

“Access and Benefit Sharing: A Welfare Measure Lacking Implementation”

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Abstract

Access and Benefit Sharing is a scheme that came into picture with full thrust act the Convention of Biological Diversity, the purpose of such a measure was to compensate the traditional knowledge holders of the loss that they would face, as a result of scientific and technological advancement. Science and Technology has created an atmosphere which is not conducive for the life of the persons who lag behind or those who prefer to stay without indulging into it. The ABS scheme was given further shape through the Nagoya Protocol, which mandated that every party to the convention should formulate domestic legislations to effectuate the ends of the protocol. A pertinent issue facing all the authorities under the act is the determination of the value of the biological resource. Right now there is a confusion regarding whether local industries should pay the ABS fees as the wording of the legislation are ambiguous about this. The difference between the marginal benefit of the user and the marginal benefit of the stakeholders should be decreased to attain the actual purpose of the scheme. The establishment of several administrative authorities under the act which are empowered to impose fines for the purpose of enforcing the provisions of the act, the need for the involvement of various stakeholders and empowering the Biodiversity Management Committee is also necessary as it is the institution that has first-hand knowledge about the realities of the locality.

I. Introduction

In pursuance of the Convention of Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and Equitable Sharing of Benefits Arising from their Utilization, the signatories to it have drafted and passed local legislations and other administrative policies for the purpose. India became a signatory to this convention on the 19th May 1994.

Mostly resource rich countries are developing and poor when it comes to the technical know-how required to tap into these resources. As a result the developed countries tend to barge into the biological resources of the developing countries and illegal means extract these resources and claim a patent protection over them. Instead of a plant patent they go for a utility patent which covers the entire niche of the DNA and other genetic material, thus depriving the local community of their right to access the livelihood security systems.

It is the fear of this IP ambush that has triggered the International Community to present such a convention and other protocols under it.¹

The IPR system provides uninterrupted rights over the commodity on which such rights prevail, this will give the holder the incentive to commercially exploit the same. The holder will not consider keeping enough for the indigenous/local community for sustainable growth. Our present understanding of the genetic knowledge owes a good deal towards the traditional knowledge of indigenous communities, hence it is our duty to consider their rights as well.

The ABS regime comes into picture at this juncture, it brings in the idea of sharing out of the benefits accrued from the utilization of resources. This is done through a contract which involves the Mutually Agreed Terms (MAT) which highlights the commitments from the side of the biological resource supplier (State) and the user (Individuals/Corporations). The goal of ABS is to make an environment suitable for sustainable development. ABS is also helpful in the achievement of two Sustainable Development Goals (SDGs):

SDG 2: Zero Hunger.

SDG 15: Protect, restore and promote sustainable use of terrestrial resources.²

According to the Bonn Guidelines on Access and Benefit Sharing, ABS can be carried out either in monetary as well as in non-monetary terms. The examples of these are provided in Appendix II to the Bonn Guidelines, some of which will be discussed here for the benefit of the reader:

Monetary forms of ABS:³

- Access Fee.
- Fee for the collection of samples.
- Joint ownership of IPRs

Non-Monetary forms of ABS:⁴

- Sharing R&D results with the state.
- Locating production and R&D facility in the region for the purpose of improving the living standard.
- Research directed to the priority needs of the supplier state.

¹ Neeti Wilson, 'Guidelines for Access and Benefit Sharing for Utilization of Biological Resources based on the Nagoya Protocol', JIPR, 67,70.

² 'Sustainable Development Goals' <www.fao.org/sustainable-development-goals/news/detail-news/en/c/1045012/>

³ ABS Guidelines, 2014.

⁴ *Ibid.*

II. Convention on Biological Diversity, 1992

The convention took shape as one which was for the purpose of protecting the biological resources of the planet, but it has got relevance to the topic of this paper as one of the three objectives of the act is, "...ensuring fair and equitable sharing of benefits arising out of utilization of genetic resources." States have been roped in to play a major role in drafting domestic legislations in pursuance of Article 15(7) of the Convention which states that it is mandatory for every contracting to state to frame domestic laws and rules for attaining the objectives of the convention. There has been a departure from the earlier belief that biological resources are part of the common heritage of mankind, the convention through Article 3 has reaffirmed the position of the state as the custodian of the natural resources found within its territory.⁵

India had ratified this convention on 19th May 1994 and hence have the liability to carry out the obligations laid down under the Act. The deadline for the countries that have ratified this convention to effectuate the aspirations of the convention is mentioned in the Aichi Biodiversity Targets, Target 16 states that the Nagoya Protocol should be in force and operational by the year 2010.

