

# **LITIGATING**

## **INDIA'S BIOLOGICAL DIVERSITY ACT**

### **A Study of Legal Cases**

**By**

**Shalini Bhutani & Kanchi Kohli**

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# Abbreviations

ABS	Access and benefit sharing	MNC	Multi national company
ABSP	Agricultural Biotechnology Support Project	MoEF&CC	Ministry of Environment, Forest & Climate Change
AP	Andhra Pradesh	MTA	Material transfer agreement
ADMA	Ayurvedic Drug Manufacturers Association	NBA	National Biodiversity Authority
ASU	Ayurveda, Siddha & Unani	NGT	National Green Tribunal
AYUSH	Ayurveda, Yoga, Unani, Siddha & Homeopathy	NTC	Normally traded commodity
BDA	Biological Diversity Act	PA	Protected area
BHS	Biodiversity Heritage Site	PIL	Public interest litigation
BMC	Biodiversity management committee	PL	Policy and Law
BS	Benefit sharing	PSU	public sector undertaking
CBD	Convention on Biological Diversity	SBB	State biodiversity board
CIDMA	Central India AYUSH Drug Manufacturers Association	SECL	South Eastern Coalfield Limited
CZ	Central Zone	SEIAA	State Environment Impact Assessment Authority
EC	Expert Committee	SLP	Special Leave Petition
EPO	European Patent Office	THC	Transfer by High Court
ESG	Environment Support Group	TNAU	Tamil Nadu Agricultural University
FD	Forest Department	UAS	University of Agricultural Sciences
GM	genetically modified	UoI	Union of India
LMO	Living modified organism	VAPs	Value added products
MHSCCL	Maharashtra Hybrid Seeds Company Limited	WCL	Western Coalfields Limited
		WLP	Wild Life Protection
		WP	Writ petition
		WZ	Western Zone

# Preface

**L**itigating means going to court or resorting to legal action to resolve a dispute or seek an opinion of the judiciary. It can also mean passively being part of a lawsuit, having been dragged into the proceedings, as an unwilling respondent when one does not otherwise want confrontation. In whatever situation, it is important to know of the issues being brought to court, the arguments placed by both sides and thereafter the order/judgement in the matter by the court of law/tribunal. The emerging jurisprudence needs to be collated and understood. That is the intention of this publication. The intent of the authors is solely to highlight how the judicial system in the country is responding to issues of the biodiversity law.

# Introduction

The Parliament of India enacted the Biological Diversity (BD) Act in 2002. With that the country got a formal legal regime for the conservation of, access to and sustainable use of both biological resources (hereinafter referred to as bioresources), as well as people's knowledge associated with their local biological heritage.

The provisions of the law have differential restrictions and exemptions, depending on the person involved or the activity envisaged with respect to bioresources. For foreign entities the regulation is stricter than that for Indian persons (natural or legal); likewise, local healers have more freedoms than commercial enterprises. Also, there are no legal obligations for benefit sharing under the BD Act if the access is being done for collaborative research or if what is being accessed falls within the legal category of normally traded commodity (NTC).

Much can be read from the literature about what the law lays out as its objectives and what new institutions it has created to take forward the provisions (NBA, 2012; NBA, 2012a<sup>1</sup>; Bhutani and Kohli, 2012<sup>2</sup>; Kohli, 2007).<sup>3</sup> A three-tier system for biodiversity management was set up under the BD Act: a National Biodiversity Authority (NBA) at the Centre, state biodiversity boards (SBBs) in each of the twenty-nine Indian states and local-level biodiversity management committees (BMCs) to be set up in both municipalities and panchayats.

These implementing bodies have had to respond to both local realities and national requirements for regulating use and access to bioresources and related knowledge. Over and above that, there are pulls and pushes from the international law on the subject from which the BD Act flows. That is the Convention on Biological Diversity (CBD) and its *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*. Post the Nagoya Protocol<sup>4</sup> and India's ratification of the same in 2012, there are ongoing discussions within the country on how the third objective of the CBD and India's corresponding ABS regime needs to be streamlined.

In previous studies undertaken by the authors the design and the implementation of the BD Act, its Rules and corresponding guidelines were researched. The authors had laid out the legislative history of the law, the legislation's institutional framework, and how then the executive was taking it forward. They had traced how in exercise of executive power embedded in the institutional structure implementation of the law was being done, especially when it comes to local level BMCs and their interface with communities and conservation (Kohli and Bhutani, 2013).<sup>5</sup> Further, the existing literature on the BD Act has focused on an analysis of the executive rules, regulations

<sup>1</sup>NBA, 2012. Access and Benefit Sharing Experiences from India ABS Fact Sheet available at [http://nbaindia.org/uploaded/pdf/ABS\\_Factsheets\\_1.pdf](http://nbaindia.org/uploaded/pdf/ABS_Factsheets_1.pdf); NBA.2012a. National Biodiversity Authority Annual Report 2011-2012, NBA, Chennai

<sup>2</sup>S, Bhutani and K. Kohli, 2012. Ten Years of the Biological Diversity Act, Economic and Political Weekly, September 29, 2012 Vol XLVII No. 39, pp 15-18.

<sup>3</sup>Kohli, K. (ed). 2006. Understanding the Biological Diversity Act: A Dossier. Kalpavriksh, GRAIN, IIED, Pune/Delhi. pp 159

<sup>4</sup>"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* is a supplementary agreement to the Convention on Biological Diversity. It provides a transparent legal framework for the effective implementation of one of the three objectives of the CBD: the fair and equitable sharing of benefits arising out of the utilization of genetic resources". The Protocol was adopted on 29 October 2010 and entered into force on 12 October 2014 (Source: <https://www.cbd.int/abs/about/>)

<sup>5</sup>Kohli, K and S Bhutani, 2013. *The Balancing Act: Experiences with Access and Benefit Sharing under India's Biodiversity Regime*, Kalpavriksh and Swissaid, India

and other notifications issued since the Act came into force.

There is little research available on the how the judiciary is dealing with the BD Act. Yet there have been many instances where an issue of legal interpretation or dispute under or violation of the BD Act have come before the judiciary. These include criminal complaints against scientists, or seed companies challenging instances of biopiracy and questions around the very definitions that have been laid out in the law. A body of case law has emerged since the Act began to be implemented. For example, there are bunch of legal cases relating to the access and benefit-sharing regime in India.

In the original BD Act of 2002, Section 52 allowed any person aggrieved by any benefit sharing order by the NBA or SBB to appeal before a High Court within a prescribed time limit. After the National Green Tribunal (NGT) Act, 2010 came into force Section 52 became redundant, and the new Section 52A was inserted in the BD Act, which redirects such appeals to the NGT.

The Policy and Law (PL) Division of the MOEF-CC at New Delhi deals with the establishment matters of the NGT. This Division also monitors the court cases involving the Environment Ministry. It does the empanelment of advocates for conducting cases before the NGT on behalf of the Ministry. A specific cell, called the Legal Monitoring Cell (LMC), works under the PL Division to keep track of cases. The LMC basically keeps account of the number of cases in which the Ministry has been impleaded as a Party.<sup>6</sup> Yet it may not have a full list of BD Act-related cases other than those that may have come up before the NGT.

The NGT has jurisdiction over all questions that arise over the implementation of seven environment-related legislation, including the BD Act. It is important to also place as fact that while the BD Act states that appeals against the violation of the law (especially the access provisions) lie before the NGT, the High Courts have not abdicated power to oversee matters under their writ jurisdiction (see the judgement on preliminary objection in the CIDMA PIL).

Nonetheless, litigation has taken place at different levels from courts of judicial magistrates, other district level courts to the apex court and high courts, as well as before different benches of

the National Green Tribunal (NGT). The venues of conflict have been spread across India. And as the pages hereafter will show, there has been and will continue to be litigation under the BD Act across legal fora in the country.

This publication attempts to put forward a collection of the key legal cases to both understand the trends of how the BD Act is being litigated upon and how the orders and judgments passed in these cases come to bear on biodiversity management, local governance and resource conservation. Further, it explores who are the actors who have both led and responded to the legal battles.

The authors looked at about fifty cases with respect to provisions of the BD Act or its rules/guidelines. The time period under these cases spans from 2004 (when the Act began to be implemented) to the present 2016. In the sections that follow, these cases are presented under the category of the main theme that they deal with. There are five broad categories: biopiracy and bioresources smuggling, benefit sharing, definitional issues, matters of ecosystem conservation and overall concerns of implementation. Some cases straddle more than one category, for instance a matter while it raises issues of interpretation and definition, may also have implications for benefit sharing (see Box 2 in Chapter 3).

The facts and arguments in the cases are combined with an analysis of the specific legal provisions and larger debates that they generated. Web links and sources to reach the full texts of substantive orders and judgments related to some of these cases have been provided, allowing those interested to delve into further details of the matter. As an annexure to this study, the penalties listed in the BD Act are recounted for easy reference. Additionally a full list of the cases and the year in which they were filed is also presented (see Annexure II). The list does not claim to be exhaustive.

The authors welcome feedback and updates on other cases related to the BD Act, which may not have found mention here. They would also like to thank those who through the generosity of their inputs contributed to the contents of this study.

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<sup>6</sup>As per the statistics of the PL Division, as of 31 March 2016 the MoEF&CC has 2601 cases pending in different courts and Tribunals of India in which it is a party. <http://www.moef.gov.in/sites/default/files/Policy%20and%20Law.pdf>



## 1

# Cases Related to Bioresource 'Smuggling' & Biopiracy

The very first cases that emerged under the biodiversity regime pertain to bioresource 'smuggling' or 'biopiracy'. Biopiracy of bioresources or related people's knowledge has for the 'global South' been one of the main reasons to adopt the CBD. Since the issue took on a global proportion, biodiversity-rich countries like India argued for an international legal regime that would arrest the taking away of the country's biological heritage sans either any acknowledgement of the source, without consent of local communities or without sharing any 'benefits' with them.

Therefore, when the CBD came into force and following that when the BD Act was passed, there were expectations from people's movements that it would be used as a tool to check biopiracy. However, this did not happen as soon and as much.

The early years of the Act were focussed on setting up the statutory bodies, particularly the NBA. In fact, the MoEF&CC took a step-by-step approach to implement the Act; the first set of provisions came into force on 1 October 2003. Sections such as 3, 4, 5 and 6 of the Act relevant to the biopiracy issue were subsequently notified to come into force on 1 July 2004.<sup>7</sup> After that too, there were many practical issues to deal with, such as building the capacity of custom officials to prevent the illegal transportation of Indian bioresources outside the country, while creating general awareness about CBD and the BD Act. In parallel, the procedures and applications for access to bioresources or grant of IPR began to be streamlined and the NBA's Expert Committee (EC) on ABS was set up. The EC's first meeting was

held in 2006. The presumption being that when the due process for access is followed, 'biopiracy' is contained.

