

April 2013



# The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



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<b>Item 9 of the Provisional Agenda</b>
<b>FIFTH SESSION OF THE GOVERNING BODY</b>
<b>Muscat, Oman, 24-28 September 2013</b>
<b>REPORT OF THE RESUMED SEVENTH MEETING OF THE AD HOC ADVISORY COMMITTEE ON THE FUNDING STRATEGY</b>

*Note by the Secretary*

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1. This document contains the *Report of the resumed seventh meeting of the Ad Hoc Advisory Committee on the Funding Strategy*, held from 26 to 27 March 2013 in Geneva, Switzerland.
  2. The Report was published online on the Treaty website and circulated to the National Focal Points through a Notification. The Report is accompanied by a cover note summarizing the major outcomes of the meeting.
  3. The Committee agreed that, subject to availability of resources and circulation of documentation in advance, it might resume its meeting again before the Governing Body Session. If another meeting is held, the Report will be provided through document IT/GB-5/13/ Inf. 4 Add.2.
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1. The seventh meeting of the Committee was held from 18 to 20 September 2012 in Geneva, Switzerland.<sup>1</sup> The Committee recommended that, subject to the availability of resources, a resumed meeting of the Committee be held to complete remaining work of the Committee, particularly on innovative approaches and partnerships. The meeting was held on 26 and 27 March 2013 in Geneva.
2. The Report of the resumed meeting is contained in the *Appendix* to this document. What follows provides a summary of major outcomes of the meeting. The Committee:
  - further considered innovative approaches for resource mobilization for the Benefit-sharing Fund, including through presentations of proposals made by various regions.
  - reviewed progress made to develop a proposal for vegetable seed trait licensing through an industry licensing platform (ILP) and agreed to mandate the Co-chairs to continue working on the proposals with the Co-leads of the Vegetable Industry Group. The Committee adopted a roadmap for finalizing the proposal.
  - identified and approached various options to increase the flow of funds to the Benefit-sharing Fund in a predictable, immediate and reliable manner, based on the sustainable use of plant genetic resources for food and agriculture: revisiting Article 6.11 of the Standard Material Transfer Agreement (SMTA), revisiting Article 6.7 of the SMTA, promoting regular seed-sales based contributions by Contracting Parties, expanding coverage of the Multilateral System, promoting novel ways to attract industry to volunteer funding and enhancing legal certainty for users of the Multilateral System germplasm.
  - advised the Governing Body to address innovative options to increase the flow of funds to the Benefit-sharing Fund at its Fifth Session, and made a number of follow-up considerations in preparation for the Session so that their consideration and implementation by the Governing Body will be more fruitful.
  - revised the standard steps for establishment and monitoring of partnerships for the Benefit-sharing Fund and basic criteria for approval of partners.
3. The Committee agreed that, subject to availability of resources and circulation of documentation in advance, it might resume its meeting again before 15 July 2013, to, in particular, prepare and forward detailed proposals for the options to increase income to the Benefit-sharing Fund and the proposed ILP for decision by the Governing Body. At the time of publication of this document, it was still uncertain whether the Committee will resume its discussions again. If another meeting is held, the Report will be provided through document IT/GB-5/13/ Inf. 4 Add.2.

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<sup>1</sup> IT/GB-5/13/Inf. 4, *Report of the seventh meeting of the Ad Hoc Advisory Committee on the Funding Strategy*. The terms of reference of the Committee are provided in paragraph 1 of that document. A summary of major outcomes of the meeting is provided on paragraph 2 of that document.

**APPENDIX**

IT/ACFS-7 RES/13/Report

March 2013

<b>Item 10 of the Draft Provisional Agenda</b>
<b>INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE</b>
<b>RESUMED SEVENTH MEETING OF THE <i>AD HOC</i> ADVISORY COMMITTEE ON THE FUNDING STRATEGY</b>
<b>Geneva, Switzerland, 26-27 March 2013</b>
<b>REPORT</b>

**Agenda Item 1 - Opening of the meeting**

1. As decided at its meeting in September 2012, the Ad Hoc Advisory Committee on the Funding Strategy (the Committee) resumed its discussions on 26 and 27 March. The agenda items that remained before it were Items 4, 5 and 8. The list of participants is attached in *Appendix 1*.
2. The resumed meeting was chaired by Ms. Grethe Helene Evjen (replacing Mr. Erick Cockbain) and Mr. Modesto Fernandez Diaz-Silveira. Mr. Fernandez opened the meeting, welcomed the members and provided a brief explanation on the issues pending finalization from the first part of the meeting. Ms. Evjen welcomed the members of the Committee to the resumed meeting.

**Item 4: Resource mobilization for the Benefit-sharing Fund, with a particular focus on innovative approaches**

3. The Committee further considered the three innovative approaches that had been raised in September: “crop-based benefit-sharing”, “a percentage of seed sales”, and the “Industry Licensing Platform (ILP)” that were under consideration by a Working Group of the Vegetable Seed Industry.

***Crop-based benefit-sharing (SMTA Article 6.11)***

4. Angola presented substantive discussion of the most important features of Article 6.11 of the SMTA (which is contained in *Appendix 2*). During the negotiations of the SMTA, the African Region had proposed the crop-based benefit-sharing option (now in Article 6.11), in order to seek a more immediate and predictable flow of funds to the Benefit-sharing Fund, and to reduce the transaction costs of the Multilateral System, both for the management of the system, and for the users of the SMTA. The African Region was still of the opinion that the basic principles of a crop-based benefit-sharing system should form a major part of innovative approaches to resource mobilisation.
5. The African Region provided a first analysis of the potential income that could flow to the Treaty, if crop-based benefit-sharing were widely adopted, which could be substantial. In the

discussions that followed the presentation, it was recalled that the African Region had put forward its proposal late in the process of the negotiation of the SMTA. Recently, there appeared to be a convergence of opinion amongst certain regions that it might be the basis for a default option, if users considered it to be attractive.

### *A percentage of seed sales*

6. The Norwegian initiative took the form of an annual contribution of 0.1% of the value of all seeds sold in its territory to the Benefit-sharing Fund. This initiative was over and above the money that should flow to the Benefit-sharing Fund from the working of the SMTA. It had been welcomed by the Governing Body, but no other Governments had yet announced that they intended to do the same. It was noted that this initiative was not based on a single transfer of material, but was an aggregated and simplified solution, as was the crop-based based benefit-sharing option in Article 6.11.

### *Vegetable seed trait licensing through an industry licensing platform (ILP)*

7. Following the September meeting, the eight questions that the Committee had developed were transmitted to the Co-leads of the Vegetable Industry Working Group, and comments had been invited from the members of the Committee. As requested by the Committee, its Co-chairs held closed discussions with the Co-Leads of the Working Group in meetings in November 2012 and March 2013. Their joint report of the two meetings held was distributed, and is attached as *Appendix 3*. The final report would be integrated, as an *Appendix*, in the final Report of the seventh meeting of the *Ad Hoc* Committee on the Funding Strategy that will be made available to the Governing Body.

8. The Co-Chairs presented their report to the meeting, and briefed the Committee on the wide-ranging and interesting discussions. The Co-leads joined the meeting by teleconference. In response to questions, they clarified that the proposed ILP was a response to the difficulties that vegetable breeders were encountering with access to the wide range of plant genetic resources that was needed to improve food security, as well as the difficulties posed by increasing patenting of normal (i.e., non-genetically modified) traits. It attempted to find a practical solution to both these questions, and, in partnering with the Treaty, much greater legal certainty could be achieved. In recognition of this fact, the Co-Leads reported that the industry group would consider benefit-sharing, in the form of a percentage of licensing fees or on the net sales of patented varieties paid to the Benefit-sharing Fund.

9. The Co-chairs and Co-leads recognised that, before recommending arrangements for a functional administrative infrastructure to implement any possible partnership with the ILP, the most immediate goal would be to make adequate preparations for the initial consideration of the ILP by the Governing Body. Considering the excellent progress made through the two meetings, the Co-leads would report back to the Vegetable Industry Working Group. The Committee agreed to mandate the Co-chairs and Co-leads to develop a roadmap by mid-May, in order to complete the proposal by mid-June, if the Vegetable Industry Working Group agreed to go further. If substantive progress were made, the Committee agreed that, subject to adequate resources being available, it might meet again before 15 July 2013 to prepare and forward detailed proposals for the six options to increase income to the Benefit-sharing Fund (see paragraphs 14–19 of this report and *Appendix 4*) and the proposed ILP for decision at the Governing Body.

### *A flexible benefit-sharing approach*

10. The Near East Region, with the support of the Committee members of the Asia Region, presented “A Proposal for a Flexible Benefit Sharing Approach, Predicted by the Treaty”, which is contained in *Appendix 4*. This proposal notes that the current benefit-sharing mechanism is not delivering, because most products are commercialised under plant variety protection, for which there is no mandatory payment obligation. It notes that the Governing Body has the capacity to establish different levels of payment for various categories, from time to time to review the level of payment, and to assess whether the mandatory payment requirement shall apply also in cases where commercialized products are available without restriction to others for further research and breeding. It proposes that the Governing Body consider making benefit-sharing mandatory, as well, for products that are restricted for multiplication, or research and breeding, at a relatively lower level of payment. In the discussion that followed, it was suggested that certain other factors, such as contractual obligations that did not allow the user to multiply seed, might also be considered.

### *Preparations for the Fifth Session of the Governing Body*

11. The Committee recalled the mandate given to it by the Governing Body, to advise the Governing Body on resource mobilization efforts, and the invitation of the Governing Body to “Contracting Parties and other relevant stakeholder to explore innovative benefit-sharing measures within the purview of Articles 13.2a, b, and c of the Treaty”. It therefore reviewed the proposals and information that had been presented.

12. The Committee concluded that the flow of income to the Benefit-sharing Fund had stagnated, and that nothing indicated that this trend would reverse in the near future, which would severely restrict the possibility to fund future project cycles of the Benefit-sharing Fund. The Committee also noted that no benefits deriving from the use of germplasm from the Multilateral System had accrued to the Benefit-sharing Fund, despite earlier expectations. In this light, the Committee approached the various options to increase income to the Benefit-sharing Fund, based on use.

13. The Committee was of the opinion that the Governing Body should address innovative options to increase funds flowing into the Benefit-sharing Fund. The Committee noted that the options should be based on the use of plant genetic resources for food and agriculture, and that the flow of funds should be predictable, immediate and reliable. It felt that the deliberations of the Governing Body would be more fruitful, if preparations were made and discussions initiated, within and between regions, in the months leading up to the meeting of the Governing Body.

14. The Committee decided to request Contracting Parties to make any representations they wished, through the members of the Committee representing their region, which the Secretariat would take into account in finalising the documentation for the next Session of the Governing Body. Such representations should be received by mid-May.

### *1. Revisiting Article 6.11 of the Standard Material Transfer Agreement (SMTA)*

15. To the Committee, this appears to be a feasible option, which could provide substantial income at an earlier stage, and which would simplify monitoring and tracking the use of Multilateral System germplasm. The challenge would be to make the alternative payment option in SMTA Article 6.11 more attractive to users.

## ***2. Revisiting Article 6.7 of the SMTA***

16. The Committee notes that the basis for mandatory payment is small, since mandatory payment would flow mainly from varieties containing Multilateral System germplasm that are protected by patents. One option for consideration could be to transform the voluntary payment obligation under SMTA Article 6.7 into a mandatory payment obligation. In preparation for the Session of the Governing Body, the regions might wish to consider what such new mandatory payment requirements might involve, taking into account the desirability of making a distinction between patent and Plant Breeder's Rights-protected varieties, as envisaged in Treaty Article 13.2d (ii), as follows:

- i. No mandatory payment on new PGRFA products, when they are available for multiplication, research and breeding by others without restriction.
- ii. Any commercialized PGRFA products that is restricted for multiplication or research and breeding by others is subject to mandatory payment.
- iii. The level of payment for commercialized PGRFA products that are available for further research and breeding by others without restriction should be relatively lower.

## ***3. Promoting regular seed sales-based contributions by Contracting Parties***

17. The Committee noted that the Norwegian pledge to make an annual contribute to the Benefit-sharing Fund, as a percentage of seed sales in its territory. The Committees invited Contracting Parties to consider similar voluntary regular contributions to the Benefit-sharing Fund.

## ***4. Expanding the coverage of the Multilateral System***

18. The Committee noted that a number of Contracting Parties have revisited their position on the coverage of Treaty Annex I, in the context of benefit-sharing. It suggested that Contracting Parties discuss their current views on the desirable composition of Annex I, along with the other options presented above, in anticipation of a correspondingly increased income from an expanded list.

## ***5. Novel ways to attract industry to volunteer funding***

19. The Committee considered that it was important to consider innovative ways to attract industry to volunteer funding. An example of how this might be achieved was the ILP currently under consideration by vegetable breeding companies, in which context contributions to the Benefit-sharing Fund, based on a certain percentage of license income, were under consideration. These companies are motivated by their need both for increased access to germplasm and for improved legal certainty.

## ***6. Enhancing legal certainty for users of Multilateral System germplasm***

20. The Committee noted that increasing concerns were being raised by parts of seed industry, regarding the need for legal certainty in the use of germplasm from the Multilateral System. It was of the opinion that this was a major factor that should be considered in the context of elaborating innovative options.

21. The Committee welcomed the collaboration with the ILP and clarified that any concrete partnership proposal should not contain institutional linkages between the Treaty and the ILP, and should not increase the workload of the Secretariat.

22. The Committee decided to adopt the following roadmap for finalizing the proposals:

- If the response expected from the Co-Leads before mid-April were to be positive, the Co-Chairs would meet with the Co-leads to develop concrete proposals.
- The Co-chairs would aim to finish the development of a draft innovative approach with the Co-Leads and invited experts by 15 May.
- A resumed meeting of the Committee would take up the draft innovative approaches before 15 July , subject to:
  - funding by the FAO Geneva Liaison Office of the entire costs of the resumed meeting;
  - circulation of the documentation, including an elaboration of all the options for innovative approaches, based on consultations within regions, six weeks before the resumed meeting;

If these conditions are not met, the Committee will work through an electronic consultation.

