THIRD WORLD NETWORK
10 AUGUST 2016

Seed Treaty Meanders Toward Revising its Access and Benefit Sharing System Under Cloud of Possible ~~Monsanto~~ US Ratification

A Report prepared by Edward Hammond, Director, Prickly Research, USA
eh@pricklyresearch.com

The International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) is continuing its effort to develop an effective system for benefit sharing by companies that use crop seeds from the Treaty's Multilateral System (MLS). The current system uses a standard material transfer agreement (SMTA) with several benefit sharing options, including a voluntary-only option, and has failed to yield payments. A Working Group has been tasked with proposing a fix.

At its fifth meeting, held in Geneva from 12 to 14 July 2016, the Ad Hoc Open-Ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-Sharing modestly advanced discussions on the creation of a "subscription system" to cover access and benefit sharing for the list of key crops contained in the Treaty's Annex 1.

Hanging over discussions is a possibly imminent ratification vote on the Treaty by the United States Senate, and many observers feel US entry into the Treaty could up-end the Working Group's efforts. That is because US government officials are thought to be eager to back Monsanto, the seed and chemical giant, which is expressing displeasure with the direction of the Working Group. Further complicating matters is a pending takeover offer for Monsanto from German giant Bayer.

If the prospective subscription system is eventually adopted, subscribers would receive access to all varieties of crops in the MLS including many farmers' varieties of seeds from developing countries, and make payments to the Treaty's Benefit Sharing Fund (BSF) based on company income from seed sales and licenses. This differs from the present approach in which users access seeds one by one and are only expected to pay "later", when commercial varieties based on those seeds are sold – an approach that has not yielded payments.

1. Will the US Ratify?

The dynamics of the Working Group's discussions have been impacted by recent Treaty ratification movements. Japan joined the Treaty in mid-2013 and is taking an increasingly vocal role, while earlier this year the United States Senate's Foreign Affairs Committee recommended US ratification of ITPGRFA, with a vote by the full Senate possibly taking place in September.

Although similar moves toward US ratification have previously reached this point only to fizzle out, the US seed industry and public universities with agricultural research programs are strongly behind the present push.

Industry and the universities are particularly, indeed according to e-mails released under open records requests, they are almost exclusively interested in the US exerting more influence over the

Working Group's discussions, as they view the terms of access to MLS seeds as far and away the most important aspect of the Treaty. (The US is present in the Working Group discussions by way of a US representative accredited as part of the Canadian delegation.)

With industry, especially Monsanto, and the US visibly unhappy with the direction of negotiations, it is possible that the Working Group's accomplishments to date could be up-ended if the US arrives as a Treaty Party.

2. Regional Dynamics

Africa, whose long-standing proposals underlie the present effort toward a subscription system, has become more vocal and assertive in the negotiations. Latin America is also more broadly and actively represented, and has achieved greater internal union and more concordant positions with other developing regions in recent months.

Europe, however, remains hobbled by internal disagreements, and European activity and contributions were more limited than in previous meetings.

Canada, North America's sole official representative, appears increasingly caught between its desires to please industry and its southerly neighbor versus playing an earnestly constructive role in shaping the subscription system. Along with Australia, Canada mildly endorses continued development of a subscription system while simultaneously arguing for the retention of the old system of benefit sharing, whose failure prompted the formation of the Working Group in the first place.

3. Opening

The Working Group meeting opened with Co-Chair Bert Visser of the Netherlands thanking his outgoing colleague Modesto Fernandez of Cuba. Fernandez was replaced by Javad Mozafari of Iran, who was nominated to be Co-Chair by the Group of 77 (G-77).

Opening statements by regions were largely recapitulated existing positions and expressed a willingness to continue the discussions.

Unusually, the most notable opening statement came from a stakeholder. An especially sour emission from **MONSANTO** complained that the Working Group "*has taken a very unfortunate direction*". The seed and agrochemicals giant was especially upset that a Friends of the Co-Chairs group discussing a termination clause for the subscription system had postponed a specific decision until later in the negotiations. (The termination clause is a possible provision to set a fixed number of years after last access or use of MLS seeds at which point benefit sharing obligations expire.)

Monsanto has participated in all of the Working Group's meetings and many associated discussions, and often has strong advocates in the form of the representatives of Canada and Australia. It has not previously expressed such intense discontent with the Working Group's processes. Perhaps with its eye cast toward US lawmakers, however, Monsanto now claims that it has been "marginalized". Asserting a government-like status, Monsanto said "*we're equal partners here*" and complained that a subscription system would raise the objections of its investors.