Cases involving access of Indian bioresources without NBA approval kept the issue alive. In 2007 it surfaced that the Indian face of a British company D1 Oil PLC had got *Jatropha* germplasm without permission from an agricultural university in Chhattisgarh.<sup>8</sup> In March 2011 there was news in the local media that the Andhra Pradesh (AP) government was planning to take legal action against Brazil for using the germplasm (semen) of the Ongole bull (named after Ongole Taluka in AP) to develop the breed there in violation of international agreements and the BD Act. At its 20th meeting on 20 June 2011 the NBA decided to proceed legally against the violators in the case of export of embryos of Gir breed of cattle and Ongole breed bull and its semen to Brazil.<sup>9</sup> In 2012, the AP SBB had filed cases on this issue under other legislation, such as the Cruelty to Animals (Prevention) Act and Illegal Transportation of Animals (Prevention) Act. But there is no additional publicly available information on the follow-up to NBA decision in a court of law.

Then in May 2013 the NBA decided to file cases on certain non-ethical biodiversity practices. These include patenting of virus-resistant melon variety by the US MNC Monsanto. The NBA had written to Monsanto in November 2012, explicitly stating that "(t)he actions of Monsanto in using Indian melon varieties in research and development with commercial intent including application of a patent based on Indian melon varieties amounts to a blatant violation of Section

<sup>7</sup>Notification S.O.(E) dated 1 July 2004 <http://nbaindia.org/uploaded/pdf/notification/6%20%20Sec%203-7%2018%2047.pdf>

<sup>8</sup><http://www.thehindubusinessline.com/todays-paper/tp-opinion/who-decides-on-biosecurity/article1671555.ece>

<sup>9</sup>Agenda Item 20.5 [http://nbaindia.org/uploaded/docs/20th\\_Proceedings\\_10\\_08\\_2011.pdf](http://nbaindia.org/uploaded/docs/20th_Proceedings_10_08_2011.pdf)

3 and 6 of the Act.”<sup>10</sup> These are potential cases, but not all result in court action. The cases that did make it to the courts are discussed below.

## 1. Czech Scientists case

### (C.R. Case 48 of 2008 before the Darjeeling Chief Judicial Magistrate)

In July 2008, two Czech nationals were arrested in India for illegally collecting rare insects in Singhalila National Park, West Bengal. As foreign nationals they could not have done this without requisite approval from the NBA, as per the requirements of Sections 3 and 19 of the BD Act.<sup>11</sup> However, taking action required either the SBB or an empowered authority or a “benefit claimer” to file a case before the High Court. (At this point in time the NGT had not been constituted.)

At the first instance, the West Bengal Forest Department (FD) invoked Sections 27 and 29 of the Wild Life Protection (WLP) Act, 1972 (illegal entry into the PA) to charge the two scientists. They had not taken permissions from the Chief Wildlife Warden to enter into a national park and collect butterflies, moths and other insects. Subsequently, additional grounds related to violation of Section 3 of BD Act (i.e. lack of permission from NBA), were added as they were in possession of over 1500 species of butterflies including endangered species.

The accused who were acknowledged by their peers to be scientists of repute, stated that the collection was being done for research purposes and not for any commercial use. According to available literature, the Chief Judicial Magistrate in Darjeeling convicted them on 8 September 2008 under the provisions of the WLP Act, 1972 (Priyadarshini, 2008).<sup>12</sup>

While one was fined Rs.20,000/-, the other was sentenced to 3 years of imprisonment and fined Rs.60,000/- (Times New Network, 2008).<sup>13</sup> According to a 2009 paper in the journal *Conservation*

*Biology*, the court took into account the international reputation of one of the scientist for the differential sentencing. While, the other was granted bail and ordered to stay in India till the matter is heard before the appellate court. He however reportedly fled the country (Kothamasi and Kiers, 2009).<sup>14</sup>

There were two aspects that came to light here; first, that access for research also attracts the provisions of the BD Act and second in the cases reportedly there was evidence of commercial activities and sale.

It was after this case that the NBA also issued a clarification on which officers could take cognisance of violations under the BD Act. On 17 November 2008 S.O. 2708(E) was issued authorising officers of the NBA, SBB and environment ministry’s regional offices (not below the rank of Scientist ‘C’) to take enforcement action. On 12 January 2009 this power was also extended to forest officers not below the rank of Range Officers to file complaints under the BD Act [S.O. 120(E)].

As highlighted in the references through which this case has been discussed, this issue came to be widely debated by researchers on whether the BD Act was curtailing freedom of research. For bona fide research also involves access to and use of biological material and people’s related knowledge.

The NBA has since put out an explanation on its web site in the section on FAQs, that (t) *here is no requirement under the legislation for seeking permission for carrying out research, if it is carried out in India by Indians, as well as under collaborative research projects that have been drawn within the overall policy guidelines formulated by the Central Government vide notification S.O.1911(E) of Government of India. The only situations that would require permission of the NBA are: (i) when the results of any research which has made use of the country’s biodiversity is sought to be commercialized, (ii) when the results of research are shared with a foreigner or foreign institution, and (iii) when a*

<sup>10</sup>no patents on seeds <http://no-patents-on-seeds.org/en/information/news/hearing-opposition-against-monsanto-patent-indian-melon>

<sup>11</sup>Section 3 related to Regulation of Access to Biological Diversity specifies that, “Certain persons not to undertake Biodiversity related activities without approval of National Biodiversity Authority”. Section 19 is “Approval by National Biodiversity Authority for undertaking certain activities”.

<sup>12</sup>Priyadarshini Subhra. 2008. Entomologists convicted, accessed from <http://www.natureasia.com/en/nindia/article/10.1038/nindia.2008.277> on 15 July 2016

<sup>13</sup>Times New Network, 2008. Forest officials elated at Czechs’ conviction, Times of India, 12th September 2008.

<sup>14</sup>Kothamasi, David and Kiers, Toby. E. 2009. Emerging Conflicts between Biodiversity Conservation Laws and Scientific Research: the Case of the Czech Entomologists in India, *Conservation Biology* Volume 23, No. 5, 2009

foreign institution/individual wants access to the country's biodiversity for undertaking research and (iv) when any intellectual property protection is sought on Indian biological resources.<sup>15</sup>

## 2. Japanese Nationals Conviction

In 2015 it was reported that two Japanese nationals had been booked under the BD Act.<sup>16</sup> This was a matter that arose in the southern state of Kerala. Forest areas, particularly those as diverse in the Western Ghats are particularly vulnerable to bioprospecting and wildlife smuggling. The two men from Japan had collected reptiles from the Athirappally forest in Kerala.

The Kerala FD filed a case in July 2015 against the two Japanese nationals. They were tried under provisions of both, the WLP Act, and the BD Act. This is a reminder of Section 59 of the BD Act, which lays down that *(t)he provisions of this Act shall be in addition to, and not in derogation of, the provisions in any other law, for the time being in force, relating to forests and wildlife.*

Also as discussed in the previous case, there is an express prohibition under the BD Act against foreign nationals taking any bioresources without due permission of the NBA. In the absence of NBA approval, this punishable offence attracts penalty of either a jail term extendable to five years or with fine that extends to ten lakh Indian Rupees.

Though forest officials usually man the SBBs, it's not very often that the BD Act is used by field-level forest officers to deal with smuggling of bioresources, such as exotic wild species. In fact, the newspaper report expressly mentioned that even though the Act was introduced many years ago, it was not properly known and understood. As a consequence it has been 'rarely invoked'.<sup>16</sup>

## 3. Complaints related to Biotechnology R&D

The potential of the BD Act in matters related to regulation of biotechnology has not yet been fully realised. The ongoing PIL before the Supreme Court of India on the issue of genetically modified (GM) crops – *Aruna Rodrigues & others versus Union of India & others* [Writ Petition (Civil) No.260 of 2005], does invoke the government's legal obligations under the CBD towards biodiversity conservation

and sustainable use of bioresources. The BD Act also insists on biosafety. Section 36(4)(ii) makes it a legal duty of the Central Government to regulate, manage or control the risks associated with the use and release of living modified organisms (LMOs) resulting from biotechnology, if those LMOs are likely to adversely affect biodiversity; this provision has never really been used.

The matter of one particular GM crop brings into sharp focus the different legal dimensions that arise when bioresources and people's knowledge are used in the very making of LMOs from modern biotechnology. The LMO being made was the transgenic Bt brinjal in a collaborative research project by a seed company and the public sector in India. The starting point of litigation in this matter was a complaint made on 15 February 2010 by an NGO – Environment Support Group (ESG), to the Karnataka SBB. This was investigated by the Board and further passed on to NBA on 10 March 2010, questioning how the Maharashtra Hybrid Seed Company Limited (MHSC) had acquired Indian biological material (*Solanum melongena*) i.e. traditional varieties of Indian Brinjal for developing its GM Bt brinjal.

MHSC had signed a material transfer agreement (MTA) with the Tamil Nadu Agriculture University (TNAU) on 20 March 2005, through which TNAU transferred brinjal germplasm of four local Indian varieties to the company. Likewise, the University of Agricultural Sciences (UAS) in Karnataka also transferred six local brinjal varieties to MHSC.

Situations like these where Indian bioresources are transferred to a company with foreign stakes, expressly require the approval of the NBA (ref. Section 3 of the BD Act). The US MNC Monsanto has 26% shares in MHSC, which as per the BD Act makes the latter a company with non-Indian participation in its share capital.

The NBA examined the matter. It also held that this case of developing GM varieties under ABSP II did not fall under the purview of the exemption of 'collaborative research agreements' that do not need Section 3 clearance. On 20 June 2011 the NBA at its 20th Meeting took the decision to take action against MHSC. Since no legal action followed

<sup>15</sup><http://nbaindia.org/content/19/16/1/faq.html>

<sup>16</sup>K S Sudhi 2015 Japan Nationals to be booked under Biodiversity Act, The Hindu 24 June 2015; accessed from <http://www.thehindu.com/news/cities/Kochi/japan-nationals-to-be-booked-under-biodiversity-act/article7348752.ece>

immediately after this decision, a question on this was raised in the Parliament in November 2011. In response to that it came to be known that the NBA did intend to legally pursue the matter.<sup>17</sup>

At the 23rd meeting of the NBA on 28 February 2012, the matter resurfaced and was put to vote amongst the present members; a slim majority of the members (3:2) voted in favour of initiating action against Monsanto in India for violating the country's biodiversity law and using Indian brinjal varieties without permission.<sup>18</sup>

#### 4. MHSCL Matter: PIL by ESG

##### **Environment Support Group & Another versus NBA & Others**

A writ petition (No. 41532 of 2012) was filed by ESG before the Karnataka High Court against the relevant officials responsible for the BD regime on the issue of access to brinjal germplasm. The petitioner NGO urged the Court to direct attention to the widespread practice of biopiracy by national and international corporate bodies. It alleged that the TNAU and UAS, involved in developing Bt brinjal, did not seek permission from the NBA before passing on local varieties of brinjal to a non-Indian seed company. The bench headed by Chief Justice Vikramjit Sen listed the matter for further consideration in the last week of January 2013. The Court issued a notice to the NBA accusing the Authority of callousness towards protecting the country's biodiversity.

