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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

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

Rome, Italy, 17−21 June 2019

REPORT OF THE STANDING GROUP OF LEGAL EXPERTS: OUTCOMES OF THE FOURTH MEETING

INTRODUCTION

1. The Standing Group of Legal Experts (SGLE) was established by the Co-chairs of the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing (Working Group), as recommended by the Working Group at its fifth meeting. The Governing Body, at its Seventh Session, welcomed the important contribution of the SGLE to the work of the Working Group.

2. The members of the SGLE are Ms. Sarah Naigaga, Prof. Gurdial Singh Nijar, Prof. Hiroji Isozaki, Mr. Gerald Moore (facilitator), Mr. Jorge Cabrera, Mr. Hojjat Khademi and Ms. Indra Thind.[1] The Legal Office of FAO is involved in the work of the SGLE through Ms. Annick van Houtte.[2]

3. The Report of the first meeting of the SGLE, held on 14 and 15 November 2016 in Rome, Italy, is provided in the document, IT/OWG-EFMLS-6/17/Inf.3, which also contains, in its Annex 2, the Terms of Reference of the SGLE. The Report of the second meeting, held on 14 and 15 February 2017 in Rome, Italy, is contained in the document, IT/OWG-EFMLS-6/17/Inf.3 Add.1. The Report of the third meeting, held on 17 October 2017 through a teleconference and subsequent discussion by email, is provided in the document, IT/OWG-EFMLS-8/18/Inf.5.

4. The SGLE held its fourth meeting from 27 to 29 May 2019, to provide legal opinions on the following questions:

> Question 14: Please provide a legal assessment of the definitions of "Sales" and "to commercialize" proposed by the International Seed Federation for the revised SMTA. Please include legal advice on replacing the term "Products" and "products" by "PGRFA" and on replacing the concept of income resulting from commercialization by the Recipient, its affiliates, contractors, licensees and lessees by the terms "income received by the Recipient and its respective affiliates from licensing PGRFA to third parties and from commercialization".
>
> Question 15: In the revised SMTA being negotiated by the Working Group, the words "contractors", "licensees" and "lessees" might be deleted, so that only the Recipient and its affiliates would remain (e.g. in Article 2, definition of "Sales", Annex 2). Could you

[1] Prof. Gurdial Singh Nijar was not able to participate in the fourth meeting of the SGLE. Ms. Neha Sheth Lugo participated in place of Ms. Indra Thind in the fourth meeting of the SGLE.
[2] Ms. Annick van Houtte could not participate in the fourth meeting of the SGLE

provide a generally accepted legal definition of the term "affiliate" as it is being used in the revised SMTA? If there is no generally accepted definition, could you clarify what the meaning of "affiliate" could be in the context of the SMTA?

Question 16: What rights and guarantees could be stipulated in the revised SMTA to ensure that a Subscriber duly receives PGRFA from the MLS on the basis of their Subscription? What could be a possible redress for the Subscriber if PGRFA is not received from providers under the Multilateral System as per the Subscription terms?

Question 17: What would constitute a "material breach" in case of Article 4.5 of Annex 3 of the draft revised SMTA? Would your assessment change if the Governing Body did not have the right to terminate the Subscription but to terminate the right of the Subscriber to access PGRFA covered by the MLS under the Subscription terms? Are you aware of any cases in international law where a political body is given the right to establish a "material breach" of a contract between private individuals and to make a decision that could result in the termination of rights set out in the contract?

Question 18: The Working Group is exploring the possibility of limiting an expansion of the list of crops contained in *Annex I* of the Treaty to all plant genetic resources for food and agriculture found in *ex situ* conditions, for example by adding the qualifier, "that are held in *ex situ* collections". Would such a limitation be compatible with the provisions on the MLS contained in Articles 10 to 13 of the Treaty, including Article 12.3h? Would such an amendment have any consequences for the exemptions currently contained in the list of crops? If so, what could these consequences be? What are the consequences of the formulation "established according to criteria of food security and interdependence" in Article 11.1 of the Treaty for amending *Annex I*?

