Drafting successful ABS contracts – with a particular view to benefit sharing clauses

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28. September 2016, Nairobi
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FNI’s ABS Publications


- Implementing the Nagoya Protocol on ABS: A Hypothetical Case Study on Enforcing Benefit Sharing in Norway (with Ole Kristian Fauchald 2011)
Link to the AU Guidelines:

10 Benefit sharing AU Member States should, as appropriate, include provisions in their domestic legislative, administrative or policy measures to clarify ownership of GR and aTK, in order to provide legal certainty and ensure fair and equitable sharing of benefits arising from their utilization.

When negotiating benefit sharing arrangements, provisions should be made in MATs about how various costs will be covered.
10 [...] When developing community protocols or procedures, ILCs may wish to reflect on how they will be dealing with sharing of benefits deriving from the utilization of aTK shared by neighbouring or other communities, in the same country and elsewhere.

AU Member States shall support the creation of a GMBSM to address the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent.
What is a contract?

- A **contract** is an agreement between two or more parties that creates an obligation on all parties to perform (or not perform) a particular action or set of related actions.

- **Contract law** determines what makes a particular contract enforceable, and provides remedies when a contract is breached.

- Contract law is **highly diverse** between countries.

- If you don’t follow contract law (in a careful and legal manner), a contract will/may not be enforceable when you want it to be, and may be enforceable when you don’t want it to be.
The situation in GR Policy and Law

International law

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

Hinder for cross-border enforcement of:
- law,
- policy,
- judgments and
- adm. decisions

Kenya

Requirements to the contract
- What is required in the contract?

Movements of biological material and TK

Norway

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

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The situation in GR Policy and Law

International law

Different legal tools
- Memorandum of understanding
- Prior informed consent
- Two-step mutually agreed terms
- Contracts

What is required in the contract?

Movement of biological material and TK

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

Suriname

International law

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

Regional level

Hinder for cross-border enforcement of:
- law,
- policy,
- judgments
- adm. decisions

Different legal tools
- Memorandum of understanding
- Prior informed consent
- Two-step mutually agreed terms
- Contracts
The situation in GR Policy and Law

International law

Different legal tools

- Memorandum of understanding
- Prior informed consent
- Two-step mutually agreed terms
- Contracts that are enforceable in the user country – must meet contract law requirements
The situation in GR Policy and Law

International law

- The principle of sovereignty
- Sovereign rights over GR (permanent sovereignty to natural resources)

Hinder for cross-border enforcement of:
- law,
- policy,
- judgments and
- adm. decisions

How will a contract come around or be negotiated?

Kenya

Norway

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

Requirements to the contract

What is required in the contract?
Rules for drafting contracts:

1. Why is Awareness of Contract Law Important in ABS?
2. Develop a Commercial Plan for the Contractual Relationship
3. Avoid Ambiguity
4. Rules for Drafting Successful Access and Benefit Contracts
   4.1 Make Sure You Contract with the Right Parties
   4.2 Be Specific and Concrete Regarding All Substantive Obligations and Processes
   4.3 Manage and Address Major Risks
   4.4 Know the Possibilities and Limitations of Contract Law
   4.5 Expect the Best; Plan for the Worst
   4.6 Protect Contractual Rights/Expectations
   4.7 Avoid Mistaken Legal Assumptions
5. Using Models and Standards
6. Lessons for ABS Contracts, Drawn From Contract Law and Practice
Rules for drafting contracts:

1. **Why is Awareness of Contract Law Important in ABS?**

2. Develop a Commercial Plan for the Contractual Relationship

3. **Avoid Ambiguity**

4. **Rules for Drafting Successful Access and Benefit Contracts**
   - 4.1 Make Sure You Contract with the Right Parties
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5. Using Models and Standards

6. Lessons for ABS Contracts, Drawn From Contract Law and Practice
Challenges for ABS Contracts I:

- There is no agreed international contract law for ABS
- Long time between access, utilisation and benefit sharing
- The cross-boarder challenge: sovereignty, jurisdiction, Parties and private parties

What is the idea of an ABS Contract?

