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## Access and benefit sharing agreement on

# teff

Lessons derived from the failure to implement the Teff Agreement also provide some insights into the implementation of the CBD and the Nagoya Protocol.

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Since the adoption of the Convention on Biological Diversity (CBD) in 1992 and its entry into force in 1993, various attempts have been made to establish agreements between providers and recipients of genetic resources on access to such resources and the fair and equitable sharing of the benefits arising out of their use. And there are a few success stories. That makes it important to analyse experiences to date in order to draw lessons for future access and benefit sharing (ABS) agreements. Such lessons will also be useful for the implementation of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, which was adopted at the 10th Conference of the Parties to the CBD in 2010. The Protocol is to enter into force 90 days after the 50th country has ratified it, and so far, only 15 countries have ratified it.

A recent report<sup>1</sup> of the Fridtjof Nansen Institute (FNI), Norway, focuses on the Agreement on Access to,

and Benefit Sharing from, Teff Genetic Resources (the Teff Agreement). This article presents some of the major findings and recommendations of the report.

### The Agreement

Negotiations on the Teff Agreement started in March 2004, and it was signed in April 2005 between the Ethiopian Institute of Biodiversity Conservation (IBC), together with what was then the Ethiopian Agricultural Research Organization (EARO), as one party, and Health and Performance Food International (HPFI), a Dutch company, as the other party. According to the agreement, HPFI could access specified teff varieties and use them to produce a wide range of specified food and beverage products not traditional in Ethiopia. In return, it had to provide monetary (such as shares in royalties, licence fees and profits) and non-monetary (such as research cooperation and the sharing of research results) benefits to Ethio-

pia. The agreement also stipulated that HPFI should recognize Ethiopia as the origin of teff genetic resources. Moreover, it prohibited access to traditional Ethiopian knowledge or to claiming of rights over such knowledge, or making commercial profits from its use.

### Disappointments and failure

Teff products were considered to have considerable marketing potential in Europe and the United States because teff is gluten-free and has high nutritional value. Thus, there were great expectations regarding the benefits that Ethiopia could derive from the agreement. However, these expectations failed to materialize. When the company was declared bankrupt in August 2009, the benefits that Ethiopia received were a meagre €4,000, and a small research project, which too got discontinued soon.

In the years prior to the bankruptcy, HPFI directors had transferred their shares to new companies. Therefore, even after HPFI's bankruptcy,

these companies continued to produce and sell teff flour and teff products, expanding their activities further to other countries and continents. Since it was the now-bankrupt HPFI that had been the party to the agreement, the other companies, even though operating under the same directors and partly the same owners, could continue selling teff flour and teff products with no obligations towards Ethiopia. After the HPFI bankruptcy, there was no longer any legal counterpart to the Teff Agreement.

### Explaining the failure

An important factor behind the failure of the Teff Agreement was that HPFI had overestimated the market potential for teff and was overly optimistic about potential profits. These miscalculations, combined with the company's lack of knowledge and experience on the subject of ABS, resulted in benefit sharing provisions which the company later found largely unable to fulfill.

Communication problems were another important factor. These problems started when the IBC asked for the upfront payment provided for in the Teff Agreement, which they did not receive. As per the agreement, HPFI was also supposed to provide to IBC its annual reports. But except for one annual report, that too in Dutch, it did not provide its annual reports to IBC. When it became clear to the IBC in 2007 that HPFI did not intend to comply with its obligations under the agreement, the situation worsened significantly. The communication difficulties between the IBC and the HPFI can also be linked to internal problems within the HPFI. Several shareholders left the company due to internal communication problems. Moreover, the HPFI had originally been established because of disagreements among shareholders in the original company, Larenstein Transfer and Soil and Crop Improvements (S&C).

According to HPFI, IBC demanding upfront payment in a situation where no benefits had yet been generated was a root cause of the problem.

But the IBC had reasons to expect upfront payments because the agreement, without any reference to the prospects of benefit generation, stated that a fixed minimum amount would be transferred to IBC in advance. HPFI had miscalculated the prospects for benefits and thus found it difficult to provide upfront payment as per the agreement. Nevertheless, when HPFI realized that it was not in a position to implement the provision on upfront payment, it should have made efforts to create better mutual understanding of the situation. Instead, it appeared to be irritated by the demands from IBC.

Coordination problems on the Ethiopian side were also a complicating factor. When S&C first contacted Debre Zeit Agricultural Research Centre of Ethiopia, which had released 18 of the 32 different varieties of teff, it brought in EARO under which it was organized and to which it was accountable. A Memorandum of Understanding with S&C was then negotiated by EARO, without involving the IBC, which was the agency that had been authorized to provide access to genetic resources. That could be because the IBC at that time was a subordinate body of EARO, and so EARO might have deemed it unnecessary to ask its subordinate for permission to provide access to teff genetic resources. There was also very limited flow of information at this juncture. Nevertheless, the IBC was brought in for the Teff Agreement, and from that point onwards, most of the relevant institutions were consulted.

