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**Food and Agriculture
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The International Treaty
**ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE**

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**INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE**

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

Rome, Italy, 2 October 2015

**Commentary on Structural Elements for
the Development of a Subscription Model/System**

Executive Summary

This document identifies and explains the structural elements of a Subscription Model/System on which decisions are still to be made, in the finalization of a new SMTA. In this context, it points to Articles in the Standard Material Transfer Agreement (SMTA) that would need revision, and the almost certain need to embed these in a coherent legal framework, through an amendment of, or Protocol to, the Treaty, once the Governing Body has taken the necessary decisions. A set of key structural decisions needs to be taken and reflected in both the provisions of the revised SMTA and the development of the overall legal framework. They are accordingly put before the Governing Body for its consideration and guidance.

It is therefore proposed that this document be forwarded by the Working Group to the Governing Body, with the Draft Revised Standard Material Transfer Agreement.

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I. Introduction

1. In the context of developing a package of measures to enhance the functioning of the Multilateral System, the establishment of a Subscription Model/System for access to plant genetic resources for food and agriculture under the Treaty, and the sharing of benefits resulting from their use, has received substantial support from all Regions.
2. At its third meeting, the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System (Working Group) decided to recommend to the Governing Body the development of a Subscription Model/System in a step-by-step approach. The first step that the Working Group foresaw is the incorporation of the Subscription Model/System into a revised Standard Material Transfer Agreement (SMTA). The second step would then deal with the necessary completion of the System/Model in a larger legal framework, through an amendment of, or a Protocol to, the Treaty.
3. The Working Group requested the Secretariat to prepare textual elements to enable the adoption by the Governing Body, at its Sixth Session, of a revised SMTA that includes provision for the Subscription Model/System, for its fourth meeting immediately preceding the session of the Governing Body.
4. This document outlines the reasoning behind the draft revised SMTA in document IT/OWG-EFMLS-4/15/3, and sets out the various structural elements that will need to be addressed. It analyses the changes that would need to be made to the current text of the SMTA, to allow for the preparation of a fully functional revised SMTA, incorporating the Subscription Model/System, on the basis of the guidance from the Working Group. In doing so, the document distinguishes between those matters on which substantive agreement appears to have been reached, and those matters where there is still no agreement. When it is possible to reduce the diversity of opinions about a particular matter to clear options, expressible in alternative text, this is done. When the diversity of opinions cannot be reduced to clear alternatives, this is noted. Finally, technical formulations that would allow the various options still under consideration to be handled in a coherent manner are also identified. These take into account the Working Group's deliberations, the background studies prepared in accordance with the terms of reference given to it by the Governing Body, and the submissions received from Contracting Parties and stakeholders. As not all matters have yet been fully agreed, and relevant decisions reached, this document also discusses some of the options and provides alternatives, wherever possible, for the consideration of the Governing Body.
5. A Subscription Model/System goes beyond a mere payment option. The SMTA is a commercial contract between two private persons (the Provider and the Recipient of the specific Materials transferred under that SMTA). It cannot deal with more general matters, such as (1) the right to exchange materials between subscribers, without SMTAs, and (2) legal certainty regarding the interface between the Treaty and the Nagoya Protocol, in this context.
6. Careful consideration of the legal and practical aspects of creating a Subscription Model/System, including the need for a subscribers' Register, in a separate legal instrument, in addition to the SMTA, leads to the conclusion that an amendment of, or Protocol to, the Treaty would be the most appropriate form of completing such a system, and should be addressed as soon as possible, in the second step foreseen by the Working Group.
7. The document, wherever possible, also draws attention to the complementary work that will be needed to prepare an overall coherent legal framework, through an amendment of, or Protocol to the Treaty.

II. Development of a Subscription Model/System through revisions to the SMTA

8. The Working Group has agreed that the structural problems in the current functioning of the Multilateral System — including avoidance of access to or exchange of materials under SMTAs, the availability of alternative sources of material without financial obligations, and the total lack of the voluntary payments foreseen in the Treaty and in the SMTA — cannot be overcome by revisions to the SMTA alone.¹ While some progress may be made by immediate revisions to the text of the SMTA, these need to be considered as part of a more systematic approach, in order to ensure that they support, and do not run contrary to the overall objective of increasing user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner, and enhancing the functioning of the Multilateral System by additional measures.

9. An effective Subscription Model/System that ensures a sustainable and predictable user-based income stream will of course have to be attractive to users. It will need, in particular, to reduce transaction costs and provide greater legal certainty, especially in relation to the Nagoya Protocol to the Convention on Biological Diversity, and relevant regional and national regulations.

10. While it is possible to reduce the transaction costs for users that result from the current functioning of the Multilateral System, through revisions to the SMTA, the greater legal certainty sought in relation to the Nagoya Protocol cannot be achieved simply through revisions to the SMTA, because of the nature of the SMTA: it is a private commercial contract. In particular, a formal international agreement would appear to be needed to reverse the burden of proof of compliance with the provisions of the Nagoya Protocol, which applies to breeders even when they are using no materials accessed under the provisions of the Convention on Biological Diversity (see textbox 3, and Appendix 3 below). It is hence crucial that the Treaty Subscription Model/System be developed in a way that allows for its integration and full recognition in the wider international framework governing Access and Benefit-sharing, through an amendment of, or a Protocol to the Treaty, in the medium to long-term.

