

## **Comments/suggestions for Revising Access and Benefits Sharing Regulations, 2014**

Submitted by the Centre for Policy Design, Ashoka Trust for Research in Ecology and the Environment

Contributors: Gautam Aredath, Sangita Ganesh, Sachin Pernacca Sashidhar, Dr. Sharachchandra Lele

### **PREFACE**

These comments/suggestions are being submitted in response to the 'Notice inviting comments/suggestions for Revising Access and Benefits Sharing Regulations, 2014' issued by the National Biodiversity Authority. The comments/suggestions, while indicating general directions and measures that may be adopted to improve the effectiveness of access and benefits sharing under the Biological Diversity Act, 2002 perforce (due to the limited time available) do not address specific details of operationalising these suggestions, including prerequisite/consequent amendments to the relevant legal provisions. We anticipate that the revision of the regulations will be a participatory process, where civil society is invited to provide more specific recommendations, such as in response to a draft of the revised regulations, on a later date.

### **GLOSSARY**

**ABS:** access and benefits sharing

**ABS Regulations:** Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014

**BDA:** Biological Diversity Act, 2002

**BMC:** Biodiversity Management Committee

**BRK:** biological resources and/or associated knowledge

**CFR:** community forestry resource

**FPIC:** free prior informed consent

**FRA:** The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

**IPR:** intellectual property rights

**JFMC:** joint forest management committee

**MAT:** mutually agreed terms

**NGO:** non-governmental organisation

**PBR:** People's Biodiversity Register

**PES:** payment for ecosystem services

**PESA:** The Panchayat (Extension to Scheduled Areas) Act, 1996

### **COMMENTS/SUGGESTIONS**

1. **Devolving and specifying custodianship:** BMCs that are currently set up at the level of the gram panchayat should be devolved to align with actual community-level natural resource use/management for effective biodiversity and environmental protection. These include gram sabhas under the FRA and the PESA, where present, and other statutory grassroots democratic institutions, where these are absent.

These statutory bodies have broad powers for environmental protection and biodiversity conservation, and have special provisions for gender equity, thereby strengthening FPIC and MAT. The merger of existing statutory committees for natural resource management at the village-level and BMCs should be considered for operational efficiency. *For clarity, all references to BMC hereon in this note shall mean the BMC/corresponding statutory committee at the village level.*

As an interim measure, the identification of the appropriate “group of individuals or organisations” for direct transfer of benefits under section 23(1) of the BDA should be strengthened by recognising statutory committees under the FRA and PESA as the benefit claimants in the case of biological resources and/or associated knowledge (BRK) that are accessed within their customary boundaries. Due to the higher biodiversity values occurring in the forest and tribal areas covered by these legislations, this recognition will support greater direct transfer of benefit sharing. All references in ABS regulations to JFMCs must be read as/replaced with CFR management committees (under rule 4(1)(e) of FRA) in accordance with the MoEFCC and MoTA Joint Advisory on FRA (14.03.2024).

2. **Defining the territorial jurisdiction of BMCs:** The territorial jurisdiction of BMCs for the purposes of ABS, including FPIC and MAT, must be clearly defined as being coterminous with (and including all lands within) the customary/administrative boundaries of the corresponding village gram sabhas, for example, under the FRA and PESA. This will provide certainty to the power of the BMCs under section 41(3) of the BDA to levy collection fees over the access of BRK for commercial purposes within its territorial jurisdiction. Any access or collection of BRK that are privately owned, or for which the sale price is received, by an individual or group of individuals belonging to the gram sabha should be excluded from the applicability of BMC’s collection fees.
3. **Ensuring traceability in transaction chains:** End-users must be obligated to ensure traceability of all BRK that require regulatory approval under the BDA. A mechanism of certification by BMCs may be considered wherein any transaction that would invoke regulatory approval under the BDA requires the issuance of an ‘access certificate’ by the BMC for the initial access to BRK. The access certificate should mention the details of the access, including the type(s) of BRK, quantity, ownership, levy of collection fee (if applicable), and shall be in addition to the FPIC. A standard form for the ‘access certificate’ should be prescribed and the responsibility for ensuring their issuance must be with the end-user (which may be flown down to traders/intermediaries via supply-chain agreements). This process will enable the traceability of BRK at the time of approval and benefits sharing, proportionate distribution of benefits across applicable BMCs/benefits claimants and verification of the end-users’ compliance with applicable requirements under the BDA for the whole stock of BRK for which approval is sought.
4. **Strengthening prior informed consent:** FPIC of the community, individual or entity to whom the biological resource or traditional knowledge belongs must be mandated, including necessary procedures to ensure transparency and accountability in its implementation. This may be done by mandating the written FPIC of the benefit

claimers, i.e., by the concerned individual or entity in the case of privately owned biological resources, or through a resolution of the gram sabha (at the lowest level, preferably the CFR or PESA gram sabha) in the case of other biological resources. The information to be shared prior to obtaining FPIC must be specified to include the local name of the biological resource, its sources and locations, details of procurement (including quantity and price), use of associated traditional knowledge, and the end user's purpose of use, prospective commercialisation and commercial value. These details should be expressly included in the written PIC to allow the regulator to verify against the actual or known use by the end-user/applicant at the time of approval.

