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- The WTO Agreement on Agriculture: Addressing India's Concerns
- Implementation of the Biodiversity Convention In India and Canada
- The Law on Wildlife and Protected Areas in India: An Analysis

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BOOK REVIEW

ENVIRONMENTAL CRUSADER

EDITORIAL

The *Indian Journal of Environmental Law* enters its second year with this issue. A few of the decisions taken at the time of the inauguration of the journal have been put into stream with this issue. The first one was to broad base the journal's editorial team so as to tap the latent talents of the students of the Law School. As an experiment in this direction, a large number of students have now been brought on board, and it is matter of great pride for me to report that almost every aspect of editing in this third issue of the journal, starting from the first draft of authors, to the final printed form, has been carried out by my students. The second decision was to encourage authors to turn "inward", and to bring out the environmental ethos of India. Accordingly, the call for papers specifically emphasized on this feature of the journal. The students of the Environmental Law programme, at the undergraduate level in the Law School, took upon themselves the responsibility of carrying out field exercises and preparing panel presentations (as part of their curricular requirements for the course), to produce well researched papers that reflected on local environmental problems, and relate them to the existing corpus of environmental law and administration. It gives me immense pleasure to inform the reader that this issue presents the first set of such efforts. The selections produced here are the efforts of a young group of students attempting to come to grips with the current environmental imperatives, the legal responses to them, and the level of preparedness of the Indian legal system to face the challenges and implement the *lex scriptum*.

The articles deal with diverse and yet closely related issues. In the paper concerning the agreement on agriculture, Indian concerns are addressed. The papers that follow carry out comparative studies of different legal systems, including that of India, concerning legal designs and aspects of implementation of international conventions on conserving heritage and biodiversity.

In the Notes and Comments section, in the paper on Indian wildlife law, the premise and the institution of management come under microscopic scrutiny. Possible approaches to the protection of traditional knowledge within the emerging national biodiversity law framework are also reviewed. In the Case Analysis section, tribal rights in scheduled areas are analyzed by revisiting the momentous judgement given by the Supreme Court of

India in the *Samatha Case*. The analysis acquires added significance in the light of current administrative practices and evolving legislative efforts, in relation to the balancing of tribal interests in, and grants of leases for, developmental activities within the scheduled areas in India. The section on Law in the Making examines the Protection of Plant Varieties and Farmers' Rights Bill, 2000, and the extent to which it addresses the concerns of the farmers in India. Vandana Shiva's significant work, *Stolen Harvest: The Hijacking of the Global Food Supply*, is reviewed in the Book Review section.

Profiling an Environmental Crusader, a section carried in the journal for the first time in this issue, features a tribute to the environmentalist Rajendra Singh, Secretary of Voluntary Organizations, Tarun Bharat Sangh, upon the conferment of the Ramon Magsaysay Award on him. The Board of Editors deems this a celebration of the triumph of native, local, Indian, and traditional conservation efforts.

I would like to record my sincere thanks to Dr. G. Mohan Gopal, Director of the Law School, for having given me the freedom to experiment and innovate. The student editors deserve the credit for this issue, and my heartfelt thanks are due to them. My gratitude also goes out to Govind Naidu (V Year, B.A., LL.B.(Hons.) Candidate) for having designed the cover for the journal. I also thank the National Printing Press for their fine hand in completing the demanding task of publishing.

The Editorial Board looks forward to receiving detailed studies that critically analyze local environmental problems, community perceptions, administrative prescriptions and practices highlighting the adequacies or failings of the legal ordering in India. We also look forward to receiving constructive critical comments from the discerning readers of the journal.

M. K. Ramesh
For the Board of Editors

THE WTO AGREEMENT ON AGRICULTURE: ADDRESSING INDIA'S CONCERNS

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"Farmers producing food for local markets have been suddenly subjected to the cold wind of international competition - and may find it impossible to compete with technologically advanced farmers in Europe or North America who can sell cheaply in part because they have benefited from massive subsidies. Expanding international markets may have created vast opportunities for some wealthier farmers, but the impact on the livelihood of the rural poor in developing countries has been harsh."[1]

Introduction

The Agreement on Agriculture[2] came into force on January 1, 1995. Ever since India became a party to it, questions regarding the stability and sustainability of agriculture have assumed significance. Further concerns have been raised about the trade-related aspects of the agreement, and the impact it will have on India's economy. The basis for these concerns is that agriculture has started to become commercialized in nature. Specific agreements under the World Trade Organization Agreement[3], particularly the AoA, influence most aspects of agriculture - the type of crops grown, the inputs to be used, the markets for sale, etc.[4] It seems that Indian agriculture stands at crossroads.[5]

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1 1995 report by the United Nations Research Institute for Social Development (UNRISD), *cited from* Khor, Martin, "Macroeconomic policies that affect the South's agriculture", http://www.commin.nic.in, visited on May 15, 2001.

2 Hereinafter referred to as "AoA", or "the Agreement."

3 Hereinafter referred to as the "WTO" Agreement.

4 In principle, all WTO agreements and understandings on trade in goods apply to agriculture, including the GATT, 1994, and the WTO agreements on matters such as customs valuation, import licensing procedures, pre-shipment inspection, emergency safeguard measures, subsidies and technical barriers to trade. The WTO Agreements on Trade in Services and on Trade-Related Aspects of Intellectual Property rights and Counterfeit Goods (TRIPS) are also applicable to agriculture. In case of any conflict between these agreements and the Agreement on Agriculture, the provisions of the Agreement on Agriculture are to prevail.

5 Swaminathan, M.S., "Livelihood Security must be the Bottomline," *Frontline*, February 16, 2001, p.112.

The predecessor to the WTO Agreement, the General Agreement on Tariffs and Trade, had completely ignored trade and market reforms in agriculture. Under the umbrella of domestic policy, agriculture in most countries received governmental patronage and protection. During the Uruguay Round in 1994, certain countries expressed their desire to establish a fair and market-oriented agricultural trading system.[6] According to the Punta del Este Declaration[7], the motivation for the inclusion of agriculture was "the need to bring more discipline and predictability into the world of agricultural trade by correcting and preventing restrictions and distortions including those related to structural surpluses so as to reduce the uncertainty, imbalances and instability in world agricultural markets." Another objective in including agriculture within the purview of the WTO Agreement was the achievement of binding commitment concerning market access, domestic support and export competition.[8] Special and differential treatment for developing countries was called to attention by the realization that agriculture was livelihood for the masses in most of these countries.[9] Therefore, the AoA recognizes that existing inequities in the hierarchy of nations be taken into account.[10]

The Indian justification for the commercialized system under the AoA is that it allows a higher degree of liberal trade access for imports into the country. This is premised on the assumption that such trade liberalization will benefit the Indian economy.[11] The other view is that the AoA is designed to force the pace of liberalization in a manner that significantly erodes the right of governments and local communities to determine the appropriate balance of liberalization and protectionism.[12] Amidst these conflicting views, it is clear that all World Trade Organization[13] member countries have to alter their agriculture policies in line with the AoA.

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6 Pressure from major agricultural exporting countries in the Cairns Group and concerns of the two major developed trading blocks – the United States of America and the European Union – placed agriculture in the Uruguay Round. Both the USA and the EU, as surplus producers, needed to find markets and reduce expensive subsidies. Disagreements between them over agriculture nearly stalled negotiations in the GATT until they reached a compromise agreement on agriculture in 1992. These two major trading blocks largely thrashed out the AoA and selected the base year and detailed targets so as to benefit them most.

7 The Declaration is part of the Preamble to the AoA.

8 **See generally** the Preamble to the Agreement.

9 As evinced in the Preamble to the AoA, liberalization of agriculture should take into account the possible negative effects of the implementation of the reform process on the least developed countries (LDCs) and countries that are not self-sufficient.

10 This finds recognition in the Preamble to the AoA, "…. [H]aving regard to the agreement that special and differential treatment for developing countries is an integral element of the negotiations…"

11 This school of thought opines that liberalization is the panacea of all distortions plaguing agriculture today.

12 This is the view taken by most developing countries, and ironically enough, by the people the AoA affects the most – the farming community. **See generally** http://www.commin.in.

13 Hereinafter referred to as the WTO.

On April 1, 2001, India removed quantitative restrictions on the import of agricultural products and committed to gradually remove export subsidies, under terms of the AoA. In addition, India has also agreed to control and limit the domestic support received for decades by its farming communities. It is essential that the AoA be examined and analyzed in the light of these rapid and far-reaching changes to India's agriculture and its economy. The major elements of the AoA are market access, domestic support and export subsidies. The paper will attempt to examine the provisions relating to these areas, and then propose suitable changes.

Market Access

This section deals with the duties that are to be imposed by the member countries on import restraints and import limitations.[14] In certain situations, countries allow imports up to some quantity at comparatively low tariff levels when ordinary tariffs are high. These quantities are termed tariff quotas. Imports exceeding the tariff quota are subject to the ordinary tariff rates. In the AoA, tariff quotas are to be allocated for three purposes:[15]

- **Current Access Opportunity:** If a country decides to follow the current access opportunity to fulfil its requirements under market access, then it has to provide an opportunity for levels of import that are equal or equivalent to the average imports level during the base period of 1986-88.[16]

The method often suggested to circumvent the objective of few restrictions on access under the WTO structure is to impose extremely low tariffs upto the current access opportunity level for imports, and subjecting any excess above this level to extremely high duties. This achieves a sort of status quo with the position that existed pre-AoA, whereby high levels of import tariffs were used to deter exporters. This approach ensures that the requirement under the AoA is fulfilled through adoption of the current access opportunity standard. The advantage of following such a method is that the member country can ensure that it is able to protect the domestic industry, while fulfilling its obligations under the AoA.

