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The International Treaty
ON PLANT GENETIC RESOURCES FOR FOOD AND AGRICULTURE



**INTERNATIONAL TREATY ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE**

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

Brasilia, Brazil, 2–5 June 2015

OPTIONS FOR INTRODUCING A TERMINATION CLAUSE

Note by the Secretary

This document elaborates on different options to introduce a termination clause into the SMTA, as requested by the Working Group at its second meeting.

It has been prepared by the Secretary in consultation with the Co-chairs and based on their specific advice, as well as upon consultation with the FAO Legal Office.

I. INTRODUCTION

1. At its second meeting, the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System (Working Group) “*requested the Co-chairs and the Secretary to elaborate on different options for introducing a ‘termination clause’, for discussion at its next meeting.*”¹ It agreed to further review the possible implications for the Multilateral System of introducing a termination clause into the Standard Material Transfer Agreement (SMTA), while taking into account a potential revision of Articles 6.7/6.8 and 6.11 of the SMTA and the relationship between the payment options contained therein. In developing the range of measures it will propose to the Governing Body, the Working Group decided to increase incentives for users, in particular the seed sector, to use the Multilateral System.² One of such incentives might be to introduce a termination clause into the SMTA.
2. As part of the Studies, which the Governing Body requested the Secretariat to prepare and which the Secretariat accordingly provided to the Working Group before its second meeting, the researchers held consultations with users of the Multilateral System, and applied other methodologies for assessing users’ willingness to access material from the Multilateral System. It resulted from this research that impossibility for users to terminate their obligations under the SMTA was perceived as one of the major problems with the current SMTA, in particular by the seed industry.³
3. Calls for introducing a termination clause by users of the Multilateral System, especially the seed industry, are not new. It has been argued that the impossibility to terminate the STMA and thus to cancel the respective obligations would lead to perpetual transaction costs for users and providers, for example in case they hold descendancy of material accessed from the Multilateral System. The fact that the SMTA does not contain a termination clause would also create a competitive disadvantage for those companies, which actually access material from the Multilateral System, and lead to legal uncertainty.⁴
4. The Explanatory Notes on the First Draft of the SMTA, prepared by the Secretariat in 2005, noted that the “*Expert Group on the Terms of the Standard Material Transfer Agreement suggested the inclusion of a time-frame for the Standard Material Transfer Agreement.*”⁵ The draft SMTA, which was finally submitted to the First Session of the Governing Body in 2006, still contained in brackets a clause, pursuant to which the agreement could be terminated by either party in case of a breach of any provisions of the SMTA by the other party, i.e. cases of non-performance (“*[Termination 9.3 Notwithstanding Article 9.2, either party to this Material Transfer Agreement may terminate this Material Transfer Agreement with immediate effect by giving notice to the other party if that other party breaches any provision of this Agreement.]*”).⁶
5. In the end, since no agreement could be reached on a termination clause, the SMTA was adopted by the Governing Body at its first session without explicitly providing a right to the Recipient or the Provider to terminate the agreement. Under the heading “*Duration of Agreement*” the current SMTA therefore stipulates, “*This Agreement shall remain in force so long as the Treaty remains in force*” (Art. 9.2 SMTA). No right is given to the parties to amend or cancel specific obligations, apart from the possibility for the Recipient to opt out of the payment scheme under Art. 6.11 of the SMTA, in which case, however, the Recipient is still bound to payment obligations under the SMTA (Art. 6.11g; Annex 3, paras. 3 and 4 SMTA).

¹ IT/OWG-EFMLS-2/14/Report, para. 6.

² IT/OWG-EFMLS-2/14/Report, para. 4.

³ For example IT/OWG-EFMLS-2/14/6, para. 18, IT/OWG-EFMLS/Background Study 4, paras. 32, 67, 81; IT/OWG-EFMLS/Background Study 1, Research Study 7, para. 42;

⁴ See for example Anke van den Hurk, ‘Plant Breeding and the International Treaty on Plant Genetic Resources for Food and Agriculture’ in Christine Frison, Francisco López, José EsquinasAlcázar (eds), *Plant Genetic Resources and Food Security* (Earthscan, London 2011), p. 169.

⁵ CGRFA/IC/CG-SMTA-1/05/2 Add.1, p. 10.

⁶ IT/GB-1/06/6, p. 10.

6. This document elaborates on options for introducing a “termination clause” into the SMTA. It will do so by first providing some short general legal background, before turning to the relevant provisions of the SMTA, including the obligations, which the Working Group might wish to make available for termination. It will then look into the possible elements of a termination clause and seek to understand what implications a termination clause could have for the Multilateral System.

