



**Food and Agriculture
Organization of the
United Nations**



The International Treaty
ON PLANT GENETIC RESOURCES
FOR FOOD AND AGRICULTURE

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

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

Rome, Italy, 14-17 March 2017

**SECOND REPORT FROM THE FRIENDS OF THE CO-CHAIRS
GROUP ON A TERMINATION CLAUSE**

I. INTRODUCTION

1. This is a second report of the Friends of the Co-Chairs Group on a Termination Clause (FoCC termination group). The group submitted its first report¹ to the Co-Chairs in the lead-up to the fifth meeting of the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing (WG-EFMLS), held in July 2016, in Geneva. The Terms of Reference of the FoCC termination group are given in Annex 2 of its first report.
2. Following the fifth meeting of the WG-EFMLS, the Co-chairs asked the FoCC termination group to continue their work to develop draft texts of termination/withdrawal clauses to be included in a revised SMTA, with the understanding that the SMTA could still contain a single-access option, and a short note explaining the main aspects of those clauses. They asked the group to start its drafting work using the relevant sections of text in the 'Second Draft Revised SMTA Co-Chairs' Proposal' which was prepared for the fifth meeting of the WG-EFMLS.²
3. The members of the FoCC termination group are, in alphabetical order, Geoff Budd, Michael Halewood (facilitator), Francois Meienberg, Thomas Nickson, Rachel Wynberg, and Tomme Young. The FoCC termination group held two teleconferences on 21 and 26 October 2016, and had further discussions by email.
4. There are a few places in the SMTA where one could include the relevant clauses, including Article 6 (Rights and Obligations of Recipient), Article 9 (Additional Terms), Annex 2 (Rate and Modalities of Payment under Article 6.7 of this Agreement) and/or Annex 3 (Terms and Conditions of the Subscription System).
5. That said, with respect to the subscription model, the 'Second Draft Revised SMTA' already includes draft text in Annex 3, Article 4, entitled 'Duration and Withdrawal from the Subscription'. Consequently, the FoCC-termination group has focused its work on revising that draft Article.
6. With respect to the single access model, the situation is somewhat different. All text related to the single access model, including Articles 6.7, 6.8 and Annex 2, has been deleted in the 'Second Draft

¹ The first report of the FoCC termination group to the Co-Chairs of the WG-EFMLS is available at <http://www.fao.org/3/a-bp083e.pdf>

² The 'Second Draft Revised SMTA Co-Chairs' Proposal' is available at <http://www.fao.org/plant-treaty/meetings/meetings-detail/en/c/414961/>

Revised SMTA'. So the starting point for the FoCC-termination group's work was not pre-ordained. Based on the fact that the Co-chairs included clauses on withdrawal/termination for the subscription model in Annex 3, one option could be to also include such clauses for the single access model in Annex 2. Without more concrete guidance from the Co-chairs, the other FoCC groups or WG-EFMLS concerning the content and form of the models that will ultimately be included in the SMTA, it is premature for this FoCC termination group to make recommendations about where the withdrawal/expiry clauses should ultimately be placed. Ultimately, depending on what models are eventually adopted, the WG-EFMLS can move and adapt the clauses included here into different sections of the SMTA as it sees fit³.

7. Appendixes 1 and 2 to this report include a combination of revised and new draft text of the relevant clauses. They do not and could not reflect each and every option that has been considered, and advocated for, by the various members of the group. Instead, they reflect the core themes discussed by the FoCC group. Variations on those themes that cannot be reflected in the text – because the bracketed and additional text would make the text hard to follow – are raised in the explanatory notes.

8. Sections 2 and 3 of this paper provide brief explanations related to those clauses. Clearly, eventually, the clauses adopted for inclusion in the SMTA will need to 'stand on their own two feet' without the benefit of explanatory notes. However, in light of the fact that these clauses are currently under negotiation, the FoCC group feels it is important to 'spell out' what they mean, or at least what they are intended by the FoCC to mean, to facilitate their further consideration by the WG-EFMLS.

9. Sections 2 and 3 also highlight, for the Co-Chairs' and WG-EFMLS's consideration, important, unresolved issues that came up in the context of the FoCC's deliberations that are relevant to the issue of termination/withdrawal, but are nonetheless beyond the mandate of the FoCC to consider.

10. This second FoCC Termination Clause report is not meant to replace the first report of the FoCC Termination Clause. Indeed, they should be read together since the first report provides considerably more information about arguments for the different approaches – arguments that continue to be important, but are not repeated in this report. WG-EFMLS members are encouraged to consult the first FoCC Termination Clause report if they want to understand more about the policy rationale behind the options set out in this report.

