INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

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

Rome, Italy, 10–12 October 2018

SUBMISSIONS FROM CONTRACTING PARTIES AND STAKEHOLDERS ON MATTERS TO BE DISCUSSED AT THE EIGHTH 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 GB8-009, 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 eighth meeting.

This document compiles the submissions received in preparation for the eighth meeting of the Working Group, in language and form, as well as in the sequence, in which they were received.

This document is printed in limited numbers to minimize the environmental impact of FAO’s processes and contribute to climate neutrality. Participants are kindly requested to bring their copies to meetings and to avoid asking for additional copies.
List of Appendixes

1. Submission by La Via Campesina, received on 25 September 2018, Appendix 1

2. Submission by the International Seed Federation, received on 26 September 2018, Appendix 2

3. Submission by the North America Region, received on 26 September 2018, Appendix 3

4. Submission by the CGIAR, received on 1 October 2018, Appendix 4
La Via Campesina’s contribution to the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-Sharing in response to the call for contributions posted on August 12, 2018

Access to digital sequence information (DSI) identified in a material derived from the Multilateral System now allows to produce genetically modify plants, thanks to new genetic techniques (including genome editing). This is done by forcing plants to develop a copy of the genetic parts or components of this material related to this digital sequence information. In order to obtain these genetically modified plants, it is no longer necessary to have access to the physical material from which this genetic information originates, nor to insert genetic parts or components of this material in the new modified plant through breeding or transgenesis.

As a result:

- Most of the benefits from the use of plant genetic resources do no longer derive from the use of physical resources provided by the Multilateral System, but from the use of associated digital sequence information.
- The scope of a claimed patent or other type of IPR on a digital sequence information obtained by these new genetic techniques extends to all cultivated plants that contains and expresses its function, including the material provided by the Multilateral System within which this sequential information has been identified.

1) an efficient benefit-sharing mechanism

Regardless of the outcome of the debate taking place in the Governing Body, on whether digital sequence information are plant genetic resources subject to the Treaty’s benefit-sharing obligations or not, this information is already freely accessible on the internet and it seems unlikely that this access could be controlled in the future. This information is published by researchers who do no commercialise any product derived from the use of plant genetic resources of the Multilateral System and thus have access to it without any benefit-sharing payment obligations. These researchers also publish the knowledges they have gathered from the farmers which allows for the identification of the functions associated to the genetic sequences of the same resources. Seed companies have free access to databases that compiles this information derived from the plant genetic resources of the Multilateral System. They are not bound by any agreement or other contract, requiring them to share their profits by claiming patents on the link they establish between a genetic sequence and its function.

Any benefit-sharing mechanism based solely on access to the physical resources of the Multilateral System and the Standard Material Transfer Agreement will ultimately be systematically disregarded by the most important seed companies, which are the only ones able to invest in new genetic techniques without relying on their competitors’ patents. Three of these companies currently control more than half of the world commercial seed market. Only small and medium-sized enterprises and small-scale farmers who do not have the same capacities, still need to access the physical plant.

---

1 La via campesina is the largest peasant and farmers organization in the world, representing 200 million peasant farmer: viacampesina.org
genetic resources of the Multilateral System, if only to prove that they have not used the patented seeds of the three Big breeders derived from recent breeding.

La Vía Campesina is not opposed to the implementation of the Subscription System proposed by the co-chairs. However, LVC has little hope that it will be enough to meet the benefit-sharing objectives, especially if the current payment mechanism is maintained as an alternative option when the products are marketed (Article 6.11 and 6.12 of the Revised Standard Agreement). In the absence of a labelling obligation when products are marketed, of the origin of the used plant genetic resources, this process is most often avoided and will continue to be avoided.

La Vía Campesina proposes that the States engages themselves in completing the payments obtained through the Subscription System by collecting a tax levied on companies marketing seeds on their territory without being able to prove that they have fulfilled the benefit-sharing obligations. This tax should be proportional to the sales turnover of the farmers’ non-reproducible seeds. “Farmers’ non-reproducible seeds” means F1 hybrids and other seeds derived from Genetic Use Restriction Technologies, and seeds covered by intellectual property rights that prohibit or restricts the farmers’ use of farm-saved seeds. The sale of reproducible seeds enables farmers to develop new plant genetic resources by selecting commercial varieties’ traits of adaptation to their own growing conditions. La Vía Campesina considers that it is a form of non-monetary benefit-sharing and should therefore not be taxed.

2) Farmers’ right to continue to use, exchange and sell their seeds that they offer to the Multilateral System

By handing over their seeds to the Multilateral System, farmers make them available to the researchers who will publish their genetic sequences on the internet. These researchers also publish the knowledges they have gathered from the farmers. These publications enrich the digital databases used by the companies to claim patents on genetic information associating a genetic sequence with its function. which allows for the identification of the functions associated to the genetic sequences of the same resources. The scope of these patents extends to the farmers’ seeds in which the companies identify patented sequences. These farmers are thus deprived of their right to carry on conserving, using, exchanging and selling the seeds they handed over to the Multilateral System.

Many States put forward the need to relaunch the plant genetic resource collections, especially in the fields of the farmers who selected new climate change adaptation traits. Farmers willingly share their seeds and knowledges. However, they will no longer do so if their sharing risks depriving them of their right to keep, use, trade and sell seeds. The Treaty must consider this new risk arising from the development of genetic techniques and take the necessary measures to guarantee that farmers can continue to save, use, exchange and sell the plant genetic resources that they generously provide to the Multilateral System.

