Chapter 19

An Innovative Option for Benefit-sharing Payment under the International Treaty on Plant Genetic Resources for Food and Agriculture

Implementing Article 6.11 Crop-related Modality of the Standard Material Transfer Agreement

Carlos M. Correa

Introduction

This chapter discusses the crop-related payment established by Article 6.11 of the Standard Material Transfer Agreement (SMTA), as adopted by the Governing Body of the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA or the Treaty). It argues that this option, based on a proposal by the African group, might be attractive for recipients and important to generate funding for benefit sharing under the Treaty. The ITPGRFA has been developed ‘in harmony with the Convention on Biological Diversity’ (CBD)\(^1\) (see Annex 1 of this volume for the list of all Commission and Treaty negotiating meetings). Accordingly, the Treaty recognizes ‘the sovereign rights of States over their own plant genetic resources for food and agriculture’, and that the ‘authority to determine access to those resources rests with national governments and is subject to national legislation’.\(^2\) The ITPGRFA sets out as one of its principal objectives to ensure ‘the fair and equitable sharing of the benefits’ arising out of the use of plant genetic resources for food and agriculture\(^3\) (see Annex 3 of this book for details on the main provisions of the Treaty).
Despite aiming at the same objective of the CBD as regards benefit sharing, the system established for this purpose under the Treaty is significantly different from the CBD’s mechanism. While the latter is essentially conceived as resulting from a bilateral relationship between the country providing genetic resources and the recipient thereof, benefit sharing under the ITPGRFA is of a multilateral nature.

In addition to the facilitated access to plant genetic resources for food and agriculture (PGRFA) which are included in the ‘multilateral system’, four contracting parties to the ITPGRFA (see Annex 2 of this volume for the list of contracting parties to the Treaty) may benefit from ‘the exchange of information, access to and transfer of technology, capacity-building, and the sharing of the benefits arising from commercialization’. Importantly, these benefits are not intended to accrue to individual countries, but to be distributed ‘fairly and equitably’ among contracting parties ‘taking into account the priority activity areas in the rolling Global Plan of Action’.

Obviously, the capacity to fulfill the benefit sharing objectives of the ITPGRFA will depend on the funding available for this purpose. The benefit-sharing fund established in pursuance to the ITPGRFA has already funded more than a half-million US dollars in awards aimed at supporting 11 developing countries for the protection of existing collections of seeds and other genetic resources. Funding has relied so far on voluntary contributions from Norway, Italy, Spain and Switzerland, which have contributed seed money for the benefit-sharing scheme.

The benefit-sharing fund should also receive, under certain circumstances, contributions from the recipients of materials in the multilateral system. One of the components of the benefits to be shared under the Treaty is to be derived, in effect, from the obligation imposed by Article 13.2 (d)(ii) of the Treaty: a recipient who commercializes a product that is a PGRFA and that incorporates material accessed from the multilateral system, must pay to the international fund set up by the Treaty, ‘an equitable share of the benefits arising from the commercialization of that product, except whenever such a product is available without restriction to others for further research and breeding, in which case the recipient who commercializes shall be encouraged to make such payment’.

Product-related payment under the SMTA

Consistently with the principle of facilitated access that underpins the multilateral system created by the Treaty, Article 13.2 (d)(ii) of the Treaty only requires a payment to be made when the PGRFA that incorporates a material obtained from that system is commercialized and subject to ‘restriction’. In accordance with the SMTA approved by the Governing Body, the recipient shall pay a fixed percentage of the sales of the commercialized product, which has been set at 0.77 per cent (1.1 per cent less 30 per cent) of the sales value.

The Treaty does not define the type of restriction that would trigger payment; as defined by the SMTA (see below), such a restriction might be of legal, technological or contractual nature. Despite the broad range of possible measures that
may restrict access for further research and breeding, the likelihood of immediate and substantial payments under the referred Article 13.2 (d)(ii) is low. During the negotiations of the Treaty, there were significant expectations about the funding that the implementation of this obligation could generate; however, its actual potential is probably rather limited.