II. REGARDING POSSIBLE REVISIONS OF SUBSCRIPTION TERMS BY THE GOVERNING BODY (SMTA ANNEX 3, ARTICLE 3.1)

11. According to SMTA Annex 3, Article 1.3 in the Co-Chairs' 'Second Draft Revised SMTA' the Governing Body would be able to change subscription terms, and when they do, the newly adopted subscription terms would automatically apply to all existing subscription holders after a set notice period. Subscribers would have the right to withdraw from their subscriptions if they did not like the new terms. The FoCC termination group was of the opinion that this would not be a desirable approach.

12. Instead, most of the FoCC members felt that the Governing Body should be able to decide to change the terms of subscriptions in the future. But if and when it does so, the revised terms should only apply to new subscribers, and not to earlier subscribers without mutual agreement. That means that the 'Subscription Terms' of the current SMTA would not be affected by later decisions of the Governing Body, and they would continue indefinitely, unless the subscriber withdraws from her earlier subscription as per Annex 3, Article 4 below, and re-subscribes under the new subscription terms. This approach is reflected in the revised SMTA Annex 3, Article 1.3 in Appendix 1 to this report.

³ It is noteworthy that Article 9.2 of the 'Second Draft SMTA' states that "[t]his Agreement shall remain in force as long as the Treaty remains in force" and Article 9.3 opens the possibility of withdrawing from the subscription with a cross reference to Annex 3. The FoCC did not focus on or revise this text. It can be changed later as a matter of course.

13. Other FoCC members suggested yet an alternative approach, whereby the old subscription terms would continue to apply to those who had subscribed prior to the Governing Body adopted different subscription terms, *as long as they did not access new materials*. However, if they did obtain new materials, the newly adopted subscription terms would automatically apply. They argue that such an approach would solve the problem that two different systems would otherwise go on in parallel, potentially for eternity and that parallel systems would raise the complexity of the system e.g. when there is exchange between subscribers of two different versions. This is an instance where an option is not reflected in the draft text included in Annex 1 of this document. If the WG-EFMLS eventually considers that this is a desirable approach, it may wish to request the FoCC termination clause, or the Standing Group of Legal Experts to develop draft text for a clause reflecting this option.

III. CLAUSES FOR WITHDRAWING FROM THE SUBSCRIPTION MODEL (ANNEX 3 , ARTICLE 4)

14. Pursuant to Article 4.1., the subscription continues indefinitely, until the recipient/subscriber voluntarily withdraws from it by giving written notice....

15. Pursuant to Article 4.2., the subscriber cannot withdraw from the subscription before a minimum period of time has passed. The FoCC group was not able to make a joint recommendation on the actual minimum time.

16. Pursuant to Article 4.3., the subscriber is required to continue making mandatory benefit sharing payments for a fixed number of years after it has withdrawn from its subscription. The FoCC group was not able to make a joint recommendation on the actual number of years. However there is a conceptual link between the minimum duration of the subscription under article 4.2 and the fixed period of continued benefit sharing under article 4.3. The shorter the minimum period of initial subscription, the longer the fixed period of continued benefit sharing, or *vice versa*.

17. The last sentence of this clause, “[a]ll other conditions in this Agreement shall continue to apply to the Recipient” means that, after withdrawing from the subscription, recipients may continue to use materials they accessed during their subscription period as prescribed by the SMTA, including passing the material on to subsequent recipients using the SMTA. All other terms, including the operation of the Third Party Beneficiary, etc., also continue to apply. Since transfers to subsequent recipients would be done under a new SMTA, this means that, among other things, the benefit sharing clauses of the SMTA would apply to subsequent recipients, even if they have expired for the first recipient/subscriber.

18. Article 4.4, introduces a qualifier to the principle set out in Article 4.3, with respect to PGRFA under Development. It envisages that after a fixed number of years, in addition to benefit sharing clauses expiring (as established for all PGRFA in Article 4.3) a range of other clauses in the SMTA – possibly even the entire SMTA – would also cease to apply, but only with respect to PGRFA under Development. So after a fixed number of years, recipients could transfer/license PGRFA under Development that they have developed with fewer, or no, ‘encumbrances’ from the SMTA. In this way, potentially, the Recipient could, after a fixed number of years, transfer or license PGRFA under Development without passing on the benefit sharing obligations, or restrictions on the uses that can be made of the materials, etc.

19. There was not agreement among the FoCC group members concerning this proposal in general, which is why it is in square brackets. Furthermore, there was disagreement among the members about which additional articles – apart from the benefit sharing obligations which was already established in Article 4.3 – could theoretically be discontinued. For example, some argued that it would be impossible to terminate Article 6.1 (i.e., the recipient’s undertaking to use the materials for specified purposes) because that undertaking delimits the boundary between the ITPGRFA’s multilateral system and the Nagoya Protocol. Furthermore, the FoCC group did not recommend what period of time would be appropriate if this approach is eventually adopted by the WG-EFMLS and the Governing Body.

