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The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

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

Geneva, Switzerland, 12-14 July 2016

REPORT

ITEM 1. OPENING OF THE SESSION

1. At its Sixth Session, the Governing Body decided to extend the mandate of the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing through Resolution 1/2015. The fifth meeting of the Working Group was held in Geneva, Switzerland, from 12 to 14 July 2016.
2. Bert Visser, Co-Chairperson of the Working Group, provided a brief summary of the work undertaken since the Sixth Session of the Governing Body. Modesto Fernandez, out-going Co-Chairperson, provided a statement on behalf of the Co-Chairs presenting their vision on the way forward to enhance the functioning of the Multilateral System and the Treaty in general.¹

ITEM 2. ELECTION OF CO-CHAIRPERSON

3. Upon the retirement of Mr Modesto Fernandez, the Working Group elected Mr Javad Mozafari (Iran) as Co-Chairperson.

ITEM 3. ADOPTION OF AGENDA

4. The Working Group adopted its agenda, as given in *Appendix 1*.

¹ The full statement is given in *Appendix 2* to this Report.

ITEM 4. ELABORATION OF A FULL DRAFT REVISED STANDARD MATERIAL TRANSFER AGREEMENT FOCUSING ESPECIALLY ON THE DEVELOPMENT OF A SUBSCRIPTION SYSTEM

5. The Working Group considered the document IT/OWG-EFMLS-5/16/3, *Second draft revised Standard Material Transfer Agreement: Co-Chairs' proposal*. It agreed to work on the basis of this text and in a preliminary reading identified Articles of the SMTA where there are no major problems that still need to be addressed and those where some technical and formulation matters need to be addressed. These were recorded by the Secretariat for further consideration.

6. The Working Group then focused on the development of the Subscription System. It considered the need to improve the placement of the Subscription System within the structure of the SMTA to give the correct prominence to the Subscription System within the revised SMTA.

7. It provided 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.

8. The Working Group agreed not to delete Articles 6.7, 6.8 of the current SMTA at this stage, but to discuss

- 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.
9. 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 need to be resolved at the next meeting of the Working Group.
10. The Working Group recognized that currently there is no consistent practice regarding the restoration of material to the provider or the competent authority of the territory from which they were originally collected. It recalled the opinion of the *Ad Hoc* Technical Advisory Committee on the Standard Material Transfer Agreement and the Multilateral System and agreed to seek legal advice and bring the matter to the attention of the Governing Body.
11. The Working Group recommended to further consider the need and practicability of information requirements in Annex 1 of the revised SMTA.
12. 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.
13. The Working Group recalled that Resolution 1/2015 requests it to consider issues regarding genetic information associated with the material accessed from the Multilateral System. It considered whether to await policy developments at the CBD or to recommend the Governing Body to take action. It had an initial exchange of views on whether to expand reporting obligations of Recipients under the SMTA beyond descriptive information and whether genetic information could function as a form of leakage out of the Multilateral System. The Working Group decided to contact the Scientific Advisory Committee on the Global Information System on these issues. It requested the Secretariat to prepare an information document for its next meeting.

ITEM 5. ENHANCING THE FUNCTIONING OF THE MULTILATERAL SYSTEM: MEASURES BEYOND THE ELABORATION OF THE FULL DRAFT REVISED STANDARD MATERIAL TRANSFER AGREEMENT