On 2 December 2013, the High Court transferred the writ petition to the NGT's Southern Zone, Chennai: Application No. 10 of 2014 (SZ). ESG appealed against the order of the High Court in SLP (Civil) No.7951 of 2014 before the Supreme Court of India, arising out of the impugned final judgment and order passed by the Bengaluru HC in the W.P. No. 41532 of 2012.

The SLP is still pending before the Supreme Court of India; as per the Court's web site the matter is to be listed in January 2017.

#### 5. NBA's Action at Dharwad

The Secretary NBA along with Karnataka SBB and DC Dharwad filed a criminal complaint in the brinjal matter on 24 November 2012 before the Principal Civil Judge and Judicial Magistrate of First Class, Dharwad (Criminal Complaint No. 579 of 2012).

The then head of NBA made it public in January 2013, that a chargesheet was submitted at the Dharwad principal sessions court against MHSCL and UAS, Dharwad. This complaint by NBA for (brinjal) 'biopiracy' is the first criminal prosecution under the Act, against Monsanto in India. It resulted in part due to the public pressure on the issue and the aforementioned case filed by ESG.

On 12 October 2013 in a significant ruling, the High Court in Bengaluru dismissed a petition by MHSCL and others seeking to quash criminal proceedings against them and others who have been booked for bio-piracy while developing Bt brinjal.<sup>19</sup> Holding that there is a prima facie case for prosecuting them for violation of the BD Act, the Karnataka High Court dismissed petitions filed by the vice-chancellor, registrar and former vice-chancellor of the UAS, Dharwad. The petitioners thus faced trial for clearing agreements with the private company with regard to creating Bt brinjal using local species [ref. Criminal Petitions 10002 of 2013 and 10003 of 2013 in Karnataka High Court seeking relief from criminal proceedings (against Vice Chancellor and Registrar of UAS)].

In response to the aforementioned petitions of the accused, Justice Mr. B. V. Pinto of the Karnataka High Court (Dharwad Bench) had previously stayed the criminal proceedings on 3 January 2013 for an unprecedented 6 months.

(Source: ESG Press Release, 12 October 2013, Bangalore)<sup>20</sup>

#### 6. Wheat Patent matter

A writ petition (**Research Foundation for Science, Technology & Ecology & Another versus Union of India & Others [WP (Civil) No. 64 of 2004]**)

<sup>17</sup>Violation of Biodiversity Act 28 Nov 2011 MoEF&CC Press Release <http://pib.nic.in/newsite/erelease.aspx?relid=77768>

K S Sudhi 2015 Japan Nationals to be booked under Biodiversity Act, The Hindu 24 June 2015; accessed from <http://www.thehindu.com/news/cities/Kochi/japan-nationals-to-be-booked-under-biodiversity-act/article7348752.ece>

<sup>18</sup>Agenda Item 23.3 Proceedings of the 23rd Meeting of the NBA, 28 February 2012 [http://nbaindia.org/uploaded/pdf/Proceedings\\_%2023\\_Meeting\\_1.pdf](http://nbaindia.org/uploaded/pdf/Proceedings_%2023_Meeting_1.pdf)

<sup>19</sup>The full text of the judgement can be accessed here: <http://judgmenthck.kar.nic.in/judgments/bitstream/123456789/908411/1/CRLP10003-13-11-10-2013.pdf>

<sup>20</sup>Full press release here: [http://www.indiaenvironmentportal.org.in/files/file/ESG\\_Release\\_Kar\\_HC\\_Monsanto\\_Criminal\\_Proceedings\\_Restored\\_12102013.pdf](http://www.indiaenvironmentportal.org.in/files/file/ESG_Release_Kar_HC_Monsanto_Criminal_Proceedings_Restored_12102013.pdf)

was originally filed in 2004 by an NGO - RFSTE, headed by Dr Vandana Shiva, seeking directions for the Centre to challenge the patenting of wheat by US company Monsanto before the European office.

The petitioners sought the following reliefs from the Supreme Court of India:

- “A] Issue a writ of mandamus or directions of like nature directing the respondents to take appropriate action to challenge the patenting of wheat before the European Patent Office at Erhardtstrasse 27, D-80331, Munich, Germany in patent No. EPO 445929 B1 filed vide application No. 9130127.
- B] Direct the respondents to set up a permanent Department/Committee/Board which shall be competent/responsible to take appropriate actions to protect our biodiversity and file necessary claims/objections relating thereto before various forums all over the world;
- C] Direct the respondents to take appropriate action to identify the traditional Indian wheat variety referred to as NAPHAL in western databases and in Monsanto’s patent specification before EPO and take steps to rectify/correct the records, if necessary.
- D] Any other order/orders which this Hon’ble Court deems fit and proper in the facts and circumstances of the case.”

Through a subsequent I.A. (No. 4 of 2014) the petitioners had also sought to amend the

writ petition to add an additional prayer, namely:

- “E) Direct the respondent to set up Committee, Board, etc. with participation of civil society engaged in preventing biopiracy to take appropriate action for identification of traditional Indian varieties of plants and products and for correction of records in data-base.”

In an order dated 16 February 2016,<sup>21</sup> the Chief Justice dismissed the petition as being infructuous.

The court held that there was no need for a directive to the government to set up a permanent body to oversee preservation of biodiversity or for raising claims at international forum for patent rights.

“We see no real reason to direct the constitution of any department, committee or board at this stage, especially when the government does appear to us to be taking all necessary steps required for preservation of biodiversity,” a bench headed by Chief Justice of India, T S Thakur said.

He further stated in his order *that (i)n any case it is for the petitioners to make a suitable representation to the Government suggesting suitable measures, should any further steps be required in the direction of protecting biodiversity and preventing biopiracy, as alleged by the petitioners. We hope and trust that any such suggestions will engage the attention of the Government for such action as it may in its wisdom consider appropriate.*

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<sup>21</sup>Full text available here: [http://courtnic.nic.in/supremecourt/casestatus\\_new/querycheck\\_page2.asp](http://courtnic.nic.in/supremecourt/casestatus_new/querycheck_page2.asp)

# 2

## Cases Related to Access and Benefit Sharing

There have been many difficulties in implementing the ABS provisions of the BD Act. There has also been a tug-of-war between NBA and some SBBs on the ABS issue. Regardless of that, NBA's thinking has been injected into many SBBs—to collect (ABS) fees as a means to generate funds.

The states with maximum number of cases on the issue of ABS are Madhya Pradesh (MP) and Uttarakhand (UK). The SBB in MP has been on both sides: as a complainant in some matters and at the receiving end in some matters.

❖ **Applications Challenging the MP SBB's Notices on Benefit-Sharing that led to the drafting of the ABS Guidelines (Judgment Issued in February 2015 related to 13 appeals and original applications before the NGT)<sup>22</sup>**

In March-April 2013, the SBB wrote to the NBA asking it to issue uniform guidelines for access and benefit sharing (ABS), which could be used by the SBB as well. Their primary contention was that there are several Indian companies, which use raw material that can be brought under the definition of “bioresources” and thereby ensuring that they pay the SBBs as well as the BMCs for the use of these bioresources.

A letter by the Member Secretary of the MP SBB to the NBA dated 3 April 2013, states that “in the absence of any guideline by the NBA for

access and benefit sharing to the State Biodiversity Board, we are not able to implement third and most important objective of the Biological Diversity Act, 2002, i.e., access and benefit sharing.”

When no clear response was received from the NBA the MP SBB, issued notices to the all companies using “bioresources” to deposit a “benefit sharing” amount for the use of bioresources. Since December 2012 and until March 2013, the MP SBB issued notices under Section 7 of the BD Act<sup>23</sup> to several private companies, including those of pharmaceuticals, coal extracting, liquor, sugar, oil as well as food and industrial processors who according to MP SBB's interpretation, were (commercially) utilising bioresources. It also wrote to the state Forest Department, the Forest Development Corporation, the Minor Forest Produce Federation and the Fisheries Department.

Each of the companies to whom the notice was issued was asked to deposit 2% of their gross sales or gross revenue on financial year basis towards benefit-sharing in the Biodiversity Fund of the state (Kohli and Bhutani, 2013). In response to these notices, 13 cases starting May 2013 were filed before the Central Zone (CZ) Bench of the NGT at Bhopal. These were filed by several companies (including Dabur) to whom the notices were severed. On 28 May 2013, the NGT CZ Bench stayed

<sup>22</sup>This includes the following cases: Original Application No.62/2013 (CZ) (Som Distilleries Pvt. Ltd. Vs. MP State Biodiversity Board & Ors.); Original Application No.63/2013 (CZ) (Associated Alcohols & Breweries Ltd. Vs. MP State Biodiversity Board and Others); Original Application No.64/2013 (CZ) (Regent Breweries & Wines Ltd. Vs. MP State Biodiversity Board & Ors.); Original Application No.65/2013 (CZ) (Mount Everest Breweries Ltd. Vs. MP State Biodiversity Board & Ors.); Original Application No. 67/2013 (CZ) (M.P. Beer Products Ltd. Vs. MP State Biodiversity Board & Ors.); Appeal No. 06/2013 (CZ) (Agro Solvent Products Pvt. Ltd. Vs. MP State Biodiversity Board & Ors.); Appeal No. 03/2013 (CZ) (Lilasons Breweries Ltd. Bhopal Vs. MP State Biodiversity Board & Ors.); Appeal No. 07/2013 (CZ) (Ruchi Soya Industries Vs. MP State Biodiversity & Ors.); Appeal No. 02/2014 (CZ) (Great Galleon Limited Vs. M.P. State Biodiversity Board & Three Ors.(CZ)); Appeal No. 01/2014 (CZ) (Dabur India Ltd. Vs. M.P. State Biodiversity Board and Others); Original Application No. 46/2014 (CZ) (Gwalior Alcobrew Pvt. Ltd. Vs. M.P. State Biodiversity Board & 2 Ors.); Original Application No. 47/2014 (CZ) (Sanwaria Agro Oils Ltd. Vs. M.P. State Biodiversity Board & 3 Ors.); Original Application No. 136/2014 (CZ) (M/s Som Distilleries & Breweries Pvt. Ltd. Vs. MP SBB)

<sup>23</sup>Section 7 of the Biological Diversity Act, 2002 relates to “Prior intimation to State Biodiversity Board for obtaining biological resource for certain purposes”.

the MP SBB's notice of legal action against Lilason Breweries in case no response was received (Kohli and Bhutani, 2013).<sup>24</sup>

In June 2013 the MP SBB registered a compliant for prosecution before the chief judicial magistrate, Bhopal against Som Group of Companies, who are in the liquor business. A complaint was registered against four people including the managing director and directors of company under the BD Act.<sup>25</sup> The breweries and coal companies who were slapped with similar notices challenged the benefit sharing orders of MP SBB. In the same month in another matter the NGT, Bhopal issued notices to Western Coalfields Limited (WCL), Coal India, NBA, MoEF&CC and MP SBB for not sharing benefits from bioresources with local BMCs.

