

## Resumed Ninth Meeting of the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System of the International Treaty on Plant Genetic Resources for Food and Agriculture: 24-26 October 2019

The resumed ninth session of the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing (MLS) of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA or Treaty) convened with the expectation to conclude negotiations on a package of measures to enhance the functioning of the MLS. In June 2019, the Working Group made significant advances, including tentative agreement to amend Annex I of the Treaty (list of crops in the MLS), and progress on revising the Standard Material Transfer Agreement (SMTA). Rates for benefit-sharing payments, and information related to plant genetic resources for food and agriculture (PGRFA), also referred to as genetic sequence data or digital sequence information (DSI), remained as the main outstanding issues. The meeting was thus suspended to allow for additional time to finalize negotiations.

However, at the three-day resumed session, the Working Group was unable to bridge positions between the developed and the developing world. Deep principled divergences remained, in particular regarding benefit-sharing payments from use of genetic sequence data. Co-Chairs Hans Hoogeveen (Netherlands) and Javad Mozafari (Iran) issued a compromise proposal on a package of elements, addressing benefit-sharing payment rates, benefit-sharing from genetic sequence data, and the review of the enhanced MLS, but consensus was elusive. In addition, delegates inserted a significant number of proposed revisions in the draft revised SMTA and the draft resolution. As a result, the Co-Chairs will hold informal consultations immediately prior to the Governing Body (GB) session to be held from 11-16 November 2019, with one or two representatives from each region, in a final attempt to reach consensus.

Since its establishment in 2013, the Working Group has focused on the revision of the SMTA. It elaborated a subscription system for access to all MLS material upon annual user-based payments, also allowing for access to specific MLS crops with no subscription, as an exception (dubbed as single access system). The Working Group also discussed options for possible expansion of the scope of the MLS.

The Working Group is composed of up to 27 regional representatives: up to five each from Africa, Asia, Europe, and Latin America and the Caribbean; up to three from the Near

East; and up to two each from North America and the Southwest Pacific. Up to two representatives from each of the following groups may participate as observers: civil society; the seed industry; farmers' organizations; and the CGIAR Consortium of International Agricultural Research Centers.

The Working Group's resumed ninth session convened from 24-26 October 2019, at the headquarters of the Food and Agriculture Organization of the UN (FAO) in Rome, Italy. It was preceded by a day of regional consultations on 23 October.

### A Brief History of the Treaty

Concluded under the auspices of the FAO, the ITPGRFA is a legally-binding instrument that targets the conservation and sustainable use of PGRFA, and fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity (CBD), for sustainable agriculture and food security. It establishes an MLS for facilitated access to a specified list of PGRFA including 35 crop genera and 29 forage species (Annex I), and institutionalizes monetary and non-monetary benefit-sharing from the utilization of these resources in the areas of commercialization, information exchange, technology transfer, and capacity building.

The Treaty was adopted on 3 November 2001 by the FAO Conference, following seven years of negotiations. It entered into force on 29 June 2004, and currently has 146 parties.

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### Key Turning Points

**GB 1:** The first session of the Treaty's GB (June 2006, Madrid, Spain) adopted the SMTA and the Funding Strategy. The SMTA includes provisions on a benefit-sharing scheme, providing two options. First, the recipient can choose to pay 0.77% of gross sales from commercialization of new products incorporating material accessed from the MLS, if its availability to others for further research and breeding is restricted. Alternatively, the recipient can choose to pay 0.5% of gross sales on all PGRFA products of the species they accessed from the MLS, regardless of whether the products incorporate the material accessed and regardless of whether the new products are available without restriction. The GB further adopted: its rules of procedure, including decision making by consensus; financial rules with bracketed options on an indicative scale of voluntary contributions or voluntary contributions in general; a resolution establishing a Compliance Committee; the relationship agreement with the Crop Trust; and a model agreement with the CGIAR and other international institutions.

**GB 2:** The second session of the GB (October-November 2007, Rome, Italy) addressed, *inter alia*, the implementation of the Funding Strategy, the material transfer agreement for non-Annex I crops, and sustainable use of PGRFA. The meeting also adopted a resolution on farmers' rights as well as a joint statement of intent for cooperation with the FAO Commission on Genetic Resources for Food and Agriculture.

**GB 3:** The third session of the GB (June 2009, Tunis, Tunisia) agreed to: a set of outcomes for implementation of the Funding Strategy, including a financial target of USD 116 million for the period July 2009 - December 2014; a resolution on the implementation of the MLS, including setting up an intersessional advisory committee on implementation issues; procedures for the Third Party Beneficiary; and a resolution on farmers' rights.

**GB 4:** The fourth session of the GB (March 2011, Bali, Indonesia) adopted procedures and mechanisms on compliance, and reached consensus on the long-standing item of the financial rules of the GB. It also adopted resolutions on farmers' rights, sustainable use, and implementation of the Funding Strategy.

