I. INTRODUCTION

1. The Working Group, at its eighth meeting, prepared an updated version of the draft revised SMTA, as contained in the Annex to the Report and reproduced in the document, IT/OWG-EFMLS-9/19/3, which it decided to further consider at its ninth meeting.

2. Therefore, building on all the efforts made by the Working Group during the last three biennia, considering the submissions received from Contracting Parties and stakeholders and advice by the Standing Group of Legal Experts (SGLE), as well as taking into account the discussions during the informal consultations, the Co-chairs drafted the Co-chairs’ proposed draft revised SMTA, as given in the document IT/OWG-EFMLS-9/19/4 Add.1.

3. In this document, the Co-chairs provide further information and explanations on the options chosen and revisions made, including rationales and reasons behind their proposals.

4. The basis for this draft proposal by the Co-chairs is the updated version prepared by the Working Group at its eighth meeting, as contained in the document, IT/OWG-EFMLS-9/19/3, Draft Revised Standard Material Transfer Agreement: Proposal by the Working Group, at its eight meeting. As in previous versions of draft revised SMTAs proposed by the Co-chairs, changes are indicated as follows:
   1. Text deleted is indicated as struck through.
   2. Text inserted is indicated by double underlining.
   3. [Square brackets] indicate either text that has not been agreed, or alternative versions of text.

5. In order to facilitate the discussions and following advice received during the informal consultations, lines in the Co-chairs’ proposed draft revised SMTA were numbered, restarting at each page. Given that the lines and text vary in the different language versions, only the English text of the document contains numbered lines.

6. The Working Group previously wished to improve the placement of the Subscription System within the structure of the SMTA, to give the correct prominence to the Subscription System. Article 6.11 had accordingly been placed before Articles 6.7 and 6.8. The Co-chairs followed this approach and did not renumber the Articles, in order to avoid creating undue confusion.
7. As a further source of information, this document contains various Appendixes, providing further background information and possible options for the revision of the draft revised SMTA prepared by the Working Group at its eighth meeting¹, as follows:

- Appendix 1: ENHANCING FAIR AND EQUITABLE MONETARY BENEFIT-SHARING
- Appendix 2: WITHDRAWAL AND TERMINATION
- Appendix 3: ENFORCEABILITY
- Appendix 4: OVERVIEW OF OTHER [BRACKETED] PROVISIONS IN THE DRAFT REVISED SMTA
- Appendix 5: DEFINITIONS (ART. 2) AND LEGAL READING

8. These Appendixes therefore relate to the SMTA arising from the eighth meeting of the Working Group, as contained in the document IT/OWG-EFMLS-9/19/3, and provide some further information on the options chosen by the Co-chairs when drafting their proposed revised SMTA contained in the document IT/OWG-EFMLS-9/19/4 Add.1.

II. ENHANCING FAIR AND EQUITABLE BENEFIT-SHARING

Access and payment mechanisms

9. The Co-chairs opted to keep both the Subscription System and the “single access mechanism” in the revised SMTA, as there seems to be firm opposition by a number of Working Group members to an SMTA that would contain only a Subscription System. The Co-chairs note that creating conditions for the Subscription System to be attractive to potential users could be reached by defining payment rates and other SMTA conditions (for example withdrawal or expiration clauses) differentiating between the two access mechanisms. Therefore, the Co-chairs kept Article 6.11 to 6.11ter as well as Annex 4 (Registration Form).

10. The Co-chairs note the importance to the Working Group of establishing differentiated payment rates in case of a dual access system and there seem to be consensus that the differentiation of rates should be significant, to make the Subscription System attractive to potential users.²

11. The Co-chairs decided to rename the access mechanism under Articles 6.7 and 6.8 “single access system” instead of “single access option” or “single access mechanism”, which were used previously. Neither of the terms is used in the revised SMTA, except for a bracketed proposal made at one of the informal consultations on a possible alternative heading for Annex 2 that makes reference to the term.

12. Following the advice received at the informal consultations, the Co-chairs propose to delete the possibility for the Recipient to opt for the Subscription System through EasySMTA. Given the importance and longer-term implications of the decision to opt for the Subscription System (Art. 6.11) the Co-chairs suggest that the Registration Form (Annex 4) must be signed and sent to the Governing Body through the Secretary. Article 6.11 of the revised SMTA and Article 1.2 of Annex 3 were changed accordingly.

Monetary benefit-sharing under the Subscription System

13. Based on the discussions held at the eighth meeting of the Working Group and advice received during the informal consultations, the Co-chairs would prefer to use the second alternative of Articles 3.1ALT and 3.2ALT, providing for concise language and a single payment rate under the Subscription System.

14. However, the Co-chairs’ impression from their informal consultations is that at least one Contracting Party still supports a differentiation of payment rates under the Subscription System

¹ IT/OWG-EFMLS-9/19/3.
² See for example IT/OWG-EFMLS-7/17/Report, paras. 10 and 14.
based on the level of access restriction. Therefore, the first alternative of Articles 3.1ALT and 3.2ALT of Annex 3 was still kept as a second possible option for structuring payments under the Subscription System, together with Art. 3.2BIS. The Co-chairs think that this option would equally address the user requests for simplicity, by allowing users to choose the higher rate voluntarily so that a single rate would apply, if that should, for example, facilitate bookkeeping and accounting. At the same time, a differentiation of rates based on access restrictions would still be possible.

15. The Co-chairs strongly encourage the Working Group to work towards reaching a compromise on this element, considering possible agreement in other areas of the revised SMTA.

16. Participants in the informal consultations also advised on limiting the “Sales” in Article 3 of Annex 3 and related provisions of the SMTA to apply (only) to PGRFA covered by the provisions of the Multilateral System or to PGRFA listed in Annex I of the Treaty. The Co-chairs invite further discussions on these two options, which were both included in the revised SMTA, at this meeting.

17. Further discussions will also be needed on the consequences of this limitation for the use of the revised SMTA by the IARCs of the CGIAR for PGRFA other than those listed in Annex I (Article 15.1b), and the respective payment obligations.

18. Regarding exemptions from payment (Article 3.3 of Annex 3), the Co-chairs kept the first alternative as the simpler solution that seems to be supported by the majority of Working Group members. As a consequence of opting for Article 3.1ALT (either of the two alternatives), which provides that payments shall be made based on Sales, further technical changes/deletions were made in the proposed Article 3.3. Moreover, provision for a declaration by the Subscriber was added in Article 3.5 of Annex 3 (on reporting) and Article 10 of the SMTA (an option to make the declaration at the time of signing or accepting the SMTA), drawing on advice the Co-chairs received during the informal consultations.

