

# Benefit Sharing Under the Legal Regime of Indian Biodiversity System: A Critical Analysis

GUVVALA BALAJI

Department of Law, OU, Tarnaka, Telangana, INDIA.

**ABSTRACT:** - Nagoya Protocol made an extraordinary stride for headway and giving better shape to the entrance and advantage sharing (ABS) component. After the entry of enactment and lead on biodiversity, obviously we don't viable ABS process. Question emerge whether the rationality of Bonn Guidelines on ABS are truly taken after or not? This paper will basically investigate Bonn rules, Nagoya Protocol and how it is imperative for the client and contracting gathering to recognize indigenous groups and give them their meriting right. Careful investigation of ABS contextual analysis on Kani tribe in regards to assembling of Jeevani medicate and genuine claim of biopiracy on bt brinjal has sufficiently given perception so complexities around execution of enactments and arrangements can be settled immediately. There is requirement for multilateral ABS instrument to guarantee straightforwardness and better appraisal for biodiversity administration. The paper will fundamentally investigate ABS control go by National Biodiversity Authority in 2014 and in what manner or capacity far it is successful.

**KEYWORDS:** Benefit sharing, bio piracy, Prior informed consent, Bioprospecting.

## INTRODUCTION

There is no uncertainty about the way that the all inclusive feature of condition and economy is changing quickly in the period of present day innovation. Related universal approaches and residential enactments identified with condition protection and economical advancement were acquainted from time with time in similarity with tirelessness of biological system. UN Convention on Biological Diversity (CBD) and Trade Related Aspects of Intellectual Property Rights (TRIPS) are those lawfully restricting instrument on the planet which are for the most part worried about sustenance and protection of natural assorted variety, licensed innovation rights and development of world exchange each measurement.

The extent of organic assorted variety or biodiversity is sufficiently wide to incorporate diverse angles natural & hereditary assets over the world. Numerous Asian nations which are exceptionally prosperous and princely in biodiversity and conventional learning, end up noticeably applicable for operation of IPR strategy and world exchange whereby corporate bodies draw in for business course of action. These business game plan impeded intrinsic estimation of organic decent variety coming about into moderate debasement of our biological system. There are not kidding suggestions on since quite a while ago settled reliance of indigenous groups where they are deprived of conceivable money related advantages. Diligent loss of biodiversity and quickly

developing exchange (bioprospecting) with no confinement make natural unsustainability.

The Convention on Biological Diversity advanced out in year 1992 with a reason to fortify and protect biodiversity for its essentialness. The Convention looks to receive agreed measures for getting social manageability for indigenous groups and ecological maintainability for biological system. Specialists have acknowledged the way that continuance of biodiversity can be accomplished through profitability and proficient use of hereditary assets. The Convention clarifies the requirement for administering the advantages to indigenous groups continuing from utilization and use of hereditary assets. The tradition appeared likewise because of biopiracy and loss of biodiversity.

Despite the fact that it is clear from the target of CBD that methods for moving toward hereditary assets and appropriate exchange of innovations must be correlated to the yearning of practicality and reasonable utilization of biodiversity.<sup>2</sup> The Convention put a commitment on nations to create national outline and masterplan for feasibility and upkeep of organic decent variety in correspondence to the goal of the CBD and it ought to be deliberately reflect in the diverse projects and arrangements.<sup>3</sup> While looking pointedly and carefully finished history and goal of CBD, it can be watched that there is brilliant exertion by United Nation to make such a contemporary multilateral assentment which is natural

neighborly and canny. Be that as it may, its most gainful and clever information is its third target which is legitimate and fair-minded method for sharing advantages coming about because of the application and utility of hereditary assets. It is imperative that the idea of sharing advantages must reflect fair and impartial nature in the business assentment. CBD substantiates that entrance and advantage sharing (ABS) is deliberate course of action in which dealers (pharmaceutical organization or any transnational research based organization) will approach hereditary assets and consequently advantages will be shared impartially and satisfactorily.

The term get to truly implies securing or accomplishing any material question for a particular reason. However, so far as and hereditary assets are concerned, get to is idea that is particularly applicable and similar to exchange Different sort of drugs, beauty care products and other helpful made things are straightforwardly or in a roundabout way got from these hereditary assets and related learning corresponded with it. So it has turned out to be imperative to get to (by means of exchange) for various enterprise over the world according to the idea of their business. With the progression of time, it has been understood that there is predictable development in advertise openings or over the top request of these indigenous assets for extension of business of companies and ventures. Be that as it may, there are impediments as for universal limits and distinctive laws and strategies from nation to nation which confine exploitative access to hereditary assets and some of the time make exchange obstruction legitimately or wrongfully. That is the reason CBD has made such a strategy system having administrative component managing parallel open doors for Research and Development (R&D) establishments and other private enterprises by giving them through real course (business game plan having ABS in consistence to the destinations of CBD). Nagoya Protocol is real global activity which essentially covers parts of advantage sharing instrument and related techniques.