- **Minimum Access Opportunity:** Under this method, the member country has to ensure that the minimum access to domestic markets that is to be provided under the AoA, is at a level that is not less than 3% of the annual consumption during the base period in 1986-88. This level was raised to 5% in end-2000 for the developed countries, whereas the developing countries must do so by 2001.[17]

The strategy usually adopted is that low tariffs are imposed on imports upto this level, and

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14 Myneni, S.R., *The World Trade Organization,* Asia Law House, Hyderabad, 2000, p.45.

15 **See generally** Das, Bhagirath Lal, *WTO - A Guide to the Framework for International Trade,* Earthworm Books, Chennai, 1999, pp.230-35.

16 This period between 1986-88 is considered the base period because, the Uruguay Round took place in 1987 and the three years immediately preceding this period are considered the base period.

17 This period between 1995 (when the AoA came into force) and 2000 for the developed countries, between 1995 and 2002 for the developing countries, and between 1995 and 2004 for underdeveloped countries, is termed the "implementation period".

once this level is breached, the duty imposed is very high. This approach is advantageous to the member country's domestic industry, as AoA requirements will have been fulfilled, while retaining some degree of protection against imports.

- **Special Minimum Access Opportunity**: In this method of providing for market access, the standards are different for the developed and the developing countries. For the developed countries, the import opportunity for the year 1995 is to the extent of 4% of the annual average consumption in the base period of 1986-88, and thereafter it undergoes an increase of 0.8% every year till the year 2000. Some countries have opted out of the process of tariffication, and have instead chosen to follow this method of allowing for market access. [18] For developing countries that have opted for this method**,** the import opportunity in 1995 is to the extent of 1% of the annual average consumption in the base period and thereafter, it has to rise uniformly to 2% by 1999 and thereafter, it has to rise uniformly to 4% by 2004.

It is notable that all these opportunities could lead to a situation where extremely low tariffs are prevalent until the stipulated requirements of imports under the AoA are reached, and for imports above this level, importers face steep tariff levels.[19] Thus, the opportunity approach to access is riddled with loopholes, which restore the situation to that which prevailed before the AoA came into force.

Special Safeguard Provisions (SSPs)

Under the AoA, countries that are of the opinion that their domestic agriculture or agricultural products industries are suffering as a result of the increase in imports following the AoA can impose SSPs against the imports of such products, thereby providing some

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18 Examples of such countries are Japan, Philippines and the Republic of Korea. These countries have adopted this method for the import of rice into their territories. Israel has adopted this method for sheep meat and diary products.

19 The tariff levels are specified in the IV Schedule of each member country. A rough idea of what the Schedule contains with respect to market access, is indicated below:

Tariff No.	Description of Product	Base Rate of Duty	Bound Rate of Duty	Implementation Period	Special Safeguard(s)	Initial Negotiated Rate	Other Duties and Charges

Explanation of the various Columns

The first column indicates the tariff that is fixed on a particular product, and the second column specifies the product on which the tariff is fixed – the description is given to ensure that there is no confusion about the product. The third column indicates the existing duty that has to be subject to reduction under the AoA. The fourth column refers to the Final Bound Commitment Level (FBCL) of the Member in relation to that particular product. The sixth column refers to the safeguard that is recommended by the member country, and any safeguard provisions that the Member wishes to use in the implementation period. The seventh column refers to the Members with whom the host country has conducted initial negotiations to reduce tariff on the particular item, and the rate of reduction fixed consequently. This column assumes importance in the event that there is a future proposal to to raise the tariff. When this occurs, compensation for this rise in tariff above the FBCL is calculated based on the Initial Negotiated Rate.

protection to the domestic industry.[20]

The pre-requisites for the usage of SSPs are:

- Tariffication must have been accomplished for the product by the host country.[21]
- The product should be marked as an SSG (Special Safeguard).[22]

The SSP measure can be resorted to if the import price falls below a particular level, or if import quantity rises above a particular level.[23] These levels, termed triggers, are of two types. Article 5(1) (b) of the AoA provides that in the case of a price trigger, the SSP measure can be imposed if the price of imports falls below a particular level, called the Trigger Price. The Trigger Price is the average of the c.i.f. import price of the product in the base period of 1986-88. Art. 5(1) (a) provides for the quantity trigger**.** The actual quantity trigger level is the sum of two components: the first being the increase in import quantity and change in domestic consumption, and the second being the Base Trigger Level. The triggers are calculated on a shipment-by-shipment basis. In case of the quantity trigger, the higher duties only apply until the end of the year in question. In case of the price trigger, any additional duty can be imposed only on that specific shipment. The additional duties cannot be applied to imports taking place within tariff quotas.[24]

It is important to understand that in the case of a SSP, there is only an increase in duty and no quantitative restrictions can be imposed. Even if this additional duty is imposed, there are two conditions that are to be fulfilled:

The additional duty cannot be more than 1/3rd of the ordinary customs duty, which has already been recorded in the Schedule.

The additional duty that has been imposed, is for that particular year (current financial year) alone, and not for a longer period.[25]

Drawbacks in the Provisions for Market Access

Since the negotiation processes for the AoA included representatives from the developing countries, it is plausible to suppose that their interests had been safeguarded at that stage.

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20 **See** Article 5 of the Agreement.

21 Tariffication refers to the replacement of all quantitative restrictions, variable levies, import barriers and non-tariff measures with a single import duty, so that there is no change in the level of protection. **See** Das, Bhagirath Lal, *An Introduction to WTO Agreements*, Earthworm Books, Chennai, 1998, p.72.

22 The SSG is to be notified in the sixth column of the table shown in n.20.

23 **See** Article 5(4) of the AoA.

24 It may be noted that the Agreement on Safeguards can also be used for similar purposes. The significant difference is that for imposing a safeguard duty on products under the Agreement on Safeguards, the country imposing the duty has to prove and demonstrate that there has been an adverse effect on the domestic industry. However, when SSPs are used, no such requirement of proof or demonstration is required. It is also notable that the importing countries cannot resort to the use of both these measures under any circumstances.

25 **See** Article 5(4) of the AoA.

However, the provisions are inequitable in many ways, and detrimental to the Indian economy.

Issues relating to Special Safeguards

Access to the SSG is not universal - the right to make use of the special safeguard provisions has been reserved by 36 Members and for a limited number of products in each case. SSG has a built-in discrimination against the developing countries.[26]

Tariff quotas

The access opportunity has to be provided by low tariffs, which are specified in the Members' Schedules, up to a certain quantity of imports. The tariff quotas to protect the access, as a result of bilateral or plurilateral agreements, will, naturally, be country-specific. However, for other cases of access opportunities, the tariff quota should be global and not specific to countries, to ensure that all countries have the opportunity of utilizing the quotas. In the tariff quotas in agriculture, however, some developed countries have mixed up various elements of access opportunities and have liberally provided for country-specific tariff quotas. Thus, it appears that other countries do not have the possibility of utilizing these access opportunities.

Administration of tariff rate quotas

The administration of tariff rate quotas can take place in various ways, including entrusting import exclusively to state trading enterprises or producer organizations, auctioning of tariff quotas, limitations on imports of particular products under broadly defined tariff quota commitments (broad banding), and making imports under tariff quotas conditional on absorption of domestic production of the product concerned. In practice, several defects are noticed in administration, such as allocation to preferential suppliers and to non-members, low fill rates and problems in monitoring the administration of tariff rate quotas. In this context, it is interesting to note that there has been a recent compliant filed by the United States of America and Canada against India on the grounds that India has been violating the Anti-dumping Agreement. One of the arguments used by the United States and Canada is that the buying and selling of the wheat by India is being done by state trading corporations, and therefore the costs are less and so and so forth. So the AoA should be amended to state clearly that complaints on the bases of other arguments will not be entertained if they are in the course of acts done that are permitted by the AoA.

Experiences of other developing countries

A case study conducted in the Philippines shows the ill-effects of the lowering of agricultural tariffs on small holder producers who have to face dramatically increased competition from the industrialized and heavily subsidized farming systems take of North America and

[26] India favours universal accessibility to the special safeguard clause since this was denied to most developing countries, on the ground that it was linked to the tariffication process.

Europe.[27] A recent Oxfam report estimated that average household incomes of maize farmers would be reduced by as much as 30% over the next six years as cheap imports from the United States drive down prices in the local markets.[28] Under its WTO commitments, the Philippines government has no choice but to lower import barriers to half their present levels, over a span of six years. The report estimates that, in the absence of trade restrictions, American maize could be marketed at less than half the price of maize grown on the Philippine island of Mindanao, and that the livelihoods of up to half a million Filipino maize farmers (out of the total 1.2 million) are under immediate threat. This has specific significance for India, considering the primal contribution of agriculture to the economy in terms of revenues and employment.

