

THE ABS
CAPACITY
DEVELOPMENT
INITIATIVE



L'INITIATIVE DE
RENFORCEMENT
DES CAPACITES
POUR L'APA

Negotiation dynamics

Introduction

Dr. Hartmut Meyer

ABS Capacity Development Initiative

02.12.2015, Paramaribo, Suriname

funded by



DANISH MINISTRY
OF THE ENVIRONMENT



implemented by



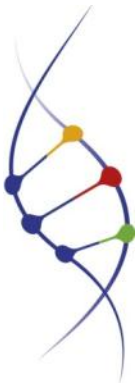
What makes ABS negotiations special?



Although ABS contracts are business contracts, ABS negotiations differ from ordinary business negotiations in crucial aspects:

- Partners:** One of the partners is government
In special cases a third partner are indigenous peoples or local communities
- Ownership:** One partner has sovereign rights in determining about transferring the subject of the deal to the other partner
In special cases, the ownership rests with the providing partner
- Economics:** The receiving partner does not (only) pay a price for the material but needs to “share benefits arising from utilisation”

What makes ABS negotiations special?



Due political and economic reasons, ABS negotiations carry a “historic burden” with them:

- History:** Extension of colonial practises into the post-colonial times trigger allegations of biopiracy; critical groups consider ABS agreements as disguised biopiracy
- Human Rights:** The fight by indigenous peoples over land rights is closely linked with the receiving the right to determine on access to genetic resources
- Emotions:** Historic and current injustice as well as asymmetrical distribution of resources and power potentially load ABS negotiations with strong emotions

ABS requires wise agreements



The seminal work '*Getting to Yes: Negotiating Without Giving In*' by Roger Fisher and William Ury (1981) characterises wise agreements as follows:

- Meeting the legitimate interests of each party
- Respects rights
- Resolves conflicting interests
- Being durable

Four principles for negotiations



Fisher and Ury suggest four principles to overcome common pitfalls of business negotiations:

1. Separate people from the problem
2. Focus on interests, not positions
3. Invent options for mutual gain
4. Insist on using objective criteria

Separate people from the problem



ABS negotiations between the leaders of five clans of an indigenous community in Southern Africa and a large multinational food, beverage and cosmetic company regarding the use of the former's traditional knowledge to develop hair and skin care lotions.

Case 1: Resolving personal issues



- The company offered to support the travel of all the indigenous leaders to the negotiations
- Due to budgetary constraints they could only fund the travel of two leaders, with only short notice
- One of the clan leaders reacted in writing a strong letter to the company accusing them of neo-colonialism and deliberately weakening the participation of the indigenous representatives
- Offended by the accusations, the company refused to engage in any further negotiations unless the letter was retracted and an apology offered
- Negotiations were able to continue only after the supreme head of all the clans wrote an apology to the company on behalf of all the leaders and distanced themselves from the accusations

Focus on interests, not positions



The government of a South Asian country initiated ABS negotiations with an Australian textile company seeking to do research on the unique fiber of a local plant found in the South Asian country with the aim of developing a new textile variety. At the final stages of the negotiation, the parties had to agree upon the way forward if the Australian company at the conclusion of their research decided that it would not go ahead with textile production.

Case 2: Clarifying interests



Government's position: Because of simplified access to genetic resources for the purpose of research with the expectation of production, the research results should belong to the government, if there were no production.

Company's position: Because of investments, the research results should belong to them.

Government's interest: Company shall not sell the valuable research results to third parties who had no contractual obligations to government

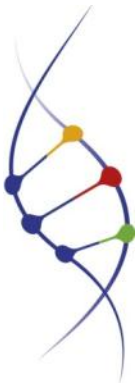
Company's interest: Government shall not sell the research to a third company, but it itself should do this in the first place to defray the costs of the research.

Case 2: Bringing interest together



- Company X and the government on termination of the Agreement, agrees not use any of the data/results/conclusions from the research on the accessed material for any purpose whatsoever. If however Company X intends to use the data/results/conclusions then it must secure a permit from the government by following the necessary procedures.
- If Company X intends to transfer such data/results/conclusions of the terminated agreement to any third party, then such a transfer can be undertaken only with the prior approval of the government.
- If the government intends to commercially use the data/results/conclusions of the terminated agreement, then Company X shall be entitled to full cost recovery plus 50% of its financial outlay on the research until the point of termination.

Invent options for mutual gain



An international pharmaceutical company in collaboration with a domestic research company sought access to a unique genetic resource from an East Asian country for research on its medicinal properties. The company during the negotiations underscored that it was unable to identify the benefits likely to accrue from the genetic resource since it was still involved in the research stage. For the National Biodiversity Unit (NBU) representing the country, the company's inability to identify benefits meant that it would be unable to negotiate a realistic benefit sharing agreement. Yet the NBU knew that in order to realize any benefits, it would need to provide the company access to the genetic resource.

Case 3: Options for mutual gain



NBU proposed that

- The agreement for conducting research on the GR would be time bound and would not require any monetary benefit sharing
- The pharmaceutical company would deposit an agreed sum of money in the NBU's trust account as a security deposit.
- The security deposit would be returned to the company at conclusion of the research agreement.
- If the pharmaceutical company intends to commercialize its findings, then the company would then enter into a benefit sharing agreement
- During the research phase, the pharmaceutical company would share non-monetary benefits, such as local research capacity and technology transfer

Insist on using objective criteria



The National Biodiversity Center (NBC) representing the Government of Country Z entered into an ABS agreement with a French cosmetic company seeking to do broad-spectrum research on a list of the country's rare herbs. The aim of the agreement was to identify those herbs that can be used to develop cosmetic products for the market.

Case 4: Objective criteria



- French company agreed to undertake responsibility for claims by third parties arising from actions or omissions of the company
- French company agreed to indemnify and protect Country Z from any legal action arising from the actions of the company or its employees.
- French company agreed to periodic reporting regarding the status of the research in English.
- Country Z on its part agreed to maintain confidentiality regarding the nature of the research unless required by law to disclose the information.
- Both parties agreed that Country Z's law will govern the contract and all disputes will be settled not by litigation but by mediation. If mediation fails, then the dispute will be settled by arbitration in Country Z through an arbiter agreed upon by both parties.

Thank you for your attention !



Contact

Dr. Hartmut Meyer

Advisor, ABS Capacity Development Initiative

Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ)

GmbH

Dag-Hammarskjöld-Weg 1-5

65760 Eschborn

Germany

t: +49 6196 793285

f: +49 6196 79803285

m: +49 171 1027839

e: hartmut.meyer@giz.de

e: abs-initiative@giz.de (secretariat)