JUSTIFIABLY SHARING OF “ACCESS AND BENEFIT SHARING”

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What access and benefit sharing is a term that really came about because for many years up to 1990s when the issue became international that developing countries which holds most of the resources whether it is under seas, farms, rivers, forests and traditional knowledge and lot of traditional knowledge that is associated with biodiversity. So for many generations there has been flow of resources and traditional knowledge all across the world. They have been developed into product, flowers foods, cosmetics, so there has been lot of use of these resources. Then by the 1970s-1980s there were realizations about these issues and lots of awareness started with these. NGOs which mostly started awareness and even exposing those big companies who have started making into a lot of profits from pharmaceutical from seeds and yet countries and community that have provided those seeds remains very poor. Thus it was like benefits taking away from resources of a country without giving benefit to it, flowing of resources from a country to another. This can be equated to colonialism where it seems to be like resources of a country belonged to another controlling country. This is what we called for few hundred years bio-piracy in new term by these colonial rulers. But when we reached 70s-80s there were many concerned NGOs from developed and developing countries that began to realize that there is something wrong and injustice is prevailing. Big part of outcomes came like patenting when you monopolize something that originally came from somewhere else. So these issues started catching every ones attention in those times including United Nations. Thus developing countries started doing negotiations and worrying about biodiversity conservation saying that if we will not worry about their disappearance of resources, which is not only conservation of resources but many things more. Thus having international agreement to deal with it but also conservation should be linked to sustainable development. Since the human can’t be thrown out of field, forest etc. thus linking conservation to sustainable use makes it most valuable. Therefore need to have fair and benefit sharing, then evolved to equitable benefit sharing. Access is not something like come and takes away and those countries have rights to say and how to use it, thus giving a background of having a united treaty for that.

Thus the “Convention on Biological Diversity (CBD)” was inserted during the “United Nations Conference on Environment and Development (UNCED)” in 1992 with major focus on “conservation, sustainable use of biological resources and fair and equitable sharing of benefits arising from such use”. Other objective of the CBD on fair and equitable sharing of benefits arising from the utilization of genetic resources is considered an innovative approach adopted by a multilateral treaty where the principle is based on series of discussions on the issue and consensus to recognize and reward people and countries who have contributed to the conservation of genetic resources and share the benefits with such providers.

“All living organisms; plants, animals and microbes, carry genetic material that could be
potentially useful to humans. These resources can be taken from the wild, domesticated or cultivated. They are sourced from environments in which they occur naturally (in situ), or from human-made collections such as botanical gardens, gene banks, seed banks and microbial culture collections (ex situ)”

“There are significant potential benefits to be gained by accessing genetic resources and making use of them. They provide a crucial source of information to better understand the natural world and can be used to develop a wide range of products and services for human benefit. This includes products such as medicines and cosmetics, as well as agricultural and environmental practices and techniques”

However, “like many key resources in the world, genetic resources are not evenly distributed. What’s more, the plants, animals and microbes in which they are found often make up complex and delicately-balanced ecosystems which can be threatened or endangered. The way in which genetic resources are accessed, and how the benefits of their use are shared, can create incentives for their conservation and sustainable use, and can contribute to the creation of a fairer and more equitable economy to support sustainable development”

“Access and benefit-sharing (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)”

Providers of genetic resources are governments or civil society bodies, which can include private land owners and communities within a country, who are entitled to provide access to genetic resources and share the benefits resulting from their use. The access and benefit-sharing provisions of the Convention on Biological Diversity (CBD) are designed to ensure that the physical access to genetic resources is facilitated and that the benefits obtained from their use are shared equitably with the providers. In some cases this also includes valuable traditional knowledge associated with genetic resources that comes from ILCs.

“The benefits to be shared can be monetary, such as sharing royalties when the resources are used to create a commercial product, or non-monetary, such as the development of research skills and knowledge. It is vital that both users and providers understand and respect institutional frameworks such as those outlined by the CBD and in the Bonn Guidelines. These help governments to establish their own national frameworks which ensure that access and benefit-sharing happens in a fair and equitable way”

Access and benefit-sharing is based on prior informed consent (PIC) being granted by a provider to a user and negotiations between both parties to develop mutually agreed terms (MAT) to ensure the fair and equitable sharing of genetic resources and associated benefits.

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• Prior informed consent (PIC): is the permission given by the competent national authority of a provider country to a user prior to accessing genetic resources, in line with an appropriate national legal and institutional framework.

• Mutually agreed terms (MAT): is an agreement reached between the providers of genetic resources and users on the conditions of access and use of the resources, and the benefits to be shared between both parties. These conditions are required under Article 15 of the CBD, which was adopted in 1992 and provides a global set of principles for access to genetic resources, as well as the fair and equitable distribution of the benefits that result from their use.

