May 2015

The International Treaty
ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

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

Brasilia, Brazil, 2-5 June 2015

COMPILATION OF SUBMISSIONS RECEIVED BY WORKING GROUP MEMBERS AND OTHERS

Note by the Secretary

1. The Working Group at its second meeting welcomed further analysis and input by Working Group Members, stakeholders and others on certain issues, in preparation for its next meeting.

2. This document contains the submissions received until 10 April 2015. The submissions were compiled in language and form, as well as in the sequence, in which they had been received.

3. Submissions received after 10 April 2015 will be made available as an Addendum to this document.

Introduction

1. At its second meeting the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System (Working Group) requested further analyses and inputs on a number of issues from Working Group Members, stakeholders of the seed sector, and others.

2. The Working Group identified various options for increasing user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner, and for enhancing the functioning of the Multilateral System by additional measures. It requested the working document of its next meeting to contain, wherever possible, textual elements by which the various options could be implemented.

3. For this purpose, the Working Group *"invited its Members to submit textual elements for compilation in the* [working document to be prepared for its next meeting] *to the Secretary, two calendar months before the meeting began, so that they might be circulated well beforehand*."[1]

4. Moreover, the Working Group also *"welcomed further analysis to be provided to its next meeting, elaborating the ways in which a subscription model could be implemented in the context of Art. 6.11 of the SMTA or beyond, bearing in mind the need to make such a model attractive to users.*"[2]

5. The Working Group further agreed that an enhanced Multilateral System should minimize the administrative burden arising from the SMTA for users, while at the same time facilitating the functioning of the Third Party Beneficiary. It recognized that the seed sector and other users need legal certainty concerning access and benefit-sharing arrangements around plant genetic resources for food and agriculture.

6. In this context, the Working Group recognized that it would be difficult to introduce a minimum incorporation threshold at this stage. However, it stated that it *"would still welcome proposals from the seed sector in this regard."*[3]

7. Accordingly, the Secretary issued Notification GB6-031, inviting (1) Working Group Members to submit the above mentioned textual elements; (2) stakeholders of the seed sector to provide proposals for a possible minimum incorporation threshold; and (3) all interested stakeholders to share their analyses on the ways in which a subscription model could be implemented in the context of Art. 6.11 of the SMTA and beyond, bearing in mind the need to make such a model attractive to users.

8. By 10 April 2015, the Secretary received ten submissions, which are contained in the Appendix to this document, in language and form in which they were received.

[1] IT/OWG-EFMLS-2/14/Report, para. 22

[2] IT/OWG/EFMLS-2/14/Report, para. 14

[3] IT/OWG/EFMLS-2/14/Report, para. 5

List of Appendixes

Submission by the Berne Declaration and the Community Technology Development Trust (CTDT)

Textual elements to implement increasing user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner, and for enhancing the functioning of the Multilateral System by additional measures.

Note: The following proposal for textual elements focuses on the main amendments in the SMTA. When a decision has been made on a new mechanism for Benefit-Sharing, the whole text of the SMTA (e.g. 6.4. and 6.5.) has to be reviewed and made coherent with the new mechanism.

Article 6.2 of the SMTA
The Recipient shall not claim any intellectual property or other rights that limit facilitated access for the purposes of research, breeding, training for food and agriculture and crop production to the Material provided under this Agreement, or its genetic parts or components, in the form received from the Multilateral System. No intellectual property rights may be taken out over the material accessed from the Multilateral System that would limit facilitated access to the original PGRFA, their genes or any parts thereof and their native traits.

Reasoning:
The need for a clear definition for facilitated access: In several jurisdictions (e.g. the unitary patent in the EU), a research exemption and/or a so-called limited breeders' exemption has been introduced in patent law. This means that under such laws, a breeder is granted the "use of biological material for the purpose of breeding, or discovering and developing other plant varieties.[1]" But also in this case the breeder can't market his new product, and a farmer is not free to use it without the proprietor's consent. The proposed text clarifies that patents — even in jurisdictions with a limited breeders' exemption in patent law — fall under the prohibition under Art. 6.2.
The need for a clear definition for facilitated access: To effectively implement Art. 6.2, the vague wording in the current text has to be further clarified. A helpful interpretation has been made by Moore and Tymowski (2005)[2], which is partially integrated into the proposed text. The term "native traits" has been added, because in recent years a growing number of patents on native traits have been granted by patent offices. The proposed addition to the text seems to be coherent with current interpretations by gene banks[3].

Art. 6.3
In the case that the Recipient conserves the Material supplied, the Recipient shall make the Material, and the related information referred to in Article 5b, available to the Multilateral System using the Standard Material Transfer Agreement.
Recipients, who are natural and legal persons, have to offer all PGRFA, which are sold by the recipient, to a gene bank which is part of the MLS, at the time the product is taken from the market or when the IP protection ends.

Reasoning:
Articles 11.3 and 11.4 of the Treaty have so far not been implemented. The best way to implement the facilitated access to PGRFA held by natural and legal persons is to incorporate this obligation into the SMTA. As a first step, the SMTA could include the obligation that the recipient has to offer all PGRFA, which are sold by the recipient, to a gene bank which is part of the MLS, at the

[1] Art. 26c of the Agreement on a Unified Patent Court(2013/C 175/01)
[2] G. Moore and W. Tymowski (2005) Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture. IUCN Environmental Policy and Law Paper No. 57. IUCN, Gland, Switzerland and Cambridge, UK.
[3] See for example the Note of the Centre for Genetic Resources, the Netherlands, on the provisions of the Standard Material Transfer Agreement in relation to patents on native traits as granted by the European Patent Office.

time the product is taken from the market or when the IP protection ends. In a second step Articles 11.3 and 11.4 should be fully implemented by asking Recipients, who are natural and legal persons who hold plant genetic resources for food and agriculture listed in Annex I, to include such plant genetic resources for food and agriculture in the Multilateral System.

Art. 6.7

➔ To be deleted

Art. 6.8

➔ To be deleted

Art. 6.11

In the case that the Recipient commercializes Products that are Plant Genetic Resources for Food and Agriculture, the recipient shall make payments on an annual basis during 10 years after the access has taken place in accordance with Annex y to this Agreement (subscription fee).

The payments shall be based on the annual Sales of any Products that are Plant Genetic Resources for Food and Agriculture set out in Annex 1 to the Treaty. Sales of products, which are not covered by Intellectual Property Rights and without any legal or contractual obligations or technological restrictions that would restrict the free use by breeders and farmers, will be excluded when calculating the payments.

There should be a periodic review of the benefit-sharing mechanism in order to adjust the modalities and the amount of payments so that the defined target is sustainably achieved.

Reasoning: The proposal takes up the idea of a subscription fee which was already discussed at the last meeting of the OEWG MLS. The reform has to lead to "*Increase[d] user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner".* To do so, it will be essential that any loopholes to circumvent the obligation to contribute to the benefit-sharing fund are closed as much as possible. To make the contributions sustainable and predictable, the mechanism has to be restricted to one option. Such a new system would be less bureaucratic to handle for users, providers and the third-party beneficiary, and diminish the need for tracking a specific resource.
It will be difficult to calculate how much user-based payments to the Benefit-sharing Fund will be generated before the system is implemented. Therefore it is crucial to set a target beforehand and include a review article to make sure that this target is reached.

Dr. Ivana Saska
National Focal Point (Australia)
International Treaty on Plant Genetic Resources for Food and Agriculture

20th February 2015

Dear Dr Saska,

In response to your further request for comments relating to the Standard Material Transfer agreement (STMA) and the work of the *Ad Hoc Open-Ended Working Group to Enhonce the Functioning of the Multiloterol System of Access ond Benefit Sharing* (Working Group), Australian Grain Technologies Pty Ltd (AGT) and Intergrain Pty Ltd would like to provide the following comments;

It is still AGT's and Intergrain's position, as stated in our first responses of September 2014, that the value Australian cereal breeders provide to the FAO Genetic Resource Centre (seed collections) is and will remain far greater than the value either AGT or Intergrain extracts from such centres. This is particularly evident in the knowledge that Australia is one of the few jurisdictions where it is mandatory for cereal breeders to place a pure seed sample of all new varieties granted PBR protection into an FAO Genetic Resource Centre thereby making them freely and publically available As long as this remains the case it is essential that clause 6.8 **MUST** remain within the STMA.

If at some time in the future **ALL** jurisdictions are obliged to lodge new varieties into an FAO Genetic Resource Centre, and thereby make their new varieties available to all other jurisdictions for breeding and research, then it **might** be conceivable that the need for clause 6.8 could change.