III. Nagoya Protocol

It is an additional agreement to the Convention on Biological Diversity, 1992. The purpose of this Protocol is to convey to the signatories their obligations under the third objective of the CBD. Article 5 of the Nagoya Protocol mandates the sharing of the benefits accrued out of the utilization of genetic resources, it further goes on to state that this sharing should be based on a formal agreement which will be known as the Mutually Agreed Terms (MAT).⁶ The Nagoya protocol has a wide scope as compared to the earlier ABS regime under the International Treaty on Plant Genetic Resources for Food and Agriculture (IT PGRFA) which covered only seeds. The Nagoya Protocol on the other hand covers in its ambit all kinds of genetic material and the benefit arising out of its utilisation, also it covers under its wide net the Traditional Knowledge of the indigenous communities.

Mutually Agreed Terms

The two parties (State-Individual) will come into a contract on how to carry out the terms of the ABS. It is a bilateral agreement, to provide access to genetic resources by the supplier state and on the part of the user to reciprocate by granting both monetary and non-monetary benefits. Negotiating the MAT is the most crucial part in arriving at a equitable contract as provided under the Convention. As the state is the sovereign it has to

⁵ Law Commission, Report on Biodiversity Bill (Law Com No.171, 2000)

⁶ Bavikatte Kabir, Robinson, Daniel.F, "Towards a people history of the law: Bio culture Jurisprudence & the Nagoya protocol on Access and Benefit Sharing" 37, 49.

exercise his power to restrict the way in which collection is done, all natural resources of a country are within the sovereign powers of the state and it is their duty to protect it. The state can prescribe regulations, the only qualification being that it should not be restrictive in nature.⁷

IV. Bonn Guidelines on Access and Benefit Sharing

The main purpose of these guidelines is to serve as a pole star for different states to help them in drafting local legislations, rules, regulations and policies. It also tries to enhance the compliance with the Mutually Agreed Terms (MATs) by including in it the names of the indigenous tribe as well as the user of the resource. Further in the absence of MAT, i.e., when they are under negotiation other IP clauses have to be developed to fix the vacuum. They have also mandated the setting up of a Competent National Authority which look into the matters relating to Biodiversity conservation and protection of the indigenous and tribal community. They have been given the authority to decide on whether to admit a certain user and to decide on the quantum of compensation to be paid to the local community via the fund created by it.⁸

In India the Competent National Authority is the National Biodiversity Board, established under the provisions of the National Biodiversity Act, 2002.

V. National Biological Diversity Act, 2002

The objective of the Act as provided in the objects and reasons, '...fair and equitable sharing of benefits arising out of the utilization of biological resources, knowledge and of matters connected with or incidental thereto.' Section 2(g) defines Fair and Equitable benefit sharing as those acts of ABS as provided under Section 21(2) which is nothing more than the non-exhaustive list of monetary and non-monetary modes of benefit sharing. The Act goes onto to mention that the NBA is duty bound to ensure the existence of a contract for benefit sharing before grant of access and at the same time should ensure that there was prior informed consent.

The money deposited with the National Biodiversity Fund should be utilized only for those purposes purpose as specified by the Act under Section 27(2):

- For the benefits of the stakeholder.
- Development of the areas from where the biological resources have been sourced.
- Socio-Economic development of the community.

VI. Biodiversity Rules, 2004

These rules prescribe the duty of the Biodiversity Authority and the State Biodiversity Board, both these bodies in consultation with the Biological Management Committee and

⁷ *Ibid.*

⁸ *Supra*, n.3.

the local community will have to negotiate with the user about the terms of the Mutually Agreed Terms, the clauses should guarantee that there will exist equal bargaining power. Neither access nor the benefit should be disproportionate. Rule 14(6) lists the information that should be included in the application for the receipt of the informed consent. Rule 14 (10) is a hallmark rule which should be implemented with and carried out can reduce the asymmetry between access to the genetic resource and the benefit that has to be paid to the local community on each level of commercialization of the bio resource. A look at Rule 20 of the Rules says that there is no blanket formula for determining the value of the benefit sharing and this should be done in a case to case basis. In most cases this valuation is below the actual value this can be countered by the introduction of an ABS Cess/ABS Tax, which is a percentage calculated upon the difference of the ex-factory cost of the commodity and the taxes.

