'BENEFIT SHARING' REGIME IN INDIA REGARDING THE USE OF BIOLOGICAL RESOURCES – AN ALTERNATIVE MODEL

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The access to biological resources located within India is governed by the Biological Diversity Act, its Rules and Regulations, that were enacted in furtherance of the Convention on Biological Diversity ('CBD') and the Nagoya Protocol. One important aspect under them is fair and equitable 'benefit sharing' wherein, users of biological resources are required to share certain parts of the benefits accruing to them from such use, with the local communities that preserve those resources and impart their traditional knowledge relating to them. We argue that the current benefit sharing regime in India is problematic on various fronts and a recent judicial pronouncement has only aggravated these concerns further. Luckily, the CBD and Nagoya Protocol do not envision a singular model for benefit sharing and leave that for the member countries to decide. Therefore, we propose an alternative two- step ad-valorem royalty model that should be explored which addresses various problems prevalent in the current regime. The specifics of the proposed model can be worked out with due deliberation but our purpose is to highlight the existing problems in the system and initiate a discussion towards rebranding India's benefit sharing regime into a more definite, credible, transparent and fairer regime. We believe that the proposed model is a concrete step towards the same.

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I. INTRODUCTION

"If conservation of natural resources goes wrong, nothing else will go right."

- M. S. Swaminathan

Benefit sharing has been a recurring theme in the international debates in law, medical ethics and philosophy since the late nineties.[1] It entails levying obligations upon certain users of genetic or biological resources ('bio-resources') to share the benefits they reap from utilising such bio-resources, with the local communities that preserve those resources, in a fair and equitable manner.[2] It thus, is a way in which law (both domestic and international) seeks to ensure the conservation of natural resources and their sustainable and accountable use.

The legal framework on benefit sharing, internationally formulated for the first time around 1993,[3] has undergone changes, additions, and improvements from time to time, both internationally and domestically. Recently, the United Nations Convention on Biological Diversity ('CBD') Secretariat released its first official draft on a new Global Biodiversity Framework to align actions across the globe through 2030 for the preservation and protection of the nature and its essential services to people.[4] One, out of the four goals of the draft framework is to ensure that the "benefits from the utilization of genetic resources are sharedfairly and equitably, with a substantial increase in both monetary and non-monetary benefits shared, including for the conservation and sustainable use of biodiversity".[5]

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1 D. Schroedar, *Benefit sharing: it's time for a definition*, Vol. 33, J. Med. L. Ethics 4, 205-209 (2007).

2 United Nations Environment, *Access and Benefit Sharing*, available at https://globalpact.informea.org/glossary/access-and-benefit-sharing (Last visited on August 21, 2021).

3 Convention on Biological Diversity, *Introduction*, January 16, 2012 available at https://www.cbd.int/intro/ (Last visited on August 17, 2021).

4 UN Environment Programme, *First Draft of the Post-2020 Global Biodiversity Framework*, available at https://www.cbd.int/doc/c/abb5/591f/2e46096d3f0330b08ce87a45/wg2020-03-03-en.pdf (Last visited on July 23, 2021).

5 Eurek Alert! American Association for the Advancement of Sciences, *UN's New Global Framework for Managing Nature: lst Detailed Draft Agreement Launched*, July 12, 2021,

In India, the benefit sharing framework is well-defined. However, various issues plague the current framework, like bureaucratic red-tape, delays, etc.[6] Furthermore, a 2018 decision of the Uttarakhand High Court in *Divya Pharmacy* v. *Union of India* ('Divya Pharmacy'), has added to these concerns by endorsing the current practices in the benefit sharing regime, as we shall later argue.[7] In this light, this article seeks to explore the benefit sharing framework in India, highlight the existing problems, and then propose an alternative model for benefit sharing. Part II lays down the international backdrop against which, India's benefit sharing regime was introduced. Thereafter, Part III discusses the broad legal framework and the peculiar provisions regarding benefit sharing under laws in India. Part IV discusses an erroneous addition to the Indian benefit sharing regime by a subordinate legislation. Part V discusses how a recent judicial pronouncement has in fact, legitimised the said erroneous addition. Thereafter, Part VI highlights some existing problems in the benefit sharing regime that have been aggravated by the said judicial pronouncement. Part VI highlights the need to introduce an alternative model in the benefit sharing regime in India. In Part VII, we propose two prongs of the alternative model and discuss how they respectively address the issues that exist in the current benefit sharing regime. In the concluding Part VIII, we tie the discussion together on the future course of action that can be taken vis-à-vis the proposed model.

II. INTERNATIONAL FRAMEWORK ON 'BENEFIT-SHARING'

The CBD, signed at Rio de Janeiro in 1992-93, with 196 state parties today, is so far the most widely accepted international arrangement for conservation and sustainable utilisation of bio-resources and sharing of its benefits.[8] India became a party to the CBD on May 19, 1994.[9] It then enacted the Biological Diversity Act 2002 ('Act') and the Biological Diversity Rules 2004 ('Rules'). The Act has adopted the three objectives of the CBD verbatim, i.e., 'conservation of biological diversity, sustainable use of its components, and fair and equitable sharing of the benefits arising out of the use of bio-resources, knowledge'.[10]

Later, at the 10th CBD Conference of Parties, a supplementary agreement to the CBD, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (the 'Nagoya

available at https://www.eurekalert.org/pub_releases/2021-07/tca-ung071121.php (Last visited on July 23, 2021).

6 *See* discussion *infra* Part VI.

7 *See* discussion *infra* Part V.

8 M.S. Suneetha, B. Pisupati & S. Kumar, *Framework for Benefit Sharing Guidelines for India* 11 Asian Biotechnology and Development Review 2 (2009), ¶¶55-58.

9 Convention on Biological Diversity, *List of Parties,* available at https://www.cbd.int/information/parties.shtml (Last visited on June 28, 2021).