Article 15 and 16 of CBD assume a pivotal part in the matter of how biodiversity would be controlled, safeguarded and managed. Obviously States have self-ruling specialist over their common assets. They can decide and systematize access as indicated by their individual household enactment. As a contracting gathering to CBD, state must not put any sort of hindrance/limitation, which is totally against the ethos, rule, and targets of CBD. Advantage sharing component based approach and long haul

methodology ought to be set up by creating nations. In understanding to commonly concurred terms, benefits coming about because of utility of hereditary assets must be imparted to neighborhood specialists and nearby communities.<sup>4</sup> It is additionally required that office of access to indigenous assets must be of judicious &endurable utilization of biodiversity and in at all circumstance, it must not make any sort of damage the earth. <sup>5</sup> So far as customary learning is concerned, ABS talk in said in Article 8 (j) of CBD where maintainable and valid utilization of indigenous assets can be given to the intrigued brokers. The concerned arrangement underwrites broad use of customary information with acknowledgment and engagement of holder and in this manner they need to give proportionate advantage sensibly coming about because of its application. The appropriate basic issue brought up in such manner is that earlier educated assent of indigenous group is no place said who are legitimate customary information holders and it is additionally unequivocally not given that the use of conventional learning assets will be liable to commonly concurred terms.

## ANALYSIS OF BONN GUIDELINES

Where CBD appeared in the year 1992 and its instrumentality assumes an essential part for ABS. With the progression of time, it has been understood that lone couple of nations had embraced ABS as enactment thus remembering this sort of steady approach with no lucidity over execution of ABS, CBD created Bonn rules on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising out of Their Utilization in 2002.<sup>6</sup> Bonn Guidelines are developed by CBD to escalate and expand the ABS design of activity with proper strategy. The rules additionally fill a significant need in deciding the stages associated with the component of acquiring access to hereditary assets and advantage sharing. These rules give a solid proposal in detailing authoritative measures, hierarchical and administrative strategy making procedures on ABS in inference to Article 8(j), 15 and 16 of the CBD.<sup>7</sup> The rules known for its noticeable quality, reasonable and businesslike approach towards proper advances included and required for PIC and MAT whether it is identified with amplexness, capability, reasonableness, assurance of sort of research required, reason, constraints, insurances engaged with keeping the adjust over utility of assets, instance of innovation exchange and financial improvement of indigenous groups by means of limit building program, and so forth.

With reference to benefits, Bonn Guidelines has characterized benefits into fiscal and non-money related class. In any case, the basic issue is that there is no further clarification with respect to non-financial advantages. So there will be question on the probability and productivity of its method for implantation and distribution among indigenous groups. Also, there is no clearness in the rule with reference to how advantages will be appropriated between administrative body and indigenous groups and will's identity the genuine partner. Another correlated issue is that the point of advantages is limited just to advancement of conservation and reasonable utilization of organic decent variety, which doesn't identify with the prosperity of indigenous communities.<sup>8</sup> Since the Bonn Guidelines is optional in nature and its accentuation particularly on significant parts of access to hereditary assets in general. So it may not adjust the enthusiasm of instrument amongst access and advantage sharing. It is watched that need of ABS enactment and its application in the client nation will assume basic part in authorizing ABS understandings separated from the congruity of Bonn Guidelines for authoritative choice. India has humongous wellspring of natural decent variety enhanced with scholarly legacy. The aspect of regular heterogeneity is spread crosswise over species and biological system. It is obviously more defenseless to various sort of biopiracy and threat in bioprospecting course of action. It is all around settled reality that entrance and business course of action identified with hereditary assets won in India since immemorial. The standard administer followed in the effective fruition of these organizations is based transaction and shared assent of the two gatherings. In any case, those variables can't choose and resolve distinctive complexities emerging out of exchange which might be because of extension of business, surge in inquire about and advancement because of science and innovation, and so forth. It was felt that there is requirement for local enactment which can save organic decent variety and in addition law related on ABS understanding particularly because of the advance in science and innovation and government need to continue with same force by figuring laws and arrangements to stay away from regulatory obstacles. Prior to the development of CBD, there was no well-known normal or formal tradition to track and screen exchange identified with hereditary assets inside nation or outside nation crosswise over fringe. There was neither any administrative component to oversee these business exchanges nor any perceived all inclusive contract for advantage sharing amongst clients and benefactors/indigenous groups.

