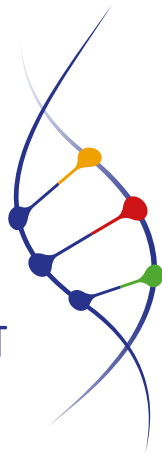


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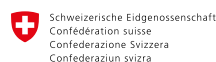


How (Not) to Negotiate Access and Benefit Agreements

by Dr. Kabir Bavikatte (United Nations University – Institute for the Advanced Study of Sustainability)

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About the multi donor ABS Capacity Development Initiative

The ABS Capacity Development Initiative aims to contribute to poverty reduction, food security, technology transfer, social development including equity and rights, and biodiversity conservation through implementing the Nagoya Protocol (NP) on ABS and the third objective of the Convention on Biological Diversity (CBD) in its entirety. Established in 2006, the ABS Capacity Development Initiative is hosted by the German Federal Ministry for Economic Cooperation and Development, implemented by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH and funded by the governments of Germany, Norway and Denmark, the Institut de la Francophonie pour le développement durable and the European Union.

Introduction

Writing a manual that would assist those negotiating access and benefit sharing (ABS) agreements is a daunting task. As authors of this manual we have had years of experience with the Nagoya Protocol negotiations, assisting countries develop and implement ABS law and negotiating ABS agreements.

However our biggest challenge has been distilling the experience and lessons we have learnt into an easy to use, hands on manual that would assist the various stakeholders involved in ABS.

You could argue that negotiating ABS agreements is no different from negotiating any other kind of agreement, and we would tend to agree. We understand that individuals and institutions negotiating ABS agreements could well benefit from the burgeoning information out there on how to negotiate successful contracts. However we would still bring to your attention that ABS agreements have certain peculiarities, which they don't share with other kinds of contract negotiations. What we hope to do here is to weave together the traditional wisdom of good contract negotiations with our own latter day experience and insights in negotiating ABS agreements. The result of this effort is the manual you hold in your hands incorporating the best of the old and the new.

Another challenge in writing a manual on ABS agreements is to distinguish between the substantive and procedural aspects of the negotiations. In the cut and thrust of ABS negotiations, both the substantive and procedural aspects tend to flow into each other making it hard for watertight academic distinctions. The manner in which we engage the procedural aspects will significantly inform the substantive outcomes. We believe that both the procedural and substantive aspects are integrally linked because the substantive opportunities and possibilities can only be created in an appropriate procedural climate.

In order not to be hamstrung by theoretical distinctions between the substantive and procedural, we decided to use a case study format in this manual. Here we will elaborate on real cases or scenarios of ABS negotiations that we have had experience with and tease out the lessons to be learnt. The reader is welcome to determine based on his/her needs as to which of these lessons are substantive and which are procedural. We do intend to develop further material to assist ABS negotiations focusing on substantive aspects such as a checklist of key elements to be addressed in ABS contracts, model clauses, templates etc. The current manual however seeks to be holistic offering a hands-on approach to negotiating ABS agreements.

Our final challenge was one of classification. We asked ourselves what would be the best way to categorize all these scenarios and the lessons learnt. This was crucial since we wanted the manual to be search and reference friendly and avoid presenting the scenarios as one indistinguishable mass. We have therefore decided to heed to tradition and use the classification provided by Roger Fisher and William Ury in their widely read 1981 classic on contract negotiations *'Getting to Yes: Negotiating Without Giving In'*. Fisher and Ury provide three criteria for successful negotiations, which could also apply in the context of ABS. They are:

- 1. It should produce a wise agreement if agreement is possible;**
- 2. It should be efficient;**
- 3. And it should improve or at least not damage the relationship between the parties.**

A wise agreement according to Fisher and Ury is one, which meets the legitimate interests of each party, respects rights, resolves conflicting interests and is durable. They go on to provide four principles that negotiators should adhere to in order to ensure successful

ABS negotiations. These principles focus on people, interests, options and criteria. Simply put they are:

- 1. Separate PEOPLE from the problem;**
- 2. Focus on INTERESTS, not positions;**
- 3. Invent OPTIONS for mutual gain;**
- 4. Insist on using objective CRITERIA.**

We decided to classify this manual as per these four principles, which though seem simple at first glance, have multiple layers of complexity all of which are brought out in the scenarios that follow. Under each principle we provide a few relevant scenarios and the lessons that can be drawn from them.

The structure and style of the manual is such that it seeks to reach multiple audiences. It can for e.g. be used by negotiators preparing for an ABS negotiation or it can assist trainers running a workshop on negotiating ABS contracts. If anything, the manual is written to be an engaging read that would hold the interest of the various stakeholders in an ABS process. While some of the names and identities of individuals and entities in the scenarios have been withheld to protect their identity, the reader can rest assured that all the scenarios are real.