7. In the *Appendixes* to this paper, illustrative examples for a termination clause are given. The textual elements have been developed in close coordination with the Co-chairs and upon consultation with the FAO Legal Office. Based on the advice provided by the Co-chairs, textual examples are presented for specific options, which are at the core of the discussions in the Working Group, but not for all the issues or all possible scenarios. The textual elements are illustrative examples only and it will be the sole responsibility of the Working Group to develop them further for consideration and decision by the Governing Body.

8. Termination clauses generally need careful drafting, so that it is not the intention of this paper to limit itself to merely list textual examples of possible termination clauses for the SMTA, but to also provide at least some brief background information on commercial legal practice and possible implications a termination clause might have for the SMTA and the Multilateral System. It is hoped that such additional information will facilitate an informed decision by the Working Group about a possible termination clause as part of the measures it will propose to the Governing Body.

II. BACKGROUND

9. Duration and termination clauses lay down the term, for which a contract shall last. Contracts are generally concluded for a fixed period of time, after which the contract expires and the mutual rights and obligations end automatically, or for an indefinite period of time, in which case the mutual rights and obligations only end after cancellation or termination by the parties. In both cases, the parties usually also have the right to terminate the contract in case of certain acts or omissions of the other party. Under specific circumstances, this might even lead to a rescission of the contract, rendering the contract null and void.

10. In cases where a contract is concluded for a fixed period of time, but automatically renewed for another term, the parties generally give themselves a right to object to such renewal, within certain parameters. It is common in these contracts to include a termination clause for situations of breach of one or more contractual obligations.

11. In general, commercial contracts therefore usually contain provisions giving the parties the right to put an end to their obligations under a contract, while specifying the circumstances under which this right may be exercised, as well as the consequences of such a termination. This is based on the idea that parties to a contract do generally not intend to be bound to its terms forever. In addition, most legal systems provide for certain conditions, under which termination is justified by law. The contractual termination rights operate in addition to these rights set by law, unless the latter are effectively excluded in the contract.

12. The types of contracts, which can be said to be comparable or similar to the SMTA of the Treaty, such as for instance access and benefit-sharing contracts, material transfer agreements (MTAs), technology transfer or know-how (license) contracts, intellectual property rights related license agreements, and the like, are no different in this regard. They usually contain provisions on the contract’s duration and/or possible termination, which are specifically tailored to the needs of the contract’s subject matter.

13. In the context of MTAs relating to plant genetic resources, one of the specific challenges for drafting a termination clause is the fact that once the material has been provided to the recipient or user, it might be difficult to hand it back. Even if the requirement should be to send the remaining material back or to destroy it, the original material might have been developed

further or crossed with other material. This situation is comparable to technology or know-how license agreements.

14. This is one of the issues that the Working Group may wish to address in a potential draft termination clause to be introduced in the SMTA and, together with other possible elements, will be further explored below.

15. The SMTA having been adopted by the Governing Body, a termination clause could be introduced by a decision of the Governing Body. The Treaty itself does neither contain any requirements for payment obligations or any other obligations for users of the Multilateral System to be in effect forever, nor any provisions to the contrary.

III. RELEVANT PROVISIONS IN THE SMTA

16. Pursuant to its current provisions, the parties to an SMTA have no possibility to put an end to the obligations they contracted. Also, the SMTA does not foresee any expiry date. Rather it provides that the SMTA “*shall remain in force so long as the Treaty remains in force*” (Art. 9.2 SMTA, “*Duration of Agreement*”).

17. In seeking to agree on the possible contents of a termination clause, the Working Group will first need to identify the obligations under the SMTA, which the parties will have the right to terminate, unless the Working Group considers that such right could extend to the SMTA overall.

18. The prime obligations under the SMTA are set forth in the monetary benefit-sharing provisions as contained in its Articles 6.7/6.8 and 6.11, as well as in the relevant Annexes.

19. In connection with the termination of a Recipient’s payment obligations under the SMTA, the Working Group should also consider the provisions dealing with the transfer of such obligations to a third party. If the Recipient is released from any benefit-sharing obligation under the SMTA, it may for example not transfer such obligation together with an intellectual property right on a Product, developed from the Material or its components received from the Multilateral System, to a third party according to Art. 6.10 SMTA. Similarly, the Recipient could not transfer the benefit-sharing obligation under the SMTA together with the Material received under the SMTA (Art. 6.4 SMTA) or together with a Plant Genetic Resource for Food and Agriculture under Development (PGRFAuD; Art. 6.5 SMTA).

20. The SMTA provides also for reporting obligations which both Provider (5.e) and Recipient (Arts. 6.4b, 6.5c, 6.9) would want to cancel as these obligations are far reaching and lead to a need to track down the material obtained from the Multilateral System.

21. Moreover, the SMTA provides for a series of obligations in case of transfers of PGRFAuD (Arts. 6.5, 6.6 SMTA); consequences of termination of these obligations may require a careful analysis. The Working Group may also need to decide, whether such obligations should survive termination.