11. This is also indispensable with a view to a possible future expansion of the Treaty's crop coverage, as a Subscription Model/System contained within a revised SMTA could always only be for crops listed in *Annex I* to the Treaty, due to current Treaty provisions (see Appendix 1). A formal amendment of the Treaty, or the development of a Protocol, would hence be necessary, if the overall Subscription Model/System is to provide for access to all, or some other, plant genetic resources for food and agriculture in the future.

12. Moreover, the SMTA is a contract between an individual Provider and an individual Recipient, and it cannot govern the relationship between subscribers as a group, which needs to be established, in order to reduce transaction costs, provide legal certainty, and make the Subscription Model/System attractive to potential users. It would appear necessary to establish a set of rights and obligations for subscribers in a substantive legal instrument, which could provide a legal basis, for example, for transfers of material between subscribers without the need for SMTAs (see textbox 3).

13. These considerations imply that any preliminary revisions to the SMTA at this first stage, in order to establish a Subscription Model/System, must be of such nature that they already foresee and indeed prepare the completion of the Subscription Model/System in a second step, without which the legal basis for a Subscription Model/System is inadequate. To be effective, the

¹ See also 'Background Study 1', *Estimating Income to be Expected from Possible Changes in the Provisions Governing the Functioning of the Multilateral System*, Section 5, especially paragraphs 215–222, available at http://www.planttreaty.org/sites/default/files/ITPGRFA_BS001e.pdf. This was one of the studies prepared for the Working Group, as requested in its terms of reference.

revision of the SMTA (a private law contract), would need to be supported by relevant additional provisions in an instrument of public international law, such as an amended Treaty, or a Protocol to the Treaty.

III. Structural elements of the Subscription Model/System

14. In order for the Governing Body to adopt a revised SMTA, which incorporates a preliminary Subscription Model/System, as the first step towards its complete development in a larger framework, a number of key decisions need to be taken by the Governing Body. Without these decisions, which will define the structural elements of the Subscription Model/System, revisions to the SMTA cannot be structurally coherent, or be implemented.

15. The remainder of this document hence underlines the reasoning on the basis of which the draft revised SMTA was developed, and identifies the structural elements still to be decided upon, with cross-reference to the SMTA Articles that will require revision (See Appendixes 1–3).

1. ACCESS OPTIONS

16. One of the decisions to be made is whether the Subscription Model/System should offer its subscribers access to all crops, or access only on a crop-by-crop basis, or indeed whether both access options should be offered.

17. Another decision to be made is whether the Subscription Model/System should offer, in addition to its subscription option or options, an option of individual access to single samples (as in the current SMTA Article 6.7).

18. The combination of different access options which the Subscription Model/System may provide are visualized in Figure 1. For example, the system could provide access solely by subscription to individual crops (1a), or only to all crops as a group (1b). It could also allow subscribers to choose between subscribing to one or more individual crops, or to all crops (1a or 1b). It could also provide an individual sample access option (2), as an alternative to the Subscription Model/System, however this is structured. Each version of the system would require different changes to the SMTA, which would need to be consistent with any relevant provisions of an accompanying amendment of, or Protocol to, the Treaty, and [...].

Fig. 1
Elements of a subscription system,
with or without an alternative access to individual samples



2. PAYMENT STRUCTURES

19. A series of decisions also need to be taken to establish payment rates, both in a Subscription Model/System, and in an individual sample access option. The Working Group discussed at length the possibility of retaining, or not retaining, a provision for voluntary payments for Products that are available without restriction to others for further research and breeding (currently SMTA Article 6.8), which so far provides for voluntary payments for all commercialized Products, except those under patents, where payment is mandatory (currently Article 6.7).² Textbox 1 considers some of the implications of retaining, or not retaining, provision for voluntary payment, and explains why making payment for all Products mandatory does not have to mean that all Products would have to pay. This is a matter that the Governing Body may wish to decide.

Textbox 1.

Articles 6.7 and 6.8

Mandatory and voluntary payments

The Working Group has not reached any substantive agreement as to whether the enhanced Multilateral System should retain a provision for “voluntary payment”, with proposals to (1) remove Article 6.8 completely (leaving only Article 6.7 providing for mandatory payments); or (2) “retain Article 6.8 and make it mandatory”; or (3) retain the option of voluntary payments.³ It should be noted that these proposals are not mere alternatives, but are mutually inconsistent.

There is some confusion in what is meant by “retain Article 6.8 and make it mandatory” in this context, and this needs to be resolved, in order to assemble the elements of a draft SMTA, in a way that allows these three options to be considered by the Governing Body.

“Retaining Article 6.8 and make it mandatory” is unclear, because Article 6.8 currently refers to all Products that are freely available for further research and breeding, whereas most of the discussions turned specifically on whether or not to make payment for one or more categories of Products that currently attract only voluntary payments, such as those covered by PVP, mandatory, leaving other Products without any obligation to pay.

Moreover, making mandatory the payment for any Product that is freely available for further research and breeding is currently not legally possible, because the Treaty, in Article 13.2d(ii), requires payments to be voluntary when “*a Product is available without restriction to others for research and breeding*”. This may, however, be resolved, if the Governing Body invokes the provision of Article 13.2d(ii), whereby it may “assess ... whether the mandatory payment in the SMTA shall apply also in cases where such commercialized Products are available without restriction to others for further research and breeding”. (See document IT/GB-6/15/9, *Reviews and assessments under the Multilateral System*).