- Such resumed meeting of the Committee would wrap up the draft innovative approach including the elaboration of concrete proposals to be forwarded to the Governing Body at its Fifth Session for consideration;
- The report of the resumed meeting would be added to the working documents of the Governing Body.

23. The Committee requested the six options for increasing revenue to the Benefit-sharing Fund be further elaborated into option papers by the Secretariat by 15 May and further made the following considerations in this context:

- The Governing Body might wish to consider ways by which the alternative payment option in SMTA Article 6.11 could be made the preferred payment option.
- It might wish to consider revisiting SMTA Article 6.7, and consider making mandatory some payment obligations that are currently voluntary.
- The Committee invites Contracting Parties to make regular donations to the Benefit-sharing Fund, similar to those being made by Norway.
- The Committee invites regions to discuss their current views on the desirable composition of Annex I to the Treaty, in relation to the various options.
- The Committee invites Contracting Parties to make any representations they wish regarding the proposed ILP, through the members the Committee representing their region, which the Secretariat will take into account in finalising the documentation for the next Session of the Governing Body.
- The Committee invites the Regions to consider how legal certainty could be provided, with regard to the use of germplasm from the Multilateral System.
- If the Vegetable Industry Workgroup decides to further develop its proposal for an ILP, so that this is ready for consideration by the Governing Body, the Committee recommended that the Governing Body take it up at its next session.

24. Agenda item 4 was suspended, pending a possible further resumed meeting of the Committee.

**Item 5: Operation of the Benefit-sharing Fund, with a particular focus on partnerships**

25. At its seventh meeting, the *Ad-Hoc* Advisory Committee on the Funding Strategy endorsed the standard stages for the establishment of long-term partnerships and, based on those standard stages, requested the Secretary to develop a draft standard procedure and cooperation framework for submission to the Bureau for its review. The Committee recommended that the resumed meeting complete remaining work of the Committee particularly on partnerships.
26. At its resumed meeting, the Committee revised the basic criteria for approval of partners, as contained in *Appendix 5*. The Committee also revised the process for establishment of partnerships, as contained in *Appendix 6*.
27. The Committee recommended that progress made in the development of the partnerships be reported regularly at sessions of the Governing Body.
28. Agenda item 5 was closed.

**Item 8: Other business**

29. The Bureau of the Fifth Session of the Governing Body, at its second meeting (March 2013), requested the Committee to explore further options for resolving the issue of the funding of the eight project projects favourably appraised but not funded by the end of the previous biennium (December 2011).
30. The Committee did not reach consensus at this time on this matter and decided to continue this discussion at the next resumed meeting, if convened.
31. Ms Ann Tutwiler, Special Representative of FAO to the UN organizations in Geneva and to the World Economic Forum, recalled the long-term collaboration of the FAO Liaison Office with the United Nations in Geneva and the Treaty Secretariat in support to the organization and running of meetings of this Committee. She looked forward to continue this collaboration in support of future meetings of the Committee.
32. The Committee thanked Ms Tutwiler for the support provided by the FAO Liaison Office in the preparation and running of the resumed meeting and looked forward to continue this collaboration in the future. It congratulated Ms Tutwiler for her recent appointment as Director General of Bioversity International and looked forward to continue collaborating with her once she will start her new assignment.
33. The Committee expressed its concern about the late preparations for the meeting and dispatch of documents. It recommended that, for future meetings, the invitation letter, provisional agenda and other documents be furnished to the Committee members at least six weeks prior to the meeting.
34. The Committee decided to discuss the refinement of the selection criteria of the Operational Procedures at the next resumed meeting, if convened.

**Agenda Item 9- Adoption of the report**

35. The Committee adopted the report of its resumed seventh meeting.
36. The meeting was suspended, pending a possible further resumed meeting of the Committee.

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*Appendix I*

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**LIST OF PARTICIPANTS**

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## *Appendix 2*

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### **AN INNOVATIVE APPROACH TO INCREASE THE BENEFIT SHARING FUND OF THE INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE (ITPGRFA)**

#### **Introduction**

1. The following are included as principles agreed by the Contracting Parties to the ITPGRFA as set out in the Preamble of the Treaty:

*“Acknowledging that Plant genetic resources for food and agriculture are the raw material indispensable for crop genetic improvement, whether by means of farmers’ selection, classical plant breeding or modern biotechnologies, and are essential in adapting to unpredictable environmental changes and future human needs;”*

*“Affirming that the past, present and future contributions of farmers in all regions of the world, particularly those in centers of origin and diversity, in conserving, improving and making available these resources;*

*“Aware that questions regarding the management of plant genetic resources for food and agriculture are at the meeting point between agriculture, the environment and commerce, and convinced that there should be synergy among these sectors; “*

*“Recognizing that, in the exercise of their sovereign rights over their plant genetic resources for food and agriculture, states may mutually benefit from the creation of an effective multilateral system for facilitated access to a negotiated selection of these resources and for the fair and equitable sharing of the benefits arising from their use;”*

#### **The International Treaty’s Multilateral System of Facilitated Access to PGRFA and Benefit Sharing from their utilization**

2. An important section of the International Treaty deals with a Multilateral System (MLS) of facilitated Access and Benefit-sharing in relation to the 35 crops included in the Treaty’s Annex 1. The Treaty entered into force in 2005 and the MLS became operational in 2006, since which time facilitated access has resulted in the transfer of hundreds of genetic resources between researchers, plant breeders, national and international institutions, etc. to and from all regions of the world. However, although the Treaty has been operational in terms of providing facilitated access to PGRFA, the Benefit-sharing side of the Treaty has not been correspondingly effective.
3. Benefit-sharing measures of the Treaty’s Multilateral System include:
  - Transfer of technology (Art.13.2(b))
  - Capacity building (Art.13.2(c))
  - Information exchange (Art.13.2(a))
  - Sharing of monetary benefits (Art.13.2(d)).

The main vehicle for sharing monetary benefits arising from the use of PGRFAA is the **Benefit-sharing Fund** (BSF). It was established in the Treaty specifically to finance projects in developing countries that can address the Treaty's objectives of sustainable PGRFA conservation and utilization, the implementation of the Global Plan of Action on PGRFA, to support farmers as on farm/*in situ* conservers and innovators of PGRFA.

4. The Benefit-sharing Fund was expected to receive a major part of its funding for benefit sharing from the trade resulting from the sale of new and improved varieties and the commercial use of the PGR accessed through the MLS. The Fund may also receive donations from countries that are Contracting Parties to the Treaty, as well as from other national and international institutions, and several of these have made generous most welcome donations to the Fund.

#### **Performance of the Benefit-sharing Fund to date**

5. The BSF was established as a fund to provide support for projects in developing countries. The distribution of funds in the BSF is meticulously controlled by the Treaty's Secretariat, its regionally balanced Ad Hoc Funding Strategy Committee, and final approval for projects is sought from the Treaty's Governing Body at its biennial meetings of all Contracting Parties present.

6. To date the Treaty's Secretariat has organised two biennial cycles for the disbursement of financial support from the BSF for the implementation PGRFA projects. The first call for proposals (2009) resulted in the submission of approximately 300 immediate impact project proposals, while the second call (2011) resulted in approximately 400 proposals, some concerned with strategic planning projects and others for immediate impact research projects. The agreed focus of all projects has been support for sustainable *in situ*/on farm conservation, for farmer participation in plant breeding, improving livelihoods of small farmers, including addressing problems arising due to expected and unexpected results of climate change.

7. The funds available for the first cycle were approximately US\$ 500,000 and for the second cycle US\$ 7,500,000. These amounts were sufficient to finance 11 immediate impact projects of approximately US\$ 50,000 each in 2009 and 19 strategic planning and immediate impact projects, of around US\$330,000 per project in 2011.

**8. Thus, so far it has been possible for the Benefit-sharing Fund to support the implementation of a total of 30 projects in 4 years at a total cost of some US\$ 8 million.**

9. For the International Treaty to make a significant and sustainable impact on the conservation of PGRFA, for farmers in developing countries to receive a fair and equitable share of benefits and for there to be practical implementation of benefit sharing from the Treaty, the number of projects that can be supported needs to be considerably increased. *This situation was recognised at the 2011 meeting of the IT Governing Body. Resolution 3/2011(Part I: Resource Mobilization for the Benefit-sharing Fund).*

10. In efforts to secure support for the BSF the Treaty set up measures to raise financial support from foundations, private institutions and individuals, as well as from voluntary contributions from Contracting Parties, etc. While the results of this exercise were most welcome, funds into the BSF have remained stubbornly insufficient.

### How was it expected that funds should accrue to the BSF?

11. Under the Treaty's Standard Material Transfer Agreement (SMTA) a beneficiary of PGRFA from the MLS may choose between two alternative obligatory payment options that will provide funds for the Benefit-sharing Fund, and hence support projects agreed and approved by the Treaty's Governing Body.

#### Option 1: Art.6.7 of the Standard Material Transfer Agreement of the MLS

12. One of the alternative obligatory payments is that which arises when PGRFA that have been accessed through the Treaty's MLS are incorporated into a product (e.g. a new crop variety), which has had restrictions placed on its use by others for further research and breeding, i.e. it is placed under a patent or other strict property right restriction. This restriction gives rise to the requirement to pay a so-called "Product-related Payment" on the seed sales of the new variety. The level of this royalty is 0.77% of the seed sales and is to be paid to the BSF for as long as the patented product is being sold. However, as breeding programmes may take several to many years to produce a patentable variety, any payments to the BSF are not expected to be made for at least several years. Also, time-consuming, careful and continued tracking of any inclusion of the PGRFA received from the MLS into any product is required so as to be able to calculate the payments that should be made to the BSF.

#### Option 2: Art.6.11 of the Standard Material Transfer Agreement of the MLS

13. This alternative obligatory payment is one which is paid on all the seed sales of the particular crop species for which PGRFA are received from the MLS. For example, a recipient of PGRFA of maize from the MLS will pay a royalty of 0.5% on all seed sales of maize, as from the time when he/she received these maize genetic resources and the payment is due for a fixed period of ten years.

14. A clear detailed account of the "Product-related payment" and the "Crop-related Payment" options and of their relative advantages and disadvantages, is given by Carlos Correa, in his chapter on this innovative option *An Innovative and Transparent Option for Royalty Payment under the Treaty*.

### Current situation of the Benefit Sharing Fund (2012)

15. Faced with the prevailing depressed and uncertain economic situation in many developing and developed countries, there appears to be little perspective that Contracting Party governments may be willing or able to make voluntary contributions to the Treaty's BSF, including some Contracting Parties which have generously donated funds to the BSF in the past.

16. **Recognising that the present level of the BSF is inadequate to provide benefit sharing that can appropriately provide benefit sharing to the *in situ* guardians of PGR resources that are needed by all users, and the pressing need to address the approved points of the GPA, Contracting Parties to the Treaty were charged by the 2011 Meeting of the Treaty's Governing Body in Bali and through the IT Secretariat, to look for innovative measures to raise the level of the BSF.**

17. We should also take into account the final paragraph of Treaty's Art 13.2:

*"The Governing Body may, from time to time, review the levels of payment with a view to achieving fair and equitable sharing of benefits, and it may also assess, within a period of*

*five years from the entry into force of this Treaty, whether the mandatory payment requirement in the MTA shall apply also in cases where such commercialized products are available without restriction to others for further research and breeding.”*

**18. The following proposal is presented as an appropriate and possible approach to address, and significantly improve on, the present shortfall of funding available for the implementation of benefit sharing projects.**

**African proposal: a source of funding within the existing framework and articles of the International Treaty, appropriate for the present economic situation and for the urgency of global food and climate change demands**

19. One area of commercial trade which has continued to grow over the past 40 years and has continued to maintain this trend even over the past few years, and whose present perspectives indicate a continued rise, is the seed trade industry. Indeed, there is growing demand for seed in a world facing pressing and continually rising need for increased agricultural production and for new varieties that may be able to meet the multiple and varied challenges posed by global climate change.

20. Research in plant breeding and the seed industry need the widest possible range of genetic variation available to meet these challenges, and there are calls for greater and wider access to PGRFA. The other side of the coin is the need for the sharing of benefits, through the BSF, for farmers in developing countries, who continue to conserve and utilize the PGR adaptive characters that are of value to all.

**Seed Sales Data and Some Tentative and Approximate Calculations that may be made from them**

21. Recent data on global seed sales vary according to source and particularly according to the range of crop and other plant species included in the data.

22. According to the **International Seed Federation (ISF) 2012** figures of the total market value of seeds sold in 62 principal seed producing countries is **US\$ 42,632 million**. Results of a study commissioned by IT Secretariat give a figure of **US\$ 38 billion p.a.** The **USA Context's Global Seed Market Database 2012** provides a figure of **US\$ 37 billion** in seed sales for 2011.

23. Accepting that there is not a great range in these figures, the average total seed sales being around **US 40 billion a year**, and below we have used the International Seed Federation figures for 2012, as the ISF data identifies quantities according to crop seed types and gives sales figures in 62 principal seed producing countries.

24. From the ISF figure of **US\$ 42.6 billion** we may exclude the seed sales of 16 of the 62 countries in the ISF tables that are not currently Contracting Parties to the Treaty, which leaves the value of seeds sold in 46 Contracting Party countries as **US\$ 17,093 million**. (N.B.: Further consideration may also be given to the situation of seeds of non-contracting parties sold on to or in Contracting Party countries).

25. Taking into account that not all these seed sales are of Annex 1 crops, although approximately 60% of them are<sup>2</sup>, say US10,200 million. (or approximately **US\$ 10 billion**). From US\$ 10,000 million sales of Annex 1 crops sold in present Contracting Party countries, the royalty of 0.5% from the crop-related option of the SMTA (Art. 6.11) could bring **US\$ 50,000,000** into the Benefit-sharing Fund a year (or US100,000,000 per biennial project cycle.)

26. While accepting that not all recipients of MLS PGRFA might opt for the crop-based option, the use of this payment modality could immensely improve the level of support to the BSFund. If only half of this amount were received into the BSFund, it would mean that the biennial project cycle for developing countries could be supported by, say, **US\$ 30,000,000** (sufficient for around 90 projects), plus some **US\$ 5million** to alleviate the tight financial situation of the IT Secretariat and perhaps a further **US\$ 15 million** to accumulate in a trust fund for future decades.