Access to genetic resources and the fair and equitable sharing of the benefits arising from their utilization is one of the three objectives of the Convention on Biological Diversity (CBD). At its tenth meeting, the Conference of the Parties adopted the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. This agreement created a framework that balances access to genetic resources, including those related to traditional knowledge of indigenous and local communities, on the basis of prior informed consent and mutually agreed terms, with the fair and equitable sharing of benefits, thereby contributing to the conservation and sustainable use of biodiversity. The Protocol entered into force in 2014, 90 days after the date of deposit of the fiftieth instrument of ratification.

Access and benefit sharing done is evolving concept till now, since it is taking into consideration many a thing now. The accessing of a biological resource done and equitably sharing of its benefits is considered in various ways. Firstly the valuation of the product is done. Say that product is only available in the area, and then its value will shoot up. Like the case of Arogya pacha "which has been in use for centuries by the Kaani tribal community of the Agastya Koodam ranges in Kerala, India, for its medicinal properties, when modern Indian scientists learned the medical properties of Trichopus zeylanicus in December 1987 while on a scientific expedition to the Agasthia Hills in the Western Ghats. They noticed that their guides, belonging to the Kaani tribe, were very energetic in sharp contrast to themselves. They had walked for several hours with the scientists, but the difference was that they ate the fruits of a wild plant T. zeylanicus as they walked. It was found from the Kaani men that it was indeed the fruits they were eating that made them energetic, a fact about the plant well known to the tribe for ages. Historically, the members of the tribes called the plant "chathan kalanji" literally meaning 'satan destroyer'. The more popular name of the plant, "Arogya pacha" (literally meaning "the green that gives strength") was given to it by the scientists.

Detailed chemical and pharmacological investigations showed that the leaf of the plant contained flavonoid glycosides, glycolipids and some other non-steroidal compounds”. Thus, that plant has its own value in the field of pharmaceutical or medicines and it need to be valued accordingly. Also, the people who have been living there have their right accordingly and the profit which has been brought out of those should be shared equitably. Those people who have been living around and know the
knowledge of that are the person holds most benefit to be distributed. The fund for ABS should be distributed among those communities; since they are caretaker and original person who have nurtured those plants is the first having right over ABS.

What are the core obligations of the Nagoya Protocol with respect to genetic resources?

The Nagoya Protocol sets out core obligations for its contracting Parties to take measures in relation to access to genetic resources, benefit-sharing and compliance.

Access obligations

Domestic-level access measures are to:

- Create legal certainty, clarity and transparency
- Provide fair and non-arbitrary rules and procedures
- Establish clear rules and procedures for prior informed consent and mutually agreed terms
- Provide for issuance of a permit or equivalent when access is granted
- Create conditions to promote and encourage research contributing to biodiversity conservation and sustainable use
- Pay due regard to cases of present or imminent emergencies that threaten human, animal or plant health
- Consider the importance of genetic resources for food and agriculture for food security

Benefit-sharing obligations

Domestic-level benefit-sharing measures are to provide for the fair and equitable sharing of benefits arising from the utilization of genetic resources with the contracting party providing genetic resources. Utilization includes research and development on the genetic or biochemical composition of genetic resources, as well as subsequent applications and commercialization. Sharing is subject to mutually agreed terms. Benefits may be monetary or non-monetary such as royalties and the sharing of research results.

Compliance obligations

Specific obligations to support compliance with the domestic legislation or regulatory requirements of the contracting party providing genetic resources, and contractual obligation, reflected in mutually agreed terms, are a significant innovation of the Nagoya Protocol. Contracting Parties are to:

- Take measures providing that genetic resources utilized within their jurisdiction have been accessed in accordance with prior informed consent, and that mutually agreed terms have been established, as required by another contracting party
- Cooperate in cases of alleged violation of another contracting party’s requirements
- Encourage contractual provisions on dispute resolution in mutually agreed terms
- Ensure an opportunity is available to seek recourse under their legal systems when disputes arise from mutually agreed terms
- Take measures regarding access to justice
- Take measures to monitor the utilization of genetic resources after they leave a country including by designating effective checkpoints at any stage of the value-chain: research, development, innovation, pre-commercialization or commercialization.
Determination of Equitable Benefit Sharing:

The terms and conditions subject to which approvals are granted under Sections 19 and 20, shall secure equitable sharing of benefits arising out of the use of accessed biological resource or knowledge associated thereto. These terms and conditions form the ABS Agreement. The determination of equitable benefit sharing by the NBA shall be in accordance with mutually agreed terms and conditions between the applicants, local bodies and benefit claimers. The NBA may decide whether the equitable sharing of benefits could be in monetary or nonmonetary terms.

Rule 20 of the Biological Diversity Rules, 2004, deals with the procedural provisions for determining benefit sharing component of ABS Agreements. The formula for determination of benefit sharing shall be done on a case-to-case basis.

