

EFFICACY OF INDIA'S ABS REGIME: EXPLORING ITS CHALLENGES AND RECENT DEVELOPMENTS

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***A**bstract — India is one of the richest biodiverse regions on the planet and its bioresources have been nurtured by the local communities for the purpose of sustainable livelihood for generations. India is also party to the Convention on Biological Diversity and Nagoya Protocol, which prescribe equitable access and benefit sharing (ABS) of bioresources. The Indian legal regime enacted on the lines of the international law has the primary objective in using the ABS regime in generating economic returns and encouraging the local communities in conserving the resources. Unfortunately, the results have not been very successful due to several challenges ranging from true empowerment of the local communities to lack of information about bioresources to payment of compensation to the relationship among various authorities under the Biological Diversity Act, so on and so forth. Development in science and technology coupled with COVID-19 have further complicated the situation. Recently, Uttarakhand High Court's purposive interpretation in the Divya Pharmacy case tried to stem the exploitation of the bioresources by the Indian entities and benefit the local communities. Nonetheless, it appears that the new Draft ABS Guidelines have tried to protect the interests of the industry rather than the local communities. Unless, the challenges are addressed we are destined to lose out on our bioresources and its economic potential.*

Keywords: Biodiversity, Benefit Sharing, COVID-19, Nagoya Protocol, Divya Pharmacy.

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I. INTRODUCTION

Since pre-historic times, plants have been used for medicinal purposes. There is evidence to prove that herbs have been systematically used for medicinal purpose over 4000 years in almost every civilization – Indian, European, Chinese and Mediterranean.¹ Interestingly, population explosion, insufficient supply of drugs, exorbitant rise in the cost of treatment and uncomfortable side effects of a number of synthetic medicines, have caused renewed interest in the usage of plant-based medicines for various human ailments.² The World Health Organisation (WHO) estimates that in most developing countries about 70 to 95 per cent of their populations are still reliant on traditional medicine, especially herbal remedies, for primary healthcare.³ Furthermore, the contribution of medicinal plants in the modern drug discovery is more than 25 percent of all medicines of today.⁴

In 10 bio-geographic regions of India, experts have documented over 91,000 animal and 45,500 plant species. Indigenous healthcare systems prominently employ nearly 6,500 of these native plant species.⁵ Such rich biodiversity has immense environmental as well as economic potential, especially for the local communities, who actually stay close-by and nurture it.⁶ However, it is prone to exploitation and destruction without appropriate safeguarding mechanism. As a result, the biodiversity legal regime seeks to guarantee “appropriate access” to genetic resources and “fair and equitable sharing of the benefits” derived from them,⁷ also termed as access and benefit-sharing (ABS), while also protecting the associated traditional knowledge⁸ of such communities (“benefit claimers”). These benefit claimers are conservers, users and knowledge holders of biological resources.⁹ The basic aim of ABS regime is to benefit the local community of any profit accrued from commercial utilization of those resources.

It is no way to suggest that mere existence of ABS framework will cause countries and communities to become enormously rich. Moreover, there is no

¹ Mahtab Alam Khan, “Introduction and Importance of Medicinal Plants and Herbs”, *National Health Portal* (May 20, 2016), <https://www.nhp.gov.in/introduction-and-importance-of-medicinal-plants-and-herbs_mtl>. (Accessed on 28 December 2022).

² *See id.*

³ Aathira Perinchery, “Forests that Heal: Medicinal Plants as an Ecosystem Service”, *Mongabay* (February 24, 2020), <<https://india.mongabay.com/2020/02/forests-that-heal-medicinal-plants-as-an-ecosystem-service/>> (Accessed on 28 December 2022).

⁴ *See id.*

⁵ *See* Parameswaran Prajeesh, “India Lays the Cornerstone of Biodiversity Access and Benefit Sharing System”, 112(1) *Cur. Sci.* 24, 25 (January 2017).

⁶ *See* S. Bala Ravi, “Infirmities and Inconsistencies of Indian Legislations on Access and Benefit Sharing”, 90(1) *Cur. Sci.* 15, 15 (January 2006).

⁷ *See* Convention on Biological Diversity, Art. 1, 1760 UNTS 79 (1992) (hereinafter ‘CBD’).

⁸ *See id.*, Art. 8.

⁹ *See* Biological Diversity Act S. 2(a).

evidence of any country gaining significantly through the use of ABS frameworks.¹⁰ Even slender potential of substantial monetary gains has gone wasted because countries haven't tried utilizing ABS as a modern financing mechanism, albeit opportunities abound, leading to the misappropriation of genetic resources. Riding on this excuse of misappropriation, numerous countries have almost completely barred legitimate scientific research on biodiversity.¹¹ India's story is not very different from this trend. Besides briefly apprising the readers of the international and national legal regime safeguarding ABS, this paper highlights the challenges faced in our country in proper implementation of the ABS arrangements and endeavours to find an answer in the light of the recent legal developments.

II. A BRIEF OUTLINE OF ABS LEGAL REGIME

A. Enactment of the Biodiversity Act following CBD

Due to increased rate of destruction of biological diversity, there was a growing recognition that the global community should take coordinated action to ensure conservation of the ecosystem and its various species. This approach encouraged the adoption of the Convention on Biological Diversity, which was effective from 1993.¹²

The CBD spells out three key objectives— conservation of biodiversity, sustainable use of its resources, and fair and equitable sharing of benefits arising from the use of genetic resources.¹³ It's the third objective further emboldened through Article 15 and Article 16 gives ABS a legal recognition. It is noteworthy that the CBD neither mentions the words "access" and "benefit sharing" together nor defines them. Nonetheless, ABS has emerged as an inseparable and interlinked terminology in the context in which the global treaty operates. Essentially it means that when the user/access or access bioresources or people's knowledge, the provider community must be compensated in some way, either financially or otherwise.¹⁴

India became a party to CBD and to give effect to it, Parliament enacted the Biological Diversity Act (hereinafter 'BD Act') in 2002¹⁵ and the Government

¹⁰ See Balakrishna Pisupati, "CBD: Can the Cure Kill?" *Mongabay* (July 17, 2018), <<https://india.mongabay.com/2018/07/commentary-cbd-can-the-cure-kill/>>. (Accessed on 28 December 2022).

