

Agreements & understandings

M Elangovan & P Kiran Babu¹*

**Senior Scientist & 1-Research Associate, Directorate of Sorghum Research (DSR), Hyderabad 500030 (AP), India*

1. Material Transfer Agreement (MTA)

A Material transfer agreement (MTA) is a contract that governs the transfer of tangible research materials between two organizations, when the recipient intends to use it for his or her own research purposes. The MTA defines the rights of the provider and the recipient with respect to the materials and any derivatives. Biological materials, such as reagents, cell lines, plasmids, and vectors, are the most frequently transferred materials, but MTAs may also be used for other types of materials, such as chemical compounds and even some types of software.

Three types of MTAs are most common at academic institutions: transfer between academic or research institutions, transfer from academia to industry, and transfer from industry to academia. Each agreement has different terms and conditions.

2. Standard Material Transfer Agreement (SMTA)

The International Treaty on Plant Genetic Resources for Food and Agriculture (hereinafter referred to as “the Treaty”) was adopted by the Thirty-first session of the FAO Conference on 3 November 2001 and entered into force on 29 June 2004;

The objectives of the Treaty are the conservation and sustainable use of Plant Genetic Resources for Food and Agriculture and the fair and equitable sharing of the benefits arising out of their use, in harmony with the Convention on Biological Diversity, for sustainable agriculture and food security;

The Contracting Parties to the Treaty, in the exercise of their sovereign rights over their Plant Genetic Resources for Food and Agriculture, have established a Multilateral System both to facilitate access to Plant Genetic Resources for Food and Agriculture and to share, in a fair and equitable way, the benefits arising from the utilization of these resources, on a complementary and mutually reinforcing basis;

Articles 4, 11, 12.4 and 12.5 of the Treaty are borne in mind; The diversity of the legal systems of the Contracting Parties with respect to their national procedural rules governing access to courts and to arbitration, and the obligations arising from international

and regional conventions applicable to these procedural rules, are recognized;

Article 12.4 of the Treaty provides that facilitated access under the Multilateral System shall be provided pursuant to a Standard Material Transfer Agreement, and the Governing Body of the Treaty, in its Resolution 1/2006 of 16 June 2006, adopted the Standard Material Transfer Agreement.

3. Memorandum of Agreement (MoA)

A memorandum of agreement (MOA) or cooperative agreement is a document written between parties to cooperate on an agreed upon project or meet an agreed objective. The purpose of an MOA is to have a written understanding of the agreement between parties.

An MoA is a good tool to use for many heritage projects. It can be used between agencies, the public and the federal or state governments, communities, and individuals. An MoA lays out the ground rules of a positive cooperative effort. It is an agreement b/w two parties which bound to each other upto a certain projects, because it has certain constraints to both the parties.

3.1: Dispute resolution: An MoA can be a document written as a result of dispute resolution. An MoA written in this context will clearly identify the dispute, the means of resolving the dispute and an agreement for cooperatively working as partners, or working as separate entities but with certain agreed and often legal recourse

3.2 Partnership agreement: A MoA can also be used as a document outlining the cooperative terms of two entities to work in partnership on certain listed projects, or as a general partnership. The agreed responsibilities of the partners will be listed and the benefits of each party will be listed. As a part of the agreement there is usually a list of binding terms that makes the partnership a cohesive unit and often there is an obligation of funds attached to certain terms in the agreement. A tenancy MoA is an agreement between the parties and they may require consent to let from the current freeholders.--

4. Memorandum of Understanding (MoU)

A Memorandum of Understanding or MoU is a written agreement put in place to establish a clear understanding of how an arrangement will practically function and each party's role and responsibilities.

The MoU allows all involved to concretely see that they are agreeing to the same thing and to be a tangible reference to review should, heaven forbid, any troubles arise during the arrangement.