(If Monsanto has been marginalized it is primarily within industry itself, at the hands of other companies, especially Syngenta and some other European company interests, who have taken a somewhat more receptive attitude toward the possible subscription system.)

Monsanto's claims of marginalization cast the company as a pitiable victim of intergovernmental attempts to create a fair system to share seeds, a strange image to contemplate considering the overwhelmingly negative international public perceptions of the company. Monsanto's surreal and sickly self-portrait might best be understood, however, as an obsequious plea to US Senators in the hope that the United States will aggressively promote the company's interest if it ratifies the Treaty.

4. The Meeting Begins

Following opening statements, a lengthy exchange between delegates and the FAO Legal Counsel involved questions from Latin America, Canada, Africa, and comments by Co-Chair Visser. Counsel's comments did not fully dispel uncertainty about legal implications of some options to implement a subscription system.

BRAZIL, speaking for the **Group of Latin American and Caribbean Countries (GRULAC)**, raised the question of legal responsibilities for monitoring compliance with a subscription system. It noted that monitoring required reporting and that few – only two – cases of enforcement had arisen with regard to the present Treaty SMTA. It was unclear if the lack of cases reflected a lack of monitoring or the absence of non-compliance.

The Treaty Secretariat said it was uncertain at this stage how a subscription system would be monitored, while Civil Society Organizations see a strong link between transparency and monitoring.

A novel question was posed by **NAMIBIA**, speaking for **AFRICA**, which asked if countries could oblige seed companies to subscribe to the revised Multilateral System in their domestic legislation. The FAO Counsel replied that she saw no reason in the Treaty why they could not, but that trade agreements might be germane to the question, so a clearer answer would require some research.

At the end of the meeting, it was agreed that the Co-Chairs should appoint a standing group of legal experts that could answer legal questions posed by working Group. **AFRICA** said that the group should include strong expertise in contract law.

5. Out with the Old? Or Not?

Co-Chair Visser then asked for opinions on a key unresolved question – whether a subscription should be the only way to access MLS germplasm or if the options that had failed to generate benefits (Articles 6.7 and 6.8 of the current SMTA) should be retained.

AFRICA, reprising a long-held position, stated that the subscription system should be the only access mechanism and that the retention of older options would incentivize gaming the system. Africa said that a subscription system is a necessary precursor to discussion of expanding the coverage (i.e. number of crops) of the MLS.

SWITZERLAND, speaking for **EUROPE**, said that, "*By creating several access systems we might not do well.*" Europe endorsed "*one door into the system*." Perhaps conceding some ground to developing countries, it suggested that the subscription system's establishment might precede expansion of the MLS, saying, "*A subscription system enables a look at the scope.*"

(In the past, Europe has typically linked revision of the SMTA to simultaneous expansion of the scope of the MLS, a position opposed by all developing regions.)

GRULAC considered a subscription system as the single access mode as the "*best way to go*" and noted that companies might try to avoid making payments if other access options were maintained.

JAPAN disagreed and claimed that it might be hard for companies to calculate their profits on an annual basis, hence this is a problem in the subscription system.

CANADA wanted to keep Articles 6.7 and 6.8 (voluntary payments). It said keeping 6.7 and 6.8 "*maintains balance between access and benefit sharing*", a description that perplexed many listeners. Canada thought that the subscription system could be made more attractive to users than present options, but nevertheless wanted to retain the present options.

The Co-Chair Visser then moved to discuss the reports of three Friends of the Co-Chair groups that met between Working Group meetings to consider questions of access and payment rates, users and crop categories, and a termination clause in a possible subscription system.

The Friends of the Co-Chair group on **access and payment rates** concluded that a subscription system would need to require that all user payments under the revised SMTA be mandatory and should be based on a percentage of seed sales and license income. The group also began to consider how access and use of genetic sequence data (an issue referred to as "dematerialization" in Treaty discussions) might be addressed in a revised SMTA. If an alternative to a subscription system for users to pay on an accession by accession basis (e.g. present Article 6.7 of the SMTA) is retained, the group thought that it should have a payment rate five to ten times that of the subscription option in order for the system to be balanced. Finally, the Friends emphasized that in addition to user payments, "*direct and substantial financial support*" from governments would be required for the Benefit Sharing Fund.