¹¹ See *id.*

¹² See generally Virginie Barral, "National Sovereignty over Natural Resources: Environmental Challenges and Sustainable Development", in *Research Handbook on International Law of Natural Resources* 17–20 (Kati Kulovesi and Elisa Morgera eds., 2016).

¹³ See CBD Art. 1.

¹⁴ See Kanchi Kohli & Shalini Bhutani, "The Legal Meaning of Biodiversity", 48(33) *Econ. & Pol. Wkly* 15, 15 (2013).

¹⁵ Act No. 18 of 2003.

of India notified the BD Rules in 2004.¹⁶ The BD Act enumerates six broad types of benefit sharing that can be executed either at the time of access or granting of approval for intellectual property rights (IPR). This includes shared control of IPR by either the National Biodiversity Authority (NBA) or an identified benefit claimer, technology transfer, participation in research and development, establishment of venture capital funds, and payment of compensation.¹⁷

The Act focuses on controlling access by foreign persons –non-resident Indians, foreigners, or corporate bodies, which are associations or entities neither incorporated nor registered in India, nor incorporated or registered but have non-Indian participation in its share capital or management – all being covenant with the CBD. It requires any foreign personality to obtain permission from NBA for any type of access, including science, bio-survey, and commercial use¹⁸ through a rigorous 18-step path.¹⁹

On the contrary, the legislation only allows Indians to send “prior information” to the appropriate state-level biodiversity board (SBB), with locals and traditional healers excluded.²⁰ However, if any conduct is harmful to the BD Act’s purposes, the SBB has the authority to forbid or regulate it.²¹ In fact, for such access, one has to obtain relevant permits or letters of no objection from the concerned SBB prior to commencement of activity after payment of prescribed fees as per the State Rules. *E.g.*, under the Karnataka Biological Diversity Rules, 2005,²² an Indian person, natural or legal, is required to apply to the SBB in a prescribed form along with a fee of ₹ 100. The SBB, after necessary consultation, shall dispose of the application within two months.²³

In all above instances of approvals for access, NBAs and SBBs must work with local biodiversity management committees (BMCs) in both rural and urban areas.²⁴ It may also be highlighted that the BD Act does not envisage bringing all biological resources within its purview. In fact, it exempts a list of biological resources from its purview as normally traded as commodities (NTCs).²⁵

¹⁶ See Min. of Env't. & Forests, Gov't of India, Notification No. G.S.R. 261(E) (April 15, 2004).

¹⁷ See BD Act, S. 21 r/w BD Rules, R. 20(2).

¹⁸ See BD Act, Ss. 3, 19 r/w Form – I, r/w BD Rules, R. 14.

¹⁹ *Application Process*, NBA, <<http://nbaindia.org/content/684/62/1/applicationprocess.html>> (Accessed on 12 April 2022).

²⁰ See BD Act, S. 7.

²¹ See *id.*, S. 24.

²² See Dep't of Forests, Ecology & Env't., Gov't of Karnataka, Notification No. FEE 151 ENV 2005 (June 29, 2006).

²³ Karnataka Biological Diversity Rules, R. 15.

²⁴ See Kanchi Kohli & Shalini Bhutani, “Access to India’s Biodiversity and Sharing Its Benefits”, 50(31) *Econ. & Pol. Wkly* 19, 20 (2015).

²⁵ See BD Act, S. 40.

B. Emergence of the ABS Guidelines

On the equal and egalitarian allocation of advantages resulting from the usage of genetic capital, as envisioned in the CBD, the international community, after prolonged negotiation, adopted the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (hereinafter ‘Nagoya Protocol’)²⁶ in 2014 providing arrangements for greater legal clarity and accountability for all resource suppliers and consumers.²⁷ Simultaneously, significant development took place in India. In March-April 2013, the Madhya Pradesh (MP) SBB approached the NBA and demanded for laying down uniform ABS guidelines which the SBBs can also utilize. The primary reason they cited for it was that many raw materials which could be counted under the definition of “bioresources”, were being used by several Indian companies and thus ensuring that they paid the SBBs and the BMCs for such usage.²⁸ In absence of any clear response from NBA, the MP SBB served notices under the Section 7 of the BD Act on several companies involved in sectors like liquor, sugar, pharmaceuticals, coal extraction, oil and food processing to deposit a “benefit sharing” amount for their use of bio-resources. Each company was ordered to submit 2 per cent of its gross sales on the financial year basis into the Biodiversity Fund of the state. In response to these notices, several companies filed cases before the Central Zone (CZ) Bench of the National Green Tribunal (NGT) at Bhopal. On May 28, 2013, the NGT CZ Bench eventually stayed the MP SBB’s notice of legal action.²⁹

The NGT (CZ) instructed the Ministry of Environment, Forest & Climate Change (MoEF&CC) and NBA to develop uniform guidelines for ABS. Following internal consultations among the MoEF&CC, NBA and the SBBs, the Guidelines on Access to Biological Resources and Associated Knowledge and Benefit Sharing Regulations, 2014 (hereinafter ‘ABS Guidelines’)³⁰ were finally released.³¹ The BD Act and the Rules have prescribed four different types of forms facilitating the approval process for ABS to access biological resources and associated traditional knowledge (TK).³²

Regardless of detailed procedures dictating everything from application to approval and their prescribed forms under the BD Act and Rules, several procedural uncertainties or guarantee benefits could not be settled. The ABS

²⁶ U.N. Env’t. Prog., Decision Adopted By the Conference of the Parties to the Convention on Biological Diversity at its Tenth Meeting, Nagoya, Japan, U.N. Doc. UNEP/CBD/COP/DEC/X/1, annex. 1 (October 29, 2010) (entered into force October 12, 2014).