Balance of Payments

India has an adverse balance of payments – the foreign exchange system is not stable enough for the import of food.[29] The population cannot afford to purchase food at relatively higher prices. It is wrong to assume that India can be protected from the market access provisions of the AoA, by merely resorting to the excuse of Balance of Payment (BoP), because the BoP exemptions only concern tariffication and does not cover market access (current and minimum market access).[30]

Domestic Support

Notably, the AoA recognizes that domestic producers may suffer.[31] The scheme, envisaged in the AoA, limits domestic support in the first year of implementation (1995) to a particular level and thereafter progressively reduced levels in subsequent years during the period of implementation.[32] For developing countries such as India, the reduction requirement is fixed at 13.3% in the period of implementation between 1995-2004. For the developed countries, it is fixed at 20%. This reduction has to be in equal instalments every year during the entire implementation period. The objectives of these provisions are to identify the acceptable measures of support, and to discipline trade distorting support to farmers.[33]

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27 Watkins, Kevin, "Macroeconomic policies that affect the South"s Agriculture", http://www.oxfamindia.org, visited on May 12, 2001.

28 *Ibid.*

29 A UN Food and Agriculture Organization (FAO) study on the impact of the Uruguay Round on agriculture concludes that the WTO will raise the food import bills of most developing countries because of the reduction in export subsidies on those products, and that it will also lead to a sizeable fall in the value of preferential trading arrangements. **See generally** http://www.wtnide.org.

30 Goyal, Arun (ed.), *WTO in the New Millenium,* 4th edition, Academy of Business Studies, New Delhi, 2000, p.185.

31 Domestic support refers to the support given by the Government to the domestic producers.

32 The maximum levels for each year is to be mentioned in the Schedule of every Member.

33 *Supra* n.15 at 242.

These objectives are achieved by quantification of domestic support, that is, Aggregate Measure of Support (AMS, also called the Amber Box)[34], followed by the progressive reduction of AMS.[35]

AMS Commitments

The AMS consists of two components:

- Product specific subsidies, i.e., the difference between the administered price (minimum support prices in India) and external reference prices (c.i.f. prices of imports and f.o.b. prices of exports), multiplied by the quantity of production which gets this support.
- Non-product specific subsidies, i.e., subsidies on inputs such as fertilizers, electricity, irrigation etc.[36]

The AMS commitments are aimed at restricting the high levels of agricultural support in developed countries. This objective is achieved by quantification of domestic support through the AMS system, and the progressive reduction of AMS.[37] There are three categories that are not subject to reduction under the AoA:

- Green Box Measures[38]
- Blue Box measures: These measures represent direct payments under the production limiting programme, and are relevant from the point of view of developed countries alone.[39]
- Special and differential treatment for developing countries.[40]

One notable feature is that there may be no resort to the Agreement on Subsidies and

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34 In some cases, it is not possible to calculate the AMS. In such cases, the Equivalent Measure of Support (EMS) is calculated. EMS is defined in Article 1(d) of the AoA, and the calculation of the EMS is provided for in Annex 4 to the AoA.

35 **See** Article 6 of the AoA.

36 For the technical definition of AMS, **see** Article 1(a) of the AoA. The procedure for the calculation of the AMS is provided in Annex 3 to the AoA.

37 **See** Article 6 of the AoA.

38 These measures are provided for in Annex 2 to the AoA. Examples of these are as follows:

- Government assistance on general services like research, pest and disease control, training, extension and advisory services
- Public stock holding for food security purposes
- Domestic food aid
- De-coupled income support
- Government financial participation in income insurance and income safety net programmes
- Payments for relief from natural disasters
- Structural adjustment assistance provided through producer retirement programmes, and investment aids
- Payments under environmental programmes
- Direct payments to producres, and payments under environmental assistance programmes

39 At a stalemate in the negotiating process, the Blair House Accord of November 1992 was struck to end the deadlock between the United States and the European Union. The resulting *Blue Box* accommodated the United States 1990 Farm Bill and the revised Common Agricultural Policy of the European Union.

40 Article 6 of the AoA. These subsidies include:

- investment subsidies generally available to agriculture in developing countries, and

Countervailing Duties.[41] Due restraint has to be taken in initiating countervailing duty investigations and the countervailing duty is to be imposed only after determining the injury caused to the domestic industry or its threat to do so. Action that is taken through the Dispute Settlement process under the WTO Agreement cannot be taken, especially with respect to agricultural goods.[42]

Drawbacks in the System

Provisions for special and differential treatment under the AoA pertain to the Least Developed Countries (LDCs) only. There do appear to be provisions that may be used by developing countries in this scenario, such as a long transition period, but it seems that the qualitative difference between the countries has not been substantively recognized in the AoA.

Dumping in Indian markets

The AoA allows for certain forms of domestic support that can be used by the developed countries, in order to continue support to their agricultural support systems, so that the costs that the farmers incur for export will be less than the cost of production. This will lead to dumping in the Indian markets, which would be to the detriment of the Indian farmers.[43]

The results of policies followed by the European Union and the United States over the past few decades has been to allow dumping or disposal of their surpluses in developing countries using various mechanisms (food aid, USDA PL480), subsidized exports) and have affected agricultural development in those countries. The WTO has stated that "the main complaint about policies which support domestic prices, or subsidize production in some other way, is that they encourage over-production. This squeezes out imports or leads to export subsidies and low-priced dumping on world markets."[44]

- exemption of agricultural inputs to "low income" and "resource poor farmers" from the calculation of the AMS
- subsidies that are provided to the farmers of the developing countries, in an attempt to wean them away from growing illicit narcotic drugs, is also not part of the AMS

41 It is notable that the United States is the most extensive user of countervailing duties. The legislative history for the 1979 Trade Agreements Act, 1982 which established the countervailing duties statute indicates that Congress intended the Act to satisfy American obligations arising from the Tokyo Round Agreements. **See generally** Jackson, John H., *The Jurisprudence of GATT and WTO*, Cambridge University Press, New York, 2000, p.89.

42 Article 13 of the AoA.

43 Paper prepared by the Ministry of Agriculture, Government of India, on *Review of WTO/Agreement on Agriculture*, following a Meeting of Farmer's Representatives, Political Parties and Voluntary Organizations, New Delhi, September 13th, 2000.

44 *Supra* n.27.

Calculation and implementation of the AMS

- AMS is to the advantage of the producers. These commitments are aimed at containing the high levels of agricultural support in developed countries.
- There are problems of systematic calculation.[45]
- There is no clarity regarding treatment of negative Aggregate Measurement of Support and "eligible production".
- There are also some genuine mistakes in certain calculations arising out of mistakes in base period prices, currency rates etc.
- Developed countries have been manipulating their subsidy commitments, and have been shifting their subsidies from the prohibitive "Amber Box" to the non-prohibitive "Blue" and "Green Boxes", thereby distorting international trade. India has proposed that the sum of all domestic support provided by the developed countries should not exceed an appropriate proportion of the total value of agricultural production. India has to resolve the technical problems regarding the calculation of the AMS. India should take a stance that the negative part of the AMS should be allowed to be added to the positive part. The calculation of the AMS should also take into account the high levels of inflation, while making the support notification to the WTO.[46]
- Problems faced during the calculation of AMS, arising out of the depreciation of domestic currencies, have to be sorted out. The definition of subsidies that can go into either the "Blue" or the "Green Boxes" should be secured to prevent any misuse of these provisions. Developing countries like India should be allowed to take measures to ensure food security, and resources spent on these measures should not be included in the calculation of AMS. In order to implement this, creation of a separate "Food Security/ Development Box" could be considered.[47]
- Processes such as tariffication and the calculation of the domestic support levels are complex. Developed countries may exploit the ambiguities in these processes to further their own policy agendas.

Uncertainty about specific domestic support

The commitment on domestic support is to limit it within the ceiling mentioned in the Schedule. A country can modulate the choice of the product and the rate of subsidy, depending on its own need. This keeps the exporters in other countries in a state of uncertainty. Therefore, they have some handicap in planning their own exports.[48]

Subsidized food stock of developing countries

The subsidy provided by developing countries in purchase of food for stocking and public distribution is exempt from the reduction commitment. However, the difference between

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45 **See generally** http://www.wto.org/wto/online/ddf.htmG/AG/N/IND/1.

46 *Supra* n.15.

47 *Ibid.*

48 *Ibid.*

the purchase price and the external reference price has to be included in the calculation of the AMS. The Annual Bound Commitment Level (ABCL) of the AMS mentioned in the Schedule of the country signifies that the support cannot exceed that level in that year. As mentioned earlier, it means that a country choosing to subsidize the food purchase for stocking, will have to reduce subsidies on some other items, so as to limit the subsidy to the bound level of the AMS in that year. This would be possible even without this special dispensation. Therefore, it seems that this provision, which appears to be a special favour for developing countries, is actually not so.[49]

Distortion in world food prices

Domestic support measures or subsidies disciplined through reduction in the total (AMS) and area of export subsidies affect the export of developing countries, rendering them uncompetitive when compared to subsidized exports of the developed countries. Furthermore, they also result in distortion of the world prices of agricultural commodities, and thereby adversely affect developing countries that are net importers of foodgrains.[50]

Peace Clause

Article 13 of the AoA ("due restraint" or "peace clause")[51] provides that "Green Box" domestic support measures cannot be the subject of countervailing duty action or other subsidy action under the WTO Agreement on Subsidies and Countervailing Measures (which is an agreement under the WTO), nor can they be subject to actions based on non-violation, nullification or impairment of tariff concessions under the GATT.[52] This is inequitable because subsidies covered by Annex 2, which are generally prevalent in developed countries, have been made immune from countermeasures and countervailing duty action, whereas subsidies that are generally prevalent in developing countries, e.g., investment subsidy and input subsidy, covered by Article 6, do not have this immunization. In fact, in this case, the stipulation, that due restraint should be shown in initiating countervailing duty investigations, is in the nature of a suggestion and not an obligation.[53]

Green Box

The "Green Box" appears to be favourable to developing countries. It is submitted that while this may be so, the protection is inadequate. Support programs that are financially

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49 *Ibid.*

50 *Supra* n.1.

