

LEAD

JOURNAL

The Revamping of India's 'Access and Benefit Sharing' Regime: A Gateway to Inclusive Biodiversity Governance?

by Esha Joshi, Ishika Patodi and Neema Pathak Broome

**Vol 21/2
2025**



The Revamping of India's 'Access and Benefit Sharing' Regime: A Gateway to Inclusive Biodiversity Governance?*

By Esha Joshi*, Ishika Patodi and Neema Pathak Broome

ABSTRACT

Codified for the first time in the Convention on Biological Diversity 1992 (CBD), 'Access and Benefit Sharing' (ABS) is a mechanism for ensuring that indigenous people and local communities (IPs & LCs) receive a share of the monetary benefits arising from the access and use of their traditional knowledge and associated genetic resources by third parties. Since the adoption of the CBD, the implementation of access and benefit sharing, bolstered by additional international commitments such as the Nagoya Protocol, has gained traction. India, as a party to both instruments, had enacted the Biological Diversity Act in 2002 (BDA) and framed allied rules and regulations. In the original provisions, this ABS framework were not stringent enough to fully safeguard the rights and decision-making powers of IPs & LCs. Successive changes to these instruments, have now further whittled down the rights of IPs & LCs in the ABS process. This comes at a time when India has made ambitious commitments under the Kunming Montreal Global Biodiversity Framework (KMGBF) on conserving biodiversity in tandem with IPs & LCs' rights. This paper aims to analyse the aforesaid changes and their impacts on the ABS mechanism in India including, the extent to which they complement or contradict India's commitments under the Kunming Montreal Global Biodiversity Framework and Article 8(j) of Convention on Biological Diversity 1992. The authors hope this will add to the body of knowledge in India pertaining to access and benefit sharing and also lead to a better-informed response to the Government's recent efforts of revising the Indian ABS framework to bring them in compliance international mandates.

* Esha Joshi, Kalpavriksh, Pune Email: eshajoshi15@gmail.com

* [Analysing the implications of amendments to the Biological Diversity Act, Rules and Regulations on India's international commitments vis-à-vis 'Access and Benefit Sharing' arrangements and the rights of Adivasi and other local communities in India](#)

INTRODUCTION

The Parties to the Convention on Biological Diversity are currently negotiating a monitoring framework for the implementation of the Kunming Montreal Global Biodiversity Framework (KMGBF) and the biodiversity conservation targets set under it, at the national levels. This monitoring framework was expected to be finalised at the Conference of Parties (COP)-16 at Cali in October 2024, however a consensus was not reached and hence this remains to be adopted. Under these circumstances, it becomes imperative for Parties to ensure that the Targets are effectively implemented. To that end, India was one of the few nations that submitted 'National Biodiversity Targets' in line with the KMGBF at the COP. However, the purpose of these targets would be vitiated if national legislation itself, remains dissonant with international commitments under the KMGBF and its parent treaty the Convention on Biological Diversity (CBD). An essential element of many of the Convention's decisions, particularly Article 8(j) is the protection of the 'use, access and benefit sharing rights' of indigenous peoples and local communities over genetic resources within their lands, waters & territories and associated traditional knowledge. The scope of these rights, however, has been substantially reduced through recent changes to India's Biological Diversity Act (BDA) 2002, Biological Diversity Rules 2004 and Guidelines on Access and Benefit Sharing 2014. In this context this paper includes:

- a. An overview of the Kunming-Montreal Global Biodiversity Framework, Article 8(j) of the CBD, and the Nagoya protocol in the context of ABS rights of the indigenous peoples and local communities.
- b. An analysis of the changes made to the BDA, the rules and regulations framed under it. In particular, the implications of said changes on India's commitments under the CBD and allied instruments towards recognising the rights of indigenous people and local communities to free, prior, and informed consent (FPIC), before access to their knowledge and genetic & biological resources is granted and right to negotiate & receive appropriate benefits from such access to their resources and traditional knowledge.

I. AN OVERVIEW OF THE INDIA'S COMMITMENTS UNDER THE CONVENTION ON BIOLOGICAL DIVERSITY (CBD) IN THE CONTEXT OF ACCESS AND BENEFIT SHARING (ABS)

The CBD is an international legal framework adopted in 1992, aimed at conserving biological diversity, promoting the sustainable use of its components, and ensuring fair and equitable sharing of benefits from the use of genetic resources.¹ To date, 196 parties have ratified the CBD. Article 8 of the CBD provides for 'in-situ conservation' strategies and to establish protected areas where special measures are needed to be taken to conserve biological diversity.² Article 8(j) mandates that each country must, through its national legislation:

¹ Convention on Biological Diversity (adopted 22 May 1992, entered into force 29 December 1993) 1760 UNTS 79 (CBD), Introduction.

² CBD, Art 8.

- a. Respect, preserve, and maintain the knowledge, innovations, and practices of indigenous and local communities that embody traditional lifestyles relevant to the conservation and sustainable use of biological diversity.
- b. Promote the broader application of such knowledge, innovations, and practices with the approval and consent of the holders of such knowledge and resources.
- c. Provide a mechanism for the fair sharing of the benefits arising from such utilisation with the holders of the knowledge and resources.

Since, the CBD sets out broad overarching objectives and principles to be adhered to which must be couched in more substantive and tangible terms by parties through subsequent agreements and protocols, it is often seen as a framework convention.³ This, however, does not in any way mitigate the binding nature of the provisions of the CBD itself. For instance, in Article 8, the word 'shall' denotes that the provision is prescriptive in nature. The use of qualifiers such as 'as far as possible', 'as appropriate:' or 'Subject to its national legislation' should not be seen as derogating from the substantive provision itself. In line with Article 31 (1) of the Vienna Convention on the Law of Treaties, the treaty is to be interpreted in good faith and in light of the ordinary meaning of the words and the object and purpose of the treaty.⁴

³ CBD, Art 28. See also Nele Matz-Lück, 'Framework Agreements' (last updated February 2011), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2008) <<https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e703#>> (accessed 13 June 2025).

