

# Access to India's Biodiversity and Sharing Its Benefits

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The Biological Diversity Act, 2002 is meant to fulfil the objectives of the Convention on Biological Diversity, to which India became a party in 1994. In its 10-year history, a key issue that has dominated the implementation of the act is access to bio resources and sharing its benefits. The government's new guidelines on access and benefit sharing notified in 2014 have only marginally added to what the act and its rules lay down. In addition, neither the intended beneficiaries nor readers of the document get much hint of the thought process behind the exercise.

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The International Day for Biological Diversity is observed the world over on 22 May. It is the day the United Nations (UN) has chosen to commemorate the adoption of the Convention on Biological Diversity (CBD) in 1992. The CBD essentially gathers the myriad concerns related to biological resources into three key objectives—conservation of biodiversity; sustainable use of its components; and fair and equitable sharing of benefits arising from the use of genetic resources (whether plant, animal or microorganisms). This international law came into force on 29 December 1993 after 30 countries ratified it. Today, the CBD has 196 members, including India, which became a party to it from 1994.

To fulfil the three CBD objectives, Parliament passed the Biological Diversity (BD) Act in 2002. In 2004, the government issued the BD Rules for implementation. While the law was rolled out, many concerns remained. These ranged from the legal status of genetic resources, lack of clarity on commonly held resources and knowledge, and the efficacy of domestic legislation to counter “biopiracy” to an overemphasis on access to genetic resources in the regulatory framework (Kohli 2006; Sahai 1998; Kothari 1994). Biodiversity-rich countries such as India are required by the CBD to facilitate access to their genetic resources by non-Indians, though that is not the sole objective of the CBD. In addition, technology-rich

countries are also required to provide access to technology.

## Implementing the CBD

In its 10-year history, there have been quite a few controversies surrounding the implementation of the BD Act. This, in part, stems from the perceived priorities of the BD Act, particularly when state functionaries appear too focused on prioritising trade in genetic resources. The industry that accesses genetic resources seeks clear rules for its business environment, and local communities expected more devolution of powers than what the BD Rules provide for (Kohli and Bhutani 2014). Over the years, there have been both government and civil society attempts to understand what the legal regime for biological diversity and its implementation have meant for India (Bhutani and Kohli 2012; NBA 2012).

One key issue that has dominated the CBD landscape globally and the implementation of the BD Act domestically is that of access, and with it, benefit sharing, together referred to in the CBD as ABS. As of 29 April 2015, 172 approvals for access have been granted by the Chennai-based National Biodiversity Authority (NBA), which began to process applications in 2005.<sup>1</sup> But in many cases, permissions for access are simply not being sought (Sood 2013). And the law itself exempts a list of normally traded commodities from access rules and benefit-sharing obligations.

## International Regime

The CBD does not specifically define the terms “access” or “benefit sharing” in its text. Articles 15 and 16 elaborate two aspects of access—access to genetic resources and access to technology, respectively. Given the power that

technology-rich countries have in multilateral environmental agreements such as the CBD, it is not surprising that while access to genetic resources has been made subject to national legislation, reciprocal access to technologies and their transfer have not been made as burdensome. And, as far as sharing of benefits goes, the CBD only says that it ought to be “fair and equitable” and on “mutually agreed terms.”

The CBD framework considers “access” and “benefit sharing” as two sides of the same coin. ABS is now locked into a single frame—the aspect of access to genetic resources and that of sharing legally recognised “benefits” once relevant national authorities grant access are treated as inseparable. It completely puts aside the question that often access itself can be disenfranchising for both local communities and weak governments. Access may also go against the tenets of conservation and sustainable use, and, in such instances a sharing of benefits may be deceptive (Bavikatte and Robinson 2011; Kohli and Bhutani 2013).