Developing countries have long drawn attention to the Treaty's Article 18, financial provisions, which states that developed country Parties are to provide financial resources for implementing the Treaty.

The Friends of the Co-Chairs group on **crop and user categories** then reported. On crop categories, the group concluded that "*Differences in market size, profitability, turnover, research intensity and MLS use across and within countries and across and within crops makes the development of any categories essentially arbitrary and liable to create additional problems with respect to MLS use*." The group reached similar conclusions on user categories, preferring that all users are treated similarly. One exception favored by the group, however, was to allow small farmers in developing countries to have access without payment, although the group noted there were regional differences and other difficulties defining a "small farmer".

Ensuing discussion focused on the question of developing country small farmers having access to MLS germplasm on acceptable terms. **GRULAC** thought small farmers should be exempt but only

if they are from a country that is Party to the Treaty. **LA VIA CAMPESINA** noted that there were many small farmers in developed countries, and said they should have such access too.

The **INTERNATIONAL SEED FEDERATION (ISF)** was displeased that the Friends of the Co-Chair had not given greater consideration to creating a variety of crop categories (i.e. grouping of crops to be treated distinctly).

The Friends of the Chair group on a **termination clause** reported that it had decided to postpone a decision until all other major items in a subscription system were agreed. A termination clause is a strong industry demand, however, it is controversial because developing countries and civil society organizations fear that industry would take advantage of such a clause by holding germplasm long enough for benefit sharing obligations to expire and then move forward with commercialization and/or intellectual property claims.

GRULAC asked what would happen if a company used MLS seeds in varieties under development (i.e. a breeding program) but commercialization never took place, what would happen to those seeds and information about them?

The Friends of the Co-Chairs had not discussed this issue.

MONSANTO was concerned about the same thing. It said that material under development was a company asset, and that possibly having to pay benefit sharing on such germplasm "*20, 30, 50 years out*" was a problem for the company and its investors.

Co-Chair Visser then invited the meeting to proceed through the revised draft SMTA (IT/OWG-EFMLS-5/16/3) and offer comments, but not specific text proposals, which the Co-Chairs would draft based on the discussion.

THIRD WORLD NETWORK (TWN) drew attention to Article 3 of the revised document, "Subject Matter of the Material Transfer Agreement". TWN said the present text was insufficiently clear that genetic sequence data was included as material and that the Article should be modified to do so.

AFRICA agreed with TWN and said it intended to raise the same issue with the draft's Article 5, "Rights and Obligations of the Provider", which also needed to clarify that digital sequence data is included.

Also on Article 5, **GRULAC** revisited its concerns about monitoring, and wanted to make sure that information about the use of germplasm was shared for that purpose.

MONSANTO said that it was "concerned about confidentiality."

LA VIA CAMPESINA noted that small farmers collected and developed seeds. Access to material "under development" therefore was not only at the discretion of corporate and institutional breeders but in many cases also farmers' discretion.

A lengthy discussion ensued on how to manage cases where MLS germplasm is returned to its country of origin, a process referred to as "repatriation". Should the SMTA be used always, in certain cases, never? Meeting participants described a number of cases that revealed highly variable practices. It was agreed that the issue merited further consideration.

LA VIA CAMPESINA said that trait patents were being obtained and could be used to restrict use of MLS seeds by farmers. This issue needed to be dealt with, and farmers freed from such restrictions.

BERNE DECLARATION agreed that the issue needed to be dealt with in the SMTA and asked the Co-Chairs when they intended for the group to discuss the issue.

As the group moved through the SMTA's Article 6, **CANADA** reiterated that it wanted the old access options, Articles 6.7 and 6.8, to remain.

AFRICA wondered if Article 6.6 on "additional conditions" might be used to address genetic sequence data (dematerialization), and noted that Article 6.9 on information sharing also needed clarity with respect to sequences.

FRANCE wanted Article 6.9 on information sharing by MLS users, "non-monetary benefit sharing", and the placement of commercial seeds with expired intellectual property claims into the MLS to be reconsidered closer to the end of the Working Group process.

AFRICA said that under the subscription system it and most other countries favored, it did not make sense for Article 6.11 and its associated Annex (detailing the subscription system) to be buried deeply within the SMTA. Since the subscription system would contain key obligations in a revised SMTA, AFRICA thought the SMTA should be restructured in the interest of clarity and the provisions of revised 6.11 and Annex 3 placed squarely up front, so that users would clearly see their obligations before subscribing.

