



# Policy Papers

## *Access and Benefit Sharing (ABS)*

ABS refers to the ways in which biological resources may be accessed and how the benefits resulting from their use be shared between the user and providers. Based on PIC (Prior Informed Consent) and MAT (Mutually Agreed Terms), as mandated by the internationally binding legal agreement i.e. CBD, India's Biological Diversity Act, 2002 lays down the structure for implementation of ABS. Given these provisions this policy brief looks at the status of ABS across the States of India.

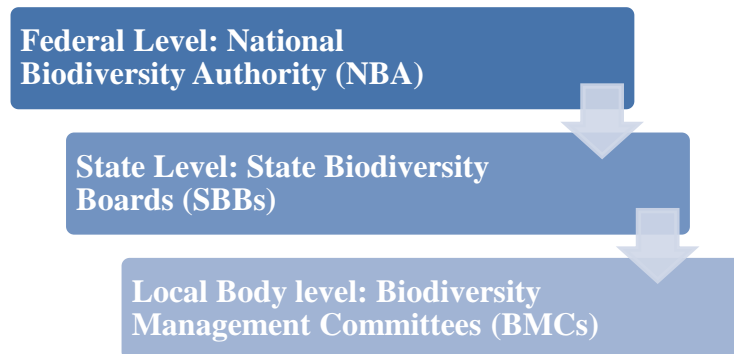
Convention on Biological Diversity (CBD), adopted at the Rio "Earth Summit, 1992 by reaffirming the sovereign rights of the countries over their biological resources, replaced the earlier notion that biodiversity was a common heritage (resource) of the mankind. Signed by 198 countries<sup>1</sup>, the internationally binding agreement is based on three fold objectives: the ***conservation of biological diversity***, the ***sustainable use of its components*** and the ***fair and equitable sharing of the benefits arising out of the utilization of genetic resources***<sup>2</sup>. To achieve the objectives of the convention, the Government of India (a party to the CBD) enacted the Biological Diversity Act, 2002 (BD Act, 2002) which came into effect on 05.02.2003 and notified the Biological Diversity Rules, 2004 (BD Rules, 2004) which came into force on 15.04.2004. For its implementation, the BD Act, 2002 institutes a 3 tier structure (as shown in the chart

<sup>1</sup> List of Parties: <https://www.cbd.int/information/parties.shtml>

<sup>2</sup> Article 1: Objectives: Convention on Biological Diversity: <https://www.cbd.int/doc/legal/cbd-en.pdf>

below) to ensure conservation of biological diversity, sustainable use of its components and equitable sharing of benefits from the use of biological resources and knowledge associated and matters connected thereto<sup>3</sup>.

**Chart 1: Institutional Structure under BD Act, 2002**



Given the above, this policy brief looks at the implementation of Access and Benefit Sharing (ABS) regime in India under BD Act, 2002 for pursuance of the third objective of the statute. The brief first looks at International Regime under CBD for regulation of access and sharing of benefits followed by the corresponding regime under India's BD Act, 2002. Given the legal provisions with respect to ABS, the brief then looks at the status of implementation of the same at the state level and the issues emerging therein.

## THE INTERNATIONAL REGIME ON ABS

The CBD established a global regime on access to genetic resources (GR) and sharing of benefits arising from their utilization also known as the Access and Benefit Sharing (ABS)<sup>4</sup>. As provided for in the CBD, it refers to the ways in which GRs may be accessed, and how the benefits that result from their use area shared between the people or

<sup>3</sup> See Preamble to Biological Diversity Act, 2002

<sup>4</sup> Pauchard, Nicolas. "Access and Benefit Sharing under the Convention on Biological Diversity and Its Protocol: What Can Some Numbers Tell Us about the Effectiveness of the Regulatory Regime." *Resources* , 2017: 1-15. <https://absch.cbd.int/api/v2013/documents/91888343-E9CE-7703-784C-34805BDEBCF6/attachments/resources-06-00011-v2.pdf>

countries using the resources (users) and the people or countries that provide them (providers)<sup>5</sup>.