⁴ Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), Art. 31 (1).

Interpreting these qualifiers as a means for parties to renege on their obligations, would undermine the binding objectives of the CBD as outlined in Article 1. Instead, as is apparent from the preamble to the CBD, such qualifiers are meant to account for the differing capabilities and priorities of developing and developed countries.⁵ Thus, the CBD and instruments formulated under it (which have also been adopted by the same parties) form an internationally binding obligation on parties.

A. Nagoya Protocol - bringing Indigenous People and Local Communities to the forefront of Access and Benefit Sharing

In 2010, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation (Nagoya Protocol) was adopted as a supplementary agreement to the CBD. It furthers the objective of Article 8(j) and represents an important advancement in integrating the rights of indigenous people and local communities as a key issue in international negotiations. The Protocol aims to implement one of the three main objectives of the Convention, including the fair and equitable sharing of benefits (FEBS) derived from the use of genetic

⁵ Felix Ekardt and Others, 'Legally Binding and Ambitious Biodiversity Protection under the CBD, the Global Biodiversity Framework, and Human Rights Law' (2023) 35(80) *Environmental Sciences Europe* <<https://enveurope.springeropen.com/articles/10.1186/s12302-023-00786-5>> (accessed 13 June 2025).

resources. Although within the Protocol, the provisions pertaining to ‘access to genetic resources’, ‘traditional knowledge’, ‘traditional knowledge associated with genetic resources’ and ‘FEBS’ are addressed separately, however, the protocol requires two common principles to govern any actions associated with all of these. These two common principles are - ‘Mutually Agreed Terms’ (MAT) and ‘Prior and Informed Consent’ (PIC),⁶ which must be ensured between the Provider Party (country) and the Party wanting to access genetic resources. Most importantly, the Provider Party is mandated to make national legislation to ensure equity and fairness, including through MAT and PIC, in access and benefit sharing arrangements with those indigenous people and local communities whose knowledge, genetic and other resources are sought to be accessed. MAT is expected to ensure that equity and fairness are at the forefront of access to genetic resources and traditional knowledge by requiring that providers (usually indigenous people and local communities), are parties to any agreements governing the above mentioned areas.⁷ PIC requires the prior & informed consent or approval, as well as involvement of the indigenous people and local communities in instituting

mechanisms for any access and benefit sharing agreements.⁸

B. Access and Benefit Sharing under the Kunming Montreal Global Biodiversity Framework

The KMGBF, adopted at the CBD’s 15th Conference of Parties (CoP15) in 2022 after four years of consultations, outlines an ambitious plan for achieving a world in harmony with nature by 2050. It is a successor to the Aichi Targets of 2010 which aimed to address the underlying causes of biodiversity loss while mitigating existing threats globally through participatory planning, dialogue and capacity building. The 23 Targets⁹ and the 2050 Goals¹⁰ formulated under the framework recognise the essential role and rights of indigenous people and local communities as stewards of biodiversity and key partners in its conservation, restoration and sustainable use. They raise the threshold of involvement of the indigenous people and local communities as under the Nagoya Protocol by requiring ‘Free, Prior and, Informed Consent’ (FPIC) rather than ‘PIC’. As such, throughout this article we have adjudged state action in compliance with ‘FPIC’ rather than ‘PIC’. The KMGBF also requires the *‘full and*

⁶ The use of the terminology ‘Prior and Informed Consent’ under the Nagoya Protocol is distinct from the more commonly used ‘Free Prior and Informed Consent’ which is derived from the ‘United Nations Declaration on the Rights of Indigenous Peoples’. The latter adds an additional layer of protection and is incorporated into the Kunming Montreal Global Biodiversity Framework.

⁷ Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation (adopted 29 October 2011, entered into force 12 October 2014) 3008 UNTS 3 (Nagoya Protocol), Page 2.

⁸ Nagoya Protocol, Art 7.

⁹ Kunming-Montreal Global Biodiversity Framework, (adopted on 19 December 2022) CBD/COP/DEC/15/4 (KMGBF), 2030 Targets <<https://www.cbd.int/doc/decisions/cop-15/cop-15-dec-04-en.pdf>> (accessed 11 June 2025).

¹⁰ KMGBF, ibid 2050 Goals.

effective participation in decision-making' of indigenous people and local communities in accordance with international instruments including the UN Declaration on the Rights of Indigenous Peoples, and human rights laws. The following two Targets are of significance in the context of this paper:

a. TARGET 13 - *Increase the sharing of benefits from genetic resources, digital sequence information and traditional knowledge*

This target (corresponding to Aichi Target 16) requires parties to implement effective legal, policy, administrative and capacity building measures at all levels, as appropriate, to ensure the fair and equitable sharing of benefits derived from the use of genetic resources, digital sequence information related to genetic resources. Most significantly, such measures must be implemented in accordance with '*applicable international access and benefit-sharing instruments*'. It directly supports the realisation of Goal C of the KMGBF which calls for the fair and equitable sharing of benefits arising from the use of genetic resources with the indigenous people and local communities and the protection of traditional knowledge associated with genetic resources in accordance with internationally agreed ABS instruments.