The NGT (CZ) directed the MoEF&CC and NBA to lay down standardised guidelines for ABS. Following internal deliberations between the Environment Ministry, NBA and the SBBs the *Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014*

(*hereinafter referred to as the ABS Guidelines*) were issued on 21 November 2014 (see Table 1). The Member Secretary (now former) MP SBB was on the committee to set up guidelines for ABS. In December 2014, the NGT directed the MP SBB to issue fresh notices to around 500 companies following NBA's notification of the ABS Guidelines, 2014.

Following the acceptance of these guidelines, all cases were reportedly disposed off in February 2015 (Nautiyal, 2015).<sup>26</sup>

In July 2015 following the NGT directive to the MP SBB to comply with the ABS notification as per the BD Act, the MP SBB formed a committee to look into the matter and expedite the process of recovery of ABS from the AYUSH manufacturers.

#### ❖ ABS and the Ayurveda Industry

In October 2014 there were media reports that ayurvedic manufacturers from Vidarbha region of Maharashtra are planning to seek clarity from the SBB over serving of notices to them under section 7 of the BD Act. The said section under the Act

**Table 1: Chronicling the ABS Regime**

Year	International Law	National Law & Executive Action(s)
5 Jun 1992	Convention on Biological Diversity signed at Rio Earth Summit	India signs the Convention
29 Dec 1993	CBD enters into force	
18 Feb 1994		India ratifies CBD
19 May 1994		India becomes a Party to CBD
Dec 2002		BD Act passed by Parliament to implement CBD
5 Feb 2003		Act notified
15 Apl 2004		Central BD Rules notified by MoEF&CC
2 Jun 2010		NGT Act notified; Section 52A inserted in the BD Act
29 Oct 2010	Nagoya Protocol on ABS adopted	
5 Nov 2011		India signs the Protocol
9 Oct 2012		India ratifies the Protocol
12 Oct 2014	Nagoya Protocol enters into force	India becomes a Party
21 Nov 2014		ABS Guidelines issued by NBA in pursuance of the Nagoya Protocol

<sup>24</sup>Kohli, K and S. Bhutani. 2013. The Legal Meaning of Biodiversity, Economic and Political Weekly, August 17, 2013, Vol XLVIII NO. 33 pp 15-17

<sup>25</sup><http://www.greentribunal.gov.in/Writereaddata/Downloads/03-2013%28CZ%29%20APL%2028-10-14.pdf>

<sup>26</sup>Nautiyal, Shardul. 2015. Green Tribunal disposes of 13 cases after ABS notification on compliance to Biodiversity Act, PHARM-ABIZ.com, 16th February 2015 (accessed from <http://www.pharmabiz.com/NewsDetails.aspx?aid=86736&sid=1>, on 15 July 2016

stipulates intimating SBB in a prescribed format whenever plant-based raw material is sourced or acquired by an Indian corporate, association or organisation for commercial utilisation. The Maharashtra SBB had issued 1500 notices to AYUSH manufacturers in the state following MoEF&CC's notification on ABS effective from 21 November 2014. The notices stated that details of any bioresource accessed should be filed under Rule 17 of Maharashtra Biological Diversity Rules, 2008 (available on [www.maharashtrabiodiversityboard.gov.in](http://www.maharashtrabiodiversityboard.gov.in)). The manufacturer was requested to download and apply in the prescribed Form I to be sent to the SBB with a fee of Rs. 5,000/- in a demand draft drawn in favour of "The Member Secretary MSBB", payable at Nagpur.

But not all Ayurveda manufacturers were in agreement with the ABS Guidelines. Many of them argued that ABS compliance is not applicable to Indian entities and that only foreign companies and companies holding foreign equity can be held liable as per the BD Act. The insistence of compliance by Indians to ABS Guidelines to them was irrational and unacceptable. The manufacturers also pointed to the failure of the NBA & SBB to set up functioning BMCs in the state. As per NBA's own statistics, as on 2 September 2016 there were 890 BMCs in Maharashtra on paper.

In December 2014 likewise, the Kerala SBB had served notices on 2,300 establishments using bioresources for various commercial purposes, including drugs, food flavours, colours, extracts and fragrances, to report the details on the type and quantity of the bioresources being used.

Similarly, the Uttarakhand SBB had directed 1,000 companies and traders to provide 0.5 per cent of their gross profit to the state BMCs according to the BD Act. For ABS it also laid down a 'Standard Operating Procedure for commercial users of bioresources'.<sup>27</sup> In fact, there have been media reports that Baba Ramdev, his Uttarakhand-based flagship yoga institute Patanjali Yogpeeth and its subsidiary Divya Pharmacy with units in the

industrial area of Haridwar, will also be asked to pay ABS for using the state's bioresources for their commercial products.<sup>28</sup>

In February 2015 the ayurvedic drug manufacturers from across the country sought urgent intervention from the Ministry of AYUSH to bring in more clarity on BD Act, and some key provisions in it. They claimed that in its present form it was creating lot of chaos and confusion within the sector. They also wrote to the Secretary, NBA vide letter dated 30 March 2015 seeking clear interpretation of certain provisions of the BD Act.<sup>29</sup>

In June 2015 concerned by the constant harassment by the SBB in Gujarat, the ayurvedic industry in the state urged the Centre to provide some reprieve to the sector by postponing the implementation of 'ABS tax' so that the industry can better adjust to these changes. The then Union Environment Minister Prakash Javadekar informed the Ayurvedic Drug Manufacturers Association (ADMA) that the ASU industry has to pay 'ABS tax' for sustainability and no exemption can be provided by the government.

Given this position of the MoEF&CC, in August 2015 ADMA sought legal opinion from three different law firms. It was advised that while the BD Act is applicable to all companies, the clause on payment of ABS fees is applicable only to non-Indian companies. Based on this, the ADMA circulated an advisory to its members suggesting to defer the ABS payment, if possible. If not accepted by the biodiversity officials, the payment should be made only under protest to avoid litigation, as explained to Pharmabiz by representative of South, ADMA who is also director Natural Remedies Pvt Ltd (a member company of ADMA).<sup>30</sup>

In August 2015 Natural Remedies paid ABS fees following the Karnataka SBB insisting on the submission of Form I and Form A as per the BD Act. But as part of a long-term plan to safeguard itself, the company established a bio-resource team, which started working towards backward integration through contract farming to minimise the bur-

<sup>27</sup>The twelve-point SoP can be found on the UK SBB web site here: <http://sbb.uk.gov.in/files/Documents/ABS/Sop.pdf>

<sup>28</sup>Baba Ramdev's firms to give Rs 12 crore to Uttarakhand Biodiversity Board Seema Sharma | TNN | 7 September 2016 <http://timesofindia.indiatimes.com/city/dehradun/Baba-Ramdevs-firms-to-give-Rs-12-crore-to-Uttarakhand-Biodiversity-Board/article-show/54055261.cms>

<sup>29</sup>The full text of ADMA's letter to NBA can be downloaded from here: [http://admaindia.com/downloads/subissue\\_ADMA%20543%20dt%2030-3-2015%20to%20Secretary,NBA.pdf](http://admaindia.com/downloads/subissue_ADMA%20543%20dt%2030-3-2015%20to%20Secretary,NBA.pdf)

<sup>30</sup><http://www.ingredientssouthasia.com/News/natural-remedies-pays-abs-in-protest-to-ksbb-forms-bioresource-team-for-backward-integration>



den of its commercial activities on Indian forests. It is also exploring substitution based on scientific studies for selected botanicals that are gradually reducing in terms of availability. The advertisements by the SBB insisting on ABS have not since ceased (see Annexure III).

Following actions taken in Uttarakhand and Gujarat for non-compliance with ABS notices, the Maharashtra SBB planned to take action against the ayurvedic manufacturers in the state for non-compliance following issuance of around 350 notices in the past three months. The said SBB till October 2015 had received responses from only 20 manufacturers in the state and that too had not been satisfactory, according to an SBB official.

### The CIDMA PIL

#### **Central India AYUSH Drug Manufacturers & Others versus State of Maharashtra through its Secretary, Department of Revenue & Forests, & Others [Writ Petition 6360 of 2015]**

On 14 December 2015 the Central India AYUSH Drug Manufacturers Association (CIDMA) filed a petition in the Nagpur bench of the Bombay High Court in Maharashtra seeking explanation on notices issued for the recovery of ABS under the BD Act. The petition challenges the vires of the state rules and ABS Guidelines, which ask for benefit sharing upon access by Indian entities.

After the matter was listed notices were issued to the respondents, returnable by 18 December. The court sent four notices to the authorities namely NBA, Maharashtra SBB, MoEF&CC and the state forest ministry and directed them not to take coercive action against the manufacturers. The case came up for hearing on 18 December 2015.

Meanwhile, ADMA was scheduled to meet the Maharashtra SBB officials on 5 January 2016 in order to arrive at a consensus on the much-debated ABS compliance issue in the state. Even as the SBB sought to clarify the rationale of collection of 'benefit sharing' to the AYUSH manufacturers, some of these companies moved court to challenge the BD Act. Cases were admitted at the Nagpur Bench and Bombay Bench of Bombay High Court (HC). ADMA members are seeking clarity from the courts on whether Indian companies fall under the purview of ABS obligations under the Act.

After 14 appearances the petitioners got a favourable judgement on preliminary objection dated 29 September 2016 from the Bombay High Court

on jurisdiction, i.e. why the matter should be heard by the High Court rather than by a specialised tribunal on environment, which is meant to hear appeals under BD Act (see Box 1). The judgement held that the High Court and not the NGT had jurisdiction over the matter. The NBA ideally wanted that the matter remain at the NGT.

