

Ten Years of the Biological Diversity Act

SHALINI BHUTANI, KANCHI KOHLI

As India plays host to the Convention on Biological Diversity's 11th Conference of the Parties in Hyderabad in October 2012, this article takes a closer look at the country's legislation on the subject – the Biological Diversity Act (2002).

India's Biological Diversity (BD) Act was enacted in 2002. There is now a decade of its existence to reflect on. The genesis of the law can be traced to the Convention on Biological Diversity (CBD), which was signed at the Rio Summit in 1992. While assessing the 10 years of the Act, one has to be mindful of how India itself has undergone change in these years. By the time the Act came into force, trade imperatives had begun to influence environmental law and policy-making both at the national and global level. The final shape of the Act and the manner of its implementation through the BD rules issued by the Ministry of Environment and Forests (MOEF) in 2004 reflect that bent.

The “economic reforms” introduced in 1991 meant greater reliance on market forces, encouragement of the private sector and restructuring the role of the government. In 1995, the country had also become a member of the World Trade Organisation (WTO). This, among other things, meant changes in the country's intellectual property (IP) regime. Economic liberalisation has created many new challenges for local communities. Situating the 10 years of the BD Act in this post-“reforms”, post-WTO context, helps to better understand the direction it has taken.

Building Institutions

The BD Act prescribed an institutional framework in order to implement the three CBD objectives of conservation, sustainable use, and equitable sharing of benefits arising out of the use of biological resources and related knowledge. So

from the start, the central government was preoccupied with establishing the institutional structure, particularly at the national level. In 2003, the National Biodiversity Authority (NBA) was set up by the MOEF at Chennai.¹ It has seen seven chairpersons up to date. The 15-member authority has largely consisted of bureaucrats or senior scientists, mostly ex officio appointments. Apart from that, the NBA has had the prescribed five non-official “specialists” and “expert” members. The NBA is required to function as the biodiversity board for the union territories but there is little to show on that front.

Meanwhile, almost all states have state biodiversity boards (SBBs). The count on date is 26 out of 28,² with Kerala, Karnataka and Madhya Pradesh being amongst the first to set up their SBBs. Most boards have forest and wildlife officials doubling up as chairpersons and member secretaries. Clearly, each of the SBBs is at different stages of implementation of the BD Act, yet their role has remained limited to that of receiving intimation from Indian institutions, corporate bodies or individuals who wish to use biological resources and related knowledge. Most SBBs have busied themselves with steering processes for biodiversity management committees (BMCs) to be set up at village, municipality or block levels and the documentation of local resources to be undertaken by them. Till December 2011, only 14 states had notified their BD rules.

The Act mandates that seven-member BMCs be set up by every local body. There are 33,077 BMCs across 23 states of India as of September 2012, of which 27,712 are in Madhya Pradesh.³ Only very few states such as Nagaland are willing to integrate existing customary institutions such as village councils and Tribal Hohos with BMCs.⁴ By and large, the emphasis by the NBA and SBBs has been to have as many BMCs ready on paper. In many places that the authors visited,

Shalini Bhutani (*sbhutani@gmail.com*) is trained as a lawyer and works on trade, agriculture and biodiversity. Kanchi Kohli (*kanchikohli@gmail.com*) is an independent writer and researcher. Both are based in Delhi and coordinate the national-level Campaign for Conservation and Community Control over Biodiversity.

for instance, north Karnataka and central India, not all the local individuals listed as BMC members were even aware of their position on these committees. Both civic bodies in the urban centres and panchayat samitis in the rural areas have been reluctant to set up BMCs since it creates additional work with no guarantee of visible benefits to show their immediate constituencies. In urban areas there are very few BMCs set up with the exception of some districts in Madhya Pradesh and Maharashtra. So the BMC experience largely remains a rural exercise. National guidelines for BMCs are being finalised by the NBA.

