



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

Rome, Italy, 16–19 September 2024

Introduction

From 16 to 19 September, the IPC Working Group on Agrobiodiversity took part in the 12th meeting of the Open-Ended Working Group to enhance the functioning of the Multilateral System of the ITPGRFA (OEWG-MLS).

Guy Kastler and Tanmay Joshy (La Via Campesina) engaged in the negotiations on behalf of the IPC, in a new attempt to push the Contracting Parties to uphold Farmers' Rights and apply Treaty provisions against restrictions to access and use of Plant Genetic Resources for Food and Agriculture (PGRFA) by peasants and Indigenous Peoples.

The Working Group's task is to discuss and agree on how to implement specific parts of the International Treaty related to the Multilateral System of Access and Benefit Sharing. This implementation goes hand in hand with a tentative reform of the whole system, given the current provisions have not delivered satisfactory results over the last 20 years.

A brief history of the process

The mechanism was put in place to ensure that facilitated access by commercial actors to the Multilateral System (a network of public gene banks holding more than 2 million samples from 64 crops accounting for 80% of all human consumption) implies the sharing of benefits arising from the use and sale of seeds or plant varieties incorporating these genetic resources, with priority for developing countries. At the same time, this activity should not restrict farmers' rights to save, exchange and sell their seeds, but with a huge flexibility: “subject to national law and as appropriate”. Until now, both these provisions have not been respected. Seeds, along with associate traditional knowledge, have been taken and collected for free in peasants' and Indigenous Peoples' fields, without their informed consent on the destination of such resources, by researchers funded by benefit sharing breadcrumbs to collect those PGRFA to be put in the MLS. They also publish the traditional knowledge associated to these PGRFA online in open access, including the genetic sequence information (DSI) they contain. Therefore, millions of those DSI, and associated knowledge of peasants and Indigenous Peoples, are freely available in open access online databases.

This allows the seed industry to access the DSI of PGRFA from other sources, including those linked to genetic resources from the Treaty Multilateral System, without any obligation to pay their fair share in respect of benefit sharing, nor to respect the prohibition to patent Products incorporating the MLS material, its genetic parts or components. Lack of requirements for traceability of DSI prevent institutions to identify the MLS as the physical source of this genetic sequence information, cancels the benefit-sharing obligations and the ban on patenting the genetic components of the PGRFA from the MLS.

Discussion on how to enhance the functioning of the MLS started in 2013. . Until very recently, they were only concerned with benefit sharing and, despite numerous warnings from the IPC, they never took into account the prohibition on claiming IPRs on the PGRFA from the MLS, their genetic parts or components. In spite of this they quickly get to a stalemate that we still see today. The reasons are the following:

- The industry is circumventing its obligations to pay by not ensuring the traceability of the multiple exchanges of PGRFA, and now of DSI (that precede the development of the new seeds it puts on the market). This adds up to the possibility for the industry to access the PGRFA of the immense US collections, which are freely available to all companies with a registered office in the country. US refuses to apply the obligations of the Treaty it ratified in 2017.
- Contracting Parties from the Global North say that it is crucial, in order to increase the benefit sharing contributions, to make more material available under the facilitated access provided by the MLS. Therefore, the Annex I of the Treaty, containing the list of species each country makes available, should be expanded to all Plant Genetic Resources for Food and Agriculture. In such a scenario, the current approach would then change from a positive list (which includes all material made available) to one or more negative lists of some species, that countries would be exceptionally allowed not to make available, but only in their territory;
- Contracting Parties from the Global South, supported by NGOs, would agree to open up their collections to put more genetic resources in the "common pool" of the MLS, but only if an effective benefit sharing mechanism is put in place first, which can ensure predictability and continuity of payments to the Benefit Sharing Fund.

The IPC refuses to discuss the topic in these terms. Peasants and Indigenous Peoples try to make parties understand that if there are no binding provisions at the international and the national level to prevent patents on DSI linked to the MLS material, there's no possible benefit sharing whatsoever, nor any protection for seeds of peasants and Indigenous Peoples, and their traditional knowledge. The reason is that industry will always have open access databases to use as a source of material extracted by researchers from the MLS. Therefore, peasants push governments to solve the DSI and patent issues first, and then concentrate on other matters. IPC warns also Parties that switching from the current positive list to different national negative lists would be very risky, because if an exemption list cannot be changed over the time, they will fail to protect peasants and Indigenous Peoples from the future commercialization of wild species that are not yet considered food crops, but already are (or will be one day) essential to their livelihoods, and potentially for all world's population.

What is happening now

After more than 10 years of negotiations, something could be about to change in the next future. The Treaty could be forced to adapt to a possible decision on DSI at the next meetings of the Convention of Biological Diversity (CBD COP). In 2022, CBD parties decided to create a multilateral benefit-sharing mechanism from the use of DSI on genetic resources, and are now working towards its operationalization. In a dedicated working group (WGDSI-2), broad support for a sector-based approach to benefit-sharing has emerged: this would imply seeking sales-based monetary benefit-sharing contributions from all companies in sectors likely to make extensive use of DSI in the development and commercialisation of PGR (including agriculture, pharmaceuticals, and cosmetics). A decision could be reached at the COP, scheduled for 21 October - 1 November 2024 in Cali (Colombia). How will the Treaty take this new scenario into account, given it has competence only over use of genetic resources for food and agriculture accessed from the MLS?

That's the huge question mark pending over the heads of delegates who recently met in Rome to negotiate the enhancement of the MLS.