The text of the Treaty appears to only provide for the Governing Body to be able to make payments for all, not some specific Products, mandatory. How, then, could the Governing Body decide to provide for only certain Products making mandatory payments? This could be achieved by first making payment for all Products mandatory, and then setting different rates for the different Products that the Governing Body wished to identify. For those Products that it wished to be free of mandatory payments—including, if it is so decided, Products under PVP—the payment rate could be set at 0%. This would require no amendment to the Treaty, and might be decided directly by the Governing Body.

If the Governing Body wished to continue to encourage payments, on a voluntary basis, for the commercialization of those Products to which no mandatory obligation to pay applied, it might do

² See also ‘Background Study 1’, op. cit., especially paragraphs 196–205.

³ IT/OWG-EFMLS-3/15/Report, Appendix 3.

so in an article of the SMTA, by encouraging voluntary payments for those Products where the payment rate was set at 0%.

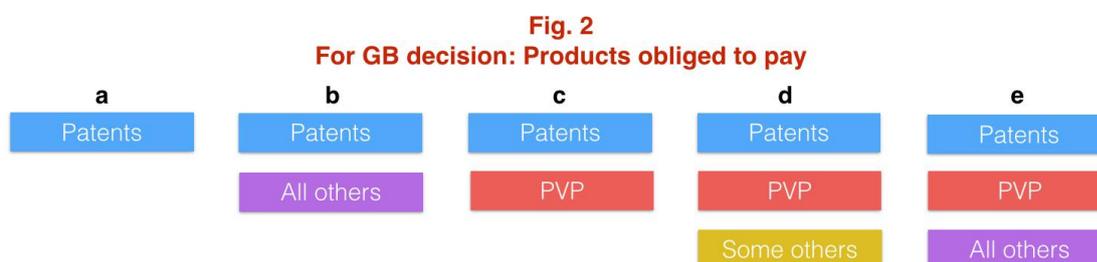
If the Governing Body decided to make payment for all Products mandatory in this way, then there would be no structural need for Article 6.8. Moreover, the Governing Body may then also consider revising Article 6.7 and in particular the phrase, “where such Product is not available without restriction to others for further research and breeding”.

This construction has been used IT/GB-6/15/4, *Draft revised Standard Material Transfer Agreement*, on the assumption that it is the only way to offer all the different options identified by the Working Group, without requiring amendment of the Treaty. While the question of voluntary or mandatory payments is often understood as applying only in the context of the individual sample access option, it could also apply to the subscription options, in that it might be decided that payments only apply to the sale of certain, and not necessarily all Products belonging to the crop or crops subscribed to (e.g.. subscribers to rice would have to make payments on the sales of their rice Products commercialized under patents, and not on all their rice Products).

The deliberations of the Working Group, during this biennium, and the detailed technical studies that were undertaken, suggest that substantial use-based income to the Benefit-sharing Fund cannot be generated by improvements to the SMTA alone. Indeed, other elements of the overall package of measures under discussion will need to be taken into account, in considering the likely income from mandatory payment.

20. The Working Group has also discussed possible provisions for differentiating payment rates by crop (and preferably a few crop groupings), and by Product category or type of intellectual property protection under which they are marketed. Although the Working Group did not reach a consensus on this matter, there was discussion as to whether both patents and PVP, and perhaps other categories, should give rise to payment obligations, and what the relationship of the rates between product categories might be.

21. Figure 2 provides the options for which set of Product categories should give rise to payment obligations. These sets are mutually exclusive. The Governing Body may wish to give guidance in this regard.



22. Rates should also differ between the individual sample access option (2) and the Subscription Model/System, if the subscription option (1a, 1b, or 1a or 1b) is to be the more attractive. The technical implications of offering both a subscription option, and an individual sample access option, and the implications for rate-setting, was considered at length in Background Study 1 (op. cit.), through a parity point analysis.⁴ The study concluded that it would be exceedingly difficult to create an effective balance between these two access options, such that the subscription option became the more attractive to users, by setting payment rates alone.

⁴ See especially its Section 4.1.

Without a substantial difference in rates between the two options, with rates applying in the subscription option much lower than in individual sample access option, it would never be economically rational for a user to opt for the subscription option.

23. Should a system be developed that offered the choice between a subscription to individual crops (1a) and a subscription to all crops (1b), applicable rates would have to differ between these two access options as well, to balance their relative attractiveness to users.

24. Textbox 2 describes a possible methodology for setting different rates, and suggests a way for introducing these into the SMTA (see also Appendix 2). These, too, are matters that the Governing Body may wish to decide.

Textbox 2.

Article 6.7 and Annex 2

A methodology for setting different rates for different Products

The Working Group did not reach an agreement on what Product categories should carry an obligation to pay (e.g., patented Products, Products under PVP, and possibly other Product categories), nor on the ratios between the rates for such categories. The Working Group also did not reach an agreement on the ratio of payment rates under a Subscription Model/System and under an option to access individual samples.

The Governing Body needs first to decide which Product categories would carry an obligation to pay. Figure 2 shows the possibilities amongst which it can decide. They are mutually exclusive: a single option must be chosen.

