

December 2014



# The International Treaty

ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



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## INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE

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

Geneva, Switzerland, 9-11 December 2014

#### SUBMISSIONS RECEIVED FROM STAKEHOLDERS GROUPS AND INTERNATIONAL ORGANIZATIONS: THE MERIDIAN INSTITUTE

#### FACILITATOR'S SUMMARY: INFORMAL STAKEHOLDER WORKSHOP ON MULTILATERAL SYSTEM OF THE INTERNATIONAL TREATY – MERIDIAN INSTITUTE



# Facilitator's Summary: Informal Stakeholder Workshop on Multilateral System of the ITPGRFA

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## Overview

The following provides highlights and summary points from a two-day informal workshop from 29-30 September 2014 held at Bioversity International in Maccaresse, Italy. The workshop was attended by 24 participants, invited in their individual capacity, from: civil society; farmers organizations; private sector (both from associations and companies of various sizes); scientists; and developed and developing countries - each of whom shared their individual and personal perspectives on a range of options to improve the functioning of the multilateral system.

The objective of the workshop was to provide an opportunity for those involved in conserving, using, improving, sharing, and commercializing products containing PGRFA to engage in informal discussion on the multilateral system, with the aim of contributing to the ongoing deliberations of the Ad Hoc Open Ended Working Group to Enhance the Functioning of the MLS (WG-EFMLS).

To help inform and stimulate discussion, the workshop opened with remarks from a diverse set of participants who shared their personal reflections on the ideal multilateral system (MLS) with the aim of helping to stimulate creative solutions among the group. Participants also made use of a background context paper prepared by Bioversity International (included in Annex I) to help inform and organize the discussion. The background paper was organized into two parts: 1) options to increase users' financial contributions to the Benefit Sharing Fund (BSF); and 2) revisions to increase enhanced functioning of the MLS, with particular focus on increasing de facto availability/access. Each part included a number of options for modifying the MLS that were explored in greater detail during small group discussions.

This summary aims to reflect, without personal attribution, the key topics of discussion and the diversity of views expressed during the workshop.

## Introduction

Participants underscored the importance of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) and the critical need for the effective implementation of the multilateral system (MLS) in order to meet the diverse interests of stakeholders:

- to support exchange and enhanced diversity of genetic material;
- to serve as a source of materials to farmers, researchers and breeders;
- to support activities for the conservation, improvement and sustainable use of genetic material; and
- to generate both monetary and non-monetary benefits that are shared with conservers and sustainable users of PGRFA in line with Art. 13.3 of the Treaty.

Participants recognized that identifying ways to enhance the functioning of the MLS involves exploration and understanding of the complex relationships and users' perception of the system. For example, the two-way relationship between benefit-sharing and access: on one hand, increased de facto availability and access to material under mutually agreed terms will create greater incentive to finance the system and allow benefits to be realized; and on the other hand, de facto access and availability will be incented by more benefits starting to flow.

More broadly, some participants underscored the need to keep in mind the overarching goal and practical aspects of the MLS: to support flow of germplasm in order to support agriculture globally, especially in the context of unfolding climate change.

The group explored options for revising the standard material transfer agreement (SMTA) adopted for use in the MLS, and the above-mentioned complexities factored into nearly all discussion on options for improving the MLS, as outlined in the sections below.

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## Relationship between Increasing Financing to BSF and Access

Participants explored the relationship between increased finance to the benefit sharing fund (BSF) on one hand, and users accessing material in order on the other, in order to identify impediments to user access. These included:

- Demand for materials in the MLS is lower than it could be due to:
  - Lack of clarity on and subsequent avoidance of the SMTA by some breeders (e.g., Some conditions in the SMTA as 'in perpetuity' and any enclosure as trigger point for benefit sharing);
  - A lot of other material for Annex I crops is freely available outside of the MLS;

- Many crops covered by Annex I do not have significant international commercial markets;
- Annex I does not include a number of important crops;
- Most member states have not publicly identified which Annex 1 PGRFA within their borders are automatically or voluntarily included in the MLS, making it difficult, and often impossible, for anyone to know what materials are available to request;
- Many member states do not yet have mechanisms in place to be able to receive and process requests for materials in the MLS;
- Much of the material in the MLS is not made available by some contracting parties;
- Much of the PGRFA in the MLS is uncharacterized and therefore of unknown value to users;
- Once MLS genetic material is commercialized non-users get free access (where the material is not protected), whereas users need to track and trace which presents a burden, and pay royalty on sales of the entire variety even in the case of a small amount of irrelevant genetic material from the MLS.

In order to have a functioning MLS, all these 'disadvantages for a user relative to a non-user' need to be addressed.

- SMTA user demand is further impeded by the processes related to accessing, paying for, and tracking MLS material (compliance with the SMTA). Some participants considered the benefit sharing system under the Treaty would be fairer if it distributed benefit-sharing beyond the point of first commercialization, whereas others are of the opinion that this is a core principle of the Treaty and should remain as is.

For increasing financing to the BSF, some suggested decoupling financing from user accession for the purposes of thinking through goals and identifying possibilities for expanding resources to the BSF (i.e., there may be additional approaches to increase financing to BSF).

Some participants also suggested that enhancing the MLS effectively must include consideration of the economic benefits that are already accruing to developing countries through non-monetary benefits (i.e., exchanging PGRFA, exchanging information, technology transfer, and capacity-building); revisions to the system to increase flows of financial resources should not inadvertently undermine/erode those non-monetary benefits. Some underscored that at this stage in the history of the implementation of the Treaty, the focus on increasing compulsory monetary benefit sharing will remain central, and increased flows of financial support to the BSF will be a necessary part of improving the effectiveness of the MLS overall.

Some participants expressed a concern that the Governing Body's request to "increase user-based payments and contributions to the BSF in a sustainable and predictable long-term manner" would necessitate compulsory payments from commercial entities that would need to be justified from a business case. A possible alternative could be to explore how the philanthropic side of the private sector could play a role in helping to fund the BSF while making a clear distinction between a voluntary donation to the BSF and a compulsory payment for access to the MLS.

In light of the above challenges for users, some noted that it is important to keep sight of the long-term value proposition for the conservation and use of genetic resources, and options to improve implementation should also consider that farmers can be both providers and users.

In this context, some participants stated that the most cost efficient way forward would be for Contracting Parties to assume responsibility for making payments to the BSF based on a to-be-agreed-upon formula, and leave it to them, based on their national systems, to decide whether or not to recoup some or all of the contribution from commercial users in their own countries.

Several participants also noted that the MLS is working better than many perceive it to be-- meaning, there is already a lot of germplasm transfer taking place using the SMTA involving national agricultural research organizations, genebanks, natural and legal persons, and particularly the CGIAR Centers. Some participants expressed the view that even more transfers could take place if providers and users in many (perhaps all) countries actually knew more about the multilateral system, and how they can use it. Widespread awareness raising and capacity building were therefore noted as being important prerequisites for increased use of the MLS, by both providers and users, contracting parties and natural and legal persons. .

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## Input on Potential Changes to Articles 6.7 and 6.11 of SMTA

The group discussed options in Part 1 of the background context paper, dealing with potential changes to Articles 6.7 and 6.11 of the SMTA with the aim of increasing financing to the BSF. Participants first provided feedback on 6.7 and then on 6.11. As the discussion evolved, the linkages between 6.7, 6.8 and 6.11 became clearer and some additional options emerged that take into account the relationships between these Articles.