²⁷ See Prajeesh, *supra* note 5 at 24 – 25.

²⁸ See BD Act, S. 2(c).

²⁹ See *Kanchi Kohli & Shalini Bhutani*, 13–14 (2016).

³⁰ Min. of Env’t., Forests & Climate Change, Gov’t of India, Notification No. G.S.R. 827 (November 21, 2014).

³¹ See *Kohli & Bhutani*, *supra* note 29, at 14.

³² See Balakrishna Pisupati, Access and Benefit Sharing: Issues and Experiences from India, 6(1) *Jindal Global L. Rev.* 31, 36 (2015).

Guidelines are meant to fill these gaps.³³ As a result, applicants have the option to pay a benefit between 0.1 and 0.5 per cent of the product's total ex-factory sale annually, minus taxes, in exchange for obtaining and commercialising India's bioresources.³⁴

III. CHALLENGES IN IMPLEMENTATION

Therefore, for an effective ABS regime to exist we must safeguard sovereignty of the state over genetic resources and protect the associated TK of the benefit claimers. With the issuance of the ABS Guidelines, the government hoped to utilize our rich-biodiversity and translate it into large-scale financial mechanism, and thus revitalize the local communities.³⁵ Yet some challenges lie ahead in actual accomplishment of such a mission.

A. Actual Benefits Elude the Benefit Claimers

The benefit sharing model prescribed under the BD Rules provides that where the NBA has accorded approval for research or commercial utilization or transfer of research results or application for IPR, after splitting 5 per cent of the accumulated benefits between the NBA and the concerned SBB for administration expenses, the remaining 95 per cent will be allocated to the concerned BMC(s) and/or reward claimants.³⁶ Furthermore, the BD Act authorises BMCs to charge fines on prospective accessors that extract bioresources from their field for industrial use.³⁷ These resources are to be credited in the Local Biodiversity Fund³⁸ and used for the purpose of conservation and preservation of the biodiversity of the area. As on April 6, 2022, 3369 approvals for access have been granted by the NBA.³⁹

However, there is very little evidence to show that the benefit claimers actually have been benefited from such access. In one case, an Indian company named Bio India Biologicals paid a royalty of ₹ 53,000 to the NBA, in pursuance of its export of neem leaves from Amarchinta village in Andhra Pradesh. The Amarchinta BMC obtained ₹ 20,000 of this revenue. According to records, the BMC used the funds to fund awareness drives, sapling planting, and

³³ See generally Kanchi Kohli & Shalini Bhutani, "Can Benefits Be Shared? Three Tangles for Access and Benefit Sharing", in *Biodiversity for Sustainable Development: 3 Environmental Challenges and Solutions* 121, 126 (K.P. Laladhas et al., eds., 2017).

³⁴ See ABS Guidelines, Reg. 4.

³⁵ See Preetha N., Laladhas K.P. & Oommen V. Oommen, *ABS – Unlocking the Opportunities*, 4(2) *J. Tradit'l and Folk Prac.* 27, 27–28.

³⁶ See BD Rules, R. 15.

³⁷ See BD Act, S. 41(3).

³⁸ See *id.*, Ch. XI.

³⁹ "Approval Granted to the Applicants", NBA, <<http://nbaindia.org/content/683/61/1/approvals.html>> (Accessed on 12 April 2022).

fencing projects.⁴⁰ In another scenario, PepsiCo India Holdings Private Limited paid ₹ 37.26 lakh to the NBA in 2007 for accessing a certain kind of dry sea weed from the Gulf of Munnar district in Tamil Nadu. Nonetheless, the money collected by the NBA was not ploughed back to the benefit claimant.⁴¹

Recent incidents add further scepticism regarding actual benefit sharing. Responding to the global urgency for medical research in quest for vaccine against the coronavirus, on April 3, 2020, the NBA issued a circular allowing access application⁴² by foreign entities to be processed within five days.⁴³ Another circular followed extending the deadline for signing a contract with NBA in view of the lockdown announced due to COVID-19.⁴⁴ Reading both the circulars together leads to absurdity where the terms and conditions of the ABS agreement can be fixed after the access has been already approved!⁴⁵ The circular is silent about benefit sharing. Similar emergency situation has not been contemplated either under the BD Act or ABS Guidelines, except where any government institutions send biological resources to a foreign entity for the purpose of carrying out non-commercial urgent research studies to avert emergencies like epidemics. The entity is mandated to declare that it would neither utilize the bioresources for commercial purpose or make any claim of any IPR.⁴⁶ Such application may be processed within 45 days by the NBA.⁴⁷

Given the nature and extent of the pandemic, the haste was understandable. There was a justifiable reason for such quick access to Indian bioresources for COVID-19 study, provided that it intended to deliver secured and reasonably priced medicines as per the requirement of the country in return.⁴⁸ The author remains apprehensive whether the pharmaceutical firms would share any sort of benefit, in case any such research conducted with the accessed resources results in the manufacturing of some consumer product.