14. The Working Group considered a number of measures to enhance the functioning of the Multilateral System that go beyond the elaboration of the full draft revised SMTA, including with regard to the scope of the Multilateral System, the Funding Strategy, and the Global Information System, as well the relationship with the implementation of the Nagoya Protocol.
15. The Working Group emphasized the importance of enhancing the functioning of the Funding Strategy during the biennium, and in particular to consider the role of the Benefit-sharing Fund in the context of the wider Funding Strategy. The Working Group considered it important that the Governing Body at its seventh session will discuss contributions by Contracting Parties to the Benefit-sharing Fund vis-à-vis user-based income, and improve resource mobilization and the execution of the project cycles. It recognized the importance of liaising with the *Ad Hoc* Advisory Committee on the Funding Strategy and welcomed the opportunity to interact with it when they meet back to back in November.
16. The Working Group considered the scope of the Multilateral System vis-à-vis the scope of the Treaty. Some delegations thought expanding the scope of Annex I would increase the attractiveness of the Multilateral System, other delegations thought 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. The Working Group noted that it would have a further discussion on this matter at its sixth meeting. This will include exploring launch mechanisms for a new SMTA. The Working Group is committed to explore additional mechanisms for increasing benefit-sharing and for increasing access, including a possible buy-in mechanism.

ITEM 6. PREPARATIONS FOR THE SIXTH MEETING OF THE WORKING GROUP

17. The Working Group discussed preparations for its sixth meeting. It recommended to the Co-Chairs to request the Friends of the Co-Chairs groups on a termination clause and on access mechanisms and payment rates to conclude their work and report in time for its next meeting.

18. The Working Group recommended to the Co-Chairs to establish a standing group of legal experts that will be called upon to provide a legal opinion on questions arising from this meeting and the work of the Friends of the Co-Chairs groups. The Regional groups were requested to provide suggestions for a regional representative by 1 August 2016. The Working Group highlighted the need for adequate expertise and involvement of the FAO Legal Office.

19. The Working Group requested the Co-Chairs to consider establishing a further Friends of the Co-Chairs group on the scope of the Multilateral System to map options that the Working Group could consider at its sixth meeting.

20. The Working Group invited Contracting Parties and stakeholders to submit inputs on matters to be discussed at its sixth meeting. It requested the Regional Groups to enable consultations amongst Contracting Parties during the intersessional period in preparation for the sixth meeting, including through support by the Secretariat, if needed.

ITEM 7. OTHER BUSINESS

21. At the end of the meeting, the Secretary, Mr. Shakeel Bhatti, informed the Working Group that he had recently decided to take up new responsibilities and career development opportunities outside of the Organization. He had therefore resigned from his function so this was the last Working Group meeting that he facilitated together with his team as the Secretary of the Governing Body. The Working Group thanked him for the excellent work carried out for the past nine years and wished him the best of success on his future professional and personal life.

ITEM 8. ADOPTION OF THE REPORT

22. The Working Group adopted the Report of its fifth meeting.

*Appendix I***FIFTH MEETING OF THE *AD-HOC* OPEN-ENDED WORKING GROUP TO
ENHANCE THE FUNCTIONING OF THE MULTILATERAL SYSTEM****Geneva, Switzerland, 12-14 July 2016****AGENDA**

1. Opening of the meeting
2. Election of the Co-Chair
3. Adoption of the agenda and time table
4. Elaboration of a full draft revised Standard Material Transfer Agreement focusing especially on the development of a Subscription System
5. Enhancing the functioning of the Multilateral System: measures beyond the elaboration of the full draft revised Standard Material Transfer Agreement
6. Preparations for the sixth meeting of the Working Group
7. Other business
8. Adoption of the report

*Appendix 2***STATEMENT BY MR MODESTO FERNÁNDEZ, OUTGOING CO-CHAIR OF THE AD-HOC OPEN-ENDED WORKING GROUP TO ENHANCE THE FUNCTIONING OF THE MULTILATERAL SYSTEM**

The mandate given to this Working Group by the 6th Session of the Governing Body in 2015 to continue, during the 2016-2017 two-year period, the work to enhance the Multilateral System, was based on three key factors: 1) the ratification of the absence of contributions to the Benefit-sharing Fund of the Treaty, 2) the positive results achieved by this same Working Group in the previous two-year period (2014-2015), and 3) the sense of urgency perceived by the Contracting Parties to solve the structural problems of our International Treaty.

This mandate from the Governing Body requires a commitment to the Working Group and leads us to ask: What do we actually want to achieve by the end of the 2016-2017 two-year period? Are we clear about the end product we want to achieve?