51 The peace clause remains in effect for a period of nine years from the time that the WTO Agreement comes into force.

52 The purpose is to regulate the application of other WTO agreements to subsidies in respect of agricultural products. Other domestic support measures which are in conformity with the provisions of the AoA may be the subject of countervailing duty actions, but due restraint is to be exercised by members in initiating such investigations. Further, in so far as the support provided to individual products does not exceed that decided in the 1992 marketing year, these measures are exempt from other subsidy action or nullification or impairment action.

53 *Supra* n.15.

accessible to developing countries are glaringly absent. Hence, a review of the measures listed under the Green Box, which may require a tightening of criteria or re-classification may also be undertaken.

Effect on Public Distribution System

The Public Distribution System is exempt from any discipline as it is covered under the "public stock holding for food security purposes" and "domestic food aid" clauses of the AoA. The non-product specific support calculated in terms of the AoA in 1995-96 was 7.52% of the total value of production, against 10% allowed under the AoA.

Environmental resource management ignored

Treating food under these market-oriented GATT disciplines fails to take account of crucial food security objectives, such as the access of poor households to food[54], income, and employment opportunities. It also ignores the failure of market mechanisms to provide for effective environmental resource management.

Export Subsidy

The objective of the AoA is to control the unrestricted use of production and export subsidies. Export subsidy is the support extended by the government to exports by the host country. Each Member Country is required to reduce export subsidies from year to year in the implementation period. Such a reduction is consists of two factors[55]:

- Total budgetary outlays on export subsidies in the agricultural sector[56], and
- Total quantity of exports covered by the export subsidies.[57]

Export Restrictions

There are sufficient provisions for member countries to impose new restrictions on exports, other than the restrictions indicated in the Members' Schedules. Before any such export restriction is imposed, each Member is required to follow a certain procedure, which is laid down in the AoA. The procedure is as follows:

- Each Member has to give consideration to the effects of such an export restriction on other importing Members' food security, and
- The Member country that is imposing such export restrictions has to give notice to the Committee on Agriculture, before taking such action and also has to provide for

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54 A 1995 report by the United Nations Research Institute for Social Development (UNRISD), which refers to liberalization under SAPs states: "*Poor farmers in developing countries undergoing adjustment programmes have had no cushion of social security.*" In region after region, governments have eliminated subsidies and as a result small farmers have lost access to essential inputs and services, and many have suffered a steep fall in income or have had to cease farming altogether.

55 Article 9(2)(a) of the AoA.

56 Reduction by 36% for developed countries and 24% for developing countries.

57 Reduction by 21% for developed countries and 14% for developing countries.

consultation with Members who have substantial interests and will be affected in case such an export restriction is imposed.[58]

The above-mentioned restrictions on export subsidies are not applicable to developing countries like India, until and unless the developing country that imposes such a restriction is a food exporter of the food product on which such restriction is imposed.[59]

Drawbacks

Unfair advantage for developed countries

The developed countries have undertaken to reduce their domestic support, budgetary outlay for export subsidy, and the quantity of export covered by export subsidy by 20, 36 and 21% respectively over the period 1995-2000. Thus the bulk of their domestic support and export subsidy will continue to be applicable even beyond the year 2000. It must be noted that the farmers of developed countries have enjoyed protection and support for a long time in the past. They are more endowed with resources and enjoy a far more favourable environment of production and export, compared to farmers in developing countries today.[60] Thus, a level playing field is absent. Moreover, the domestic support and export subsidy provided by the governments in developed countries today further enhance the unfair advantage that the farmers in developed countries have over those in developing countries.

Countries not recording export subsidy earlier

Developing countries, which did not apply domestic support and export subsidy measures earlier, have naturally not recorded them in their Schedules, thereby debarring them from applying these measures in future, beyond the *de minimis* levels. This is a highly iniquitous position.[61]

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58 **See** Article 12 (1) of the AoA.

59 **See** Article 12 (2) of the AoA.

The table on Export Subsidy under Schedule 4 of the Member's Schedule:

Description of the Product and Tariff Item No. at HS Six digit Level	Base Outlay Level	Calendar/ other year applied	Annual and Final Commitment levels (1995-2004)	Base Quantity	Calendar and other year applied	Annual and Final Quantity Commitment Levels	Relevant Documents and Supplementary Tables

The Schedule contains descriptions of products covered by the subsidy, unlike the Schedule on Domestic Support, which contains only the amount, and not subsidies on the relevant individual product. Hence, products that are not included in the Schedule will not receive any subsidy for export, other than those that are applicable to all products because the Member country is a developing country, and therefore merits special and differential conditions.

In some cases, Members do not have a Schedule (if they have not submitted one). In such a case, there are no export subsidies available to the products that originate in that particular Member country, unless the AoA has exempted them.

60 *Supra* n.5 at 112.

61 *Supra* n.15.

Natural calamities

Liberalization assumes that the supply and flow of goods in the market will be relatively stable. This is far from reality. Problems of war, drought[62], flooding[63], and other causes of market instability can disrupt the flow of food. Therefore, India cannot rely solely on the market to ensure food availability.

Proposals for Change

An analysis of the AoA indicates that the agreement is not entirely favourable to India. The terms of the AoA perpetuate further control of global resources by the North. While some quarters in India will benefit, the AoA does not seem to benefit the greater common good. It is perhaps far too hypothetical to dwell on an alternate framework to the AoA, when India has already committed itself to the Agreement.[64] Within the framework of the WTO, there is a pressing demand for fair and beneficial provisions. Some proposals for reform are suggested in this regard.

Issues regarding Tariff Rate Quotas (TRQs)

- India should demand the total abolition of TRQs. If the abolition of the TRQs is not possible, an expansion of the TRQs should be preferred. Allocation of the TRQs has to be made more transparent. A ceiling on in-quota has to be made. Non-performing quotas (i.e., quotas that are not filled due to a lack of domestic demand) should be eliminated and an in-quota tariff rate should be made the applicable rate.[65]
- There should be a provision for ceilings on the peaks of tariffs in developed countries. There should also be tariff quotas with lower tariffs.[66]
- Tariff quotas should be made global, with very few strict exceptions. If country quotas follow bilateral agreements, the global tariff quotas should be an addition to these country quotas, to be shared by those that are not covered by the country quotas.[67]
- In the process of tariffication, developed countries have recorded very high tariffs in their schedules. Their farmers have benefited from protection for a very long time, earlier through direct import control measures and lately by prohibitive tariffs. In fact, developed countries undertook to reduce the tariffs only by 36% during the period 1995-2000.

62 Districts in Andhra Pradesh, Orissa and Gujarat have undergone severe droughts this year. Their (seasonal) crops have failed.

63 Parts of Orissa and West Bengal witnessed heavy showers, resulting in floods, and the consequent loss of life and destruction of property.

64 Pulling out of the Agreement at this stage is hardly a consideration, as India will incur serious economic hardship and international criticism; it will admittedly be a loss of credibility to the government to pull out of an international agreement.

65 *Supra* n.61.

66 *Ibid.*

67 *Ibid.*

Continuation of such a high level of protection of agriculture in developed countries is blatantly unfair. Developed countries should reduce their tariffs significantly during the five years beyond 2000. There should be a rational ceiling on their tariff peaks.

Beyond the *de minimis* level

Countries that did not domestic support and export subsidy measures earlier should now be permitted to apply these measures beyond the *de minimis* levels. As their farmers are in a generally disadvantaged position compared to those in developed countries, it is only fair to lift this restriction. So far, the exemption has been up to the *de minimis* level.[68] But considering that the countries that have taken these measures are able to retain the restraints and subsidization upto almost 65 to 80%, it is desirable to permit the others to take new measures up to levels substantially higher than the *de minimis* levels as well.

Aggregate Measurement of Support

With regard to the AMS, the options that may be considered are as follows:

- Set product-specific AMS as compared to total AMS
- Allow developing countries to recalculate AMS
- Schedules to be flexible
- Even higher *de minimis* levels for basic foodstuffs
- Exempt strictly food security measures
- Correct/clarify methodological problems

Support to household farmers and small farmers

In India, the majority of the farming community practises subsistence agriculture at the household level, and not as a commercial venture.[69] India has a large number of small farmers, whose farming activity will not be able to stand up to a large scale of international competition.[70] Hence, there must be some flexibility for countries like India regarding import restraint and domestic subsidy for the protection of, and support to, household subsistence farming and small-scale farming. There should be a clarification in Articles 3 and 4 for this purpose. It is submitted that India and other such countries should not be subjected to this restriction in Article 3 of the Agreement. Similarly, India, in its Schedules for reduction of domestic support and export subsidy, should be allowed some flexibility to enhance the levels of these measures, or to lessen the pace of reduction of the levels.

