

Third World Network

FAO Seed Treaty to Consider a New Benefit Sharing Approach

A report by Edward Hammond (eh@pricklyresearch.com)

A working group of the UN Food and Agriculture Organization's International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA) has recommended that the Treaty's Governing Body adopt a new approach to benefit sharing payments.

[Meeting](#) on 2-5 June in Brasilia, the *Ad Hoc Open-Ended Working Group to Enhance the Functioning of the Multilateral System*, co-chaired by the Netherlands and Cuba, recommended creation of a new method for seed companies to make benefit sharing payments called a “subscription system.” Under the approach, companies that get seeds from the genebanks of the Treaty's Multilateral System (MLS) may become “subscribers”, and then make annual mandatory benefit sharing payments in return for access to the seed collections of the globally-important crops listed in the Treaty's Annex 1, such as maize, rice, wheat, and beans.

The Working Group recommended that the Treaty begin by modifying the standard material transfer agreement (SMTA) presently used so as to offer the subscription system. Governments agreed to try to make the subscription attractive, but disagree about what other options should be available in the revised SMTA, in particular, whether or not an alternative voluntary option for benefit sharing should continue to be possible.

The Working Group also endorsed the possibility of the Treaty later creating a subscription system that goes beyond the Treaty's current Annex 1 list of crops, potentially expanding to cover all plant genetic resources for food and agriculture (PGRFA). Radical changes, however, would require a protocol or amendment of the Treaty, both of which would require a new round of ratifications by governments.

On an expanded system, developing countries said that while they are willing to discuss the possibility, expansion cannot be considered until the SMTA for the present list of crops is amended to offer a subscription system, and it is proven effective in collecting mandatory payments from industry. In the event of eventual expansion, most developing countries want a new annex of crops contained in a protocol (a separate negotiated agreement), rather than expanding the present Annex 1 or covering all PGRFA.

The Working Group's recommendations will be taken up by the Treaty Governing Body when it meets in Rome on 5 to 9 October. Some governments, particularly in Europe, would like to see the initial version of a subscription system quickly

negotiated and adopted at that same meeting. With no negotiating text tabled and complex issues to sift through, however, that goal may be over-optimistic.

The Treaty is under considerable pressure to improve benefit sharing by companies (and governments), whose payments go into a Benefit Sharing Fund (BSF) created to support in-situ conservation of crop diversity by farmers in developing countries. To date, however, the BSF has limped along in reduced form using modest voluntary donations primarily from governments, and companies have not made benefit sharing payments at all, not even nearly 11 years after the Treaty came into force.

At the same time, the UN Convention on Biological Diversity's Nagoya Protocol on Access and Benefit Sharing entered into force in October 2014 and is gaining momentum. The ITPGRFA is recognized as a specialized instrument under the broader CBD access and benefit sharing regime, but the Treaty's failure to generate payments has placed pressure on ITPGRFA to do better.

Generalities on negotiating a possible subscription system

There are many undecided details of a subscription system, but the general idea is for companies to "subscribe" to the MLS – in some conceptions on a crop-by-crop basis, in others a single subscription for access to all crops. Subscribers then can access seeds from MLS genebanks and make annual payments for the period of their subscription. This "payment now" or "early payment" approach most closely resembles the present SMTA's to date unutilized Article 6.11 (called the "African Proposal"), and differs from the SMTA's articles 6.7 and 6.8, which defer payments until commercialization (if at all) and include a non-mandatory payment option.

(In any event, the present SMTA has not generated benefit sharing payments from industry under any of its options.)

In a subscription system, some payment obligations (details to be worked out) would survive after the end of a subscription and some regions support a termination clause for all benefit sharing obligations under the SMTA, which would kick in a presently undetermined number of years after the subscription was over.

All regions in principle support negotiations to create a subscription system, beginning with the existing Annex 1 crops. However, whereas the NEAR EAST, ASIA, GRULAC (Latin America and the Caribbean), AFRICA, and EUROPE all approach a subscription system with seriousness about significantly improved monetary benefit sharing (albeit at different levels), NORTH AMERICA (essentially Canada, as the United States is not a Party) and the SOUTHWEST PACIFIC's support for a subscription system is more equivocal, and appears rooted in an intent not to substantially upset the *status quo*. Dressing up the SMTA with a new subscription system is acceptable with those two regions, so long as it is just one of the SMTA's options, and the others (Article 6.7 and 6.8) are retained.

Opening confusion

Organizational issues impaired the meeting's start. The Co-Chairs began by presenting a draft report of the meeting – already written! – and proposed to consider it in two days' time. The report was awkwardly premature, but many also felt the voluminous draft resolution proposed by the Secretariat contained many lengthy elements already discussed and, in some respects, key passages of the draft report more closely focused on the critical issues than the draft resolution.

