



The object and purpose of the contract – the subject matter of the contract

THE **ABS**
CAPACITY
DEVELOPMENT
INITIATIVE



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DANISH MINISTRY
OF THE ENVIRONMENT



implemented by

giz

Programme Implementing
the Biodiversity Convention

Key element of the content of contracts:

- Parties – legal persons – turning them into being bound
- Subject of the contract – what is being transferred?
- Purpose
- Benefit sharing linked to specific utilisation or products (including IPR)
- Subsequent third party use
- Changes of intent
- Confidentiality
- Dispute settlement



The demand for genetic resources (GR):

Basic learnings:

- Know the user
- Know the use
- Seek to get the institutional structure
- Grasping the more long term
 - Building scenarios for what could happen best/worse case
- Alternative sources



The need for one-time access vs. repeated access to the resource :

- **One-time access: Difficult to control => lead to a need for surveillance**
- **Repeated access: Trust, transparency and stability**
- **Business models of bio-trade as a part or outcome of ABS**

- **Unlike or different models for ABS**



How contracts can pave the way to increased valorisation of GR and TK:

- The idea is to turn genetic resources and traditional knowledge into subjects /res for property
- Property in a wide sense
- Rather an asset from which to draw benefits



The situation in GR Policy and Law

International law

- The principle of sovereignty
- Sovereign rights over (natural resources) sovereignty to nat.

Hinder for cross-border enforcement of:

- law,
- policy,
- judgments and
- adm. decisions

Fiji

Mov
mate

Requirements to the contract

How will a contract interact with the IPR systems?

Norway

How will this contract be treated under the jurisdiction or legal situation?



The situation in GR Policy and Law

International law

- **Two or more worlds are meeting**
- - **Indigenous leaders and representatives**
 - **Corporate lawyers/ companies**
 - **Human right law**
 - **International environmental lawyers**
 - **Biotechnologists/ scientists/ biologists**

S
R

contract



be treated under the jurisdiction or legal situation?



The situation in GR Policy and Law

International law

- **Two or more worlds are meeting**
-

**The object must hold before a judge
in the user country – ultimate test**

S

Requirements to the
contract

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Subject of the contract

What is your contract about?

- **What are you transferring to the company?**
 - **The object of the contract/ subject matter**
+
 - **The actions that the user are allowed to do (positively and negatively defined)**
 - **Stipulate concrete consequences**



The overall virtue

- Remove uncertainties
- Describe what you foresee happening in the clearest language (ever)
- Make it possible for a non-biologist, lawyer judge to understand the *res*



Definition of 'Utilisation of GR'

ARTICLE 2: definitions

- (c) "Utilization of genetic resources" means to **conduct research and development** on the **genetic and/or biochemical composition** of genetic material, including through the application of biotechnology as defined in Article 2 of the Convention.
- (d) "Biotechnology" as defined in Article 2 of the Convention means **any technological application** that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.
- (e) "Derivative" means a **naturally occurring biochemical compound** resulting **from the genetic expression** or **metabolism** of biological or genetic resources, even if it does not contain functional units of heredity.

Observations:

- A bit complex
- The interesting thing is to explore the ways in which it is used



The variety of actors involved in ABS agreements:

- **Academics**
- **Master student and PhD**
- **Small scale company**
- **Public breeding companies**
- **Large commercial enteties**
- **Multinational companies**
- **Traders**
- **Collections**



The variety of actors involved in ABS agreements:

Academia

Is it possible to specify what is the subject matter of the contract?

■ Collections



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What does each of these users want from you?

What can you provide?



The great challenge: How to turn this into a written language definition:

- Clear
- Enforceable
- Understandable

- Collections



A case study – the teff contract:

- Teff varieties sent from Ethiopia to the Netherlands
- The purpose/ rational was twofold:
 - Making a new plant variety for being grown in Europe
 - Develop the market in Europe for Ethiopian grown teff
- Common ground of understanding
 - Make a long term relationship or get some quick benefits?



The subject in the teff case:

4 The scope of access

- 4.1 The **Provider** agrees that the **Company** accesses and uses the genetic resources of Teff specified in Annex 1 to this **agreement**.
- 4.2 Under this **agreement**, the **Company** is permitted to use the genetic resources of Teff only for the purpose of developing non-traditional Teff based food and beverage products that are listed in Annex 3 to this **agreement**.
- 4.3 The **Company** cannot use Teff for any other purposes (e.g. chemical, pharmaceutical etc.) whatsoever unless explicit written consent is given by the **Provider**.
- 4.4 The **Provider** shall not grant to other parties access to Teff genetic resources for the purpose of producing the products of the **Company** listed in Annex 3 of this **agreement** unless it secures the consent of the **Company**.
- 4.5 The **Company** is not permitted to access the traditional knowledge of Ethiopian communities on the conservation, cultivation and use of Teff. Therefore, the **Company** shall not claim any rights over, nor make commercial benefit out of, such traditional knowledge unless explicit written **agreement** is given to it by the **Provider**.
- 4.6 To avoid possible confusion between the traditional knowledge of Ethiopian local communities and inventions made by the **Company**, the **Provider** shall, upon submission by the **Company** of its research proposals, inform the **Company** of the

