

# The Legal Meaning of Biodiversity

KANCHI KOHLI, SHALINI BHUTANI

By suggesting that even coal extraction falls within provisions of the Biological Diversity Act, 2002 and its specific provision of access and benefit-sharing, the Madhya Pradesh State Biodiversity Board has raised important questions relating to the interpretation of the law. While the principle of profit sharing from commercial use of biological sources is justifiable, the authors argue that the principle of the conservation ethic should not be lost.

The authors Kanchi Kohli ([kanchikohli@gmail.com](mailto:kanchikohli@gmail.com)), Shalini Bhutani ([sbhutani@gmail.com](mailto:sbhutani@gmail.com)) are coordinators of the pan-India Campaign for Conservation and Community Control over Biodiversity.

It is in the nature of law to be interpreted. Once a legal statute is in place, administrators face the challenge of relying on their discernment in both understanding and prioritising the law's provisions. At the same time, there are principles that courts often use along the way to give meaning to a legal text. Such is also the case with India's Biological Diversity (BD) Act, 2002, where not all of its current interpretations seem to coherently fit into a common understanding of the law. While the executive is challenged with implementing the law, there are instances of judicial interpretations of the law that raise important questions.

One such instance has come to light in Madhya Pradesh (MP) in the context of the BD Act. The MP State Biodiversity Board (MPSBB) has chosen to take a substantially expanded meaning of the words "biological resources" and "commercial utilisation" used in the BD Act.

The BD Act was legislated to give effect to the Convention on Biological Diversity (CBD). Therefore, the explicit objectives of the law are supposed to be in line with the convention. These are not just conservation of biological diversity and

sustainable use of biological resources, but also fair and equitable sharing of benefits arising from genetic resources. The latter requires putting into place a mechanism through which benefit-sharing arrangements can be arrived at when the question of access for research or commercial utilisation arises. This is both for Indian entities (who need to intimate the relevant SBB of the state in which these resources are accessed) and for foreign entities, who need to take prior permission from the Chennai-based National Biodiversity Authority (NBA).

More than the conservation and sustainable use aspects of the BD Act, the legal provisions seeking to establish the prerequisites of access and benefit-sharing (ABS) have received national and international attention. Essentially what this means is that when bio-resources or people's knowledge are accessed, the user/accessor must compensate the provider community either in financial terms or acknowledge the source. While the biodiversity law broadly prescribes the six ways in which benefit-sharing is to be effected, neither its text nor the BD rules specify situations that attract the legal provisions for such "sharing". Moreover, the procedural clarities have yet to emerge through actual experiences of implementing the rules.

## Law and Context

Yet, context also determines the meaning that a certain law is given. The

MPSBB's initiative to push a certain interpretation amidst the uncertainty brings to the fore the objectives in the real-time practice of the BD Act in India. A letter by the Member Secretary of the MPSBB to the NBA dated 3 April 2013, states emphatically 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 and, i.e., access and benefit sharing.

For the MPSBB this clarity is critical. Its aim is to harness as many "benefits" from those who access biological resources. This clear aim pushes the board to stretch the meaning of biological resources so as to maximise the number of cases that will be subject to the legal requirements of the benefit-sharing provisions. Since December 2012 and until March 2013, the MPSBB has issued notices to several private companies, including pharmaceutical, coal mining, food processing, liquor, sugar, oil and industrial processes which, according to MPSBB's interpretation, are (commercially) utilising biological resources. It has also written to the state forest department, the Forest Development Corporation, the Minor Forest Produce Federation and the fisheries department.

In its letters, the MPSBB has invoked Section 2(c) of the BD Act, which defines biological resources as "plants, animals and microorganisms 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". In its letters to all these industries, the MPSBB has highlighted that each of the industries, as per the BD Act, needs to intimate the MPSBB through the prescribed Form 1 and pay Rs 1,000 as they are carrying out "commercial utilisation" of biological resources, which attracts the definition of the BD Act. Each of the industries to whom notices have been issued are now being 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.