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68 The domestic support given to the agricultural sector within the specified *de minimis* level is upto 10% of the total value of the agricultural produce in developing countries and 5% in developed countries. See Article 6 of the AoA.

69 It is due to this factor that a purely market-oriented approach may not be appropriate for India. Proposals have been made from different quarters for a "market plus" approach, in which non-trade concerns such as maintenance of the livelihood of the agrarian peasantry and the production of sufficient food to meet domestic needs are taken into consideration.

70 Watkins, Kevin in a Report to the World Wide Fund for Nature (WWF) concludes that: *"Silently, relentlessly, and away from the glare of the world's media, "free trade" is displacing communities and destroying their livelihoods with all the ruthless efficiency of a civil war."* **See generally** http://www.oxfamindia.org.

Removal of inequity in Article 13

The subsidies of developing countries, covered by Article 6, should be made immune from countermeasures and countervailing duty action. Accordingly, Article 13 should be modified.

Exemptions for Alleviation of Rural Poverty

India needs flexibility within the AoA to pursue non-trade concerns such as food security and rural employment, distinct from the trade distortive support and subsidies presently permitted by the Agreement. Therefore, it is important that a differentiation is made between such domestic support measures that are presently being used to carve out a niche in the international trade environment, and between those measures that would allow developing countries to alleviate rural poverty.[71]

Amendments to the Green Box

Articles 1-19 are more about the interests of the major players, with special provisions included to placate developing countries. The protection envisaged in the Green Box is inadequate; support programs that are financially accessible to developing countries are glaringly absent. Articles 1-19 should be modified to accommodate the interests of the poor and food insecure.[72] An effective approach to food security would be to amend the Green Box. A review of the measures listed under the Green Box, which may require a tightening of criteria or re-classification, should be undertaken. This would build on the existing commitments in Article 20. This will allow reviews of the AoA to take into account non-trade concerns, such as "food security and the need to protect the environment"[73].

Limitations of the theory of Comparative Advantage

The Agreement is based on the rationale of open international trade in the agriculture sector. Thus, it presupposes the supremacy of the price system and the comparative advantage operating in this sector. In keeping with the theory of comparative advantage, a country must import its agricultural products from those countries that produce them more cheaply than its own production.[74] In practice, this will be disastrous for the food products of developing countries. It is prudent for India to encourage domestic production

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71 http://earthsummit2002.org, visited on August 8, 2001.

72 **See generally** "The World Trade Organization and food security – opportunities for action", http://www.sdnp.delhi.nic.in, visited on August 8, 2001.

73 As mentioned in the Preamble to the AoA.

74 For the United States, the case for free trade is self-evident as a third of its agricultural output is now exported, earning $40 billion. The agri-corporations need foreign markets to absorb domestic surpluses, and the Pacific Rim region (which already accounts for two-thirds of US farm exports) is expected to be the biggest market. This would justify the drive for free markets and a level playing field. US supremacy in world markets derives less from comparative advantage than comparative access to subsidies. **See generally** Watkins, Kevin, "The WTO Agriculture Agreement," http://www.oxfamindia.org, visited on May 15, 2001.

of necessary food items even if the domestic production is more costly compared to the import of the food articles.[75]

Food aid

For the net food-importing developing countries like India, there should be provisions permitting food aid and soft loans to buy food in the international market. Countries that are consistent net exporters of food products must shoulder this burden.

Agenda for developed countries

Developed countries should totally eliminate their domestic support and export subsidy. They should accordingly provide schedules for their domestic support and export subsidy applicable from 2001 onwards until 2005, by the end of which the levels should be zero. This is because their farmers have long enjoyed immense protection, and the special concession given to countries like India still does not ensure a level playing field.

Relief to net food-importing countries

An amendment may be contemplated to Article 12, containing specific and concrete action for relief.[76] At present, Article 12 is not very specific on relief to the net food-importing developing countries. There should be more operational and effective provisions for this purpose. A Fund may be opened for this purpose, with the major exporters of agricultural products being contributors. Specific criteria for the contributions to the fund should be worked out and made enforceable in the agreement.[77]

Subsidies

The subsidy provided by developing countries for the purchase of food products for public stocking should be excluded from the calculation of the AMS, as in the case of other exempted subsidies. The subsidies covered by Article 6 of the Agreement, particularly the investment subsidy and input subsidy of developing countries, should have the benefit of exemption from countervailing duty and countermeasures as in the case of the subsidies listed in Annex 2 to the Agreement.

Elimination of Export Subsidies in the long run

The Agreement allows only 25 countries to provide for export subsidies to their agricultural products. This will obviously affect the competitiveness of the agricultural products of the developing countries. India should support the Cairns Group's[78] view that the export subsidies should be eliminated within an agreed period of time.

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75 *Supra* n.15.

76 **See** Article 12 of the AoA.

77 Third World Resurgence No. 100/101, Dec 98/Jan 99, Ministry of Agriculture, **cited from** http://www.twnside.org, visited on May 12, 2001.

78 The Cairns Group consists of countries such as, Australia, New Zealand, Thailand, and Argentina. The Group is pressing for the removal of trade barriers, deep cuts in tariffs, and the elimination of export subsidies.

National Food Policies to be outside AOA

The strategy envisaged in the AoA is that continued growth in world trade will allow food-deficit countries[79] to produce and export other primary products, industrial goods, and services that should enable them to purchase significant quantities of food from food-surplus countries in both the North and the South. For this food to reach the food-insecure in poor countries, the development of effective national food security policies is required. The AoA must permit such policies, and in doing so, must not be strict about the interpretation of the exemption to the AMS.[80]

Domestic production

All possible encouragement must be given to domestic food production. Hence, it is suggested that India and other developing countries should be permitted to protect its production against cheap imports and provide domestic support to the production.[81] Self-sufficiency in food production has a specific developmental perspective, as opposed to a purely commercial perspective.[82]

Concluding Remarks & Perspectives

The attempt in this paper has been to highlight the iniquitous nature of the AoA. Even indulging in an overestimation of quantifiable costs (let alone non-trade concerns), it is evident that the costs outweigh the benefits.

They see this as essential if they are to have entry into the rich markets of the USA, Europe and Japan. Australia, for example, wants trade in agricultural goods to be put on the same basis as other goods in the next negotiating round. New Zealand is supportive of the US position in TRIPS. Due to domestic reforms in US agriculture, the United States is no longer defensive about domestic support, and in alliance with the Cairns Group, sees the EU as the problem (together with some of the larger Asian economies). The biggest stumbling block to their informal alliance is State Trading Enterprises, which the US wants to forbid under the WTO rules, but on which many Cairns members rely for their export promotion efforts.

79 India probably falls in this category – not so much for food-deficit as much as for improper and inefficient management of foodgrains.

80 FAO suggests that these policies must ensure higher food entitlements for both the rural and urban poor through sufficient access to food made possible by income generation and employment. **See generally** Webb, von Braun (1993), "Conceptual framework for famine analysis: A household income approach", International Food Policy Research Institute (IFPRI), Washington, D.C.. **See also** Chung, Haddad, Ramakrishna and Reily (1997), "Identifying the Food Insecure: The application of mixed-method approaches in India", International Food Policy Research Institute (IFPRI), Washington D.C.; *Supra* n.77.

81 This proposition recognizes the limitations of a purely balance-of-payments (BOP) approach, which is of a temporary nature, and exclusively trade-centred.

82 A World Wide Fund for Nature (WWF) International Report concludes that producers in developing countries will continue to face competition in local markets from subsidized imports, with adverse consequences for their livelihood. Exporters among them will also continue to compete in world markets where prices are artificially depressed by subsidized exports from the EU and the US. **See generally** http://www.oxfamindia.org.

- There is a need for checks and balances. There is a vestige of usefulness in the concept of sovereignty, when it is used to express the concept of checks and balances against too much concentration of power in an international institution.[83]
- Greater participation of citizenry: The community opposing the AoA most is the agricultural community. Open and accessible procedures to voice local concerns are what India needs.
- Some global governance structures are needed to regulate transnational enterprises, as individual governments cannot. So far the focus has been on opening up markets rather than on safeguards and responsibilities to go with investor rights.
- The WTO is placing external pressure towards liberalization at a forced pace, and in a manner that significantly erodes the right of governments and communities to determine the appropriate balance of liberalization and protection. Such "liberalization under pressure" is bound to have negative social consequences.

Internal Constraints

There are various internal constraints that if not appropriately addressed, would severely limit the capacity of India to increase domestic production to at least a certain minimum percentage of their requirement.

Land holdings are small, and the majority of farmers belong to the small and marginal category. This limits any attempts to introduce mechanized farming and also constrains the adoption of new technologies unless accompanied by large-scale extension programmes. Agricultural productivity is low and total production varies substantially, since a large percentage of the agricultural sector continues to suffer from natural uncertainties. Further, only a small percentage of the produce is sold in the market, the rest being used by the small and marginal farmers for sustenance or for simple barter. There is increasing pressure on land from non-agricultural users, including multinational corporations.