GERMANY and the **CONSULTATIVE GROUP ON INTERNATIONAL AGRICULTURAL RESEARCH (CGIAR)** were concerned that the SMTA's Annex 1, a list of materials and associated information provided to be part of executed SMTAs, was potentially problematic. It was felt that this issue would be considered in more detail later.

Concluding the day's observations, **AFRICA** felt that the draft SMTA's Article 8.3, which gives FAO the right to request information from the provider and recipient of germplasm in the event of a dispute was too weak, as it did not spell out any consequence for ignoring FAO's request.

6. Weighing the subscription system itself – current Annex 3

Formerly called the "African Option", in the present drafts Article 6.11 is the key link to the subscription system that the Working Group is developing. The Co-Chairs' redraft of Article 6.11 refers to an Annex (presently Annex 3) that contains the particulars of the subscription system.

On Wednesday morning (12 July), the new draft Annex 3 to the SMTA was offered by the Co-Chairs for consideration.

Before moving into the particulars of Annex 3, **AFRICA** pointed out that compliance with the subscription system also needed to be discussed, and **GRULAC** added that monitoring and dematerialization also needed to be talked about. **FRANCE** wanted to return to discussion of article 6.8 (voluntary benefit sharing).

On the new Annex 3 itself, **AFRICA** reiterated that the annex described critical components of the new access and benefit sharing system and that these should appear more prominently, as joining the new system was a high level decision whose implications should not be "buried" at the back of the SMTA.

GERMANY and **SWITZERLAND**, also supported by **JAPAN** and **MONSANTO**, wanted to keep open a discussion about how subscribers might join the system on a crop-by-crop basis, though the Friends of the Co-Chairs group had not favored that option.

GRULAC said that the wording of the Annex should be careful to reflect that the subscription system was presently only for those crops in Annex 1, and not all plant genetic resources for food and agriculture, since expansion of the system could come only after the benefit sharing system was fixed.

TWN said that the public register of companies and others that were members of the subscription system, an element of Annex 3, should also include the annual statements of account submitted by subscribers. TWN said it was important to be transparent about how much each subscriber was paying, and for the basis of the subscriber's calculation of its payment to the Benefit Sharing Fund to be public, so that it could be reviewed, as this would build confidence in the system. TWN noted that the Working Group could also consider a system of payment bands, based on income, to which companies could assign themselves, an approach that had been effective for vaccine manufacturers in the World Health Organization's Pandemic Influenza Preparedness Framework.

SWITZERLAND wondered who would hold the register.

AFRICA agreed with TWN's concern that the payment system should be transparent so as to promote confidence.

Apparently presupposing a crop-by-crop subscription system, **FRANCE** wondered if the register would note what parts the subscriber had subscribed to.

CANADA, supported by **JAPAN**, questioned if payment rates based on company sales were consistent with the Treaty, and thought such a subscription system might require re-ratification. Canada wanted payments to be calculated "based on use".

Delegates also discussed how some seed banks, including those of the CGIAR, use the Treaty's SMTA not only for Annex 1 crops, but for some other seeds. While these other seeds were not part of the MLS and thus would not be part of the subscription system, representatives generally agreed that these situations needed discussion and some form of resolution.

Delegates then discussed rates and the possibility for higher rates to be paid when MLS-derived materials were "restricted" from further research and breeding, i.e. subjected to intellectual property claims that impaired or prevented their use by others, including farmers.

GRULAC and **AFRICA** emphasized that the most important aspect was that the necessary benefit sharing payments must be generated. AFRICA linked payment rates to needs and, more specifically, the funding goal for the Benefit Sharing Fund.

CANADA, in another perplexing comment, said it thought the difference between payments under Article 6.8 (voluntary benefit sharing) and that of the subscription system is what would make the subscription system attractive.

Since voluntary benefit sharing has never generated significant payments and is obviously optional, the conclusion to be drawn from Canada's comment appears to be that it thinks the subscription system payment rate should be at or very close to zero.

TWN emphasized the importance of a clear annual funding target and said that payment rates for users, linked to their seed sales income, would be implied by the target. A clear target agreed by governments and then meeting that target would be a public demonstration of a fair and functioning system that would instill confidence.

CGIAR said it sent a large proportion of its seed distributions to public entities and wanted to be sure a disincentive would not be created for such distributions.

MONSANTO said that a large proportion of its seeds sales were from non-Annex 1 crops and that the calculation of seed sale income needed to take that into account.