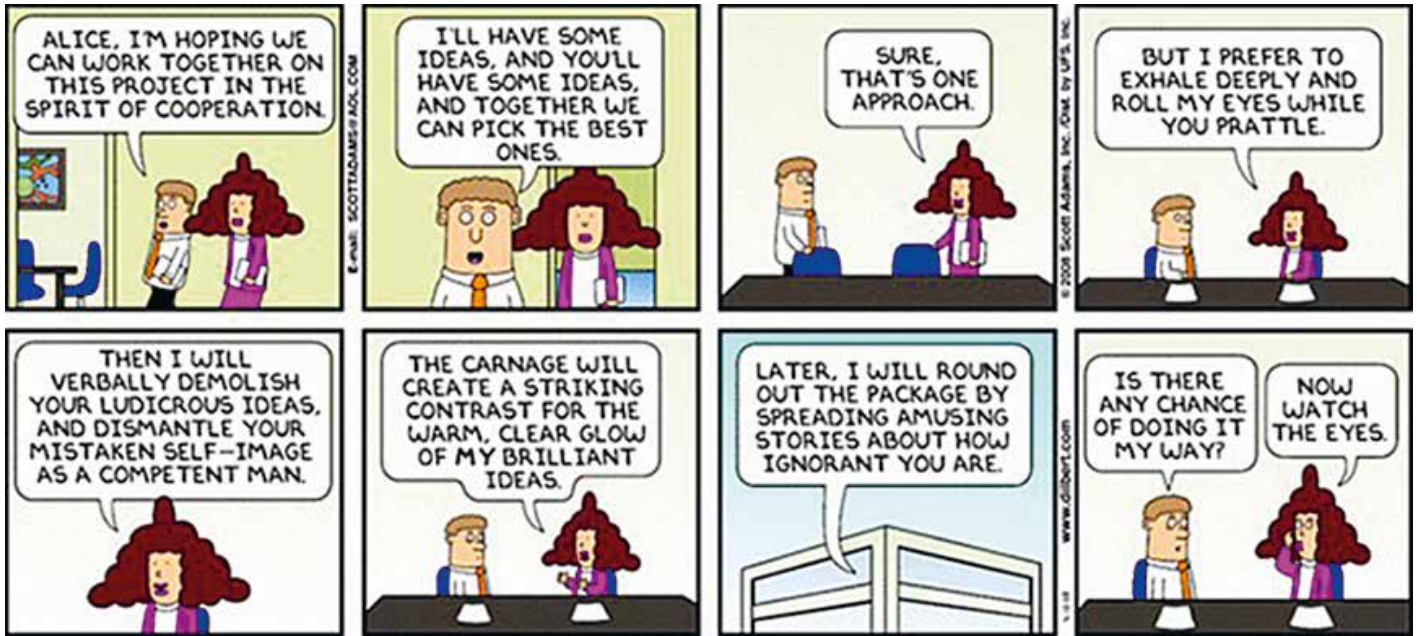
Happy reading.

Kabir Bavikatte

Supported by:

Morten Tvedt, Valerie Normand and Susanne Heitmuller

Separate PEOPLE from the problem:



Scenario (a)

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.

The parties are nearing an agreement. The company had offered to support the travel of all the indigenous leaders to the negotiations. A few days before the meeting the company informed the leaders that due to budgetary constraints they could only fund the travel of two leaders. On hearing this, one of the clan leaders took the liberty to write 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 thereafter refused to engage in any further negotiations unless the letter was retracted and an apology offered. There was a distinct possibility that more than two years of efforts to get both parties to the negotiating table would come to nothing because of a break down in trust. 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.

LESSONS

- I. ABS negotiations may involve a series of face-to-face meetings between parties who may not be located in the same place or even country. The travel and logistics of organizing such meetings are likely to be expensive and sometimes unaffordable for some parties (e.g. developing countries, indigenous and local communities). Agree beforehand on the approximate number of meetings, who will cover these expenses and also make arrangements for teleconferencing.
- II. ABS negotiations can sometimes get volatile and personal because of the nature of the parties involved, their histories and the resources under discussion (e.g. traditional knowledge). Where possible consciously create spaces in the negotiations to allow people to let off steam and be candid about how they are feeling. Try to separate the people from the problem, don't react to outbursts and take time to respond (even a couple of days if need be) rather than resorting to quick verbal or email reactions that you would later regret. Listen carefully to grievances, constantly clarify with the other party whether you have understood them correctly and always respond constructively.
- III. ABS negotiations especially with communities sharing the genetic resource or associated traditional knowledge are complicated. Communities are rarely homogenous with homogenous interests. It is important that community representatives ensure that they have a clear mandate from the community for the negotiations and concessions and regularly check internally whether the key actors are satisfied with the way things are proceeding. It is also critical for companies, institutions or entities negotiating with communities to frequently verify whether the community representatives have the necessary mandate and the buy in of key community stakeholders. Equally it is critical for communities (or other providers of genetic resources) to seek and get clarification regarding the mandate of the company or institutional representatives they are negotiating with.



