



**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**

**SUBMISSIONS FROM CONTRACTING PARTIES AND STAKEHOLDERS ON  
MATTERS TO BE DISCUSSED AT THE NINTH MEETING OF THE  
WORKING GROUP**

*Note by the Secretary*

At its Seventh Session, the Governing Body requested the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System (Working Group) to revise the SMTA, based on the Report of the Working Group to the Seventh Session of the Governing Body and taking into account, *inter alia*, “*further information or proposals that have been or may be submitted by Contracting Parties and stakeholder groups.*”

Moreover, the Governing Body “*appeal[ed] to stakeholders who use plant genetic resources under the International Treaty to assist the Working Group in finalizing the process for the enhancement of the Multilateral System, including by continuing to develop concrete proposals regarding the finalisation of the revised Standard Material Transfer Agreement, the process for further expansion of the scope of Annex I of the International Treaty, and ways to attract additional voluntary funding for the Benefit-sharing Fund on a sustainable basis, for consideration of the Working Group.*”

Based on these requests, the Secretary issued Notification NCP GB8-019, inviting Contracting Parties, stakeholder groups and stakeholders who use plant genetic resources under the International Treaty to make available inputs and proposals on the subjects being discussed by the Working Group at its ninth meeting.

This document compiles the submissions received in reply to Notification NCP GB8-019, in language and form in which they were received.

In addition to the submissions, the Co-chairs of the Working Group received a number of informal inputs that they considered in preparing for the ninth meeting of the Working Group.

---

*List of Appendixes*

---

1. Submission by Argentina, *Appendix 1*
2. Submission by Brazil, *Appendix 2*
3. Submission by Japan, *Appendix 3*
4. Submission by the North America Region, *Appendix 4*
5. Submission by the Philippines, *Appendix 5*
6. Submission by Senegal, *Appendix 6*
7. Submission by Spain, *Appendix 7*
8. Submission by Uruguay, *Appendix 8*
9. Submission by the Consultative Group on International Agricultural Research, *Appendix 10*
10. Submission by the International Seed Federation, *Appendix 11*

**Appendix 1**

"2019 – AÑO DE LA EXPORTACION"



Ministerio de Relaciones Exteriores y Culto

NOTA DIGMA N° 063 /2019

Buenos Aires, 30 de abril de 2019

Estimado Dr. Nnadozie,

Tengo el agrado de dirigirme a Usted en relación con las negociaciones en curso sobre la reforma del Sistema Multilateral de Acceso y Reparto de Beneficios del Tratado Internacional sobre los Recursos Fitogenéticos para la Alimentación y la Agricultura.

Al respecto, y de conformidad con las disposiciones del Tratado Internacional, y con la finalidad de mejorar la facilitación del acceso a los recursos fitogenéticos para la alimentación y la agricultura dentro del sistema multilateral (artículo 12 del tratado Internacional), la Argentina desea realizar las siguientes consideraciones ante las alternativas de propuesta de modificación del Acuerdo Normalizado de Transferencia de Materiales (ANTM).

La Argentina considera que, en el caso de que el ANTM vigente se modificara para transformarlo en un sistema general de pagos obligatorios con excepciones, será condición necesaria la inclusión del siguiente artículo:

[artículo XX: Los siguientes usuarios estarán exentos de las obligaciones estipuladas en el artículo XX:

- a) agricultores familiares.
- b) pueblos originarios que en el contexto de prácticas de agricultura familiar o en un ámbito agrícola comunitario tradicional intercambien o vendan entre ellos semillas.
- c) pequeñas empresas fitomejoradoras.
- d) instituciones públicas.]

La Argentina considera que definición de estos términos debería tener en cuenta el alcance dado por las normativas nacionales.

La Argentina solicita la distribución de esta propuesta entre todas las partes involucradas en el proceso de negociación de reforma del ANTM.

Aprovecho la oportunidad para saludarlo con mi más distinguida consideración.

María Levaque VAGGI  
MINISTRO  
DIRECTORA GENERAL  
DE ASUNTOS AMBIENTALES

AL SEÑOR SECRETARIO  
TRATADO INTERNACIONAL SOBRE RECURSOS FITOGENÉTICOS  
PARA LA ALIMENTACIÓN Y LA AGRICULTURA  
KENT NNADOZIE  
S/D

"2019 -- AÑO DE LA EXPORTACION"



Ministerio de Relaciones Exteriores y Culto

NOTA DIGMA N° 06 4 /2019

Buenos Aires, 30 de abril de 2019

Estimado Dr. Nnadozie,

Tengo el agrado de dirigirme a Usted en relación con las negociaciones en curso sobre la reforma del Sistema Multilateral de Acceso y Reparto de Beneficios del Tratado Internacional sobre los Recursos Fitogenéticos para la Alimentación y la Agricultura.

Al respecto, y de acuerdo con las disposiciones del Tratado Internacional, la Argentina presenta la siguiente propuesta de modificaciones del Acuerdo Normalizado de Transferencia de Materiales (ANTM), con el objetivo de mejorar el cumplimiento de los objetivos del Tratado Internacional.

La Argentina propone un nuevo artículo, cuyo texto que debería incorporarse a continuación del artículo 6.8:

artículo 6.8 bis [Cuando el pago sea realizado por un Receptor radicado en el territorio de una Parte Contratante que es un país en desarrollo o en el territorio de una Parte Contratante con economía en transición, o cuando el pago realizado por un Receptor haya sido calculado de acuerdo al artículo 6.8 del ANTM sobre la base de los registros contables del Receptor en el territorio de una Parte Contratante que es un país en desarrollo o en el territorio de una Parte Contratante con economía en transición, el 80 % del monto efectivamente pagado al Organismo Rector será inmediatamente destinado a financiar proyectos de implementación del Tratado Internacional en el territorio de la Parte Contratante que es un país en desarrollo o en el territorio de la Parte Contratante con economía en transición, de la cual provienen los fondos depositados. Estos fondos serán administrados por la autoridad de aplicación que cada Parte Contratante designe al efecto, en conjunto con la FAO. Se deberá informar sobre la evolución de los proyectos al Comité Permanente de Estrategia de Financiamiento y Movilización de Recursos del Tratado, quien remitirá un informe al Órgano Rector..]

AL SEÑOR SECRETARIO  
TRATADO INTERNACIONAL SOBRE RECURSOS FITOGENÉTICOS  
PARA LA ALIMENTACIÓN Y LA AGRICULTURA  
KENT NNADOZIE  
S / D

"2019 – AÑO DE LA EXPORTACION"



Ministerio de Relaciones Exteriores y Culto

Asimismo, la Argentina propone un nuevo artículo en el Anexo 3 del ANTM, cuyo texto sería el siguiente:

[3.7 Cuando el pago sea realizado por un Suscriptor radicado en el territorio de una Parte Contratante que es un país en desarrollo o en el territorio de una Parte Contratante con economía en transición, o cuando el pago realizado por un Suscriptor haya sido calculado de acuerdo al artículo 3.1 del Anexo 3 del ANTM sobre la base de los registros contables del Suscriptor en el territorio de una Parte Contratante que es un país en desarrollo o en el territorio de una Parte Contratante con economía en transición, el 80 % del monto efectivamente pagado al Órgano Rector será inmediatamente destinado a financiar proyectos de implementación del Tratado Internacional en el territorio de la Parte Contratante que es un país en desarrollo o en el territorio de la Parte Contratante con economía en transición, de la cual provienen los fondos depositados. Estos fondos serán administrados por la autoridad de aplicación que cada Parte Contratante designe al efecto, en conjunto con la FAO. Se deberá informar sobre la evolución de los proyectos al Comité Permanente de Estrategia de Financiamiento y Movilización de Recursos del Tratado, quien remitirá un informe al Órgano Rector.]

Estas propuestas realizadas por la Argentina se basan en las siguientes consideraciones:

- a) Los objetivos del Tratado son la conservación y el uso sostenible de los recursos fitogenéticos para la alimentación y la agricultura y la distribución justa y equitativa de los beneficios derivados de su utilización. Dichos objetivos se obtendrán vinculando el Tratado con la FAO y con el Convenio de Biodiversidad (artículo 1 del Tratado), así como explorando y aprovechando las sinergias correspondientes entre la FAO, el Convenio y el Tratado.
- b) Los países en desarrollo han asumido obligaciones internacionales al ratificar el Tratado. A nivel nacional, el cumplimiento de manera efectiva con dichas obligaciones se relaciona con los desafíos que debe hacer frente cada país en materia de conservación y uso sostenible de recursos fitogenéticos, así como desafíos en materia de nutrición y lucha contra el hambre, la necesidad de adaptación frente al cambio climático y de preservación de la biodiversidad, entre otros.

AL SEÑOR SECRETARIO  
TRATADO INTERNACIONAL SOBRE RECURSOS FITOGENÉTICOS  
PARA LA ALIMENTACIÓN Y LA AGRICULTURA  
KENT NNADOZIE  
S/D



Ministerio de Relaciones Exteriores y Culto

Dichos desafíos varían según tamaño del país, ubicación, características geográficas, cantidad de población, etc.

c) La asignación efectiva de recursos para que las Partes Contratantes que son países en desarrollo cumplan de manera efectiva las mencionadas obligaciones en virtud del Tratado, no depende particularmente de dichos países en desarrollo (artículo 18.4.b). Es por ello que el ANTM debería incluir disposiciones que preservasen la letra y el espíritu del Tratado en lo que respecta a la provisión de recursos, particularmente en caso de que los usuarios nacionales de Partes Contratantes que son países en desarrollo quedasen incluidos en un régimen de pagos obligatorios.

d) Los objetivos del mecanismo financiero del Tratado son potenciar la disponibilidad, transparencia, eficacia y efectividad del suministro de recursos financieros (artículo 18.2).

e) Tanto los usuarios del sistema que se encuentran en países en desarrollo, como otras partes interesadas, deberían ser beneficiarios directos de un Sistema Multilateral de reparto de beneficios que funcionara de manera eficaz, con el objetivo de contribuir a proyectos de conservación y uso sustentable de los recursos fitogenéticos en dichos países.

f) Por tales motivos, la Argentina considera necesario que un porcentaje de los aportes realizados por usuarios nacionales de países en desarrollo retorne al país inmediata e incondicionalmente para la implementación de proyectos de conservación y uso sustentable.

g) La implementación estaría definida por las autoridades competentes de cada país, teniendo en cuenta las prioridades nacionales. Este flujo de recursos estaría supervisado directamente por la Secretaría del Tratado y en el marco del Comité Permanente de Estrategia de Financiamiento y Movilización de Recursos del Tratado, que a su vez informaría al Órgano Rector.

La Argentina solicita comunicar esta propuesta entre todas las partes involucradas en el proceso de negociación de reforma del ANTM.

Aprovecho la oportunidad para saludarlo con mi más distinguida consideración.

  
Marcia Levaggi  
MARCIA LEVAGGI  
MINISTRO  
DIRECTORA GENERAL  
DE ASUNTOS AMBIENTALES

AL SEÑOR SECRETARIO  
TRATADO INTERNACIONAL SOBRE RECURSOS FITOGENÉTICOS  
PARA LA ALIMENTACIÓN Y LA AGRICULTURA  
KENT NNADOZIE  
S / D

**Appendix 2**

NOTIFICATION NCP GB8-019  
– MLS Working Group  
Inputs and proposals by Brazil

Introduction

The Multilateral System of Access and Benefit-Sharing of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) has been successful in providing facilitated access to plant genetic resources for food and agriculture listed in Annex I of the Treaty. However, the sharing of monetary benefits arising from the commercialization of plant genetic resources that incorporate material accessed from the Multilateral System has been meager and has only occurred in one occasion, in 2018. In view of these issues, Brazil believes that the functioning of the Multilateral System can be enhanced by the adoption, at the 8<sup>th</sup> Session of the Governing Body, of two measures that should be approved in a single undertaking: a revised Standard Material Transfer Agreement (SMTA) and an amendment to the Treaty that expands the scope of Annex I.

Revision of the SMTA

The SMTA should be modified for the purpose of making all payments mandatory when Recipients commercialize a product that is a plant genetic resource for food and agriculture and that incorporates material accessed from the Multilateral System, regardless of the product being available with or without restriction. To guarantee mandatory payments, article 6.8 of the SMTA must be modified, eliminating voluntary payments and establishing a fixed percentage for payments, which would be more attractive than the one prescribed for article 6.7.

The Subscription System foreseen in article 6.11 should be stimulated as a way of replenishing the Benefit-Sharing Fund (BSF) in the short term and providing resources in a predictable and reliable manner. Exemptions from payment to the subscription system would include public educational and/or research institutions, native peoples and family farming.

With regard to the funding strategy for the implementation of the Treaty, Brazil defends that the BSF needs to have a constant and adequate flow of resources that should come primarily from obligations acquired through the SMTA. In addition to that, Contracting Parties, specially developed countries, should strive to fulfill obligations defined by article 18.4 of the Treaty.

#### Expansion of the scope of Annex I

Brazil endorses the expansion of the coverage of the Multilateral System to all plant genetic resources for food and agriculture that are under the management and control of the Contracting Parties, and in the public domain, as prescribed by the Treaty, once available in ex situ conditions.

Other options for the expansion of the coverage of the Multilateral System, such as an amendment (required by Art. 19.2) to give the Governing Body the capacity to add further PGRFA or the partial/periodic expansion of Annex I, would mean a permanent negotiation engagement by the Parties, in a time demanding and politically sensitive process. Paradoxically, that would create additional obstacles for the expansion of the coverage.

Additionally, Brazil would like to highlight the importance of the full implementation of articles 11.2, 11.3 and 11.4 of the Treaty. All holders of plant genetic resources for food and agriculture, including natural and legal persons, should be encouraged to include these resources in the Multilateral System, as part of a general effort to guarantee the conservation and sustainable use of plant genetic resources for food and agriculture.



**Appendix 3*****Inputs from Japan to the Ad Hoc Open-Ended Working Group on Enhancing the Functioning of the Multilateral System of Access and Benefit-Sharing***

The Government of Japan would like to submit the following inputs on enhancing the functioning of the Multilateral System (MLS) of Access and Benefit-Sharing to the ninth meeting of the Working Group, as a reply to Notification NCP GB8-019-MLS Working Group, based on Resolution 2/2017 of the Treaty.

The main issue for the enhancement of the functioning of the Multilateral System of Access and Benefit-Sharing is to increase payments to the Benefit-Sharing Fund (BSF). It is, therefore, critical to consider how to provide more attractive plant genetic resources through the MLS to users who pay into the Benefit-Sharing Fund (BSF). The Subscription Option should, therefore, be sustainable and feasible, designed to be easily accessible by any user, fully taking into account the users' interests.

**1. Revision of the Standard Material Transfer Agreement (SMTA)****(1) Access Mechanism**

In our view, the Subscription Option should not be the sole access mechanism for plant genetic resources.

This is because the user-based Subscription Option is not necessarily aligned with the basic principle of access and benefit sharing (ABS), which is the fair and equitable sharing of the benefits arising out of "utilization" of genetic resources, as provided in the Article 10.2 of the Treaty and in the Convention on Biological Diversity. It is questionable whether SMTA that only contains a subscription system and has no option for single access (as outlined in document IT/OWG-EFMLS-5/16/3) is in accordance with the provisions of the Treaty.

The Standing Group of Legal Experts is of the opinion that the link between access and subsequent benefit-sharing resulting from commercialization should be maintained. This can be done by maintaining 6.7 and 6.8 of the SMTA.

In addition, the Subscription Option should be designed to be feasible and efficient, taking into account the potential burden incurred on users as well as providers. For instance, efforts should be made to ensure that costs entailed for the provider in checking the subscription status of the end user are kept low, while inspection of sales from the use of plant genetic resources should not be enforced, given the significant cost implications.

**(2) Withdrawal/ Termination**

Japan can agree with an initial 10-year term for the Subscription Option, after which the subscriber has the right to terminate the subscription. Japan also agrees with the payment obligation of up to 2 years after the subscription has been terminated.

With regard to payment obligations on single access, clear time limits for payment obligations should be set, taking into account the duration of intellectual property rights (average 20-25 years).

(3) Payment Rates

Payment rates/levels need to be acceptable to the seed industry, which is most likely to benefit from the commercialization of plant genetic resources for food and agriculture (PGRFA).

To facilitate sustainable and predictable income into the BSF, the number of plant genetic resources contained in the MLS should be increased sustainably and predictably by, for example, setting a numerical target of the number of plant genetic resources in the MLS. It should be reminded that plant genetic resources in the MLS are the sources of benefits that are to be shared.

Furthermore, it is necessary to enhance incentives for providers to register their plant genetic resources on the MLS through modifying the operational rule of the BSF projects, that is to say, countries which deposit more plant genetic resources in the MLS and/or which receive more access to their plant genetic resources in the MLS should gain preferential access to the BSF.

(4) Digital Sequence Information as it Relates to a Revised-SMTA

Japan considers that digital sequence information (DSI), in the context of access and benefit sharing, should be discussed in conjunction with the CBD. We believe that accumulation, open- access and free use of DSI facilitate the advancement of scientific knowledge, and contribute to the conservation and sustainable use of PGRFA. These activities could be hindered if open- access and free use of DSI are to be restricted.

## **2 Expansion of Crops to be Covered by the MLS**

(1) Expansion of Crops to be Covered by the MLS

Japan supports expanding the scope of MLS to cover all PGRFA. The expansion of crops that are to be covered by the MLS could stimulate more user-based payments into the Benefit-Sharing Fund. A gradual expansion in coverage is impractical, as it would take too much time in the selection of additional crops, in addition to the ratification of an amended Annex I.