## ISSUES IN ABS MODEL FOR KANI TRIBE

One particular occurrence of bioprospecting, in which ABS mechanism was executed & implemented for utility of indigenous resource related to traditional knowledge in the case Kani Tribe (ABS Model). It was considered as one of best ABS model to understand & critically analyze its nuances so that Government can make a standard ABS protocol & related domestic legislation. It was benefit-sharing arrangement between Tropical Botanic Garden & Research Institute(TBGRI) and Kani tribe of Kerala where local plant Arogyapacha will be utilized for manufacturing an antifatigue drug called 'Jeevani' which will be licensed to a pharmaceutical company.<sup>9</sup> In the year 1987, during research work, it was disclosed by Kani tribe to the researchers that Arogyapacha plants were generally consumed by community people to remove anti-fatigue & anti-stress. So, a team of scientists got some compounds from Arogyapacha for formulating drug Jeevani and applied for patent for the drug. TBGRI licensed the technology for producing Jeevani to the pharmaceutical company, in return TBGRI got good amount of money as license fee and royalty. Since TBGRI get substantial profit from the same and wish to expand further the business in this regard, so they entered into benefit sharing arrangement with Kani Tribe. Substantial share from the license fees and royalty agreed to be given to the Kani tribe under this mechanism. Interestingly, there was no concept of PIC or MAT at that time as CBD and Nagoya Protocol came into existence formally later on. Even, Kani tribe entered into such an agreement without any hassle shows an act of eminent character and noble peculiarity. Though, there was neither any existence of right to bargain with rational approach nor right to contend benefit/advantage at that time which is later on introduced Biological Diversity Act in our country. Secondly, TBGRI thought of extending benefits to kani tribe by providing social security measures through other means. A trust was established by TBGRI for welfare/socio-economic development for the people of Kani tribe, documentation of traditional knowledge& genetic resources and provides substantial support to encourage sustainable & viable utility of genetic resources and its proper conservation. Lack of proper acknowledgement & cognizance in Kani society regarding this ABS arrangement is one of the critical issues that raises doubt over legitimacy & potentiality of mode of ABS agreement. Further problems like lack of substantial raw material (Arogyapacha) due to inefficient mechanism for its sustainability &

restrictions created by competent authority made it more complex over the time. There are certain questions that arise from this case particularly like: How so far legal regime related to IPR in India is connected with the whole mechanism of ABS for local communities? How ABS agreement directly between local/indigenous communities and corporate body that further develop the raw product, can be organized properly without any administrative hurdle in the absence of specific law & policy? Thirdly, what can be the possible solution to the complex problem of mode of the benefit sharing agreement especially over jurisdiction and where more than one indigenous community from adjoining areas claim to be the part of the same ABS agreement?<sup>10</sup> ANALYSIS OF BD ACT 2002 India become contracting party to CBD in the year 1994, by which it is mandatory for Indian legislature to achieve the objectives & philosophy of CBD. Accordingly, Biological Diversity Act was passed in 2002 with its aim to preserve, viable use and fair benefit sharing mechanism. National Biodiversity Authority(NBA)<sup>11</sup> at national level, State Biodiversity Board(SBB)<sup>12</sup> at state level and Biodiversity Management Committee<sup>13</sup> at local level were established to monitor the commercial application & utility of genetic resources and maintain its sustainability either by themselves or by providing assistance to the government.

The concept of fair & equitable benefit sharing is not defined properly in BD Act, 2002 & BD Rules, 2004. The word 'equitable' doesn't signify explicitly the proper way of distributing benefits. In fact, as per the language of the legislation and BD Rules 2004, it is not clear in case of commercial use of indigenous resources, how benefits will be distributed equitably among two adjacent areas or villages of the indigenous communities. It is clear from biodiversity legislation & Rules in India that NBA will give formal authorization for commercial application & utility of genetic resources<sup>14</sup> as well as devise resolution & settlement of benefit sharing.<sup>15</sup> The scope of benefit sharing was further extended in the BD Rules 2004. It was introduced with a purpose to expand the trade & empowerment of indigenous communities. Therefore, it covers joint proprietorship, royalty, opportunities for possible business association, advancement & proliferation of raw product, Public sensitivity & awareness programmes for environmental sustainability, activities which promote strengthen skill, competence so that indigenous community can prosper socially and economically. National Biodiversity fund<sup>16</sup>, State Biodiversity funds<sup>17</sup> and local Biodiversity Fund<sup>18</sup> were created at 3 different levels for sustainability of biodiversity via conservation, other

dimensions of benefit sharing and provisions of loan to each other. This concept has been inspired & followed from one of the peculiar feature of ABS model for Kani tribe in which same pattern of utilization of the fund was used for socio-economic improvement & better cultivation of biodiversity.