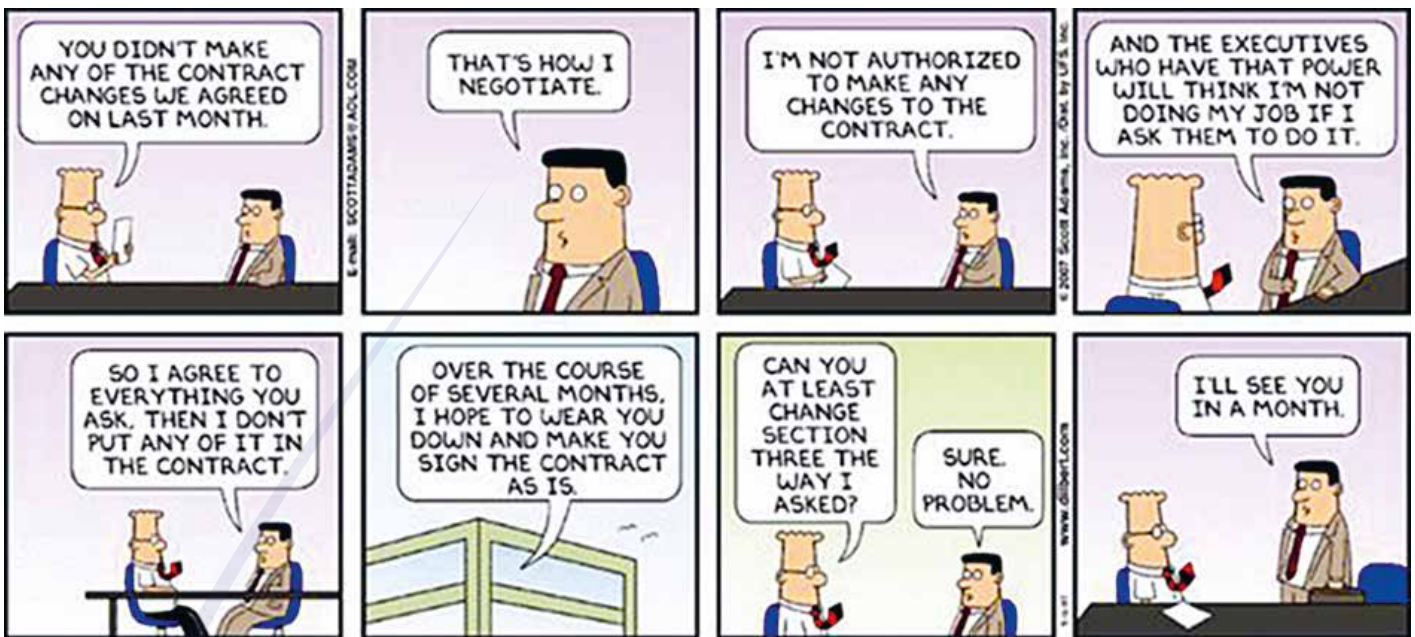
Scenario (b)

The Institute for Biodiversity Conservation (IBC) in Ethiopia entered into an ABS agreement with a Dutch company High Performance Food International (HPFI) for the use of teff genetic resources by HPFI to produce nutritional supplements including bread and beer for people who were allergic to gluten.

Over the life of the agreement the relations between the parties became increasingly strained. HPFI submitted periodic reports on the development of teff products to the IBC in Dutch. The IBC complained that they were unable to understand the language in which the report was written. HPFI also raised concerns that they were unable to import teff grain from Ethiopia since the Ethiopian government banned teff exports to safeguard domestic food security. The IBC responded that they had not received any real benefits from HPFI thus far though HPFI claimed that it had deposited monies into a trust account. The relations between IBC and HPFI became increasingly acrimonious. Soon after that HPFI declared bankruptcy.

LESSONS

- I. ABS agreements by their very nature tend to be long-term involving various steps from research to product development to marketing, with pre-agreed benefits to be shared when specified milestones are reached. The nature of ABS agreements necessarily requires clear, understandable and regular communication between parties even after entering the agreement and a periodic exchange of each party's concerns and interests in light of developments at the country or company level. While the agreement should be binding, it should include clauses that allow for the possibility of eventualities include clauses which anticipate possible developments, such as the need for translation of texts, good dispute settlement mechanisms (e.g. conciliation, mediation and arbitration).
- II. Because most ABS agreements take place in cross-cultural settings it is critical to be sensitive to cultural nuances and expectations that may not be explicitly articulated. Furthermore the language of negotiation may not be the language all parties to the agreement are comfortable with and parties may prefer to resort to their native languages. This is likely to lead to miscommunication and misunderstanding. In some cases it could lead to a break down in trust and consequently the negotiations or the agreement. The way to address such challenges would be to make provision for them by reducing assumptions and periodically checking with each other whether your understanding is correct.



