



Item 4 of the Provisional Agenda

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

Geneva, Switzerland, 14-16 May 2014

**INNOVATIVE APPROACHES ALREADY IDENTIFIED BY THE AD HOC
ADVISORY COMMITTEE ON THE FUNDING STRATEGY**

**Excerpt from the Report of the second resumed Session of the
Seventh meeting of the Ad Hoc Advisory Committee on the Funding Strategy**

Note by the Secretary

EXECUTIVE SUMMARY

1. This document provides an overview of the “innovative approaches”, which were identified and considered by the *Ad Hoc* Advisory Committee on the Funding Strategy (the Committee) in the last biennium. It is an excerpt from the Report of the Second Resumed Session of the Seventh Meeting of the *Ad Hoc* Advisory Committee on the Funding Strategy, which was made available to the Governing Body in document IT/GB-5/13/Inf.4 Add.2.
2. In Resolution 3/2009, the Governing Body “invite[d] Contracting Parties to explore, including with relevant stakeholders, the development of innovative approaches to allow for the provision of resources to the Benefit-sharing Fund, including on a regular and predictable basis.” At its Fourth Session, the Governing Body in Resolution 3/2011 “emphasize[d] the need to further explore innovative approaches in engaging voluntary donors to the Benefit-sharing Fund, in particular various private sector prospects such as the seed and the food processing industry.”
3. The Committee has accordingly identified and considered a wide range of innovative approaches during the last biennium. Moreover, there have been extensive discussions on innovative approaches among Contracting Parties and stakeholders. The descriptions of the six innovative approaches contained in this document were prepared by the Committee at its second resumed meeting.
4. The document *Background on the work undertaken by the Ad Hoc Advisory Committee on the Funding Strategy, and its further development*,¹ makes ample reference to the innovative approaches already identified by the Committee and contained in this document.

¹ IT/OWG-EFMLS-1/14/3.

TABLE OF CONTENTS

	<i>Para.</i>
I. Introduction	1-10
II. Innovative approaches	
Revisiting Article 6.11 of the SMTA	11-14
Revisiting Article 6.7 of the SMTA	15-19
Promoting regular seed sales-based contributions by Contracting Parties	20-23
Expanding the coverage of the Multilateral System	24-27
Novel ways to attract use-based voluntary funding: vegetable licensing platform	28-35
Upfront payments on access, to be discounted against payments due on the commercialization of a product	36-38
III. Consideration by the Governing Body of innovative approaches to mobilizing funds	39-41

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

Introduction

1. At its fourth meeting, in 2011, the Governing Body of the Treaty adopted Resolution 3/2011, which:
“emphasize[d] the need to further explore innovative approaches in engaging voluntary donors to the Benefit-sharing Fund, in particular various private sector prospects such as the seed and the food processing industry”.
2. At its seventh meeting, the Committee noted the uncertainty and lack of predictability of income for the Benefit-sharing Fund and how this made the innovative approaches for resource mobilization requested by the Governing Body, a particularly high priority. The experience of project funding through the Benefit-sharing Fund (BSF) has shown that there are huge needs for funding, directed to the implementation of the *Global Plan of Action for the Conservation and Sustainable Utilization of Plant Genetic Resources for Food and Agriculture* in developing countries.
3. The Committee has identified several innovative approaches during the intersessional period in order for the Governing Body, at its Fifth Session, to begin an exploration of all possible measures that could address the shortfall accumulated in the Benefit-sharing Fund and create predictable, reliable and sustainable resources for the Benefit-sharing Fund in order to avoid a negative impact on the Treaty. These approaches are based on the use of plant genetic resources for food and agriculture.
4. The Committee requested that the contents of Agenda Item 4 of the *Report of the second resumed session of the seventh meeting of the Ad Hoc Advisory Committee on the Funding Strategy*² be translated and incorporated by the Secretariat into the relevant working documents of the Fifth Session of the Governing Body. What follows in this section is an excerpt of the section of the Report referred above.
5. The *Ad Hoc* Advisory Committee on the Funding Strategy has accordingly identified a number of such potential innovative approaches. The innovative approaches were first described in the Report of the first resumed meeting of the Committee³, and which are described in more detail in Part II of the present Report, below:
 1. Revisiting Article 6.11 of the SMTA.
 2. Revisiting Article 6.7 of the SMTA.
 3. Promoting regular seed sales-based contributions by Contracting Parties
 4. Expanding the coverage of the Multilateral System.
 5. Novel ways to attract use-based voluntary funding.
 6. Upfront payments on access, to be discounted against payments due on the commercialization of a product.
6. The Committee concluded that the various innovative approaches are technically interlinked and interdependent, and need to be addressed together. It also concluded that different