19. Regarding reporting (Article 3.5 of Annex 3), the Co-chairs also used inputs received at the informal consultations about the statements of account to be submitted by the Subscriber on a yearly basis, which now shall include information about the “source of the verifiable information provided” (3.5c). The Co-chairs noted support for adding the word “financial” before “year” (Articles 3.4 and 3.5 of Annex 3).

**Monetary benefit-sharing under the “single access system”**

20. The Co-chairs believe that consensus is emerging on making all payments in the revised SMTA mandatory, while certain conditions would need to be met (notably differentiated rates of payment, including to accommodate different needs of users) and a willingness to compromise in other areas of the package of measures would need to be shown by Working Group members.

21. Nevertheless, the Co-chairs were advised by the informal consultations to still keep both alternatives of Articles 6.7 and 6.8, as well as both alternatives of Annex 2 in their proposed draft revised SMTA, as a basis for further negotiations.

22. For the first alternative (the SMTA would only provide for mandatory payments), following constructive suggestions received on perpetual payment obligations under the revised SMTA, the Co-chairs deleted the provision for a time-bound expiration of the payment obligations in Article 6.7 and inserted the clarification “for the period for which the restriction is applicable”, as opposed to Article 6.8, where the time-bound expiration was kept. The reason for this is that the Co-chairs understand that payments under Article 6.7 would only have to be made as long as access to the Product is restricted. Since this would not be the case for the first alternative of Article 6.8, however, the expiration was kept in Article 6.8, so as to avoid perpetual payment obligations for Products that are available without restriction to others for further research and breeding. Therefore, this would help to avoid an undue unequal treatment between Articles 6.7 and 6.8 (first alternative).

23. The Co-chairs noted the strong support by the vast majority of participants in the informal consultations to keep only the first alternative of Articles 6.7 and 6.8 and Annex 2, so that the revised SMTA would only provide for mandatory payments.
24. The Co-chairs requested advice from the SGLE on the definitions of “Sales”, “to commercialize” and “affiliate”. Considering the advice provided by the SGLE in its Opinions 14 and 15, and the discussions at the informal consultation, consensus seems to emerge on the trigger for payments under Articles 6.7 and 6.8, namely the commercialization by the Recipient or any of its affiliates. The Co-chairs accordingly adapted the language in Articles 6.7 and 6.8 as well as in Annex 2.

25. The terms “annual” and “each year” were added in Annex 2 for clarity, as suggested during the informal consultations. In order to avoid duplication and to keep Articles 6.7/6.8 concise, the terms were not added in Articles 6.7/6.8.

26. The revised language proposed by the North America region at the eighth meeting of the Working Group was included in Annex 2, in brackets and slightly revised on the basis of discussions at the informal consultations. At the request of a participant at the informal consultations, an additional provision on Farmers’ Rights was included as Article 3d) of Annex 2 (Option 1) and Article 1.e) of Annex 2 (Option 2), for consideration and discussion of the Working Group.

27. Regarding reporting on Sales, the Co-chairs also used inputs received at the informal consultations about the reports to be submitted by the Recipient on a yearly basis, which now shall include information about the “source of the verifiable information provided” (Article 5.d of Annex 2 for Option 1; Article 3.d of Annex 2 for Option 2).


III. WITHDRAWAL AND TERMINATION

Withdrawal and termination under the Subscription System

29. A provision was inserted on the use of the Material after withdrawal from the Subscription System (Article 4.3), drawing on the language in Article 9.4 of the revised SMTA.

30. The discussions at the informal consultations on the surviving obligations (Articles 4.3 to 4.xbis of Annex 3) were constructive. The Co-chairs were advised to list all obligations that should survive withdrawal, so that no special provisions would need to be made for PGRFA under Development.

31. Following these discussions, the Co-chairs revised Article 4.4 of Annex 3. Reference to Articles 6.4 (obligation to transfer the Material with an SMTA), 6.9 (making available to the Multilateral System all non-confidential information resulting from research and development on the Material) and 6.10 (obligation to pass on the benefit-sharing obligations in case of a transfer of IPRs on the Product) were added to the list of surviving obligations. Moreover, given the discussions on enforceability of the SMTA and in order to ensure that the withdrawal would not negatively impact the third party beneficiary in its capacity to enforce compliance with the provisions of the SMTA, the revised Article 4.4 of Annex 3 now also includes reference to Articles 4 (third party beneficiary) and 8 of the SMTA (dispute settlement).

32. Regarding the continued benefit-sharing obligations (Article 4.4 of Annex 3), the Co-chairs noted an emerging compromise on the two years after the end of the Subscription, although the level of the payment rates is expected to have an important influence on the final decision. The Co-chairs also considered the conclusion of the Friends of the Co-chairs on a Termination Clause, emphasizing the conceptual link between the minimum Subscription term and the continuing benefit-sharing payment obligation and advising that the longer the Subscription term the shorter the payment obligation after withdrawal and vice versa.

33. The Co-chairs decided to revise Article 4.5 of Annex 3 (termination) by using language contained in Article 10 of the Co-chairs’ proposed consolidated text of the Revised Standard.

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3 IT/OWG-EFMLS-9/19/Inf.4, Report of the Standing Group of Legal Experts: Outcomes of the fourth meeting.
**Material Transfer Agreement**, in order to accommodate advice received during the informal consultations on the role of the Governing Body and on the consequences of termination, as well as advice from the SGLE (Opinion 17). Therefore, in the revised Article 4.5 of Annex 3, the third party beneficiary would be given the right to terminate a Subscription, claim damages and terminate the Subscriber’s right to access material under the Subscription Terms by excluding them from opting for the Subscription in the future.

**Withdrawal, termination and expiration of obligations under the “single access system”**

34. The Co-chairs noted that the draft revised SMTA currently contains a number of provisions that bring obligations under the SMTA to an end or that provide for rights towards this effect. These provisions are partly overlapping or duplicative. Therefore, and based on the constructive discussions and advice received during the informal consultations, the Co-chairs revised the relevant provisions in their proposed draft revised SMTA to contain the following:

1. An expiration clause for obligations related to the transfer of PGRFA under Development (Article 6.5 of the SMTA)
2. A minimum incorporation threshold with an exemption from any payments under Articles 6.7/6.8 (Article 3.(c) of Annex 2, in brackets)
3. An expiration clause for mandatory benefit-sharing payments under Article 6.8
4. A withdrawal right for the Recipient, which is possible, however, only after 30 years (Articles 9.2 to 9.4 of the SMTA)

35. The Co-chairs were advised to additionally include a minimum incorporation threshold for obligations related to the transfer of PGRFA under Development (Article 6.5e of the SMTA). This clause remains bracketed, for the time being, for the following reasons: A consensus seems to be emerging on making this obligation time-bound. However, the Co-chairs are of the view that providing an additional minimum incorporation threshold seems excessive. Such a provision would overlap with the expiration clause already provided in the same Article 6.5. The respective obligations would end in any case after [x] years. It is difficult to provide a rationale for including an additional possibility for them to end even before [x] years had lapsed, namely whenever the genetic contribution did not reach a certain threshold.