That is why the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-Sharing proposed at the GB7 (document IT/GB/-7/17/7) proposed Article 6.2 of the current Standard Material Transfer Agreement:
6.2 The Recipient or Subscriber 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 any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material.

Unfortunately, this proposal has been modified in the co-chairs’ proposal of a new revised Standard Material Transfer Agreement provided in Annex 2 of the Governing Body’s resolution 2/2017 (document IT/GB-7/17/Res2).

6.4 The Recipient or Subscriber 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 any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.

This new formulation is a huge step backwards in comparison to the current Standard Material Transfer Agreement. As formulated in the text, the restriction “subject to national law and as appropriate” shall apply to the entire Article 6.4 and, subsequently, the ban on the claiming of any intellectual property or other rights that limit the facilitated access. This contravenes Article 12.3.d) of the Treaty. The Standard Material Transfer Agreement commits the Recipient or Subscriber with regard to the Third-Party Beneficiary not to the States. National laws cannot question a commitment concerning the Treaty itself. The same can be said for the rights that farmers have to save, use, exchange and sell seeds that they provided to the Multilateral System, as stated by the working group (document IT/GB-7/17/7) and not the entirety of the farm-saved seed or propagating material, as stated in the co-chairs’ new formulation (document IT/GB-7/17/Res2).

The rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material is certainly subject to provisions in national law in Article 9 of the Treaty. However, the Standard Material Transfer Agreement is not affected by Article 9.3 of the Treaty. It does not apply to the entirety of the farm-saved seed/propagating material but only to the material provided to the Multilateral System by the farmers. The Multilateral System is under the responsibility of the Treaty, not under that of the States, subject to national law.

That is why La Vía Campesina calls for a return to this article’s formulation as it was proposed in document IT/GB-7/17/7.
Contribution de La Via Campesina au Groupe de travail spécial à composition non limitée chargé d’améliorer le fonctionnement du Système multilatéral d’accès et de partage des avantages en réponse à l’appel à contribution mis en ligne le 13 août 2018

L’accès à une information séquentielle dématérialisée (DSI) sous forme numérique identifiée dans un matériel issu du Système multilatéral permet désormais, grâce aux nouvelles techniques génétiques (notamment l’édition du génome), de modifier génétiquement des plantes en les forçant à élaborer une copie des parties ou composantes génétiques de ce matériel liées à cette information séquentielle dématérialisée. Il n’est plus nécessaire pour obtenir ces plantes génétiquement modifiées d’accéder au matériel physique d’où provient cette information génétiques, ni d’insérer par croisements ou transgenèse dans les nouvelles plantes modifiées des parties ou composantes génétiques de ce matériel.

Il en résulte que :

• La majeure partie des bénéfices issus de l’utilisation des ressources phytogénétiques ne provient plus de l’utilisation des ressources physiques fournies par le Système multilatéral, mais de l’utilisation des informations séquentielles dématérialisées associées.

• La portée d’un brevet revendiqué sur une information séquentielle dématérialisée obtenue par ces nouvelles techniques génétiques s’étend à toute plante cultivée qui la contient et exprime sa fonction, y compris le matériel fourni par le Système multilatéral au sein duquel cette information séquentielle a été identifiée.

1) un mécanisme efficace de partage des avantages

Quel que soit le résultat du débat engagé au sein de l’Organe Directeur pour savoir si les informations séquentielles numériques sont ou non des ressources phytogénétiques soumises aux obligations de partage des avantages du Traité, ces informations sont déjà librement accessibles sur internet et il semble peu probable que cet accès puisse être un jour contrôlé. Ces informations sont publiées par des chercheurs qui ne commercialisent aucun produit issu de l’utilisation des ressources phytogénétiques du Système multilatéral et peuvent ainsi y accéder sans aucune obligation de paiement au titre du partage des avantages. Ces chercheurs publient aussi les connaissances qu’ils ont recueillies auprès des paysans et qui permettent d’identifier les fonctions associées aux séquences génétiques des mêmes ressources. Les entreprises semencières accèdent librement aux bases de données qui compilent ces informations issues des ressources phytogénétiques du Système multilatéral. Elles ne sont liées par aucun accord ou autre contrat les obligeant à partager les bénéfices qu’elles réalisent en revendiquant des brevets sur le lien qu’elles établissent entre une séquence génétique et sa fonction.

Tout mécanisme de partage des avantages basé uniquement sur l’accès aux ressources physiques du Système multilatéral et sur l’Accord type de transfert de matériel sera à terme systématiquement contourné par les entreprises semencières les plus importantes, seules à posséder les capacités d’investir dans les nouvelles techniques génétiques sans dépendre des brevets de leurs concurrents. Trois de ces entreprises contrôlent aujourd’hui plus de la moitié du marché mondial des semences commerciales. Seules les petites et moyennes entreprises et les petits agriculteurs qui ne disposent pas des mêmes capacités ont encore besoin d’accéder aux ressources phytogénétiques physiques du Système multilatéral, ne serait-ce que pour prouver qu’ils n’ont pas utilisé les semences brevetées par les trois Bigbreeders issus des récentes fusions.
La Via Campesina n’est pas opposée à la mise en place du système de souscription proposé par les coprésidents, mais a peu d’espoir qu’il soit suffisant pour remplir les objectifs de partage des avantages, surtout si le mécanisme actuel de paiement lors de la commercialisation des produits (articles 6.11 et 6.12 de l’Accord type révisé) est maintenu comme une option alternative. En l’absence d’obligation d’indication, lors de la commercialisation des produits, de l’origine des ressources phytogénétiques utilisées, ce mécanisme est la plupart du temps contourné et continuera à l’être.

