

DRAFT¹

(This document was presented and discussed at 2 March 2016 during the conference “Genetische Ressourcen, Gesetze und Gute Praxis”, a meeting focusing in the implementation of the Nagoya Protocol in Germany.

Feedback and comments are welcome and should be submitted until 30 April 2016 to gwinter@uni-bremen.de)

MODEL CLAUSES FOR MUTUALLY AGREED TERMS ON ACCESS TO GENETIC RESOURCES AND BENEFIT SHARING recommended by Deutsche Forschungsgemeinschaft (DFG)

These model clauses are meant to serve researchers applying for DFG funding when negotiating access to genetic resources with provider state institutions. At times provider states do not have their own model agreement, or the one they use is over-restrictive or otherwise inappropriate from the user perspective. In such cases these model clauses may be offered as an alternative or as a source from which some parts may be taken up.

It depends on the legislation of the state where access is planned (called ‘provider state’) whether access is subject to prior consent at all. Many states do not require this. An increasing number of states do however have in place legislation regulating access.

Some provider states only require an access permit (‘prior consent’ in the terminology of the Nagoya Protocol –NP-). While the permit often comes in addition to other permits such as for research, environmental impact, entrance to protected areas, exportation, etc. - an awkward situation which has raised questions for one key-solutions -, no additional access agreement (‘mutually agreed terms’ in terms of the NP) will then be required.

If the transfer of material from the provider state to the DFG applicant’s state is envisaged it is apposite for the provider state to require the conclusion of a contractual access agreement. For due to principles of sovereignty administrative acts such as the access permit could not be enforced in the country where the material is used (called ‘user country’). In contrast, due to internationally agreed rules on contract law an access agreement can be enforced in foreign jurisdictions.

¹ The following model clauses were elaborated on a DFG grant by Evanson Chege Kamau and Gerd Winter, University of Bremen. They draw in parts on a model agreement which was developed as part of the EU funded MicroB3 project (www.microb3.eu). This model agreement was elaborated under leading participation of Gerd Winter and was published, including a commentary, in Evanson Chege Kamau, Gerd Winter, Peter-Tobias Stoll (eds.) Research and Development on Genetic Resources, Earthscan 2015, pp. 330-362

Some provider states facilitate consent for domestic research institutions, for instance by only requiring prior notification or a permit based on simplified procedure such as electronic communication. If the DFG applicant cooperates with a domestic individual or institution he/she should be prepared to assist the same when submitting the information requested for notification or permit, especially concerning possible transfer of material or data, and the sharing of non-monetary benefits. In such cases the following clauses can also be of help.

It should be noted that in cases of transnational cooperative projects the DFG applicant and the domestic researcher will conclude a research contract in addition to the ABS agreement. This contract will contain many more details of the cooperation. The present model clauses only include those core provisions for which the provider state wishes to establish its own legal basis for supervisory and enforcement action.

Opening Clause

THIS AGREEMENT is made on this _____ [*insert number of the day of the month*] day of _____ [*insert the month and the year*]

BETWEEN:

[*Insert the names of the provider institution, the authorized representative and the full contact details*]

(*“the **Provider**”*)

AND:

(1) _____
[*Insert the name of the recipient institution and its representative and full contact details*]

(2) _____
[*Insert the name of the head researcher and full contact details*]

(*“the **Recipients**”*)

hereinafter referred to as “the **Parties**”, and constitutes a contract.

Explanation

The opening clause contains the names and contacts of the parties to the agreement. In many ABS agreements and in the following the parties are referred to as “provider” and “recipient”.

In an attempt to raise certainty the provider is likely to show preference in dealing with a person who is attached to an institution in the user country, or who acts as a representative of such an institution. The reason behind this is because it may become difficult for the provider to trace the whereabouts of an individual once he/she leaves the provider country.

It is advised that as far as possible the recipient affiliates him- or herself to an institution and, prior to application of a permit of access, be in possession of proof that the institution will host the research and bear the responsibilities and liabilities foreseen in the agreement. It is even more recommendable to have the responsible researcher and the institution for which he or she works become contract partners. The involvement of the institution is expected to facilitate the implementation of the contract obligations.

Vice versa, the recipient should ascertain the genuineness of the party acting as a provider either in representation of the state or an indigenous/local community, if the community has established rights to grant access to genetic resources, or if access involves associated traditional knowledge and the community shall be contract partner.