### Box 1: NGT VERSUS THE HIGH COURT

The CIDMA petition before the Bombay High Court questions the validity of Rule 17 of the BD Rules of Maharashtra that lays down the procedure for access. The petitioners also question the ABS Guidelines issued by the NBA. Their contention is that these rules and regulations cannot be made applicable to Indian entities for imposing benefit-sharing obligations.

The court dwelled on the interpretation of the NGT Act and the extent of the jurisdiction it confers on the NGT. It held that the jurisdiction given to the NGT under Section 14 is only to decide cases, which are civil in nature, arise of the implementation of the seven environmental laws, (including the BD Act) and wherein the substantial question involved is in relation to the environment. Thus, not all civil cases are cognisable by the NGT.

The court made it clear that the NGT does not have the power to examine the validity of rules and regulations made under the BD Act. The two-judge bench comprising B P Dharmadhikari and A S Chandurkar, JJ. relied on decisions of the apex court, to make it clear that the constitutionality of a statute is maintainable under Articles 226 or 32 of the Constitution of India and not open in proceedings before authorities (like the NGT) made under a statute itself; and that tribunals (like the NGT) cannot act as a substitute for the High Court and the Supreme Court.

The court dismissed the preliminary objection that the petitioners have an alternate remedy before the NGT to raise their challenge.

The hearing on merits is yet to happen in this matter; no next date for this case had been announced when this publication went to print.

#### ❖ **Castor Oil Case**

On 3 November 2015 the NGT Western Zone (WZ) Bench hearing a matter filed by Advocate Asim Sarode (No. 25 of 2015) passed an order for ABS payments by companies engaged in commer-

cial utilisation of castor plant and other bio-resources for drugs and cosmetics. Castor oil is extracted from castor plant, which is an agricultural produce.

Justice VR Kingaonkar, judicial member and Ajay Deshpande, expert member of the NGT WZ Bench at Pune delivered a brief order making it clear that if a bioresource like castor oil is commercially utilised, the Maharashtra SBB has the mandate to collect ABS payment under the provisions of BD Act. They claim that castor oil is a value added product, so not a bioresource. In their view, it is a final product as it comes into market in that form and not in raw form. *(Note: This judgment also has relevance to the discussion in chapter 4 of this publication, which discusses another case related to the definition of a bioresource).*

The NGT gave instructions to Maharashtra SBB to take appropriate action against the defaulting parties and in case of no response their names be published in newspapers; immediately thereafter prosecution be filed against them as per the law. In another similar matter in MP, Hershey in India had to be sent repeated notices by the MP SBB for compliance with ABS requirements under the BD Act.<sup>31</sup>

The legal cases do not seem to have settled the matter on ABS and if and how it is applicable to Indian entities; this is resulting in a situation where some bio-based businesses are even considering moving their R&D out of India. It is to be seen how this decision comes to bear on the outcome of the CIDMA petition.

Not all those doing commercial utilisation of bioresources resort to litigation. Some companies may also approach the NBA directly seeking resolution on the issue of ABS. For example, at its 38th meeting the NBA had to consider the plea of M/s Hindustan Unilever Limited for reduction of benefit sharing.<sup>32</sup>

## Paper Industry matter

In 2016 a series of cases emerged in Uttarakhand on the ABS issue (included in the list in Annexure II). All the cases came from the paper and pulp industry in the state, particularly from those units that were manufacturing different types of paper. They were filed in reaction to being asked by the SBB to pay benefit sharing for the use of bioresources. The SBB had from 2015 onwards issued notices to

them under Section 7 read with Section 24(1) of the BD Act, which require Indians to give prior intimation to SBBs for obtaining bioresources for certain purposes including commercial utilisation. The score of cases clubbed together raise some interesting common points of contention that arise when operationalising ABS in the country under the legal provisions of the BD Act. These are discussed point-wise below:

### 1. Preliminary Objections

The Learned Senior Counsel for the UK SBB raised a preliminary objection to the maintainability of the writ petitions. He put forward the argument that given Section 52A of the BD Act, the NGT and not the High Court had power to decide this matter. Countering this view, the petitioners' lawyers emphasised the point that the matter is not cognisable by the NGT, inasmuch as the order has not been passed by the SBB under Section 24(2) of the BD Act.

The Court agreed with the petitioners on this and clarified that the writ petitions are the only remedy available to the petitioners against the impugned notices of the UK SBB.

### 2. Indian companies

The petitioner companies were seeking the court's intervention to quash the said orders of the SBB and seeking, among others, relief in the form of:

*Issue (of) a writ of declaration coupled with writ of certiorari or any other appropriate writ, order or direction declaring that the Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014 are applicable only to transactions involving non-Indian entities and do not apply to Indian entities who are not trading any biological resources with non-Indian entities or applying for intellectual property rights.*

The companies hold the view that they do not come under the purview of the ABS obligations, as non-Indian entities do. This remains a controversial matter.

### 3. 'Biological Resources'

The SBB was of the opinion that from amongst the bagasse, rice husk, wheat straw and waste paper, etc. used by the petitioner companies as raw

<sup>31</sup><http://www.legalera.in/blogs/entry/hershey-in-magistrate-s-court-chocolate-anyone.html>

<sup>32</sup>Agenda Item 36.16.02 [http://nbaindia.org/uploaded/docs/36th\\_Authority\\_Meeting.pdf](http://nbaindia.org/uploaded/docs/36th_Authority_Meeting.pdf)

material, 'waste paper' came under the definition of 'biological resources'. The counsel for the petitioner companies consistently held the view that none of these are bioresources.

The petitioner companies had in fact wanted the Court to give an order that waste paper comes under the definition of 'value added product'.

The court refrained from giving opinion on whether waste paper comes within the ambit of the legal definition of 'biological resources' in the BD Act.

#### 4. 'Commercial Utilisation'

The companies put forth the argument that they were an industry, which is not covered under Section 2(f) of the BD Act. The said provision lays down that

*'Commercial utilisation' means end user of biological resources for commercial utilization such as drugs, industrial enzymes, food flavours, fragrance, cosmetics, emulsifiers, oleoresins, colours, extracts and genes used for improving crops and livestock through genetic intervention, but does not include conventional breeding or traditional practices in use in any agriculture, horticulture, poultry, dairy farming, animal husbandry or bee keeping.*

The order of the Court is silent on this matter.

#### 5. Jurisdiction of an SBB

The issue of the territorial coverage of an SBB came to be discussed. As per Section 22 of the BD Act each State Government is to mandatorily set up an SBB for the purposes of this Act. The Board in each state also gets its name from the State in which it functions, for example the 'Uttarakhand Biodiversity Board' for UK. Each state has its own SBB.

In the present set of cases, the petitioner companies took the plea that they are sourcing bioresources from other states, such as Uttar Pradesh and Bihar, etc. According to them only a minimal amount of raw material is procured from within the territorial boundaries of the State of UK.

The Court held that the petitioners are bound to give the desired information to Respondent No. 2 (i.e. UK SBB) in respect of the raw materials that they have obtained from within the territorial boundary of Uttarakhand.

It further directed that UK SBB could not compel the petitioners to give desired information in

respect of the biological resources obtained from outside the territorial boundary of Uttarakhand.

#### 6. Prescribed Form

The UK SBB had asked each of the companies to file information in Form I & Form A for the financial years 2014-2015, 2015-2016 & 2016-2017. The question arose whether Form I in the Central BD Rules, 2004, which has been issued by the Central Government (under Section 62 of the BD Act) would be the appropriate form for providing the information asked for under Section 7 of the Act?

It was specifically pleaded by the advocate for the petitioners that the State Government had not (as of date) framed any rules or prescribed thereunder any specific forms, and therefore no 'prescribed form' as contemplated under Section 24(1) is in existence for those falling under the purview of Section 7.

The Court explained that in Section 24(1) it is clearly stated that the accessor shall give prior intimation in such form as may be prescribed by the State Government to the SBB. As per Section 2(k) of the BD Act, 'prescribed' means prescribed by rules made under this Act.

Moreover, the Court referred to Section 63 of the BD Act, which gives the State Government the power to make rules, including rules that provide for

*(b) the form in which the prior intimation shall be given under sub-section (1) of Section 24.*

Even though the Government of Uttarakhand had not made rules giving the form, upon reading of the legal obligation under Section 7, the Court concluded that the petitioners are bound to give information to UK BB. The absence of a prescribed form by the State Government does not absolve from the BS obligations.

The Court went on to address the next related question – what would be the modality, in case such a form is not prescribed by the State Government? UK BB suggested that the forms as laid in the Central BD Rules, 2004, could be used. Interestingly, the Court left it to the discretion of the petitioners to supply the desired information in any form that they wanted.

Hon'ble Justice U C Dhyani in his oral order dated 2 June 2016 decided all the writ petitions, which had the same factual matrix and the same points of law governing them. The petitions were disposed of in the admission stage with directions. The full text of the order can be found on the UK High Court web site.

## 3

## Cases Related to Legal Interpretation and Definitional Issues

### Is coal a 'bioresource'?

#### Case by a BMC

**BMC Eklahara sought NGT intervention to declare coal as a bioresource to be able to insist on benefit sharing from coal companies [Application No. 28 of 2013(CZ) and Application No. 17 of 2014(CZ) THC]**

**Judgment dated 16 October 2015**

Section 2(c) of the BD Act, 2002 defines “biological resources” as *plants, animals and micro-organisms or parts thereof, their genetic material and by products (excluding value added products) with actual or potential use or value, but does not include human genetic material.*

Seeking to expand this definition to include coal a fossil fuel, as a bioresource and thereby extend the benefit sharing obligations of the BD Act, the MP SBB issued notices to PSUs like South Eastern Coalfield Limited (SECL) in January 2013. The notices stated that neither prior intimation had been given to the SBB for use of bioresource in the form of coal, nor payment had been made towards ensuring benefit sharing (BS).

At the same time the BMC of Eklahara reportedly in discussion with the SBB filed a case before the NGT’s CZ Bench in Bhopal seeking its intervention. The relief sought included the demand to receive payment from Western Coalfields Limited for commercial use of coal from their area, which in the BMC’s view fell within the definition of a “biological resource” [Application No. 28 of 2013(CZ)

and Application No. 17 of 2014 (CZ) THC]. While the MP SBB supported the contention of the BMC, the Environment Ministry and the NBA disagreed with this position. The latter two submitted that neither the CBD nor the BD Act had ever been conceived to regulate fossil fuels. Its primary focus has been genetic material and people’s knowledge on bioresources.

This case created a wide debate in the media on whether coal should be treated as a bioresource or not. Mainstream newspapers also discussed whether this is same as levy of a “tax” (Times New Network, 2014<sup>33</sup>; Kohli and Bhutani, 2013<sup>34</sup>; Trivedi, 2013<sup>35</sup>).