IRAN, speaking for the NEAR EAST, diplomatically noted *“having text of the report beforehand has created confusion.”*

BRAZIL, speaking for GRULAC, proposed putting the draft resolution aside in to instead focus on a key passage of the draft report.

Emerging from a lumbering discussion was a consensus to accelerate the pace of considering less pressing elements of the draft resolution in order to conserve time for more difficult matters. How fast some regions wanted to dispense with parts of the draft resolution quickly became apparent when discussion was opened.

ANGOLA, speaking for AFRICA, stressed the need to quickly advance to discussion of benefit sharing, the third substantive item of the draft resolution, on modifications to the SMTA to prompt industry payments.

Both MALAYSIA, speaking for ASIA, and SWITZERLAND, speaking for EUROPE, moved to delete or highly condense large portions of the draft resolution's 2nd, 3rd, and 4th pages, on items on *“increase[ing] the availability of plant genetic resources for food and agriculture through the multilateral system”* and *“non-monetary benefit sharing mechanisms, such as capacity-building, technology transfer and information sharing.”*

It was agreed to reduce these measures to a minimal text incorporating references to past discussions. Later in the week, a conference paper summarizing proposals submitted was tabled, but never discussed. These items disappeared from the meeting's report, as well as some elements of the draft resolution that followed its third item.

A subscription model/system¹

On the afternoon of 2 June, the meeting moved to consider the heart of its mandate, how to get more benefit sharing payments from the seed industry in order to support the Benefit Sharing Fund. This topic was addressed in “Measure III” of the

¹ Governments have yet to decide on using subscription “model” or “system”, with some hesitant about possible legal implications of the latter word. In this paper, “model” and “system” are used interchangeably, as the precise difference in their meanings in this context has not yet been defined.

draft resolution, which, building on previous Working Group discussions, proposed recommending to the Treaty's Governing Body that it approve creation of a "subscription system."

EUROPE opened discussion saying that the Working Group should do more than inform the Governing Body that a subscription system would work in principle. It said the meeting should try to make practical progress and think about "*stepwise implementation*" with "*long and short term goals*", meaning a subscription system for Annex 1 as soon as possible, to be quickly followed by further negotiation of to include more types of seeds.

ASIA (DEVELOPING COUNTRIES OF, i.e. excluding JAPAN, henceforth "ASIA") began by observing that there was a problem with the Treaty's "*pathway*", and called the present process a search for a "*new pathway*", which it said might be called a subscription system. It was flexible and open to discussion, including on a possible protocol, although it "*will take years*."

Whatever system results from the negotiation, Asia said, needed to be "*closed*", meaning that seeds would not leak out, and benefit sharing not be missed because of loopholes in the SMTA, actions of non-parties, etc. Asia strongly supported "*payment now*" as anticipated in the subscription system, rather than the "*payment in the future*" approach (i.e. of the SMTA's Article 6.7).

GRULAC said that it supported the "*pay now*" concept and that a subscription system "*opens new opportunities*". It also raised the question of users not under control of state parties, and suggested they would need to be addressed.

CANADA (speaking as NORTH AMERICA), said that it supported exploring a subscription system through a modified Article 6.11 of the SMTA, but that industry's willingness to pay was crucial. Canada was flexible about discussions, but if it came to expansion, it favored placing more crops in the Annex rather than negotiating a protocol.

AUSTRALIA, speaking for the SOUTHWEST PACIFIC, said it supports a subscription model but wanted the existing alternatives for benefit sharing (SMTA Articles 6.7 and 6.8) to remain in place, so that "*an alternative pathway is not the only one*."

AFRICA was pleased that the discussions were finally getting concrete on transforming its long-favored article 6.11 into a subscription system. It favored as simple a subscription system as possible, and noted some users might not need to pay, such as some non-profit entities, farmers, and very small seed enterprises in developing countries.

JAPAN said it preferred "*payment based on monetary benefits based on utilization*" (i.e. on an accession by accession basis only when MLS-based products are commercialized) but was open to discussions.

The Co-Chairs appeared surprised at the speed with which regions agreed to move ahead to discuss characteristics of a subscription system and there was some uncertainty apparent about how to proceed.

FRANCE intervened to state some of its priorities for a subscription system, raising the question of whether Article 6.8 (voluntary payments) should be made mandatory under a new subscription system, a question that later emerged as one about which there is European internal disagreement.

The Co-Chairs raised the possibility of postponing more specific discussion of the features of a subscription system to an informal evening session.

The SOUTHWEST PACIFIC offered that “*governments deciding what business should pay isn’t useful*” and suggested an evening informal discussion should focus on reducing transaction costs for companies to participate in the MLS. It also raised the question of how a subscription system would relate to compliance with the Nagoya Protocol.

CANADA liked the idea of postponing substantive discussion until an evening informal session, suggesting it begin by discussing priorities identified by industry.

ASIA reiterated that it was crucial for a subscription system to be closed and not leak materials to non-subscribers. It noted many detailed submissions had been made about a possible subscription system and that they should be discussed.