22. Apart from the foregoing obligations which could be subject to a termination right by either party to an SMTA, the Working Group might need to discuss those SMTA provisions that will not lapse upon termination, in particular where the termination clause affects the SMTA overall.

23. Considering general contract law and commercial practice, and ABS contracts in particular, such provisions could for example include Art. 8 SMTA (dispute settlement), Art. 9.1 SMTA (warranty), Art. 4.3 (acceptance of the third party beneficiary) and Art. 6.5 (PGRFAuD), as well as the corresponding Articles in each of these cases. Taking into account the overall design of the Multilateral System, other provisions to survive termination could include, for example, Art. 6.1 (Material be used solely for research, breeding and training for food and agriculture) and Art. 6.2 (Intellectual property rights).

24. Finally, when further looking into the insertion of a termination clause in the SMTA, the Working Group may also wish to give attention to Art. 7 of the SMTA (applicable law). According to this provision, the applicable law is the General Principles of Law, including the UNIDROIT Principles of International Commercial Contracts 2004 (UNIDROIT Principles).⁷

25. The UNIDROIT Principles contain provisions on the right to terminate a contract under certain circumstances, e.g. where one of the parties fails to perform its obligations under a contract. They also address the procedure for terminating a contract, as well as the effects of such termination. The UNIDROIT Principles stipulate that any provision, which is operative after termination, will not be affected by the termination. It is reasonable to argue that in case of the SMTA, this could for example apply to its dispute settlement clause (Art. 8). However, it should be noted that the UNIDROIT Principles do not contain a provision that would give the parties a right to terminate a permanent contract without any valid reason.

IV. ELEMENTS OF A POSSIBLE TERMINATION CLAUSE

26. Contractual termination clauses can be kept quite simple or, to the contrary, be made quite detailed. In practice, the contents of a termination clause may depend on the reasons for termination and the consequences of termination.

27. In a first instance, the Working Group will need to have a clear idea on the kind of obligations contracted under the SMTA that the parties will have the right to terminate. Once the Working Group will have determined those obligations which may be subject to termination, additional questions to be addressed may relate to the conditions under which such right may be exercised. Likewise, the Working Group will have to identify the obligations that will survive termination.

28. In this context, the Working Group may also wish to clarify, whether parties having already signed an SMTA in its current version will have the right to “switch to” a possible “new” SMTA to enhance the functioning of the Multilateral System.

a. What to terminate

29. Again, the key question for the Working Group to determine is, which obligations under the SMTA will the parties have the right to terminate? Will the parties be entitled to terminate only specific obligations (benefit-sharing obligations, payment obligations, reporting obligations) or will they be in a position to terminate the SMTA in its entirety? Additionally, the Working Group may wish to clarify whether an expiry date can be introduced, either for certain obligations or for the SMTA as a whole.

i. Payment obligations

30. In case the termination right applies to the payment obligations of the Recipient under the SMTA (Article 6.7), the Working Group will need to give due regard to any potential changes relating to such payment obligations it intends to submit for consideration and decision by the Governing Body. The termination clause should be drafted in close connection with such changes.

31. The termination of payment obligations will have implications on those provisions in the SMTA that deal with the transfer of such obligations to a third party, in particular Arts. 6.4, 6.5 and 6.10 SMTA. Since the Recipient would not have any obligation to make payments, it would be consistent that the assignee of an intellectual property right or the subsequent recipient of the Material or the PGRFAuD would not have to pay either.

⁷ Although Art. 7 SMTA explicitly refers to the 2004 version of the UNIDROIT Principles, it may be interpreted in the sense that it should actually read “the UNIDROIT Principles in their applicable version”. In 2010, the Governing Council of the International Institute for the Unification of Private Law published a revised version.

32. In terms of drafting, a termination of the payment obligations under the SMTA could be implemented through amendments to Articles 6.7 and/or 6.11 of the SMTA, as well as to the respective Annexes. Alternatively, an additional Article (e.g. 6.12 or 9.3) could be introduced, covering both payment schemes. The contents of the amendments or the new article will depend on the review and consensus reached by the Working Group on the above issues. Some illustrative examples of how to integrate a termination of payment obligations into Art. 6.11 SMTA are given in *Appendix 1*.

ii. Reporting obligations

33. The SMTA provides for a number of reporting obligations for the Provider and the Recipient. These are likely to remain in place in case a termination clause will only affect the payment obligations. Reporting obligations are *inter alia* provided for in the following Articles of the SMTA: 6.4 (transfer of Material), 6.5 (transfer of PGRFAuD) and 6.9 (disclosure of non-confidential information).