On 6 October 2015, the NGT’s CZ Bench declared that coal was not to be regarded a bioresource. The judgment relies on the following paragraph included in a letter from the MoEF&CC to the MP SBB which says, “It is hereby clarified that on the issue of whether coal is a “biological resource” or not, the NBA and the MoEF&CC have unequivocally concluded that coal is not “biological resource” under Section 2(b) of the Biodiversity Rules, 2004. In fact the letter goes on to give directions under Rule 12(xiv) of the BD Act, 2002 which NBA is empowered to do to MP SBB on the subject stated above.”

Once the NGT upheld this contention it concluded that the BMC of Eklahara cannot invoke the sections of the BD Act that empower BMCs to collect fees against access to biological material in their area of jurisdiction.

<sup>33</sup>Times News Network. 2014. Ministry of environment and forests says coal is mineral, green tribunal slaps notice, Times of India, 12 August, 2014

<sup>34</sup>Kohli, K and S. Bhutani. 2013. *The Legal Meaning of Biodiversity*, Economic and Political Weekly, August 17, 2013, Vol XLVIII No. 33 pp. 15-17

<sup>35</sup>Trivedi, Shashikant. 2013. Is coal a mineral or bio-resource?, Business Standard, 12th September 2013

## Box 2. DEFINITIONS IN THE ABS CASES

In November 2012 the MP SBB issued notices to 538 companies involved in ‘illegal’ collection of bioresources, especially medicinal plants, for commercial utilisation.

On 11 January 2013 the SBB served notices to the three CIL subsidiaries — South Eastern Coalfields, Western Coalfields and Northern Coalfields, for extraction of coal for commercial purpose without informing the board, as a punishable offence, saying that coal comes under the BD Act’s definition of a ‘bioresource’.

In March 2013, Northern Coalfields Limited (NCL) responded to the notice by MP SBB stating that under Section 2(c) of the BD Act, ‘biological resource means plants, animals and micro-organisms or parts thereof, their genetic material and by-products...’

On 28 May 2013, in a matter admitted by the NGT’s CZ Bench at Bhopal, the legal question considered was the interpretation of the term ‘biological resources’ and whether the product in question in this case - ‘malt’, used in the manufacture of beer is covered under the said term.<sup>36</sup> MP SBB’s position was that malt is a by-product of a plant and therefore must be regarded as a bioresource.

Disagreement on such an interpretation has led to the many cases by industries.

### Interpretations of coverage for ABS

In May 2013 the MP SBB issued an ‘Important Notice’ on its web site, which among other things said that *(a)ny person, organisation, department, private company, etc. using bioresources from the State for commercial use are required to share benefit arising out of such commercial use which shall be deposited in the Biodiversity fund and used for promoting biodiversity conservation in the State.*<sup>37</sup>

Domestic industry has consistently held that they cannot be brought under the legal obligation of ABS. As per their interpretation of Section 7 of the BD Act, Indian persons (including Indian corporate bodies) have only to give prior intimation to the SBB for obtaining bioresources.

<sup>36</sup>For the full order in CZ 3/2013 see: Lilason Breweries Ltd. Bhopal versus Madhya Pradesh State Biodiversity Board [http://www.greentribunal.in/orderinpdf/3-2013\(CZ\)\(Ap\)\\_28May2013.pdf](http://www.greentribunal.in/orderinpdf/3-2013(CZ)(Ap)_28May2013.pdf)

<sup>37</sup>MP SBB’s Notice to ‘Organisations using bioresources for commercial purpose to share their benefit for biodiversity conservation in the state’ <http://www.mpsbb.info/ImportantNotice.aspx>

The legal battles on this issue continue.

### What is a ‘normally traded commodity’?

#### Case by an NGO

The PIL filed by ESG challenged the MoEF&CC’s Notification of 26 October 2009 on normally traded commodities (NTCs) issued under Section 40 of the BD Act.

#### Section 40

**Power of Central Government to exempt certain biological resources** – *Notwithstanding anything contained in this Act, the Central Government may, in consultation with the NBA, by notification in the Official Gazette, declare that the provisions of this Act shall not apply to any items, including biological resources normally traded as commodities.*

The petitioner NGO questioned the lack of government efforts in tackling biopiracy, asking why certain bioresources were being exempted from the Act. It submitted to the court that the Environment Ministry had *shockingly allowed critically endangered and threatened species to be included in a list of 190 plants as those which are “traded as commodities”, thereby allowing their unfettered exploitation, making them commodities for global trade and also exempting them from the protection provided under Sections 3 and 7 of the BD Act.* Among other demands, the NGO wanted both Section 40 and the NTC Notification to be struck down.

The case came up for final hearing before the Principal Bench of the High Court of Karnataka. A copy of the full petition may be accessed at: <http://www.esgindia.org/campaigns/press/karnataka-high-court-issues-notice-pil-h.html>

Though ESG wanted the matter to be heard in the High Court itself, a division bench headed by Chief Justice D H Waghela referred the same to NGT by following a directive issued by the apex court.

In July 2015 the NBA sought comments on a revised list of NTCs exempt from the provisions of the BD Act, 2002 when traded as commodities. The new list of NTCs was notified by the MoEF&CC on 7 April 2016. The list has 385 plants listed under

22 categories.<sup>38</sup> The NBA explains that *NTCs that are utilised for research and development by certain individuals under section 3 of the Act and for alternate/ commercial uses need to get prior approval from NBA, as the exemption is only for purposes of commodity trade.*<sup>39</sup>

An expert committee on NTCs under the NBA has been reconstituted on 9 September 2016.<sup>40</sup> Among other things it is to function as an *amicus curiae* in a court of law.

### What do 'value-added products' mean?

Law firms with experience in advising their corporate clients also point to other key terms in the legislation that have inadequate explanations. For example, no clear guidance on the difference

between 'by products' and 'value-added products' (VAPs) creates confusions as to the applicability of the Act on certain products.<sup>41</sup>

For instance, ADMA too had sought clarification from NBA in their letter of 30 March 2015 regarding whether herb powders, oils, oleo-resins, extracts and isolated phytochemicals and such other items which are sourced in this processed form from the market/traders/suppliers are to be treated as bioresources or VAPs? ADMA is of the considered opinion that such bioresources that have already been processed and sold in such processed form are VAPs. The NBA web site states that value added *product implies products containing portions/ extracts of plants and animals in unrecognisable and physically inseparable form.*

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<sup>38</sup>Notification S.O. 1352 (E) dated 7 April 2016

[http://nbaindia.org/uploaded/pdf/Notification\\_of\\_Normally\\_Tradedded\\_Commities\\_dt\\_7\\_April\\_2016.pdf](http://nbaindia.org/uploaded/pdf/Notification_of_Normally_Tradedded_Commities_dt_7_April_2016.pdf)

<sup>39</sup>FAQ 17 <http://nbaindia.org/content/19/16/1/faq.html>

<sup>40</sup>For the full list of members and their TOR please see:

[http://nbaindia.org/uploaded/pdf/OFFICEORDER/Oo\\_EC\\_on\\_NTC\\_9sep2016.pdf](http://nbaindia.org/uploaded/pdf/OFFICEORDER/Oo_EC_on_NTC_9sep2016.pdf)

<sup>41</sup>Beware of the Indian Biological Diversity Act, 2002 Krishna & Saurastri Associates <http://www.lexology.com/library/detail.aspx?g=1294c10e-82ad-471a-a010-371762810bd7>

# 4

## Cases Raising Concerns on the Implementation of the BD Act

### 1. Case seeking implementation of the BD Act, 2002 filed before the NGT's Principal Bench in New Delhi

**Chandra Bhal Singh versus Union of India & Others (O.A. No. 347 of 2016 with hearings underway and last order as on 29 September 2016)**

One of the most recent cases related to the BD Act is a matter, which seeks the intervention of the NGT to expedite the overall implementation of the BD Act. Original Application No. 347 of 2016 was heard before the Principal Bench of the NGT on 8 July 2016. The petitioner in this case raised concerns about the slow implementation of the BD Act, 2002. The petition also raises concerns about how the BMCs have not been set up at the local level and the preparation of people's biodiversity registers has not been completed amongst other issues with the overall implementation with the law (Phadnis, 2016).<sup>42</sup>

On 8 July 2016 notices were issued to the central government as well as all state governments to respond and the case was to be heard on 17 August 2016. During this hearing the Principal Bench of the NGT issued bailable warrants against key respondents,<sup>43</sup> as they had not filed their responses in the case. This was recalled through another order of 23 August 2016, following affidavits being filed before

the NGT. The matter is still being heard before the NGT and as of September 2016, the last hearing was listed for 29 September 2016.

### 2. Case in Madras High Court on Constitutional Validity and implementation of the Act

**(Writ Petition No. 15663 of 2014 judgment dated 11 March 2015)**

A Writ Petition was filed by petitioner R. Muralidharan under Article 226 of the Constitution of India before the High Court of Madras. This petition sought to declare that the BD Act is unconstitutional, as it violates Article 14 and India's obligation under the Convention on Biological Diversity (CBD). It also sought directions to delink the Indian Patent Act formalities with the access approvals that need to be taken by the NBA.

On 11 March 2015 the two-judge bench in the Madras High Court that all the petitioner persists with seems to be qua the implementational difficulties rather than any worth-while challenge to the constitutional validity of the Act. The judgment added that there were no satisfactory answers by the petitioner on both these aspects. On the same date this case was dismissed with the finding that "the petition is completely misconceived and accordingly dismissed".

<sup>42</sup>Phadnis, Mayuri. 2016. Practice Biodiversity Act, NGT tells states, Pune Mirror, 9 July 2016

<sup>43</sup>The warrants were issued against the "Resident Commissioners of Gujarat, Karnataka, Manipur, Mizoram, Odisha, Punjab and Tripura for not appearing before it despite issuance of notice." (See: Press Trust of India. 2016. Biological Diversity Act: NGT issues warrants against states, UTs as, Business Standard 18 August 2016)

# 5

## Invoking the BD Act for Ecosystem Conservation

Conservation of bioresources is one of the key objectives of the CBD and the national law – BD Act, made to comply with the CBD. The Act (see Section 36) makes it a duty of the Central and state governments to develop national strategies, plans, etc. for biological diversity. It is also the function of the NBA & SBBs to advise the Central and state governments respectively on matters relating to conservation of biodiversity. Every local body is also required to constitute a BMC for among other things the purpose of promoting conservation.

For ecosystem conservation one of the unique provisions of the BD Act (Section 37) is to legally declare areas of biodiversity importance as biodiversity heritage sites (BHS).