GRULAC said that if there was time to start now, then the meeting should.

ASIA and EUROPE agreed with GRULAC.

THIRD WORLD NETWORK (TWN) said a subscription system for the Annex 1 crops had potential to prompt industry payments, and is exactly what the meeting should dedicate its time to. TWN did not agree that industry could not be told what it should pay. Instead of asking industry what it was willing to pay, governments should establish a hard target for fair and equitable benefit sharing payments under a subscription model, a sum that would imply the minimum payment rates for industry subscribers, taking into account their size. Such a target was important, TWN stated, as a measure by which to evaluate if a subscription system for Annex 1 crops was working. If there were too few payments, it would not be fair and equitable.

It was agreed not to postpone the discussion. The meeting then moved to consider possible features of a subscription system, starting with who could be a subscriber.

Who can subscribe?

ASIA thought subscriptions should be open to anyone.

SOUTHWEST PACIFIC agreed, noting that anyone entitled to obtaining an accession from the MLS should also be able to subscribe.

The NEAR EAST thought the answer might depend on whether we were talking about a subscription system based on modifying the existing SMTA or on something else.

Regions were satisfied, for the time being, to say that the system could be open to all natural and legal persons, located in Treaty Parties or not.

How to subscribe?

EUROPE said it should be through the SMTA, but that might change if there is a new protocol.

ASIA agreed, adding that under a new protocol it would be a new SMTA.

CANADA preferred a revised 6.11 for subscriptions and thought mention of another way to subscribe under a protocol was premature.

EUROPE agreed that the issue would be revisited in the event of a protocol negotiation.

SOUTHWEST PACIFIC thought the SMTA could be used but the system might include “central registration” [as a subscriber] with the Treaty Secretariat.

Scope of the subscription?

ASIA said that, under a protocol, it would be on a crop-by-crop basis. Under the existing framework subscriptions would be for all Annex 1 crops. *“If, 20 or 30 years from now we see benefits,” Asia said, “then consider expansion.”*

EUROPE saw a link between improving access and improving benefit sharing, but did not think a protocol needed discussion at this stage. Europe was flexible – crop by crop or all crops.

CANADA supported EUROPE. It said it would like to see Annex 1 expanded, but expansion was not linked to a subscription model. It wanted to keep options open and to hear from industry.

BERNE DECLARATION thought that payment rates should be variable based upon the crop.

FRANCE said it was *“totally opposed”* to the BERNE DECLARATION’s idea.

TONGA noted there would be different types of users in a subscription system, and it was concerned about protecting the interests of small users.

Termination clause, i.e. period after which all SMTA obligations expire

ASIA wondered what would happen if somebody subscribed for three years, took *“all the material they want”* and then ended their subscription using a termination clause. It said this was a risk.

FRANCE said subscriptions should be for ten years, not just one, and that the terms of the agreement could remain in place for ten years after cancellation. France said that requests for very large numbers of seed accessions could be handled by providing a portion one year, another portion the next, and so on.

GRULAC noted there were no limits on germplasm requests in the present system and shared Asia’s concern that someone could *“take everything and terminate”*. It thought incentives were needed to prevent that from happening.

CANADA thought there should be no limits on requests, and thought that if new material keeps being added, users won’t leave the system.

The NEAR EAST noted it was not simple to fit a termination clause in the present SMTA and that rules of operation would need to be carefully developed.

Transfer to Other Subscribers and Non-Subscribers

ASIA said that non-subscribers would have to pay access fees and have articles 6.7 and 6.8 mandatorily applied, whereas 6.7 and 6.8 would be inapplicable to subscribers since they would pay subscription fees.

BERNE DECLARATION said it was evident that current SMTA obligations, for example in the event of patent claims, would need to be kept.

With no more interpretation time, the formal sessions of the first day ended. The meeting resumed on the morning of 3 June where it had previously left off.

Triggers for Payments

ASIA said payment should be based on annual sales of current products. For non-subscribers, there should be an access fee and then further payment upon commercialization, whether or not the product is covered by intellectual property claims.

EUROPE thought there should be annual company turnover as well as payments upon commercialization, and that these were complementary (i.e. applicable at the same time).

SOUTHWEST PACIFIC, supported by CANADA, thought that payment should be in proportion to the amount of material the subscriber was “*reviewing*”.

ASIA thought that in a revised Treaty, articles 6.7 and 6.8 would best be gone (i.e. payment would be by subscription only and not proportional in the sense mentioned by SOUTHWEST PACIFIC).

GRULAC noted that different speakers had different ideas and was somewhat equivocal in its own position. It wanted a subscription system under a revised Article 6.11, but also wanted 6.7 and 6.8 kept, “*only for use with specific accessions.*” GRULAC wanted to “*use the framework we have, but to add a new model that guarantees access is linked to benefit sharing.*”

AFRICA wanted payments based on a revised 6.11 subscription system, and to see Articles 6.7 and 6.8 eliminated.