PREAMBLE

Whereas activities involving access to genetic resources and associated traditional knowledge should be consistent with the provisions of the Convention on Biological Diversity, its Nagoya Protocol and other international, regional, national and sub-national laws and policies concerning biodiversity;

Whereas states have sovereign rights over their own biological resources and the authority to determine access to genetic resources rests with national governments;

Whereas access to genetic resources and benefit-sharing shall provide an incentive for the conservation and sustainable use of biodiversity;

Whereas the conditions of access and their utilization and their possible transfer should be specified;

Whereas the benefits arising from the use of genetic resources should be shared fairly and equitably with the country of origin that provided the genetic resources and with other stakeholders, as appropriate;

Acknowledging that access to genetic resources is subject to the prior informed consent of the party providing such genetic resources and to the establishment of mutually agreed terms;

Acknowledging the need to support research that enhances the general knowledge about biodiversity and thereby contributes to the conservation and sustainable use of biodiversity;

Acknowledging that therefore access to genetic resources for non-commercial research and development should be facilitated;

Explanation

A preamble (at times referred to as recitals) can be described as a statement of facts or assumptions upon which a *contract* is based. It introduces what the parties have agreed in the substantive part of the agreement. It puts the agreement into context. It describes the goals of the agreement. On the other hand, it does not contain any promises. It does not contain any restrictions or commitments and possesses no independent vitality as a source of rights or obligations. Parties may add other recitals if they wish, including concerning themselves, their capacity and their activities. But the preamble could also be removed entirely without disrupting the specific terms of the agreement. However, the preamble can be a useful tool of construing and interpreting ambiguous language of the substantive provisions of the agreement. If included, the preamble should avoid general statements but rather concretely formulate the underlying concerns and motivations, identify the issues addressed in and the actual need for an agreement as well as explain the reasons for its main provisions.

Article 1 OBJECTIVE AND REGULATORY CONTEXT OF THE AGREEMENT

1.1 This agreement sets out the terms that shall apply to the taking and use of genetic resources and/or traditional knowledge associated with genetic resources.

1.2. The recipient needs to obtain additional access consents and permits as required by the law of the provider state. These are, in particular:

1.3 The provider is satisfied that the consents and permits will be obtained in due course.

1.4 The provider is satisfied that these consents and permits were obtained.

1.5 The provider institution shall provide or obtain the following consents and permits for the recipient:

1.6 This agreement includes the prior informed consent of the provider.

(Delete non-pertinent paragraph)

Explanation

The first paragraph sets out the general objective of the agreement. The further paragraphs place the agreement in context with other consents and permits the recipient may have to obtain. The parties can agree that the recipient must have obtained them before the agreement is signed, or that they shall be obtained later on, or that the provider is prepared to provide them or secure them for the recipient. The agreement may also be understood to include the prior informed consent (PIC) which is often juxtaposed to the mutually agreed terms. Such other consents and permits may concern nature and environmental protection, general research oversight, exportation, etc.

Of particular importance are consents and permits for access to genetic resources belonging to indigenous communities or access to traditional knowledge associated with genetic resources. In such cases, and of course depending on the procedure established by domestic law, a representative of such communities must be asked to sign. The consent may be given in the form of a separate permit. Alternatively, the representative of such a community may sign the present agreement in the capacity of provider together with the state representative. The representative of the community must then provide his/her full identification and prove capacity to represent. Thus, it might be necessary to add a line to the provider line where the names of the indigenous/traditional local community and/or the representative and the full contact details are inserted.

Article 2. DEFINITIONS

As used in this agreement, the following terms shall have the meaning provided below.

"Access" means collecting genetic resources from the location where they are found in situ or ex situ, or acquiring them at the market or other places.

"Accessed genetic resources" means the genetic resources accessed on the basis of this agreement.

"Access permit" means written authorization issued by a public authority that allows a person to access genetic resources under certain conditions.

"Genetic resources" means any material of plant, animal, microbial or other origin containing functional units of heredity and having actual or potential value.

"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.

"Prior informed consent" means consent given by a (competent national authority) to access genetic resources based on advance research information provided by the user.

"Associated genetic knowledge" means any experimental or observational data, information, and other findings on the composition, life conditions, and functions of the accessed genetic resources.

“Traditional genetic knowledge” means knowledge grown from studies and practices of or within traditional or local communities concerning the composition, life conditions, and functions of genetic resources.