A number of observations were made on the duration of benefit sharing payments and withdrawal (or termination) from the subscription system. **GRULAC** thought that the length of time that payments are required might vary since the length of breeding cycles varies between crops.

AFRICA and the **BERNE DECLARATION** pointed out the need for benefit sharing payments to be renewed if a former subscriber took up MLS material again and began generating income from them.

MONSANTO disagreed. It thought that front end payments should suffice.

7. Around and Around We Go

Co-Chair Visser then returned the group to discussing the fate of Articles 6.7 and 6.8.

CANADA still wanted both articles kept. **AUSTRALIA** supported CANADA because it thought that Articles 6.7 and 6.8 were "not the source of failure" in the current SMTA. It did not explain further.

Co-Chair Visser engaged **CANADA** and **AUSTRALIA**, with **JAPAN** also joining in, on the merit of retention of Article 6.8 (voluntary benefit sharing). Visser asked those countries "*Why would anyone become a subscriber and commit to mandatory benefit sharing if there was a voluntary option?"*

CANADA said that if users were forced to share benefits, they might go elsewhere to obtain genetic resources. It said the subscription system must be attractive to users, which CANADA reasoned meant retaining Article 6.8.

JAPAN said that Article 6.8 had existed "*only for 10 years*," and posited that it needed to be tried out for longer.

In reply to CANADA, **AFRICA** asked who the alternative sources of genetic resources were. It had heard that the US Department of Agriculture might be one. A list of facilitators of biopiracy should be drawn up, AFRICA said, and these facilitators should be halted from collecting seeds in other countries.

SWITZERLAND said the mandate was to enhance the system because the present system did not work. Switzerland said it was clear that payments needed to be up-front ("now") and be mandatory.

FRANCE said it was open to changing Article 6.7 to take into account the subscription system. But FRANCE wanted to discuss voluntary versus compulsory benefit sharing in greater depth and to draw a distinction between restricted (i.e. patented) and unrestricted genetic resources.

LA VIA CAMPESINA said that it would be happy to see the rules changed on "restricted" genetic resources in the subscription system, and that not only patents but plant breeder's rights restricted farmers' use of seed.

GRULAC wondered if the old system had been unsuccessful because MLS seeds were not used in products, or if it was because there was no monitoring of users. It said monitoring was needed in the subscription system in order to ensure a flow of benefits.

JAPAN thought that LA VIA CAMPESINA was wrong and said that plant breeder's rights do not cause restrictions on farmers.

URUGUAY, supported by the **DEVELOPING COUNTRIES OF ASIA** and the **NEAR EAST**, said that it saw little point of the subscription system discussion if Articles 6.7 and 6.8 are kept.

The **UNITED STATES** (by a representative badged as a delegate from CANADA) took the view that the main purpose of the MLS was not to generate revenue. Therefore it was a mistake to call the MLS and SMTA failures. The US said many SMTAs had been signed with public institutions in developing countries, and that it would not call those institutions biopirates.

(The US statement misconstrued AFRICA's intervention on a list of facilitators of biopiracy, in which AFRICA discussed entities that deliberately avoid benefit sharing by obtaining seeds outside the MLS, as CANADA had mentioned, and not entities that sign and SMTA and use the MLS.)

Co-Chair Visser then ended the morning discussion by noting that, in his personal view, there was backtracking by some countries. He did not see how a subscription system could work if there was also an option for voluntary payments instead.

In the afternoon, another attempt was made to resolve the question of retention or deletion of Articles 6.7 and 6.8.

CANADA reiterated its insistence on retaining both articles, characterizing the present problem as being one of making the subscription system sufficiently attractive to industry. But it could contemplate some eligibility rules on Article 6.8, for example, making it for NGOs (to use).

SWITZERLAND said that if an accession-based option were retained, then timing of payment was critical. Advance payment would be needed.

AFRICA recalled that the Treaty's expert study concluded that, in effect, Article 6.7 and a subscription system could not coexist because a sensible balance between them was not possible. AFRICA wondered if those that prefer keeping the old articles were refuting FAO experts. At this point, AFRICA considered it an irrational demand to insist on the retention of Articles 6.7 and 6.8.

The Treaty study's lead author, Mr. Clive Stannard, affirmed that the expert paper had found what appear to be insurmountable incompatibilities in retaining Article 6.7 and simultaneously implementing a subscription system, and that in a simulation held with industry representatives, industry itself concluded that benefit sharing payments would not occur if Article 6.8 is retained.