There are two main reasons for this hypothesis:

1. Developing a new variety by conventional breeding methods may take several years and, hence, payments by potential recipients may not be received soon. The payment obligation is triggered when a product is ‘commercialized’. This means that the product must be actually introduced into commerce. The logical linkage to commercialization rather than access delays the possible generation of income for benefit sharing. In accordance with the Secretariat of the Treaty, ‘plant breeding is a slow process and it can take ten years or more for a patented product to emerge from the time the genetic transfer took place which is why the aforementioned governments have backed the scheme’.  
2. Legal restrictions are likely to arise only in those few countries where plant varieties are patentable per se. Most countries have implemented the exception specifically allowed by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994) and do not allow such patents. As a result, the payment obligation may arise in a relatively small number of countries.

The ‘African proposal’

During the negotiations regarding the text of SMTA, the African group proposed an alternative to the obligation to pay a royalty on each product that incorporates material received from the multilateral system, as described above. The proposal, with some amendments, was finally incorporated in Article 6.11 of the SMTA.

The main reason underpinning this proposal was the African group’s concern about the long period that would normally be necessary to develop new varieties which would eventually incorporate materials from the multilateral system and the limited circumstances in which the obligation to pay might arise. The proposal emerged from discussions between the African group members and Mr José Esquinas-Alcázar, Secretary of the Commission on Genetic Resources for Food and Agriculture. It essentially aimed at providing a simple method of payment that could reduce transaction costs for recipients in obtaining materials from the multilateral system. At the same time, it would accelerate and increase the generation of income to support the various types of benefit-sharing activities contemplated in the Treaty.

The proposal suggested another option to the product-related payment obligation. Choosing this alternative was left to the discretion of the recipient because the proposed royalty (as finally established by the SMTA) would be applicable
not only to the sales of the product that incorporated the material received from the multilateral system, but to any products that are PGRFA belonging to the same crop to which the material received from the multilateral system belongs. This means that, by selecting this option, the recipient would pay a royalty on all products of a certain crop regardless of whether they incorporate the material received from the multilateral system or whether the further use of the material by third parties for research and breeding is limited. A clear advantage of this option from the perspective of contracting parties is that the payment obligation would be triggered as soon as the recipient sells any product of the respective crop.

An important feature of this option is that, once the choice is made, it becomes the mandatory form of payment applicable to the recipient. This means the recipient is free to choose but, after selecting his preferred option, he is bound by the respective terms and conditions of the SMTA.

The African proposal was received with some scepticism by some of the negotiating parties. Doubts were raised about the compatibility with the IPGRFA given that payment is not linked to the effective commercialization of a product incorporating material received from the multilateral system. It might even happen that such a product was never developed; despite this, the recipient would be obliged to pay the established royalty. Strictly speaking, there would be no ‘benefit sharing’ since no such benefit would have been created at that stage. This observation, however, can be dismissed on the argument that the Treaty provides for mandatory and voluntary payments. The African proposal introduced a hybrid solution: it is voluntary to opt for it but, as noted, payment becomes mandatory when the recipient has exercised his right to choose.

It was also argued that the Treaty required the establishment of a single level of payment. The commented proposal introduced, in fact, a different (discounted) royalty rate. But Article 13.2(d)(ii) of the Treaty provides that ‘(t)he Governing Body may decide to establish different levels of payment for various categories of recipients who commercialize such products …’. Recipients that accept to pay a royalty over all the products belonging to a crop may be considered a different ‘category’ of recipients.

The duration of the obligation to pay was also questioned. The mandatory product-related payment under the SMTA has no definite term. It will be enforceable as long as the conditions that trigger the payment obligation continue to exist. Since the African proposal delinked payments from the presence of the received material in the products sold, the determination of a term was necessary and introduced in the adopted SMTA.

