



# Disagreement Declaration in Practice for Access Benefit Sharing

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**Abstract:** *Access and benefit-sharing (ABS) means the way in which the availability of genetic resources may be accessed, and the benefits that result from their use are shared between the people or countries using the resources (users) and the people or countries that provide them. The basic aim of Access and Benefit Sharing is to promote sustainable development and the fair and equitable sharing of benefits arising from the utilization of genetic resources and associated traditional knowledge with them. ABS processes are required to be conducted under Mutually Agreed Terms between parties. A requirement that poses a lot of implementation challenges which often results in disputes for which effective and efficient resolution mechanisms is required. This paper explores the concept, key elements, policy legislation, Authority, Jurisdiction and Responsibility and Procedures adopted for Access and Benefit Sharing. The paper examines the Dispute Resolution in practice for Access Benefit Sharing in India through various case studies. In conclusion, the paper recommends that to promote fair and equitable sharing of benefits arising from the utilization of biological resources and associated knowledge and available ABS dispute resolution may cater to the need for utilization of genetic resources in a fair and equitable way.*

**Keywords:** Sustainable Development, Utilization of Genetic Resources, ABS Processes, Jurisdiction and Responsibility, Utilization of Biological Resources

## I. THE CONCEPT OF ACCESS AND BENEFIT SHARING

The concept of ABS is the sharing of benefits in a fair and equitable way, arising from the utilization of genetic resources. A United Nations Convention on Biological Diversity (BD) was signed in Rio on the 5<sup>th</sup> June, 1992, according to which the ABS is defined as the fair and equitable sharing of the benefits arising from the use of genetic resources. The states are the 'owners' of genetic resources located within their borders as per international law. The Communities have both customary and recognized rights over genetic resources as well as the traditional knowledge of those resources. Those stakeholders who want to research and use traditional knowledge or genetic resources are first bound to follow certain procedures and uphold standards in collaboration with the appropriate governments and communities.

### 1.1 Key elements of ABS

The various key elements of access and benefit-sharing are described below:



- **Access and Benefit-sharing:** The main procedures for gaining access to available genetic resources and agree upon that how the benefits resulting from the use of genetic resources will be shared between users and providers?
- **Utility of Genetic Resources:** The utilities of genetic resources both commercial and noncommercial use and its impact on access and benefit-sharing
- **Traditional Knowledge:** The concept of traditional knowledge and its use. The relation of traditional knowledge to access and benefit-sharing
- **The Bonn Guidelines:** The Bonn guideline's assistance and implementation for access and benefit-sharing framework set out by the Convention on Biological Diversity (CBD)
- **National Implementation:** The role of governments, as providers and users of genetic resources and various implement measures to govern access and benefit-sharing

## II. POLICY, LEGISLATION LEAD THE WAY

India became one of the first countries in world to enact the Biological Diversity Act in 2002, a dedicated law to safeguard and protect biodiversity, by implementing the international treaty within its borders. In 2002, the Government of India enacted the Biological Diversity (BD) Act in order to achieve the obligations prescribed under the Convention on Biological Diversity (CBD), an internationally legally binding agreement that was adopted in 1992. India became a party to the CBD in 1994 and enacted the BD Act and subsequent Rules in 2004 to adopt the goals of the CBD nationally, which is to conserve biological diversity, ensure sustainable use of its components and to have fair and equitable sharing of the benefits arising from genetic resources. This Act is implemented through decentralization. The function of National Biodiversity Authority (NBA) is to performs facilitative, regulatory and advisory functions to conserve genetic resources and ensure fair and equitable benefit sharing among beneficiaries. The concerned State Biodiversity Boards (SBBs) advise the respective state government on matters related to biodiversity conservation and sustainable use; and Biodiversity Management Committees (BMCs) implement conservation at the grassroots (panchayats and municipalities) and prepare peoples' biodiversity registers, or lists of all the biodiversity within their territories, as well as bio resources including associated traditional knowledge.