36. In this context, the Co-chairs also note that for the payment obligation under Article 6.7/6.8, the revised SMTA includes an expiration clause, a minimum incorporation threshold and a withdrawal right. Article 6.5e of the SMTA, however, only relates to an obligation of making transfer with an SMTA.

37. The Co-chairs think that this package constitutes a balanced approach and addresses the concerns expressed by users that the revised SMTA should contain an “exit clause” as a formality, while at the same time avoiding perpetual substantive obligations.

38. On the other hand, the Co-chairs believe that these changes reflect the need to balance between the two access mechanisms contained in the revised SMTA and make the Subscription System attractive to users, unless the Working Group would be able to agree on not having a withdrawal right for the Recipient at all.

**IV. ENFORCEABILITY**

39. The draft revised SMTA deals with dispute settlement in Article 8. During the informal consultations, a suggestion was made to include one of the following formulations as Article 8.d:

- [Failing such agreement, the plaintiff may avail itself of access to justice measures provided by the concerned Contracting Party under Article 12.5 of the Treaty.]
- [The Provider and the Recipient can exercise their rights and obligations provided in this Agreement by seeking recourse on the basis of Article 12.5 of the Treaty.]

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40. Other participants during the informal consultations referred to the discussions before and during the adoption of the current SMTA on the interpretation of Article 12.5 of the Treaty and whether or not an exclusive arbitration clause would be compatible with this Article.

41. In this context, the Co-chairs would like to recall the relevant advice provided by the Legal Advisor back then, which they consider to still be relevant: “On request, the Legal Advisor explained that there are two possible ways of dispute settlement, both of which are legally valid under the Treaty. The first of these is reference to national courts or other national legal forums. The second of these is arbitration, including international arbitration. A question to be considered is whether it is desirable to have a number of divergent legal opinions coming from national authorities. International Arbitration would make possible a more consistent interpretation. [...] On request, the Legal Advisor noted that it was up to the Contracting Parties to decide the opportunities for recourse to be made available, including both resort to national courts and arbitration. For the Contracting Parties, in the exercise of their sovereign rights, to provide for binding international arbitration, would not, in his opinion, be contrary to the provisions of Article 12.5. In any case, it would still be open to parties to the MTA to have recourse to national courts to enforce international arbitral decisions, should this prove necessary.”

42. The Co-chairs consider this legal advice to be still valid. International arbitration is an established mode of dispute resolution in commercial contracts, especially at the international level. Also, Article 8 does not exclude national courts from reviewing the binding nature of the SMTA, including the validity of the same Article 8, and from enforcing an eventual arbitral award.

43. Also, the Co-chairs carefully went through the SMTA and noted that Article 12.5 of the Treaty is mentioned in the following provisions:

- Article 4.2: “The parties recognize that they are subject to the applicable legal measures and procedures, that have been adopted by the Contracting Parties to the Treaty, in conformity with the Treaty, in particular those taken in conformity with Articles 4, 12.2 and 12.5 of the Treaty.”

- Preamble: “Articles 4, 11, 12.4 and 12.5 of the Treaty are borne in mind;”

44. Based on these considerations, the Co-chairs suggest having further discussions, before the proposed Article 8.d (see above) is inserted into the revised SMTA. Since there is general agreement in the Working Group that the SMTA should be an enforceable contract, possible changes to Article 8 should be supportive of this objective. This includes interpretations of Article 12.5 of the International Treaty and the possible flexibilities it provides.

45. The Co-chairs decided to delete, based on the advice received from the SGLE (Opinion 20), proposals for provisions setting forth remedies made in Articles 6.1bis and 6.2bis. As noted by the SGLE, these proposals raise the following legal problems

- A contract cannot determine the evidentiary standards for a court or arbitral tribunal to use;
- A contract cannot determine the level of the competent court;
- The third party beneficiary could challenge the intellectual property right (IPR) either through challenging the obtaining of the IPR or by challenging the ownership and validity of the IPR, before a competent body.
- If dispute settlement by the national competent court were to be included in the SMTA, this would require changes to Article 8.4;

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6 IT/OWG-EFMLS-9/19/Inf.4, Report of the Standing Group of Legal Experts: Outcomes of the fourth meeting.
- Liquidated damages could be provided for in the SMTA, but the proportionality of the damages would be subject to review by the arbitral tribunal upon request of the affected party, which the proposed draft Articles seek to exclude; and
- The whole question of legal remedies falls under Article 8 of the SMTA, including remedies for breach of Articles 6.1 and 6.2.

V. OVERVIEW OF OTHER [BRACKETED] PROVISIONS IN THE DRAFT REVISED SMTA

Overview of further revisions: Annex 3 (Subscription Terms)
46. The Co-chairs propose to keep the term “Subscription System” rather than “Subscription Option” (Article 1.1), in keeping with their decision to also call the access mechanism under Articles 6.7 and 6.8 “single access system” rather than “single access option”.
47. The Co-chairs suggest deleting the crop-by-crop Subscription, following advice received from the Friends of the Co-chairs Group on User and Crop Categories during the last biennium and recent discussions at the informal consultations (changes in Article 1.2 of Annex 3).
48. The Co-chairs propose keeping the possibility for a Subscriber to opt for the amended Subscription Terms (Article 1.4ALT of Annex 3). The Co-chairs did not change “amended” to “revised”, as proposed during the informal consultations, because the Treaty not only uses the term “amend” regarding changes to the Treaty (or its Annexes), but also in relation to changes to the SMTA in Article 15.1b as well as in Article 19.3n. Furthermore, the Treaty does not use the term “revise” in relation to changes to the SMTA.

Overview of further revisions: Annex 4 (Registration Form)
49. The reference to the crop groups was deleted (see comment above).

Overview of further revisions: Annex 1 (List of materials provided)
50. The Co-chairs only made technical and editorial changes. Since Annex 1 of the SMTA always lists the Material, the phrase “and/or Plant Genetic Resources for Food and Agriculture under Development” was deleted and the title of Article 3 was slightly adapted. Also, the Co-chairs changed “subject to domestic, or other, relevant law” back to “subject to applicable law”.