**GB 5:** The fifth session of the GB (September 2013, Muscat, Oman) established the *Ad hoc* Open-ended Working Group to Enhance the Functioning of the MLS, with the mandate to develop measures to increase user-based payments and contributions to the Benefit-sharing Fund (BSF), as a priority, as well as additional measures to enhance the functioning of the MLS. GB 5 also adopted a resolution on the funding strategy for the BSF containing a list of innovative approaches to increase voluntary contributions and a work programme on sustainable use.

The Working Group met four times during the intersessional period (May 2014, December 2014, June 2015, and October 2015).

**GB 6:** The sixth session of the GB (October 2015, Rome, Italy) extended the mandate of the Working Group on the MLS, and requested that it, among other issues:

- elaborate a full draft revised SMTA;
- elaborate options for adapting coverage of the MLS, based on different scenarios and income projections; and
- consider issues regarding genetic information associated with material accessed from the MLS.

The meeting adopted a work programme for the Global Information System, and resolutions on a series of substantive, cooperation-related, and administrative items, with a focus on addressing the shortfall in the BSF and on strengthening the implementation of Treaty provisions regarding conservation and sustainable use of PGRFA on-farm, through the work programme on sustainable use and farmers' rights.

The Working Group met three times during the intersessional period (July 2016, March 2017, and September 2017).

**GB 7:** The seventh session of the GB (October-November 2017, Kigali, Rwanda) extended the mandate of the Working Group on the MLS, requesting it to:

- continue revision of the SMTA;
- develop a proposal for a growth plan to attain the enhanced MLS; and
- elaborate criteria and options for possible adaptation of the coverage of the MLS.

GB 7 further established an *Ad Hoc* Technical Expert Group on farmers' rights; reconvened the Committee on the Funding Strategy and Resource Mobilization to develop the updated Funding Strategy; and decided to put DSI on the GB 8 agenda.

**8th Meeting of the Working Group:** At its eighth meeting (October 2018), the Working Group continued negotiations on specific clauses of the SMTA. Questions related to DSI and a possible expansion of the MLS remained deeply divisive.

**9th Meeting of the Working Group:** In what was described as a largely successful meeting, the ninth meeting of the Working Group (June 2019) reached tentative compromise to amend Annex I of the Treaty (list of crops in the MLS) to include all PGRFA under the management and control of parties and in the public domain, in *ex situ* conditions, while allowing for reasoned national exemptions regarding a limited number of native species. The Working Group also agreed on a package of measures, also known as the growth plan, which simultaneously adopts the revised SMTA and the amendment of Annex I. Negotiations continued on the draft revised SMTA. Consensus was reached on several provisions, with genetic sequence data and rates for benefit-sharing payments remaining as the main outstanding issues, and the meeting was suspended.

### Working Group Report

On Thursday, 24 October, Co-Chairs Hans Hoogeveen (Netherlands) and Javad Mozafari (Iran) opened the resumed ninth meeting of the Working Group, urging participants to conclude the negotiations and provide clean text to the GB. ITPGRFA Secretary Kent Nnadozie expressed his appreciation to Switzerland and the Netherlands for their financial contributions.

### Revision of the SMTA

On Thursday morning, the Working Group initiated negotiations on the draft revised SMTA, with a focus on outstanding provisions, on the basis of the draft resulting from the first part of the meeting, included in the Working Group's interim report (IT/OWG-EFMLS-9/19/Interim Report).

**Definitions (Article 2):** The Working Group addressed two alternative definitions of "sales." Europe requested deleting a bracketed reference to income from commercial use of genetic sequence data. Africa, the Latin American and Caribbean Group (GRULAC), and Civil Society stated that use of genetic sequence

data needs to be clearly included in the SMTA. Japan called for a simple definition, not including reference to genetic sequence data.

Civil Society and Africa stressed the need to capture the entire downstream income resulting from license fees to avoid free riders. The CGIAR stressed the need for clear rules on whether the licensor or the licensee makes benefit-sharing payments and when, in cases of transfer of PGRFA through licenses. The Working Group addressed license fees in the definition of “sales” and in the provision on transfer of PGRFA under development. GRULAC stressed the need to clarify that when material is passed on, irrespective of its stage of development, there has to be a new SMTA.

Regarding the definition of “commercialization,” the CGIAR, supported by Europe, stressed that PGRFA under development should be discussed under licensing, not commercialization. Africa queried the conditions that apply when PGRFA under development are transferred and the recipient subsequently commercializes the material. GRULAC noted that, from an economic perspective, the material could be commercialized at any point in time.

#### **Rights and Obligations of the Recipient (Article 6):**

The Working Group considered obligations for PGRFA under development, and an exemption for PGRFA under development that contain a genetic contribution of less than 12.5% by pedigree of MLS material and do not contain a trait of commercial value contributed by MLS material. Debate hinged on the 12-year period agreed for obligations to apply, and its relationship to the exemption. Discussion revealed divergent interpretations on whether the obligations apply within, as supported by North America and Europe, or within and after this period, as supported by GRULAC and Civil Society. Expressing the concern that MLS material would escape the system, GRULAC and Civil Society stressed the need for clarification, noting that agreement on 12 years was the result of a compromise. Farmers’ Organizations underlined that obligations to inform the GB should persist whether or not the user believes the material has commercial value, since it may obtain value in the future. The provision was bracketed.

