



**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**

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

Geneva, Switzerland, 12-14 July 2016

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

I. INTRODUCTION

1. At its Sixth Session in October 2015, the Governing Body requested the *Ad Hoc* Open-ended Working Group to Enhance the Functioning of the Multilateral System of Access and Benefit-sharing (Working Group) “to establish small *ad hoc* Friends of the Co-chairs groups, where needed, e.g. on user categories, on crop categories, on legal modalities, on payment rates, and on a termination clause, at the request of the Working Group or its Co-Chairs.”
2. The mandate of the Friends of the Co-Chairs Group on a Termination Clause (FoCC-termination clause group) is to develop a text proposal that would form the basis for discussions by the Working Group to enable the inclusion of a termination clause in the revised Standard Material Transfer Agreement (SMTA).
3. The members of the FoCC-termination clause group are, in alphabetical order, Geoff Budd, Michael Halewood (facilitator), Francois Meienberg, Thomas Nickson, Rachel Wynberg, and Tomme Young. The FoCC-termination clause group did not meet in person. It held five teleconferences on March 2 and 23, May 10 and 31, and June 7, and corresponded between meetings by email. For most of the calls, one of the Co-chairs (Bert Visser) and Secretariat staff member (Tobias Kiene) attended as observers.
4. Unlike the other two FoCC groups, the FoCC-termination clause group was not requested to finalize its work prior 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). It was understood that advanced work by the group on developing optional text of legal clauses for the SMTA would have to be postponed until the other two FoCC groups had finished their deliberations, and the WG-EFMLS met in July. Consequently, this is an interim report, summarizing the work-in-progress of the FoCC-termination clause group. It is anticipated that further work on termination clauses will be conducted by a Friends of the Co-chairs group in the period following the fifth meeting of the WG-EFMLS.

II. OVERVIEW OF MAIN CONCLUSIONS

5. Although the discussions of the FoCC group were initially very broad, over time the group was able to distill a small number of core issues that need to be considered in the process of developing expiry or termination/ withdrawal clauses for the SMTA. Those issues are summarized in the following paragraphs. A more detailed summary of the group's considerations is set out in Annex 1 of this report.

6. The FoCC-termination clause group considered whether both expiry (automatic) and termination/withdrawal (at user request) would be needed. It also considered which obligations that the user would have entered into would continue. It concluded that benefit-sharing obligations on the use of the accessed germplasm would have to continue for a set number of years, whereas a set of other obligations would continue indefinitely, including to use the materials only for 'conservation and use for research, breeding and training for food and agriculture' (Article 6.1 of the SMTA); to not take out intellectual property rights that would restrict facilitated access to the materials in the form received (Article 6.2 of the SMTA); to pass on the same materials under a new SMTA (Article 6.4 of the SMTA); to report transfers to the GB (Article 5e of the SMTA); whereas the right of the Third Party Beneficiary to monitor and initiate legal proceedings (Article 8 of the SMTA) would not be terminated either. The FoCC has not yet come to a conclusion regarding ongoing obligations on PGRFA under Development as these will depend on outcomes of discussion regarding access and other equity considerations.

7. The FoCC-termination clause group addressed the subscription and single access models separately when considering expiry, termination/withdrawal options.¹

a. Subscription model

8. With respect to the subscription model, group's main conclusions were as follows:

Concerning the termination/ withdrawal from subscriptions

9. As a general principle, the subscription should continue until it is terminated/withdrawn-from by a subscriber by way of written notice six months in advance.² There should be a minimum, fixed period of time before a subscriber can terminate/withdraw. The group did not agree how long the minimum period of subscription should be, but notes that resolution of this issue requires simultaneous consideration of the longevity of benefit sharing obligations, considered below.