VII. ABS Guidelines, 2014

The guidelines have been issued by the Ministry of Environment, Forest and Climate Change after the action taken by the Madhya Pradesh and Maharashtra State Biodiversity Board's action against the domestic users of biological resources.

The guidelines include within it the matters that need to be taken into consideration before evaluation the monetary consideration. They also present ration in which the National Biodiversity Authority and the State Biodiversity Board should devolve the money to the locals, which is to be done through the Biological Management Committee (BMC) which is the grass root level institution to secure the rights of the inhabitants. The money to be paid to the authority is 1%-3% or 3%-5% as the case maybe, which is worked on the net of the ex-factory price and the applicable government taxes.⁹

VIII. Benefit sharing under Protection of Plant Varieties & Farmer's Rights Act, 2001

The Act has nuances of benefit sharing but the scope of the Act is limited to plant varieties and not as wide as the Biodiversity Act, 2002. Special reference should be laid on Section 26 of the Act which provides for determination of the worth of benefit that has to be transferred to the indigenous community. The authority under the Act is empowered for the purpose which listens the matter from the side of the user and the claimants of the benefit, it has to dispose the matter in an expedient manner and this order shall also contain the value of the monetary benefit that has to be paid if any, this has to be accompanied by reasons for the same. Some grounds on which the amount has to be determined:¹⁰

- Commercial utility and demand in the market of the variety relating to which the benefit sharing is claimed.

⁹ *Supra*, n.1.

¹⁰ The Protection of Plant Varieties and Farmer's Rights Act, 2001, s 26.

- The extent and the nature of the use of genetic material of the claimant in the development of the variety relating to which the benefit sharing has been claimed.

IX. Conclusion- Keeping pace with the changing landscape for the effective implementation of ABS regime

Valuation of the potential of the Biotechnology resource is a tricky business, no one is able to readily tell the monetary value of the resource that is being extracted from a particular area. There have been certain suggestions regarding what elements should be taken into consideration while making this decision, these can be found in the Nagoya Protocol itself and in the Indian domestic framework, in the ABS Guidelines, 2014 published by the Ministry of Environment, Forest & Climate Change along with the National Biodiversity Authority which is the competent authority in India to determine whether the access should be granted. These are the matters to be considered while determining the value of the compensation that is to be made to the National Biodiversity Fund for distribution among the benefit claimers:

- Market Potential.
- Investment in Research and Development.
- Likelihood of commercial success of research or product.
- Intention to secure IPR on the outcome.
- Annual Turnover of the applicant from the previous years.¹¹

These will be considered only as a guiding light, the competent national authority has to construe other factors for determination with the help of an expert research group. Drawing inspiration from the Brazilian ABS framework, they have a concept of Ad hoc compensation to be paid to the Biodiversity Fund, which is in line with the environmental law concept of 'Polluter Pays'¹², i.e., a percentage as set by the authority calculated on the amount of genetic resource taken. The authorities in that country have realized that collection of a sum at different stages of commercialization will increase the cost of monitoring and actually eat up the finances which have to be made available to the domestic community.

Another suggestion is to widen the powers and the function of the Biological Management Committee, to increased participation of the affected stakeholders for better understanding of the situation, it should be invested with greater powers of advising the National Biodiversity Authority on which areas should be allowing to be subject to bio surveying/bioprospecting and which areas should be left out so as to maintain sustainability in the area. Furthermore, the Intellectual Property Office of the country should be allowed to participate in the decision making process to advice the Authority in framing the MAT.

¹¹ Biodiversity Rules, 2004.

¹² Juliana Santilli, Genetic Resources common pools in Brazil, Common Pools and Genetic Resources: Equity and Innovation in International Biodiversity law (Evanson Chege Kamau & Gerd Winter).