### Feedback on Article 6.7:

- Introducing a time limitation could address both threshold and time limit challenges in ways to bring them in line with commercial practice. For example, currently, the potential for the recipient to trigger the mandatory 6.7 benefit sharing obligations lasts indefinitely after receiving that material under the SMTA. The potential for

triggering 6.7 benefit sharing could instead be made to expire 10 or 20 or 30 years after the material is received under the SMTA.

- Introducing a minimum percentage threshold for incorporation of MLS materials into new products (and/or focusing on the introduction and use of 'traits of value') might be useful to bring the system more in line with standard business practice and could possibly lower transaction costs associated with tracking and tracing. However, others noted that such a system would still require significant tracking and tracing, and concerns about transparency/accountability in terms of how MLS materials are actually being used. It was noted that minimum percentage thresholds are effective for the exchange and use of elite lines with known high value (as is normal in standard business practice), but would be much less likely to be triggered when landraces/traditional varieties are being incorporated into breeding programs, given the number of times the line being developed would need to be back-crossed to 'screen out' much of the unwanted or unneeded genetic heterogeneity that otherwise 'comes with' or characterizes landraces/traditional varieties.
- Extending mandatory benefit-sharing to commercializers who do not restrict access was considered by some to be a useful avenue to pursue, on the understanding that the level of benefit-sharing would be significantly lower than when access is restricted. Some noted that this strategy carried an attendant risk of creating a disincentive for current users (who don't have to pay under the extant formula) from continuing to access and use those materials.
- It was noted that Products released with PVP (whether under UPOV or under independent national *sui generis* systems) are, in practice, often subject to legal or contractual obligations that prevent their facilitated access under the MLS. It will be useful to confirm whether or not such practices 'trigger' the Article 6.7 benefit sharing provision of the SMTA.
- The relationship between 6.7 and 6.11 needs further differentiation to incentivize access (options elaborated below).
- Another option to address the challenge of "first user pays" would be to change 6.8 from non-mandatory to mandatory (as provided for in the Treaty article 13.2(d)(ii), ) and perhaps explore a low rate of payment under 6.8 in order to help foster equality among users.
  - Some participants pointed out that making 6.8 mandatory would create a disincentive for breeding and using the MLS.
  - Others pointed out that keeping 6.8 voluntary would make it impossible to raise the benefit-sharing payments to a fair and equitable level.

**Feedback on Article 6.11:**

Overall, there was a sense that 6.11 has embodied some useful principles and approaches to benefit sharing, but it is currently not functional because a) it costs significantly more than 6.7 and b) the transaction saving aspects it seems to embrace are lost when it 'switches back' to 6.7. Article 6.11 involves three distinct modalities of payments, namely: (1) payments during the period of validity of 6.11; (2) payments after the end of its validity which is similar to 6.7 but at a different rate; and (3) payments to be made by subsequent recipients of PGRFA under development, which are different again from 6.7 and 6.8 and the first two modalities under 6.11. This complexity needs to be removed to make 6.11 more attractive.

- The current obligation to pay could be construed as an order of magnitude too high compared to commercial reality, especially if 6.11 is to be made attractive vis-à-vis Article 6.7.
- Some participants thought there should be a charge on per sample accessed by the seed industry in the form of upfront payment. However, it was pointed out that in the first meeting of WG-EFMLS in Geneva in May, 2014, the Asian Group has requested for exemption for the small and medium companies from this upfront payment, up to a certain turnover, which is in line with the provisions of the Treaty.
- For revising Article 6.11, one option could be to introduce a subscription model whereby users could either:
  - gain access to the entire range of PGRFA by subscribing to the MLS at large, rather than a single crop, which may be simpler;
  - Subscribers could pass on materials free of charge to anyone else who had also subscribed, in the form as received from the MLS.
- Some participants suggested that subscription rates should vary depending upon the profit margins for the crop or forage concerned
- Under the subscription scenario, if benefit sharing were to occur at a lower level in perpetuity, there would not be a need to track anymore because the continuation in perpetuity would eliminate the current constraints of 6.11 (i.e., a user subscribes and pays a low fee on all material commercialized which eliminates the need for tracking. This would require that all exchange of material under development would have to use an SMTA, regardless whether it contains material acquired from the MLS.) Some participants pointed out that any level of payment in perpetuity would be viewed as unfavorable by some users.
- One of the challenges of a time-limited subscription model is that it could create a perverse incentive for users to access anything of potential value from the MLS within five or ten years and then not continue making subscription payments thereafter. To help address this problem, a number of options arose:
  - There could be a staggered fee for 6.11 to differentiate between the levels of access. Users that only access a small amount of material could pay a lower

- subscription fee, and users that access large amounts of material could pay the lower subscription fee and plus a fee per accession; and/or
- The subscription fee under 6.11 could be set low enough to incentivize long-term users in exchange for users not needing to track and trace under this option.
  - Some participants suggested categorizing crops by gross margins of profitability as a degree to which commercial users can contribute. Some crops are more profitable than others, so there may be benefit to differentiating the rate of payment depending on the type of crop accessed.
- The major advantage potentially in 6.11 – or a revised 6.11 -- would be to not have to track and trace. 6.11 currently requires tracking and tracing in the case that a user terminates their commitment to 6.11 or transfers material to subsequent users. To address this challenge and make 6.11 more attractive, a user could opt for 6.11 and would be required to stay with this commitment for five to twenty years after the last acquisition from the MLS. This approach also secures funding over a longer period.
  - Another option for users that revert to 6.7 after the subscription period under 6.11 ends would be to define a minimum level of material from the MLS incorporated into commercialized PGRFA products (e.g., 10-25%) or for incorporating defined traits of value in order to reduce current transaction costs associated with tracking *any* level of incorporation of MLS material. This higher level of incorporation can reduce those costs and create greater incentive for users to access material.
  - Some participants pointed out that using some of the above percentages may not generate the kind of resources deemed appropriate by some stakeholders.
  - If benefit-sharing under 6.11 was made non-renewable, limiting liability to a fixed term, this would be more in line with normal commercial practice, and it would completely eliminate the need for tracking, and it would eliminate its complexity.
  - Some participants suggested removing Paragraph 3 of Annex 3 of the SMTA, to allow subsequent recipients the same freedom enjoyed by all other recipients to choose between 6.11 or opting for 6.7. (It currently obliges all subsequent recipients of PGRFA under development derived from materials accessed by an original recipient who opts for 6.11 to follow a distinct schedule of payments, which is different from 6.7 and 6.8 and the 6.11 payments made by the original recipient). Denying such subsequent recipients a right enjoyed by all other recipients uniquely disadvantages this category of recipient.

***Relationship between 6.7, 6.8 and 6.11:***

The following points were raised in the context of the group considering and discussing the option of setting 6.11 as the default option. Many discussion points under this scenario seemed to be linked to implications for other options and articles such as 6.7 and 6.8.

- For some participants, there seemed to be a desire to maintain the choice between 6.11 and 6.7 and 6.8.
- As stated above, some participants felt the rate of payment would have to be changed to make 6.11 attractive as the default, suggesting there should be an order of magnitude difference in the rate of payment between 6.7 and 6.11.
- Also as stated above, it was suggested that the system should be revised to avoid the transaction costs that arise with a 'return' to the conditions of 6.7 when the 6.11 arrangements come to an end. It is important to explore mechanisms, once opting for the lower transaction costs of 6.11 to maintain those advantages, following some of the options discussed above.