Article 15 of the CBD recognises that States (providers of GRs) have sovereign rights over natural resources in areas within their jurisdiction and therefore the authority to determine access to genetic resources rests with the national government subject to national legislation. Users seeking access to GRs need to get permission from the provider country (known as Prior Informed Consent or PIC). Thereafter, the provider country and user have to negotiate an agreement to share benefits resulting from the use of GRs (known as Mutually Agreed Terms or MAT).

Given the provisions of Article 15 of the CBD, the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Benefit Sharing Arising From their Utilization (ABS) to the CBD was adopted in 2010. This was principally to provide 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<sup>6</sup>.

The current International Regimes on ABS under the CBD and Nagoya Protocol, determine that access to genetic resources requires prior permission from competent national authorities (CNAs) of a provider country, in line with an appropriate legal and institutional framework; where CNAs are bodies established by governments responsible for granting access to users of their genetic resources<sup>7</sup> and may entitle indigenous and local communities to also negotiate terms of access and benefit sharing<sup>8</sup>.

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<sup>5</sup>Convention on Biological Diversity: Fact Sheets in ABS series: Produced by the Secretariat of the Convention on Biological Diversity: <https://www.cbd.int/abs/infokit/revised/web/all-files-en.pdf>

<sup>6</sup> About Nagoya Protocol: <https://www.cbd.int/abs/about/>

<sup>7</sup> See Article 13 (2): National Focal Points and Competent National Authorities of Nagoya Protocol, 2010  
Convention on Biological Diversity: Fact Sheets in ABS series: Produced by the Secretariat of the Convention on Biological Diversity: <https://www.cbd.int/abs/infokit/revised/web/all-files-en.pdf>

<sup>8</sup> As per Article 6 (Access to Genetic Resources) of the Nagoya Protocol, In accordance with the domestic law, the contracting parties are required to take measures for obtaining PIC or approval and involvement of indigenous and local communities for access to genetic resources, where they have the established right to grant access to such resources.

As per Article 7 (Access to Traditional Knowledge Associated With Genetic Resources) of the Nagoya Protocol, in the context to access to traditional knowledge associated with genetic resources; In accordance with the domestic law, the contracting parties are required to take measures to ensure that traditional knowledge with genetic resources that is held by indigenous and local communities is accessed with prior and informed consent or approval and involvement of these indigenous and local communities, and that mutually agreed terms have been established.

PIC embodies the consent of the provider on the basis of the information given by the user regarding the description of the GRs, quantity of the GRs, time span in which the resources it to be collected, the purpose for which the access is requested including the type and extent of research, commercial use being derived and expected to be derived from it etc.<sup>9</sup>. After PIC is obtained, the users and providers have to agree on MAT, which establishes the conditions of access and uses of the resources and the benefits to be shared (monetary or non-monetary)<sup>10</sup>.

## THE INDIAN REGIME ON ABS

Given the International Regime laid down under CBD and Nagoya Protocol, India (a signatory to both CBD and the Protocol) has its own legal framework for granting access to biological resources (BRs) subject to PIC and benefit sharing based on MAT<sup>11</sup>. Under India's BD Act, 2002 read with BD Rules, 2004, a mechanism for regulating ABS is designated both at the national level and at the State level with the provision for mandatory consultation with legislative bodies at the local body level.

The Regulation of access to and sharing of benefits arising out of the use of BRs and associated knowledge is tabulated below:

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<sup>9</sup> Pauchard, Nicolas. "Access and Benefit Sharing under the Convention on Biological Diversity and Its Protocol: What Can Some Numbers Tell Us about the Effectiveness of the Regulatory Regime." *Resources* , 2017: 1-15. <https://absch.cbd.int/api/v2013/documents/91888343-E9CE-7703-784C-34805BDEBCF6/attachments/resources-06-00011-v2.pdf>

<sup>10</sup> Convention on Biological Diversity: Fact Sheets in ABS series: Produced by the Secretariat of the Convention on Biological Diversity: <https://www.cbd.int/abs/infokit/revised/web/all-files-en.pdf>

<sup>11</sup> It needs to be noted that while **as per the CBD**, the objective is to ensure fair and equitable benefit sharing arising out of the utilization of **genetic resources**; such that after adoption of Nagoya Protocol, the scope was extended to include traditional knowledge associated with genetic resources; the corresponding objective in **India's The Biological Diversity Act, 2002** is to ensure fair and equitable benefit sharing arising out of the use of **biological resources** and knowledge. The difference between biological resources and genetic resources as mentioned in the CBD is that **Biological Resources are inclusive of genetic resources** besides including organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use value for the humanity; such that Genetic Resources means genetic material of actual or potential use value.