(2) Incentives for Expanding the Crops to be Covered by the MLS

In order to facilitate the conservation and sustainable use of plant genetic resources through the MLS following the ratification of an amended Annex I, efforts should be made to provide preferential treatment in approvals of projects that are funded by the BSF for Contracting Parties that have provided PGRFA through the MLS (either directly or indirectly) and/or have ratified the amended Annex I.

(3) Coming into Force of a Revised-SMTA and Amendment of Annex I

To enhance the functioning of the MLS, due consideration is necessary on how to provide more attractive plant genetic resources to users.

Therefore, an amendment of the SMTA and an expansion of Annex I should come as a single package, with both coming into effect simultaneously.

North America submission  
OWG-EFMLS-9  
April 2019

The North America region refers also to its submission of September 2016.

## **PAYMENT EXEMPTIONS/TERMINATION**

### ***Exemptions from payments***

- For exemptions from payments under the Subscription Option, use a simple approach that exempts users whose annual sales do not reach a certain threshold, for example USD5,000,000 per year.
- Obligatory payments under Article 6.7 of the SMTA should cease if the proportion of MLS Material in the Product is very low. Proposed language:

Annex 2, Option 1 (obligatory payments)

“No payment shall be due from the Recipient when the Product or Products...

- (c) contain a genetic contribution of less than 25% by pedigree of the Material accessed from the MLS or do not contain an identifiable trait of Commercial Value that originated from the Material accessed from the MLS.”
- The same text is needed under Annex 2, Option 2 (voluntary payments) under v 1. (d).
- If an agreement were reached that included some form of mandatory payment under Art. 6.8, then similar exemption provisions would have to be incorporated as part of that agreement.
- Possibly, the same exemption should apply if Material under development is passed on, under 6.5 (e).
- Maintain Article 4.x and 4.x bis to cover the possibility of a subscriber being unable to continue due to bankruptcy or other severe extenuating circumstances.

### ***Terminations of payments***

- Termination of payment obligations after 20 years are needed for Articles 6.7 and 6.8.

## **DEFINITIONS REQUIRED UNDER SMTA ARTICLE 2**

- Definitions of Sales
  - We support using the definition of Sales proposed by industry (ISF) as the basis for discussion.  
*“Sales” means gross income received by the Recipient and its respective affiliates from licensing PGRFA to third parties and from commercialization.*
- Definition of Affiliates:
  - "One corporate body is affiliated with another corporate body if one of them is the subsidiary of the other or both are subsidiaries of the same corporate body or each of them is controlled by the same legal person"
- Definition of Trait of commercial value (based on IT/OWG-EFMLS-8/18/Report, page 25)
  - *“Trait of Commercial Value”* means any inheritable and measurable trait that confers significant commercial value to a Product, including but not limited to agronomic traits, traits conferring resistance to biotic or abiotic stresses, traits that enhance the nutritional or processing value of harvested commodities, and any other traits used to describe a Product for the purpose of promoting its commercialization.

**AMENDMENT TO ANNEX I**

- We support expansion of Annex I to all PGRFA, using the amendment mechanism of the Treaty (Arts. 23-24).
- The amendment should be as simple as possible. We support the overall intent pursued under the Swiss proposal.

**“DSI” / GENETIC SEQUENCE DATA AND OTHER INFORMATION**

- We will not support adding language into the SMTA or Treaty that allows an interpretation that the SMTA refers to anything other than the exchange of material. DSI is not genetic material and cannot be included in the SMTA except as captured by the Subscription Option. We do not accept new definitions in SMTA Art. 2 or elsewhere (such as proposals in 6.2 including “genetic parts and components”).
- Of course providers should make available non-confidential information associated with the material, in accordance with Treaty Art.12.3(c).

**GOVERNING BODY DECISION ON EFMLS**

- A Governing Body decision should urge countries that have not yet done so to place material in the Multilateral System. In 2018, according to the WIEWS database of FAO, the MLS contained material of national genebanks of 54 countries (0.7 million accessions) and 10 International Agricultural Research Centres (0.6 million accessions).
- There are some aspects of the OWG-EFMLS discussions that, if adopted, should be captured in a Governing Body decision, rather than in the SMTA or in an amendment to Annex 1. These include the following:
  - Clarification on materials covered by (expanded) Annex 1
  - Genetic Sequence Data/”DSI”
- Any decision of the Governing Body must be consistent with the Treaty and cannot create additional obligations upon Contracting Parties. It could recall, as appropriate, relevant Treaty provisions.
- Exemptions from facilitated access of certain materials (e.g., *in situ*) under expanded Annex I should be based on provisions of the Treaty, must be consistent with the Treaty and should not create loopholes in implementation of the Treaty.
- GSD, “DSI” and other data and information are covered under the provisions of the Treaty, e.g., Articles 7 and 13.2 addressing information. A GB decision could cite relevant provisions and possibly provide for additional actions to advance those provisions.
- Access to information constitutes a major non-monetary benefit, as noted in Article 13.2 and in Article 17.1 on the Global Information System on PGRFA, which states that “...exchange of information will contribute to the sharing of benefits...”.

To promote stronger capacity in developing nations to access available DSI/GSD and apply it to locally relevant research, crop breeding, conservation programs, etc., the GB could decide on specific guidance for the BSF to support capacity-building related to GSD/DSI, within the context of Article 18.5 and other relevant provisions.

- Additional measures could include: encouraging countries to provisionally implement, on a voluntary basis, the expanded Annex 1 before its entry into force; actions by the seed industry, donors, or others to support the MLS; or scheduled review of progress in achieving entry into force of the amendment to Annex I.

**CLEARINGHOUSE**

- SMTA data at the accession level identifying requesters should not be made available to the public because it would infringe upon the privacy of germplasm recipients and is not required according to Treaty Article 12.3(b). Only the Treaty Secretariat can request access to such confidential information. In case of dispute settlement, wider access to such information may be provided. It may be advisable for the SMTA to indicate to germplasm recipients how information can (and cannot) be shared.
- The additional administrative burden to create a clearinghouse for SMTAs by the Treaty Secretariat has not been justified.

**Appendix 5**

Here are some suggestions for the Ad Hoc Open-Ended Working Group to Enhance the Functioning of the Multilateral System of Access and benefit-Sharing to update and support the process to enhance the functioning of Multilateral System.

SUGGESTIONS	REASONS
1. Addition of Soybean, <i>Glycine max</i> (L.) Merr, peanut, <i>Arachis hypogaea</i> & mungbean, <i>Vigna radiata</i>	<ul style="list-style-type: none"> <li>- these food crops are high in protein and nutrient content which could help alleviate malnutrition</li> <li>- and to update the list of crops under Annex 1 since some food crops which are equally important</li> <li>- to those on the list are not included</li> </ul>
2. To alphabetize the list of crops in Annex 1	<ul style="list-style-type: none"> <li>- to locate crop name easily</li> </ul>
3. To include not only the genus but also the species of specific crops under the list of food crops	<ul style="list-style-type: none"> <li>- to specifically identify the species of crops covered under the Multilateral System</li> </ul>

Additional Comments:

1. Please alphabetize the crops per group.

2. Additional crops for the list of food crops:

tomato, peanut or groundnut, durian, mango, rambutan, jackfruit, sugarcane, coffee, cacao.

Prepared by: Maricel Ramos PGR Focal  
 Person  
 Bureau of Plant Industry  
 Philippines

## TRAITÉ INTERNATIONAL SUR LES RESSOURCES PHYTO-GÉNÉTIQUES POUR L'ALIMENTATION ET L'AGRICULTURE

### *Ad Hoc* Open-Ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-Sharing

Dakar-Sénégal, Avril 2019

**Réf:** NCP-GB8-019 Groupe de travail SML, du 11 mars 2019.

#### Avant-propos

En tant qu'expert désigné, nous vous remercions de l'opportunité qui nous est offerte, depuis deux intersessions de l'Organe directeur, pour soumettre des avis et des contributions au Groupe de travail spécial à composition non-limitée sur l'amélioration du fonctionnement du système multilatéral d'accès et de partage des avantages (SML-ABS) du Traité International. Le Sénégal, Partie contractante au dit Traité International, permettez-nous de saluer avec respect la dynamique évolutive favorable des négociations en cours et l'apport considérable des Parties prenantes.

Nous rappellerons certaines caractéristiques fondamentales du Traité International qu'il est bon de garder à l'esprit en la circonstance, avant de formuler nos avis et propositions sur les points encore en discussion.

#### 1. Introduction

Le Traité International dont il est question, harmonisé à la Convention sur la diversité biologique, est le premier instrument international sur les Ressources Phytogénétiques pour l'Alimentation et l'Agriculture (RPGAA) juridiquement contraignant. Il est également le premier instrument à avoir instauré au niveau international, une gouvernance multilatérale de la biodiversité. Il est inscrit dans la ligne du Sommet Mondial de l'Alimentation (FAO-Rome, 1996) qui avec son plan d'action a permis aux États membres du système des Nations-Unies, de mettre un accent particulier sur la faim dans le monde, l'objectif de sécurité alimentaire et nutritionnel avec le gage d'un fort engagement politique à la mise en œuvre du plan convenu. Le Traité Int'l met en exergue la recherche scientifique, notamment, en amélioration génétique des plantes et création de variétés adaptées aux effets des changements climatiques, et en production et commercialisation de semences et matériels de plantation de qualité qui soient accessibles à tous afin de contribuer significativement à l'objectif "**Faim Zéro**".

En s'intéressant à une ressource naturelle tarissable : les RPGAA, éléments tangibles de la biodiversité non moins accompagnés d'éléments intangibles que sont les savoirs traditionnels qui leurs sont associés, le bon fonctionnement d'un tel instrument multilatéral qui, après sept années de difficiles négociations, suscitait un large engouement et un immense espoir pour les gens des champs, ne peut laisser indifférent. Nous gardons de nouveau espoir, qu'avec cette refondation du Traité Int'l, à travers une amélioration substantielle du fonctionnement de son **Système multilatéral d'accès aux RPGAA et de partage des avantages générés de leur utilisation (SML-ABS)**, un saut qualitatif significatif puisse être noté, à la prochaine évaluation de son application et de sa mise en œuvre.

La présente contribution aux négociations concernant l'ATTM s'inscrit dans l'intérêt commun que ce MLS-ABS fonctionne mieux. Le grand nombre de documents émis sur la question en discussion, depuis au moins six années, pour ou par le Groupe de travail spécial chargé d'améliorer le fonctionnement du système d'accès et de partage des avantages a été passé en revue et débattu selon les enjeux en cours, en ayant à l'esprit, les objectifs et l'impact potentiel dudit Traité Int'l sur l'agriculture sénégalaise et ses populations, en période de réchauffement climatique intense.

#### 2. Révision de l'Accord type de transfert de matériel (ATTM)

## 2.1. *Améliorer le partage juste et équitable des avantages monétaires (appendice 1)*

### 2.1.1. Accès et paiement dans le projet d'ATTM révisé

Dans le but de fournir un flux de ressources immédiat, régulier et prévisible aux différents acteurs impliqués dans la conservation, l'utilisation, l'échange, l'amélioration génétique et la commercialisation de produits contenant des ressources phytogénétiques pour l'alimentation et

l'agriculture (RPGAA), notre avis porte sur l'instauration d'un mécanisme d'accès aux RPGAA sous la forme d'une **adhésion au Système de souscription** avec un paiement de redevance tel que décrit par l'article 6.11 de l'ATTM (Appendice 2, IT/OWG-EFMLS-8/18/Rapport). Laquelle souscription concerne **toutes les espèces couvertes par le système multilatéral d'accès facilité et de partage des avantages**, tel que mentionné à l'article 1.2 de l'annexe 3 de l'ATTM révisé.

Dans un souci de transparence dans l'utilisation du matériel génétique, une fois l'abonnement établi (cf. annexe 4), un ATTM est requis pour chaque nouvelle demande de RPGAA avec l'obligation d'y **préciser l'espèce ciblée** et sans aucune autre nouvelle obligation de paiement. Et ce, pendant toute la durée de l'abonnement.

Ayant pour sous-entendu d'établir la confiance par la conciliation d'intérêts, à première vue, divergents, le mécanisme de souscription au MLS-ABS qui est choisi, a pour caractéristiques essentielles, une simplicité d'actions à tous les niveaux (fournisseurs, bénéficiaires, Secrétariat, tierce partie bénéficiaire), une transparence dans les échanges de matériels, une immédiateté du flux des ressources (génétiques et financières) et un important gain de temps et d'argent. Ce mécanisme ne nécessite aucun suivi, tout en assurant un flux de ressources immédiat et régulier car les banques de gènes seront de plus en plus professionnalisées dans leur fonction primaire (*par évolution vers une généralisation de l'intégration et d'une application efficiente des normes de gestion*) et les entreprises de sélection, dans celle de l'innovation variétale adaptée aux besoins alimentaires variés et croissants, et à l'agriculture.

### 2.1.2. Partage des avantages monétaires dans le système de souscription

- L'option 3 du projet de révision présentant un **taux unique de paiements annuels obligatoires** de la redevance calculée à partir des "**Ventes**" de l'abonné, est choisie. Ceci correspondant aux articles 3.1-VARIANTE et 3.2-VARIANTE (Annexe 3). La disposition 3.2-BIS devrait donc être biffée. La définition de "Ventes" est examinée avec l'Appendice 5 pour cerner ses éléments constitutifs. L'intérêt principal de cette option 3 est la simplicité du calcul de la redevance obligatoire, car le paiement est effectué sur la base de la **totalité du chiffre d'affaires (Ventes) des espèces couvertes par le MLS-ABS**. En conséquence de quoi, **l'influence de ce mode de calcul de la redevance sera un élément déterminant** dans la fixation du taux de paiement applicable (paragraphe 2.1.4 ci-dessous).

- S'agissant de l'**Exemption du paiement** annuel obligatoire des entreprises ayant un faible chiffre d'affaires, constituées des petits agriculteurs familiaux et, des instituts publics ou privés de recherche-développement et d'enseignement, l'option 1 qui fixe un seuil d'acceptation des paiements dus en deçà duquel l'abonné est exempté de paiement de la redevance toutes les fois où son volume annuel des ventes produit un montant de redevance inférieur à 1 000 USD, est préféré. Cette **option d'exonération** de paiement de la redevance **de l'année en cours**, reste dans l'objectif de rationalisation des coûts de gestion, car elle est sans fardeau administratif supplémentaire.

- S'agissant du **Reporting** du volume annuel des **ventes de toutes espèces du MLS-ABS confondues** (cf. Annexe 3, art. 3.1-VARIANTE), de l'année fiscale du dernier exercice écoulé, la procédure de reporting usitée par le PIP de l'OMS (2015) et décrite à l'Appendice 6, est une approche discrète acceptable. Elle **maintient la confidentialité** quant aux détails des informations commerciales de l'abonné et fournit celles nécessaires au besoin du paiement de la redevance. Un **formulaire** à remplir et à signer doit être préparé à cet effet, **avec une série de tranches de ventes progressives** exprimées en millions de dollars US et, une autre partie du formulaire, **réservée à la Certification de la déclaration** de l'abonné. À charge au Secrétariat du Traité Int'l de calculer le montant exact de

la redevance à payer. Cependant, pour plus de clarté juridique, une disposition autorisant la Tierce partie bénéficiaire à procéder **éventuellement à un audit** des déclarations pour vérification, devrait être prévue.

### 2.1.3. Partage des avantages monétaires dans le cadre de l'option «d'accès unique»

De l'expérience qu'a connue le Traité Int'l depuis son entrée en vigueur, en juin 2004, essayant également de répondre à la question suivante : Quelle serait la finalité d'un accès occasionnel au MLS- ABS ? Il nous est apparu difficile d'entrevoir un tel évènement sans alourdir l'ATTM révisé et plus particulièrement, la gestion simple du MLS-ABS (cf. Articles 6.7 et 6.8 et l'Annexe 2 de l'ATTM fixant les conditions d'application). Nous sommes d'avis que le choix d'une seule possibilité d'accès au MLS-ABS est raisonnable, économique et surtout, il permet de satisfaire l'obligation de paiement pour accéder aux RPGAA.

### 2.1.4. Taux de paiement

Le taux de paiement à appliquer dans le cadre d'un partage juste et équitable tel que souhaité par l'un des deux objectifs du Traité Int'l, est lié au niveau de revenu souhaité pour le Fonds fiduciaire pour le partage des avantages. Les nombreuses stratégies et simulations de niveaux, diffusées ou édictées sur la question, ont été passées en revue. Les échanges qui ont suivi localement, ont mis en exergue la nécessité d'une part, d'une **durabilité du flux de ressources** en sus de sa prévisibilité qui est plus souvent mise en exergue, et d'autre part, l'**attractivité du système de souscription** en vue de bénéficier de **la loi des grands nombres**. Au demeurant, lors de la 9<sup>ème</sup> réunion du Groupe de travail spécial, un **équilibre** sera être trouvé durant la discussion finale sur le taux de paiement à établir, une fois fixé sur le niveau de revenu du fonds fiduciaire qu'aurait établi le Comité *Ad hoc* sur la Stratégie de financement et de mobilisation des ressources.

### 2.1.5. Niveau de paiement / revenu

Conférer paragraphe 2.1.4.

## 2.2. Préciser les conditions d'expiration des obligations à l'issue d'un retrait ou d'une résiliation (appendice 2)

Pour mettre fin aux conditions d'abonnement au MLS-ABS, un certain nombre de dispositions légales est prévu par l'article 4 de l'Annexe 3 de l'ATTM. Parmi elles, certaines précisent les conditions d'expiration des obligations contractuelles : l'alinéa 4.3 maintient en vigueur des dispositions portant sur le partage des avantages visées à l'article 3 de ladite Annexe. La durée requise pour un tel maintien devrait être de **trois années**, à compter de la **fin de la souscription**, avant l'expiration définitive des paiements dus par l'abonné. En outre, l'alinéa 4.4-VARIANTE portant sur les **RPGAAeD** (PGRFAuD *en anglais*), maintient en vigueur les dispositions 6.1, 6.2, 6.3 et 6.9 de l'ATTM pour une durée de **cinq années**, à compter de la **date de dénonciation** de la souscription, avant leur expiration définitive.