**Comparison of the Effects of Opting for Product-related Payment (Art 6.7) or Crop-related Payment (Art.6.11) of the Multilateral System (MLS) Standard Material Transfer Agreement (SMTA)**

27. The principal advantages of choosing the crop-related option of Art. 6.11 of the SMTA can be seen in the table below.

Options	Opting for Art.6.7 “Product -Related Payment”	Opting for Art. 6.11 “Crop-Related Payment”
1.What triggers obligation to pay a royalty to the BSF?	Application of a patent or other restriction on the further use of the PGRFA accessed through the MLS	Receipt of PGR from the MLS
2.When is the royalty payment due to be made to the BSF?	When a product incorporating the received PGR is commercialised (this may take several years)	Upon receipt of PGRFA from the MLS
3.Royalty payment rate	0.77% of seed sales of products containing PGR obtained from MLS	0.5% of seed sales of chosen crop for which PGR is received
4.Length of term of payment	Payments continue for as long as the restricted product containing PGR obtained from the MLS is commercialised	Maximum period of 10 years
5.Ease of calculating payments due to the Benefit Sharing Fund	Complicated because tracking is required to distinguish between which products have any PGR received from MLS incorporated in them.	No tracking required- payment of 0.5% on all sales of the crop for which PGR were provided. Straight and simple calculation of royalty payments to be made.
6.For each new request for PGR of same crop	New SMTA and tracking required for each PGR received. And new calculations of payments required	Payment is already being made for 10 years on the first receipt of PGR for this crop. SMTA is required, but no duplicate payments are required.
7.For each new request of PGR of a different crop	(As for No. 6) New SMTA and tracking required for each PGR received. And new calculations of payments required.	No tracking required- payment of 0.5% on all sales of the new crop for which PGR were provided
8.Information required by the Governing Body	Obligation to provide Governing Body with information about restrictions for further use	No obligation to provide information to Governing Body about any restrictions that may be imposed.
9.Disputes about compliance with the SMTA	More likely to arise as system is more complicated	Less likely to arise on a simple transparent system

28. The crop-related option is simple, transparent, less bureaucratic, easier to administer and enforce by recipients than the product-related alternative, and is fair, in providing an appropriate sharing of benefits to farmers in developing countries.

29. Choosing the crop-related option may also be positive in terms of public relations for the image of seed companies, as supporters of the implementation of the ITPGRFA, which might be recognized, for example, on their seed containers, etc.

30. Further, the royalty level of 0.5% is sufficiently low as to have very little impact on seed sales (even assuming this amount were to be passed onto the farmers).

31. The African region wishes to propose that there should be a reconsideration and reappraisal of the approach to the signing of the International Treaty's SMTA and consequent contributions to the BSF, so as to increase the flow of funds into the BSF and thus rapidly begin to implement the fair and equitable sharing of benefits from the use of PGRFA with those who in the past, present and future are responsible for their conservation and sustainable use *in situ*/on farm. (See Art 18.5 and 13.3 of ITPGRFA).

32. With this in mind the African region proposes that the Governing Body of the Treaty (through its representatives the Secretariat and Bureau of the Treaty) take a new look at the crop-based option set out in Art.6.11 of the SMTA, and that this proposal be discussed and promoted before and during the next meeting of the Treaty's Governing Body.

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*Appendix 3*

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**REPORT OF THE MEETING OF THE  
CO-CHAIRS OF THE *AD HOC* ADVISORY COMMITTEE ON THE FUNDING  
STRATEGY AND THE CO-LEADS OF THE VEGETABLE BREEDERS  
WORKING GROUP ON VEGETABLE SEED TRAIT LICENSING**

**I. Background**

In its Resolution 3/2011, the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture:

*“emphasizes the need to further explore innovative approaches in engaging voluntary donors to the Benefit-sharing Fund, in particular various private sector prospects such as the seed and the food processing industry”.*<sup>2</sup>

The Governing Body consequently *“Invites* Contracting Parties to explore, including with relevant stakeholders, the development of innovative approaches to allow for the provision of resources to the Benefit-sharing Fund, including on a regular and predictable basis.”<sup>3</sup> It further decided to reconvene the *Ad Hoc* Advisory Committee on the Funding Strategy, *inter alia*, “to advise ... on resource mobilization efforts, including on innovative approaches.”<sup>4</sup>

Further to these Resolutions, at the Information Session of the seventh meeting of the *Ad Hoc* Advisory Committee on the Funding Strategy of the Treaty (the Committee, or ACFS), a presentation was made about an Open Innovation Model which was developed by a group of vegetable breeding companies and which was intended to contribute to the Benefit-sharing Fund of the Treaty when implemented through an online industry licensing platform for patented vegetable traits (ILP). The Model had been developed by a Working Group and Chairman assigned by the Dutch Ministry of Agriculture and was presented by the Co-leads<sup>5</sup> to the Committee.

The Committee “appreciated the efforts of the Working Group [...] under the projected industry licensing platform to create an innovative approach to sharing of monetary benefits from commercialization with the Benefit-sharing Fund of the Treaty. It consider[ed] that the development of such a mechanism could reduce transaction costs of technology transfer, incentivize technology dissemination, and contribute to the sustainable use of PGRFA.”<sup>6</sup>

The Committee, through its Co-chairs, and with the support of the Secretariat, invited the Working Group to provide further information on the proposal, with a view to exploring the development of a proposal on the establishment of the mechanism to the Governing Body of the Treaty. In particular, it identified eight questions to be answered by those developing the industry licensing platform (ILP):

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<sup>2</sup> Resolution 4/2011, Part I, paragraph 9. Report of the Fourth Session of the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture, 2011. The Governing Body has repeatedly emphasized the importance of innovative approaches for benefit-sharing. For example, the Governing Body, in Resolution 3/2011, “*Invit[ed]* Contracting Parties and other relevant stakeholder to explore innovative benefit-sharing measures within the purview of Articles 13.2a, b, and c of the Treaty,” i.e., innovative benefit-sharing mechanisms related to exchange of information, transfer of technology and capacity building. Resolution 3/2011, paragraph 19.

<sup>3</sup> Resolution 3/2009, Part II, paragraph 8.

<sup>4</sup> Resolution 3/2009, Part II, paragraph 8.

<sup>5</sup> A representative of Rijk Zwaan and a representative of Syngenta

<sup>6</sup> IT/ACFS-7/12/Report, paragraphs 18-23

1. What kind of incentives have motivated the vegetable breeders Working Group to develop this innovative approach and partner with the Treaty?
2. What is the legal framework for the platform and how would it interface with the regulatory regime of the Treaty?
3. Which percentage of licensing fees would be shared with the Benefit-sharing Fund and what are your tentative projections of the yearly financial benefits accruing to the Benefit-sharing Fund from the mechanism?
4. [...] Could you delineate the financial and non-financial benefits accruing to the Treaty?
5. What kind of technologies would be transferred through the licensing Platform?
6. What would be the conditions for developing countries to access the technologies on the licensing platform?
7. Could you develop a business model for the e-licensing mechanism and its link with the Treaty?
8. To what extent do you foresee voluntary contributions to the Benefit-sharing Fund?

The Working Group, through the Co-leads, provided answers to the eight questions raised by the Committee. The answers are attached to this document as Appendix 1. In addition, the Committee Co-chairs solicited questions and comments from the Treaty membership in all regions, through the Committee members, and discussed them with the Co-leads of the ILP Task Force.

As agreed by the Committee, following these answers, the following steps were taken to further develop the proposal for consideration by the Governing Body:

- The answers were circulated to the ACFS members;
- Committee members had two weeks to provide comments and reactions to the responses to the Co-chairs via the Secretariat.
- On the basis of these comments and reactions, the Committee Co-Chairs met with the Co-Leads of the ILP Working Group;
- This report provides the basis for the Committee's resumed meeting to take up the draft innovative approach, and prepare it for submission to the Governing Body at its Fifth Session; at which the report of the resumed session would be a working document for the Governing Body.

The closed meeting of the Co-chairs of the Committee and the Co-leads of the ILP Working Group took place on 30 November 2012 in Geneva, and was hosted by the FAO Liaison Office in Geneva. An open session followed the closed meeting, to discuss current experiences and practices of technology transfer linked to plant genetic resources for food and agriculture. The Agenda and the list of participants are attached at Appendices 2 and 3.

The present report has been prepared jointly by the Co-chairs of the Treaty Committee and the Co-leads of the ILP, to summarize their discussions and reflect the understanding reached. The questions identified by the Committee have been retained as headings to structure the joint report. An introductory PowerPoint presentation, as delivered by one of the Co-leads, is included in this report as Appendix 4.

**1. What kind of incentives have motivated the group of vegetable breeders to develop this innovative approach and partner with the Treaty?**

**1.1 MOTIVATION TO DEVELOP THIS INNOVATIVE APPROACH**

The International Treaty provides “*that plant genetic resources for food and agriculture are the raw material indispensable for crop genetic improvement, whether by means of farmers’ selection, classical plant breeding or modern biotechnologies, and are essential in adapting to unpredictable environmental changes and future human needs.*”

Fully in line with this consideration, a global group of vegetable breeders in 2010 began a process to explore solutions for innovation policy issues in plant breeding. The group includes many small, family-owned and medium-sized plant breeding companies and two larger ones. Some of the participating companies are patent holders but many are licensees. The core team (“Clean team”) of the ILP Working Group consists of representatives of Rijkswaard, Bejo, Nunhems and Syngenta.

The Working Group has developed an “Open Innovation Model” for patented vegetable traits, which is almost ready to launch and is currently undergoing assessment for competition law compliance. It has obtained a consensus of all members for this Model, as described in the present document.

*Much of the increase in food production over the last half century can be attributed to innovations achieved through plant breeding.*<sup>7</sup> The motivation to develop the ILP as an Open Innovation Model emerged from several challenges that plant breeders—especially small, family-owned and medium-sized plant breeders—have faced in recent years when seeking to breed new varieties. Strong innovation and use of improved technologies has increased the speed and quality of variety development, but has at the same time resulted in an increasing number of patents, on both breeding technologies and traits.<sup>8</sup> This trend has raised concerns amongst vegetable breeders that the current broad access to genetic diversity could become increasingly limited, because:

- a) a single patented trait may hamper an entire breeding program;
- b) of the increasing number of plant-related patents;
- c) of long, complex and uncertain patent application procedures;
- d) the need for “integrated solutions” in developing high-performing plants comes up against the fact that several different patents owned by different parties may be involved;
- e) of high transaction costs that result; and
- f) a lack of transparency (i.e., which patents relate to commercial plant varieties).

Uncertainties over access, and the costs relating to obtaining access to material for breeding are growing obstacles to optimal innovation, and the underlying motivation for establishing the ILP is to facilitate the use of plant genetic resources and facilitate innovation in plant breeding. This is a problem for society at large, as Contracting Parties to the International Treaty have acknowledged: “Much of the increase in food production over the last half century can be attributed to innovations achieved through plant breeding.”<sup>9</sup>

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<sup>7</sup> Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture, p. 3.

<sup>8</sup> For the avoidance of doubt it has to be noted that there is alignment between the leading breeders that no patent can be granted on existing material. In consequence, patents only become possible in the area of naturally occurring genetics if (i) a trait has been transferred from one crop or wild-type to another crop or (ii) a new combination of alleles which does not pre-exist in nature. This is in full recognition of the requirement under the IT that “[r]ecipients shall not claim any intellectual property or other rights that limit the facilitated access to the plant genetic resources for food and agriculture, or their genetic parts or components, in the form received from the Multilateral System.” (Art.12.3d).

<sup>9</sup> Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture, p. 3.

As breeding relies on pre-existing materials, the ILP aims to provide a framework for non-exclusive access for plant breeders to normal traits subject to patents. Hence, the underlying motivation for establishing the ILP is to stimulate use of plant genetic resources through innovation through plant breeding. This is essential in view of the crucial importance of plant breeding for the world's food supplies.

The challenge that vegetable breeders have sought to address is how to preserve the incentive for innovation that intellectual property provides, while avoiding potentially negative consequences of increasingly limited to genetic diversity, particularly that part of diversity that is of high development potential, and which for that reason has and is attracting patents. A balanced approach to IP and access rights aims to optimize and promote the flow of innovation and plant breeding for food security, which is one of the goals of the International Treaty.<sup>10</sup>

What is being proposed is a fundamentally new approach to the management of the use of vegetable traits, which is consistent with the International Treaty, and which includes a mechanism to provide a revenue stream for the International Treaty, over and above the monetary benefits currently provided for in the SMTA. The ILP takes the form of an open-innovation licensing platform, where all interested parties can obtain a license under pre-defined, fair and transparent conditions. It will apply to a collection of patented normal traits, on the principle of "*free access but not access for free*" for such traits. This means, "Open access but not free-of-charge," i.e. facilitated access but with sharing of value derived from the use. Access to these resources would be through a license between licensor and licensee, which, if the Governing Body agrees, would include contractual provisions for benefit-sharing with the International Treaty, in a manner similar to the benefit-sharing provisions of the SMTA.

In the past, plant varieties were protected in most countries by plant breeders' rights only, and, through the breeder's exemption, protected varieties could be freely used for further breeding. There was no need for licensing agreements among breeders and the transaction costs for accessing such material were low. Today, plant varieties can be subject to both plant breeders rights *and* patent protection, and patents have recently also become more numerous in the normal (i.e., non-genetically modified) breeding sector (for example, over "native traits", and mutant traits). This creates a need to enter into licenses and therefore increases the transaction costs. The costs of acquiring, maintaining and licensing portfolios of patent traits for their breeding work, is especially onerous for small, family-owned and medium-sized breeding companies. The motivation for developing the Open Innovation Model ILP is to reduce the transaction costs for breeders and to enhance benefit-sharing in the exchange of a specific set of Plant Genetic Resources for Food and Agriculture.