Participants also addressed rights and obligations of the recipient under the single access system, when the commercialized product is available without restriction to others for further research and breeding, including a clause for paying, for a period of ten years, a fixed percentage of the sales into the benefit-sharing mechanism to be established.

Switzerland, supported by the Near East, Africa, and GRULAC, suggested replacing the fixed ten-year period with the period of commercialization, stressing the need to balance the subscription and the single access systems. Switzerland cautioned that, under current arrangements, all larger actors would opt for the single access system.

North America and the EU opposed payments linked to the period of commercialization, stressing that the ten-year period was the result of intense negotiation, but expressed flexibility to discuss another specific timeframe. The EU suggested it be increased to 12 years.

Europe and North America expressed flexibility in supporting a bracketed reference to a general limit on payments of 25 years.

Africa suggested new language noting that “a recipient who transfers under license a product, or products, or PGRFA under development, or any associated information, including genetic

sequence data, to a subsequent recipient, shall include in the licensing agreement an obligation on the subsequent recipient to pay to the mechanism established by the GB an amount equivalent to any payments that the original recipient would have been liable to pay it if had itself carried out the activities allowed by the license, and notify the GB accordingly.” North America said this proposal would result in double payments for a number of products and licenses.

North America proposed new language noting that for recipients opting for the single access system, its terms and conditions as set out in SMTA Annex 2 apply. The two proposals were tabled for further discussion.

The Working Group agreed that: the recipient shall not claim intellectual property rights (IPRs) or other rights that limit facilitated access to MLS material or its genetic parts or components, in the form received from the MLS; and a recipient that transfers IPRs or IPR applications to a third party, shall also transfer the related benefit-sharing obligations.

**Payment rates under the single access system (Annex 2) and the subscription system (Annex 3):** On Thursday afternoon, Co-Chair Hooeven presented a Co-Chairs’ proposal on potential payment rates, regarding:

- under single access, for products that are available without restriction to others for further research and breeding, 0.2% of the sales of the commercialized PGRFA product, minus 30%;
- under single access, for products that are not available without restriction, 2% of the sales of the commercialized PGRFA product, minus 30%; and
- under subscription, 0.015% of annual sales of commercialized PGRFA products covered by the MLS.

Under single access, alternative proposals were submitted by GRULAC, who proposed a rate of 0.3% for products that are available without restriction; and Canada, who suggested 0.1%. The EU recalled mandatory payments had been accepted as a compromise.

Southwest Pacific, Japan, Switzerland, and others supported the Co-Chairs’ proposal, but called for retaining Canada’s proposal if agreement is not reached. GRULAC suggested calculating hypothetical value contributions to the BSF based on the proposed rates, to inform the context of the debate, noting that they would be quite low. The Seed Industry cautioned against increasing demands, which would discourage commercial users from joining the system. Following discussions, most participants supported the Co-Chairs’ proposals. North America expressed flexibility to consider the proposals, requesting bracketing them until other substantive elements of the SMTA were agreed upon.

Under the subscription system, Africa and the Near East proposed a rate of 0.1%, noting it is a reasonable rate for access to the entire range of MLS material.

Brazil opined that the subscription system should be the only one to be used, and urged delegates to go along with the Co-Chairs’ proposals despite the low rates, noting “it would be much more difficult to agree on the rates during the GB meeting.” Argentina added that benefits and their distribution also depends on parties’ financial contributions to the BSF.

Japan supported the Co-Chairs’ proposal. France supported the Co-Chairs’ proposal on the understanding that differentiated rates would be determined.

Switzerland stressed that the rates were estimated based on the findings of the Advisory Committee on the Funding Strategy. Uruguay said that the rates should reflect the highest goals for the

BSF as identified by the Committee in different scenarios. Canada emphasized the need to move carefully, “testing the waters,” so that the revised SMTA can be accepted by users.

Africa emphasized the link between the rates agreed and the overall targets for the BSF, and added that the region has no flexibility to agree to the Co-Chairs’ proposal of 0.015% for the subscription system. He expressed concern that the “future is digital,” and allowing users to choose the single access system would inevitably foster a situation where genetic sequence data will be accessed for free, reducing the flows to the BSF. Civil Society stated that even using the highest proposed rates would not yield significant monetary benefits if use of genetic sequence data is not captured.

**Withdrawal and Termination of Subscription (Annex 3, Article 4):** On Thursday evening, the Working Group agreed that monetary benefit-sharing provisions under subscription would continue for two years from the end of the subscription.

Regarding a list of SMTA provisions that continue to apply after the end of the subscription, a lengthy debate took place regarding the obligation to transfer IPRs and benefit-sharing obligations to a third party (SMTA Article 6.10). The EU and North America requested deleting the reference, while Africa suggested retaining it.