10 Biological Diversity Act, 2002, *Statement of Object & Reasons*.

Protocol') was signed (witheffect from October 12, 2014).[11] The Nagoya Protocol calls for the state parties to, *inter alia,* make provisions to ensure that the users of the genetic resources share the benefits that they reap from such use, with the local communities who conserve such resources. Such benefits can be monetary or non-monetary, but they have to be on mutually agreed terms with the local communities.[12] India ratified the Nagoya Protocol in 2012. Consequently, the Government of India, through the National Biodiversity Authority (created under the Act) introduced the Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations 2014 ('Regulations').[13]

Thus, the Act, the Rules and the Regulations together constitute the benefit sharing regime in India. The next part shall explain the legal framework of benefit sharing as envisaged by the Act and the Regulations. A clear understanding of the peculiar provisions of the Act is necessary to appreciate an argument made later in this article on how the Regulations deviate from the Act.[14] It is also necessary to understand the judicial misinterpretation in Divya Pharmacy.[15]

III. LEGAL FRAMEWORK OF BENEFIT-SHARING IN INDIA

The Biological Diversity Act, 2002, prescribes the procedures to be followed by the users to access bio-resources located within the Indian territory. However, the law categorically prescribes different procedures for non-Indian and Indian users. The non-Indian users[16] are required to get an approval from the National Biodiversity Authority ('NBA'), the central regulatory body created under the Act, before accessing the bio-resources for any purpose.[17] However, the Indian users[18] do not require such approval. They just need to give a 'prior intimation' to their respective State Biodiversity Boards ('SBBs') that are state-level statutory authorities created under the Act. More importantly, this 'prior

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[11] Convention on Biological Diversity, *About the Nagoya Protocol*, June 9, 2015, available at https://www.cbd.int/abs/about/default.shtml/ (Last visited on June 28, 2021).

[12] *Id*.

[13] Ministry of Environment, Forests and Climate Change (National Biodiversity Authority), Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014, G.S.R. 827 (Notified on November 21, 2014) ('Guidelines 2014').

[14] *See* discussion *infra* Part IV.

[15] *See* discussion *infra* Part V.A.

[16] *See also* Biological Diversity Act, 2002, §3; §3(2) defines non-Indian users to mean and include:

(a) a person who is not a citizen of India; (b) a citizen of India, who is a non-resident as defined in Cl. (30) of §2 of the Income Tax Act, 1961 (43 of 1961); (c) a body corporate, association or organization— (i) not incorporated or registered in India; or (ii) incorporated or registered in India under any law for the time being in force which has any non-Indian participation in its share capital or management.

[17] Biological Diversity Act, 2002, §3.

[18] *See also* Biological Diversity Act, 2002, §7; §7 defines an Indian user to mean and include, citizen of India; body corporate, association or organization registered in India; but excludes local people and communities of the area, including growers and cultivators of biodiversity, and vaids and hakims who have been practising indigenous medicine.

intimation' is required only when the purpose of the access is commercial utilisation, bio-utilisation or bio- survey.[19]

The Act also provides a separate process of NBA approval for the non-Indian users. They are required to apply to the NBA before accessing the bio-resources and the NBA then processes and approves those applications.[20] In approving the applications, the NBA is required to impose certain terms and conditions on the use of the bio-resources that would ensure that the user equitably shares the benefits arising out of such use.[21] These terms have to be as per mutual agreement between the users, the local bodies, and benefit claimers.[22]

Pertinently, this provision, under which the NBA is required to place benefit sharing as a condition precedent to its approval, is present, only for non-Indian users and not for Indian users. Consequently, since Indian users are not required to get an approval from the NBA or the SBB, it makes sense that the benefit sharing obligation is not levied on them by the legislature. However, despite such clear differentiation in the law, various SBBs (on the footsteps of the NBA) have been, over the years, putting benefit sharing obligations upon the Indian users. Some of these SBBs are MP SBB,[23] Maharashtra SBB,[24] Uttarakhand SBB,[25]

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19 *Id*., §7.

20 *Id*., §19.

21 *See also* Biological Diversity Act, 2002, §21(3); §21(3) provides that the benefit sharing amount has to be deposited to the National Biodiversity Fund or be directly given to the benefit claimer individual(s)/group(s). The NBA is empowered to frame regulations to that effect as per §21(4).

22 *Id*., §21; *See also* Biological Diversity Rules, 2004, Rule 20(5); Rule 20(5) lists some parameters to be regarded in determining the mutually agreed terms. It states: "The quantum of benefits shall be mutually agreed upon between the persons applying for such approval and the Authority in consultation with the local bodies and benefit claimers and may be decided in due regard to the defined parameters of access, the extent of use, the sustainability aspect, impact and expected outcome levels, including measures ensuring conservation and sustainable use of biological diversity."

23 *See generally* Foundation for Ecological Security and Kalpavriksh Environmental Action Group, K. Kohli & S. Bhutani, *Litigating India's Biological Diversity Act: A Study of Legal* Cases (2016) available at https://docplayer.net/54604536-Litigating-india-s-biological-diversity-act-a-study-of-legal-cases-by-shalini-bhutani-kanchi-kohli.html (Last visited on 28 June 2021) ('Kohli & Bhutani (2016)'); The authors discuss about various litigations that Indian users of bio-resources have fought against various SBBs (like Madhya Pradesh SBB, Maharashtra SBB, etc.) for demanding benefit sharing from Indian users.

24 *Id*.

25 *See generally* Uttarakhand State Biodiversity Board, ANNUAL REPORT 2013-14, 26, available at https://sbb.uk.gov.in/files/Documents/Annual_Report-2013-14.pdf (Last visited on Aug 17, 2021); At page 26, it mentions that the Uttarakhand State Biodiversity Board had started demanding benefit sharing amout from Indian users back in 2013, however, due to lack of regulations from the NBA to that effect, the endeavour was not very successful. However, as evident in subsequent Annual Reports, Uttarakhand SBB has regularly demanded ABS from the Indian users; *See also* Uttarakhand SBB, ANNUAL REPORT 2014-15, 2, available at https://sbb.uk.gov.in/files/Documents/Annual_Report-2014-15.pdf (Last visited on Aug 17, 2021); At page 2, it mentions that the Uttarakhand SBB had already issued around 300 notices to industries for sharing ABS amount.

and Kerala SBB.[26] The Uttarakhand SBB has even argued earlier that it is legally empowered to demand benefit sharing from Indian users,[27] a proposition accepted by the Uttarakhand High Court in Divya Pharmacy.[28]

Before dealing with the judiciary however, we must also discuss how the executive has endorsed this erroneous position of law by empowering the SBBs to demand benefit sharing through the Regulations. This is discussed in the next part.