La Via Campesina propose que les États s’engagent à compléter les paiements obtenus grâce au mécanisme de souscription en prélèvant une taxe auprès des entreprises commercialisant des semences sur leur territoire sans pouvoir amener la preuve qu’elles ont rempli les obligations découlant du partage des avantages. Cette taxe devrait être proportionnelle au chiffre d’affaire de vente de semences non reproductibles par les agriculteurs. Par « semences non reproductibles par les agriculteurs », on entend les hybrides F1 et les autres semences issues de technologies de restriction de l’utilisation des ressources génétiques ainsi que les semences couvertes par des droits de propriété intellectuelle qui interdisent ou restreignent l’utilisation par les agriculteurs des semences conservées à la ferme. La vente de semences reproductibles permet en effet aux agriculteurs de développer de nouvelles ressources phytogénétiques en sélectionnant les caractères d’adaptation des variétés commerciales à leurs propres conditions de culture. La Via Campesina estime qu’elle est une forme de partage non monétaire des avantages et qu’elle ne devrait donc pas être taxée.

2) Le droit des agriculteurs de continuer à utiliser, échanger et vendre leurs semences qu’ils offrent au Système multilatéral.

En remettant leurs semences au Système multilatéral, les agriculteurs les mettent à disposition des chercheurs qui vont publier sur internet leurs séquences génétiques. Les mêmes chercheurs publient aussi les connaissances associées qu’ils ont recueillies auprès des agriculteurs. Ces publications enrichissent les bases de données numériques utilisées par les entreprises pour revendiquer des brevets sur des informations génétiques associant une séquence génétique à sa fonction. La portée de ces brevets s’étend aux semences des agriculteurs au sein desquelles les entreprises identifient les séquences brevetées. Ces agriculteurs se voient ainsi privés de leurs droit de continuer à conserver, utiliser, échanger et vendre les semences qu’ils ont remis au Système multilatéral.

De nombreux États ont souligné la nécessité de relancer les collectes de ressources phytogénétiques, notamment dans les champs des agriculteurs qui sélectionnent les nouveaux caractères d’adaptation aux changements climatiques. Les agriculteurs aiment partager leurs semences et leurs connaissances. Mais ils ne le feront plus si ce partage risque de les priver de leur droit de les conserver, les utiliser, les échanger et les vendre. Le Traité doit prendre en compte ce nouveau risque découlant de l’évolution des techniques génétiques et prendre les mesures nécessaires pour garantir aux agriculteurs qu’ils pourront toujours continuer à conserver, utiliser, échanger et vendre les ressources phytogénétiques qu’ils remettent gracieusement au Système multilatéral.

C’est pourquoi le rapport du Groupe de travail spécial à composition non limitée chargé d’améliorer le fonctionnement du Système multilatéral d’accès et de partage des avantages proposé au GB7 (document IT/GB-7/17/7) proposait de formuler ainsi l’article 6.2 de l’actuel Accord type de transfert de matériel:

[6.2 Le bénéficiaire ne revendique aucun droit de propriété intellectuelle ni aucun autre droit limitant l’accès facilité au matériel – ni à des parties ou composantes génétiques de celui-ci – fourni en vertu du présent Accord, sous la forme reçue du Système multilatéral, ou limitant les
droits des agriculteurs de conserver, d'utiliser, d'échanger et de vendre des semences ou autres matériels de multiplication du matériel fourni.]

Cette proposition a malheureusement été modifiée dans la proposition des coprésidents d’un nouvel Accord type révisé de transfert de matériel, qui figure dans l'annexe 2 de la résolution 2/2017 de l’Organe directeur (document IT/GB-7/17/Res2)

6.4 Le bénéficiaire ou le souscripteur ne revendique aucun droit de propriété intellectuelle ni aucun autre droit limitant l’accès facilité au matériel – ni à des parties ou composantes génétiques de celui-ci – fourni en vertu du présent Accord, sous la forme reçue du Système multilatéral, ou limitant les droits des agriculteurs de conserver, d'utiliser, d'échanger et de vendre des semences de ferme ou du matériel de multiplication, selon le cas, et sous réserve des dispositions de la législation nationale.

Cette nouvelle formulation constitue un immense recul par rapport à l’actuel Accord type de transfert de matériel. Telle que formulée, la restriction « selon les cas, et sous réserve des dispositions de la législation nationale » s’applique à l'ensemble de ce nouvel article 6.4 et donc aussi à l’interdiction de revendiquer un droit de propriété intellectuelle ou autre droit limitant l’accès facilité. Cela est contraire à l’article 12. 3. d) du Traité. L’Accord type de transfert de matériel engage en effet le bénéficiaire vis à vis du Traité et de la Tierce partie bénéficiaire et non vis à vis les États. Les lois nationales ne peuvent pas remettre en cause un engagement qui concerne le Traité lui-même. Il en est de même du droit des agriculteurs de conserver, utiliser, échanger et vendre les semences qu’ils ont fourni au Système multilatéral, comme indiqué dans le rapport du groupe de travail (document IT/GB-7/17/7), et non l’ensemble des semences ou matériel de multiplication conservés à la ferme, comme indiqué dans la nouvelle formulation des coprésidents (document IT/GB-7/17/Res2).