Delegates further addressed provisions on material breach of the subscriber’s obligations. They agreed to remove language on “presumed, alleged, or suspected” breach, and state that in cases that the Third Party Beneficiary has reason to believe that the subscriber has materially breached any of its obligations, the Third Party Beneficiary shall inform the subscriber in writing. Following interventions by Africa, Germany, and the US, the Working Group reached consensus on a provision noting that if such a suspected breach is not satisfactorily explained or remedied within 30 days of notice, the Third Party Beneficiary has the right to initiate dispute settlement and claim damages in accordance with SMTA Article 8 (dispute settlement). Delegates further agreed that, in case the subscriber is found at fault for material breach, the Third Party Beneficiary may terminate the subscription and initiate procedures to recover damages.

The Working Group considered identifying consequences of material breach, in accordance with the rules and procedures of the Third Party Beneficiary. Africa emphasized that a material breach should result in halting access to the MLS. The US proposed it should result in limiting the right to opt for the subscription system. Africa emphasized the importance of enforceable remedies to ensure the SMTA is an effective legal contract. Civil Society highlighted the need for transparency. The provision remained in brackets.

On withdrawing a subscription in case of a material breach, brackets remained on the obligations of the subscriber that continue to apply. Civil Society noted the provision enables a user to unilaterally declare a breach and cease payments. The CGIAR supported a two-way process for dispute resolution. Africa stated payments should only cease after, and not during, a dispute resolution process.

**Other Proposals:** On Saturday, participants made numerous additional textual proposals.

In the preamble to the SMTA, Africa proposed language from the Treaty preamble recognizing that PGRFA are the raw material indispensable for crop genetic improvement, including through modern biotechnologies. North America added text affirming the understanding that the SMTA accompanies the transfer of material

only. Africa proposed affirming that the purpose of benefit-sharing is to support conservation of PGRFA especially on-farm in developing countries.

Under definitions (Article 2), France proposed defining “affiliates” as any entity controlled by the recipient, further defining what is meant by “control.” Africa suggested adding reference to genetic sequence data in the definition of genetic material and to DSI in the definition of PGRFA. He further tabled a definition on genetic sequences.

Under general provisions of the SMTA (Article 4), the US suggested recognizing that information is not treated as such under the Treaty or the SMTA, while Africa proposed stating that this Agreement applies to biological and information genetic resources.

Regarding dispute settlement (Article 8), Germany proposed adding that provisions of the Treaty apply for the interpretation of the availability of multiple-use crops.

Following discussion, ranges of rates were included in the draft SMTA: 1.1% - 2% minus 30% for products not available without restriction, under single access; 0.1% - 0.5% minus 30% for products available without restriction, under single access; and 0.01% - 0.1% for the subscription system.

Regarding withdrawal from and termination of the subscription (Article 9), North America suggested a process of arbitration, including dispute settlement, that potentially allows termination of subscription in cases where requests from recipients, reasonable in scope and scale, are not fulfilled. Brazil requested taking into consideration the potential resource limitations of the provider.

Germany called for including a tick-box in the registration form so that subscribers can indicate their choice of rate. She further suggested language regarding the transitional phase (Article 9.6), that recipients may not apply for subscription between 1 August 2025 and the date when the amendment of Annex I enters into force.

### **Draft Resolution**

**Elements on the Draft SMTA:** On Thursday afternoon, the Working Group addressed a section on potential elements for the implementation and review of the enhanced MLS, addressing a review, in 2025, of the status of ratifications to the amended Annex I, the level of user-based income accruing to the BSF, and availability of and access to MLS material. Africa proposed that the review take place five years after subscription by 30% of users. Argentina suggested also reviewing the source of income, including donor countries’ contributions. Civil Society considered the section lacks balance, as it only identifies the consequences of insufficient ratifications, but not insufficient income, and proposed including an income target in the SMTA. North America cautioned against adding more conditions to the SMTA.

Discussions continued on Friday morning. The Working Group discussed a provision on the rights of farmers and indigenous communities related to MLS material. North America suggested reference to national law, which was accepted. Participants discussed whether the provision refers to material provided by farmers themselves or all MLS material, clarifying that many farmer varieties have not been placed in the MLS by farmers, but by other institutions. Farmers’ Organizations stressed the possibility of IPRs on MLS material undermining farmers’ rights. Switzerland suggested simplifying the wording to state that the SMTA is not intended to limit farmers’ rights to PGRFA in the MLS. Canada preferred reference to farmer varieties

and landraces, rather than PGRFA. Africa called for reference to PGRFA, including genetic parts and components. Norway proposed using Treaty language on farmers' rights to "save, use, exchange, and sell" PGRFA rather than "conserve, exchange, and use." The Seed Industry stressed that existing IPRs on MLS material should be recognized to ensure users submit such material to the MLS.

Participants also debated whether the GB "decides," as supported by India, "recognizes," as proposed by Germany and Japan, or "agrees," as suggested by Argentina, that farmers' rights are preserved.