The CBD's Article 8(j) and the Nagoya Protocol's Article 5 are the most significant internationally agreed ABS instruments. Article 8(j) mandates the 'approval and involvement of the holders of such knowledge' while Article 5 requires all FEBS agreements to be reached at on the basis of 'Mutually Agreed Terms' involving the concerned indigenous people and local communities.

b. TARGET 21 - *Ensure That Knowledge is Available and Accessible to Guide Biodiversity Action*

A major component of this target is ensuring that, while making knowledge and data available to decision-makers, practitioners and the public, 'any traditional knowledge, innovation practices and technologies of indigenous people and local communities' must only be accessed through their Free, Prior and Informed Consent (FPIC). The Scheduled Tribes and Other Traditional Forest Dwellers (Forest Rights) Act 2006 or the 'FRA' under its Section 3 (k), by providing for claiming and asserting 'right of access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity' is among the few legislations in India which are in consonance with this. Additionally, the Protection of Plant Varieties and Farmers' Rights Act, 2001 (PPVFR Act) also includes provisions that align with the spirit of FPIC, particularly regarding the recognition and protection of traditional knowledge and the rights of farmers and communities. Under Section 26, the Act mandates that if a registered plant variety has been developed using any genetic material, landraces, or associated traditional knowledge contributed by farmers or communities, the Protection of Plant Varieties and Farmers' Rights Authority must determine an appropriate benefit-sharing arrangement. This ensures that communities are not exploited and are fairly compensated for their contributions. The benefits arising from such use are to be disbursed through the National Gene Fund, as outlined in Section 45. This fund also supports conservation efforts and the recognition of farmers' roles in maintaining and enhancing agro-biodiversity.

The BDA was also formulated in pursuance with similar objectives. However, as we will analyse in this paper, recent changes have vitiated these objectives and threaten India's compliance with international obligations including Target 21.

II. AN ANALYSIS OF THE CHANGES MADE TO THE BDA VIS-À-VIS RIGHTS OF LOCAL COMMUNITIES AND THEIR IMPLICATIONS ON INDIA'S COMMITMENTS UNDER THE CBD AND ALLIED INSTRUMENTS

India ratified the CBD on 18 February 1994. The principle of *pacta sunt servanda*, a binding rule of customary international law, mandates adherence in good faith to obligations and commitments under the CBD.¹¹ The only scenario where such a mandate may be ignored is if compliance would be in direct contravention with pre-existing acts of parliament.¹² Obligations under the CBD including the conservation of biological diversity and the equitable sharing of benefits arising from the use of genetic resources, are in fact in perfect harmony with the domestic regime in India. This includes the fundamental right to environment under Article 21 of the Constitution, the protection of the rights of tribals and local communities over their traditional lands and resources under the Constitution, the Forest Rights Act and the Panchayats (Extension to Scheduled Areas) Act 1996 as well as a slate of environmental legislations that further the objectives of conservation and pollution

mitigation. Thus, India is obligated to implement the CBD domestically. It is in furtherance to this, that it enacted the BDA. The BDA is India's cornerstone legislation which provides a framework for the documentation of biodiversity through People's Biodiversity Registers (PBRs), regulating access of outsiders to such resources and knowledge associated with them. It also ensures equitable benefit sharing arising from the utilisation of these resources and associated knowledge. Before the enactment of the BDA, India had witnessed instances of traditional knowledge over biological resources being co-opted and commercialised without the consent of the communities or the accrual of any financial benefits to them.¹³ This made the BDA's recognition of traditional knowledge and the rights of the holders of such knowledge particularly significant. The major tool for achieving this was 'Access and Benefit Sharing' (ABS), a mechanism through which persons requiring access to genetic resources that communities have traditional knowledge of, or have control over are required to ensure that any benefits accrued from the use of such resources *are equitably shared* with the person or community in question. Additionally, the Act governs the procedure to be followed with respect to any intellectual property right claimed and research conducted based on biological resources derived from India and associated traditional knowledge. The Act also establishes a three-tiered governance structure with the National Biodiversity Authority (NBA) at the central level, the

¹¹ Mark E Villiger, 'Commentary on the 1969 Vienna Convention on the Law of Treaties' (Martinus Nijhoff 2009) 368.

¹² *Gramophone Company of India Ltd v Birendra Bahadur Pandey & Ors* AIR 1984 SC 667.

¹³ Centre for Environmental Law, Education, Research & Advocacy (CEERA) and National Law School of India University, *Handbook on Biodiversity Laws, Access and Benefit Sharing* (CEERA & NLU Bangalore 2019) 41. (CEERA is a research centre established by NLU Bangalore, they have not co-authored the report together. Can we revert to the earlier citation?)

State Biodiversity Board or Union Territory Biodiversity Council (collectively referred to as 'SBB' hereinafter) as the case may be and the 'Biodiversity Management Committees' (BMC) at the level of the local bodies such as the Panchayats, Municipalities, etc. to implement the provisions of the Act.

In 2023, the BDA was amended with the stated objective of achieving the following:¹⁴

- a. Reducing the pressure on wild medicinal plants by encouraging the cultivation of medicinal plants.
- b. Encouraging Indian Systems of Medicine (AYUSH).¹⁵
- c. Fast Tracking the access to biological resources for a variety of purposes without compromising India's commitments under the CBD and allied instruments.
- d. Decriminalisation of offences under the Act.
- e. Increase inflow of foreign investments in access and use of biological resources without compromising Indian Interests.

To achieve this, several changes were made to critical provisions including those governing ABS and the powers of the BMC

through the 2023 amendment. Pursuant to the amendment, the Government of India further notified the Biological Diversity Rules 2024 (2024 Rules) and the Biological Diversity (Access to Biological Resources and Knowledge Associated Thereto and Fair and Equitable Sharing of Benefits) Regulations, 2025 (ABS Regulations 2025) which replace the 2004 rules and 2014 guidelines respectively. These changes have serious implications for equity, justice and the indigenous people and local communities rights pertaining to access and benefit sharing of biological and genetic resources and traditional knowledge associated with them. These amendments can majorly be divided into two parts, and in the following section we will analyse these in detail, as follows:

- a. Access to biological resources and traditional knowledge associated with them which includes access to non-Indian and Indian entities.
- b. Benefit Sharing Agreements and representation of the indigenous people and local communities.