There are few pertinent issues raised in many sections of the legislation & related regulation that can indirectly put an adverse impact on ABS mechanism. For example, if any Indian corporate organization which wants to go for commercial usage of genetic resources, it needs to give prior intimation to State Biodiversity Board for doing the same<sup>19</sup> and after understanding the provision of legislation, it is clear that there are two other related factors which is a matter of opaqueness & intricacy i.e., consultation process with local bodies in this regard seems to be weak, shallow & trivial and the provision of confidentiality of such information.<sup>20</sup> Now the question will arise what the magnitude of prior intimation? Are they not responsible towards the conservation & sustainable utility of genetic resources as enshrined from the objective of BD Act 2002? Are they not responsible towards fair ABS agreement with local & indigenous communities who are the holders of genetic resources since time immemorial? There is absence of accountability, work assessment and precautionary principle in this particular case especially if the matter is vulnerable to biopiracy.

Secondly, there will be a doubt over integrity & reliability of benefit sharing process in the law related to biodiversity in India because there is complete absence of representation of indigenous communities either in SBB or in BMC. Few questions will definitely arise like what are the roles & rights of benefit claimer? How so far the mode of necessary negotiation will be efficient on determining equitable benefit sharing especially in the absence of indigenous communities? SBB play a crucial role in giving guidance & input to the State Government on various issues related to development of biodiversity. Earlier, it was mentioned in the legislation that SBB can also regulate by endorsing permission for commercial usage of genetic resources<sup>21</sup>, but surprisingly there is absence of such provision of giving such approval by SBB in the BD Rules 2004, in fact NBA is only authorized to give such permission as of now.<sup>22</sup> Another issue is that BMC despite being a very crucial body is limited only to formulate & manage People Biodiversity Register.<sup>23</sup> No specific power has been provided to BMC to protect People Biodiversity Register. There is no provision for legal action against misappropriation of People Biodiversity Register as well as no safety measures against the misuse of the

same. BMC is well connected with holders of genetic resources (indigenous communities) and having strong community knowledge about conservation of genetic resources and its viability in any environment. So, it is important to introduce changes in the legislation in such a way so that they can also play an imperative role in establishing access to genetic resources for commercial users who are involved in bioprospecting & other similar trade. Therefore, the use of the word 'consultation' which NBA and SBB needs to seek from BMC to decide accessibility & commercial use of genetic resources<sup>24</sup>, should be modified so that it should reflect the spirit of PIC and MAT.

## **ANALYSIS OF ABS CASE RELATED TO COMMERCIAL UTILIZATION OF SEAWEED**

Agreement for access to genetic resources and its commercial usage was admitted & signed between NBA and M/s. Britto Seafood Exports Pvt. Ltd. on 9th July, 2010. The company's main trade is to produce & export of seafoods. In this particular agreement, the company has to export 28 metric tonnes of dried red seaweed to Vietnam. Seaweeds are generally grown by fishing community. It was further cultivated by women SHGs to produce carrageenan. In this agreement, NBA asked M/s. Britto Seafood Exports Pvt. Ltd to pay royalty of 5% of Free on Board value for exporting seaweeds, which is a huge amount of money. NBA also directed the company to share its benefits according to the BD Act, 2002. Surprisingly, benefit claimer & applicant is M/s. Aqua Clinic Centre, Mandapam as mentioned in the application for access to genetic resources.<sup>25</sup> There are two critical issues emerging out from the facts of this case: 1. Absence of benefit sharing with fishing community or seaweed processors. It may be due to lack of proper coordination & communication. There is doubt on reliability of such kind of equitable sharing for benefit even if it exists or follow in the near future.

2. The most critical matter in this case that there is no direct involvement & participation of BMC as it is important for NBA to consult them for deciding over accessibility and commercial usage of indigenous resources. It is because of non-existence of BMC during that period in state of Tamil Nadu. Though serious endeavour were conceived to make BMCs by SBB of Tamil Nadu so as to allocate benefits equitably in the state.<sup>26</sup> 3. The complex problem will arise when the ownership is not factually clear. It is difficult then to share benefits among them equitably.

Accountability and socio-environmental assessment are required for even for the grant of access to genetic resources. Since law related to biodiversity doesn't mention about the application of Intellectual Property Rights(IPRs), it is difficult to assess the real amount of money to be considered as monetary benefits in the presence of practical intricacies involved. So, this case can give an explicit inference that it is very necessary for every state to establish BMCs in their territory as it can be observed from the report of NBA that there are few states which have no record of establishing BMCs yet, or some states have few numbers of BMCs. <sup>27</sup> This is serious issue where serious exercise & strict resolution is required to establish BMCs, then People Biodiversity Register can be managed properly. This effort can also reduce further complications & hurdles in the effective implementation of ABS mechanism.