Concerning the expiry, termination/withdrawal from benefit-sharing obligations

10. The majority of the group generally endorsed the following formula: If the mandatory minimum duration of the subscription is short, then the monetary benefit sharing provisions should

¹ For the purposes of this report, 'expiry' refers to the automatic expiration of obligations in the SMTA after a set number of years. Voluntary 'termination' refers to the ability of a recipient to decide, subject to preset conditions, to terminate certain rights and obligations under the SMTA or the SMTA as a whole. The group considered that it might be more appropriate to refer to a subscriber or recipient as 'withdrawing' from a subscription rather than terminating it, based on the fact that 'termination' is not a commonly used legal term of art outside the United States (and other common law jurisdictions). Furthermore, it may be relevant that the UNIDROIT Principles of International Commercial Contracts 2004, (referred to in SMTA Article 7 concerning 'Applicable Law') Section 3 refers to termination as an outcome of non-performance. We recognize however that until now, the WG-EFMLS has been using the term 'termination' and that there appears to be a shared appreciation among the regions about what is meant by the term. For this reason, in this document, we refer to both termination/withdrawal in a hybridized way, with the idea that the WG-EFMLS may eventually transition to replacing 'termination' with 'withdrawal'.

² One option is to simply state that the subscription will continue indefinitely, and subscribers may terminate/withdraw from the subscription after [number] years. Another approach is to say that the initial subscription period is for [number] years. After that period, the subscription renews automatically on a year to year basis. Subscriber may not terminate/withdraw after fixed period of time. In the end, the practical effect, from the point of view of the subscriber, is substantially similar.

continue for a relatively longer period of time after the subscription is finished. If the mandatory period is longer, then the mandatory benefit sharing obligations can continue for a relatively shorter period of time after the subscription is finished.

11. As an alternative, the group considered the idea that mandatory benefit sharing obligations should continue for a fixed number of years after receipt of materials from the Multilateral System.

12. These options can potentially be combined. However the group felt that it needed some additional direction back from the WG-EFMLS on access and benefit sharing mechanisms before delving further into such details.

Concerning expiry, termination/ withdrawal from 'other' rights and obligations

13. Some group members felt that, while the mandatory benefit-sharing obligations can 'come to an end' as described above, the other rights and obligations in the SMTA should continue indefinitely for all PGRFA including PGRFA under Development. Accordingly, subsequent transfers from the recipient to downstream recipients should be under the SMTA.

14. Other group members argue that there should be a distinction for PGRFA under Development, i.e., that all SMTA obligations concerning PGRFA under Development should also 'come to an end'. Accordingly, there would be an option to distribute such materials to subsequent recipients without using the SMTA.

Concerning new obligations/restrictions triggered by expiry, termination/ withdrawal

15. The group agreed that ex-subscriber/recipient cannot access more material from the MLS after the subscription has ended.

16. The group also agreed that the subscriber may be required to make benefit sharing payments for additional years after subscription is cancelled, following the principles and formula discussed above.

17. Some members argued that after the subscription expires, recipients/developers of PGRFA under Development should be able to continue to use such material for research, training and breeding. However, they should not be allowed to start to commercialize PGRFA products incorporating this material unless the ex-subscriber re-subscribes and makes benefit-sharing payments once again.

b. Single access model

18. With respect to the single access model, the group identified four optional approaches to developing termination/withdrawal and or expiry clauses:

Option 1. The mandatory benefit-sharing obligations in the SMTA do not expire, but continue as is currently the case in the SMTA.

Option 2. The mandatory benefit-sharing provisions in the SMTA expire after a fixed number of years. All other rights and obligations in the SMTA continue. Subsequent transfers to downstream recipients are done using the SMTA. Subsequent recipients are bound by all terms of the SMTA including benefit sharing.

Option 3. The mandatory benefit-sharing provisions in the SMTA expire after a fixed number of years. All other rights and obligations in the SMTA continue for PGRFA that is *not* PGRFA under Development. Such material must be transferred to down-stream recipients using the SMTA. All SMTA obligations expire for PGRFA under Development. Subsequent transfers of PGRFA under Development are not under the SMTA. No SMTA obligations, including benefit sharing obligations, apply to down-stream recipients for PGRFA under Development.

Option 4. The mandatory benefit sharing provisions in the SMTA expire when the material received is incorporated into a new PGRFA and either a) constitutes X percent or less of the

genetic make-up of that new PGRFA or b) is not the genetic source of a commercially valuable trait.³ All other rights and obligations under the SMTA [do] [not] continue.

