



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

**REPORT OF THE STANDING GROUP OF LEGAL EXPERTS:
OUTCOMES OF THE FIRST MEETING**

INTRODUCTION

1. The *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing (Working Group) at its fifth meeting in July 2016 made a number of recommendations to the Co-Chairs on possible further inputs from small groups of experts. The Working Group agreed on the establishment of an expert group to look into legal questions that emerged in the meetings of the Working Group and in the discussions of the Friends of the Co-Chairs groups. The Working Group took the following decision:

“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.” (IT/OWG-EFMLS-5/16/Report, para. 18)

2. The Co-chairs accordingly established the Standing Group of Legal Experts (SGLE) in September 2016.

3. The members of the SGLE are Mr. Olivier Rukundo, Prof. Gurdial Singh Nijar¹, Prof. Hiroji Isozaki, Mr. Gerald Moore (facilitator), Mr. Jorge Cabrera, Mr. Hojjat Khademi, and Ms. Indra Thind. The Legal Office of FAO is involved in the work of the SGLE through Ms. Annick van Houtte. The terms of reference of the SGLE are provided in Annex 2 to this Report.

4. The mandate of the Standing Group is “to provide a legal opinion on questions arising from the fifth meeting of the Working Group and from the work of the Friends of the Co-chairs groups.” It was requested to initially provide legal opinions on the following issues:²

¹ Prof. Gurdial Singh Nijar was not able to participate in the first meeting of the SGLE and has not adhered to the Legal Opinions contained in this Report.

² At the time of publication of this documents, arrangements were being made for the SGLE to have a second meeting in February 2017. The report of that meeting will be published as an addendum to this document.

Question 1: Can the Governing Body delete Article 6.8 without having to amend the Treaty, i.e., can the Governing Body revise the SMTA in accordance with the provisions of the Treaty in such a way that all payments under the SMTA are mandatory?

Question 2: Should all payments be mandatory, are there any provisions of the Treaty that would prevent the Governing Body stipulating different payment rates for different categories of products, in accordance to whether or not they are protected by intellectual property rights, and the nature of such protection (e.g. PVP, patents)?

Question 3: Would a SMTA that only contains a subscription system and has no option for single access, like that outlined in document IT/OWG-EFMLS-5/16/3, be in accordance with the provisions of the Treaty?

Question 4: Would the advance payment discussed in document IT/OWG-EFMLS-5/16/Inf.5 (paras. 25 and 30) be in accordance with the Treaty, in particular its Article 12.3b? If not, what would be the main questions that require further consideration?

Question 5: Could the Register provided for in document IT/OWG-EFMLS-5/16/3, p. 14 (Article 2 of Annex 3 to the second draft revised SMTA) be public, while respecting confidentiality laws? More specifically, which information could or should be public, and which information should or might not be public?

Question 6: Reviewing the advice from the *Ad Hoc* Technical Advisory Committee on the SMTA and the MLS on this matter (IT/AC-SMTA-MLS 2/10/Report, *Appendix 3*), would the restoration of germplasm to the original provider/providing country require the use of an SMTA?

5. The SGLE held its first meeting in Rome on 14 and 15 November 2016 to provide legal opinions on these questions. The legal opinions are set out in Annex 1. The Agenda of the meeting is given in Annex 3; the list of participants is given in Annex 4.

ANNEX 1: LEGAL OPINIONS**OPINION 1**

Can the Governing Body delete Article 6.8 without having to amend the Treaty, i.e., can the Governing Body revise the SMTA in accordance with the provisions of the Treaty in such a way that all payments under the SMTA are mandatory?