Certes, le droit des agriculteurs de conserver, d’utiliser, d’échanger et de vendre des semences ou du matériel de multiplication conservés à la ferme est soumis aux dispositions de la législation nationale à l’article 9 du Traité. Mais l’Accord type de transfert de matériel n’est pas concerné par cet article 9.3 du Traité. Il ne s’applique pas à l’ensemble des semences ou matériel de multiplication conservés à la ferme, mais uniquement au matériel remis par les agriculteurs au Système multilatéral. Le Système multilatéral est sous la responsabilité directe du Traité et non des États selon leurs lois nationales.

C’est pourquoi La Via campesina demande de revenir à la formulation de cet article telle que proposée dan le document IT/GB-7/17/7.
Ref: NCP GB8-09 - MLS Working Group

Dear Dr N’nadozie,

Following your invitation to stakeholders to send inputs and develop proposals as a contribution to the work of the Ad Hoc Open-Ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-Sharing, the International Seed Federation, the voice of the global seed industry, would like to provide the following documents:
- ISF Contribution to the notification NCP GB8-09 – MLS Working Group
- Annex A: Statement on the Revision of the SMTA, 31 July 2017

I remain at your disposal if you need further information.

Best regards,

Michael Keller
Secretary General
ISF Contribution to the notification NCP GB8-09 – MLS Working Group

The International Seed Federation (ISF) would like to provide a written contribution to the subjects raised in notification NCP GB8-09. Our submission is intended to help the 8th Working Group session to:

(a) Develop a proposal for a Growth Plan to attain the enhanced Multilateral System, taking into account the draft Growth Plan prepared by the Co-chairs, as appropriate;

(b) Revise the Standard Material Transfer Agreement, based on the Report of the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System (IT/GB-7/17/7), and taking into account, inter alia, "the Co-Chairs’ Summary arising from [the Seventh] Session [of the Governing Body] and their proposed consolidated text for the revised Standard Material Transfer Agreement" and "further information or proposals that have been or may be submitted by Contracting Parties and stakeholder groups";

(c) Elaborate criteria and options for possible adaptation of the coverage of the Multilateral System, taking into account, inter alia, proposals presented at the Seventh Session of the Governing Body;

(d) Make recommendations to the Governing Body on any other issues related to the process for the enhancement of the Multilateral System.

First, ISF reminds the Co-Chairs that our members want a practical MLS for PGRFA that facilitates access and sustainable use of PGRFA under business-reasonable terms and conditions for any user – whether a frequent or infrequent user, whether from the public or private sector, whether from a large, medium-sized or small country or organization.

With regard to (a) and (c) above, ISF notes that the coverage of the MLS (Annex 1) is a critical element of the Growth Plan necessary to enhance benefit-sharing. ISF supports the expansion of the coverage of the MLS to reflect the scope of the Treaty.

We stress that the expansion of Annex 1 to all plant genetic resources must occur in a timely manner to fully enhance the MLS and the potential for benefit-sharing.

ISF also notes that 5 blocks of issues were identified in the Co-chairs’ Summary Arising from the Seventh Session of the Governing Body that may require further work in revising the Standard Material Transfer Agreement (SMTA). The Co-chairs’ summary specifically mentions:

(a) Mechanisms to access PGRFA from the Multilateral System;

(b) Withdrawal and termination;

(c) Formulation of benefit-sharing in particular within the Subscription System;

(d) Enforceability;

(e) Digital sequence information in relation to the SMTA.
With regard to each block, ISF would like to share the following input.

**(a) Mechanism to access PGRFA from the Multilateral System (MLS):**

ISF believes that the primary benefit of the MLS is utilization of PGRFA resulting from facilitated access, which is the basis of conservation and benefit-sharing. Without effective and facilitated access to PGRFA from the MLS, monetary and non-monetary benefit-sharing will not be realized. ISF supports multiple, appropriately flexible mechanisms of access that use an SMTA: a single access mechanism and a subscription system. However, Contracting Parties must meet their obligations for the system to work. Specifically, countries must deposit material in the MLS and make it readily available upon signing a SMTA or subscription. More details on the type of access mechanisms proposed can be found in Annex A (ISF Statement).

Furthermore as noted above, Annex 1 must be expanded to include all PGRFA for the MLS to work as intended under the Treaty and CBD.

ISF emphasizes that unlike fossil fuels, plant genetic resources do not disappear when used. ISF believes that under-use of PGRFA could even lead to their disappearance.

**(b) Withdrawal and termination:**

ISF reminds the negotiators to ensure that the enhanced system includes reasonable withdrawal and termination conditions especially in terms of payment and transfer obligations. ISF members cannot sign contracts committing them to perpetual payment obligations. The same is true regarding transfer of obligations for the material under development. More details are contained in Annex A (ISF Statement).