Question 19: After adoption of the revised SMTA by the Governing Body, which version of the SMTA would have to be used for subsequent transfers of PGRFA received under the current (old) SMTA? Could the revised SMTA be adopted provisionally by the Governing Body pending the fulfilment of certain specified conditions? In other words, could the Governing Body adopt the revised SMTA on condition that it will come into effect after certain requirements are met within a given period of time?

Question 20: What are the legal consequences in case of a breach of Art. 6.2? What are the possible legal remedies that are available in such a case?

Question 21: The Working Group is discussing a proposal to prioritize/earmark income generated under the benefit-sharing provisions of the SMTA (and therefore paid into the BSF): Payments made by users in a specific Contracting Party would be used, either exclusively or predominantly, for projects to be implemented in this same Contracting Party. The Co-chairs are of the opinion that this is not a merely legal question, but a political question for, for the Governing Body to decide. Please provide a general legal assessment of this proposal.

5. The SGLE developed its legal opinions on these questions as set out in *Annex 1*. The list of participants of the meeting is given in *Annex 2*.

ANNEX 1: LEGAL OPINIONS

OPINION 14

Please provide a legal assessment of the definitions of "Sales" and "to commercialize" proposed by the International Seed Federation for the revised SMTA. Please include legal advice on replacing the term "Products" and "products" by "PGRFA" and on replacing the concept of income resulting from commercialization by the Recipient, its affiliates, contractors, licensees and lessees by the terms "income received by the Recipient and its respective affiliates from licensing PGRFA to third parties and from commercialization".

Note:

The Co-chairs of the Working Group invited the seed industry to make a proposal for a definition of the term "Sales" that could be included in Article 2 of the revised SMTA. The definition of "Sales" will be of great importance for the benefit-sharing payments in the revised SMTA. The International Seed Federation accordingly proposed the following definitions for "Sales" and "to commercialize", with the aims of providing definitions that would work for all access and benefit-sharing options in the SMTA, consider the diversity of business practices and business models, and release the Recipient from the obligation of having to track/monitor activities of their contract partners:

> ***"Sales**" means gross income received by the **Recipient** and its respective affiliates from licensing **PGRFA** to third parties and from **commercialization.***
>
> ***"To commercialize**" means to exchange **PGRFA** for monetary consideration on the open market, and "commercialization" has a corresponding meaning. Commercialization shall not include any form of transfer of **PGRFAuD,** nor shall it include commodities and other products used for food, feed and processing.*

Relevant provision(s) of the Treaty:

Article 13.2d(ii)

Relevant provision(s) of the (current) SMTA

Article 2, Article 6.7, Article 6.8, Article 6.11, Annex 2, Annex 3

Legal opinion:

1. The SGLE recalls its Opinion 13 in which it considered that the term "Sales" may include both gross income from selling PGRFA by the Recipient and its affiliates, as well as income from granting licenses. It also noted that with such a definition, the Recipient would not be bound to monitor and report sales by contractors, licensees and lessees, etc., but only to apply the royalty rate to the income received from them.

2. The SGLE is of the opinion that the definition proposed by International Seed Federation does not capture all income received by the Recipient.

3. The SGLE considers that income received by the Recipient's contractors (other than licensees) and lessees would not be captured. Income received by the Recipient's licensees would

only be partly captured, namely in the form of a license fee, which is usually a percentage of the income generated by the licensee.

4. The SGLE noted that the definition of "Sales" remained contingent on the agreed understanding of the meaning of the term "affiliate" and the clarification of the concepts of licenses and licensing.

5. One way to capture the income referred to in paragraph 3, would be to include, in addition to the income from licensing, income resulting from other contracts authorizing the use of the material under the SMTA.

6. The SGLE notes that the term "licensing PGRFA to third parties" may lead to problems of interpretation and suggests using the term "income in the form of license fees" as proposed in its Opinion 13.

7. The SGLE noted that the exemption in the proposed definition of "to commercialize" related to commodities should be clarified to include the word "sale", so that it would read: "nor shall it include the sale of commodities".

OPINION 15

In the revised SMTA being negotiated by the Working Group, the words "contractors", "licensees" and "lessees" might be deleted, so that only the Recipient and its affiliates would remain (e.g. in Article 2, definition of "Sales", Annex 2). Could you provide a generally accepted legal definition of the term "affiliate" as is being used in the revised SMTA? If there is no generally accepted definition, could you clarify what the meaning of "affiliate" could be in the context of the SMTA?