Overview of further revisions: Main body of the draft revised SMTA
51. The Co-chairs decided to delete the alternative version of Article 6.2, which includes a reference to Farmers’ Rights, because they do not see broad support for this addition. In this context, the Co-chairs also refer to their proposed consolidated SMTA arising from the Seventh Session of the Governing Body, where they included the reformulated suggestion to read “…or that limit any rights that farmers have to save, use, exchange and sell farm-saved seed/propagating material, subject to national law and as appropriate.” This is obviously for discussion at the Working Group.
52. During the informal consultations, the Co-chairs were advised to add the word “standard” before “material transfer agreement” in Article 6.4a. For consistency and in order to avoid the term “material transfer agreement” in the SMTA, the Co-chairs additionally made similar changes in Article 1.1, the title of Article 3, Article 6.5a, Article 6.5b and Article 6.6. Consequently, the revised SMTA now only contains:
   - “this Agreement” (when referring to the specific concrete contract that is signed)
   - “Standard Material Transfer Agreement” (when referring to any SMTA as provided in Article 12.4 of the Treaty)
53. The Co-chairs were advised during the informal consultations to delete in Article 6.9 (information that the Recipient shall provide, or is encouraged to provide, respectively) the phrase “after the expiry or abandonment of the protection period of an intellectual property right on a
Product that incorporates the Material”. Further editorial changes had to be made as a consequence of this deletion.

54. For Article 6.10 (intellectual property rights on a Product and benefit-sharing obligations), alternative language was added as Article 6.10 ALT, as proposed during the informal consultations, requiring the Recipient to seek the consent of the new owner of the intellectual property right to be bound to the benefit-sharing obligations as a condition for transferring the intellectual property right.

55. At the very end of Article 6, two draft Articles were inserted as proposed by one Contracting Party during the informal consultations and in its submission to the ninth meeting of the Working Group, for discussion. The SGLE provided legal advice on several aspects of one of the two draft Articles in its Opinion 21.7

56. The Co-chairs revised the language in Article 9.4 to include suggestions made at the informal consultations. The further proposal to include an obligation or possibility for the Recipient to destroy the Material and provide proof of destruction was not inserted, given the objectives of the Treaty and the Multilateral System. Concerns were also raised at the informal consultations on including Article 6.9 among the surviving obligations. However, the Co-chairs decided not to bracket the reference because two of the three provisions seem to be voluntary anyway (“encourage”) and the only mandatory provision relates to the Material, not to PGRFA under Development, further supporting the achievement of the objectives of the Treaty.

57. In Article 10, additional text was inserted as proposed during the informal consultations, on the one hand to draw the attention of the Recipient to the rights of the third party beneficiary, on the other hand to provide an opportunity for Subscribers who fall under the exemption from payments to make a respective declaration at the time of signing the SMTA. The same could be established for the click-wrap, but not for the shrink-wrap, where a different formulation had to be included, for practical reasons. An annual declaration would still be expected by Article 3.5 of Annex 3.

VI. DEFINITIONS (ART. 2), FURTHER CHANGES AND LEGAL READING

58. As suggested by participants in the informal consultations, the Co-chairs requested the International Seed Federation to provide a draft definition of the terms “Sales” and “to commercialize”. Preliminary discussions on the two definitions were held at a subsequent informal consultation.

59. The SGLE provided advice on this proposal in its Opinion 14,8 and the Co-chairs slightly adapted the proposal accordingly, for inclusion in their draft revised SMTA, in brackets. The Co-chairs now put these definitions of “Sales” and “to commercialize” to the Working Group for its consideration and possible agreement (Article 2).

60. The Co-chairs noted advice provided at the informal consultations to apply a higher rate on licence income in case the definition of “Sales” put forward by the seed industry should be agreed.

61. The Co-chairs note that different terms were used in the discussions to define the threshold, including “sales”, “revenue”, “income” and “turnover”. The Working Group is invited to consider possible alternatives, on the basis of the terms used in the context of defining the monetary benefit-sharing payments. The respective turnover figures will still need to be agreed.

62. For clarity, the term “Subscriber” could be defined in Article 2 and added to the term “Recipient” in the main body of the SMTA whenever relevant. This approach was chosen by the Co-chairs in their consolidated text for the revised STMA contained in Resolution 2/2017.

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7 IT/OWG-EFMLS-9/19/Inf.4, Report of the Standing Group of Legal Experts: Outcomes of the fourth meeting.
8 IT/OWG-EFMLS-9/19/Inf.4, Report of the Standing Group of Legal Experts: Outcomes of the fourth meeting.
The Co-chairs suggest to have a thorough discussion on all definitions in Article 2, including the proposals listed in Appendix 5 below.

The Co-chairs noted a proposal to move Article 5.c between Articles 6.4 and 6.5 (and change references in Article 6 accordingly), because they relate to the rights and obligations of the Recipient rather than the Provider, given that the term PGRFA under Development is in bold. The Co-chairs consider this as a legal-technical issue to be considered in the overall legal reading.

For clarity, the Co-chairs suggest keeping Articles 6.7/6.8 and 6.11 of the revised SMTA short, whereas all details of the respective access and payment mechanism, not applying to both of them, would be moved to the respective Annex 2 or Annex 3. A proposal for how this could be done with regard to Articles 6.7/6.8 (first alternative) and Annex 2 (first alternative), is provided in Appendix 5 below.

This could also be a general approach for restructuring the revised SMTA to make it more user-friendly, once agreement is reached on all issues, so that the main body of the revised SMTA would contain those provisions that apply to both access and payment mechanisms, whereas all details would be contained in the respective Annexes.

The Co-chairs suggest, as the last step in the revision of the SMTA, a thorough overall legal reading and drafting of the revised SMTA before it is transmitted to the Governing Body for adoption.
ENHANCING FAIR AND EQUITABLE MONETARY BENEFIT-SHARING

1. It is in this area that the Working Group was able to make the most progress at its last meeting. A number of brackets were lifted, whereas solid and concrete alternative text was incorporated for some other provisions.

Overview of access and payment options in the draft revised SMTA

2. Besides the Subscription System as a primary access and payment option, the current draft revised SMTA\(^9\) still contains a “single access option”. Both the Subscription System and the “single access system” are set forth in Article 6 of the draft revised SMTA, with details provided in Annex 2 or Annex 3, respectively.

Figure 1: Access and payment options in the draft revised SMTA

3. The Working Group still needs to agree which of these alternatives to retain, with the basic decision being on whether to keep a single access option in the revised SMTA. Although the majority of Working Group members seems to be willing to keep a single access option, others favour finalizing this question only once the details of the Subscription System is fully agreed.