## 2.3. Évaluer le caractère exécutoire (appendice 3)

Les inquiétudes ou préoccupations formulées quant au caractère exécutoire de l'ATTM sont pour l'instant difficilement appréhendables par manque d'exemples précis. Mais les points en cause, ont été très largement discutés lors des négociations du Traité International, jusqu'à l'**introduction** et au **choix stratégique** de la "**Tierce partie bénéficiaire**" pour les fonctions à elle édictées. Ce qui a permis leur prise en compte aussi bien par certaines dispositions du Traité International que par d'autres dispositions complémentaires de l'ATTM actuel. À notre connaissance, le processus de révision n'a pas, pour l'heure, porté préjudice aux dispositions pertinentes ayant trait à cette question. L'Avis n° 9 formulé par le Groupe permanent d'experts juridiques (GPEJ), confirme cette situation.

Au demeurant, si des personnes ressources ayant une expérience avérée sur ce point d'ordre, peuvent encore améliorer sans inflation, cet aspect, le texte proposé sera étudié en conséquence et une opinion sera formulée en temps opportun, dans l'intérêt commun d'un **fonctionnement rassurant** du Traité Int'l.



## 2.4. *Simplifier le projet de texte de ses crochets (appendice 4)*

- **Au niveau de l'Appendice 3 :**

L'article 1.2, après en avoir biffé le texte entre-crochets suivant [*l'espèce cultivée mentionnée...*], est une rédaction plus **conforme** à notre vision et plus **précise** quant à la **couverture exacte du Système de souscription**, du fait que nous considérons l'inscription au mécanisme comme devant être unique quelles que soient les espèces usitées. Le partage des avantages qui s'en suit a un aspect uniforme, en ce sens que le volume des ventes à considérer, va bien au-delà des espèces reçues du MLS-ABS.

**L'information sur l'espèce utilisée par l'abonné**, peut être collectée par le MLS-ABS, gestionnaire des bases de données, car toujours mentionnée sur l'ATTM signé ou l'EasySMTA accepté par le bénéficiaire, à partir du formulaire de la Liste du matériel fourni (cf. Annexe 1 de l'ATTM révisé).

L'article 1.4-VARIANTE satisfait à notre entendement. Les deux crochets de la disposition devraient être retirés afin que le système bénéficie au mieux des conditions modifiées en cas de **décision volontaire de l'abonné** de s'y conformer, après que l'Organe directeur ait modifié certains éléments de l'ATTM en vigueur.

- **Au niveau du Corps de l'ATTM révisé :**

La sanction prévue à l'article 6.1-BIS en cas de violation de l'article 6.1 par le bénéficiaire et celle prévue à l'article 6.2-BIS en cas de violation de l'article 6.2 sont de nature dissuasive. La question que l'on se pose, tout au moins pour l'article 6.2-BIS, serait de savoir si une telle violation en matière de droits de propriété intellectuelle pourrait être commise dans le domaine de la sélection des plantes ?

Afin que ces deux dispositions ne paraissent superfétatoires, nous proposons de biffer la 6.2-BIS et conserver la 6.1-BIS. Et, dans le cas d'une violation de l'article 6.2, les dispositions du Traité Int'l et de l'ATTM prévues à cet effet s'appliqueront.

L'article 6.2 peut être accepté sans les crochets. L'ajout mentionné est conforme au Traité Int'l. Cependant, il est nécessaire de compléter le texte par : « ... vendre des semences ou autres matériels de multiplication **de ferme** du Matériel fourni. »

- **Propositions de suppression des crochets les moins difficiles :**

– **Paiement** : article 3.1 de l'Appendice 3, redevances des technologies. Nous limitant à la définition de Vente présentée à l'Appendice 5 et à la base de calcul de la redevance annuelle (para. 1.2 ci-dessus), nous proposons de **biffer** à l'article 3.1 "**des droits perçus au titre des technologies**". Ceci pour éviter des paiements doubles de la part des bénéficiaires et des coûts supplémentaires dans le suivi ou la vérification de certains éléments ou de procédures constitutifs des "Ventes".

– **Exemption** : article 3.3-VARIANTE, nous proposons une modification de la disposition : « ... ne dépasse pas un montant de 1 000 dollars US, le souscripteur est **exonéré** de paiement de la redevance due sur **cet exercice fiscal**. »

– **Reporting** : L'article 3.5 devra être réécrit si la procédure de calcul des redevances basée sur un formulaire présentant une série progressive de volumes de ventes semblable au modèle présenté à l'Appendice 6, est retenue par le Groupe de travail spécial. Cette procédure évite la question de l'audit des bilans des ventes de l'ensemble des bénéficiaires, elle maintient la confidentialité dans les activités commerciales et facilite la prise en compte des petites entreprises familiales. L'audit n'aura lieu que dans certaines situations laissées à la discrétion de la Tierce partie bénéficiaire.

## 2.5. *Conformer les définitions au nouveau texte révisé (appendice 5)*

**Faisant suite** aux dispositions et options retenues dans ce présent document, le libellé des définitions des termes et expressions qui suivent : Matériel génétique, Organe directeur, Système multilatéral, Ressources phylogénétiques AA, RPGAA en cours de mise au point, Produit, Ventes et Commercialiser, telles qu'elles

apparaissent dans le projet d'ATTM révisé (IT/OWG-EFMLS- 8/18/Rapport) et "Parties ou composants génétiques" encore entre-crochets dans l'Appendice 5 (Informal consultation : Background Note, Addis-Ababa 2019), nous satisfait.

### **3. Informations numériques de séquençage en relation avec l'ATTM**

Outre les RPGAA, tangibles par nature, le MLS-ABS est également établi pour partager facilement et rapidement de informations liées aux RPGAA : des informations de documentation, des informations constituées de résultats de la recherche telles que la caractérisation phénotypique, l'évaluation, la caractérisation moléculaire, le séquençage, etc.

Au titre de l'article 10.2 du Traité Int'l, le MLS-ABS doit être rendu efficient, efficace et transparent et, s'établit entre autres, dans une perspective complémentaire et de renforcement mutuel. L'échange d'information est instauré, plus particulièrement par les articles 13.2a et 14 du Traité Int'l, à travers la promotion d'une bonne mise en œuvre du plan d'action mondial à évolution continue.

Dans ce contexte, il ne peut être approprié de ne point considérer les informations numériques de séquençages (INS, *en anglais DSI*) comme faisant partie intégrante des informations échangeables dans le cadre du MLS-ABS, voire de poser de difficiles conditionnalités à leur échange et/ou à une utilisation transparente, au point de susciter la méfiance et faire croire à un usage potentiel illicite.

En l'intégrant dans le texte de l'ATTM en révision ce n'est point pour une seconde prise en compte dans le calcul de la redevance due. Et, il ne serait pas possible de chercher à tout traquer – Le Système à mettre en place étant attendu économe, transparent, juste et équitable. L'intégration des INS dans les dispositions doit avoir pour rôle, d'une part, de lever toute équivoque quant à une possible utilisation illicite ou non-transparente suite à un échange ou un transfert, et d'autre part, de pouvoir contribuer à un renforcement mutuel, une assistance évoquant un partage non-monnaire. En ce sens, l'intégration est prioritairement destinée aux pays en développement.

### **4. Adaptation de la couverture du système multilatéral**

L'assortiment de conditions et de spécifications supplémentaires à la proposition Suisse d'élargissement de l'Annexe I du Traité Int'l tel que proposé par les coprésidents (IT/OWG/-EFMLS- 8/18/4), nous semble adéquat pour contribuer à faire fonctionner le Traité Int'l d'une manière équilibré et durable. Ladite proposition, légèrement reformatée, suit :

« Toute Partie contractante peut proposer que des ressources phylogénétiques pour l'alimentation et l'agriculture supplémentaires soient couvertes par le Système multilatéral d'accès et de partage des avantages.

Toute proposition d'ajout de ressource phylogénétique pour l'alimentation et l'agriculture est communiquée aux Parties contractantes par le Secrétariat au moins six mois avant la session à laquelle elle est proposée pour adoption.

L'Organe directeur peut adopter, toute ressource phylogénétique pour l'alimentation et l'agriculture supplémentaire, par consensus entre les Parties contractantes présentes à la session de l'Organe directeur, en tenant compte des critères de sécurité alimentaire et d'interdépendance.

L'élargissement de la portée du Système multilatéral entre en vigueur quatre-vingt-dix jours après son adoption par l'Organe directeur. Après son entrée en vigueur, toute référence à l'Annexe I du Traité s'entend comme englobant toute ressource phylogénétique pour l'alimentation et l'agriculture adoptée par l'Organe directeur conformément à la présente disposition. »

En s'affranchissant des fastidieuses et longues procédures de ratification nationale à chaque modification de l'Annexe I, par l'octroi à l'Organe directeur, de la capacité à ajouter d'autres RPGAA appartenant au champ d'application du Traité Int'l, il devient possible de convenir plus rapidement et sur une base multilatérale, à une plus large utilisation des RPGAA. Cet élargissement rapide de la couverture du MLS-ABS est d'autant plus justifié que la proposition de calcul de la redevance due par les bénéficiaires, s'appuie sur le volume annuel des **ventes sans distinction des espèces couvertes** par le MLS-ABS de celles effectivement reçues du MLS-ABS, et d'autre part, un très grand nombre d'espèces utiles à l'alimentation et l'agriculture est déjà présent dans les banques de gènes, c'est-à-dire déjà collectées et conservées *Ex-situ*. Le bon fonctionnement de ce **Système à gouvernance multilatérale**, devra induire une amélioration du fonctionnement des banques de gènes et du flux des ressources et, réduire l'érosion génétique de ces ressources qui jouent un rôle spécifique primordial pour l'atteinte de la **sécurité alimentaire locale, nationale et mondiale**, et pour lesquelles nous sommes **interdépendants**. Autrement dit, un bon fonctionnement du **Traité Int'l** devrait induire un bon niveau de mise en œuvre de certaines activités prioritaires du Plan d'action mondial à évolution continue, en référence au domaine d'action prioritaire n° 5 (GPA-2).

## 5. Plan de croissance et instauration de la confiance

Si l'on se réfère à l'article 11.1, il semblerait nécessaire de modifier le Traité International, pour établir une sécurité juridique à l'élargissement à d'autres RPGAA que celle énumérées à l'Annexe I en vigueur. Le plan de croissance est donc un processus indispensable qui clarifie la démarche à suivre et la chronologie des actions. Ce qui permet d'évaluer le niveau d'instauration de la confiance et lever d'éventuels doutes. Pour l'heure, nous prenons le temps d'étudier plus en profondeur le concept proposé par un groupe de parties prenantes, avec l'établissement d'un compte séquestre temporaire. À première vue des aspects pratiques intéressants y figurent, malheureusement la mise en œuvre dépend de l'élargissement de l'Annexe I du Traité Int'l à toutes les RPGAA. Ce qui encore est loin d'être acquis.

*FALL Cheikh Alassane MAER /*

*ISRA*

*Dakar-Sénégal*



MINISTERIO  
DE AGRICULTURA,  
PESCA Y ALIMENTACIÓN

DIRECCIÓN GENERAL D PRODUCCIONES Y MERCADO AGRARIOS
---

SG MEDIOS DE PRODUCCIÓN AGRÍCOLAS Y  
OEVV

**24 de Abril de 2019**

**Grupo de trabajo especial de composición abierta para mejorar el funcionamiento del Sistema multilateral de acceso y distribución de beneficios –**

**Actualización sobre consultas oficiosas e invitación para enviar contribuciones**

**REF.: NCP GB8-19 Grupo de trabajo SML – consultas oficiosas**

**Contribución de España**

Se envía opinión e información en respuesta a la notificación recibida por parte de la Secretaría del Tratado Internacional sobre los Recursos Fitogenéticos para la Alimentación y la Agricultura (TIRFAA), por la cual se invita a las partes interesadas que utilizan recursos fitogenéticos en virtud del TIRFAA i) a que formulen propuestas concretas relativas a la mejora del funcionamiento del Sistema multilateral de acceso y distribución de beneficios (SML), ii) a la finalización del Acuerdo Normalizado de Transferencia de Material (ANTM) revisado, iii) al proceso para la ampliación ulterior del alcance del Anexo I del TIRFAA y iv) sobre la forma de atraer contribuciones voluntarias adicionales para el Fondo de Distribución de Beneficios de manera sostenible, de forma que puedan ser consideradas por el Grupo de trabajo de composición abierta para mejorar el funcionamiento del SML.

Con el fin de dar respuesta a esta notificación, desde el Ministerio de Agricultura, Pesca y Alimentación, como punto focal nacional del TIRFAA, se elaboró una encuesta para consultar a los principales miembros del sector agrícola español su opinión sobre los mayores temas de debate relacionados con el objeto de esta notificación, de forma que nos sirviera de base para elaborar la respuesta. Con esta notificación se pretende dar apoyo al proceso y algunas nociones de cuál es la perspectiva del país hacia algunos de los principales puntos de debate, mientras se sigue trabajando y profundizando en lo relativo a estas cuestiones.

España considera que el establecimiento de un **sistema de suscripción** para acceder a los RFAA incluidos en el Anexo I del TIRFAA puede contribuir de forma efectiva a mejorar el funcionamiento del SML, así como el reparto de los beneficios derivados del uso de los recursos fitogenéticos obtenidos en virtud del TIRFAA. Por lo tanto, España se compromete a suscribirse a tal sistema en el caso en que el mismo llegue a aprobarse por el Órgano Rector, así como a esforzarse para que la implementación nacional del mismo sea lo más eficaz posible.

España está de acuerdo con la visión de que el sistema de suscripción debería adoptar un enfoque diferenciado en función de que los productos obtenidos a partir de materiales adquiridos a través del SML esté disponible o no sin restricciones para la mejora e investigación ulteriores, de tal modo que el porcentaje de pago a realizar por el suscriptor sea diferente para cada una de las dos opciones. No obstante, en la actualidad no se dispone de la información suficiente como para adoptar una posición de país con respecto a cuál sería una tasa razonable para cada una de las opciones.

España considera que el establecimiento del sistema de suscripción resuelve en parte la problemática asociada con la Información Digital sobre Secuencias. No obstante, España no es partidaria de **regular el acceso a dicha información** mediante el ANTM, puesto que no considera que la Información Digital sobre Secuencias sea equivalente a los recursos fitogenéticos. España, sin embargo, considera que dada la importancia que la Información Digital sobre Secuencias tiene para la conservación y usos sostenible de los recursos fitogenéticos, el ANTM sí que debería establecer que el Receptor pondrá a disposición del SML toda la información no confidencial que resulte de la investigación y el desarrollo realizado en el material, incluyendo la información digital sobre secuencias. Desde España se considera fundamental a su vez, que se establezcan mecanismos eficaces para garantizar que los países en vías de desarrollo adquieran las capacidades necesarias para poder acceder, hacer uso y, por tanto, también beneficiarse de este tipo de información.

Respecto a **la posible ampliación del alcance actual del Anexo I** del TIRFAA, España es partidaria de ampliar el mismo a todos los recursos fitogenéticos para la alimentación y la agricultura. Sin embargo, y si fuera de utilidad a la hora de alcanzar un acuerdo con el resto de Partes contratantes, España estaría de acuerdo con limitar la ampliación del Anexo I a los cultivos conservados *ex situ*, exceptuando, por tanto, los recursos fitogenéticos de dominio público conservados *in situ*.

También podríamos apoyar la ampliación parcial por etapas, para listas concretas de especies cultivadas (aquellas especies de gran cultivo, cereales, leguminosas, forrajeras... o con mayor valor añadido sería las considera que deberían ser los primeros en incluirse.

En cuanto a la última cuestión planteada en la notificación, sobre posibles alternativas para **atraer contribuciones voluntarias adicionales para el Fondo de Distribución de Beneficios**, España considera necesario debatir el asunto en mayor profundidad. Desde España se considera que quizás sea pertinente esperar a que el sistema de suscripción sea puesto en marcha, confiando en que el nuevo sistema será más efectivo en atraer fondos al Fondo de Distribución de Beneficios y, en el caso de que esto no fuese así, entonces, comenzar a plantearse alternativas para atraer nuevos fondos.

Finalmente, exponer cuales son algunos de los **principales temas que consideramos que hay que afrontar** en relación a estos temas. Debe asegurarse que todos los organismos, tanto públicos como privados relacionados con el sector, estén convenientemente informados al respecto. No debe suponer, en ningún caso, una pérdida de capacidad de mejora genética, ya que el acceso y reparto de beneficios se considera fundamental en este ámbito. La gestión y los trámites necesarios nunca deberían hacer complicado este proceso. Por todo esto, las normas de funcionamiento deben ser claras, sin generar dudas sobre su aplicación en ninguna de las partes implicadas, de forma que los fondos que se obtengan por el sistema de suscripción realmente reviertan en la conservación tanto *ex situ* como *in situ*, así como en la capacitación en los países de origen.

Se considera que todas las partes interesadas deberían asumir su responsabilidad de contribuir al sistema, el cual debería ser sencillo, implicar una carga administrativa mínima, proporcionando una alta seguridad jurídica para los usuarios, proporcionando transparencia al sector, de forma que se implique en los proyectos en los que revierten estos fondos.

Respecto al uso de la Información Digital sobre Secuencias consideramos que no debe suponer un bloqueo de la investigación, ni restringir el desarrollo de los conocimientos necesarios para la conservación y el uso sostenible de la biodiversidad y los recursos fitogenéticos.