² IT/GB-5/13/Inf.4 Add.2.

³ IT/GB-5/13/Inf.4 Add.1.

innovative approaches could each provide a part of an adequate and sustainable flow of income to the BSF, and the objective should therefore be to stack such approaches, within a single package.

7. Discussions with stakeholders have shown that there appears to be an increasing realization that the use of the SMTA has simplified administrative procedures in the plant breeding industry and reduced transaction costs. Any modification to the system that reduces transaction costs has the potential to attract greater support from stakeholders.

8. Stakeholders, in particular the plant breeding industry, have expressed, however, a perceived need to rapidly enhance the legal certainty of the use of the SMTA, in particular in relation to obligations to disclose origin in applications for intellectual property rights, and to the check-points established in national implementation of the Nagoya Protocol, in particular, the acceptance of the SMTA as a certificate of compliance in this context. This is a matter that the Governing Body may wish to address as a matter of urgency not later than the Sixth Session of the Governing Body in 2015, developing any intersessional work required.

9. Enhanced legal certainty will be of particular importance in obtaining support from users of the SMTA for any modifications to the SMTA, and for stakeholder-led, use-based innovative approaches, and should therefore be addressed at the same time.

10. The Committee also noted that, until the innovative approaches begin to generate income, it is important to intensify existing efforts and plans for resource mobilization of voluntary contributions, as established in Resolutions 3/2009 and 3/2011, to sustain immediate income for the BSF.

INNOVATIVE APPROACHES

1. Revisiting Article 6.11 of the SMTA

11. The SMTA already contains an option for crop-based benefit-sharing (SMTA Article 6.11). This option was proposed by the African Region at a late stage in the negotiation of the text of the SMTA, with the intention of creating a payment option for recipients of material under an SMTA that would generate a immediate and predictable flow of funds to the BSF, and reduce the transaction costs of the Multilateral System, both for the management of the system, and for the users of the SMTA. The African Region is still of the opinion that the basic principles of a crop-based benefit-sharing system should form a major thrust of innovative approaches to resource mobilisation.⁴

12. No recipient of material under an SMTA has so far adhered to this crop-based “subscription” option. Discussions with breeders suggest that the main perceived impediments are two-fold:

(a) This option creates, in effect, a **mandatory** payment obligation, whereas the accession-based option (implemented by SMTA Articles 6.7 and 6.8) will in most cases result in a product that is a variety that is not protected by a patent, and as such will not be subject to mandatory payment under Article 6.7. Varieties will likely be commercialized under Plant Variety Protection (PVP), and fall under Article 6.8, which provides only for **voluntary** payments. Since it appears that breeders do not consider it likely that any substantive voluntary payments will be made, this creates an automatic bias against accepting the crop-based payment subscription option.

(b) Even without taking this factor into account, and considering only the level of mandatory payments, the ratio of mandatory payments under Article 6.11 (at 0.5% of a

⁴ See Report of the Resumed Seventh Meeting of the *Ad Hoc* Advisory Committee on the Funding Strategy- Appendix 2 (document IT/GB-5/13/Inf.4/Add.1)

company's gross annual sales of all its products, whether or not these contain materials received under and SMTA) to mandatory payments under Article 6.7 (at 1.1%, less 30% = 0.77%, of annual gross sales), is not economically attractive to breeders.