19. Over the course of its discussions, the group flagged a few issues that will eventually need to be considered, but which it was not able to consider given its time constraints. Those issues are: actual periods of time that would need to pass before a right or obligation under the SMTA expires (or could be voluntarily terminated/withdrawn from); actual duration of new obligations that could arise upon expiration or withdrawal; what to do with old SMTAs; options for early termination/withdrawal from SMTAs as a result of bankruptcy, force majeure, etc. The members of the group considered it was necessary to address the more fundamental issues highlighted in this report before tackling these issues.

³ This assumes that other ‘triggers’ for mandatory benefit sharing under SMTA article 6.7 are also triggered, including that the new PGRFA is subject to restrictions so that it is not available to others for research, training and breeding for food and agriculture.

ANNEX 1

**SMTA EXPIRY, TERMINATION/WITHDRAWAL CLAUSES UNDER SUBSCRIPTION
AND SINGLE ACCESS MODELS**

The FoCC-termination clause group addressed the subscription and single access models separately when considering expiry, termination/withdrawal options. These models are considered in Parts A and B respectively.

Part A: Under the subscription model**A.1. Termination/withdrawal or expiry of the subscription versus
termination/withdrawal or expiry of obligations and/or rights in the SMTA**

The subscription system as a whole may be constructed so that individual subscriptions expire after a fixed period of time or can be voluntarily terminated after a minimum period of time. Presumably these options will need to be reflected in the revised SMTA (unless a protocol to the Treaty is developed to create the superstructure for the subscription system). That still leaves open the question of what other rights and obligations under the SMTA expire along with the subscription, and which should continue. Given the rationale behind the revision of the SMTA and the creation of the subscription system – i.e., to increase user-based payments to the BSF – it is not surprising that the subscription and mandatory benefit-sharing options are so closely associated that they are sometimes treated as synonymous. Nonetheless, they are not the same thing; the FoCC group has worked hard to establish conceptual clarity in this regard.

A.2. Subscription expiry and/or termination/withdrawal clauses

The FoCC group considered a range of options concerning how subscriptions could come to an end, including fixed term subscriptions that would expire after a certain number of years (that could subsequently be renewed), and subscriptions that continue indefinitely, until such time as a subscriber withdraws by way of written notice, after a minimum period of time. Ultimately, the group expressed a general preference for the latter model because it is the simplest, with lowest transaction costs for the system overall, and for individual users.

Ultimately, it will be necessary to introduce appropriate text into the SMTA to reflect the approach the fifth WG-EFMLS decides is most appropriate.

**A.3. Obligations in the SMTA that should or should not be subject to expiry or
termination/withdrawal from the subscription**

The list of obligations (and rights) in the SMTA are reproduced in Appendix 1 to this report. They can be used as a guide to double-check that important issues are not inadvertently being overlooked.

Mandatory monetary benefit sharing obligation

The obligation that attracted most attention up to and including the fourth meeting of the WG-EFMLS concerned mandatory monetary benefit sharing. There was agreement within the FoCC group that mandatory monetary benefit sharing obligations under the subscription model can/should ‘come to an end’ in ways that are linked to the underlying subscription. The group discussed whether the benefit sharing obligation should end at the same time as the subscription, or continue for an additional period of years. One member argued that the subscription would have to last at least one year before a subscriber could terminate/withdraw from it, and that the benefit sharing obligations should continue for an additional ten years. Another member argued that the minimum subscription period (before a subscriber can terminate/withdraw from it) should be ten years, and benefit sharing obligation should last an additional one to three years.

Not being able to agree on the final formula, the group agreed upon the general principle that if the minimum period of time before a subscription can be ended by the subscriber is short (e.g., 1 year), then the number of years that the recipient should pay benefits after the subscription ends should be longer (e.g., 10 years). By way of corollary, if the initial minimum period of subscription is long (e.g. 10 years) then the number of years recipients should pay benefits after the subscription is ended should be shorter (e.g. 3 years). If the minimum period of subscription is long enough (e.g., 15 years), then, some members argued, it could be justifiable to have the benefit sharing obligations end with the subscription; other members were not in agreement on this last point.

