



Third party transfer and changes of intent – day 3

THE **ABS**
CAPACITY
DEVELOPMENT
INITIATIVE



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Training on Mutually Agreed Terms: Contracts for making ABS functional

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Changes:

- **New use of the biological material**
 - Not foreseen in the contract
 - Foreseen but depends on a new negotiation
- **Contract from one sector to a finding in another**
- **Academic a commercial**



The two step approach:

- **Supposes a trust-situation**
- **or a long-term interest on the user side**
 - Deposit in the providers account
 - A (bank) guarantee with specific incidents that allows you to use it
- **Follow-up capacity**
- **Caution: Australia has such a system, but till now no company has ever come back to re-negotiate. WHY?**



Contract law

International law

How to regulate what is transferred?

Surinam

Private law Agreement
MAT (PIC)

Norway

Accesses something
unknown

Genetic resources

To develop something
not pre-known

+knowledge

+technology

• **Changing form**

• **Relationship GR-
product**



Time challenge: access-utilisation-benefits



24:56



FRIDTJOF NANSENS INSTITUTT
FRIDTJOF NANSEN INSTITUTE

- **Relationship GR-product**
- www.fni.no

Challenges for ABS Contracts:

What is the idea of an ABS Contract?

- **Regulate the research and development**
 - **It is a utmost dynamic object in the contract**
 - **The raw material is unknown and the product is to be developed**
- **High degree of uncertainty – how to make good rules?**
- **How to construct mutual trust and collaboration?**



Changes on the user side:

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



Likely transfers to thirdparties:

- Academics ➤ A commercialised company
- Master student and PhD ➤ The univ./ commercial comp
- Small scale company ➤ Bought up/ bankrupt
- Public breeding companies ➤ Privatisation/ bought up
- Large commercial enteties ➤ Merger/ bought up/ bankrupt
- Multinational companies ➤ Transfer inside the corp struct
- Traders ➤ Any selling on to others
- Collections ➤ Any selling of/ access



Limit to a contract – binds the parties:

How can a contract adhere to these changes:

- End the rights – continue the obligations (no ending/termination clauses)
- Obligation to come back for new negotiations
- Specific regulations of scenarios
 - Collections and academic institutions
- Better to foresee different scenarios than attempt to prevent certain things from happening



From academic to commercial:

- Can be regulated – what is the potential scenario?
- Secure a % of the earnings
- Better to allow this to happen



From collection to commercial users:

- **Develop an Standard Material Transfer Agreement jointly for access to the material**
- **Clarify the discretion: Shall the country be involved in deciding on transfer or shall the collection act on behalf of the country**
- **Secure a % of the earnings which happens in the collection**
- **Regulate how this will proceed**



From collection to commercial users II:

■ “Trusted collections” in the EU

(19) Collections are major suppliers of genetic resources and traditional knowledge associated with genetic resources used in the Union.

A system of Union trusted collections should be set in place.

It would ensure that collections included in the register of Union trusted collections **effectively apply measures** to only supply samples of genetic resources to third persons with documentation providing evidence of legal acquisition and the establishment of mutually agreed terms, where required. A system of Union trusted collections should substantially lower the risk that illegally acquired genetic resources are used in the Union.

Competent authorities of Member States would verify if a collection meets the requirements for recognition as Union trusted collection. Users that acquire a genetic resource from a collection listed in the Union register should be considered to have exercised due diligence as regards the seeking of all necessary information. This should prove particularly beneficial for academic researchers as well as small and medium sized enterprises.



From collection to commercial users II:

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“Trusted collections” in the EU:

Article 5 Union trusted collections

1. The Commission shall establish and maintain a Union register of trusted collections. That register shall be internet-based, easily accessible to users, and shall include the collections of genetic resources identified as meeting the criteria of Union trusted collection.
2. Each Member State shall, upon request by a collection under its jurisdiction, consider the inclusion of this collection in the Union register of trusted collections. After verifying that the collection meets the criteria set out in paragraph 3, the Member State shall notify the Commission without delay of that collection's name, contact details, and type. The Commission shall without delay include the information thus received into the Union register of trusted collections.



In order for a collection to be included in the Union register of trusted collections, a collection owner shall demonstrate its capacity to:

- apply **standardised procedures** for exchanging samples of genetic resources and related information with other collections, and for supplying samples of genetic resources and related information to third persons for their use;
- have samples of genetic resources and related information supplied to third persons for their use only with **documentation** providing evidence that the resources and the information were accessed in accordance with applicable legal requirements and, where relevant, mutually agreed terms for the fair and equitable sharing of benefits;
- **keep records** of all samples of genetic resources and related information supplied to third persons for their use;
- establish or use unique identifiers for samples of genetic resources supplied to third persons;

use **appropriate tracking and monitoring** tools for exchanging samples of genetic resources and related information with other collections.



Changes:

- This Agreement commences on the Effective Date, and endures indefinitely, subject to the review process set out in clause 3.2 below, or until it is terminated by agreement or by a material breach of one of the Parties.
- Signature by the Parties shall bind them towards each other, and signature by the Minister of the Department of Environment will pronounce the agreement as valid and enforceable on third Parties in terms of the Act



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Right ends but obligations are maintained in the situation of breach



Changes:

3.5 Commencement, Duration, and Extent

This agreement commences on the Effective Date, and endures indefinitely, **until either** the discovery results in the registration of a patent or other form of intellectual property rights, which will lead to review as set out below, or until the agreement is terminated by agreement or by a material breach of one of the parties. The date of signature of the Minister below shall provide the date on which the agreement is enforceable in public and in terms of the Act.

- Terminates – why?
- Obligations endure and rights end?



8. Term of the Agreement and Termination (Bhutan)

8.1 This Agreement, unless terminated as provided herein, shall remain in effect for a period of **five (5) years** from the date of signing of this Agreement by the Parties. However the obligations of USER with respect to the utilization of Bhutan's genetic resources and/or associated information under this Agreement will remain in perpetuity.

8.2 The AA may terminate the rights under this Agreement and revoke the Scoping Permit by a written notice if USER defaults in the performance of any obligations under this Agreement and the default has not been remedied within sixty (60) days after the date of notice in writing of such default by AA.



Bought up/ merger:

- **How to secure that the obligation follows to the next entity**
- **How to ensure commitment**

In the event of any substantial changes in the management or shareholding of COMPANY, that alters the control structure of COMPANY and includes changes brought by a transfer of business units, merger, demerger or any other kind of corporate restructuring, COMPANY shall ensure that the obligations under this agreement perpetuate and provide written notice to the AA not less than **thirty (30)** days prior to initiating such changes.



Contract law

International law

How to regulate what is transferred?