Regarding the relationship between IPRs and farmers' rights, France suggested that the GB call upon parties to draw the attention of the recipients to their responsibility when developing a trait or a product related to material that could have been made available by farmers, to consider not to impede its continuous use by farmers through patent applications or enforcement of their rights. North America offered a simpler version calling upon parties to clarify that IPRs are not intended to impede the PGRFA use by farmers and indigenous communities.

Africa and Brazil suggested calling directly on recipients rather than parties. Africa further proposed that parties raise relevant awareness among recipients. Switzerland suggested calling upon recipients to exercise their rights in a way that takes into account the rights of farmers and indigenous communities under national law. Following a lengthy debate, participants agreed, pending consultation with capitals, to call upon recipients to exercise their IPRs in a way that does not impede the continuous use by farmers and indigenous communities of their PGRFA under national law, and call on parties to raise awareness among recipients of this consideration.

The Working Group then addressed a clause exempting developing country public institutions from payments under the MLS. Germany and Japan opposed such an exemption. India, with GRULAC, noted the importance of the provision for developing countries, adding the exemption is already provided for under thresholds for payments under the SMTA, and suggesting that the GB "recognize" such an exemption. The Seed Industry noted competition-related concerns raised by developing country seed companies.

Discussions on an exemption for public institutions continued in conjunction with alternate provisions on exemptions from benefit-sharing payments for family farmers, indigenous communities, and small plant breeding companies in developing countries. Canada suggested incorporating reference to the threshold of sales that would trigger obligations under the subscription system of the SMTA. Switzerland, with Germany, preferred referring to a general threshold rather than to sales. Japan remarked the exemption for public institutions may result in a considerable loophole, when it comes to some large developing country institutions escaping benefit-sharing obligations. Canada suggested reference to public institutions that have no income from sales or commercialization. Switzerland, with North America, Japan, and Germany, noted that the Treaty only allows for specific exemptions to benefit-sharing obligations, namely smallholders in developing countries, and requested deleting the provision. Argentina and Africa opposed deletion.

A lengthy discussion took place on clauses emphasizing the importance of the MLS to enable access to PGRFA to a wide range of recipients, especially in developing countries, as well as introducing a threshold exempting them from payments, with

focus on specifying the recipients and whether they originate from developing countries. Argentina and France suggested deleting reference to "family farmers, indigenous peoples, and small plant breeding companies and public institutions," noting that payments ultimately depend on the relevant threshold. Switzerland said the threshold would apply to all recipients both in developing and developed countries. India proposed removing explicit reference to developing countries.

The Working Group then addressed two alternative provisions on preparation of criteria for fund allocation under the BSF: the first one referring to, *inter alia*, payments made by entities in a given country and ratification of the amended Annex I; and the second one providing details on returning 60-80% of the amount transferred into the BSF by an entity in a developing country to finance projects in that developing country.

Discussion focused on the second option. Argentina explained its rationale, noting it serves developing country conservation needs. India added the proposal provides incentives to developing countries' governments and institutions to promote Treaty implementation.

Switzerland and Japan drew attention to Treaty language, the work of the Advisory Committee on the Funding Strategy, and legal opinions indicating that BSF funds cannot be earmarked, and preferred working on the first option. Africa noted that earmarking of funding is rejected in the Treaty and the MLS and, if used, should rather reward countries that conserve and actively share resources. Argentina argued that the proposal implies repatriation rather than earmarking. A member of the Standing Group of Legal Experts recalled that the group referred to this proposal when they addressed earmarking, and concluded by consensus from experts from all regions that the Treaty provides no legal basis for earmarking funding. The provision was retained for further consideration, upon Argentina's request.

**Elements on the Amendment of Annex I:** On Friday, participants debated a draft provision allowing parties to declare a limited number of species native to their territory that they will not make available to the MLS. They discussed whether to amend it to specify "some" or "certain" rather than "a limited number of" native species, as proposed by Brazil, "and landraces," as suggested by Chile. Other participants called for ensuring consistency and opposed re-opening text, drawn from and agreed upon in Appendix 2 of the document on the amendment to Annex I. Chile remarked that Appendix 2 was not agreed *ad referendum*. Secretary Nnadozie said that the FAO Legal Office concluded that the text in Appendix 2 can be validly adopted by the GB.

Africa, supported by Chile, suggested reference to "farmers' varieties" rather than "landraces." Switzerland proposed reference to "farmers' varieties generated and used in their territories." Canada noted that the FAO Commission on Genetic Resources for Food and Agriculture uses the term "farmers' varieties/landraces" and agreed with Switzerland, who noted that the scientific term would be "autochthonous landraces." Germany, supported by Canada, requested stating that such exemptions shall not include crops and forages listed in the current Annex I.

On Saturday morning, Brazil indicated flexibility to accept reference to a "certain and limited number of" species to be exempted from the MLS.

**Other Proposals:** On Saturday afternoon, delegates made numerous textual proposals. Africa inserted preambular language

on the importance of benefit-sharing for conservation of PGRFA on-farm in developing countries.

Germany proposed removing reference to “pre-existing legal restrictions, socio-economic, or cultural reasons, bearing in mind food security and interdependence” as reasons for exempting native species from the MLS.