The proposal to enhance the Multilateral System that we will recommend to the Governing Body next year cannot be isolated from the Treaty process as a whole, viewed as an inseparable unit, but with a Multilateral System which is the visible part of the iceberg, at the same time as constituting the only international tool which can provide an admittedly incomplete response on the issue of access and benefit-sharing for genetic resources in general. We might ask whether we are really focusing on an analysis of how the Treaty will operate in the future and, above all, whether it will meet the expectations of the Contracting Parties.

Access and Benefit-sharing is an inseparable dichotomy, which we are responsible for improving and really making work for the benefit of all the Contracting Parties, to help solve the major problems faced by farmers with the consequences of climate change and, finally, with the undertaking to contribute to world food security in the context of the Sustainable Development Goals up to 2030, adopted by the United Nations.

Considering that towards the end of the 20th century, at the start of the review process of the International Undertaking on Plant Genetic Resources for Food and Agriculture of FAO, the idea of some of the countries at that time was that this process could be regarded as a Protocol for the Convention on Biological Diversity, which at that time had recently been adopted. However, the complexities and interactions of plant genetic resources for food and agriculture were able to convince the negotiators that this problem could not be solved simply on an environmental level, given the characteristics involved of biologically diverse species, but that at the same time they are responsible for feeding humanity, and that they are closely linked to the economic activities of both developing and developed countries, as well as being the subject of trade and possible intellectual property protection.

The Treaty founders took the wise decision to set up an independent, multilateral, international tool to try to identify the mechanisms and routes that would resolve these complex issues.

In its report to the Sixth Session of the Governing Body, the fourth meeting of this Working Group emphasized that the structural problems of the Multilateral System cannot be solved simply by a review of the Standard Material Transfer Agreement, and that the failure to solve these structural problems would jeopardize the Treaty as a whole. This is a warning that it will not be possible to continue postponing this solution every two years. In my opinion, we are at a critical point and we should make the most of this opportunity.

The confidence placed by the Governing Body in this Working Group, given a mandate to enhance the most visible and complex mechanism of the Treaty, creates a commitment for all of us and leads me to ask: Could we go beyond the mandate given by the Governing Body and make sound proposals for changes for the Seventh Session of the Governing Body? What would be the risks and benefits of this? Furthermore, non-action no longer appears to be an alternative for the Treaty and could signal a reduction in the future priority accorded it by the vast majority of our Contracting Parties.

I would finally like to mention the basis for the Multilateral System, which is Annex I. Those of us who took part in the adoption process of the Treaty are aware of how long and traumatic that process was and of the policy reasons, sometimes unrelated to the plant genetic resources themselves, which resulted in its limitation. The Treaty was conceived with universal scope: all plant genetic resources for Food and Agriculture.

We should be ready to advise the Seventh Session of the Governing Body appropriately on the possible legal changes that might be required to enhance the Multilateral System and also the Treaty itself, so that it is a simple consensus process to resolve the structural problems we know the International Treaty has.

To conclude, I would like to express my gratitude for the confidence placed in me by my Region, Latin America and the Caribbean, and by the Group of 77 to represent them during this time. I would also like to express my gratitude for the support I have received in my work and the respect and confidence I have always had from the other regions. Finally, I am indebted to our very efficient Secretariat that facilitates our meetings and obviously to my colleague Dr. Bert Visser with whom it has always been a pleasure to work, and who I hope will continue to receive support along with the new Co-Chair who will be elected by you today.