Meanwhile, the NBA has been setting up several short-term (two-three years) expert committees on specific issues on need basis. The ones currently functional are on agro biodiversity, medicinal plants, training modules and access and benefit sharing (ABS).⁵ An Indian Institute of Biodiversity and likewise an Institute of Marine Biodiversity have also been approved since 2005. Earlier this year, a Centre for Biodiversity Policy and Law (CEBPOL) was created in April⁶ and

Regional Biodiversity and Bio-resources Centres (RBBC) too are envisaged. There is a suggestion to have a regional office of NBA at Shillong for the north-eastern states.⁷ So 10 years on, there is still unfinished work in building institutions.

Access Rules

The other objectives of conservation, sustainable use and benefit sharing have not received as much attention as access to biological resources and associated knowledge of the people of India by foreign persons, which requires the prior approval of the NBA. This is in line with the CBD requirement for the accessor to have the prior informed consent (PIC) of the country providing genetic resources.⁸ The CBD also requires that in exchange, domestic laws provide for fair and equitable benefit sharing on mutually agreed terms (MAT) when access is granted⁹ and the benefits are to be routed back to local peoples who are the real keepers of biodiversity.

The legal provisions dealing with grant of access were brought into effect only in 2004 after the NBA was fully in place.¹⁰ At its second meeting in 2004,

the NBA processed the first eight access applications for biological resources received by it. By its third meeting in July 2005, the ABS agreements for access, material transfer and intellectual property rights were prepared using the expertise of different lawyers from various government departments. There was still concern that SBBS had not been formed in all states, which also meant that there were no functioning BMCs in some states at that time. Yet the work of processing access applications continued unabated despite the fact that the Act makes it mandatory for NBA and SBBS to consult BMCs before taking any decision.¹¹ In 2005, at an NBA meeting members stressed the need to prioritise commercialisation with fair and just benefit sharing because out of all resources spent by NBA so far, not one penny has gone to the communities whose knowledge and resources we are supposed to care for.¹²

After 10 years of the Act, India has 100 ABS agreements to show.¹³ These were publicly announced by the union environment secretary in July 2012 at a CBD meeting in Delhi. It is yet to be seen if

NEW

The Adivasi Question

Edited By

INDRA MUNSHI

Depletion and destruction of forests have eroded the already fragile survival base of adivasis across the country, displacing an alarmingly large number of adivasis to make way for development projects. Many have been forced to migrate to other rural areas or cities in search of work, leading to systematic alienation.

This volume situates the issues concerning the adivasis in a historical context while discussing the challenges they face today.

The introduction examines how the loss of land and livelihood began under the British administration, making the adivasis dependent on the landlord-moneylender-trader nexus for their survival.

The articles, drawn from writings of almost four decades in EPW, discuss questions of community rights and ownership, management of forests, the state's rehabilitation policies, and the Forest Rights Act and its implications. It presents diverse perspectives in the form of case studies specific to different regions and provides valuable analytical insights.

Authors: Ramachandra Guha • Sanjeeva Kumar • Ashok K Upadhyaya • E Selvarajan • Nitya Rao • B B Mohanty • Brian Lobo • K Balagopal • Sohail Firdos • Pankaj Sekhsaria • DN • Judy Whitehead • Sagari R Ramdas • Neela Mukherjee • Mathew Areeparampil • Asmita Kabra • Renu Modi • M Gopinath Reddy, K Anil Kumar, P Trinadha Rao, Oliver Springate-Baginski • Indra Munshi • Jyothis Sathyapalan • Mahesh Rangarajan • Madhav Gadgil • Dev Nathan, Govind Kelkar • Emmanuel D'Silva, B Nagnath • Amita Baviskar

Pp xi + 408

ISBN 978-81-250-4716-2

2012

Rs 695

Orient Blackswan Pvt Ltd
www.orientblackswan.com

Mumbai • Chennai • New Delhi • Kolkata • Bangalore • Bhubaneswar • Ernakulam • Guwahati • Jaipur • Lucknow • Patna • Chandigarh • Hyderabad

Contact: info@orientblackswan.com

monetary collections from these 100 agreements going into the National Biodiversity Fund translate into real “benefits” for at least 100 local communities in India. The challenge with respect to many of these agreements is to reach out to the legitimate local “benefit claimers” who are yet to be fully identified in most cases.