Estimados de la secretaría del TIRFAA

De acuerdo a la notificación con fecha 11 de marzo de 2019, sobre “*Actualización sobre consultas officiosas e invitación para enviar contribuciones en el marco del Grupo de trabajo especial de composición abierta para mejorar el funcionamiento del Sistema multilateral de acceso y distribución de beneficios*”, solicitando contribuciones a las partes contratantes, es que se envía este documento con las siguientes propuestas, para lograr un informe al próximo órgano rector, a celebrarse el presente año.

Teniendo presente los objetivos del presente Tratado: “...son la conservación y la utilización sostenible de los recursos fitogenéticos para la alimentación y la agricultura y la distribución justa y equitativa de los beneficios derivados de su utilización ...”. También los artículos comprendidos en el sistema multilateral y la distribución de beneficios. Y por último el hecho incuestionable de que el acuerdo Normalizado hay que modificarlo, y es por ello que se han mantenido varias reuniones de este grupo de trabajo, donde el ANTM ha estado siempre en la agenda de las reuniones de este grupo de trabajo ya sean formales o informales.

- Acuerdo Normalizado de Transferencia de Material.

El tema central aquí ha sido los fondos que se han generado para la distribución de beneficios, los cuales han sido básicamente por donaciones voluntarios (estaría sumamente claro, mostrar cifras de cuanto se ha generado a través del ANTM y cuanto por donaciones). Esta cifra va a demostrar que el ANTM actual, no es viable. La razón es que el artículo 6.7, es la vía de escape para realizar aportes al SML. Por tanto el grupo debe trabajar dos artículos, por suscripción anual y por acceso a un género. Esta última debe ser una tasa 10 veces superior al de suscripción a todo. También el acceso a género debe garantizar el pago.

- Termino Ventas

Se deberá trabajar en especificar el términos “ventas” de “material genético”, que especifique como se va a documentar y controlar dichas ventas.

- Cobertura del sistema Multilateral

El actual anexo 1 es parte del Tratado, por tanto una modificación del mismo, debe ser ratificado por las partes contratantes como un nuevo Tratado. También se entiende que la enmienda de suiza no fue ratificada, por tanto para avanzar se debe trabajar sobre una lista de cultivos, de no trabajarse sobre una lista concreta, poco avance se estará dando en este grupo de trabajo, con vistas al próximo órgano rector. Para ello se sugiere comenzar con la primera lista que se comenzó antes de ratificar el Tratado.

- Plan de Crecimiento

El ratificar un nuevo tratado es potestad de cada país, pero si se puede alentar a que cada país disponga la mayor cantidad de variedades que tiene bajo el dominio público.

Entendemos que esto son los principales puntos sobre los cuales debe avanzar el grupo de trabajo, especialmente se debe incluir en la agenda, la lista de cultivos que se pretende incluir en el anexo 1, de no trabajarse sobre dicha lista, es poco probable que existan avances en la materia.

Atentos saludos

Por Uruguay

Ing. Agr. Marcos Martínez Punto focal  
TIRFAA Uruguay



## **CGIAR submission re: option for addressing DSI in the enhanced multilateral system of access and benefit-sharing**

This submission from CGIAR describes an option for including benefit-sharing from the use of digital genomic sequence information (dsi) in the overall package of measures being considered to enhance the functioning of the multilateral system of access and benefit-sharing under the plant treaty.

CGIAR is making this submission in response to an invitation from the Co-chairs of the Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing (WG-EFMLS). The Co-chairs issued this invitation to all participants during the 2nd Informal Consultation by the Co-Chairs of the Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing, Addis Ababa, 25-27 March 2019. The submissions will be compiled and shared with the participants of the 3rd Informal Consultation, to be held 28-30 May, 2019.

Cgiar makes this submission in the hope that it will contribute to constructive discussion of options by the working group, acknowledging that a wide range of outstanding issues still need to be addressed and that 'nothing is agreed until EVERYTHING IS AGREED' BY CONTRACTING PARTIES.

The option described in this submission is meant to represent a compromise between those Contracting Parties who are not willing to redefine "PGRFA" as included in the Plant Treaty and its standard material transfer agreement (SMTA) to include DSI, and other Contracting Parties who will not agree to a final package of measures that does not, in some manner, require monetary benefit sharing from the use of DSI.

This option is also meant to reflect, and build upon, the fact that most (perhaps all) Contracting Parties in the WG-EFMLS agree that it is critically important to promote open access and use of PGRFA-related data as part of agricultural research and development. It is also meant to reflect the fact that benefit-sharing obligations that would require tracking and tracing the use of DSI, and its 'incorporation' in new PGRFA products would be extremely difficult, if not impossible, with no 'off the shelf' methods to copy or follow.

The option assumes that a robust, attractive, subscription system will be part of the package of measures adopted by the Plant Treaty's Governing Body, and that a critical density of commercializing entities will become (or demonstrate willingness to become) subscribers.

In short, the proposed option is simply that the Plant Treaty's Governing Body decision adopting the revised SMTA (and other measures to enhance the multilateral system) should state that the Governing Body recognizes that subscription payments reflect the value to subscribers'/commercial users' access to, and use of, both PGRFA and associated information/data/DSI.

The SMTA itself would not need to include any text referring to benefit-sharing from use of DSI per se. (Of course, it could, but it may not be necessary.) There would be no revision of the definition of PGRFA, or introduction of a definition of 'genetic parts and components' as included in the Co-chairs Proposed Consolidated Text of the SMTA (<http://www.fao.org/3/CA1536EN/ca1536en.pdf>).

Nor would it be necessary to precisely define DSI, or to be able to say what kinds of information is included within the scope of the term, and what is excluded.

Since under the subscription system, payments are made on the basis of all sales, it is arguably not absolutely necessary to know what kinds of information are accessed and used by subscribers, as long as it is agreed that subscription payments made reflect in part the value of access to and use of DSI.

To increase the possibility of this option gaining acceptance, it should be 'put on the table' soon, so that all Contracting Parties would have it in mind when negotiating the subscription payment rates. This is important as some Contracting Parties will argue that the rate should be higher if it is meant to reflect benefit sharing from DSI as well



as PGRFA. It might be useful for the WG- EFMLS to consider the text of the relevant paragraph(s) of the proposed GB decision, if and when they consider subscription payment rates.

This option does not address the situation where non-subscribers can access and use DSI without making payments. However, it can be argued that as long as a substantial proportion of the seed industry is subscribing, then a substantial portion of benefit-sharing from use of dsi is being captured.

It may be better to embrace a system where this outcome is achieved rather than to risk having no system at all.

The issue of a loophole for non-subscribers highlights the importance of ensuring that the subscription option will be the preferred option for all users -- and especially commercial users -- over the single access option. If it is not, then this option for addressing benefit-sharing from DSI in the overall package to enhance the functioning of the multilateral system will not be convincing.

To assuage doubts that some Contracting Parties might have about embracing the option described in this submission, the Governing Body could decide to monitor future trends vis-à-vis how many (or what proportion of) PGRFA commercializers maintain subscriptions. If overall subscription rates drop below a certain level, it could possibly kick-start a review process.

It would significantly increase the attractiveness of the subscription system if it provided legal certainty for DSI users that they would be insulated from future possible legal ABS-based challenges concerning their use of DSI. It would be useful to further investigate whether the proposed option would/could provide such legal certainty. This would entail being recognized pursuant to Nagoya Protocol Article 4 (concerning ‘Relationship with International Agreements and Instruments’), assuming for the sake of argument that the Nagoya Protocol was extended to cover DSI.

\* \* \*

In this context, we reiterate the importance of exempting subscribers from making subscription payments if their annual sales and or license fees fall below a set threshold (as is currently reflected in Annex 3, Article 3.3 of the draft Revised SMTA considered by WG-EFMLS 8). This measure addresses the risk that new monetary benefit-sharing approaches to increase payments from larger seed companies could inadvertently create disincentives for a range of users who generate relatively few monetary benefits (such as farmers and farmer associations, small seed companies and public agricultural research organizations engaged in the production/marketing of basic seed) from using the multilateral system of access and benefit-sharing. Adopting such a threshold would also relieve the treaty secretariat of the burden of dedicating disproportionate resources to monitoring reports from a wide range of users and possibly enforcing very small payments.



# Statement on the Revision of the SMTA

26 APRIL 2019

A STATEMENT PREPARED BY THE INTERNATIONAL SEED FEDERATION  
ITPGRFA REFERENCE: NCPGB8-019 – MLS WORKING GROUP





The International Seed Federation (ISF) is providing this submission as requested in Notification NCP GB8- 019 from March 11, 2019. The information below is intended to help the Working Group “*finalize the process for the enhancement of the Multilateral System*” (MLS) by providing Industry’s views on what would make a new, revised Standard Material Transfer Agreement (SMTA) “workable” and attractive to all users. In addition to giving views on general principles, we provide a concrete text proposal on the definitions of “Sales” and “To Commercialize” that can suit the diversity of business practices around the world. We also recall initiatives from the seed industry to build trust and support a package of enhancements that will benefit the MLS and International Treaty.

The SMTA needs to accommodate all users of PGRFA, from the public and private sector, regardless of country, of citizenship and of organizational, financial, and technical capacity, so they can access and use material in the MLS, and comply with all the terms and conditions with minimum administrative burdens. Moreover, the system should be practical for both frequent and infrequent MLS users.

In addition, ISF supports the expansion of the coverage of the MLS to all PGRFA in the public domain.

ISF believes that the scope of the MLS must reflect the scope of the International Treaty as in Article 11.2: the MLS “*shall include all plant genetic resources for food and agriculture listed in Annex 1 that are under the management and control of Contracting Parties and in the public domain.*” Furthermore, to best support the objectives of the International Treaty, the scope of Annex 1 should reflect the scope in Article 3, which is all PGRFA.

ISF recommends that the SMTA includes the following elements:

## **1. MULTI-OPTIONAL ACCESS MECHANISMS WITH DIFFERENT BENEFIT SHARING OBLIGATIONS**

ISF holds that a multi-option approach to access and benefit sharing is needed to account for the wide variation among users and create the legal certainty needed by all users. Many users of MLS material operate on a not-for-profit basis while those who are “for profit” face a range of circumstances in which profitability varies greatly among crops and markets. In addition, breeders know that the quality and value of MLS material also varies greatly across crops and regions, which impacts the attractiveness and utility of PGRFA in the MLS. As such, MLS materials and benefit sharing obligations present very different situations for breeders, which must be accommodated by multiple options to avoid creating a system that is exclusive to one type of user. Based on discussions that have taken place until now, the ISF sees the need for two options for benefit-sharing in the SMTA among which the user can choose:

- Option 1: Subscription Option based on an annual subscription fee;
- Option 2: A Single access mechanism; payment based on use of accessed genetic resources

A Subscription Option could provide a more timely flow of monetary benefits into the benefit-sharing fund and minimize administrative burden for users (i.e. eliminate the need to track and trace). ISF considers the following conditions important for an efficient and effective Subscription Option.

Subscription scope: The subscription system should allow access to all PGRFA in accord with the scope of the International Treaty.

Subscription rate of payment: The rate of payment for the Subscription must make economic sense given a breeder’s profitability and the value of the material in the MLS. A group of companies have earlier



indicated that, if the subscription covers all crops, a single rate of 0.01% on sales (see Appendix 1 for ISF proposed definition) of Annex 1 crops would be acceptable. Any differentiation of rates, even as an attempt to recognize the Breeders Exemption, adds unattractive complexity to a Subscription Option and would deter many companies from subscribing.

*Subscription term:* ISF supports a 10-year Subscription term with annual payments. After the 10-year period, a Subscriber should have the right to continue their subscription or withdraw from it. ISF recognizes that some Parties would like additional years of payment after withdrawal from a Subscription. As such, ISF notes that extending payment obligations beyond withdrawal after 10 years will require a lower rate to make the Subscription Option attractive. If Parties decide that a Subscription should have a phase-out period during which the annual payment continues but access to PGRFA is no longer possible, the phase-out period should be kept as short as possible, and no longer than 2 years.

*Access rights during subscription:* ISF is of the opinion that a Subscriber should have access to PGRFA in the MLS during the full term of a Subscription.

*Subscription and prior SMTAs:* ISF supports the approach described in Article 1.3 of Annex 3 in the revised draft SMTA resulting from the 8<sup>th</sup> meeting of the OWG-EFMLS, where a Subscriber is relieved from any payment obligations under SMTAs signed prior to the Subscription. Moreover, a Subscriber should have the right to bring existing SMTAs under the conditions of the new SMTA, however, mandatory conversion of prior SMTAs is not desired.

*Subscriber's surviving rights and obligations after termination of Subscription:* The SMTAs signed during the Subscription term should remain in effect after termination of the Subscription, without application of the payment obligations under 6.7/6.8 and 6.10. ISF holds that the total payment made during the Subscription term should be sufficient to meet benefit sharing obligations except if a Subscription is terminated due to breach of the agreement or bankruptcy. If the Subscription is terminated after the specified minimum term, the Subscriber should retain paid-up rights to continue to sell and license Products, to license and transfer PGRFA under Development, and to research and breed with Material and PGRFAuD accessed and developed during the Subscription.

- Option 2 : Single access mechanism; payment based on use of accessed genetic resources

The single access mechanism reflected in current articles 6.7 and 6.8 is needed for many users of MLS materials. For example, there are users who only occasionally access genetic resources where subscribing for 10 years does not make economic or practical sense. There are other users who will prefer to pay on sales of Products derived from MLS material after they begin to realize financial benefit. ISF considers the following conditions important for an effective single access mechanism system.

*Single access rates:* ISF supports differentiating rates under Articles 6.7 and 6.8 of the SMTA. ISF upholds the Breeders' Exemption, as a cornerstone of the plant breeder's rights system; it is an important tool for benefit-sharing and open innovation because varieties protected by plant breeders' rights can be used by others for further research and breeding to develop and commercialize distinctive new varieties without any obligation towards the rightholder. In case mandatory payments are required for products available without restriction (6.8), ISF is of the opinion that the payment should be significantly lower than the 1.1% rate for products that are available with restriction (6.7). ISF recommends a rate of 0.11%, but not greater



than 0.22% (less 30%) of the sales of the Product available without restriction. The difference proposed for 6.7 and 6.8 rates reflects the ratio between exclusive and non-exclusive license rates in commercial practice.

*Expiration of payment obligations:* Also consistent with commercial practice, payment obligations of the SMTA should be limited in time, and not perpetual. Payment obligations should expire either i) when a period of 20 years after signature has passed or ii) as proposed by North America, “consists of less than 25% of the Material” by pedigree. ISF also agrees that no payment shall be due if a product does not contain a trait of value that originated from the Material (Appendix 2).

*Expiration of transfer obligations of PGRFA under Development:* For PGRFA under development (PGRFAuD), ISF agrees that this should be transferred with a SMTA. However, ISF urges to limit this obligation to either i) 20 years after signature has passed or ii) if it consists of less than 25% of the Material by pedigree and does not contain a trait of value that originated from the Material (Appendix 2).

*SMTA surviving rights and obligations:* ISF believes that a recipient should be able to terminate the SMTA, and it needs to be clear what surviving rights and obligations remain. Therefore, Articles 6.2, 6.5, 6.6, 6.7, 6.8 and 6.9 shall, event after the SMTA has been terminated, remain applicable for an indefinite period of time, unless the specific Article itself mentions a limited period of applicability.

## 2. CONTRACTUAL AND LEGAL CLARIFICATIONS IN THE SMTA

- a) Definition of Sales and To Commercialize: see Appendix 1
- b) Remedies: The language currently proposed in Article 6.1 bis and 6.2 bis of the revised SMTA will deter commercial users from using the revised SMTA; moreover, this language is unnecessary. If negotiators insist on introducing remedy language, ISF recommends the following language based on art. 7.4.1 of the UNIDROIT Principles 2010:
 

“7.2 Any non-performance under this Agreement gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies, except where the non-performance is excused, all in accordance with the UNIDROIT Principles of International Commercial Contracts 2010.”

Regarding the enforcement of the SMTA, ISF would like to remind negotiators that like any other contract signed on a daily basis by companies, the SMTA includes a section on “Settlement of Disputes”. Parties would be held liable of any breach of contract.
- c) Inclusion of digital sequence information (DSI): The SMTA should be based on PGRFA in material form obtained from the MLS and not on DNA information. ISF is strongly opposed to creating any regulatory rules relating to the access and utilization of digital/genetic sequence information (DSI) in the context of the ongoing access and benefit sharing (ABS) negotiations. ISF has prepared a submission on the issue of DSI based on a request from the Secretariat. This document submitted to the ITPGRFA Secretariat on 28 March is appended (Appendix 3).
- d) Unilateral changes: Unilateral changes are not acceptable in typical commercial contractual agreements. As such, unilateral changes in the terms of the SMTA or Subscription should not be allowed.



e) Entering into force of the new SMTA: the extension of the Annex 1 and the entering into force of the new SMTA should be seen as a package. ISF opposes any changes to the application of the terms and conditions related to 6.7/6.8 in the current SMTA without an extension of Annex 1 to all PGRFA, ratified according to Article 23.4 of the ITPGRFA.

### **3. SEED INDUSTRY INITIATIVES**

ISF reminds the Working Group that a Declaration was presented at the 6th Working Group Meeting and GB-7 by an industry representative to show the willingness of 41 seed companies to subscribe to a system under fair and reasonable conditions as an indicator of potential monetary benefit-sharing. While this Declaration is no longer valid, some of the signatories may still be willing to pursue a similar course if it leads to an enhanced MLS.

A new proposal is the development of a holding fund into which future Subscribers could voluntarily pay their subscription fee until the new SMTA and the Annex 1 are extended and fully functioning. The concept is presented in Appendix 4.