Main outcomes of the MLS negotiations

Co-Chairs presented a package of measures to enhance the functioning of the MLS. This package includes:

- A draft resolution
- A revised Standard Material Transfer Agreement
- A draft amendment for the expansion of Annex I

The main outcomes of the negotiations are the following:

- Co-Chairs presented a new proposal for a subscription mechanism for MLS users. This mechanism would have two alternative triggers for mandatory monetary benefit-sharing: early payment upon registration or deferred payment upon commercialization. This compromise will be better explored in the next two meetings of the Working Group, expected in March/April and June 2025. Co-Chairs idea was to accommodate all requests from the industry (looking for a system which does not require a "fee for access") and countries from the Global South (looking for a system which can ensure transparency, continuity and predictability of payments).
Comment from the IPC: given that industry refuses to ensure traceability of the multiple exchanges of PGRFA that separate access to the MLS from the development and marketing of new seeds, and given free access to US collections, the deferred payment mechanism will not work any better than the current MLS, which has never worked for these two reasons, and free access to DSI will only exacerbate this loophole.
- On DSI, Africa and Near East proposed to address the topic in a paragraph of the draft resolution recalling article 12.3 d), which prohibits claiming intellectual property rights on PGRFA, their genetic parts or components, in the form received from the MLS. There was also a discussion on the importance of requiring the disclosure of the source of DSI. Civil Society (NGOs) proposed to request users to identify the source of the genetic resource when accessed using an SMTA. The proposal received broad support, also from North America (because USA do not require SMTA to be signed domestic users when accessing US genebanks, so they won't be forced to disclose any information). Whether DSI should be addressed in the draft resolution and/or in the revised SMTA, it has not been decided. The issue will be discussed in the next meetings.
The IPC pointed out that free access to DSI makes it illusory to know the PGRFA from which these DSI have been identified, and thus makes it possible to circumvent the obligations resulting from facilitated access to the PGRFA in the MLS. This new context, unforeseen at the time of the adoption of the Treaty, requires that Article 12.3(d) be updated to prohibit, in particular in the national laws of all Contracting Parties, the claiming of Intellectual Property or other rights restricting facilitated access to PGRFA of the MLS, their genetic parts or components and not "in the form received from the MLS".
- The expansion of Annex I to all PGRFA will require further work as well, because many countries pointed out the need to define "all PGRFA". Would this wording include also wild food plants? How long and how flexible should be the list of exemptions that countries can draw? Why not going for a positive list instead, where only newly included species are declared, and all the rest would be excluded? Why not to create a benefit sharing mechanism and ambitious payment rates that can ensure a predictable and acceptable monetary flow before discussing the enlargement of the Annex? All these longstanding open questions still have no answers, but no country formally opposed the "all PGRFA" proposal, as the possibility of creating national negative lists remains open.
- Regarding the revised SMTA, a critical paragraph about accessing material from the MLS for direct use to enhance food security ended up under the spotlight. In the draft, access for direct use excludes commercial purposes. GRULAC suggested adding language that specifies who can access the MLS

in this context. North America cautioned against excluding commercial purposes, with CGIAR explaining that a commercial intermediary organization is often needed to create and scale up virus-free material for use by farmers. This issue will be discussed in a small group to find a way forward.

IPC proposals

The IPC Working Group on Agrobiodiversity advocated for:

- a positive list for the expansion of Annex I, but only after DSI issues are properly addressed. Only ex situ collections can be part of the list. If Parties decide to go for a negative list (exclusion list), it should be flexible so that it can be expanded anytime, instead of being only shortened;
- Given that free access to DSI seems to be irreversible, all patents on DSI linked to PGRFA from the MLS should be prohibited. This is the only measure that can guarantee the correct application of the Treaty article 12.3 d). National laws should be passed to ensure these provisions are properly implemented at the country level;
- It should be clearly reaffirmed that farmers and small firms remain exempt from any obligation to pay into the Benefit Sharing Fund.
- In situ material should not be accessed without Free Prior and Informed Consent, because it should be considered as PGRFA under development by farmers.
- Access for direct use should not be available for marketing seed or seedlings except for local markets.

Future work

13th Working Group meeting, initially scheduled for March 2025 in Rome, back-to-back with the meeting of the Commission on Genetic Resources for Food and Agriculture (CGRFA), is difficult to maintain due to logistical constraints related to a major religious event taking place in Rome in 2025. Korea proposed to host the meeting beginning of April.

14th WG meeting will probably take place in June.

The work to be done before the 13th meeting involves:

- a small drafting group on direct use, with likely three members;
- a drafting group on the new subscription mechanism including a dual payment trigger, with one member per region;
- an informal meeting, from 13-15 December, likely in Rome, to discuss issues related to DSI, with participation by stakeholders;
- regional consultations to discuss issues related to the amendment of Annex I, including possible national exemptions; and
- an in person meeting with the seed industry on payment rates and willingness to subscribe to the enhanced MLS ahead of the next Working Group session.

No written submissions are foreseen at this stage. Co-Chairs might decide to ask for them between the 13th and the 14th meeting.

Based on the outcome of these next steps, Co-Chairs will update their proposal, to present it at the next Working Group Meeting.

An alarming final day

No country dared to oppose the USA formal refusal to put an end to the current free access to their immense national collections of PGRFA for “national residents”, a refusal accompanied by a clear threat to withdraw from the ITPGRFA.

Refusal by the co-chair of any decision to involve farmers organisations and Indigenous Peoples in the working group on direct use... by farmers! Formal refusal to involve the IPC in the working group with the industry on payment rates.