***Rates of Payment Options:***

Participants explored several different rate options for 6.11, or between 6.7, 6.8 and 6.11:

- One option proposed would include three different rates for a subscription model: 1) a higher rate for material that is not available for breeding and research (perhaps 1%); 2) an intermediate rate for material that is available for breeding and research but that is not available for farmers to exchange (perhaps 0.5%); and 3) material that has no restriction and that farmers can exchange freely (perhaps 0.05%). However, some participants noted that these three levels would likely require track and trace mechanisms and would question its legality under the Treaty. Others said that it would be possible to implement such a solution without track and trace.
  - It was noted that under the SMTA now, subject to 6.11 (g), once the period of 6.11 benefit sharing ends, there is a reversion back to a modified form of 6.7, in which the payments continue at 0.5%. This rewards recipients of materials who initially elect to receive materials under 6.11 by allowing them to pay a slightly lower rate under 6.7.

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**Input on Levy-/Tax-Based System**

Participants discussed the proposal for a levy- or tax-based system to get a fee from the sale of every seed. This would be a very simple and straightforward system, entirely eliminating not only the need to track but also all disincentives to acquiring PGRFA under the MLS rather than from other sources. However, some concerns were raised about the feasibility of implementing such a system among sovereign states. The range of feedback on this option included:

- Consider framing this as a levy rather than a tax. The distinction being that a tax assumes a sovereign state gets money from its citizens, whereas a levy would be paid by states and then states would determine how best to recoup that domestically, presumably through Ministries of Agriculture..
- In order to make this an attractive option for contracting parties and users, the payment amount should be set at a lower rate than alternative options (6.7, 6.8 and 6.11)
- For companies that do not regularly utilize the MLS given the nature of the crops they work on, or for multinational companies subject to multiple state levy systems, they may choose to opt-out of the levy and pay according to 6.7, 6.8 or 6.11.
- A potential downside of the levy-based system is that it could create an uneven playing field if some countries choose to recoup the levy from companies and some do not.
- Some participants explored a scenario for a levy- or tax- based system which would shift the upfront payment based upon expected seed sales from .5% to .023% under Article 6.11, thereby incentivizing users to support a levy-based system.
- Some participants suggested that a levy- or tax-based system might create an inequality since only member states would be obliged to implement the system. Companies (or sales of companies) operating in non-member states could still have access to the MLS via member states and not pay a levy on sales in the non-member states.

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## BSF Funding Priorities

The objective of the workshop was to discuss issues relating to increasing the flow of money to the BSF and to increase access to PGRFA under the MLS. Those discussions led to consideration and clarification of the status of current BSF use and funding priorities; as well as BSF funding decision taking. The group especially sought to clarify the funding categories and priorities to help inform their discussion.

Following clarification, participants offered some suggestions on how the BSF funding process and priorities could help enhance the functioning of the system:

- It is clear that the final decision for BSF use rests with the Governing Body, although to help facilitate decision-making it may be useful to have some follow-up to the Leipzig Conference particularly regarding funding needs for ITPGRFA.
- Funding should be for farmers who continue to manage traditional varieties and develop new varieties thereby conserving/evolving diversity (and associated culture) and keeping options open for the present and future of agriculture.

- Some suggested one window of the BSF might be opened for a portfolio of projects which might also appeal to industry, which could create greater incentive for them to finance it. For example, identifying strategic “hot spots” where collecting or conservation efforts are necessary or characterization of material already in the system that is of broad, general interest to industry and which would benefit everyone using the MLS system. A team of experts, with significant industry representation could be formed to develop the portfolio of projects, which could then be considered/endorsed by the Governing Body or the Bureau.
  - The whole system would benefit if the mechanism of how funds are allocated is more transparent and the results of projects funded by the BSF are made available in the MLS (which may be true in principle but not always in practice).
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## Access and Availability

Participants discussed a number of options for increasing *de facto* availability and access. In considering the possibility of expanding the coverage of Annex I, some pointed to the relationship with benefit-sharing, in that expansion is more likely once contracting parties see benefits flowing and have greater incentive to expand coverage.

Some pointed out there is a need for clarification for contracting parties on whether inclusion of material is automatic or if they have to explicitly declare what material they are placing into the MLS. Some participants underscored the need to build understanding and capacity in order to encourage contracting parties to include material in the system. As an example, some note the need for capacity strengthening for contracting parties to be able to distinguish between, and identify PGRFA that is automatically included in the MLS and that which can be voluntarily included.

### Challenges for compliance among contracting parties:

- Lack of capacity and understanding of the complexities in the system. Specifically, national focal points often do not fully understand their responsibility and/or have low awareness and little pressure to comply.
- There seem to be little monetary benefits flowing, and little awareness of the non-monetary benefits (tech transfer, capacity building, information exchange, facilitated access) which developing countries enjoy which creates disincentives, or does not create positive incentives, for contracting parties or natural and legal persons to provide access (i.e., benefits have to start flowing and be seen to be flowing for the access to start working). More specifically, farmers and those who carry the burden of maintaining these genetic resources need to benefit from the system. And they will not be inclined to share materials voluntarily until they see what they consider as fair and equitable levels of benefit sharing.

**Suggestions for improving *de facto* access and availability:**

- Find ways to increase benefit sharing to create greater incentives for access and expansion of coverage in Annex I.
- Some participants felt that Annex I should not be expanded until the MLS is functioning correctly.
- Some participants suggested that contracting parties could use the SMTA for non-Annex I crops in order to overcome legal hurdles to expand the Annex and also to approach this matter in a more pragmatic way.
- Link BSF funding and access by requiring or rewarding with BSF funding recipients from countries that are in compliance.
- Some participants felt that implementation of farmers' rights could motivate expansion of Annex I. Farmers should be able to continue to grow varieties they have used historically and/or varieties they made available to the MLS, even if these varieties have traits that have been protected by companies. .
- Consider ways to expand Annex I to include vegetables which, at their general current state of breeding/improvement, would benefit from access to MLS germplasm and would, in turn, create greater leverage for the MLS.
- Some participants suggested that availability would be improved if patents were not granted on gene sequences or native traits accessed through the MLS.

*For natural and legal persons:*

- Encourage or put an obligation on natural and legal persons to deposit varieties into genebanks to be made internationally available once commercialization ceases. Some participants noted that this is already happening in some parts of the world.
- It may be helpful for the Governing Body to clarify ITPGRFA in terms of biofuels or other mixed uses. (The TAC-MLS/SMTA has addressed some of these issues and offered opinions that could be quite helpful. It might be useful for the Governing Body to explicitly consider/endorse those opinions to help users.)

*For Farmers:*

- When material is transferred to farmers, it can be for the purposes of conservation and used for research, training and breeding for food and agriculture (i.e., the purposes of facilitated access listed under the Treaty) or for direct use in cultivation (which is not one of the enumerated purposes under the Treaty). Many providers may have the legal right to transfer MLS material to farmers for direct use, but in such cases, they would not use the SMTA. (NB: Transfer without SMTA is not problem for direct use, but causes a problem if farmers would like to breed with the material. For breeding purposes, some think farmers could use an instrument that did not include the same obligations of the SMTA. This could help to deal with

article 9.3 of the IT that states: nothing in this article shall be interpreted to limit any rights that farmers have ensure that farmers' right to save, exchange and sell farm-based seed/ propagating material, subject to national law and as appropriate.