⁴⁰ See Kanchi Kohli & Shalini Bhutani, "Chasing 'Benefits': Issues on Access to Genetic Resources and Traditional Knowledge with Reference to India's Biodiversity Regime" 10 (2011).

⁴¹ See *id.*

⁴² BD Act, Form-I.

⁴³ See Nat'l Biodiversity Auth., Gov't of India, Circular No. NBA/Chairman/Misc/2020-21 (April 3, 2020), <http://nbaindia.org/uploaded/pdf/X-RESEARCH_CIRCULAR.pdf>. (Accessed on 12 April 2022).

⁴⁴ See Nat'l Biodiversity Auth., Gov't of India, Circular No. NBA/Chairman/Misc/2020-21 (April 3, 2020), <<http://nbaindia.org/uploaded/pdf/TIME-EXTENSION-CIRCULAR.pdf>>. (Accessed on 12 April 2022).

⁴⁵ See Kanchi Kohli & Shalini Bhutani, "Benefit Sharing in the Time of a Public Health Emergency", *NewsClick*, (August 13, 2020), <<https://www.newslick.in/Biodiversity-India-ABS-Guidelines-Benefit-Sharing-Public-Health-Emergency>>. (Accessed on 18 April 2022).

⁴⁶ ABS Guidelines, Form B.

⁴⁷ See *id.*, Reg. 13.

⁴⁸ See Kohli & Bhutani, *supra* note 45.

B. BMCs lack ‘real’ authority

The BD Act mandates that the NBA and the SBB “shall consult” the concerned BMC before taking any decision on biological resources or knowledge.⁴⁹ However, reading of the Act, Rules or Guidelines does not convey the meaning that any advice/opinion given the BMCs in this regard would be binding upon the higher authorities. The NBA and SBB, not the BMCs, regulate the access. Only after NBA takes a decision to allow the access, it consult the communities on the benefit sharing mechanisms.⁵⁰ Bereft of technical knowledge about IPR regime or commercial use of the TK, the approach remains highly centralized in practice.⁵¹

In majority of the cases, their existence is only a formality. To date, nationwide 276,836 BMCs have been set up inconsistently. While Uttar Pradesh has 59,407 BMCs, much larger state, Maharashtra has 28,649 BMCs, and a bio-diverse state of Assam has only 2,549 BMCs.⁵² Local civic bodies in both urban and rural areas have shown no enthusiasm for forming BMCs, not just because it entails extra effort, but also because there is no guarantee of visible incentives to show their immediate constituents.⁵³

C. Lack of Information about Bioresources

BMCs’ primary function, according to the BD Rules, is to prepare a people’s biodiversity registers (PBRs).⁵⁴ A PRB is a document, maintained by SBBs, recording the diversity of species of flora and fauna for the purpose of granting legal protection to TK. Applicants willing to access such biological resources and associated TK are required to provide all details to the NBA including the quantities and exact geographic location for the intended access of such biological resources and knowledge.⁵⁵ Given the fact that biological resources are available in more than one geographical region and knowledge, by nature is dynamic, may be linked to various indigenous communities,

⁴⁹ See BD Act, S. 41(2).

⁵⁰ See BD Rules, R. 20(5) r/w ABS Guidelines, Reg. 14.

⁵¹ See generally Udish Ghosh & Chandralekha Akkiraju, “Biodiversity Act, 2002: An Analysis”, *Lawctopus*, (February 4, 2015) <https://www.lawctopus.com/academike/biodiversity-act-2002-analysis/#_ednref17>. (Accessed on 21 April 2022).

⁵² Biodiversity Management Committees, NBA, <<http://nbaindia.org/content/20/35/1/bmc.html>>. (Accessed on 12 April 2022).

⁵³ See Kanchi Kohli & Shalini Bhutani, “Ten Years of the Biological Diversity Act”, 47(39) *Econ. & Pol. Wkly* 15, 15–16 (2012).

⁵⁴ See BD Rules, R. 22(6).

⁵⁵ See *Regional Centre for Development Cooperation Bhubaneswar*, “Implementation of Biological Diversity Act in India: An Overview with Case Studies” 23 (Bikash Rath ed., 2011), <<https://www.niua.org/csc/assets/pdf/key-documents/phase-2/Up-GreenC-and-BIO/Implementation-of-Biological-Diversity-Act-in-India-Overview-and-Case-Studies.pdf>>. (Accessed on 23 April 2022).

it becomes an uphill task for the NBA to identify the actual benefit claimers resulting in undue delays in processing of the ABS applications.⁵⁶

The problem also arises because the PRBs in many states are not compiled. For instance, in 2018, the Comptroller and Auditor General of India lamented that even a decade following the establishment of Andhra Pradesh SBB, only 75 BMCs had prepared PBRs. In 2019, the NGT sharply criticized 14 states for making no progress in creating PBRs.⁵⁷ In fact, such a state of affairs also encourages illegal access of bioresources.

Balakrishna Pisupati, ex-Chairperson of NBA, further points out that latest developments in science and technology possess newer challenges to acquiring information about bioresources. Existence of the Digital Sequence Information (DSI) is one such areas where information regarding genetic sequence of a bioresource is publicly available which is sufficient for industrial development of the product without having physical access to the same. It plays a vital role in environmental and biological research. He draws an instance from research for the cure to COVID-19. Since the virus' sequence specifics is made public, scientists all over the world will do accelerated research on vaccine and diagnostic kits.⁵⁸ There are undoubtedly efforts to put DSI under the auspices of ABS by some value sharing models for resource sustainability.⁵⁹ In this backdrop, efforts are also underway to develop and implement an e-PBR framework which would be helpful for monitoring the sources over time, too.⁶⁰

D. Benefits Sharing Beyond Payment of Compensation

Research on Indian ABS regime appears that it is primarily focused compensation. As a matter of fact, besides monetary compensation, the BD Act has provided for five other types of benefit sharing.⁶¹ However, not much has proceeded in those directions. It may be time for the policy makers to think in terms of ensuring a sustainable livelihood to the claimers or developing their skills or establishing small scale industries at the point of origins as monetary benefits have not brought about large-scale financing. Of course, there have been few inspiring tales. One such example is that of Gram Mooligai Company Limited (GMCL), which won the Biodiversity Award 2016 in the ABS category

⁵⁶ National Biodiversity Authority, Gov't. of India, "Access and Benefit Sharing Experiences from India" 5–6, <http://nbaindia.org/uploaded/pdf/ABS_Factsheets_1.pdf>. (Accessed on 2 April 2022).