**(c) Formulation of benefit-sharing in particular within the Subscription System:**

ISF suggests that instead of focusing on the amount of expected benefit-sharing expected from users, it would be more appropriate to discuss the features that would make an enhanced MLS ‘package’ that is attractive to users and acceptable for providers. As stated in the past submissions and remaining valid now, key features of any ‘package’ need to include: clear termination rights and flexibility to withdraw from the system, legal certainty, administrative simplicity including workable tracking and tracing, financially reasonable terms, and a scope that includes all crops, not just Annex 1 species.

ISF notes that previous discussions on expected monetary benefit-sharing have left some disappointment despite honest attempts to exchange views on potentially acceptable financial terms. Importantly, discussions on expectations for monetary benefits may overlook critical elements including the fact that enhancing the MLS must be a “package deal” and utilizing PGRFA in breeding is the most important benefit of the MLS.

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 business-friendly conditions as an indicator of potential monetary benefit-sharing. While this Declaration is no longer valid, some of the signatories may still be interested in pursuing a similar course if they feel that it will lead to making enhancements to the MLS.

Finally, ISF continues to be concerned about an over-emphasis on monetary benefit-sharing coming primarily from private sector seed companies. ISF acknowledges that funding conservation of genetic resources is a global concern and supports international efforts to
address this. However, expecting private sector breeders to primarily fund the conservation of PGRFA is inappropriate and overlooks the benefits plant breeding brings to this important work. ISF would like to remind negotiators once more of the immense value of non-monetary and in-kind benefits sharing activities undertaken everyday by seed companies around the world to sustain farmers and environment. A database of activities can be found here: https://www.euroseeds.eu/voluntary-benefit-sharing-activities-european-seed-industry

(d) Enforceability:

ISF would like to reiterate here that any clause imposing unrealistic compensation payments in cases of breach of the contractual conditions will be strong grounds for companies to refuse to sign a SMTA. The legal provisions of the current SMTA are strong enough and protect the rights and obligations of all parties.

(e) Digital Sequence Information:

With regard to the issue of DSI, ISF has recently adopted a policy that states:

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. Furthermore, ISF strongly discourages national and regional governments from including DSI within the scope of their ABS implementing frameworks. Regulating the access and utilization of DSI would have far-reaching negative effects on basic and applied research and breeding that supports the conservation of biodiversity and food security. In addition, regulation of DSI is inconsistent with the spirit of the Convention on Biological Diversity (CBD), is not supported by the legal definition of a genetic resource and is unnecessary to ensuring the fair and equitable benefit sharing related to the utilization of genetic resources.


Dealing with DSI is a complex topic. Considerable work by experts has not yet resulted in a workable definition of the subject matter itself which would be needed for any meaningful discussion on the terms and conditions of regulation. If not managed appropriately, the DSI topic could further delay progress toward an enhanced MLS system. It is clear that the on-going collection, recording, interpreting, curating, retrieving, and transferring of DSI involves the collaboration of multiple stakeholders in diverse ways. It is also clear that DSI is used for plant breeding and address farmer needs, to monitor and mitigate agricultural harmful organisms and invasive species and to conduct research and conservation work such as taxonomy. So in other words the creation and use of DSI is a benefit in itself. Unnecessarily disrupting these efforts would be contrary to the objectives of the Treaty.

Conclusion:

ISF reminds negotiators that the draft SMTA in Resolution 2/2017 is significantly flawed especially when compared to the text that was produced from the 6th Working Group session.

With regard to making progress toward an improved SMTA with a workable Subscription option, we strongly encourage the Co-chairs to resume discussions at the 8th Working group using the draft SMTA that came out of the 7th Working Group session.
Statement on the Revision of the SMTA

31 JULY 2017

A STATEMENT PREPARED BY THE INTERNATIONAL SEED FEDERATION
The International Seed Federation (ISF) wishes to provide you with its input for further discussions on the revision of a SMTA to become workable. The new SMTA and the related MLS need to be attractive to users and provide legal certainty.

The SMTA needs to be drafted in such a way that any user, from public sector, private sector, any country, or an organization of any size, can access and make use of MLS genetic resources and comply with reasonable monetary and non-monetary benefit-sharing obligations. Moreover, it should be practical for both frequent and infrequent MLS users.

Therefore, ISF is of the opinion that the SMTA should include the following elements:

1. **Multi-optional benefit-sharing mechanism**

   Based on the type of organization, economics, risk tolerance and legal certainty, and on the quality and accessibility of MLS genetic resources, different benefit-sharing mechanisms can be chosen. Based on discussions that have taken place until now we see the need for two options for benefit-sharing in the SMTA among which the user can choose:

   - **Option 1: Subscription system; annual subscription fee**
   - **Option 2: Single access mechanism; payment base on use of accessed genetic resources**

   Regarding the scope of the SMTA, any genetic resource of Annex 1 crops under the management and control of Contracting Parties and available in the public domain should be included in the MLS and become accessible through the SMTA.

   - **Option 1: Subscription system; annual subscription fee**

     In order to facilitate access for frequent users, to have a continuous input into the benefit-sharing fund and to minimize administrative burden for users, a subscription mechanism could be useful. ISF considers the following conditions important for an efficient and effective Subscription System.

     **Subscription scope:** The subscription system should encourage total portfolio subscription of Annex 1 crops, but it should also be available on a crop by crop basis. Subscribers may not be ready to pay on total Annex 1 crop sales when their MLS needs are limited to a few crops of lesser value or will only serve minor regions. However, in case the subscription is based on a Subscriber’s total portfolio of Annex 1 crops, the payment rate should be sufficiently low.