ABS implies that a user of genetic resources or related knowledge is now using them with permission; however, there is no mechanism to monitor post-access conduct of the accessor and compliance with the terms of conditions on which access was originally granted. At the global level, to make countries abide by each other's ABS procedures, in 2010 a global protocol was established under CBD at Nagoya, Japan.¹⁴ Though India has signed it, the protocol is yet to come into force. In any case, there is a need to build more capacity to deal with ABS-related issues at different levels.

Another important aspect of access, as CBD insists, is that genetic resources be used sustainably and for environmentally-sound purposes. Yet many applications before the NBA also seek clearance for use or transfer of genetic material from India for developing products through modern biotechnology. In 2005, the private seed company Maharashtra Hybrid Seeds Corporation (MAHYCO) sought NBA approval for “transfer results of research” to ship out parental eggplant seeds from India to Bangladesh. This was required as the source population of eggplant RHR-51 used was from India into which MAHYCO had inserted its Cry 1AC gene to make genetically modified (GM) brinjal.¹⁵ In the absence of an effective biosafety regime in the country, there are concerns that the access regime will only encourage India's genetic wealth being marketed for the manufacture of potentially hazardous GM seeds and breeds.

Intellectual Property

A key expectation from the legislation was that it would check the grant of illegal and unjustified patents or other intellectual property rights (IPR) based on India's biological resources by other countries and foreign companies. The country had been at the receiving end of “biopiracy”, with the basmati rice and neem fungicide

patent cases making much news since the 1980s. Council of Scientific and Industrial Research (CSIR), on behalf of the central government, had successfully challenged one such patent on use of turmeric in the US patent office in 1996. Post-BD Act, CSIR was amongst the first public research institutes to seek approval for IPR applications from the NBA. And in the last 10 years there has been no instance of the NBA invoking the legal provision that gives it the function and power to oppose the grant of any IPR in any foreign country on any biological resource or knowledge from India.¹⁶ The CBD itself does not provide for a global forum to take such cases.

Nonetheless, the BD Act does not take a clear position on IPR on living matter or people's know-how. Meanwhile, at the WTO India's position had long shifted from “no patents on life forms” to patents on biological resources on fulfilment of certain conditions. The BD Act does not outrightly disallow IPR for any invention based on research or information on a biological resource obtained from India; it simply requires approval of NBA and compliance with the benefit sharing and other conditions that NBA may impose. So the NBA has become an office to screen requests for approval being sought for IPR applications by both foreign and Indian entities.

Of the 100 ABS agreements approved and endorsed by the NBA till date, 54 are agreements allowing applicants to seek IPR¹⁷ and 51 of these 54 are from Indian applicants, whether individuals or institutes. (The three granted during 2012-13 have not yet been made public.)

Ironically, India's patent law does not regard anything in the area of traditional knowledge (TK) as patentable;¹⁸ however, only a few states like Kerala have articulated their own IPR policy with respect to TK in medicine. Moreover, Nagaland's draft BD rules define “community intellectual property” as belonging to the community as a whole rather than to individual inventors.¹⁹ Under the Act, the central government has the statutory duty to “respect and protect the knowledge of local people relating to biological diversity.”²⁰ On the basis of a non-governmental organisation (NGO) text, NBA did issue the draft “Protection, Conservation and Effective Management of Traditional

Knowledge relating to Biological Diversity Rules, 2009” but this text has not been finalised. Not surprisingly, the Ministry of Commerce and its department of industrial policy and promotion (DIPP) that handles IP-related issues is now working on a draft TK Bill for India through a DIPP-approved FICCI task force on traditional knowledge.

