

# Reconciling Implementation of the Nagoya Protocol in India

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## 1. Introduction

India ratified the 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 (NP)<sup>1</sup> in October 2012. This is to showcase its commitment to facilitate early entry into force of the Nagoya Protocol that was adopted in 2010 and to lead effective implementation of Article 15 of the Convention on Biological Diversity (CBD) as the host of the eleventh Conference of Parties to the Convention on Biological Diversity (CBD COP 11).

With the entry into force of the NP in October 2014, the need for India to respond to the legal obligations of the NP is compounding with very specific issues such as notifying user country measures, designating check-points and others that are yet to be considered to implement the NP at national level. Delays in effective implementation of the NP would undermine India's ability to act as a responsible Party to the NP.

This paper attempts to provide an overview of India's preparedness to implementing the NP and provides options for better compliance of NP in India.

## 2. The Nagoya Protocol and the Biological Diversity Act (2002), India

There is a general perception that the Biological Diversity Act (2002) in India responds fully and objectively to the NP though this is not completely true. While several provisions of the Act relate to the elements of the NP, Government of India needs to undertake significant amounts of work to comply with the provisions of the NP.

The following section provides an overview of key provisions of the NP and how they relate to provisions within the Act.

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<sup>1</sup> <https://www.cbd.int/abs/text/default.shtml>

## *Comparing the Provisions of the Protocol and the Act*

### *2.1 Issues of objectives, mandates and coverage*

The objectives of the Nagoya Protocol (“Protocol”) are for countries to ensure fair and equitable benefit sharing arising from the utilization of genetic resources, access to and transfer of technologies, recognizing the role of traditional knowledge with informed participation of local and indigenous communities in decision making processes<sup>2</sup>. These objectives are echoed in the Indian Biological Diversity Act, 2002 (“Act”) as is seen in the statement of objects and reasons to the Act<sup>3</sup>.

Section 15 of the CBD and Article 3 of the Protocol make the instrument applicable to “genetic resources” and “traditional knowledge”, while the Act uses the term “biological resources” which is in fact wider in its scope and ambit. This, in fact, has been widely debated both in India and abroad in terms of the scope the Act and the Protocol.

### *2.2 Fair and Equitable Benefit Sharing*

Article 5 of the Protocol mandates the fair and equitable sharing of benefits arising out of the utilization of genetic resources with the provider country, upon mutually agreed terms (MAT), and to take appropriate measures that could include legislative, administrative or of policy. Such benefits may be monetary or non-monetary. Though the Act cannot be considered as a legislative measure to fully enforce the Protocol since it was enacted much before the Protocol came into force, some provisions of the Act are in consonance with the Protocol. Sections 3 and 21 of the Act address issues of fair and equitable benefit sharing and contemplate both monetary and non-monetary benefits in accordance with the Protocol. Section 3 regulates access to biological resources by non-Indians, non-resident Indians and Indian entities/companies with non-Indian participation, by requiring the prior approval of the NBA for any such access. This ensures complete protection to India as a country providing the biological

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<sup>2</sup> <https://www.cbd.int/abs/text/articles/default.shtml?sec=abs-01>

<sup>3</sup> <http://nbaindia.org/content/25/19/1/act.html>

resource, or in the words of the Protocol, the country of origin. However, India's obligations as a user country are missing making the compliance to the Protocol a problem.

Section 21 of the Act is a significant provision in this regard which empowers the NBA to determine fair and equitable sharing of benefits with mutually agreed terms. This provision read with Rule 21 of the Rules under the Act prescribes the criteria for equitable benefit sharing. Government of India notified the Guidelines for Access and Benefit Sharing in 2014<sup>4</sup>.

The Protocol further prescribes measures to be taken by the Parties for benefit sharing with local and indigenous communities, whether they are the holders of such resources and/or of traditional knowledge associated with them. Current provisions of Act and the Rules as well as implementation measures thus far indicate that there is limited or no focus on issues related to traditional knowledge associated with the resources with regard to ABS except for passing mention of traditional knowledge in the Act and Rules.