According to the MPSBB, since there are no prescribed guidelines for ABS, nor

any directions from the NBA, it is using the same formula that the NBA has adopted in one of the agreements signed by it in 2009. In part, the NBA practice has also spurred such an interpretation by an SBB because in several cases, the NBA has granted access for not just the transfer or trade of a gene or small quantities, but approved access to several tonnes of biological materials (excluding only normally traded commodities that are traded in bulk from coverage under the BD Act) and insisted on benefit-sharing thereafter.

It comes as no surprise that this step of the MPSBB has triggered strong reactions. Several of the industries that received notices have dragged it to the National Green Tribunal (NGT). The Central Zone Bench of the NGT at Bhopal has admitted cases filed by several private companies such as Agro Solvent and Lilason Breweries that are presently being heard.

On 28 May 2013, the NGT bench stayed the MPSBB's notice of legal action against Lilason Breweries in case no response was received. The MPSBB had sent such a show cause to various companies who had not responded to their earlier notice. Following the same logic, the Eklehra Panchayat in Chhindwara district has filed a public interest litigation (PIL) against Coal India to share profits from coal extraction with the panchayat. The panchayat argues that while coal is being extracted from coal mines that fall under the panchayat, the company is not sharing its benefit with them.

The argument against the MPSBB's position on this issue can be that aspects of ABS in the BD Act are applicable only to genetic material and not biological resources in general. While the BD Act uses the term "biological resources", internationally, the CBD defines "biological resources" (Article 2) to include genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity. And in the specific Protocol on ABS, the Nagoya Protocol, the legal obligation of benefit-sharing is talked of in situations of access to genetic resources and/or "traditional knowledge" associated with such resources.

The logic of the MPSBB as stated in its letter to the NBA in April 2013 is that "coal is a plant fossil and it has a genetic material of a plant", and therefore it needs to be treated as a biological resource under the BD Act. Similarly, "limestone is a genetic material of marine organisms and is made after calcification of marine organisms". Further, it argues, that it is not just coal mining but also thermal and other industrial operations, which use coal, that need to come into the purview of ABS.

The MPSBB has sought a response from the NBA, which it is yet to receive. In both its letters of April 2013 to the NBA, the member secretary of the board has stressed how

it is very very necessary that it should be clarified that what are the bio-resources and broader classification of industries are covered under the purview of industries using biological resources for commercial utilisation.

### Debate on Biodiversity

This action by the MPSBB has sparked off a debate on the interpretation of the BD Act in India, 11 years after it was gazetted. The matter is now before the NGT. If the tribunal's interpretation is in line with that of the MPSBB and if the NBA too acknowledges that the steps taken by the MPSBB are in order, it would mean that private companies using biological resources created through all kinds of "genetic material" would need to pay from their profits. These "double taxes", as the companies call it, will go into the coffers of the MPSBB. It is likely then that other SBBs, who are perhaps awaiting the decision on this, would follow suit.

This brings us back to the larger question of implementation of the BD Act. Should it preoccupy itself with collecting cash by insisting on ABS? Or should those mandated with ensuring that the objectives of the BD Act are met, bring extractive and potentially biodiversity-destructive businesses under conservation rules or sustainable use principles? These questions are sought to be settled by charging fees from those who continue in the business of extraction and possibly unsustainable use. The strategy

does link itself to the “polluter pays” principle by asking those making profits out of biological material to contribute financially. However, this alone will not reduce the extent of coal mining or stop distilleries from continuing business as usual even though the BD Rules, 2004 give administrators the power to restrict or prohibit access to biological resources on account of overriding public interest

or for protection of environment and conservation of biological diversity.

These interpretations of the law tend to suggest that implementing agencies are seeking to derive financial benefits from the extraction and commercial use of biological resources. Some panchayats and Biodiversity Management Committees (BMCs) being set up under the BD Act might also follow suit to increase

their cash coffers. But this move by the MPSBB, even if it were to be accepted, should not replace the first objective of the BD Act, that of conservation of biodiversity. The real purpose of ABS even in its broadest definition and not the minimalistic view of cash compensation, will fail if it separates itself from a conservation ethic. That is what needs to be constantly reinterpreted no matter what the case.