- Regulate the research and development
- It is a utmost dynamic object in the contract
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

Movement of biological material and TK

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

Contract: Two-party relationship (or more parties)

- Bind the entity where benefits will be created

- The legal “glue” is in the accept to be bound

- Ability to accept on behalf of someone/entities

Kenya

Private law Agreement
MAT (PIC)

Norway

Which entity is the one entitled to enter into an ABS Contract agreement?

How to ensure that the ‘right’ legal person is the one signing the contract?
Rules for drafting contracts:

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Avoid Ambiguity:

A first step to a functional benefit-sharing obligation is to reduce the ambiguity to an absolute minimum and formulate the contract with externally verifiable criteria.

- Contract law is built on specificity and concreteness, and cannot function without it.

- Terms like “access,” “benefit-sharing,” “genetic resources,” “traditional knowledge,” “derivative,” “utilization,” “provider,” “user” still have multiple meanings.

- Contracts are a legal tool that must create and impose concrete obligations.
Avoid Ambiguity:

- Unspecific terms leaves the interpretation of the meaning of the contract to national judges.
- If you cannot be more specific in your drafting, how can you expect a judge later to understand your contract better than its drafters?
Avoid Ambiguity:

- Unspecific terms leaves the interpretation of the meaning of the contract to national judges.
- If you cannot be more specific in your drafting, how can you expect a judge later to understand your contract better than its drafters?
- On this point there is a need in shifting paradigm in ABS to make contracts work otherwise there will be a whole generation of ABS contracts being signed that will end up as unenforceable.
Rules for drafting contracts:

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Be Specific and Concrete Regarding All Substantive Obligations and Processes:

Content of a benefit-sharing clause:

- Definition of the material
- Manners of its utilisation that are legal under the contract
- Stipulate exact manner in which benefit sharing obligations will be discharged
- Definition of what acts are not allowed
- Clear stipulation of consequences of breaches
The overall virtue

- Remove uncertainties
- Describe what you foresee happening in the clearest language (ever) step-by-step till the expected scenario has been ended
- Make it possible for a non-biologist, lawyer judge to understand all steps and their consequences
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:

- Complex and ambiguous – open to interpretations
- Can work in international law - must be specified in national law
- Not at all suited for being the wording in a contract
The variety of actors involved in ABS agreements:

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

What does each of these users want from you?
What can you provide?
The variety of actors involved in ABS agreements:

- Academics
- Master student and PhD
- Small scale company
- Public breeding companies
- Large commercial entities
- Multinational companies

The great challenge:

How to turn this into a written language definition:

- Clear
- Enforceable
- Understandable
A case study – the teff contract:

- Teff varieties send 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
The subject in the teff case:

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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
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.
Relationship to IPRs:

5 Intellectual property ownership

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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.
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.
Be Specific and Concrete Regarding All Substantive Obligations and Processes:

Content of a benefit-sharing clause:

- Definition of the material
- Manners of its utilisation that are legal under the contract
- Stipulate exact manner in which benefit sharing obligations will be discharged
- Definition of what acts are not allowed
- Clear stipulation of consequences of breaches
A second great challenge:

Exact manners to stipulates the sharing-obligations

- Concrete
- Well defined and externally verifiable trigger points
- Calculable
- Legal certain for both parties
- Enforceable
How to draft benefit-sharing obligations:

• Clear and defined trigger-points
• What shall be shared?
• When?
• How to calculate?
• What happens if/ when something goes wrong?
Benefit sharing in a scoping agreement

2.4 Benefit sharing under the ABS Agreement during Actualization Phase shall be based on each party’s contribution, fairness and mutual consensus.