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\(^9\) IT/OWG-EFMLS-8/18/Report.
**Monetary benefit-sharing provisions under the Subscription System**

4. On the details of the benefit-sharing provisions, the Co-Chairs suggest starting with the Subscription System first, before turning to the “single access option”, similar to the approach followed at the eighth meeting of the Working Group.

5. The monetary benefit-sharing provisions under the Subscription System are contained in Article 3 of Annex 3 and in Articles 6.11 (or 6.11 to 6.11ter, respectively) of the draft revised SMTA.

6. These provisions are closely connected to the definitions in Article 2, especially of the terms “Sales”, “Products” and “to commercialize”.

7. The Working Group has discussed, with advice received from the Friends of the Co-chairs Group on Access Mechanisms and Payment Rates and inputs received in the form of submissions, the need to avoid loopholes while not making the payment provisions too complex and not creating an excessive obligation for the Subscriber to monitor the activities of their contract partners.

8. Based on these principles, the Working Group developed the following formulations and now needs to find a compromise on which of the options to retain.

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**SUBSCRIPTION SYSTEM:**

**MONETARY BENEFIT-SHARING**

*Art. 6.11 ➔ Annex 3 ➔ Art. 3*

**PAYMENT**

- **Option 1**
  *Art. 3.1 and 3.2*
  - Differentiated payment rates

- **Option 2**
  *Arts. 3.1 ALT, 3.2 ALT (first alternative)*
  - Shorter than Art. 3.1 by referring to “Sales”
  - Differentiated payment rates

- **Option 3**
  *Arts. 3.1 ALT, 3.2 ALT (second alternative)*
  - As Option 2, but only one payment rate

- **Art. 3.2 BIS**
  - Subscriber may choose to pay the higher payment rate voluntarily
<table>
<thead>
<tr>
<th>Option 1</th>
<th>3.1 In order to share the monetary benefits from the use of <strong>Plant Genetic Resources for Food and Agriculture</strong> under the Treaty, the <strong>Subscriber</strong> shall make annual payments based on the Subscriber’s sales, [technology fees] and licensing fees of/for products that are <strong>Plant Genetic Resources for Food and Agriculture</strong> belonging to the same crops that are subject to the <strong>Subscription</strong>, and on income that the <strong>Subscriber</strong> receives from its affiliates, contractors, licensees and lessees, in the preceding year.</th>
</tr>
</thead>
</table>
|  | 3.2 The rates of payment shall be as follows, less thirty percent (30%):  
|  | (a) For [ **Products** and any other products] available without restriction to others for further research and breeding: [xx] percent;  
|  | (b) For [ **Products** and any other products] not available without restriction to others for further research and breeding: [yy] percent] |
| Option 2 | 3.1 ALT The **Subscriber** shall make annual payments based on the **Sales**. |
|  | 3.2 ALT The following rates of payment shall apply to **Sales**:  
|  | [xx]% when the **Products** or products are available without restriction, and  
|  | [yy]% when the **Products** or products are not available without restriction. |
| Option 3 | 3.1 ALT The **Subscriber** shall make annual payments based on the **Sales**. |
|  | 3.2 ALT The applicable rate of payment in relation to **Sales** shall be [zz]%.

**N.B.:**  
Definitions in Article 2 to be considered, especially “Sales”, “Products” and “to commercialize”.

For options on definitions see above Chapter VI. and below Appendix 5.

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[3.2 BIS At the request of the **Subscriber**, the higher rate of payment shall apply to **Sales** without distinction.]

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**Figure 2: Monetary benefit-sharing under the Subscription System (1): payments**
9. The Co-chairs suggest opting, whenever possible without losing content, for the simpler language in the draft revised SMTA.

10. Discussing these provisions may need close consideration of the elements for a definition of the term “Sales”, given that much of the substantive information on the payment obligation would be contained there. However, since consideration of the definition of “Sales” would be linked to other definitions, the Co-Chairs would prefer discussing all definitions together, once the discussions advance on the main questions of the revised SMTA.

---

**Figure 3: Monetary benefit-sharing under the Subscription System (2): exemptions**

<table>
<thead>
<tr>
<th>Option 1</th>
<th>Art. 3.3</th>
</tr>
</thead>
<tbody>
<tr>
<td>[3.3] Notwithstanding the above, no payment shall be required for a <strong>Subscriber</strong> in a year in which its [declared] <strong>Sales</strong> [total sales and license fees referred to under Articles 3.1] do not exceed US$ [xxx].]</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Option 2</th>
<th>Art. 3.3 ALT</th>
</tr>
</thead>
<tbody>
<tr>
<td>[3.3 ALT] Notwithstanding the above, in a year in which its payments due on declared <strong>Sales</strong> referred to in Article 3.1 do not exceed [US$ 1,000], the <strong>Subscriber</strong> may defer payment, in consecutive years, until it has accumulated up to the sum of [US$ 1,000] due and payable.]</td>
<td></td>
</tr>
</tbody>
</table>
11. For the exemption from payments, there was not much support for Option 2 at the eighth meeting, but rather there were statements from Working Group members emphasizing the additional administrative burden that monitoring of Option 2 would require. Also, the Co-chairs noted support by the majority of Working Group members and stakeholder groups for sticking to a numerical definition of a “small” farmer, although the amount might have a different meaning in different contexts.

12. For the reporting, there is need to strike a balance between the goal of establishing a lean and workable system, not requiring overly burdensome bureaucratic processes, and the need to monitor compliance with the obligations we set for the enhanced system.

13. A number of further brackets in Article 3 of Annex 3 relate to technicalities still requiring agreement by the Working Group. It is suggested to review them once there is agreement on the main issues of Article 3.

14. In order to move rapidly, the Co-Chairs will suggest identifying the paragraphs that could be cleaned up easily, where agreement can be found easily, and discuss how to address other paragraphs further, where agreement seems more difficult.
Monetary benefit-sharing under the “single access system”

15. For monetary benefit-sharing under the “single access system”, if the Working Group should decide to retain it, there is the outstanding main decision still to be made on whether or not to apply the mandatory payment provision also for Products that are available without restriction to others for further research and breeding. Therefore, the draft revised SMTA proposed by the Working Group at its eighth meeting contains two clear options.

<table>
<thead>
<tr>
<th>Payment</th>
<th>Exemptions</th>
<th>Payment modalities</th>
</tr>
</thead>
</table>
| • *Art. 3.1*:  
  • "[technology fees]"
| • *Art. 3.3*  
  • "[declared]"
  • "[Sales]"
  • "[total sales and license fees referred to under Article 3.1]"
  • actual amount
| • *Art. 3.4*  
  • "[financial]"
| • *Art. 3.2*  
  • "[Products and any other products]"

*Figure 5: Overview of further brackets in Article 3 of Annex 3 (monetary benefit-sharing under the Subscription System)*
16. The Co-chairs believe that consensus is emerging on the first option. They think that the majority of the members could agree on this option if other members equally showed their flexibility in other areas of the package of measures.

