

Statement on the Revision of the SMTA

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A STATEMENT PREPARED BY THE INTERNATIONAL SEED FEDERATION



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

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

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

1. Multi-optional benefit-sharing mechanism

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

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

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

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

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

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

Subscription rate of payment: The rate of payment for the Subscription must make economic sense. In case the system would be implemented for all crops, one should think of a maximum rate of 0.01% on sales of Annex 1 crops by the company.

Subscription term: ISF supports an initial 10-year Subscription term with annual payments after which the Subscriber has the right to terminate the Subscription. A longer initial subscription term will likely require a lower rate needed to make the Subscription attractive.

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

Subscription and prior SMTAs: ISF supports retention of paragraph 1.3 of Annex 3 in the 3rd revised draft, so that a Subscriber is relieved from any payment obligations under SMTAs signed prior to the Subscription. Next to that, a Subscriber should have the possibility to bring existing SMTAs under the conditions of the new SMTA, to make the Subscription system more attractive to potential subscribers. However, *mandatory* conversion of prior SMTAs is not desired.

Subscriber's surviving rights and obligations after termination of Subscription: The SMTAs signed during the Subscription term should remain in effect after termination of the Subscription, without application of the payment obligations under 6.7/6.8. ISF is of the opinion that the total payment made during the Subscription term should be sufficient. Upon termination of the Subscription, any time after the specified minimum term, the Subscriber should retain paid-up rights to continue using **Material** accessed during the **Subscription** term in the form received and for the development of **PGRFAuD** (unless Subscription is terminated due to breach of agreement or bankruptcy), to sell and license Products, to breed with PGRFA under Development without payment obligations, and to license and transfer PGRFA under Development.

SMTA surviving rights and obligations: Next to the Subscription, a Subscriber should also be able to terminate the SMTAs signed during the Subscription and it should be clear what surviving rights remain. Breeders must have the right to continue breeding with PGRFA under Development and the right to transfer, license and sell both Products and PGRFA under Development after SMTA termination. Possible transfer obligations should continue until the expiration as mentioned below (20 years or 5 outcrosses) has been reached.

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

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

Single access rate: ISF is of the opinion that the breeders' exemption, as a cornerstone of the plant breeder's rights system, is an important tool for benefit-sharing and open innovation. It implies that any variety protected by plant breeders' rights can be used for further research and breeding and the newly bred variety can be commercialized without any obligations towards the right holder. In case mandatory payments are required for products available without restriction, ISF is of the opinion that the payment

should be significantly lower than the 1.1% rate for products that are available with restriction. ISF recommends a rate of 0.11 to 0.22% of the sales of the product available without restriction less 30%. This difference is consistent with what is used in commercial practice as a ratio between an exclusive license and a non-exclusive license.

Expiration of payment obligations: Payment obligations based on use of a genetic resource should not be in perpetuity; it should be limited in time. Payment obligations should expire at 20 years after signature or after 5 outcrosses when there is no Trait of Value (see appendix).

Expiration of transfer obligations of PGRFA under Development: For PGRFA under development it is accepted that this should be transferred with a SMTA. However, ISF urges to limit this obligation in time at 20 years after signature or after 5 outcrosses when there is no Trait of Value (see appendix)

SMTA surviving rights and obligations: A user should be able to terminate the SMTA and it should be clear what surviving rights remain. Breeders must have the right to continue breeding with PGRFA under Development and the right to transfer, license and sell both Products and PGRFA under Development after SMTA termination. Possible payment obligations and transfer obligations should continue until the expiration as mentioned above (20 years or 5 outcrosses) has been reached.

2. Contractual and legal clarifications in the SMTA

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

b. Remedies: The language currently proposed in Articles 6.x is unacceptable and unnecessary. If negotiators insist on introducing remedy language, ISF recommends the following language based on art. 7.4.1 of the UNIDROIT Principles 2010:
“7.2 Any non-performance under this Agreement gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies, except where the non-performance is excused, all in accordance with the UNIDROIT Principles of International Commercial Contracts 2010.”

c. Digital sequence information: The SMTA should be based on PGRFA from the MLS and not on any DNA information. ISF is of the opinion that DNA information or Digital Sequence Information alone is not within the scope of the IT PGRFA. Even though a discussion currently takes place on Digital Sequence Information, it should not for now have any consequence to broaden the scope beyond PGRFA as such.

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

Appendix

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

6.5 In the case the Recipient transfers a Plant Genetic Resource for Food and Agriculture under Development to another person or entity, the Recipient shall, [until a period of X years after signing of this agreement has lapsed]: (subparagraphs a through d are unchanged)

- a) (as in draft revised version)
- b) (as in draft revised version)
- c) (as in draft revised version)
- d) (as in draft revised version)

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

Proposed definition:

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

Explanation:

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