## **CRITICAL ANALYSIS OF BT BRINJAL CASE**

A tripartite research based agreement was signed between Maharashtra Hybrid Seeds Co. Ltd., Sathguru Management Consultants Private Limited and University of Agricultural Sciences on 23rd April 2005 addressed at the advancement & growth of pro-poor varieties of eggplant that was genetically engineered into modified Bt Brinjal. Though, it is clear from the agreement that this collaborative project was done under the name of Agricultural Biotechnology Support Project-II and it has formal approval of Department of Biotechnology, Government of India. <sup>28</sup> On 15th February, 2010, an NGO named Environment Support Group (ESG) wrote a complaint to Karnataka Biodiversity Board where serious allegation of violating different sections of BD Act, 2002 were made against Mahyco (Monsanto as partner), Sathguru company and University of Agricultural Science on their collaborative research agreement. The allegation shows that an act of biopiracy was committed where accessibility & transferability of genetic material was done without following basic standard of PIC of indigenous communities. It was observed as per allegation that benefitsharing mechanism was completely ignored shockingly in the presence of operational Karnataka SBB. There is another issue raised in this regard i.e., prior formal permission of NBA was not taken under section 3 & 4 of BD Act, 2002. In fact, there is no evidence to show that prior intimation or information has been given to Karnataka Biodiversity Board as section 7 of BD Act, 2002.<sup>29</sup> So, it was obvious from the above

mentioned violation of different sections of BD Act 2002 that BMC was also ignored completely as no consultation was done between NBA, SBB and BMC with reference to accessibility & transfer of genetic resources in this tripartite agreement. Even the defence of section 5 of BD Act 2002 was not acceptable because a collaborative research agreement needs to comply strictly guidelines framed by Central Government according to section 5(3) of BD Act 2002. But guidelines based on international collaborative research assignments were issued in public by Ministry of Environment & Forests (MoEF) in November 2006<sup>30</sup>, whereas this tripartite agreement was signed in the year 2005. Unfortunately, Karnataka SBB has refused to take any action against three parties of this collaborative agreement. It was decided in its 19th meeting that NBA is competent authority to decide & take action against three parties regarding the serious allegation made by ESG.<sup>31</sup> This particular action got no reasonable explanation from the board meeting. This kind of act will definitely question the legitimacy and rationality of any SBB. It can be observed that some drastic change is required in the law related to biological diversity with respect to responsibility of SBB towards conservation & biodiversity assessment. Later on, a public interest litigation was filed by ESG in Karnataka high court on serious issues like increase in biopiracy, violation of law related to biodiversity in research based agreements and Government's inaction in framing specific policies in the interest of indigenous communities & conservation of biodiversity where respondents are NBA, MoEF, Karnataka SBB, State of Karnataka. It was asked in the prayer that NBA should make guidelines for ABS mechanism.<sup>32</sup> Another important issue was emphasized that section 40 of BD Act 2002 should be considered unconstitutional because it gives arbitrary power to the Government to exempt certain genetic resources from the grant of approval from NBA & SBB for accessibility or commercial utilization of the same. If it is continued & implemented further, it may go against the objective of BD Act, 2002.<sup>33</sup> Later on, NBA confirms to take criminal case of biopiracy (where prior approval was not taken) against all three parties of the collaborative research agreement of Bt. Brinjal.<sup>34</sup>

## **ANALYSIS OF NAGOYA PROTOCOL**

The Nagoya Protocol on ABS process is the new protocol to the CBD, which came into existence on

29th October, 2010 in Nagoya, Japan. It was endorsed to address & target successful application of ABS process without any complexity by systematically following third objective of CBD. Therefore, it encompasses & takes account of all aspects of genetic resources and indigenous/traditional knowledge related to genetic resources.<sup>35</sup> The preamble of Nagoya Protocol elucidate clearly that ABS play a very potential part in proper conservation & viable use of biodiversity. It has acknowledged the local communities as holder of genetic resources who conserve & protect since time immemorial. It has become important that benefit sharing process should be sensibly systematized in an equitable way so that it serve the purpose of sustainable development. It indicated few complications in the appropriate implementation of CBD from practical point of view especially related to MAT. It emphasizes on transparency & clarity in the negotiation process to achieve MAT in fair manner.<sup>36</sup> The concept of benefit sharing is explained in the nature of reasonableness & best possible fair and square agreement. It gives an obligation of the State to frame policies, legislations & regulations in such a compatible way so that there won't be any hurdle for access mechanism and benefits are shared in the most proportionate & equitable manner according to mutually agreed terms either in the case commercial usage of genetic resources or traditional knowledge. One of the pivotal characteristics of this mechanism of benefit sharing that benefit has been classified into two types: monetary and nonmonetary.<sup>37</sup>