"Utilization of genetic resources" means research and/or development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology which is any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use.

"Utilization for commercial purposes" means research and development that aims at producing marketable associated knowledge, including products and processes developed, and bringing it to the market, be it through intellectual property rights or sales or otherwise, at more than incremental cost for dissemination.

“Utilization for non-commercial purposes” means research and development that aims at making associated knowledge, including products and processes developed, publicly available at no more than incremental costs for dissemination.

"Third party" means any person other than the recipient and the provider or any employee under their direct supervision and control.

Explanation

In an area such as ABS, which involves interaction of varying regulators and researchers, and which also has a system that operates at a global level e.g. the Clearing-House Mechanism of the CBD, giving new meanings to terms that have found consent internationally can be counterproductive causing instead ambiguity and uncertainty. Except for terms that have not been defined yet, or which are activity specific, we advise that agreements adopt the terminology of the relevant international instruments, e.g. the Convention on Biological Diversity, the Nagoya Protocol, the International Treaty on Plant Genetic Resources for Food and Agriculture and World Intellectual Property Organization, and their usage.

The definition of “utilization of genetic resources” is a compilation of the definitions of the terms “utilization of genetic resources” in Article 2 (c) NP and “biotechnology” in Article 2 (d) NP. According to Article 2 (c) NP, utilization means research and development. In other words, applied research and development of products or processes is implied in the term utilization. This is also indicated by the definition of biotechnology which includes the making or modifying of products and processes. Not included in the term is, however, the commercialization of developed products (cf. Article 5 NP).

The distinction between commercial and non-commercial purposes and their definitions need further explanation. It is indispensable because different procedures and obligations can and should be attached to them, such as the simplification of access and the right and obligation to publish research results. One may use a substantive criterion that distinguishes between basic research and applied research/development of products. However, results from basic research (such as genes and their function) may at an early stage of research be patented or synthesized and traded on the market, thus being

commercialized. Alternatively, an institutional criterion may be chosen by asking whether the research institution belongs to the public or private sector. But public research institutions are not necessarily confined to non-commercial research while private ones may sometimes work for the public domain.

For the present model clause it is suggested that the intention of the researcher and developer best distinguishes the two realms from each other: A commercial intention would be that the knowledge and derived products and processes shall be marketable and be brought to the market. By contrast, a non-commercial intention would be that the knowledge, products and processes – be they marketable or not – shall be made publicly accessible and usable at not more than incremental costs thus feeding and enhancing the public domain. By incremental costs it is understood that the costs of publication of knowledge may be charged to the users, but not the market value of the knowledge.

Article 3. ACCESS TO GENETIC RESOURCES AND/OR TRADITIONAL KNOWLEDGE

3.1 The recipient shall be entitled to collect or otherwise acquire samples as follows:

(a) Kinds of samples, including the kind of genetic resources, if known:

(b) Number and quantity of samples:

(c) Geographical location of collection:

(d) Time period for collection:

(The details may be laid down in an annex 1 to the agreement)

3.2 The recipient shall be entitled to obtain traditional knowledge associated with genetic resources as follows:

a) Kinds of traditional knowledge

b) Holder of the knowledge

c) Time period for collection

(To be deleted if no traditional knowledge shall be obtained)

3.3 The recipient shall within ... [time period to be specified by the parties] after collection of the samples notify to the provider the kinds of genetic resources which the recipient intends to utilize. The provider may within ... weeks [to be specified] raise objections in which case the parties will seek agreement on the kinds of genetic resources that the recipient is allowed to utilize.

(delete if not applicable)

3.4 The recipient shall be entitled to move the accessed genetic resources to the following locations:

Alternatively

3.4 The accessed genetic resources shall remain in the provider state for utilization therein

(delete what is not applicable)

3.5 The recipient shall deposit a sample of the materials with a local collaborating institution or a local repository.

(to be deleted if the provider does not require the recipient to deposit samples)

3.5 The costs for accessing and delivering the genetic resources and/or traditional knowledge shall be borne by the recipient.

Explanation

The provider may consent to a rough description of the genetic resources or traditional knowledge but may require the recipient to give a precise definition of the kind and number of specimens to be accessed and utilized *ex ante*. If this is not possible (for instance because the sample must first be screened), it is advisable for the applicant to seek for the inclusion of a clause (such as paragraph 3.3) allowing for *ex post* submission of such information and, upon mutual agreement with the provider, defining a reasonable timeline to do that.