Setting payment rates is a policy, not a technical, matter. A methodology which the Governing Body might wish to adopt could start from the base payment rate (R = the rate for Products under patents in the individual sample access option, for a reference crop group), and then apply a number of multipliers to this rate. These could be:

C: Crop multiplier (as stakeholders have noted, crops could be grouped into perhaps three categories for this multiplier, and this is assumed).

P: Product category multiplier, for example, the ratio that the Governing Body wishes to set between Products under patents / Products under PVP, and, and any other category of Product it wishes to identify.

The following table, with only the calculated figures, representing percentages of sales, would be in the SMTA.

In Annex 2, for the option to access individual samples

Crop group	Product sold under		
	Patents	PVP	(Others?)
1	$R \times C_1 \times P_1$	$R \times C_1 \times P_2$	
2	$R \times C_2 \times P_1$	$R \times C_2 \times P_2$	
3	$R \times C_3 \times P_1$	$R \times C_3 \times P_2$	

In Annex 3, for the Subscription Model/System

A further multiplier would be needed to relate rates under the Subscription Model/System to rates under the access to individual sample access option, with the individual sample access option set to 1.

S: Individual sample access option / Subscription Model/System (see fig. 1, 1 / 2).

If the Governing Body decided to offer two alternative Subscription Model/Systems – one for access to single crops, and one for access to all crops – a final multiplier would be needed:

A. Single crop / all crops (see fig. 1, 1a /1b).

Crop group	Single crop subscription Product sold under			All crops subscription Product sold under		
	Patents	PVP	(Others?)	Patents	PVP	(Others?)
1	$R \times C_1 \times P_1$ $\times S_2 \times A_1$	$R \times C_1 \times P_2$ $S_2 \times A_1$		$R \times C_1 \times P_1$ $\times S_2 \times A_2$	$R \times C_1 \times P_2$ $\times S_2 \times A_2$	
2	$R \times C_2 \times P_1$ $\times S_2 \times A_1$	$R \times C_2 \times P_2 \times$ $S_2 \times A_1$		$R \times C_2 \times P_1$ $\times S_2 \times A_2$	$R \times C_2 \times P_2$ $\times S_2 \times A_2$	
3	$R \times C_3 \times P_1$ $\times S_2 \times A_1$	$R \times C_3 \times P_2$ $S_2 \times A_1$		$R \times C_3 \times P_1$ $\times S_2 \times A_2$	$R \times C_3 \times P_2$ $\times S_2 \times A_2$	

3. A HYPOTHETICAL CALCULATION OF RATES

25. On the basis of this methodology, an Excel spread-sheet, in which the base rate, and the values attributed to the different multipliers, may be inserted, which then calculates the rates for these tables, has been prepared, and is available at <http://www.planttreaty.org/content/tool-calculation-rates>.

26. Purely as an example of the effects of applying this methodology, the following tables have been calculated, on the basis of hypothetical multipliers. In providing this example, it is important to stress that *it is not intended as a recommendation* as to what Product categories should pay, and what these rates should be, but merely as an example of how the methodology works, and of how rates under the different options relate to each other.

27. The values for the multipliers that have been adopted in this example were identified on the basis of the Working Group's discussions at its third meeting, submissions received from users, and consultations with users carried out for Background Study 1. A base rate of 1% has been chosen for simplicity's sake, as a round figure. It is close to the current rate of 1.1% minus 30% in the SMTA. The crop multipliers for three different crop groups are based on a submission the Secretariat received from a group of industry stakeholders in June 2015.⁵ The Product category multipliers are based on Appendix 3 of the Report of the Working Group's third meeting, and suggestions made during stakeholder consultations. The individual sample access option / Subscription Model/System multipliers reflect suggestions during the consultations with users, and Appendix 3 of the Report of the third meeting of the Working Group, which states that the subscription option payment rate should be "significantly lower" than the rate of the individual sample access option. There has as of yet not been any discussion of the relationship between single crop subscription / all crops subscription, and the multipliers here have been chosen simply for their plausibility at face value.

⁵ IT/OWG-EFMLS-4/15/Inf. 3, Appendix 2

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Elements for the Development of a Subscription Model/System
A Hypothetical Calculation of Rates

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First set Base Rate:
i.e., The rate for patents in Art. 6.7

R 1.00%

Then input multipliers:

Group 2 : group 1
0.25

C Group 3 : group 1
0.05

PVP : Patents
P 0.20

Individual : Subscription
Access : System
S 0.10

All crops : Single crop
A 0.25

Payment Rates (% of Sales)

Article 6.7

Crop group	Rates (%) for Products sold under		
	Patents	PVP	(Others?)
1	1%	0.20%	
2	0.25%	0.05%	
3	0.05%	0.01%	

Article 6.11

Crop group	Single crop subscription rates (%)			All crops subscription rates (%)		
	Product sold under			Product sold under		
	Patents	PVP	(Others?)	Patents	PVP	(Others?)
1	0.100%	0.020%		0.025%	0.005%	
2	0.0250%	0.005%		0.00625%	0.00125%	
3	0.005%	0.001%		0.00125%	0.00025%	

28. It must, however, again be stressed that the use of these numbers is not in any way intended as a judgement as to whether or not they are correct, or better than any other proposals. The setting of the overall pattern of rates raises both a number of technical questions, which have not yet been addressed, and, in the end, is a political decision for the Governing Body.

