



Benefit sharing clauses in ABS Contracts

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Key element of the content of contracts:

- Parties – legal persons
- Subject of the contract – what is being transferred?
- Purpose
- **Benefit sharing linked to specific utilisation or products (including IPR)**
- Subsequent third party use
- Changes of intent
- Confidentiality
- Dispute settlement



Nagoya takes us *back to access*

Why did the NP take us back to access

- User country: relax in their implementation
- Providing countries: afraid of loosing their sovereign rights (defensive strategy)

This shows the importance of your ABS policy and law

The Nagoya Protocol has rules to help



Trigger-points for the sharing ‘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.

Task: Is this a good trigger-point in an agreement?



The overall virtue

- Remove uncertainties
- Describe what you foresee happening in the clearest language (ever)
- Make it possible for a non-biologist, lawyer judge to understand the *res*



Benefit-sharing virtues:

- 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?

Nestle agreement

4.1 Calculation of Benefits and payment

Nestlé will make payment to the ILCs of an amount of three percent (3%) of the net sales (as per Nestle accounting standards) of the Products by Nestlé, whether in South Africa or abroad. The payments will be calculated bi-annually (every six months) by Nestlé and paid to the Bioprospecting Trust fund managed by Department of Environment Affairs within two months after the end of each six month period.



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- **three percent (3%)**
- **net sales, after all and every cost Nestle might**
- **as per Nestle accounting standards [themselves?]**
- **the Products – which products the coffee machine or only this particular cappucino?**
- **Nestlé [which Nestlé?]**
- **whether in South Africa or abroad – Will Nestle SA 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-pro prospector contribute with?
- Development aid contribution?

Griffith University and Eskites as 'best practices'

Buthan



Specific Undertakings:

5.1 The INDIGENOUS PEOPLE undertake and offer their cooperation and collaboration with COMPANY, if required, regarding their endorsement and marketing assistance regarding all Products as herein defined.

- **Remuneration for endorsement or marketing assistance?**
- **Instead of b.sh?**
- **Who will determine what is required? Mutually accepted?**
- **Any legitimate reasons to say no? Procedures?**



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?



Draft some clauses for your contract:

- **Subject matter that you transfer**
- **Benefit sharing obligations, when, how much and so on**
- **Thirdparties**



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Thank you for your attention

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