The provider may be more willing to agree to a broad description of the sample if internal researchers participate in the research project.

Paragraph 3.4 contains the important decision whether the accessed genetic resources shall stay in the provider state or can be moved to the recipient's state.

Article 4. UTILIZATION OF THE ACCESSED GENETIC RESOURCES AND/OR TRADITIONAL KNOWLEDGE

4.1 The recipient shall be entitled to utilize the accessed genetic resources and or associated traditional knowledge for any non-commercial purpose/ the following non-commercial purposes.

Specifications if deemed necessary:

(delete the non-applicable option; delete the whole paragraph if the purpose is entirely commercial (see paragraph 4.4)

4.2 The recipient shall respect the customary laws, community protocols and procedures of indigenous and local communities when utilizing traditional knowledge associated with genetic resources.

(to be deleted if traditional knowledge is not involved)

4.3 The recipient shall seek the written prior informed consent of the provider and in good faith renegotiate this agreement with the provider if the purpose of the utilization changes from non-commercial to commercial.

4.4 The recipient shall be entitled to utilize the accessed genetic resources and /or traditional knowledge for commercial purposes:

Specifications, if deemed necessary:

(This clause is to be crossed out if not applicable, in particular if the purpose shall be non-commercial)

Explanation

The sovereign rights of provider states to regulate access to their genetic resources and traditional knowledge imply that the provider somehow determines the allowed research and development (or utilization in terms of the NP and this agreement). Of course it is a matter of negotiations to what extent the agreement leaves broad space or narrows it down. Following Article 8 (a) NP it is assumed that provider states will facilitate the utilization by allowing for a broad margin of research and development activities if the research and development is aimed at non-commercial purposes. But the parties may also agree that the utilization shall enable commercial intentions. A third option is that the original non-commercial intention later on changes into commercial, in which case the agreement must be renegotiated. Article 4 opens these options up.

Article 5. TRANSFER OF MATERIAL AND KNOWLEDGE TO THIRD PARTIES

5.1 The recipient may transfer to a third party the accessed GR or parts thereof, provided that the third party agrees with the recipient to be bound by the pertinent provisions of this agreement. The recipient shall notify the transfer to the provider.

Alternatively:

5.1 The recipient must not transfer the accessed genetic resources and/or the accessed traditional genetic knowledge or or parts thereof to any third party save with the written prior informed consent of the provider.

(delete the not adopted option)

5.2 The provider permits the recipient to transfer the accessed genetic resources and/or the accessed traditional genetic knowledge or parts thereof to collaborating researchers for the purposes of joint research and/or development on the same. Such researchers shall be listed and annexed to this agreement. The recipient shall be held accountable for any actions of collaborating scientists in violation of the pertinent provisions of this agreement.

(delete if not pertinent)

5.3 Paragraphs 5.1 and 5.2 apply also, if the recipient transfers to third parties any associated genetic knowledge.

Explanation

Article 5 describes the conditions under which the recipient is allowed to transfer the accessed genetic resources and/or the accessed traditional genetic knowledge to third parties. Paragraph 5.1 introduces the so called “viral licence clause” for such transfers. The viral licence concept means that the originally signed contract provisions between the provider and the recipient travel with the genetic material and the traditional genetic knowledge upon transfer to a third recipient and subsequent recipients: that is to say, the subsequent recipients are bound by the same obligations that were imposed on the (first) recipient. The provider is therefore reassured that the conditions he/she had negotiated will be respected further down in the transfer chain. This is an important clause given that, usually, provider states’ legislation tends not to facilitate access to genetic resources for research purposes due to legal uncertainty regarding the transfer to third parties and the treatment of materials and knowledge produced out of it by them.

As an alternative the provider may insist that any transfer to third persons shall be subject to its explicit consent. Of course, such clause complicates the research process and should be avoided if possible.

Third parties that are partners to the research project can be treated differently thus facilitating the transfer of the accessed genetic resources and/or traditional genetic knowledge among the project participants. In this case the recipient as lead researcher takes responsibility that the pertinent provisions of the agreement are respected by partners without them becoming formal parties to the agreement (paragraph 5.2).