Scenario (c)

The Institute for Traditional Medicine (ITM) in India began ABS negotiations with a large cosmetic company for the use of traditional knowledge relating to clear skin.

In the initial stages of the negotiations ITM had several meetings with the scientists of the company who were very keen on an agreement and research collaboration that they felt would produce a breakthrough cosmetic product. At a later stage of the negotiations, the company sent their country managers and lawyers to discuss benefit sharing. The managers and lawyers were directed to ensure that the benefit sharing agreement favored the company and they did not have the mandate to make any concessions. ITM in the course of the negotiations increasingly felt that the new negotiators neither represented the enthusiasm of their predecessors (the scientists) for the traditional knowledge nor did they care about the long-term research partnership. The new negotiators felt that they were doing their job in protecting the interests of the company. They noted that while scientists were tasked with identifying exciting new product possibilities, they (the managers and lawyers) were in charge of closing the deal. ITM felt that they had been misled about the motives of the company and the negotiations broke down after a year of hard work.



LESSONS

- I. Most ABS negotiations involve different representatives within the same party at different stages of the negotiations. Each of these actors may be tasked with different roles. For e.g. within a company, it may involve the individuals from the research, marketing, finance and legal departments. All these actors may not share the same interest, mandate or competence or act in coordination. The legal department in charge of drafting the ABS agreement could raise concerns that could conflict with some offers made by the scientists during the early stages of the negotiations. The way to deal with this challenge is to regularly verify the precise mandate of the negotiators and not to confuse statements or views expressed during the negotiations with what a party is willing to agree to.
- II. ABS negotiators sometimes wrongly assume that the other party is familiar with one's own internal decision-making process. This wrong assumption could later lead to accusations of negotiating in bad faith when parties to a negotiation realize that their expectations regarding the outcomes of the negotiation were unfounded. It is therefore critical to clarify at the beginning of every negotiation the internal processes of decision making in each part. Furthermore it is critical to restate at end of every negotiation sitting what has been agreed to, what still needs to be internally approved and what the next steps will be.
- III. Because of the different contexts of the parties involved in an ABS negotiation (communities, governments, business, research etc.), the priorities of the parties are also likely to be very different. This could lead conflating the issues with personalities and easy judgments regarding the motives or character of the negotiators. When issues get personalized, it soon leads to a breakdown in discussions or at least will create an atmosphere of acrimony that is not conducive to effective negotiations. It is therefore important to remember that negotiators are people first and not only the entities that they represent. Small but frequent actions of goodwill such as sharing a meal or an occasional drink go a long way in building trust and engendering efficient negotiations.
- IV. Due to the nature of interests involved in an ABS negotiation, discussions could quite quickly become ideological and with negotiators resorting to point scoring and making speeches to win ideological debates. Situations like this do not lead to wise outcomes since they tell us less about the other party's real interests and merely reinforce our own assumptions. Hence it is critical to ensure that negotiators leave aside ideology and instead ask practical questions and seek clarifications from each other and speak to be understood rather than to win a debate or score a point.

Focus on INTERESTS, not positions:



Scenario (a)

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.

The negotiations were in their final stages and the government had been working closely with a community cooperative of growers and harvesters who were likely to benefit from the ABS agreement between the government and the Australian company. The company had visited the country twice under the invitation of the government and had developed an excellent working relationship with the government and both parties were excited about the mutual benefits that could be derived from the ABS agreement.

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. The government's position was that they had provided the Australian

company simplified access to their genetic resources for the purpose of research with the expectation of production. Therefore if the company decided not to go ahead with production, then the research results should belong to the government. The Australian company disagreed and stated that since they had invested in the research, the research results should belong to them.

The negotiations nearly came to a halt until a government negotiator asked for a discussion of the real interests behind the two positions. She articulated the government's real interests by noting that they were concerned that the Australian company could sell the valuable research results to third parties who had no contractual obligations to government and hence the company would still benefit from the use of the genetic resource. The Australian company stated that their real concern was not to sell their research to another company but that government will sell the research to a third company and company could itself have done this in the first place to defray the costs of the research.



Once both parties had stated their real interests behind their positions, the government negotiator suggested a review of their positions that took each other's interests seriously. The government stated that their interest here was not to make money from the company's research but to prevent the company from indirectly benefitting from or transferring information about the genetic resource to third parties. However they were willing to take seriously the concerns of the company by

agreeing to defray the company's research costs if the government ever decided to sell the research. Both parties then quickly concluded an ABS agreement that could have not have come to pass if they had stuck to their positions and not explored each other's interests.