**Table 1: Regulation of Access to BRs and Associated Knowledge under BD Act, 2002**

<b>Level</b>	<b>Competent National Authority</b>	<b>Purpose of access</b>	<b>Entity seeking Access</b>
<b>National Level</b>	National Biodiversity Authority (NBA)	Research or Commercial Utilization or Bio Survey and Bio-Utilization	Person not a citizen of India  Citizen of India who is a NRI  Body Corporate, association or organization which is not registered or incorporated in India  <i>or</i>  incorporated or registered in India under any law from time in being force which has any non-Indian participation in its share capital or management
<b>State Level</b>	State Biodiversity Boards (SBBs)	Commercial Utilization, or bio-survey and bio-utilization for commercial utilization	Citizen of India or body corporate, association or organization which is registered in India
<b>Local Body Level</b>	Biodiversity Management Committees (BMCs)	Mandatory for NBA and SBBs to <i>consult</i> BMCs while taking any decision relating to the use of BR and knowledge associated with such resources occurring within the territorial jurisdiction of the BMC	

**Notes:** While PIC in the context of NBA refers to prior approval from the NBA, in the context of SBBs it refers to prior intimation; however, SBBs on the receipt of the prior intimation and consultation with local bodies, may, by order, prohibit or restrict any such activity if it is of the opinion that such activity is detrimental or contrary to the objectives of conservation and sustainable use of biodiversity or equitable benefit sharing arising out of such activity. Provided that no such order shall be made without giving the opportunity of being heard to the person affected.

While the legal framework for PIC in India's context was laid down in the BD Act, 2002 and BD Rules, 2004, the legal certainty and transparency in MAT with respect to benefit

sharing came after the Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014 (ABS Guidelines, 2014). The Benefit sharing regulations as per ABS Guidelines are summarised below:

**Table 2: Regulation of Benefit Sharing as per ABS Guidelines, 2014 issued under BD Act, 2002**

Regulation of Access by	Benefit Sharing payable by the User	Share of NBA/SBBs in the Accrued Benefits	Share of the BMCs in the Accrued Benefits
<b>NBA</b>	<u>On the Basis of the Purchase Price of the Biological Resource:</u>  For Traders: 1.0 to 3.0 % For Manufacturers: 3.0 to 5.0%	5% of the benefits shall go to the NBA out of which half of the amount shall be retained by the NBA and other half may be passed on to the concerned SBB for administration charges	95% of the accrued benefits shall go the concerned BMC and/or benefit claimer
	<u>On the basis of Annual Gross ex-Factory Sales of Product minus Govt. tax paid</u>		
<b>SBBs</b>	For Manufacturers:  Up to Rs. 1 Crore: 0.1 % Between Rs 1 to 3 Crore: 0.2% Above 3 Crore: 0.5%	Not exceeding 5% of the benefits accrued towards their administrative charges	Remaining Share shall be passed on to the BMC concerned or to the benefit claimers, where identified

Note: Collection of fees, if levied by BMC for accessing/collecting BRs for commercial purposes from areas falling within their territorial jurisdiction shall be in addition to the benefit sharing payable to the NBA/SBB

## STATUS OF IMPLEMENTATION OF ABS IN INDIA

Given the legal provisions with respect to ABS in India, the section below looks at the status of implementation of ABS at the state level:

**Table 3: Status of Implementation of ABS at State Level in India**

S. No	State	Number of ABS Agreements Signed	Amount collected via ABS	ABS Amount disbursed to BMCs
1.	Uttarakhand	9	22,60,000	1, 00, 000 (BMC, Dudhai)
2.	Andhra Pradesh	8	1, 15, 00, 731	Nil
3.	Gujarat	60	83, 77, 035	Data Not Available
4.	Karnataka	Agreements signed with 119 companies	36, 25, 150	Nil
5.	West Bengal	14	13, 03, 223	Nil
6.	Uttar Pradesh	Agreement signed with only 1 Company (Dabur Ltd.)	11, 97, 000	Nil
7.	Maharashtra	Data Not available	8, 69, 505	Nil
8.	Telangana	14	1, 87, 000	Nil
9.	Odisha	2	88, 287	Nil
10.	Himachal Pradesh	1	10,000	Nil
11.	Sikkim	1	Data Not available	
12.	Tripura	7 Commercial users have entered into agreements; however, agreements yet to be executed		
13.	Kerala	Notices sent to more than 2000 companies; however, Agreement yet to be signed;		
14.	Madhya Pradesh	No data available, however strict steps are being taken at the Board level to ensure the strict adherence and implementation of ABS Regulations, 2014 with the involvement of various stakeholders like BMC's, traders, manufacturers, researchers etc.		
15.	Punjab			
16.	Goa			
17.	Bihar	Data Not available		No BMC Constituted
18.	Haryana			
19.	Jammu and Kashmir			
20.	Jharkhand	Nil (No Action taken in these States with respect to Implementing ABS)		
21.	Manipur			
22.	Meghalaya			
23.	Mizoram			

24.	Nagaland	
25.	Rajasthan	
26.	Tamil Nadu	
27.	Chhattisgarh	
28.	Arunachal Pradesh	
29.	Assam	

Given that the SBBs of Andhra Pradesh, Uttarakhand, Gujarat, Karnataka, West Bengal, Uttar Pradesh, Maharashtra, Telangana and Odisha<sup>12</sup> have been able to collect benefits, it is relevant to note the ABS strategy followed in some of these states. For example, the SBBs of Andhra Pradesh, Uttarakhand, Karnataka, West Bengal, Uttar Pradesh, Maharashtra had issued several notices/letters to agencies engaged in commercial utilization of biological resources directing them to comply with the provisions of ABS<sup>13</sup>. Specifically, the letters highlight the said agency's extraction of raw materials falls under the ambit of BD Act, 2002 as it counts as an act of accessing/collecting of biological resources defined 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"*<sup>14</sup> for 'commercial utilisation' defined

**Source: Replies received in the matter of Chandra Bhal Singh Vs. Union of India and Ors. NGT 347/2016**

*enzymes, food flavours, fragrances, cosmetics, nutraceuticals, serums, 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 agricultural, horticulture, poultry, dairy farming, animal husbandry or bee keeping"*<sup>15</sup>. Therefore, each of these agencies are required to give prior intimation to the relevant SBB in the form prescribed in the State Biodiversity Rules and Form (s) appended to the ABS Guidelines,

<sup>12</sup> In the state of Himachal Pradesh, the amount earned from Dabur Ltd. is the upfront payment received by the Himachal Pradesh State Biodiversity Board on account of upfront payment from the company, the ABS agreement is yet to be executed. As per the ABS Guidelines 2014, (Regulation 3 (3)) in case of biological resources of high economic value, benefit sharing includes an upfront payment that is payable before accessing the biological resource.

<sup>13</sup> Notices sent by different SBBs: Andhra Pradesh: 364; Uttarakhand: 608; Karnataka: 519; West Bengal: 384 Maharashtra: 600: Reply Affidavits filed by the SBBs in *C.B. Singh Vs. Union of India and Ors. Original Application (O.A.) No. 347 of 2016; National Green Tribunal, Principle Bench, New Delhi*

<sup>14</sup> Section 2 (C ) of the BD Act, 2002

<sup>15</sup> Section 2(f) of the BD Act, 2002



2014<sup>16</sup>. The information to be supplied by the user agency primarily pertains to details and specific information about the nature of such access sought and biological resources to be accessed such as its identification (scientific/common name), quantum of resource to be collected, specific purpose for access, commercial use to be derived from it and geographical location from where the resources are to be collected. Notices also highlight that in case of failing to give prior intimation as mandated by the law, it invites the penalty for a term which may extend to 3 years or with fine which may extend to five lakh rupees, or with both<sup>17</sup>.