IV. THE REGULATIONS AND THE EMPOWERMENT OF SBBS QUA BENEFIT-SHARING

As already discussed, the Act does not envisage the placing of benefit sharing obligations on Indian users.[29] However, soon after India ratified the Nagoya Protocol in 2012, the NBA came up with the 2014 Regulations to further the 'fair and equitable benefit sharing' objective of the Nagoya Protocol.[30] These Regulations empowered the SBBs to demand benefit sharing amount from Indian-users.[31] However, the Nagoya Protocol was not the only driving force behind the enactment of the Regulations. The Regulations (and the resulting empowerment of the SBBs to demand benefit sharing) were also consequent to certain activities undertaken by the Madhya Pradesh SBB ('MP SBB') and the resulting litigation,[32] as discussed hereinafter.

Between 2012 and 2013, the MP SBB (that has the largest share of cases on benefit sharing issue in India) issued notices to various Indian companies using bio-resources to share with it two percent of their gross revenue annually.[33] Around thirteen of these companies moved the National Green Tribunal Central Zone Bench ('NGT (CZ)') and argued that the SBB was not empowered to demand benefit sharing from Indians.[34] The NGT (CZ), through a common order in all these cases, directed the National Biodiversity Authority and the Government

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[26] *See generally* Kerala State Biodiversity Board, Annual Report 2014-15, 9, available at https://www.keralabiodiversity.org/images/annual/annual_2014_15_opt_eng.pdf (Last visited on Aug 17, 2021); At page 9, it mentions that more than 1500 notices were issued to the industries to seek approval from the SBB to use the bio-resources, something, as discussed in this article, is beyond the powers of an SBB as per the Act.

[27] S. Bhutani & K. Kolhi, *Despite Landmark Judgment, Issues of Regulation Remain in India's Biodiversity Regime*, The Wire, March 5, 2021, available at https://thewire.in/law/divya-pharmacy-india-biodiversity-act (Last visited on June 28, 2021).

[28] *See* discussion *infra* Part V.

[29] *See* discussion *supra* Part III.

[30] *See generally* Guidelines 2014, *supra* note 13; The headnote to the Regulations mention that they have been enacted in furtherance of the Nagoya Protocol.

[31] Guidelines 2014, *supra* note 13, Regs. 2, 4.

[32] National Green Tribunal (Central Zone Bench, Bhopal), Som Distilleries Pvt. Ltd. v. MP State Biodiversity Board, 2014 SCC OnLine NGT 6966, 2.

[33] Kohli & Bhutani (2016), *supra* note 23, 13.

[34] *Id.*

of India to come up with standardised guidelines for ABS from Indian users. It also authorised them to examine whether in the absence of any such standardised guidelines, the SBBs could demand benefit sharing amount and other related information from Indian users.[35] In response to this and in furtherance of the Nagoya Protocol, the NBA came up with the 2014 Regulations.[36]

Under the Regulations, both non-Indian as well as Indian users are required to apply to the NBA and SBBs respectively for accessing bio-resources for commercial utilisation, bio-utilisation or bio-survey for commercial utilisation.[37] Therefore, as per the Regulations, on being satisfied with the applications, the NBA or the SBB, as the case may be, can enter into Access and Benefit Sharing Agreements ('ABS agreements') with the users, and thereby approve the applications.[38] Under the ABS agreements, the users are liable to pay to the NBA or the SBB, a certain percentage (0.1% to 0.5%) of their annual gross ex- factory sale minus government taxes as the 'benefit sharing amount'.[39]

Thus, in essence, the above provisions in the Regulations have empowered the SBBs with twin powers regarding the access and usage of bio-resources by Indians. The first is the grant of 'approvals' to the Indian users to access the resources through ABS agreements, and the second is the power to demand benefit sharing money from them as part of the ABS agreements.[40] The Biological Diversity Act however, does not provide either of these powers to the SBBs, as discussed.[41] Nevertheless, some SBBs, like Uttarakhand[42] and Madhya Pradesh[43] SBBs, have been exercising these powers even before the 2014 Regulation were introduced.[44] With the advent of 2014 Regulations, such acts of the SBBs have gotten some sort of legal recognition. Furthermore, to make matters worse, the Uttarakhand High Court in Divya Pharmacy has also endorsed the view that SBBs are empowered to demand benefit sharing from Indian users, thereby adding another layer of legitimacy to such powers. The next part discusses the Divya Pharmacy judgment and its ramifications, and the subsequent part ties such ramifications with the problems that exist in the current benefit sharing regime.

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35 National Green Tribunal (Central Zone Bench, Bhopal), Som Distilleries (P) Ltd. v. MP State Biodiversity Board, 2014 SCC OnLine NGT 6966, 2.

36 Kohli & Bhutani (2016), *supra* note 23, 14.

37 Guidelines 2014, *supra* note 13, Reg. 2(1).

38 *Id*., Reg. 2(2).

39 *Id*., Reg. 4.

40 *Id*., Regs. 2, 4.

41 *See supra* Part III.

42 *See supra* Part III.

43 *Id*.

44 *See* discussion *supra* Part III.