A. Access to Traditional Knowledge and Genetic Resources associated thereto

'Access', as defined under Section 2 (a) of the BDA, means '*collecting, procuring or possessing any biological resource occurring in or obtained from India or traditional knowledge associated thereto, for the purposes of research or bio-survey or commercial utilization*'. It is one of the two components of the ABS mechanism and the BDA has separate rules for Indian & non-Indian entities wanting to access biological resources.

¹⁴ Joint Parliamentary Committee, 'Report of the Joint Committee on the Biological Diversity (Amendment) Bill, 2021' (Lok Sabha Secretariat 2022) 7. Note that these objectives are not mentioned in the amendment Act as passed by Parliament.

¹⁵ AYUSH systems of medicine include 'Ayurveda, Yoga, Naturopathy, Unani, Siddha and Homeopathy'. A separate department viz. the 'Ministry of AYUSH' has been established for governing these systems of medicine.

As mentioned above, the Nagoya Protocol clearly outlines the involvement of indigenous peoples and local communities in the process of granting access to their traditional knowledge and to genetic resources associated thereto within their lands, waters and territories. The Protocol provides a dual protection - that of 'PIC' and 'MAT' between the providers and users of genetic resources, i.e.:

- a. Article 6 and 7 of the Protocol require Parties to ensure that access to genetic resources and traditional knowledge associated with genetic resources respectively, held by indigenous and local communities is granted only with the '*prior and informed consent or approval and involvement of these indigenous and local communities*'.
- b. Article 12 requires the '*effective participation*' of the concerned indigenous people and local communities in establishing mechanisms to inform users/applicants of their obligations when accessing any traditional knowledge associated with genetic resources including those of fair and equitable benefit sharing.

It is the duty of the party (i.e., the Government of India) to take the required legislative and administrative measures to ensure that access is granted in accordance with aforementioned provisions.¹⁶ However, the BDA (both pre- and post- amendment), while requiring 'MAT' as a prerequisite for benefit-sharing agreements, does not make it mandatory for accessing biological resources and associated traditional knowledge. This brings the BDA in direct violation of the Nagoya Protocol.

¹⁶ Nagoya Protocol, Art 5 (2), 6 (3), 13 (2), and 14 (2).

As is detailed below, with respect to 'PIC', also a much-diluted version has been adopted which does not fulfil the requirements of the Protocol.

1. Access to Non-Indian Entities

Section 3 of the BDA seeks to regulate access to biological resources or traditional knowledge in India by non-Indian entities. Persons falling under Section 3 of the BDA include, non-citizens of India, non-resident citizens of India as per the Income Tax Act, 1961 and body corporates, associations or organisations that are either not incorporated or registered in India or, although incorporated or registered in India are controlled by a 'foreigner' as under the Companies Act of 2013. Such entities would require prior permission from the NBA for accessing biological diversity and associated traditional knowledge in India. Under the BDA 2002, Section 3 (2) (c) (ii) mere '*non-Indian participation in its share capital or management*' was enough for an entity to require prior permission from the NBA. In the 2023 amendment this has been changed to '*those controlled by a "foreigner"*'. This will benefit many actors which earlier qualified as non-Indian entities and hence had to seek permission from the NBA. These entities will now be able to access genetic resources through State-level mechanisms which do not offer the same level of protection to local communities in the law.

Aside from this change, the rest of the framework for access by non-Indian entities is carried forward from the old Act. The prior approval of the NBA is required to -

- a. obtain any resources occurring in India or any knowledge associated with it either for research or commercial utilisation or for bio-survey and bio-utilisation.

- b. transfer the results of research on any biological resources occurring in or obtained or accessed from India or associated with Indian traditional entities whether for monetary consideration or otherwise.

The 2024 Rules are meant to lay down the procedure to be followed by the NBA in granting such access. The original rules formulated in 2004 were already weak in ensuring rights of the knowledge and resource holding indigenous people and local communities, as they required the NBA to only consult 'local bodies' (Panchayat or Municipality as the case may be) concerned while granting approval. The BD Rules of 2024 brought some changes to these provisions-

- a. Rule 13 (4) now requires the NBA to consult the 'Biodiversity Management Committees' instead of the 'local bodies' but adds that such consultation can be done *'either directly or through'* the concerned SBB, while granting or rejecting approvals.
- b. The proviso further adds that, BMCs *'may consult wherever required'* the community or individual who owns the bioresource, in order to ensure their prior informed consent, the community, individual or entity concerned.

As illustrated in point a. above, the 2024 Rules give prominence to the BMCs in the process of granting access but continue to only provide for a 'consultation' rather than 'consent' and also, whether BMCs are consulted directly or indirectly is left the discretion of the NBA. This would limit the negotiation power of the BMC (which would be much stronger if it were a party directly involved in the process). Furthermore, BMCs themselves are established at the level of local bodies such as the Panchayats and the Municipality, and not at the level of individual villages and settlements of the indigenous people and local communities.

They often do not represent the rights and knowledge holders, particularly where a Panchayat may include multiple villages and where rights and knowledge holders within a Panchayat may be in minority or part of less privileged sections. In point b. above, the use of *'may'* rather than *'shall'* clearly signifies that the consent of the local community or individual is not mandatory for granting approval and whether or not consultation takes place and PIC is received is left entirely up to the discretion of the BMC. Additionally, and very importantly, there is no provision at all in the BDA or its Rules for consultation/ consent with the BMC or local community in cases of transfer or sharing of results of research based on genetic resources or traditional knowledge. All of the above almost completely vitiates the purpose of PIC under the Nagoya Protocol which aims to keep the indigenous people and local communities at the centre of all processes stemming from ABS. The Nagoya protocol would require mandatory approval/ consent from the concerned communities prior to grant of access.

The Rules also provide that any approval to access shall be based on mutually agreed terms between an authorised officer of the NBA and the applicant.¹⁷ This is also in direct contravention to the Nagoya Protocol which requires that MAT must be concluded between *'providers and users of genetic resources'*, which would be the relevant indigenous people and local communities.