In the past, plant breeders' rights made possible the use of the plant varieties for further breeding through the breeder's exemption. The risk of dependency was low and litigation was infrequent. Today, the availability of patents for non-GM traits creates a risk of legal uncertainty, dependency on patent holders, and requires monitoring for patented elements, with litigation and "innocent infringement" risks. The Open Innovation Model aims to instead provide a transparent, fair, reasonable, non-discriminatory and commonly agreed platform for licensing of patented elements. It responds to the near impossibility of changing international agreements and national patent laws, in order to secure a new exclusion from patentability for plant varieties or native traits, and the trend of patents being increasingly available for such traits. Therefore, solving the immediate problem for breeders through changes to patent legislation seemed unlikely, and the development of the open innovation model was to find a solution for this challenge which was practical, balanced, cooperative, dynamic, fast and global.

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<sup>10</sup> In accordance with Art. 6.2, the sustainable use of plant genetic resources for food and agriculture may include such measures as: c) promoting, as appropriate, plant breeding efforts which, with the participation of farmers, particularly in developing countries, strengthen the capacity to develop varieties particularly adapted to social, economic and ecological conditions, including in marginal areas.

Hence, the main motivation for creating the Open Innovation Model was an effort by the Working Group to reduce transaction costs, legal uncertainty, dependency and possible litigation in the exchange of PGRFA products under restriction after their first commercialization, especially for small, medium-sized and family-owned breeders.

## 1.2 MOTIVATION TO PARTNER WITH THE TREATY

The motivation for the group of vegetable breeders to explore the potential of partnering with the Treaty is twofold:

1. **Seeking Counsel:** The group would welcome feedback on how to align the Open Innovation Model with global sustainability targets. The group wishes the Open Innovation Model to be aligned with the Treaty's objectives of food security and sustainable agriculture through an appropriate governance structure. A credible and appropriate umbrella for the Open Innovation Model could be the International Treaty on Plant Genetic Resources for Food and Agriculture.
2. **Discussing synergies:** In such a case, the group wishes to explore whether the Open Innovation Model might also contribute to the benefit-sharing principles and structures of the International Treaty and facilitate access to PGR for vegetable breeders.

The group sees synergies between the objectives and mechanisms of the Treaty and the Open Innovation Model.

Objectives of the International Treaty	Open Innovation Initiative
<p>“the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.” (Art.1)</p>	<p>to provide and/or facilitate access to vegetable plant genetic resources which are patented innovations for the use of those plant genetic resources, as a benefit in itself, and to contribute to monetary benefit-sharing</p>
<p>“provide and/or facilitate access to technologies for the conservation, characterization, evaluation and use of plant genetic resources for food and agriculture which are under the Multilateral System” (Art. 13(b)i)</p>	<p>Establish a fair, reasonable and non-discriminatory (FRAND) sharing of the benefits arising out of the use of patented normal traits between innovators and users</p>

The Open Innovation Model would be reviewed by competition law authorities to ascertain that it does not contradict competition law principles. In this context, a governance umbrella independent of the vegetable seed companies that have included their vegetable normal traits on the platform would reflect the public utility of the Open Innovation Model, and align it with the internationally agreed principles of open access, sustainable agriculture, food security and benefit-sharing of the Treaty.

Participants in the meeting of which this is the report agreed that the Platform could not be a mechanism for the benefit of any single company or group of companies, but be an inclusive framework for all stakeholders present, whether small-, medium-sized or large, with equal conditions of participation.

The Treaty participants noted that, should the Governing Body agree to provide a governance umbrella for the ILP, this would likely be in the wider context of the Funding Strategy of the Treaty and not the Multilateral System. The rights and obligations of the Treaty, and of users of the SMTA, would not in any way be altered. The Working Group, for its part, confirmed that the ILP would function in the exchange of traits both derived from materials received under SMTAs and not, and of crops in Annex 1 and not in Annex 1 incorporating PGRFA, irrespective of whether or not they have been received from the MLS. It is therefore neutral towards the MLS. The ILP could cover traits of crops, which, in the context of the Treaty, are currently non-Annex 1 crops. The royalty stream to the Benefit-sharing Fund would therefore benefit from these resources as well, if vegetables become covered by the MLS. These benefits would be over and above those provided for in the current SMTA.

## **2. *What is the legal framework for the platform and how would it interface with the regulatory regime of the Treaty?***

The participants discussed the legal framework envisaged for the Platform and the regulatory regime established by the International Treaty. Questions and discussion items covered on both sides are summarized separately below.

### **A. 2.1 WHAT IS THE LEGAL FRAMEWORK FOR THE PLATFORM?**

The legal framework for the ILP is a set of rules for licensing of patented normal traits, to which participants in the ILP commit themselves, which would implement the following Guiding Principles:

- No obstruction to plant breeding through such patents;
- Reasonable remuneration to the licensor;
- A relatively easy access system;
- Feasible execution and “trick-proof” legal enforceability;
- Consistency with competition law; and
- Broad acceptance by breeders and other stakeholders.

The ILP is summarized below, with an explanation of its most relevant constituents.

#### **Purpose**

The ILP’s key purpose is to guarantee worldwide access to patented normal traits for breeding purposes, as well as the commercialization of follow on products, while safeguarding the innovation incentives through patent protection. It is as a focused solution for certain types of innovations that utilize plant genetic resources for food and agriculture, and is not intended to provide a comprehensive solution for the entire scope of plant innovations.

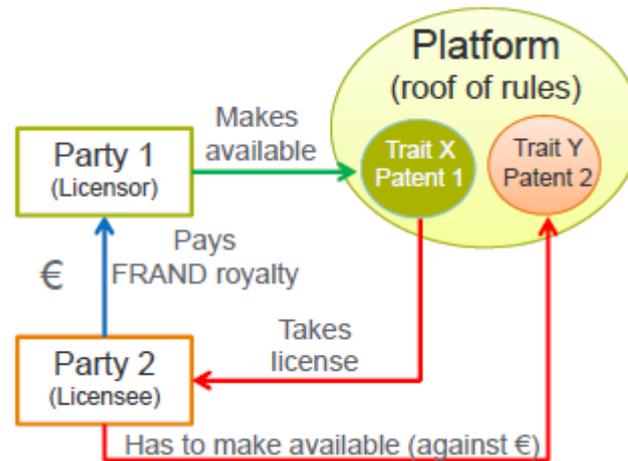
- The ILP would not in any way facilitate or increase the grant of patents on vegetable normal traits by patent offices. It would have no influence at all on whether, which, and how many patents might be granted in relation to vegetable traits. It aims to make the exercise of patent rights more manageable and transparent, especially for smaller plant breeders, once the patent granting authorities have issued such a patent in relation to a normal trait.
- Participation in the ILP is voluntary and open to all on an equal footing, but dependence on acceptance of its rules. It is expected that the advantages it offers to breeders would over time mean that most breeders and breeding companies would join.
- Through the Open innovation ILP, transparent, accessible and complete information on patents and patent applications for normal vegetable traits will become openly available. This transparency and availability of information will allow stakeholders to request reexamination of patents or individual patent claims, if they consider them inappropriate.

## Scope

The scope of the ILP would be all existing patents and patent applications and all new patents and patent applications (together: “patents”) “owned and controlled” by a participant which cover biological materials are part of the licensing platform (“Committed Patents”). The ILP will make every new patent on normal traits immediate available for licensing for further breeding.

- The scope of the licensing schemes is to allow the use of all legally accessible biomaterial, including commercial seeds and certain patent deposits, for breeding purposes, and only excludes the use of patented methods, such as marker assisted selection and hybrid production. A fair, reasonable and non-discriminatory remuneration is established for the commercial use, and is coupled with a “pull-in mechanism” for the licensee’s normal trait patents, coordinated through a clearing house.
- If no patent has been granted in a region or country for a vegetable trait, no licensing or payments for that technology in that country is necessary under the Open innovation model, even if material is covered by a patent in other countries and on the platform. Thus, the ILP can in no way extend the geographical scope or other scope of availability of patents, the grant of patents, or the exercise of patent rights.
- No payments are due, if a patent is reexamined or opposed after the grant of the patent and that patent (or individual claims) is cancelled. Thus, the ILP would not be a mechanism for any expansion of patent claims either before or after the grant of a patent.
- The ILP currently distinguishes between patents on “Normal Traits “. Normal Traits are considered to be all traits not considered to be “Special Traits “by a “Committee of Independent Experts” to be established in the context of the ILP (see below). Special Traits are “regulated traits” that bear significant liability risks, entail substantive deregulation costs and require rules of stewardship. “Special Traits” do not currently block access and cause concerns for breeders. If this were to change, the Companies in the Working Group have committed to a good faith intention to also develop a solution for “Special Traits “ that is equally based on the principle of ensuring access for breeding.
- Within “normal traits”, the platform differentiates between two categories: “basic traits” and “differentiating traits”.
  - a. For “basic traits”, which are the default category covering >90% of all traits, royalties cannot be higher than a defined cap (X% on net sales), provided that the patentee can always lower the royalties and bilateral agreements always remain possible. There are an adjustment of single trait royalties if multi-trait stacks become a trend, and a “hardship clause” consisting of a total royalty cap for each single variety.
  - b. For “differentiating traits”, the evaluation of an Independent Expert Committee and the proof of a substantial price premium (calculated as price increase in comparison with a variety that is similar but for the protected trait), are required. The royalty scheme that applies to differentiated traits leaves the majority of the added value with the licensee.

The following table illustrates the basic mechanisms of the platform:



## Participation

Participation in the Licensing platform is unrestricted: both vegetable breeding industry patent holders and prospective licensees active can join. Those parties that wish to participate in the Licensing platform commit to submit their own relevant patents to the ILP. *This creates a “Pull-in” mechanism, and ensures an even playing field.* When a participating company contributes their patented normal traits, they must contribute all their patented normal traits. This creates a strong pull-in mechanism and will eventually ensure that the most patented traits on the vegetable innovation markets will be part of the Open innovation model and it will ensure that companies will have a strong incentive to apply the Open innovation model and join the platform.

## Operating principles

- The system is open for both parties without patents and for patent owners, for commercial entities and academic institutions, both private and public. The outreach is global, hence not limited to European companies.
- Access to materials covered by patents is free to participants in the ILP for research and breeding.
- In the event of commercial use of material covered by a patent, the licensee will compensate the patent owner, in the countries where a valid patent exist.
- Negotiations relating to compensation are on a bilateral basis, subject to the “safety net” and Fair Reasonable and Non-Discriminatory (“FRAND”) terms described below.
- The ILP will serve as a “safety net” to guarantee fair terms if bilateral negotiations fail. In the event that a prospective licensee (a breeder) and a patentee do not reach a bilateral agreement in relation to patentee compensation (notably a royalty rate) within three months from the start of the negotiation process, the mechanism of the ILP becomes effective.
- The ILP is devised to create multiple pro-competitive effects in that it lowers transaction costs, and enables stacking of traits and integrated solutions, thus providing incentives for innovations and enabling faster innovation cycles. Specifically, it includes a provision that, in case that a participant in the ILP has to pay more than z% of royalties for a specific variety to other participants, the royalties are proportionally reduced. This operates as a ‘hardship clause’ and overall individual safety net.
- FRAND compensation conditions become effective in the event that a bilateral agreement on patentee compensation cannot be reached. On the basis of these FRAND compensation conditions the commercial use of biological material covered by a patent can take place.

FRAND conditions operationalize the key underlying principle of the Licensing platform: “*free (open) access but not for free*”.

- FRAND conditions include a royalties cap for various categories of patented traits.
- Licenses for individual patents must be available, i.e. no “bundling” or “packaging” of patents under the ILP is allowed.
- The participating patentees and licensees make use of a Standard License Agreement (“SLA”), which takes away the need to continuously (re)negotiate terms for every agreement, and greatly reduces transaction costs. The benefit-sharing obligations in favour of the Treaty are a part of the SLA.
- Participants make available information on their pending patents to an accessible database to ensure transparency.
- Some administrative costs will apply: e.g. a fee covering the costs of operating the ILP and its organs. However, these costs will be fairly distributed and structured so as to prevent *de facto* exclusion.

### Governance

- The governance structure of the Licensing platform includes a Committee of Independent Experts, entrusted with objectively confirming the status of so-called “differentiating traits”, as a consequence of the diverging economic value of the various Committed Patents.
- The governance structure of the Licensing platform provides for Dispute Settlement procedures for parties to the SLA, including in relation to benefit-sharing obligations in favour of the Treaty. The Third Party Beneficiary mechanism of the SMTA could also provide such dispute resolution services for the platform.

## 2.2 HOW WOULD THE LEGAL FRAMEWORK OF THE PLATFORM INTERFACE WITH THE REGULATORY REGIME OF THE TREATY?

The potential for synergies between the two frameworks is in the fact that the respective missions are compatible. The International Treaty is designed to foster “*the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.*” The vision of the Open Innovation Initiative around which the industry licensing platform is construed is: “*free access but not for free.*” The platform provides and/or facilitates access to patented innovations for the use of vegetable plant genetic resources, and, in that respect, is aligned with Art. 13(b)i. of the Treaty, according to which the Contracting Parties are to “[P]rovide and/or facilitate access to technologies for the conservation, characterization, evaluation and use of plant genetic resources for food and agriculture which are under the Multilateral System”.

Nevertheless, in the fulfillment of the respective missions, the two frameworks would operate separately and not overlap with each other.

### *Relation with the Multilateral System of Access and Benefit-sharing and the Standard Material Transfer Agreement*

The licensing platform operates in a segment of the research and development process that is more downstream than the area covered by the current functioning of the Multilateral System of Access and Benefit-sharing. Whereas the Multilateral System guarantees the flow of accession-level germplasm for research and breeding, the scope of the licensing platform covers patented innovation for the use of vegetable plant genetic resources.

The ILP is designed not to regulate access to unimproved material, rather to facilitate the use of IP-protected breeding traits and technologies at equitable conditions for users and remunerative

terms for IP-holders. The contractual framework of the ILP would not interfere with the operation of the SMTA, as the purpose of the former is to license patented innovation, whereby the latter regulates access and benefit-sharing for germplasm.

SMTA operations are relevant only before and until the product incorporating material from the MLS is commercialized. The SMTA chain ends at the stage of commercialization of a product which is a plant genetic resource for food and agriculture and which incorporates material accessed from the Multilateral System. Once the product has reached commercialization, it is no longer covered by the Multilateral System. The ILP licenses only begin their operation *after* the commercialization of a product. Therefore, there is no overlap between the two systems. Rather, the approach of the ILP, if brought under the governance of the Treaty, might extend the spirit of the Treaty of facilitating exchange, use and benefit-sharing for plant genetic resource for food and agriculture into a downstream domain where the Multilateral System currently has no reach. Thus, if brought into a coherent governance framework, the systems could be made complementary rather than overlapping or contradictory.

