

A critical appraisal on implementing Access & Benefit Sharing guidelines

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Abstract

This paper provides a critical appraisal on implementing Access & Benefit Sharing Guidelines notified by the Central Government under the provisions of the Biological Diversity Act 2002. The author stated that Access and Benefit Sharing is a complicated subject matter and the way in which the guidelines has been prepared to implement the ABS mechanism was insensible when the rest of the world was waiting to see how India implements the ABS mechanism in an intelligent manner. If these guidelines are not denotified at the earliest, one thing is certain and that NBA is definitely not planning to implement the Act with its true spirit and sanctity.

Keywords: *ABS Mechanism, Biological Diversity Act, Access to Biological Resources, Traditional Knowledge, Nagaya protocol.*

Introduction

Ministry of Environment, Forests and Climate Change (National Biodiversity Authority) New Delhi, the 21st November, 2014, Notification G. S. R 827. —In exercise of the powers conferred by section 64 read with sub-section (1) of section 18 and sub-section (4) of section 21 of the Biological Diversity Act, 2002 (18 of 2003), hereinafter referred to as the Act, and in pursuance of the Nagoya Protocol on access to genetic resources and the fair and equitable sharing of benefits arising from their utilization to the Convention on Biological Diversity dated the 29th October, 2010, the National Biodiversity Authority hereby makes the following regulations, namely. — Short title and commencement — (1) These regulations may be called Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014. (2) They shall come into force on the date of their publication in the Official Gazette.

In this context, the author has made an attempt to critically evaluate the pros and cons of the Gazette Notification of G. S. R. 827 dated 21 November 2014.

on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014. Some of the observations are made by author. The Biological Diversity Act, 2002 was not implemented for over 10 years while it had every ingredient to uplift the most neglected population of this country and ensure a sustainable and dignified living to this class of society. The administrators and policy makers failed to discharge their duties for framing sensible and concrete guidelines for practically implementing the Access and Benefit Sharing Mechanism.

The Southern side of the North-South divide to stand up and take lead while negotiating the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. In fact, the world was looking at India as to how it deals with Access and Benefit Sharing but unfortunately; the effort was not appreciable at global level.

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From Environment Protection towards Sustainable Use

Not many people would know what ABS is. Environment has been a cause for concern for a long time, but slowly the world realised that the move has to be from 'protection' to 'sustainable use' and for sustainable use, the benefits should be shared in a fair and equitable way with the people who conserved it and this was the direction in which the world moved towards and culminated in the 1992 United Nations Convention on Biological Diversity (CBD). India adopted this by a domestic legislation viz. the Biological Diversity Act, 2002.

Access and Benefit Sharing provisions of the Act & Rules

Section 21(2) of the Act stated that benefit sharing may give effect to all or any of the following measures such as:

- (a) Grant of joint ownership of IPR's to the Authority, or where benefit claimers are identified, to such benefit claimers;
- (b) Transfer of technology;
- (c) Location of production, research and development units in such areas which will facilitate better living standards to the benefit claimers;
- (d) Associating Indian scientists, benefit claimers and the local people with research and development in biological resources and bio-survey and bio-utilisation;
- (e) Setting up of venture capital fund for aiding the cause of benefit claimers;
- (f) Payment of monetary compensation and other non-monetary benefits to the benefit claimers as the Authority may deem fit.

Rule 20(2) of the Biodiversity Rules 2004 states that the guidelines shall provide for monetary and other benefits such as:

- a) Royalty
- b) Joint ventures

- c) Technology transfer
- d) Product development
- e) Education and awareness raising activities
- f) Institutional capacity building and
- g) Venture capital fund

The Act and the Rules made it clear that ABS will be made on a case by case basis though a general criteria will be formulated through measures stated above. There was pressure on the NBA to formulate a general criteria and multiple options were thrown up and discussed but unfortunately for 10 years nothing happened other than discussions.

Inability to formulate ABS Regulations

Though many persons approached the NBA after the enactment, the NBA was unprepared to implement the Act. There is no doubt that the subject matter was complicated, but none of the persons responsible were willing to take any bold steps. As a result a majority of the users of Biological Resources were non compliant with the provisions of the Law. As a Legal Advisor, the author regularly advised the chairpersons the dangers of non implementation and so did try to create awareness among the users. It was sure of one thing, that it was just the question of time before the floodgates open. The NBA, SBB and the users could be quiet, but the benefit claimers will raise their head sooner than later. Towards the end of 2012, a new officer joined in the Madhya Pradesh State Biodiversity Board and the first thing he did was to issue notices to all users including that of Coal, textiles and distilleries. The only thing the officer did not know was what would be the Benefit Sharing. As a State, Madhya Pradesh could have had its own regulations but he took the stand that it was the NBA which was supposed to provide the ABS Regulations. Though that stand of his was incorrect, the matter was finally taken before the National Green Tribunal, which questioned the NBA's inability to formulate ABS Regulations and the NBA finally had to enact Regulations as it was duty bound to do so and the time was limited.

Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014

India is so different, what works in any other part might not work here and what works here may not work in any part of the world. The diversity of India brought with it, its own challenges and that is one reason why the already complicated ABS became even more complicated. When the benefit claimer is just the collector of resources for which he gets paid, whether he again needs to get paid the benefit sharing fees or those benefit sharing fees will be used to ensure conservation and sustainable use of Bioresource? When a benefit claimer is passing on traditional knowledge, would there be a Prior Informed Consent and mutually agreed terms entered into with the claimer? In such case what would be the role of NBA?

How much ever be the complication, whatever be the urgency, one thing that is unacceptable is to make a travesty of the Indian State in the World Platform by the policy makers by reducing the ABS regime in India as a Commercial Agent. This is unacceptable because the author had specifically warned the NBA on the commission business adopted by the expert committee on ABS while approving application. In 2010, the author had even given a written legal opinion that the percentage business will not stand the test of law and should not be made a norm. If at all, there is a need for this it could have been for simple commercial uses where vanilla and milk is used to make a product or when wheat was ground into Atta. Not that, the author was suggesting that prior approvals need to be obtained for even these routine businesses but since the law is in force and the central government has not used its powers under section 40 of the Act wisely, technically approval is required even for such simple routine business.

When the personal care industry or Herbal drug industry requires a continuous supply of raw materials

that are biological resources, can't the policy makers think in terms of ensuring a sustainable livelihood to the claimers? What about skill development to the Claimers? How about establishing small scale industries at the point of origins? It is unacceptable that the policy makers deprived themselves of their reasoning capacity and embraced commission tables. The author feel bad even to explain the commission percentages as laid down by these Guidelines as under:

- (A) For Commercial Utilization (no prior benefit sharing negotiation)
- (i) Point of origin to Trader or
Trader to Trader 1-3 % of purchase price
 - (ii) Point of origin to 3 - 5 % of purchase
Manufacturer or price
Trader to Manufacturer

- (B) For Commercial Utilization (prior benefit sharing negotiation)
- (i) Point of origin to
Trader 3 % of purchase price
 - (ii) Point of origin to
Manufacturer 5 % of purchase price
- For High Economic Value Bioresource it's a blanket 5%

- (C) When the use of Bioresources in (a) or (B) is used for Products then

Annual Gross ex-factory sale of product	Benefit sharing component
Upto Rs. 1,00,00,000	0. 1%
Rs. 1,00,00,001 upto Rs. 3,00,00,000	0. 2%
Above Rs. 3,00,00,000	0. 5%

- (D) Transfer of results 5% of Monetary
of Research Consideration to NBA
- (E) Intellectual Property
- (i) If own exploitation 0. 2 - 1% ex factory sales
 - (ii) If to assignee / licensee 3-5% of Fees received +
2-5 % of Royalties
- (F) Transfer of Bioresource 2-5% of Fees and
Royalties
- (G) Any Fees collected by BMC under Sec. 41 is additional

Of the monies received by the NBA, 95% would be routed back to Benefit Claimers, of the 5% retained by the NBA, it will share half with the SBB.

The guidelines then dedicates Para 14 on Determination of benefit sharing. What is there to be determined once all the percentages have already been given? Whether anything could be made out of these guidelines or not, one thing absolutely stands clear. The NBA, policy makers in the MoEF are confused and do not know a thing about Benefit Sharing. The use of words are so loose and meaningless. For *eg.* it speaks about applicant not entering into any 'prior benefit sharing negotiation' and entering into a prior benefit sharing negotiation. What is the legal difference? Negotiations are irrelevant, Law only recognises Agreements. Again, the Applicant agrees with NBA. Whether the applicant agrees with NBA or whether it is with the benefit claimer? A commission is set for trader to trader transfer and in today's realistic scenario, a bioresources changes

hands with many traders, the author says that NBA is oozing positivism and hoping that each trader will walk to its offices and hand over the commission. Moreover, these traders are usually local people and NBA doesn't even know that these people are beyond its own jurisdiction under the Act.

If these guidelines are not denotified at the earliest, one thing is certain and that is NBA is definitely not planning to implement the Act with its true spirit and sanctity.

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