     **Subscription rate of payment:** The rate of payment for the Subscription must make economic sense. In case the system would be implemented for all crops, one should think of a maximum rate of 0.01% on sales of Annex 1 crops by the company.
**Subscription term:** ISF supports an initial 10-year Subscription term with annual payments after which the Subscriber has the right to terminate the Subscription. A longer initial subscription term will likely require a lower rate needed to make the Subscription attractive.

**Access rights during subscription:** ISF is of the opinion that a Subscriber should have access to genetic resources in the MLS during the full term of the Subscription. In case, negotiators are of the opinion that the Subscription should have a phase-out period during which the annual payment continues but genetic resource access is no longer possible, ISF may accept a phase-out period as long as it is no longer than 2 years.

**Subscription and prior SMTAs:** ISF supports retention of paragraph 1.3 of Annex 3 in the 3rd revised draft, so that a Subscriber is relieved from any payment obligations under SMTAs signed prior to the Subscription. Next to that, a Subscriber should have the possibility to bring existing SMTAs under the conditions of the new SMTA, to make the Subscription system more attractive to potential subscribers. 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. ISF is of the opinion that the total payment made during the Subscription term should be sufficient. Upon termination of the Subscription, any time after the specified minimum term, the Subscriber should retain paid-up rights to continue using Material accessed during the Subscription term in the form received and for the development of PGRFAuD (unless Subscription is terminated due to breach of agreement or bankruptcy), to sell and license Products, to breed with PGRFA under Development without payment obligations, and to license and transfer PGRFA under Development.

**SMTA surviving rights and obligations:** Next to the Subscription, a Subscriber should also be able to terminate the SMTAs signed during the Subscription and it should be clear what surviving rights remain. Breeders must have the right to continue breeding with PGRFA under Development and the right to transfer, license and sell both Products and PGRFA under Development after SMTA termination. Possible transfer obligations should continue until either i) a period of 20 years after signature has passed or ii) 5 outcrosses have been made and no Trait of Value (see Appendix) is maintained, whichever occurs first.

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

The single access mechanism will be preferred by MLS users who rarely access genetic resources, who cannot subscribe for a long period, or who prefer to pay on sales of products derived from accessed genetic resources. ISF considers the following conditions important for an effective single access mechanism system.

**Single access rate:** ISF is of the opinion that the breeders’ exemption, as a cornerstone of the plant breeder’s rights system, is an important tool for benefit-sharing and open innovation. It implies that any variety protected by plant breeders’ rights can be used for further research and breeding and the newly bred variety can be commercialized without any obligations towards the right holder. In case mandatory payments are required for products available without restriction, ISF is of the opinion that the payment
should be significantly lower than the 1.1% rate for products that are available with restriction. ISF recommends a rate of 0.11 to 0.22% of the sales of the product available without restriction less 30%. This difference is consistent with what is used in commercial practice as a ratio between an exclusive license and a non-exclusive license.

Expiration of payment obligations: Payment obligations based on use of a genetic resource should not be in perpetuity; it should be limited in time. Payment obligations should expire either i) when a period of 20 years after signature has passed or ii) once 5 outcrosses have been made and no Trait of Value (see appendix) is maintained, whichever occurs first.

Expiration of transfer obligations of PGRFA under Development: For PGRFA under development it is accepted 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) 5 outcrosses have been made and no Trait of Value (see Appendix) is maintained, whichever occurs first.

SMTA surviving rights and obligations: A user should be able to terminate the SMTA and it should be clear what surviving rights remain. Breeders must have the right to continue breeding with PGRFA under Development and the right to transfer, license and sell both Products and PGRFA under Development after SMTA termination. Possible payment obligations and transfer obligations should continue until either i) a period of 20 years after signature has passed or ii) 5 outcrosses have been made and no Trait of Value (see Appendix) is maintained, whichever occurs first.

2. Contractual and legal clarifications in the SMTA

a. Scope of "sales": For the purpose of calculating benefit sharing payments, “sales” must be limited to only those seed sales and licensing fees received by the user’s (the Recipient) company and affiliates. Sales should not include value generated beyond the direct business engagement of the Recipient, who is the signatory of the SMTA. A Recipient can’t assume obligations to track, audit, report and pay on downstream value beyond the scope of the company’s own revenue generation.

b. Remedies: The language currently proposed in Articles 6.x is unacceptable and 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.”

c. Digital sequence information: The SMTA should be based on PGRFA in material form obtained from the MLS and not on DNA information. The current discussions regarding use of Digital Sequence Information should not delay efforts to finalize the revised SMTA.

d. Unilateral changes: Unilateral changes are not acceptable in usual contractual relations so such changes in the terms of the SMTA or Subscription should not be allowed.
Appendix

Industry proposal for Article 6.5(e) and definition of “Trait of Value”

6.5 In the case 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]: (subparagraphs a through d are unchanged)

a) (as in draft revised version)
b) (as in draft revised version)
c) (as in draft revised version)
d) (as in draft revised version)
[ e) The obligations in this paragraph 6.5 do not apply to Plant Genetic Resources for Food and Agriculture under Development after 5 generations of outcrossing, except where one or more Traits of Value are retained and identified at the time of transfer. ]

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.