Relevant provision(s) of the Treaty

n/a

Relevant provision(s) of the (current) SMTA

Article 2, Annex 2

Legal opinion:

1. The SGLE notes that there is no agreed international definition of the term "affiliate", but that this term is commonly used in contract law, corporate law and tax law and it is referred to but not defined in the UNIDROIT Principles of International Commercial Contracts.

2. The SGLE notes that criteria usually used to define an "affiliate" include the concept of control, which can be achieved through various means including ownership, and which may vary from one jurisdiction to another.

3. The term "affiliate" is used in relation to identifying the scope of the recipient entities that are authorized to exercise the rights, and to perform the obligations, set out in the SMTA, i.e. they do not need to sign a separate SMTA.

OPINION 16

What rights and guarantees could be stipulated in the revised SMTA to ensure that a Subscriber duly receives PGRFA from the MLS on the basis of their Subscription? What could be a possible redress for the Subscriber if PGRFA is not received from providers under the Multilateral System as per the Subscription terms?

Relevant provision(s) of the Treaty

Article 12.1, Article 12.2, Article 11.4, Article 15.1a, Article 15.1b, Article 15.2

Relevant provision(s) of the (current) SMTA

n/a

Relevant provision(s) of the draft revised SMTA (eighth meeting of the Working Group, IT/OWG-EFMLS-8/18/Report, Appendix 2)

Annex 3

Legal opinion:

1. The SGLE notes that the rights and obligations under the SMTA relate to the material transferred under the SMTA. The SMTA does not give any rights or guarantees for future access to other material from the Multilateral System.

2. Any remedies that the Subscriber may have relating to the refusal of future access are only those derived from its status as a legal or natural person under the jurisdiction of a Contracting Party to the Treaty and not as a party to the SMTA. The Subscriber could request its national government, if it is a Contracting Party, to institute compliance procedure for breach of obligations under the Treaty.

3. The SGLE, however, notes that an alternative for additional remedies could be to establish redress options in the provisions of the SMTA, which could include the right of the Subscriber to withdraw from the Subscription or pay a lower Subscription fee. This would require the establishment of conditions and procedures for the operation of such options.

OPINION 17

What would constitute a "material breach" in case of Article 4.5 of Annex 3 of the draft revised SMTA? Would your assessment change if the Governing Body did not have the right to terminate the Subscription but to terminate the right of the Subscriber to access PGRFA covered by the MLS under the Subscription terms? Are you aware of any cases in international law where a political body is given the right to establish a "material breach" of a contract between private individuals and to make a determination that results in the termination of rights set out in the contract?

Relevant provision(s) of the Treaty

n/a

Relevant provision(s) of the (current) SMTA

Article 7, Article 8

Relevant provision(s) of the draft revised SMTA (eighth meeting of the Working Group, IT/OWG-EFMLS-8/18/Report, Appendix 2)

Article 7, Article 8, Annex 3 (Art.4.5)

Legal opinion:

1. The SGLE notes that the term "fundamental non-performance" as used in Art. 7.3.1 of the UNIDROIT Principles of International Commercial Contracts relates to the same concept as "material breach". The UNIDROIT Principles are a source of applicable law under the SMTA. The criteria for determining if there is fundamental non-performance, as set out in Art. 7.3.1 of the UNIDROIT Principles, are the following:

> (a) the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract unless the other party did not foresee and could not reasonably have foreseen such result;
>
> (b) strict compliance with the obligation which has not been performed is of essence under the contract;
>
> (c) the non-performance is intentional or reckless;
>
> (d) the non-performance gives the aggrieved party reason to believe that it cannot rely on the other party's future performance;
>
> (e) the non-performing party will suffer disproportionate loss as a result of the preparation or performance if the contract is terminated.

2. The SGLE has not found any precedent in international law in which a political body is given the right to establish a "material breach" of a contract between private individuals and to make a determination that results in the termination of rights set out in the contract.