V. DIVYA PHARMACY V. UNION OF INDIA - JUDICIAL MISINTERPRETATION AND ITS RAMIFICATIONS

The authority of NBA in demanding benefit sharing from non-Indian users has not been questioned so far. However, similar authority of the SBBs has been questioned on various occasions, more so, since the notification of the Regulations. Finally, in 2018, the Uttarakhand High Court ('Court') settled the jurisprudence on this issue in Divya Pharmacy.[45]

In 2016, the Uttarakhand SBB had issued a notice to Divya Pharmacy, a manufacturer of Ayurvedic medicines and nutraceutical products in Haridwar, to share two percent of its revenue, annually to the SBB as 'fair and equitable benefit sharing' amount. Divya Pharmacy moved the Court against such notice. It relied upon the definition of 'fair and equitable benefit sharing' under Section 2(g) of the Act that defines it as "sharing of benefits as determined by the National Biodiversity Authority" and not by State Biodiversity Boards.[46] *It argued that under the Act, only the NBA, and not the SBBs, is empowered to levy benefit sharing obligations, and since NBA approval is required only for non-Indian users,*[47] *Indian users are free from benefit sharing obligations.*[48] *All they need to do is give prior intimation to the SBB.*[49]

The Union of India ('UOI') argued that the Indian-non-Indian user differentiation in the Act is only to determine the authority they need to approach, and not regarding benefit sharing obligations.[50] It further argued that if such a differentiation is maintained, it would defeat the objective of the Act and the international conventions that India is a signatory to. Further, it relied upon Section 7 read with Section 23(b),which suggest that the SBB is not a mere bystander that is only required to accept prior intimations by the Indian users, but also has the power to 'regulate by granting of approvals or otherwise', requests for commercial utilisation, bio-survey, or bio-utilisation. The UOI also argued that the SBB can restrict any activity if it opines that such activity is detrimental to the 'sharing of equitable benefits' that arise from the activity.[51]

The Court observed that even though a literal interpretation of the Act does not put a benefit sharing obligation upon Indian users, the law has to

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45 Divya Pharmacy v. Union of India, 2018 SCC OnLine Utt 1035 ('Divya Pharmacy').

46 *See also* Biological Diversity Act, 2002, §21; Under this provision, the NBA, while granting approval to the non-Indian users, shall ensure that the terms on which such approval is granted, secures equitable benefit sharing from use of the bio-resources.

47 *Id*.

48 Divya Pharmacy v. Union of India, 2018 SCC OnLine Utt 1035, ¶¶9-16.

49 *Id*., ¶14.

50 *Id*., ¶17.

51 *Id*., ¶¶18-21.

be interpreted in light of its purpose.[52] Since the Act was enacted in furtherance of the CBD and Nagoya Protocol, it has to be interpreted in that light. Therefore, since CBD and Nagoya Protocol do not differentiate between domestic and foreign entities while levying benefit sharing obligations on them, the legislature would not have intended to make such a differentiation in the Act.[53] In effect, the Court agreed with the Union to hold that SBBs also have the power to levy benefit sharing obligations on Indian users and the NBA is empowered to frame necessary guidelines in that regard under Section 21 of the Act. The Court thus, also upheld the vires of the Regulations vis-a-vis the Act.[54]

This judgment received mixed responses from different sections. While some saw it as a landmark judgment that has clarified the law on ABS by SBBs, and as a concrete step that would further the objectives of the CBD and the Nagoya Protocol, others feared that it would give impetus to a new order of bureaucrats to secure their own turfs[55] as the benefits anyway do not 'actually' reach the local communities. The authors argue that the court's decision is a judicial misinterpretation of the Act and that a purposive interpretation was not warranted in this case. The next sub-section clarifies this argument.

A. JUDICIAL MISINTERPRETATION

The Court in Divya Pharmacy had acknowledged that a literal interpretation of the Act does not put benefit sharing obligations upon Indian users, although the Union argued otherwise.[56] However, the Court went past the literal interpretation to advance a purposive interpretation in light of India's international obligations.

The authors argue that the Court was incorrect in undertaking a purposive interpretation here when the statute clearly differentiates between Indian and non-Indian users vis-à-vis their benefit sharing obligations, as discussed.[57] In India, the courts are not supposed to necessarily read a law in light of India's international obligations. As discussed by the Supreme Court in *NALSA* v. *Union of India*, if the legislature makes a law that is in conflict with international law, Indian courts are bound to give effect to the domestic law, rather than the international law. But, if there is a void in the domestic legislation and a contrary legislation is absent, the courts can give effect to international laws.[58] Pertinently, in *Vishaka* v. *State of Rajasthan*, when there was a void in the Indian law on prevention of sexual harassment and no contrary law was present on the subject, the court read

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[52] *Id*., ¶34.
[53] *Id*., ¶72.
[54] *Id*., ¶106.
[55] L. Jishnu, *Pressed for Sharing*, January 8, 2019, available at https://www.downtoearth.org.in/news/economy/pressed-for-sharing-62743 (Last visited on June 29, 2021) ('Jishnu').
[56] *See infra* Part V.
[57] *See* discussion *infra* Part III.
[58] National Legal Services Authority v. Union of India, (2014) 5 SCC 438, ¶53.

the provisions of the CEDAW Convention into the domestic law.[59] Furthermore, the constitutional provision that authorises India to respect its treaty obligations in dealing with its people, falls under Part IV, i.e., the Directive Principles of State Policy, and hence is non- mandatory.[60] Therefore, it can be concluded from the constitutional scheme that India is not required to mandatorily give effect to its international obligations while dealing with its people domestically.

Hence, when the Act is loud and clear in not placing benefit sharing obligations upon Indian users, the Court should have interpreted the provisions literally and not purposively, even if the literal interpretation conflicted with India's international obligations. Further, the Act envisages different procedures and rules for Indian and non-Indian users regarding benefit sharing, and wherever required, they are placed on equal footing.[61] Therefore, if the legislature intended to put benefit sharing obligation upon Indian users as well, it could have very well done that *via* the relevant provisions.[62]

B. RAMIFICATIONS

This judgment gave judicial acceptance to the Regulations that empowered the SBBs to levy benefit sharing obligations upon Indian users. This judgment has been eyed by various Indian entities that had not previously registered themselves with the SBBs, but who would now be required to be registered mandatorily.[63] Further, various SBBs that were not very pro-active in demanding benefit sharing amounts from the Indian users before, may nowfeel empowered by this judgment and start demanding benefit sharing amounts from Indian users.[64]

Furthermore, a large number of businesses, small businesses in particular, had been facing unjustified legal threats from SBB seven before the Divya Pharmacy judgment was pronounced and the risk of such threats has only increased post the judgment. For example, in 2017, the MP SBB had created the Madhya Pradesh Biodiversity Enforcement Cell to take legal actions, including arrests, against the Indian entities using the bio-resources without sharing its

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59 Vishaka v. State of Rajasthan, (1997) 6 SCC 241.