Some group members also argued that, as an alternative, or in addition, the duration of benefit sharing obligations could be linked to the date of the last receipt of materials from the Multilateral System under the subscription. Accordingly, benefit-sharing obligations should continue for a fixed period of years (3-10 years) after a recipient's last receipt of materials from the MLS. So for example, if the minimum initial term for subscription lasts 10 years and the subscriber has provided notice in year 9 that she wants to end her subscription, but received materials for the last time on year 9, the recipient would need to make benefit sharing payments until year 12.

A variation concerning PGRFA and PGRFA under Development advocated by some group members is that while recipients should continue to be able to use PGRFA and PGRFA under Development for research, training and breeding after the expiration/termination of benefit sharing obligations, they should not be able to start to commercialize new PGRFA products that incorporate such materials in them (either PGRFA under Development, or Products as defined in the SMTA) unless they re-subscribe and start making benefit-sharing payments once again. Again, there is not agreement within the FoCC about this issue.

The reasoning behind these proposals is to avoid the possibility of creating a real or perceived loophole whereby a subscriber takes out a lot of materials before the end of its subscription period, and is using the parallel collection for an unlimited time.

Other obligations

The FoCC also considered other obligations under the SMTA, including the recipient's obligations to use the materials only for 'conservation and use for research, breeding and training for food and agriculture'; to not take out IPRs that would restrict facilitated access to the materials in the form received; to pass on the same materials under a new SMTA; to report transfers to the GB. They also considered possible termination of the right of the Third Party Beneficiary to monitor and initiate legal proceedings. There was agreement within the FoCC group that these obligations/clauses should not 'come to an end' when underlying subscriptions are terminated/withdrawn from in the case of PGRFA received under the SMTA that are not PGRFA under Development. For clarity, in this case, the group agreed that if such material were transferred from a recipient (later a provider) whose benefit sharing obligations have expired, the benefit sharing obligations would start afresh for the new recipient. To do otherwise would risk giving rise to creating a parallel system for Multilateral System PGRFA (that is not PGRFA under Development) without benefit-sharing obligations.

However, the issue has been raised within the FoCC that some people in private industry consider that, in addition to the mandatory benefit sharing clause, these other obligations (indeed, the entire SMTA) should also expire with respect to PGRFA under Development after a fixed number of years (i.e., linked to the expiry of the underlying subscription). The rationale for this position is that perpetual obligations on germplasm will affect their economic value. Track and trace obligations within a breeding program will influence (negatively) a recipient's decision to access and breed with such materials. Third parties will not want to access/license PGRFA under Development that is subject to these additional restrictions/obligations from developers who have incorporated materials from the Multilateral System. This in turn creates or maintains a disincentive for developers to access and incorporate materials from the MLS in the first place. Counter arguments are that this approach would exempt a large proportion of the materials whose use could give rise to monetary benefits to be shared through the BSF, and it would simultaneously create a parallel, competing system of access to materials that are substantially similar to (and improved over) those available through the MLS, but not subject to benefit-sharing conditions. There is not agreement within the FoCC group concerning

this issue. It looks forward to guidance from the fifth meeting of the WG-EFMLS on this issue, and other issues flagged in this report for consideration.

A.4. New obligations/conditions triggered by expiry or termination

Following from the discussion above, upon the end of the subscription, there could be new obligations to make benefit-sharing payments for a fixed number of years after the end of the subscription, or after the last receipt of materials under the SMTA.

Otherwise, the recipient could continue to use the materials received during the subscription period for the purposes established in the SMTA, passing them on with the SMTA, reporting those transfers to the GB, developing new PGRFA products, etc. That said, it is important to recall one member's position that if the ex-subscriber wanted to take a new PGRFA to market, it would need to re-subscribe and start making benefit-sharing payments once again.

Of course, the ex-subscriber could not access any additional materials from the Multilateral System.

A.5 Clusters of options for expiry, termination/withdrawal clauses based on A.1--A.5

The discussion in the forgoing sections can be 'boiled down' to be reflected in the following short descriptions of the basic elements of the termination/withdrawal options as considered by the FoCC Termination clause group.

Concerning the termination/ withdrawal from subscriptions

As a general principle, the subscription should continue until it is terminated by a subscriber by way of written notice six months in advance.⁴ There should be a minimum, fixed period of time before a subscriber can terminate/withdraw. The group did not agree how long the minimum period of subscription should be, but notes that resolution of this issue requires simultaneous consideration of the longevity of benefit sharing obligations, considered below.