The most important feature of Nagoya protocol is that access to genetic resources or traditional knowledge must be subject to Prior informed consent (PIC) and Mutually agreed terms (MAT). Surprisingly, there is no specific reference or definition of PIC and MAT given in the CBD. PIC has inherent character of voluntariness and democratic process. The word Consent means that exchange of formal dialogue should be free from any kind of deception and coercive negotiation. The state must reflect transparency in the accessibility process in a way it should be harmonious to domestic policies & law related to access and benefit sharing. State should ensure that appropriate domestic authority should comply their respective equitable function on timely basis & in an economical manner. Proper deliberation & discourse via active engagement of indigenous/local communities is very important for accessibility to genetic resources<sup>38</sup> and traditional knowledge<sup>39</sup>. It is very common that factors like non-receptiveness, non-approachability with indigenous/local communities (where PIC is unnoticeable or practically not possible) and more

than one indigenous/ local community as benefit claimer create an entangled situation with multifarious legal & administrative issues. Nagoya Protocol has emphasized conducive mechanism in the form multilateral agreement<sup>40</sup> and mutual-responsiveness & collaboration across a particular area or boundary.<sup>41</sup> National & state level local laws related to commercial utilization of biodiversity can vary from place to place. So, it is important for users to follow their business procedure in conformity to national legislation reconciling with principle of PIC and MAT from the purview of CBD. This is called as compliance, which is necessary foundation for equitable benefit sharing. <sup>42</sup> But there are apprehensions raised in this case like what is implication of state's action towards fulfillment of legal & administrative responsibility against non-compliance. Another issue is the loose language and lack of sincere approach against any kind of transgression and encroachment against the ABS mechanism. Formulation of biodiversity concerned policies, strategies, legislations in accordance with CBD won't be sufficient enough until unless there is dynamic mechanism adopted to inspect & monitor commercial usage of indigenous resources. The protocol emphasizes on creation of checkpoints that ensure proper supervision & assessment over actual implementation of PIC and MAT. Checkpoints can assemble related data for every stage and provide the same to competent establishment, provider and ABS clearing house. <sup>43</sup> There are other kinds of supervisory mechanism which are not mentioned specifically in the Nagoya Protocol like accomplishment of the work through economical way, proper mode of assessment to ensure no violation of law of patents, precautions in case of accessibility for fact-finding & advancement activities by research based institutions or laboratories and countermeasures against administrative hurdles especially in the case of benefit sharing process. Another matter of serious consideration is that the Nagoya Protocol doesn't refer the most critical issue of application of law of patents in these cases. Nagoya Protocol doesn't describe any kind of incontrovertible mechanism, which can oversee the possible issue of biopiracy and confront it strategically with solution.

## **CRITICAL ANALYSIS OF ABS REGULATION 2014 IN INDIA**

NBA after taking permission & discussion with Ministry of Environment, Forests and Climate Change, has prepared the regulation namely,

Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014 in accordance with section 21(4) and 64 of BD Act, 2002.<sup>44</sup> The present regulation mainly covers the modes of fulfilling financial responsibilities after commercial usage of genetic resources<sup>45</sup> and even in the case of commercial application of Intellectual Property Rights.<sup>46</sup> The regulation has followed a quantitative approach of distributing & sharing benefits to commensurate with accessibility & commercial utility of biological diversity. The present regulation doesn't talk about sustainable development because it is very much associated with ABS system. However, there are few critical issues arose in this regulation:

1. It is mentioned in the regulation that there won't be any change in the amount of benefit sharing even if the final outcome in the form of conclusive product is made of one or more biological resources.<sup>47</sup> Now this point will become contentious, in fact it indicates lack of faith and ambiguity over fair & equitable approach of sharing benefits. Secondly, the regulation explained that the benefit would be shared proportionately between one and more than jurisdiction of SBBs if the biological resources originated from these jurisdictions. <sup>48</sup> Now this mode of sharing mechanism doesn't give definiteness & proper resolution would not be determined easily in appropriate time because different states have different law related to biodiversity.

2. The most contentious issue arises where certain activities or persons are excluded & discharged from taking permission of NBA or SBB:

(i) Collaborative research projects having transmittal of biological resources are completed with approval of the competent authority (Central government) & in allegiance to guidelines framed by the central government for the same.<sup>49</sup> When there is absence of formal permission then it means no liability to provide benefits to indigenous communities. The present regulation doesn't make it compulsory for the companies under collaborative research projects to conserve, preserve & go for sustainable operation of biodiversity.

(ii) Similarly, big manufacturers & producers of indigenous medicine including vaid & hakims are absolved from taking permission from NBA.<sup>50</sup> The present regulation explained the point that the scope of benefit includes royalty fees as administrative charges for NBA and SBB apart from benefits for indigenous communities (benefit claimers).<sup>51</sup> The amount of benefit that is equal to royalty fees, if given afforestation of natural resources. So this is also a grey area of concern related to benefit sharing mechanism that is unattended.

(iii) The third critical issue that is related to section 40 of BD Act, 2002 where certain biological resources are termed as commodities over which no application of BD Act, 2002 exist.<sup>52</sup> This particular point in the regulation doesn't reflect transparency and articulateness as to how conservation & sustainability of such resources would take place after the exhaustion of resources.