## **A. APPENDIX 1**

### Proposed definitions of Sales and To Commercialize

ISF recommends that the new SMTA uses the following revised definition for “Sales” and “To commercialize”:

“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.



**B. APPENDIX 2**

**DEFINITION OF “TRAIT OF  
VALUE”**

Proposed definition:

“Trait of Value” means a trait that is bred from the Material, which is selected specifically to increase the commercial value of a product, and is used to describe a Product for the purpose of promoting its Commercialization.





## C. APPENDIX 3

### ISF Submission to the ITPGRFA Notification “Invitation to submit views and other information on “Digital sequence information””

(a) 28 MARCH 2019

A CONTRIBUTION PREPARED BY THE INTERNATIONAL SEED FEDERATION  
 ITPGRFA REFERENCE: NCP GB8-016 MYPow/DSI

The International Seed Federation (ISF) is pleased to submit its views and other information relating to “Digital Sequence Information” (DSI) in accordance with Notification NCP GB8-016 MYPow/DSI.

In accordance with the Notification, we provide views on the four elements listed:

- *terminology used in this area*
- *actors involved in DSI on PGRFA*
- *the types and extent of uses of DSI on PGRFA, such as: characterization; breeding and genetic improvement; conservation; identification of PGRFA*
- *relevance of DSI on PGRFA for food security and nutrition.*

## SUMMARY

ISF continues to fully support the effective implementation of the Treaty in a way that mutually supports the conservation and sustainable use of Plant Genetic Resources for Food and Agriculture (PGRFA) as well as the fair and equitable sharing of benefit resulting from the utilization of PGRFA. We believe that achieving conservation, sustainable use and access and benefit sharing objectives hinge on facilitated access to and utilization of PGRFA in the Multilateral System (MLS).

ISF recognizes that the issue of DSI is complex in many ways. First, there is no consensus definition for the term digital sequence information. We agree with many who have stated that non-material information and data are not equivalent to genetic resources as defined in the Convention on Biological Diversity and the Treaty. Second, many diverse actors in industry and academia are involved in the generation, storage, curation, dissemination, interpretation and use of DSI. These “users” work in well-functioning systems that have been established for a long time. Many of these systems have operated under the principle of “open access” to promote information exchange, which we believe is a fundamental principle of the Treaty. Third, the types and extent of uses of DSI are equally diverse, ranging from public and private breeding to conservation work. Beneficial research has been accelerated by public and private actors as sequencing PGRFA has become more common and affordable. Finally, and with the wider use of sequencing, DSI has become a critically important tool in food security and nutrition especially through faster breeding cycles, more effective control of agricultural pests in farmers’ fields.

Within the context of the broader discussion on DSI, ISF supports having a constructive debate with the goal of enhancing the fairness and equity elements of access and benefit sharing under the Treaty. However, ISF is concerned that the current attempts to create an international DSI regulatory regime will



undermine the access and benefit sharing objectives of the Treaty. We believe that there is also a high likelihood for DSI regulation to disrupt on-going conservation, exploration, collection, characterization, evaluation and documentation of PGRFA, and to create an entry barrier for capacity building for smaller market segments and for new users.

#### **D. TERMINOLOGY**

ISF notes that the issue of DSI is complex due in large part to the fact that a consensus definition has not been agreed upon. This may be due to the technical complexities around “sequences” which include defining minimum length requirements, homology levels, epigenetic attributes, data quality metrics, and handling of sequencing artefacts (to name only a few). Importantly, neither “digital”, “sequence” nor “information” are defined in the Treaty. Rather, the Treaty adopted definitions of plant genetic resources for food and agriculture, genetic material, and Traditional Knowledge that were harmonized with definitions in the Convention on Biological Diversity. ISF agrees with Parties that have determined that these definitions refer only to physical material and not non-material information. In fact, within Articles 5.1, 7.2, 12.3 of the Treaty, PGRFA and “[descriptive] information” are listed side by side suggesting information and PGRFA are distinct from each other. As such, an amendment process would be required for DSI to fall within the scope of the Treaty.

ISF believes that the Treaty (and Convention) require collaborative and cooperative exchange of information among Parties. In particular, we note that conserving PGRFA (Article 7), provisioning of technical assistance (Article 8), and sharing of benefits through the exchange of information, access to and technology transfer, capacity building, and the monetary and other commercial benefits (Article 13) often have linkages to the use of information including genetic sequence data. It is logical that open access to publicly available genetic sequence data should be seen as facilitating the cooperation called for in the above-mentioned articles of the Treaty.

Looking to the future, ISF is willing to explore the approach proposed by several Parties to the Treaty to use “genetic sequence data” as an initial reference when discussing DSI.

#### **E. ACTORS INVOLVED IN DSI ON PGRFA**

Regardless of how DSI is defined, many actors within industry and academia are involved in the generation, storage, curation, exchange, interpretation and use of DSI on PGRFA. These “users” work within well-functioning systems that have been established for a long time. Many of these systems have operated under the principle of “open access”. As sequencing costs have fallen exponentially over the years, the availability and use of DSI has grown among breeders and other plant scientists. Use of DNA sequence information is becoming one of the cheapest forms of high through-put phenotyping/genotyping<sup>1</sup>, and supports taxonomic identification and protection against pests and pathogens. Actors in the area of breeding, pest and invasive species control, and in-situ and ex-situ conservation see DSI and genetic sequence data as an invaluable tool for conservation and sustainable use of PGRFA. Even some farmers are using DSI for pest detection and identification.

<sup>1</sup>Today BGI offers to sequence any human genome for \$600 while the first human sequencing project in 1990 cost \$2.7 billion. BGI Beijing Genomics Institute is a publicly traded company that has become a major powerhouse in DSI generation, and they receive millions each year from the Chinese government.



A specific group of actors maintain publicly and internationally available gene banks with sophisticated data storage and sharing systems. These databases were developed with public funds for the purpose of making sequence data freely available. ISF would also like to remind Parties that Article 17.1 of the ITPGRFA encourages the development of a global information system that has been launched. ISF encourages users of the MLSTo exchange information and make it available through the GLIS, to support the Programme of Work to provide “capacity development and technology transfer opportunities for the conservation, management and use of PGRFA and associated information and knowledge paying special attention to the needs of developing countries.”<sup>2</sup> This gives visibility and value to PGRFA by adding information necessary to help researchers and breeders’ choice when choosing a PGRFA according to their needs.

Policy makers are another important set of actors who must listen to all voices in the discussion on DSI. In addition to the views of ISF, some negotiators alleged that unregulated access to DSI will allow users to further circumvent benefit sharing obligations under the Convention on Biological Diversity (CBD), the Nagoya Protocol and the Treaty. Some policy makers may be disadvantaged due to the technical complexity of the topic when trying to view this issue in a balanced manner. For example, descriptions of “rematerialization” of PGRFA solely from accessing DSI are grossly overstated and misleading. Material PGRFA will be essential in commercial breeding for the foreseeable future. ISF is concerned that overly simplistic arguments for regulation overlook the serious, broad and negative impacts of regulation. We urge policy makers to recognize that the societal value of keeping DSI out of scope of any regulation is typically underestimated by the proponents of regulation.

## F. TYPES AND EXTENT OF USES OF DSI

As noted above, the current discussions on DSI are complex for many reasons. For example, some technical complexities arise around “sequences” including defining minimum length requirements, homology levels, epigenetic attributes, data quality metrics, and handling of sequencing artefacts. DSI is being extended broadly to include DNA, RNA and protein sequence information without limit all of which may apply to PGRFA. Some assume that “information” is equivalent to “data”, but this creates a number of key questions, such as: does DSI include metadata? Annotated data? Raw data? Gene expression data? And what about data errors? Should we only include “natural sequences” or include synthetic sequences?

With more information being shared by experts in the collection, storage, curation, and dissemination of sequence data, it is becoming clear that the proponents of regulation fail to grasp the intractable complexities. The free access and use of public sources of DSI benefits everyone from conservationists to farmers, from researchers to consumers, and anyone concerned about climate change. The benefits are threatened now by proposed increased regulation of DSI. Regulating access to DSI will create an entry barrier that hinders the capacity building and technology transfer and sustainable use for smaller market segments (orphan crops and market segments with less financial value). It will increase the divide between sophisticated users and others.

The dissemination and transfer of know-how and innovations around the world will be impacted by any regulation affecting DSI as the ability of scientific publications to publish and grant access to information containing DSI will be impaired. Information drawn from scientific publications are accessed by millions of users on a daily bases around the world and constitutes the backbone sustaining science and technology

<sup>2</sup> <http://www.fao.org/3/a-bq638e.pdf>



advances; impairing this fundamental right of researchers and breeders and directly contradicts the benefit sharing spirit of the Treaty.

Areas where DSI contributes include:

- In conservation: Use of DSI continues to increase both in taxonomic research and in the monitoring and protection of ecosystem biodiversity e.g., control of pathogens and invasive species. Genetic information is also used to enhance knowledge of ecological communities, which is important for environmental remediation and restoration. In addition, DSI is used to enhance agricultural efficiency which mitigates against the conversion of land for food, feed and fibre production.
- In exchange of genetic resources: applications of DSI in diagnostic tools e.g. virus, identification improve the safe international movement of plant materials and commodities.
- In exploration, collection, documentation, DSI is used in breeding and basic research.
- In characterization and evaluation: DSI can facilitate the development of plant varieties that contribute to more sustainable agriculture. DSI is also used to monitor pest and diseases on farm, as well as for quality control, food safety and other customer-oriented services.
- Basic researchers: collect and extensively use DSI to advance science and scientific understanding of biological systems. The rate of scientific advancement and technological development is heavily dependent on the ready availability of unburdened DSI.

## **G. THE RELEVANCE OF DSI TO FOOD SECURITY AND NUTRITION**

ISF emphasizes that open (unregulated) access to DSI (genetic sequence data) is critical for food security, nutrition and sustainable agriculture—the primary objectives of the Treaty. This is because DSI is a universal tool in research used globally to solve problems related to food security and nutrition. Present day advancements have been facilitated by the dramatic reduction in the cost of sequencing and the availability of sequence data made possible through multiple public data bases.

ISF feels that more emphasis should be placed on capacity building and enhancing the ability of all scientist around the world to access DSI (sequence data) in support of their conservation and sustainable use efforts. Capacity building for the conservation and use of PGRFA will bring more social benefits than increased regulation of characterization information. The public accessibility of vast sequence databases and the ever-diminishing costs of tools to generate DSI will improve food security and nutrition across the globe if capacity building is prioritized over bureaucratic regulation.

## **H. CONCLUSION**

In conclusion, if DSI were regulated, anyone and any institution (e.g. a national research unit, a company, or a university) that generates or uses genetic sequence data, and/or accesses non-confidential sequence information would be negatively impacted. The proposed administrative and financial barriers to the sharing and use of DSI would discourage innovation and add to existing disparities. Most institutions would have to add administrative staff to attempt to ensure legally compliant DSI exchange. As we noted above, the task of tracking and defining what data are in scope would likely be an intractable exercise. Users and providers of DSI would have to ensure that prior informed consent (PIC) and mutually agreed terms (MAT) account for the information acquired. Again, extensive, if not impossible, tracking and tracing would be needed; ultimately making both downstream products and other utilizations more expensive and less accessible in the future.



ISF is concerned about the increasing burdens on access and use of germplasm and other genetic resources at a time when plant breeding should be a priority. Impeded access to genetic resources has been growing for over 30+ years. Additional barriers to information access and sharing would further threaten food security, as well as basic research to conserve biodiversity. It would also have a distinctly negative impact on plant breeding programs that strive to sustainably meet the needs of farmers and their customers.



## I. APPE

### NDIX 4 ISF

#### PROPOSAL

## Staging the Implementation of the Subscription Option and New (revised) SMTA

### BACKGROUND AND RATIONALE

The IT PGRFA OWG-EFMLS will meet in June prior to the Governing Body (GB) meeting in November 2019. Primary objectives for the meetings will be to finalize a consensus text for a revised SMTA for GB approval and to formalize an amendment to expand Annex 1 to include all plant genetic resources for food and agriculture for approval or ratification by two-thirds of the Contracting Parties (CPs).

It is the position of some Contracting Parties that the suite of MLS enhancement measures under discussion should come into force together. A revised SMTA would come into effect only when two-thirds of the CPs have approved or ratified the Annex 1 amendment. The approval and ratification process might take 3-7 years. ISF also holds the position that both an expansion of scope and a better SMTA should be linked.

Even so ISF is proposing a concept to retain momentum until ratification and to demonstrate the willingness of MLS users to subscribe. In recent discussions with seed companies, a number of potential users have indicated interest in the proposed concept. This would allow the Seed Industry to demonstrate its support for the Subscription option with annual subscription payments and to access the current Annex 1 MLS material, assuming acceptable terms and conditions in the approved new SMTA.

ISF proposes the Subscription option be implemented soon after the GB approves the new SMTA so the flow of subscription payments into the holding (escrow) account can be enabled and thereby encourage Contracting Parties to ratify the amendment to expand Annex 1 in a timely manner.

### PROPOSAL

Assuming the GB will adopt a new revised SMTA and process to expand Annex 1 in November, ISF proposes a staged implementation by which seed companies and other entities may register as Subscribers as soon as the new SMTA is approved by the GB. A registered Subscriber would be granted access to MLS Material for current Annex 1 crops and would be allowed, but not required, to bring existing SMTA's into the subscription. Subscription payments would be directed to a designated holding (escrow) account until the amendment to expand Annex 1 has been ratified. Once the amendment enters into force, Subscription funds in the holding account would be transferred to the 3rd Party beneficiary,



a Subscriber would have access to MLS Material for all PGRFA and the flow of subscription payments from Subscribers active in the new Annex 1 crops would increase.

The IT Secretariat and Seed Industry would jointly establish a holding account to receive subscription payments until the amendment is ratified or not within a reasonable time. Subscribers would deposit their yearly subscription payments in the account. The account would not be managed for income so there would be no management fees. The principal would remain protected and grow with the annual subscription payments from all Subscribers. The holding account could be established with the Global Crop Diversity Trust.

If the Treaty amendment is not ratified by two-thirds of the Contracting Parties within a reasonable time specified by the GB, for example two biennia, a Subscriber would have two options as described below and illustrated in the graphic.

#### Option 1

- Subscriber may decide to continue its Subscription for at least the minimum term specified by the New SMTA with access to only the current Annex 1 crops.
- Subscriber would be obligated to release the remaining funds in the holding account for transfer to the FAO BSF
  - Subscriber would continue its subsequent annual Subscription payments directly to the FAO.
  - The years of Subscription payments into the holding account would be counted toward the minimum term of required subscription payments.

#### Option 2

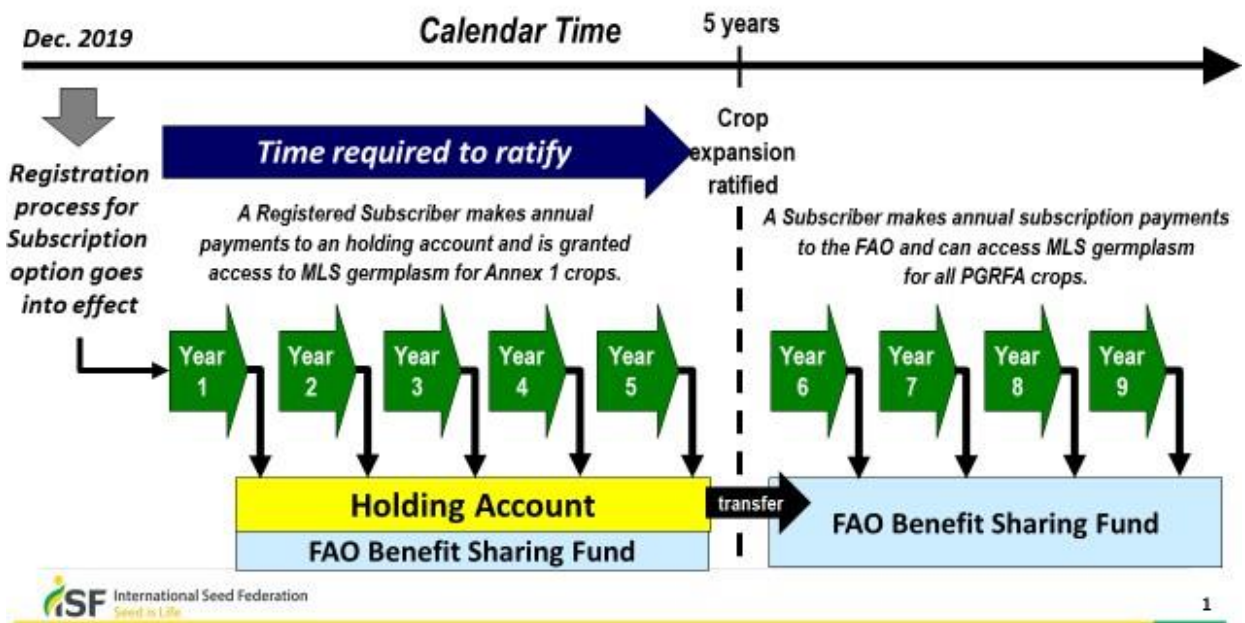
- Subscriber may decide to terminate its Subscription.
- Subscriber would retain use of PGRFAuD from Materials received prior to (if combined into the Subscription) and during the Subscription term to develop commercial Products.
  - Subscriber must report any payments due under 6.7 for Products sold during the Subscription term.
  - Subscriber has the continuing right to develop and further commercialize Products from Materials under the Old (current) SMTA with payment on sales subject to 6.7 (obligatory) and 6.8 (voluntary).
  - Subscriber would have the sole decision regarding the disposition of the balance of Subscription payment funds remaining in the holding account after any payments due on Products under 6.7 have been paid.
  - Subscriber may elect to access future Materials under the terms of the Old SMTA with payments on Sales subject to 6.7 (obligatory) and 6.8 (voluntary).

