



Mr Shakeel Bhatti
Secretary

***International Treaty on Plant Genetic
Resources for Food and Agriculture***

FAO
Viale delle Terme di Caracalla 1
00153 Rome, ITALY

Fax: +39 06 5705 6347
E-mail: PGRFA-Treaty@fao.org

04.04.2016

ESA_16.0225.1

Subject: Notification NCP GB7-004 Working Group: Fifth Meeting of the *Ad Hoc* Open-Ended Working Group to Enhance the Functioning of the Multilateral System of Access and benefit-Sharing – Input from the European Seed Association regarding termination

Dear Mr Bhatti,

Dear Shakeel,

Following the notification dated February 15, 2016 and referred to in the subject of the present letter I would like to share with you hereby the input of ESA on the issue of termination.

First of all, we would like to underline that the issue of termination is a very complex one and has to be considered carefully and separately for each access mechanism. That first leads us to confirm once again that ESA is in favour of a multi-option solution which should at least include (1) a subscription option; (2) an option of payment based on commercialization; and (3) a fee per access option. Then, it also has to be pointed out that for options (1) and (3) one has to consider separately whether there should be an expiry to the option and whether there should be a possibility of voluntary termination. And last but not least the consequences of such expiry or termination for the rights and obligations with regard to original and derived material have to be determined. In light of this, in the following we outline our views on these issues separately for the subscription option and the option of payment based on commercialization.

1. Subscription option

1.1 Expiry

We believe that the subscription of a user should expire after the period of 10 years. With that also the payment obligation of the user should end. A period of 10 years is long enough – in our view – to bring in sustainable, long-term income to the BSF, however, at the end of this period the flexibility

should be provided to the user to decide whether or not to continue with the subscription. In case the user does not express its intention to end the subscription upon expiry, then the subscription should be automatically renewed for an additional year and such automatic renewal every year would then go on until the user decides to stop.

If upon expiry (of the initial 10 years or any of the additional years) the user decides to indeed end the subscription the consequences would be that the user could still continue using original material accessed from the MLS but would not be allowed to transfer such original material to others. As to material under development the user should be able to keep and continue using such material but for another 10 year period following the expiry of the subscription the user could only transfer such material under development to third parties under sMTA conditions. After these additional 10 years also the transfer of material under development becomes free, i.e. without any obligations stemming from the MLS.

1.2 Termination

Voluntary termination on specific grounds

We are of the view that under the subscription option there should be a possibility to terminate subscription upon certain grounds such as bankruptcy, termination of business or of breeding program at any moment during the subscription. It may well happen in reality that a user goes bankrupt or stops business in certain areas, and in such cases we are of the view that it is fair to allow for a possibility to step out of the subscription. Such termination would have the consequence that original material cannot be used or transferred any more but should be returned or destroyed. Derived material should not be used any more either and transfer of such material must happen only under sMTA conditions.

Voluntary termination without specific grounds

If the user does not have any of the particular reasons mentioned above, we believe that there still should be a possibility to voluntarily terminate the subscription. Such a possibility is normal in contracts. However such premature termination of subscription could only take place after a certain period of time spent in the subscription option and would need to have penalties as consequences such as for example penalty payment in order to avoid creating loopholes in the system.

1.3 Breach of contract

It also has to be mentioned that in case the user breaches its contractual obligation, the subscription of the user should be terminated and penalties should be applied.

2. Option of payment based on commercialization

2.1 Expiry

We believe that under the option of payment based on commercialization there should not be foreseen a defined term upon which the option would expire.

However, we are of the opinion that both the payment obligation and the tracking and tracing obligation under this option should end at a certain moment in time. This is key since neither perpetual payment obligations nor endless tracking and tracing obligations are possible for and desired by any commercial entity.

We believe that the payment obligation should end after a determined period of time, which could be 20 years starting from the signature of the sMTA. Similarly, the obligation to track and trace in material under development should be over after 20 years starting from the signature of the sMTA. During this 20 years period transfer of material under development could only take place under sMTA conditions but following this period, transfer of material under development would be free of obligations. As to the obligations regarding original material, those should remain in place, thus original material would always have to be transferred under sMTA conditions. In other terms, after 20 years following the signature of the sMTA articles 6.5, 6.6 and 6.7 of the sMTA would not apply any more.

2.2 Termination

Due to the construction of this option of payment based on commercialization (no expiry foreseen) we are of the view that a simple possibility of terminating the sMTA voluntarily would be necessary, regardless of the grounds for such termination.

In the case of such voluntary termination the payment obligation and the obligation to transfer material under development under sMTA conditions would remain in place until the 20 years following the signature of the sMTA is reached. However, original material would need to be given back or destroyed upon termination.

2.3 Breach of contract

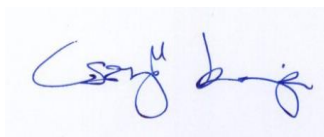
It also has to be mentioned that in case the user breaches its contractual obligation, the sMTA should be terminated and penalties should be applied.

Last, we would like to underline that the above expressed views are in line with the opinions of the International Seed Federation and should be understood as supporting those.

We hope that you find the above elements useful for the further discussions of the Working Group and that the Working Group will take due consideration of them.

I remain at your disposal for any question you may have regarding the above.

Sincerely yours,

A handwritten signature in blue ink, appearing to read 'Szonja Csörgő', is shown on a light blue background.

Szonja Csörgő

Director IP & Legal Affairs