### A. The following two relevant protocols that have been adopted under the CBD.

1. The Cartagena Protocol on Biosafety held in 2000 at Montreal and
2. The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, held in 2010 at Nagoya, Japan

Before the Convention on Biological Diversity (CBD) came into force, biological resources were considered common heritage of mankind and were exchanged and utilized freely. The country providing raw material for developing useful value added products rarely ever got any benefits or share for commercialization of those products in many terms. This situation was perceived to be inequitable; unilateral especially by the biodiversity rich countries and therefore the concept of Access and Benefit Sharing was introduced in Convention on Biological Diversity. The first protocol of CBD is the Cartagena Protocol on Biosafety for regulating the movement of living



modified organisms between beneficiaries' countries. After several years of negotiation, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity was finalized and adopted in 2000 at Montreal. This Protocol is considered to be a major step forward in the matter concerned for Biosafety and has helped enable a situation for the environmentally sound application of biotechnology and the use of living modified organisms while minimizing the possible risks to human health, safety and environment. The second protocol of CBD is the Nagoya Protocol which focuses on Access and Benefit Sharing (ABS) held in 2010. India along with other mega diverse countries participated and played an key role in shaping the Protocol. ABS refers to the way in which genetic resources may be accessed, and how the benefits that result from their use are shared between the people or countries using the resources (users) and the people or countries that provide them (providers).

**B.** The benefits to be shared can be both monetary as well as non -monetary, such as sharing revenue/royalties when the resources are used to create a commercial or value added product, or non-monetary, such as the development of research skills and knowledge.

**C.** In order to implement the provisions of the Biological Diversity Act, various authorities such as the National Biodiversity Authority, the State Biodiversity Boards (SBBs) and local level Biodiversity Management Committees (BMCs) were established under the Biological Diversity Act in 2002. With respect to Access and Benefit Sharing, the National Biodiversity Authority deals with requests for access to bio resources and granting approvals for access subject to the mutually agreed terms and conditions set forth in the Access and Benefit Sharing Agreement. This is done in order to ensure equitable sharing of benefits from the use of biological resources and associated knowledge. The structural and procedural framework for accessing biological resources and sharing the benefits of that access has been elaborated in details under the Biological Diversity Act, 2002

### **III. AUTHORITY, JURISDICTION AND RESPONSIBILITY FOR ABS**

The various authorities their territorial jurisdiction and accountability for Access and Benefit Sharing (ABS) in India are described below:

#### **3.1 National Biodiversity Authority (NBA)**

1. The request for access by “non-Indian individuals or entities (body corporates/associations/organizations) with non-Indian participation (in share capital/management)
2. Transfer or sharing of research results by any person (i.e., Indian/ non-Indian individual/entity) to Non-Indian entities with foreign participation
3. Approval before making an application for Intellectual Property Rights (IPR) based on research/information on a biological resource obtained from India by any person (i.e., Indian/ non-Indian individual/entity)



### **3.2 State Biodiversity Boards (SBB)**

1. Prior Intimation for the sue of biological resources by Indian (individuals/entities) for commercial utilization including bio-survey and bio- utilization for commercial utilization
2. Restriction of activity that violates principles of conservation and sustainable use of biological resources or equitable benefit sharing

### **3.3 Biodiversity Management Committees (BMC)**

1. Documentation of biological diversity, promoting conservation and sustainable use of biological diversity and knowledge
2. NBA and SBSs are required to consult with BMCs for use of biological resources and Associated Knowledge (AK) in BMC's jurisdiction
3. It can levy charges by way of collection fees for accessing/collecting bio resources for commercial purposes within its area of jurisdiction.

## **IV. PROCEDURES FOR ACCESS AND BENEFIT SHARING**

The Biological Diversity Act, 2002 lays out a fairly straightforward clear procedure for access for the purposes of research, commercial utilization, obtaining approval before applying for an Intellectual Property Rights (IPR) or for transfer to a third party within or outside India. The detailed procedure includes submission of an application to the NBA for non-Indian entities with foreign participation and intimation to SBBs when it comes to Indian entities. In both instances a final agreement can only be signed in consultation with the concerned BMCs at the village or urban ward level. The request for access to biological resources or Associated Knowledge (AK) in any way is required to be made to the NBA in the prescribed Forms as prescribed in the BD Rules, 2004. Once the request is accepted, agreements in the prescribed format are signed between the NBA and the applicant. The agreements between the NBA and the applicant require payment of royalty fees which changes on a case to case basis and are regulated by the ABS Guidelines notified in 2014. When NBA grants approval for research for commercial utilization, for transfer of results of research, for Intellectual Property Rights or for third party transfer, a charge equivalent to 5 percent of accrued benefits is applied, out of which half of the amount is retained by the NBA and the other half may be passed on to the concerned SBB for administrative charges. Majority say 95% of the accrued benefits are supposed to go to the concerned BMCs and/ or benefit claimers.