34. In order to further increase incentives for users to conclude an SMTA and use the Multilateral System, the Working Group may wish to discuss ways of further reducing the reporting obligations of the Recipient under the SMTA, or of giving the Recipient a termination right relating to such obligations, while considering possible implications for the functioning of the Multilateral System.

iii. Termination of the SMTA, expiry date

35. The Working Group may consider the possibility of introducing a termination clause that would give the parties the right to terminate the SMTA as a whole. Users of the Multilateral System, especially the seed industry, pointed out that such a termination clause could influence the willingness of users to access PGRFA from the Multilateral System. Users consider that the current Article 9.2 of the SMTA on the duration of the agreement generate uncertainty and should therefore be removed.⁸

36. In connection with such a termination clause, the Working Group may wish to discuss the possibility of introducing an expiry date for the SMTA. An expiry date may have conceptual consequences for formulating the termination clause, as already discussed above.

37. However, should the Working Group agree on introducing an expiry date in the SMTA, the right of the parties to terminate certain obligations or the SMTA overall, respectively could be subject to specific reasons or conditions. Another option would be to not grant the parties any such specific termination right at all, especially given that the UNIDROIT Principles contain relevant provisions on the termination of contracts under specific circumstances, i.e. in case of non-performance of the other party. Finally, the termination clause could also entitle parties to an SMTA to terminate the agreement before the expiry date and mention at the same time that the agreement will definitely expire at such date, unless the parties agree on its renewal.

38. Another possibility would be to combine time limit and termination clause in such a way that the termination right may only be exercised after a certain period of time has elapsed since the signing of the SMTA. During that period, parties would not have a possibility to put an end to their obligations.

39. A termination clause as well as a possible expiry date could be implemented through changes and additions to Art. 9.2 SMTA. The surviving obligations, if any, could either be included in such a termination clause or it could be highlighted in each relevant provision that the respective obligation will survive termination. Possible textual examples are given in *Appendix 2*.

⁸ IT/OWG-EFMLS/Background Study 4, paras. 32, 67, 81.

b. How to terminate

40. As stated above, the right to terminate an SMTA could be or not be subject to specific reasons or conditions. This is a matter for the Working Group to consider.
41. In practice, further elements that will need to be defined for exercising a termination right include the notice period, the addressee of such notice (e.g. the Provider, the Governing Body, the Third Party Beneficiary, the Secretary), and the form such notice must take.
42. Given the current provisions of the SMTA, especially those dealing with information to be provided by the Recipient (Articles 6.4b, 6.5c, 6.11h of the SMTA), the termination clause could require the Recipient to send the notice in writing to the Governing Body through the Secretary.
43. This element of the termination clause is included in the textual examples given in *Appendixes 1 and 2*.

c. Surviving obligations

44. Especially in case the termination right should relate to the SMTA as a whole, the Working Group should determine which provisions of the SMTA, if any, will survive termination, i.e. remain binding on the parties although the contract has otherwise been terminated.
45. As outlined above, this could include for example Arts. 4.3 and 8 SMTA (dispute settlement, third party beneficiary), Art. 9.1 SMTA (warranty), Art. 6.1 (Material be used solely for research, breeding and training for food and agriculture) and Art. 6.2 (intellectual property rights), as well as the corresponding Articles in each case.⁹
46. Regarding the dispute settlement provisions, it will be important for the Working Group to ensure that any proposed termination clause will not have negative effects on the functioning of the Third Party Beneficiary and its capacity to enforce compliance with the provisions of the SMTA, both during the time the SMTA is in force and after its termination in respect of surviving obligations. For example, the Third Party Beneficiary will need to maintain the possibility to request all necessary information from the parties, even after termination, including to know which obligations were binding upon the parties at which point in time (potentially for a limited period of time).
47. For drafting purposes, the surviving provisions could be referred to in the termination clause or it could be stated in each of the provisions concerned whether the obligation survives termination and/or expiration of the SMTA.
48. This element of the termination clause is included in the textual examples given in *Appendix 2*.

d. Obligations regarding the Material

49. As in other MTAs, a termination clause for the SMTA could stipulate the obligations that the Recipient will still have upon termination of the agreement with regard to the Material and/or any descendants of the Material. The Recipient could, for example, be required to return the Material to the Provider, to destroy it or simply to stop using it.
50. In order to not create any potential negative effects on the Multilateral System, the Working Group should agree on the principle that no Material can be transferred by the Recipient to a third party without an SMTA. Either the termination clause could include certain obligations for the

⁹ It might be interesting to note that the duration and termination clauses of the draft SMTA submitted to the First Session of the Governing Body in 2006 provided for the whole Art. 6 SMTA to survive termination (“*the obligations and rights contained in Article 6 shall survive the termination of this Agreement*”), see IT/GB-1/06/6, p. 10 (Art. 9.2 SMTA).

Recipient regarding the Material or the issue could be resolved by providing for certain obligations which would survive termination, or both.

51. In this connection, it should also be made clear whether such obligations only relate to the Material or also to any other material provided. Moreover, the Working Group may wish to discuss the possible implications for PGRFAuD.