## Appendix A | Workshop Agenda

### Day 1 | Monday, 29 September 2014

- 7:00 Continental breakfast available**  
*Breakfast will be available beginning at 7:00 for guests at The Conchiglia Hotel*
- 8:20 Transportation to Bioversity International headquarters**  
*Bioversity vehicles will be available to transport participants from The Conchiglia Hotel*
- 9:00 Welcome, introductions, and agenda review**  
*Location: Sakura Room, Ground Floor*  
*Dr. Michael Lesnick, Meridian Institute and Dr. Michael Halewood, Bioversity International*  
 Participants are invited to briefly introduce themselves and share their perspective on how this informal workshop and dialogue could best contribute to the Ad Hoc Working Group.
- 9:30 Plenary Session | Vision Paper Briefings**  
 Brief reflections by a diverse set of participant volunteers on their vision regarding benefit sharing, and the questions below. Each volunteer will spend about 5 minutes sharing their personal perspective (which is not intended to represent any broader views).  
**Questions to be Addressed:**  
 Within the context of the Treaty as it stands (perhaps putting the current SMTA aside for a moment):
1. From your perspective, what would an “ideal multilateral system” look like?
  2. How could your view of an “ideal MLS” improve the benefit sharing?
- 10:00 Plenary Session | Discussion Stimulated by the Vision Papers**  
 Participants from the broader group may want to reflect upon the vision briefings and share their own perspectives on:
1. What would an “ideal multilateral system” look like?
  2. How could an “ideal MLS” improve the benefit sharing?
- 10:45 Break**  
*Location: Courtyard outside Sakura Room*
- 11:00 Plenary Session | Revisions to Increase Users' Financial Contributions to the Benefit Sharing Fund (BSF)**  
*Dr. Michael Halewood, Bioversity International will provide a brief review of relevant materials*  
 Suggested Discussion Questions:

1. Do you foresee circumstances under funds could be directed to the BSF? If so, what are those circumstances?
2. Would the value of access to PGRFA of different crops (in terms of size of the market of that crop and potential profitability of new varieties) need to be taken into account? If so, in what ways?
3. Assuming that there are circumstances under which users would be willing to direct funds to the BSF, what formula could encapsulate and make operable (and mandatory) that direction of funds?

**12:15 Lunch**

*Location: 1<sup>st</sup> floor staff room or terrace (depending on weather)*

**13:15 Plenary Session | Instructions for Small Mixed Group Discussion**

*Kristy Buckley, Meridian Institute*

**13:30 Small Group Discussions | Revisions to increase users' financial contributions to the Benefit Sharing Fund (BSF)**

Keeping in mind the morning discussion on bigger picture ideals, participants will reconvene in two groups with mixed participation.

**Resources:**

- *Tables 1-3 of Background Context Paper*
- *Copies of ITPGRFA*

Suggested small group discussion questions (same as plenary):

1. Do you foresee circumstances under funds could be directed to the BSF? If so, what are those circumstances?
2. Would the value of access to PGRFA of different crops (in terms of size of the market of that crop and potential profitability of new varieties) need to be taken into account? If so, in what ways?
3. Assuming that there are circumstances under which users would be willing to direct funds to the BSF, what formula could encapsulate and make operable (and mandatory) that direction of funds?

**15:30 Break**

*Location: courtyard outside Sakura Room*

**15:45 Plenary Session | Summary of Small Group Discussions**

Each group will select a rapporteur to briefly summarize the discussion including areas of convergence and divergence on each of the proposed revisions covered, as well as ideas for combinations of revisions.

**16:00 Plenary Session | Discussion on Options Generated****Discussion Questions:**

- Have any combinations of revisions emerged from the discussions?
- Taking into account the discussions and ideas generated, can you see a path forward and if so, how?
- What options need additional discussion and why?

**17:30 Plenary Session | Wrap-up Discussion**

*Dr. Michael Lesnick, Meridian Institute*

**18:00 Adjourn**

**18:30 Reception followed by Group Dinner**

Levante 72, Lungomare di Levante, 72, 00054 Fregene  
06 6656 0705

**Day 2 | Tuesday, 30 September, 2014**

**8:30 Continental breakfast available**

*Location: Breakfast will be available beginning at 7:00 for guests at The Conchiglia Hotel*

**8:20 Transportation to Bioversity International headquarters**

*Bioversity vehicles will be available to transport participants from The Conchiglia Hotel*

**9:00 Welcome, Day 1 Summary, Agenda Review**

*Location: Sakura Room, Ground Floor*

*Dr. Michael Lesnick, Meridian Institute*

**9:10 Plenary Session | Potential options to increase enhanced functioning of the MLS, with particular focus on increasing *de facto* availability/access**

*Dr. Michael Halewood, Bioversity International, will provide introductory comments, referencing the background paper, to help to frame the discussion.*

**9:25 Plenary Session | Discussion on Increasing *de facto* Availability/Access**

Suggested Discussion Questions:

- In your experience, what are the barriers to increasing *de facto* availability and access and how might those be best addressed?
- What aspects of the MLS would need to change to make it more attractive to access materials from the MLS?

**10:10 Plenary Session | Potential options to increase enhanced functioning of the MLS, with particular focus on increasing *de facto* availability/access**

*Dr. Michael Halewood, Bioversity International, will provide introductory comments, referencing the background paper, to help to frame the discussion.*

**10:25 Plenary Session | Instructions for Small Mixed Group Discussion**

*Kristy Buckley, Meridian Institute*

- 10:30**      **Break**  
*Tea and coffee will be available outside the two breakout rooms, Sakura Room and Vavilov Room.*
- 10:45**      **Small Mixed Group Discussions | Increasing *de facto* Availability/Access**  
 Participants will reconvene in two smaller groups in order to discuss options for increasing *de facto* availability/access.  
**Resources:**
- *Tables 4- 5, Background Context Paper*
  - *Copies of ITPGRFA*
- Discussion Questions:**
- In addition to the options discussed and those provided in Table 5 of the background paper, are there other options the group should consider? If so, what are alternatives and how could they increase availability and access?
  - How might these options be improved upon?
- 12:15**      **Lunch**  
*Location: 1<sup>st</sup> floor staff room or terrace (depending on weather)*
- 13:15**      **Plenary Session | Summary of Small Group Discussions**  
 Each group will select a rapporteur to briefly summarize the discussion including areas of convergence and divergence on each of the proposed revisions covered, as well as ideas for combinations of revisions.
- 13:30**      **Plenary Session | Continue Discussion**
- 14:45**      **Break**
- 15:00**      **Plenary Session | Reflections on Options and Ideas**  
*Dr. Michael Lesnick, Meridian Institute*  
 Suggested discussion questions:
- Of the options and ideas discussed, which do you believe to be most critical for improving access and benefit sharing in the MLS and why?
  - How can the output of this meeting and the participants in the meeting be helpful in contributing to a solution?
- 15:45**      **Plenary Session | Summary & Next Steps**  
*Dr. Michael Lesnick, Meridian Institute and M. Ann Tutwiler, Bioversity International*
- Non-attributional meeting summary to capture highlights of the discussion for participant use only.
  - Are there other suggestions for written inputs that could be useful?
- 16:00**      **Adjourn**

## Appendix B | Participant List

**Nestor Altoveros**

National Plant Genetic Resources  
Laboratory, College of Agriculture  
Philippines  
Email: ncaltoveros@yahoo.com

**Shakeel Bhatti**

International Treaty on Plant Genetic  
Resources for Food and Agriculture  
Italy  
Email: Shakeel.Bhatti@fao.org

**Szonja Csörgő**

European Seed Association  
Belgium  
Email: szonjacsorgo@euroseeds.org

**Christiane Duchene**

LimaGrain  
France  
Email: christiane.duchene@limagrain.com

**Philippe Ellul**

CGIAR Consortium  
France  
Email: p.ellul@cgiar.org

**Robert Graveland**

HZPC  
Netherlands  
Email: robert.graveland@hzpc.nl

**Luigi Guarino**

Global Crop Diversity Trust  
Germany  
Email: luigi.guarino@croptrust.org

**Christoph Herrlinger**

Syngenta  
Switzerland  
Email: christoph.herrlinger@syngenta.com  
Email: christoph.herrlinger@syngenta.com