The CGIAR drew attention to its lack of capacity to “require” recipients of MLS material to make genetic sequence data on this material publicly available, and proposed to “encourage” them to do so. Regarding accessibility and how third parties can use this information, Africa suggested that terms and conditions be specified by the GB.

On the MLS review, Africa proposed language stating “that if the review shows that less than 30% of global seed sector by value have become subscribers to the MLS and total income to the BSF from all sources is less than USD 25 million/year, further review will be postponed for two years.”

### **Genetic Sequence Data**

Discussion on genetic sequence data opened on Thursday afternoon. Co-Chair Hooegeven noted that the information needs to be associated with the genetic resource, otherwise it is beyond the Treaty’s scope.

GRULAC stated that reference to genetic sequence data should be under definitions.

The Philippines drew attention to Treaty Articles 12.3(c) and (d) on access to PGRFA in the MLS under the condition that associated information is made available and that recipients do not claim IPRs that limit facilitated access to the PGRFA or their genetic parts or components in the form received from the MLS, and the related provisions of the SMTA currently in force; and suggested focusing on information derived directly from genetic sequences of MLS material, therefore DNA and RNA sequences. He explained that genetic sequences are genetic parts or components, adding that this interpretation stays true to the Treaty text and allows capturing benefits arising from use of genetic sequences. Co-Chair Hooegeven urged the Working Group to consider this proposal as a way forward.

Switzerland noted that the Treaty provisions on monetary benefit-sharing refer to commercialization of PGRFA that incorporate MLS “material” (Article 13.2(d)(ii)), while information is addressed under information exchange as a mechanism for benefit-sharing (Article 13.2(a)).

Brazil explained that the issue includes two main components: the possibility of appropriation of research results on genetic information derived from MLS material; and the question of monetary benefit-sharing. He noted that the Treaty does not allow for IPRs on sequences or any information derived from MLS material, so appropriation should not be an issue if the Treaty is enforced. Focusing on benefits arising from sales of PGRFA resulting from MLS material when the research and development process involves genetic sequences, he stated that, under the subscription system, all monetary benefits should be captured. Under single access, he argued that genetic sequences are genetic parts or components, so sales of products arising from them should give rise to benefit-sharing obligations.

Noting the flexibility built into the Treaty’s benefit-sharing provisions, Norway called for focus not only on Treaty Article 13.2(d)(ii), but also on Article 13.2(d)(i) on achieving commercial benefit-sharing through private and public sector involvement.

Farmers’ Organizations highlighted that the same genetic component can be found in different plant genetic resources, stressing that under the single access system, MLS genetic components may escape the system.

Germany underscored that the right place to address genetic sequence data is in the draft resolution, stressing that any relevant language, especially on benefit-sharing, should not pre-empt discussions in other fora. Africa cautioned against waiting for guidance from other fora, highlighting the Treaty’s own culture and mechanisms.

The US stressed the need to remain within the Treaty’s scope, calling to clarify that “material” and “information” are not equivalent. She noted that there is room within existing provisions to provide for wide use of information, promoting capacity building. Canada highlighted “the impossibility to technically trace all information, inside or outside the MLS,” noting, with Europe, that SMTA provisions referring to information associated with MLS material cover genetic sequence data.

Civil Society emphasized the need to articulate new language in the SMTA regarding genetic sequences in both the subscription and the single access systems.

### **Co-Chairs’ Compromise Proposal**

On Friday afternoon, Co-Chair Hooegeven presented the Co-Chairs’ compromise proposal on a package of elements, including:

- benefit-sharing payment rates under the single access and subscription systems, including: 2% of the sales of the commercialized product, minus 30%, for products that are not available without restriction to others for further research and breeding, under the single access system; 0.2% of the sales of the commercialized product, minus 30%, for products that are available without restriction under the single access system; and 0.015% under the subscription system;
- clauses specifying, under both systems, that the benefit-sharing payment obligations reflect the value of information, including genetic sequence data, directly derived from or directly associated with the MLS material in question; and
- a clause stating that the review of implementation in 2025 will include the status of ratifications of the amended Annex I, the level of user-based and other income, the number of subscribers, and the availability of MLS material.

Co-Chair Hooegeven invited participants to engage in informal consultations and consultations with capitals, in preparation for the final day of negotiations on Saturday.

On Saturday morning, Co-Chair Hooegeven stressed the need to agree on fundamental issues, highlighting an enhanced MLS is part of the effort to achieve the Sustainable Development Goals, including global food security.

Norway expressed readiness to work on the basis of the proposal. North America, Australia, Japan, and Germany expressed concerns, in particular with regard to benefit-sharing from genetic sequence data. Africa, GRULAC, India, and other developing countries stressed that any agreement must include genetic sequence data. Germany advocated language noting that genetic sequence data is already implicit in Treaty provisions on information. Co-Chair Hooegeven stressed that the proposal has been carefully crafted to include genetic sequence data directly derived from or directly associated with MLS material, to avoid going beyond the Treaty’s scope.