52. This element of the termination clause is included in the textual examples given in *Appendix 2*.

e. “Old” SMTAs

53. In case the Governing Body should agree on introducing a termination clause into the SMTA, there would be one SMTA, where obligations continue in perpetuity, and another SMTA, which can be terminated by the parties.

54. The Working Group may want to discuss allowing parties, who have signed the current SMTA, to agree to amend or replace such SMTA with the terms and conditions of the new SMTA.

55. This option could be granted through a decision by the Governing Body, which could include the requirement for the parties to sign a standard statement together with the new SMTA, potentially with the consent of the Third Party Beneficiary. The statement could contain elements like the mutual consent of the (same) parties to replace the SMTA by a new SMTA, concerning the same Material, with immediate effect; or that this statement forms an integral part of the new SMTA and that in case the statement or the new SMTA should not be valid, the old SMTA would revive.

V. CONCLUSIONS

56. There are a number of initial issues that the Working Group may wish to clarify, when seeking to agree on introducing a termination clause into the SMTA, as part of the package of measures it will propose to the Governing Body.

57. The Working Group will first need to identify those obligations under the SMTA that the parties shall have the right to terminate. Possible obligations include the monetary benefit-sharing obligations as contained in Articles 6.7/6.8 and 6.11, as well as in the relevant Annexes, and the reporting obligations of both users and providers.

58. It may also consider the possibility of introducing a termination clause that would give the parties the right to terminate the SMTA as a whole, or of introducing an expiry date in the SMTA, or a combination of the two.

59. The Working Group may then wish to address additional questions relating to the conditions under which such a right could be exercised, for example the notice period, the addressee of such notice and the form such notice must take.

60. The Working Group may also identify the obligations under the SMTA that shall not lapse upon termination, especially where the termination clause should affect the SMTA overall.

61. Finally, it should be clarified, whether parties to the current SMTA shall have the right to agree to amend or replace such SMTA with the terms and conditions of the possible revised SMTA.

62. The drafting of the termination clause will need to take into account the discussions and possible agreement of the Working Group on other measures it will propose to the Governing Body, to enhance the functioning of the Multilateral System. It might therefore be premature to consider, in detail, textual elements for different options to introduce a termination clause into the SMTA at this stage, especially if these were considered separately from the other measures under

discussion. In order to facilitate text-based discussions by the Working Group at a later stage, the Annexes to this document contain preliminary illustrative textual examples, for introducing a termination clause relating to payment obligations (Annex 1), and for introducing a termination clause relating to the SMTA as a whole (Annex 2).

Appendix I:**Illustrative textual examples for introducing a termination clause relating to payment obligations**

TERMINATION CLAUSE RELATING TO RECIPIENT'S PAYMENT OBLIGATIONS		
Obligation	Possible textual examples for a termination or expiration clause (NB: current SMTA text is in standard font, deletions are struck through , text proposed for insertion is <i>washed in grey</i>)	Further considerations
Art. 6.11 (payment obligation)	<p><u>Option 1:</u> Termination right at the end of 20 years; no reason for termination; payment obligations continue for the remainder of 10 years.</p>	<p>Art. 6.11a) The Recipient shall make payments at a discounted rate during the period of validity of the option <i>this system of payments</i>;</p> <p>Art. 6.11b) <i>This system of payments shall be valid so long as it has not been terminated by the Recipient, The period of validity of the option shall be ten twenty years renewable in accordance with Annex 3 to this Agreement;</i></p> <p>Art. 6.11f) The Recipient shall be relieved of 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, <i>if and so long as the Recipient is obliged to make payments under this system of payments;</i></p> <p>Art. 6.11g) After the end of the period of validity of this option <i>system of payments</i> the Recipient shall make payments on any Products that incorporate Material received during the period in which this Article was in force, and where such Products are not available without restriction. These payments will be calculated at the same rate as in paragraph (a) above; <i>not have any further payment obligations arising from this Article, unless, at the time of termination, the Recipient was under an obligation to make payments pursuant to Art. 6.11, in which case he shall continue to make such payments for a period of 10 years from the commercialization of a Product that is a Plant Genetic Resource for Food and Agriculture and that incorporates Material as referred to in Article 3 of this Agreement, according to the terms and conditions set out in this Article as well as in Annex 3 to this Agreement;</i></p>