20. Some members of the group argued for a different combination of rights and obligations to be subject to expiry and continuation. They argue that when benefit sharing obligations cease, so too should the right to commercialize anything incorporating multilateral system germplasm. Accordingly, recipients could continue to use the material after the subscription period which they received during the subscription period for the purposes of research, training and breeding but they could not commercialize products incorporating those materials. If they did chose to commercialize such products, they would need to either subscribe again under the subscription model, or pay the mandatory benefit sharing payments under the single access window. They argue that this approach would address a potential loophole whereby a subscriber takes out a lot of materials before the end of its subscription period, and uses that material for an unlimited time. This approach is reflected in footnote 4, to Article 4.3, in Appendix 1. Other members of the FoCC group argue that this approach does not ultimately amount to an actual termination of the benefit-sharing provisions, since a user will always be required to make payments if it commercializes. If the Co-chairs or the WG-EFMLS decide that they want to adopt this approach, they can use the text of the footnote as a basis for further development.

21. Article 4.5 underscores the principle that after withdrawing, ex-subscribers will not be able to access additional materials from the multilateral system. Unless, of course, they subscribe again, or, if a single access model is also adopted, they access materials under that model. Since it is not clear at this point if there will be a single access model, the particular clause referring to the possibility of accessing material through that model is in square brackets. It is worth underscoring here that the prohibition against receiving additional materials post-subscription does not apply to the capital-M 'Material' that is being transferred under the SMTA accompanying that capital-M 'Material', but to other small-m materials that the recipient of the SMTA may otherwise want to access in the future. On one hand, it is potentially good practice to reinforce this message to recipients/subscribers in individual SMTAs and thus incorporate Article 4.5 for clarification. On the other hand, it may also be appropriate to include this information/rule in a decision by the Governing Body concerning the functioning of the subscription system overall. Developing such a decision for the Governing Body is beyond the mandate of this FoCC group.

IV. CLAUSES FOR EXPIRY IN THE SINGLE ACCESS MODEL (SMTA ANNEX 2)

22. Before explaining the text of the expiry clauses included in Appendix 2 of this report for the single access model, it is important to underscore that some FoCC members feel that no such clauses should be introduced into the SMTA, i.e., that mandatory benefit sharing obligations linked to this model should continue indefinitely, as they currently do in the SMTA. It is for this reason that both optional clauses addressing expiry of obligations related to the single access model in Appendix 2 of this report are in square brackets.

23. The FoCC members that argue against the introduction of expiry clauses with respect to the single access model consider that there should be withdrawal options for the subscription model as discussed above. The idea being that the discrepancy in treatment would create an incentive for recipients to opt for the subscription model.

24. Pursuant to article 0.1, the mandatory monetary benefit sharing obligation that is included in the single access model (currently Article 6.7 of the SMTA) would expire after a fixed period of time. The FoCC group was not able to agree upon the actual length of time.

25. The last sentence of this clause, "[a]ll other conditions in this Agreement shall continue to apply to the Recipient" means that recipients can continue to use the accessed materials, but only as prescribed by the SMTA. This means that, among other things, the SMTA would be used for subsequent transfers, and the benefit sharing clauses in that SMTA would apply to those subsequent recipients, even though the benefit-sharing clauses had expired for the previous recipient/provider of the material to them.

26. Article 0.2. introduces a qualifier to the principle set out in article 0.1 with respect to PGRFA under Development. It envisages that after a fixed number of years, in addition to payment obligations

expiring (as established in 0.1) a range of other clauses in the SMTA -- possibly even the entire SMTA -- would also cease to apply with respect to PGRFA under Development. In this way, potentially, the Recipient could, after a fixed number of years, transfer or license PGRFA under Development without passing on the benefit sharing obligations, or restrictions on the uses that can be made of the materials, etc.

27. There was not agreement among the FoCC group members concerning article 0.2 in general, which is another reason why it is in square brackets (in addition to the reason, listed above, that some FoCC members do not believe any form of expiry clause should be introduced in the SMTA with respect to materials accessed through the single access model). Furthermore, there was disagreement among the members about which additional articles – apart from the benefit sharing obligations which was already established in article 0.1 – could theoretically be discontinued. Here again, some members took the position that it would be impossible to terminate Article 6.1 (i.e., the recipient's undertaking to use the materials for specified purposes) because that undertaking delimits the boundary between the ITPGRFA's multilateral system and the Nagoya Protocol.