## CONCLUSION

Protection and conservation of indigenous assets serve a financial welfare of indigenous social orders and the biological system as entirety. Biopiracy and different methods for misuse through bioprospecting assention by taking undue favorable position of ambiguities exhibit in the authoritative polices and enactments, should be corrected and reviewed appropriately. Biodiversity equity won't be conveyed until and unless social effect evaluation of indigenous groups, natural maintainability ought to be joined as important criteria for ABS assention. Legitimate portrayal and dynamic support of indigenous groups in choosing ABS plan will guarantee straightforwardness and decency. The essential and evident inquiry emerges in the present legitimate administration identified with biodiversity that who is genuine advantage claimer? Neither the enactment including other related principles nor ABS control address any component about distinguishing proof, osmosis of indigenous groups and it is essential since issues like acceleration of destitution, absence of education make genuine dilemma on indigenous groups as advantage claimer under law and direction identified with biodiversity.

1 Zubair Ahmed Khan, PhD Scholar & Assistant Professor, University School of law & Legal Studies, GGSIP University, New Delhi.

2 Article 1, Objective, Convention on Biological Diversity, 1992.

3 Article 6, General Measures for Conservation and Sustainable Use, Convention on Biological Diversity, 1992.

4 Article 15, Access to Genetic Resources, Convention on Biological Diversity, 1992

5 Article 16, Access to and Transfer of Technology, Convention on Biological Diversity, 1992

6 Introduction, Bonn guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising out of Their Utilization, Convention on Biological Diversity, available at: <https://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf> (Last visited on 5<sup>th</sup> June, 2016).

7 Ibid.

8 Benefit-sharing, Bonn guidelines on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising out of Their Utilization, Convention on Biological Diversity, available at: <https://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf> (Last visited on 5<sup>th</sup> June, 2016).

9 Shivendu K. Srivastava, Case Study 4: Benefit Sharing with the Kani People (India), Case Studies on the Commercial Use of Biodiversity, Chap.6, pg.178-188, Commercial Use of Biodiversity Resolving the ABS Issues (Sage Publication, 2016).

10 Shivendu K. Srivastava, Case Study 4: Benefit Sharing with the Kani People (India), Case Studies on the Commercial Use of Biodiversity, Chap.6, pg.183, Commercial Use of Biodiversity Resolving the ABS Issues (Sage Publication, 2016).

11 Section 18 of BD Act 2002, Functions and Powers of National Biodiversity Authority.

12 Section 23 of BD Act 2002, Functions of State Biodiversity Board.

13 Section 41 of BD Act 2002, Constitution of Biodiversity Management Committee.

14 Section 19 of BD Act 2002, Approval by National Biodiversity Authority for undertaking certain activities.

15 Section 21 of BD Act 2002, Determination of equitable benefit sharing by National Biodiversity Authority

16 Section 27(2) of BD Act 2002, Constitution of National Biodiversity Fund

17 Section 32(2) of BD Act 2002, Constitution of State Biodiversity Fund

18 Section 43(2) of BD Act 2002, Constitution of Local Biodiversity Fund

19 Section 7 of BD Act 2002, Prior intimation to State Biodiversity Board for obtaining biological resources for certain purposes.

20 Section 24 of BD Act 2002, Power of State Biodiversity Board to restrict certain activities.

21 Section 23 of BD Act 2002, Functions of State Biodiversity Board.

22 Section 14 of BD Rules 2004, Procedure for access to biological resources and associated traditional knowledge.

23 Section 22(6) of BD Rules, 2004, Constitution of Biodiversity Management Committees

24 Section of 41(2) of BD Act 2002, Constitution of Biodiversity Management Committee

25 Agreement on Access to Biological Resources and/or associated knowledge for commercial utilization between NBA and M/s. Britto Seafoods Exports Pvt Ltd., available at: [http://www.nbaindia.org/approvals/form-i/agr-pdf/ag\\_form1\\_379\\_Agnello.pdf](http://www.nbaindia.org/approvals/form-i/agr-pdf/ag_form1_379_Agnello.pdf) (last visited on 10<sup>th</sup> June, 2016).



26 Seaweeds, Case Studies, pg.6 Applications for Access to Biological Resources and/or Associated Traditional Knowledge (Form I), Dealing with ABS Issues, Access and Benefit Sharing Experience from India, National Biodiversity Authority, available at: [http://nbaindia.org/uploaded/pdf/ABS\\_Factsheets\\_1.pdf](http://nbaindia.org/uploaded/pdf/ABS_Factsheets_1.pdf) (last accessed on 17th June,2016)

27 Biodiversity Management Committee, National Biodiversity Authority, available at: <http://nbaindia.org/content/20/35/1/bmc.html> (last visited on 12th June,2016)

28 Annexure D: Agreement between UAS Dharwad & Mahyco, March 2005, available at: <http://www.esgindia.org/sites/default/files/campaigns/brinjal/press/d-uas-dharwad-mahycoagreement-2005-1-15.pdf> (last visited on 14th June,2016).