Should Clause 6.8 not exist and a financial contribution was required to access germplasm from a Genetic Resource Centre then both AGT and Intergrain believe a subscription model would be the most equitable and efficient method. Such a model would need to:

1) Take into account the genetic contributions made by Australian cereal breeders. This is not insignificant particularly given the IP and financial cost invested into the development of the new varieties deposited into the system;
2) Ensure the access fee is of a commercially acceptable level. (We are talking a few thousand $ per annum not tens or hundreds of thousands);
3) Be renewable on an annual basis;
4) Not require the tracking of and reporting on the use of the accessed germplasm within the breeding program.

An upfront agreed subscription also provides commercial breeders with the opportunity to accurately determine the relative cost/benefit of deciding to utilise any given genetic resource or whether to find alternative sources.

A royalty based system would be the least preferred option due to:

1) The cost of administration associated with tracking genetic contributions into each new variety;
2) The current perpetual nature of the royalty stream;
3) The requirement for payment no matter how small the final genetic contribution is from the germplasm accessed through the SMTA, and;
4) The very different royalty systems used in different countries and the need to be globally equitable.

Further to this if a royalty system did exist it should **NOT** apply to germplasm that is accessed through the Australian Genetic Resource Centre where:

1) that germplasm has been placed into the Centre by an Australian based breeding entity, or;
2) That germplasm is a PBR registered variety in Australia.

Both AGT and Intergrain trust that these comments will assist your team during your next Working Group meeting scheduled for 20-24 April 2015 in Brazil.

If there are any issues you would like to discuss or any assistance we can provide prior to that meeting please do not hesitate to contact us.

We look forward to hearing the outcomes from the next meeting.

Kind regards

Tress Walmsley
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Appendix 3

Comments by Third World Network

Submitted to the ITPGRFA Secretariat, 20 February 2015

Third World Network submits the following comments in relation to *Notification GB6 031 - Invitation to send input for the third meeting, as requested by the Working Group at its second meeting*, particularly item three of the Notification, inviting "*interested stakeholders to share their analyses on the ways in which a subscription model could be implemented in the context of Art. 6.11 of the SMTA…*"

Introduction

A subscription model is an approach that may be considered for the purpose of increasing user-based payments to the Treaty's Benefit Sharing Fund.

In order for a subscription model to enjoy broad support, effectively serve its purpose, and to merit the considerable effort that its implementation would require, there are number of characteristics that it should include.

These comments identify a number of those characteristics and set forward some ways of possibly achieving them.

Should it prove impossible to reach consensus on these characteristics, the Governing Body should pursue other alternatives to ensure user-based payments to the Benefit Sharing Fund.

Efficiency - Minimum Income Requirement

A subscription system must generate sufficient income for the BSF to merit the effort to create and maintain it, by capturing an appropriate proportion on the benefits derived by the US $40 billion+ per year seed industry from Multilateral System (MLS) genetic resources of Annex 1 crops, and to justify continued sovereignty concessions by genetic resource providers.

Treaty-commissioned good case estimates of changes to user payment levels under the present SMTA place income below reasonable levels, below even that of the (dated) Treaty financial plan, which is already unacceptably low. According to these Treaty studies, expansion of the MLS to additional or all PGRFA, even in most *best-case* estimates, does not substantially change this.

If a subscription system does not ameliorate the problem of lack of user payments and generate sufficient income, it isn't worth pursuing. Thus in a subscription system, a minimum income requirement must be identified by a thorough and contemporary needs assessment for *in-situ* conservation of PFRGA, and satisfaction of the minimum income requirement enforced by the terms of the model itself.

Reliable – Built-In Review

If user payments to the BSF do not reach or exceed the minimum requirement by two years from inception, or subsequently fall significantly short of the requirement, the terms of the subscription system should require that access to the MLS by commercial entities be suspended and the subscription model be immediately reviewed and revised to meet the minimum requirement.

Efficacy and Results Demonstrated before Expansion

Some countries have expressed interest in expansion of Annex 1 to cover additional crops, and a few even "all PGRFA". FAO Legal Counsel, however, has noted that such changes would require a new round of ratifications or a supplementary agreement to the Treaty.

Expansion of the MLS should not be contemplated until a binding subscription system, based on Article 6.11, is in place for the current Annex 1 crops and is demonstrated to function, meeting minimum income requirements, over the period of a decade. PGRFA not covered by the Annex remains under the Convention on Biological Diversity (CBD) and its Nagoya Protocol on access and benefit sharing.

In the broad perspective, it should be recalled that the Working Group has been convened because it is widely acknowledged that sufficient payments to the BSF have not been made. A system that is failing to properly generate benefit sharing payments from access and use of resources already committed should not be expanded before it is fixed.

If a subscription system for the present MLS proves itself over the course of time, then expansion may be subsequently considered.

It also bears noting that substantial complications may arise in differing conceptions of what is entailed by "all PGRFA" and how that relates to crop wild relatives, introgression lines, transgenic traits, and some other materials, including genetic sequence data and synthetic genetic materials.

Exclusion of Transgenic and Introgressed Materials

In respect to the above, functional units of heredity that originate in genetic resources not identified in the present Annex 1 that are incorporated into crop varieties by biotechnology or introgression would be outside the subscription system and remain governed by the CBD and its Nagoya Protocol.

Binding Articulation with the SMTA

A subscription model must have a binding character through the SMTA. The Working Group has identified a modified form of Article 6.11 within the SMTA is the most practical possibility.

Monies provided to the Treaty outside of SMTA obligations, such as donations by users to the BSF, or voluntary MLS user contributions to the Treaty funding strategy, should not be considered to contribute to or constitute fulfillment of subscription model obligations.

Sole SMTA Option

A subscription model, if implemented, should the only option for benefit sharing in the SMTA. The continued existence of other benefit sharing options (Articles 6.7 and 6.8), even with increased payment rates, would undermine the viability of a subscription model, seriously hindering its prospect of success.

If, ultimately, it is determined by FAO Legal Counsel that Article 6.7 and/or Article 6.8 may not be removed from the SMTA without triggering the need for re-ratification or a supplementary agreement, it must be recalled that Treaty-commissioned good case estimates of the income generated from these options fall far short of minimal expectations - even with increased royalty rates and including speculative income from types of mandatory benefit sharing (e.g. "restricted" varieties) opposed by some governments and industry. And an increase in these rates would further stimulate industry avoidance.

Therefore if it is conclusively determined that it is not legally possible for the subscription model to be the sole option under the SMTA without amending the Treaty, serious consideration should be given to abandoning any effort to create one.

Obligation based on access

In a subscription model, user obligations should occur on access of MLS genetic resources and apply no matter the proportion of those resources in a given final product.

Exempting low proportions of MLS genetic material (a "threshold" or "*de minimis*" clause) in commercial products from benefit sharing obligations is technically unworkable and could result in very valuable pieces of genetic material escaping benefit sharing obligations. There are and will continue to be many cases where low proportion does not correlate with the relative value of such genetic material.

Clarity and Simplicity - Contribution formula based on targets

It is widely acknowledged that the complexity of the Treaty is an important factor that hinders implementation. In developing a possible subscription model, extensive differentiation in subscriber obligations by crop, company, market, etc., runs a high risk of further complication that will render negotiation difficult, potentially create loopholes, and could result in a system that is excessively complex and opaque.

The formula for contribution should be as simple as possible. Companies and other paying users that are subscribers should make payment at a level linked to their respective income from seed sales (of Annex 1 crops). While this payment should be based on seed sales, as in the present Article 6.11, it should <u>not</u> be calculated as a percentage of them.

Rather, subscriber's payment should be a percentage of the model's minimum income requirement and apportioned on the basis of seed sales. For example, if the minimum income requirement from user payments is $100m per year, and a seed company's sales constitute 20% of the total income from seed sales of all subscribers, then that company's minimum annual payment would be $20m.

Alternatively, annual payments could be assessed on the basis of the proportion of global seed sales of Annex 1 crops that the subscriber commands. For example, if the minimum income requirement is again $100m, and a subscribing company accounted for 10% of the value of global seed sales in Annex 1 crops, then its annual payment would be at least $10m.

The Governing Body may periodically adjust the minimum income requirement as necessary. The model offered by the World Health Organization Pandemic Influenza Preparedness (PIP) Framework may be helpful. In the PIP Framework, an income target is fixed and the payments of commercial users of genetic resources in the system determined by bands (levels). The bands, of which there are presently 23, are stratified based on product sales.[1] Companies assign themselves to a band, with larger companies paying more and smaller companies less.