4. POSSIBLE STRUCTURE OF THE SUBSCRIPTION MODEL/SYSTEM

29. A further set of decisions needs to be taken to regulate the relationship between subscribers. One key decision in this context concerns possible exemptions from mandatory payments. The Working Group has been discussing the possibility of exempting certain types of users from payment obligations, with non-profit institutes, small enterprises, and public organisations being mentioned. Decisions need to be made on how to define the kinds of users that might be exempted (see also Appendix 2). The Governing Body may wish to give guidance in this regard.

30. Suggestions as to how to operationalize the Subscription Model/System, and define subscriber rights and obligations are made in textbox 3, and Appendices 1 and 3.

31. Careful consideration of the legal and practical aspects of creating a Subscription Model/System, including the need for a subscribers' Register, in a separate legal instrument, in addition to the SMTA, leads to the conclusion that an amendment of, or Protocol to, the Treaty would be the most appropriate form to complete such a system, and should be addressed as soon as possible, in the second step foreseen by the Working Group. This is because the SMTA, as a private legal contract between a Provider and a Recipient, for a single transfer of material, cannot provide the coherent international legal framework necessary for the Subscription Model/System to work effectively, including at the interface with the CBD and its Nagoya Protocol. Appendix 4 lists a number of the possible elements of such a Protocol, on the basis of the discussions of the Working Group during the biennium.

Textbox 3.

Implementing key aspects of the Subscription Model/System

There is substantial interest in establishing a Subscription Model/System, as the primary payment mechanism in the Treaty's access and benefit-sharing system.

The coverage of the Subscription Model/System — whether it should be for single crops, or for all crops — is covered in textbox 2. How the Subscription Model/System could be dealt with in the body of the SMTA — namely, by simply providing for an option to subscribe, leaving all substantive rights and obligations of the subscriber to the relevant annex — is covered in Appendix 1, ref. Article 6.11. In reality, the substantive provisions of the SMTA, and the relevant annexes, govern the individual sample access option (Article 6.7) only, leaving all substantive provisions of the Subscription Model/System (Article 6.11) in a single text with Annex 3 to the SMTA, which then functions as a separate contract, accepted by a subscriber by returning the signed act of subscription to the Secretary of the Treaty.

To be attractive to users, the Subscription Model/System, the SMTA should provide the subscriber with a contractual right to receive all relevant material “in the Multilateral System”, for the crop or crops for which he subscribes (subject to a Provider's real capacity to respond to requests for large numbers of accessions), and remedy in the event that this right is not effective. This is the nexus of the new relationship created by subscription: access to all materials of the crop or crops subscribed for, as a condition of agreeing to pay for all Products. This is more than the mere expectation that a person requesting material from the Multilateral System may have, relying on Article 12.2 of the Treaty. Such a Subscription Model/System, therefore, goes beyond a mere payment option.

A Subscription Model/System cannot be implemented by a simple commercial contract between the original Provider and Recipient, which governs only to the individual materials transferred under a specific SMTA. It cannot deal with more general matters, such as (1) the right to exchange materials between subscribers, without SMTAs, and (2) legal certainty regarding the interface between the Treaty and the Nagoya Protocol, in this context.

The Subscription Model/System, to be attractive to users and reduce their transaction costs, should allow subscribers to exchange Plant Genetic Resources for Food and Agriculture under Development among themselves without the use of an SMTA. This, of course, does not mean that they are obliged to provide such resources to other subscribers, who might wish to have them.

In order to be able to exercise the right to exchange materials amongst themselves without SMTAs, subscribers must have legal certainty as to who the other subscribers are. Provision should therefore be made for the names of all subscribers, and the crop or crops for which they subscribe, to be placed on a public internet Register managed by the Secretary, and the role of this Register in the operation of the Subscription Model/System should be stipulated in Annex 3. (In order to maintain commercial confidentiality, no information on accessions received is required to be made public.)

The role and rights of the Third Party Beneficiary also differ in relation to exchanges between subscribers, and between subscribers and non-subscribers, for example, if a subscriber were to transmit a material to a non-subscriber without an SMTA, and would need to be stipulated in Annex 3, to cover the whole Subscription Model/System. This aspect of the Subscription Model/System has not yet been considered in any way by the Working Group.

Many Contracting Parties and stakeholders who are potential subscribers have stated the importance of providing full legal certainty with regard to the interface between the Treaty and the Nagoya Protocol, especially with regard to measures that Parties to the Nagoya Protocol will have to implement to support compliance, including the establishment of checkpoints at, *inter alia*, any stage of research, development, innovation, pre-commercialization or commercialization. This might relate to the exchange of materials, the application for intellectual

property rights (patents and PVP) over Products, and the registration or application for market authorization of Products. The matters arise in the context of user country regulations that parties to the Nagoya Protocol are obliged to establish.

Although the Treaty, on the one hand, and the CBD and its Nagoya Protocol, on the other hand, are in full harmony one with another, merely becoming a subscriber, through the SMTA, may not be adequate to provide such legal certainty, including in the case of the transfer of materials between subscribers in different jurisdictions, and it would therefore appear to be necessary for these matters to be implemented through an amendment of the Treaty, or the adoption of a Protocol to the Treaty. This would appear to be the case, not only for the extension of the Treaty's crop coverage, but also for crops currently in *Annex I* to the Treaty, and would best be addressed immediately, in the context of step 2.