13. A further factor must be taken into account, in considering how to make Article 6.11 more attractive to recipients: the attractiveness of this option varies greatly from breeder to breeder, depending on the resources that they actually need to access under SMTAs, and the number of products they actually make that incorporate material received under SMTAs. This makes it difficult for Article 6.11, as currently constructed, to serve as a "one size fits all" solution.

14. Article 6.11 should therefore not be approached independently of the other innovative approaches, in particular, the possibility of extending mandatory payments to other categories of product, and to possible changes that may be made to the level of payments, under Article 6.7. Levels of payment under Articles 6.11 and 6.7 are technically interlinked, and dependent variables. They would need to be considered together, if Article 6.11 is revisited, so that it can achieve the objectives for which it was formulated, that is, the generation of an immediate and predictable flow of funds, and a reduction of transaction costs for users and the Treaty.

2. Revisiting Article 6.7 of the SMTA

15. A consideration of Articles 6.7 and 6.8 together shows that there is an inbuilt bias towards recipients avoiding the use of materials under SMTAs, when these would be incorporated in a product that would result in mandatory payments (i.e., payments in accordance with Article 6.7), and that breeders are of the opinion that voluntary payments (in accordance with Article 6.8) are unlikely ever to be substantial, because a company that makes a substantial payment is put at a real competitive disadvantage, in relation to a company that does not.

16. This imperfection in the current system could be addressed by extending the range of products to which mandatory payments would apply, for example, by including under mandatory payments all products that may not be freely reproduced.

17. The Governing Body may, in accordance with Article 13.2d(ii), establish different levels of payment for various categories of recipient; and from time to time review the level of payment and assess whether the mandatory payment requirement shall apply also in cases where commercialized products are available without restriction to others for further research and breeding. The Governing Body might accordingly consider making benefit-sharing mandatory, as well, for products that are restricted for multiplication, at a relatively lower level of payment.

18. In revisiting the levels of payment under Article 6.7, the Governing Body will need to also take into account the impact this would have upon the attractiveness or otherwise of Article 6.11, and to consider the two innovative approaches together.

19. Innovative approaches 1 and 2 have the advantage of only requiring modifications to the text of the SMTA, which may be effected by a simple decision of the Governing Body, and which would not require changes to the Treaty itself.

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

20. This innovative approach recognizes the decision of the Government of Norway to make an annual contribution of 0.1% of the value of seed sales in its territory to the BSF, beginning in 2009. These are voluntary contributions, as foreseen in Article 18.4f of the Treaty, which are outside the scope of the SMTA. Norway regards such contributions as recognizing not only the

value of current access, but as also constituting a recognition of the value of plant genetic resources that were received before the Treaty came into force. It estimated that Norway's contributions through this initiative would amount to USD 1 million over a ten-year period. At the time of announcing the decision, Norway estimated that, if all Developed Countries made similar contributions, a sum of about USD 200 million would flow to the BSF over ten years, in a predictable manner.

21. At the Second World Seed Conference in 2009, speakers from the seed industry estimated the value of the world's annual turnover of all seeds at USD 36 billion, and noted that, if the whole world followed this approach, for all seeds, it would bring the BSF the sum of USD 36 million annually. In such a case, it hoped that the administrative load for the industry could be lightened.

22. The Governing Body has recommended that other Contracting Parties consider making a similar contribution, but, at the time of writing, no other Party has done so.

23. The Governing Body, in considering innovative approaches, might therefore wish to clarify whether other Contracting Parties would be prepared to make regular seed sales-based contributions, and under what conditions, within a larger package of innovative benefit-sharing approaches.