⁵⁷ See Aathira Perinchery, Bioresource Access and Benefit-sharing: How Far Have We Come in India?, *Mongabay* (April 9, 2020), <<https://india.mongabay.com/2020/04/india-bioresource-access-and-benefit-sharing-how-far-have-we-come/>>. (Accessed on 23 April 2022).

⁵⁸ See *id.*

⁵⁹ See generally Comm'n on Genetic Res. for Food and Agric., U.N. Food and Agric. Org., *Digital sequence information*, <<http://www.fao.org/cgrfa/topics/digital-sequence-information/en/>>. (Accessed on 2 April 2022).

⁶⁰ See Perinchery, *supra* note 57.

⁶¹ See *supra* note 17.

from Government of India for paying benefits of up to 2 per cent of its sales to the MP SBB.⁶² Small groups made up of the members of a community of medicinal plant gatherers constitute the company's shareholders. GMCL procures forest products directly from these groups and 70 per cent of its returns are shared with the communities.⁶³ In fact, GMCL has actually demonstrated an example to follow for domestic companies in involving local populations in the production of goods and markets, with a concentration on genetic resource sustainability and transaction equity.⁶⁴ Similarly, the initial success story of the Kani tribals from Kerala is another addition to such endeavours.⁶⁵ The challenge is about replication of such models in other places.

E. Monitoring of the Shared Benefits

There is nothing in the ABS regime about monitoring of the benefits received. Whether monetary or non-monetary, there is no mechanism to ensure that the benefits have helped in rejuvenating the biodiversity or developing TK-based products involving the benefit claimers. The standalone model of the Kani tribes could usher the right way as a good practice in this respect.⁶⁶ In this case, Jawaharlal Nehru Tropical Botanical Garden and Research Institute (JNTBGRI) scientists understood secret of stamina of Kani tribals in forest walks due to *Arogyapacha* use in 1987 in Kerala. Subsequently, a drug was developed and named 'Jeevani' by Arya Vaidya Shala and JNTBGRI. 50 per cent of the royalty was shared with Kanis by forming a charitable trust. Subsequently, 70 per cent of Kanis became members of the trust and received the benefits in some form. Incidentally, this successful process started prior to CBD due to conscious of the scientists, especially Dr. Pushpangadhan, then Director of JNTBGRI, working with the tribe.⁶⁷

Regrettably, the Kani success story gradually fell apart. The members were left stranded when Dr. Pushpangadhan, the person instrumental for that revolution, left the organization. Besides, both legal and illegal collection of *Arogyapacha* led to the depletion of the plants. In 2008, even Arya Vaidya backed off from the deal. The method patent JNTBGRI had secured for Jeevani had already expired by that time, and no patent for the product had been obtained under the Patents Act, 2005. As a result of unequal distribution

⁶² Biodiversity firm Awarded for Sharing 2% Benefits, *The Times of India* (June 8, 2016) <<https://timesofindia.indiatimes.com/city/raipur/Biodiversity-firm-awarded-for-sharing-2-benefits/articleshow/52649094.cms>>. (Accessed on 2 April 2022).

⁶³ *See id.*

⁶⁴ *See* M.S. Suneetha, Balakrishna Pisupati & Sanjay Kumar, "Framework for Benefit Sharing Guidelines for India", 11(2) *Asian Biotech. & Dev. Rev.* 55, 66–67 (2009).

⁶⁵ For more discussion, *see infra* pt. III (E).

⁶⁶ *See* World Intellectual Property Organisation, "Using Traditional Knowledge to Revive the Body and a Community", <<http://www.wipo.int/ipadvantage/en/details.jsp?id=2599>>. (Accessed on 4 April 2022).

⁶⁷ *See id.*

of rewards, a schism developed in the group. The new management of the trust could not carry forward the work which rendered the trust ineffective.⁶⁸

F. Certain Problems with ABS Guidelines

According to experts, the ABS Guidelines just add a smidgeon to what the current BD Act and Rules say for ABS. They have remained focuses on access. The Guidelines do not explain the rationale behind arriving on various percentages of payments enumerated therein. Moreover, no reason is being advanced as to why certain payments are envisaged to be made directly to the local communities, while others are not.⁶⁹ Benefit-sharing agreements of all kinds have been handled the same way, whether it's a one-time payment or shared product research and development.⁷⁰

The ABS Guidelines do not deal with modalities for carrying forward the fundamental principles of the CBD and the Nagoya Protocol, i.e., seeking prior consent before access, or helping to facilitate talks with them for developing mutually agreed terms (MATs) of benefit sharing despite the mandate of the NBA under Section 21 of the BD Act. Additionally, processing of applications is opaque and there is no public scrutiny or hearing, unlike Environmental Impact Assessment Notification of 2006, for raising the local communities' concerns on the terms of the ABS. The ABS Guidelines only offers that where benefit claimers remain unidentified, the profit would be applied for conservation purposes, sustainable utilisation of biological resources and promotion of local community members' livelihoods.⁷¹ Legal experts have further expressed serious reservations in using of vague terms, i.e., entering into a "prior benefit sharing negotiation".⁷² In law, negotiations have no binding force as opposed to agreements.⁷³

G. Arduous task before the SBBs

Two essential factors that ensure and regulate benefit sharing are self-disclosure of access by the assessors and executive actions by the SBB and NBA. Quite a few challenges remain before the SBBs in effective implementation

⁶⁸ Roy Mathew, "A Benefit-Sharing Model that Did not Yield Desired Results", *The Hindu* (October 18, 2012), <<https://www.thehindu.com/news/national/A-benefit-sharing-model-that-did-not-yield-desired-results/article12561312.ece>>. (Accessed on 12 January 2022).

