

THE **ABS**
CAPACITY
DEVELOPMENT
INITIATIVE



L'INITIATIVE DE
RENFORCEMENT
DES CAPACITES
POUR L'**APA**

Confidentiality and exclusivity

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How to deal with confidential information?



- Government need to provide information to the public upon request or due to regular reporting requirements.
- Part of this information might stem from private individuals or non-governmental legal entities
- Tensions between providing sufficient information and the privacy expectations of individuals and the interest in maintaining the economic value of confidential information submitted by business and other legal persons
- Management at the domestic level within the constitutional structures balancing access to information, privacy interests, and economic interests

Confidential information and ABS



Basic understanding

- Users in commercial ABS negotiations need to disclose privileged commercially valuable information
- Confidential information is categorised as either
 - Trade secrets, or
 - Restricted information
- Because negotiation partners include governments, legal requirements on providing access to certain information may apply, contrary to negotiations between two private partners
- If indigenous peoples and local communities join negotiations, their understanding of issues of confidentiality might be very different from government and commercial users

Access to information as democratic principle



In a democratic society, the ability to access information generated, and used by executive and other government bodies is crucial to ensuring an informed citizenry that can participate properly in government decision-making. Issues to be clarified:

- Who may request? Interested parties or any person?
- How to address privacy concerns of those the information may concern, if they have a privacy interest?
- How to address the commercial interest of those with commercial interests at stake
- How broad to make the disclosure?
- Is the disclosure discretionary or required?
- Who can object to the disclosure, if at all?

Protection of information as legitimate concern



- Personal data of citizens need to be protected as a matter of principle. National legislation deals with this to different extent. There is no international legal framework for the protection of personal data.
- Protection of business information is rooted in the prevention of unfair competition and respective legal frameworks.
- The Paris Convention was the first international legal framework to address this issue in the context of IPRs. Since then, the form of protection chosen - trade secrets – is often regulated in IPR laws
- Boundaries of what constitutes a trade secret vary quite significantly not only between countries, but sometimes within countries, depending of jurisdictions.

Confidential business information and environmental protection



- Trade secrets and restricted information can extend to the content of products on the market
- Such products, e.g. chemicals, could come into direct contact with humans and the environment, causing adverse impacts
- Environmental advocates lobby for increased access to information to enable informed public participation in decision making
- Industry lobbies for regulation of approval and use of chemicals outside of the environmental law, e.g.:
 - Composition and safety of fracking liquids
 - Composition and safety of pesticide formulations