The convention while mandating that access should be granted in all cases, upholds the spirit of sovereignty over the natural resources under its territorial jurisdiction, this gives unfettered rights to the state to put in place restrictions of its choice which it finds appropriate in consultation with the local community. The only requirement for the parties to the convention is that they should lift the blanket ban on access to technology. Moreover, the convention does not provide for a definition to the term 'Prior Informed Consent', this leaves space for the individual nation to frame case to case PIC requirement. The PIC may specify the territorial limit of bioprospecting.¹³

The local legislation should also be made applicable to domestic land grabbers and other individuals who make use of the biological resources, this is because if they are left unattended by any law, they will become brazen. In order to tackle this a very novel method is to conduct frequent and timely audit of the user of the genetic resources, this can be done without hassles by the inclusion of a 'licensor audit' clause in the Mutual Agreed Terms.

The aspirations of ABS cannot be achieved all of a sudden, this can be done only through constant research and analysis of the results of such research findings needs to be incorporated, the Authority in every country ought to work without vested interest and work towards attaining the best interest of its people especially the persons living in the geographical area being subject to bioprospecting activity. In situations where the access is truly for academic or research purpose the authority should place an obligation to the researcher to publish the work and conduct workshops for the local community to understand the results of the work, this should be done in non-technical language to facilitate better understanding of and to make useful application of the research finding. The competent authority can direct the user to make their research and development directed to certain particular end that might be useful for the country of origin to tackle some of their domestic problems.¹⁴

The National Green Tribunal (Central Zone) has made certain observation regarding the tardy implementation of the Biodiversity Act and the Rules under it that the State Biodiversity Boards in many of the Indian states have not yet been given guidelines pertaining to the demarcation of certain geographical locations as Biological Heritage Zones. The following was noted by the National Biodiversity Authority and the guidelines for the demarcation of Biological Heritage Zones were issued by the Authority in its 19th meeting and now it is open to the state governments to notify the rules for enforcing the guidelines.¹⁵ The National Biodiversity Authority has in its 19th meeting passed guidelines regarding designation of ecologically fragile zones and those with other peculiar characteristic as Biological Heritage Zones, this is a step towards sustainable growth and protection from commercial exploitation.

¹³ *Ibid.*

¹⁴ Srividhya Raghavan, 'India's attempt to reconcile diversity' (IJIPL).

¹⁵ *Bio Diversity Management Committee, Keonti Gram Panchayat v. Union of India, O.A 06/2014 (CZ).*

I am of the personal opinion that the provision of the national legislation in India is not far behind the international standards, in fact the Biodiversity Act, 2002 from its conception had all the provisions other nations like Brazil, Costa Rica & Brazil are coming up with, the issue here lies with the implementation of the provisions. The illiteracy that prevails with regard to the provisions of the Act and the lack of awareness of such mechanisms in the part of the local community who are finally the victims of exploitation as they are deprived of human food, livelihood security systems and human health in the name of technological development. The government and the people of the region should realize that sustained use of biological resources is important for growth and development, economic growth without development in other sectors will result in nothing less than perpetual poverty and over dependence on external sources for basic needs. In order to satisfy the concern of the holder of the patent holder that disclosure in the PIC be prejudicial to their interest, such a disclosure maybe made in a separate form with a confidentiality clause attached to it, which will enable the applicant to hold the Competent National Authority liable for any breach in a court with relevant jurisdiction. And another key suggestion would be the introduction a digital library in line with the Traditional Knowledge Digital Library so that the search cost of the potential users can be reduced to a minimal and the job of maintaining of the PBR can be stopped, hence providing a single point of contact to derive all the necessary information.

That perfect balance between access and equitable benefit sharing is a farfetched goal, this can be arrived at only by constant research in this regard, development of various parameters for the calculation has to be seen, till then the local communities will have to settle with the valuation that prevails, the technology transfers and the capacity building initiatives.¹⁶ Access and Benefit sharing is a novel idea that has blossomed in the hindsight of the international community which has duly found that the IPR system is acting in a manner which is inconsistent to the interest of the local communities and those who depend on it for their livelihood. The objective of implementing newer mechanisms to make sharing efficient is pertinent as now the ABS system is only in its nascent stage and even though in theory they have to balance economic growth and welfare, the reality is antithetical to that objective. New valuation mechanisms, distribution mechanisms and check point systems which ensure that prompt implementation of the scheme should be in place. The gulf between the marginal benefit of the user and the marginal benefit of the stakeholders are widening, the ABS system should attempt to bring this closer and finally achieve a level playing field, where no one gets an upper hand.

¹⁶ International Treaty on Plant Genetic Resources for Food and Agriculture.