**Guy Kastler**

ECVC  
Belgium  
Email: guy.kastler@wanadoo.fr

**Brad Kurtz**

Pioneer/Dupont  
USA  
Email: bradley.kurtz@pioneer.com  
Email: bradley.kurtz@pioneer.com

**Vern Long**

USAID  
USA  
Email: jlong@usaid.gov

**Gigi Manicad**

Oxfam Novib  
Netherlands  
Email: gigi.manicad@oxfamnovib.nl

**François Meienberg**

Berne Declaration  
Switzerland  
Email: food@evb.ch  
food@evb.ch

**Frank Michiels**

Bayer Cropscience NV  
Belgium  
Email: frank.michiels@bayer.com

**Pat Mooney**

ETC Group  
Canada  
Email: mooney@etcgroup.org

**Andrew Mushita**

Community Technology Development  
Trust  
Zimbabwe  
Email: andrew@ctdt.co.zw

**Godfrey Mwila**

Agriculture Research Institute  
Zambia  
Email: godfrey.mwila@gmail.com

**Tom Nickson**

Monsanto Law E1NH  
USA  
Email: thomas.nickson@monsanto.com  
Email: thomas.nickson@monsanto.com

**Ruaraidh Sackville Hamilton**

IRRI  
Philippines  
Email: r.hamilton@irri.org

**Maria José Sampaio**

EMBRAPA  
Brazil  
Email: zeze.sampaio@embrapa.br

**Jaap Satter**

Ministry of Economic Affairs, Directorate  
General for Agro  
Netherlands  
Email: j.h.satter@minez.nl

**Avinash Srivastava**

Ministry of Agriculture (Department of  
Agriculture and Cooperation)  
India  
Email: avinash.srivastava@nic.in  
Email: avinash.srivastava@nic.in

**Anke van den Hurk**

Plantum  
Netherlands  
Email: a.vandenhurk@plantum.nl

**Bert Visser**

Centre for Genetic Resources  
Wageningen University and Research  
Centre  
The Netherlands  
Email: bert.visser@wur.nl

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**Staff****Michael Lesnick**

Meridian Institute  
United States  
Email: mlesnick@merid.org

**Kristy Buckley**

Meridian Institute  
United States  
Email: kbuckley@merid.org

**M. Ann Tutwiler**

Bioversity International  
Italy  
Email: a.tutwiler@cgiar.org

**Michael Halewood**

Bioversity International  
Italy  
Email: m.halewood@cgiar.org

**Emile Frison**

former Director General of Bioversity  
Italy  
Email: e.frison@cgiar.org



## Appendix C | Background Context Paper

### Options for the revision of the multilateral system of access and benefit-sharing

#### A primer for multi-stakeholder consultations

*Background Context Paper for PGR informal stakeholder workshop. Authored by Michael Halewood, Bioversity International. Please send comments to [m.halewood@cgiar.org](mailto:m.halewood@cgiar.org).*

#### Introduction

The purpose of this paper is to provide the background context for the 29-30 September stakeholder consultation meeting, particularly with respect to how it relates to the ongoing deliberations of the Ad Hoc Open Ended Working Group to Enhance the Functioning of the MLS, and to highlight issues for discussion by participants during the stakeholder meeting.

At its fifth session, in September 2013, the governing body of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) decided to take action to address the fact that the multilateral system of access and benefit sharing was generally not functioning at the level hoped-for by the contracting parties. To this end, the governing body created the Ad Hoc Open Ended Working Group to Enhance the Functioning of the MLS (WG-EFMLS) with the mandate to develop a range of optional measures to: “a) Increase user-based payments and contributions to the Benefit-sharing Fund in a sustainable and predictable long-term manner, and (b) Enhance the functioning of the Multilateral System by additional measures.” The WG-EFMLS met for the first time in May 2014, in Geneva. It will meet again in December 2014, and for a third time in the first half of 2015. It focused primarily on options for increasing user-based payments to the BSF in the first meeting, and will do so again during its December 2014 meeting. The WG-EFMLS will consider other options to enhance the functioning of the multilateral system (including options to increase access to PGRFA) at its third meeting.

The objective of the 29-30 September stakeholder consultation meeting is to contribute to the ongoing deliberations of the WG-EFMLS. The stakeholder meeting will provide an opportunity for organizations that are deeply involved in conserving, using, improving, sharing and commercializing PGRFA to discuss the issues being considered by the WG-EFMLS. Meeting outcomes will be summarized in a paper and submitted to the Treaty Secretary, who may in turn forward it to the WG-EFMLS for consideration during its ongoing deliberations. It is not the objective of the stakeholder meeting for participants to arrive at consensus on the options considered. Indeed, one of the most important outputs of the meeting will be exploration and documentation of disagreement within and between

stakeholder groups on key issues related to the current state of functioning of the multilateral system, and options for ways to improve it. A document which clearly identifies and describes these issues and perspectives would be a useful contribution to the ongoing deliberations of the WG-EFMLS. It is also expected that the opportunity to openly discuss the issues will allow the participants to be able to better understand each other's perspectives, appreciate objections to possible courses of action, and to explore mutually satisfactory ways to address those objections based on this improved understanding.

Taking its lead from the WG-EFMLS, the stakeholder meeting will initially focus more on user-based measures. For this reason, there will be a number of representatives from companies and public sector research organizations that improve and or commercialize PGRFA. As was stated during the first meeting of the WG-EFMLS, 'users vote with their feet,' meaning if they ultimately are not willing to accept the terms of the SMTA, they will not access materials from the multilateral system and instead seek alternative sources of PGRFA. The result would be that benefits will not be generated to be shared, and PGRFA will not be conserved as envisioned by the Treaty. It is critically important that users are provided this early opportunity for in depth discussions of options for increasing user-based payments to the BSF – most of which would eventually need to be reflected in revisions to the monetary benefit-sharing clauses of the SMTA (i.e., articles 6.7 and 6.11).<sup>1</sup> It is equally important that other stakeholders have opportunities to react, ask questions and deepen their understanding of users' perspectives on these issues and vice versa.

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<sup>1</sup> Revisions to articles 6.7 and 6.11 are two of the six options for enhancing the functioning of the MLS that were originally identified by the Working Group on the Funding Strategy, and later, the 5<sup>th</sup> Session of the Governing Body, and most recently, presented to and considered by the first meeting of the WG-EFMLS meeting. (See [http://www.planttreaty.org/sites/default/files/OWG-EFMLS\\_1-14-w4\\_en.pdf](http://www.planttreaty.org/sites/default/files/OWG-EFMLS_1-14-w4_en.pdf) and [http://www.planttreaty.org/sites/default/files/OEWG-EFMLS\\_1-14-w3\\_en.pdf](http://www.planttreaty.org/sites/default/files/OEWG-EFMLS_1-14-w3_en.pdf)). The report of the first meeting of the WG-EFMLS in May 2014 is available at [http://www.planttreaty.org/sites/default/files/OWG-EFMLS-1\\_RE.pdf](http://www.planttreaty.org/sites/default/files/OWG-EFMLS-1_RE.pdf). Participants in the stakeholder consultation are expected to read these three documents in advance of the September 29-30 meeting. Participants will not be asked to discuss one of the other options – the 'vegetable licensing platform' – because it is not an industry-wide initiative and is purely voluntary. We fully appreciate that some stakeholders are in favour of the option of contracting parties assuming responsibility for making contributions to the BSF based on annual seed sales within their country (a policy piloted by Norway), because the benefits generated could be more predictable with potentially lower transaction costs for the multilateral system administration overall. However, in light of the ordering of discussions in the WG-EFMLS, we believe it is useful to explore options for increased flow of financial resources to the benefit-sharing fund from immediate users of multilateral system materials before possibly discussing new undertakings by member states.