2. Access to Indian Entities

The 2023 amendment through changes to Section 7 addresses issues related to access to the Indian Entities. The changes in this section can be understood by

¹⁷ Biological Diversity Rules 2024, r 13 (5).

analysing them under two main parts - those related to the Powers of the SBBs (A.) and those related to the 'Exceptions' provided under the amended Act (B.).

A. Powers of the SBB

As with the NBA under section 3, the SBBs under the Act as well as the recent ABS Regulations 2025 remain the sole approval granting authority for Indian persons/entities. In the BDA 2002, there was a conflict between Section 7 and Sections 23 & 24 of the Act as, the former required only 'prior intimation' to the SBB while the latter vested the SBB with the power of 'granting or rejecting approvals'. There was a lack of clarity as to whether, this distinction is put in place to give State Governments the power to lower the threshold under the State Biodiversity Rules to be framed by each state. Thereby, creating room for wilful misinterpretations of the legislation and enabling easier access to local biological resources and traditional knowledge of 'benefit claimers'.¹⁸ This issue was raised by various stakeholders and Ministries when the amendment bill was placed before the Joint Parliamentary Committee on the Biological Diversity (Amendment) Bill, 2021. The Ministry of Environment, Forest and Climate Change (MoEFCC) addressed this concern by clarifying that, '*prior intimation as well as approval of SBB is required while accessing biological resources for commercial utilization*'.¹⁹ This then translated into a change in the amended BD Act which clearly states under Section 7 that, '*such access shall be subject to the provisions of clause (b) of section 23 and sub-section (2) of section 24*'. Thus, both, prior

intimation and approval from the SBB are now legally required for access by the Indian Entities. The ABS Regulations 2025, through Regulation 5 further clarify that, such prior intimation is to be done by submitting Form B as annexed to the regulations within the stipulated timeframe. If the Board fails to respond to the request, the application is deemed to be approved for a whole year. This effectively regularises institutional oversight at the expense of rights of the indigenous people and local communities. 'Mutually Agreed Terms' appended to Form C are also to be filled as part of this process. However, there seems to be no space for involving the communities in the drafting of these model terms. In fact, there is no space in the form for them to even sign their consent!

This explicitly excludes the holders of traditional knowledge and biological resources (including the indigenous people and local communities) and violates the Nagoya Protocol. It is compounded by an amendment to Section 24 (2) which removes the previous requirement that the SBBs give any approvals or rejections only in consultation with 'local bodies' i.e. either Panchayats or Municipalities. This essentially leaves the decision to involve 'benefit claimers' (including indigenous people and local communities) in the entire process to the discretion of the SBB (unless the State Rules specify otherwise). Interestingly, this change was not part of the Amendment Bill which was floated to the general public and Joint Parliamentary Committee for comments and appeared directly in the final Biological Diversity (Amendment) Act, 2023 as tabled before and passed by Parliament in June 2023. The 2023 Amendments and 2025 regulations, therefore, are in clear violation of Nagoya Protocol by not following the requirement of PIC of the indigenous people and local communities when accessing their traditional knowledge, and biological & genetic resources.

¹⁸ This has also been pointed out by several stakeholders in the Report of the Joint Committee on the Biological Diversity (Amendment) Bill, 2021.

¹⁹ Joint Parliamentary Committee (n 14) 99.

The concerns outlined above were underscored in the landmark 2018 judgment of *Divya Pharmacy v Union of India*,²⁰ where the Uttarakhand High Court held that Indian companies extracting biological resources are liable to obtain prior approval and share part of their revenue with local communities. Divya Pharmacy had contested the need to comply with the fair and equitable benefit-sharing (FEBS) requirement, arguing that Indian entities were only obligated to provide prior intimation. The Court rejected this claim, ruling that the Biological Diversity Act, 2002 mandates compliance with both prior approval and benefit-sharing mechanisms. The judgment emphasised that local and indigenous communities are rightful beneficiaries of the Act, and that the State Biodiversity Boards are fully empowered to enforce benefit-sharing. Justice Sudhanshu Dhulia referred to the Convention on Biological Diversity, 1992 and the Nagoya Protocol, 2010 to affirm the rights of communities and the international obligations of India to uphold these. This judgment reinforced that access cannot be separated from community consent and benefit sharing, and remains a judicial benchmark against efforts to dilute PIC and MAT obligations.

Exceptions

Before the 2023 Amendment, only '*local people and communities of the area, including growers and cultivators of biodiversity, and vaidas and hakims, who have been practising indigenous medicine*' were exempted from 'intimating' the SBBs prior to obtaining any resources occurring in India or any knowledge associated with it either for research or commercial utilisation or for

bio-survey and bio-utilisation.²¹ However, through the insertion of additional *provisos* to Section 7, the 2023 Amendment expands the list of domestic entities or situations that are exempted from prior approval required for accessing biological resources and associated traditional knowledge for commercial exploitation. The three new exceptions are:

- a. Codified Traditional Knowledge
- b. Cultivated Medicinal Plants
- c. AYUSH Practitioners

a. Codified Traditional Knowledge

Codified Traditional Knowledge is defined under Section 2 (iv) (ea) of BDA as '*the knowledge derived from authoritative books specified in the First Schedule to the Drugs and Cosmetics Act, 1940*'. Read with the first proviso to Section 7 of BDA, the implication is that Indian Entities are exempt from following legal mechanisms under the BDA for 'Access and Benefit' for any of the biological resources referenced in the more than 100 books listed in the first Schedule of the Drugs and Cosmetics Act of 1940. Under Section 4 of the Act, this exception is also applicable to the *sharing or transferring of the results of research* pertaining on these resources. This will have huge implications for the indigenous people and local communities' access and benefit sharing rights as there is a high degree of overlap between the biological resources on which communities' traditional knowledge is based and those that are used in the AYUSH systems of medicine. This would

²⁰ *Divya Pharmacy v. Union of India* 2018 SCC Online Utt. 1035.