The payment obligation for a subscriber would survive termination of the subscription for at least ten years and the final disposition of MLS material under the control of former subscribers addressed in the subscription agreement.

Exemption for Farmers and some others

Farmers should continue to be provided MLS genetic resources for free.

Government and not-for-profit entities in Member States that do not claim intellectual property rights over, license, or otherwise profit from exchange of PGRFA, and do not place technological or legal restrictions on PGRFA, should be considered for subscriptions without payment.

Public and nonprofit entities that claim intellectual property rights, license, restrict, etc., PGRFA , however, should be paying subscribers. This should apply even if the entity itself does not commercialize genetic resources (e.g. a breeding institute that claims intellectual property over a variety and sells rights to it to a seed company, which then commercializes the variety).

In-Situ Diversity Maintained by Farmers

No aspect of a subscription model, including any aspiring "global solution", should prejudice or interfere with the rights of farmers with respect to PFRFA that they maintain and develop on-farm.

Part of a Whole - Does not supplant need for government contributions

A subscription model does not supplant the need for developed country governments to contribute to the funding strategy, including the BSF, per Treaty Article 18.4.

Addresses Avoidance

A subscription system that does not take steps to address avoidance is one that is unlikely to succeed. The obvious first step is to limit commercial access to MLS materials to subscribers, however, that alone may not be sufficient. The Treaty may, for example, limit the right of subscribers to license, sell, or otherwise exchange materials containing MLS functional units of heredity with seed companies that are not also subscribers.

No new subscriber rights in the BSF

[1] The PIP Framework Partnership Contribution Implementation Portal details the bands to which companies assign themselves, and the Framework's budget and income allocations. A "funds received and allocated" tab indicates each company's payments. See: https://extranet.who.int/pip-pc-implementation/budget.aspx

Subscription model payments should be made in return for permitting access and use MLS genetic resources, and do not confer any rights with respect to the BSF or other aspects of the Treaty.

GB6 031 – Working Group (3) – Call for input

Comments and proposals from La Via Campesina

for the third meeting of the Ad Hoc Open-Ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-Sharing (MLS)

I – Patenting and the Nagoya Protocol undermine the MLS

I-1. The new patents on "traits" threaten facilitated access

When the Treaty was drafted, industry-owned intellectual property rights (IPRs), whether patents or plant variety protection certificates (PVPs), protected entire plants or varieties. The seeds of an accession were placed in the seed banks under the governance of the Multilateral System, the variety in question became publicly known and was no longer eligible to be protected by intellectual property rights (IPRs) of this sort. Nowadays, however, new patents protect "traits," that is to say genetic sequences linked to particular characteristics (tolerance to a herbicide; resistance to an insect or a fungus, to drought, to soil salinification, presence of ingredients of interest to industry, etc.). These traits are not specific to a single plant, access or variety. As long as they have not been isolated and described, they are considered as new and therefore eligible for patenting. Yet the property rights granted by these patents extend to all plant genetic ressources for food and agriculture (PGRFA) in which the patented trait is found, included those which are already known.

With molecular or biochemical markers, the identification of new patented traits in plant genetic resources, including seeds, and throughout the food chain, is very effective and only costs a few dollars. The first patented traits were genetically modified organisms (GMOs). Since then, this has also been applied to traits which are already naturally present in crops; these are "native traits". These patents protects all seeds which naturally contain or have been contaminated by these new patented traits, including those of the MLS. This privatisation of PGRFA which until now were part of the commons removes facilitated access; without this, the MLS and the Treaty no longer serve a purpose.

I-2. Will the Treaty facilitate bio-piracy?

The majority of the MLS's "plant genetic resources" are also conserved in private or public collections maintained outside the MLS, particularly in the United States of America, which has not ratified the Treaty. The Treaty's prohibition of intellectual property rights that restrict access to resources coming from its MLS therefore does not allow it to prohibit patents on identical resources obtained from other gene banks. Declaring the source of the resources used as a basis for claiming a patent is voluntary. Industry views this information as a trade secret that should not be divulged; this

prohibits any transparency, which would guarantee effective control over the voluntary declarations. Therefore, not declaring the use of resources coming from the Treaty's MLS is sufficient to take control of these resources by claiming patents on their traits.

The Treaty currently has no provision for opposing these patents. On the contrary, the Global Crop Divrsity Trust encourages their facilitation by providing funding for the publication of a digital database describing the traits of interest and the genetic sequences of all seeds in the multilateral system[1]. This "DivSeek" initiative is promoted in the name of improving information on PGRFA. Farmers do not work with genetic sequences but with whole plants, and therefore have no need for this information. Only very large genetic resource laboratories and very large seed companies have tools which are likely to make use of it. It will therefore feed their powerful digital search engines tasked with identifying new genetic sequences linked to traits of commercial interest. Companies will then only need to patent these new digital traits, without even needing to access a single real seed of the MLS to do so.

I-3. These new patents make the sustainable use of PGRFA impossible and cancel out the rights of farmers

Even when a company acknowledges that it has used resources from the Multilateral System, it can still claim a patent on one of these traits without the Treaty being able to prohibit it from doing so. All that is required is that the patent should not restrict access for research, breeding or training,[2] as is the case with the new European unitary patent. This does not prevent these patents from prohibiting all access for sustainable use through agricultural crop production, the swapping or sale of seeds and plants for food and agriculture. Thus peasants who have selected and conserved their own seeds or plants will no longer have the right to grow, swap or sell these once one of their traits is patented. In giving their seeds to the MLS's gene banks, peasants thought that they were giving them to everyone and protecting them from being appropriated. Henceforth it is the reverse that is about to happen. No sustainable use of plant genetic resources is possible if farmers no longer have the right to use, swap and sell their own seeds and plants.

1-4. The illusion of benefit sharing

In order to encourage peasants to accept free access to all their seeds and plants, which make up the bulk of the PGRFA of the MLS, the promotional statements which have accompanied the the signing of the Convention on Biodiversity and the Treaty have promised that they will also benefit from the economic benefits derived from their use. 22 years of the Convention on Biological Diversity and 10 years of the Treaty – and

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1 http://www.planttreaty.org/content/information-about-divseek-initiative

2 Research, conservation, and training are the objectives defined by the Treaty for which it grants "facilitated access" to the plant genetic resources of the Multilateral System. Agricultural crop production is not included.

industry has reaped the benefits while contributing nothing. The Treaty has, however, put into place a Benefit-sharing Fund. But the Fund functions in such a way as to allow industry to be exempt from all payments, because these remain linked to access to the PGRFA of the MLS. The industry either refuses to indicate whether it has used genetic resources from the MLS, or claims it is sharing the benefits by authorising use for research purposes of its new accessions that are protected by PVPs – while prohibiting farmers from reusing these seeds or charging them royalties for doing so.

I-5. The consequences of the Nagoya Protocol

The Nagoya Protocol, which came into effect in October 2014, has upset the status quo. When any new product is put on the market, the Protocol requires States to verify that obligations regarding prior consent and benefit sharing have been respected. For the agricultural species covered by the MLS,[3] it is the Treaty's facilitated access that is applied, and therefore no verification is required. But for the numerous other species that are not registered in Annex I of the Treaty, the industry must account for the origin of the resources used for each new seed that is marketed, and it can only gain access to the genetic resources of these species by signing a prior consent and benefit-sharing agreement each time that it gains such access, which requires unrealistic bureaucracy. This is why, at the last session of the Treaty's Governing Body in October 2013, the industry asked to open Annex I to all crop varieties, for the multilateral system to be extended to all crop species. But the Governing Body decided, before extending the Treaty, to first improve the functioning of the MLS, as well as the rights of farmers and sustainable use, before opening up the debate on a potential extension of Annex I.

II – Proposals to improve the functioning of the MLS

The sustainable use of PGRFA rests first and foremost on facilitated access to these resources and farmers' rights to conserve, use, swap or sell them. Any restriction to this access or these rights runs contrary to the objectives of the Treaty. Improving the functioning of the MLS alone would not be sufficient in prohibiting the new patents which threaten this access and these rights, because this prohibition lies under the remit of national legislative initiatives of the Contracting Parties. It can nevertheless contribute to these objectives, in particular through the following measures:

II – 1. Extend the prohibition of those benefiting from access to PGRFA of the MLS from claiming an IPR which restricts facilitated access to new patents on native traits which also restrict the sustainable use of these PGRFA and the rights of farmers who have provided them to the MLS and cultivate them.