Part 1 of this paper sets out a number of questions/issues that the participants will be asked to discuss with respect to the objective of increasing the flow of financial resources from users to the ITPGRFA benefit-sharing fund. It also includes descriptions of potential revisions to SMTA articles 6.7 and 6.11 that could be made to reflect new approaches to user-based monetary benefit sharing discussed by the group.

While the primary focus of the meeting is intended to be on measures to increase users' contributions to the BSF, many users have clearly stated that their willingness to commit to revised benefit-sharing formulae is dependent upon increased access to PGRFA through the multilateral system. So it is practically inevitable that the stakeholder meeting's discussions concerning monetary benefit-sharing options will lead to discussions of other options for improving the functioning of the MLS, including issues related to increasing functional access to PGRFA. Part 2 of the paper sets out options for revised governing body policies and new policy initiatives that could be adopted/endorsed by the governing body to increase access to PGRFA through the MLS. Some of these options would link disbursement of BSF support to demonstrable progress in implementing (or adding value to) the MLS.

## **Part 1: options to increase users' financial contributions to the BSF**

### **1.1. Background concerns and perspectives**

Thus far, no funds have been contributed to the BSF from PGRFA users based on the operation of the mandatory monetary benefit-sharing provisions of the SMTA (i.e. articles 6.7 and 6.11). This is partly a result of the fact that the PGRFA users who are most likely to trigger the default mandatory benefit-sharing provisions of the SMTA (i.e. article 6.7) — e.g. by patenting new PGRFA products — are choosing not to access materials from the multilateral system out of the felt need to avoid the related obligations. On the other hand, a range of users that commercialize new PGRFA products in ways that do not trigger the mandatory benefit-sharing provisions — e.g. by obtaining forms of plant variety protection (PVP) that allow use for research and breeding — are accessing materials from the multilateral system.

Ultimately, it appears that the outstanding majority of PGRFA transferred through the MLS is going to public sector research organizations in developing countries. At least that is the picture that emerges based on CGIAR transfer data. The CGIAR centres transfer approximately 500,000 PGRFA samples per year under the SMTA. Eighty-five percent of those transfers are to recipients in developing countries and countries with economies in transition. And the vast majority of those recipients are public agricultural research

organizations and genebanks. Only approximately five percent is sent to private commercial organizations.<sup>2</sup>

Rethinking how to increase the flow of funds to the BSF from users must take into consideration the risk/possibility of inadvertently creating additional incentives for a broader range of users to avoid accessing materials from the multilateral system, with still lower use of the system overall, and no more money coming in. For this reason, it is critically important to understand, a priori, the perspectives of different groups of PGRFA users concerning the structure and function of the multilateral system, and the advantages and disadvantages, from their points of view, of accessing/using materials from the multilateral system. To this end, it will be useful for the participants to explore some version of the questions set out in Table 1, immediately below.

Table 1: Background perspectives and considerations
<ol style="list-style-type: none"> <li>1. From their particular perspective, what aspects of the multilateral system work well? What aspects don't work well? Do they access materials from the MLS? Why or why not?</li> <li>2. What aspects of the MLS would need to change to make it more attractive for them to access materials from the MLS?</li> <li>3. As users, do they foresee circumstances under which they would be willing to direct funds to the BSF? If so, what are those circumstances? Would the value of access to PGRFA of different crops (in terms of size of the market of that crop and potential profitability of new varieties) need to be taken into account? If so, in what ways?</li> <li>4. Assuming that there are circumstances under which users would be willing to direct funds to the BSF, what formula could encapsulate and make operable (and mandatory) that direction of funds?</li> </ol>

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<sup>2</sup> More detailed information about PGRFA acquired and provided through the multilateral system by CGIAR centres until 2010, as reported to the Fourth Session of the Governing Body, 2011, is available at <http://www.planttreaty.org/sites/default/files/gb4i05e.pdf>.

## 1.2. Possible revisions to articles 6.7 and 6.11

The last questions above lead to a discussion of potential revisions of SMTA articles 6.7 and 6.11, since they encapsulate the existing monetary benefit-sharing formula, binding PGRFA users to direct funds to the BSF. Of course, it is logical to have a full discussion of the questions posed above before entering into discussion of potential revisions to these two articles. On the other hand, we think it will be useful for the stakeholder meeting participants to have a summary of some of the options for 6.7 and 6.11 revisions as they head into the meeting. Many of the participants at the workshop will already have fairly well developed ideas about such potential revisions, and the ways in which those revisions are linked to issues that will be flagged as part of the discussion of higher-level issues pursuant to 1.1 above. Indeed, some participants will want to move quickly through the questions set out in 1.1 above to discuss the details of 6.7 and 6.11.

The options for revisions to articles 6.7 and 6.11 are potentially highly interdependent, with the result that stakeholders will eventually want to consider 'packages' of combined revisions across the two articles, as well as other options for increasing the flow of financial resources to the benefit-sharing fund and increasing availability of PGRFA through the multilateral system.

### 1.2.a. Options for revising article 6.7

#### SMTA article 6.7

"In the case that the **Recipient commercializes a Product** that is a **Plant Genetic Resource for Food and Agriculture** and that incorporates **Material** as referred to in Article 3 of **this Agreement**, and where such **Product** is not **available without restriction** to others for further research and breeding,

the **Recipient** shall pay a fixed percentage of the **Sales** of the **commercialized Product** into the mechanism established by the **Governing Body** for this purpose, in accordance with *Annex 2 to this Agreement.*"

NB: Consideration of article 6.7 necessarily includes consideration of the definitions of the highlighted terms (highlighted in the original) which are included in Article 2 of the SMTA, as well as Annex 2 of the SMTA.

There are a number of components to the article 6.7 benefit-sharing formula. Some of those components are linked to thresholds which have to be surpassed to 'trigger' the benefit-sharing obligation. These 'threshold' components are related to: the level of incorporation of materials received from the MLS included in the new PGRFA product; recipients' use of the

new PGRFA (e.g. commercialization), and recipients' restrictions on others' uses of the new PGRFA by third parties. Other components concern the rate of payment (see Annex 2), annual reporting on sales and restrictions (see Annex 2), and the duration of obligations (concerning which the SMTA is silent, with the result that they last in perpetuity<sup>3</sup>).

Some companies have commented that, read together, these components create transaction costs that often outweigh the benefits/attractiveness of using materials from the multilateral system. It is possible that revisions to one of these components on its own, or a number of them together, as part of a package of linked revisions, could make article 6.7 more attractive to commercial users to take materials from the multilateral system, and simultaneously increase the predictable flow of financial benefits shared by those users through the international benefit-sharing fund.

A number of potential revisions to article 6.7 are set out in Table 2 below. They may or may not capture/reflect the terms or conditions under which users would be willing to direct funds to the BSF as discussed in 1.1 above. Where there is such a correlation, it should be noted and the option should be discussed in greater detail by the participants. If none of the optional revisions set out in Table 2 reflect the terms or conditions identified in the 1.1 discussion, the stakeholder meeting should identify requisite changes that would be necessary.

It is important to note that Article 6.7 was not discussed much in its own right during the first WG-EFMLS meeting, partly as a result of shortage of time. For the most part, Article 6.7-related options were only raised in the context of their possible future relationship to a revised Article 6.11.