Documentation

The BD rules make documentation the main function of BMCs. Many local groups and people's campaigns have consistently questioned these rules and pointed out that they dilute the Act since knowledge holders at the local level are reduced to mere data providers rather than facilitating self-governance of India's many (bio) knowledge-based local communities. The BD rules require the authority to take steps to specify the form of People's Biodiversity Registers (PBRs), the particulars these registers will contain and the format for the electronic database. As a result, an NBA expert committee prepared the methodology for PBRs for which guidelines were issued in 2009. Ever since, the work of making and digitising PBRs has been going on in several states and a little over 1,100 had been made by the end of 2011. SBBs guide the BMCs in its documentation with the help of a technical support group (TSG). The “experts” in the TSG are drawn from various disciplines, government line departments, universities, research institutes, colleges and schools and NGOs. But the proposed digital Indian Biodiversity Information System (IBIS) is yet to be fully set up. Meanwhile, BMCs such as those in Heggarni village of Uttara Kannada or Purola tehsil in Uttarakhand are waking up to the fact that this official documentation process can be extractive.

Conservation Objectives

The Act opens with the words that it is meant to “provide for the conservation of biological diversity.” That is also the primary objective of the CBD and concern of local communities whose lives and livelihoods depend on it. Early meetings of NBA reiterated the point that it was not meant to be an institution to promote trade but was constituted to protect the biodiversity of the country.

Certain provisions of the BD Act lay down the duties and responsibilities of the central government (through MOEF) towards ensuring conservation.²¹ These have hardly even been put to use. Even though in the last decade several large “development” projects including on mining, big dams, etc, have invited controversy for their likely impact on biodiversity, they have never been either questioned from the point of view of the BD Act or required to undertake a biodiversity impact assessment other than the environment and forest clearances. In this context, it is important to point out that the central government is not bound by the NBA’s recommendations, which are only advisory in nature. On the contrary, NBA remains bound by the directions on questions of policy given by the central government.

The BD Act has also created a new category of conservation, Biodiversity Heritage Sites (BHS), and NBA issued its guidelines for the declaration of the same in 2009. So far four BHS have been declared in the country, all being in Karnataka.²²

Regarding resources, the thinking vis-à-vis the biodiversity regime is that it will generate its own funds through selling genetic material, which can then be used for conservation. NBA charges a standard 5% of estimated benefits as its non-refundable administrative fee, apart from the costs of the prescribed forms and any other royalty imposed on an applicant seeking access. The benefit-sharing mechanism is meant to plough back (monetary) “benefits” to the local biodiversity funds. However, there are few instances to speak of. For example, the Hyderabad-based Bio India Biologicals Corporation had exported neem leaves accessed from Amarchinta BMC in Mahbubnagar district of Andhra Pradesh by paying a “royalty” of Rs 53,000 to NBA. Earlier this year the authority reportedly transferred Rs 20,000 to Amarchinta BMC and the money was utilised for planting saplings, fencing, etc.

The central government is also required by CBD and the BD Act to develop national strategies, plans and programmes for conservation and sustainable use of biological diversity. Between 2000 and 2003, MOEF, with United Nations Development Programme-Global Environment Facility

support, commissioned the civil society group Kalpavriksh to prepare India’s National Biodiversity Strategy and Action Plan (NBSAP). After a four-year process with over 100 organisations from across India being involved, the final report was not accepted by the MOEF. In August 2007, MOEF released its own draft National Biodiversity Action Plan (NBAP) made by technocrats, which was then approved by the union cabinet in 2008.

To ensure that business-as-usual should not be disrupted by the workings of the BD Act, a list of 190 “normally traded commodities” have been kept out of the purview of the Act;²³ only conservation concerns can keep certain threatened species out of the list. A MOEF notification to that effect was issued in early 2010. However, an NBA consultation on the subject confirms that on this issue there is a difference of opinion between technical institutions and those dealing with trade in species.²⁴

Biodiversity Governance

Though CBD laid down the principle of national sovereignty over biological resources, from the point of view of people it was to translate into community sovereignty. The real biodiversity-keepers, be it farmers, fisherfolk, pastoralists, etc, are required to be central to preserving biodiversity, not simply their knowledge, innovations and practices. Integrating women’s concerns also remains an issue that needs attention. In the villages in Uttarakhand women were denied an all-female BMC because it deemed to be legally impermissible.