A memorandum of understanding (MoU) is a document describing bilateral or multilateral agreement between two or more parties. It expresses a convergence of will between the parties, indicating an intended common line of action. It is often used in cases where parties either do not imply a legal commitment or in situations where the parties cannot create a legally enforceable agreement. It is a more formal alternative to a gentlemen's agreement. Whether or not a document constitutes a binding contract depends only on the presence or absence of well-defined legal elements in the text proper of the document (the so-called "four corners"). The required elements are: offer, consideration, intention (consensus ad idem), and acceptance. The specifics can differ slightly depending on whether the contract is for goods (falls under the Uniform Commercial Code [UCC]) or services (falls under the common law of the state).

4.1: List of Aspects to include in a MoU

1. The date of the Memorandum of Understanding.
2. Describing the situation of the parties involved and how they relate to each other.
3. What services each party contributes to the deal before, during and after the arrangement.

4.2: Communication details

1. The names and contact information of each party.
2. Any probationary or trial period.
3. Any set dates to review activity, performance, or satisfaction with the arrangement.
4. What parts of this arrangement are open to change or negotiation and how.
5. What aspects of the arrangement should require formal notification and how.
6. How disputes will be settled.

4.3: Compensation details

1. Who handles the money and how.
2. How people are paid (who pays who, by what method, in what currency, deposited where).
3. When people are paid (the same day every month, immediately after the transaction).

4. How much people are paid (flat fee, a percentage of the sale, if so, does this include tax, a percentage of the profit and if so, what are the applicable costs and how much are they, on all customers, on certain customers and if so, how is sales are tracked and reported).
5. How long people are paid (for the initial sale of a customer, for the lifetime of the customer's business, for the duration of the contract, for 6 months after the contract ends).

4.4: Term of agreement

1. When the agreement starts (on a certain date, during a limited event, as soon as a sale occurs).
2. How long it lasts (for a certain period, indefinite until someone ends, at the end of an event).
3. How the agreement is terminated (by one or both parties, under what circumstances, how is the end carried out.)
4. What happens at the end of or after the agreement.

4.5: Miscellaneous

1. Any restrictions to either party
2. Any disclaimer statements
3. Any privacy statements (such as revealing the sales amount, but not information about the customers)
4. A place for all parties to sign the agreement.

4.6: Some of the questions you are asked include

1. Who is the first party?
2. Who is the second party?
3. What is the general situation of your arrangement?
4. What is the product/service/value the first party will provide?
5. What is the compensation/commission/value the first party will provide to the second party?
6. What will the second party provide for the compensation/commission/value?
7. What services will the first party provide prior to the onset of the arrangement?
8. What services will the first party provide during operation of the arrangement?
9. What services will the first party provide after conclusion of the arrangement?
10. What services will party two provide prior to the onset of the arrangement?
11. What services will the second party provide during the operation of the arrangement?

12. What services will the second party provide after conclusion of the arrangement?
13. When will the arrangement between the parties commence?

5. Non-disclosure Agreement (NDA)

A Non-Disclosure Agreement (NDA), also known as a Confidentiality Agreement (CA), Confidential Disclosure Agreement (CDA), Proprietary Information Agreement (PIA), or Secrecy Agreement, is a legal contract between at least two parties that outlines confidential material, knowledge, or information that the parties wish to share with one another for certain purposes, but wish to restrict access to or by third parties. It's a contract through which the parties agree not to disclose information covered by the agreement. An NDA creates a confidential relationship between the parties to protect any type of confidential and proprietary information or trade secrets. As such, an NDA protects nonpublic business information.

NDA's are commonly signed when two companies, individuals, or other entities (such as partnerships, societies, etc.) are considering doing business and need to understand the processes used in each other's business for the purpose of evaluating the potential business relationship. NDAs can be "mutual", meaning both parties are restricted in their use of the materials provided, or they can restrict the use of material by a single party.

It is also possible for an employee to sign an NDA or NDA-like agreement with an employer. In fact, some employment agreements will include a clause restricting employees' use and dissemination of company-owned "confidential information."

Many NDAs are unilateral or one-way agreements, where one party wants to disclose certain information to another party but needs the information to remain secret for some reason, perhaps due to secrecy requirements required to satisfy patent laws or to make sure that the other party does not take and use the disclosed information without compensating the discloser.

Another type of nondisclosure agreement is one that is a mutual agreement, where both parties will be supplying information that is intended to remain secret. This type of agreement is common when businesses are considering some kind of joint venture or merger.