Concerning the expiry, termination/ withdrawal from benefit-sharing obligations

The group generally endorsed the following formula: If the mandatory minimum duration of the subscription is short, then the monetary benefit sharing provisions should continue for a relatively longer period of time after the subscription is finished. If the mandatory period is longer, then the mandatory benefit sharing obligations can continue for a relatively shorter period of time after the subscription is finished.

In addition, the group considered the idea that mandatory benefit sharing obligations should continue for a fixed number of years after receipt of materials from the Multilateral System.

These options can potentially be combined. However the group felt that it needed some additional direction back from the WG-EFMLS on access and benefit sharing mechanisms before delving further into such details.

Concerning expiry, termination/withdrawal from 'other' rights and obligations

Some group members felt that, while the mandatory benefit-sharing obligations can 'come to an end' as described above, the other rights and obligations in the SMTA should continue indefinitely for all PGRFA including PGRFA under Development. Accordingly, subsequent transfers from the recipient to downstream recipients should be under the SMTA.

Other group members argue that there should be a distinction for PGRFA under Development, i.e., that all SMTA obligations concerning PGRFA under Development should also 'come to an end'.

⁴ One option is to simply state that the subscription will continue indefinitely, and subscribers may terminate/withdraw from the subscription after [number] years. Another approach is to say that the initial subscription period is for [number] years. After that period, the subscription renews automatically on a year to year basis. Subscriber may not terminate/withdraw after fixed period of time. In the end, the practical effect, from the point of view of the subscriber, is substantially similar.

Accordingly, there would be an option to distribute such materials to subsequent recipients without using the SMTA.

Concerning new obligations/restrictions triggered by expiry, termination/withdrawal

The group agreed that ex-subscriber/recipient cannot access more material from the MLS after the subscription has ended.

The group also agreed that the subscriber may be required to make benefit sharing payments for additional years after subscription is cancelled, following the principles and formula discussed above.

One member argues that after the subscription has been terminated/withdrawn from, the recipients/developers of PGRFA under Development should be able to continue to use such material for research, training and breeding. However, they should not be allowed to start to commercialize PGRFA products incorporating this material unless the ex-subscriber re-subscribes and makes benefit-sharing payments once again.

Part B: Under the single access model

B.1. Entry level question: should there be an expiry or termination/withdrawal clause for the existing single access model?

The discussion of options for expiry or termination/withdrawal clauses for the single access model must be prefaced with recognition that some members of the FoCC-termination group feel that the revised SMTA should operate on the subscription model exclusively (no other access options). If a single access option is included, the same people argue that expiry and or termination/withdrawal clauses should not be introduced; instead, the SMTA would stay the way it is, unrevised as far as Article 6.7 (and possibly other articles) is concerned. The rationale given was that this would create an incentive for users to opt for the subscription model (which would be subject to expiry or voluntary termination).

Subsection B.2, B.3 and B.4 consist of a further exploration of what termination/withdrawal and or expiry clauses could look like, if indeed it is accepted by WG-EFMLS and the Governing Body that some (or possibly all) of the obligations under the SMTA under the single access model should be subject to expiry or termination.

B.2. Expiry or termination/withdrawal clauses

Some FoCC members felt that a simple expiry clause should suffice to meet the concerns expressed to date by commercial users regarding the perpetual nature of the current mandatory monetary benefit sharing provisions in the SMTA and related tracking and tracing obligations. They were cautious about including additional clauses and considerations related to voluntary termination/withdrawal on the basis that they could add too much unjustified complexity to an already very complex system and SMTA.

None of the FoCC group members advocated for the introduction of a voluntary termination/withdrawal clause alone, i.e., in the absence of an expiry clause.

Some group members are in favour of introducing the concept of minimum thresholds of MLS materials, or traits of value from MLS materials incorporated in PGRFA products as a means of defining when benefit sharing (possibly all obligations) should expire. If a new PGRFA contains less than X% of genetic material incorporated from MLS germplasm, and or if it does not incorporate traits of value from MLS germplasm, then benefit sharing obligations should not apply to those PGRFA.

The issue of which type of clause is best suited will turn at least partly on the next question of what obligations should be subject to expiry/termination and which ones should necessarily continue, and under what conditions.