They revised their termination clauses to say:

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 of the terminated agreement for further research or production 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 and as per conditions set by 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. The funds for this will be limited to monies or other direct or indirect financial benefit obtained by sale or use of any part of the data/results/conclusions completed at the time of termination, by or via the government or any other organization that use the data/results/conclusions developed by Company X. The monetary value of the data/results/conclusions developed by Company X prior to termination will be by mutual agreement using standard accounting practices and/or by arbitration as set out in clause z.

LESSONS

- I. ABS negotiations usually involve parties from very different contexts. Thus when positions are stated during the negotiations it is likely that the parties are unaware of each other's interests behind the positions. Thus when one party disagrees with the other's position, more positions are presented without clarifying the interest behind the position. When these positions are also unacceptable, negotiations falter and parties assume that their interests are irreconcilable. However if parties at the outset candidly discuss their interests, they can try to reconcile interests rather than positions. By expressing their interests parties understand that there are various positions that can satisfy their interests and are hence able to multiply their options. Furthermore parties also realize that behind seemingly opposing positions, they have more common than antagonistic interests.
- II. ABS negotiations many a times are fraught with insufficient knowledge. For e.g. governments may not understand business priorities, businesses may not be aware of community-concerns or communities and businesses may not appreciate government's challenges. It is therefore helpful for parties to spend a good portion of the negotiations asking 'why' and 'why not' in order to ensure sufficient knowledge across the negotiating table. Parties should be encouraged to articulate their problems/concerns before putting forward any positions that they feel they cannot retreat from.
- III. Parties to ABS agreements tend to be concerned because of the nature of their investments. A government could have provided a genetic resource whose use it may not have the capacity to monitor and track and a company is anxious that the government does not renege on its commitments on the basis of which large sums of money have been invested in research and development. Stating these concerns clearly allows for including in the ABS agreement the necessary guarantees and remedies in situations where things don't proceed as expected.



Scenario (b)

The federal structure of a Pacific island nation is made up of a federal government and four state governments. The federal government can make laws regarding genetic resources of the state government to the extent that the state government delegates this law making power to the federal government. However the state governments would undertake the implementation of the law in the states. Moreover the state governments would have to consult with the chiefs of the local tribes when it comes the development or implementation of any laws relating to biological resources. This is because the tribes have full authority to determine any access to the resources on their land.

A Korean company doing research on marine plants approached the federal Ministry of Environment for access to certain species of seaweed in the lagoons of one of the states. The Ministry directed the company to its counterpart at the state level who in turn directed the company to the chief of the tribe whose territory included the lagoon. Ultimately the company entered into an ABS agreement with the state government but later concerns were raised both by the federal government and the local chief regarding insufficient consultations with them.



LESSONS

- I. Legal, administrative, customary frameworks circumscribe ABS contract negotiations involving governments and communities. There are legislative or administrative or customary limits to what a negotiator representing the federal or state government or a community can offer or agree to in a negotiation. For e.g. the flexibility of a government negotiator is limited by what the ABS framework in the country prescribes even if she would like to make concessions based on the uniqueness of the issue being negotiated. Likewise what a community representative in an ABS negotiation can consent to, could be regulated by customary law, traditional decision making processes or a community protocol. It is therefore vital for the parties to an ABS negotiation to ask and provide clarity regarding the legal, administrative or customary frameworks within which the negotiations take place and which affect the decision making power of the negotiators.
- II. While it is generally assumed that a party to a contract negotiation has a common interest it is not necessarily true in ABS negotiations. It is highly likely that a party that is negotiating an ABS agreement has multiple and sometimes conflicting internal interests that represent the concerns of different stakeholders. This sometimes gives the impression that a party to an ABS negotiation is making contradictory statements, is inflexible or does not have a coherent position. In such situations it is imperative to seek clarification of the different interests within the same party and identify the key stakeholders who are likely to influence a negotiating position. Mapping these multiple interests and stakeholders at the outset will bring greater coherence to the negotiations and avoid accusations of indecision or bad faith at later stages.
- III. Because of the varied nature of in-country stakeholder interests that could affect an ABS negotiation, it is useful to develop options in the negotiations that are at simultaneously concrete and flexible. This should be done before putting forward any final positions. Doing so will give negotiating representatives an opportunity to go back to their stakeholder groups to get an internal agreement and come back with multiple negotiating positions. Furthermore such an approach has the advantage of reducing multiple negotiating meetings that result from inflexible positions that reduce the internal maneuverability of negotiators.

Invent OPTIONS for mutual gain:



Scenario (a)

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.

The NBU decided that the best way forward would be to develop options that would benefit both the country and the pharmaceutical company. The NBU proposed that it would enter into a research

agreement with the pharmaceutical company that would enable the company to conduct research on the genetic resource. The agreement would be time bound and would not require any monetary benefit sharing. Instead 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 research results were positive and the pharmaceutical company intends to commercialize its findings, then the company would then enter into a benefit sharing agreement with the NBU. During the research phase however, the pharmaceutical company through its collaboration with the domestic company would engender non-monetary benefits, such as local research capacity and technology transfer.