### *2.3 Role of communities, PIC and MAT*

Article 6 of the Protocol deals with access to genetic resources and correspond to Sections 3, 7, 19, 20, 21 of the Act. The overall intent of ABS provisions within the Act indicate that local communities as the key persons to provide access and benefit from the ABS provisions. While the text of the Protocol mandates consent of the party providing a resource, Section 41(2) of the Act suggest "*consulting*" the Biodiversity Management Committees (BMCs)<sup>5</sup> rather than seeking consent. It would be difficult to bring the requirement of prior informed consent mandated under the Protocol within the meaning of "*consulting*". Currently, the State (Provincial) Biodiversity Boards provide information regarding consultation with the BMCs in making a decision on ABS applications.

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<sup>4</sup> [http://nbaindia.org/uploaded/pdf/Gazette\\_Notification\\_of\\_ABS\\_Guidlines.pdf](http://nbaindia.org/uploaded/pdf/Gazette_Notification_of_ABS_Guidlines.pdf)

<sup>5</sup> Biodiversity Management Committee (BMC) was to be established at local government level in India as per section 41 of the Act. The BMC is expected to represent the interests of local people and communities and are empowered by the Act to undertake certain measures including charging access fee (Section 41.3)

The Act is compliant with the requirements of legal certainty, clarity and transparency on issues of ABS permissions and contracts. The rules are non-arbitrary. Rule 14 of the Biological Diversity Rules (2004) clearly provides for a written decision by the NBA on issues of access and benefit sharing.

#### *2.4 Permits and ABS Agreements*

Article 6 (e) of the Protocol provides for the issuance of a permit as evidence of the decision to grant prior informed consent and notify the Access and Benefit Sharing Clearing House. While there is no provision for the latter, the former has been complied with in India through the ABS agreements.

Access to traditional knowledge associated with genetic resources should be with the PIC and involvement of indigenous communities and MAT as per provisions of Article 7 of the Protocol. There is partial compliance of this in the Act with Sections 3 and 7 dealing with this though issues of traditional knowledge have not received much attention in decision making and implementation of the Act.

#### *2.5 Special Considerations and transboundary issues*

Article 8 of the Protocol broadly outlines special considerations such as access for non-commercial research especially change of intent, imminent emergencies whether national or international, and importance of genetic resources for food security, the provisions of the Act and Rules do not cover such issues or situations. Recently, the Ministry of Environment, Forests and Climate Change, Government of India notified the ABS Guidelines that contain provisions for 'emergency' situations with no clarity on what these situations are and who will decide what is an emergency<sup>6</sup>. Additionally, the approval process for such situations, as prescribed by the Guidelines, involves a timeline of 45 days. Such provision in the Guideline makes implementation of Section 8 of the Protocol questionable.

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<sup>6</sup> Ibid, 4

Issues of trans-boundary cooperation in instances where same genetic resources are found *in situ* of more than one country is contemplated under Article 11. It also mandates cooperation where more than one indigenous and local communities share the resource. Current provisions under the Biological Diversity Act in India do not clarify provisions related to trans-boundary issues. Issues of how the States in India will deal with access and benefit sharing agreements, as elaborated under Section 7, when such resources and associated knowledge are present across States are unclear.

### *2.6 Traditional Knowledge*

Article 12 of the Protocol specifically deals with traditional knowledge associated with genetic resources. It elucidates that Parties must take into consideration customary law, community protocols and procedures while granting access to traditional knowledge of indigenous communities and mandates effective participation of the concerned communities to inform potential users of such knowledge. The Biodiversity Act fails to satisfactorily address these issues within its substantive provisions.

### *2.7 Other Provisions including Compliance*

Currently, there is no provision in the Act to notify the Access and Benefit Sharing Clearing House and Information Sharing as contemplated under Article 14. However, Sections 52 to 60 of the Act are in full compliance with Article 18 on ensuring compliance with MAT. Provisions of Articles 19, 20, 21 and 22 of the Protocol on Model Contractual Clauses, Codes of conduct and Best Practices, Awareness Raising and Capacity are partially addressed in the implementation frameworks currently being used in the country. The following Table provides a synopsis of provisions of the Act and the Protocol.