Agriculture is still at a stage in India, where it needs governmental support in the use of inputs, particularly irrigation, electricity, fertilizers, pesticides, technical know-how, high yielding varieties, infrastructural development, market support, etc.[84] The removal of such aid will cripple Indian farmers. The AoA must bear in mind such cultural and economic factors. The character of agriculture in India is, and will continue to undergo major change. In the ever-increasing tendency today towards commercialization, "trade should become an ally in the equity movement and not a source of aggravating inequity."[85]

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83 *Supra* n.41 at 454. The macroeconomic framework that provides the background for agriculture policies in the South is undergoing important and dramatic change. Whereas previously, national governments determined the policy framework for agriculture, in recent years, countries undergoing structural adjustment programmes (SAPs) have had to accept the SAP framework in agriculture. Now India under many – though perhaps, less obvious – compelling factors, had to embrace the WTO Agreements.

84 *Supra* n.1.

85 *Supra* n.5 at 118.

IMPLEMENTATION OF THE BIODIVERSITY CONVENTION IN INDIA AND CANADA

Venkatesh Vijayaraghavan*

Introduction: The Framework of Law provided by the Convention on Biological Diversity

The United Nations Convention on Biological Diversity[1] was signed at Rio de Janeiro in 1992 by 157 Parties or States. As of March 2000, the Convention on Biological Diversity has been ratified by 176 nation states and the European Community. The United States of America has not ratified the Convention, owing to differences with the rest of the world community on key issues in the Convention, such as intellectual property rights.[2] For that

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1 Hereinafter referred to as "the Convention".

2 See Benjamin, Craig, "U.S. Still To Ratify U.N. Biodiversity Convention", http://www.gene.ch/gentech/1998/Jul-Sep/msg00093.html, visited on December 5, 2000.

reason alone, it is questionable as to whether this Convention has become part of the corpus of customary international law. Indeed, there has been no positive assertion to that effect. However, the unusually large number of signatories and ratifiers of the Convention indicate that there is substantial world opinion and agreement on the subject.[3] There have been some attempts at conserving biological diversity prior to the Convention, especially in countries such as the United States,[4] although there have been none on the scale attempted by the Rio Summit. The effectiveness of such global policy needs to be examined, and will be attempted by this paper, in the most obvious way –by looking at the implementation of the Convention at the national level, and noting differences in approach and policy. Before embarking on the comparison, studies showing the approaches of the two countries, in their individual light, are carried out. This is necessary because some of the characteristics of the approaches may not be immediately amenable to comparison. A comparative study, if carried out from the beginning, may also have the effect of inducting some sort of bias into the study, which is not desirable. Additionally, a comparative study may also be unwieldy. Therefore, the comparisons are carried out after a due sketch of the reigning international policy and the national developments in their own contexts.

A Note on Biodiversity

The Rio Summit brought to light the serious global deficiencies in biological diversity, hitherto not understood properly, even at the conceptual level. It also stressed on the need to save the estimated 5 million species on the planet.[5] Commentators and scientists have generally agreed that biological diversity is on the decline, and have especially noted this during the period following the Convention.[6] The race for development has hardly begun to slow in favour of the environment. Therefore, an instrument such as the Convention

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3 The common assumption of success due to the large number of heads of state meeting should not be made – rather, it may only be indicative. Indeed, commentators have argued that the Convention was a failure, because "rules, regulations and relationships" were not altered in any significant way. **See** Susskind, Lawrence E., "What will it take to ensure Global Environmental Management? A Reassessment of Regime-building accomplishments", pp.221-232 at 221 in Spector, Bertram L., Sjostedt, Gunnar and Zartman, I.William, *Negotiating International Regimes: Lessons learned from the UNCED*, Graham and Trotman, London, 1994.

4 For example, **see** the International Cooperation to Protect Biodiversity, 1988 and the Special Foreign Assistance Act, 1988.

5 Estimates vary between 5 million and 100 million species, although the number described is only 1.4 million. **See** United Nations Conference on Environment and Development, *The Global Partnership for Environment and Development – A Guide to Agenda 21*, Geneva, 1992, p.67.

6 Swanson, Timothy M., "Why does biodiversity decline? The analysis of forces for global change", pp.1-9 in Swanson, Timothy M. (ed.), *The Economics and Ecology of Biodiversity Decline: The Forces Driving Global Change*, Cambridge University Press, Cambridge, 1995. The reasons cited include:

- choice of development path
- institutional failure

assumes larger importance, as the sole regulator of development.[7] The fear held by certain countries that there would be very bad consequences as a result of the continuing destruction of natural resources was created because of the feeling that developing nations were taking the same road. This was, partially, a reason for the development of the Convention. This does not augur well for the instrument, and indicates some hypocrisy in the system.[8] International instruments of this nature have been heavily criticized, especially in this area.[9] Whether the Convention will belie these criticisms through its effectiveness, remains to be seen.

Comments on the Convention on Biological Diversity

The role played by international instruments in shaping environmental policy is well documented. Environmental law is one of the areas in which the influence of international law is extremely pervasive and persuasive. In this context, it would be worthwhile to examine the impact of one instrument[10] in the face of about a decade of national developments among the signatories to that instrument – the Convention on Biological Diversity, signed by 157 States in 1992 at the city of Rio de Janeiro. There are several advantages in making this a comparative study, including that the information provided would be able to show the impact in different countries, in different stages of development. For this reason, the two countries chosen were India and Canada.[11] One is a country considered part of the developing international community as envisaged by its Western counterparts, and the other is a state considered developed by those same parameters. A comparison will note the difference in approach, if any, and accordingly account for the reasons for this. It is important to note such differences if they are to be caused by the state

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- policy failure
- development

7 This is not an assertion, since development, in the traditional sense, has not ever slowed down in favour of the environment, at least on a global level. However, there are no other instruments that seem to bar this kind of development, leaving aside controversial neo-colonialist documents such as the WTO agreement.

8 Magill, Frank N. (ed.), *Chronology of Twentieth-Century History: Ecology and the Environment*, Volume 2, Fitzroy Dearborn Publishers, Chicago, 1999, p.1445. This is also accentuated by claims by the United States of America that the figures demanded by the Convention did not take into account the ability of developing countries to absorb the aid.

9 For example, **see** the discussion in the World Bank's Biodiversity Action Plan in Shiva, Vandana , "Globalism, Biodiversity and the Third World", pp.47-66 at 54-56 in Shiva, Vandana, Norberg-Hodge, Helena, Goldsmith, Edward and Khor, Martin (eds.), *The Future of Progress – Reflections on Environment and Development*, Natraj Publishers, Dehra Dun, 1994. **See also** Shiva, Vandana, "Earth Summit: Towards an Earth Democracy", Third World Network, *Earth Summit Briefings*, Penang, 1992, pp.15-16.

10 According to a report by the United Nations Environment Programme, there were about 150 multilateral agreements devoted specifically to environmental issues by 1991. **See** DeSombre, Elizabeth R., "International Environmental Policy", pp.361-377 at 374 in Nath, B., Hens, L., Compton, P. and Devuyst, D. (eds.), *Environmental Management in Practice – Managing the Ecosystem*, Volume 3, Routledge, London, 1999.

11 The inclusion of a third country would have restricted detailed study.

of development of the country. This will be very important to understand the impact of the development of international environmental law through the international convention method.

A short study of the Convention itself as a legal instrument, including the kind of preparation that went into it, and the reasons for its genesis will be in order to understand the political intention behind it. This is important because an understanding of the policy ideas behind the Convention is vital to any understanding of subsequent law based on such policy.

The Development of International Environmental Policy

It has been observed that international environmental policy is difficult to make, due to the lack of a higher authority within the international system to impose or enforce regulations.[12] Notwithstanding this basic obstacle, some States have taken steps to implement environmental policy on as global a scale as possible.[13] It is said that negotiations tend to travel at the speed of the "slowest boat" and constitute the lowest common denominator approach to international problems.[14] It is inevitable that such a process should have its inequalities. Some States do not find themselves with sufficient bargaining power at the negotiating table, nor are they in a suitable position to suit risks, both to their development and their environment, which will be consequent to the acceptance of international obligations in this area.[15] Therefore, it would normally be expected that any such treaty or convention would meet with substantial reluctance and circumspection. It is remarkable to see the progress achieved by the Convention on Biological Diversity, especially in this respect – an atmosphere of consensus has prevailed on the subject of bio-diversity, and the 176 ratifications that the Convention has received are testimony to this fact. An analysis of the Convention itself is now in order, to understand the reasons for such a scale of agreement, not commonly seen at the international level.

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12 *Supra* n.10 at 361.

13 They are not without help in this area, as pointed out by some learned commentators. The "weapons" available include:

- Increased scientific knowledge
- Supportive domestic public
- International organizations to assist in overcoming problems of collective action
- Financial and technical assistance
- Economic sanctions
- Improved monitoring and compliance mechanisms

For an excellent analysis of the methods of development and implementation of general environmental policy, see ***ibid*, pp.362-372.**

14 Kellow, Synsley, *International Toxic Risk Management*, Cambridge University Press, Cambridge, 1999, p.7.

15 **See** Khor, Martin, "Democratising global economic relations is the key to resolving the environment crisis", Third World Network, *Earth Summit Briefings*, Penang, 1992, pp.37-41. **See also** Ling, Chee Yoke, "Unequal negotiations in an unequal world", Third World Network, *Earth Summit Briefings*, Penang, 1992, pp.71-75.