Questions:

- Based on each contribution – relative contribution.
  - Danger: low value to natural resources, high value to research
- ‘mutual consensus’ – what happens if they do not agree?
Benefit sharing clause

4.1 Calculation of Benefits and payment

THE COMPANY will make payment to the ILC of an amount of three percent (3%) of the net sales (as per THE COMPANY’s accounting standards) of the Products by THE COMPANY, whether in [one specific country] or abroad. The payments will be calculated bi-annually (every six months) by THE COMPANY and paid to the Trust fund managed by MINISTRY within two months after the end of each six month period.
Example agreement

4.1 Calculation of Benefits and payment

THE COMPANY will make payment to the ILC of an amount of three percent (3%) of the net sales (as per THE COMPANY’s accounting standards) of the Products by THE COMPANY, whether in [one specific country] or abroad. The payments will be calculated bi-annually (every six months) by THE COMPANY and paid to the Trust fund managed by MINISTRY within two months after the end of each six month period.

- three percent (3%)
- net sales, after all and every cost the Company might relate
- as per the Company’s accounting standards [themselves?]
- the Products – which products the coffee machine or only this particular cappuccino?
- which branch of the company
- whether in one country or abroad – Will this national branch sell anything abroad?
Benefit-sharing calculation principles:

- Relative contribution?
- What if the GR was taken out of the scenario?
- The low value of nature as a problem
- How to calculate? Net or gross?
Building a lab:

- Identify the vision for bio-innovation
- Identify your needs
- Which institutional structure exists?
- What can each bio-prospector contribute with?
- Development aid contribution?

Griffith University and Eskites as ‘best practices’

Bhutan
The link to IPRs - patents:

- Apply for a patent together? Common recognition as inventors
- A patent is an object for property – can be transferred
- Prohibit patenting?
- Encourage patenting?
- How to ensure a part
- Relative values?
Be Specific and Concrete Regarding All Substantive Obligations and Processes:

Formulate in most concrete manner possible:

(i) the resources accessed and its location (genetic resources and/or ATK),

(ii) the user’s rights and expectations,

(iii) the provider’s rights and expectations,

(iv) the user’s obligations,

(v) the provider’s obligations and

(vi) the overall contract objective.

The text of the contract must convey exactly what is included and what the parties have agreed to do, with the highest possible level of clarity and detail.
Rules for drafting contracts:

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Rules for drafting contracts:

There is a need in shifting paradigm in ABS to make contracts work otherwise there will be a whole generation of ABS contracts being signed that will end up as unenforceable.

(copy-past is not useful)
Countries making examples available:

Kenya
Cameroon
Ethiopia
South Africa

My worry: that we are making agreements that will not be fulfilled and will not be possible to enforce.
MoU Kenya:

- ARTICLE 8: BENEFIT SHARING

- Benefits resulting from utilization of biological resources by all partners will be used in accordance with the CBD and Nagoya Protocol and in line with the country’s constitution 2010 and the domestic legislations such as Wildlife Conservation and Management Act 2013 and EMCA 2015.

- Partners shall take inventory of all potential and derived benefits guided by the IP audit reports and develop agreeable benefit sharing plan.
ARTICLE 8: BENEFIT SHARING

Benefits shall include both monetary and non-monetary on the R&D value chain, which will include both academic and commercial steps. These benefits will be shared in accordance with the benefit sharing plan in the Annex V and utilized as stipulated in Nagoya protocol Article 9,

The benefit sharing plan shall consider the communities living adjacent to the project sites and their indigenous knowledge.
MoU Kenya:

ARTICLE 6: INTELLECTUAL PROPERTY RIGHTS AND PROTECTION

I. [...].

II. The Project Partners will undertake IP audit before, during and towards the end of the project to show the baseline and progress of existing and generated intellectual property. All generated and potential IP will be recorded in special note books and all parties to the IP generated will sign specific IP agreements as per the SOP.