To achieve this, the wording of article 6.2 of the Standard Material Transfer Agreement (SMTA) should *also* be amended:

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3 Included in Annex 1 of the Treaty

*6.2 The **Recipient** shall not claim any intellectual property or other rights that limit the access to the **Material** provided under **this Agreement**, or its genetic parts or components, received from the **Multilateral System**, or limiting the sustainable use, cultivation, breeding, swapping or sale of propagating material for the above-mentioned Material.*

II – 2. Eliminate the possibility of sidestepping benefit sharing

The benefit-sharing mechanism based on the traceability of exchanges of PGRFA, from access to those of the Multilateral System to products from resources and put on the market is completely ineffective. It requires bureaucracy which is often impossible to implement and check under current international legislation. That is why it has not enabled any payments to the Treaty's Benefit-sharing Fund. This mechanism must be abandoned and replaced by an annual obligatory payment proportional to the turnover generated by the sales of seeds or plants of species included in Annex I of the Treaty. The sale of seeds or plants which are not subject to intellectual property rights, any other legal or contractual obligation, or technological restrictions limiting their free use and reuse by breeders and farmers, should be excluded from the calculation of payments. These seeds are the only ones to foster the renewal of crop biodiversity, by enabling famers to reuse part of their harvest as seeds every year, in order to develop new traits adapting to the diversity of crop production conditions and climate change. This respect for farmers' rights is the only non-monetary form of benefit sharing which is acceptable.

Therefore, articles 6.7 and 6.8 of the SMTA should be deleted. Article 6.11 should be redrafted to read as follows:

A Recipient of any access to the PGRFA of the MLS who commercializes a Product that is made up of PGRFA included in the list of species in Annex I of the Treaty must make annual payments to to the Treaty's Benefit-sharing Fund from the first year following accession and the ten subsequent years. These payments shall be based on the annual sales of any product that is made up of PGRFA included in the list of species in Annex I of the Treaty. The sale of a Product not covered by intellectual property rights and not subject to any other legal or contractual obligation, or technological restrictions limiting their free use and reuse by breeders and farmers, is excluded from the calculation of payments.

The percentage of annual sales which should be returned to the Benefits-sharing Fund remains to be defined, potentially of variable amounts depending on the species, in order to obtain an overall sum which enables the Fund to achieve its objectives.

II – 3. An effective Benefits-sharing Fund

The Benefits sharing fund must not finance research centres, universities or genetic sequencing programmes to the sole benefit of industry. It must be used as a priority to (1) strengthen peasant organisations which are developing collective programmes in terms of conservation, breeding and the dynamic management of plant resources *in situ* at the farm, or the *ex situ* conservation of decentralized PGRFA locally, under the shared

governance of the farmers likely to use them; (2) collaborative breeding or research programmes striving towards the same objectives and led by peasant organisations; (3) measures aiming to include famers' rights in national legislation. The farmers who benefit from these programmes must not be required to transfer their innovations undergoing development to the MLS. In addition, they should not be required to transfer their traditional seeds in the absence of a guarantee that they will never be prohibited from continuing to use them because of intellectual property rights claimed over their native traits.

Discussion paper

Cornerstones for a reform of the benefit-sharing mechanism of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA)
prepared by

a group of Swiss stakeholders representing a wide range of interests from seed sector to nongovernmental organizations

Introduction:

At the fifth session of the Governing Body, 24-28 September in Muscat, Oman, it has been agreed to establish, in the forthcoming biennium, and Ad Hoc Open-ended Working Group to enhance the functioning of the Multilateral System (MLS) of Access and Benefit-sharing with the following Terms of Reference:

1. *To develop a range of measures for consideration and decision by the Governing Body at its sixth session that will:*
   (a) Increase user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner, and
   (b) Enhance the functioning of the Multilateral System by additional measures

The aim of this discussion paper is to develop some cornerstones for a reform of the benefit-sharing mechanism. Although this paper has it's focus on the benefit-sharing part, it is evident there is also a need to reform the access part of the Multilateral System. But this will not be discussed in detail in this paper.

Goal of the reform:

To sustain and potentially expand the benefits of the ITPGRFA, the reform should lead to "*Increase user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner".* To do so it will be essential to establish a pragmatic, efficient, and "trick-free" approach to secure continuous and predictable contributions to the benefit-sharing fund. On the other side a functioning benefit-sharing mechanism should provide legal certainty for users of PGRFA of the MLS, that they fulfil all their mandatory monetary benefit-sharing obligations. A new system should be less bureaucratic to handle for users as well as for providers and the third party beneficiary and diminish the need for tracking a specific resource.

A realistic target for a future benefit-sharing should be assessed with the current list of crops, contracting states, and size of the MLS. This target can then be increased based on two factors:

(i) a broader basis for benefit sharing if the MLS is expanded to all crops for Food and Agriculture and when all contracting Parties have notified their collections and if the ITPGRFA has become the global solution for crops for Food and Agriculture without the need of a parallel governance system under the Nagoya Protocol[1], and

(ii) a higher benefit sharing by the users if savings are created by (i) requiring no trace and track und the ITPGRFA and (ii) avoiding parallel governance processes (e.g., under the Nagoya Protocol) by making the ITPGRFA the sole system for CBD compliance for plant genetic resources for Food and Agriculture.

A simplified benefit sharing mechanism should recognize the different needs of users pending on the status (e.g., public, non-profit vs. private, commercial), enterprise size, and crops they are working on. An existing Benefit-Sharing mechanism should be an incentive for contracting Parties to notify their collections (if they have not already done so), to expand the MLS to all crops for Food and Agriculture, and to establish national biodiversity legislation and regulations for the full implementation of the ITPGRFA. This should ensure acceptance of the sMTA as internationally recognized certificates of compliance with Article 6(3)(e) and Article 13(2) of the Nagoya Protocol and sole ABS instrument to govern PIC and MAT for crops under the MLS.

[1] There is a further upside potential if GM traits comprised in plants could be considered a PGRFA irrespective of the original source of the genetic information. Ideally the ITPGRFA would provide an agricultural sector solution to cover all products and solutions which benefit the food and agricultural sector.

The Cornerstones of the Reform:

The core of a new benefit-sharing mechanism would be a new SMTA with one consolidated provision for benefit-sharing by users accessing the MLS. The new provision could be seen as a "merger" of the existing options under Art. 6.7 and 6.11 of the current SMTA.

New Art. 6.11 (subscription benefit-sharing model) could be developed in the following way:

- It would work like a "club" with a subscription fee. This option would give access to all the PGRFA in the MLS to the subscribing entity. Entities involved in the commercial sale of PGRFA using the PGRFA from the MLS as breeding material would have access to the collections of the MLS by paying an annual fee in the range of 0.X% of their annual seed sales. A higher contribution of 0.Y% could be justified **if** the ITPGRFA becomes the sole system for CBD compliance for PGRFA and the contracting Parties agree to the modified benefit sharing regime and the expansion of the MLS to all PGRFA simultaneously[2]. On the other hand the contracting Parties would waive all formality obligations for users incl. the requirement to manage trace-and-track of PGRFA for the subscribed crops(s). Club members would still enter into an SMTA and other obligations (e.g., transfer of material to 3rd parties) remain unchanged. A "free" transfer of PGRFA is only permitted if both parties are subscribers.
- As an alternative to clause 6.7 a surcharge could apply on the sale of those plant varieties where the patent is based on a gene or trait which has been directly obtained from a PGRFA (taking into account that currently a part of these patents will be excluded under Art. 12.3d of the ITPGRFA and the surcharge will only apply if the traits or genes covered by the patent has been substantially changed). In contrast to contributions to the genetic background of varieties, this gene or trait can be tracked with acceptable efforts. The surcharge should result in a total payment of 0.77% on net sales of the respective plant varieties in countries where related patent rights exist.
- Users could terminate their crop subscription. However, while they would have no future access to material under the MLS anymore after the termination becomes effective, the annual subscription fee under 6.11 would have to be paid for 10 years after the cancellation of the subscription.
- The calculation of the subscription fee would be calculated on the basis of their net seed sales, less the fraction paid for seed care and gmo-traits (when they are based on genetic resources which are not part of the MLS).
- As a modification is could also be considered to establish different subscription fees reflecting the different value of crops, for example:
    - A higher subscription fee for high value crops like vegetables
    - A low subscription fee for stable and row crops like rice or wheat
    - A very low or no subscription fee for orphan crops like cassava
- The following reductions should be made for calculating the subscription fees:
    - No benefit sharing should be due for commercialization of varieties which are not protected by IPRs (patents or PVP) and the free propagation is not affected by hybrid or any other technologies.
    - No benefit sharing should be due for small, independent entities with an annual turnover of less than €2m. This exception does not apply for entities which are controlled by a larger, non-excepted entity.
    - Membership will be free for non-profit entities (NARS, CGIAR and NGOs) as long as they do not engage in and benefit from commercial seed sales or license fees.