60 The Constitution of India, 1950, Art. 51(c).

61 *See* Biological Diversity Act, 2002, §6; As per this provision, both Indian and non-Indian users are placed on same footing if they make an application for intellectual property rights over the bio-resources.

62 Apoorv K. Chaudhary, *Access and Benefit Sharing for domestic entities: Case comment on Divya Pharmacy v.Union of India & others*, April 25, 2019, available at http://scholarship.ciipc.org/2019/04/25/access-and-benefitsharing-for-domestic-entities-case-comment-on-divya-pharmacy-v-union-of-india-others/ (Last visited on March 5, 2021).

63 *Patanjali Judgement can have Ramifications Beyond Uttarakhand*, Down To Earth, December 28, 2018, available at https://www.downtoearth.org.in/news/economy/patanjali-judgement-can-have-ramifications-beyond-uttarakhand-62629 (Last visited on July 23, 2021).

64 *Id*.

benefits.[65] Pursuant to which, some arrests were also made. Further, in Himachal Pradesh, the premises of a factory were raided by the Himachal Pradesh SBB with assistance from the state forest department.[66] However, it must be noted that the Act does not sanction such enforcement activities. All that is permitted, as per the Rules, is the physical inspection of any area in relation to the implementation of the Act, that too, only by the NBA, and not the SBBs.[67] Nevertheless, the SBBs have made unjustified legal threats, and undertaken enforcement actions against these industries. The Divya Pharmacy judgment has given legitimacy to the authority of the SBBs to demand benefit sharing. Hence, it is very likely that these enforcement activities, like arrests, raids, etc. that do not have any legislative backing, would continue to take place, unchecked.

The Divya Pharmacy judgment is not up for an appeal. Therefore, the bottom line is that the system of levying benefit sharing upon Indian users continues, in fact, with a further layer of legitimacy (apart from the legitimacy granted to it by the Regulations) with the Divya Pharmacy judgment. Nevertheless, as discussed, the position taken by the Court in Divya Pharmacy, on the benefit sharing obligation upon the Indian entities is beyond the scheme of the Act, and the Court should have stuck to the clear wordings of the Act to that effect. This issue may reopen for further discussions in some future case law where the Court may either side with ratio of Divya Pharmacy, or hold against it. There may even be a legislative intervention or clarification on this issue later. Whatever maybe the course of action taken on the issue of benefit sharing obligation, there are further reasons to argue that the current benefit sharing regime in India, for both Indian and non-Indian users, is problematic on various other fronts. And now that even the SBBs are legally empowered to levy benefit sharing obligations, it would further multiply the pre-existing problems, as discussed in the next part.

VI. PROBLEMS IN THE CURRENT ABS REGIME

The benefit sharing responsibility cast on the users of bio-resources, particularly, commercial users, is a result of a global push by conservationists, rights activists, governments, etc. to ensure that at least parts of the benefits yielding from bio- resources go back to the communities who play a significant role in housing, developing, and conservation of these resources.[68] This responsibility is

[65] Alphonsa Jojan, *The Curious Case of the Indian Biological Diversity Act*, THE WIRE, November 18, 2017, available at https://thewire.in/environment/india-biological-diversity-act (Last visited on August 18, 2021) ('Alphonsa').

[66] *Id*.; *See also* Prashant Reddy, *India's Biodiversity Law has Turned Out to be a Nightmare for Scientists and Businesses – Parliament Should Repeal it,* November 28, 2018, available at https://spicyip.com/2018/11/indias-biodiversity-law-has-turned-out-to-be-a-nightmare-for-scientists-and-businesses-parliament-should-repeal- it.html (Last visited on July 15, 2020) ('Reddy').

[67] Biological Diversity Rules, 2004, Rule 12(xviii).

[68] Kanchi Kohli & Shalini Bhutani, *Can Benefits be Shared? Three Tangles for Access and Benefit Sharing* in BIODIVERSITY FOR SUSTAINABLE DEVELOPMENT: ENVIRONMENTAL CHALLENGES AND SOLUTIONS 121-134, 124 (K. Laladhas, P. Nilayangode and O.V. Oommen, Springer International Publishing, 2017) ('Kohli & Bhutani (2017)').

a further acknowledgment that the users, in utilising the bio-resources, greatly rely upon and benefit from the 'traditional knowledge' of the local communities regarding such bio-resources.[69]

However, some scholars argue that the Regulations enacted supposedly to further the objectives of CBD and Nagoya Protocol reflect that the Government of India sees ABS as a 'large-scale financing mechanism' that would generate funds to be used for conservation and poverty reduction.[70] As per the Regulations, ninety-five percent of the money received under ABS has to be given directly to the local communities (if identifiable) or to support the conservation of bio-resources and the livelihood of people of the region.[71] However, there is no information on how the ABS money is ultimately shared with the local communities. This raises suspicion against the SBB bureaucrats that they are using the ABS system to extract money from the users just to secure their own turfs.[72] Similarly, little documentary evidence exists to prove that the ABS money goes towards conservation of bio- resources and livelihood of the communities. These raise questions regarding the actual performance of the government on its promises under the Act. However, further exploration on the 'actual performance' of the government is not the primary focus of this article. Nevertheless, under the current framework, the bio-resources and the traditional knowledge of the communities are now being controlled by government bureaucrats.[73] More so, the NBA (again, a government body) has been made the relevant authority to determine what shall be 'equitable' for benefit sharing in each case, adding another level of bureaucratic interface.[74] This excessive control and involvement of the government authorities in the entire process is a major issue that needs to be fixed. Some of the problems due to this excessive bureaucratic interface are discussed hereinafter.