III. All partner institutions will submit their IP policy to the Project Management Office and harmonized appropriately under this MoU.
ARTICLE 6: INTELLECTUAL PROPERTY RIGHTS AND PROTECTION

IV. The accessed biological resources shall remain the property of the Kenyan Government and all voucher specimen duplicates will be deposited in Kenyan designated repositories and other agreed repositories as per established standards in conformity with Nagoya protocol instruments of PIC, MAT and MTA.

VIII. Transfer of generated IP rights by partner to new ownership will be subject to authorization by the provider and consultations by all partners under this MoU.
Prior Informed Consent AGREEMENT:

20 academic visits to THE USER COUNTRY for Kenyan professionals will be supported for exchange programs in institutions in THE USER COUNTRY under xxx and other fellowships. The Academic Exchange Programs will be undertaken to THE USER COUNTRY by the Kenyans spread across the five years as outlined in the project proposal (Year 1, 4 visits; year 2, 5 visits, Year 3, 4 visits, Year 4, 5 visits and year 5, 2 visits). ONE INSTITUTION will have 8 and ONE INSTITUTION 6 of these visits.
4. Utilization of Material

1. The Researcher shall utilize the material for said research program only.

2. The Researcher cannot use the material for commercial purpose nor can it obtain any intellectual property right on the material.

3. The Researcher retains the material for the period of the research in "destination country" whereupon it shall return any remaining unused material to the Provider.
Ethiopia: material transfer agreement:

5. Other Obligations

1. The Researcher shall not transfer the material to any third party whosoever without first notifying to and securing explicit written agreement of the Provider.

2. Any third party that obtains the material from the Researcher in the absence of permission from the Provider shall not have any right whatsoever over the material and its components.
Ethiopia: material transfer agreement:

5. Other Obligations

3. The Researcher shall notify the Provider the progress of its research through periodic research report.

4. The Researcher shall at the end of the research present to the Provider the hard and electronic copy of the research results.

5. Any benefit that accrues from the use of this material shall be subject to the relevant existing and future national and international laws.
4.3 The **User** shall not use *Aloe debrana* genetic/biological resource for any other purposes whatsoever unless an explicitly written permit is given by the **Provider**.

4.4 The **User** shall not transfer the *Aloe debrana* genetic/biological resource to third parties the Access permit or the rights and obligations there under without obtaining explicit written consent from the **Provider** to that effect.

4.11 The **User** shall neither claim any rights over, nor make commercial benefit out of such community knowledge unless an explicitly written permit is given to it by the **Provider**.
Ethiopia: contract

5. Intellectual property ownership right

5.1. The User shall neither claim nor obtain intellectual property rights over Aloe debranagenetic/biological resource or any parts thereof and associated community knowledge.

5.2. The User shall acknowledge and declare Ethiopia as a geographic origin of Aloedebrana genetic/biological resource for the product developed therefrom.

5.3. Any joint inventions made by Parties based on Aloedebrana genetic/biological resource or parts thereof shall be jointly owned by the Parties.
Ethiopia: contract

6. Transfer to third parties

The **User** shall not transfer *Aloe debrana* genetic/biological resource or any component of it to the third parties for any purpose without first obtaining explicit written consent from the **Provider**.
8. Benefit sharing

The **User** has agreed to share the following benefits that arise out of the utilization of genetic/biological resource:

8.1 The **User** agrees to pay to the **Provider** a **yearly amount** of xxx amount of Ethiopian Birr per year.

8.2 The mode of payment will be effective at the first month of each agreement year.

8.3 The years for the purpose of this agreement begins from the date of the entry into force of this agreement.
8. Benefit sharing

The **User** has agreed to share the following benefits that arise out of the utilization of genetic/biological resource:

8.4 The **User** shall give the community priority to supply the raw materials of *Aloe debrana* genetic/biological resource required for the production of Aloe oil/gel.