The ILP would function separately from the Multilateral System and under the Funding Strategy of the Treaty as an additional voluntary and compatible form of benefit-sharing for predictable contributions to the Benefit-sharing Fund. For the International Treaty, the ILP would present several opportunities to implement the benefit-sharing objective of the Treaty into areas which were previously beyond the scope of application of its benefit-sharing principles and operations. In particular, benefit-sharing contributions to the Benefit-sharing Fund would become voluntarily universalized for a certain category of products (i.e. normal vegetable traits) irrespective of whether they result from germplasm received from the Multilateral System or not.

The participants discussed what the innovative approach would mean for the possibility of expanding Annex I of the International Treaty, which had recently been discussed by some Contracting Parties, and concluded that it is neutral and has no impact on such a possibility and its likelihood or unlikelihood. However, to unleash the full potential of benefit sharing a coverage of vegetables by the MLS (through expansion of Annex I or otherwise) would be desired.

#### *Interface with the regulatory regime and governance structures of the Treaty*

The Co-leads of the Working Group stated that the Treaty would need to own this framework. The Co-leads confirmed that industry would be ready to turn the governance of the ILP over to the Treaty. The Co-chairs suggested that the Treaty would be the legal framework for the Contracting Parties to govern the possible model and platform. For this, the Treaty should receive regular and specific information on how ILP is working and which operational processes would be taking place.

The participants discussed and clarified that the meaning of the term “independent” in the title “Independent Expert Committee” refers to independence of the Committee from the users and not from the Treaty. An additional governing board would likely be necessary. The Co-Chairs highlighted that for them it was important that both the Expert Committee and the governing board would be accountable to the Governing Body. The governing board would be composed *inter alia* of representatives from Contracting Parties, in addition to experts from vegetable breeding companies which are users of the ILP.

All participants agreed that they wanted the Independent Expert Committee to be accountable to the Treaty, if the Governing Body decides to go forward with the innovative approach. The Expert Committee would be in charge of dispute mediation and overseeing the trait valuation process. In addition a joint governing board would be required if making adjustments to the ILP as would be considered necessary by the Treaty governance processes. In this regard, the Co-chairs and Co-leads considered that the Expert Committee and the governing board could provide guidance to the ILP and that the provision of such guidance to the ILP could be integrated in the terms of reference of the Expert Committee or governing board (or any other structure established by the Governing Body). The Independent Expert Committee, if and when established by the Governing Body, could report once per year to the Treaty’s Committee on the Funding Strategy, or any other

structure established by the Governing Body. The Chair of the Independent Expert Committee could be designated by the Treaty membership.

**II. 3. Which percentage of licensing fees would be shared with the Benefit-sharing Fund and what are your tentative projections of the yearly financial benefits accruing to the Benefit-sharing Fund from the mechanism?**

**1. Benefits for the IT:**

- a. Assuming that the MLS is expanded to vegetables and that the normal traits are developed with the use of PGR covered by the MLS, a mandatory benefit sharing of 0.77% on net sales of every patented variety (not only from the patentee but also from licensees) would be made to the MLS in addition to voluntary benefit sharings:

Crop	Current global sale of non-GM varieties	Sale in countries which allow patents on plants*	Today's sale of patented varieties with normal traits (Estimate)	2020 sale of patented varieties with normal traits (Estimate)	0.77% (now / 2020) (assuming full coverage)
Vegetables	\$3.5 bn	\$2.0 bn	\$200 m	\$1 bn	\$1.6m / \$8m
Field crops	\$12 bn	\$8.0 bn	\$500 m	\$2 bn	\$4m / \$16m

\* ONLY SOME DEVELOPED COUNTRIES ALLOW FOR CLAIMS WHICH COVER NON-GM PLANTS: EU, US, JAPAN, KOREA, AUSTRALIA. TO OUR INFORMATION THE MAJORITY OF THE DEVELOPING COUNTRIES DO NOT ALLOW SUCH CLAIMS

**A.**

It is important to note that these figures are not an estimate of the Working Group, but rather an independent estimate based on public data. For the 2020 data both an increase of the global seed market and an increase of the use of patented normal traits is factored in. No change of patent laws is foreseen.

The Co-leads stated that membership fees for the ILP would be adjusted in such a way as to ensure that all operational costs of the ILP would be covered by membership fees from users and there would be no financial implications to the Treaty operational or extended budget. This would ensure that all financial benefits shared with the Treaty from the platform would go directly and exclusively into the Benefit-sharing Fund.

Participants agreed that all decisions on the use, allocation and disbursement of the financial benefits and funds accruing to the Benefit-sharing Fund from the ILP would be under the direct control of the Governing Body of the Treaty.

A specific envelop, window or other subcategory in the Benefit-sharing Fund could be created for the contributions coming from the ILP, if the Contracting Parties so wished. Alternatively, the ILP contributions could be merged into the financial assets of the Fund, so as to be utilized in the standard processes. Participants agreed that these choices would be up to the Governing Body of the Treaty.

The Secretariat was requested to undertake further research, in collaboration with the ILP Task Force, to develop projections of income from the ILP, based on existing projections and modeling done for income to the Benefit-sharing Fund.

#### **4. Could you delineate the financial and non-financial benefits accruing to the Treaty?**

The establishment of the ILP under the framework and governance of the Treaty would be in line with its remit “to provide and/or facilitate access to technologies for the conservation, characterization, evaluation and use of plant genetic resources for food and agriculture which are under the Multilateral System.” (Art. 13(b)i).

An association of the ILP could also provide direct benefits, primarily in the following two areas:

- For parties in “developing countries that are Contracting Parties, in particular least developed countries, and countries with economies in transition, shall be provided and/or facilitated under fair and most favourable terms”, as explicitly pointed out in the Treaty (Art.13(b)ii). For technologies relating to normal vegetable traits such provision could be even free. This would currently be the case, since normal traits are not patentable in developing countries and in consequence no royalty would be due for any use in such countries.
- As seen above, the revenues created under the ILP from a commercial use of a varieties comprising the patented technology (primarily in the developed countries) a certain percentage (e.g., 0.77% of the net sales for varieties based on PGR covered by the MLS; or a reduced voluntary benefit sharing for other varieties ) could flow directly to the Benefit-sharing in line with Art. 13.2(d) of the Treaty, despite the fact that the ILP mechanisms enable the use for further research and breeding without restrictions.

In addition to that, the ILP would produce a number of significant non-financial benefits within the ambit of the Treaty, namely:

- It will lower the transactional costs, as no case-by-case negotiation of contractual terms and royalties;

It will include provisions to create patent transparency. This will allow stakeholders to monitor the filing of applications and the grant and licensing of patents on a transparent and inclusive basis.

- It will provide an incentive for creation of new innovation and knowledge sharing through patent disclosure;

- It will improve technology dissemination and access under the parameter of “free access but not access for free”;

- It will establish a global breeders exemption for patents which enables a free use for breeding and development, and under which payments are only due upon commercialization in countries where the resulting variety is covered by a valid patent;

- It will lower legal uncertainty during long patent examination terms, as access to plant biomaterial is always ensured;

- It will enable the stacking of patented technologies from various parties including a clear mechanism for royalty adjustment.

#### **5. What kind of technologies would be transferred through the licensing Platform?**

The patents (or patent applications) in the vegetable seed industry for which the standard conditions of the licensing platform apply (i.e. those covering “normal traits”) can roughly be categorized as follows:

- a) Disease resistance traits and other agronomic traits (e.g. resistance against viruses and parasites)
- b) Consumer traits (e.g. taste and appearance characteristics)
- c) Seed production technology traits
- d) Various others (e.g. yield improving methods).

The ILP would *not* cover and transfer any GM technologies. The ILP would be limited to normal traits.

Given that it is a demand-based mechanism, the ILP will be guided by technology pull, i.e. by the needs of farmers and end-users, rather than technology push. This can be ensured through further structure of the mechanism.

The Co-chairs inquired about the possibilities of scaling up the platform beyond vegetables. The Co-Leads indicated that the area of vegetables had been chosen because there was the highest number of normal trait patents and licensing needs, and in the future it was in principle possible to scale up the mechanism beyond vegetables. However, the Task Force wished to first see if the mechanism would work in the area of vegetables and then consider its adjustment and expansion to other areas.

**6. What would be the conditions for developing countries to access the technologies on the licensing platform?**

In general terms, the provision of technologies relating to normal traits would in general be free for parties in “developing countries that are Contracting Parties, in particular least developed countries, and countries with economies in transition” (Art. 13(b)ii of the Treaty).

**7. Could you develop a business model for the e-licensing mechanism and its link with the Treaty?**

In general terms, these are the combining strengths and compensation challenges that the business model would have to address.

	International Treaty	Licensing Platform
<b>Objective</b>	“Access and benefit sharing”	“Free access but not for free”
<b>Strength</b>	<ul style="list-style-type: none"> <li>• Global framework</li> <li>• Established governance framework</li> <li>• Benefit sharing mechanism for PGRF</li> <li>• Separate technology transfer initiative</li> </ul>	<ul style="list-style-type: none"> <li>• Global IP access solution for vegetables sector</li> <li>• Creates innovative benefit sharing between innovators and users</li> <li>• Broad acceptance</li> </ul>
<b>Challenges</b>	<ul style="list-style-type: none"> <li>• Governs germplasm access and technology transfer, but not (yet) technologies covered by IP</li> <li>• Governs not all crops</li> <li>• Limited benefit sharing</li> </ul>	<ul style="list-style-type: none"> <li>• Potentially cumbersome to bring to life</li> <li>• Would benefit from independent governance and framework</li> <li>• Benefit sharing for genetic diversity to solved</li> </ul>

The Co-chairs and Co-leads discussed the concrete business model of the platform and the operational links with business processes for which the Treaty would be responsible. In practical and applied terms, the links with the Treaty could amount to three concrete activities for which the Treaty and its Governing Body would be responsible:

1. to convene the IEC and receive reports from it on the operations of the platform and give guidance on the further operation of the model and the platform;
2. maintain a website, including standard back-end operations of the site;
3. to provide alternative dispute resolution for possible disputes arising from the operations of the Open innovation model, at a minimum in those cases where the benefits would accrue directly to the Treaty and its Benefit-sharing Fund.

Besides these tasks, the Treaty would also be responsible to decide what to do with the money which the platform would contribute to the Benefit-sharing Fund through its standard governance structure and processes. It is expected that this utilization of the funds contributed by the platform would optimally reflect the priorities of the Treaty.

On continuous operating costs of the ILP, the Co-leads confirmed that there would be no costs to the Treaty budget at all. All operational costs would be borne through an operational reserve for the ILP that is resourced by users of the ILP. The location of such reserve would have to be decided. If the Governing Body decided to go forward with the approach, one-off costs for the establishment of the mechanisms, e.g. through the creation of a webpage and a database, would be fully covered by the ILP.

The administrative and operational requirements of existing similar initiatives as well as the estimated requirements of the projected approach were reviewed and assessed. In order to concretize the operational requirements of operating such an approach, the Co-leads shared the experiences with the operating costs of similar mechanisms. Recognizing that various companies which are part of the Task Force had sought to establish licensing platforms, the Co-Leads explained that they had so far required part of the time of one officer (full-time executive, or FTE) in order to operate the webpage and operations of the mechanisms.

Participants agreed that there were multiple options which could be explored:

1. If the Governing Body decided to go forward with the approach and the administration was to be housed by the Treaty, its operating costs would need to be entirely covered by the membership fees of the mechanism membership and the approach would have to be fully cost-neutral to the Treaty, the Governing Body, the Secretariat and the work programme and budget. This might also include the coverage of standard project servicing costs charged by the Treaty.
2. Alternatively, the operation of the mechanism could be outsourced to an administrator entity, as has been the case with other Treaty administered systems as well, and only the higher-level governance functions would be retained by the Governing Body of the Treaty and its Secretariat.

#### ***8. To what extent do you foresee voluntary contributions to the Benefit-sharing Fund?***

A projection of potential income into the Benefit-sharing Fund has been provided above under question n. 3.

#### ***Closing of the First Meeting of the Co-chairs and Co-leads***

The participants agreed to continue the discussions at a second orientating meeting, prior to the resumed meeting of the Committee.

#### ***The Second Meeting of the Co-chairs and Co-leads***

The orientating meeting took place in Rome, at FAO, on 22 March, to explore the possibilities of the inclusion of the envisaged ILP of vegetable breeding companies in the IT combining arrangements with regard to access to genetic resources. It was followed by a working lunch hosted by H.E. Gerda Verburg, Ambassador of The Netherlands for the Rome-based UN Agencies.

The agenda and list of the participants are in Annexes 5 and 6.

The Co-chairs and Co-leads examined the factual information on the ILP provided at the first meeting and found it accurate and relevant. They agreed to forward it to the Committee in order to communicate the scope and modalities of the ILP as well as the different potential synergies with the International Treaty. The Working Group is still in the process of setting up the ILP in close

consultation with competition law authorities. The Co-leads will go back to the Steering Group of the ILP and we will inform the Treaty about the feedback. They will first finalize the discussions with the breeding companies and, when launching the ILP after consent of the competition law authorities, can more concretely discuss options for partnership.

As requested by the Co-chairs and Co-leads at their first meeting, additional experts were invited to the second meeting. This included H.E. Gerda Verburg, the Ambassador of the Netherlands to the Rome-based UN Agencies, and the Vice-Secretary General of the Union for the Protection of New Plant Varieties, who indicated that from their perspectives the initiative was welcome, as was any initiative which facilitates breeders to have access to breeding material for developing new plant varieties for food security. Furthermore, a representative of Plantum was invited to contribute advice to the Co-leads and a representative of the Indonesian Agency for Agricultural Research and Development, who described the work of IAARD on related matters, welcomed the initiative, and informed on the forthcoming Third High-level Round Table on the International Treaty.

With the support of the invited experts, the Co-chairs and Co-leads discussed the following option: how the MLS/SMTA could include the ILP through adaptations of the ILP and by (i) improving mandatory benefit-sharing under clause 6.11, or (ii) by encouragement of voluntary contributions to the BSF through a system.