17. The Co-Chairs would suggest re-considering the wording of Annex 2 in light of any agreement we will be able to reach on Annex 3, so that both Annexes would be aligned. This suggestion is to refer not to conceptual questions, but rather only to technicalities like the level of detail of the payment clause, avoiding an overlap (and possible contradictions) between the definitions in Article 2 and the payment clause etc.

18. The Co-chairs suggest dealing with the proposal of a minimum incorporation threshold in Annex 2 (Art. 3c and Art. 1d, respectively) in the context of the discussions on “withdrawal/termination” (see below). Also, they suggest having a separate discussion on the payment rates (see below).

19. Only two other brackets still remain in Annex 2, both relating to reporting. The Co-Chairs suggest reviewing them once there is agreement on the main issues of Annex 2 and align the language of Annex 2 with that of Annex 3.

Figure 6: Monetary benefit-sharing under the “single access option”
Payment rates

20. One of the outstanding elements of the benefit-sharing provisions is the payment rates, both for the Subscription System and for the single access option. The Working Group did not discuss payment rates at its eighth meeting.

21. Although the contact group at the Seventh Session of the Governing Body did not address the payment rates, it stressed their importance in realizing effective benefit-sharing. The Working Group in its report to the Governing Body noted the need to set differentiated payment rates. Such differentiation of rates was identified as one of the key issues to take into account in making the Subscription System more attractive (IT/GB-7/17/07 Add.1, Report of the Seventh Meeting of the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System, para. 14).

22. For its meetings in the previous biennia, the Working Group had before it several documents, reports and tools on the question of how to define and balance the payment rates under the revised SMTA, including the following:

- **IT/OWG-EFMLS-2/14/3**, Synoptic Study 1: Estimating Income to Be Expected from Possible Changes in the Provisions Governing the Functioning of the Multilateral System (see in particular the chapters The Parity Point: describing the dynamic inter-relation of Articles 6.7 and 6.11, at paras. 12-24, and The attractiveness of the Innovative Approaches, at paras. 80-81);

- **IT/OWG-EFMLS-6/17/Inf.4**, Second Report from the Friends of the Co-chairs Group on Access Mechanisms and Payment Rates (see especially the chapter Can rates for both a single sample access option and a Subscription System be balanced?, paras. 16-20);

- A background note that the Friends of the Co-chairs Group on Access Mechanisms and Payment Rates considered at its second meeting, *Balancing payment rates between options*;

- **IT/OWG-EFMLS-5/16/Inf.5**, Report from the Friends of the Co-chairs Group on Access Mechanisms and Payment Rates, paras. 27-34);

- A computer tool for the calculation of rates under different scenarios, with explanations and background information contained in the document, **IT/OWG-EFMLS-4/15/4**, Commentary on Structural Elements for the Development of a Subscription Model/System (e.g. in chapter 3: A hypothetical calculation of rates, paras. 25-28).
**Level of payment/income**

23. So far, the Working Group has not considered or discussed levels of payment in terms of monetary benefit-sharing. Targets for income generation through the Multilateral System have not been established yet, and this is an important area for liaison between the Working Group and the *Ad Hoc* Committee on the Funding Strategy and Resource Mobilization during this biennium.


25. In the last biennium, the Co-chairs received a declaration of commitment signed by 23 seed companies (expanded to 41 by the Seventh Session of the Governing Body). These companies, which are based in Asia, Europe and North America, expressed their intention to become subscribers under the enhanced Multilateral System, provided that certain business critical conditions would be met. The declaration did not provide a projection of possible income arising from its signatories becoming Subscribers under the enhanced Multilateral System.

26. It is to be noted that the Governing Body requested the Working Group to continue to liaise closely with the *Ad Hoc* Committee on the Funding Strategy and Resource Mobilization (Committee) in its review of the Funding Strategy. The Committee during the last biennium recognized that its work is closely related to the work of the Working Group, especially when identifying a funding target for the Benefit-sharing Fund, and it acknowledged that in order to meet the target for the Benefit-sharing Fund, both user-based income and contributions from Contracting Parties would be necessary.
1. The draft revised SMTA arising from the eighth meeting of the Working Group contains several draft provisions that bring obligations under the SMTA to an end, namely expiration clauses, withdrawal possibilities for the Subscriber/Recipient and a termination possibility for the Governing Body. An overview is provided in the following figure and more details are provided below.

![Overview of withdrawal/termination/expiration clauses in the draft revised SMTA](image)

**Figure 8: Overview of withdrawal/termination/expiration clauses in the draft revised SMTA**

2. The Co-chairs note that there seems to be a general agreement in the Working Group that the revised SMTA should contain a withdrawal clause for the Subscriber and, possibly, another one for the Recipient under the “single access option”.

3. It is suggested to focus on the Subscription System first, before moving to the relevant provisions in the other parts of the revised SMTA.
Withdrawal and termination under the Subscription System

4. The specific withdrawal and termination clauses for the Subscription System are contained in Article 4 of Annex 3 of the draft revised SMTA.

5. Considering the various brackets contained in Articles 4.3 to 4.xbis, the Co-chairs worked out the following options for those issues that still require a decision by the Working Group.

N.B.:
- Special withdrawal option in Art. 4.xbis (no notice period, special consequences).
- Art. 4.xbis has not been discussed by the Working Group.
Figure 10: Withdrawal under the Subscription System

Surviving obligations

*Arts. 4.3 to 4.x bis (with [brackets])*

Monetary benefit-sharing obligation

- **Option 1**
  - Will continue for 2 years from the end of the Subscription
  - *Art. 4.3*

- **Option 2**
  - Will continue for 5 years from the end of the Subscription
  - *Art. 4.3*

Other obligations

- **Option 1**
  - All other provisions will survive (except 6.7/6.8).
  - *Art. 4.3*

- **Option 2**
  - Only Arts. 6.1, 6.2, 6.3 and 6.9 continue to apply.
  - *Art. 4.3*

Special provisions for PGRFAuD:

- Only Arts. 6.1, 6.2, 6.3 and 6.9 continue to apply
- Only for a certain number of years

*Arts. 4.4 and 4.4 ALT*

N.B.:
- An alternative formulation for this option is provided in *Art. 4.x*, which explicitly mentions other SMTAs signed during the Subscription term.