Finally, doubts were raised about the potential interest of seed companies and other recipients to subscribe to an option that might create a financial burden higher than that emerging from the mandatory payment. However, the African proposal, received support from the representative of the seed industry (for details on the seed industry, see Chapter 12). In fact, it may be particularly suitable to companies that are unwilling or unable to track the presence of a received material in its breeding lines and could eventually become the preferred option for some companies in the seed industry.
Crop-related payment under the SMTA

The African proposal, as implemented in the SMTA, allows for a simplification of the procedures to receive materials in the multilateral system. While subscribing to an SMTA, the recipient must notify the Governing Body that he has opted for this modality of payment. The recipient is relieved from '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'. This means that once a recipient has opted for this alternative to receive a particular material or set of materials, he may receive other materials belonging to the same crop by signing the respective SMTA. The recipient will be waived from complying with the product-related payment obligation under these new SMTAs, but he will be subject to the other obligations established by the agreements, including not to seek intellectual property protection over the received materials.

In implementing the proposal, the SMTA took into account the referred concern raised during the negotiations about the period of validity of the option. In accordance with the SMTA, the payment clause will be valid for ten years and would be renewed for additional periods of five years unless the recipient notifies his intention to opt out. If the application of the clause were terminated, the recipient would be bound to make payments only on the products that incorporate material received during the period in which the clause was in force, and only in cases where such products are not available without restriction. These payments would be calculated at the same rate as that applicable during the period in which the clause was in force.

In order to make the crop-related payment attractive to potential recipients, as mentioned, a discounted royalty rate was set out by the SMTA. It was set at 0.5 per cent of the sales of any products that incorporate the received material and of the sales of any other products that are PGRFA belonging to the same crop to which the material received under the SMTA belonged.

Given that the product-related payment under the SMTA is, as noted, 0.77 per cent, the discounted rate means a saving of 0.22 per cent, but the crop-based rate applies to all products of the recipient for the relevant crop. This modality of payment, hence, would generate considerably more income from individual recipients than the product-related modality. It is even possible to speculate that a greater discount could attract more recipients and increase the funds available for benefit sharing under the Treaty. The Governing Body might consider reviewing the royalty rate applicable to this option in the future, in order to expand the difference with the ordinary rate.

Complying with the payment obligation: A comparative analysis of the two options

Compliance with the product-related payment obligation requires the recipient to submit to the Governing Body an annual report setting forth the sales of the product that incorporates the material received from the multilateral system,
including the amount of the payment due, and information that would allow for the identification of any restrictions that have given rise to the benefit-sharing payment.\textsuperscript{19}

Since the product-related payment under the SMTA would be mandatory only when a restriction is imposed by the recipient for further research and breeding by third parties, the recipient would have to assess whether a ‘restriction’ encumbers a product that incorporates the received material in a way that limits research and breeding by others.

The SMTA defines in Article 2 ‘available without restriction’ as follows: ‘A Product is considered to be available without restriction to others for further research and breeding when it is available for research and breeding without any legal or contractual obligations, or technological restrictions, that would preclude using it in the manner specified in the Treaty’. This definition suggests that a ‘restriction’ would exist when the owner of the product is able ‘to exclude, prevent, make impracticable’\textsuperscript{20} access for research and breeding. This interpretation raises, among others, the question whether the establishment of certain conditions (for instance, payment of a predetermined royalty) to get access to a product would be sufficient or not to consider that a ‘restriction’ exists. The recipient may have reasonable doubts in these cases about the need or not to effect the payment provided for, and should eventually seek clarification from the Governing Body or any subsidiary body dealing at that time with this issue through the Secretariat.\textsuperscript{21}

In addition, the implementation of the product-related payment obligation imposes on the recipient the burden of tracking the use of the material received from the multilateral system, keeping separate records of the products that incorporate such material, calculating and paying the established royalty on each of the products in this situation. Further, the recipient would be responsible not only for payment of the royalties calculated on the sales of his own products, but also on the sales made by its affiliates, contractors, licensees and lessees. This might create a significant additional burden on the recipient.\textsuperscript{22}

Opting for the crop-related payment obligation would not mean that the recipient would be relieved from signing new SMTAs to obtain other materials from the multilateral system, even if they belonged to the same crop as the material obtained under the first SMTA. Likewise, if he had previously signed other SMTAs, he must comply with them, except with regard to the product-related payment obligation. The integrity of the system, hence, is not affected in any way by the implementation of the crop-related payment option.