The Co-chairs and Co-leads further explored the scope and modalities of operation of the ILP and the Multilateral System. They recognised that cooperation with the ILP could produce benefits for the Multilateral System not only by generating revenue into the Benefit-sharing Fund by using the SMTA but also by enhancing the wider use of the Multilateral System. It was emphasized that this could create an effective and practical linkage among facilitated access, intellectual property and benefit-sharing through technology transfer. Coupled with monetary benefit-sharing, this linkage could trigger a holistic approach to benefit-sharing which recognizes the multiple actors and processes necessary to produce innovation for food security. It was also recognized that using the SMTA could contribute to increased legal certainty for breeders and researchers. Furthermore, this linkage could concretize multiple action points of the Rio Action Plan, thus gathering the necessary political support in the Treaty forum.

As the scope of the ILP covers vegetable crops, the Co-chairs and Co-leads highlighted the potential of the partnership for spurring discussions on the possible future expansion of the list of crops in Annex I. Recognizing the exclusive mandate of the Governing Body, the Co-chairs and Co-leads nevertheless considered the opportunity to create a small expert group to develop the proposal and contextualize it as part of a package which includes the rationale of the expansion as well as possible alternative solutions which, although not resulting in a formal revision of Annex I, could facilitate access and equitable benefit-sharing for vegetable crops.

#### ***Linkage with Article 6.11 of the SMTA (so-called African proposal)***

The Co-chairs and Co-leads considered that a partnership with the ILP that generates revenue for the Benefit-sharing Fund, although voluntary by nature, could follow the spirit of the so-called African proposal (Article 6.11 of the SMTA), as it would materialize a collective form of monetary benefit-sharing in return for facilitated access to biological material. The Co-chairs and Co-leads preliminary explored the possible harmonization of the SLA and the SMTA and noted that, pending a recognition of the issues addressed by the ILP and a formal endorsement of the ILP mechanisms by the Governing Body, it would be too early to undertake a more detailed exploration.

***Steps towards an appraisal by the Governing Body***

The Co-chairs and Co-leads recognised the mandate of the Committee to advise on innovative approaches to benefit-sharing as well as the mandate of the Governing Body to decide on enabling partnerships, including with the ILP. The Committee may continue to request relevant information from UPOV and WIPO for the possible consideration of the Committee. The participating representative of UPOV offered to continue to provide expertise to ensure that the ILP would fully ensure that plant variety protection is taken into account and supported.

***The way forward***

The Co-chairs and Co-leads recognised that, before recommending arrangements for a functional administrative infrastructure to implement any possible partnership with the ILP, the most immediate goal would be to make adequate preparations for the initial consideration of the ILP by the Governing Body. Considering the excellent progress made through the two meetings, the Co-chairs and Co-leads decided to provide their reports on such progress to the respective constituencies (i.e. the Committee and the Working Group) and, provided that the initiative continue to be supported, request a mandate to develop a succinct and actionable framework proposal for the consideration of the Governing Body. The Co-chairs and Co-leads agreed to communicate the results of their consultations within the first half of April. Should the mandate to work on a proposal be given, the participants would develop a roadmap in order to complete the proposal by mid-June, including through further meetings if required. The support of a Contracting Party or Contracting Parties would be preferable to formally table the proposal before the Governing Body at its Fifth Session.

[end of report, Annexes 1 through 5 follow]

### Annex 1

#### **Answers provided by the Working Group of vegetable plant breeding companies to the eight questions identified by the Ad Hoc Advisory Committee on the Funding Strategy**

We thank you for your kind letter dated Oct. 17, 2012 and the interest of the International Treaty into innovative licensing and technology transfer initiatives. We are very interested to deepen the dialogue and explore potential synergies between the Treaty and our initiatives.

With respect to your questions we would like to answer as follows:

#### **1. What kind of incentives have motivated Syngenta to develop this innovative approach and partner with the Treaty?**

Both the e-licensing and the industry licensing platform initiative are driven by a deep belief that an evolution of the IP use on plant related innovations is necessary. While it is critical to preserve the incentive for new innovation by providing IP protections in the form of patents and plant breeders rights, it is equally critical to facilitate dissemination of beneficial technologies by granting fast access to innovation and by enabling improvement and integration. The slogan “free access but not access for free” describes our basic philosophy on how to reconcile these goals.

The mission of the International Treaty is to foster “*the conservation and sustainable use of plant genetic resources for food and agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.*” In this context, the establishment of a technology transfer and licensing platform could become an instrument under the framework and governance of the Treaty in line with the remit of the Treaty “*to provide and/or facilitate access to technologies for the conservation, characterization, evaluation and use of plant genetic resources for food and agriculture which are under the Multilateral System.*” (Art. 13(b)i).

We believe that the governance of the Treaty would ensure independence and sustainable governance, especially with respect to the definition of FRAND terms and fair use exemptions, such as free use in least developed countries, in orphan or underexploited crops, or for humanitarian and non-profit purposes.

#### **2. What is the legal framework for the platform and how would it interface with the regulatory regime of the Treaty?**

Currently the platform is developed as an association, which is open to all interested parties. The rules of the platform will be provided by ‘articles of association’, which are underpinned by standard license agreements. The independence of the platform will be ensured by an independent expert committee. It could be foreseen that the association and especially the expert committee is established under the roof and governance of the Treaty. One possibility would be a contractual framework similar to the SMTA.

#### **3. Which percentage of licensing fees would be shared with the Benefit-sharing Fund and what are your tentative projections of the yearly financial benefits accruing to the Benefit-sharing Fund from the mechanism?**

Currently, the licensing platform is limited to vegetables. Expansions to field crops might be possible in the future based on the needs of the industry. While it is recognized that vegetables

today are not in scope for the Treaty, it could be envisioned that similar payments as foreseen under the SMTA are made provided the same preconditions for payments are met.

For scenarios where no payments would be due under the SMTA, the contribution to the Treaty may depend on the degree of involvement and support of the Treaty. For example, if the Treaty provides a governance structure, expert committee or other support, either annual payments by the participating commercial parties (e.g., “membership fee” based on company size: for example 30,000 € for large companies) or a partial allocation of the royalty stream (e.g., 5-10% of royalty stream) would be appropriate. It is currently contemplated that the platform in its initial stage could require 2-3 FTE for administration.

**4. Taking this a mechanism that is in the Treaty’s Platform for the Co-development and Transfer of Technologies, could you delineate the financial and non-financial benefits accruing to the Treaty?**

The potential financial benefits are laid out above. Potentially more important and of higher benefit would be the following non-monetary benefits:

- Free licenses for non-profit organizations for humanitarian and non-profit use (e.g., farmers varieties)
- Free licenses for use in under developed and orphan crops
- Free licenses for non-profit use in LDCs and developing countries
- Pull-in mechanism: all Licensees are obligated to contribute their patented native traits

The platform would enable technology transfer especially in the area of modern breeding technology in a sustainable way by balancing public and private interests.

**5. What kind of technologies would be transferred through the e-licensing Platform?**

The current scope of technology is limited to products of modern breeding technology (so called “native traits”). It does not include genetically modified technology and plants. In its current stage the scope is limited to the vegetable area.

**6. What would be the conditions for developing countries to access the technologies on the e-licensing platform?**

See above: Any non-profit use in developing countries would be free.

**7. Could you develop a business model for the e-licensing mechanism and its link with the Treaty?**

The question is not entirely clear. The licensing platform could be a special agreement under the Treaty, similar to the SMTA. Administration could be directly provided by the Treaty or by a new association under the governance of the Treaty. Administration of ongoing activities may require 2-3 FTE. In addition an independent expert committee needs to be established on a part time basis, which oversees the FRAND conditions and mediates disputes. All related costs will be borne by the participating private party members.

**8. To what extent do you foresee voluntary contributions to the Benefit-sharing Fund?**

This is certainly an option. Payments could be one time, annual or part of ongoing royalty-stream.

We hope we have clarified some of the questions you have. Please do not hesitate to contact us should you require additional information or explanation. We very much look forward to continuing this important dialogue with an aim to improve plant breeding and technology availability for the benefit of farmers around the world.

## Annex 2

### **Agenda of the first closed meeting of the Co-Chairs of the Committee and the Co-leads of the Working Group**

#### *CONSULTATION ON*

#### **INNOVATIVE APPROACHES FOR CONTRIBUTIONS TO THE FUNDING STRATEGY**

30 November 2012

FAO Liaison Office, Geneva, Switzerland

#### **MORNING SESSION (RESTRICTED)**

**(10.00 – 10.15)**

➤ ***Opening and Welcome***

*Sandra Aviles, Officer in charge, FAO Liaison Office  
Shakeel Bhatti, Secretary of the International Treaty*

**(10.15 – 10.30)**

➤ ***The Ad Hoc Committee on the Funding Strategy: processes and expectations***

*Modesto Fernández Díaz-Silveira, Erik Cockbain (Co-Chairs of the Committee)*

**(10.30 – 11.15)**

➤ ***The industry licensing platform: mechanisms and synergies***

*Michael Kock (Co-lead of the Working Group)*

**(11.15 – 11.30)**

*Coffee break*

**(11.30 – 13.00)**

➤ ***Discussion between Co-leads and Co-Chairs***

**(13.00 – 14.00)**

**Lunch**

#### **AFTERNOON SESSION**

**(14.30 – 15.15)**

➤ ***Resumed discussion: the way forward and next steps***

**(15.15 – 15.30)**

➤ ***Synthesis of discussion***

*Secretary of the International Treaty*

**(15.30 – 16.00)**

➤ ***Models for implementing technology transfer***

*Mike Robinson, Syngenta Foundation*

**(15.30 – 16.30)**

➤ ***Policy and operational synergies between the industry-licensing platform and the Treaty platform***

*Discussion among participants*

***(16.30 – 17.00)***

➤ ***Summary and closing***

*Shakeel Bhatti*

*Modesto Fernández Díaz-Silveira, Erik Cockbain*

**Annex 3****List of Participants of the first closed meeting of the Co-Chairs of the Committee and the Co-leads of the Working Group, and to the open session****Mr Erik Cockbain**

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## Annex 4

Slide presentation provided by the Working Group of vegetable breeders through Syngenta as one of its Co-leads at the first closed meeting between the Co-chairs of the Committee and Co-leads of the Working Group

# Open Source Innovation Model

Industry-licensing platform for vegetable traits

Presentation to ITPGRFA-FAO

Classification: Internal – for discussion with ITPGRFA-FAO only

## The Industry Licensing Platform

A global initiative with broad consensus



# Synergies with the IT

Similar missions

## **Mission of the International Treaty: Access & Benefit Sharing**

- Foster “the conservation and sustainable use of plant genetic resources for food and agriculture *and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security.*”
- “[P]rovide and/or *facilitate access to technologies for the conservation, characterization, evaluation and use of plant genetic resources for food and agriculture which are under the Multilateral System.*” (Art. 13(b)i).

## **Vision of the Open Innovation Initiative: Free access but not for free**

- **Access:** “[P]rovide and/or *facilitate access to patented innovations for the use of vegetable plant genetic resources*” (Art. 13(b)i).
- **Benefit sharing:** Establish a *FRAND (fair and reasonable) sharing of the benefits arising out of their use between innovators and users.*”

Classification: Internal – for discussion with ITPORFAFAO only

## Definitions

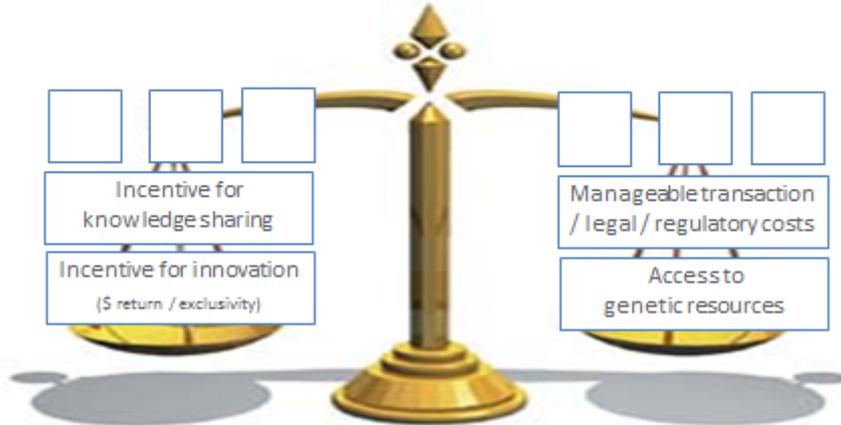
**Normal traits:** All traits which are not special → **In scope**

**Special traits:** GM traits with substantial stewardship requirements and liability risks

Classification: Internal – for discussion with ITPORFAFAO only

## High innovation need – strong IP need

- Unprecedented need for innovation
- Increasing technification and investment
- Increasing complexity of IP, legal, and regulatory landscapes



Classification: Internal – for discussion with ITPORFAFAO only

## Plant Breeding & Patents

### The challenge

**The past:** Plant varieties were protected by plant breeders rights only

- The breeders exemption enabled use of le plant material for further breeding.
- The risk of dependency was low and avoidable by good breeding practice. No risk of „innocent“ infringement.

**The present:** Plant varieties can be subject to plant breeders rights and patents.

- While already common for GM plants, patents gain impact on the non-GM breeding sector (native traits, mutants, ...)
- Patent marking is not mandatory. Risk of „innocent“ infringement.
- The risk of dependency is high and requires monitoring for patented elements.