Paragraph 5.3 extends the viral clause to the transfer of knowledge that has been generated in the course of the research and development process (here called associated genetic knowledge, see definition in Article 2. This extension may raise controversy. An argument against would be that the Nagoya Protocol rejected claims of provider states in intellectual property of the information contained in their genetic resources. However, provider states may use their acknowledged rights to the genetic material to allow access only under the condition that they can control the flow of knowledge produced on their genetic resources. Art. 5.3 follows this line, as does Art. 9.2 concerning the publication of research results.

Article 6. SCIENTIFIC COLLABORATION AND CAPACITY BUILDING

The recipient shall collaborate with institutions and persons from the provider state when planning and implementing research and development projects entailing access to genetic resources and/or associated traditional knowledge. Such collaboration shall basically take the following form details being agreed by separate cooperation contract:

☐ strengthening local capacities for technology transfer

☐ strengthening local capacities for administration and enforcement of ABS regulations

☐ education and training

☐ research funding to local research institution(s) to conduct research on species collected as samples or the ecosystem from which they were collected:

☐ involvement of local researchers in the utilization

(parts or all to be deleted if not appropriate)

Explanation

This clause is the first of five consecutive clauses that may be used to agree on the sharing of benefits. Four (Articles 6 – 9) are concerned with non-monetary benefits, one (Article 10) with monetary benefits. This weighting reflects the fact that most of the benefits for the provider state can and should be non-monetary, i.e. consist in capacity building and technology transfer. Only very rarely have expectations become true that the utilization of GR generates significant monetary yield.

The clauses only contain those core obligations which are of interest for the provider state (which is assumed to be the partner to the present model clauses). More details will be laid down in the research agreement the DFG applicant will conclude with the domestic researcher and research institutions (if any).

Article 6 determines one of the forms of benefit sharing, and possibly the most seminal one, i.e. the involvement of provider state researchers in the research and development activities. Most of the issues will be laid down in the research agreement between the DFG applicant and his/her counterpart. The basics will however also be included in the access agreement in order to enable the provider to enforce the provisions on its own legal basis.

Article 7. RECORD KEEPING AND REPORTING

7.1 The recipient shall maintain records concerning the handling, storage and physical movement of the samples and be prepared to provide such records to the provider if requested.

7.2 The recipient shall furnish the provider, or the authority or person designated by the same, with reports detailing the progress of the utilization and any occurring commercialization. The time of furnishment shall be every ____ (months, years) starting with ____ (date). The designated authority or person shall be _____.
(delete if not pertinent)

7.3 The recipient shall make reports to the indigenous and local communities concerned in seminars, workshops and other programmes detailing the progress and results of the utilization.

(Specify if deemed necessary)

(to be deleted if genetic resources of indigenous and local communities are not involved)

Explanation

Article 7 determines what records should be kept, how research progress should be documented and reports thereto shared with the provider. Both providers and users would have concerns about how reporting and sharing of information is handled.

Common concerns for the provider:

- A possible change of intent from non-commercial to commercial use
- Use of material for disallowed uses
- Third party transfer without the provider's knowledge and/or consent
- Use of public domain results for commercial purposes without benefit sharing
- Loss of control after the material leaves the territory of the provider
- Loss of track of generation of benefits

Common concerns for the recipient:

- Risk of premature disclosure of research information
- Monitoring and tracking burden during the research and after its conclusion
- Possibility of timely publication of final research results

Article 8. SHARING OF KNOWLEDGE

8.1 The recipient shall furnish the provider, or the authority or person designated by the same, with the associated genetic knowledge and provide assistance in their assessment or interpretation as reasonably requested.

_____ (insert name and address of authority or person if applicable)

8.2 The associated genetic knowledge shall be furnished ____ (weeks, months) prior to its publication. The provider shall ensure that the knowledge remains undisclosed to third parties until the recipient publishes them as required under § 9.

Alternatively:

8.2 The associated genetic knowledge shall, at the latest, be provided once it has been made publicly available.

Specifications if deemed necessary:

(Delete the non-applicable variant)

8.3 The obligations under paragraph 8.1 and 8.2 extend to associated genetic knowledge intended for commercial purposes according to Article 4.4. When using this knowledge the provider shall not prejudice any use for commercial purposes by the recipient.

Specifications, if deemed necessary:

(This clause is to be crossed out if not applicable)

8.4 The recipient shall acknowledge in any publication or public disclosure the provider country as the source and the role of local scientists, and, where such scientists have

collaborated closely with the recipient in the research endeavour, or have provided any significant advice or recommendations, their (co-)authorship.