		<p>Annex 3, para. 4: At least six months before the expiry of a period of ten twenty years counted from the date of signature of this Agreement by the Provider or the Recipient, whichever date is later, or from the date of acceptance of this Agreement by the Recipient, respectively, and, thereafter, six months before the expiry of subsequent periods of five years, the Recipient may terminate his obligations under Article 6.11 as of the end of any of those periods, in which case he shall notify the Provider and the Governing Body [Third Party Beneficiary] [Secretary of the Treaty] in writing accordingly 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 of the first Standard Material Transfer Agreement where an option for this Article has been made. Such termination will have no effect on Art. 6.11g).</p> <p>Annex 3, para. 5: Where the Recipient has entered or enters in the future into other Standard Material Transfer Agreements in relation to material belonging to the same crop[s], the Recipient shall only pay into the referred mechanism the percentage of sales as determined in accordance with this Article or the same Article of any other Standard Material Transfer Agreement. No cumulative payments will be required.</p>	
	<p><u>Option 2</u>: expiration after 20 years; no termination option; payment obligations continue for the remainder of 10 years.</p>	<p>Art. 6.11a) The Recipient shall make payments at a discounted rate during the period of validity of the option this system of payments;</p> <p>Art. 6.11b) The period of validity of the option this system of payments shall be ten twenty years renewable in accordance with Annex 3 to this Agreement;</p> <p>Art. 6.11f) The Recipient shall be relieved of 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, if and so long as the Recipient is obliged to make payments under this system of payments;</p>	<p>It should be considered how to provide for Recipient's obligations regarding the Material and/or PGRFAuD, as well as concerning the transfer of any obligations to third parties.</p> <p>Could also be drafted in the form of an additional Art. 9.3 or an additional Art. 6.12 (see</p>

		<p>Art. 6.11g) After the end of the period of validity of this option system of payments the Recipient shall make payments on any Products that incorporate Material received during the period in which this Article was in force, and where such Products are not available without restriction. These payments will be calculated at the same rate as in paragraph (a) above; not have any further payment obligations arising from this Article, unless, at the time of expiration, the Recipient was under an obligation to make payments pursuant to Art. 6.11, in which case he shall continue to make such payments for a period of 10 years from the commercialization of a Product that is a Plant Genetic Resource for Food and Agriculture and that incorporates Material as referred to in Article 3 of this Agreement, according to the terms and conditions set out in this Article as well as in <i>Annex 3</i> to this Agreement;</p> <p>Annex 3, para. 4: At least six months before tThe expiry of a period of ten twenty years is counted from the date of signature of this Agreement by the Provider or the Recipient, whichever date is later, or from the date of acceptance of this Agreement by the Recipient, respectively, 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 of the first Standard Material Transfer Agreement where an option for this Article has been made.</p> <p>Annex 3, para. 5: Where the Recipient has entered or enters in the future into other Standard Material Transfer Agreements in relation to material belonging to the same crop[s], the Recipient shall only pay into the referred mechanism the percentage of sales as determined in accordance with this Article or the same Article of any other Standard Material Transfer Agreement. No cumulative payments will be required.</p>	<p>below).</p>
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<p>Art. 6.11 revisited (crop based subscription model)</p>	<p><u>Option 1:</u></p> <p>Termination at the end of 20 years; no reason for termination; “cooling-off” period of 10 years following [last access][termination], i.e. payment obligations continue for 10 years from [last access to MLS][termination].</p>	<p>Art. 6.11b) This system of payments shall be valid so long as it has not been terminated by the Recipient. The period of validity of the option shall be ten twenty years renewable in accordance with Annex 3 to this Agreement;</p> <p>Art. 6.11f) The Recipient shall be relieved of 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, if and so long as the Recipient is obliged to make payments under this system of payments;</p> <p>Art. 6.11g) After the end of the period of validity of this option system of payments the Recipient shall continue to make payments on any Products that incorporate Material received during the period in which this Article was in force, and where such Products are not available without restriction. These payments will be calculated at the same rate as in paragraph (a) above; in accordance with the payment conditions laid down in this Article as well as in Annex 3, which will remain in force for this purpose after termination, for a period of 10 years from [last accessing material from the Multilateral System under this Article][receipt of the written notification of termination by [the Governing Body][the Third Party Beneficiary][the Secretary of the Treaty]];</p> <p>Annex 3, para. 4: At least six months before the expiry of a period of ten twenty years counted from the date of signature of this Agreement by the Provider or the Recipient, whichever date is later, or from the date of acceptance of this Agreement by the Recipient, respectively, and, thereafter, six months before the expiry of subsequent periods of five years, the Recipient may terminate his obligations under Article 6.11 as of the end of any of those periods, in which case he shall notify the Provider and the Governing Body [Third Party Beneficiary] [Secretary of the Treaty] in writing accordingly 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</p>	<p>This textual example is based on the assumption that an improved and extended subscription model will be implemented in the remaining subparagraphs of Art. 6.11 as well as in the relevant Annexes, but obviously without knowing its concrete design. It might be advisable to include the termination clause in any exercise and discussions on redrafting Art. 6.11. This document only addresses options for introducing a termination clause.</p> <p>It should be considered how to provide for Recipient’s obligations regarding the Material and/or PGRFAuD, as well as concerning the transfer of any obligations to third parties.</p> <p>Could also be drafted in the form of an additional Art. 9.3 or an additional Art. 6.12 (see below).</p>
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		<p>of signature of the first Standard Material Transfer Agreement where an option for this Article has been made. Such termination will have no effect on Arts. 6.11f) and 6.11g).</p> <p>Annex 3, para. 5: Where the Recipient has entered or enters in the future into other Standard Material Transfer Agreements in relation to material belonging to the same crop[s], the Recipient shall only pay into the referred mechanism the percentage of sales as determined in accordance with this Article or the same Article of any other Standard Material Transfer Agreement. No cumulative payments will be required.</p>	
Arts. 6.7 and 6.11 (payment obligations)	<p><u>Option 1:</u> Termination of payment obligations under 6.7 and 6.11, anytime, no reason for termination; no further payment obligations.</p>	<p>[Art. 6.12][Art. 9.3] The Recipient may terminate its obligations under Articles 6.7 and 6.11 upon [X] days' written notice by it to the Provider and to the [Governing Body][Third Party Beneficiary] [Secretary of the Treaty].</p>	<p>It should be considered how to provide for Recipient's obligations regarding the Material and/or PGRFAuD, as well as concerning the transfer of any obligations to third parties.</p>
	<p><u>Option 2:</u> Termination of payment obligations under 6.7 and 6.11, after 20 years, no reason for termination; no further payment obligations.</p>	<p>[Art. 6.12][Art. 9.3] The Recipient may terminate its obligations under Articles 6.7 and 6.11 upon [X] days' written notice by it to the Provider and to the [Governing Body][Third Party Beneficiary] [Secretary of the Treaty], but in any event not less than twenty years from the date of signing of this Agreement by the Provider or the Recipient, whichever date is later, or from the date of acceptance of this Agreement by the Recipient, respectively.</p>	<p>It should be considered how to provide for Recipient's obligations regarding the Material and/or PGRFAuD, as well as concerning the transfer of any obligations to third parties.</p>