The crop-related payment option presents some advantages for the operation of the multilateral system set out by the Treaty. They include the possibility of generating income faster than under the product-based modality, as well as of reducing the monitoring costs. In effect, there would neither be a need to verify whether a material received from the multilateral system has been incorporated by a recipient into a commercialized product, nor to establish whether further access for research and breeding is restricted. This would reduce the burden of the third party beneficiary and, possibly, avoid litigation. In addition, as noted, the
income generated by individual recipients may be much greater than under the product-based payment modality, since the 0.5 rate would be applicable to all the recipient’s sales of products belonging to the same crop.

On the other hand, the modality of crop-related payment may have a number of distinct advantages for recipients as compared to the product-based payment, namely:

- No need to track the incorporation of the material received from the multilateral system.
- No obligation to provide the Governing Body with information about restrictions for further use.
- Straight and simple annual calculation of the royalty payments to be made.
- Disputes about compliance with the SMTA are less likely to arise.
- Opting for the crop-related modality may be positive in terms of public relations for the image of seed companies (as supporters of the implementation of the Treaty).

In sum, this option may be far less bureaucratic and much easier to administer and enforce by recipients than the product-related alternative. There are, in fact, indications that some seed industry circles are interested in investigating more deeply the potential advantages of the crop-related modality as the preferred alternative.

Conclusion

The crop-related modality of royalty payment represented an innovative way of looking at the implementation of the obligation established by Article 13.2 (d) (ii) of the Treaty. Through this hybrid (mandatory/voluntary) option, transaction costs may be reduced for both the Governing Body (and FAO as third beneficiary) and the recipients that choose to apply it. The benefit-sharing fund created in pursuance of the Treaty might receive royalty payments earlier than under the product-based modality, given that there will be no need to wait until a product incorporating material from the multilateral system is developed and commercialized. Moreover, since payment is to be made independently of the existence of any restriction for the further use of the improved material, if that option were chosen by a large number of recipients and/or by companies with significant seed sales, it might possibly generate more funds than its contractual alternative. Although the proposal by the African group was essentially aimed at speeding up and improving funding for benefit sharing, the optional mode of payment incorporated into the SMTA may, due to its lower cost and greater simplicity, serve well the immediate and long term interests of a wide range of recipients.
Notes

1 Article 1.1 of the ITPGRFA.
2 Article 10.1 of the ITPGRFA.
3 Article 1.1 of the ITPGRFA.
4 Article 13.1 of the ITPGRFA.
5 Article 13.2 of the ITPGRFA.
6 Article 13.1 of the ITPGRFA.
7 Article 13.2 of the ITPGRFA.
9 Norway introduced a small tax on the sale of seeds on its domestic market to fund its donation. See www.itpgrfa.net/International/content/delegates-120-nations-tunis-share-benefits-treaty-food-plant-genes (accessed 2 September 2010).
10 Article 13.2 (d)(ii) of the ITPGRFA.
11 Annex 2, Article 1 of the SMTA.
12 See www.itpgrfa.net/International/content/delegates-120-nations-tunis-share-benefits-treaty-food-plant-genes (accessed 2 September 2010).
13 See Article 27.3(b), which permits WTO members to protect plant varieties under a sui generis regime, patents or a combination of both.
14 The USA is one of the few countries where patents may be granted over plant varieties. Although the USA has signed the ITPGRFA, it has not ratified it yet.
15 SMTA, Article 6.11(h).
16 SMTA, Article 6.11(f).
17 SMTA, Article 6.11(h). In accordance with Annex 3, Article 4 ‘[A]t least six months before the expiry of a period of ten years counted from the date of signature of this Agreement and, thereafter, six months before the expiry of subsequent periods of five years, the Recipient may notify the Governing Body of his decision to opt out from the application of this Article as of the end of any of those periods. In the case the Recipient has entered into other Standard Material Transfer Agreements, the ten years period will commence on the date of signature’.
18 SMTA, Article 6.11(h).
19 SMTA, Appendix 2, Article 3.
21 SMTA, Article 8.3.
22 SMTA, Annex 2, Article 3(a).