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69 *See generally,* NLSABS, *Biodiversity and Access and Benefit Sharing in India,* available at https://nlsabs.com/?page_id=219 (Last visited on June 28, 2021); This discusses about Kani tribe inhabiting the Agastyamalai forest in Kerala, who use a medicinal plant called 'Arogyapaacha' as their traditional medicine recognizing its restorative, immune-enhancing, anti-fatigue properties. The knowledge about these properties of the plant was revealed by some tribe members to some scientists from the Tropical Botanical Garden and Research Institute who then, using this 'traditional knowledge' developed a drug called 'Jeevani'. The license to manufacture this drug commercially was then granted to a pharmaceutical company. Thereafter, in recognition of the contribution of the Kani tribe in developing the drug (through their 'traditional knowledge'), a Trust Fund was created to continuously share the benefits coming from the commercialization of the drug with the Kani tribe. This story remains an important motivation behind strengthening the ABS regime in India.

70 Kohli & Bhutani (2017), *supra* note 68, 126.

71 Guidelines 2014, *supra* note 13, Reg. 15.

72 Jishnu, *supra* note 55.

73 Kohli & Bhutani (2017), *supra* note 68.

74 The Biological Diversity Act, 2002, §21; The Biological Diversity Rules, 2004, Rule 20.

A. DETERMINATION OF ABS TERMS IS TOTALLY CONTROLLED BY THE GOVERNMENT AUTHORITIES

The Act provides that the amount to be paid, and other terms under ABS have to be determined on Mutually Agreed Terms ('MAT') between the user, the concerned local bodies and the local communities ('benefit claimers').[75] However, in practice, the users under both, NBA and SBBs, hardly get any say in the determination of the MAT. The application process of the NBA as well as of major SBBs starts with the filling of a standard application form by the user. The NBA/SBB then, after completing the internal processes which involve consultation with the local bodies, for the application, comes up with the terms of access and the ABS amount to be paid by the user. The user is then required to sign an ABS agreement drafted to that effect (usually, a standard agreement) and pay the ABS amount.[76]

Importantly, in this entire process, there seems to be no scope for any consultation or discussion with the users in determining the MAT. At most, the users can appeal before the National Green Tribunal against the calculation of the ABS amount.[77] Therefore, MAT is just a misnomer and in reality, the users do not have any say in it. Further, even the benefit claimers hardly have any say in the MAT determination. This is because the local bodies, i.e., the Biological Management Committees ('BMCs'), that are ultimately required to deliberate with the local communities and take steps for their benefits and the conservation of resources,[78] are not adequately developed.[79]

Therefore, only the government authorities, i.e., the SBBs take the first and the final calls. Pertinently, only recently, on the order of the National Green Tribunal ('NGT') on a plea seeking the implementation of the provisions of the Act and the Rules regarding setting-up of the BMCs, a substantial number of BMCs were formed, and quite hastily.[80] Out of the 2,75,220 local bodies where a BMC is supposed to be formed, only 9,700 existed in 2016, which increased

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[75] The Biological Diversity Act, 2002, §21(1).

[76] *See generally,* National Biodiversity Authority, *Schematic Presentation of Processing of Applications under Biological Diversity Act, 2002 and Rules 2004*, available at http://nbaindia.org/content/684/62/1/applicationprocess.html (Last visited on June 29, 2021) (depicting the process-flow of getting NBA approval by non-Indians and consequent ABS process); *See also,* Uttarakhand SBB, *Workflow chart (SoP) for Commercial Users of "Biological Resource" Annual Compliance of ABS- Indian Entity,* available at https://sbb.uk.gov.in/files/Documents/ABS/Workflow.pdf (Last visited on June 29, 2021) ('Schematic Presentation – Utt. SBB') (depicting the process-flow for ABS process at Uttarakhand SBB for Indian users).

[77] The Biological Diversity Act, 2002, §52A, *inserted vide* The National Green Tribunal Act, 2010 (w.e.f. October 10, 2010).

[78] *See* The Biological Diversity Act, 2002, §41; This provision mandates the creation of a Biodiversity Management Committee at the local level under every state.

[79] Kohli & Bhutani (2017), *supra* note 68, 125.

[80] National Green Tribunal (Principal Bench, New Delhi), Chandra Bhal Singh v. Union of India, 2016 SCC OnLine NGT 968.

to 1,55,838 by mid-2020. The latest numbers show that 2,43,499 out of 2,75,200 BMCs have been constituted, which is around ninety percent.[81] However, it is yet to be seen if this swift expansion in their numbers actually results in their meaningful involvement in the MAT determination or not. Therefore, the concern regarding lack of their meaningful involvement in MAT determination remains real.

B. LONG DELAYS IN THE ABS PROCEDURE

For non-Indian users, NBA approval is required at almost every stage; from approval for access to research, commercial utilisation, bio-utilisation or bio-survey and for transfer of research results, to approval for transfer of biological resource or knowledge associated thereto.[82] This causes the diversion of resources from such non-Indian users into legal advices, other transaction costs, etc.[83] Long delays in approvals further complicate the quagmire.[84] Now, with the Regulations and the Divya Pharmacy judgment, since the SBBs also enjoy the right to demand benefit sharing as a condition precedent to granting the approval to access the bio-resources (and other terms as per the ABS agreements), similar delays have become a reality for Indians as well. For example, in Uttarakhand SBB which belongs to one of the most biologically diverse Indian states, as of May 17, 2018, the status of around 120 out of 139 ABS agreements have been pending at the application stage for the applications filed in the year 2014-15.[85]

Further, since the bureaucrats have been given the power to determine the ABS and other terms, this gives them the leverage to demand more money from the users. Consequently, bigger companies and entities get free from this bureaucratic red tape by providing hefty upfront benefit sharing amounts and easily secure their access to the bio- resources.[86] It is the smaller players in the market that suffer from the system. It may also introduce barriers against the entry of smaller players and reduce investments in this industry. Pertinently, the Confederation of Indian Industries ('CII') in its recommendations on issues regarding compliances under the Act has concluded that the regulatory approval requirements and their lengthy procedures act as strong disincentives for new startups in this industry.[87] Although this recommendation was in light of the NBA's approval process

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81 *Id*., 5.