THIRD WORLD NETWORK supported elimination of Articles 6.7 and 6.8, leaving subscriptions as the source of benefit sharing payments, and urged governments to fix a fair and equitable minimum total payment figure required.

The INTERNATIONAL SEED FEDERATION (ISF) thought that a subscription should be one option which “*fits in*” alongside Article 6.7 and 6.8.

The Consultative Group on International Agricultural Research (CGIAR) thought governments should consider an exemption from payments for small companies.

Possible Differentiation on Payment Levels

ASIA recalled that during the negotiation of the Treaty, AFRICA said all plant genetic resources for food and agriculture might be included, but on the condition that there be no intellectual property (IP) rights. This idea was not accepted by developed countries. Now, ASIA thought, differentiation should be made only on commercialization of products, meaning that commercial subscribers should be the ones that pay.

EUROPE wanted to differentiate payment rates between materials protected by patent and materials protected by plant breeder’s rights.

SOUTHWEST PACIFIC, and later CANADA, did not agree with EUROPE and did not support differentiating payments based on type of IP protection.

The NEAR EAST observed that differentiating rates between patents and plant breeder's rights might not be necessary if benefit sharing was settled at the subscription payment level.

GRULAC said that if you establish an annual subscription rate, differentiation might be added later on, depending on the subscription rate.

AFRICA agreed with GRULAC, saying that a discussion of actual levels and amounts was needed to add clarity to the question.

FRANCE said its national position was to keep Article 6.8 voluntary, even if the delegate himself was of the opinion that it might be made mandatory. It did not support payments for PVP protected varieties, claiming they are "*free for breeding and research*".

EUROPE clarified that all the comments it had made today were in reference to the current system, not a future protocol or other negotiation.

INTERNATIONAL SEED FEDERATION drew attention to its view of the value of the breeder's exemption in plant variety protection laws.

The BERNE DECLARATION, supported by LA VIA CAMPESINA, argued for three levels of payment, one for materials commercialized without IP protection, another for those sold with PVP protection, and a third for those covered by patent.

ASIA said there might be differentiation in rates between crops, due to the differences in profit margins.

CANADA said it could support ASIA.

GRULAC supported differentiation by crop, but only a very simple approach that didn't become too burdensome. The NEAR EAST agreed.

SOUTHWEST PACIFIC was open to differentiation if it was practical.

THIRD WORLD NETWORK thought that questions about possible differentiation could be more easily sorted out in the context of a target for annual industry payments.

INTERNATIONAL SEED FEDERATION said it did not object to a target in principle, but that it "*needs to be acceptable to us.*"

Differentiation of Users

ASIA, supported by AFRICA, said there would need to be categories of users, with non-profits exempt.

EUROPE thought differentiating among users might not be necessary because users that don't commercialize seeds wouldn't be "*in the system*" (i.e. subscribers).

SOUTHWEST PACIFIC and CANADA supported differentiating between users without offering further detail.

ASIA thought that "commercialize" (as used by EUROPE) was potentially overbroad, and might include farmer-to-farmer exchanges. It said users might submit annual accounts.

FRANCE said commercialize was sufficiently defined and that turnover is public information. It noted that some non-profits have huge turnover.

GRULAC said that if use of accessions results in monetary gains, then benefit sharing must arise.

The BERNE DECLARATION proposed exempting entities with an annual turnover of less than 2 million euros.

LA VIA CAMPESINA said farmer-to-farmer exchanges must be exempted.

EUROPE was annoyed, and said "*let's not throw everything in*". It thought farmer-to-farmer was a "*non-issue*" (i.e. already covered).

Period of validity, renewals and termination, residual obligations

ASIA said residual obligations needed clear spelling out in a revised Article 6.11, and that if a subscriber terminates, there should be a fee.

GRULAC thought discussion should be directed to what rights a subscriber has after leaving the system, not just financial aspects, but what rights of use of materials.

SOUTHWEST PACIFIC favored a short subscription period with regular renewal. It meant a subscription period of 5 to 10 years, with an annual decision on renewal.

CANADA favored a termination clause and renewal but had no fixed idea in years of a subscription period.

The NEAR EAST said obligations on use should survive at least 10 years after termination, when article 6.7 should kick in, perhaps at a rate much higher than at present.

CANADA said establishing a penalty for termination would have a chilling effect on the use of the system.

ASIA clarified that the penalty it favored was if termination was invoked early (i.e. before the end of a subscription period).

The INTERNATIONAL SEED FEDERATION said it could agree to making a payment if it continued to use "*something from MLS material*" after expiry of a subscription. It did not favor automatic renewal of subscriptions.

The BERNE DECLARATION said that Article 6.7 should be the fallback after termination/cancellation.