Many thanks

*Appendix 3***LIST OF PARTICIPANTS****AFRICA****Mr Pierre DU PLESSIS**

ABS Expert
 Ministry of Environment and Tourism (MET)
 Windhoek
Namibia
 E-mail: pierre.sadc@gmail.com

Mr John Wasswa MULUMBA

Curator Entebbe Botanic Gardens
 National Agricultural Research Organization (NARO)
 Plot 2-4 Barkeley Road
 Entebbe, **Uganda**
 Tel: +256 414320638
 Fax: +256 414321070
 E-mail: jwmulumba@yahoo.com

M. Amar TAHIRI

Chef, Division de Contrôle des Semences et Plants
 Office National de Sécurité Sanitaire des produits alimentaires (ONSSA)
 Ministère de l'agriculture et de la pêche maritime
 BP 1308 Rabat, **Maroc**
 Tel: +212 537771085/ + 212 6 62 60 25 07
 GSM: + 212 6 73 99 78 09
 Fax: + 212 5 37 77 98 52
 E-mail: amar.tahiri@gmail.com

Mr Kudzai KUSENA

Curator
 Genetic Resources and Biotechnology Institute
 Fifth Street Extension
 PO Box CY 550
 Causeway, Harare, **Zimbabwe**
 Tel: +263 4 704531 - 702519 - 704531
 Cell: +263 773041186
 Fax: +263 4 700339
 E-mail: kudzaikusena@yahoo.com

Mr Cheik ALASSANE FALL

Directeur de l'Unité de Production de Semences de Céréales et de
 Légumineuses
 Institut sénégalais de recherches agricoles (ISRA)
 Dakar, **Senegal**
 Tel: +221 765972880
 E-mail: cheikhalassane.fall@gmail.com

ASIA**Mr Zulhairil BIN ARIFFIN**

Research Officer
 Agrobiodiversity and Environment Research Centre
 Malaysian Agricultural Research and Development Institute (MARDI)

Persiaran MARDI-UPM
43400 Serdang, Selangor
Malaysia
Tel: +603 89536305
Cell: +6013-5231123
E-mail: hairi@mardi.gov.my

Mr Shri Raman KANT MISHRA
Additional Commissioner (Seeds)
Department of Agriculture, Cooperation and Farmers Welfare
Government of India
Ministry of Agriculture and Farmers Welfare
Krishi Bhawan 110001
New Delhi, **India**
Tel: +91 11 23073102
Mobile : +91 9910461117
Fax: +91 11 23387669
E-mail: ramankant.mishra@nic.in
mishraramankant@gmail.com

Mr Nestor ALTOVEROS
Associate Professor
Crop Science Cluster
University of the Philippines Los Baños
College, Laguna, **Philippines**
Tel: +63 495016649
Fax: +63 495363438
E-mail: ncaltoveros@yahoo.com

Ms Asta TAMANG
Principal Biodiversity Officer
Ex-situ conservation programme
National Biodiversity Centre
Ministry of Agriculture and Forest
Thimpu, **Bhutan**
Tel : +975 2351417
E-mail: asta.nbc@gmail.com

Mr. Akio YAMAMOTO
Researcher
Genetic Resource Center
National Agriculture and Food Research Organization
2-1-2 Kannondai, Tsukuba
Ibaraki, 305-8602, **Japan**
Tel: +81-29-838-8707
E-mail: yamaaki@affrc.go.jp

EUROPE**Mr Bert VISSER (Co-Chair)**

Policy Advisor
Centre for Genetic Resources
Wageningen University and Research
P.O. Box 16
6700 AA Wageningen the Netherlands
Tel: +31 317 480993
mobile: +31 6 24565294
E-mail: bert.visser@wur.nl

Mr Thomas MEIER

Biological Diversity and Biopatents
Federal Ministry of Food and Agriculture
PO Box 14 02 70, D-53107
Bonn, **Germany**
Tel.: +49 228 99 529 4078
E-mail: thomas.meier@bmel.bund.de

Ms Patricia LARBOURET

Ms Patricia Larbouret
Adjointe
Bureau Changement climatique et biodiversité
Direction générale de la performance économique et
environnementale des entreprises
Ministère de l'Agriculture
Paris, France
3, rue Barbet de Jouy,
75349 Paris, **France**
Tel: +33 149555907
E-mail: patricia.larbouret@agriculture.gouv.fr