LESSONS

- I. ABS negotiations are unique due to the high levels of uncertainty involved. It is hard to predict at the outset the final product based on the use of genetic resources or traditional knowledge. Often a user of a genetic resource or associated traditional knowledge is unable to specify the quantum of benefits likely to accrue at the early stages of research and development. Because of the uncertainty involved in anticipating monetary benefits, it is easier to broaden options regarding the nature of benefits that can be shared. While background research regarding the potential benefits likely to accrue in a particular sector is critical, it is equally important to identify various benefit sharing options at different stages of resource utilization. Non-monetary options at a research stage can include research collaborations, technology transfer or training all of which are valuable and could be agreed upon despite uncertainty regarding monetary benefits. Providers with a goal of building their own bioprospecting capabilities in the long run would have much to gain from strategically leveraging non-monetary benefits that brings them closer to their goal.
- II. A prudent way of viewing ABS negotiations is to see it as building a long-term mutually beneficial relationship where both parties would need to assist each other to expand the pie by exploring a variety of options to deal with the uncertainty. An initial fast track research or a scoping agreement for a set period with certain protections like bank guarantees and security deposits takes care of the interests of the provider for security and the user for exploratory research. A subsequent commercialization or actualization agreement based on a realistic estimate of benefits will ensure fair and equitable benefit sharing. Furthermore such an approach fosters a long-term partnership between the parties by ensuring collaborative problem solving with the common aim of maximizing benefits from bioprospecting.
- III. Clarity regarding actions that are prohibited during the research or scoping phase is critical in ABS related research agreements. For e.g. a term could be included in the research agreement prohibiting the application for intellectual property rights, product registration or advertisement, manufacturing etc.



Scenario (b)

A tripartite agreement was established in 2008 between Laboratoire Serobiologiques (LS) (a division of Cognis), the cosmetic company L'Oreal and the NGO Yamana and its partners in Morocco- the Targanine cooperatives.

Under this agreement the Targanine cooperatives would supply to LS Argan oil and Argan related products like pressed oil cake and leaves under a fair trade arrangement. The arrangement included a pre-payment for products and a two-year contract for the supply of Argan oil at a pre-agreed premium price. L'Oreal is supplied with the oil for the use in its various cosmetics and Yamana is responsible for training the cooperatives and facilitating the relationship between LS and L'Oreal and the Targanine cooperatives. While this agreement is not strictly an ABS agreement and is more to do with biotrade, it offers an insight into a collaborative approach to negotiations where parties to the agreement work together to satisfy each other's interests. Moreover the agreement addressed the real needs of the women of the Targanine cooperatives including the environmental sustainability of Argan production. The cooperatives were offered a guaranteed buyer for their Argan oil at fifteen times the local market price.

LESSONS

- I. Good ABS negotiations generate a number of possible options that satisfy the interests of the different parties before narrowing down concrete proposals. This engenders a negotiating atmosphere that focuses on collaborative problem solving by the parties involved rather than a win-lose approach. A problem solving approach to ABS negotiations makes every party responsible for addressing the other parties' interests rather than focusing on one's own interest. Creation of livelihoods, purchasing guarantees, payment of premium prices for material, long-term agreements are all designed to meet the basic human needs of the communities providing the biological resource. While it may not amount to huge financial returns, the Argan agreement has shown itself to be more sustainable and addressing the most significant needs of communities when compared with other more high profile ABS agreements. Moreover it has led to concrete conservation outcomes securing both biodiversity and livelihood interests.
- II. ABS agreements can also take place in contexts where the country from where the genetic resource or associated traditional knowledge is being accessed has no ABS legal framework. While Morocco does not have an ABS legal framework, the development and the success of the Argan agreement shows that legal contracts are possible between willing parties even in the absence of user and provider country legislation. It is therefore possible to generate national interest and political will to develop an ABS legal framework by negotiating good ABS agreements that exemplify real benefits to the providers.

Insist on using objective CRITERIA



Scenario (a)

On the 19th of August 2013, the South African San Council along with the National Khoi-San Council (NKC) of South Africa signed an ABS agreement with Cape Kingdom Nutraceuticals Pty (USA) under South Africa's Biodiversity Act.