The name of the members will be published on the ITPGRFA Website.

Review

There should be a periodic review of the benefit-sharing mechanism in order to adjust the modalities and the amount of payments till the target is achieved.

[2] The beneficial effect of a subscription fee model would be substantially diminished if users have to establish a parallel trace-and-track system for crops outside the MLS (e.g., non-Annex-1 crops). The full benefit of a simplified system can only be obtained if essentially all crops can be managed under one regime.

MAFF
Ministry of Agriculture, Forestry and Fisheries

9 March 2015

Dr. Shakeel Bhatti

Secretary,
International Treaty on Plant Genetic
Resources for Food and Agriculture
Viale delle Terme di Caracalla, Rome Italy

Dear Sir,

Submission to the Third Meeting of the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System

Herewith, I send you our opinion to facilitate the discussion at the third meeting of the Ad Hoc Open-ended Working to Enhance the Functioning of the Multilateral System (MLS), as par Attached.

Please note, as the consultations with the stakeholders are still under way, we will give more input to the third meeting of the Working Group on the result of the communication.

Regards,

Akio Yamamoto
Director, Unit of Sustainable Use of Biological Diversity,
Environment Policy Division, Minster's Secretariat
Ministry of Agriculture, Forestry and Fisheries
(Delegate from Japan to the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System)
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Attachment

Opinion to facilitate the debate at the third meeting of the Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System

1. Basic Principles

(1) Utilization is the beginning of benefit sharing.

(2)Distinction between the Benefit Sharing Fund (BSF) and the funding strategy of the Treaty should be cleared.

2. General Comments based on the Principles

(1) Through utilization of genetic resources, we can turn potential value of Plant Genetic Resources for Food and Agriculture (PGRFA) into actual one. This means that without utilization, we cannot get any real benefits to be shared under the MLS.

As stipulated in the Article 13.2 of the Treaty, we believe that the benefits to be shared are those arising from the use of PGRFA accessed under the MLS.

(2) To enhance the use of PGRFA under the MLS, we support the approach to increase incentives for users, in particular the seed industry, to use the MLS (para 4 of the IT/OWG-EFMLS-2/Report).

(3) To make the MLS more attractive to users, it is important to increase the number of accessions under the MLS and to expand its coverage.

(4) We prefer use-based payment. We are also of an opinion that we should not confuse financial benefit sharing under the MLS with other activities under the funding strategy, because the benefit sharing under MLS is only a part of the funding strategy of the Treaty (Article 18.4 (e)). This means that the target of the funding strategy is not in itself the amount of money expected to be shared through the BSF.

3. Specific comments

(1) Duty to include materials into the MLS

Parties not yet notified the inclusion of their PGRFA to the MLS shall do so as soon

as possible.
To facilitate this process, we request update and further analysis of the coverage of the MLS (IT/OWG-EFMLS-2/14/Inf.3) in such a way that the data from Article 15 bodies is separated in the analysis.

(2) Expansion of the scope of the MLS
Expand the scope of the MLS so that all the PGRFA are covered under it. After hearing preliminary explanation from the Legal Officer of the FAO, we think that the stepwise expansion is not feasible, in practice, from a legal viewpoint.

(3) New and unique materials into the MLS
The missing discussion, to date, is the inclusion of new materials from in-situ conditions into the MLS. Without inclusion of such unique materials, the MLS* will not become attractive to users, and they avoid accessing to the MLS.
Furtbermore, tbe continuous inclusion of such new materials into the MLS will enable us to receive predictable and continuous income to the BSF.

* Many samples are duplicated samples also available elsewhere.

(4) Different treatment on type of users, crops and further availability of the products
1) Users
Although users of the MLS spreads from seed industry, public experimental stations, universities and research institutes and individuals including farmers, the discussion in the Working Group seems to be too narrowly focused on seed industry. Therefore we should keep in mind that the main users of the MLS are public and/or academic sectors that produce little monetary benefit, though are willing to continue discussion to make the MLS more attractive to seed industry,.

Another point is the various size of users from large company to a small family business or individuals including farmers and students. Depending on the size, the frequency of accessing to the MLS would be different, from hundreds of accessions a year to one accession a year, for example. Considering this situation, retaining only Article 6.11 of the SMTA (deleting both Articles 6.7 and 6.8) is unacceptable to us*.

*We are willing to further discuss improvement of Article 6.11.

2) Crops

Because the margins that breeding company will get may different by type of crops (such as vegetables, potatoes and so on), the SMTA should accommodate tbis difference. To categorize the crops into several types will be helpful.

3) Further availability of tbe products

For securing food security, it is very important for the world to be able to access to PGRFA not only to those under the MLS but also to the products (new varieties) therefrom. As we believe this is the reason why we have both Articles 6.7 and 6.8 of the SMTA, we should distinguish the benefit sharing requirements depending on further availability of the products. In this regard, the requirements to those products protected under patent and under plant variety protection system (PVP) should be different.

(5) Respect for business custom and breeding practice

To promote utilization of MLS by the seed industry, it is very important to respect their business custom and breeding practice. Thorefore, for example, eternal payment requirement (including no cancellation clause in an agreement) will reduce their willingness to use the MLS.

It is also important not to require payment on the materials accessed from the MLS but no longer utilized in their breeding program.

(6) Cut-off Points

To make the MLS more operative, it is important to introduce cut-off points into the use of PGRFA accessed under the MLS.

This is because in the case of making hybrid between PGRFA from MLS and from outside of the MLS (from seed company's original variety), the company retains the right to claim benefit sharing from the Product because their material has also contributed the creation of the new variety. As the present system does not respect the contributions of germplasm from the seed company (acting as a user and a provider at tbe same time), introduction of a cut-off point (s) is necessary.

Appendix 7

North American input to ITPGRFA Ad-Hoc Open Ended Working Group on the EFMLS

1. The MLS needs to support a broad and balanced approach to access and benefit-sharing, given the diversity of users it must serve. A focus on generating income from large corporations should not limit (or even exclude) options for access and payment by smaller companies, public institutions, and others who have different needs and resources.

2. The MLS should cover all PGRFA, by expanding Annex I. The Treaty itself covers all PGRFA, whether in the MLS or not, whether in situ or ex situ, and thereby Parties have obligations regarding all those materials (e.g., provide information, conserve them, etc.). We support extending the MLS to cover all PGRFA. By use of the SMTA, this provides the best possible perspective for sustainable increases in the amount of funding for the Treaty's Benefit-Sharing Fund.

3. Based on legal interpretation offered by FAO at the second meeting of the Working Group, it would be best to do so as a single move, rather than a very incremental approach.

4. Retain 6.7 and 6.8, in line with the provisions and language of the Treaty itself (especially Article 13.2(d))

5. Retain 6.8 as a voluntary payment. An indicative rate could be decided, which should be set lower than 6.7 (but above 6.11).

6. Support the development of 6.11 as a potentially attractive subscription option.
   - This is most likely to be helpful for companies. It's unclear how useful it would be to public-sector research institutions and genebanks, which are often the first to access MLS materials, and the first in the link of a long chain of sequential R&D that ultimately results in a "product."
   - Subscription models based on all crops and individual crops are possible. Pricing of an inclusive all-crops subscription model may not provide the flexibility that an individual crop model could provide. The cost of "all crops" may be prohibitively expensive if a company wants just one crop. Any subscription should be entered into voluntarily, as one of a series of options.
   - The subsciption model must recognize the reality that the values of all Annex I crop available in the MLS are not equivalent, nor are they equivalent within a single crop. For instance, F1 hybrid corn is a very valuable crop, but the MLS currently has little material of commercial value. The case may be different for other crops.

7. Within each payment option, rates could be differentiated by crop and by type of user (public research institution, private company (also differentiated by size?), academic research, etc.)
   - Differentiation should consider the value of crops and the resource of users. For instance, crops identified with developing world agriculture and with extremely low profit margins ("orphan crops") should be free to breeders to support the objectives of the Treaty toward farmers in developing countries.
   - The Working Group and Treaty will need to consider a balance so that a system of differentiating users doesn't become cumbersome. There should be a balance between simplicity and incentives. Careful consideration needs to be given to how such a system of differentiation can be developed.

8. Hybrids must not be classified as a restriction under the SMTA. The expert working group on the SMTA has confirmed that hybrids per se are not considered a restriction under the Treaty, unless there is some specific restriction on the use of the hybrid seed in research and breeding.

9. There should not be payments in perpetuity. All payment options should have an “end-by” date. More input from users and the private sector is needed to determine what time frame is appropriate and consistent with commercial practice.