### **‘From Policy to Practice’**

Given the notices issued by the SBBs and the benefits accrued, a practical issue as highlighted by the SBBs of Uttarakhand, Maharashtra and Karnataka that comes up while sharing these benefits with the BMCs is that the geographical origin of the biological resources accessed by the company is not known and hence it is difficult to identify the BMC to which the benefit share is payable. Specifically, for the state of Uttarakhand, the SBB has reported that *“in most cases, the origin of the biological resources being commercially recognised by the user agencies could not be established as they were purchased by traders”*<sup>18</sup>. Given the data available, Uttarakhand is the only state where any benefits accrued by way of ABS has been disbursed to the BMCs. Of the total benefits received by the SBBs i.e. Rs, 22, 60, 000, only Rs. 1, 00, 000 has been given to one BMC (BMC Dudhai, Dudhai Gram Panchayat, Sahaspur Block, Dehradun) which is 4.42% of the total benefits accrued to the Board. Further, for Maharashtra, with respect to benefits payable to the BMCs, SBB has submitted *“Geographical location tracing from where the biological resources have been accessed is under progress. After confirmation of geographical location benefit sharing will be transfer to concerned BMC”*<sup>19</sup>. Lastly, for Karnataka, considering the anonymity of the origin of bio-resources for which ABS was collected, it has been decided by the Board to let the PCCF (HOFF) identify four

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<sup>16</sup> See provisions of Section 7 read with 24 (1) of the BD Act, 2002 and Regulation 2(1) of the ABS Regulations, 2014

<sup>17</sup> See Provisions of Section 55 (2) of the Biological Diversity Act, 2002

<sup>18</sup> Reply Affidavit submitted by the Uttarakhand SBB in *C.B. Singh vs. Union of India & Ors.* Original Application (O.A.) No. 347 of 2016; National Green Tribunal, Principle Bench, New Delhi

<sup>19</sup> Reply filed by the Maharashtra State Biodiversity Board via Right to Information (RTI); RTI filed by LIFE

biodiversity-rich talukas (as ABS received is mostly for the use of medicinal plants) to which the ABS amount may be dispersed<sup>20</sup>.

The geographical location of the biological resources being unknown is tantamount to saying that the relevant BMC is unidentified; and it is indeed unlikely that the SBBs have undertaken mandatorily consultation with the BMCs as required under the BD Act, 2002.

Therefore, with respect to the implementation of ABS, it seems to represent a *top-down approach* followed at the State level, wherein agreements have been signed between the SBB and the concerned user agencies by sending notices directing them to comply with the relevant provisions of the statute. Benefits so received from the user agency are distributed to the BMC, wherever identified and in case not then it may be left to the wisdom of the Board to decide as the case with Karnataka. Instead of a *top down approach* followed with respect to ABS, it may be replaced by a more *bottoms up approach* where initiation of ABS starts at the level of the BMCs. In this context it is relevant to note the provisions of the law which provide for regulation of access to start at the level of BMC.

Firstly, as per the BD Rules, 2004 it is the main responsibility of the BMC to prepare a People's Biodiversity Register (PBR) in consultation with local people which contains comprehensive information on availability and knowledge of local biological resources (those falling within the areas of territorial jurisdiction of the BMC, which is same as that of its local body), their medicinal or any other use or any traditional knowledge associated with them<sup>21</sup>. The PBR thus prepared then serves as a legal document which confirms the sovereign rights of that BMC over the resources documented in the PBR. In addition to a PBR, BMCs are to maintain a register giving information about the details of the access to biological resources and traditional knowledge granted, details of the collection fees imposed and details of the benefits derived and the mode of their sharing<sup>22</sup>. As per the NBA issued Guidelines on Operationalization of Biodiversity Management Committees (BMCs), once constituted, a BMC is responsible for regulating

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<sup>20</sup> Proceeding of the 34<sup>th</sup> Meeting of the Karnataka State Biodiversity Board: <http://www.kbb.kar.nic.in/Board%20meeting%20proceedings-34.pdf>

<sup>21</sup> Sub-Rule 6 of Rule 22 of the BD Rules, 2004

<sup>22</sup> See Sub-Rule 11 of Rule 22 of the BD Rules, 2004

access to biological resources and associated knowledge for commercial and research purposes within its area of territorial jurisdiction.

Therefore, given the provisions of Central Rules and guidelines issued in furtherance of the Act and its Rules, the BMC takes decision at its own level on regulation of access to biological resource (taking into consideration the status and availability of the resource and after levying charges in exercise of its independent powers), and can inform the SBB about the same so that the procedure for ABS can then start at the SBB level in accordance with the provisions of the BD Act, 2002 and ABS Guidelines, 2014.

