

A Study of Bio-Diversity Act in India

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Abstract

India woke up to the potential of its immense bio-heritage and took steps to safeguard it by enacting several laws including Biodiversity Act. This is the time to find innovative solutions for conserving biodiversity and to provide effectual revenue models for native populations instead of just passing laws which are good on paper but remain toothless. The onus of safeguarding biodiversity is not just on Government or indigenous communities but on all of us as this is our common heritage. Policies are implemented in true spirit only when there is widespread knowledge about them. This paper explains in brief the concepts of ownership of biodiversity, factors responsible for its loss, economic advantage, access and benefits sharing, legislative measures and suggests ways of conserving biodiversity.

Keywords: bio diversity, protection of biological resources, implementation of bio diversity laws in India

Regulations and Requirements

Biodiversity Act, 2002 came into existence much later than the other existing laws on environment such as the Indian Forest Act, 1927, Wildlife Protection Act, 1972, Environment Protection Act, 1986 etc. Though all these legislations laid impetus on the conservation of the environment, yet none of them properly addressed all the dimensions of the ecological and biodiversity preservation.

The regulatory authorities constituted under the Act are the National Biodiversity Authority (NBA), the State Biodiversity Boards (SBB's) and the Biodiversity Management Committee's (BMC's). The NBA regulates the grant of approval –

- a) for obtaining Indian biological resources or knowledge associated thereto for commercial utilization, bio-survey or bio-utilization by foreign citizens, or foreign corporations, or non-resident Indians or Indian corporate bodies having non-Indian shareholding or management (Section 3 of the Act)
- b) for transfer of results of research relating to Indian biological resources by any person to

any foreign citizen, or non-resident or Indian corporate bodies containing foreign shareholding or management (Section 4)

- c) for applying for intellectual property protection including patents by any person in or outside India (Section 6).
- d) To regulate activities of, approve and advice the Government of India on matters relating to the conservation of biodiversity, sustainable use of its components and equitable sharing of benefits.
- e) To notify areas of biodiversity importance as biodiversity heritage sites under this act and perform other functions as may be necessary to carry out the provisions of the Act.
- f) To take measures to protect biodiversity of the country as well as to oppose the grant of intellectual property rights to any country outside or any biological resources obtained from India.

The SBB's regulate the grant of approvals for obtaining Indian biological resources for

commercial utilization, bio-survey or bio-utilization by Indian citizens or Indian corporate bodies (Section 7). The local BMC's provide consultation to the NBA and SBB's regarding the use of and the imposition of fees for accessing or collection of biological resources by any persons, whether legal or natural.

Further, the NBA deals with the requests for access to the biological resources as well as transfer of information of traditional knowledge to foreign nationals, institutions and companies. The recent developments relating to NBA implementation include the establishment of designated National Repository (DNR) under Section 39 as an important aspect of infrastructure for biodiversity conservation. This DNR provides service providers for preserved specimen consisting all faun, herbarium (dried plant material for research), living cells, genomes of organisms and information relating to hereditary and function of biological system.

Penalties and Offences

The Act stipulates that all offences shall be cognizable and non-bailable, which means that all offences under the Act shall be punishable with imprisonment for 3 years or more and that a police officer may arrest any alleged offender without a warrant.

Any contravention of the provisions of Sections 3, 4 and 6 of the Act, or attempt or abetment thereof attracts an imprisonment term of 5 years, or fine of INR 1 million (note: in case of the damage cause is greater than INR 1 million, then commensurate with such damage caused), or both.

Any contravention of the provisions of Section 7 of the Act, or attempt or abetment thereof attracts an imprisonment term of 3 years, or fine of INR 0.5 million, or both.

Furthermore, in case the offender is found to be a company, the directors and key managerial personnel of the company shall be deemed to be guilty of such offence, unless they prove that they the offence was committed without their knowledge.

Based on recent experiences in advising on this Act, the typical non-compliance or statutory violations found are as below -

- a) Objection from the Indian Patent Office ("IPO") with regards to failure in providing disclosure with respect to the use of biological resources for arriving at the invention for which a patent application has been made.
- b) Objection from the IPO with regards to the need for seeking approval of the NBA prior to receiving grant of the patent application.
- c) Notice from the NBA alleging violation of Section 3 of the Act on account of failure to seek approval of the NBA prior to accessing Indian biological resources for carrying out research.
- d) Notice from the NBA alleging violation of Section 6 of the Act on account of failure to seek approval of the NBA prior to receipt of grant of patents in countries outside India on inventions which are based on research or information on Indian biological resources.

In light of the above, it is amply clear that the access to Indian biological resources is heavily regulated and contains extremely harsh penalties for unregulated access. In view thereof, it is critical that in-house compliance teams in R&D organizations devise effective measures to contain statutory risks. Briefly outlined below are some steps that can be taken by those concerned -

- a) Pre R&D (for foreign individuals, NRI's, foreign corporations and Indian corporations having non-Indian shareholding or management)
 - Gather information from research teams regarding the material proposed to be obtained for a research project.
 - Identify whether such material is a "biological resource" or a "value added product". If there is no clarity, seek opinion of expert outside counsel.
 - Gather details regarding the date of procurement and details of vendors from who such material is procured.
 - Apply to the NBA for approval prior to obtaining the Indian biological resource.
- b) At the time of filing a patent application (for any person, whether legal or natural, whether Indian and non-Indian)
 - Intimate your patent counsel regarding use of a biological resource in the invention, if in case there is no clarity, seek opinion of the patent counsel.

- Provide undertaking regarding use of an Indian biological resource in the invention to the Indian Patent Office.
- Provide adequate disclosure of the source and geographical origin of the biological resource used in the invention.
- Apply to the NBA for approval prior to receiving grant of a patent whether inside or outside India.

Conclusion

Although, the Act is a noble attempt to protect the rich biological diversity of India, there are a number of reasons why it is a complex one to navigate, some of which are outlined below -

a. Inadequate explanations of the difference between key terms such as by-products and value added products has caused a lot of confusion, since by-products are included in the definition of biological resources whereas value added products are excluded; thus, causing unnecessary difficulty in ascertaining whether one lies under the purview of the Act, or not. Coherent and detailed examples from the concerned authorities will go a long way in getting rid of such confusion.

b. Non-adherence of the mandatory 90 day period for disposal of NBA applications, coupled with the denial of grants of patents by the Indian Patent Office (IPO) until receipt of NBA approvals, has lead

to massive increase in the bureaucracy, timelines and costs of the patent approval process. Since, India is well known for inordinate delays in patent approvals, this added burden could lead to a situation whereby filing a patent application is no longer worth the trouble. Delinking the NBA approvals to patent approvals would be a welcome move by the concerned authorities.

Experts are of the opinion that the country is losing a minimum of Rs 30,000 crores annually by not implementing the Biological Diversity Act, which has provisions for access and benefit sharing for commercial utilisation of bio-resources. It is ascertained that the NBA headquartered at Chennai is losing about Rs 10,000 crores annually from foreign companies as the guidelines are not applied properly. If the money had been realised through implementation of the Act, it could have been utilised for conservation of forests, wildlife, ecosystems and other bio-resources. As the Ministry of Environment, Forests and Climate Change (MoEF & CC) is the authority for implementing the Act, it should see that the provisions of the Act are enforced without any delay for conserving and sustainable management of the biodiversity.

It is high time that the central and state governments should wake up from their deep slumber and take speedy and earnest action to overcome disastrous calamities by implementing the Biological Diversity Act in its true spirit.

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