8.5 The recipient shall acknowledge, in any publication arising out of the recipient's use of genetic resources of indigenous and/or local communities and/or traditional knowledge associated with such resources, such communities and their role, and, where any significant advice or recommendations have been provided by such communities, their co-authorship.

(to be deleted if genetic resources of indigenous and/or local communities and/or traditional knowledge associated with such resources are not involved)

8.6 The recipient shall furnish the provider or the authority or person designated by the same with a copy, scan or freely accessible electronic link of any publication based on the utilization of the accessed genetic resources.

_____ (insert name and address of authority or person if applicable)

Explanation

This clause establishes a second form of non-monetary benefit sharing besides scientific collaboration under Article 6, i.e. the sharing of research results. Even if the research results are published, the provider shall have privileged access by being individually informed, offered further explanation, acknowledged as origin and possible co-authorship and furnished with copies or freely accessible links.

Variants are proposed in relation to the time and content of knowledge sharing both in relation to non-commercial and commercial research.

The shared associated genetic knowledge may jeopardize subsequent publication or commercialisation. In such cases the provider must be liable not to disclose the knowledge to third persons.

Article 9. PUBLICATION OF KNOWLEDGE IN CASE OF NON-COMMERCIAL UTILIZATION

9.1 If the utilization is aimed at non-commercial purposes according to Art. 4.1 the recipient is entitled and obliged to publish or publicly disclose the results of the research and development of the accessed genetic resources and/or associated traditional knowledge.

9.2 The recipient shall earmark in any publication or public disclosure that the published knowledge may not be utilized for commercial purposes by third parties unless the prior informed consent of the provider has been obtained. The recipient shall make reasonable efforts to this effect if such earmarking is not offered by a public data base or other publication medium.

Alternatively:

9.2 The recipient shall mark in any publication or public disclosure that the published knowledge, insofar as it has a distinct market value, is not utilized for commercial purposes by third parties unless the prior informed consent of the provider has been obtained. If such marking is not offered by a public data base or other publication medium, the knowledge shall not be published or publicly disclosed.

(Delete non-applicable option)

9.3 The provider shall not hold the recipient accountable for any actions committed by third parties who utilize published knowledge in disrespect of earmarks according to paragraph 9.2.

9.4 The obligations under paragraphs 9.1 – 9.3 shall not prejudice any rights of the recipient resulting from renegotiation of this agreement thus permitting the recipient to utilize accessed genetic resources and/or traditional knowledge associated with such resources for commercial purposes.

Explanation

In this section, parties will fix terms and conditions on the handling of genetic knowledge associated with the accessed genetic resources and/or traditional knowledge associated with such resources upon the conclusion of the research undertaking. Under normal circumstances, the terms and conditions on access and use should suffice. Concretely, if the parties agree on utilization for public domain purposes, the recipient's obligations would be fulfilled once the results are placed in the public domain. The recipient would not have further obligations *vis-à-vis* the provider in this regard, except such as may survive the expiry or termination of the agreement. The provider state would benefit by having access to the publication media, and being provided with copies and explanation, and having its contribution mentioned in the publication.

However, the provider would barely benefit from public domain knowledge if its research capacity is weak or not committed to the specific kind of accessed genetic resources. In that case the provider may wish to at least benefit from eventual commercial uses by third parties of the published knowledge. In that case the provider might oblige the recipient to earmark the knowledge in its publication that any commercial utilization requires its prior consent. As an alternative, the parties may agree that, everything else being unrestrictedly public, the earmarking shall only be applied to knowledge having a distinct market value, because it can be patented or otherwise brought to the market.

Of course this comes with new challenges not only for the recipients, but also for databases. As some of them may not be willing to let the restriction travel with the data, paragraphs 9.2 opens up the alternative that either the recipient's burden is reduced to a due diligence duty or any publication shall be excluded.

Article 10. DUTY TO SHARE MONETARY BENEFITS

10.1 The recipient agrees to pay an up-front compensation of ____ (amount to be specified) to the provider, if the recipient utilizes the accessed genetic resources for proprietary purposes. The payment is due to the provider within --- months (term to be specified) after consent on the kinds of genetic resources to be utilized has been reached under Article 3.3. The payment shall be transferred to the following account of the provider:

(This clause is to be crossed out if not applicable)

10.2 If the recipient utilizes the accessed genetic resources or uses the associated knowledge for commercial purposes according to Art. 4.4, he/she must fairly and equitably share with the provider any monetary benefit obtained.