Appendix 2:**Illustrative textual examples for introducing a termination clause relating to the SMTA as a whole**

TERMINATION CLAUSE RELATING TO THE SMTA AS A WHOLE			
Issue	Possible textual examples for a termination or expiration clause <i>(NB: current SMTA text is in standard font, deletions are struck through, text proposed for insertion is washed in grey)</i>	Further considerations	
Expiration	<p><u>Option 1:</u> Expiration after [X] number of years</p>	<p>Art. 9.2: This Agreement shall remain in force so long as the Treaty remains in force. This Agreement shall be in effect for a term of [X] years from the date of signing of this Agreement by the Provider or the Recipient, whichever date is later, or from the date of acceptance of this Agreement by the Recipient, respectively. It may be renewed upon mutual agreement of the Provider and the Recipient.</p>	<p>It should be considered how to provide for Recipient's obligations regarding the Material and/or PGRFAuD, and the transfer of any obligations to third parties. The Working Group should also consider the possibility to have certain provisions survive termination.</p>
Termination	<p><u>Option 1:</u> Termination right anytime</p>	<p>Art. 9.3: The Recipient may terminate this Agreement upon [X] days' written notice by it to the Provider and to the [Governing Body][Third Party Beneficiary] [Secretary of the Treaty].</p>	<p>It should be considered how to provide for Recipient's obligations regarding the Material and/or PGRFAuD, and the transfer of any obligations to third parties. The Working Group should also consider the possibility to have certain provisions survive termination.</p>
	<p><u>Option 2:</u> Termination right after [X] number of years</p>	<p>Art. 9.3: The Recipient may terminate this Agreement upon [X] days' written notice by it to the Provider and to the [Governing Body][Third Party Beneficiary] [Secretary of the Treaty], but in any event not less than [X] years from the date of signing of this Agreement by the Provider or the Recipient, whichever date is later, or from the date of acceptance of this Agreement by the Recipient, respectively.</p>	<p>It should be considered how to provide for Recipient's obligations regarding the Material and/or PGRFAuD, and the transfer of any obligations to third</p>