THIRD WORLD NETWORK said governments should consider not allowing cancellation so long as a subscriber is commercializing MLS materials.

Additional Elements

The NEAR EAST wanted to tackle the question of transfers to non-subscribers.

ASIA proposed discussing targets, and said annual income targets were needed.

The CHAIR replied targets would be discussed later.

The CGIAR said the model needed to take into account the CGIAR's limited capacity to respond to large requests for seeds. It also said access needed to be simple for farmers.

BERNE DECLARATION noted the need for targets and for a built-in review mechanism. It also wanted public access to information.

EUROPE supported public access to information.

SOUTHWEST PACIFIC was skeptical about public access to information.

GRULAC said that CGIAR centers will, from time to time, receive large requests for seeds, but that these were good if, for example, they related to the establishment of a new genebank. In GRULAC's view, the subscription model should not confer any additional access rights to requesters.

On the question of a protocol and expanding coverage of the Multilateral System

EUROPE said its idea was to take a "*stepwise approach*," to first see what can be done with the present SMTA, but to also bear in mind what can be done next. It wanted to quickly deliver modifications to the present SMTA and then go beyond. EUROPE said it thought it might be possible to expand Annex 1 not by a protocol but by a unanimous decision of the Treaty Parties.

ASIA had no objection to a “*staged process*” moving forward. It could accept a subscription model based on a revised Article 6.11, but it would also require other changes to the SMTA. That revised system could then be tested. If payments were acceptable, then expansion could be “*looked into*”. ASIA said it is difficult to reconcile a subscription model with retention of articles 6.7 and 6.8. It said it could foresee a compromise to retain them in some form, but worried that they would badly impact the subscription model. The Treaty needed a “new pathway”, ASIA said, and that the easiest way to expand was through a protocol under which a second Annex might be established.

SOUTHWEST PACIFIC wanted to modify Article 6.11 as an “*alternative*” payment option, while retaining Articles 6.7 and 6.8, which it said will continue to be used.

CANADA also supported modifying Article 6.11 and retaining Articles 6.7 and 6.8, although it noted that it was open to possibly revising the payment rates for the latter two, in order to make the subscription model attractive.

The BERNE DECLARATION supported implementing the subscription model through a revised Article 6.11 and offered that it had draft text for how to do so.

The fate of Article 6.8 (voluntary benefit sharing option)

EUROPE said Article 6.8 was a difficult issue for it as a region, since some members preferred to make it mandatory, while others preferred to leave it voluntary.

SOUTHWEST PACIFIC was “*strongly of the view that 6.8 be retained as a voluntary option,*” and should include non-monetary benefit sharing options such as placing varieties “*commercialized without restriction*” into the MLS without any payments on top of that.

(Australia’s plant breeder’s rights law obliges recipients to place protected varieties into the MLS, something which Australia apparently believes should be considered voluntary benefit sharing in the sense of Article 6.8.)

CANADA and JAPAN wished to keep Article 6.8, and keep it voluntary.

GRULAC said the subscription system needed further development before it could take a position.

ASIA noted that Article 6.8 was already slated for review. It asked those that favored its retention if they’d already performed that review and, if so, “*How many millions have come in through the voluntary option?*” (The answer is none.)

SOUTHWEST PACIFIC renewed its effort to construe Australia placing seeds in the MLS as voluntary benefit sharing under Article 6.8.

CANADA added that it wanted a subscription system under Article 6.11 that, coupled with a modification in the payment rate for Article 6.7, “*might work*.” It wanted to try that as a first attempt (i.e. while retaining Article 6.8 as a voluntary alternative).

GERMANY said it supported CANADA and AUSTRALIA. It thought that making Article 6.8 mandatory would be toughest on small and medium sized companies, who were not the entities to be targeted for benefit sharing.

The NEAR EAST felt that keeping Article 6.8 intact would make it hard to make a revised Article 6.11 attractive. It also noted that even if Article 6.8 were removed, voluntary contributions could still be made to the Benefit Sharing Fund.

ASIA recalled that Article 6.8 came into existence on the basis of trust. “*They said trust us, and the money will come in, but no money actually came in.*” At present, ASIA said, companies could contribute one dollar and say they were benefit sharing. As long as Article 6.8 stays, ASIA thought a revised Article 6.11 won’t be attractive.

EUROPE said that on the basis of what it was hearing, perhaps there was room to keep some material under Article 6.8.

FRANCE said that, in its opinion, removing Article 6.8 would require a protocol.

SOUTHWEST PACIFIC did not agree with ASIA that Article 6.8 would undermine a subscription model. Other factors, like rate, administrative burden, and legal certainty would be more important, it said. It agreed with FRANCE that making Article 6.8 mandatory would require a Treaty amendment.

CANADA said that whether Article 6.8 is mandatory or not might not be so important.

AFRICA agreed with ASIA. It also recalled that developing countries were asked to trust that voluntary payments would be made, but after 10 years, none had.