10.3 The share shall be determined by further negotiations between the Parties to this agreement.

Alternatively:

10.3 The share shall be _____ percent of the revenue from sales of the product or process based on the accessed genetic resources. It shall be paid on the basis of a financial report to be sent to the provider or an authority designated by the same at the end of any year of any revenue generation to the account designated by the same.

(Insert authority and account details if applicable)

10.5 If the recipient utilizes the accessed genetic resources or utilizes the associated genetic knowledge for commercial purposes without being entitled according to Article 4.4, and therefore in breach of the conditions of this agreement, he/she must share with the provider any monetary benefit obtained from such utilization or use. The share shall be _____ percent of the revenue from sales of the product or process based on the accessed genetic resources. It shall be paid on the basis of a financial report to be sent to the provider or an authority designated by the same in due time upon request by the same.

(Insert authority and account details if applicable)

(This Article or some of its paragraphs is to be crossed out if not applicable)

Explanation

Article 10 determines the sharing of monetary benefits in cases of commercial utilization of the accessed genetic resources. It covers those forms of proprietary utilization that were agreed upon between the Parties according to Article 4.4, and also forms of proprietary utilization that were not agreed and undertaken in breach of Article 4.

In cases of utilization of the accessed GR for commercial purposes, the recipient has to fairly and equitably share any monetary benefit obtained with the provider. Article 10.1 foresees the possibility of an up-front payment. It is suggested that such payment shall preferably not be agreed because at the negotiation stage of the agreement, the economic value of the genetic resources is unknown. While this clause may therefore be crossed out, it is compulsory to regulate an ex post compensation. The Parties may either decide to determine a posteriori the share of the benefits by further negotiation (10.3) or to determine a priori the share (in percentage) of the revenue from the sales of the products or processes based on the accessed GR (10.4). This clause thus establishes the possibility for an ex ante compensatory liability scheme.

The Article goes further to impose on the recipient the share of monetary benefits in cases where proprietary utilization of the accessed GR has been undertaken with no prior informed consent of the provider (if this would be required according to the provider's legislation), in breach of the agreement. For such cases of breach the Parties are required to define a priori the percentage of the share.

Article 11. OTHER LAWS TO BE RESPECTED

11.1 The recipient shall ensure that the collection, storage, transfer, utilization, and exportation of the genetic resources complies with all applicable laws of the provider State on the protection of human health and the environment, on taxes, on customs and on any other concern.

11.2 The recipient shall, if it has been established that the access caused or is likely to cause adverse impact on any species or population, or any ecosystem or ecological community, discontinue collection and removal of the materials and, at the recipient's cost, undertake measures to remedy, mitigate or hinder such impact as the case may demand.

Explanation

The Article brings attention to the recipient about the fact that in the course of sampling, utilizing, and moving of the genetic resources it might be confronted with certain domestic legal requirements protecting different public interests such as human health, the environment, or fiscal concerns.

Article 12. LIABILITY TO PREVENT AND COMPENSATE DAMAGE

12.1 The recipient indemnifies the provider against all liability and damage resulting from taking, using and disposing of the materials or traditional knowledge by the recipient.

12.2 The provider obliges himself to honour his obligations under this agreement and any other duty that is relevant for the realisation of this agreement in such a manner that does not result to delay, loss or any other inconvenience for the recipient.

Explanation

The clause establishes that the provider is indemnified against claims resulting from the utilisation by the recipient of the accessed GR or traditional knowledge. Vice versa the provider promises to properly observe its obligations. Liability of the provider for damage arising to the recipient is however not foreseen in order facilitate the provider's willingness to subscribe to the access agreement.

Article 13. TERMINATION OF AGREEMENT

13.1 This agreement may be terminated by either party at any time prior to a written notice of _____ [*insert the duration*] to the other party, for material breach of the agreement, or if either party, prior to a similar notice, informs the other party of its intent to terminate the agreement.

13.2 The obligations and rights contained in Articles ... shall survive the expiration or other termination of this agreement.

13.3 The recipient shall not assign any of the recipient's rights under this agreement to any person upon termination of this agreement.