Explanation:
ISF proposes that a commercialized Product is only subject to benefit sharing if it contains >3.125% (theoretical) of the original material (5 or fewer outcrosses) or contains a Trait of Value present in and traceable to the original Material using markers or other scientifically recognized methods. If neither of these conditions are met, product(s) from a user’s breeding program are not subject to mandatory benefit sharing under 6.7 or 6.8.
North America Regional Submission to

Ad Hoc Open-Ended Working Group to
Enhance the Functioning of the Multilateral System

September, 2018

The North America region appreciates the opportunity to submit feedback and input for the Ad Hoc Open-Ended Working Group to Enhance the Functioning of the Multilateral System (MLS). Most of the statements made in a previous written submission by the region from August 2016 are still relevant. In some cases the discussion has moved on and new items were discussed.

Overall objective

The Treaty is a critical means for maintaining global food security, through conservation and sustainable use of plant genetic resources for food and agriculture (PGRFA), and the fair and equitable sharing of the benefits arising out of their use. Facilitated access and the sharing of monetary benefits generated through use of PGRFA, in line with commercial practice, are key aspects of the Treaty’s SMTA. While we remain open to considering changes that will improve the system, North America cannot accept proposed changes to the SMTA that would make it less workable for the broad range of potential MLS users. Proposed amendments to the current SMTA should strengthen both facilitated access and sharing of monetary benefits as well as non-monetary benefits. We believe these objectives can be accomplished most effectively through an SMTA that maintains a clear link between payment and commercialization of a Product, is consistent with commercial practice, provides legal certainty to users, and does not discourage use of plant genetic resources in the MLS by either the public or private sectors.

Coverage of the MLS

In addition to establishing reliable terms for exchanging plant genetic resources (material), the purpose of the SMTA is to facilitate the sharing of benefits including by mandating or encouraging user-based payments for the Benefit Sharing Fund. An expansion of the crops covered by the MLS would also enhance the possibility to generate such benefits. The North America region supports expanding the list of crops covered by the MLS.

Options for access to the MLS and for generating benefits

The North America region emphasizes that, to realize the greatest range and quantity of benefits from facilitated access, the access and benefit sharing (ABS) regime must encourage research and development by both public and private sectors that deliver improved products to farmers and other end-users. Consequently, the MLS and its SMTA should be sufficiently flexible to facilitate access for numerous users and to generate benefits in a general sense, including monetary and non-monetary benefits.

For this reason, North America supports retaining SMTA Articles 6.7 and 6.8 access options entirely in addition to developing a “subscription” access option based on SMTA Article 6.11.
SMTA Articles 6.7 and 6.8 implement Article 13.2.d(ii) of the Treaty, which states that the SMTA “shall include a requirement that a recipient who commercializes a product that is [PGRFA] and that incorporates material accessed from the [MLS] shall pay . . . an equitable share of the benefits arising from the commercialization of that product” unless that product is freely available, in which case the recipient “shall be encouraged to make such payment.” Removing 6.7 and 6.8 would make the SMTA inconsistent with the Treaty and therefore cannot be done without amending the Treaty. Providing for three different access options ensures accessibility for various users, including many public-sector and some private-sector users who, although they may never generate a “product” from MLS germplasm, nor commercialize a product, will nonetheless generate research tools, information and breeding stocks that may contribute substantially to global food security.

In creating a revised subscription option, the North America region insists that the basis for calculating user-based payments be reasonable and clear. The payment rates must be acceptable to the user community and the basis for calculating them needs clarification.

Instituting termination clauses for all access options would make the MLS a more attractive option for accessing PGRFA for many researchers and breeders. All access options that trigger mandatory payments should have a termination clause that defines when the payment obligation ceases. The SMTA also should specify the minimal genetic contribution of MLS material to a product that triggers an obligatory payment.

Expectations and approaches for generating monetary benefits should be based on making the MLS as comprehensive and as practical as possible to attract a wide range of users and high rates of PGRFA utilization. It is not useful to define *a priori* monetary targets for income from user-based payments as they may not represent realistic expectations.

**Genetic sequence data**

The North America region considers any discussion of digital sequence information (“DSI”) to be outside the mandate of the Working Group. Furthermore, it does not consider that either the Working Group or SMTA requires specific deliberations or provisions on “DSI.” Governing Body resolution 13/2017 provides for the Treaty to consider at its Eighth Session the potential implications of the use of “DSI” on genetic resources for the objectives of the International Treaty and also to consider at that time whether or not to include it in the ITPGRFA multi-year program of work.

The North America region does not support any measures that intend to restrict access to information associated with PGRFA, or attach legal obligations to accessing that information associated with MLS material or with any other PGRFA. Information associated with PGRFA is not covered under the MLS except by Article 12.3 c, “All available passport data, and subject to applicable law, any other associated available and non-confidential descriptive information, shall be made available with the PGRFA provided,” and Article 13.2 (a) Exchange of information. Access to information constitutes a major non-monetary benefit, as noted in Article 17.1 on the Global Information System on PGRFA, which states that “…exchange of information will
contribute to the sharing of benefits…”. We do not support adding language into the SMTA that allows an interpretation that the SMTA refers to anything other than the exchange of material.

The North America region acknowledges that technical and other resources and capacities are required to make use of information, and the region engages in numerous initiatives and educational programs to enhance such capacity globally.