## **V. DISPUTE RESOLUTION**

Indian biodiversity legal claims are increasing. There is growing public recognition of biodiversity importance and concern about its decline at an unprecedented rate. As with other nation states that are signatories to the CBD, India accepts and honors its legal commitment through its laws and judicial practice. The constitutionally based judicial journey from PIL to specialized adjudication in the NGT provides a steadfast foundation to promote decision- making based upon a rights-based approach. The proactive, amicus friendly, Indian judiciary through expansive interpretation and the integrated approach of the constitutional mandates (Arts. 21, 48A and 51A(g)) have produced a powerful symbiotic link between human rights and biodiversity conservation discourse.



The biodiversity litigation journey still faces challenges that mirror legal fragmentation discourse. The sectorial legislation (forests and wildlife), and the Biodiversity Act are part of the same corpus and share the same goals of protecting and conserving biodiversity, but the multiple governance mechanisms are conflictual. Conflicting norms and disparate institutional responses produce different and disjointed responses within biodiversity laws. The gaps in the ABS raise operational issues regarding the “what,” “who” and “how” thereby creating ambiguities in the governance of the protection of biodiversity and the benefits for local and indigenous communities.

Nevertheless, closer cooperation and institutional integration would provide synergetic legal structures supporting the legitimacy of biodiversity regime. For example, the establishment of the NGT, a judicial body staffed by scientific experts, engages, produces, and enforces scientifically supported policies and laws thereby taking its remit beyond the courtroom door and into the wider community. The NGT has impacted upon the country’s biodiversity jurisprudence by formulating biodiversity principles where they were undervalued or undeveloped, evolving its own procedures, and exposing serious administrative and compliance weaknesses. Similarly, the formulation of draft ABS Guideline (2019) aims to clarify and improve rules and regulations regarding the ABS governance. In the creation of synergetic legal space, all dimensions of biodiversity need to be balanced with the objectives of conservation and sustainable use as guiding principles.

## VI. ACCESS AND BENEFIT SHARING CASE STUDIES

The case studies of the importance of effective and successful access and benefit sharing regimes are discussed below:

- 1. The Kani Case of Arogyapaccha:** This case arose much before India signed or ratified the CBD and is still noted for creating a model for access and benefit sharing which tried to take into account regarding the rights and the benefit sharing privileges of the indigenous community. The In Kani case the complexities of a benefit sharing agreement has been discussed. The conclusion in this case is that a lot of commercially viable business is now being done based on this plant product without any benefits from such business given to the Kani Tribe members.
- 2. The Monsanto India case:** This case is important in order to discuss the issue of the effect of the legal framework and Biological Diversity procedures over large business houses such as Monsanto. This case was originally an issue of Intellectual Property Rights (IPR), namely that of patent and further a socio-legal issue of the company misusing its dominant position prevailing in the market. In 2017, High Court of Delhi ordered in favor of Nuziveedu Seeds Ltd, the Indian sub-licensee. The termination of the sub-license was held to be invalid and illegal and the Court also held that the earlier agreement for the use of Monsanto’s BT technology between the two parties would prevail.
- 3. Red Sanders Case:** In year 2015, the Red Sanders case open gateway for the National Biodiversity Authority, State Boards and local communities to utilize the Access and Benefit-sharing of the biological resources. In this case, Andhra Pradesh Government conducted a global E-auction for sale of high economic value Red Sanders by the foreign and Indian bidders before accessing the biological resources. The successful bidder had to



pay five percent to the National Biodiversity Authority or State Biodiversity Board. Ninety-five percent of the total benefits were to be transferred to the Biodiversity Management Committee at the local level. Access and benefit sharing arrangement was one of a kind which proved its utility in the State not only by providing the people a source of income but also by engaging them at the decision-making level which had the potential of encouraging them for the sustainable utilization of the genetic resources. Consequently, people from all walks of life in the state such as indigenous people, tribal people, and forest-dwellers will get benefits from the auction. This innovative instance of Access and benefit sharing has changed the way companies have been utilizing genetic resources.