ISF expects that the single access mechanism would continue under the old (current) SMTA with Article 6.8 specifying the voluntary payment condition. Once the extension of Annex 1 to all PGRFA



and the new SMTA enter into force, any new single access of MLS Material would be provided under the new SMTA and subject to the revised conditions of Article 6.8.

### Subscription Payments into Holding (escrows) Account



#### Summary - KeyConditions

ISF believes that enhancements to the MLS through a Subscription option could begin soon after the GB adopts a new (revised) SMTA and formalizes the Treaty amendment to expand Annex 1 at





their meeting in November. The key conditions for ISF are as follows:

1. Any entity choosing to become a Registered Subscriber under the Subscription option of the New SMTA after approval by the GB:
  - would make payment into the holding account within 90 days after registration based on its most recent fiscal year results for the portfolio of current Annex 1 crops;
  - would have access to and use of MLS materials from all Contracting Parties for the current Annex 1 crops until ratification of the amended Treaty enters into force (before the 5-year ratification period ends); and
  - shall be entitled but not required to bring prior SMTAs into the scope of the Subscription.
2. A right to obtain MLS materials is linked to the Subscriber's first payment based on the Subscriber's most recently completed fiscal year.
3. For non-subscribers, the current unrevised SMTA remains in force until ratification officially expands Annex 1
4. Once the amendment to expand Annex 1 has been ratified, use of the old (current) SMTA will be terminated.
5. If the amendment is not ratified, Subscribers could either continue their Subscription for only the current Annex 1 crops or terminate their Subscription and move to the single access mechanism under the old (current) SMTA.



*APPENDIX 2*

**[DRAFT REVISED STANDARD MATERIAL TRANSFER AGREEMENT:  
PROPOSAL BY THE WORKING GROUP**

**PREAMBLE****WHEREAS**

The International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter referred to as “the **Treaty**”<sup>1</sup>) was adopted by the Thirty-first session of the FAO Conference on 3 November 2001 and entered into force on 29 June 2004;

The objectives of the **Treaty** are the conservation and sustainable use of **Plant Genetic Resources for Food and Agriculture** and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security;

The Contracting Parties to the **Treaty**, in the exercise of their sovereign rights over their **Plant Genetic Resources for Food and Agriculture**, have established a **Multilateral System** both to facilitate access to **Plant Genetic Resources for Food and Agriculture** and to share, in a fair and equitable way, the benefits arising from the utilization of these resources, on a complementary and mutually reinforcing basis;

Articles 4, 11, 12.4 and 12.5 of the **Treaty** are borne in mind;

The diversity of the legal systems of the Contracting Parties with respect to their national procedural rules governing access to courts and to arbitration, and the obligations arising from international and regional conventions applicable to these procedural rules, are recognized;

Article 12.4 of the **Treaty** provides that facilitated access under the **Multilateral System** shall be provided pursuant to a Standard Material Transfer Agreement, and the **Governing Body** of the **Treaty**, in its Resolution 1/2006 of 16 June 2006, adopted the Standard Material Transfer Agreement, which in Resolution XX/2017 of XX October 2017 it decided to amend.

**Commented [HG1]:** Should be changed once we are about to take decisions.

<sup>1</sup>Defined terms have, for clarity, been put in bold throughout.

## ARTICLE 1 — PARTIES TO THE AGREEMENT

1.1 The present Material Transfer Agreement (hereinafter referred to as “**this Agreement**”) is the Standard Material Transfer Agreement referred to in Article 12.4 of the **Treaty**.

1.2 **This Agreement** is:

BETWEEN: (*name and address of the provider or providing institution, name of authorized official, contact information for authorized official\**) (hereinafter referred to as “**the Provider**”),

AND: (*name and address of the recipient or recipient institution, name of authorized official, contact information for authorized official\**) (hereinafter referred to as “**the Recipient**”).

1.3 The parties to **this Agreement** hereby agree as follows:

## ARTICLE 2 — DEFINITIONS

In **this Agreement** the expressions set out below shall have the following meaning:

“**Available without restriction**”: a **Product** is considered to be available without restriction to others for further research and breeding when it is available for research and breeding without any legal or contractual obligations, or technological restrictions, that would preclude using it in the manner specified in the **Treaty**.

“**Genetic material**” means any material of plant origin, including reproductive and vegetative propagating material, containing functional units of heredity.

“**Governing Body**” means the **Governing Body** of the **Treaty**.

“**Multilateral System**” means the **Multilateral System** established under Article 10.2 of the **Treaty**.

“**Plant Genetic Resources for Food and Agriculture**” means any **genetic material** of plant origin of actual or potential value for food and agriculture.

“**Plant Genetic Resources for Food and Agriculture under Development**” means material derived from the **Material**, and hence distinct from it, that is not yet ready for **commercialization** and which the developer intends to further develop or to transfer to another person or entity for further development. The period of development for the **Plant Genetic Resources for Food and Agriculture under Development** shall be deemed to have ceased when those resources are **commercialized** as a **Product**.

\* Insert as necessary. Not applicable for shrink-wrap and click-wrap Standard Material Transfer Agreements.

A “shrink-wrap” Standard Material Transfer Agreement is where a copy of the Standard Material Transfer Agreement is included in the packaging of the **Material**, and the **Recipient’s** acceptance of the **Material** constitutes acceptance of the terms and conditions of the Standard Material Transfer Agreement.

A “click-wrap” Standard Material Transfer Agreement is where the agreement is concluded on the internet and the **Recipient** accepts the terms and conditions of the Standard Material Transfer Agreement by clicking on the appropriate icon on the website or in the electronic version of the Standard Material Transfer Agreement, as appropriate.

“**Product**” means **Plant Genetic Resources for Food and Agriculture** that incorporate<sup>2</sup> the **Material** or any of its genetic parts or components that are ready for **commercialization**, excluding commodities and other products used for food, feed and processing.

“**Sales**” means gross income received by the **Recipient** and its respective affiliates from licensing 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.

~~“**Sales**” means the gross income resulting from the **commercialization** of a **Product** or **Products**, by the **Recipient**, its affiliates, contractors, licensees and lessees.~~

~~“**To commercialize**” means to sell a **Product** or **Products** for monetary consideration on the open market, and “**commercialization**” has a corresponding meaning. **Commercialization** shall not include any form of transfer of **Plant Genetic Resources for Food and Agriculture under Development**.~~

### ARTICLE 3 — SUBJECT MATTER OF THE MATERIAL TRANSFER AGREEMENT

The **Plant Genetic Resources for Food and Agriculture** specified in *Annex 1* to **this Agreement** (hereinafter referred to as the “**Material**”) and the available related information referred to in Article 5b and in *Annex 1* are hereby transferred from the **Provider** to the **Recipient** subject to the terms and conditions set out in **this Agreement**.

### ARTICLE 4 — GENERAL PROVISIONS

4.1 **This Agreement** is entered into within the framework of the **Multilateral System** and shall be implemented and interpreted in accordance with the objectives and provisions of the **Treaty**.

4.2 The parties recognize that they are subject to the applicable legal measures and procedures, that have been adopted by the Contracting Parties to the **Treaty**, in conformity with the **Treaty**, in particular those taken in conformity with Articles 4, 12.2 and 12.5 of the **Treaty**.<sup>3</sup>

4.3 The parties to **this Agreement** agree that the Food and Agriculture Organization of the United Nations acting on behalf of the **Governing Body** of the **Treaty** and its **Multilateral System**, is the third party beneficiary under **this Agreement**.

4.4 The third party beneficiary has the right to request the appropriate information as required in Articles 5e, 6.5c, 8.3, *Annex 2*, [OPTION 1 *paragraph 5*] / [OPTION 2 *paragraph 3*], and *Annex 3*, Article 3, to **this Agreement**.

4.5 The rights granted to the Food and Agriculture Organization of the United Nations above do not prevent the **Provider** and the **Recipient** from exercising their rights under **this Agreement**.

### ARTICLE 5 — RIGHTS AND OBLIGATIONS OF THE PROVIDER

The **Provider** undertakes that the **Material** is transferred in accordance with the following provisions of the **Treaty**:

<sup>2</sup>As evidenced, for example, by pedigree or notation of gene insertion.

<sup>3</sup>In the case of the International Agricultural Research Centres of the Consultative Group on International Agricultural Research (CGIAR) and other international institutions, the Agreement between the Governing Body and the CGIAR Centres and other relevant institutions will be applicable.

- a) Access shall be accorded expeditiously, without the need to track individual accessions and free of charge, or, when a fee is charged, it shall not exceed the minimal cost involved;
- b) All available passport data and, subject to applicable law, any other associated available non-confidential descriptive information, shall be made available with the **Plant Genetic Resources for Food and Agriculture** provided;
- c) Access to **Plant Genetic Resources for Food and Agriculture under Development**, including material being developed by farmers, shall be at the discretion of its developer, during the period of its development;
- d) Access to **Plant Genetic Resources for Food and Agriculture** protected by intellectual and other property rights shall be consistent with relevant international agreements, and with relevant national laws;
- e) The **Provider** shall inform the **Governing Body** at least once every two calendar years, or within an interval that shall be, from time to time, decided by the **Governing Body**, about the Material Transfer Agreements entered into,<sup>4</sup>

either by:

Option A: Transmitting a copy of the completed Standard Material Transfer Agreement,<sup>5</sup>

or

Option B. In the event that a copy of the Standard Material Transfer Agreement is not transmitted,

- i. ensuring that the completed Standard Material Transfer Agreement is at the disposal of the third party beneficiary as and when needed;
- ii. stating where the Standard Material Transfer Agreement in question is stored, and how it may be obtained; and
- iii. providing the following information:
  - a) The identifying symbol or number attributed to the Standard Material Transfer Agreement by the **Provider**;
  - b) The name and address of the **Provider**;
  - c) The date on which the **Provider** agreed to or accepted the Standard Material Transfer Agreement, and in the case of shrink-wrap, the date on which the shipment was sent;

<sup>4</sup>This information should be submitted by the Provider to:

The Secretary  
International Treaty on Plant Genetic Resources for Food and Agriculture  
Food and Agriculture Organization of the United Nations

I-00153 Rome, Italy

Email: ITPGRFA-Secretary@FAO.org

or through EasySMTA: <https://mfs.planttreaty.org/itt/>.

<sup>5</sup>In the event that the copy of the completed Standard Material Transfer Agreement that is transmitted is shrink-wrap, in accordance with Article 10, Option 2 of the SMTA the **Provider** shall also include information as to (a) the date on which the shipment was sent, and (b) the name of the person to whom the shipment was sent.

- d) The name and address of the **Recipient**, and in the case of a shrink-wrap agreement, the name of the person to whom the shipment was made;
- e) The identification of each accession in *Annex I* to the Standard Material Transfer Agreement, and of the crop to which it belongs.

This information shall be made available by the **Governing Body** to the third party beneficiary.

#### ARTICLE 6 — RIGHTS AND OBLIGATIONS OF THE RECIPIENT

6.1 The **Recipient** undertakes that the **Material** shall be used or conserved only for the purposes of research, breeding and training for food and agriculture. Such purposes shall not include chemical, pharmaceutical and/or other non-food/feed industrial uses.

[6.1bis If the **Recipient** uses the **Material** for any of these prohibited uses, a lower court in the country of origin of the **Material** may, on presentation of *prima facie* evidence of such illegal use, award damages against the **Recipient** to the value of USD25 million or ten times the **Recipient**'s annual turnover, whichever is higher. The **Recipient** agrees that it shall not oppose enforcement of such damage by a competent court in the jurisdiction, where its main business identity is registered.]

6.2 The **Recipient** shall not claim any intellectual property or other rights that limit the facilitated access to the **Material** provided under **this Agreement**, or its genetic parts or components, in the form received from the **Multilateral System**.

[6.2 The **Recipient** shall not claim any intellectual property or other rights that limit the facilitated access to the **Material** provided under **this Agreement**, or its genetic parts or components, in the form received from the **Multilateral System**, or that limit Farmers' Rights to save, use, exchange and sell seed and propagating material of the provided **Material**.]

[6.2bis If the **Recipient** claims any such IP or other rights in contravention of this clause, a lower court in the country of origin of the **Material** may on presentation of *prima facie* evidence of such claims award damages against the **Recipient** to the value of USD25 million or ten times the **Recipient**'s annual turnover, whichever is higher, and declare the IP or other right forfeited to the country of origin.]

6.3 In the case that the **Recipient** conserves the **Material** supplied, the **Recipient** shall make the **Material**, and the related information referred to in Article 5b, available to the **Multilateral System** using the Standard Material Transfer Agreement.

6.4 In the case that the **Recipient** transfers the **Material** supplied under **this Agreement** to another person or entity (hereinafter referred to as "the **subsequent recipient**"), the **Recipient** shall

- a) do so under the terms and conditions of the Standard Material Transfer Agreement, through a new material transfer agreement; and
- b) notify the **Governing Body**, in accordance with Article 5e.

On compliance with the above, the **Recipient** shall have no further obligations regarding the actions of the **subsequent recipient**.

**Commented [HG2]:** NOT acceptable. The SMTA is of course a contract that is enforceable in national jurisdictions but then it should be the applicable national law that determines the damages or other types of remedies.

**Commented [HG3]:** NOT acceptable.

**Commented [HG4]:** NOT acceptable. See comment regarding 6.1bis.

6.5 In the case that the **Recipient** transfers a **Plant Genetic Resource for Food and Agriculture under Development** to another person or entity, the **Recipient** shall[, until a period of [x] years after signing of **this Agreement** has lapsed]:

- a) do so under the terms and conditions of the Standard Material Transfer Agreement, through a new material transfer agreement, provided that Article 5a of the Standard Material Transfer Agreement shall not apply;
- b) identify, in *Annex 1* to the new material transfer agreement, the **Material** received from the **Multilateral System**, and specify that the **Plant Genetic Resources for Food and Agriculture under Development** being transferred are derived from the **Material**;
- c) notify the **Governing Body**, in accordance with Article 5e; and
- d) have no further obligations regarding the actions of any **subsequent recipient**.

[The obligations in this Article 6.5 do not apply to **Plant Genetic Resources for Food and Agriculture under Development**, of which the theoretical proportion of germplasm from the **Material** is sufficiently low, **and does not consist more than 25% by pedigree, or does not contain a trait of commercial value that originated from the Material**]

e) ~~because at least five generations of crossing have been made.~~

6.6 Entering into a material transfer agreement under paragraph 6.5 shall be without prejudice to the right of the parties to attach additional conditions, relating to further product development, including, as appropriate, the payment of monetary consideration.

[6.11 The **Recipient**, by signing **this Agreement**, agrees to be bound by the terms and conditions of the **Subscription System**, as set out in *Annex 3* of **this Agreement**, which constitute and integral part of **this Agreement**. Any reference to **this Agreement** shall be understood, where the context permits and *mutatis mutandis*, to also include *Annex 3*. ]

OR

[6.11 The **Recipient** may opt at the time of signing of **this Agreement** or at the time of acceptance of **this Agreement** for the **Subscription System**, as set out in *Annex 3* to **this Agreement**, by returning the **Registration Form** contained in *Annex 4* to **this Agreement**, duly completed and signed, to the **Governing Body** of the **Treaty**, through its Secretary[, or by signifying acceptance through EasySMTA] ("**Subscription**"). [If the **Registration Form** is not returned to the Secretary, [or acceptance not signified through EasySMTA], within this period, the modality of payment specified in Articles 6.7 and 6.8 will apply], unless the **Recipient** has already opted for the **Subscription System** earlier.]

[6.11bis Should the **Recipient** opt for the **Subscription System**, the terms and conditions of the **Subscription System**, as set out in *Annex 3* to **this Agreement**, apply. In this case, *Annex 3* to **this Agreement** constitutes an integral part of **this Agreement** and any reference to **this Agreement**

6.11ter By opting for the **Subscription System**, the **Recipient**, as **Subscriber**, shall have no payment obligations with regard to the **Material** received, during the term of the **Subscription**, and the **Product** that incorporates the **Material**, other than the payment obligations provided for under the **Subscription System**.

**Commented [HG5]:** This text is OK except for the acceptance of the Subscription System with the use of EasySMTA. The EasySMTA is OK for product-based payments.

**Regarding the practical modalities of the subscription option:**  
When further accessions under the subscription option are accessed, the record of the subscriber containing the accessions accessed by him, should be adjusted and a paper document about this should be made available to the subscriber. This does not necessarily have to be a document to sign, it can be the packing list that comes with the seeds referring to the conditions of the SMTA, or it could be a shrink-wrap or similar.

**Commented [HG6]:** We are okay with this text

**Commented [HG7]:** We are okay with this text



[6.7 In the case that the **Recipient commercializes a Product** that is a **Plant Genetic Resource for Food and Agriculture** and that incorporates **Material** as referred to in Article 3 of **this Agreement**, and where such **Product** is **not available without restriction** to others for further research and breeding, the **Recipient** shall pay [for a period of [x] years] a fixed percentage of the **Sales** of the **commercialized Product** into the mechanism established by the **Governing Body** for this purpose, in accordance with *Annex 2* [OPTION 1] to **this Agreement**.

6.8 In the case that the **Recipient commercializes a Product** that is a **Plant Genetic Resource for Food and Agriculture** and that incorporates **Material** as referred to in Article 3 of **this Agreement** and where that **Product** is **available without restriction** to others for further research and breeding, the **Recipient** shall pay [for a period of [x] years] a [lower] fixed percentage of the **Sales** of the **commercialized Product** into the mechanism established by the **Governing Body** for this purpose, in accordance with *Annex 2* [OPTION 1] to **this Agreement**.]