²¹ Now, the relevant portion of Section 7 reads as follows - '*shall obtain any biological resource for commercial utilisation, or bio-survey and bio-utilisation for commercial utilisation except after giving prior intimation to the State Biodiversity Board concerned*' stands replaced by '*access any biological resource and its associated knowledge for commercial utilisation*'.

lead to the indigenous people and local communities being denied the economic benefits arising from the commercial usage of numerous resources and traditional knowledge associated thereto.

There is also no clarity as to whether this exception applies even in cases where although the resource is common, the usage outlined in codified texts and by the community is distinct. Significantly, the Nagoya Protocol does not make a distinction between 'traditional knowledge' and 'codified traditional knowledge'.

b. Cultivated Medicinal Plants

As per the *proviso* to Section 7 of the 2023 Amendment, access to 'cultivated medicinal plants' is not subject to the consent of the SBB. The ministry has quite clearly stated that this exception was formulated at the behest of the AYUSH Ministry to promote the practice of AYUSH.²² In doing so however it appears that the effects of this exemption on the rights of indigenous people and local communities under the ABS mechanism have not been considered. For instance, although certain medicinal plants may now be cultivated rather than foraged from the wild, such cultivation itself is often the product of traditional knowledge regarding its medicinal qualities. One could very easily extract a sapling of the plant from the wild and proceed to cultivate and use it without sharing benefits with the communities. Several research institutes and private entities are doing just that. Communities that are engaged in cultivation (traditionally or otherwise) may also be prevented from receiving benefits by being unduly influenced or coerced into private agreements with the users.

The procedure for availing this exception is outlined in Rule 19 of the 2024 Rules

which requires the 'user/ accessor' to submit a 'self-declaration' mentioning the cultivation and post-harvest details of the cultivated plant. Subject to that, a 'certificate of origin' is to be issued by the BMC in question which would enable the 'user' to benefit from this exception.²³ It also provides that the onus of proof for the 'source of origin' of the medicinal plants lies on the end-user of the medicinal plant. In the ABS Regulations 2025, Regulation 5.7 goes beyond the scope of the amended BD Act by granting the MoEFCC the power to issue notifications exempting Indian entities from benefit-sharing obligations not only for products containing 'cultivated' medicinal plants but also those derived from 'non-cultivated' or wild medicinal plants. By doing so, not only are the rights of the indigenous people and local communities infringed upon, but by failing to remain within the ambit of the parent legislation i.e., the BDA, it traverses beyond the bounds of its delegated rule-making authority. The general power of bodies like the NBA to make rules/regulations, cannot be exercised to bring into existence rights or obligations beyond those provided under the parent act i.e., the BDA.²⁴

Overall, through these exceptions, the scope of biological resources which are the subject of benefit claims by communities is substantially reduced. The only positive is that this may prevent an over-exploitation of resources from the wild. Yet, this too can be achieved by keeping the communities in the loop regarding possible conservation and cultivation activities.

²² Joint Parliamentary Committee (n 14) 62.

²³ Biological Diversity Rules 2024, r 19 & Biological Diversity Act 2002 (as amended up to Act 10 of 2023), s 7 (2).

²⁴ *Naresh Chandra Agrawal v The Institute of Chartered Accountants of India & Ors* [2024] 2 S.C.R. 194.

c. *AYUSH Practitioners*

The phrase '*practicing indigenous medicines, including Indian systems of medicine as profession for sustenance and livelihood*' in the proviso which qualifies the exception provided to AYUSH practitioners is vague and open to misinterpretation. Proper criteria must be outlined as to who would qualify as a 'practitioner' and what would constitute 'sustenance and livelihood'. Would a practitioner who is part of the local community and one who runs a commercial enterprise selling medicines be placed on equal footing? For both, it would be a matter of 'sustenance and livelihood' yet, the scale of exploitation of local biodiversity would be worlds apart. Although the MoEFCC has stated that this exception would not include AYUSH companies and the benefit is only intended for local practitioners benefiting the community, it would be helpful if the same is incorporated into the law.²⁵ If not, 'benefit claimants' may not be able to avail benefits from non-local practitioners seeking to exploit their biological resources and traditional knowledge.

B. Benefit Sharing Agreements and representation of indigenous people and local communities

Under the BDA (both old and new), the BMC is to be established at the *Gram Panchayat* level in rural areas or at the *Nagar Panchayat* or *Municipal Committee* level in urban areas. The major mandate of these committees is '*promoting conservation, sustainable use and documentation of biological diversityand chronicling of*

knowledge relating to biological diversity'.²⁶

This places the BMCs in a unique position to represent the interests of the 'benefit claimers' and 'holders of traditional knowledge'. It also makes them critical to ensuring that the principles of PIC are adhered to and that the MAT is worked out such that rights of the indigenous people and local communities are protected when benefit sharing agreements are formulated. However, considering that the BMCs are established at the Panchayat or Municipality level, they may not always be the true representatives of the rights and knowledge holders.

Under the BDA 2002, the role of the BMC's in formulating Benefit-Sharing Agreements (Agreements) was limited as it was the 'local bodies' i.e., Panchayats and Municipalities which were designated to represent the interest of local communities in negotiating the agreements. Under Section 21(1) of the 2002 Act, the NBA was required to finalise benefit-sharing agreements based on MAT and conditions between the '*person applying for such approval, local bodies concerned and the benefit claimers*'. 'Benefit claimers' as defined in the Act were the holders of traditional knowledge.²⁷ Thus, in BDA 2002, although they weren't involved in the 'grant of access', their inclusion in the benefit sharing process was as per the Nagoya Protocol which requires that MAT are established with the indigenous people and local communities and not with any 'local bodies'.

Under Section 21(1) of the 2023 Amendment, the direct involvement of such 'local bodies' and 'benefit claimers' is removed. The NBA is no longer required to determine benefit sharing arrangements

²⁵ Joint Parliamentary Committee (n 14) 66 & 104.