Cape Kingdom Nutraceuticals sought to commercially use the traditional knowledge of the San and the Khoikhoi relating to Buchu, a small shrub endemic to the Western Cape and used as an anti-inflammatory, anti-septic and for the treatment of hypertension. As a result of the ABS agreement Cape Kingdom will produce and market a product called Buchulife in the form of a topical gel, gel capsules and herbal water. The agreement acknowledged that the Khoikhoi and San are "legally entitled to a fair and equitable share of the benefits that result from the commercial development of the Buchu plant." The San Council and the NKC relied upon the legal support provided by the lawyers to help with the vetting and drafting of the ABS agreement. The South African Department of Environmental Affairs (DEA) oversaw the negotiations. Some break away Khoi groups challenged the legitimacy of the NKC to negotiate this agreement on behalf of all the Khoikhoi and San. However, the fact that the NKC was officially set up in 1999 by the then President Nelson Mandela and that its current representatives were elected through country wide elections in 2012 put an end to legitimacy challenges.

LESSONS

- I. ABS agreements are typically contracts where parties have the freedom to negotiate a variety of possible terms and conditions. However ABS agreements do not take place in a legal vacuum. In fact in many situations the ABS agreements must meet the standards of good faith and respect the legal rights of parties as prescribed by the ABS legal framework of the provider and user countries. Moreover ABS agreements cannot be used to undermine the rights of providers and users of genetic resources and associated traditional knowledge as recognized by the Nagoya Protocol and set out in national legislation. The legal frameworks within which ABS agreements take place therefore provide objective criteria, which the agreements will have to meet. It is absolutely necessary for the parties to an ABS negotiation to be aware of these objective criteria and highlight them in situations where these criteria could be violated.
- II. Compliance with these objective criteria can also be ensured by the negotiations being overseen by the government (as in the South African case) or by clearly establishing the legal mandate of negotiating parties against challengers (as in the case of the NKC). By ensuring objective and legal criteria inform the process and the substance of the ABS negotiations, parties can ensure that the agreement is later not vitiated on the grounds of illegality or bad faith.
- III. Negotiating ABS agreements in most cases will involve lawyers or legal departments who will provide advice regarding relevant laws along with drafting the ABS agreement in legal language. Lawyers can also be relied upon to unpack the meaning of legal terms and wordings put forward by the parties. Nevertheless it is wise to avoid discussions regarding legal wording or clauses until the parties have managed to discuss their respective interests and agree on terms of the agreement. Lawyers can then be asked to provide model clauses or assist in drafting the terms of the agreement in legal language in a manner that would best capture the terms that the parties have already agreed to.
- IV. The role of lawyers and legal advisors is however critical for the parties to stay informed about the rules governing not just what can be agreed upon but also the kind of clauses that need to be included in an ABS agreement that can secure the interests of the parties if things go wrong.



Scenario (b)

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.

Prior to concluding the agreement the NBC and the French company had to agree on certain standard clauses, which are unique to ABS agreements. The clauses did not relate to benefit sharing. These clauses related restrictions on transfer of the genetic resource to third parties, periodic reporting of the status of the research, indemnification, limiting liability, confidentiality, modification and dispute settlement.

As per the clauses the French company agreed to undertake responsibility for claims by third parties arising from actions or omissions of the company. The company also agreed to indemnify and protect Country Z from any legal action arising from the actions of the company or its employees. The 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 neither can modify the agreement without the consent of the other but can terminate the agreement if one of the parties defaults on its contractual obligations and does not rectify this within a 60-day period. Finally both parties also 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.

LESSONS

- I. Since many ABS agreements involve parties from different countries it is critical to not assume that the standard terms of agreement in one's own country will automatically apply or be accepted by the other party. Dispute settlement is a case in point. While litigation may be an option, it is prudent to explore less adversarial and more cost-efficient methods of resolving disputes. This could include mediation where a trusted mediator could assist in dispute resolution and if that fails both parties could agree to abide with the decision of an arbitrator that they jointly appoint. Here the party with limited financial means has to be mindful that dispute settlement may involve international travel due to the requirement of physical presence. To avoid this undue financial pressure, it would be wise to agree on a venue for the dispute settlement that is financially affordable which in most cases is the country of the party with limited means. Furthermore despite mediation and arbitration being less expensive than litigation, there would still be expenses such as fees for the mediator or arbitrator and it would be best for parties to state in the agreement who would incur these costs and how much.
- II. Due to the transnational nature of many ABS agreements, the parties would need to agree upon the law that would govern the agreement. An ABS agreement is typically a contract and rules for interpretation and implementation of contracts can vary depending on the legal system (for e.g. common law, civil law, Islamic law etc.) An ABS agreement involving parties from different countries should ideally state the law that would govern the contract. Again it would be prudent for the party with limited financial means to as far as possible ensure that the law that would govern the contract is the law of the country where it resides. This will ensure that in the event of disputes regarding the interpretation of the contract, legal opinions can be sought locally.
- III. Research and development relating to genetic resources and associated traditional knowledge may not always take place at the facilities of the user who is party to an ABS agreement. In many cases such research and development may be carried out by research companies or institutes contracted for this purpose. These companies and institutes will not be bound by the ABS agreement since they are not parties to it. This means that the ABS agreement itself would need to include terms that specify the conditions governing the transfer of the material to third parties.
- IV. Third party transfers, dispute resolution, periodic reporting, conditions for termination are usually standard terms to be included in every ABS agreement. These terms are often included in the tail end of an ABS contract. Many a times these are standard clauses that the lawyers or the legal departments tasked with drafting the ABS agreement include. However it would be paramount to work on the details of these clauses and tailor them to the needs and capabilities of the parties as in the Country Z case. Asking the lawyers or the legal department to elucidate the meaning and implications of these terms before agreeing to them would ensure your interests are protected.
- V. It is important to remember that the decision of a court or an arbitrator would need to be enforced. This enforcement sometimes needs to happen not in the country where the decision is rendered but in the country where one of the parties to the ABS agreement is domiciled or is registered or has its assets. Such kind of enforcement is not easy and it would be important to get legal advice upon this while negotiating the ABS agreement.