<b>Table 2: Potential revisions to Article 6.7</b>	<b>Discussion/ perspectives</b>	<b>Options for cross cutting packages of revisions</b>
<p>1. Raising the minimum threshold of incorporation of accessed PGRFA into new PGRFA products up from 'any' to a higher percentage and or traits of value.</p> <p>-This was discussed a lot during the SMTA negotiations. With 8 years of experience, would parties/stakeholders be willing to reconsider the balance struck? Or would record-keeping costs and monitoring</p>		

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<sup>3</sup> For clarity, this refers to the general obligation to share benefits upon 'triggering' Article 6.7, not the duration of the benefit-sharing obligation for each new PGRFA product, which expires along with restrictions on others' uses for research and breeding.

concerns be prohibitive?		
<p>2. Extending mandatory monetary benefit sharing to commercializers who do not restrict access for training research and breeding.</p> <p>-Just for cultivars subject to PVP protection?</p> <p>-For any products that are commercialized regardless of whether they are subject to any form of intellectual property protection?</p>		
<p>3. Raising or lowering the percentage of gross sales (from current 1.1 minus 30%)</p> <p>-If the obligation to pay is extended to commercializers who do not restrict access for research and breeding, should their rate of payment be less than that of commercializers who do restrict such uses?</p> <p>-If the threshold for incorporation is increased to X% or traits of value (as considered above), could the rate of payment also be increased upward, to reflect the higher value of the material incorporated in the new PGRFA product?</p> <p>-to increase the potential attractiveness of 6.11, the differential between it as 6.7 needs to be greater. To achieve this, should the rates of payment under 6.7 be increased? Should the rate of payment under 6.11 be decreased? Both raised? Both lowered, but with increased differential?</p>		
<p>5. Introducing a time limitation on the operation of the mandatory benefit-sharing clauses</p> <p>-Could recipients be relieved of mandatory financial benefit sharing if they incorporate PGRFA into a new product [10][ 20][30] years after receiving it through the multilateral system?</p>		

### 1.2.b. Possible revisions of article 6.11

#### SMTA Article 6.11

"The **Recipient** may opt as per *Annex 4*, as an alternative to payments under Article 6.7, for the following system of payments:

The **Recipient** shall make payments at a discounted rate during the period of validity of the

option;

- a) The period of validity of the option shall be ten years renewable in accordance with *Annex 3* to **this Agreement**;
- b) The payments shall be based on the **Sales** of any **Products** and of the sales of any other products that are **Plant Genetic Resources for Food and Agriculture** belonging to the same crop, as set out in *Annex 1* to the **Treaty**, to which the **Material** referred to in *Annex 1* to **this Agreement** belongs;
- c) The payments to be made are independent of whether or not the **Product** is **available without restriction**;
- d) The rates of payment and other terms and conditions applicable to this option, including the discounted rates are set out in *Annex 3* to **this Agreement**;
- e) The **Recipient** shall be relieved of any obligation to make payments under Article 6.7 of **this Agreement** or any previous or subsequent Standard Material Transfer Agreements entered into in respect of the same crop;
- f) After the end of the period of validity of this option the **Recipient** shall make payments on any **Products** that incorporate **Material** received during the period in which this Article was in force, and where such **Products** are not **available without restriction**. These payments will be calculated at the same rate as in paragraph (a) above;
- g) The **Recipient** shall notify the **Governing Body** that he has opted for this modality of payment. If no notification is provided the alternative modality of payment specified in Article 6.7 will apply."

NB: Consideration of article 6.11 necessarily includes consideration of the definitions of the highlighted terms (highlighted in the original) which are included in Article 2 of the SMTA, as well as Annex 3 of the SMTA.

Some of the most animated discussion during the first meeting of the WG-EFMLS in June 2014 related to potential revisions to Article 6.11. It appeared that many delegates and observers felt that Article 6.11 revisions have the most potential for: reducing users' transaction costs related to (and also those of providers and the third-party beneficiary) tracing uses of materials; achieving an acceptable form and level of mandatory financial benefit sharing, including up-front payments, in a predictable, stable way. That said, the WG-EFMLS discussions remained at a relatively high level of generality, with different

approaches to the revision of Article 6.11 being mentioned, but not subject to protracted discussion.

It is important to note that, despite the potential attractiveness of a *revised* Article 6.11, so far, no recipient of materials under the MLS has opted to receive materials under 6.11 as it is currently written. Numerous commentators and the WG-EFMLS background papers note that one likely explanation for this phenomenon is that the difference in mandatory payment rates required by the two articles is too small (just 0.21%)<sup>4</sup> to compensate for the fact that the obligation to pay under 6.11 extends to the sales of a much wider scope of commercialized products (i.e. all products, regardless of whether their availability for research, breeding or training is restricted). One option to address this issue, to promote wider adherence to the 6.11 option, would be to increase the difference between the two payment rates: raising one, lowering the other, or a combination of both. Given the evidence of high levels of avoidance of the SMTA by companies that would likely trigger Article 6.7 benefit sharing, lowering both rates while increasing the difference between them, appears to be an option to at least consider.

Table 3 below sets out a few such options for Article 6.11 revisions.

Table 3: Potential revision of Article 6.11	Discussion/ perspectives	Options for cross cutting packages of revisions
<p>1. Lowering the percentage of gross sales to be paid under 6.11 (or raising the rate of payment under article 6.7, or both)</p> <p>-What difference would create an incentive to choose 6.11?</p> <p>-What is the range of that amount that industry sees as possibly acceptable?</p>		
<p>2. Converting form, calculation and timing of payments to annual subscription/membership fees.</p> <p>-How would a membership approach actually differ from what is already anticipated under 6.11?</p> <p>-What is the minimum length of membership?</p>		

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<sup>4</sup> [Art 6.7 (1.1 – 30% = 0.71%)] minus [Art 6.11 (0.5%)] = 0.21%

<p>-How to deal with commercialization of materials after membership expires? (Simple reversion to 6.7, as it is currently?)</p> <p>-What is the basis for differentiation between membership fees? Size of company? Annual turnover?</p> <p>-Form of payment: could companies make contributions in the form of stock options, instead of cash transfers (allowing tax savings on capital gains to be passed on to the BSF as a charitable foundation, at least in some countries. Incentive for companies because it would generate public interest in their financial well-being)?</p>		
<p>3. Introducing a time limitation on any obligations to pay after which there would not be any obligation to pay – not just reversion to 6.7. formula as now</p> <p>-X number of years after receiving materials?</p> <p>-When no longer subject to patents? PVP?</p>		
<p>4. Combine a) front membership/subscription fees for access to materials in the MLS for the purposes of research and breeding only, and not commercialization (as inspired by Article 6.11) with b) obligation for additional benefit sharing, based on percentage of sales of new PGRFA products, if and when they are commercialized, and they incorporate materials originally accessed for just research and breeding (as inspired by Article 6.7)</p> <p>-Different subscription rates for different sized companies? If so, based on what formula?</p> <p>-Different up-front subscription rates for different crops? Perhaps the rates should be adjusted to reflect the size of the commercial market of the crop concerned (e.g. lower for peanuts than for maize), or the range of diversity of the crop that is available through the multilateral system (or both).</p>		
<p>5. Allowing recipients of materials from prior 6.11 electees to choose to receive materials under 6.7.</p> <p>-Currently they don't have that option for PGRFA under Development. Is there a reason for not allowing it?</p>		

6. Making the revised 6.11 the only option (i.e., deleting Article 6.7 entirely)		
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**Part 2: Revisions to increase enhanced functioning of the MLS, with particular focus on increasing de facto availability/access**

As stated above, it is quite likely that the stakeholder meeting's consideration of options for increasing users' contributions to the BSF will lead to discussions of ways to increase access to PGRFA through the multilateral system.