### 1. M/s Chembra Peak Estates Limited Versus State of Kerala & Others W P (Civil) No. 3022 of 2008 (I)

Source: <https://indiankanoon.org/doc/123774714/> Judgement dated 10 March 2011

This is a matter in which the Kerala High Court directed the Revenue authorities to seek the opinion of the SBB regarding the ecological balance of the private coffee estate at Muttill in Wayanad before proceeding with the acquisition of the estate for setting up a mega food park. Justice T.R. Ramachandran Nair ordered that this should be completed within two months. The park was being set up by the Kerala Industrial Infrastructure Development Corporation (KINFRA) with funds the Union Government.

There were some every interesting arguments that were raised in the course of this PIL. The government pleader argued that the state government has got power (under Section 37) to declare an area as a 'biodiversity heritage site'. Since they had chosen not to do so, there can be no objection to any land acquisition of the area.

The court nonetheless made mention of Sections 23 and 24 of the BD Act. According to the court, Section 23 makes clear that it is amongst the functions of the SBB to advise the State Government on matters related to biodiversity conservation. And as per Section 24, an SBB has the power to restrict certain activities in the state that might be going against the objectives of conservation. In the context, the court hinted that if the Government were to consider the inputs of the SBB on concerns of biodiversity conservation, the authorities may be compelled to reconsider the land acquisition of a biodiversity-rich area for commercial activities.

### 2. Judgment in NGT Case by Keoti Village challenging destruction of biodiversity by state government, collection of fees by BMC and declaration of BHS [Original Application No. 06/2014 (CZ) Judgment dated 4 May 2016]

The BMC of Keoti Village in Rewa district of Madhya Pradesh had filed a case before the NGT's CZ Bench in 2014 (Original Application No. 06/2014 (CZ)) raising concerns about the impacts being caused due to construction of biodiversity parks, illegal mining and the collection of Tendu Patta by contractors without any charges being levied by the BMC.

Section 41 of the BD Act, 2002 allows for the BMCs to levy fees against the access to bioresources and knowledge in the area of their jurisdiction.

There were 10 respondents in this case including private parties as well as various government departments of the state of Madhya Pradesh like the state FD, the Tourism Department and the MP SBB. The NBA was also a respondent.

The BMC through their lawyers made some significant asks:



- Immediate stoppage of construction activity and commercial use of bioresources in Keoti village
- Declaration of Keoti as a Biodiversity Heritage Site under the BD Act, 2002
- Notifying of Samavalli/Somlata (*Sarcostemma Acidum*), Morshikha & Patthar Chatha as threatened species and prohibition and regulation of their collection
- Directions for payment of revenue to the BMC by all commercial users of biodiversity in the area of BMC jurisdiction.

The judgment discusses an interesting legal point about what is the territorial jurisdiction of a BMC. The NGT bench observed that this was an important point to address the applicants “ask” of declaring Keoti a BHS. However, this observation also raises some larger questions in the light of the fact that the BD Act has no clear provisions to address a conflict arising between two BMCs.

The NGT judgment on 4 May 2016 does not conclude on the point related to jurisdiction of the BMCs. It relies on the SBBs final submission to say that the national level guidelines for the declaration of the BHS have already been put in place and the process of declaring Keoti BMC as a BHS is also underway. The judgment makes some strong observations about destruction of biodiversity, high rate of extension of species and the knowledge about process, practices and biological uses of natural products being sought for free from holders of this knowledge. One solution for that the NGT observed is expediting the preparation of people’s biodiversity registers (PBRs) not just in Keoti but also in other villages. This is already provided for under the BD Act (Section 41 requires BMCs to undertake the chronicling of local bioresources).

As final directions, the NGT directed that the state government of Madhya Pradesh “to expeditiously formulate guidelines and strategies in

consultation with communities and experts to identify and document resources and knowledge associate with them and to protect and conserve such resources not only in Keoti village but throughout the State and come out with proper method of sharing of benefits and flow of compensation to people and communities.”

There are also many other cases in which activists and advocates have taken up the cause of biodiversity conservation. For instance, in considering a petition filed by an environmental lawyer Harish Vasudevan on violation of safeguards by quarries, a meeting of the State Environment Impact Assessment Authority (SEIAA) in Kerala observed that the SEIAA had no machinery for post-clearance monitoring or scientific staff for site inspections to verify complaints. The SEIAA that met on 3 August 2015 decided to empower panchayat-level BMCs with the mandate to report non-compliance of clearance conditions. The authority chaired by K P Joy resolved to constitute a panel of experts to assist the SEIAA in post-clearance monitoring. The Kerala SBB attempted an arrangement with the Kerala Institute of Local Administration (KILA) to impart training to panchayat members in biodiversity management.<sup>44</sup>

Previously, in November 2011 a Division bench comprising Chief Justice Vikramajit Sen and Justice B V Nagarathna of the Karnataka High Court directed that notices be issued to Indian Navy and Karnataka SBB for protecting Nethrani Island—the only remaining island of Western Ghats Archipelago (group of islands).

The NGT on 11 January 2016 heard a matter on the issue of protection of environment and biodiversity in North Bengal, brought before it by environmentalist Subhas Datta. He had submitted evidence including pictures of North Bengal to prove that if not checked immediately destructive activities would wipe out the biodiversity in that part of the state.<sup>45</sup>

<sup>44</sup><http://www.thehindu.com/todays-paper/seiaa-mechanism-to-check-quarries/article7623911.ece>

<sup>45</sup>[http://www.business-standard.com/article/pti-stories/national-green-tribunal-hearing-for-north-bengal-on-jan-11-116010400881\\_1.html](http://www.business-standard.com/article/pti-stories/national-green-tribunal-hearing-for-north-bengal-on-jan-11-116010400881_1.html)

# Concluding Analysis

The quality and quantity of the cases under BD Act is telling in itself. The litigation has been relatively less when compared to other environment, forest and wildlife cases. Yet it has been no less complex.

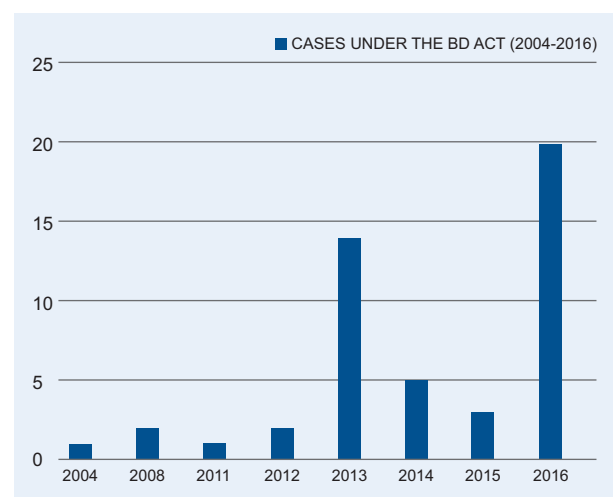
This study highlights that there are primarily five kinds of cases that have come to be litigated with respect to the BD Act through 2004-2016. These include cases of 'biopiracy' that highlight violations, to those seeking biodiversity conservation and overall implementation of the BD Act, while contesting interpretations of definitions (such as biological resources and normally traded commodities) and disputing applicability of ABS requirements. The latter set of matters have a direct linkage to cases where it needs to be determined which are the sectors or uses of biological material that attracts provisions requiring users to take prior permissions and set into motion benefit sharing mechanism. The final two set of themes related to questioning the slow implementation of the law as well as invoking its jurisdiction for ecosystem conservation in specific instances.

A closer look at all the cases brings to light that the ABS issue tops the list of areas/issue(s) contested under the BD Act. This ties in with the fact that both globally and nationally the emphasis of implementation of the biodiversity regime has been on regulating access and by virtue of that on pushing user agencies to share benefits. However, this does not imply that other issues under the BD Act are not equally important. But it does go to show that those with the resources are able to pursue litigation to safeguard their interests to counter an unfavourable law or policy.

The first spurt in the number of cases is during the period (2012-2014) that is the time in-between India joining the Nagoya Protocol and making its own ABS Guidelines. The second surge occurred in 2016 when ABS was being insisted upon by the UK SBB.

The lack of clarity from the Centre pushed some of the SBBs to take their own steps towards ABS, which then came to be challenged in court. One cannot help but think, particularly with respect to issues such as ABS, whether another process of decision-making prior to the notifying of either State Rules or the Central Guidelines could have pre-empted or avoided some of the court cases. The cases are primarily the industry's reaction to the executive's handling of the subject.

**Table 2. Case Filings (2004-2016)**



It is noted that 2014 onwards there has been a decided pushback from the AYUSH industry on the issue of ABS. This was also the year when the Central Government under the Prime Minister began to focus on giving global exposure to AYUSH. The Department of AYUSH, previously under the Ministry of Health & Family Welfare was made into a full-fledged Ministry on AYUSH on 9 November 2014.<sup>46</sup> A new National Policy on AYUSH, 2016 is also being finalised. Within India there is a thrust on the development of AYUSH systems to integrate them into the healthcare delivery systems of the country. The ASU industry would resist ABS obligations as it seeks policy support to expand. This will need in-

<sup>46</sup>Ministry of AYUSH <http://ayush.gov.in/about-the-ministry>

ter-ministerial coordination between the Ministry of AYUSH and the Environment Ministry.

What is notable is that the NBA itself has been at the receiving end of much litigation. This can itself be very resource draining. Legal capacity to deal with cases is also quite limited in the bodies set up under the Act. The NBA has only very recently got a dedicated Centre for Biodiversity Policy and Law (CEBPOL). Yet the Centre does not undertake the litigation work of the Authority. The NBA relies on external lawyers for that purpose. There are sometimes law internships/placement notes that are put up by law professors before the NBA for its members to consider.

The lack of litigation expertise in the SBBs is also a concern. Representatives of the boards explain how big and powerful companies come with their strong team of equally influential lawyers. On the ground the lack of awareness about the Act and the low to negligible legal literacy compounds the situation. And even after several years of the BD Act, some cases are around very basic definitional conflicts.

The NBA is itself concerned with the rising number of violations. Though it is aware that some of the penalties seem strict (see Annexure I). The Act stipulates that all offences shall be cognisable and non-bailable, which means that for all offences under the Act a police officer may arrest any alleged offender without a warrant.

Interestingly, apart from its regulatory role the NBA also has to perform several quasi-judicial functions. Under the BD Act, through Section 50(6) it is empowered to act as a civil court in case disputes arise between two SBBs. Thereby, it has the power as under the Civil Code of Procedure to:

- Summon and enforce the attendance of any person and examine him/her on oath
- Require the discovery and production of documents
- Receive evidence on affidavits
- Issue commissions for the examination of witnesses or documents
- Review its decisions
- Dismiss an application for default or decide it

ex parte

- Set aside any order of dismissal of any application for default or any order passed by it ex parte
- Any other matter which may be prescribed

The Act further lays down that every proceeding before the NBA shall be deemed to be a judicial proceeding.