The National Biodiversity Authority shall while granting approvals under section 19 or section 20 ensure that the terms and conditions subject to which approval is granted secures equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers. “Fair and Equitable Benefit Sharing” is one of the three important posts of the entire movement of conservation of biodiversity, and one of the main purposes of the statute. Indigenous and local communities, who either grow “biological resources”, or have a traditional knowledge of these resources, are the beneficiaries under the Act. In return for their parting with this traditional knowledge, certain benefits accrue to them as FEBS, and this is what FEBS is actually all about. This benefit the “indigenous and local communities”, get under the law is over and above the market price of their “biological resources”.

Nagoya Protocol makes it clear that FEBS if for the benefit of “the local and indigenous communities”. Biological Diversity Act, 2002 is a follow up to the Rio Convention of 1992, similarly, the Regulations of 2014, is a consequence of the Nagoya Protocol. By the Regulations, the commitments at Nagoya are being enforced. In fact the Preamble of the 2014 Regulations mentions that the Regulations are in pursuance of the Nagoya Protocol.

The concept of FEBS, as we have seen, is focused on the benefits for the “local and indigenous communities”, and the Nagoya Protocol makes no distinction between a foreign entity and an Indian entity, as regards their obligation towards local and indigenous communities in this regard. Consequently the “ambiguities” in the national statute have to be seen in the light of the International treaties i.e.


Rio and Nagoya and a purposive rather than a narrow or literal interpretation has to be made, if we have to arrive at the true meaning of FEBS. In our case the Biological Diversity Act, 2002 has been enacted not merely in furtherance of an International treaty but it is rather to enforce a treaty obligation and therefore in case there is any difference between the language of a municipal Law and corresponding provision of the treaty, “the statutory language should be construed in the same sense as that of the treaty”.

Determination of equitable benefit sharing by National Biodiversity Authority. –

(2) The National Biodiversity Authority shall, subject to any regulations made in this behalf, determine the benefit sharing which shall be given effect in all or any of the following manner, namely:—

(a) grant of joint ownership of intellectual property rights to the National Biodiversity 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) association of Indian scientists, benefit claimers and the local people with research and development in biological resources and bio-survey and bioutilisation;

(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 National Biodiversity Authority may deem fit.

(4) For the purposes of this section, the National Biodiversity Authority shall, in consultation with the Central Government, by regulations, frame guidelines.”

Mode of benefit sharing for access to biological resources, for commercial utilization or for bio-survey and bioutilization for commercial utilization.— (1) Where the applicant/trader/manufacturer has not entered into any prior benefit sharing negotiation with persons such as the Joint Forest Management Committee (JFMC)/Forest dweller/Tribal cultivator/Gram Sabha, and purchases any biological resources directly from these persons, the benefit sharing obligations on the trader shall be in the range of 1.0 to 3.0% of the purchase price of the biological resources and the benefit sharing obligations on the manufacturer shall be in the range of 3.0 to 5.0% of the purchase price of the biological resources: Provided that where the trader sells the biological resource purchased by him to another trader or manufacturer, the benefit sharing obligation on the buyer, if he is a trader, shall range between 1.0 to 3.0% of the purchase price and between 3.0 to 5.0%, if he is a manufacturer: Provided further that where a buyer submits proof of benefit sharing by the immediate seller in the supply chain, the benefit sharing obligation on the

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buyer shall be applicable only on that portion of the purchase price for which the benefit has not been shared in the supply chain.

(2) Where the applicant/trader/manufacturer has entered into any prior benefit sharing negotiation with persons such as the Joint Forest Management Committee (JFMC)/Forest dweller/Tribal cultivator/Gram Sabha, and purchases any biological resources directly from these persons, the benefit sharing obligations on the applicant shall be not less than 3.0% of the purchase price of the biological resources in case the buyer is a trader and not less than 5.0% in case the buyer is a manufacturer:

(3) In cases of biological resources having high economic value such as sandalwood, red sanders, etc. and their derivatives, the benefit sharing may include an upfront payment of not less than 5.0%, on the proceeds of the auction or sale amount, as decided by the NBA or SBB, as the case may be, and the successful bidder or the purchaser shall pay the amount to the designated fund before accessing the biological resource.”

Conclusion

Thus at the end it would be noticed that access and benefit sharing contains enough provisions both at domestic level in India as well as in international level. It is playing crucial role in doing justice and abrogating the historical injustice done to local community. But while equitably sharing of ABS there arise the interface between various rights of people i.e. individual rights and social right, societal right, economic development, environmental conservation as well as social right come into play and has its own importance. Thus equitably maintaining balance between all these will take us to our goal of reaching justice done to equitably access and benefit sharing. Taking into consideration In Situ and Ex Situ conservation in genetic resources with traditional knowledge and providers providing it with prior informed consent and users using it for commercial and non-commercial purpose, thus sharing the monetary and non-monetary benefits will leads to justice done.

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