OR

[[6.7 In the case that the **Recipient commercializes a Product** that is a **Plant Genetic Resource for Food and Agriculture** and that incorporates **Material** as referred to in Article 3 of **this Agreement**, and where such **Product** is **not available without restriction** to others for further research and breeding, the **Recipient** shall pay [, for a period of 20 years,] a fixed percentage of the **Sales** of the **commercialized Product** into the mechanism established by the **Governing Body** for this purpose, in accordance with *Annex 2* [OPTION 2] to **this Agreement**.]

[6.8 In the case that the **Recipient commercializes a Product** that is a **Plant Genetic Resource for Food and Agriculture** and that incorporates **Material** as referred to in Article 3 of **this Agreement** and where that **Product** is **available without restriction** to others for further research and breeding, the **Recipient** is encouraged to make voluntary payments into the mechanism established by the **Governing Body** for this purpose in accordance with *Annex 2* [OPTION 2] to **this Agreement**.]

[6.9 The **Recipient** shall make available to the **Multilateral System**, through the information system provided for in Article 17 of the **Treaty**, all non-confidential information that results from research and development carried out on the **Material**, and is encouraged to share through the **Multilateral System** non-monetary benefits expressly identified in Article 13.2 of the **Treaty** that result from such research and development. After the expiry or abandonment of the protection period of an intellectual property right on a **Product** that incorporates the **Material**, the **Recipient** is encouraged to place a sample of this **Product** into a collection that is part of the **Multilateral System**, for research and breeding.]

6.10 A **Recipient** who obtains intellectual property rights on any **Products** developed from the **Material** or its components, obtained from the **Multilateral System**, and assigns such intellectual property rights to a third party, shall transfer the benefit-sharing obligations of **this Agreement** to that **third party**.

#### ARTICLE 7 — APPLICABLE LAW

The applicable law shall be the General Principles of Law, including the UNIDROIT Principles of International Commercial Contracts 2010 and as subsequently updated, the objectives and the relevant provisions of the **Treaty**, and, when necessary for interpretation, the decisions of the **Governing Body**.

Commented [HG8]: And that “third party” has the right to  
the non-commercialization of the genetic resources to the sub-recipient

## ARTICLE 8 — DISPUTE SETTLEMENT

- 8.1 Dispute settlement may be initiated by the **Provider** or the **Recipient** or the third party beneficiary acting on behalf of the **Governing Body** of the **Treaty** and its **Multilateral System**.
- 8.2 The parties to **this Agreement** agree that the Food and Agriculture Organization of the United Nations, representing the **Governing Body** and the **Multilateral System**, has the right, as a third party beneficiary, to initiate dispute settlement procedures regarding rights and obligations of the **Provider** and the **Recipient** under **this Agreement**.
- 8.3 The third party beneficiary has the right to request that the appropriate information, including samples as necessary, be made available by the **Provider** and the **Recipient**, regarding their obligations in the context of **this Agreement**. Any information or samples so requested shall be provided by the **Provider** and the **Recipient**, as the case may be.
- 8.4 Any dispute arising from **this Agreement** shall be resolved in the following manner:
- a) Amicable dispute settlement: The parties shall attempt in good faith to resolve the dispute by negotiation.
  - b) Mediation: If the dispute is not resolved by negotiation, the parties may choose mediation through a neutral third party mediator, to be mutually agreed.
  - c) Arbitration: If the dispute has not been settled by negotiation or mediation, any party may submit the dispute for arbitration under the Arbitration Rules of an international body as agreed by the parties to the dispute. Failing such agreement, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce, by one or more arbitrators appointed in accordance with the said Rules. Either party to the dispute may, if it so chooses, appoint its arbitrator from such list of experts as the Governing Body may establish for this purpose; both parties, or the arbitrators appointed by them, may agree to appoint a sole arbitrator, or presiding arbitrator as the case may be, from such list of experts. The result of such arbitration shall be binding.

## ARTICLE 9 — ADDITIONAL ITEMS

### Warranty

9.1 The **Provider** makes no warranties in **this Agreement** as to the safety of or title to the **Material**, nor as to the accuracy or correctness of any passport or other data provided with the **Material**. Neither does it make any warranties as to the quality, viability, or purity (genetic or mechanical) of the **Material** being furnished. The phytosanitary condition of the **Material** is warranted only as described in any attached phytosanitary certificate. The **Recipient** assumes full responsibility for complying with the recipient nation's quarantine, invasive alien species and biosafety regulations and rules as to import or release of **genetic material**.

### [Duration of and Termination of this Agreement]

9.2 The **Recipient** may terminate **this Agreement** upon six months written notice to the **Governing Body** through its Secretary, not less than [XX] years from the date of signing of **this**

Agreement by the **Provider** or the **Recipient**, whichever date is later, or from the date of acceptance of **this Agreement** by the **Recipient**.

~~9.3~~ In the case that the **Recipient** has begun before termination to **commercialize a Product**, in respect of which payment is due in accordance with Articles 6.7 and 6.8 and *Annex 2* of **this Agreement**, such payment shall continue while that **Product** is **commercialized**.~~]~~

[9.4 In case of termination of **this Agreement**, the **Recipient** shall no longer be allowed to use or transfer the **Material**. In case the **Recipient** still has any **Material** in its possession, the **Recipient** shall contact the **Provider** or any other designated MLS provider to effect the return or transfer of the possession of the **Material**. Termination of **this Agreement** shall not affect the rights and obligations of the **Recipient** with regard to both the **Plant Genetic Resources for Food and Agriculture under Development** as well as the **Products**. Articles [6.1, 6.2, 6.5, 6.6, 6.7, 6.8, 6.9 and 6.10] shall therefore, even after **this Agreement** has been terminated, remain applicable for an indefinite period of time, unless the specific Article itself mentions a limited period of applicability.]

~~[9.4 — Notwithstanding the above, Articles [6.1.][6.2][...] of this Agreement shall continue to apply.]~~

**[Amendments to this Agreement]**

[9.5 If the **Governing Body** decides to amend the terms and conditions of the Standard Material Transfer Agreement, such amendments shall only affect subsequently signed Standard Material Transfer Agreements. **This Agreement** shall remain unchanged, unless the **Recipient** explicitly agrees in writing with the proposed amendments.]

[9.6 **This Agreement** shall remain in force so long as the **Treaty** remains in force, unless terminated according to Article 9.2.]

**ARTICLE 10 — SIGNATURE/ACCEPTANCE**

The **Provider** and the **Recipient** may choose the method of acceptance unless either party requires **this Agreement** to be signed.

**Option 1—Signature\***

I, (*Full Name of Authorized Official*), represent and warrant that I have the authority to execute **this Agreement** on behalf of the **Provider** and acknowledge my institution’s responsibility and obligation to abide by the provisions of **this Agreement**, both by letter and in principle, in order to promote the conservation and sustainable use of **Plant Genetic Resources for Food and Agriculture**.

Signature..... Date.....

Name of the **Provider** .....

\* Where the **Provider** chooses signature, only the wording in Option 1 will appear in the Standard Material Transfer Agreement. Similarly where the **Provider** chooses either shrink-wrap or click-wrap, only the wording in Option 2 or Option 3, as appropriate, will appear in the Standard Material Transfer Agreement. Where the “click-wrap” form is chosen, the **Material** should also be accompanied by a written copy of the Standard Material Transfer Agreement.

**Commented [HG9]:** In relation to this text we discussed the following question:

If a recipient received material under the old SMTA conditions, does the recipient have to transfer the material or material under development under the original conditions (s)he received the material with or under the amended SMTA conditions. Articles 6.4(a) and 6.5(a) refer to “the” SMTA.

Since there are diverging views as to whether transfer under the new conditions is desirable or even possible for the original recipient, it was agreed to ask the Standing Group of Legal Experts of the Treaty how they see this matter. The questions would simply be:

Which SMTA should be used in case of transfers if the original material was received under the old SMTA

I, (*Full Name of Authorized Official*), represent and warrant that I have the authority to execute **this Agreement** on behalf of the **Recipient** and acknowledge my institution’s responsibility and obligation to abide by the provisions of **this Agreement**, both by letter and in principle, in order to promote the conservation and sustainable use of **Plant Genetic Resources for Food and Agriculture**.

Signature..... Date.....

Name of the **Recipient**.....

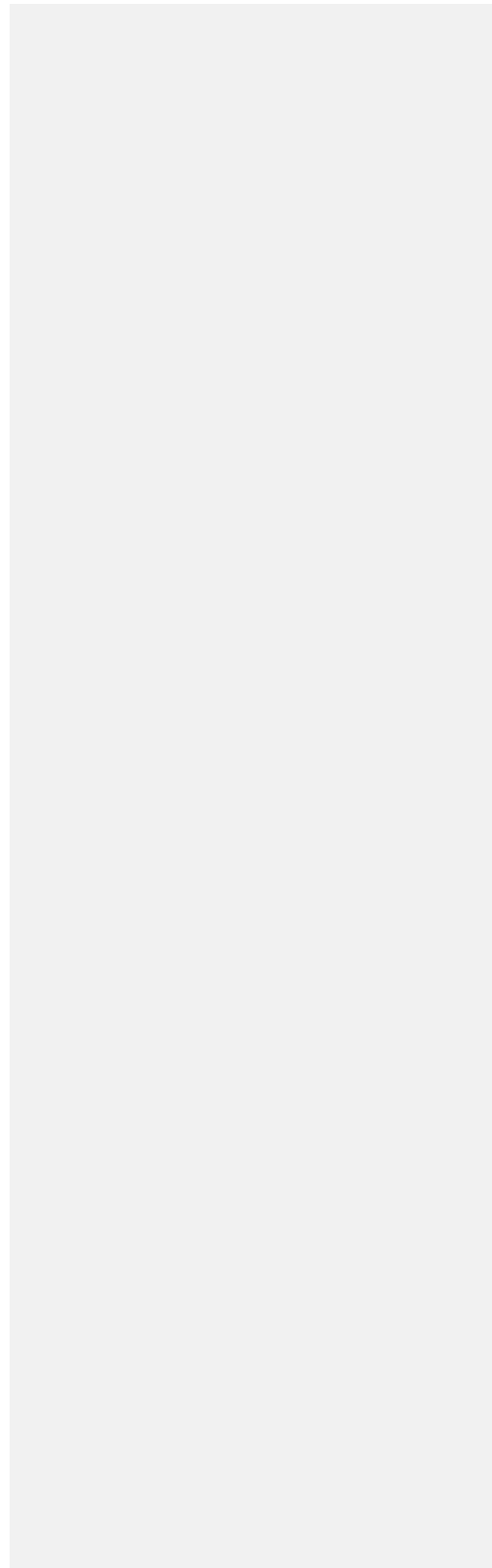
**Option 2 – Shrink-wrap Standard Material Transfer Agreements\***

The **Material** is provided conditional on acceptance of the terms of **this Agreement**. The provision of the **Material** by the **Provider** and the **Recipient’s** acceptance and use of the **Material** constitutes acceptance of the terms of **this Agreement**.

**Option 3 – Click-wrap Standard Material Transfer Agreement\***

- I hereby agree to the above conditions.

\* Where the **Provider** chooses signature, only the wording in Option 1 will appear in the Standard Material Transfer Agreement. Similarly where the **Provider** chooses either shrink-wrap or click-wrap, only the wording in Option 2 or Option 3, as appropriate, will appear in the Standard Material Transfer Agreement. Where the “click-wrap” form is chosen, the **Material** should also be accompanied by a written copy of the Standard Material Transfer Agreement.



*Annex 1*

**LIST OF MATERIALS PROVIDED**

This *Annex* lists the **Material** and/or **Plant Genetic Resources for Food and Agriculture under Development** provided under **this Agreement**, including the associated information referred to in Article 5b.

The following information is included, or the source indicated from which it may be obtained, for each **Material** and/or **Plant Genetic Resources for Food and Agriculture under Development** listed: all available passport data and, subject to domestic, or other, relevant law, any other associated, available, non-confidential descriptive information.

**Table A**

**Materials:**

Crop:	
Accession number or other identifier	Associated information, if available, or source from which it may be obtained (URL)

**Table B**

**Plant Genetic Resources for Food and Agriculture under Development:**

Crop:	
Accession number or other identifier	Associated information, if available, or source from which it may be obtained (URL)

In accordance with Article 6.5b, the following information is provided regarding the materials received under an SMTA or which were brought into the **Multilateral System** by an agreement pursuant to Article 15 of the **Treaty**, from which the **Plant Genetic Resources for Food and Agriculture under Development** listed in Table B are derived:

Crop:	
Accession number or other identifier	Associated information, if available, or source from which it may be obtained (URL)

---

*Annex 2*

---

**OPTION 1**

**NB: THIS OPTION RELATES TO THE FIRST ALTERNATIVE OF ARTICLES 6.7 AND 6.8 IN THE BODY OF THE SMTA**

**[RATE AND MODALITIES OF PAYMENT UNDER ARTICLES 6.7 AND 6.8 OF THIS AGREEMENT**

1. If a **Recipient**, and its respective affiliates ~~its affiliates, contractors, licensees, and lessees~~, commercializes a **Product** or **Products** that are not **available without restriction** to others for further research and breeding in accordance with Article 2 of **this Agreement**, then the **Recipient** shall pay [one point- one percent (1.1 %) of the **Sales** of the **Product** or **Products** less thirty percent (30%)]

2. If a **Recipient**, and its respective affiliates ~~its affiliates, contractors, licensees, and lessees~~, commercializes a **Product** or **Products** that are **available without restriction** to others for further research and breeding in accordance with Article 2 of **this Agreement**, then the **Recipient** shall pay [xx] percent ([xx] %) of the **Sales** of the **Product** or **Products** less thirty percent (30%).

3. No payment shall be due from the **Recipient** when the **Product** or **Products**:

- (a) have been purchased or otherwise obtained from another person or entity who has already made payment on the **Product** or **Products**;
- (b) are sold or traded as a commodity.
- [(c) {PROPOSAL BY NORTH AMERICA} do not consist of at least 25% of the **Material** by pedigree or do not contain a trait of commercial value that originated from the **Material**]

4. Where a **Product** contains a **Plant Genetic Resource for Food and Agriculture** accessed from the **Multilateral System** under two or more material transfer agreements based on the Standard Material Transfer Agreement only one payment shall be required under paragraphs 1 and 2 above.

5. The **Recipient** shall submit to the **Governing Body**, within sixty (60) days after closure of accounts each year, an ~~audited~~ annual report setting forth:

- (a) the **Sales** of the **Product** or **Products** by the **Recipient**, and its respective ~~affiliates its affiliates, contractors, licensees and lessees~~, for the twelve (12) month period preceding the annual closure of accounts;
- (b) the amount of the payment due; and
- (c) information that allows for the identification of the applicable payment rate or rates.

Such information shall be treated as confidential ~~business~~-information], and shall be made available to the third party beneficiary, in the context of dispute settlement, as provided for in Article 8 of **this Agreement**.

6. Payment shall be due and payable upon submission of each annual report. All payments due to the **Governing Body** shall be payable in *United States dollars (US\$)* for the following account established by the **Governing Body** in accordance with Article 19.3f of the **Treaty**:

**FAO Trust Fund (USD) GINC/INT/031/MUL,  
IT-PGRFA (Benefit-sharing),**

**Citibank**

399 Park Avenue, New York, NY, USA, 10022,

Swift/BIC: CITIUS33, ABA/Bank Code: 021000089, Account No. 36352577]

**OR****OPTION 2**

**NB: THIS OPTION RELATES TO THE SECOND ALTERNATIVE OF ARTICLES 6.7 AND 6.8 IN THE BODY OF THE SMTA**

**[RATE AND MODALITIES OF PAYMENT UNDER ARTICLE 6.7 OF THIS AGREEMENT**

1. If a **Recipient**, and its respective ~~affiliates-its affiliates, contractors, licensees, and lessees~~, commercializes a **Product** or **Products**, then the **Recipient** shall pay one point-one percent (1.1 %) of the **Sales** of the **Product** or **Products** less thirty percent (30%); except that no payment shall be due on any **Product** or **Products** that either:
  - (a) are **available without restriction** to others for further research and breeding in accordance with Article 2 of **this Agreement**;
  - (b) have been purchased or otherwise obtained from another person or entity who either has already made payment on the **Product** or **Products** or is exempt from the obligation to make payment pursuant to subparagraph (a) above;
  - (c) are sold or traded as a commodity.
  - ~~(d) have a theoretical proportion of germplasm from the Material which is sufficiently low, because at least [x] generations of crossing have been made.]~~
  - (d) [have a theoretical proportion of germplasm from the Material which is sufficiently low because at least 5 generations of outcrossing have been made [, *except where one or more traits of commercial value are retained therein*.]
  
2. Where a **Product** contains a **Plant Genetic Resource for Food and Agriculture** accessed from the **Multilateral System** under two or more material transfer agreements based on the Standard Material Transfer Agreement only one payment shall be required under paragraph 1 above.
  
3. The **Recipient** shall submit to the **Governing Body**, within sixty (60) days after closure of accounts each year, an annual report setting forth:
  - (a) the **Sales** of the **Product** or **Products** by the **Recipient**, and its respective ~~affiliates its affiliates, contractors, licensees and lessees~~, for the twelve (12) month period preceding the annual closure of accounts;
  - (b) the amount of the payment due; and
  - (c) information that allows for the identification of any restrictions that have given rise to the benefit-sharing payment.

Such information shall be treated as confidential [business information], and shall be made available to the third party beneficiary, in the context of dispute settlement, as provided for in Article 8 of **this Agreement**.
  