			parties. The Working Group should also consider the possibility to have certain provisions survive termination.
<u>Option 3:</u> Expiration after [X] number of years, termination right anytime	<p>Art. 9.2: This Agreement shall remain in force so long as the Treaty remains in force. This Agreement shall be in effect for a term of [X] years from the date of signing of this Agreement by the Provider or the Recipient, whichever date is later, or from the date of acceptance of this Agreement by the Recipient, respectively. It may be renewed upon mutual agreement of the Provider and the Recipient.</p> <p>Art. 9.3: The Recipient may terminate this Agreement upon [X] days' written notice by it to the Provider and to the [Governing Body][Third Party Beneficiary] [Secretary of the Treaty].</p>		It should be considered how to provide for Recipient's obligations regarding the Material and/or PGRFAuD, and the transfer of any obligations to third parties. The Working Group should also consider the possibility to have certain provisions survive termination.
<u>Option 4:</u> Expiration after [X] number of years, termination right after [Y] number of years	<p>Art. 9.2: This Agreement shall remain in force so long as the Treaty remains in force. This Agreement shall be in effect for a term of [X] years from the date of signing of this Agreement by the Provider or the Recipient, whichever date is later, or from the date of acceptance of this Agreement by the Recipient, respectively. It may be renewed upon mutual agreement of the Provider and the Recipient.</p> <p>Art. 9.3: The Recipient may terminate this Agreement upon [X] days' written notice by it to the Provider and to the [Governing Body][Third Party Beneficiary] [Secretary of the Treaty], but in any event not less than [Y] years from the date of signing of this Agreement by the Provider or the Recipient, whichever date is later, or from the date of acceptance of this Agreement by the Recipient, respectively.</p>		It should be considered how to provide for Recipient's obligations regarding the Material and/or PGRFAuD, and the transfer of any obligations to third parties. The Working Group should also consider the possibility to have certain provisions survive termination.
<u>Option 5:</u> Termination by non-use, after [X] numbers of years, destruction of remaining Material and PGRFAuD	<p>Art. 9.3: This Agreement shall terminate, in case the Recipient discontinues its use of the Material, as well as any PGRFAuD derived from the Material, destroys any remaining Material, as well as any PGRFAuD derived from the Material, and notifies the Provider and the [Governing Body][Third Party Beneficiary] [Secretary of the Treaty] accordingly, but in any event not less than [X] years from the date of</p>		It should be considered whether to establish any obligations for the Recipient regarding the Material and/or PGRFAuD, and the transfer of any obligations to third parties.

		<p>signing of this Agreement by the Provider or the Recipient, whichever date is later, or from the date of acceptance of this Agreement by the Recipient, respectively.</p>	<p>The Working Group should also consider the possibility to have certain provisions survive termination.</p> <p>It will be of particular importance in this case to ensure that the Third Party Beneficiary has the capacity to enforce this provision.</p>
Material provided	<p><u>Option 1:</u> Recipient required to stop using and returning/destroying Material</p>	<p>Art. 9.4: Upon termination of this Agreement, the Recipient shall stop using the Material and [return] [destroy] any remaining Material and notify the [Governing Body][Third Party Beneficiary][Secretary of the Treaty] accordingly.</p>	
	<p><u>Option 2:</u> Recipient required to stop using and returning/destroying Material; and additionally to destroy PGRFAuD or continue to be bound by SMTA</p>	<p>Art. 9.4: Upon termination of this Agreement, the Recipient shall stop using the Material and [return] [destroy] any remaining Material and notify the [Governing Body][Third Party Beneficiary][Secretary of the Treaty] accordingly. In addition, the Recipient, at its discretion, will also either destroy all PGRFAuD, derived from the Material, and notify the [Governing Body][Third Party Beneficiary][Secretary of the Treaty] accordingly, or notify the [Governing Body][Third Party Beneficiary][Secretary of the Treaty] that it has chosen to remain bound by the terms of this Agreement as they apply to PGRFAuD. In case no notification is provided within [X] days after termination, the Recipient shall destroy all Material and all PGRFAuD derived from the Material.</p>	
Surviving obligations	<p><u>Option 1:</u> Short version, surviving obligations listed</p>	<p>Art. 9.5: Obligations with respect to [...] [Arts. ...] shall survive termination [or expiration].</p>	<p>Possible examples for surviving obligations: dispute settlement (Arts. 4.3, 8); warranty (Art. 9.1); PGRFAuD (Art. 6.5); payments after termination (Arts. 6.7./6.8/6.11 together with Annexes 2, 3 and 4); no IPRs on Material</p>

			received (in case Recipient is not obliged to return/destroy Material), Art. 6.2; termination clause itself (Arts. 9.3, 9.4, 9.5).
	<p><u>Option 2</u>: Longer version, surviving obligations listed in non-exhaustive manner (“or by their nature”)</p>	<p>Art. 9.5: All obligations of the parties, which expressly or by their nature survive termination [or expiration], shall continue in full force and effect subsequent to and notwithstanding such termination [or expiration], until they are satisfied or by their nature expire, including but not limited to [...]Arts. ...].</p>	<p>Possible examples for surviving obligations: dispute settlement (Arts. 4.3, 8); warranty (Art. 9.1); PGRFAuD (Art. 6.5); payments after termination (Arts. 6.7./6.8/6.11 together with Annexes 2, 3 and 4); no IPRs on Material received (in case Recipient is not obliged to return/destroy Material), Art. 6.2; termination clause itself (Arts. 9.3, 9.4, 9.5).</p>