N.B.: *Art. 4 of Annex 4* does not stipulate what happens with the material received during the Subscription term, whereas this is provided for in *Art. 9.4 of the revised SMTA* for the “single access option”.

Figure 10: Withdrawal under the Subscription System
6. Article 4.5 provides for a possibility for the Governing Body to terminate a Subscription in case of (serious) non-performance by the Subscriber. This Article is drafted as a placeholder based on the intention to keep a balance between rights of the Subscriber (to withdraw) and rights of the Governing Body or the Multilateral System (to bring a Subscription to an end in case of a material breach by the Subscriber of their obligations). One of the reasons for this clause was the fact that the Governing Body does not have a possibility to change the Subscription Terms once Subscription has taken effect, for example to adapt them to a changing environment or changing circumstances. The Subscription Terms will be in effect forever, unless the Subscriber decides otherwise (Art. 1.4).

![Figure 11: Termination under the Subscription System](image)

**Withdrawal, termination and expiration of obligations under the “single access option”**

7. For the “single access option”, the draft revised SMTA currently contains expiration clauses for the payment obligations in Articles 6.7/6.8 as well as Annex 2, a withdrawal right for
the Recipient (still called “termination”) in Article 9.2 and no termination possibility for the Governing Body similar to the one for the Subscription System.

8. Considering the discussions of the Working Group, the Co-chairs grouped the provisions in the two following proposals for consideration by the Working Group.

**Figure 12: Withdrawal, termination and expiration under the “single access option”**

- **Co-chairs’ proposal 1**
  - **Expiration clauses**
  - Expiration of (1) payment obligations, and (2) PGRFAuD
  - **Art. 6.5, Arts. 6.7/6.8, Annex 2**

- **Co-chairs’ proposal 2**
  - **Withdrawal (Recipient) and termination (GB)**
  - **Art. 9 (revised by including text from Art. 4.5 Annex 3)**

**Main consequences:**
- No withdrawal or termination under the “single access option”
- Delete relevant parts of Art. 9

**Main consequences:**
- No expiration clauses, delete relevant parts of Arts. 6.5 and 6.7/6.8 as well as Annex 2
- Need to define effects of withdrawal or termination, surviving obligations, on the basis of Art. 9.4
- Clarify formulations (withdrawal/termination of “this Agreement”?)
- Structurally, clarify the need (or not) to keep both Art. 9 for the “single access option” and Art. 4 Annex 3 for the Subscription System.
ENFORCEABILITY

1. In the contact group at the Seventh Session of the Governing Body, there were concerns from some Contracting Parties who felt that the enforceability of the revised SMTA should be further enhanced.

2. In the Co-chairs’ summary arising from the Seventh Session of the Governing Body, the Co-chairs reported the general agreement among Regions that the SMTA should be an enforceable contract, but that there was no consensus on whether the current SMTA provides for effective enforcement measures. Revisiting Article 8 (dispute settlement, third party beneficiary rights) would be sufficient to guarantee enforceability for some participants. Others thought that new provisions would be needed.

3. There was also general agreement that the Standing Group of Legal Experts (SGLE) would be the primary body to provide advice and to bring in additional skills on contract law, when and if required.

4. The SGLE at its second meeting discussed the enforceability of the SMTA and issued Opinion 9 providing the following:

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**OPINION 9**

[...]

1. The provisions of the current and revised SMTAs are legally enforceable, and action can be taken to enforce the SMTA through arbitration, including by the Third Party Beneficiary. It is to be noted that the SMTA provides that the result of arbitration is to be binding.

2. The SMTA makes reference in its applicable law provision to the UNIDROIT Principles, which specifically recognize the rights of the Third Party Beneficiary.

3. The SMTA provides that the parties may choose their arbitral tribunal, and failing agreement on which tribunal to choose, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce.

4. If a recalcitrant party fails to respond to the request for arbitration, the Rules of the ICC provide that the arbitration may nevertheless proceed and may lead to a binding award.

5. Enforcement of arbitral awards can be sought before national courts, including, as appropriate, in accordance with the New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

6. In addition, Article 12.5 of the Treaty provides that the “Contracting Parties shall ensure that an opportunity to seek recourse is available, consistent with applicable jurisdictional requirements, under their legal systems, in case of contractual disputes arising under [the SMTA], recognizing that obligations arising under [the SMTA] rest exclusively with the parties to [it].”

7. An arbitral tribunal constituted under the SMTA may effectively award remedies as specified in the UNIDROIT Principles, which provide for a range of monetary and non-monetary remedies under Chapter 7.
8. The SGLE recognized that the availability of information is relevant to transparency and compliance with the obligations under the SMTA. The SGLE noted that in the context of the revision of the SMTA the Contracting Parties could consider whether to clarify the scope of Article 4.4 of the SMTA with respect to the provision of information regarding performance with all obligations of the parties under the SMTA, including in particular information regarding use of material in terms of Article 6.1 of the SMTA, and whether the Provider could also request this information. The SMTA provides that the Third Party Beneficiary has the authority to request information under Articles 4.4 and 8.3 of the SMTA.

9. As no cases have yet been brought to arbitration under the SMTA, there is no practical information regarding problems that might arise regarding the enforceability of the SMTA, and consequently regarding whether there is a need to improve enforceability of the SMTA.

**Box 1: Opinion 9 of the SGLE**

5. The draft revised SMTA deals with dispute settlement in Art. 8. Proposals for provisions setting forth remedies were made in Art. 6.1bis and in Art. 6.2bis, which are both in brackets.

6. The discussions taking place during our informal consultations during this biennium showed the need to distinguish between (1) concerns relating to the legal basis of enforcing the SMTA, both on substance (remedies) as well as on process (dispute settlement, third party beneficiary, Art. 8 and its relation to Article 12.5 of the Treaty) and (2) practical concerns relating to monitoring.

7. In order to advance in this area of concern for some Contracting Parties, the Co-chairs suggest there is a need to further clarify these concerns, so that proponents are invited to provide more information in this regard. The Co-chairs would suggest to then distinguish between (1) technical legal questions that could be put to the SGLE for advice, and (2) policy questions that require a political decision by the Working Group. The Co-chairs believe it would be advantageous for the process if the Working Group could move from raising and analysing potential problems to proposing solutions. Therefore, proponents are invited to not only provide information on their concerns, but make suggestions on how their concerns could be overcome, including textual proposals.
Appendix 4

OVERVIEW OF OTHER [BRACKETED] PROVISIONS IN THE DRAFT REVISED SMTA

1. Once the work on the provisions regarding fair and equitable monetary benefit-sharing, withdrawal/termination and enforceability is completed, the Co-chairs suggest tackling the main remaining [bracketed] provisions in the draft revised SMTA.