Mr Alwin KOPSE

Responsable
Secteur Agriculture durable internationale
Office fédéral de l'agriculture OFAG
Mattenhofstrasse 5
CH 3003 Berne, **Switzerland**
Tel: +41 58 4651700
Fax: +41 58 4622634
E-mail: alwin.kopse@blw.admin.ch

Ms Svanhild Isabelle BATTA TORHEIM

Senior Advisor
Ministry of Agriculture and Food
Postboks 8007 Dep
0030 Oslo, **Norway**
Tel: +47 41123404
E-mail: sto@lmd.dep.no

**LATIN AMERICA AND
THE CARIBBEAN****Mr José Francisco MONTENEGRO VALLS**

Agronomist
EMBRAPA Genetic Resources and Biotechnology/Cenargen
Parque Estação Biológica/PqEB
Cx.Postal 02372 - CEP 70770-917

Brasília, DF - **Brazil**
Tel: +61 3448 4644
Fax: +61 3340 3624
E-mail: jose.valls@embrapa.br

Mr William SOLANO
Researcher, Genetic Resources and Biotechnology
Tropical Agricultural Research and Higher Education Center
Research and Development Division
CATIE Headquarters
7170 Cartago, Turrialba 30501
Costa Rica
Tel: +506 2558-2390
E-mail: wsolano@catie.ac.cr

Sr. César Guillermo TAPIA BASTIDAS
Instituto Nacional de Investigaciones Agropecuarias (INIAP)
Punto Focal Nacional para el Tratado Internacional sobre Recursos
Fitogenéticos para la Alimentación y la Agricultura
Coordinador Científico
Departamento Nacional de Recursos Fitogenéticos
Estación Experimental Santa Catalina
Av. Eloy Alfaro No.30-350 y Av. Amazonas
Quito, **Ecuador**
E-mail: cesar.tapia@iniap.gob.ec

Mr Roger Alberto BECERRA GALLARDO
Especialista en Acceso a Recursos Genéticos
SDRIA-DGIA-INIA
Sede Central
Lima, **Perú**
Tel: +51 939269910
E-mail: dpirrgg@inia.gob.pe

Mr Federico CONDÓN PRIANO
Banco de Germoplasma del Instituto Nacional de Investigación
Agropecuaria (INIA)
La Estanzuela, Colonia, **Uruguay**
Tel: +598 45748000
E-mail: fcondon@inia.org.uy

NEAR EAST

Mr Javad MOZAFARI HASHJIN
Professor, Plant Genetics and Biotechnology
National Plant Gene Bank
Seed and Plant Improvement Institute (SPII)
Mahdasht Ave. (or P.O. Box 31585-4119)
Karaj, **Iran**
Tel: +98 2122402013
Cell: +98 9123763457
E-mail: jmozafar@yahoo.com

Mr Ali CHEHADE
Research Engineer
Plant Genetic Resources Unit

Department of Plant Biotechnology
 Institut de Recherches Agronomiques Libanais (IRAL)
 P.O Box 287
 Zahlé, **Lebanon**
 Tel: +961 8 900037
 Fax: +961 8 900077
 E-mail: alichehade@hotmail.com

NORTH AMERICA

Ms Felicitas KATEPA-MUPONDWA
 Director, Research Development & Technology Transfer
 Saskatoon Research Centre
 107 Science Place
 Saskatoon, S7N0X2 **Canada**
 Tel: +1 306 3859320
 Cell: +1 306 3419341
 E-mail: Felicitas.Katepa-Mupondwa@agr.gc.ca

Ms Catherine KARR-COLQUE
 Office of Conservation and Water (OES/ECW)
 US Department of State
 2201 C Street NW, Room 2657
 Washington, DC 20520, USA
 Tel: + 1 202.647.2255
 Fax: + 1 202.736.7351
 E-mail: Karr-ColqueCJ@state.gov