Relationship between payment rates in a subscription system

ASIA tabled its proposal to make the payment rate under Article 6.7 to be ten times the current rate for Article 6.11 and, if Article 6.8 was retained in mandatory form, for it to be five times the rate of Article 6.11.

As the articles are presently constructed, the proposal would result in rates of:

Article 6.11:	0.5%	(of all sales by the subscriber of that crop)
Article 6.8:	2.5%	(of sales of materials commercialized <i>without</i> restriction)
Article 6.7	5%	(of sales of materials commercialized <i>with</i> restriction)

(“*Restriction to others for further research and breeding*,” in the present SMTA is typically interpreted to not include varieties protected by plant breeder’s rights.)

EUROPE said it would not make a counterproposal at this stage. The challenge, it said, was the right relationship between the rates to make Article 6.11 attractive. Europe did not have a recipe, and it offered to discuss the matter informally.

The SOUTHWEST PACIFIC did not have a specific rate to propose either. It could support Article 6.7 being higher than the subscription (Article 6.11) rate but not making Article 6.8 mandatory.

CANADA supported SOUTHWEST PACIFIC and thought the seed industry should be asked what it can pay.

The INTERNATIONAL SEED FEDERATION said companies might be confidentially surveyed and the information aggregated into a report on what payment rates could be. It could not offer a specific rate now, since there were differences of opinion within industry. It said there needed to be “*a sound process*” of consultation with industry on what rates it could offer.

THIRD WORLD NETWORK opposed the idea that asking industry was the correct approach to rate-setting in a subscription system. The MLS is part of a broader regime including the Biodiversity Convention, and ‘fair and equitable’, TWN said, “*is not defined as what crumbs a \$40 billion a year industry is willing to brush off its table in the Treaty’s general direction.*” TWN said that rate setting would be aided by a proper needs assessment for the in-situ conservation goals of the Benefit Sharing Fund and by fixing a target to meet that need, which could be distributed across industry, taking company size into account.

CANADA replied that it did not mean to suggest that the seed sector would set rates, but rather that its opinion should be taken into consideration.

The NEAR EAST wondered how much industry spent on access to germplasm, and if that would be a useful indicator.

MONSANTO replied that it did not have a number on hand. Referring to maize, it said that sometimes it signs non-binding MTAs in order to evaluate material. If it wants the material, then binding negotiations ensue wherein the cost “*can be substantial*”. It said it had signed few “*open ended agreements with percentages.*”

INTERNATIONAL SEED FEDERATION said it could research the question, which needed further clarification.

The CHAIR asked industry what was needed in a subscription system to make it attractive, so companies would opt for it over voluntary payments.

INTERNATIONAL SEED FEDERATION (IFS) replied that it needed clear expectations.

With “*an easy system that is business-wise doable*,” ISF thought, “*people are ready*.”

AFRICA said that financial requirements for the BSF should be researched, which might produce a range.

The BERNE DECLARATION argued for placing “*6.7 on top of 6.11*”, in other words, having both simultaneously applicable, so that a subscription fee would be paid, and additional payments made if materials were commercialized with restrictions (e.g. under patent). In reply to SOUTHWEST PACIFIC, it did not think that placing seeds in the MLS is a way of fulfilling the SMTA’s benefit sharing obligation.

Other items

The INTERNATIONAL SEED FEDERATION raised the issue of a minimum threshold of incorporation. ISF had submitted a paper arguing that in most circumstances, commercialized varieties that incorporated only a small proportion of genes from MLS materials should not trigger benefit sharing obligations.

ASIA said the issue had been discussed at length during the drafting of the SMTA, and for many reasons the proposal for a threshold was rejected.

The INTERNATIONAL SEED FEDERATION said its proposal was that commercial varieties with less than 3.125% MLS genetic material should be exempted, except in certain cases involving a “*trait of value*”.

SOUTHWEST PACIFIC said it supported the creation of a threshold.

THIRD WORLD NETWORK said that a low proportion of genes did not necessarily indicate low value. TWN noted that the Working Group had agreed that a subscription system was supposed to reduce the need for tracking and tracing of germplasm, a key industry demand. And earlier this morning, TWN recalled, the meeting agreed to focus efforts towards making a revised Article 6.11 more attractive than other options. TWN therefore did not understand why industry was now proposing an item that would require companies to perform more tracking and tracing, and which would tend to make Article 6.7 attractive over a revised 6.11.

ASIA agreed.

Before the end of the day, the meeting briefly, and inconclusively, discussed contributions to the Benefit Sharing Fund from governments, including “*territorial approach*” concepts (such as that formerly referred to as the “Norwegian model”), of taxing seed sales and contributing proceeds to the Benefit Sharing Fund. The issue of some governments contributing the Global Crop Trust and not to the Benefit Sharing Fund was also raised.

