Benefit sharing: development of frameworks and contracts

Hanoi, Vietnam 27-28 June 2016

David Vivas Eugui, Legal Officer, DITC, UNCTAD
Kiyoshi Adachi. Legal Officer. DIAE, UNCTAD
Table of contents

• Benefit sharing in ABS, BioTrade and TK
• Type of Benefits
• Type of contracts
• Key clauses
  – ABS
  – BioTrade
  – TK
  – Sample clauses
• Some issues for policy makers and regulators
BENEFITS UNDER ABS SYSTEMS

• Consequence of access and utilization to GRs (R&D + commercialization)
• Transfer of low quantities of material, samples of extracts (few Kg or even grs)
• Linked to bioprospecting, identification of new applications & product development
• Level of benefit linked to results of R&D + commercialization (medium and long term)
• Mandatory
• To be shared with competent authorities (government)

BENEFITS FROM BIOTRADE

• Consequence of use and provision of native biological resources (natural ingredients)
• Transfer of significant quantities of unprocessed material often in bulks
  It may imply at a certain stage also the utilization of GRs or TK
• Linked to sourcing agreements and payment or goods & services provided
• BioTrade P&C are voluntary but payment of price is business requirement
• Benefits emerge along the value chain to commercial success (short & medium term)
• To be shared with local providers and processors)

BENEFITS FROM TRADITIONAL KNOWLEDGE

• Consequence of access and use of TK (intangible).
• Multi use (from R&D to wide range of goods and services)
• Linked to licenses and biocultural protocols
• Only mandatory in countries with legislation
• Level of benefit depends on the value of the knowledge and use (short to long term)
• To be shared with competent authority (indigenous and local communities)
Type of Benefits

**ABS**
- Monetary
  - Access fees
  - Milestone payments
  - Royalties
  - R&D funding
  - Joint ventures
  - Joint IP ownership
- Non-Monetary
  - Sharing of R&D results
  - Scientific collaboration
  - Education & training
  - Technology transfer
  - Capacity building
  - Local development

**BioTrade**
- Monetary
  - Linked to the market value
  - Fair Price (products, volume, quality & ethics)
  - Exclusive sourcing
  - Value evolves as we move upward in the value chain
- Non-Monetary
  - Local Employment
  - Local value addition
  - Sustainable practices
  - Education & training
  - Technology transfer
  - Capacity building
  - Local development

**TK**
- Monetary
  - Access fees
  - Licenses fees
  - Joint IP ownership
- Non-Monetary
  - Moral rights & recognition
  - Local development
  - Food, seeds and inputs
  - Support to health & livelihoods
  - Preservation of TK context
  - Infrastructure
  - Employment

*HOWEVER IN PRACTICE THEYE ARE NOT CLEAR CUT AS ACTIVITIES MAY OVERLAP AND NOT ALL BENEFITS HAPPEN SIMULTANEOUSLY*
<table>
<thead>
<tr>
<th><strong>ABS contract / MAT</strong></th>
<th><strong>BioTrade Agreements</strong></th>
<th><strong>TK Licenses / Agreements</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Object:</strong> access, utilization and transfer of materials</td>
<td><strong>Object:</strong> sales of goods and services (e.g. natural ingredients)</td>
<td><strong>Object:</strong> access to knowledge (intangible)</td>
</tr>
<tr>
<td><strong>Subjects:</strong> State vs Private (research center or company)</td>
<td><strong>Subjects:</strong> business to business</td>
<td><strong>Subject:</strong> indigenous and local communities and Private (research center or company)</td>
</tr>
<tr>
<td><strong>Cause:</strong> R&amp;D and commercialization (potentially transfer)</td>
<td><strong>Cause:</strong> sourcing, processing &amp; commercialization (potentially R&amp;D)</td>
<td><strong>Cause:</strong> R&amp;D, fixation, production, commercialization</td>
</tr>
<tr>
<td><strong>Date</strong></td>
<td><strong>Date</strong></td>
<td><strong>Date</strong></td>
</tr>
<tr>
<td><strong>Applicable law:</strong> usually public law + contract law</td>
<td><strong>Applicable law:</strong> commercial contractual law</td>
<td><strong>Applicable law:</strong> TK regulations + private law + costmary law</td>
</tr>
</tbody>
</table>
Key elements of an ABS contracts

- Definitions
- Project information
- Performance obligations
- Material and the treatment of the material
- Uses
- Transfers
- Benefits
- Exclusivity
- Intellectual property clauses and licensing
- Confidentiality
- Warranties
- Conservation measures
- Monitoring and reporting
- Term and Termination
- Governing law
- Dispute settlement, enforcement
Key elements of an BioTrade contracts

- Definitions
- Performance obligations
- Price & Benefits
- Volume
- Qualities
- Exclusivity
- Place and time for delivery
- Sustainability and social measures
- Verification of standards
- Intellectual property clauses and licensing
- Confidentiality & warranties
- Term and Termination
- Governing law
- Dispute settlement, enforcement
Key elements of TK licenses

• Definitions
• Performance obligations
• Uses
• Benefits
• Exclusivity
• Non authorised action (e.g. use of religious symbols)
• Customary law principles
• Sustainability and social measures
• Use in the local context
• Moral rights & recognition
• Intellectual property clauses and licensing
• Confidentiality & warranties
• Term and Termination
• Governing law
• Dispute settlement, enforcement
CAPACITY-BUILDING
- The Access Party will transfer to an Australian research institution or to Indigenous Access Providers knowledge to make use of genetic resources, including biotechnology, or knowledge that is relevant to the conservation and sustainable use of biological diversity.

TECHNOLOGY TRANSFER
- The Access Party will transfer to an Australian research institution technology to make use of genetic resources, including biotechnology, or technology that is relevant to the conservation and sustainable use of biological diversity. The terms of transfer will be negotiated with the receiving institution, and should be developed under fair and favourable terms, including concessional and preferential terms.

SCIENTIFIC R&D PROGRAMMES
- The Access Party will collaborate with Australian research institutions and contribute to scientific research and development programmes, particularly biotechnological research activities.
Issues for policy makers and regulators

- There are multiple benefit sharing schemes (ABS, BT and TK), which may often overlap depending on the type of project or business.
- Benefits may be quite diverse. Benefits are not always profit.
- In the case of a BioTrade value chain ABS and TK may arise at any time depending on the intention and type of project activity which is undertaken.
- The intention of the user is key for contract negotiations – although often it is difficult to ex ante predict where R&D processes may go.
- There are different types of benefit sharing, we need to align them.
- Too many forms of benefit sharing may defeat the purpose.
- There can be multiple transfers along the value chain for different purposes.
- Contracts for ABS, BioTrade and TK are quite different and have different legal effects.
- We need to consider these difference when negotiating.
- We need some form of recognition of existing relations under BioTrade for ABS and TK protection purposes and vise versa.
Questions and answers

The seeds we plant today
Are the fruits of tomorrow
Our future lies in our hands

Thank you