- 5. Improving mutually agreed terms (MAT):** Within the current mechanism of the NBA/SBB entering into the MAT as a representative of BMCs, procedures should be prescribed to ensure the prior approval and involvement of the BMC/benefit claimants to the MAT to the terms proposed to be agreed by the NBA/SBB. Any specified range of monetary benefits may be considered as a minimum guidance value, allowing the benefits claimants to negotiate more favourable arrangements on a case-by-case basis. More guidance on benefits sharing on associated traditional knowledge, such as with reference to PBRs and other forms of customary/traditional knowledge, must also be provided and promoted. Direct participation of benefit claimants in negotiations with the applicants would also permit discussions on non-monetary benefit sharing options that are suited to local needs.

Further, a longer term vision of enabling benefits claimants to determine the MAT autonomously would be key to their empowerment, biodiversity conservation and effective ABS. This may be operationalised through simple model contract clauses (and guidance manuals) that can be used by benefits claimants, which may be vetted at an appropriate level, as necessary, prior to entering into effect.

- 6. Decentralising approvals to state (or lower) levels:** Over the years, states have created state-level biological diversity rules, set up SBBs and many have also prepared state biodiversity action plans. Therefore, it must be considered whether states have built the capacity to handle a larger share of approvals under the BDA, which would expand the capacity of the NBA to focus on policy and supervisory functions. Notably, the NBA retains only 2.5% of the payments received through benefits sharing mechanisms. Transfer of more functions to SBBs, with necessary guidance to harmonise FPIC and MAT procedures, supervision and a robust complaints mechanism for benefits claimants, may be considered as a longer term target for the ABS mechanism.
- 7. Clarifying valuation criteria for monetary benefits sharing:** The current mechanism for determining monetary benefits sharing under the ABS Regulation does not distinguish between resource types or the specific uses of the BRK (except broad differentiations between research, commercial use, obtaining or commercialising IPR, etc.), instead applying uniform percentages of monetary sharing either on the resource value or product value. While the more decentralised system of FPIC and MAT proposed in this note would allow for greater consideration of these factors in the determination of the monetary benefits, the NBA must in the

short-to-medium term offer further guidance through whitepapers and manuals on the potential valuation of monetary benefit sharing of BRK. This may be based on considerations such as resource abundance, sustainable harvesting costs, commercial utilisation of the BRK, potential market and commercial value and risks/benefits involved in commercialisation.

8. **Ensuring participation in the management of local biodiversity funds:** BMCs must be required to consult gram sabhas (at the lowest level) when BRK is to be accessed from community owned or managed and public lands to provide information regarding the proposed access (including in cases which may not be subject to regulatory approval by the NBA or SBB) and to determine the collection fees under section 41(3), if permissible under the relevant state rules. Similar consultation with benefit claimants and local bodies must also apply for the use of the biodiversity funds, such as under sections 27(2)(c) and 44 of the BDA. Gram sabhas that have prepared CFR management plans under the FRA are well placed to utilise these funds to conserve and promote biodiversity and for sustainable socio-economic development, and funds relating to their areas may be transferred to the CFR management committees to support CFR management.
9. **Improving monitoring and compliance:** Record-keeping and monitoring must be improved at all levels to ensure the effectiveness of the ABS mechanism. This would include: (a) improving transparency of granted approvals by publishing for online public access the details of approved uses (commercial, non-commercial, etc.), calculation of monetary and non-monetary benefits sharing and corresponding 'access certificate' IDs; (b) mandating periodic reviews by nodal agencies in charge of FRA and PESA (and other local government statutes) of the process and outcomes of FPIC; (c) monitoring the utilisation of central, state and local biodiversity funds by publishing for online public access periodic audit reports, involving non-state actors such as NGOs; and (d) otherwise ensuring greater transparency in decision making by regulatory bodies. The applicable timelines for the various regulatory processes, including depositing/fulfilling benefits sharing with the benefits claimant/regulator (and the onward transfer to BMCs) must be specified and compliance ensured.
10. **Capacity building and incentivising action:** Capacity building can be in the form of (a) skill development and awareness programs to improve community engagement, such as for the timely preparation and updation of PBRs, and to improve the understanding of rights and benefits relating to ABS and (b) improving self-financing mechanisms for BMCs and nodal agencies under PESA and FRA, such as PES, in addition to benefits/fees under the BDA, to implement measures aimed at biodiversity conservation and sustainable socio-economic development, including as contemplated in sections 27(2) and 44 of the BDA.

The India Biodiversity Awards that recognised 'replicable mechanisms for ABS' as one of the categories for the awards may be resumed and regularised to build awareness and encourage action by the relevant authorities and local bodies. Other mechanisms to incentivise action could involve setting up incentive funds for high

performing BMCs that take action towards equitable benefits sharing and involve marginalised groups, as a means to further strengthen and encourage their work.