SOUTH WEST PACIFIC

Ms Maria JARVIO
 Policy Officer
 Department of Agriculture and Water Resources
 Canberra ACT 2601
Australia
 Tel: +61 432 976079
 E-mail: maria.jarvio@agriculture.gov.au
maria.jarvio@yahoo.com.au

Ms Valerie Saena TUIA
 Genetic Resources Coordinator
 Pacific Community (SPC)
 SPC Suva Regional Office
 Private Mail Bag
 Suva, **Fiji**
 Tel: +679 337 0733
 Fax: +679 337 0021
 E-mail: ValerieT@spc.int

OBSERVERS FROM STAKEHOLDER GROUPS

CIVIL SOCIETY ORGANIZATIONS

Berne Declaration
Mr François MEIENBERG
 Déclaration de Berne
 Erklärung von Bern
 Zürich, **Switzerland**

Tel: +41 442777004
Fax: +41 442777001
E-mail: food@evb.ch

Third World Network
Mr Edward HAMMOND
Advisor
131 Jalan Macalister
Penang, **Malaysia**
Tel: +1 3253472829
E-mail: eh@pricklyresearch.com

**FARMERS'
ORGANIZATIONS**

La Via Campesina
Mr Guy KASTLER
La Sieure
FR 34210 La Caunette
France
Tel: +33 468912895
E-mail: guy.kastler@wanadoo.fr

SEED INDUSTRY

Ms Anke VAN DEN HURK
Deputy Director
International Seed Federation - Plantum
Vossenburchkade 68
Gouda, **The Netherlands**
Tel: +31 182688668
Fax: +31 182688667
E-mail: a.vandenhurk@plantum.nl

Mr Thomas NICKSON
International Policy Lead
Monsanto Law
800 North Lindbergh Bvd
St. Louis, Missouri, **USA**
Tel: +1 3146942179
Fax: +1 3146941622
E-mail: thomas.nickson@monsanto.com

**CGIAR
CONSORTIUM**

Mr Michael HALEWOOD
Senior Scientist
CGIAR Research Programme on Climate Change
Agriculture and Food Security
Bioversity International
Via dei Tre Denari, 472/a
00057 Maccarese (Fiumicino)
Rome, Italy
Tel: (39) 066118294
Fax: (39) 0661979661
E-mail: M.Halewood@cgiar.org

Mr Rodrigo SARA
Legal Officer
CGIAR Consortium
Agropolis, 34394 France

Montpellier, France
Tel: +33 (0)4 67 04 36 45
E-mail: R.Sara@cgiar.org

OBSERVERS FROM CONTRACTING PARTIES

ARGENTINA

Dr. Juan Ignacio CORREA

Asesor Legal de la Secretaría de Coordinación y Desarrollo Territorial
Ministerio de Agroindustria.
Buenos Aires
Argentina
Tel: +54 11 4349-1696
E-mail: jicorrea@magyp.gob.ar

BRAZIL

Ms Janaina LOURENÇATO

Second Secretary
Permanent Mission of Brazil to the UN
Chemin Louis-Dunant 15 (6th Floor)
1202 Geneva
Tel: +41 22 332 50 23
Fax: +41 22 910 07 51
Email: janaina.lourencato@itamaraty.gov.br
delbrasgen@itamaraty.gov.br

Ms Juliana DE MOURA GOMES

Second Secretary
Permanent Mission of Brazil to the UN
Chemin Louis-Dunant 15 (6th Floor)
1202 Geneva
Tel: +41 22 332 50 23
Fax: +41 22 910 07 51
Email: delbrasgen@itamaraty.gov.br

Mr Rafael CORREA

Participant in the Capacity Building Program
Permanent Mission of Brazil to the UN
Chemin Louis-Dunant 15 (6th Floor)
1202 Geneva
Tel: +41 22 332 50 00
Fax: +41 22 910 07 51
Email: delbrasgen@itamaraty.gov.br