10. The MLS should remove the requirement to track and trace every functional unity of heredity in a breeding program (Tracking according to commonly practiced breeding records should be sufficient for compliance).

11. Contracting Parties’ responsibilities should be reaffirmed. Contracting Parties should comply with the Treaty’s access terms, including incorporating their germplasm collections in the MLS. Parties to the Treaty should inform the Working Group about their germplasm collections in the MLS. They should provide statistics on the number of SMTA provided and the number of requests for which no GR were provided, and why.

12. Additional contributions by CPs, such as through a “Norwegian Approach” are welcome, but cannot be mandatory. The "Norwegian Approach" needs to be understood as a government subsidy and not, as sometimes presented, as a payment made by the seed sector.

13. The Benefit Sharing Fund should support better integration of in-situ and ex-situ efforts. This could include:
    Platform for co-development
    Support (but not exclusive) to the GIAHS and NICHES

14. We would not support negotiating a new protocol under the Treaty, as proposed by Asia.

A Discussion Paper from the International Seed Federation

Ideas to Enhance the Implementation of the International Treaty on Plant Genetic Resources for Food and Agriculture and the Access and Benefit-sharing Provisions

March 2015

The Ad Hoc Open-ended Working Group to Enhance the Functioning of the Multilateral System (MLS) of Access and Benefit-sharing is meeting for the third time in April 2015. In response to the Notification GB6 031 14-January-2015, ISF describes here a multi-optional approach to enhance benefit sharing. One element of the approach is a subscription model in the context of Art. 6.11 as specifically requested in Notification GB6 031. Also included is a suggestion for a minimum incorporation threshold per a request in the Notification.

Paragraph 6 of IT/OWG-EFMLS-2/14/Report states that the Working Group "discussed the possibility of introducing a "termination clause" in the sMTA". The responsibility to elaborate text for a "termination clause" went to the Co-chairs and Secretary working in consultation with FAO's legal office. Recognizing that the industry has expressed concern about the perpetual nature of the sMTA (tracking and potentially payments), and in appreciation that the Working Group has taken up this issue as noted in the Report cited above, ISF has drafted text for consideration to address (1) termination of payment, and (2) termination of an sMTA. This language is also provided below.

This discussion paper is intended to contribute to further alignment of the MLS and the sMTA with real-world commercial practices and thereby enhance the benefit-sharing provisions of the MLS.

Importantly, for the MLS to become broadly attractive to commercial breeders the sMTA must be based on the following principles:

- Impose minimal administrative burden (no unreasonable track & trace);
- Fair and equitable to all users (based on appropriate economic metrics and proportionate to a user's volume of seed sales):
    - sMTA encumbered material creates no competitive disadvantages;
    - Uses a differentiated approach for final products that will be available with restrictions for research and breeding and final products that will be available without restrictions for research and breeding;
- Create legal certainty for users;
- Recognize that different crops have very different profit margins;
- Definite expiration timeframe (no in-perpetuity); and
- Oblige benefit-sharing only when a tangible benefit is traced to MLS material.

In other words commercial breeders cannot sign a sMTA if it creates a competitive disadvantage such as tracking and tracing and payments in perpetuity. Also related to creating a healthy competitive environment, payment terms should be attractive to small and medium sized companies as well as larger enterprises. Payments are only fair and equitable when expenses

can be recovered through standard market practices. The sMTA must be simple to understand, comply with and transfer to third parties. It is also essential to recognize that some crops and their genetic resources are more valuable commercially[1]. Importantly, the sMTA must be recognized as an internationally recognized certificate of compliance under the Nagoya Protocol and Convention on Biological Diversity.

Multiple option approach

Many within the seed industry believe that a sMTA that offers more options (and reflects the conditions noted above) will be appropriately flexible to commercial breeders' business models globally.

1. Subscription fee on a Crop-by-crop, multiple-year renewable agreement[2]

As in Art 6.11, access to PGRFA under a subscription should be on a crop-by-crop basis over multiple years. The subscription fee should be structured as such to allow for a reduction when a company requests a subscription for multiple crops. The recommended payment would be much lower than the current percentage in Article 6.11 to attract researchers and/or breeders to subscribe. The fee may be based on the net seed sales[3] of the applicable crop (or collection of crops) and will be paid over the multiple years (number should not exceed 10 years). Different rates for different crop groups could be considered[4]. During the subscription period the subscriber would be allowed to access any material from the MLS of the crop covered under the subscription. Payments at the agreed percentage of a recipient's yearly net seed sales for the applicable crop are made regardless of whether or not a product is developed, and as long as any product commercialized is available without restriction for research and breeding. Commercialized products that include PGRFA of the applicable crop from the MLS that are restricted for research and breeding, and where the grounds for the restriction can be tracked from the original material of the applicable crop received from the MLS (see Minimum Threshold of Incorporation below) as demonstrated by standard breeding records (normal tracking and tracing), would be subjected to a different rate of payment as described below. A recipient, subject to the payment for restricting a Product, would submit a calculation on how the amount of payment was determined. All details of payment i.e., the crop, the payment calculation and exact amount must be kept confidential.

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[1] The economic value of MLS material for these and all crops depends, in part, on the amount of investment it takes to develop a commercial product i.e., wild relatives require more investment in general than improved materials. Ultimately, a high cost of utilizing MLS material would lead to avoidance.

[2] Ref Notification GB6 031: implementation of a subscription model in the context of Art. 6.11 of the SMTA

[3] Net sales means the gross revenues of seed sold minus taxes and other expenses plus revenues from seed treatments and tech fees not derived from the original material from the MLS.

[4] Currently, there is no direct correlation between a crop's profitability and the perceived commercial value of material of that crop in the MLS. Percentages based solely on a crop's profitability as described below in Section 2 will result in avoidance when the cost of the material is judged to be too high.

No further payment would be required after expiration of the initial subscription period for products developed with accessions acquired from the MLS as long as these products are available for further research and breeding without restriction. A recipient will have the right to renew a subscription of the multiple-year term. Upon expiration, a recipient may continue to use any materials received during the subscription period without any further obligations for payment and reporting. A recipient agrees to pay the remainder of payments due under the agreement if they decide to terminate before the expiration of the initial agreement or any extensions thereof.

Additional royalty on material not freely available for research and breeding:

A recipient agrees to pay a % royalty (much lower than the royalty under Art. 6.7 annually based on annual net sales of the product globally) on commercial products that include PGRFA of the applicable crop from the MLS that are restricted for research and breeding, and where the restriction results from the original material of the applicable crop received from the MLS, where the restriction is created up to and before 5 year after expiration of the subscription. A recipient will use standard breeding record keeping practices (standard tracking and tracing) to provide evidence that the original PGRFA of the applicable crop received from the MLS is the grounds for the restriction imposed on the commercial products. The royalty will be paid yearly until the restriction expires.

2. Royalty at commercialization only

This option is very much like the current Art. 6.7. In principal there should not be an obligatory payment for commercial products that are freely available for research and breeding. However, if this is changed in the future, and if payments should be required of all users of MLS material upon commercialization, then we propose two different rates based on a percentage of sales of a product. Royalty rates would be higher for products restricted for research and breeding versus those available for research and breeding. In addition, to ensure that payments are fair and equitable, a rate should be subsequently multiplied by a "crop factor" that accounts for the fact that different crops have vastly different profit margins[5]. (To simplify the system, crops might be organized into three groups on the basis of margins). Royalties would be payable as long as a material is restricted in any manner for the time that the product is not free for research and breeding or until the expiration term of the sMTA is reached. This option must also consider the need for conditions on minimum threshold of incorporation and termination and be consisted with the text provided below.

3. Upfront payment

It would be helpful to study the possibility of having a reasonable upfront payment per

[5] Contrary to the situation of the subscription where payment estimations are made before research and breeding is done, the crop-factor approach is appropriate for royalties since commercialization has occurred and the value of the MLS material has been determined. In this case, factoring a crop's profitability is appropriate.

accession or application of accessions to do the benefit sharing after which no further BS-obligations are required. This would simplify the system for access extremely.

Minimum threshold of incorporation

At present in the sMTA, in the definition of a 'Product' there is no condition for a minimum level of incorporation of the material obtained from the MLS. This is widely interpreted to mean that incorporation of any functional units of heredity from the original material will trigger the obligations of benefit sharing irrespective of their commercial "functionality" – the value, or lack of value, the genetics of the original material confer to a Product.