29 Annexure A: Copy of ESG's complaint to NBA, 15th Feb 2010, <http://www.esgindia.org/sites/default/files/campaigns/brinjal/press/esg-karbiiboard-btbrinjal-petition-12021.pdf> (Last visited on 14th June,2016).

30 Notification, Ministry of Environment and Forests, 8th Nov.,2006, New Delhi, available at: <http://www.gsbb.in/pdf/guideline.pdf> (last visited on 16th June,2016)

31 13/11- Bt.Brinjal-Bt. Crop , Reading and recording of 18th Board Meeting held on 14-09-2011, Proceedings of the 19th board meeting held on 20/01/2012- 12.00Noon, Karnataka Biodiversity Board, available at: <http://www.esgindia.org/sites/default/files/campaigns/press/kbb-board-select-minutes-biopiracy.pdf> (last visited on 16th June,2016).

32 Environment Support Group vs National Biodiversity Authority, In the High Court of Karnataka at Bangalore, Writ petition 41532/2012, available at: <http://www.esgindia.org/sites/default/files/campaigns/press/esg-pil-biopiracy-hc-kar-oct-2012-final-.pdf> (last visited on 17th June,2016)

33 Ibid.

34 Arun P Mathew, Chargesheet against Bt firm in Biopiracy case, 19th Jan.,2013, The Times of India, available at: <http://timesofindia.indiatimes.com/city/coimbatore/Chargesheet-against-Bt-firm-in-biopiracy-case/articleshow/18083592.cms> (last visited on 17th June,2016).

35 About the Nagoya Protocol, Nagoya Protocol, Access and Benefit Sharing, available at: <https://www.cbd.int/abs/about/> (last visited on 19th June, 2016)

36 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, Nagoya Protocol on Access and Benefit-

sharing, Convention on Biological Diversity, United Nations, available at: <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> (last visited on 19th June,2016)

37 Article 5, Fair and Equitable Benefit-sharing, Nagoya Protocol on Access and Benefit-sharing, Convention on Biological Diversity, United Nations, available at: <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> (last visited on 19th June,2016)

38 Article 6, Access to Genetic Resources, Nagoya Protocol on Access and Benefit-sharing, Convention on Biological Diversity, United Nations, available at: <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> (last visited on 19th June,2016)

39 Article 7, Access to Traditional Knowledge Associated with Genetic Resources, Nagoya Protocol on Access and Benefit-sharing, Convention on Biological Diversity, United Nations, available at: <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> (last visited on 19th June,2016)

40 Article 10, Global Multilateral Benefit-Sharing Mechanism, Nagoya Protocol on Access and Benefit-sharing, Convention on Biological Diversity, United Nations, available at: <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> (last visited on 19th June,2016)

41 Article 11, Transboundary Cooperation, Nagoya Protocol on Access and Benefit-sharing, Convention on Biological Diversity, United Nations, available at: <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> (last visited on 19th June,2016)

42 Article 15, Compliance with Domestic Legislation or Regulatory Requirements on Access and Benefit-Sharing, Nagoya Protocol on Access and Benefit-sharing, Convention on Biological Diversity, United Nations, available at: <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> (last visited on 19th June,2016)

43 Article 17, Monitoring the Utilization of Genetic Resources, Nagoya Protocol on Access and Benefit-sharing, Convention on Biological Diversity, United Nations, available at: <https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf> (last visited on 19th June,2016)

44 Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014, National Biodiversity Authority, Ministry of Environment, Forests and Climate Change (21st November,2014), available at: [http://nbaindia.org/uploaded/pdf/Gazette\\_Notification\\_of\\_ABS\\_Guidelines.pdf](http://nbaindia.org/uploaded/pdf/Gazette_Notification_of_ABS_Guidelines.pdf) (last visited on 22nd June,2016)

45 Regulation 3, Mode of benefit sharing for access to biological resources, for commercial utilization or for bio-survey and bio-utilization for commercial

utilization, Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations,2014.

46 Regulation 9, Mode of benefit sharing in IPR, Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations,2014.

47 Regulation 14(3), Determination of benefit sharing, Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations,2014.

48 Regulation 14(4), Determination of benefit sharing, Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations,2014.

49 Regulation 17(b), Determination of benefit sharing, Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations,2014.

50 Regulation 17(c), Determination of benefit sharing, Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations,2014.

51 Regulation 15(1)(a), Sharing of benefits, Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations,2014.

52 Regulation 17(g), Determination of benefit sharing, Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations,2014.