Legal consistency

Any changes to the SMTA must be consistent with the Treaty itself. The North America region opposes changes to the SMTA that would require amendments or changes to the Treaty, with the exception of expanding Annex 1 as discussed above.

The North America region does not support proposals to change or introduce new definitions in the Treaty, or to alter other provisions such as those on dispute settlement. There is no evidence that the SMTA’s dispute settlement provisions are not working, or that they need to be supplemented by provisions that would spell out legal measures or penalties in case a recipient violates the SMTA.

The Growth Plan

The North America region agrees with the goal to enhance benefits and benefit-sharing, both monetary and non-monetary, under the Treaty and recognizes the need to build trust for users and Contracting Parties, including in negotiations to revise the SMTA. However, we question the potential ability of the current proposed Growth Plan to create better understanding or facilitate the revision process.
CGIAR Submission to the Eight Meeting of the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing

In notification “NCP GB8-09 - MLS Working Group” the ITPGRFA Secretariat requests Contracting Parties and stakeholders to “re-submit or reconfirm” previously submitted written information and proposals to the WG-EFMLS.

CGIAR appreciates this opportunity to resubmit and underscore previous submissions of relevance to the ongoing work of the Working Group.

In May, 2015, CGIAR made a lengthy written submission to the 3rd session of the WG-EFMLS available at http://www.fao.org/3/a-be694e.pdf. We do not repeat those submissions in full length here, but only provide bullet points highlighting issues raised that continue to be important for the 8th session of the WG-EFMLS:

- CGIAR supports the further development of options for low-transaction-cost means of increasing monetary benefit-sharing, including through
  a) governments making annual contributions to the benefit sharing fund, (in return for which all natural and legal persons under their jurisdiction would get facilitated access to materials in the multilateral system, or
  b) adoption of a system based on revised and improved SMTA Article 6.11 (i.e. what has subsequently come to be referred to as the subscription system)

- While revising the multilateral system to encourage more monetary benefit sharing from bigger seed companies, it is critically important to proactively address the risk of inadvertently ‘driving off’ a wide range of traditional recipients of materials from CGIAR Centres/multilateral system. This can be achieved by not requiring payments from subscribers whose seed sales fall below certain threshold every year e.g., 2-5 million dollars (as per draft bracketed text of SMTA Annex 3, Article 3.3 in the revised SMTA to be used by WG-EFMLS 8, as set out in document IT/OWG-EFMLS-8/18/3).

- CGIAR appreciates the importance of introducing termination clauses to address commercial users’ concerns about never-ending benefit sharing obligations and related transaction costs associated with track and tracing their use of germplasm from the MLS

- It is critical for CGIAR Centres to be able to make PGRFA available to potential recipients in non-contracting parties, as subscribers or pursuant to whatever other benefit sharing terms are eventually adopted. (NB: three CGIAR centers are hosted by countries that are not ITPGRFA Contracting Parties, and CGIAR Centres conserve ‘in trust’ materials collected from countries that are not ITPGRFA Contracting Parties).

- At some point, somewhere -- perhaps in the decision adopting the revised SMTA – there needs to be recognition that there are practical limits on CGIAR Centres’, and other providers, to be able to respond to blanket requests for samples of large numbers of accessions.

- CGIAR supports the expansion of coverage of the multilateral system, potentially to include all PGRFA.
In August 2017, CGIAR submitted a letter to the WG-EFMLS, through the ITPGRFA Secretary, which is available at file:///G:/CRP%20genebanks/WG-EFMLS/submission%20for%20WG-EFMLS%208/a-br413e.pdf.

- In that submission, CGIAR provided a draft revision of Annex 1 of the SMTA to make it feasible for its use by organizations that provide large volumes of PGRFA under the multilateral system. CGIAR made this submission in reaction to the draft revision of Annex 1 in the 2nd Draft Revised SMTA: Co-Chairs Proposal introduced for the 5th meeting of the WG-EFMLS in July 2016 as per document IT/OWG-5/16/3. The WG-EFMLS subsequently conducted two ‘read throughs’ of a revision of Annex 1 that is different from that submitted by CGIAR but nonetheless represents a very significant improvement. CGIAR will continue to propose additional, relatively small, changes to SMTA Annex 1.

- CGIAR also noted that in the proposed draft revision to SMTA Article 6.5(b), “Material” has been changed to “material”; CGIAR does not understand the logic behind this revision and consider that it should remain “Material”.

In more recent meetings of the WG-EFMLS and in the informal consultations organized by the ITPGRFA Secretariat in the last few months, CGIAR representatives have made oral submissions to the effect that

- Opportunities exists to address growing tensions related to the use and exploitation of digital sequence information through adaptations to a) Norway style approach, or b) subscription system under consideration by the WG-EFMLS, for payments from countries or subscribers to reflect value to commercializers of their access and use of DSI as well as material PGRFA

- There should be more active consideration of means to promote non-monetary benefit sharing (in addition to monetary benefit sharing) as part of the process for enhancing the multilateral system of access and benefit-sharing. Increased focus on non-monetary benefit sharing should also be included in the ITPGRFA’s multi-year program of work and Funding Strategy. Non-monetary benefit-sharing mechanisms are obligations of Contracting Parties, and recipients of material with SMTA are also encouraged to share the non-monetary benefits that result from research and development. The CGIAR contributes actively to such benefit-sharing.