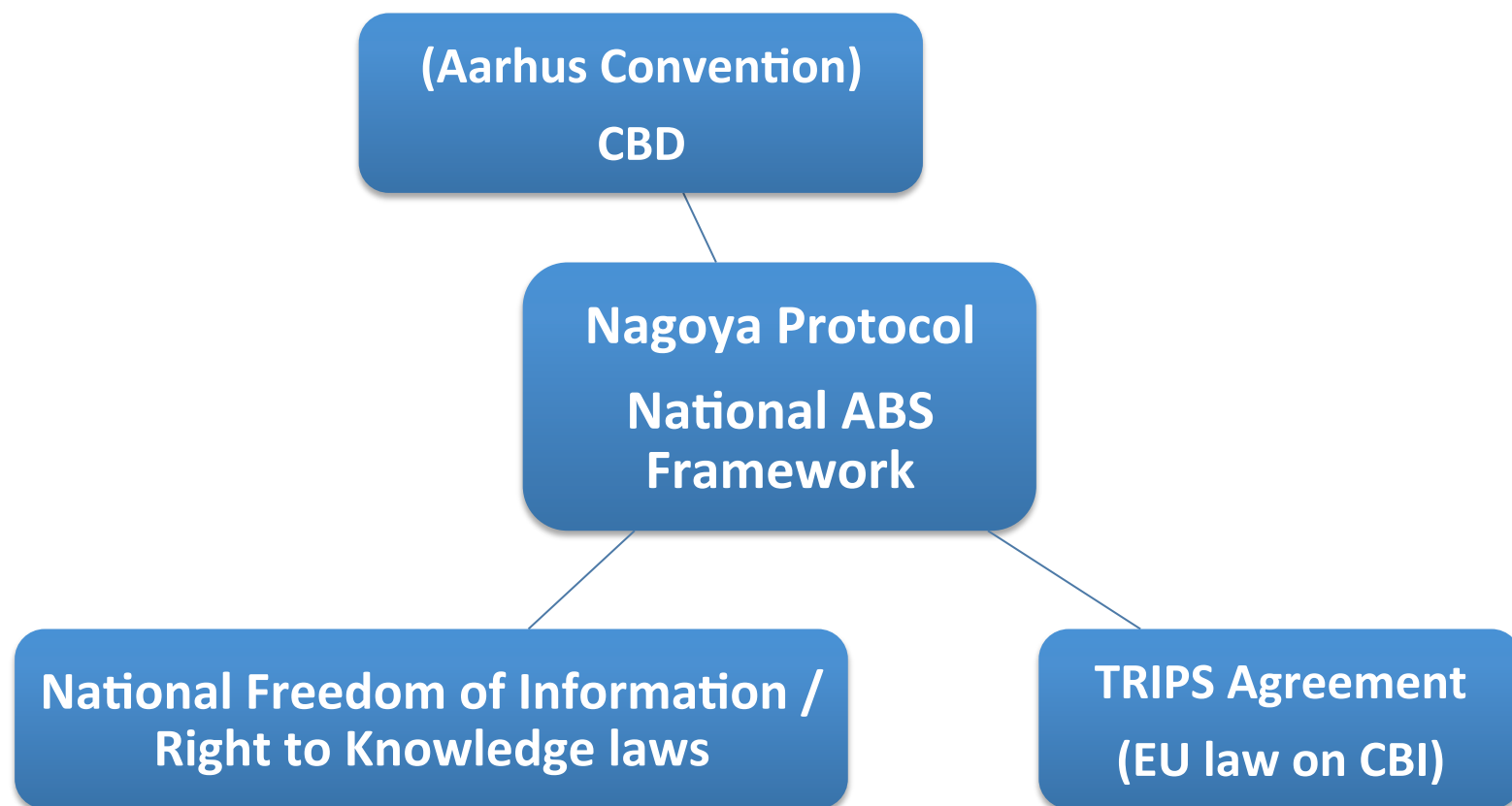
ABS is a special case



Although the Nagoya Protocol and respective national ABS regimes are elements of environmental law, common justifications for provisions on access to environmental information do not necessarily apply to ABS agreements:

- Access and utilisation assumed to not cause environmental harm
- Environmental properties of products are not assessed within the framework of ABS laws, CBD Art. 15.2 is not reflected in NP:
“Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses”
- The Nagoya Protocol and existing ABS law do not foresee public participation in decision making

ABS and confidential (business) information



Network of influences



The Nagoya Protocol speaks of „confidential information“, which goes beyond trade secrets and confidential business information. Issues to consider in developing national ABS frameworks and MAT negotiations are:

- Protection of personal data
- Protection of business-related information
- Incentive for users to invest in product development
- Granting exclusivity in utilisation through limiting access
- Standards in access to governmental information in general
- Notion that access and utilisation do not cause environmental harm, which is the trigger for access to environmental information

Contrasting approaches in CBD and NP



- The CBD calls for providing environmental information without mentioning limitation through confidentiality (Art. 14.1(a); Art. 15(7); Art. 19.2)
- The Nagoya Protocol provides for an unlimited possibility to declare any information as confidential

NP Art. 14.2 **Without prejudice to the protection of confidential information**, each Party shall make available to the Access and Benefit-sharing Clearing-House any information required by this Protocol, as well as information required pursuant to the decisions taken by the Conference of the Parties serving as the meeting of the Parties to this Protocol.