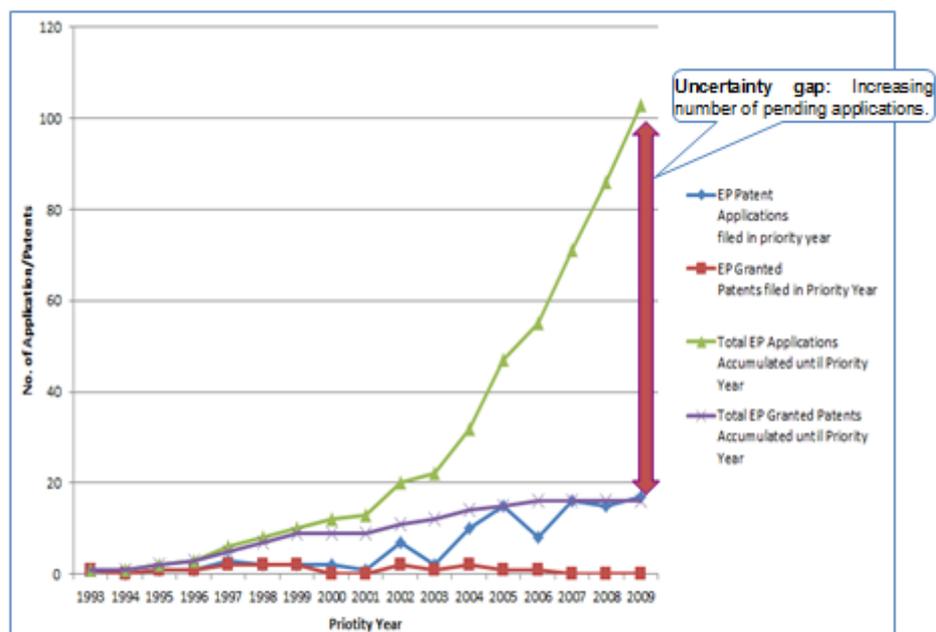
Classification: Internal – for discussion with ITPORFAFAO only

## EU IP landscape for non-GM vegetable trait patents

	No. of patents / applications
EP non-GM trait patents / applications	286
... relating to vegetables	154
... not finally rejected or withdrawn	103

The list of countries which allow patents on plants with non-GM traits is very limited: US, EU, Japan, Australia, Korea.

Classification: Internal – for discussion with ITPORFAFAO only



	PBRs	Patents
Infringement – when?	Reproduction of a protected plant variety or seed thereof	Reproduction of a protected plant variety or seed thereof
When does a new variety infringe on the IP-right? ("dependency")	They do not	All new varieties that include the patented trait
Limitation IP-right (EU level)	- Research exemption - Full breeders' exemption (including commercial use) - Farm saved seed (for certain agricultural crops)	- Research exemption - No full breeders' exemption - Farm saved seed (for certain agricultural crops)
License required to obtain FTO?	No	Yes: leading to high transactions costs
Duration of procedure prior to grant	2-3 years	5-10 years
Grant rate	>95%	approx. 50%
Opposition rate	<5%	approx. 30%
Conclusions Freedom to operate (FTO)	FTO issues are rare; high legal certainty; low risks	FTO-issues common; legal uncertainty; high risk

	Application	Granted	Total	Committed Patents
Lettuce	10	4	14	11
Tomato	27	3	30	8
Brassica	13	2	15	8
Pepper	6	1	7	5
Melon	6	2	8	5
Cucumber/Squash	15	1	16	8
Various	10	3	13	9
Total	87	16	103	54

	Granted	Syngenta	Monsanto & Group	Rakazwaan	Group Vilmorin	Enza	Bejo	Bayer & Group	Other	Committed to platform (total)	Committed & granted
Total	13	3	2	6	1	1	0	0	2	11	3
Lettuce	29	3	13	2	2	0	0	1	8	8	0
Tomato	15	2	5	0	0	0	2	1	2	8	0
Brassica	7	1	3	1	0	2	1	0	0	5	1
Pepper	8	1	4	3	0	1	0	0	0	5	1
Melon	17	2	1	8	1	0	4	0	2	8	2
Cucumber/Squash	13	3	1	2	3	3	1	1	1	9	2
Various	102	15	18	34	12	9	7	3	5	14	9
Total										= 53% (of total)	= 60% (of total granted)

## Plant Breeding Technologies & Patentability

### The challenge

#### The future:

- Increasing technification of breeding  
(smart breeding, molecular breeding, causative alleles, causative mutants)
- New breeding technologies: Induced mutants and other “man-made traits”
- Improving patent claim quality
  - Increasing numbers of patented traits  
(even if native traits would be excluded from patentability)
  - Increasing number of non-GM varieties which include at least one patent trait
  - Increasing number of non-GM varieties with >2 traits from different parties

#### Potential consequences:

- Legal uncertainty, costs to screen and work-around, transactional costs
- Limited germplasm basis for future breeding
- Cumbersome technology integration and slower innovation cycle

Classification: Internal – for discussion with ITPORFAFAO only

## Looking for solutions

### Basic considerations

The vegetable industry needs a solutions which is  
**balanced, cooperative, dynamic, fast, and global.**

- The patent law landscape – exceptions, rights, and limitations – differs from country to country.
- Global legal harmonization is unlikely or resource/time-consuming.
- Legislation and case law is unpredictable.
- Technology develops fast, law changes are slow.
- Confrontational and cooperative solutions are rarely compatible

Classification: Internal – for discussion with ITPORFAFAO only

## Industry licensing platform

An innovative access & benefit sharing solution

### History

- Aug. 2010: Discussion start; establishment of working group (all relevant vegetable breeders on board)
  - Feb. 2011: Request from Dutch Ministry of Agriculture to expedite; assignment of chairman (Chris vander Winden)
  - 2011-2012: Definition of termsheet; establishment of clean team.
  - Current status:
    - Self-assessment document (99% done)
    - Standard license agreement (2nd revision)
    - Articles of Association (first draft on core provisions)
- Dec. 2012: First submission for competition law review in the EU
- Submission in other regions will follow after positive opinion of the EU

Classification: Internal – for discussion with ITPORFAFAO only

## Guiding Principles

- No obstruction through patents to biological material
- Reasonable remuneration for innovator
- A relatively easy access system
- Execution feasible and “trick proof”
- Consistent with competition law
- Broad acceptance

Classification: Internal – for discussion with ITPORFAFAO only

## Open Innovation House



Classification: Internal – for discussion with ITPORFAFAO only

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Optimizing IP use  
Industry licensing platform



*“Free access” but not “access for free”*

A system based on  
incentives („carrots“ 🥕 ) and obligations („sticks“ 🪄 )

- **Open pool:** Everyone can join
  - Patent owners and parties without patents
  - Commercial entities and academics, private and public
  - Global (EU companies and non-EU companies)
- **Scope of license:** Use of plant biological material (e.g., seed) for breeding
  - Enables use of all legally accessible biomaterial (commercial seed, certain patent deposits)
  - **Free for research and breeding**
  - Excluded: Use of patented methods (e.g., marker assisted selection; hybrid production)

Classification: Internal – for discussion with ITPORFAFAO only

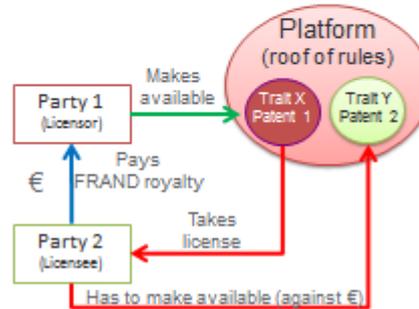
Optimizing IP use  
Industry licensing platform



“Free access” but not “access for free”

A system based on incentives („carrots“ 🥕 ) and obligations („sticks“ 🪄 )

- Free for R&D and breeding
- FRAND remuneration for commercial use (independent expert committee)
- Pull-in mechanism for licensee’s normal trait patents
- Coordinated by “clearing house”
- **Pro-competitive effects:** Low transactional costs; enables stacking and integrated solutions; incentives for new innovations; enables faster innovation cycles



Classification: Internal – for discussion with ITPGRFAFAO only

## Open Source Innovation Model

- Leading: bilateral negotiation with safety net.
- Maintaining 4 categories of traits

	Basic	Differentiating
Normal		
Special (Regulated as GM)	Currently not an issue (to be included if situation changes)	

Classification: Internal – for discussion with ITPGRFAFAO only

# Benefit Sharing with Innovators

## Financial compensation

- Traits are separated in two categories:
  - „**Basic traits**“: Default category (>90% of all traits)
    - Royalties cannot be higher than a defined (low) cap (X% on net sales)
    - Patentee can always lower the royalties
    - Bilateral agreements always remain possible
    - Adjustment of single trait royalties if multi-stacks become a trend
    - Hardship clause: Total royalty cap for each single variety
  - „**Differentiating traits**“: Premium category (<10% of all traits)
    - Requires application to Independent Expert Committee and proof of a Price Premium of at least 20%.
    - “Price Premium” is calculated as price increase in comparison with a variety which is similar but for the protected trait.
    - Price Premium is measured as weighted average of all sales in two subsequent years and requires a statistically significant turnover.
    - Royalty scheme leaves % of the added value with the licensee.

Classification: Internal – for discussion with ITPORFAFAO only

# Hardship Clause

## Overall individual safety net

- In case an individual participant has to pay per variety more than Z% of royalties to other participants, the royalties will be proportionally reduced, so that he will not pay more than Z% of sales of seed from the variety.
  - only license agreements with participants
  - anti misuse clauses

Classification: Internal – for discussion with ITPORFAFAO only

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## The Industry Licensing Platform

The pro-competitive effects

- **Incentive** for creation of new innovation and knowledge sharing (patent disclosure)
- **Improves technology dissemination** and access (“free access but not access for free”)
- Establishes a **global breeders exemption for patents** which enables a free use for breeding and development. Payments are only due upon commercialization in countries where the resulting variety is covered by a valid patent.
- **Lowers legal uncertainty** during long patent examination terms. Access to plant biomaterial is always ensured.
- **Lowers transactional costs**. No case-by-case negotiation of contractual terms and royalties.
- **Enables stacking** of patented technologies from various parties including a clear mechanism for royalty adjustment.
- Includes provisions to create **patent transparency**.

Classification: Internal – for discussion with ITPGRFAFAO only

## Synergies with the IT

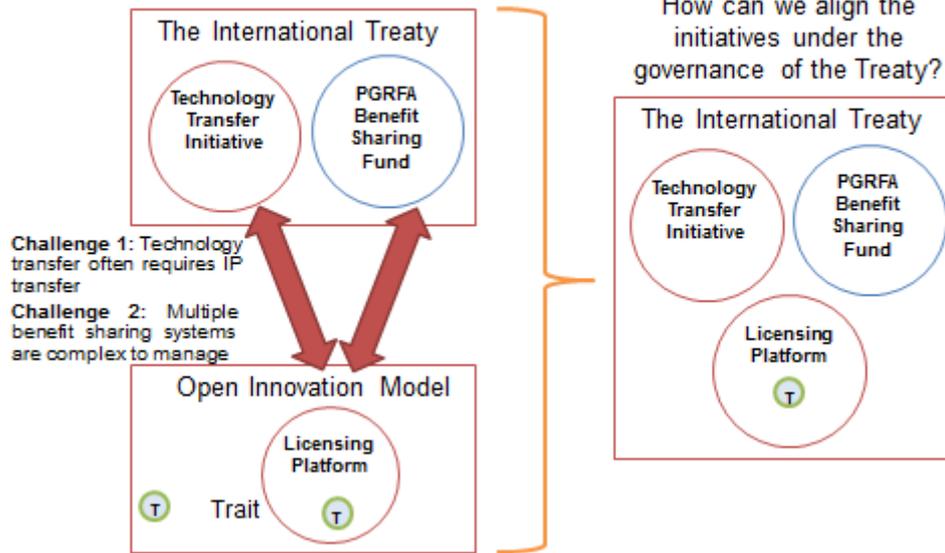
Combining strength – compensating challenges

	International Treaty	Licensing Platform
Objective	“Access and benefit sharing”	“Free access but not for free”
Strength	<ul style="list-style-type: none"> <li>• Global framework</li> <li>• Established governance framework</li> <li>• Benefit sharing mechanism for PGRF</li> <li>• Separate technology transfer initiative</li> </ul>	<ul style="list-style-type: none"> <li>• Global IP access solution for vegetables sector</li> <li>• Creates innovative benefit sharing between innovators and users</li> <li>• Broad acceptance</li> </ul>
Challenges	<ul style="list-style-type: none"> <li>• Governs germplasm access and technology transfer, but not (yet) technologies covered by IP</li> <li>• Governs not all crops</li> <li>• Limited benefit sharing</li> </ul>	<ul style="list-style-type: none"> <li>• Potentially cumbersome to bring to life</li> <li>• Would benefit from independent governance and framework</li> <li>• Benefit sharing for genetic diversity to be solved</li> </ul>

Classification: Internal – for discussion with ITPGRFAFAO only

# Innovative Benefit Sharing

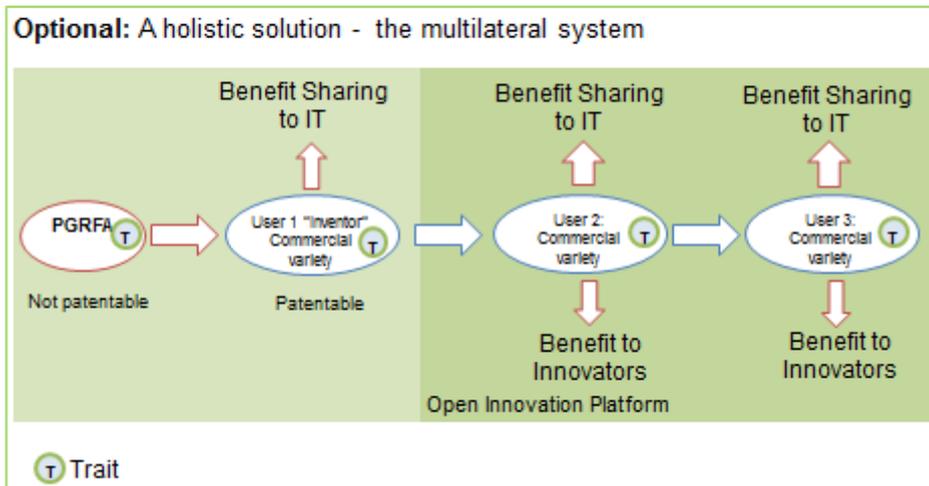
Synergies with the IT



Classification: Internal – for discussion with IT/PGRFA/FAO only

# Opportunities for Innovative Benefit Sharing

Synergies through alignment with the IT



Classification: INTERNAL USE ONLY

## Opportunities for Innovative Benefit Sharing

Synergies through alignment with the IT

Benefits	Challenges
"One stop" access: Easy PIC and access for both PGRFA and protected technologies	May require to expand IT scope to vegetables
"One stop" benefit sharing: One system of obligations reduces transaction costs of benefit-sharing and raise the benefits that reach farmers through the IT benefit-sharing fund and tech transfer platform	May require additional advice for dealing with politically sensitive IP/patent issues
Expanded benefit sharing beyond "first user"	New contractual frame (potentially similar but distinct from sMTA-like)
Synergy with technology transfer project (IT tech transfer platform will have to be able to deal with IP, in order to transfer some commercially valuable technology)	May require infrastructure and governing body (2-3 FTE plus ad hoc Expert Committee on part time; cost will be covered by the platform)
<b>Benefits for developing countries:</b> <ul style="list-style-type: none"> <li>• Higher benefit sharing through expansion of the sharing mechanism beyond the first user; more funds will reach farmers through the IT-BSF;</li> <li>• Free use: Breeding traits are not patentable in developing countries</li> <li>• If patents arise a series of exemptions: free use in least developed countries, in orphan and underexploited crops, or for humanitarian and non-profit purposes.</li> <li>• Access to technology: Platforms ensures disclosure of technologies, which are available</li> </ul>	

Classification: Internal – for discussion with IT/PGRFA/FAO only

### Options for a new innovative approach for benefit sharing Way forward & questions

- Is an alignment of the IT and the Licensing Platform desired and feasible in areas of comparative advantage for the IT and the Platform ?
  - **Model 1:** Governance and administration could be directly provided by the Treaty
  - **Model 2:** Administration could be provided by a new association under the governance of the Treaty.
- What support would be necessary to bring it to life?
- If a formal alignment is not feasible, can we still establish mutual support and synergies ?