Developing countries stressed that including genetic sequence data is in line with the Treaty and must be addressed, noting the issue constitutes a red line in their negotiating positions. Africa stressed that the provisions of the Treaty, as well as those of the CBD and the Nagoya Protocol, have been overtaken by technological developments, including in the case of genetic sequence data that renders physical access to genetic resources obsolete; and the package deal should be broader. Zimbabwe, following input from capital, added that recipients: should not share genetic sequence data outside the MLS; cannot obtain proprietary rights on the genetic sequence data derived from the MLS; must provide all genetic sequence data from the MLS material to the Third Party Beneficiary; and must cease to use genetic sequence data if their subscription is terminated. Africa added that: the suggested payment rates cannot be accepted as they are too low and set a precedent for the valuation of genetic sequence data; and specific targets should be included in the section on implementation and review.

Co-Chair Hooegeven reminded delegates that the Working Group is constrained by its mandate and the Treaty text.

The Near East highlighted that the proposed rates will not lead to noticeable improvement in the cash flow to the BSF, stressing that they incentivize recipients to choose the single access over the subscription system. He stressed the need for a clear text for benefit-sharing from the use of genetic sequence data. Uruguay said the payment rate under the subscription system will not enhance benefit-sharing, noting the Nagoya Protocol may be a favorable framework for exchanges of PGRFA. Norway supported the subscription system as the primary system for access to the MLS and expressed concern that, as proposed, the subscription system is not the most favorable to potential recipients. Canada requested noting in the report of the meeting their proposed lower payment rates.

India noted the review process could also include the payment rates, and queried the implications of: ratification by two thirds of the parties, but minimal subscriptions; and placing in the public domain genetic sequence data generated by MLS material by recipients. Argentina suggested the review cover user-based and other income, including pledges by parties.

Co-Chair Hooegeven halted deliberations on the compromise proposal and called for a second reading of the revised SMTA and the draft resolution. Participants made numerous suggestions for additional text, as noted in the relevant sections of this report. North America, Argentina, and Japan expressed concerns over reopening agreed text. Argentina, supported by Norway and North America, suggested new additions be included as a separate document. Africa suggested distinguishing new text by noting that it has not been discussed. Co-Chair Hooegeven encouraged delegations not to reopen agreed text, but stressed that it is their right to do so.

### **Closing Plenary**

On Saturday afternoon, following the second reading of the revised draft SMTA and the draft resolution, Co-Chair Hooegeven proposed to hold informal consultations immediately prior to the Governing Body session, with one or two representatives from each region, to reach compromise on outstanding items.

The Working Group agreed to the proposal. Argentina proposed using the elements of the Co-Chairs' compromise proposal as a starting point. Co-Chair Hooegeven noted the

compromise proposal will be annexed to the report of the meeting. Africa and Argentina stressed the need for flexibility on the inclusion of genetic sequence data in the SMTA.

Secretary Nnadozie introduced the report of the meeting, including four annexes on: the draft resolution; the draft revised SMTA; the draft text for the amendment of Annex I; and the Co-Chairs' compromise proposal. It was agreed that a footnote will indicate text proposed on Saturday, but not discussed; and the report was adopted.

Africa suggested that the Bureau consider how to facilitate a process to consider genetic sequence data, noting the need for consistency with other areas of work under the Treaty.

Co-Chair Mozafari urged participants to work towards making a "sensible improvement" to the MLS for the "good of the Treaty." Following the customary exchange of courtesies, he closed the meeting at 3:12 pm.

### **A Brief Analysis of the Meeting**

Delegates arrived in Rome ready to walk the road towards final agreement. Following seven years of negotiations on enhancing the efficiency of the Treaty's Multilateral System (MLS) of access and benefit-sharing (ABS), they had finally made significant advances at their last meeting in June 2019, or just before the summer break, as Co-Chair Hans Hooegeven (Netherlands) put it. The June meeting was suspended to allow for conclusion of the negotiations and hopefully submission of a clean text for adoption at the Governing Body (GB) meeting in November 2019.

However, the resumed meeting did not live up to expectations. Delegates' inability to reach consensus on the basis of a Co-Chairs' compromise proposal dealing with the most controversial elements as a package resulted in re-opening the draft revised Standard Material Transfer Agreement (SMTA) and the draft resolution—the main texts under consideration—and inserting a significant number of proposed revisions. As a result, rather than celebrating success, the Working Group needs to manage "a crisis in their hands," again in the words of Co-Chair Hooegeven. A final attempt to reach compromise will take place during informal consultations in less than two weeks, immediately prior the GB meeting. This brief analysis will explore why the Working Group did not reach consensus on the Co-Chairs' compromise proposal.

The Co-Chairs' proposal addressed three of the most controversial issues under negotiation:

- payment rates for monetary benefit-sharing;
- benefit-sharing obligations arising from the use of genetic sequence data (also known as digital sequence information); and
- the review of implementation of the enhanced MLS in 2025.