**A Bio cultural Community Protocol (BCP)** prepared at the level of a BMC may help in this regard. *“A BCP is a protocol that is developed after a community undertakes a consultative process to outline their core cultural and spiritual values and customary laws relating to their traditional knowledge and resources, based on which they clear terms and conditions regulating access to their knowledge and resources”.*<sup>23</sup> By listing the terms of access to biological resources and associated traditional knowledge (which is absent in a PBR), a BCP empowers communities to engage with the stakeholders involved in ABS at a more level playing field. Specifically, given the bottoms-up approach as recommended above, a BCP will enable a BMC to objectively evaluate each of the requests for accessing their biological resources and traditional knowledge. Within the ambit of the BD Act, 2002 it is only in the State of Uttarakhand where BMCs are mandated to prepare a BCP along with a PBR<sup>24</sup>. Though the exact format of the BCP is not made transparent by the Uttarakhand SBB, the BCP prepared for the Juni Village (Bageshwar, Uttarakhand) under the UNDP India Project gives an insight as to how the BMC may evaluate the request for access at its own level. As per the Jhuni BCP, for each request received, a BMC meeting is held to assess the same according to the intended use of the resources or knowledge and the BMCs decision is communicated to the SBB. The draft which entails terms and conditions for access are elaborated in consultation with the resource /knowledge seeker and the BMC. Further, in order to ensure

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<sup>23</sup> Bavikatte , Kabir & Jonas, Harry (Eds.), Bio-Cultural Community Protocols: A Community Approach to Ensuring the Integrity of Environmental Law and Policy. Nairobi, Kenya: Natural Justice and United Nations Environment Programme (UNEP), October 2009.: <http://cisdl.org/biodiversity-biosafety/public/docs/communityprotocols.pdf>

<sup>24</sup> See Sub-Rule 9 of Rule 19 of the Uttarakhand Biological Diversity Rules, 2015 which mandates that a BCP shall also be prepared to promote Access and Benefit Sharing (ABS) as an annexure to the People’s Biodiversity Register: <http://www.sbb.uk.gov.in/files/act/Uttarakhand State Biodiversity Rules English 2015-Final.pdf>

transparency in the process, the parties seeking resources/knowledge are required to disclose all the information about the intended use of the resource of knowledge and the likely benefits accruing from the use. The BCP contains a model contract for signing an agreement with the 3<sup>rd</sup> party whether from India or overseas. As a final step, given the consent of the community and in consultation with the SBB, a written agreement is signed by the BMC and the knowledge/resource seeker<sup>25</sup>. Therefore, in this manner, the BMC gets to have a direct say in the proposed ABS agreement.

However, for the ABS implementation to start at the BMC level only, it is firstly important to constitute the BMCs at the level of local bodies at least the gram panchayat level (from where the maximum resource collection takes place) by releasing them the basic funding as provided for in the NBA Guidelines on Operationalization of Biodiversity Management Committees (BMCs)<sup>26</sup>; thereafter build their capacity to generate their own finances (the statute empowers BMCs to levy charges by way of collecting fees from any person accessing/collecting biological resources for commercial purposes from areas falling within its territorial jurisdiction<sup>27</sup>) so as to ensure that BMCs are operational at the local level and then to take their awareness building and skill development with respect to ABS<sup>28</sup>. Only after BMCs are made operational at the local level followed by their skill building, can ABS implementation start from the local level.

## **OTHER PRACTICAL ISSUES WHILE IMPLEMENTING ABS**

In addition to the issues highlighted above with respect to implementation of ABS at the State level, there are other practical difficulties with respect to the same.