Subscription System: Annex 3

Figure 13: Further brackets in Annex 3 (Articles 1.2 and 1.4)

NB: In the Registration Form (Annex 4), a bracketed text provides for a crop-by-crop Subscription. This text would need to be deleted in case of Art. 1.2 ALT.
2. The Co-chairs suggest deleting the crop-by-crop Subscription, following advice received from the Friends of the Co-chairs Group on User and Crop Categories during the last biennium. The Co-chairs favour short language and therefore suggest keeping Art. 1.2 ALT (Option 2) and deleting Art. 1.2.

3. The Co-chairs also think that agreement can be reached on Art. 1.4 ALT that includes language proposed at the eighth meeting of the Working Group. The Co-chairs do not see any good reason why the Subscriber should not be given the choice of opting for the amended terms. The Working Group did not discuss the last sentence of Art. 1.4 ALT in detail at its eighth meeting, both regarding (1) the choice given to the Subscriber and (2) the consequences of such choice for the effective date of Subscription.

**Main body of the draft revised SMTA**

4. A number of brackets remain in other parts of the draft revised SMTA, as listed in the following.

<table>
<thead>
<tr>
<th>Remedies</th>
<th>IPRs</th>
<th>Information-sharing</th>
</tr>
</thead>
<tbody>
<tr>
<td>• [Art. 6.1bis]</td>
<td>• [Art. 6.2 (second alternative)]</td>
<td>• [Art. 6.9]</td>
</tr>
<tr>
<td>• [Art. 6.2bis]</td>
<td>• ”or that limit Farmers’ Rights to save, use, exchange and sell seed and propagating material of the provided Material.”</td>
<td></td>
</tr>
</tbody>
</table>

*Figure 14: Overview of further brackets in the main body of the draft revised SMTA*

5. The Co-Chairs expect the issue of remedies to be resolved in the context of the enforceability discussions (see above).

6. On information-sharing, there are no changes in Art. 6.9 and [brackets] were only inserted pending discussions and agreement on how to deal with “digital sequence information” in the revised SMTA. The Co-Chairs suggest lifting the brackets since we will have to decide on how to reflect issues related to “digital sequence information” in the revised SMTA based on our further discussion of this subject, where we will not only deal with Art. 6.9.

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10 IT/GB-7/17/31, para. 17; IT/OWG-EFMLS-5/16/Inf.4, e.g. para. 54.
DEFINITIONS (ART. 2), FURTHER POSSIBLE CHANGES AND LEGAL READING

1. The Working Group will still have to discuss the definitions in Art. 2 of the draft revised SMTA. At its previous meetings, the Working Group agreed to tackle the definitions after having reached consensus on the other pending issues, although some of these issues depend on the formulation of the definitions.

2. As a basis for the discussions at the ninth meeting, in the following the Co-chairs list alternative definitions that the Working Group has already seen at its eighth meeting, in addition to the definitions contained in the draft revised SMTA proposed by the Co-chairs:

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

   [ALT: “Product” means Plant Genetic Resources for Food and Agriculture that incorporate the Material or incorporate, or are based on, any of its genetic parts or components that are ready for commercialization, excluding commodities and other products used for food, feed and processing.]

   [“Genetic parts or components” means the elements of which they are composed or the genetic information/traits that they contain.]

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

   [ALT 1: “Sales” means the gross income, including any income from the sale of seeds and plant materials and income in the form of any license fees, received by the Recipient and its respective affiliates, resulting from the commercialization of any Product under Article 6.8, or by a Subscriber and its respective affiliates, of any Product, or product that is a Plant Genetic Resources for Food and Agriculture.]

   [ALT 2: “Sales” means the gross income, including but not limited to any income from the sale of seeds and plant materials and income in the form of license fees, received by the Recipient and its respective affiliates from the commercialization of any Products under [Articles 6.7/6/8], or by a Subscriber and its respective affiliates from selling or licensing any Product or products that are Plant Genetic Resources for Food and Agriculture under [Article 6.11].]

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

   [ALT: “To commercialize” means to sell a Product or Products for monetary consideration or to license an intellectual property right in a Product or Products for monetary consideration, and “commercialization” has a corresponding meaning. Commercialization shall not include any form of transfer of Plant Genetic Resources for Food and Agriculture under Development.]

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11 As evidenced, for example, by pedigree or notation of gene insertion.
3. The Co-chairs decided not to renumber the Articles of the revised SMTA at this stage, given the well-established references to the respective access and payment mechanisms (Articles 6.7, 6.8, 6.11 of the SMTA). The Co-chairs suggest that a renumbering will be done once an agreement is reached on the conceptual issues.

4. Moreover, the Co-chairs suggest restructuring the revised SMTA to make it more user-friendly. The advice they received at the informal consultations was to keep Articles 6.7 and 6.8 (as well a Article 6.11) short and move all details to Annex 2 (or Annex 3, respectively). The following could be an illustrative example for restructuring Articles 6.7/6.8 and Annex 2 (first alternative, all payments mandatory):

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Possible restructuring of Articles 6.7/6.8 and Annex 2 (first alternative, all payments mandatory):

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

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

[Without track changes:]

6.7 In the case that the Recipient who is not a Subscriber, or any of its affiliates, commercializes a Product that is a Plant Genetic Resource for Food and Agriculture and that incorporates Material as referred to in Article 3 of this Agreement, the Recipient shall make payments in accordance with Annex 2 to this Agreement.

6.8 [deleted]
```

Annex 2

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

1. If a Recipient or any of its affiliates, contractors, licensees, and lessees, commercializes a Plant Genetic Resource for Food and Agriculture and that incorporates Material as referred to in Article 3 of this Agreement are not available without restriction to others for further research and breeding in accordance with Article 2 of this Agreement, the Recipient shall pay each year into the mechanism established by the Governing Body for this purpose one point-one percent (1.1%) of the annual Sales of the Product or Products less thirty percent (30%) of the annual Sales of the Product or Products, [for the period for which the restrictions are applicable].
2. If a Recipient, or any of its affiliates, contractors, licensees, and lessees, commercializes a Product or Products referred to in Article 6.7 of this Agreement that are available without restriction to others for further research and breeding in accordance with Article 2 of this Agreement, then, the Recipient shall pay each year into the mechanism established by the Governing Body for this purpose [xx] percent ([xx] %) of the annual Sales of the Product or Products [less thirty percent (30%)], [for a period of [x] years].

5. The Co-chairs suggest, as the last step, a thorough overall legal reading and drafting of the revised SMTA before it is transmitted to the Governing Body for adoption.