EUROPEAN COMMISSION

Mr Thomas WEBER

Unit G1 Plant Health
Health and Food Safety DG (DG Sante)
Office B232 4/22 - BE-1040 Brussels, Belgium
Tel: +32-2-2957616
Fax: +32-2-2960951
E-mail: Thomas.Weber@ec.europa.eu

ECUADOR**Sra. Mónica MÁRTINEZ**

Ministra

Representación Permanente del Ecuador

15 Chemin Louis-Dunant, 1202

Ginebra, Suiza

Tel : +41 22 732 4955 / 41 22 732 4628

Fax: +41 22 732 4834

E-mail: onuginebra@cancilleria.gob.ec**Sra. Angela MONTAÑO**

Representación Permanente del Ecuador

15 Chemin Louis-Dunant, 1202

Ginebra, Suiza

Tel : +41 22 732 4955 / 41 22 732 4628

Fax: +41 22 732 4834

E-mail: onuginebra@cancilleria.gob.ec**FRANCE****Isabelle Clement-Nissou**

GNIS

44 rue du Louvre

75001 Paris

Tel: +33 1 42 33 78 00

E-mail : isabelle.clement-nissou@gnis.fr**GERMANY****Ms Marliese VON DEN DRIESCH**

Federal Office for Agriculture and Food (BLE)

Deichmanns Aue 29

53179 Bonn, Germany

E-mail: marliese.vondendriesch@ble.de**JAPAN****Ms. Ayako TAKADA**

Deputy Director

Environment Policy Office, Policy Planning Division, Minister's Secretariat

Ministry of Agriculture, Forestry and Fisheries

1-2-1 Kasumigaseki, Chiyoda-ku, Tokyo 100-8950, Japan

TEL: +81 3 6744 2017

FAX: +81 3 3591 6640

E-mail: ayako_takada550@maff.go.jp**Mr. Yusuke KUZUHARA**

Global Environment Division

International Cooperation Bureau

Ministry of Foreign Affairs

2-2-1 Kasumigaseki, Chiyoda-ku, Tokyo 100-8919

Tel: +81-3-5501-8245

Fax: +81-3-5501-8244

E-mail: yusuke.kuzuhara@mofa.go.jp**UNITED KINGDOM****Mrs Sarah CUNNINGHAM**

Genetic Resources / CAP Simplification

Farming Productivity, Food and Farming Directorate
Defra, Rm 201, Foss House, York, YO1 7PX
Tel: +44 2080264032
E-mail: Sarah.Cunningham@defra.gsi.gov.uk

Mr Simon PARKER

National Expert
International European and Knowledge Management
Department for Environment, Food and Rural Affairs
Nobel House, Smith Square
SW1P 2AL London
Tel: +44 2072383052
E-mail: simon.parker@defra.gsi.gov.uk

SILENT OBSERVERS

Mr Brad KURTZ

Senior Research Manager
Global Crop Biodiversity
Dupont-Pioneer
United States of America
Tel: +1 515 2408726
E-mail: bradley.kurtz@pioneer.com

Mr Michael KOCK

Global Head IP – Seed and Biotechnology
Syngenta International AG
Schwarzwaldallee 215
CH-4058 Basel
Switzerland
Tel: +41 (61) 323 59 43
Fax: +41 (61) 323 25 90
E-mail: michael.kock@syngenta.com

Mr Michael MUSCHICK

Head Germplasm Legal & IP
Syngenta International AG
Schwarzwaldallee 215
CH-4002 Basel
Switzerland
Tel: +41 61 3239481
E-mail: michael.muschick@syngenta.com

Mr Jarett ABRAMSON

Intellectual Property Counsel
CIMMYT (International Maize and Wheat Improvement Center)
Carretera México Veracruz Km. 45 Col. El Batán
Texcoco, Edo. de México 56237
Tel: Office +(52)(55) 5804-2004 x 1197
E-mail: j.abramson@cgiar.org