82 The Biological Diversity Act, 2002, §§19-21; The Biological Diversity Rules, 2004, Rules 14-20; *See generally,* Guidelines 2014, *supra* note 13.

83 Prashant Reddy & M. Lakshmikumaran, *Protecting Traditional Knowledge Related to Biological Resources: Is Scientific Research Going to Become More Bureaucratized?*, 5 Cold Spring Harb Perspectives in Medicine, 10 (2015).

84 *Id*.

85 Uttarakhand SBB, *Status of compliance of ABS in Uttarakhand,* available at https://sbb.uk.gov.in/files/ABS/Status_of_compliance.pdf (Last visited on June 29, 2021) (this website does not reflect any newer data).

86 Kohli & Bhutani (2017), *supra* note 68, 125.

87 Confederation of Indian Industries ('CII'), *CII Recommendations on Issues Associated with Biodiversity Law and its Compliances*, 12, available at http://ciipharma.in/pdf/Biodiversity-Law-and-Its-Compliance-Booklet.pdf (Last visited on August 21, 2021).

regarding obtaining intellectual property rights[88] in inventions related to life sciences, it highlights the hindrances that a lengthy regulatory mechanism under the Act pose to the new players in this industry.

Now that Regulations and the Divya Pharmacy judgment have empowered the SBBs to put benefit sharing obligations upon the Indian users, this has added another regulatory layer in the benefit sharing regime vis-à-vis the Indian users. Therefore, the concerns highlighted by the CII regarding hindrance to innovation due to the regulatory requirements may further aggravate on account of this additional regulatory approval involving a long procedure.[89] Therefore, it goes without saying that the current regime is marred with delays and hence, uncertainties.

C. THE MANNER OF CALCULATION OF ABS AMOUNT IS PROBLEMATIC

Thirdly, the Regulations simply provide flat rates of 0.1-0.5%[90] on the ex- factory sales of the products without explaining the logic behind these figures. Such arbitrary calculation squarely ignores the differences in the relative value of different bio-resources in different end-products, something that should be an important consideration when calculating the benefit sharing amount. The subsequent part of the article deals with this point.[91]

Having described the problematic aspects of the current benefit sharing regime, the authors hereby propose an alternative model ('proposed model') that can be put up for discussion as a concrete step towards reforming the present system. We further argue that the proposed model is more transparent, certain and fair and also complies with the objectives of benefit sharing.

VII. AN ALTERNATIVE MODEL FOR BENEFIT-SHARING PAYMENTS

The objective of the Nagoya Protocol is fair and equitable sharing of benefits arising from the utilisation of genetic resources.[92] However, it does not subscribe to a particular type of benefit sharing or a model thereof. It provides a

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88 *See* The Biological Diversity Act, 2002, §6; The Biological Diversity Rules, 2004, Rule 18; As per Rule 18, to get an intellectual property right for any invention based on any research or information on a biological resource obtained from India, a user (both, Indian and non-India) has to obtain prior approval from the NBA.

89 Schematic Presentation – Utt. SBB, *supra* note 76.

90 Guidelines 2014, *supra* note 13, Regulation 4; the rates are: 0.1% for gross ex-factory sales up to Rs. 1,00,00,000, 0.2% for Rs. 1,00,00,001 - 3,00,00,000, 0.5% for Rs. 3,00,00,000 and above.

91 *See* discussion *infra* Part VII.B.

92 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, October 12, 2014 ('Nagoya Protocol'), Art. 1.

non-exhaustive list of monetary or non-monetary benefits that the members may adopt in their domestic jurisdictions.[93] Therefore, India's international obligations do not stop it from adopting a different model for benefit sharing as long as it ensures fair and equitable benefit sharing with the local communities. The authors argue that the proposed model allocates fair and equitable benefit sharing amounts for the local communities and is thereby, compliant with the objectives of the Act, CBD, and the Nagoya Protocol. Furthermore, it has the potential to address various problems existing in the current regime, and is more certain, transparent, and fair.

A. A TWO-STEP PROCESS FOR DISCHARGINGTHE BENEFIT-SHARING OBLIGATION

The authors propose that the benefit sharing obligation should be discharged by the users in two steps. At the time of filing of application before the SBB and for every subsequent year, a user can pay a reasonable upfront amount and be allowed to access the resources immediately on payment of such amount. A simpler version of the ABS Agreement can be signed at this point. Then, at the end of the financial year, the final ABS amount calculated can be adjusted with the upfront amount. If the calculated ABS exceeds the upfront amount, the balance can be paid to the SBB by the user, and if it falls short, the balance can be refunded to the user or be carried forward to the next financial year. This process shall be repeated for every financial year. The possibility of making this process automated can also be explored. This way, the obligation to pay a certain upfront amount would ensure that the users do not use the bio-resources free from any immediate obligation, while at the same time, they are not inadequately burdened.[94] The exact value of this upfront amount can be fixed by considering necessary variables, like the scale of operations of the user, an estimate of the quantum of biological resources to be used in production, previous years' data on the same, etc.

The scenario would be a bit different for non-Indian users. After filing the applications and before provision of access, they would be required to wait for NBA's approval.[95] However, the payment obligation can be made simpler under the proposed model even for non-Indian users. Having proposed the model, the authors now argue that this model adequately addresses the concerns raised in this article vis-à-vis the present regime.

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[93] *Id*., Annexure.

[94] *See generally*, United Nations Environment Programme ('UNEP'), Convention on Biological Diversity, Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing, 29, UNEP/CBD/WG-ABS/4/INF/7 (December 22, 2005); discussion about Australian legislations (like Queensland's Mineral Resources Act, 1989, and the Petroleum and Gas Act, 2004) under which benefit sharing arrangements follow a two-step process. First, certain amount is paid as fees before access, and then royalties are paid on discovery of the resources.

[95] Biological Diversity Act, 2002, §19.