The Convention

The instrument firmly conveys[16] a right and a duty upon the Contracting Party – the right to exploit resources pursuant to their own environmental policy, and the responsibility to ensure that activities within the control of the Contracting Party do not cause damage to other States or places beyond the control of the Contracting Party.[17] The nature of this duty becomes important due to the possibilities proposed by the theory of global commons, and transboundary issues, of which biological diversity is an integral part. It may also be seen that this is the starting point of most of the agreement that has resulted in the Convention – the base of sovereignty is indispensable.[18] Limits have been imposed by the obligation under the Convention, and therefore, the Contracting Party is precluded from taking the defence to the exclusion of any other existing duties. The expansion of the nature of this duty will, eventually, provide the basis for an international environmental law regime, until now prevented by the defence of sovereignty.[19]

The definition of biodiversity, according to the Convention, is variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.[20] This is a broad definition, which is suitable to this kind of instrument.[21]

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16 The debate between conferment and recognition of the right and duty will play an important role in determining the relations between Contracting Parties and the States that are not party to the Convention. In any case, even if the right is claimed as inherent, the duty is established in law, and it is clear that no right embedded in sovereignty can be utilized to damage the environment naturally available to other countries, individually and collectively.

17 Article 3 of the Convention.

18 This has also caused the result that very few requirements are provided by the Convention itself, and most of the limit-setting and other requirements are left to the Meetings of the Parties. This is slightly faulty as the Treaty dictates the main obligations, and the Meetings are only secondary.

19 It is not surprising, therefore, that one of the ablest supporters of the rights founded on sovereignty, the United States of America, is not a party to the Convention. This is not to say that there does not exist care for the environment in that country. On the contrary, the United States has a well developed system of legislation (several Acts passed by federal and state legislatures), administration (bodies such as the Office of Environmental Quality, the Council on Environmental Quality, the Environmental Protection Agency, the National Oceanic and Atmospheric Administration, and the National Industrial Pollution Control Council) and the judiciary (the Supreme Court can declare legislation invalid if it conflicts with the Constitution, and criminal proceedings in environmental matters are conducted on behalf of the State). **See** McLoughlin, J and Bellinger, E.G., *Environmental Pollution Control – An Introduction to Principles and Practice of Administration*, Graham and Trotman, London, 1993, pp.185-195.

20 Article 2, Convention on Biological Diversity, 1992.

21 Another definition, given by the United Nations Environment Programme is as follows: "the number and variety of living organisms on the planet. It is defined in terms of genes, species, and ecosystems which are the outcome of over 3,000 million years of evolution."

See "An explanatory leaflet about the Convention on Biological Diversity", http://www.unep.ch/bio/bio-leaf.html, visited on December 10, 2000.

The problem of free-riding becomes especially complicated when developed countries choose not to be a party to conventions evolving environmental law, caused often by the impasse between morality and practicality.[22] It is the less developed countries that suffer due to these decisions of "enlightened self-interest".[23] A major obstacle to the fulfilment of the ideals of the Convention is that no limits are specified in the Convention, for the purpose of conservation.[24]

Another problem associated with the Convention is that it forms a part of the international law created by negotiating treaties on narrow subjects – this has its advantages and disadvantages.[25] There are difficulties associated with monitoring compliance as well, a problem not specific to this convention, though well manifested by the vague terms used.[26]

A last problem is that the variety of dispute settlement procedures provided in Article 27 of the Convention seems to allow more to sovereignty than to effective dispute resolution. This arose because of the narrow nature of the treaty and the number of states involved.[27]

Several obligations can be implied from the Articles of the Convention and the Decisions of the Conference of the Parties.[28] The extensive nature of these obligations and the procedural measures taken by the Convention, try to ensure to some extent that development does not go unrestricted.[29] The problems with such an approach will be apparent on a study of the implementation undertaken by the member States. The methodology of such implementation varies between States, although they follow a common principle, such as

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22 Kellow, Aynsley, *International Toxic Risk Management*, Cambridge University Press, Cambridge, 1999, p.11.

23 In this context, it is good to note that the declaration at the Rio Conference of 1992 promoted the idea that needs of these countries should be given special priority and that developed countries should bear a special responsibility for working towards sustainable development.

24 This is also directly attributable to the fact that the Convention was watered by the large participation that it enjoyed. As one commentator remarks, "Whenever the issue of limits is raised, many people begin to squirm." **See** Freyfogle, Eric T., *Justice and the Earth*, The Free Press, New York, 1993, p.159.

25 One advantage is that a lot of time is saved, which becomes critical to environmental issues. A major disadvantage is that inter-linked issues are not covered. **See** *supra* n.10 at 368.

26 For an alternative argument, **see** Burhenne-Guilmin, Francoise and Carey-Lefkowitz, Susan, "The Convention on Biological Diversity: A Hard Won Global Achievement", pp.43-59 at 56-57 in Handl, Gunther, *Yearbook of International Law*, Volume 3, Graham and Trotman, London, 1993.

27 This can also lead to the problem of a counterprocess of limiting the effects of the regime sought to be achieved under the Convention. For a discussion on this topic, **see** Sjostedt, Gunnar, Spector, Bertram L. and Zartman, I.William, "The Dynamics of Regime Building Negotiations", pp.1-9 at 7 in Spector, Bertram L., Sjostedt, Gunnar and Zartman, I.William, *Negotiating International Regimes: Lessons learned from the UNCED*, Graham and Trotman, London, 1994, p.7.

28 World Conservation Monitoring Centre, *Summary of National Commitments Implied by the Articles of the Convention and the Decisions of the Conference of the Parties*, Ottawa, 2000.

29 The suitability of a legal regime or an institution for this situation also needs to be examined further. For a discussion on this topic, **see** Kimball, Lee A., "Toward Global Environmental Management: The Institutionalized Setting", pp.18-41 at 30-36 in Handl, Gunther, *Yearbook of International Law*, Volume 3, Graham and Trotman, London, 1993.

the Five-I approach, which has been advocated by writers on more than occasion for implementation.[30] Key roles are to be played by the Conference of the Parties, its Subsidiary Body on Scientific, Technical and Technological Advice and the Secretariat.[31]

Problems of Supervising Implementation

It is a fundamental principle of international law that treaties must be observed and their obligations performed in good faith.[32] However, supervising the performance of such obligations is not a well-defined area. Generally states parties to a treaty supervise implementation of the treaty by other states parties.[33] This is the case in the Convention. However, although there is in place a system to monitor implementation, it does not seem supervisory in character.[34]

A Note on Intellectual Property Rights (IPRs)

IPRs are not covered exhaustively by this paper, due to its size and the expansiveness of the title. An indepth study would require an examination of the TRIPs and the WTO agreements as well, both of which are outside the paper's scope.[35] Stress is instead placed on the Convention as an international instrument, and its effectiveness. It should, however, be recognized that intellectual property rights played a major role for countries negotiating the Convention, particularly countries such as India and the United States of America. The traditional western concept of rewarding knowledge is through the recognition of intellectual property rights. It is not clear whether intellectual property rights (IPR) can be accommodated to collective wisdom of whole cultures.[36] It is more likely that intellectual

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30 Investigation, Information, Incentives, Integration and International support. **See** Sloep, Peter B. and Blowers, Andrew (eds.), *Environmental Problems as Conflicts of Interest*, Arnold, New York, 1996, p.237.

31 For an innovative argument on implementation, **see** Coughlin Jr., M. D., "Using the Merck-INBio agreement to clarify the Convention on Biological Diversity", *Columbia Journal of Transnational Law*, 31 (2): 1993, 337-75.

32 Article 26, Vienna Convention on the Law of Treaties, 63 *Am. Jour. Int'l. L*, 875 (1969).

33 Kiss, Alexandre and Shelton, Dinah, *International Environmental Law*, Transnational Publishers, Inc., Ardsley-on-Hudson, 1991, p.99.

34 The provision in the Convention whicb delineates this area is Article 26, wherein the Parties are required to submit a report of implementation. No consequential action is provided for, and therefore the conclusion about the non-supervisory nature of the monitoring.

Article 26 of the Convention reads:

Each Contracting Party shall, at intervals to be determined by the Conference of the Parties, present to the Conference of the Parties, reports on measures which it has taken for the implementation of the provisions of this Convention and their effectiveness in meeting the objectives of this Convention.

35 For a discussion of the inter-linkage between the topics, **see** Dutfield, Graham, "The World Trade Organization, TRIPS And The Biodiversity Convention", http://users.ox.ac.uk/~wgtrr/cte4.htm, visited on December 5, 2000.

