ISF Contribution to the Establishment of a Material Transfer Agreement (MTA) for the Multilateral System (MS) of the International Treaty on Plant Genetic Resources for Food and Agriculture

I Technical questions

1. What constitutes commercialisation in terms of Article 13.2.d (ii) of the Treaty?

Commercialisation triggering benefit sharing should be sale or licensing for sale of the propagating material of that new product, by the person or his successor in title or possession having received the material from the MS and having developed a new product incorporating part of the received material. It should be limited to those two acts.

The deposit of an application in order to obtain intellectual property protection cannot be considered as commercialisation, as it does not involve any commercial act and does not generate any commercial benefits.

2. What means incorporation of material accessed under the MS?

Incorporation of material means any transfer of genetic parts or components of the material accessed under the MS pursuant to the terms of the MTA, be it through crosses or genetic engineering into a new product.

Different processes for incorporation may be taken into account when determining benefit sharing, such as:

- Crossing the material received with other genetic resources
- Transfer of one or several traits isolated from the material received to other genetic resources.

3. When would a product be considered to be available without restriction to others for further research and breeding?

A product would be considered to be available without restriction to others for further research and breeding when any third party, having had access to the product lawfully, may use that product to develop new products without restriction. It is not considered a restriction on research and breeding if the variety may be used as an initial source of variation for the purpose of creating other varieties (e.g. pursuant to the breeder's exception under UPOV). Freedom to operate at research level does not preclude possible infringements (e.g. essential derivation in the sense of UPOV, scope of the claims of a patent) at a level of commercialisation.

It must be noted that whether a product is available without restriction to others for further research and breeding must be analysed on a case-by-case basis. A reasonable handling fee should not be considered as a restriction.

II Financial and policy questions

1. What should be the level, form and manner of payments in line with commercial practice?

When possible, and unless otherwise agreed by the provider and the recipient, the level of benefit sharing should be defined a priori.

Any monetary benefit sharing should be based upon the relative contribution of the material accessed under the multilateral system to the commercial value of the product and according to common commercial practice[1].

An upfront payment at the time of signing the MTA is not recommended, as it would be difficult to account for the probability of developing a successful commercial product.

The form and manner of payment should be based on common commercial practice, e.g. the annual declaration by the recipient of the material of its annual turnover regarding the new product or the license at stake with the possible audit on prior written notice of his/her account books by a third independent and neutral party, under a confidentiality agreement. The duration of payment should not exceed the term of protection.

2. Whether different levels of payment should be established for various categories of recipients who commercialise such products or for different sectors and, if so, what these levels, various categories of recipients and sectors should be?

Different levels of payment should not be established as a principle as, in fact, all the recipients will have to pay a percentage of their turnover agreed on a case-by-case basis related to the new product and the selling price of that new product will be adapted to the various markets, taking into account the possible differences.

The establishment of different levels of payments as a principle would:

- Lead to high administrative burden
- Allow for a payback/subsidy scheme at national level
- Create anti-competitive conditions
- Be fraud sensitive

3. Whether to exempt small farmers in developing countries and in countries with economies in transition from the payments, and if so, who qualifies as such a small farmer?

This question is not relevant as, in fact, it is not the farmers that will have to pay to the global fund but the seller of the product to the farmers. The question duplicates the previous one, only with an emphasis on small farmers as a specific category of “different sectors”.

Exempting small farmers would imply that either the seller of the product should receive subsidies from the global fund (or government) in order to be able to sell the seed at a lower price to that category of customers or that the small farmers would receive the subsidy directly if they were paying the full market price for the seed. In any case, the system would be extremely complex, cumbersome, costly to implement and also fraud-sensitive.

If the principle of exempting small farmers from the payments were to be retained by the Governing Body of the Treaty despite the obvious difficulties expressed above, the definition of small farmers should be made on a country-by-country basis; a small farmer in Bolivia is not the same as a small farmer in say, India or Poland.

4. How will monetary and other benefits be defined, for the purpose of the standard MTA?

It seems that this question is already addressed in question II.1. and the parameters listed there should include the definition of benefits for the purpose of a standard MTA.

III Implementation questions

1. By what means will the MTA ensure the application of Article 12.3?

The MTA will ensure the application of Article 12.3 through the literal incorporation of the Article 12.3(a), (d), (f) and (g)[2] in it.

2. What terms should be included in the MTA, so that recipients are bound by it on acceptance of the material from the MS?

A copy of the MTA signed by an authorized representative of the recipient should be returned to the providing centre prior to the receipt of the material or the MTA should otherwise be accepted as binding in a manner recognized by relevant governing law. That is enough to have the recipient bound by the MTA, according to contractual law. One must be aware that contractual laws are national and the MTA may have to be adapted on a country-by-country basis to avoid clauses that could be unlawful in a given country. In any case, the following sentence should be inserted in all MTAs: “Severability: if any term, condition or provision of this MTA or application thereof is judicially or otherwise determined to be invalid, unenforceable or contrary to law, the remaining terms, conditions and/or provisions of the MTA will remain in full force and effect”.

[1] The non-exhaustive parameters usually taken into account in common commercial practice are:

- The cost of R&D to develop the new product using the material accessed under the MS and the degree/level of intellectual property covering the other components/research processes involved in the development of the new product
- The competitive environment
- The historic cost of equivalent similar material/technology
- Country specific regulations capping royalty payment

[2] Within article 12.3, para (d) is subject to different interpretations. See ISF interpretation of Article 12.3(d)