Mrs Isabel LOPEZ-NORIEGA

Policy Specialist
Bioversity Int.
Geneva, Switzerland
E-mail: i.lopez@cgiar.org

Ms Kathryn GARFORTH

Programme Officer
Access and Benefit-Sharing
Secretariat of the Convention on Biological Diversity
United Nations Environment Programme
413 Saint-Jacques St., Suite 800,
Montreal, Quebec, H2Y 1N9, Canada
Tel: +1 514 287 7030
Fax: +1 514 288 6588
E-mail: Kathryn.Garforth@cbd.int

Mrs Hélène GUILLOT

International Agricultural Manager
International Seed Federation
Reposoir 7, 1260 Nyon
Switzerland
Tel: +41 22 3654420
Fax: +41 22 3654421
E-mail: h.guillot@worldseed.org

Ms Szonja CSÖRGŐ

Director Intellectual Property & Legal Affairs
European Seed Association (ESA)
Rue du Luxembourg 23, 1000 Brussels, Belgium
Tel: +32 2 743 28 60
E-mail: szonjacsorgo@euroseeds.eu

UNITES STATES OF AMERICA**Ms Neha LUGO**

Attorney Advisor
Office of the Legal Advisor
Department of State
E-mail: LugoNS@state.gov

Mr David HEGWOOD

Senior Food Security Advisor
Bureau of Food Security
U.S. Agency for International Development
E-mail: DHegwood@usaid.gov

Ms Sangeeta SHASHIKANT

Third World Network
36 rue du Lausanne, 1201 Geneva
Tel: 0041787572331
E-mail: sangeeta@twnetwork.org

Mr Morten WALLOE TVEDT

Senior Research Fellow, Lawyer

P.O. Box 326
Fridtjof Nansens Institute
NO-1326 Lysaker, Norway
Tel: +47 67111925
Cell: +47 90673230
E-mail: mwt@fni.no

Ms Maria Alexandra GEORGES
Rue de Berne 9
Tel: +41 79 8589923
E-mail: mariaalexandra.georges@diplomatie.ht

Ms Elin Cecilie RANUM
Head of Policy and Information Department
Utviklingsfondet/The Development Fund
Mariboegs gate 8, 0183 Oslo, Norway
Tel: +47 2310 9600 (s.bord) ext. 9572
Fax: +47 2310 9601
Mobile: +47 9622 9600
E-mail: elin@utviklingsfondet.no

OUTGOING CO-CHAIR OF THE WORKING GROUP

Mr Modesto FERNANDEZ DÍAZ-SILVEIRA
International Expert on PGRFA
Havana, Cuba
Tel: + 53 78335908
Cell: +53 52725866
E-mail: mffds@yahoo.com

ITPGRFA SECRETARIAT

Mr Shakeel BHATTI
Secretary
Secretariat of the International Treaty on Plant Genetic Resources for Food
and Agriculture (ITPGRFA), FAO
Viale delle Terme di Caracalla
Rome, Italy
Phone: +39 0657053441
Fax: +39 0657056347
E-mail: shakeel.bhatti@fao.org

Mr Álvaro TOLEDO CHÁVARRI
Technical Officer
Secretariat of the International Treaty on Plant Genetic Resources for Food
and Agriculture (ITPGRFA)
Phone: +39 0657054497
E-mail: alvaro.toledo@fao.org

Mr Tobias KIENE

Technical Officer

Secretariat of the International Treaty on Plant Genetic Resources for Food
and Agriculture (ITPGRFA)

Phone: +39 0657055586

E-mail: tobias.kiene@fao.org**Mr Clive STANNARD**

Senior Consultant

Secretariat of the International Treaty on Plant Genetic Resources for Food
and Agriculture (ITPGRFA)

Phone: +39 3334334009

E-mail: clive@stannard.info**Ms Annick VAN HOUTTE**

Senior Legal Officer

General Legal Affairs Service (LEGA)

Food and Agriculture Organization

Viale delle Terme di Caracalla

Rome, Italy

Phone: +39 0657054287

Email: annick.vanhoutte@fao.org