(The Global Crop Trust, based in Germany, is a fund created to pay for the maintenance of the international genebanks of the CGIAR, which form the backbone

of the Treaty's Multilateral System. The Trust has received far more funding, primarily from Northern governments, than the Treaty's Benefit Sharing Fund. The Trust is currently ramping up programs to make new collections of farmers' seeds and seeds of crop wild relatives, and to sequence genebank seeds and make that information available online, prompting anxiety among developing countries with respect to benefit sharing.)

In the morning delegates continued to discuss measures other than industry payments to improve funding the BSF. Subjects including the possibility of a donor council as well as taking a "*more programmatic approach*" were discussed as ways to possibly stimulate more government and other contributions.

Benefit Sharing Fund (BSF) sources of funding

The Chair asked regions for their views on the relative weight of different BSF sources of funding.

GRULAC said that, from its perspective, the BSF should basically be funded by users, and it was important to make the system attractive to them.

CANADA and AFRICA and EUROPE agreed.

SOUTHWEST PACIFIC noted that users payments were not going to materialize in the next biennium, during which government contributions were needed.

ASIA thought it was not realistic to expect user payments to cover the BSF needs in the short or medium term, and that government contributions would be needed. User payments should grow over time, ASIA said, and targets were needed to gauge efficiency.

Targets

The CHAIR asked if a target was needed and, if so, how to set it?

CANADA supported a target in principle but said there were many unknowns, including how much to expect from governments and from users.

ASIA suggested setting targets per project cycle of the BSF, with an increase with each cycle. For each cycle, ASIA said, the proportion to come from industry could be defined.

GRULAC supported ASIA and recalled the Treaty's access and benefit sharing functions need to be fulfilled.

AFRICA agreed.

JAPAN said it was impossible to set a target because benefits should arise from use.

GERMANY said that Parties could decide on the amount of each cycle.

SOUTHWEST PACIFIC said that any target that does not take into account industry's willingness to pay "*will set us up for disappointment.*"

AFRICA noted that the BSF has only funded about 5-6% of the projects presented to it and that there was a large unmet need.

The NEAR EAST said there was need for both a target and a programmatic approach.

CANADA said targets were useful and maybe minimum targets could determine if a BSF funding cycle would be triggered or not.

ASIA said that if, for example, \$10 million was the first BSF new cycle target maybe 10% would come from users, and that percentage could be gradually raised, implicitly adding that it might take 100 years for it all to come from industry.

CANADA suggested minimum targets should be quite low, an idea that the NEAR EAST did not find helpful.

THIRD WORLD NETWORK recalled AFRICA's observation about the large unmet need to support in-situ conservation, and reiterated that a needs assessment would indicate the target for the BSF to reach its goals. The target also needs to be fair and equitable in line with the Biodiversity Convention and Nagoya Protocol. It noted that if the seed industry paid benefit sharing at the same rate, relative to sales, as the vaccine industry pays for access to influenza viruses under the WHO Pandemic Influenza Preparedness Framework, that they would be paying over \$400 million per year to the BSF. But they were presently paying nothing.

CGIAR said that reports had been prepared about the needs that could be consulted, and that it was important to come up with a reasoned program. It encouraged governments to think about "a big plan".

GERMANY said that when talking about financial needs that more than the BSF should be considered.

GRULAC did not think a target was the way to enforce the BSF, but it also felt that the Working Group should recommend that one be placed. It did not think, however, that fixing a number was the Working Group's job.

CANADA said a minimum target would be short term and that once a subscription system was up and running, then a target can be set that is "*reflective of our real capacity.*"

The CHAIR closed the discussion on targets.

G-77 (developing countries) Position

BRAZIL noted that the Group of 77 countries had met under leadership of IRAN. It said that while “*a common and only idea*” had not been achieved, there was an outcome to the meeting to present.

IRAN, speaking for the G-77, said that the Group supported development of a subscription model as a means to enhance the BSF, provided that it can be effectively implemented. The model could be made attractive by making Article 6.8 mandatory, and the model could be made the only means of access to the MLS for users located in non-Parties. The G-77 was willing to discuss a protocol, “*in a transitional manner*”, starting with changing the current SMTA.

With respect to expanding the crop coverage of the MLS, G-77 countries mainly prefer to see expansion occur through a protocol with a new annex, and not to expand Annex 1. G-77 was unanimous that expansion through a protocol will only be considered when it is certain that the BSF has been improved. Evaluation of the modified SMTA would be a matter of a few years, to see if industry is making payments or not. A new Annex could also improve the BSF, after making sure the subscription system is bringing results.

ASIA fully supported the G-77. Because of avoidance, lack of payments, leakages of information and materials, reluctance of legal and natural persons to place material in the MLS, etc., there could be no expansion of Annex 1. ASIA said it thought that if Annex 1 were opened now, more countries would want to delete items from it than to offer to include additional crops.