Relevant Provision(s) of the Treaty:

Article 12.4, Article 13.2.(d) (ii)

Relevant Provision(s) of SMTA:

Article 6.7 and Article 6.8

Legal opinion:

1. The Treaty in its Article 13.2d(ii) provides for the Governing Body to assess, within a period of five years from the entry into force of the Treaty, whether the mandatory payment requirement in the SMTA shall apply also in cases where commercialized products are available without restriction to others for further research and breeding and, if it so decided, to make all payments mandatory.
2. The SGLE recognizes that the Governing Body had begun its assessment within the five year period and that the Governing Body, having noted that the information on which to take such a decision was not adequate, had therefore decided to continue its assessment and postpone the decision until after such time as it had all the necessary information.
3. The SGLE considers that the power of assessment of the Governing Body, as set out in Article 13.2d(ii) of the Treaty, includes implicitly the power to take a decision on the basis of that assessment.
4. The SGLE concludes that the period of five years only applied to the initiation of the assessment and did not require that this assessment be completed and the decision taken within the period stipulated.
5. The SGLE is therefore of the opinion that the Governing Body, having initiated the process in accordance with the Treaty, retained the power to continue its assessment until it had made its decision.
6. The SGLE is therefore of the opinion that the Governing Body had the power to make all payments mandatory and to adopt the necessary changes to the SMTA, without the need to adopt an amendment to the Treaty.
7. The SGLE considers 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.

OPINION 2

Should all payments be mandatory, are there any provisions of the Treaty that would prevent the Governing Body stipulating different payment rates for different categories of products, in accordance to whether or not they are protected by intellectual property rights, and the nature of such protection (e.g. PVP, patents)?

Relevant Provision(s) of the Treaty

Article 13.2.(d) (ii)

Relevant Provision(s) of SMTA

Articles 6.7 and 6.8

Legal opinion

1. The SGLE considers that there are no conditions in the Treaty that would prevent the Governing Body from stipulating different payment rates for different categories of products, in accordance to whether or not they are protected by intellectual property rights, and the nature of such protection.
2. Article 13.2d(ii) of the Treaty confers on the Governing Body the power to determine the level, form and manner of the payment, and to establish different levels of payment for various categories of recipients. This Article refers to categories of recipients without indicating how these categories should be defined.
3. The SGLE is of the opinion that the Governing Body has the power to define these 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.

OPINION 3

Would a SMTA that only contains a subscription system and has no option for single access, like that outlined in document IT/OWG-EFMLS-5/16/3, be in accordance with the provisions of the Treaty?

Relevant Provision(s) of the Treaty

Article 13.2.(d) (ii)

Relevant Provision(s) of SMTA

Article 6.7, Article 6.11

Legal opinion

1. Article 13.2d(ii) of the Treaty provides that a “recipient who commercializes a product that is a plant genetic resource for food and agriculture and that incorporates material accessed from the Multilateral System, shall pay to the mechanism referred to in Article 19.3f, an equitable share of the benefits arising from the commercialization of that product.” The SGLE is of the opinion that this text is based on a single access and benefit-sharing modality. It noted that the Governing Body in adopting the SMTA provided, in Article 6.11, for a further option that is not linked to single access. The question is whether the first option could be dropped and only a single option of Subscription System³ be provided for, without running counter to the provisions of the Treaty.

2. The above options are systems of determining payments based on the commercialization of products that incorporate material accessed from the Multilateral System. The SGLE is of the opinion that the Governing Body could adopt an SMTA that provides for a stand-alone Subscription System and this could be compatible with Article 13.2d(ii) of the Treaty, provided that the following elements are included:

- The link between access and subsequent benefit-sharing resulting from commercialization should be maintained. This could be done by the formulation of the SMTA making clear that benefits to be shared are derived from commercialization and any such payments are not payments for access.
- The benefit-sharing payments are based on sales of PGRFA products commercialized by the recipient, which would by definition include those products derived from materials accessed under an SMTA.
- Determination of when payments of an equitable share of benefits should commence.

3. The SGLE drew attention to the fact that such a Subscription System could in fact comply more closely with the requirement in the Treaty that there should be no need to track individual accessions (Article 12.3b).

³ The SGLE discussed the appropriateness of the term “Subscription System”, which might be confused with a payment for access, which is precluded under Article 12.3b of the Treaty.

OPINION 4

Would the advance payment discussed in document IT/OWG-EFMLS-5/16/Inf.5 (paras. 25 and 30) be in accordance with the Treaty, in particular its Article 12.3b? If not, what would be the main questions that require further consideration?