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Relationship to IPRs:

5 Intellectual property ownership

- 5.1 The **Company** shall neither claim nor obtain intellectual property rights over the genetic resources of Teff or over any component of the genetic resources. However, plant variety protection may be obtained over Teff varieties.
- 5.2 The plant variety protection rights over new Teff varieties the **Company** will develop shall be co-owned by the **Company** and **EARO**. Such varieties shall be used by **EARO** and the **Company** in such a way as not to damage the business interests of the **Company** in so far as the products listed in Annex 3 or the interests of **EARO** or the **Provider** are concerned.
- 5.3 The Teff varieties that are not developed by the **Company** shall be owned by the **Provider** on behalf of the Teff farming local communities of Ethiopia. If it is found to be in the interest of the **Provider** or the **Company**, such varieties may be registered in the name of **EARO**. The **Company** shall handle and cover the cost of such registration outside of Ethiopia, provided that it has the finances in the given budget year.



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Patent law

Autonomous international legal system - No links to ABS

Benin

Private law Agreement
MAT (PIC)

Europe (Norway)

Enter into a contract

*how to regulate the object
transferred and allowed acts
regards that object*

EPO system

*... and their own court
system*



The 'life span' of a patent

International law

WIPO, WTO, UPOV

Regional level

- Harmonisation: EU, AU
- Grant of patents: ARIPO, EPO,

National patent system:

**Application
-invention**

**Search
-prior
art**

Examination

- 'novelty'
- 'inventive'
- use

Grant

Enforcement

- Exclude others from using

Revocation



Selection of claims in the teff patent

Claims

1. A flour of a grain belonging to the genus *Eragrostis*, preferably *Eragrostis tef*, **characterized in that** the falling number of the grain at the moment of grinding is at least 250, preferably at least 300, more preferably at least 340, most preferably at least 380.
2. A flour according to claim 1, **characterized in that** the grain has after-ripened.
3. A flour according to claim 2, **characterized in that** the falling number of the grain at the moment of grinding is at least 1.01 times higher than at the moment of harvesting the grain, preferably at least 1.05, more preferably at least 1.20 and still more preferably at least 1.30 times higher.



Selection of claims in the teff patent

Claims

4. A flour according to any one of the preceding claims, **characterized in that** the grain is gluten-free.
5. A flour according to any one of the preceding claims, wherein the grains has been ground at least 4, preferably least 6, more preferably at least 8 weeks after harvesting.
6. A flour according to any one of the preceding claims, wherein the falling number of the grain at the moment of grinding is substantially stable for at least 2-3 weeks.
- ...
16. A **dough or batter** comprising flour according to any one of claims 1-15.
17. A **gluten-free dough** or batter comprising flour according to any one of claims 1-14.
18. A **food product** comprising flour according to any one of claims 1-15.



Exercise:

How would you define the subject matter of the contract transferred from Ethiopia to the Dutch company?

How to capture the value in the European market in contract terms?



Basic terminology

- Genetic resources
 - **“genetic material”** means any material of animal, plant, microbial or other biological origin containing functional units of heredity;
 - **“genetic includes-**
 - (a) any genetic material; or
 - (b) the genetic potential or characteristics of any species
- Access
- Benefit sharing

Choosing wording for a contract

Contract	Patent
Genetic resources	A flour of a grain belonging to the genus
Derivatives	After-ripened grain
Non-traditional Teff based food and beverage	A flour ... gluten-free
Any component of the genetic resources	A gluten-free dough or batter
	A method for baking a product (19)
	A food product or luxury food product prepared ...
	A plant variety

A fundamental relationship:

- What you are giving access to?
- Process – utilisation
- Product outcome:
 - Which products?
- **How is the contract defining the link between GR/ TK and product?**



Three aspects to think about

Define the object	Acts allowed	What is not allowed
The patent applicant Patent claims	Defined in TRIPS art 30 + national law	Defined TRIPS art 28 + national law
CBD: 'genetic resources'	Undefined - utilisation	undefined
Contract: What are you giving a right to? Genetic resources Traditional knowledge Increase specificity	Which acts are allowed?	Negative delimitation of what can not be done