ZIMBABWE recalled that this discussion has come up repeatedly and felt those that continued to argue for retention of Articles 6.7 and 6.8 had failed to make convincing arguments. There was no point to retaining these provisions only to make them unattractive.

Co-Chair Mozafari asked who would be users of Articles 6.7 and 6.8 if they were retained. He recalled CANADA's thought that Article 6.8 could be used by NGOs. Mozafari thought that while anybody could make a voluntary contribution to the Benefit Sharing Fund, a voluntary mode of benefit sharing would not work.

GERMANY said it saw no point in retaining Article 6.8 but that if it were "*totally restricted*" maybe it would be okay.

AFRICA recalled that payments had not been made under Article 6.8 so it needed to go. If it did not, AFRICA thought countries would move to a Nagoya Protocol-type approach for access to plant genetic resources for food and agriculture, and that the same approach might also be used with other genetic resources for food and agriculture (GRFA), such as domesticated animals. Since the Treaty is the "test tube" for a wider world of GRFA, it was important to get it right, AFRICA said, and an article that does not work should not be retained.

Co-Chair Mozafari then engaged **GERMANY** and **CANADA** in a discussion of possibly merging Articles 6.7 and 6.8 into one article that included a differentiation in payment between "restricted" and "unrestricted" materials. Both signaled their possible interest in such an approach.

GRULAC, however, said that if a merged Articles 6.7 and 6.8 retained a voluntary option, it would not represent any progress, since it would retain an incentive not to subscribe to the system.

Co-Chair Mozafari observed that the Treaty says that Parties can decide to make voluntary payments mandatory.

CANADA reiterated its demand for a voluntary option.

AFRICA replied that by focusing the payment structure on commercial income generated using MLS resources, then users without sales probably would not pay. AFRICA added that solutions could be found for very small commercial entities.

JAPAN claimed that retaining Article 6.7 created harmony between the Treaty and the Convention on Biological Diversity, and that it also wanted Article 6.8 retained for now, but that it would consult on the matter at home.

PERU, whose delegate was a plant breeder, said that his public sector breeding institution received potato germplasm from the International Potato Center (CIP), a CGIAR Center, which the institute tries to improve for local farming conditions. PERU said income from this effort is quite low as the system is designed to generate just enough income to keep the process of releasing new germplasm to farmers going.

JAPAN did not think that seed sales were an appropriate basis on which to calculate a benefit sharing payment and instead favored users making a very small payment each time an MLS seed was accessed.

With discussion of the SMTA concluding, **AFRICA** recalled that the Co-Chairs had agreed that it could present its ideas on enforcement of the subscription system at the end of this discussion.

AFRICA's ideas included a provision that if a user claimed intellectual property rights on an MLS genetic resource in the form received (not allowed by the Treaty), that the intellectual property would be assigned to FAO. AFRICA also proposed that if a user transferred an MLS genetic resource without an SMTA (a violation of the SMTA), then the user would be responsible for all payments due from the subsequent recipient(s). And if a user did not provide information to FAO in the context of investigating an alleged violation, AFRICA thought that the user should be suspended from the system. AFRICA noted the lack of remedies in the SMTA, and said that remedies needed to be included so that they were available to be imposed, for example, by an arbitrator.

8. Genetic Sequence Data (Dematerialization)

Co-Chair Mozafari then moved the discussion to genetic sequence data (dematerialization) and how to account for it. He said that the Convention on Biological Diversity (CBD) was working on the issue and invited its representative to explain.

The **CBD Secretariat** explained that its work was not yet extensive but the issue has been raised in the CBD's Ad Hoc Technical Expert Group on Synthetic Biology and that two bracketed paragraphs on the subject were to be discussed at the next meeting of the CBD Conference of the Parties in December.

Mr. Carlos Correa, an expert from the **SOUTH CENTRE** and chair of the Friends of the Co-Chairs Group on Access and Payment Rates, observed that the group had considered dematerialization *vis a vis* different access options and that it could be an influencing factor on what the Treaty eventually adopted. Correa pointed out that there were consultations underway at the World Health Organization in regard to genetic sequence data and the Pandemic Influenza Preparedness Framework (PIP Framework). He noted that a vaccine may be generated without physical access to virus materials and, thus, consideration of how to manage access and benefit sharing with sequence data had begun.