Under the Treaty, access provision and monetary benefit sharing are not directly linked. Monetary benefits derived from sales of PGRFA products are directed to the BSF, and the funds are made available to provide support "primarily, directly and indirectly, to farmers in all countries, especially in developing countries, and countries with economies in transition, who conserve and sustainably utilize plant genetic resources for food and agriculture" (Treaty Article 13.3). Pursuant to its Funding Strategy, eligibility requirements and operational procedures, the ITPGRFA governing body has decided that BSF funds are disbursed through processes of competitive proposals, without consideration of whether or not the applicants (or their country) have provided material through the multilateral system or made significant progress to put systems in place to participate in the multilateral system in other ways.

Instead, delinked access (delinked from benefit sharing) under the ITPGRFA is approached more or less independently, with members states agreeing that they will automatically provide facilitated access to PGRFA of 64 crops and forages that are "under the management and control of contracting parties and in the public domain". All other materials, if they are to be included in the multilateral system, need to be voluntarily included, either by contracting parties, or by natural and legal persons. Under the Treaty, contracting parties agreed to create incentives for natural and legal persons to make such voluntary inclusions. In light of the fact that it is hard to know what PGRFA within a country is automatically and/or voluntarily included in the multilateral system, the Treaty secretariat requested parties to share information, to post on the ITPGRFA website, about collections included in the multilateral system. To date, only 33 member states have provided information about PGRFA that is included in the MLS; 99 member states have not. Very few countries have created incentives for voluntary inclusion of material in the MLS, and there are very few reports of materials being voluntarily included. There are anecdotes and at least one study (reference) concerning requests for materials that are unanswered, or refused, of materials that could reasonably be assumed to be in the multilateral system.

Out of recognition of the fact that the delinked nature of access and benefit sharing under the multilateral system does not create incentives for providers to enforce recipients' compliance with the SMTA, the Third Party Beneficiary was included in the SMTA (Articles 8.2 and 8.3) with powers to bring actions for alleged non-compliance with the SMTA on

behalf of the Governing Body and the multilateral system as a whole. However, no mechanisms or processes have ever been developed to address the fact that delinked access and benefit sharing does not create incentives for providers to actually make materials available through the multilateral system in the first place.

This situation is of direct concern to PGRFA users who are being asked to consider options for increasing their payments to the BSF. In return for agreeing to increase contributions to the BSF, many users have clearly stated that they expect increased availability of resources through the multilateral system. Since delinked benefit sharing does not involve users negotiating terms with providers for inclusion of materials in the multilateral system, they have to depend upon the multilateral system being administered in ways that create incentives for providers to increase accessibility of PGRFA. This refers to increased *de facto* access to Annex 1 materials that are *de jure* already included in the multilateral system, and increased access to additional Annex 1 materials that would need to be first voluntarily included in the MLS, and potentially, increased access to the PGRFA of crops and forages that are currently not included in Annex 1 of the Treaty (through expansion of the scope of Annex 1).

Just as in the case of considering options for increased user-based payments to the BSF, it is important to understand why stakeholders currently are, or are not, providing access to materials through the multilateral system. To this end, participants should provide feedback, from their own perspectives and experiences, to the questions set out in Table 4.

Table 4: Background perspectives and considerations

1. For contracting parties:

Have they provided the Secretariat with a list of collections included in the MLS? Have they put policies and/or systems in place to be in a position to provide PGRFA through the multilateral system? Have they actually provided materials when they received requests? If the answers to any of these questions is 'yes', what motivated them to do so? What other factors, beyond motivation, contributed to being able to do so? If any answer is 'no', why not?

2. For natural and legal persons:

Have they voluntarily included materials in the multilateral system, either by depositing them in a genebank to be distributed through the multilateral system, or by providing them under an SMTA? If so, what motivated them to do so? What other factors, beyond motivation, contributed their being able to do so? If they have not voluntarily included PGRFA, why not?

3. For both contracting parties and natural and legal persons:

What would make it more attractive (or necessary) to be more proactive in putting systems

in place to be providers under the multilateral system, and to actually provide PGRFA?

Table 5 sets out optional revisions of the Funding Strategy for promoting increased availability of PGRFA through the multilateral system, with a particular emphasis on linking availability of benefit-sharing funds to providing access to PGRFA (and/or information) through the multilateral system, or other forms of value addition to the MLS. These are not necessarily options that some potential would-be providers would identify on their own, as they represent forms of 'tightening up' the system through introduction of thresholds of demonstrable commitments and/or contributions to the multilateral system as preconditions for being able to receive support from the BSF.

<b>Table 5: Potential revisions/initiatives to increase availability of PGRFA through the multilateral system</b>	<b>Discussion/perspectives</b>	<b>Options for cross-cutting packages of revisions</b>
1. Expand the coverage of Annex 1 <ul style="list-style-type: none"> <li>- For specifically identified crops, forages and possibly agroforestry species?</li> <li>- For all PGRFA?               <ul style="list-style-type: none"> <li>○ Defined by genera/species?</li> <li>○ Defined by function/use?</li> </ul> </li> </ul>		
2. Require demonstrable proof of measures to implement and/or contribute to the multilateral system as a precondition for eligibility to submit a proposal to the BSF <ul style="list-style-type: none"> <li>- At level of contracting party ...               <ul style="list-style-type: none"> <li>○ submission of list of materials included in the MLS to Secretariat (for inclusion on Treaty website)</li> <li>○ policies, guidelines or published statements confirming providers' ability/authority to provide PGRFA through the multilateral system</li> <li>○ policies in place to encourage voluntary inclusion by natural or legal persons</li> <li>○ actual use of SMTA by providers in country</li> <li>○ assumption of activities/responsibilities to add value to materials in the MLS (e.g. evaluating materials from other collections and/or sharing information on line through the global information</li> </ul> </li> </ul>		

<p>system (GIS) or other mechanism</p> <ul style="list-style-type: none"> <li>- at level of natural and legal persons within the country             <ul style="list-style-type: none"> <li>o voluntary inclusion</li> <li>o assumption of activities/responsibilities to add value to MLS (N.B. recall scheduled Treaty Article 11.4 review of facilitated access for natural and legal persons).</li> </ul> </li> </ul>		
<p>3. Set aside a portion of BSF funds to be allocated among contracting parties or natural and legal persons that include PGRFA in the multilateral system.</p> <p>-Retroactively, through a lottery, with all 'includers' over the last X years potentially eligible?</p> <p>-Through forward-looking planning, create a system of competitive grants, to fund proposals for regenerating or collecting of priority materials and inclusion in the multilateral system?</p> <p>-Limited to voluntary inclusions of materials? Or extended also for value addition/functional inclusion of materials already "under management and control of contracting parties and in the public domain"?</p>		
<p>4. Formally identify the Treaty Article 17 Global Information System, so that users can comply with the SMTA obligation to share non-confidential information about materials they research, thereby adding to the body of information about materials in the multilateral system, making them more potentially interesting for use by others.</p> <p>- The point here is not to engage in discussion of the actual form of the GIS (which could be as simple as a web portal linking existing databases, such as GeneSys, EURISCO/GRIN, national genebank information systems, etc.). Instead, the point is simply to formally identify <i>where</i> users can share information in compliance with SMTA undertaking.</p>		