3. Under Article 8 of the SMTA, the Third-Party Beneficiary has the right to initiate dispute settlement procedures, the outcome of which may include termination of the SMTA.

4. The SGLE discussed at some length whether the Governing Body has the legal right to terminate the Subscription System for the Subscriber. The SGLE was of the opinion that the Governing Body has such a right for the following reasons: The Governing Body has the explicit power under the Treaty to regulate the Multilateral System and to set the terms of the SMTA including the level and method of payment of benefit sharing. This includes the power to regulate the Subscription System. The Third-Party Beneficiary acting on behalf of the Governing Body

could be given the right to terminate the Subscription in case of non-fulfilment of the Subscription terms. However, the Subscriber should be asked to accept the terms and conditions of the Subscription System when opting for it through registration. The terms and conditions of the Subscription System should be made available to the Subscriber at the time of Subscription including the terms and conditions for the termination of the Subscription. The SGLE notes that the combination of the power of Governing Body under the Treaty and the acceptance of the terms and conditions of the Subscription System by the subscriber provides sufficient legal basis for the power of the Governing Body and the Third-Party Beneficiary acting on its behalf to terminate the subscription.

5. As an additional observation, the SGLE noted that it is typical of contracts to provide for a balance of rights and obligations, so if the Governing Body is given the right to terminate the Subscription for fundamental non-performance, it should consider providing a comparable right to the subscriber (see opinion 16).

OPINION 18

The Working Group is exploring the possibility of limiting an expansion of the list of crops contained in *Annex I* of the Treaty to all plant genetic resources for food and agriculture found in *ex situ* conditions, for example by adding the qualifier, "that are held in *ex situ* collections". Would such a limitation be compatible with the provisions on the MLS contained in Articles 10 to 13 of the Treaty, including Article 12.3h? Would such an amendment have any consequences for the exemptions currently contained in the list of crops? If so, what would these consequences be? What are the consequences of the formulation "established according to criteria of food security and interdependence" in Article 11.1 of the Treaty for amending *Annex I*?

Relevant provision(s) of the Treaty

Article 3, Article 10, Article 11, Article 12

Relevant provision(s) of the (current) SMTA

n/a

Relevant provision(s) of the draft revised SMTA (eighth meeting of the Working Group, IT/OWG-EFMLS-8/18/Report, Appendix 2)

n/a

Legal opinion:

1. The SGLE recalling opinion 5 of the Ad Hoc Technical Advisory Committee on the Multilateral System and the SMTA concluded that PGRFA that meet the criteria of "management and control" and "in the public domain" are within the scope of the Multilateral System whether they are in *ex situ* or *in situ* conditions. The meaning of Article 12.3h of the Treaty is that Contracting Parties have the power to regulate the way in which access is provided, which may include collection of PGRFA found in *in situ* conditions through national legislation.

2. The SGLE was of the opinion that limiting the crops set out in Annex I to material found in *ex situ* collections would be incompatible with Article 12.3h and would require an amendment of the Treaty. If, on the other hand, new crops were to be added to the list, whether as an expansion of Annex I or as a new list, such an addition could, while in principle still incompatible with Article 12.3h, be viewed as an exercise of the discretionary power of the Governing Body. In any case, such an addition to the existing list or inclusion of a new list would constitute an amendment to the Treaty that would trigger the procedures as per Articles 23 and 24 of the Treaty.

3. The SGLE noted that the criteria "food security and interdependence" were the basis on which the list of Annex I was elaborated, but they also have legal importance in the interpretation of the list and more particularly in considering future amendments to the list. They provide a yardstick for future amendments and grounds on which future additions to the list may be put forward. The SGLE noted that it is up to the Governing Body to make the determination of how the criteria are met.

OPINION 19

After adoption of the revised SMTA by the Governing Body, which version of the SMTA would have to be used for subsequent transfers of PGRFA received under the current (old) SMTA? Could the revised SMTA be adopted provisionally by the Governing Body pending the fulfilment of certain specified conditions? In other words, could the Governing Body adopt the revised SMTA on condition that it will come into effect after certain requirements are met within a given period of time?