⁶⁹ See Kohli & Bhutani, *supra* note 24, at 21.

⁷⁰ See *id.*

⁷¹ See Pankhuri Agarwal, "Developing Bio-Cultural Jurisprudence for Securing Rights of Indigenous Peoples and Local Communities – Divya Pharmacy v. UoI", *SpicyIP* (March 6, 2019), <<https://spicyip.com/2019/03/developing-bio-cultural-jurisprudence-for-securing-rights-of-indigenous-peoples-and-local-communities-divya-pharmacy-v-uoi.html>>. (Accessed on 12 January 2022).

⁷² ABS Guidelines, Reg. 3.

⁷³ See generally Yeshwanth Shenoy, "A Critical Appraisal on Implementing Access & Benefit Sharing Guidelines", 2, 3 & 4(1) *J. Tradit'l. and Folk Prac.* 104, 107 (2016).

of ABS under the BD Act, emphasized by Ms. Veena P.G., Consultant with Karnataka SBB, at a training workshop in 2018. According to her, there is a resistance from industrial sectors for compliance with the ABS provisions. Such reluctance results in the need for sending repeated communications/letters to such industries. Additionally, there are no exemptions for small scale industries. Their profit margins in commercial exploitation of bioresources are far from being impressive. At times, resources spent on obtaining ABS may be more than ABS itself. Hence, they find no incentive in going through the rigors of the ABS legal process. In many cases SBBs do not adequate staff to handle large mandate under the law. On several occasions, entities do not submit all information required in the prescribed form under the State Rules at a time. They have to be pursued in such cases. Such adverse situations make it almost impossible to dispose of the application within the prescribed time (two months in case of Karnataka).⁷⁴

H. Smuggling of Bioresources Continues Unabated

Combating bioresources smuggling has been a stiff challenge. According to the NBA's Annual Report for 2015-16, 15 international buyers were granted access to red sanders auctioned by the Government of Andhra Pradesh. Sharing 5 per cent of the auction price, the NBA realized a sum of ₹16.51 crores as benefit sharing.⁷⁵ An Expert Committee was also formed towards chalking out the modalities for utilization of the amount received from access of red sanders, keeping in view the conservation and sustainability issues.⁷⁶ Yet illegal trade of this endemic species continues unabated and the seaport in Chennai acts as a vital gateway. As per certain government estimates, 90 per cent of the worldwide demand of the red sanders are met through smuggling and as a consequence, its natural distribution in Andhra Pradesh has fallen over half in last two decades. Poor coordination between the Andhra Pradesh and Tamil Nadu governments as well as connivance of local police and customs officials has allowed organized rackets to thrive in such smuggling activities.⁷⁷

⁷⁴ Veena PG, Presentation on 'Working of the SBBs with Special Reference to Karnataka SBB' at the Inception and Five-Day Training the Trainers Workshop on 'Strengthening Human Resources, Legal Frameworks, and Institutional Capacities to Implement the Nagoya Protocol', jointly organized by Nat'l L. Sch. of India U. (NLSIU), Bengaluru and UN Dev. Prog., New Delhi at NLSIU, February 12-16, 2018. (hereinafter "Training Workshop"). The author was a participant at this workshop.

⁷⁵ See *Nat'l Biodiversity Auth., Gov't of India, Ann. Rep. 2015-2016* 34 (2016).

⁷⁶ See National Biodiversity Authority, Gov't. of India, NBA 2014-2015: At A Glance, <http://nbaindia.org/uploaded/pdf/NBA_Brochure_2014.pdf>. (Accessed on 25 January 2022).

⁷⁷ See Praveen Kumar, "The Great Forest Robbery: How Andhra's Rare Red Sanders are Smuggled Around the World", *The News Minute* (November 23, 2017), <<https://www.thenews-minute.com/article/great-forest-robbery-how-andhra-s-rare-red-sanders-are-smuggled-around-world-72089>>. (Accessed on 25 January 2022).

I. In Search of Appropriate Enforcement Mechanism

Being a techno-legal issue, enforcement mechanism of ABS has been a problem. The consequential loss is enormous. For example, considering the presence of the regulation, the state of MP is expected to lose at least ₹ 2,000 crore in revenue every year by enabling over 1,000 companies, including several multinational corporations, to receive bioresources on an unregulated approach.⁷⁸ Unfortunately, the BD Act suffers from effective execution due to the absence of appropriate criminal law procedures in cases of violation of the law. Unlike the Indian Forest Act, 1927, or the Wildlife Protection Act, 1972, the BD Act is still toothless legislation when it comes to taking care of vital and indispensable procedures of law like search, seizure and arrest. Although the offences under the BD Act are cognizable and non-bailable, Section 61 of the Act creates an impediment in taking effective actions to deal with the offences under the Act. Since the provision specifically prohibits courts from taking cognizance of any crime except from a complaint filed by officers authorized in this regard, the powers of a magistrate under Section 190 of the Criminal Procedure Code⁷⁹ to take cognizance based on a police investigation or any other reports or details remains excluded.⁸⁰