For users to be more willing to consider the use of material from the MLS, and ultimately contribute benefit-sharing, a minimum incorporation of the material and/or PGRFA is essential. ISF members are of the opinion that benefit sharing obligations can only be triggered if:

- The product incorporates at least 3.125 % of the PGRFA from the MLS by Pedigree (5 crosses) and/or
- Incorporates a trait of value derived from the PGRFA of the MLS.

We propose the following definition of a "Trait of Value":

"**Trait of Value**" means *any trait that confers commercial value to a **Product**, including but not limited to agronomic traits, traits conferring resistance to biotic or abiotic stresses, traits that enhance the nutritional or processing value of harvested commodities, and any other traits used to describe a **Product** for the purpose of promoting its commercialization*.

In addition, we believe that the benefit sharing obligations linked to % incorporation based on pedigree could be a graduated scale i.e., greater payment for higher % incorporation graduated to no payment when % incorporation is less than 3.125%.

Elements for termination clauses

Termination of the sMTA

We propose to include an option in the sMTA, which will allow the recipient to terminate the SMTA after a certain number of years. Termination of the sMTA would mean that the recipient is no longer allowed to use the original material received under the sMTA, including in research or breeding. The recipient should however remain allowed to use the material that it has developed with use of the sMTA material.

Cut-off point

To avoid perpetual payment obligations, we propose to include a limitation in the duration of the payment obligation. A recipient should not pay for more than a certain number of years after accessing material under an sMTA.

Conclusion

Overall, for maximum applicability and benefit sharing, the sMTA needs to be useful to the diversity present among plant breeders. As noted earlier, the mechanism will be functional only once simple changes are made to the sMTA that will ensure long-term, sustainable funding for the Treaty. Other important factors affecting the long- term functionality of the mechanism and the willing ness for users to participate in one of the options are:

- A better recognition by Contracting Parties of the value of in-kind benefits-sharing activity provided by the seed sector;
- Contracting Parties fulfilling their monetary obligation to fund the Treaty and the benefit sharing fund;
- Contracting Parties fulfilling their obligations to include material under their control into the MLS;
- Extension of Annex I to include all plant genetic resources for plant breeding;
- Priority given to projects financed through the funding mechanism with clear links to ex-situ conservation; and
- Transparency and possible involvement of the seed sector in decision-making concerning funding of projects.

Appendix 9

No. 5-6/2013-SD.V
Government of India
Ministry of Agriculture
(Department of Agriculture & Cooperation)

Shastri Bhawan, New Delhi
Dated:- 09.04.2015

Subject:- Third Meeting of the Ad Hoc Open-Ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit – Sharing.

The undersigned is directed to refer ITPGRFA's letter no. GB6-035-OWG-EFMLS- dated 17.03.2015 seeking information on the subject mentioned above by extended period i.e. 10.04.2015.

The information is forwarded herewith on the basis of discussions held during the 2nd meeting as well as notes recorded in the proceeding on respective technical elements for compilation to the Secretary, ITPGRFA before the 3rd meeting of the working group as under.

S.No.	**Issues Reported during 2nd meeting**	**To be supported by India during third meeting (Y/N)**
ITEM 3. Enhancing the functioning of the Multilateral System of Access and Benefit-sharing		
I. Measures related to the Benefit-sharing Fund		
	Range of measures to be adopted to increase user-based SMTA payments and other voluntary payments to the Benefit-sharing Fund	**Y**
II. SMTA-based measures		
a.	The FAO Legal Office to be requested to provide further information on the legal implications of only retaining Article 6.11 as the sole option in the SMTA.	**Y**
b.	Working Group had different perspectives on	Options to make

	whether to make the voluntary payment option under Article 6.8 of the SMTA mandatory	it mandatory under 6.8 need to be explored
c.	• a payment rate should be indicated under Article 6.8, regardless of payments being voluntary or mandatory, • to add a requirement under Article 6.8 for provision of non monetary obligations, such as provision of information and inclusion in the Multilateral System of any material developed, in case that monetary benefit-sharing under Article 6.8 remains voluntary. • The improvement of Article 6.11 was another measure agreed by the Working Group, in order to maximize its attractiveness to users.	**Y** **Y** **Y**
d.	Particular attention was drawn on how to attract users to subscribe to Article 6.11, if payments under Article 6.8 remained voluntary. This question should be dealt with in the documentation for next meeting so that it can be properly addressed by the Working Group.	**N ,** if (b) above is agreed
e.	Other measures suggested were to differentiate rates based on whether the **products are available with or without restriction for further research and breeding, type of user and type of crop**. It was recognized that it would be difficult, at this stage, to make concrete proposals for rates to be applied, and it was agreed to continue discussion on the differentiation of payment rates on the basis of product, crop and user categories.	**Y,** strongly supported by Asia Group
III. Other user-based measures		
	The Working Group requested the Secretariat to conduct a succinct analysis on the question whether agreements may be made between	**Y**

	private sector representatives and the Governing Body or FAO.	

ITEM 4. Enhancing the functioning of the multilateral system of access and benefit-sharing: additional measures		
	• Support further work of the Platform of Co-development and Transfer of Technology • Implement the Global Information System, including Div Seek • Dedicate a specific window or specific windows of the Benefit-sharing Fund to support capacity building, technology transfer and information-exchange • Explore possibilities of enabling the provision of voluntary contributions to support specific projects of the Benefit-sharing Fund • Support the establishment and management of nationally important *in situ* and on-farm conservation heritage sites for plant genetic resources for food and agriculture • Develop know-how of *in situ* conservation management • Establish new and publicize existing scholarships programmes for training in management and utilization of plant genetic resources for food and agriculture • Publicize and adjust existing bilateral capacity development programmes • Recognize and increase the exploitability of registered varieties. • Provide training, where needed, on project elaboration to increase the competitiveness of project proposals from gene bank teams	All of these need to be supported as non monetary benefit sharing measures

This issues with the approval of Competent Authority.

(Gorelal Dewaker)
Asstt. Commissioner (Seeds)

To,

Dr, Shakeel Bhatti
Secretary, ITPGRFA,
FAO of the United Nations

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Position on

Enhancing the functioning of the Multilateral System of Access and Benefit Sharing of the International Treaty on Plant Genetic Resources for Food and Agriculture

and

Comment on
IT Notification of 15.02.2015 (GB6 031 – WG 3)

Introductory remarks

Plant breeding improves plant genetic resources for agricultural production to the benefit of society. In the process of plant breeding, each year thousands of genetic resources – primarily commercial varieties but also other genetic material - are screened in observation and disease trials to single out those resources that possess interesting characteristics with the objective to create new and improved plant varieties which themselves constitute new genetic resources. Combining all desired characteristics into a new variety that can be offered to consumers requires a complex, time consuming and costly process of crossing, backcrossing and selection. The development cycle of such new varieties on average takes 10 years and may take even longer where wild types or landraces are used.

The ancestry of every single plant variety is very complex. It generally combines thousands of different genetic resources from different sources and regions. There is a strong interdependence between plant breeders across the world in developing new plant varieties, which are, for instance, resistant to diseases, better adapted to local climatic conditions, and provide higher yields. Therefore, the continuous flow of plant genetic resources between countries and continents and easy and speedy access to the totality of the plant gene pool is indispensable for breeders worldwide.

Plant breeding thus requires a specific access and benefit-sharing (hereinafter: 'ABS') regime which understands its functioning and is adapted to its specificities. The International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter: the 'Treaty') recognises these specificities and is therefore the preferred ABS system of the European seed sector. Still, it may be further improved.

Review of the functioning of the ITPGRFA and its ABS mechanism

At its 5th session in September 2013, the Governing Body (hereinafter: 'GB') of the IT set up an ad-hoc open-ended working group on the enhancement of the Treaty's MLS. In the respective resolution, the GB „appeals to stakeholders who use plant genetic resources under the Treaty to themselves develop, and assist the Working Group to develop, innovative user-based approaches to realizing monetary benefit-sharing, within the context of the use of the SMTA, and other innovative approaches that can contribute to an adequate and sustainable flow of resources to the Benefit-sharing Fund."

In the following, ESA supplies its views on what the European seed sector sees as principal conditions for a successful long-term funding strategy as well as detailed options that may help to enhance the monetary benefit-sharing. These views are based on the practical processes and in sync with the economic realities and structural diversity of the plant breeding industry in Europe and worldwide.

ESA considers it decisive for the long-term success of the ABS mechanism that the current discussions take due account of this structural diversity of the sector which is based on fundamental differences of crop species, their breeding and variety development, and their marketing and markets.

At the same time, the European seed sector maintains its view that all Parties and stakeholders should take their responsibility to contribute to a successful system. Contracting Parties need to acknowledge and take responsibility for the socio-economic benefit that access and use of PGRs underpins across related economic sectors as well as for society as a whole. This acknowledgement should become manifest in a substantial and continuous financial commitment of all Contracting Parties.