The Nagoya Protocol under the CBD, also called the international regime (IR) on ABS, came into force on 12 October 2014.<sup>2</sup> The IR was the main outcome of the CBD’s Tenth Conference of Parties held in Nagoya, Japan. It forms the essential backdrop for the “new” ABS Guidelines in India, which were notified in 2014. The protocol lays down a text by which “benefits” arising from any kind of use of biological material and associated traditional knowledge need to be shared. Ever since, countries such as India have been under more pressure to design legally binding mechanisms in line with the IR to facilitate access to biological resources and knowledge. They are also under pressure to have laws and policies in place through which benefit sharing can be carried out once access is permitted. The absence of a working system for ABS puts governments of biodiversity-rich countries at the risk of not being able to claim their “benefits;” which is also how ABS rules and regulations are justified by states to their domestic constituencies.

The (NBA) and the Ministry of Environment, Forests and Climate Change

notified the “Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations” on 21 November 2014. The new guidelines only marginally add to what the existing BD Act and Rules lay down on ABS.

The act, in line with the CBD, focuses on regulating access by foreign persons. The procedure for access by Indian persons is less regulated, with both local people and traditional healers not under its purview. The rules are not stricter for Indian companies compared to non-Indian ones. While foreign persons, natural and legal, have to obtain permission for any sort of access, including research, bio-survey and commercial utilisation; the law requires Indian enterprises to only inform the relevant state-level biodiversity board (SBB) (MoEF 2002). When it comes to seeking intellectual property (except plant variety protection), both Indians and foreign entities have to mandatorily obtain permission from the NBA. In all these instances, the NBA and the SBBs are required to consult local-level biodiversity management committees (BMC) in both rural and urban areas (MoEF 2002).

The BD Act lists six broad types of benefit sharing that can be realised when either access takes place or approval for intellectual property rights (IPR) is granted. This includes joint ownership of IPR by either the NBA or an identified benefit claimer; transfer of technology; involvement in research and development (R&D) endeavours; setting up venture capital funds; or payment of a compensation. But only having prescribed forms and a detailed 15-step procedure from application to approval did not settle procedural uncertainties or guarantee benefits.<sup>3</sup> The “new” guidelines are meant to fill these gaps. They also combine the two ideas of access and benefit sharing; the NBA had earlier issued separate draft guidelines on each.<sup>4</sup>

### Access and the 2014 Guidelines

The 2014 guidelines reiterate how the government views ABS as a “large-scale financing mechanism” (NBA 2012), which it anticipates will generate the necessary funds for the purposes of conservation and poverty reduction. But the ABS system will churn out money only on commercial utilisation.

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Table 1 presents a synthesis of what is contained in the 2014 ABS guidelines, which could help understand their thrust and intent. The guidelines, as in the case of earlier NBA efforts to prepare them, remain focused on access.

The only area where the guidelines introduce something new is a category of access that allows an Indian researcher or government institution to carry or send Indian biological resources for basic research. This is only possible in emergency situations, for example, during pandemics. In such circumstances, as in collaborative research agreements, the access granted is exempt from the legal duty of the accessor undertaking to share benefits. The guidelines have prescribed a special Form B for the purpose, which has to be submitted to the NBA.

The guidelines issued do not explain how the various figures for payments have been arrived at. They also do not explain why in some instances there are direct payments to local-level committees and why this has not been envisaged in other instances. Unfortunately, neither the intended beneficiaries nor readers of the document get much hint of the thought process behind the exercise. A supplementary note to the notification indicating its reasoning would help to better understand the guidelines and allow for constructive criticism.

### Benefit Sharing

The guidelines prescribe that when India's biological resources are accessed and commercially utilised, the applicant shall have the option to pay a benefit sharing ranging from 0.1% to 0.5% at graded percentages of the annual gross ex-factory sale of the product, which shall be worked out on the basis of annual gross ex-factory sale minus government taxes.

The 2014 guidelines broadly convey that sharing of benefits may be done either through a monetary and/or non-monetary mode. A list of options is in Annexure 1 to the notified guidelines. These are in line with the IR on ABS. However, there is still no step-by-step process on how benefit sharing should be realised in a fair, equitable and ethical manner. There is also nothing to indicate what

would be "good practice" for benefit sharing. With no prioritisation, all kinds of benefit-sharing mechanisms receive equal weight, be it a one-time compensation or carrying out joint product research or development. This is significant because the 10-year practice of ABS before the guidelines shows a preference for monetary benefits. But the collection in the National Biodiversity Fund has been far less than anticipated. For instance, during 2011–12, the NBA received only Rs 1,98,603 in royalty from access applicants (NBA 2012a).