Classification: Internal – for discussion with IT/PGRFA/FAO only

## Annex 5

### **Agenda of the second closed meeting of the Co-Chairs of the Committee and the Co-leads of the Working Group, including additional invited experts**

#### *RESUMED CLOSED DISCUSSION ON INNOVATIVE APPROACHES FOR CONTRIBUTIONS TO THE FUNDING STRATEGY\**

22 March 2013

Rome, Italy

**(8.30 – 8.40)**

➤ **Opening and Tour de Table**

**Self-introduction of participants**

**Dr. Javad Mozafari, Chairperson of the Fifth Session of the Governing Body of the International Treaty**

**(8.40 – 8.55)**

➤ **Updates from Treaty processes: recent developments in the Ad Hoc Committee**

*Mr. Modesto Fernández Díaz-Silveira, Ms. Grethe Evjens, Co-Chairs of the Ad Hoc Committee on the Funding Strategy of the International Treaty*

**(8.55 – 9.10)**

➤ **Updates from the open innovation model and industry licensing platform: recent developments**

*Mr. Ben Tax, Mr. Michael Kock, Co-Leads of the Working Group on vegetable seed trait licensing*

**(9.10 – 9.25)**

➤ **Additional contributions from participants**

*Comments, questions and answers by additional invited participants*

**(9.25 – 10.45)** *(closed session)*

➤ **Exploration of proposals to the Governing Body**

*Discussion between Co-Chairs of the Committee and Co-Leads of the Working Group*

**(10.45 – 11.15)**

*Coffee break*

**(11.15 – 13.00)** *(closed session)*

➤ **Continued Exploration of Proposals: Way Forward to the Governing Body Session**

*Discussion between Co-Chairs of the Committee and Co-Leads of the Working Group*

**(13.00-14.00)**

**Working lunch**, hosted by H.E. Gerda Verburg, the Ambassador of The Netherlands to the Rome-based Agencies

*(location: Restaurant La Villetta, Viale della Piramide Cestia 53, 00153 Rome; tel: 06-575-0597)*

**(14.00-14.15)**

**Summary and closing**

**Dr. Javad Mozafari, Chairperson of the Fifth Session of the Governing Body**

*H.E. Gerda Verburg, the Ambassador of The Netherlands to the Rome-based Agencies*

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\* As requested by the Co-chairs and Co-leads at their first meeting, the following additional experts have been invited and will be available to contribute their expertise as required. They will be available during specified time windows (some only by teleconference):

- H.E. Gerda Verburg, Ambassador of the Netherlands to Rome-based Agencies
- Dr. Peter Button, Vice Secretary-General, Union for the Protection of New Plant Varieties
- Dr. Carlos Correa, Professor of Law and Economics, University of Buenos Aires (tbc)

**Annex 6****List of participants in the second closed meeting of the Co-Chairs of the Committee and the Co-leads of the Working Group, including additional invited experts**

Rome, FAO Headquarters, 22 March 2013

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*Appendix 4*

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**A PROPOSAL FOR A FLEXIBLE BENEFIT SHARING APPROACH,  
PREDICTED BY THE TREATY**

**Background**

1. Recalling article 13.2d (ii) of the International Treaty:

*“13.2d.ii) The Contracting Parties agree that the standard Material Transfer Agreement referred to in Article 12.4 shall include a requirement that a recipient who commercializes a product that is a plant genetic resource for food and agriculture and that incorporates material accessed from the Multilateral System, shall pay to the mechanism referred to in Article 19.3f, an equitable share of the benefits arising from the commercialization of that product, except whenever such a product is available without restriction to others for further research and breeding, in which case the recipient who commercializes shall be encouraged to make such payment.*

*The Governing Body shall, at its first meeting, determine the level, form and manner of the payment, in line with commercial practice. The Governing Body may decide to establish different levels of payment for various categories of recipients who commercialize such products; it may also decide on the need to exempt from such payments small farmers in developing countries and in countries with economies in transition. The Governing Body may, from time to time, review the levels of payment with a view to achieving fair and equitable sharing of benefits, and it may also assess, within a period of five years from the entry into force of this Treaty, whether the mandatory payment requirement in the MTA shall apply also in cases where such commercialized products are available without restriction to others for further research and breeding.”*

2. It is obvious that this article has been built based on the following principles:
- a) Commercialization of PGRFA products can take place in one of the following categories, each carrying different levels of restriction for others in accessing and reproducing that product, based on the type of protection that they have:
    1. with no plant variety protection and can be reproduced without restriction by others, therefore no benefit (royalty) is collected;
    2. protected by Plant Variety Protection based on Breeder Rights (BR), which is restricted for reproducing by others but not for further research and breeding;
    3. protected by Patent, and restricted for both reproducing as well as research and breeding.
  - b) Clearly, benefits are accrued form the PGRFA products type 2 and 3 above. Therefore, regardless of the type of protection that a product might have, it is logical for the benefits arising from the commercialization of that product to be shared by the Multilateral System, which has provided the original genetic resources.
  - c) Although, at that time, benefit-sharing was seen as mandatory for type 2 products, contracting parties were strongly asked to encourage such recipients to also pay, with the wording: “in which case the recipient who commercializes shall be encouraged to make

such payment”. Such encouraging measures have yet to be developed by the Treaty’s Governing Body.

- d) Recognizing “various categories of recipients who commercialize such products” requires the “Governing Body to establish different levels of payment for various categories”.
- e) As “achieving fair and equitable sharing of benefits” is the basic goal of this article, the Treaty not only envisaged “from time to time to review the level of payment”, but also to “assess whether the mandatory payment requirement in the MTA shall apply also in cases where such commercialized products are available without restriction to others for further research and breeding”.

### **The current situation and changing trends**

3. Many developments have taken place during the last ten to fifteen years in the areas of genetic resources policies, IPRs, establishment of relevant new international instruments, and economic trends which have impacted commercialization practices in protecting and marketing new varieties of PGRFA products. For instance:

- a) At the time when the treaty was negotiated, based on and in harmony with the CBD, including the concepts of biotechnology-driven IPRs, attention was mainly focused on patented products and benefits arising from such products. The tendency towards more restrictive IPRs (namely patents) was even emerging in UPOV, reflected in its 1990 Act. However, with the entry into force of the Treaty, and the establishment of its new facilitated access and benefit sharing mechanism, the interest of plant breeding sector in restrictive IPRs started to shift towards the conventional plant variety protection system, for which benefit-sharing was not mandatory in the Treaty, in order to bypass the benefit-sharing obligations-
- b) Presently, most countries that are issuing restrictive IPRs (patent) on PGRFA products are not Contracting Parties to the Treaty, while Parties to the Treaty mainly practice conventional PVP, for which benefit-sharing was not foreseen as mandatory. Therefore, no tangible benefit is accrued, and the Benefit-sharing Fund of the Treaty is lagging far behind the projected level of resources, indicating that despite the existing functional benefit-sharing mechanism, it is not delivering.
- c) Based on the facts stated above, it is now necessary to consider possible new and innovative approaches for benefit sharing under the Multilateral System, in responding to the present situation. Such an approach is already foreseen in the last sentence of Article 13.2d (ii) of the Treaty.

### **The proposal for an innovative benefit-sharing approach, as authorized by the Treaty**

4. This benefit-sharing approach is based on the categories of commercialization, logic and the principle of the equitable sharing of benefits reflected in Article 13.2d (ii) of the Treaty and Article 6.7 of the SMTA. Therefore, it is requested that this proposal, including the following categories of benefit-sharing, be brought to the attention of the Governing Body for its considerations:

- a) No mandatory payment on new PGRFA products, when they are available for multiplication, research and breeding by others without restriction.

- b) Any commercialized PGRFA products that is restricted for multiplication or research and breeding by others is subject to mandatory payment.
- c) The level of payment for commercialized PGRFA products that are available for further research and breeding by others without restriction should be relatively lower.

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*Appendix 5*

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**BASIC CRITERIA FOR APPROVAL OF PARTNERS**

1. The development of partnerships is a highly context-driven, case-sensitive, complex and case-by-case specific exercise, where the building of each partnership depends on a wide variety of shifting institutional, programmatic, financial and management factors. However, in order to ensure that these partnerships adhere to the processes and procedures established by the Governing body, a set of basic criteria is listed below which will guide the process of potential partner organisation vetting and partnership building.

2. The criteria are disaggregated by the type of partnership i.e. for partners that will act as implementing entities and partners that will act as donors. Both types of partnerships are distinct in nature and therefore the various aspects that need to be given careful consideration also vary significantly.

Partners Acting As Donors:

- a. *Track Record:* Is the donor agency a reputable organisation with a good track record in its area of focus?
- b. *Implications:* Would a partnership with the donor agency have any positive and adverse strategic, programmatic or political implications for the Treaty?
- c. *Strategic Objectives:* Does an alignment exist between the strategic objectives of the donor agency and those of the International Treaty?
- d. *Conditions:* Are there any conditions that the donor is likely to impose which will not comply with the rules and regulations set out by the Governing body of the International Treaty?
- e. *Allocation of Funds:* Are the funds un-earmarked or is the donor pre-allocating funds towards specific activities/windows or projects? In case of the latter, a convergence of strategic objectives should be reconfirmed and careful cost benefit analysis should be carried out.
- f. *Future Prospects:* Is there scope for collaboration with the agency in the future?

Partners Acting as Implementing Entities

- a. *Track Record:* Is the implementing organisation a reputable organisation with a good track record in its area of focus?
- b. *Capacity:* Does the organisation have the technical capacity to deliver high quality projects?
- c. *Strategic Objectives:* Is there synergy between the strategic objectives of the organisation and the strategic objectives of the Treaty?
- d. *Implementation:* Does the implementing organisation work in partnership with national counterparts?
- e. *Added Value:* Beyond the quality of the projects, does the partnership enhance or potentially damage the image/reputation/profile of the Treaty?
- f. *Overhead Costs:* Are the overhead costs charged by the implementing agency within acceptable limits?

- g. *Risk Management*: Does partnering with the organisation reduce the level of risk involved in managing a multimillion dollar fund?
- h. *Monitoring*: Does the organisation have in place a robust system of monitoring projects to ensure quality, accountability and transparency throughout the life of the project?
- i. *Co-financing*: Is the organisation willing to invest its own funds in the project as co-financing to enhance impact and demonstrate commitment and ownership?
- j. *Other Benefits*: Is the organisation willing to participate in joint resource mobilization with the Treaty?

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*Appendix 6*

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**PROCESS FOR THE ESTABLISHMENT AND MONITORING  
OF PARTNERSHIPS**

1. The following standard steps or stages are envisaged:
  - *Initial identification of partners:* this identification process by the Secretariat involves desk-based research, provisional partnership prospecting, initial contacts and exploratory discussions, discussions at relevant meetings or events, inviting the organisations to Treaty events to showcase their work etc.
  - *Identification of common strategic objectives:* once the organisation is identified, a careful review of its mandate and strategic objectives is undertaken by the Bureau or a Committee mandated by the Governing Body to ascertain the possibility of an alliance.
  - *Identification of areas of collaboration:* this involves detailed and intensive discussions with the potential partners to identify possible areas for collaboration by the Bureau or a Committee mandated by the Governing Body.
  - *Assessment of “value added”:* the next step in further defining the potential partnership involves identifying synergies and how each partner could benefit, including any cost-benefit analysis, from a collaboration by the Bureau.
  - *Guidance from the Contracting Parties on further development of the partnership:* at this stage once the basic parameters of a potential partnership are identified, guidance, clearance and advice is sought from the Committee to further develop the partnership.
  - *Articulation of results and clear definition of roles and responsibilities of each partner:* a key step in the partnership development process, that normally involves detail-intensive consultations, is focused on defining mutually agreeable partnerships objectives and results as well as defining the role of each partner. This also includes developing a system for regular partnership review, joint event hosting, joint resource mobilization, if relevant, etc.
  - *Preparation of draft Memorandum of Understanding (MoU):* this process also involves detailed consultations and requires a significant amount of time and effort to conclude. Legal teams from both organizations are included in the discussion to ensure that the draft agreement adheres to the operational rules and procedures of both partners.
  - *Submission of the draft Memorandum of Understanding to the Bureau:* once the legal teams provide clearance on the content of the draft MoU, it is then shared with the Bureau for final approval by the Governing Body or any intersessional body mandate by the Committee.
  - *Signing of the agreement* between the partner institution and the Treaty.
  - *Monitoring of partnerships:* the Governing Body will regularly review the progress made in the development of partnerships for the Benefit-sharing Fund including the monitoring of established partnerships.