4. **PepsiCo-seaweed:** PepsiCo India Holdings Private Ltd. has entered into access and benefit-sharing agreement with the National Biodiversity Authority (NBA) for the export of seaweed (*Kappaphycusalvarezii*) cultivated by the fishing community in the State for Rs.37 lakhs in 2007. PepsiCo has exported approximately 2000 metric tons of seaweed to countries like Malaysia, Philippines, and Indonesia. The beneficiaries of the agreements are spread across four districts in the State. The company paid the NBA to access the genetic resources from the Gulf of Munnar area in the southern Indian State of Tamil Nadu. The company has signed a yearlong agreement with the NBA to export the seaweed for commercial utilization in the food and cosmetics industry. A multinational company like PepsiCo has also signed access, and benefit sharing agreement where the ABS has been implemented successfully.
5. **Bio India Biological-Neem:** The other reported case to show the access and benefit sharing are Bio India Biological-Neem case. National Biodiversity Authority has collected 55,035.00 (about USD 924) from Bio India Biological for the export of 2000 kilograms of neem to Japan. People from the village named Amarchinta in the southern Indian state of Andhra Pradesh bundled the leaves and dried it before handing it to the company for the export by entering into an undertaking with the company for a few special operations. The National Biodiversity Authority has transferred a “part of the royalty amount” to the local biodiversity body in Amarchinta for “planting neem saplings and creation of awareness about biodiversity conservation.” The BMC has reportedly utilized this money for awareness programs, planting of saplings and fencing.
6. **Novozymes Biologicals Inc.** of USA has also signed an access and benefit sharing agreements with the National Biodiversity Authority for commercial use of bacteria of *Bacillus* and *Pseudomonas* to screen for plant growth from Malampuzha forest division in Kerala. The sample of the bacteria will be used in a laboratory for the promotion of crop production of tomato, lettuce, rice, etc. Novozymes is a multinational corporation with expertise in microbiology, biotechnology, and gene technology. The National Biodiversity Authority has charged Novozymes five percent annual royalty from the sale of the product derived from the biological resource since 2004.
7. **Habib goes herbal:** On 15 April, 2015, Uttarakhand State Board has entered into access and benefit-sharing agreement with a reputed cosmetic company Habib Cosmetics Private Limited This is a significant step towards the implementation of the Biological Diversity



Act, 2002 and first of its kind by any Biodiversity Board after the notification of Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014 by Government of India. The share of benefits generated by the Habib Cosmetics Private Limited Rs 3,22,991/- has been shared with Uttarakhand State Biodiversity Board for the year 2013-14 which would be utilized by the board as per rules.

8. **Dabur India Pvt. Ltd.**, one of the India's largest Ayurvedic medicine & natural consumer products manufacturer has agreed with the State Board of Himanchal Pradesh to pay thirty five lakh to access the biological resources of the State. This is an example to get value from company to access the biological resources.
9. **Basmati Rice:** The Basmati rice controversy emerged in late 1997 when Rice Tek Inc., a US based company applied for a patent which was granted by the US patent office to call the scented rice grown outside India 'Basmati'. This was irrespective of the fact that the rice had been grown in India for centuries especially among the Punjab, Hayama and Uttar Pradesh. Rice Tek Inc. was granted patent No. 5663484 on September 2, 1997. The grant of the Basmati patent spelled doom for Indian farmers and exporters as they lost out on profits from exports and also lost their positions in crucial markets like the European Union, Western Asia and the Middle East. after the grant of the patent, Indian NGOs initiated a campaign against the patent which drew international attention to the patent. The Indian government approached the US patent office urging them to reconsider the grant of the patent in order to protect India's interest as the patenting of Basmati by Rice Tek was not just an intellectual property and cultural theft but also a threat to the Indian economy. Subsequently, a re-examination application was filed by the Agricultural and Processed Food Products Export Development Authority in India.<sup>58</sup> Following the re-examination, Rice-Tek agreed to withdraw some of its claims which were formally retracted in January 2002. However, some other specific claims were retained such as the claims for novel rice lines. This case was addressed as a major victory against biopiracy.

The rich biological diversity around us is source of qualitative life. Life will be denuded of its significance and will peter out into a "Vegetative State" sans the components of biological diversity. Hence serious thought has to be given to preserve biological diversity. India has taken leading role by adopting a legislative, administrative and policy framework to promote fair and equitable sharing of benefits arising from the utilization of biological resources and associated knowledge. The ABS mechanism allows local communities better opportunities to benefit from the use of their knowledge, innovations and practices related to biological diversity. India has an exemplary record in implementing the access and benefit sharing (ABS) mechanism, which creates incentives to conserve and sustainably use biological resources and protect associated traditional knowledge. This Primer is an important chronicle of these efforts. The Indian judiciary enjoys widespread public credibility, and the results of its positive decisions continue to resonate across the country. The future of biodiversity litigation holds hope and promise.



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