The BD Act so far only requires “consultation” with local communities, not their full or free PIC. BMCs have not breathed life into the idea of a grass-roots democracy. They are still to become the authorities on decision-making on local resources as prescribed by both the BD Act and CBD. Till the Act delivers, people require the immediate benefit of the living resources and intellectual heritage through which they get by. However, in the current development model, communities are being forced to move or migrate from their lands. With such shifting populations, who will constitute the BMC and who are “local” communities are fundamental questions that confront the administration.

Given the law and the reality in which it operates, the question is whether the BD Act will come anywhere near to effecting biodiversity justice in the next 10 years, or will our most biodiversity-rich areas and peoples from them continue to remain in poverty.

NOTES

- 1 National Biodiversity Authority (Salary, Allowances and Conditions of Service of Chairperson and Other Members) Rules, 2003; about NBA <http://nbaindia.org/content/16/14/introduction.html>
- 2 <http://nbaindia.org/link/241/34/SBBs.html> Barring Bihar and J&K, all other states in India have an SBB at least on paper.
- 3 <http://nbaindia.org/content/20/35/bmc.html>
- 4 Proposed Nagaland Biological Diversity Rules, 2011.
- 5 <http://nbaindia.org/content/21/18/committees.html>
- 6 Launch of CEBPOL, <http://nbaindia.org/blog/466/47/LaunchofCenterfor.html>
- 7 First meeting of SBBs in the NE Region, 4-5 May 2012, Shillong, Meghalaya, <http://nbaindia.org/blog/469/47/TheFIRSTMeetingof.html>
- 8 Article 15 of the Convention on Biological Diversity.
- 9 Article 15(7) of the Convention.
- 10 Sections 3, 4, 5, 6 and 7 of the Chapter on “Regulation of Access to Biological Diversity” in the BD Act came into effect only from 1 July 2004.
- 11 Section 41(2) of the BD Act.
- 12 Minutes of the fourth meeting of the NBA held on 6 October 2005 at Port Blair. http://nbaindia.org/uploaded/docs/fourth_meeting.pdf
- 13 Agreements signed by the applicant with NBA (MAT), <http://nbaindia.org/text/19/Statusapprovalagreementsigned.html>
- 14 The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilisation to the Convention on Biological Diversity is an international agreement under the CBD. <http://www.cbd.int/abs/>
- 15 Application reference no: F. No. 9-68/2005 discussed at the fifth meeting of the NBA on 20 January 2006.
- 16 Section 18(4) of the BD Act.
- 17 http://www.nbaindia.org/approvals/agreement_signed_total_form3.htm
- 18 Section 3 (p) of the Patent Act.
- 19 Proposed Section 2(6) of the Nagaland Biological Diversity Rules, 2011.
- 20 Section 36(5) of the BD Act.
- 21 Section 36 of the BD Act.
- 22 <http://nbaindia.org/content/106/29/bhs.html>
- 23 Section 40 of the BD Act.
- 24 Report of national consultation on normally traded commodities <http://nbaindia.org/blog/504/1/Reportof.html>

REFERENCES

- Kalpavriksh and GRAIN (2009): “Six Years of the Biological Diversity Act in India”, Kalpavriksh and GRAIN, Delhi/ Pune.
- Kohli, Kanchi and Shalini Bhutani (2011): “Chasing Benefits: A Post-Nagoya Protocol View on Access and Benefit Sharing”, briefing paper, Kalpavriksh and World Wide Fund for Nature, Pune.
- Shalini Bhutani (2012): “Prized or Priced: Protection of India’s Traditional Knowledge Related to Biological Resources and Intellectual Property”, briefing paper (Delhi: WWF-India).