4. Expanding the coverage of the Multilateral System

24. Many stakeholders have expressed a desire for an urgent expansion of the coverage of the Multilateral System, to ensure that plant breeding has effective access to the wide range of plant genetic resources that it needs in order to develop high performing crops, to underwrite food security, and to face the growing challenge of climate change.

25. Stakeholders have also recognized that an expansion in the coverage of the Multilateral System could also expand the potential for benefit-sharing, and that the two questions are therefore intimately and reciprocally linked. The Committee recognized that the present Benefit-sharing Fund arrangements are not providing appropriate benefit-sharing and that any expansion of the Multilateral System shall only enhance benefit-sharing if changes to the current Benefit-sharing Fund arrangements can be agreed.

26. The list of crops in *Annex 1* to the Treaty is an integral part of the Treaty, and, as such, changes to *Annex 1* would require changes to the Treaty, and a round of ratifications. This would inevitably be slow, both for a sufficient number of Contracting Parties to ratify the revision, and bring the changes into effect, and then for further Contracting Parties to ratify it. Should the Governing Body agree to the expansion of the list, it might wish to consider, at the same time, shorter-term, practical arrangements, by which Contracting Parties could be encouraged to use the expanded list on a day-to-day basis, in the provision of facilitated access under the SMTA.

27. Alternatively, the expansion of the Multilateral System might be effected by a Protocol to the Treaty, which would allow for ratification independently from the implementation of the Treaty itself.

5. Novel ways to attract use-based voluntary funding: vegetable licensing platform

28. The *Ad Hoc* Committee stressed the desirability of stakeholder groups to themselves propose novel ways of contributing to the BSF, in recognition of the value of the Treaty in facilitating access, reducing transaction costs, and providing legal certainty. If initiatives by industry groups for use-based funding can be brought to early fruition, this will significantly enhance the likelihood of voluntary contributions from other sources.

29. During the biennium, the *Ad Hoc* Committee on the Funding Strategy has been exploring with the Vegetable Industry Working Group a possible Vegetable Licensing Platform (VLP), which is currently under construction, and which will include use-based voluntary benefit-sharing. If this initiative, by a large group of vegetable breeders, comes into being, it can be expected to create momentum for other sectors of plant breeding to structure initiatives that reflect their needs and are fitting the structure of their sectors of plant breeding.

30. The Vegetable Industry Working Group is working on establishing an Industry Licensing Platform (ILP). They are developing an Open Innovation Model protected commons, whereby immediate access to vegetable patented traits would be guaranteed under fair, reasonable and non-discriminatory conditions. The Vegetable Industry Working Group informed the *Ad Hoc* Advisory Committee on the Funding Strategy of this possibility, and has kept it informed about its preparations for the establishment of the ILP, the way in which it will work, and the contributions to the BSF that it foresees, if the ILP is finally established.

31. The rationale behind the development of the ILP as an Open Innovation Model emerged from several challenges that plant breeders (especially small, family-owned and medium-sized plant breeders) have faced in recent years, when seeking to breed new varieties. The ILP aims to provide a framework for open and non-exclusive access for plant breeders to normal traits that are under patent. According to the information received, the main motivation for creating the Open Innovation Model was an effort by the Vegetable Industry Working Group to reduce transaction costs, increase legal uncertainty, avoid dependency and possible litigation in the exchange of PGRFA products under restriction after their first commercialization. Hence, the underlying rationale for establishing the ILP is to stimulate the use of plant genetic resources by innovation through plant breeding.

32. The ILP would be limited to normal traits. The ILP would not cover or transfer any GM technologies. The scope of the ILP would be all patents and patent applications owned and controlled by participants in the platform who cover biological materials that are part of the licensing platform. The ILP will make every such new patent on normal traits immediately available for open innovation licensing for further breeding. A fair, reasonable and non-discriminatory remuneration would be established for its commercial use. Part of that remuneration would be contributed to the Benefit-sharing Fund of the Treaty, through an agreement with the ILP. If no patent has been granted in a region or country for a specific trait, no licensing or payments for that technology in that country is necessary under the Open innovation model.