Table showing the provisions of the Protocol mapped against the Biological Diversity Act and gaps where existing:

	Nagoya Protocol	Biological Diversity Act
<b>Article 1</b>	Objective of protocol: Fair and equitable benefit sharing, Access, Transfer of technology, Funding	Point 5 of the Statement of Objects and reasons reflects the objectives of the Protocol
<b>Article 3</b>	Scope: Application to (1) genetic resources (2) Traditional Knowledge	Applies to "biological resources" and traditional knowledge as a whole and not just genetic resources
<b>Article 4</b>	Not to affect other international instruments	Currently there is no provision though the Ministry of Environment, Forests and Climate Change has issued a notification in December 2014 with exemptions under ITPGRFA
<b>Art. 5(1)</b>	Sharing of benefits with country of origin based on MAT	Section 3 and 21 of the Act deal with this
<b>Art. 5(2)</b>	Community resources- fair and equitable benefit sharing	Section 3 and 21 deal with this provision.
<b>Art. 5(3)</b>	Measures for 5(1)	The Act deals with this provision
<b>Art. 5(4)</b>	Monetary and non-monetary measures	Section 21(2) elaborates on types of benefits envisaged under the Act.
<b>Art. 5(5)</b>	Measures for Traditional Knowledge	There is no specific provision for this in the Act.

<b>Art. 6(1)</b>	Prior informed consent	Sections 3, 19, 20, 21 deal with this to the extent the local communities are consulted. The issue of seeking consent is completely absent now.
<b>Art. 6(2)</b>	Prior informed consent from indigenous or local communities	There is no provision for seeking consent. Only 'consultation' is envisaged with the BMCs.
<b>Art. 6(3)(a)</b>	Legal clarity, certainty and transparency	Sections 3,4,5,6,7,19, 20, 21 of the Act provide for this.
<b>Art. 6(3) (b)</b>	Fair and non-arbitrary proceedings	Section 19 of the Act deals with this.
<b>Art. 6(3) ©</b>	Information for PIC	There is no provision for seeking PIC.
<b>Art. 6 (3) (d)</b>	Clear and transparent written decision	Rule 14 provides for this.
<b>Art. 6 (3) (e)</b>	Access or permit and notifying the ABS Clearing House	ABS Agreement is used as permit, but no provision to notify the ABS Clearing House. Limited information is shared with CBD ABS CHM with regard to ABS contracts/agreements until now.
<b>Art. 6 (3)(g)</b>	Rules and procedures for mutually agreed terms	Rule 14-16 of the Biological Diversity Rule provide for elements related to mutually agreed terms
<b>Article 7</b>	Access to TK	Sections 3, 19, 20, 21 and 41(3) deal with this issue. No special provision for TK provided.

<b>Article 8 (a)</b>	Simplified procedures for non-commercial research purposes and change of intent	There is no provision in the Act except exemptions for collaborative research approved by the Government.
<b>Art. 8 (b)</b>	Imminent emergency- special provisions	No provision in the Act. However, the Ministry of Environment, Forests and Climate Change has notified certain provisions in the ABS Guidelines for 'emergency purposes' with no clarity on what these purposes are. Timeline sought for permissions is 45 days from the date of application
<b>Article 8 (c)</b>	Genetic resources for food security	No provision exists for this in the Act. However Section 13 of the Act calls for establishment of an expert committee on agrobiodiversity
<b>Article 9</b>	Benefits for conservation and sustainable use	Rule 20 (7) provide for this
<b>Article 10</b>	Global Multilateral Benefit system	No provision exists. However, the establishment of the national, state and local biodiversity funds supports the principles for which the Global System is envisaged.
<b>Article 11</b>	Transboundary Cooperation	No provision exists
<b>Article 12 (1)</b>	Customary law and community protocols	No provision exists

<b>Article 12 (2)</b>	Mechanism to inform potential users about TK	Currently there is no provision
<b>Article 12 (3)</b>	Community protocols, MAT, Model contractual clauses	No provision for community protocols. MAT, MTA and contractual clauses are a part of the ABS Agreement approved by NBA
<b>Article 13</b>	National Focal Points And Competent National Authorities	National Competent Authority not notified yet.
<b>Article 14</b>	ABS clearing House and Information Sharing	There is no Clearing House provision made under the Act nor a CH exists now
<b>Article 15 (1)</b>	Domestic access and benefit sharing	Section 7 of the Act deal with this issue.
<b>Article 15 (2)</b>	Non-compliance measures for 15(1)	Section 56 of the Act provides provisions for non-compliance.
<b>Article 16</b>	Compliance With Domestic Legislation Or Regulatory Requirements On Access And Benefit-Sharing For Traditional Knowledge Associated With Genetic Resources	In the absence of user country measures, this provision is not addressed currently.
<b>Article 17 (1)</b>	Monitoring by designated checkpoints	Checkpoints are yet to be designated.
<b>Article 17 (2), (3) (4)</b>	Permit to be internationally recognized certificate and minimum information to be contained	Not clear if the ABS agreements can be used as a Permit of internationally agreed certificate.
<b>Article 18</b>	Compliance with MAT	Sections 52-61 deal with this.
<b>Article 19</b>	Model Contractual Clauses	There is no provision in the Act but the ABS agreement deal with