B.3. Obligations in the SMTA that should be subject to expiry/termination

To date, most of the WG-EFMLS's considerations with respect to termination or expiry clauses in the single access system have focused on mandatory monetary benefit sharing. Subject to the proviso expressed in B.1 above, some members of FoCC group argue that, if there is to be an expiry clause introduced for the single access option, it could/should apply to mandatory monetary benefit-sharing options. Accordingly, the SMTA could state that the obligations for benefit sharing under the revised articles 6.7, 6.8 will expire a fixed number of years after the material is transferred to the recipient under the SMTA.

As in the case of the subscription model, there is general agreement within the FoCC group that other obligations in the SMTA should continue indefinitely, and not be subject to expiry or voluntary termination when dealing with PGRFA that is not PGRFA under Development. These obligations include the recipient's obligations to use the materials only for 'conservation and use for research, breeding and training for food and agriculture'; to not take out IPRs that would restrict facilitated access to the materials in the form received; to pass on the same materials under a new SMTA⁵; to report transfers to the GB. Furthermore the right of the Third Party Beneficiary to monitor and initiate legal proceedings should also be continued.

However, again, with respect to PGRFA under Development, the issue was raised that some people in the private seed industry believe that all of the obligations under the SMTA (i.e. the entire SMTA) should cease to apply/expire with respect to PGRFA under Development [20][30] years after the incorporated material was received under an SMTA. Thereafter, the developer of that material should be able to make the PGRFA under Development available to anyone in the world, for any purpose, subject to any conditions they agree to with recipients. The rationale in support of this position, and the counter arguments, are the same as laid out in the context of the subscription system above.

Again, there is currently no agreement among the FoCC members on this last point.

B.4. Obligations/conditions triggered by expiry or termination

Perhaps the simplest approach would be to state that the mandatory benefit-sharing condition under the SMTA would expire [20] [a fixed number of] years after being transferred to the recipient. Thereafter, the recipient may continue to use the material for the purposes set out in the SMTA, transfer it using the SMTA, incorporate into PGRFA under Development and or new PGRFA products and commercialize them, etc. The only difference would be that the recipient would not need to make mandatory monetary benefit sharing payments once the [20 years][fixed term] had expired. For subsequent recipients of materials under the SMTA from this recipient (turned provider) the mandatory benefit sharing provisions of the SMTA would apply.⁶

B.5 Clusters of options for expiry clauses based on B.1--B.4

The group's deliberations as summarized in the previous sub-sections can be further 'boiled down' to the following four optional approaches to developing an expiry clause for the single access system.

Option 1. The mandatory benefit-sharing obligations in the SMTA do not expire, but continue as is currently the case in the SMTA.

Option 2. The mandatory benefit-sharing provisions in the SMTA expire after a fixed number of years. All other rights and obligations in the SMTA continue. Subsequent transfers to down stream recipients are done using the SMTA.⁷ Subsequent recipients are bound by all terms of the SMTA including benefit sharing.

⁵ For clarity, the FoCC group agrees that when such material is transferred from a recipient (later a provider) whose benefit sharing obligations have expired, the benefit sharing obligations would start afresh for the new recipient. To do otherwise would risk giving rise to a parallel system of MLS-derived PGRFA without benefit-sharing obligations.

⁶ By way of alternative, again, it has been suggested by some in the private sector that all SMTA conditions should be discontinued after a fixed period with respect to PGRFA under Development.

⁷ Benefit sharing obligations apply to subsequent recipients.

Option 3. The mandatory benefit-sharing provisions in the SMTA expire after a fixed number of years. All other rights and obligations in the SMTA continue for PGRFA that is not PGRFA under Development. Such material must be transferred to down-stream recipients using the SMTA.

All SMTA obligations expire for PGRFA under Development. Subsequent transfers of PGRFA under Development are not under the SMTA. No SMTA obligations, including benefit sharing obligations, apply to down-stream recipients for PGRFA under Development.

Option 4. The mandatory benefit sharing provisions in the SMTA expire when the material received is incorporated into a new PGRFA and either a) constitutes X percent or less of the genetic make-up of that new PGRFA or b) is not the genetic source of a commercially valuable trait.⁸ All other rights and obligations under the SMTA [do] [not] continue.

