than a fixed amount over a certain year (for example less than USD 500) should preferably be waived.

14. The Co-chairs see neither reason nor feasibility to establish different rates for different types of users. All users that earn an income should be expected to be able to pay regardless their legal status or geographical basis, notwithstanding the above suggestion for a waiver over small turnovers.

### ***B. A SYSTEM OF RATES UNDER WHICH PGRFA CAN BE ACCESSED FROM THE MLS***

15. Based on the advice obtained, the Co-chairs propose to develop a system of rates in which the rate for access to the Subscription System functions as a starting point and reference. Consulted stakeholders of the private sector suggested that an annual Subscription System rate of 0.01% on all sales (total portfolio) of Annex I crops by a company might be attractive to a major number of large users (see also the ISF document). If this reference fee would be set too high, the Multilateral System might attract only few users and little use, rendering the expected total income sub-optimal, noting that users of PGRFA have no obligation to access such PGRFA from the Multilateral System. Under unattractive conditions users might simply abstain from use of PGRFA from the Multilateral System.

16. Furthermore, the Co-chairs believe that an option to subscribe to only some crops or crop categories in the Multilateral System would make the administration of access to PGRFA from the Multilateral System complex. However, since this would mean by consequence that a subscriber pays over its total turnover of crops in Annex I the reference fee referred to above should remain attractively low.

17. In order to make the Subscription System the most attractive access mechanism, the fee for occasional access under Articles 6.7 and 6.8 should be significantly higher, whether for Products that are available or those that are not available without restriction to others for further research and breeding. The fee for Products available without further restrictions to others for further research and breeding could be best set at a rate that is 10 times higher than the reference rate, whereas the fee for Products not available without restrictions could then be set at 100 times higher.

18. The Co-chairs wish to stress that predictions regarding the amount of mandatory user-based payments foresee that not all expectations regarding income that should accrue to the Benefit-Sharing Fund can be met from such source and that additional income might still be sought from other sources. This has also been addressed below under the Growth Plan.

### ***C. WITHDRAWAL FROM THE SUBSCRIPTION SYSTEM***

19. The establishment of a Subscription System should also entail an option to withdraw from the Subscription System at a future point in time, in line with private and public sector practice.

20. As a default, the subscription continues, until the recipient/subscriber voluntarily withdraws from it by giving written notice. The subscriber cannot withdraw from the subscription before a minimum period has passed. The Co-chairs propose to set this minimum period at 10 years, in line with breeding practices and common contractual arrangements in the breeding sector.

21. 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 Co-chairs propose to set this period at 10 years. If the Governing Body would decide on a shorter or longer minimum

period for subscription, it would be logical to set the period over which payment obligations continue longer or shorter respectively.

22. All other conditions contained in the new and revised SMTA shall continue to apply to the subscriber.

23. Notwithstanding the above, a specific provision will have to be agreed with respect to PGRFA under Development. Such provision should envisage that after a fixed number of years (for example 20 years), in addition to benefit-sharing clauses expiring, a range of other clauses should also cease to apply, but only with respect to PGRFA under Development. Thus, after a fixed number of years, recipients could transfer/license PGRFA under Development that they have developed with fewer, or no, ‘encumbrances’ from the SMTA. In this way, potentially, the recipient could, after a fixed number of years, transfer or license PGRFA under Development without passing on the benefit sharing obligations, or restrictions on the uses that can be made of the materials. The Co-chairs propose to set this period at 20 years, in line with the ongoing benefit-sharing obligations. The Co-chairs propose that only Article 6.1 of the SMTA will then continue to apply for all PGRFA under Development.

#### ***D. EXPIRATION OF OBLIGATIONS OF USERS SEEKING OCCASIONAL ACCESS***

24. The Governing Body has requested the Working Group to submit a package of measures in which a Subscription System forms an attractive mechanism of access. The Co-chairs propose, in order to render the subscription most attractive to users, not to create an expiration of obligations of users having gained access to material through Articles 6.7 and 6.8, except for PGRFA under Development, for which the same rules as proposed for PGRFA under Development derived from material accessed under the Subscription System should apply. Such expiration of obligations is common practice in the breeding sector.

25. Expiration of obligations to a large extent also solves another issue raised by users regarding the current SMTA. Users often argued that the provisions of the SMTA should automatically expire and no longer apply to any PGRFA under Development that has undergone at least five outcrosses and contains no trait of value. An expiration of obligations as proposed above for PGRFA under Development would provide an alternative solution for this perceived problem of “eternal” obligations.

#### ***E. FURTHER ISSUES OF LEGAL CLARITY***

26. The definition of the term “sales” in the current SMTA entails that for the purpose of calculating benefit-sharing payments sales include the value generated beyond the recipient that is the signatory of the SMTA. The term “sales” should mean the gross income resulting from the commercialization of a Product or Products, including from the sales of seeds, plant materials, and income in the form of license and technology fees, received by the Recipient (including its affiliates). The Co-chairs have requested the Standing Group of Legal Experts to propose a legally sound definition in advance of the Seventh Session of the Governing Body.

27. The Governing Body should be able to decide to change the terms of subscriptions in the future. But if it does so, the revised terms should only apply to new subscribers, and not to earlier subscribers without their consent. That means that the ‘Subscription Terms’ of the new and revised SMTA would not be affected by later decisions of the Governing Body, and they would continue, unless the subscriber withdraws from its subscription, and re-subscribes under the new subscription terms.