3rd meeting of the Ad-hoc open-ended Working Group

ESA is of the opinion that the upcoming 3rd meeting in Brazil must again address basic conditions as well as different suitable options to improve the ITs financial situation. As requested by the notification of the Treaty Secretariat of 14.01.2015, ESA also provides specific comments on the option of a subscription fee model. However, these should be understood as comments on one possible option within a multi-optional system which the European seed sector considers to best address all important elements.

Principal conditions for a successful long-term funding of the IT Benefit Sharing Fund

The Working Group established by the Governing Body to enhance the Multilateral System of the Treaty has two objectives: to increase user-based payments and contributions to the Benefit-Sharing Fund in a sustainable and predictable long-term manner, and to enhance the functioning of the Multilateral System by additional measures.

ESA is of the opinion that achieving these objectives is interdependent and can only be addressed in a coherent manner. In fact, measures that would sustainably and predictably enhance the scope, value and functioning of the MLS should be understood as supportive for an increased user-based flow of financial contributions to the BS fund.

Such measures falling in the responsibility of Contracting Parties include the fulfilment of Contracting Parties' obligation to bring their material under the Multilateral System and to extend Annex I of the Treaty to all plant genetic resources used for research and breeding for all crops. Broadening the scope of the IT and increasing its potential value for breeders by making more material of more species available under the sMTA will also predictably result in more accessions and thus an increasing benefit sharing potential from users of PGRs.

With regard to the future financial mechanisms for the MLS, ESA is of the opinion that these mechanisms should be based on the following principles:

- solidarity: creating a mechanism which is as inclusive as possible, avoiding free-riding to the extent possible;
- simplicity;
- minimum administrative burden (no excessive "track & trace" obligations);
- predictability: providing high legal certainty for users;
- proportionality: providing a level playing field within the industry to the extent possible;
- differentiated approach to material available without restrictions for further research and breeding and material that is not.

Finally, ESA underlines the usefulness of measures that would promote projects financed from the Benefit Sharing Fund with links to ex situ conservation and of measures that strengthen transparency and possibilities for involvement of the seed sector in the decision-making process concerning the projects on which money from the Benefit Sharing Fund is spent.

Options to increase user-based payments and contributions to the Benefit Sharing Fund

As stated above, ESA firmly believes that a multi-optional system that takes account of fundamental differences of crop species, their breeding and variety development, and their marketing and markets is likely to be most in line with the economic realities and structural diversity of the plant breeding industry in Europe and worldwide. It is therefore also the approach that is most likely to increase the attractiveness of the system, increase the subsequent use of sMTA material, and increase consequent monetary benefit sharing to the BS Fund.

Before this background, ESA provides suggestions for a number of options that are in line with both, the principal conditions outlined above, and provide for flexibility within the system.

It should however be underlined that some general conditions apply to all of these options and need to be elaborated in the further discussions. These concern specifically:

- Termination of access and use

ESA is of the opinion that the possibility of termination of sMTAs must be provided to recipients. Any termination of an sMTA would also end the possibility of the respective recipient to use the material received under the specific sMTA. However, the recipient must be allowed to continue to use all material that has been developed with the use of the material accessed under the sMTA.

- End of payment obligations

It is incompatible with any sector's business practice to assume and regulate for financial benefit sharing obligations in perpetuity. ESA therefore considers it necessary to provide for clearly defined timelines for financial benefit sharing obligations for all material accessed under an sMTA.

- Minimum incorporation

Financial benefit sharing obligations should depend on a minimum level of incorporation by pedigree and/or an incorporation of a defined trait of value from material accessed from the MLS.

- Compliance provision

Material accessed under any of the future sMTA options should not raise any concerns whatsoever under aspects of compliance with the CBD Nagoya Protocol. Respective clarification within legal frameworks of Contracting Parties to both the IT and the CBD Nagoya Protocol should be sought, and ESA believes that official bodies responsible for the IT should play in important role in initiating and driving this process.

I. The option of a yearly subscription fee (Notification 15.02.2015)

Main elements of this option must include and assure the following:

- Any user must sign a subscription agreement with the Secretariat of the IT.
- Subscription agreements should include options for 'occasional', 'low level' access (incl. limited number of accessions) to a single crop, full access to all MLS material of a single crop or defined number of crops, and an unlimited access to all material of all species under the MLS.
- A subscription agreement would be valid for a defined period of e.g. ten years. During the term of the agreement, the user would pay a yearly subscription fee, depending on the specific subscription agreement chosen.
- The yearly subscription fee should take into account the economic importance of the user with regard to the crop(s) for which the subscription agreement is signed (turnover). The yearly subscription fee could e.g. be a defined percentage of the turnover of the user in the specific crop during the previous year.
- During the term of the subscription agreement, the user can ask for accessions in the MLS belonging to the crop(s) for which the agreement is signed. The request will be made to the relevant gene bank. A user will sign an sMTA for each individual request. In the sMTA, users will have to declare their respective subscription agreement with the IT Secretariat.
- Once the term of a subscription agreement ends, the user may choose to sign another agreement for another term. If the user does not sign a new subscription agreement after the term has ended, the user cannot acquire new accessions from the MLS under this option. The user may however choose any of the other financing options under the sMTA. The user may continue to use the already acquired accessions since the accepted sMTA's will remain valid. There will be no further payment obligations for products developed with use of these already acquired accessions.
- In case a user transfers MLS material covered by a subscription agreement to a third party, a new sMTA has to be signed by this third party. The third party then would have several options: in case the third party also has a subscription agreement for this crop, it will declare this towards the IT Secretariat; if the third party does not have a subscription agreement, it will have to choose one of the other financing options;

- The yearly subscription fee should take account of the different profitability levels of crops. ESA proposes to define categories of crops, grouped according to their individual profitability.

- In order to avoid an over-exploitation of the subscription fee system, an annual limit of the number of accessions that can be accessed throughout a year could be considered. If a user would be willing to include such an annual limit in the subscription agreement, the yearly subscription fee could for example be half of the 'normal' fee.

- To promote the use of the subscription model, incentives for multiple crop subscriptions should be considered, e.g. lower percentages for calculating the annual fee.

- It is ESA's principal position that a subscription fee model must also reflect a differentiated approach to material available for further research and breeding without any restrictions and to material which is not. Consequently, products that are not available for further research and breeding without restrictions would be subject to additional benefit sharing obligations. It is important to investigate appropriate possibilities to accomplish this which at the same time are in line with the principles mentioned above (simplicity, no excessive track and trace obligations).

II. The option of a fee per accession

The main element of the option must include and assure

- The fixed fee must be applicable on a global level, i.e. must the same all over the world and would be paid for every single accession.

ESA is of the opinion that the option of a fee-per-accession model may de facto be incorporated in a sufficiently differentiated subscription fee model (v. above).

III. The option of a payment at commercialisation

This option would in principle be the one of the current Article 6.7, but with a lower percentage and with a minimum level of incorporation. This could make this option more attractive for users and result in an increased use of MLS material and consequent benefit sharing.

Main elements of the option would have to be:

- The royalty payment, determined as a % of the annual sales of a Product incorporating MLS material, should only apply if the Product incorporates by pedigree at least a minimum defined percentage of the MLS material and/or a defined trait of value;

- The royalty payment should only apply to Products that are not available for further breeding and research without restrictions.

Concluding statement

ESA firmly believes that the continuation of a broad discussion on a set of suitable financing mechanisms that take due account of the diversity of the suppliers and users of plant genetic resources with the aim to provide for adapted respective approaches that encourage access and facilitate benefit sharing will be key to achieve both objectives, the strengthening the IT's long-term financial situation and the sustainable preservation of genetic resources by their continuous utilisation.

ESA is ready to participate in and provide input to the discussions to enhance the functioning of the Multilateral System of the Treaty. It has to be noted however that in the discussions around the improvement of the Treaty the expectations of the different stakeholders vary on a large scale. Resolution 2/2013 adopted at the fifth session of the Governing Body sets out some expectation in general terms. For the sake of clarity and more constructive discussions, ESA is of the opinion that the expectations of stakeholders participating in the discussions should be realistic and transparent.

The European seed sector is committed to support and further develop the Treaty, ready and committed to take financial engagement to support the Treaty, committed to be proactively involved in and propose solutions for shaping a future financing mechanism of the Treaty that provides sustainable, long-term income to the Treaty's Benefit Sharing Fund, and ready and committed to provide input for additional measures to further enhance the Multilateral System.