²⁶ Biological Diversity Act 2002, s 41.

²⁷ Biological Diversity Act 2002 (prior to the amendment of 2023), s 2 (aa).

under sections 19 & 20 on the basis of MAT that require the approval of benefit claimers and local bodies. Instead, the NBA must ensure that MAT are arrived at '*between the person applying for such approval, and the Biodiversity Management Committee represented by the National Biodiversity Authority*'.²⁸ [pincite necessary for this quote] The benefit claimers are blatantly excluded and even the BMCs are not involved directly but are to be represented by the NBA which as a national statutory authority will hold considerable sway and influence over smaller local-based bodies such as a BMC. Furthermore, under the 2024 Rules, under Rule 13 (4) of the 2024 Rules clarify that the BMC either directly or through the SBB must be 'consulted' in determining the benefit sharing arrangement. Yet, consultation is certainly not equivalent to 'Prior and Informed Consent' as required under the Protocol and nowhere are local communities/ benefit claimers/ holders of traditional knowledge or their representatives directly involved in arriving at mutually agreed terms to determine the quantum of benefits involved.

In the case of SBBs approving benefit-sharing agreements, there is no mention of MAT either in the 2023 Amendment or the 2024 Rules. Only the ABS Regulations 2025, under Regulation 11, reference SBBs and MAT. However, here too, the BMC or benefit claimer need only be 'consulted' in the formulation of the MAT. As highlighted previously, 'consultation' cannot amount to 'consent'.

It is clear therefore, that neither of the earlier provisions nor the ones brought in after the amendments is in compliance with the Nagoya Protocol vis-à-vis MAT and PIC. The only saving grace is that the

NBA and SBBs are required under Section 43(3) of the 2023 Amendment to 'consult' BMCs when making any decisions relating to the '*use of biological resources or traditional knowledge associated thereto*'. However, this also does not specifically address the involvement of indigenous people and local communities in the formulating fair and equitable benefit-sharing arrangements. The ABS Regulations 2025 have also created a minimum monetary threshold for entities to be bound by benefit-sharing obligations. Regulation 4.3 and Regulation 5.7, provide that both foreign and Indian entities whose annual turnover is below INR 5 crores are exempted from paying any amount on account of benefit sharing for access biological resource for commercial utilisation. They must only submit an annual report containing information on the biological resources accessed by them. This is perhaps intended to incentivise smaller companies from creating products from biological resources especially, the AYUSH medicine industry. However, it also has the effect of leaving several communities in the lurch and violating their rights both under international and domestic laws over the resources which they have traditionally conserved and cultivated.

Thus, both before and after the 2023 amendment, India was not in full compliance of its international obligations vis-à-vis the ABS rights of the indigenous people and local communities. The amendment has further whittled down the remaining safeguards in clear violation of India's obligations under CBD Article 8(j), the Nagoya Protocol and the KMGBF.

CONCLUSION

In its sixth national report to the CBD, the Indian Government had submitted that it had fully achieved Target 16 (compliance with the Nagoya Protocol) of the Aichi

²⁸ Biological Diversity Act 2002 (prior to the amendment of 2023), s 21 (1).

Targets through its enactment of the BD Act, rules and guidelines formulated thereunder.²⁹ In fact, the 2017 'interim report on implementation of Nagoya Protocol' that India had submitted to the ABS clearing house documents mentioned the inclusion of FPIC and MAT safeguards in benefit-sharing agreements. Yet, a need was felt by the Government of India to amend the 2002 Act, 2024 Rules and 2014 Guidelines. Indeed, an amendment to these legal instruments was long overdue to strengthen the rights and safeguard the ABS interests of the indigenous people and local communities, particularly considering the experience of the past two decades of implementation of the Act. There is, however, no indication or available documentation of any such analysis and compilation of experiences. It is claimed that the amendments are in furtherance of Indian obligations under the Nagoya Protocol and have also been used as indicators to denote India's compliance with the KMGBF and its National Biodiversity Targets set under it. However as illustrated in the analysis above, the Amendments themselves seem to weaken the ABS rights of the indigenous people and local communities rather than strengthening them and stand in direct contravention to the Article 8(j), Nagoya Protocol, and KMGBF.

An amendment with the objective of strengthening compliance with the CBD and its instruments would mean that MAT and FPIC of indigenous people and local communities (IPs & LCs) would need to be a mandatory prerequisite to the finalisation of ABS arrangements. At

present, the aforementioned processes are either optional (Rule 13 (4) of the 2024 Rules) or effectively exclude these communities (Section 3, 7, 21 & 24 of the Amended Act) or are not mentioned at all (SBBs control over ABS process for Indian entities). The IPs & LCs and the BMCs have been almost entirely excluded from the process of either granting FPIC for access or working out mutually agreed terms and conditions for benefit sharing. The NBA and SBBs have been given effective control over the resources and knowledge of the IPs & LCs and any benefits arising thereto. This *prima facie* violates basic principles of democracy and consent. Moreover, as statutory bodies which are primarily comprised of bureaucrats, and whose functioning and engagement is very often far removed from ground realities, such bodies are not equipped to be the sole representatives of IPs & LCs' interests in ABS negotiations. On the other hand, without government intermediaries, vulnerable individuals and communities could also be exposed to exploitation by commercial entities. Thus, a balance must be struck. This can only be achieved through an overhaul of the present system which will restore the rights of IPs & LCs and embedding democratic mechanisms (direct or representative) for their active and equitable participation in biodiversity governance and ABS mechanisms.

In addition to this, the exceptions created through the amendment viz., for medicinal plants, codified traditional knowledge and AYUSH further preclude communities from exercising rights over resources and traditional knowledge even before the process for access has begun.