HPFI wanted to export teff for further processing in the Netherlands, but the Ethiopian side did not agree to it and put a ban on its exports, but

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only since 2006. HPFI considers this as a substantial barrier to implement the Teff Agreement. HPFI had not foreseen that exporting teff from Ethiopia would prove problematic when negotiating the agreement. Nevertheless, it can be argued that the export ban was used partly as an excuse, and was not a central factor in explaining the failure of implementing the agreement. That is because HPFI did not accept the offer from Ethiopia to produce and process teff in Ethiopia for export, and because HPFI had already identified communication problems as a major problem in the collaboration.

A further explanatory factor is professionalism. In light of the miscalculations and communication problems, several stakeholders have argued that HPFI and S&C did not appear to be professional companies. Also, continuous internal conflicts, first in S&C and then in HPFI, indicate a lack of professionalism.

The formulation in the Teff Agreement prohibiting the patenting of genetic resources of teff was problematic. Probably its negotiators, unaware of the details of the patent claims, felt that the formulation in the agreement on this point would be sufficient. However, the patent, which the HPFI received on the processing of teff flour and related products in the Netherlands, from the European Patent Office in 2007, shows that the formulation on its own was easy to circumvent, as the patent in practice covers all ripe grain and all genetic resources of teff in addition to relevant products. Here we see the importance of ensuring that the intention of keeping genetic materials in the public domain cannot be circumvented by formulations, which in practice make the genetic resources in question patentable.

Another important factor is the absence of user-country measures. The responsibility to ensure that HPFI complied with its obligations under the Teff Agreement rested completely with the IBC, on behalf of Ethiopia. However, neither the IBC nor the Ethiopian Consulate in the Netherlands had the capacity or financial resources



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to follow up on this. Language and lack of understanding of the legal system were central barriers, and hiring of legal experts was costly. Moreover, Ethiopia had already suffered substantial losses connected with the agreement, and the prospects for getting these losses covered were low. A poor developing country has few prospects of getting justice, as long as there are no support measures from the side of user countries. In such a case, an ABS agreement must rest entirely on the mutual trust between the parties.

### Recommendations for provider countries

Failure to implement the Teff Agreement provides some useful lessons for future ABS arrangements. It shows that provider countries need to be more careful and active during negotiations and implementation. Below are some specific recommendations for provider countries:

- Improve coordination and information flow concerning bioprospecting and ABS issues between and within national institutions.
- Assess the professionalism of bioprospecting actors before entering into ABS agreements.
- Establish the language and venues of meetings for ABS agreements explicitly in any agreement texts.

- Include provisions in ABS agreements on how to deal with affiliated companies of the signatories to the agreement.
- Include effective provisions in ABS agreements on the protection of traditional knowledge.
- Ensure efficient mediation at a sufficiently early stage if difficulties arise.

### Recommendations concerning further implementation of the CBD and the Nagoya Protocol

Lessons derived from the failure to implement the Teff Agreement also provide some insights into the implementation of the CBD and the Nagoya Protocol. Below are some recommendations regarding the same:

- The Parties to the CBD may consider strengthening the Clearing House Mechanism, stipulated in Article 18 of the CBD and which serves as a means for sharing of information related to ABS, by introducing a separate entity in charge of assisting provider countries by providing information on bioprospecting applicants in order for provider countries to assess the applicant's professionalism and whether there is sufficient basis for establishing trust.
- The Parties to the CBD may consider establishing an ombudsman

facility to assist and support provider countries in cases of alleged violations against ABS agreements.

- As an alternative option to the ombudsman facility, the Parties to the CBD may consider establishing a Third Party Beneficiary, inspired by the model of the Third Party Beneficiary under the Multilateral System on ABS under the International Treaty on Plant Genetic Resources for Food and Agriculture.
- Focal points of ABS in user countries could be vested with the responsibility of providing access to the legal system of their countries to provider countries.
- The Parties to the CBD may consider organizing national workshops on ABS in user countries for companies working with genetic resources and bioprospecting, to inform about the aspects important for successful ABS arrangements. ■

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### Note

<sup>1</sup> Andersen, Regine and Tone Winge. 2012. The Access and Benefit-Sharing Agreement on Teff Genetic Resources: Facts and Lessons. FNI Report 6/2012. Lysaker, Norway: The Fridtjof Nansen Institute. <http://www.fni.no/doc&pdf/FNI-R0612.pdf>