As per Article 15 of the CBD, the terms of sharing are to be mutually agreed on by the applicant and the NBA/SBBs in consultation with BMCs/legally defined benefit claimer(s). The guidelines suggest that benefit sharing be based on

considerations such as commercial utilisation of the biological resource, stages of R&D, potential market for the outcome of research, amount of investment already made for R&D, nature of technology applied, and so on.

Despite the guidelines, BMCs are empowered by the BD Act to levy charges from potential accessors collecting bio-resources from their area for commercial utilisation (Section 41[3]).

### Concluding Thoughts

The question to ask is how do the guidelines help communities and conservation? Experience shows that while granting access is the norm, benefits do not always automatically follow. The irony is that both sharing benefits with

**Table 1: 2014 Guidelines on ABS**

Condition	Payment by Trader	Payment by Manufacturer
1 Access of a bio resource for commercial utilisation/bio-survey/bio-utilisation for commercial utilisation		
Where no prior benefit sharing (BS) agreement with joint forest management committee (JFMC)/ gram sabha/forest dweller/cultivar	1%–3% of the purchase price	3%–5% of purchase price
Further sale of biological resource by a trader to another trader/ manufacturer	1%–3% of the purchase price (in case there is proof of supply chain then BS only on amount for which BS has not been paid earlier)	3%–5% of purchase price
Where there is prior BS agreement with JFMC/ gram sabha/forest dweller/cultivar	Not less than 3% of purchase price	Not less than 5% of purchase price
High economic value bio resource such as Red sanders	Upfront payment of not less than 5% of 5.0% on the proceeds of the auction, or sale amount, as decided by the NBA or SBB into a designated fund	Upfront payment of not less than 5% of 5.0% on the proceeds of the auction, or sale amount, as decided by the NBA or SBB into a designated fund
Where access leads to commercial utilisation, optional benefit on ex-factory sale price	Rs 1 lakh (0.1%); Rs 1–3 lakh (0.2%); above 3 lakh (0.5%)	Rs 1 lakh (0.1%); Rs 1–3 lakh (0.2%); above 3 lakh (0.5%)
Condition	Payment to NBA	Payment to SBB/BMC
2 Access for transfer of research results		
With complete details disclosed of potential commercial value	3%–5% of the monetary consideration	
3 Access for intellectual property rights		
In case of commercialisation	Monetary and/or non-monetary benefit as agreed with NBA	
Applicant assigns licences to the process/ product/ innovation to a third party for commercialisation	3%–5% of the fee received (in any form including the licence assignee fee) and 2%–5% of the royalty amount received annually from the assignee/licensee, based on sectoral approach	
4 Transfer of research results for research/commercial utilisation		
When the resource is not of high value	Monetary and/or non-monetary benefit as mutually agreed 2%–5% (following a sectoral approach) of any amount and/or royalty received from the transferee, throughout the term of the agreement	
Where resource is of high value	In addition to the above, also an upfront payment, as mutually agreed between the applicant and the NBA	

local communities and conservation activities rely on commercialisation of India's bioresources and the people's knowledge associated with them.

Commerce based on the country's biodiversity continues, but so does the wait for successful examples of benefit sharing. Without these, there is reason to believe that while access procedures get whittled down, benefit sharing will remain an administrative construct. And the hope of accessing benefits will only encourage more commercialisation.

## NOTES

- 1 Statistics from the NBA website, <http://nbaindia.org/content/683/61/1/approvals.html>
- 2 The full text of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable

- 3 Sharing of Benefits Arising from their Utilisation is at <https://www.cbd.int/abs/about/>
- 3 ABS application process on the NBA website; <http://nbaindia.org/content/684/62/1/applicationprocess.html>
- 4 The NBA had sought public comments on the Draft Access Guidelines and Draft Benefit Sharing Guidelines in May 2013; <http://nbaindia.org/blog/602/47//CommentsSolicitedo.html>

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