28. Here the FoCC group underscores another issue that arose during its discussions that is beyond its mandate to address. It was suggested by a member of the FoCC group that another, better way to identify when SMTA obligations should cease to apply to PGRFA under Development would be linked to redefining PGRFA under Development. This redefinition would involve reference to i) a minimum proportion of materials received from the multilateral system incorporated into the pedigree of PGRFA under Development, and or ii) incorporation of a trait of value based on genetic materials accessed from the MLS. With respect to the i) above, it was suggested that the minimum proportion threshold could be defined through reference to the number of crosses that are made between MLS accessed materials and non-MLS materials: more than 5 crosses with each material from the multilateral system and the progeny would not constitute PGRFA under Development, with the result that the benefit-sharing and possibly other conditions, perhaps the entire SMTA, would not apply. Five crosses or less, and all conditions would continue to apply. Alternatively, if the amount of material from the MLS incorporated into the improved material fell below this threshold level, but was nevertheless the genetic basis of a valuable trait, the improved material would still be considered PGRFA under Development, and the SMTA would continue to apply. This possible approach to defining expiry dates for rights and obligations is certainly relevant to the FoCC discussions, but it is beyond the group's mandate to develop options related to the redefinition of PGRFA under Development.

Appendix 1: FoCC Termination Clause group’s revisions of Annex 3 of the ‘Second Draft Revised SMTA’ Articles 1 and 4 regarding the subscription model

N.B. The base text is copied from Annex 3 of the ‘Second Draft Revised SMTA’ Articles 1 and 4. The highlighted changes (deleted text is ~~struck through~~, added text is double underlined) are the revisions made by the FoCC Termination Clause Group.

Annex 3

TERMS AND CONDITIONS OF THE SUBSCRIPTION SYSTEM (ARTICLE 6.11)

ARTICLE 1 — SUBSCRIPTION

[...]

1.3 The **Governing Body** may amend the terms of subscriptions Terms at any time, with the amended terms~~Subscription Terms~~ becoming ~~immediately~~ effective for new subscribers ~~or~~ at a time that the **Governing Body** shall specify. Such amended terms will not apply to these Subscription Terms, which will continue until the Recipient withdraws from the subscription in accordance with Article 4 below.

1.3 ~~The Governing Body~~ shall inform the ~~Recipient~~ of such amendments and, if the ~~Recipient~~ does not accept such amendments, he may withdraw from his ~~Subscription~~, in accordance with ~~Article 4~~ below.

[...]

ARTICLE 4 — DURATION OF AND WITHDRAWAL FROM THE SUBSCRIPTION

4.1 The **Subscription** shall be in force until so long as the **Recipient** ~~has not~~ withdrawsn from it.

4.2 The **Recipient** may withdraw from the his Subscription upon six months written notice ~~by it~~ to the **Governing Body** through its Secretary, ~~but in any event~~ not less than [XX] 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.

4.3 The mandatory benefit sharing provisions of Article 3 of these **Subscription Terms** will continue for [YY] years from the end of the **Subscription**, ~~or for [XX] years after the Recipient last received materials from the Multilateral System, whichever period is longer.~~ All other conditions of this Agreement shall continue to apply.⁴

[4.4 Notwithstanding Article 4.3 of these Subscription Terms, with respect to PGRFA under Development, [ZZ] years from the end of the Subscription, only Articles [6.1].[6.2][...] of this Agreement shall continue to apply.]

4.5 Upon its withdrawal of the Subscription, the Recipient will no longer be allowed to access PGRFA through the Multilateral System, unless the Recipient subscribes again, [or accesses materials pursuant to single access option set out in Article A.a.]

~~4.4 — In case of Article 1.3, the Recipient may withdraw from his Subscription within [XX weeks] from the date such changes become effective, by written notice to the Governing Body of the Treaty, through its Secretary. Such withdrawal shall take effect upon receipt of the written notice by the Secretary. Article 4.3 of these Subscription Terms applies.~~

⁴ The mandatory benefit sharing provisions of Article 3 of these **Subscription Terms** will continue for [YY] years from the end of the **Subscription**. Thereafter, the recipient may not **commercialize** new PGRFA **products**, unless it subscribes again, making related benefit-sharing payments. All other conditions of this Agreement shall continue to apply after the withdrawal from the first Subscription.

Appendix 2: Options for new clauses to be introduced into SMTA concerning expiry of terms and conditions associated with the single access model.

N.B: As discussed in the introduction, these options are intended to be included in SMTA Annex 2, but could possibly be included elsewhere, depending on the benefit sharing options that are eventually included in the SMTA

The text of the two options is in track changes to reflect the fact that they are entirely new text. There was no draft text to work from in the 'Second Draft Revised SMTA', because that draft only contained a Subscription System, removing both Articles 6.7 and 6.8 of the SMTA.

[0.1. The mandatory payment obligations arising from Article 6.7 of **this Agreement** will continue for [YY] 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. All other conditions of **this Agreement** shall continue to apply to the **Recipient**.]

[0.2. Notwithstanding Article 0.1. with respect to **PGRFA under Development**, after [ZZ] 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, only the provisions of Articles [6.1][6.2] [...] of **this Agreement** shall continue to apply to the **Recipient**.]