To overcome such legal constraints, on May 24, 2017, the MP SBB, issued instructions that all officers of the SBB, who are not in the scientist category, and all forest officers of the MP responsible for the administration of forest territory across the state were authorised to file grievances in accordance with Section 61(a) of the BD Act. Further, in order to ensure the successful application of the BD Act at the provincial level as well as hearing, direction and analysis of the functions of the field officials by the SBB from time to time, the Government of Madhya Pradesh established Madhya Pradesh Biodiversity Enforcement Cell.⁸¹ Under the aegis of MP Biodiversity Enforcement Cell, the MP SBB conducted “Operation MPBio2017” instituting legal proceedings against those who had been utilising biological resources without apportioning benefits with the Board. As part of the operation, while acting against couple of traders for unauthorized possession of certain bioresources, further investigations revealed connection with Himachal Pradesh-based Konark Herbal and Health Care Company. The Cell with the Forest Department of Himachal Pradesh raided the company premises and booked it for the violation

⁷⁸ See P. Naveen, “Biodiversity Act Tied in Red Tape, MP Poorer by Rs 2k Cr a Year”, *The Times of India* (May 22, 2017), <<https://timesofindia.indiatimes.com/city/bhopal/biodiversity-act-tied-in-red-tape-mp-poorer-by-rs-2k-cr-a-year/articleshow/58780205.cms>>. (Accessed on 25 January 2022).

⁷⁹ Act No. 2 of 1974; S. 190.

⁸⁰ See Alphonsa Jojan, “The Curious Case of the Indian Biological Diversity Act”, *The Wire* (November 18, 2017), <<https://thewire.in/197892/india-biological-diversity-act/>>. (Accessed on 25 January 2022).

⁸¹ MP St. Biodiversity Bd., Gov’t of MP, Order No. 2017/34 (May 24, 2017).

of Section 7 of the BD Act.⁸² Nevertheless, the legality of such actions is still questionable.⁸³

IV. HOPE TO DESPAIR: DIVYA PHARMACY CASE TO THE DRAFT GUIDELINES

The role of Indian courts in protecting and preserving biodiversity as well as the environmental rule of law has been noteworthy. The proactive and innovative judiciary, operating as an “amicus environment”, has caused a significant change in the country’s environmental landscape. The Supreme Court, High Courts, and the NGT – all support the use of public interest litigation (PIL) in cases involving the environment and biodiversity. A strong symbiotic relationship between the discourse on human rights and biodiversity protection has resulted from the expansive interpretation and integrated approach of the constitutional mandates.⁸⁴

Even before the BD Act was passed, most of the litigation was on finding a way to balance environmental and biological concerns with economic development. Precautionary, polluter pays, intergenerational equity, sustainable development, and public trust were important principles that created the cornerstone of the judicial activism in India in rendering biodiversity justice.⁸⁵ Additionally, litigants have petitioned the courts using sectoral legislation, including the laws governing forests, wildlife, and biodiversity. The higher courts have entertained cases and provided appropriate relief under such legislation.⁸⁶

So far ABS is concerned, exploitation of bioresources by businesses in India under the grab of section 7 of the BD Act has been a point of debate for a long time and reported widely in the media.⁸⁷ Eventually, the Uttarakhand High Court responded to the legal puzzle in *Divya Pharmacy v. Union of India*,⁸⁸ when Baba Ramdev’s Divya Yoga mandir Trust had petitioned against the Uttarakhand SBB for ordering it to share ₹ 2 crore of its ₹ 421 crore revenue in 2014-2015 with the agriculture community in the name of benefit sharing under the BD Act.⁸⁹ Relying on the literal rule of interpretation, the petitioner

⁸² See “Operation MP Bio-2017 Raids Konark Healthcare”, *The Pioneer* (June 3, 2017), <<http://www.dailypioneer.com/state-editions/bhopal/operation-mp-bio-2017-raids-konark-healthcare.html>>. (Accessed on 25 January 2022)

⁸³ See generally Jojan, *supra* note 80.

⁸⁴ See Gitanjali Nain Gill et al., “Biodiversity and the Indian Judiciary: Tracing the Trajectory”, 8(2) BRICS L. J. 10, 15 (2021).

⁸⁵ See *id.*, at 18–19.

⁸⁶ See generally *id.*, at 22–26.

⁸⁷ See *supra* Pts. II & III (I).

⁸⁸ 2018 SCC OnLine Utt. 1035.

⁸⁹ S.S. Rana & Co. Adv., “India: Access and Benefit Sharing Under CBD and the Ayurveda Industry”, *Mondaq* (August 23, 2018), <<http://www.mondaq.com/india/x/730062/Environmental+Law/Access+And+Benefit+Sharing+Under+CBD+And+The+Ayurveda+Industry>>. (Accessed on 12 January 2022).

argued that the BD Act envisages only of providing “prior intimation” to the concerned SBB before accessing bio-resources and that it is beyond the jurisdiction of the SBB to ask the petitioner to share any benefit with the local communities. The petitioner being an Indian entity has no such obligation to share benefits as per provisions of the ABS Guidelines.⁹⁰

While the Court admitted that simple textual interpretation does not bind the Indian entities to share benefits and the power to impose any obligation lies with the NBA alone, it noted that such interpretation would defeat the “the very purpose, for which the law was enacted”.⁹¹ The Court was of the opinion that interest of the native communities had been the main purpose of the legislature in enacting the law in the light of the international treaties.⁹² Finally, the Court held that NBA has been empowered under the BD Act in framing regulations,⁹³ *i.e.*, ABS Guidelines and delegate to SBB to impose fair and equitable benefit sharing under the regulatory power derived from Section 7 read with Section 23(b)⁹⁴ of the BD Act. The Court added that the ABS Guidelines only follow what is already laid down in the BD Act.⁹⁵