4. Payment shall be due and payable upon submission of each annual report. All payments due to the **Governing Body** shall be payable in *United States dollars (US\$)* for the following account established by the **Governing Body** in accordance with Article 19.3f of the **Treaty**:

**FAO Trust Fund (USD) GINC/INT/031/MUL,**

**IT-PGRFA (Benefit-sharing),**

**Citibank**

**399 Park Avenue, New York, NY, USA, 10022,**

**Swift/BIC: CITIUS33, ABA/Bank Code: 021000089, Account No. 36352577**

---

*Annex 3*

---

**TERMS AND CONDITIONS OF THE SUBSCRIPTION SYSTEM (ARTICLE 6.11)**

**ARTICLE 1 — SUBSCRIPTION**

1.1 The **Recipient**, who opts for the **Subscription [System] / [Option]** in accordance with Article 6.11 (hereinafter referred to as the “**Subscriber**”), agrees to be bound by the following additional terms and conditions (the “**Subscription Terms**”).

1.2 **Subscription** shall take effect upon receipt by the Secretary of the duly signed **Registration Form**, contained in *Annex 4*, or of the acceptance by the **Subscriber** through EasySMTA, who will notify the **Subscriber** accordingly, and cover [all **Plant Genetic Resources for Food and Agriculture** covered by the **Multilateral System**][the crop mentioned in the duly signed **Registration Form**].[The **Subscriber** shall not be required to sign *Annex 4* of any subsequent Standard Material Transfer Agreement, during the period of **Subscription**.]

[1.2 ALT The **Subscription** shall take effect upon receipt by the Secretary of the **Governing Body** of the **Treaty** of the duly signed **Registration Form** contained in *Annex 4*, or upon acceptance by the **Subscriber** through EasySMTA. The Secretary shall notify the **Subscriber** of the date of receipt. The **Subscriber** shall not be required to sign *Annex 4* of any subsequent Standard Material Transfer Agreement, during the period of **Subscription**.]

1.3 The **Subscriber** shall be relieved of any obligation to make payments under any previously signed Standard Material Transfer Agreement, and only the payment obligations in these **Subscription Terms** shall apply. (AGREED AD REF.)

1.4 The **Governing Body** may amend the **Subscription Terms** at any time. Such amended terms will not apply to the **Subscriber** who has agreed to the **Subscription Terms**, which will continue until the **Subscriber** withdraws from its **Subscription**, or the **Governing Body** terminates its **Subscription**, in accordance with Article 4 below.]

[1.4 ALT The **Governing Body** may amend the **Subscription Terms** at any time. Such amended **Subscription Terms** shall not apply to any existing **Subscription**, unless the **Subscriber** notifies the **Governing Body** of its agreement to be subject to the amended **Subscription Terms**.] [Should the **Subscriber** agree to the amended **Subscription Terms**, such agreement shall not affect the date on which the **Subscription** had taken effect.]

**ARTICLE 2 — REGISTER**

The **Subscriber** agrees that its full name, contact details and the date at which **Subscription** took effect, shall be placed on a public register (the “**Register**”), and undertakes to immediately communicate any changes to this information to the **Governing Body** of the **Treaty**, through its Secretary. (AGREED AD REF.)

**ARTICLE 3 — MONETARY BENEFIT-SHARING**

[3.1 In order to share the monetary benefits from the use of **Plant Genetic Resources for Food and Agriculture** under the **Treaty**, the **Subscriber** shall make annual payments based on the **Subscriber’s** ~~sales of technology fees and licensing fees of/for products that~~ are **Plant Genetic Resources for Food and Agriculture** belonging to the same crops that are subject to the **Subscription**, ~~and on income that the **Subscriber** receives from its affiliates, contractors, licensees and lessees, in the preceding year.~~

Commented [HG10]: We prefer Option

Commented [HG11]: Acceptance of the Subscription Option via EasySMTA is not desired. See comments before.

Commented [HG12]: This seems ok



16

IT/OWG-EFMLS-8/18/Report

[3.1bis The Subscriber will transfer **Plant Genetic Resources for Food and Agriculture under Development** under an SMTA in accordance with Article 6.5 of this Agreement. The **Subscriber** will not have further obligations regarding the actions of any subsequent recipient.]

3.2 ~~The rates of payment shall be as follows, less thirty percent (30%):~~

~~{a) For [**Products** and any other products] available without restriction to others for further research and breeding: [xx] percent };~~

~~{b) For [**Products** and any other products] not available without restriction to others for further research and breeding: [yy] percent }~~

~~[3.1 ALT The **Subscriber** shall make annual payments based on the **Sales**.] [3.2 ALT The following rates, less 30%, of payment shall apply to **Sales**:~~

~~{xx}% when the **Products** or products are available without restriction, and [yy]% when the **Products** or products are not available without restriction.}~~

~~[3.2 ALT The applicable rate of payment in relation to **Sales** shall be [zz]%. less 30%]~~

~~{3.2 BIS — At the request of the **Subscriber**, the higher rate of payment shall apply to **Sales** without distinction.}~~

~~[3.3 Notwithstanding the above, no payment shall be required for a **Subscriber** in a year in which its [declared] [**Sales**] [total sales and license fees referred to under Articles 3.1,] do not exceed US\$ [xxx].]~~

~~[3.3 ALT Notwithstanding the above, in a year in which its payments due on declared **Sales** referred to in Article 3.1 do not exceed [US\$ 1,000], the **Subscriber** may defer payment, in consecutive years, until it has accumulated up to the sum of [US\$ 1,000] due and payable.]~~

3.4 Payment shall be made within sixty (60) days after closure of accounts each [~~financial~~ fiscal] year, for the previous year. Whenever the **Subscription** took effect during the year, the **Recipient** shall make a proportionate payment for the first year of its **Subscription**. (AGREED AD REF)

[3.5 The **Subscriber** shall submit to the **Governing Body** of the **Treaty**, through its Secretary, within sixty (60) days after closure of accounts each [financial] year an [~~audited~~ statement of account, including in particular the following:

- a) Information on the **Sales** of the products for which payment was made;
- b) Information that allows for the identification of the applicable payment rate or rates.

Such information shall be treated as confidential ~~business~~ information, and shall be made available to the third party beneficiary, in the context of dispute settlement, as provided for in Article 8 of **this Agreement**.]

3.6 All payments due to the **Governing Body** shall be payable in *United States dollars (US\$)* for the following account established by the **Governing Body** in accordance with Article 19.3f of the **Treaty**: (AGREED AD REF)

**FAO Trust Fund (USD) GINC/INT/031/MUL,  
IT-PGRFA (Benefit-sharing),  
Citibank**

**399 Park Avenue, New York, NY, USA, 10022,**

**Commented [HG13]:** We would like to have one rate for the subscription option. The differentiated rates for products available for research and breeding without restriction and for products which are not, is not desired. The simplicity of the subscription option should be kept.

**Commented [HG14]:** If this exemption is making it to the final text, we prefer this to the 3.3ALT.

**Commented [HG15]:** This is not acceptable: too burdensome for the small users

Swift/BIC: CITIUS33, ABA/Bank Code: 021000089, Account No. 36352577

#### ARTICLE 4 — [DURATION OF AND] WITHDRAWAL FROM [AND TERMINATION OF] THE SUBSCRIPTION

4.1 The **Subscription** shall be in force until the **Subscriber** withdraws from it, or the **Governing Body** terminates it as provided for in Article 4.5 below. (AGREED AD REF.)

4.2 The **Subscriber** may withdraw from its **Subscription** upon six months written notice to the **Governing Body** through its Secretary, not less than 10 years from the date that the **Subscription** took effect. (AGREED AD REF.)

4.3 The monetary benefit-sharing provisions of Article 3 of these **Subscription Terms** shall continue for [YY]/[two]/[five] years from the end of the **Subscription**. [All other conditions of **this Agreement** shall continue to apply, except in so far that the monetary benefit-sharing obligations arising from [Articles 6.7 and 6.8] of **this Agreement** shall not apply.] [Only Articles 6.1, 6.2, 6.3, 6.4 and 6.9 and 6.10 of **this Agreement** shall continue to apply.]

[4.4 Notwithstanding Article 4.3 of these **Subscription Terms**, with respect to **Plant Genetic Resources for Food and Agriculture under Development**, [ZZ] years from the end of the **Subscription**, only Articles [6.1][6.2][...] of **this Agreement** shall continue to apply.]

[4.4 ALT] Withdrawal from **Plant Genetic Resources for Food and Agriculture under Development**, notwithstanding Article 4.2, only Articles 6.1, 6.2, 6.3, and 6.9 of **this Agreement** shall continue to apply after [2–5] years from the date of withdrawal from the **Subscription System**.]

4.x Withdrawal from or termination of the **Subscription** does not affect the validity of the Standard Material Transfer Agreements signed during the **Subscription** term. [These Standard Material Transfer Agreements shall remain in full force and effect in accordance with the terms of the Standard Material Transfer Agreement (excluding Article 6.7 and 6.8).]

4.xbis In exception to Article 4.2, the **Subscriber** may withdraw immediately, regardless of when the **Subscription** took effect, in the event of specific circumstances of the discontinuation of its operations in the crop to which the **Subscription** relates, a suspension of payment, or declared bankruptcy. Under these circumstances, the provisions of Articles 4.3 and 4.4 also do not apply. The Standard Material Transfer Agreements signed during the **Subscription** term shall be considered terminated on the same day as the **Subscription**. Article 9.3 of the Standard Material Transfer Agreements will in such case apply, but without the applicability of Article 6.7 and 6.8 of the Standard Material Transfer Agreement.]

4.5 The **Governing Body** may, at any time, terminate the **Subscription** for material breach of the terms and conditions of the **Subscription System**. The Secretary shall inform the **Subscriber** in writing of the impugned breach, and if such breach is not cured within thirty (30) days of notice being given, shall refer the matter to the next meeting of the **Governing Body**.] [NB: THE CONSEQUENCES OF SUCH TERMINATION WILL NEED TO BE SPECIFIED.]

Commented [HG16]: These paragraphs should be deleted if 6.5 can be deleted from article 4.3

Commented [HG17]: To be clarified. I assume we have to add at least "unless terminated in accordance with Article 9.2 of this Agreement".

Commented [HG18]: As discussed in our meeting, it would be good to have examples of "material breach"

*Annex 4*

**REGISTRATION FORM**

The **Recipient** hereby declares to opt for the **Subscription System**, in accordance with Article **6.11 of this Agreement**.

It is understood and expressly agreed that **Recipient's** full name, contact details [, the crops to which the **Subscription** applies] and the date at which **Subscription** took effect, shall be placed on a public register of subscribers (the "**Register**"), and that any changes to this information is communicated immediately to the **Governing Body** of the **Treaty**, through its Secretary, by the **Recipient** or its authorised official.

Signature..... Date.....

*Full name of Recipient:* .....

Address: .....

Telephone: ..... Email: .....

*Recipient's authorised official:* .....

Address: .....

Telephone: ..... Email: .....

NB: The **Subscriber** must also sign or accept **this Agreement**, as provided for in Article 10, without which **Registration** is not valid.

The **Subscriber** may signify acceptance, either by returning a signed **Registration Form** to the Governing Body, through its Secretary, at the address below, or through EasySMTA, in the case that **this Agreement** was formed in EasySMTA. A signed **Registration Form** must be accompanied by a copy of **this Agreement**.

The Secretary,  
International Treaty on Plant Genetic Resources for Food and Agriculture  
Food and Agriculture Organization of the United Nations  
I-00153 Rome, Italy ]

*Annex 1 to Appendix 2*

**LIST OF PROPOSALS BY WORKING GROUP MEMBERS TO REVISE THE  
STANDARD MATERIAL TRANSFER AGREEMENT, NOT DISCUSSED AND  
DECIDED BY THE WORKING GROUP AT ITS SIXTH MEETING**

*Note by the Co-Chairs: The following list assembles the remaining textual proposals for revising the Standard Material Transfer Agreement that could not be fully discussed and decided by the Working Group at its sixth meeting, because they were received late by the Working Group. The proposals are presented in the sequence of the provisions in the Standard Material Transfer Agreement to which they relate and compiled in the language they were received.*

**Proposal by the Africa Region on Article 2 of the revised SMTA:**

The Africa Region, drawing on a proposal by farmers' organizations, has submitted the following proposal for additional text in Article 2 of the revised SMTA:

- ["Genetic parts or components" means the elements of which they are composed or the genetic information that they contain.]

The Africa Region has submitted the following proposal for an addition to Article 6.1 of the revised SMTA:

- [If the Recipient uses the Material for any of these prohibited uses, a mediator or arbitrator appointed in terms of Article 8 may, on presentation of prima facie evidence of such illegal use, order the Recipient to stop such illegal use forthwith and award punitive damages against the Recipient to the value of USD25 million or ten times the Recipient's annual turnover, whichever is higher. The Recipient agrees that it shall not oppose any application for enforcement of such punitive damage made to a competent court in the jurisdiction where its main business identity is registered.]

**Proposal by the Africa Region on Article 6.2 of the revised SMTA:**

The Africa Region has submitted the following proposal for an addition to Article 6.2 of the revised SMTA:

- [If the Recipient claims any such IP or other rights in contravention of this clause, a mediator or arbitrator appointed in terms of Article 8 may, on presentation of prima facie evidence of such claim, order the Recipient to stop pursuing such claim forthwith, award punitive damages against the Recipient to the value of USD25 million or ten times the Recipient's annual turnover, whichever is higher, and declare any granted IP or other rights forfeited to the provider, the country of origin of the PGRFA in question or the Third Party Beneficiary. The Recipient agrees that it shall not oppose any application for enforcement of such punitive damage or forfeiture made to a competent court in the jurisdiction where its main business identity is registered.]

Commented [HG19]: NOT acceptable

Commented [HG20]: All the following proposals are not to be supported.

**Proposal by the Africa Region on the alternative Article 6.2 of the revised SMTA:**

The Africa Region has submitted the following proposal for an addition to the alternative version of Article 6.2 of the revised SMTA that contains the sentence “or that limit Farmers’ Rights to save, use, exchange and sell seed and propagating material of the provided Material”:

- [If the Recipient claims any such IP or other rights in contravention of this clause, a mediator or arbitrator appointed in terms of Article 8 may, on presentation of prima facie evidence of such claim, order the Recipient to stop pursuing such claim forthwith, award punitive damages against the Recipient to the value of USD25 million or ten times the Recipient’s annual turnover, whichever is higher, and declare any granted IP or other rights forfeited to the provider, the country of origin of the PGRFA in question, an appropriate Farmers’ Organisation or the Third Party Beneficiary. The Recipient agrees that it shall not oppose any application for enforcement of such punitive damage or forfeiture made to a competent court in the jurisdiction where its main business identity is registered.]

**Proposal by the Africa Region on Article 6.3 of the revised SMTA:**

The Africa Region has submitted the following proposal for an addition to Article 6.3 of the revised SMTA:

- [If the Recipient fails to make the Material available as agreed, a mediator or arbitrator appointed in terms of Article 8 may, on presentation of prima facie evidence of such failure, order the Recipient to make to Material available or pay punitive damages. The Recipient agrees that it shall not oppose any application for enforcement of such punitive damage or forfeiture made to a competent court in the jurisdiction where its main business identity is registered.]

**Proposal by the Africa Region on Article 6.4 of the revised SMTA:**

The Africa Region has submitted the following proposal for an addition to Article 6.4 of the revised SMTA:

- [If the Recipient transfers the Material without securing a new SMTA from the subsequent recipient, a mediator or arbitrator appointed in terms of Article 8 may, on presentation of prima facie evidence of such transfer, order the Recipient to secure such new SMTA forthwith and hold the original Recipient liable for any obligations that arise out of the subsequent recipient’s use of the Material until the new SMTA has been signed by the subsequent recipient. The original Recipient agrees that it shall be so liable as if it had used the Material itself under the terms of the SMTA.]

**Proposal by the Africa Region on Article 6.5 of the revised SMTA:**

The Africa Region has submitted the following proposal for an addition to Article 6.5 of the revised SMTA:

- [If the Recipient transfers a Plant Genetic Resource for Food and Agriculture under Development without securing a new SMTA from the subsequent recipient, a mediator or arbitrator appointed in terms of Article 8 may, on presentation of prima facie evidence of such transfer, order the Recipient to secure such new SMTA forthwith and hold the original Recipient liable for any obligations that arise out of the subsequent recipient’s use of the Plant Genetic Resource for Food and Agriculture under Development until the new SMTA has been signed by the subsequent recipient. The original Recipient agrees that it shall be so liable as if it had used the Plant Genetic Resource for Food and Agriculture under Development itself under the terms of the SMTA.]

The North America Region, drawing on a proposal originally made by the Seed Industry, submitted the following proposal for text to be added to the proposed new Article 6.5e of the revised SMTA (added text in italics), as well as a related new definition to be included in Article 2 of the revised SMTA:

- [The obligations in this paragraph 6.5 do not apply to Plant Genetic Resource for Food and Agriculture under Development of which the theoretical proportion of germplasm from the Material is sufficiently low because at least 5 generations of outcrossing have been made *[, except where one or more traits of commercial value are retained therein].*]
- [*“Trait of Value”* means any trait that confers commercial value to a Product, including but not limited to agronomic ~~traits, traits conferring resistance to biotic or abiotic stresses,~~ traits that enhance the nutritional or processing value of harvested commodities, and any other traits used to describe a Product for the purpose of promoting its commercialization.]

The African Region, drawing on a proposal by farmers’ organizations, has submitted the following proposal for additional text in Article 3 of Annex 2 of the revised SMTA:

- [c) available without restriction to others for further research and breeding or to the realization of farmers’ rights to conserve, use, exchange or sell farm-saved seed or propagating material.]

**Proposal by the South West Pacific Region on Annex 3, Article 3.1, of the revised SMTA and Annex 2 of the revised SMTA:**

The South West Pacific Region has submitted the following proposal for an addition, to be

Commented [HG21]: We support

Commented [HG22]: NOT acceptable