⁸ This assumes that other 'triggers' for mandatory benefit sharing under SMTA article 6.7 are also triggered, including that the new PGRFA is subject to restrictions so that it is not available to others for research, training and breeding for food and agriculture.

*Appendix 1:**Rights and obligations under the current version of the SMTA*

SMTA Article	Rights – description
5c	Access to PGRFA under development at the discretion of its developer
8.1, 8.2	Right to initiate the dispute settlement procedure (Provider and Recipient and 3 rd PB)
8.3	3 rd PB has right to request information
SMTA Article	Obligations – description
5a	Access to be accorded expeditiously, without need to track individual accessions, free of charge or minimal costs involved (Provider)
5b	Passport data and any other associated available non-confidential information to be made available with the Material (Provider)
5e	Provider to periodically inform the GB about MTAs entered into
6.1	Material only to be used or conserved for purposes of research, breeding and training for food and agriculture; not chemical, pharmaceutical and/or other non-food/feed industrial uses (Recipient)
6.2	No IPRs or other rights limiting facilitated access to Material or its parts or components, in the form received (Recipient)
6.3	Obligation of the Recipient to make the Material (and related information) available to the MLS, in case Recipient conserves the Material
6.4	Transfer of the Material by the Recipient to a subsequent recipient: under the terms and conditions of the SMTA through a new MTA, obligation to notify the GB
6.5	Transfer of PGRFA under development by the Recipient: under the terms and conditions of a new MTA (except 5a SMTA), identification of Material and PGRFAuD, obligation to notify the GB.
6.7/6.11, Annexes	Payment obligations of the Recipient
Annex 2, para. 3	Recipient to submit certain information to the GB within certain timeframe, in case of payments under Art. 6.7
Annex 3, para. 3	Payment obligation for subsequent recipient (0.5% of the Sales of any Product derived from PGRFAuD, whether or not available without restriction)
6.9	Obligation of the Recipient to make available to the MLS regarding non-confidential information resulting from R&D carried out on the Material
6.10	Obligation of the Recipient to transfer the benefit-sharing obligations to the assignee of an IPR on any Products developed from the Material or its components
SMTA	Other things – description
7.	Governing law – UNIDROIT
8.4	Dispute settlement procedures
9.1	No warranty by provider

ANNEX 2**TERMS OF REFERENCE OF THE FRIENDS OF THE CO-CHAIRS GROUP ON A
TERMINATION CLAUSE**

Objective

To introduce a termination clause in the Standard Material Transfer Agreement in order to make it more attractive for users to access PGRFA from the MLS.

It should be noted that the Working Group has not yet decided on access mechanisms. Thus, it is unclear whether a termination clause might be applied to plant genetic resources for food and agriculture accessed through the subscription system only, or also of accessed under alternative access mechanisms to be introduced in the SMTA.

Mandate

This FOCC group brings together legal and policy experts and is requested to develop a text proposal that would form the basis for discussions by the Working Group to enable the inclusion of a termination clause in the revised SMTA. The proposed text should be as simple as possible, and, if possible, should also accommodate access both under a future subscription system and under current single access mechanisms.

In commercial practice, the termination clause is generally negotiated at the end of the development of the contract as the parties have to understand the other terms and conditions of the contract to draft the termination clause. This FoCC Group will only undertake preliminary work during the period preceding the Fifth Session of the Working Group, and provide feedback on the following questions:

- Are there any missing elements in the Termination Clause made available the Draft Revised Standard Material Transfer Agreement (IT/OWG-EFMLS-4/15/3)?
- Could the Termination Clause be in principle further simplified?

Composition

Facilitator: Michael Halewood
Rachel Wynberg
François Meienberg
Thomas Nickson
Geoff Budd
Tomme Young

Ways of operation

The FoC will have its own facilitator who will receive support from the Secretariat to prepare the written output that will be presented to the Working Group and other specific tasks as needed. Only electronic exchanges are foreseen. No budget for physical meetings is available. Correspondence will be in English only. At the request of the FoCC members, the Co-Chairs are available at all times for advice or participation in the discussions.

Reporting deadline

The reporting deadline is May 31, 2016