Despite the *Divya Pharmacy* judgment, it is rather discouraging to note that the Draft Regulations regarding ABS brought in by the Government in 2019⁹⁶ have failed to provide any scope for the local communities/BMCs to negotiate on the terms and conditions for access and determination of benefit sharing. In fact, the Draft ABS Guidelines have rather focused on ease of doing business and have aspired in protecting the commercial interest of the business entities. *E.g.*, small businesses whose turn-over is ₹ 1 crore, they are required to pay only a lump sum of ₹ 500,⁹⁷ which is almost insignificant compared to 0.1 per cent under the existing ABS Guidelines 2014. Moreover, this obligation is also exempted if such an entity has already paid a collection fee to the BMC. According to the 2014 Rules, the processing fee charged to the BMCs is in addition to the value share fees. Even when we compared to businesses which have higher turnover but with equal annual gross ex-factory sale, there is a requirement of paying substantially more along with a registration fee of ₹ 25,000 for three years. The logic of such differential payment only on the size of the business does not hold a very good rationale.⁹⁸

⁹⁰ See *Divya Pharmacy v. Union of India*, 2018 SCC OnLine Utt. 1035, paras 3 and 16.

⁹¹ See *id.*, paras. 76–77.

⁹² See *id.*, para 92.

⁹³ See BD Act, Ss. 21 and 64.

⁹⁴ See BD Act, S. 23. Functions of State Biodiversity Board.

⁹⁵ See *Divya Pharmacy v. Union of India*, 2018 SCC OnLine Utt 1035, paras 104–06.

⁹⁶ Ministry of Environment, Forest and Climate Change, Guidelines on Access to Biological Resources and Associated Knowledge and Equitable Sharing of Benefits Regulations, 2019, <<http://asbb.gov.in/access/draft-guidline-abs.pdf>> (hereinafter “Draft ABS Guidelines”)

⁹⁷ See Draft ABS Guidelines, Reg. 2.

⁹⁸ See Alphonsa Jojan and Vineetha Venugopal, “Biodiversity Act: Draft ABS Guidelines Helps Businesses by Diluting Sharing of Benefits with Local Communities”, *LiveLaw* (June

In cases, where any applicant himself commercialises his obtained IPR, the lower range of monetary sharing has been reduced to 0.05 per cent from 0.2 per cent in the Draft ABS Guidelines. Similarly, in cases where such commercialization is done through a third person, the lower range of the license fee has also been reduced to 2 per cent from 3 per cent.⁹⁹

Although the responsibility of the BMC has been overlooked, experts have pointed to a possible legal problem. If an applicant provides the BMC with documentation that the required fee has been paid, the Draft ABS Guidelines give them the option of receiving a 25 per cent discount on the amount of benefit sharing. Therefore, to access a bioresource for commercial purposes one is required to pay the levy fee for the BMC in addition to the benefit sharing percentage to be paid to the NBA. Such provisions lead to a twofold disbursement for the same action and may well be challenged in a court of law.¹⁰⁰

Patanjali recently introduced *Coronil* tablet and *Swasari Vati* medicines as a treatment for COVID-19 in partnership with the National Institute of Medical Sciences and Research in Jaipur – a private entity. Though the effectiveness of the drugs has been questionable, it is uncertain if any of the developers paid any access fees to the SBB.¹⁰¹

V. CONCLUSION & SUGGESTIONS

From the above discussion, it is quite apparent that despite laying down a legal framework consistent with the international law, actual implementation of ABS has met with several challenges in India. The bottom-up approach in safeguarding the benefit claimers cannot succeed unless the local authorities are made aware of the benefits of ABS through sustained campaigning and mandated to form BMCs. The SBBs must ensure that BMCs functionally exist for that matter. To be fair, ABS has not brought in substantial economic gains, as envisaged; therefore, non-monetary forms of benefits should be encouraged. Industries need to be encouraged in setting up units based on TK or obtained genetic resources close to the access points and engage the locals in gainful employment. Experiences of the Kani tribal and GMCL can usher the way. Smuggling of bioresources has caused serious loss to the biodiversity and deprived the State of enormous financial wealth. The issue demands more coordination among the enforcement authorities is required to stop such illegal practices. The MP Biodiversity Enforcement Cell is a good beginning towards

14, 2019), <<https://www.livelaw.in/columns/biodiversity-act-draft-abs-guidelines-145638>>. (Accessed on 12 January 2022).

⁹⁹ Draft ABS Guidelines, Reg. 5.

¹⁰⁰ See Balakrishna Pisupati and Shyama Kuriakose, "Biodiversity Act: A Jungle of Confusion", *The Hindu Business Line* (August 16, 2019), <<https://www.thehindubusinessline.com/opinion/columns/biodiversity-act-a-jungle-of-confusion/article29112025.ece>>. (Accessed on 12 January 2022).

¹⁰¹ See Kohli & Bhutani, *supra* note 45.

a better enforcement mechanism. Not only such cells should come up at the NBA and other SBBs, the law should be amended to empower such cells for conducting search, seizure and arrest. The Draft ABS Guidelines should not be adopted in its present form. It defeats the very purpose of Uttarakhand High Court's judgment in the *Divya Pharmacy* case in empowering the local communities against the rampaging corporations in the name of 'Indian' identity. Situations like COVID-19 may necessitate fast access, but ABS Guidelines should also highlight on modalities as to how benefit would be shared with the communities in face of such public health emergencies.