Monitoring utilisation and confidentiality



NP Art. 17.1 (a) The designation of one or more checkpoints, as follows:

- (iii)** Such information, including from internationally recognized certificates of compliance where they are available, will, **without prejudice to the protection of confidential information**, be provided to relevant national authorities, to the Party providing prior informed consent and to the Access and Benefit-sharing Clearing-House, as appropriate;

International certificate and confidentiality



NP Art. 17.4 The internationally recognized certificate of compliance shall contain the following minimum information **when it is not confidential**:

- (a)** Issuing authority; **(b)** Date of issuance; **(c)** The provider;
- (d)** Unique identifier of the certificate;
- (e)** The person or entity to whom prior informed consent was granted;
- (f)** Subject-matter or genetic resources covered by the certificate;
- (g)** Confirmation that mutually agreed terms were established;
- (h)** Confirmation that prior informed consent was obtained; and
- (i)** Commercial and/or non-commercial use.

National frameworks and MAT negotiations



There is no international guidance to support governments in the issue of confidential information and ABS. When setting up respective legislative and administrative approaches and strategising about MAT negotiation, various national frameworks need to be considered:

- Constitutional provisions about access to governmental information
- The applicability of legislation on access to environmental data
- Approaches on protection of personal data
- Approaches on protection of confidential business information and protection against unfair competition
- Policies on the valuation of GR and aTK through R&D

First example under the NP



International Certificate ABSCH-IRCC-IN-204353-1 by India

- The Indian National Biodiversity Authority (NBA) issues national ABS permits and the IRCC
- NBA published the first IRCC on 01.10.2015
- Two possible entries are kept confidential:
 - The provider
 - Type of use allowed by the permit or its equivalent
- <https://absch.cbd.int/search/national-records/IRCC>
- But: unclear relation to Indian national permits
- <http://nbaindia.org/content/683/61/1/approvals.html>

ABSCH-IRCC-IN-204353-1 vs. Permit 40 684 ?



37	777	M/s. Ming Sheng Xuan Ltd. Company Tianjin, Suzhuangzi Village, Yinliu Town, Ji County, Tianjin, China – 301914.	I	Access of 36.958 MTs of Red Sanders	<i>Pterocarpus santalinus</i> (Red Sanders)	25.03.2015
38	796	M/s. Foshan Jingfu Garment Accessories Company Limited, Room 1504, Building 2, No.11 N, Chao'an Road, Chancheng District Foshan City, 528000, China.	I	Access of 105.235 MTs of Red Sanders	<i>Pterocarpus santalinus</i> (Red Sanders)	25.03.2015
39	798	M/s. Morex Corporation Limited, Unit 04, 7/F Bright Way Tower, No.33 Mong Kok Rd, KL, Hong Kong.	I	Access of 19.36 MTs of Red Sanders	<i>Pterocarpus santalinus</i> (Red Sanders)	25.03.2015
40	684	Ms. Seema Solanki, RZ – 7, Vaishali Extension, Dabri Palam Road, P.O. Plam, New Delhi – 110 045.	I	"transformation of the traditional medicine in the African diaspora"	-	27.03.2015

Trust building is essential



Issue: Confidential information is known to CNA !

- The concept of confidential data refers to publically available information
- Governmental authorities to fulfil their obligations under legal frameworks need to receive complete information

Trust building measures

- Rules, mechanisms and spirit need to be established to keep confidential information confidential
- Authorities need to establish a sufficient level of trustworthiness to attract public and private users with commercial intent

Exclusivity as basis for commercial utilisation



Exclusivity needs to be addressed and clarified in MAT

- User receives exclusive right for access vs.
Provider retains right to give access to same GR to other users
- User receives exclusive right for any utilisation vs.
User receives rights for specified utilisation
 - Other users could get access to the same GR but for other utilisation
- There are no general rules on exclusivity in ABS contracts
- Strategic decisions that need adapted benefit sharing provisions

Thank you for your attention !



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