		the provisions
<b>Article 20</b>	Codes of conduct and Best Practices	There is no provision in the Act. No codes of conduct exist
<b>Article 21</b>	Awareness Raising	There is no provision in the Act
<b>Article 22</b>	Capacity	There is no provision in the Act
<b>Article 23</b>	Tech transfer, Collaboration, Cooperation	Currently, there is no provision in the Act though the Rules specify options for technology transfer under the benefit sharing section

### 3. Filling the Gaps

Based on the above, the following section provides some ideas and options for consideration by India in filling the current gaps to effectively implement the NP and show its commitment to realizing the objectives of the CBD. These suggestions are not exhaustive but are indicative to provide guidance to the NBA and the Ministry in its efforts to address provisions under the NP.

#### 3.1 Check Points

Article 17 of the Nagoya Protocol mandates Parties to the Protocol to designate one or more checkpoints to deal with appropriate compliance measures. Designated checkpoints would collect or receive, as appropriate, relevant information related to prior informed consent, to the source of the genetic resource, to the establishment of mutually agreed terms, and/or to the utilization of genetic resources.

Currently, in India, there are no designated checkpoints nor information shared regarding the ABS contracts with relevant agencies. This is set to impact the effective implementation of the Protocol in India.

The following institutions can be designated in India as the checkpoints: The National Bureaus of Genetic Resources (Plant, Animal, Microbial, Insect, Fisheries), the Protection of Plant Varieties and Farmers' Rights Authority (PPVFRA), the Controller General of Patents, Designs & Trade Marks, the Geographical Indications Registry, the Central Board of Excise and Customs, Ports Authorities (Airport, Sea Port), Directorate General of Foreign Trade, State Departments of Environment and Forests, Department of Biotechnology, Indian Chamber of Commerce.

The mandate of the checkpoints could include providing information on the activities, including movement of genetic resources and/or associated knowledge with details geographical location of access, the purpose for which biological resource and/or associated knowledge is accessed with specifications of use, confirming whether the collection or utilization of biological resources and/or associated knowledge was in accordance with the Biological Diversity Act, 2002 and whether prior approval was obtained by the user from the National Biodiversity Authority for access to biological resource for the purpose for which it has been accessed.

### *3.2 User Country Measures*

Articles 15 and 16 of the Protocol requires all the Parties to establish appropriate, effective and proportionate legislative, administrative or policy measures to provide that genetic resources and traditional knowledge utilized in their jurisdiction have been accessed on the prior informed consent or approval and involvement of indigenous and local communities and mutually agreed terms for access and benefit sharing have been established as required by the domestic access and benefit sharing legislation or regulatory requirements of the other Party.

Currently, very few countries have user country measures (*eg.* Norway) necessitating Parties to the NP to put in place mechanisms to realize the objectives of the Protocol as countries and its citizens importing or accessing genetic resources and/or associated traditional knowledge.

Though there are no provisions on user country measures under the Biological Diversity Act (2002), Government of India is obliged to issue appropriate notifications/orders to regulate use

of genetic resources and/or associated knowledge brought into the country. The check points identified above could be potential sources of such information.

The user country measures need to mandate those, both Indian and non-Indian, to declare the source of the resources, whether the material and associated knowledge was accessed according to national provisions in the country the resources are accessed from, the nature of use of the resource along with a declaration that the user will inform both the national competent authority and the national focal point on use of the resource and associated knowledge.

Establishment of a clearing house on ABS is the best way forward to share such information. Non-compliance to such user country measures should attract similar provisions as detailed under Sections 56 and 57 of the Biological Diversity Act (2002).