Such an amendment of the Treaty, or Protocol, could also provide the legal basis for the role of the Register in this context, particularly in relation to the Nagoya Protocol, where publicly recognized subscriber status could take the place of the Internationally Recognized Certificate of Compliance, in addition to regulating exchange between subscribers, and their rights and obligations.

Stakeholders from the seed industry have consistently stressed that only by addressing all these elements together — simplified relations between subscribers, the provision of legal certainty with regard to the Nagoya Protocol, and the expansion of the Treaty's crop coverage to its full scope, that is, all plant genetic resources for food and agriculture — is a Subscription Model/System likely to be attractive enough to provide a sizeable flow of financial resources to the Benefit-sharing Fund.

APPENDIX 1

Implementing the system design; changes needed to the SMTA, during steps 1 and 2

Articles	Possible changes and reason	Texts
1.1, 4.1 and <i>passim</i>	The provisions of Treaty Articles 11, 12 and 13, regarding the SMTA and its relationship to the Multilateral System and <i>Annex 1</i> to the Treaty, require that access to <i>Annex 1</i> materials be provided under an SMTA. The SMTA was drafted with these provisions in mind, and not with a view to possible use for non- <i>Annex 1</i> materials. Many of its provisions are linked to the Multilateral System and <i>Annex 1</i> , potentially leading to legal problems in using the SMTA for non- <i>Annex 1</i> materials.	No immediate text is needed, but care should be taken in drafting, to ensure that no formulation impedes the development of a single, coherent, ABS system, including the possible extension of the Treaty's crop coverage, in step 2, to cover both <i>Annex 1</i> and non- <i>Annex 1</i> materials.
2	Is a definition of " <i>Crop factor</i> " needed?	The crop factor is interpreted in the possible draft clauses as a factor in the establishment of payment rates, and probably does not require formal definition.
2	Is a definition of "SMTA" needed?	At the moment, the implicit definition of the SMTA is in Art. 1.1. It is not recommended to consider changes, until step 2, with the possible amendment of, or Protocol to, the Treaty, with the completion of the overall ABS system, that may cover both <i>Annex 1</i> and other materials.
2	Definition: " <i>Sales</i> ". Proposals have been made to define sales in terms of net, rather than gross, income.	This is a policy, not a technical, decision, to be considered in parallel to the decisions as to which Products require payment, and at what rates.
2, 6.1	Definition " <i>Product</i> ": possible removal of "non-feed, non-food" uses.	Any change to these provisions, in the case of <i>Annex 1</i> materials, would require an amendment of the Treaty. If agreement is reached on such changes, they would also need to be addressed in step 2, and the possible amendment of, or Protocol to, the Treaty.

3	<p>Use of the term, “<i>Material</i>”.</p> <p>As used, the term applies to an individual sample or individual samples transferred with a specific SMTA. It is inadequate for a Subscription Model/System.</p> <p>It is not possible to deal with both the actual material being transferred with the SMTA, to which the individual sample access option (Article 6.7 apply), and the wider set of materials to which a Subscription Model/System will apply, should the recipient become a subscriber.</p> <p>The SMTA will continue to be needed for transfers from non-subscribers to subscribers, and from both non-subscribers and subscribers to non-subscribers.</p>	<p>Relevant text elements are incorporated in the text of Annex 3 of the draft revised SMTA in IT/OWG-EFMLS-4/15/3.</p>
6.7 and 6.8	<p>See textbox 1, “Articles 6.7 and 6.8: Mandatory and voluntary payments”</p>	<p>Relevant text is incorporated in the draft revised SMTA in IT/OWG-EFMLS-4/15/3.</p>
6.7 and Annexes 2 and 3	<p>See textbox 1, “Setting different rates for different Products”.</p>	<p>Once the Governing Body has decided which type of Products will require payment, these will need to be defined in Article 2, Definitions. This would provide the basis of the tables of payment rates, in Annex 2, for the individual sample access option, and Annex 3, for the Subscription Model/System.</p>
6.11 and Annex 3	<p>The current SMTA divides the rights and obligations of a subscriber between Article 6.11 and Annex 3, which does not make for clarity, and is not legally necessary.</p>	<p>It would be best to transfer all provisions of the access option to Annex 3, leaving in the body of the SMTA only: (1) provision of the right to subscribe in accordance under the terms and conditions of Annex 3; and (2) stipulation of a time within which the option must be exercised.</p> <p>Possible text for a revised Article 6.11 as well as for a new Annex 3 is proposed in the draft revised SMTA in IT/OWG-EFMLS-4/15/3.</p>