AFRICA said the issue had also been raised at the World Intellectual Property Organization's Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore and that the ITPGRFA Governing Body had discussed the Diversity Seek (DivSeek) initiative. AFRICA thought restricting information might be hard and that the question really was how to capture the benefits. Current access approaches, AFRICA noted, had been formulated before gene sequencing had achieved its present state of development and that the CRISPR-Cas9 system and gene editing in

general promised changes in how genetic resources are used. But that policy changes are slow and lag behind technological developments. It might be necessary to write provisions about genetic sequence data into the SMTA in order for the SMTA to be fit for purpose in the modern world.

GRULAC was also strongly interested in the issue but unsure a full recommendation was possible before the next meeting of the Governing Body. DivSeek was just one of a number of relevant initiatives, it observed. The CBD's conclusions might not be available soon, so it was not sure if the Working Group should hurry on this issue.

DEVELOPING COUNTRIES OF ASIA were also very interested in the issue, but noted it was very large and would take time.

CANADA said the issue could not be resolved at this meeting or by this working group. It said the issue should instead be discussed in relation to the Treaty's Global Information System for the time being.

AFRICA said the last Governing Body had given the Working Group a charge, and that it would be derelict not to take it on. Responding to CANADA, AFRICA noted that the Global Information System was not dealing with questions of access and benefit sharing, so it was not the venue for the types of concerns raised by the Governing Body.

LA VIA CAMPESINA drew attention to the particular relevance of intellectual property questions in relation to dematerialization.

DEVELOPING COUNTRIES OF ASIA noted the issue had been raised as long as 4 years ago and that addressing dematerialization will require a number of actions.

TWN said that the issue was indeed large and is emerging in a number of international discussions. For the purposes of this Working Group, TWN suggested two specific aspects should be prioritized. First, the Working Group could clarify how genetic sequence data (GSD) of MLS accessions that is generated or held by genebanks should be treated. For example, right now a user is not permitted to transfer an MLS seed to another entity without using the SMTA. Should this same provision, or something similar, also be applied to GSD, since sequence data can be commercially exploited? Second, if users of the MLS generate GSD from seeds they access, how should this data be treated? To whom does it belong? Could a user share that data without using the SMTA, or with someone who is not a subscriber?

URUGUAY thought that TWN had raised important questions for the Working Group to consider.

Co-Chair Mozafari said that the question of dematerialization appeared to be an important one to him too, and proposed to ask the Secretariat to prepare a study on the question.

9. Beyond the SMTA

The following morning (14 July), the Working Group began to consider issues "beyond the SMTA", a discussion typically dominated by the question of government donations to the benefit sharing fund and the inclusion of a broader range of collections of seeds in Contracting Parties in the MLS.

Co-Chair Visser submitted that if the MLS represents a pool of common goods, then it is in the interest of Contracting Parties (governments) to make contributions.

GERMANY replied that yes, that was the case. Some governments, for example, supported the CGIAR and Global Crop Diversity Trust. GERMANY also said that the seed industry conserves diversity in its collections. GERMANY also thought support for the Global Information System was important.

CGIAR said that the MLS is a set of global public goods and that users cannot be expected to come up with the full cost of maintaining them (i.e. governments should contribute too).

TWN recalled that the mandate of the Working Group was to increase user payments into the Benefit Sharing Fund, and it hoped that renewed discussion emphasizing voluntary government support was not desired by some to deflate expectations of industry payments to the Fund. After all, TWN noted, the CHAIR had displayed a graphic yesterday showing the steady growth of proprietary seed sales, yet benefit sharing from companies was still almost totally absent.

NORWAY thought that the question now was what the role of the Benefit Sharing Fund should be.

AFRICA said contributions to the CGIAR and Global Crop Diversity Trust were not the same thing as payments to the Benefit Sharing Fund. The CGIAR and Trust did not replace conservation by farmers, and an "ark" to save seeds (i.e. the "doomsday" gene bank at Svalbard) was not a food security fund.

JAPAN said that it had placed 30,000 accessions in the MLS and that there was a need for more countries to put more seeds into the system.

ECUADOR, replying to JAPAN, wondered how much of the germplasm in the MLS came from developing countries such as it but had been placed in the MLS by others. It emphasized the need for support for genetic resources conservation to arrive at the level of the farmer. It said Ecuadorean farmers asked their government about benefit sharing, but the government could not reply when this will happen, since the Benefit Sharing Fund is not receiving payments.