On the review of implementation, the proposed clause called for reviewing the status of ratifications of the amended Annex I, the level of user-based and other income, the number of subscribers, and the availability of MLS material. While this item did not result in any major controversies, the other two did.

It has already been agreed that the revised SMTA regulating transfers of MLS material establishes a subscription system for access to all MLS material, while also allowing for access to MLS material without a subscription (dubbed the single access system). However, no payment rates for benefit-sharing have been established under either system. The Co-Chairs' proposal addressed specific payment rates based on annual sales of

products that incorporate MLS material: 0.015% for annual payments under the subscription system, a low rate to make the subscription system attractive to users; and 0.2-2% under the single access system, depending on whether or not the commercialized product remains available for further research and breeding. As a general rule, developing countries preferred higher rates, to enhance the flow of benefits to the Benefit-sharing Fund, while developed countries opted for lower ones, arguing that low rates would make the system more attractive to users. From a policy perspective, a balance is required between capturing monetary benefits to enhance benefit-sharing under the Treaty, and making the MLS attractive enough for commercial companies, the main potential users engaging in wide-range commercialization. The proposal attempted to capture these challenges.

Nobody was entirely happy, but this is often the case for compromise proposals. Delegates commented in particular on the need to make the subscription system even more attractive, and others wished to see their proposed (lower) rates retained in the text. Most participants, however, did not signal the rates as a “red line” issue. After all, accepting monetary benefit-sharing obligations is more of a political than practical issue: as several senior participants commented in the corridors, even with the highest rates proposed, the amounts are tiny compared with the annual revenues of seed companies. The deal breaker was linking such benefit-sharing obligations with the information content of plant genetic resources for food and agriculture (PGRFA), including genetic sequence data.

Genetic sequence data is an explosive issue across all ABS-related negotiations. As Brazil aptly explained during the deliberations, the issue has two main angles: the possibility of appropriation, through intellectual property rights, of data derived from MLS material; and the issue of monetary benefit-sharing from the use of such data. The issue of appropriation can largely be addressed through existing Treaty rules on information exchange, and is not divisive. Linking benefit-sharing to the use of sequence data, though, has resulted in controversies involving both legal and political arguments. Most developed countries argue that sequence data falls outside the scope of the Treaty due to the definition of “genetic resources” as “material,” noting that data is information and thus immaterial. Developing countries call for a dynamic interpretation of the scope, noting that in view of technological developments, the Treaty would become obsolete unless sequence data is addressed. According to their legal argumentation, genetic sequence data qualifies as “genetic parts or components,” which the Treaty covers, and is part of the “utilization” of genetic resources that should raise benefit-sharing obligations.

Based on a suggestion by the Philippines, the Co-Chairs’ proposal recommended that benefit-sharing payment obligations reflect the value of information, including genetic sequence data, directly derived from or directly associated with MLS material. Co-Chair Hoogeveen argued the proposal represented a solution carefully crafted to respect the Treaty’s scope but allow capture of monetary benefits. Nevertheless, most developed countries immediately rejected the proposal, and the discussion brought the negotiations to the brink of collapse. Many commented that the collaborative spirit of the June meeting was gone for good, and wondered what went wrong. Others were quick to note that there was never any in-depth discussion on genetic sequence data throughout the lifespan of the Working Group. The item was

postponed, they remarked, as a strategy to allow for consolidation of positions and informal consultations. Based on the outcome of this meeting however, this strategy did not work and positions remained divided.

On the final stretch to the GB session, most stressed the need to generate political will. Political will, a senior participant stressed, will be enabled through increased understanding of the technicalities of agricultural research and development, including practical uses of genetic sequence data. Inevitably, the informal consultations prior to the rapidly approaching GB session will address the entire package, including genetic sequence data, financial flows, and the expanded list of crops in Annex I tentatively agreed in June. These debates will determine not only the future of the Treaty, but of agricultural research and development as a whole.

## Upcoming Meetings

**Eighth Session of the ITPGRFA Governing Body:** The Governing Body of the Treaty will review progress made in the Working Group on Enhancing the MLS, as well as other matters related to the implementation of the Treaty, including the Funding Strategy, conservation and sustainable use of PGRFA, and farmers’ rights. It will be preceded by a special event on the 15th anniversary of the Treaty’s entry into force on 9 November, and two days of informal consultations on enhancing the MLS on 9-10 November. **dates:** 11-16 November 2019 **location:** Rome, Italy **www:** <http://www.fao.org/plant-treaty/eighth-governing-body/en/>

For additional meetings, see <http://sdg.iisd.org>

## Glossary

BSF	Benefit-sharing Fund
CBD	Convention on Biological Diversity
CGIAR	CGIAR Consortium of International Agricultural Research Centers
DSI	Digital sequence information
FAO	Food and Agriculture Organization of the UN
GB	Governing Body
IPRs	Intellectual property rights
ITPGRFA	International Treaty on Plant Genetic Resources for Food and Agriculture
MLS	Multilateral System of access and benefit-sharing
PGRFA	Plant genetic resources for food and agriculture
SMTA	Standard Material Transfer Agreement