This entire revamping of the 'ABS' regime in India seems to have been undertaken to further the 'ease of doing business' mission and promote the AYUSH systems of medicine. It has been done at the cost of constitutionally and internationally

²⁹ Government of India Ministry of Environment, Forest and Climate Change, 'India submits Sixth National Report to the Convention of Biological Diversity (CBD)' (*Press Information Bureau*, 29 December 2018), <<https://pib.gov.in/Pressreleaseshare.aspx?PRID=1557771>> accessed 15 December 2024.

acknowledged collective and individual rights of indigenous people and local communities over traditional knowledge, practices and related biological/ genetic resources. In particular, by diluting their authority and particularly reducing their ability to meaningfully participate in decision-making processes, these changes undermine the core principles of fairness and equity enshrined in the CBD. This is also in violation of the FRA, by preventing indigenous people and local communities to assert their rights under Section 3 (k) of FRA as mentioned above.

Without significant revisions, these amendments have the potential to compromise India's leadership role in global biodiversity governance. To align with its international obligations and ensure that the rights of indigenous people and local communities are upheld in both spirit and practice, India must critically re-examine and amend the current legislative framework. This requires not only restoring the rights of IPs & LCs but also embedding mechanisms for their active and equitable participation in biodiversity governance and ABS mechanisms.

At the bare minimum, a multi-tiered process involving the following components must be established through newer amendments:

- a. For 'foreign' entities aiming to access and derive benefits from access based on Indian resources, the ABS agreement must be a three-way negotiation process with the user, NBA and the concerned indigenous and local collectives/individuals. In keeping with the FRA and the principle of subsidiarity, the latter must include the *gram sabhas* (village assemblies) of the IPs & LC settlements at the smallest level, irrespective of their size, the Panchayats that they may be part of, or the BMCs that may represent

them. The BMC must be responsible for facilitating and ensuring prior and informed consent and fair and equitable MAT agreements.

- b. For Indian entities aiming to access and derive benefits from access based on Indian resources, the ABS agreement should be a three-way negotiation process with the user, SBB and concerned indigenous and local collectives/individuals. In keeping with the FRA and the principle of subsidiarity, the latter must include the *gram sabhas* (village assemblies) of the IPs & LC settlements at the smallest level, irrespective of their size, the Panchayats that they may be part of, or the BMCs that may represent them. The BMC must be responsible for facilitating and ensuring prior and informed consent and fair and equitable MAT agreements.

The CBD, in particular Article 8(j), and the Nagoya Protocol clearly acknowledge that indigenous people and local communities are the owners and hence rights holders of the biological resources within their areas and territories and the associated traditional knowledge. These instruments also clearly acknowledge and call for the direct involvement of the custodian indigenous and local communities in benefiting from such knowledge and resources by directly participating in any decisions related to access to such resources and knowledge and benefiting from such access. As we have explained above, in the BDA, the Biodiversity Management Committees (BMCs) are the designated authorities under the Act to facilitate such direct decision making. However, the membership of the BMCs is decreed by state-specific biodiversity rules and can very often comprise elected members of the local governance body (Panchayat or Municipal Corporation) rather than the communities whose

resources are being accessed. Such local governance bodies are often criticised to be neither the space for direct decision making, nor true representatives of the concerned communities. Direct participation of the concerned communities can only be achieved when consultations take place with *gram sabhas* (village assemblies) or equivalent customary institutions (with full and effective participation of all adult women and men) at the level of an individual settlements. The Forest Rights Act (FRA) recognises these assemblies and institutions as the primary bodies of direct democracy. They should be centrally involved in consultations regarding the provisions of the ABS laws, arriving at mutually agreed terms as well arriving at the benefit sharing mechanisms. Benefits sought by such institutions may seek tangible financial rewards. However, non-tangible assurances are often even more important. These may involve the recognition of their rights to use, manage and govern their own territories and the resources therein.

Furthermore, as mandated by the Nagoya Protocol, such institutions of direct democracy as well as the state established BMCs both must be included in any deliberations vis-à-vis future amendments made to either the BDA, its Rules or the ABS guidelines. This is of particular importance as it has not been followed in the process of amending the BDA in 2023, Rules in 2024 and the Guidelines in 2025. No meaningful consultations were organised at the local, regional, and

national levels where indigenous people and local community members could have shared their experiences and concerns with ABS mechanisms thus far. Similarly, in mid-December 2024, the NBA issued a notice seeking inputs for revisions towards the ABS guidelines giving only three days to provide these inputs. The notice was not published in any local print media, nor was it made available in local languages. Not less than 3 months after this window had elapsed, the new regulations (erstwhile guidelines) were directly published without providing a draft for public comments. In keeping with the CBD, the Government of India must provide adequate time for sharing comments, being mindful of the language and mode of reaching out to the concerned IPs & LCs and inculcation of inputs received to ensure strong PIC and MAT agreements.

Some positives have emerged from the ABS Regulations 2025, including hiking the benefit-sharing amount by 25 percent for inventions using traditional knowledge, mandating that benefits be shared proportionally in cases where the resources are sourced from multiple communities or the fleshing out through Form F of non-monetary methods of benefit-sharing which can sometimes be equally vital in empowering communities. However, there still persists an urgent need to revise many of the recent changes to the Indian ABS framework if they are to be in consonance with international obligations and commitments.

LEAD Journal is a peer-reviewed journal which publishes - on lead-journal.org - articles, case notes and documents of interest to professionals, practitioners, researchers, students and policy-makers in the field of international and regional environmental law and domestic environmental laws of developing countries. It emphasises a comparative approach to the study of environmental law and is the only journal in the field to carry a North-South focus. It is unique in providing perspectives from both developed and developing countries. Bearing in mind the principles of "sustainable development", LEAD Journal also solicits writings which incorporate related concerns, such as human rights and trade, in the study of environmental management, thus adopting a contextual approach to the examination of environmental issues. LEAD Journal encourages scholarship which combine theoretical and practical approaches to the study of environmental law and practice.