### *3.3 Dealing with PIC and MAT*

It is easy to argue that the Act and Rules as they stand fulfill the requirements Article 6.3 of the Protocol since they establish clear procedure for securing PIC. However, explicit provision for PIC or approval and involvement of local communities will help clarify confusions in terms of who gives PIC and MAT. Where the Act and Rules will run into problems is the lack of clarity as to who gives PIC and negotiates MAT with regard to access to GRs. Section 21.1 of the Act does not assume the NBA as the authority that gives PIC and MAT but rather the authority that gives permits if PIC and MAT conditions are satisfied.

In fact Section 21.1 of the Act indicates that the local bodies and benefit claimers would be the ones who will negotiate MAT for GR and TK. However, in practice this is different where the

NBA signs the ABS agreements and determines the MAT while the SBBs decide on MATs for ABS applications from Indians<sup>7</sup>.

Section 41.2 read with Section 21.1 of the Act comes to rescue here by implying a role for the BMCs in giving PIC and negotiating MAT. However, there is implementation ambiguity of the Act with regard to the above.

Article 12.1 and 12.3 of the Nagoya Protocol requires countries to develop community protocols While there is no such requirement in the Act, Section 41.1 of the Act requires local bodies to constitute BMCs to undertake activities such as developing the Peoples' Biodiversity Registers (PBRs) but not community Protocols.

Basically a community protocol in this case will be the founding document of the BMC and would require an in-depth process of consultation of all members of BMC and outline rules for biodiversity management and provision of PIC with respect to the common resources and TK held within the territory of the BMC. So it can be argued that the requirement under Section 41.1 read with Rule 22 to constitute a BMC implies that such constitution will be based on the development of a participatory community protocol that becomes the founding document of the BMC. The NBA then in situations where a user seeks access to resources within a BMC's territory refers the user to the community protocol of the BMC and asks him/her to follow the process laid down therein.

### *3.4 Issues Related to Traditional Knowledge*

The Act and the Rules do not make a distinction between holders of GR and holders of TK. The effective solution here would be for the BMC to append their Peoples Biodiversity Register (PBR) under Rule 22.6 to their community protocol. That way the PBR details the resources and

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<sup>7</sup> The National Biodiversity Authority shall while granting approvals under Section 19 and 20 ensures 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 and the benefit claimers.



TK within the territory of the BMC. The community protocol governs the rules of access to the resources and TK listed in the PBR and the NBA then ensures that prospective users follow the process laid down in the community protocol for access to the resources and TK in the PBR and based on this will give approval.

The Biological Diversity Act (2002) does not differentiate between knowledge associated with biological resources and traditional knowledge associated with biological resources that are held by local communities. The Rules on the other hand makes references to “traditional knowledge” but does not define it or afford a different treatment to such knowledge. PIC is not expressly obtained from local communities before granting access to traditional knowledge held by them. The only protection afforded to traditional knowledge is in Section 41(2) which mandates that the NBA and the SBB should consult the Biodiversity Management Committee (BMC) while taking any decision relating to the use of knowledge associated with resources occurring within the jurisdiction of the BMC. This provision does not ensure the PIC and involvement of local communities.

#### 4. Conclusions

India is one of the few countries that had put in place a comprehensive legislative framework to implement the CBD as early as 2002. The ABS provisions within the Biological Diversity Act are progressive for the time they were designed, they need urgent revisions not only with coming into force of the NP but also with the implementation experience of ABS in the country based on the differential interpretations of the provisions of the Act and the Rules in India by NBA, the Ministries and stakeholders.

While the ratification process in the country was guided by the interest of India to walk the talk of supporting early coming into force of the NP, it is time that the NBA and the Ministry of Environment, Forests and Climate Change adopt appropriate measures to effectively implement the NP.

Several of the gaps identified above can be filled by taking suitable administrative measures. However, given the inconsistencies in the provisions of the Act and the Rules, it is time the Government thinks of amending the Act and the Rules. Current interests of the Government to modify key environmental legislations and frameworks<sup>8</sup>, unfortunately did not include the Biological Diversity Act though the provisions of the Act are still seen as impeding research and development and use of biological resources and collaborations besides straining trade and product development.

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<sup>8</sup>[http://envfor.nic.in/sites/default/files/press-releases/Final\\_Report\\_of\\_HLC.pdf](http://envfor.nic.in/sites/default/files/press-releases/Final_Report_of_HLC.pdf)

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