33. *Additional Non-monetary benefits that could be expected, in support of the Treaty:*

- The Treaty provides that, for breeders in “*developing countries that are Contracting Parties [access to and transfer of technology] shall be provided and/or facilitated under fair and most favourable terms*”, as explicitly pointed out in the Treaty. For technologies relating to normal vegetable traits, access would currently be free, since normal traits are not patentable in developing countries, and in consequence no royalty would be due for any use in such countries.
- The effect of the ILP would be to lower transactional costs, as no case-by-case negotiation of contractual terms and royalties is required;
- The ILP will include provisions to create patenting transparency. This will allow stakeholders to monitor the filing of applications and the grant and licensing of patents on a transparent and inclusive basis.
- The ILP will promote food security through the dissemination of improved technology, “free access but not access for free”;
- The ILP will establish a global breeder’s exemption for patents within its pool, which enables a free use for breeding and development, and under which payments are only due upon commercialization, in countries where the resulting variety is covered by a valid patent.

34. The potential of the ILP as an innovative source of income for the BSF:

There appears to be a strong potential for contributions to the BSF from this interaction between the ITPGRFA and the vegetable seed industry. Any funds provided would accrue to the BSF for allocation through its project cycle to approved projects for conservation and sustainable use of PGRFA by farmers in developing countries, in accordance with Article 18.4f of the Treaty. Contributions to the Benefit-sharing Fund under Article 18.4f of the Treaty do not require any institutional linkage between the Treaty and the ILP and do not increase the workload of the Secretariat. The ILP would not seek any involvement in decisions on which projects to fund, or in any part of the project cycle.

35. The *Ad Hoc* Advisory Committee is convinced of the need to work closely with representatives of the plant breeding industry, in order that they can explain and make clear the advantages of the Treaty to their stakeholders, and so the advantages of supporting the Treaty by creating use-based voluntary funding mechanisms. Improving the outreach of the Treaty to relevant stakeholder groups should also be a priority in developing innovative approaches to benefit-sharing.

6. Upfront payments on access, to be discounted against payments due on the commercialization of a product

36. One way that could both encourage recipients to choose a particular payment option, and create an immediate flow of resources to the BSF, would be to link it to the possibility of the recipient making an up-front payment on access to material under an SMTA to a discount against payments due when a product is commercialized, related to the size of the up-front payment.

37. There are many ways in which this could be constructed. For example, a recipient could either pay a fixed amount, or choose how much to pay per accession, with the discount of what is owed on commercializing a product, on the amount of the up-front payment. The discount could vary according to the length of time between access and commercialization, and the system could be structured to work for either Art. 6.7 or 6.11.

38. This is not an independent approach, but an addition to innovative approaches 1 and 2. It could be incorporated in the SMTA, if it were agreed.

Consideration by the Governing Body of innovative approaches to mobilizing funds

39. The innovative approaches described above will be forwarded to the Governing Body for its consideration in the Fifth Session of the Governing Body. They are complex and interlinked, and delegations should be encouraged to come prepared.

40. The Committee recommended that the Governing Body consider the various innovative approaches identified, and any others that may be suggested, in an integrated manner, and that a package that stacks various sources of funds be identified. The need to rapidly increase the level of effective benefit-sharing, through the BSF, is evident to many stakeholders, and it is recommended that the Governing Body take the necessary steps to implement such a package.

41. The Committee recommended that the Committee on the Funding Strategy should be reconvened, but under a substantially widened mandate, that acknowledges current challenges of implementation of the Treaty and prepares for decision-making of the Governing Body regarding the functioning of the Benefit-Sharing Fund in the context of the Multilateral System in an

inclusive and comprehensive approach. Such decision would take advantage of the accumulated extensive experience in the Ad Hoc Committee on the Funding Strategy whilst addressing current realities confronting the International Treaty's implementation.