Some practitioners insist on a mutual NDA in all cases, to encourage the drafter to make the provisions "fair and balanced" in case the drafter's receiving-party client later

ends up as a disclosing party, or vice versa (not an uncommon occurrence).

A nondisclosure agreement can protect any type of information that is not generally known. However, nondisclosure agreements may also contain clauses that will protect the person receiving the information so that if they lawfully obtained the information through other sources they would not be obligated to keep the information secret. In other words, the nondisclosure agreement typically only requires the receiving party to maintain information in confidence when that information has been directly supplied by the disclosing party. Ironically, however, it is sometimes easier to get a receiving party to sign a simple agreement that is shorter, less complex and does not contain safety provisions protecting the receiver.

5.1: Common issues addressed in an NDA

- Outlining the parties to the agreement;
- The definition of what is confidential, i.e. the information to be held confidential. Modern NDAs will typically include a laundry list of types of items which are covered, including unpublished patent applications, know-how, schema, financial information, verbal representations, customer lists, vendor lists, business practices/strategies, etc.;
- The disclosure period - information not disclosed during the disclosure period (e.g., one year after the date of the NDA) is not deemed confidential;
- The exclusions from what must be kept confidential. Typically, the restrictions on the disclosure or use of the confidential data will be invalid if
 - The recipient had prior knowledge of the materials;
 - The recipient gained subsequent knowledge of the materials from another source;
 - The materials are generally available to the public; or
 - The materials are subject to a subpoena - although many practitioners regard that fact as a category of permissible disclosure, not as a categorical exclusion from confidentiality (because court-ordered secrecy provisions may apply even in case of a subpoena). In any case, a subpoena would more likely than not override a contract of any sort;
- Provisions restricting the transfer of data in violation of national security;
- The term (in years) of the confidentiality, i.e. the time period of confidentiality;
- The term (in years) the agreement is binding;
- Permission to obtain ex-parte injunctive relief;

- The obligations of the recipient regarding the confidential information, typically including some version of obligations:
- To use the information only for enumerated purposes;
- To disclose it only to persons with a need to know the information for those purposes;
- To use appropriate efforts (not less than reasonable efforts) to keep the information secure. Reasonable efforts is often defined as a standard of care relating to confidential information that is no less rigorous than that which the recipient uses to keep its own similar information secure; and
- To ensure that anyone to whom the information is disclosed further abides by obligations restricting use, restricting disclosure, and ensuring security at least as protective as the agreement; and
- Types of permissible disclosure - such as those required by law or court order (many NDAs require the receiving party to give the disclosing party prompt notice of any efforts to obtain such disclosure, and possibly to cooperate with any attempt by the disclosing party to seek judicial protection for the relevant confidential information).
- The law and jurisdiction governing the parties. The parties may choose exclusive jurisdiction of a court of a country.

6. Confidentiality Agreements

Confidentiality agreements, sometimes called secrecy or nondisclosure agreements, are contracts entered into by two or more parties in which some or all of the parties agree that certain types of information that pass from one party to the other or that are created by one of the parties will remain confidential. Such agreements are often used when a company or individual has a secret process or a new product that it wants another company to evaluate as a precursor to a comprehensive licensing agreement. Or, perhaps one party wants to evaluate another's existing commercial product for a new and different application.

Confidentiality agreements perform several functions. CA protects sensitive technical or commercial information from disclosure to others. One or more participants in the agreement may promise to not disclose technical information received from the other party. If the information is revealed to another individual or company, the injured party has cause to claim a breach of contract and can seek injunctive and monetary damages.

The use of confidentiality agreements can prevent the forfeiture of valuable patent rights. Under U.S. law and in other countries as well, the public disclosure of an invention can be deemed as a forfeiture of patent rights in

that invention. A properly drafted confidentiality agreement can avoid the undesired—and often unintentional—forfeiture of valuable patent rights.