DEVELOPING COUNTRIES OF ASIA recalled that the Treaty's Article 18 called for developed countries to allocate resources, and that these would be needed for the Fund.

CANADA thought the Working Group should ask the Treaty's Ad Hoc Committee on the Funding Strategy to work on "resource mobilization plans" and maybe raise money together with the Global Crop Diversity Trust.

FRANCE emphasized a need to attract voluntary contributions.

GERMANY thought the Treaty should exercise its political guidance role for the Trust more and supported a "fund for agreed purposes".

NORWAY thought better management of the Benefit Sharing Fund would increase willingness to make contributions.

Co-Chair Visser invited comments on the scope of the MLS.

GRULAC said expansion of the MLS scope was dependent on user payments. Contracting Party payments were not the basic condition of expansion. There was no sense in expansion, GRULAC said, until a paying user base existed.

AFRICA agreed with GRULAC and saw no incentive to expand the MLS scope so long as the benefit sharing system did not work.

SWITZERLAND said the scope of the MLS should equal the scope of the Treaty (i.e. all plant genetic resources for food and agriculture). And that fixing the SMTA goes hand in hand with expanding the scope. A "buy-in mechanism" (i.e. financial inducements for developing countries to place material in the system) might build trust.

TWN noted that after only a few years, there were discussions to expand the approach of the WHO PIP Framework to other pathogens and that, so far, governments and stakeholders seemed positively disposed. TWN believed that the Framework's clear annual benefit sharing goal, and transparent reporting of user payments that have met that goal are key factors that have promoted confidence in that system and which may enable a similar multilateral approach to be applied to other pathogens. Europe and other countries eager to expand the MLS might take note of that experience.

ISF said that the Swiss suggestion was a good approach "*in this low trust situation*".

FRANCE said that access under Article 6.8 itself was benefit sharing because when no restriction (i.e. intellectual property claim) was placed, others had access to the germplasm for breeding and research.

AFRICA said the value of the sort of seeds FRANCE referred to was dependent on its usefulness for others. Such germplasm, AFRICA said, was frequently not very useful for developing countries.

The **BERNE DECLARATION** drew attention to the fact that the Treaty envisages inclusion of private collections in the MLS yet this had not happened. These private collections needed to come into the MLS before expanding its crop coverage.

AFRICA said its inclusion in the Nagoya Protocol of Article 10 on the development of a global multilateral access and benefit system was proof of its multilateralism. AFRICA said it wanted all plant genetic resources for food and agriculture to be part of the MLS but that expansion would be impossible before benefit sharing.

Co-Chair Visser then clarified that the current Friends of the Co-Chair groups would continue and asked if another such group should be convened on expansion of the MLS.

CANADA said that a deadlock on expansion was obvious and suggested that if its mandate could not be formulated to avoid Annex 1 that it might not be productive.

Co-Chair Visser, apparently seeking CANADA's favor, noted that a "buy-in mechanism" might be discussed in such a group.

CANADA replied that it thought a buy-in mechanism belonged in the existing Friends of the Co-Chairs group discussing access.

AFRICA said that such a group should talk about building trust necessary to expand the system, and not "*funders getting together to buy genetic resources for the system*" (i.e. the 'buy-in mechanism').

GRULAC said that the mandate of the Working Group had it well occupied for the remainder of the year and suggested such a Friends of the Co-Chair group could elaborate options for consideration later on.

TWN felt such a group would be a distraction from the current key task of detailing the subscription system and did not think it was a good idea.

Co-Chair Visser said he would "*take to heart your suggestions*" and closed the discussion.

As the session moved toward conclusion, the **ITPGRFA EXECUTIVE SECRETARY** noted that the Working Group would next meet in November in Rome immediately before the next meeting of the Ad Hoc Committee on the Funding Strategy and said he wanted to "*go fully through this process with the widest scope of Treaty*". The EXECUTIVE SECRETARY said the ITPGRFA was leading the way among international bodies on dematerialization / genetic sequence data (which was perhaps an overreaching assertion) and that the issue would need to be dealt with "*in a customized and sui generis way*".

LA VIA CAMPESINA said it understood that dematerialization would be on the agenda in November and asked how it could make inputs to the study the Secretariat would prepare.

Co-Chair Visser ambiguously replied that "*stakeholders can share anything at anytime*", and noted that the Co-Chairs would produce another version of the draft revised SMTA for the next meeting.

In a final session on the afternoon of 14 July, the Working Group's report was adopted.