Interpretation of Article 12.3(d) of the International Treaty on Plant Genetic Resources for Food and Agriculture

Article 12.3.d of the recently adopted treaty on Plant genetic resources for food and agriculture states, "Recipients [of PGRFA accessed from the Multilateral System] shall not claim any intellectual property or other rights that limit the facilitated access to the PGRFA, or their genetic parts or components, in the form received from the Multilateral System (MS)".

The first draft of that article was "Recipients [of PGRFA accessed from the Multilateral System] shall not claim any intellectual property or other rights that limit the facilitated access to the PGRFA received from the MS".

Then a group of countries, not in favour of patenting gene sequences proposed to add the words "or their genetic parts or components", causing long and lively discussions.

In order to balance the new additional wording another group of countries, considering that it should be possible to protect gene sequences isolated from the plant material received, provided that they comply with patentability requirements, proposed a new addition: "in the form received" leading to the final adopted wording.

During the final meeting in Rome, in October/November 2001, the President of the Commission on GRFA clearly indicated that as the second addition balanced the first there was no reason to continue to discuss the article.

For these reasons ISF interprets the article 12.3.d as follows:

- It is not possible to claim any intellectual property or other rights that limit the facilitated access to the PGRFA, or their genetic parts or components, in their form received from the Multilateral System.
- It is possible to claim intellectual property or other rights that limit access to the genetic parts or components isolated or inherited from the material received, provided of course that the patentability criteria are fulfilled and in particular the utility one in case of patent. A genetic sequence as such, without proved industrial activity, should not be patentable. However, the rights granted should in no case limit access to the initial genetic material.

In addition, any other interpretation would be inconsistent within art. 13 that states, “A recipient who commercializes a product that is a PGRFA and that incorporates material accessed from the Multilateral System, should pay [……] 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”. This clearly means that a person who has incorporated material accessed from the Multilateral System into a product that is a new PGRFA may claim property rights or other rights that limit access to that new PGRFA.