Confidentiality agreements define exactly what information can and cannot be disclosed. This is usually accomplished by specifically classifying the non-disclosable information as confidential or proprietary. The definition of this term is, of course, subject to negotiation. As one would imagine, the company or individual disclosing the confidential information (the "discloser") would like the definition to be as all-inclusive as possible; on the other hand, the company receiving the confidential information (the "recipient") would like to see as narrowly focused a definition as possible.

The type of information that can be included under the umbrella of confidential information is virtually unlimited. Any information that flows between the parties can be considered confidential—data, know-how, prototypes, engineering drawings, computer software, test results, tools, systems, and specifications. This list is certainly not exhaustive but does illustrate the breadth of items that can be deemed confidential.

Most confidentiality agreements exclude certain types of information from the definition of confidential information. It is very important that the recipient include these exceptions in the confidentiality agreement. Some commonly employed exceptions are information that the recipient can demonstrate that they had prior to receipt of information from the discloser, information that becomes known to the public through no fault of the recipient, information that becomes known to the recipient from a third party that has a lawful right to disclose the information, information that was public knowledge before the disclosure of the information to the recipient, and information independently created by the recipient.

The confidentiality agreement can also limit each party's use of the confidential information. For example, the confidentiality agreement can specify that the confidential information is to be used only to evaluate the discloser's product and cannot be used in the recipient's business.

An important point that must be covered in any confidentiality agreement is the standard by which the parties will handle the confidential information. Usually, each party will treat the other's confidential information in the same way that it treats its own. However, this treatment is acceptable only if the recipient has set standards for handling confidential information, such as

limiting access to the information or other methods of preserving secrecy. Therefore, before signing a confidentiality agreement, it would be prudent to investigate the recipient's practices regarding maintaining secrecy of its own information. If those practices are substandard or even nonexistent, the confidentiality agreement should contain specific provisions concerning limiting access to the confidential information (e.g., clearly marking the information "confidential").

The agreement must establish a time period during which disclosures will be made and the period during which confidentiality of the information is to be maintained. Some poorly drafted confidentiality agreements will only specify one of these time periods. Furthermore, even if both time periods are specified, it is important to make sure that a starting point is established for the time period during which confidentiality of the information is to be maintained. If this starting point is not set forth, problems can occur down the road. For example, imagine a confidentiality agreement that specifies that disclosures will be made over a two-year period and that the information must be kept confidential for three years. No starting point is specified for the confidentiality term. If a company receives the confidential information on the day before the disclosure term ends, does the company have to keep the information confidential for three years from that date or for one year from that date? Obviously, it is to the recipient's advantage to make the confidentiality time period start with the beginning of the disclosure time period, whereas it is to the discloser's advantage to make the confidentiality period start with the date of disclosure of the confidential information. The point is that the confidentiality agreement should specifically state the starting date for the confidentiality time period in order to avoid any ambiguity.

Additionally, confidentiality agreements should contain a provision stating that no implied license to the technology or information is to be granted to the recipient and that all tangible embodiments of the information (e.g., models, data, and drawings) should be returned upon request and in no event later than the end of the agreement term, and that no copies shall be retained by the recipient.

In conclusion, there are several situations where a confidentiality agreement is appropriate and may be proposed. Knowing a few basic points concerning confidentiality agreements can ensure that the important purposes they serve will not be defeated by ambiguities or ignorance of the meaning of terms used in the agreement.

References

- Radack, David V. "Understanding Confidentiality Agreements". "Second, the use of confidentiality agreements can prevent the forfeiture of valuable patent rights"
- "Intellectual Property: Using Confidentiality Agreements". Yahoo! Small Business.
- Hanson, by Mark J.; Thompson, Joe R.; Dahlgren, Joel J. "Overview of Confidentiality Agreements".
- Chapman, Lisa (September, 2010). "The Impact of the Mark Hurd Saga on California's Ban on Covenants Not to Compete".
- Gromov, Gregory (October, 2010). "NDA Experiment Set up by Mark Hurd".
- United Nations Legal Department - <http://untreaty.un.org/English/Seminar/Liberia/registration.pl>
- "ABM Treaty: Memorandum of Understanding". Treaty Compliance. Office of the Under Secretary of Defense for Acquisition, Technology, and Logistics. Retrieved 2006-09-26.