Relevant Provision(s) of the Treaty

Article 12.3(b), Article 13.2.(d) (ii)

Relevant Provision(s) of SMTA

Article 6.7

Legal opinion

1. The SGLE considered that the advance payment as discussed in document IT/OWG-EFMLS-5/16/Inf.5 would not be in accordance with the Treaty, if the option were mandatory. In this case it would equate to a payment for access and, thus, be contrary to Article 12.3b of the Treaty.
2. It noted that the Friends of the Co-chairs Group on Access Mechanisms and Payment Rates was still to discuss the technical feasibility of this proposal.

OPINION 5

Could the Register provided for in document IT/OWG-EFMLS-5/16/3, p. 14 (Article 2 of Annex 3 to the second draft revised SMTA) be public, while respecting confidentiality laws? More specifically, which information could or should be public, and which information should or might not be public?

Relevant Provision(s) of the Treaty

None

Relevant Provision(s) of SMTA

None

Legal Opinion

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.

OPINION 6

Reviewing the advice from the *Ad Hoc* Technical Advisory Committee on the SMTA and the MLS on this matter (IT/AC-SMTA-MLS 2/10/Report, *Appendix 3*), would the restoration of germplasm to the original provider/providing country require the use of an SMTA?

Relevant Provision(s) of the Treaty

Article 12.4, Article 12.6, Article 15.1(a) and Article 15.1(b)(ii)

Relevant Provision(s) of SMTA

None

Legal opinion

1. The SGLE reviewed the opinion of the *Ad Hoc* Technical Advisory Committee on the SMTA and the MLS and concurred with the view that restoration is not a case of “facilitated access” as set out in the Treaty.
2. The SGLE considers that restoration means a return of samples of PGRFA that has been lost to a competent authority of the country in which PGRFA were collected from *in situ* conditions or to a legal or natural person that has voluntarily included PGRFA in the Multilateral System. Accordingly, it agreed that no SMTA should be required to restore samples of PGRFA.
3. The SGLE considered that a definition should be included in the revised SMTA in which provision could be made that in cases of restoration an SMTA is not required.

ANNEX 2: TERMS OF REFERENCE OF THE STANDING GROUP OF LEGAL EXPERTS

Background

The Working Group at its fifth meeting (July 2016) made a number of recommendations to the Co-Chairs on possible further inputs from small groups of experts. The Working Group agreed on the establishment of an expert group that would look into legal questions that emerged in the meetings of the Working Group and in the discussions of the Friends of the Co-Chairs groups. The Working Group took the following decision:

“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.” (IT/OWG-EFMLS-5/16/Report, para. 18)

The Working Group highlighted that a broad range of questions are likely to be addressed to the group, which may require knowledge and practical experience in a number of areas of law, in particular public international law, private law, commercial law, and contract law.

These Terms of Reference guide the establishment and modus operandi of such group, and identify the members suggested by the regions represented in the Working Group.

Foreseen Composition

The Regions have so far suggested the following representatives to this Standing Group:

- Africa: Mr. Olivier Rukundo
- Asia: Prof. Gurdial Singh Nijar, Malaysia and Prof. Hiroji Isozaki, Japan (alternates)
- Europe: Mr. Gerald Moore
- GRULAC: Mr. Jorge Cabrera
- Near East: Mr. Hojjat Khademi
- North America: Ms. Indra Thind
- South West Pacific:

Facilitator: Gerald Moore.

The Secretariat has informed the FAO Legal Office of the establishment of the Standing Group of Legal Experts. The Legal Office will nominate an officer to be involved in the work of the Standing Group.

Mandate

The mandate of the Standing Group is “to provide a legal opinion on questions arising from the fifth meeting of the Working Group and from the work of the Friends of the Co-chairs groups.” The various Friends of the Co-Chairs Groups (FoCCs) may address questions for a legal opinion to the Standing Group, through the Co-Chairs, who may themselves also formulate such questions. The Standing Group may also wish to address any issues that it considers important in the context of the deliberations of the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System.