#### IV. EXPANSION OF THE SCOPE OF THE MULTILATERAL SYSTEM, “GROWTH PLAN”

28. In principle, the Working Group appears to agree on a revision of the scope of the Multilateral System, as part of the package of measures. To meet the conditions proposed by various members of the Working Group, the Co-chairs suggest a staged approach as reflected in the “Growth Plan”. The Growth Plan would form a compromise between the different positions held in the Working Group. The Working Group discussed the desirability and feasibility of a launch mechanism for the implementation of the package of measures that is currently negotiated.

29. A more detailed proposal, called the “Growth Plan”, is accordingly proposed by the Co-chairs, based on informal discussions with Contracting Party representatives and stakeholders, and is presented in the box below. The term Growth Plan is chosen to indicate a gradual and staged implementation of the foreseen package of measures. The Growth Plan should become effective from a particular date to be decided by the Governing Body.

30. If the Governing Body decides to adopt the Growth Plan, it may do so through a Resolution that would adopt (1) the new and revised SMTA, (2) a process for amending Annex I of the Treaty to (a) add specific crops to the list, (b) give the Governing Body the capacity to expand the Multilateral System in the future.

31. The proposal by the government of Switzerland refers to an expansion of the scope of the Multilateral System through an amendment of Annex I and could be taken into account in the considerations of the Growth Plan.

1. Companies and other users interested in becoming subscribers of the Subscription System would be given a period of one year after a date to be set by the Governing Body to declare their willingness to sign on to the Subscription System. The new and revised SMTA containing the Subscription System as an access mechanism would automatically become effective, once companies that represent 30% of global seed sales of crops contained in the Multilateral System (i.e. listed in Annex I) sign on to the Subscription System. The Bureau of the Governing Body with support from the Secretariat would have to monitor when such 30% threshold is reached. The new and revised SMTA will thereafter apply to all users seeking access to material in the Multilateral System.
2. The users that subscribe first, i.e. within the initial period of one year, may be granted first mover advantages. These advantages could be further discussed.
3. At the same time that the Governing Body adopts the new and revised SMTA, it should decide on a process for amending Annex I of the Treaty. The amended Annex I would (1) delegate the power of future expansion of the Multilateral System to the Governing Body, and (2) include a list with a first set of specific crops. The decision of the Governing Body to adopt a process for the amendment of Annex I would generate confidence on the part of prospective subscribers of the clear intention of Contracting Parties.
4. A time limit, for example six years after adoption of the amendment by the Governing Body, should be set for achieving the number of ratifications needed for the entry into force of the Treaty amendment enlarging the scope of the Multilateral System. If the minimum threshold of ratifications is not reached within that period, users that have subscribed under the new and revised SMTA should be allowed to receive and use materials under their subscription for the crops in Annex I listed at that time, or opt out of their subscription and return to access under Articles 6.7 and 6.8 of the new and revised SMTA, providing access on an occasional basis.
5. Future expansion of the Multilateral System will be linked to proof of predictable flow of significant financial resources into the Benefit-Sharing Fund of the Multilateral System. It would be useful for users, in particular subscribers, to provide feedback to the Governing Body about which crops should be added in the future. Other considerations or criteria could also be important for decision-making by the Governing Body on further expansion.
6. The new provisions would be added in Annex I, whereas no provisions of the Treaty would need to be revised, and the amendment would follow the procedures foreseen in Articles 23 and 24 of the Treaty.
7. Clear and up-to-date information would be needed regarding inclusion of and access to material that is *de facto* in the Multilateral System, e.g. by publishing lists of materials that are in the Multilateral System through the Treaty website; and by positive response of providers to requests for accessions. After six years, a certain amount of additional PGRFA should have been placed in the Multilateral System and be made effectively available by Contracting Parties, for example 10% of all collections listed in the 2010 State of the World's Plant Genetic Resources for Food and Agriculture. If certain Contracting Parties would not contribute to inclusion and access as described above, stakeholders in those Contracting Parties could be excluded from being able to apply to grants under the Benefit-sharing Fund.
8. Contracting Parties should pledge a certain amount of funds for the next six years by Contracting Parties as voluntary contributions to the Benefit-Sharing Fund.
9. A review of the Growth Plan should be undertaken by the Governing Body six years after its adoption.

## V. DIGITAL SEQUENCE INFORMATION

32. The Governing Body requested the Working Group, among other matters, to consider the issues regarding genetic information associated with the material accessed from the Multilateral System. In the Sixth Session of the Governing Body, the Secretary of the Treaty and others raised the issue of the potential impact of the use of genetic sequence data not linked to access to the genetic material from which the genetic sequence data are derived. The Co-chairs of the Working Group believe this issue is also of relevance for the discussions in the Governing Body of the Treaty.

33. Related discussions have emerged in other relevant platforms. The Co-chairs refer to efforts currently undertaken in the framework of the WHO Pandemic Influenza Preparedness (PIP) framework, the Convention on Biological Diversity, and the FAO Commission on Genetic Resources for Food and Agriculture.

34. At this time, the Governing Body is seeking to enhance the functioning of the Multilateral System, and in this context, the feasibility of a Subscription System is being considered, in particular in the work of the

35. Working Group. If in future such a Subscription System would be adopted, the consequences of the use of PGRFA Genetic Sequence Data in further product development by third parties would be much easier to manage. Since the subscriber gains access to plant genetic resources for food and agriculture (of a given crop) in the Multilateral System, and pays a benefit-sharing fee over all its products, it is no longer relevant how such new end-products would have been developed and if PGRFA Genetic Sequence Data would have been used for such purpose.

36. The Co-chairs recommend the Governing Body to collaborate closely with the Convention on Biological Diversity and the FAO Commission on Genetic Resources for Food and Agriculture in order to solve the outstanding issues regarding the governance of digital sequence information.