GRULAC said that it trusted a subscription model would increase benefit sharing, and that early payments should be tested in the short term. It did not think that expansion of the MLS would be postponed forever, but said time was needed to test the subscription system to see if it works.

CANADA said it wanted Annex 1 to include all PGRFA but it might be better not to discuss that now.

SOUTHWEST PACIFIC also supported expanding the MLS by adding more crops or all PGRFA to Annex 1.

SWITZERLAND urged rapid action and asked to present information from an informal meeting that it had chaired the previous night, where proposals for a revised SMTA text were discussed.

(The informal meeting, was sparsely attended, mainly by European, CGIAR, and industry representatives.)

ASIA alternatively thought the Secretariat could prepare information on options for revision, and countries could submit ideas. SWITZERLAND then did not present information from the meeting.

Next Steps

A confusing and unproductive period then ensued during which the meeting attempted to discuss written draft elements of its conclusions that were prepared before the meeting began.

During this discussion some governments mentioned the desirability of the next session of the Treaty's Governing Body quickly establishing a contact group to attempt to revise the SMTA for adoption by the Governing Body at the same meeting (as opposed to, for example, charging the Working Group to undertake that task in the next biennium).

Some issues already discussed were rehashed, and some regions made comments about what they saw as possible for the revised SMTA and which steps they thought would need to wait to be addressed if a protocol negotiation eventually ensues.

Ultimately, in accordance with its mandate and usual procedure for working groups, the report's language on next steps was drafted in such a way to leave options open for the Governing Body.

Transfers to non-subscribers

A brief and interesting exchange that occurred in reviewing the draft report text regarded the question of what set of terms to use for transfer of seeds from subscribers to non-subscribers.

GRULAC reiterated that subscription should be the only option for access for entities in non-Parties.

ASIA said it was evident that subscribers would only be able to transfer MLS material to other subscribers, because it would make no sense for somebody to receive materials from a subscriber and then be able to use Article 6.8, voluntary benefit sharing. This would make the subscription system unattractive because it might give non-subscribers an advantage and facilitate leakage from the system.

SOUTHWEST PACIFIC, on the other hand, did not appear concerned by that issue, and said no agreement had been reached that the subscription system would be a "closed loop".

FRANCE conceded that ASIA was right, subscribers needed to only transfer to other subscribers or else the system wouldn't work. The NEAR EAST agreed.

Payment rates redux

Viewing the draft report text, northern governments belatedly realized that because the developing countries of Asia's proposal on payment rates (0.5% subscription, 2.5% mandatory Article 6.8, and 5% for Article 6.7) was the only concrete proposal

put forward in the Working Group's session, it was the only one that appeared in the report.

EUROPE heated up at the prospect of Asia's proposition being a negotiation starting point and bluntly labeled the proposal an "*unacceptable, counterproductive example*" (it made no such observation when the proposal was tabled), and demanded that it be deleted.

CANADA also wanted to see Asia's proposed payment rates go away.

EUROPE then said that if Asia's proposal was not deleted that a proposed payment rate of 0.01% should also appear in the report. Inaccurately referring to an informal discussion, Europe claimed that a 0.01% rate was proposed by the CHAIR (who indicated he did no such thing by vigorously shaking his head "no").

ASIA cried foul, noting that it put forward a concrete proposal and its reasoning when no other region did. It would not allow, nor did it consider proper, for its proposal to be deleted because other regions had not made their own.

FRANCE and GERMANY then began complaining about Asia's proposal.

The proposal was eventually retained in brackets.

A fourth meeting?

The possibility of reconvening the Working Group in Rome immediately prior to the Governing Body in order to hold for a brief session – perhaps a day – to review submissions and drafts on how to revise the SMTA was also discussed and generally accepted.

No specific decision was made or funding identified to support the meeting, although Europe expressed a strong interest and might be expected to offer to underwrite it in discussions by the Governing Body bureau.

Adjournment

The meeting adjourned with the Secretariat charged with drafting documents and an opportunity for SMTA revision comments and text to be submitted for consideration before late June.

A decision will be taken by the bureau on the possibility of reconvening the Working Group for a short session immediately prior to the Governing Body meeting, to be held in Rome from 5 to 9 October of this year.

At the meeting's close, momentum appeared to be moving in the direction of convening such a meeting, and for governments to form a contact group at the Governing Body to attempt to revise the SMTA then and there, thereby potentially

adopting a subscription system based on Article 6.11 as early as October.

No draft text, however, has been presented, much less discussed and, given the number and technical complexity of the issues, the notion of adoption in October may be over-optimistic.

For details of the Brasilia meeting and the official documents see:

<http://www.planttreaty.org/content/third-meeting-ad-hoc-open-ended-working-group-enhance-functioning-multilateral-system-access>

Third World Network contact:

131 Macalister Road

10400 Penang, MALAYSIA

Email: tw@twnetwork.org

www.twm.my