The following questions have been identified as of major importance for the work of the Working Group, and the Standing Group of Legal Experts is initially requested to provide legal opinions on the following issues:

1. Can the Governing Body delete Article 6.8 without having to amend the Treaty, i.e., can the Governing Body revise the SMTA in accordance with the provisions of the Treaty in such a way that all payments under the SMTA are mandatory?
2. Should all payments be mandatory, are there any provisions of the Treaty that would prevent the Governing Body stipulating different payment rates for different categories of products, in accordance to whether or not they are protected by intellectual property rights, and the nature of such protection (e.g. PVP, patents)?
3. Would a SMTA that only contains a subscription system and has no option for single access, like that outlined in document IT/OWG-EFMLS-5/16/3, be in accordance with the provisions of the Treaty?
4. Would the advance payment discussed in document IT/OWG-EFMLS-5/16/Inf.5 (paras. 25 and 30) be in accordance with the Treaty, in particular its Article 12.3b? If not, what would be the main questions that require further consideration?
5. Could the Register provided for in document IT/OWG-EFMLS-5/16/3, p. 14 (Article 2 of Annex 3 to the second draft revised SMTA) be public, while respecting confidentiality laws? More specifically, which information could or should be public, and which information should or might not be public?
6. Reviewing the advice from the *Ad Hoc* Technical Advisory Committee on the SMTA and the MLS on this matter (IT/AC-SMTA-MLS 2/10/Report, *Appendix 3*), would the restoration of germplasm to the original provider/providing country require the use of an SMTA?

Ways of operating

Like in the case of the FoCCs, this Standing Group will receive support from the Secretariat. An early meeting of the group in November is proposed to address these and other questions and make arrangements for further work by electronic means.

Outputs

The output of the Standing Group's considerations will take the form of a series of legal opinions for consideration of the Co-chairs, normally taking the form of a 1-2 pages note per question addressed.

Reporting deadline

The final reporting deadline will be 30 January, 2017. Legal opinions on the questions listed above are expected no later than 30 November 2016.

ANNEX 3: AGENDA

Meeting of the Standing Group of Legal Experts
in support of the
Ad Hoc Open-ended Working Group to Enhance the Functioning of the
Multilateral System of Access and Benefit-sharing

FAO HQ, Rome, Italy, 14 – 15 November 2016

AGENDA

14 November (Room B-640)

10:00 - 10:15 Welcome and adoption of the Agenda

10:15 - 13:00 Discussion and initial analysis of Questions 1 to 3 of the Terms of Reference:

1. Can the Governing Body delete Article 6.8 without having to amend the Treaty, i.e., can the Governing Body revise the SMTA in accordance with the provisions of the Treaty in such a way that all payments under the SMTA are mandatory?
2. Should all payments be mandatory, are there any provisions of the Treaty that would prevent the Governing Body stipulating different payment rates for different categories of products, in accordance to whether or not they are protected by intellectual property rights, and the nature of such protection (e.g. PVP, patents)?
3. Would a SMTA that only contains a subscription system and has no option for single access, like that outlined in document IT/OWG-EFMLS-5/16/3, be in accordance with the provisions of the Treaty?

13:00 - 14:00 Lunch break

14:00 - 17:00 Discussion and initial analysis of Questions 4 to 6 of the Terms of Reference:

4. Would the advance payment discussed in document IT/OWG-EFMLS-5/16/Inf.5 (paras. 25 and 30) be in accordance with the Treaty, in particular its Article 12.3b? If not, what would be the main questions that require further consideration?
5. Could the Register provided for in document IT/OWG-EFMLS-5/16/3, p. 14 (Article 2 of Annex 3 to the second draft revised SMTA) be public, while respecting confidentiality laws? More specifically, which information could or should be public, and which information should or might not be public?
6. Reviewing the advice from the *Ad Hoc* Technical Advisory Committee on the SMTA and the MLS on this matter (IT/AC-SMTA-MLS 2/10/Report, *Appendix 3*), would the restoration of germplasm to the original provider/providing country require the use of an SMTA?

17:00 - 19:00 Preparation of draft written opinions on Questions 1 to 6

20:00 Dinner

15 November (Room D-838)

09:30 - 13:00 Discussion of draft written opinions on Questions 1 to 6

13:00 - 14:00 Lunch break

14:00 - 17:30 Finalization of written opinions and advice on further legal questions, if needed

ANNEX 4: LIST OF PARTICIPANTS**Prof. Jorge Cabrera Medaglia**

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