8	<p>As currently drafted, the dispute settlement provisions would not apply to Subscribers transferring genetic resources amongst themselves, with SMTAs, and for other issues arising from the Subscription Model/System.</p> <p>For the individual sample access option, these could be contained in a revised 8; for the Subscription Model/System, these should be wholly contained in Annex 3.</p>	<p>There needs to be a dispute settlement clause in Annex 3, with all the relevant items and conditions. Some preliminary elements are proposed in the draft revised SMTA in IT/OWG-EFMLS-4/15/3.</p>
9.2	<p>Duration of the Agreement /Rights to terminate the agreement, and residual transitional arrangements: the Working Group has considered, without agreement, the terms and conditions under which the SMTA could be terminated.</p> <p>Termination under the Subscription Model/System would require substantially different provisions to those under the individual sample access option. For the individual sample access option, these could be contained in a revised 9.2; for the Subscription Model/System, these should be wholly contained in Annex 3.</p>	<p>Possible text of a revised Article 9.2, and of Annex 3, is proposed in document proposed in the draft revised SMTA in IT/OWG-EFMLS-4/15/3.</p> <p>NB: Since many factors have not been agreed, these clauses provide only a framework, to be completed when the relevant decisions have been taken.</p>
10, and Annex 4	<p>In order to distinguish the individual sample access option from the Subscription Model/System, it would be best if the title of the Article specify that it relates to Article 6.7. The subscription module, currently in Annex 4, is best contained in Annex 3.</p>	<p>This change is proposed in the draft revised SMTA in IT/OWG-EFMLS-4/15/3.</p>
Annex 2	<p>At least article 1, 2 and 3c of this annex will require substantial revision, following decision by the Governing Body as to which Product categories should attract payment, and at which rates</p>	<p>Possible text is proposed in the draft revised SMTA in IT/OWG-EFMLS-4/15/3.</p>
Annex 3	<p>Annex 3 should contain all substantive provisions of the Subscription Model/System, on the basis of the decisions of the Governing Body.</p>	

APPENDIX 2

New elements, to be included in the SMTA

New element	Possible additions and reason	Texts
Differentiation by crop, for Product payment	The Working Group has recognized that different crops have very different Production volumes and profit margins. For this reason, it recommends introducing a crop differentiation factor, in a practical and simple way. Stakeholders have proposed attributing all crops to one of three categories, with a different multiplier factor for each.	The list of crops, as agreed, would need to be introduced into the SMTA, so that those commercializing Products know which rate to apply to each crop. It would not be necessary to define “crop category”, or to show the multiplier factor and calculations: a table of rates, established by the Governing Body would be sufficient.

A final decision would need to be based on technical factors. The possible groups, as proposed by stakeholders, is as follows. The table is shown for information only, as it has not been discussed and agreed.

Group 1	Group 2	Group 3
Beet	Apple	Banana/Plantain
<i>Brassica</i>	Asparagus	Breadfruit
Eggplant	Barley	Cassava
Maize	Beans (<i>phaseolus</i>)	Chickpea
Rice	Carrot	Cowpea
Sorghum	Coconut	Faba Bean/Vetch
Strawberry	Citrus	Finger Millet
Sunflower	Oats	Grass Pea
	Peas (<i>pisum</i>)	Lentils
	Potato	Pearl Millet
	Rye	Pigeon Pea
	Triticale	Sweet Potato
	Wheat	Yams
		All forages

Differentiation by user category	<p>The Working Group has considered relieving a number of categories of users from Payment. These include:</p> <ul style="list-style-type: none">(1) entities with an annual seed-sales turnover of less than US\$ xxx;(2) entities where the annual payments would be less than US\$ xxx; and(3) non-profit organizations.(4) Some have also proposed exempting small-scale farmers [in developing countries].	<p>This would probably require an article in the SMTA, <u>applying to the individual sample access option</u>, providing for such relief from payment, subject to the return of a signed certificate asserting this right, and the reason. A register of such persons could then be put on line. Provision would need to be made for subsequent change in the status of such persons. So that material did not “leak out” of the Multilateral System, such users should remain under an obligation to transfer materials to others under an SMTA.</p> <p>For the <u>Subscription Model/System</u>, similar terms, <i>mutatis mutandis</i>, could be contained in Annex 3 to the SMTA.</p>
	<p>No agreement has yet been reached on whether to do so, and which users would be exempted.</p>	<p>No agreement having been reached, it is too early to draft text.</p>

APPENDIX 3

Harmonizing with commercial practice, and overcoming stumbling blocks to the use of the SMTA

Questions to be addressed	Discussion	Status and possible solutions
Confidentiality	The Current SMTA foresees strict confidentiality, regarding data provided by users. ⁶ Stakeholders wish to be assured that data on, in particular, accessions they access through the <i>Subscription Model/System</i> , and on their commercial sales, will be confidential.	See Textbox 3, “Implementing the relationship between Subscribers”; The Governing Body will wish to similarly ensure subscribers.
Exhaustion of obligations on distance in crossing ⁷	Various stakeholders have suggested releasing users from payment obligations, when material from the Multilateral System has been crossed for a number of generations.	No agreement has been reached on this subject. This would presumably apply on in the case of the individual sample access option, and requires technical analysis, and a consideration of the implications for benefit-sharing.
Seed multiplication companies and the problem of the end-payer ⁸	Seed breeders report that, in real market situations, they are unable to negotiate royalty contracts with seed multiplication companies, if they also have to impose on them to make payments, as provided for in the SMTA. As worded, the SMTA requires payment on someone else’s sales, which is illogical. This hinders use of the SMTA.	Overcoming this problem would require fundamental reconsideration of the structure of the payment system. The matter has not yet been addressed, and may need further inputs from the seed industry.

⁶ *Procedures for the operation of the Third Part Beneficiary Resolution 5/2009*, part II, B (iv).

⁷ *Improving the Standard Material Transfer Agreement to Increase User-Based Payments and to Make it More User-Friendly (Measure IV): Background Information*, para. 226–28.