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<sup>25</sup> The Bio-Cultural Community Protocol for the Jhuni Village can be seen here: <http://www.undp.org/content/dam/india/docs/events2012/Bio-cultural-Community-Protocol-of-Danus-and-Takulis-Uttarakhand.pdf>

<sup>26</sup> As per the NBA Guidelines, a start-up fund of Rs, 60, 000 is to be paid to the BMC at the Village level' See Section 1.6: Methodology of the BMC Start up Fund Release in Guidelines for Operationalization of Biodiversity Management Committees: Published by National Biodiversity Authority: January 2013: [http://nbaindia.org/uploaded/pdf/Guidelines\\_BMC\\_1.pdf](http://nbaindia.org/uploaded/pdf/Guidelines_BMC_1.pdf)

<sup>27</sup> See Section 41 (3) of the BD Act, 2002

<sup>28</sup> In this context see Section 1.11: Capacity Building on BD Act and BMCs in Guidelines for Operationalization of Biodiversity Management Committees: Published by National Biodiversity Authority: January 2013: [http://nbaindia.org/uploaded/pdf/Guidelines\\_BMC\\_1.pdf](http://nbaindia.org/uploaded/pdf/Guidelines_BMC_1.pdf)

## 1. What Constitutes a Biological Resource?

One practical issue is with respect to the definition of the term 'biological resource'. To substantiate, the case of MP SBB is particularly relevant. Seeking to expand the meaning of biological resources to include fossil fuels such as coal, the MP SBB had sent notices to PSUs such as South Eastern Coalfields Limited (SECL) and Western Coalfield Limited (WECL) on the grounds that coal has its origin in plants as coal has been formed from the remains of vegetation, containing the genetic material of plants, it therefore is a biological resource. Since the company's extraction of the same is commercial utilization under the provisions of BD Act, 2002, the companies are bound to give prior intimation to the MP SBB. Given the understanding adopted by the Board with respect to biological resources, BMC Eklahara (Eklahara Gram Panchayat, Chindwara district, Madhya Pradesh) had sought NGT (Central Bench) intervention to declare coal as a biological resource so to allow the BMC to levy charges from companies (specifically, Western Coalfields Limited) extracting coal from various mines situated within the territorial jurisdiction of the BMC. While the MP SBB supported the BMC, the MOEF&CC and NBA disagreed on grounds that ***CBD and BD Act, 2002 define biological resources in terms of living resources having genetic material and not in terms of dead or fossilised materials.***

Going back the definition of the biological resources as defined in CBD wherein '*Biological resources*' includes genetic resources, organisms or parts thereof, populations or any other biotic component of ecosystems with actual or potential use or value for humanity; such that '*Genetic Resource*' means genetic material of actual or potential value; wherein the term '*Genetic material*' means any material of plant, animal, microbial or other origin containing functional units of heredity" the Tribunal took the view that one of the important components of Biological Resource is the genetic resource which in turn means any genetic material which has actual or potential use and contains functional units of heredity; wherein the basic functional unit of heredity is DNA (Deoxy Ribonucleic Acid) such that Absence of the functional units of heredity will automatically disqualify the material to be classified as genetic resource and consequently as biological resource.

Concluding that though coal is indisputably of plant origin, it does not in a fossilized form retain any genetic structure similar to that of plants and therefore, the Tribunal held that coal doesn't qualify as a biological resource and coal companies were not liable to pay any fees for accessing/ collecting coal from the area falling within the territorial jurisdiction of the BMC<sup>29</sup>.

## 2. The Question of a resource being 'normally traded'

Another aspect wherein more may be required with respect to meaning of "**Normally traded as commodities**" The BD Act, empowers the Central Government (in consultation with NBA) to notify certain biological resources wherein the provisions of the Act do not apply<sup>30</sup>. In exercise of its powers the government issued a notification dated 26.10.2009 where in it exempted 190 species of biological resources from the ambit of the Act. Later in suppression of the earlier notification dated 07.04.2016 the MOEF&CC notified 385 species of biological resources which are exempted from the provisions of the Act<sup>31</sup>. The explanation from the Ministry has been that *the notification is to facilitate trade of items including biological resources which are normally traded as commodities and if any of these items is intended to be used for any other purpose, the relevant provisions of the aforesaid Act shall apply*<sup>32</sup>.