8.5 The **User** shall have the obligation to provide equipment and technological support to the communities for the proper collection and harvesting of *Aloe debrana* genetic/biological resource.
8. Benefit sharing

The User has agreed to share the following benefits that arise out of the utilization of genetic/biological resource:

8.6 The User shall include Ethiopian scientists/researchers involved in the research undertaken. The kind of research on which Ethiopian scientists/researchers will participate and the mode of participation shall be specified by written mutual agreements of the parties.

8.7 The User shall share with the Provider the results of research it will undertake on the genetic/biological resource. Accordingly, the User shall share with the Provider the knowledge or technologies it may generate using Aloe debrana genetic/biological resource.
8. Benefit sharing

The User has agreed to share the following benefits that arise out of the utilization of genetic/biological resource:

8.8 The User shall give training for the concerned institutions and local communities to enhance skills in genetic/biological resource conservation, development, propagation and sustainable use of Aloe debrana genetic/biological resource.
Cameroon:

Article 3: Duration of the MAT

(1) The present MAT are agreed upon for a duration of three (3) years, renewable by agreement of the parties on site or off site.

(4) With respect to the sharing of monetary benefits during the commercialization phase,
   - To guarantee the purchase of the dried roots at the price of 2700 FCFA per kilo, to be paid by bank transfer according to the amounts specified in article 6 and onto the accounts specified in annex 1;
   - To define jointly with the Local Community at the beginning of each year the quantity of the dried roots requested;
Cameroon:

4 [...] 

- To pay 25% of the **benefits** before taxes **associated with the selling** of products arising from the **utilization of genetic material** of the plant *Echinops giganteus* by bank account to the Local Community specified in annex 1;

- To ensure transparency in the sharing of monetary benefits resulting from commercialization of the genetic resources.
(5) With respect to intellectual property rights,

- Not to hold any rights to intellectual property on the genetic material of *Echinops giganteus*;
- To only sell products deriving from the roots of *Echinops giganteus* as agreed with the Local Community. Any other new product must be negotiated in a new agreement with the Local Community according to the laws and regulations in force in Cameroon.
South Africa:

6.1 As consideration for the KNOWLEDGE conveyed to the USER by the PROVIDER, the PARTIES hereby agree that, should commercially viable PRODUCT(S) be developed by the USER as a result of it use of the KNOWLEDGE, the PROVIDER shall be entitled to, for the duration of the ROYALTY PERIOD, share in the FINANCIAL BENEFITS in the form of ROYALTIES […]
South Africa:

7. REVIEW OF AGREEMENT

This agreement will be reviewed every ______________ (fill in agreed timeframe), with a view to amending the agreement if necessary.

One month prior to every review, the permit holder must disclose any new material information with regard to the biotrade / bioprospecting to all stakeholders to enable stakeholders to participate in the review from an informed basis.
8. THIRD PARTY TRANSFER

The RECIPIENT/PERMIT APPLICANT undertakes not to transfer the indigenous genetic and biological resources to a Third Party, without the written authorization of the ACCESS PROVIDER; and then only under a legally binding written agreement with the ACCESS PROVIDER based on this Agreement.
11. BREACH AND TERMINATION

11. If a party to this agreement ("the breaching party") breaches any material provision of this agreement, the other party ("the aggrieved Party") shall be entitled to deliver to the breaching party a written notice requiring the breaching party to rectify that breach within 30 days of receipt. If the breaching party remains in breach of such provision within 30 days after receipt of the notice, the aggrieved party shall be entitled (without derogating from any of its other rights or remedies under this agreement or at law)
11. BREACH AND TERMINATION

11.1 To sue for immediate specific performance of any of the defaulting party’s obligations under this agreement, whether or not such obligation is then due, or

11.2 To cancel this agreement, in which case written notice of the cancellation shall be given to the defaulting Party, provided that the remedy of specific performance or damages would not adequately prevent the aggrieved party from being prejudiced.
Thank you for your attention

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