<http://planttreaty.org/sites/default/files/OWG%20EFMLS%203-15-Inf%206%20Improving%20SMTA%20150511.pdf>

⁸ *Ibid.*, para. 29.

The transfer of Plant Genetic Resources for Food and Agriculture under Article 6.11 user to a non-Article 6.11 user ⁹	Paragraph 3 of Annex 3 to the SMTA, specifying payments under Article 6.11, creates a third payment regime, which requires, like Article 6.7, mandatory payment on an individual Product basis, for an individual sample, yet at a lower payment level than Article 6.7, and irrespective of whether such Product is available without restriction to others for further research and breeding.	This is probably the result of hasty drafting of the SMTA, points to the need for very careful drafting of the provisions of any Subscription Model/System, whether based on a revised Article 6.11 or otherwise, which regulate transfers between subscribers, and from subscribers to non-subscribers. Discussions on this matter are not advanced enough to prepare text at this stage.
Dealing with traits in modern breeding and commercial practice	These are very complex questions, that involve the growing “dematerialization” of value in plant breeding, and changing patterns in the acquisition and exercise of intellectual property rights and commercial practice.	No agreement has been reached on if and how to reflect this. It would probably best be addressed in step 2, through a legally coherent ABS system, that may require an amendment of the Treaty, or a Protocol, to be effective.
The importance of legal certainty: (a) the interface between the Treaty and the Nagoya Protocol ¹⁰	Stakeholders cite better and comprehensive legal certainty and clarity in the role of the Treaty’s systems, including the SMTA, in the national and international regulatory frameworks for access and benefit-sharing for genetic materials, as the largest factor that would increase use of the SMTA. This is particular the case in relation to the interface between the Treaty and the Nagoya Protocol, where they wish to be freed of the burden to demonstrate compliance with the Nagoya Protocol, even when they use no materials accessed through contracts established in accordance with the CBD.	The Treaty and the CBD and its Nagoya Protocol are in harmony, and provision is made for the recognition of the Treaty and its ABS system in the Nagoya Protocol. However, the full reversal of the burden of proof, so that users of Treaty materials are free of such obligations, can probably only be achieved in the context of a Protocol to the Treaty, completing the Treaty’s ABS system, and regulating its interface with the Nagoya Protocol, as part of step 2. See textbox 3, “Implementing the relationship between subscribers”.

⁹ Ibid., para. 30–32.

¹⁰ Ibid., para. 38–40.

The importance of legal certainty: (b) clarity and consistency of drafting¹¹

The SMTA still contains poor formulations and incomplete provisions. For example, reporting provisions have not been integrated in the SMTA, but are contained in a sub-section of a resolution of the Governing Body.¹² Stakeholders state the need for clarity and consistency of drafting, and conformity of the terms and condition of the SMTA, or of any other legal instrument developed, to commercial law and practice.

IT/GB-4/11/Inf. 08¹³ identifies some of the minor adjustments that could be made to improve legal clarity. It proposes (p. 20) that reporting obligations, in relation to the individual sample access option be integrated in SMTA Article 5e. Reporting obligations under the Subscription Model/System are best contained in Annex 3.

This text proposed in the draft revised SMTA in IT/OWG-EFMLS-4/15/3 incorporates these changes.

Whatever the Governing Body decides, the revised SMTA should be subjected to a thorough legal reading and drafting, before adoption.

¹¹ Ibid., para. 37.

¹² Part III of Annex 2 of Governing Body Resolution 5/2009, *Information to be provided to the Governing Body by parties to the SMTA*. <http://planttreaty.org/content/resolution-52009-procedures-third-party-beneficiary>. See also IT/GB-4/11/Inf. 08 *Report of the Second Meeting of the Ad Hoc Technical Advisory Committee on the Multilateral System and the Standard Material Transfer Agreement*, which identifies some of the minor adjustments that could be made to improve legal clarity, <http://www.planttreaty.org/sites/default/files/gb4i08e.pdf>.

¹³ IT/GB-4/11/Inf. 08 *Report of the Second Meeting of the Ad Hoc Technical Advisory Committee on the Multilateral System and the Standard Material Transfer Agreement*. <http://www.planttreaty.org/sites/default/files/gb4i08e.pdf>.

APPENDIX 4

Possible elements of a Protocol

The below illustrative list of possible elements was prepared at the request of the Co-chairs of the Working Group in order to illustrate the completion of the Subscription Model/System, as proposed by the Working Group. Based on the discussions of the Working Group during the biennium it identifies basic elements that might need to be included, should the Governing Body so wish. The list is not intended to be prescriptive or exhaustive and takes into account the submissions received from Contracting Parties and stakeholder, as requested by the Working Group.

- Preamble
- Objectives
- Definitions and use of terms
- Relationship of the Protocol to the Treaty
- Scope and coverage of the Protocol
- Widening of the coverage of the access and benefit-sharing terms of the Treaty, for example to the scope of the Treaty itself, namely all plant genetic resources for food and agriculture
- Harmony with the CBD and its Nagoya Protocol
- Establishment of the Subscription System, in the context of the Treaty's access and benefit-sharing approach
- Provision for the establishment, and the function of a Register of Subscribers
- Provision for ensuring the effective sharing of benefits derived from the use of plant genetic resources for food and agriculture
- Institutional Provisions, such as those set forth in Part VII of the Treaty