On the similar lines, NBA has clarified as "*Such exemption is available only when the notified item is normally traded as commodity. When the same item is used as a resource in a process or for the development of a product, such item is not exempted and shall be treated as a biological resource, the access and obtainment of which is regulated by the provisions of this Act.*"<sup>33</sup>

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<sup>29</sup>Biodiversity Management Committee, Chindwara. 28/2013; 17/2014 (National Green Tribunal, Central Zone, Bhopal, 6 October 2015): [http://nbaindia.org/uploaded/pdf/CourtOrders/Court\\_28-2013\(CZ\)OA-Jug-06-10-2015.pdf](http://nbaindia.org/uploaded/pdf/CourtOrders/Court_28-2013(CZ)OA-Jug-06-10-2015.pdf)

<sup>30</sup> Section 40 of the BD Act, 2002

<sup>31</sup> Section 40 Notification by MOEF: <http://nbaindia.org/uploaded/pdf/notification/5%20%20NTC.pdf>  
[http://nbaindia.org/uploaded/pdf/Notification\\_of\\_Normally\\_Tradeded\\_Commivities\\_dt\\_7\\_April\\_2016.pdf](http://nbaindia.org/uploaded/pdf/Notification_of_Normally_Tradeded_Commivities_dt_7_April_2016.pdf)

<sup>32</sup> Refer to Notes (1) under Ministry's notification dated 07.04.2016: [http://nbaindia.org/uploaded/pdf/Notification\\_of\\_Normally\\_Tradeded\\_Commivities\\_dt\\_7\\_April\\_2016.pdf](http://nbaindia.org/uploaded/pdf/Notification_of_Normally_Tradeded_Commivities_dt_7_April_2016.pdf)

<sup>33</sup> Explanatory Note by NBA on Section 40: <http://nbaindia.org/content/565/56/1/explanatorynote.html>

However, while there are clarifications with respect to what the notification means, there is no clarification issued with respect to meaning of the term “normally traded”.

### 3. Biological Resources and Value-added Products

Another aspect wherein a better understanding may be required is the difference between biological resources and value added products. Given that BD Act, 2002 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* and Value added products as *“products which may contain portions or extracts of plants and animals in unrecognizable and physically inseparable form”*;

This is especially relevant to the case of AYUSH (Ayurveda, Yoga, Unani and Siddha and Homeopathy) industry. While the ABS Guidelines, 2014 were notified in November 2014, multiple SBBs by early 2015 had served several notices to AYUSH units; specifically, Maharashtra SBB had served notices to 1500 AYUSH manufacturers; Kerala SBB had sent notices to 800 ayurvedic manufacturers. Given that AYUSH manufacturers extract plant based materials for commercial purposes, they were mandated to give prior intimation to the SBB<sup>34</sup>. Given the industry’s claims as vague and confusing, the industry’s lobby group Ayurvedic Drug Manufacturers’ Association (ADMA) sought clarification with respect to implementation of BD Act, 2002 from NBA wherein one of the doubts was whether herb powders, oils, oleo-resins, extracts, isolated phytochemicals and other such items which are sourced in this processed form from the market / traders / suppliers are to be biological resources or value added products. On the query, ADMA’s own response was that since such biological resources have already been processed and sold (in such processed form) they are value added products and

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<sup>34</sup> Jinshu, Latha. “Bitter ABS Medicine for AYUSH.” *Down to Earth* , 15 March 2015. <http://www.downtoearth.org.in/blog/bitter-abs-medicine-for-ayush-48825>

hence are not covered under the ambit of ABS under the BD Act, 2002<sup>35</sup>. However, clarification from NBA is still awaited.

## CONCLUSIONS

As detailed above, there are several practical challenges which have emerged in the implementation of ABS with respect to BMCs. Further, one critical issue which has delayed India's implementation of ABS is the issuance of Guidelines on Benefit Sharing after more than 11 years of the promulgation of the BD Act, 2002. While a few states have actively worked towards seeking benefit sharing from industries involved in the collection of biological resources for commercial purposes, many states are yet to initiate ABS. Those that have managed to collect benefits have failed to provide the BMCs their legally mandated share in the same. Given the questionable status of holding mandatory consultations with the BMCs by SBBs, this brief recommends the ABS implementation to start at the BMC level itself.

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<sup>35</sup> See Section 1 of the letter written by ADMA to NBA dated 30.03.2015: [http://admaindia.com/downloads/subissue\\_ADMA%20543%20dt%2030-3-2015%20toSecretaryNBA.pdf](http://admaindia.com/downloads/subissue_ADMA%20543%20dt%2030-3-2015%20toSecretaryNBA.pdf)