1. Addressing the Concerns in the Present Regime

As discussed, the present regime is saddled with huge administrative discretion and control that makes the process opaque, uncertain and places the users at the mercy of the authorities.[96] The proposed model reduces such administrative discretion and control significantly. The model discourages authorities against charging any unreasonable amount as upfront payment from the users. If they do so, they would be liable to refund the excess amount at the end of the financial year. Here a concern may arise as to how such a model may ensure that authorities do not charge excessive amounts at the end of the financial year to avoid any refund obligations. However, the second prong of our proposed model as discussed in the next part, is helpful to reduce the administrative discretion significantly in determining the amount of benefit sharing, be it at the upfront payment stage, or at the final payment stage.

Therefore, the proposed model comes with greater certainty and transparency. Further, by ensuring that the users pay fair and equitable benefit sharing amount, it furthers the objectives of the Nagoya Protocol, and at the same time, does not unnecessarily burden the users of the bio-resources. Additionally, since the proposed model would be simpler interms of working, it would cut the unnecessary delays that occur in the current benefit sharing regime.[97]

Having discussed the framework of the proposed model, we now introduce the second prong of our proposed model, i.e., a different model for the calculation of the benefit sharing amount in form of an *ad valorem* royalty. This model specifically addresses the third concern raised in this article, which is regarding the arbitrary calculation of the benefit sharing amount as 0.1-0.5% of the ex-factory sales per annum for all the products involving the use of bio-resources.[98] It then also helps to reduce the administrative discretion significantly in the calculation of the ABS amount, as raised in the preceding part.

B. BENEFIT-SHARING IN THE FORM OF ADVALOREM ROYALTY

Under the present mode, benefit sharing amount is levied as a certain percentage on the ex-factory sales value of the goods produced that use bio-resources.[99] The authors propose that ABS should instead be levied as a certain percentage on the value of the bio-resources used in the final product, like an *ad valorem* royalty, and not on the sales value of the final product. Such an *ad valorem* royalty model is not new in the benefit sharing regime. It has been previously proposed in certain other kinds of benefit sharing frameworks. For example,

96 *See supra* Part VI.
97 *See supra* Part VI.B.
98 *See supra* Part VI.C.
99 *Id*.

under the 1982 United Nations Convention on the Law of the Seas ('UNCLOS'), there are benefit sharing provisions qua the benefits arising out of the exploration of resources in the seabed, to be shared equitably for the mankind as a whole.[100] In furtherance of this, various models of benefit sharing have also been proposed subsequently. One such proposal is to impose an '*ad valorem* royalty' on the sales of the seabed resources to be paid towards benefit sharing.[101]

Evidently, the benefit sharing obligation has been proposed only on the value of the seabed resources and not the final product made out of it. The authors argue that the possibility to introduce such a model should be explored in the Indian benefit sharing regime as well where benefit sharing obligation is quantified on the total value of the bio-resources used and not the ex-factory sales value of the final product, as is the case with the present regime.

A final product, be it a pharmaceutical product, cosmetic product, etc. is not formed just by the use of the bio-resources. Various other inputs are also involved. Therefore, it is unfair to tax the users on the total value of the products (that includes many more inputs other than the bio-resources) in the name of benefit sharing. Pertinently, if the objective of the Act, CBD and Nagoya Protocol is to ensure that the benefits accruing to the users 'due to the use of bio-resources' comes to them,[102] it only seems fair that such an obligation be put on the users only to the extent that the bio-resources are valued or used in the products and not beyond. The manner of calculation of such value can be explored further in subsequent scholarships.

This model also addresses the third concern raised in this Article.[103] Since *ad valorem* royalty would be levied on the value of the bio-resources in a particular product, it would take into account the differences in the use of bio-resources (in terms of amount as well as value) in different end-products, which is not taken care of in the present regime. For example, bio-resources may form the most important component in a pharmaceutical product, but it may not be so in a cosmetic product that might just use the essence of a biological resource. Under the present system, since benefit sharing amount is levied on the ex-factory

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[100] *See generally*, United Nations Convention on the Law of the Sea, December 10, 1982, 21 ILM 1261 (1982); Under Part XI, the seabed and ocean floor and subsoil beyond the national jurisdictions ('Area') are declared as the common heritage of mankind. Under the same Part XI, Art. 153 read with Art. 155(1)(f) suggests that any activity in the Area has to be conducted for the benefit of the mankind as a whole, and the benefits arising out of such activity have to be equitably shared, giving particular regards to the developing states.

[101] Dr. James Harrison, *Who Benefits from the Exploitation of Non-living Resources on the Seabed? Operationalizing the Benefit Sharing Provisions in the UN Convention on the Law of the Sea*, July 1, 2015, available at https://benelexblog.wordpress.com/2015/07/01/who-benefits-from-the-exploitation-of-non-living-resources-on-the-seabed-operationalizing-the-benefitsharing-provisions-in-the-un-convention-on-the-law-of-the-sea/ (Last visited on July 23, 2021).

[102] Nagoya Protocol, *supra* note 92.

[103] *See supra* Part VI.C.

sales value, it does not account for the relative difference in the value of the bio-resources in the two products. However, the present model would take care of the same.

Both prongs of the proposed model can be implemented in either of the circumstances, whether it is the interpretation propounded by the Court in Divya Pharmacy, or it is a situation wherein its ratio has been overturned by the apex judiciary or the legislature has introduced a contrary legislation. In the former case, the proposed model can be applied in levying benefit sharing upon both, Indian and non-Indian users, while in the latter, it can be applied only qua the non-Indian users.

VIII. CONCLUSION

Benefit-sharing obligation is levied so that the benefits actually reach to the local communities. But as things stand, the performance of the government on this front is highly questionable. Therefore, some scholars argue legislation like the Act, that has failed in its purpose and is just benefitting the government authorities, must be repealed.[104] However, the authors argue that since the current model is not serving its purpose adequately, it should at least be made less burdensome for the users, while remaining compliant with the applicable international conventions. The proposed model is a step towards the same. The specifics of this model can be worked out, but the focus of this article has been to present the problems prevalent in the system and initiate a discussion towards rebranding the benefit sharing regime in India towards a more certain, transparent, and fairer regime. But even this model would be inadequate to ensure that the benefits actually reach the local communities. However, that is a discussion for another day.

[104] Reddy, *supra* note 66.