As far as the SBB goes, the decision of the Hon'ble High Court of Uttarakhand gives its opinion on the powers of the SBB in calling for information relating to use of bioresources collected within its territorial jurisdiction.

The NBA has also been given power under the Act to take legal action outside the country in cases of 'biopiracy'. Though the issue does occasionally surface in the NBA meetings, for instance at its 35th meeting on 13 October 2015 held at the MoEF&CC, Agenda Item 35.07 was *(t)o consider taking measures to oppose the grant of Intellectual Property Rights outside India on any biological resource obtained from India or knowledge associated with such biological resource which is derived from India, illegally.*<sup>47</sup> The BD Rules [in Rule 12(xix)] *too lay this down as a general function of the Authority to take necessary measures including appointment of legal experts to oppose grant of intellectual property right in any country outside India on any biological resource and associated knowledge obtained from India in an illegal manner.* Yet, the NBA has neither ever invoked Section 18 of the BD Act nor the said BD Rule.

It may be pertinent to recall here that in the first audit of the Environment Ministry for the period April 2008-March 2009, the CAG in its report had pointed out that there was still a lack of a legal/monitoring cell to keep track of and contest IPRs given outside the country, based on biological resources (or associated traditional knowledge) derived from India.<sup>48</sup> The MoEF&CC had then given assurance that the NBA would have one up shortly.

All the cases in the category of 'biopiracy' deal with some non-India entity, whether it is a foreign national or a company registered in India but with foreign shareholding. Yet, the government does not

<sup>47</sup><http://nbaindia.org/uploaded/docs/35th%20Authority%20Meeting%20.doc>

<sup>48</sup>Report No. 17 of 2010 - Compliance Audit on Environment, Union Government Ministry of Environment and Forests [http://www.cag.gov.in/sites/default/files/audit\\_report\\_files/Union\\_Compliance\\_Scientific\\_Department\\_Environment\\_17\\_2010.pdf](http://www.cag.gov.in/sites/default/files/audit_report_files/Union_Compliance_Scientific_Department_Environment_17_2010.pdf)

want to appear unduly strict on this matter, as the apprehension is that it will be a disincentive to foreign investors. In fact, many mainstream law firms in the country see the BD Act as the 'potential elephant in the room'.<sup>49</sup>

Another inevitability in legal disputes is those litigating get positioned by default on two opposite sides. They are then in adversarial mode. While biodiversity conservation and sustainable use require much working together. Other means for conflict resolution could also be explored. CBD

too advocates arbitration, conciliation, etc. in its Article 27 on the subject of settlement of disputes.

Litigation under the BD Act is only one of the ways of getting it implemented and generating a discussion on its controversial provisions. But the issue of biodiversity justice is a much wider one. To give effect to that all organs of the state, the legislature, executive and judiciary have to play their part.

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<sup>49</sup><http://www.lakshmisri.com/News-and-Publications/Publications/Articles/IPR/make-in-india-meets-the-biological-diversity-act#>

# Annexures

## Annexure I: Penalties laid down in the BD Act, 2002

No.	Whoever Contravenes Attempts to contravene Abets in contravention of	Punishment	Fine (Rupees)
1	Section 3	Prison up to 5 yrs	Up to 10 Lakhs / If damage > 10 Lakhs: commensurate fine, or both prison + fine
2	Section 4	Prison up to 5 yrs	Up to 10 Lakhs / If damage > 10 Lakhs: commensurate fine, or both prison + fine
3	Section 6	Prison up to 5 yrs	Up to 10 Lakhs / If damage > 10 Lakhs: commensurate fine, or both prison + fine
4	Section 7	Prison up to 3 yrs	Up to 5 Lakhs or both prison + fine
5	Section 24(2) order	Prison up to 3 yrs	Up to 5 Lakhs or both prison + fine
6	For contravention of any order or direction of Central/State Govt, NBA/SBB not provided for under the Act		1st offence up to 1 Lakh, 2nd & subsequent offence up to 2 Lakh, & continuous contravention additional fine extendable to 2 Lakhs daily

## Annexure II: List of Cases (2004-2016)

Year	Case
2004	RFSTE & Another vs UoI & Others
2008	Czech Scientists Case
2008	M/s Chembra Peak Estates Limited vs State of Kerala & Others
2011	Karnataka High Court notices to Indian Navy & Karnataka SBB
2012	NBA's Action in Dharwad against MHSCCL & Others
2012	ESG & Another versus NBA & Others
2013	Som Distilleries Pvt Ltd. vs MP SBB
2013	Associated Alcohols & Breweries Ltd. vs MP SBB
2013	Regent Breweries & Wines Ltd. vs MP SBB
2013	Mount Everest Breweries Ltd. vs MP SBB
2013	M.P. Beer Products Ltd. vs MP SBB
2013	Agro Solvent Products Pvt. Ltd. vs MP SBB
2013	Lilasons Breweries Ltd. Bhopal vs MP SBB
2013	Ruchi Soya Industries vs MP SBB
2013	Great Galleon Limited vs MP SBB
2013	Dabur India Ltd. vs MP SBB
2013	Gwalior Alcobrew Pvt. Ltd. vs MP SBB
2013	Sanwaria Agro Oils Ltd. vs MP SBB
2013	M/s Som Distilleries & Breweries Pvt. Ltd. vs MP SBB
2013	BMC, Eklahara vs Western Coalfields, Coal India, UoI, NBA & MP SBB
2014	BMC, Eklahara vs MoEF, MoC, NBA & Western Coalfields
2014	NGT Case by Keoti BMC
2014	R Muralidharan's Writ Petition
2014	Subhas Dutta vs State of West Bengal & Others
2014	Hershey India Pvt Ltd. matter
2015	Japanese Nationals Conviction
2015	The CIDMA PIL
2015	Asim Sarode & Others vs State of Maharashtra & Others
2016	Subhas Datta matter at NGT
2016	Chandra Bhal Singh vs UoI & Others
2016	M/s Vishwanath Paper & Boards Ltd & Another Vs. State of Uttarakhand and Ors.
2016	M/s Century Pulp & Paper & Another Vs. State of Uttarakhand and Ors.
2016	M/s Naini Papers & Another Vs. State of Uttarakhand and Ors.

2016	M/s Naini Tissues Ltd & Another Vs. State of Uttarakhand and Ors.
2016	M/s Vishwakarma Paper & Board Ltd & Another Vs. State of Uttarakhand and Ors.
2016	M/s Bahl Paper Mills Ltd & Another Vs. State of Uttarakhand and Ors.
2016	M/s PSB Papers (P) Ltd & Another Vs. State of Uttarakhand and Ors.
2016	M/s Sidheshwari Paper Udyog Pvt Ltd & Another Vs. State of Uttarakhand and Ors.
2016	M/s Sidharth Papers P Ltd. & Another Vs. State of Uttarakhand and Ors.
2016	M/s Sagar Pulp & Paper Mills Ltd. & Another Vs. State of Uttarakhand and Ors.
2016	M/s Goraya Straw Board Mills Pvt Ltd. & Another Vs. State of Uttarakhand and Ors.
2016	M/s Prolific Papers Pvt Ltd & Another Vs. State of Uttarakhand and Ors.
2016	M/s Banwari Paper Mills Ltd. & Another Vs. State of Uttarakhand and Ors.
2016	M/s Rajlakshmi Paper & Boards Pvt Ltd & Another Vs. State of Uttarakhand and Ors.
2016	M/s Fibremax Papers Pvt Ltd & Another Vs. State of Uttarakhand and Ors.
2016	M/s Katyayani Paper Mills Pvt Ltd & Another Vs. State of Uttarakhand and Ors.
2016	M/s Devrishi Papers Pvt Ltd & Another Vs. State of Uttarakhand and Ors.
2016	M/s Sagar Paper Mills Pvt Ltd & Another Vs. State of Uttarakhand and Ors

## Annexure III: Advertisement by Karnataka Biodiversity Board on Notification of Submitting Form 1 and ABS



**Karnataka Biodiversity Board**  
Government of Karnataka  
(Forest, Ecology and Environment Dept)



### ATTENTION:

#### **Do you use biological resources for Research/Commercial Purposes?**

As per the Biological Diversity Act 2002, users of biological resources and/or associated traditional knowledge are required take prior approval from the National Biodiversity Authority (Section 3) or the State Biodiversity Boards (Section 7) for the access of biological resources for research and/or commercial use.

Persons/Companies/Industries manufacturing drugs, industrial enzymes, food flavours, fragrance, cosmetics, emulsifiers, oleoresins, colours, extracts, etc, Research & Development Units, Universities/Colleges, are required to submit prior intimation (in Form-I) for **each Financial Year** along with a DD/Cheque of Rs.1000/- drawn in favour of '**Member Secretary, Karnataka Biodiversity Board**' as per the Section 7 read-with Section 24(1) of the Biological Diversity Act, 2002 and Rule 15 of the Karnataka Biological Diversity Rules, 2005, for access to biological resources and/or associated traditional knowledge for research and /or commercial utilization before **31<sup>st</sup> July**.

#### **Who has to apply?**

1. Persons/Companies/Industries/entities located/registered in Karnataka for access to biological resources for commercial or research purpose
2. Persons/Companies/ Industries/entities located outside Karnataka but procuring/ accessing biological resources from Karnataka have to submit the prior intimation form to the Board.
3. Persons/Companies/Industries/entities located in Karnataka but procuring biological resources from elsewhere/ other States also have to submit the intimation to the Board with the details of the access of biological resources.



## **Access and Benefit Sharing (ABS)**

Access and Benefit Sharing (ABS), as per the '*Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014*', was notified in the Gazette of India by the Ministry of Environment, Forests and Climate Change on 21<sup>st</sup> November 2014 (see <http://www.kbb.kar.nic.in/ABS/notification.pdf>). As per the Guidelines, ABS should be submitted in Form-A for the biological resources utilized during each Financial Year before **31<sup>st</sup> July of the next Financial Year** by way of a DD/Cheque for the calculated ABS amount (see Regulation (3) or (4) of the ABS Regulations) in favour of '**Karnataka State Biodiversity Fund**'.

Non-compliance of the provisions of the Act is a cognizable and non-bailable offence under Section 58 and lead to prosecution under Section 55 of the Biological Diversity Act, 2002.

The details of the Act and Rules can be downloaded from:

<http://www.kbb.kar.nic.in/actsrules.htm>

**For details contact:**

### **Karnataka Biodiversity Board**

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FOUNDATION FOR ECOLOGICAL SECURITY