Relevant provision(s) of the Treaty

Article 12.2, Article 12.3g, Article 12.4, Article 15.1a, Article 15.1b, Article 15.2

Relevant provision(s) of the (current) SMTA

Article 6.4, Article 6.5

Relevant provision(s) of the draft revised SMTA (eighth meeting of the Working Group, IT/OWG-EFMLS-8/18/Report, Appendix 2)

Article 6.4, Article 6.5

Legal opinion:

1. The SGLE noted the need to have clarity, simplicity and legal certainty.

2. The new SMTA could be adopted by the Governing Body and the Governing Body could set certain conditions on the fulfilment of which the SMTA would come into effect. To adopt the revised SMTA and allow it to be used provisionally, subject to the condition that it would be voided if certain conditions are not met, would be legally possible but would not be advisable from a legal and practical point of view because it would not provide adequate legal certainty. Should the working group wish to adopt such an approach it would need to provide legal certainty as to the rights and obligations already entered into under the revised SMTA, if the revised SMTA becomes no longer valid (terminated) (e.g. would these rights continue for a period of time). All of the consequences would need to be spelled out in the SMTA.

3. The SGLE was of the opinion that for transfers of material not received under the current (old) SMTA the new revised SMTA should be used. The default situation for transferring materials received under the current (old) SMTA should be that the current (old) SMTA should be used. However, the parties to the transfer should have the option to agree to use the revised SMTA for example if they wish to take advantage of the Subscription System.

4. The SGLE noted that it may be desirable to include in the revised SMTA provisions on how revisions of the SMTA should be introduced in the future.

OPINION 20

What are the legal consequences in case of a breach of Art. 6.2? What are the possible legal remedies that are available in such a case?

Relevant provision(s) of the Treaty

Article 12.3d

Relevant provision(s) of the (current) SMTA

Article 6, Article 7, Article 8

Relevant provision(s) of the draft revised SMTA (eighth meeting of the Working Group, IT/OWG-EFMLS-8/18/Report, Appendix 2)

Article 6, Article 7, Article 8

Legal opinion:

1. The SGLE was of the opinion that, if no action is taken by the Provider, the Third-Party Beneficiary could challenge the intellectual property right (IPR) either through challenging the obtaining of the IPR or by challenging the ownership and validity of the IPR, before a competent body.

2. The SGLE noted that another remedy would be to provide for liquidated damages in the SMTA. The proportionality of the damages would be subject to review by the arbitral tribunal upon request of the affected party.

3. The SGLE noted that the whole question of legal remedies falls under the provisions of Article 8 of the SMTA, which deals with dispute settlement and provides for the right of the Third Party Beneficiary to initiate dispute settlements procedures, including through arbitration. This would of course cover remedies for breaches of contract including breaches of Article 6.2. If a reference to dispute settlement by a competent national court were to be included, this would require changes to Article 8.4.

4. The SGLE noted, looking at the proposal made in the working group, that a contract cannot determine the evidentiary standards for a court or arbitral tribunal to use, nor can it determine the level of the competent court.

OPINION 21

The Working Group is discussing a proposal to prioritize/earmark income generated under the benefit-sharing provisions of the SMTA (and therefore paid into the BSF): Payments made by users in a specific Contracting Party would be used, either exclusively or predominantly, for projects to be implemented in this same Contracting Party. The Co-chairs are of the opinion that this is not a merely legal question, but a political question for the Governing Body to decide. Please provide a general legal assessment of this proposal.

Relevant provision(s) of the Treaty

Article 13.2, Article 13.2d, Article 13.3, Article 13.4, Article 13.5, Article 18, Article 19

Relevant provision(s) of the (current) SMTA

n/a

Relevant provision(s) of the draft revised SMTA (eighth meeting of the Working Group, IT/OWG-EFMLS-8/18/Report, Appendix 2)

n/a

Legal opinion:

1. The SGLE noted that there is no legal basis in the Treaty for earmarking and that the question of prioritizing is a matter to be decided by the GB in the exercise of its discretionary powers under Article 19 of the Treaty and in accordance with the provisions governing the use of benefit sharing funds as set out in article 13.3 of the Treaty.

2. The SGLE was of the opinion that it was not legally appropriate to include such a provision in a contract between private parties.

ANNEX 2: LIST OF PARTICIPANTS

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