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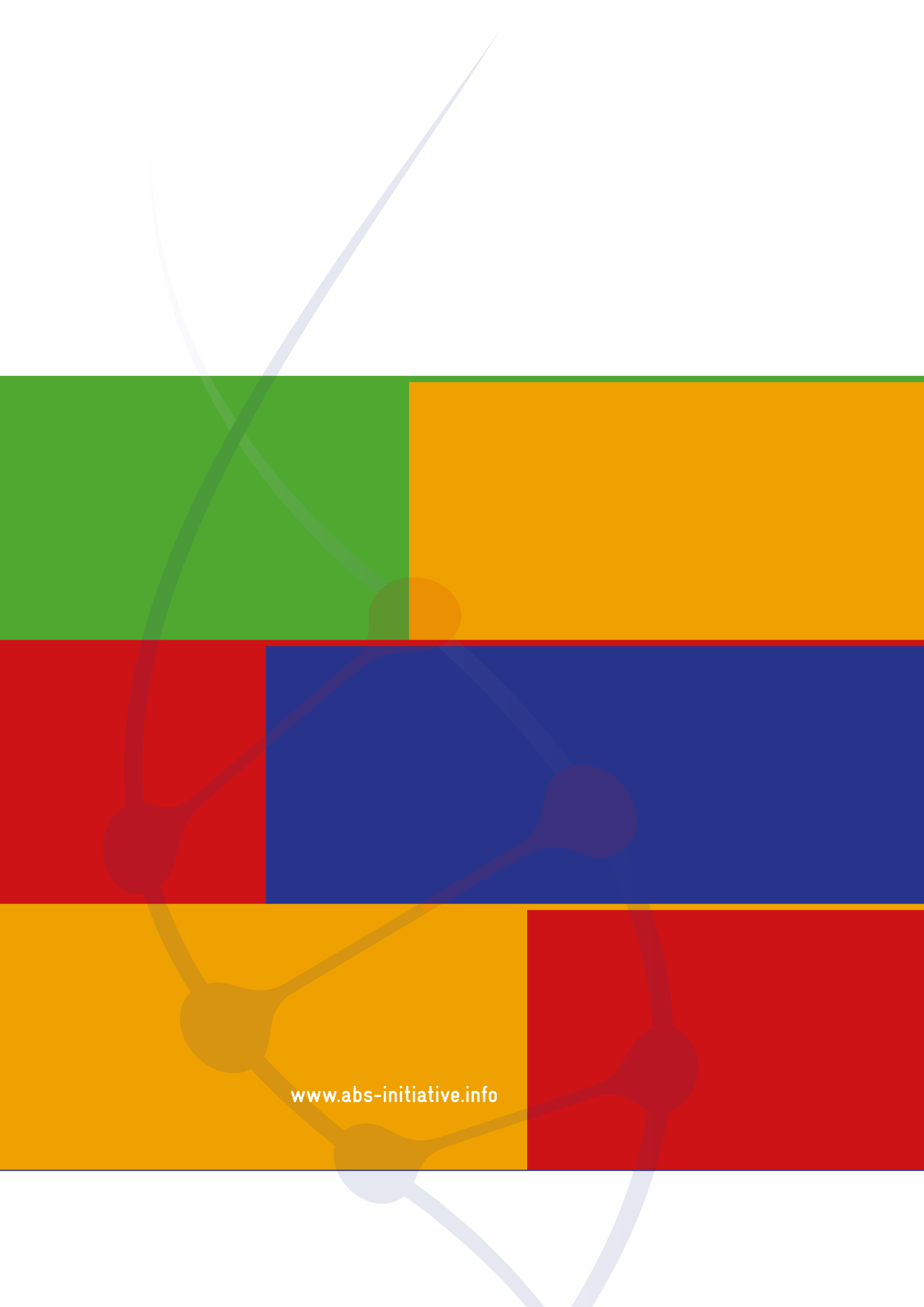
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