Explanation

Termination provisions define how the contract may come to an end. The contract may expire naturally or through premature termination by either party. The provisions also determine what happens to the parties' rights after the contract has expired.

Article 14. DISPUTE RESOLUTION

14.1 No party shall, in case of a dispute arising from this agreement, commence court or arbitration proceedings (except proceedings for urgent interlocutory relief) other than in full compliance of this Article.

14.2 A party to this agreement claiming that a dispute has arisen under or in relation to this agreement must serve the other party with a written notice specifying the nature of the dispute on receipt of which the dispute resolution shall forthwith begin.

14.3 Any dispute arising from this agreement shall be resolved expeditiously foremost by negotiation in good faith failure to which the parties shall engage informal dispute resolution techniques.

14.4 If the dispute is not resolved by negotiation within _____ [*insert the duration*] [days] from the day of receipt of the notice by the party therewith served, the parties shall

choose dispute resolution by a neutral third party mediator or arbitrator, to be mutually agreed.

14.5 Upon nomination of a mediator or arbitrator under paragraph 14.4 the person nominated to mediate or arbitrate the dispute shall determine the procedure for mediation or arbitration, respectively. The decision of the arbitrator shall be final and binding.

Explanation

This section establishes the manner by which disputes between the parties shall be settled and the mechanisms that shall be applied.

Article 15. LEGAL CLAUSES

15.1 This agreement shall be in effect for a term of _____ [*insert the number of years of the agreement's validity*] years from the date of its execution [and would be automatically renewable for a further _____ [*insert the number of years of automatic renewal*] years, unless otherwise agreed to by the parties.

15.2 Any notice under this agreement may be served by hand delivery or by forwarding by prepaid post, return receipt requested, to the address of the party or to such other address as may be notified in writing by the party from time to time and in the case of service by post it shall be deemed to have been received upon receipt. Notices may be served by recognized overnight courier, facsimile transmission, fax or e-mail and are valid if in fact received, as demonstrated by a valid transmission report or notification of delivery.

15.3 This agreement constitutes the entire agreement between the parties relating to the subject matter. The parties do not make any representations or warranties except those contained in this agreement.

15.4 If any provision of this agreement, or any part thereof, is unenforceable or invalid for any reason, the relevant provision or part will be deemed to be modified to the extent necessary to remedy such unenforceability or invalidity or, if this is not possible, then such provision or part will be deleted from this agreement, without affecting the enforceability or validity of any other provision of this agreement.

15.5 Any matters not stipulated in this agreement or/and clarifications in connection with the interpretation or execution thereof shall be discussed by the parties in good faith in search of a reasonable and amicable solution.

15.6 This agreement may not be extended, cancelled or amended otherwise other than by a written agreement signed by the parties.

15.7 This agreement shall be construed and enforced in accordance with and governed by the laws and regulations of _____ [*insert the country having jurisdiction*], without regard to its conflict of law principles.

Explanation

This section establishes legal clauses generally contained in contracts.

IN WITNESS WHEREOF the **PARTIES** have duly executed this **AGREEMENT** this

_____ *[insert the number of the day of the month]* day of _____ *[insert the month and the year]*.

Signature:

[Full name of representative of the Provider]

Signature:

[Full name of representative of Recipient's Institution]

Signature:

[Full name of Head Researcher]

Explanation

This clause contains the names and signatures of the parties to the agreement –and by choice their witnesses– and the date of the signing of the contract. The act of appending signatures on the agreement constitutes the evidence that the parties have agreed to bind themselves by the terms of the agreement and that the agreement is therewith executed.

ANNEX 1

	Type of organism	Family, genus or species (scientific and common names if possible)	Part of organism to be collected	quantity		Full locality date (GIS* readings if possible)
				To be collected	To be removed	
Ex ample	Plant	Aloe ferox	Leaves	8 kg	4 kg	x
1.	x	x	x	x	x	x
2.	x	x	x	x	x	x

Explanation

The Annex contains documents or lists related to the agreement. The parties can append, for example, the list of species and samples allowed for access/collection. Often the provider demands a detailed description of the materials to be accessed possibly indicating the type, samples and quantity to be collected and removed. Hence it might be advisable to include such details in the annex, especially if a large number of materials are to be accessed and/or many locations are to be visited. Parties may also include copies of relevant laws and regulations in the annex.

* Geographic Information System or Geographical Information System.