36 See Putterman, Daniel M., "Genetic Resources Utilization: Critical Issues in Conservation and Community Development", http://www.bcnet.org/whatsnew/biopros.html, visited on December 4, 2000.

property rights will reward a pharmaceutical company that identified the relevant genetic factor in a traditional cure than the people who have developed and used the cure for centuries. The relationship between IPRs and traditional ecological knowledge will be a key area for negotiation as the Convention is implemented.[37]

The Indian Response

India is one of the twelve megadiversity countries in the world. Around 127,000 species of micro-organisms, plants and animals have been described in the country till date.[38] India is also one of the earliest signatories to the Convention.[39]

India is, by most standards available today, a developing country.[40] India's foreign environmental policy is made, principally, by the Ministry of Environment and Forests,[41] and the body enjoys a certain amount of autonomy in this process. This is not necessarily a desirable situation, because its effectiveness while dealing with national problems becomes questionable, as does the theme of public participation.[42] Commentators have noted that the public element is often missing in the drafting stage of Indian environmental

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37 **See** Hurlbut, David, "Fixing the Biodiversity Convention: Toward a Special Protocol for Related Intellectual Property", *Natural Resources Journal*, Volume 34, No. 2, 1994, pp. 379-409. **See also** Intellectual Property Policy Directorate, "Analysis of the Biodiversity Convention:Biotechnology and Intellectual Property Rights (IPRs)", http://strategis.ic.gc.ca/SSG/ip00016e.html, visited on November 26, 2000. **See also** Intellectual Property Policy Directorate, "Survey of Comparative Approaches to the IPR/Biodiversity Linkage", http://strategis.ic.gc.ca/SSG/ip100019e.html, visited on November 26, 2000. **See also** Kagedan, Barbara Laine, "The Biodiversity Convention, Intellectual Property Rights, and Ownership of Genetic Resources: International Developments", http://strategis.ic.gc.ca/SSG/ip00011e.html, visited on November 26, 2000.

38 *Implementation of Article 6 of the Convention on Biological Diversity in India – National Report*, Ministry of Environment and Forests, Government of India, 1998, p.11. It is because of this that many commentators opine that the conservation of the biodiversity of India must be considered an important concern for the world at large.

39 For an excellent discussion of the issues that dominated India's stand at the negotiations prior to the Convention, **see** Rajan, Mukund Govind, *Global Environmental Politics – India and the North-South Politics of Global Environmental Issues*, Oxford University Press, New Delhi, 1997, pp.202-232.

40 This will impact India's ability to receive financial resources under Article 20 of the Convention.

41 Hereinafter referred to as the MoEF.

42 *Supra* n.39 at 12. However, this also has the effect of reducing the contribution and role of the non-state actors such as the non-governmental sector. Some of the reasons given by the bureaucracy for this exclusion are:

- NGOs are guided by particular interests and follow a pre-determined agenda
- Delays and controversies that may arise from the exposing of the policy to public scrutiny are to be avoided
- Fundamental traditions of foreign environmental policy are so widely accepted that specific policies need no fresh debate.

It is observed that such an approach is bound to have an adverse effect on the implementation of the policy as well.

legislation.[43] It is also notable that the Convention has not required the participation of the non-governmental sector explicitly in policy making.[44]

However, this attitude seems to have undergone a change that can only be described as welcome in the years after the Convention, in matters concerning India's commitments to biological diversity. This is to be noted in the fact that over 30 non-governmental organizations were consulted while preparing the national report on the Implementation of Article 6 of the Convention on Biological Diversity in India.[45] However, it must also be added that the report is more in the nature of a collection of information. The strategy building sessions and the policy making decisions did not reach out to include non-governmental sector, where a valuable resource remains to be tapped.[46] It must be noted that most of these organizations do not have all the resources necessary to influence foreign environmental policy,[47] and do not seem to be able to use their power collectively.

The MoEF was appointed the nodal agency in India under the Convention.[48] This does not extend to all issues concerning the United Nations system.[49] However, the system has been seen to allow itself to be guided almost solely by the bureaucracy, and the government seems to have ignored complaints on this matter.[50] The Ministry of External Affairs[51]

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43 **See** Abraham, C.M. and Rosencranz, Armin, "An Evaluation of Pollution Control Legislation in India", *Columbia Journal of Environmental Law*, Volume 11, 1986, pp.101-18 at 111.

44 There are only two references in the Articles of the Convention to the non-governmental sector, neither of which specify a requirement to participate. The first is in Article 23 (5), where these bodies are permitted to be in attendance at the Conferences of the Parties,, though such attendance is not required. The second is in the Preamble, where the following entry is contained: "*Stressing the importance of, and the need to promote, international, regional and global cooperation among States and intergovernmental organizations and the non-governmental sector for the conservation of biological diversity and the sustainable use of its components*." This leads to believe that the Contracting Parties *should* recognize the importance of the non-governmental sector, although there is no provision that requires it.

45 *Supra* n.38.

46 For example, during a meeting called by the Transport Department of the State of Tamil Nadu in January 1999, to discuss measures to be taken while building the East Coast Road, a large project eminently capable of altering the biological diversity of the area, due to its proximity to the sea, it was found that only *one* non-governmental organization that was represented. Further participation was, apparently, not encouraged, though not discouraged.

47 *Supra* n.38 at 16.

48 Ministry of Environment and Forests, Government of India, *Annual Report 1991-92*, New Delhi, 1992, p.5.

49 The Ministry of External Affairs is concerned with all matters that are within the scope of the United Nations system, with the exception of those pertaining to the United Nations Environment Programme.

50 *Supra* n.38 at 22. For example, the Core Committee which was to evolve a National Conservation Strategy recommended that: "*In order to assist Government in taking balanced and well informed decisions on international protocols, conventions and issues relating to environmental matters, a high level long range Environmental Policy Planning Committee will be set up in the Ministry of Environment and Forests.*"

See **Ministry of Environment and Forests, Government of India, *National Strategy for Conservation and Sustainable Development: Report of the Core Committee*, New Delhi, 1990, p.20.**

The recommendations have not been implemented so far.

51 Hereinafter referred to as the MEA.

does not have an institutionalized structure to deal with foreign environmental policy,[52] and there is the additional problem of over-burdening the same officials who supervise foreign policy in all other areas.[53]

On the matter of implementation, the MoEF admits that despite considerable environmental legislation over the years, governments have not matched it with proper enforcement.[54] It is particularly noteworthy that the ministry and the government have done little to combat deforestation, which is still the main reason for biodiversity loss.[55] It is said that there is need to target the sources of problems that drive cultivators into the forest, like population growth, peasant poverty, lack of agrarian reform and inadequate rural development, which in turn cause the loss of biodiversity.[56]

Certain economic instruments have been suggested by commentators to prevent this loss.[57] They include:

- Removal of subsidies distorting the economic benefits of agricultural practices that cause biodiversity loss
- Establishment of equitable land tenure systems to draw people away from shifting frontier cultivation
- Intensification of agricultural production on lands already converted to agriculture, reducing the need to convert more land.

The rich biodiversity in the entire Southern region, especially in Silent Valley, is an asset to India. To coordinate policies, research, documentation and legal protection of the country's rights in this important area, a National Bioresources Board (NBB) has been set up by the government under the chairmanship of Minister of Science and Technology.[58]

In 1994, the Ministry of Environment and Forests[59] published a document entitled "Conservation of Biological Diversity in India: An Approach". The purpose of the document

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52 *Supra* n.39 at 23.

53 There is the additional problem of putting this Ministry in charge because of the orthodox stance that it still holds regarding the reasons for pollution and degradation of the biodiversity of the environment– that of poverty and under-development. **See** Ministry of Environment and Forests, Government of India, *National Conservation Strategy and Policy Statement on Environment and Development*, New Delhi, 1992, p.31.

54 *Supra* n.39 at 33. The Ministry cites reasons such as delay in courts, but ignore structural problems. **See** Ministry of Environment and Forests, Government of India, *Annual Report 1989-90*, New Delhi, 1990, p.77.

55 Myers, Norman, "Tropical Deforestation: population, poverty and biodiversity", pp.111-122 at 112 in Swanson, Timothy M. (ed.), *The Economics and Ecology of Biodiversity Decline: The Forces Driving Global Change*, Cambridge University Press, Cambridge, 1995.

56 *Ibid* at p.119.

57 **See** Smith, Fraser D.M., Daily, Gretchen C. and Ehrlich, Paul R., "Human population dynamics and biodiversity loss", pp.125-141 at 137 in Swanson, Timothy M. (ed.), *The Economics and Ecology of Biodiversity Decline: The Forces Driving Global Change*, Cambridge University Press, Cambridge, 1995.

58 Ghatnekar, Sudhir D., and Kavian, Mahavash F., "Biodiversity research is the need of the hour", http://www.expressindia.com/fe/daily/19990308/fec08078.html, visited on December 2, 2000.

59 Hereinafter referred to as the MoEF.

was to disseminate useful information on the subject of biological diversity and to share the Indian experience on conservation and sustainable management of biological diversity with the international community. A framework National Policy and Action Strategy on Biological Diversity is being further consolidated and pursued for finalization.[60]

MoEF has also sponsored workshops on Conservation and Sustainable Use of Medicinal Plants, Industries involvement in the Conservation and Sustainable Use of Biological Diversity and Conservation and Sustainable Use of Coastal and Marine Biological Diversity. An All India Co-ordinated Project on Coastal and Marine Biological Diversity is also being developed. MoEF has also set up an Environmental Information System (ENVIS) to collect and disseminate information on the conservation and management of biological resources.

Institutionalized ex *situ* conservation of biological diversity in India started with the establishment of Botanic and Zoological Gardens. The Government of India has set up a number of gene banks for the ex *situ* conservation of plants and animals.[61] The Ministry of Environment and Forests, Government of India has initiated since 1993 a comprehensive ten-year programme in southern India across the States of Karnataka, Tamil Nadu, Kerala, Andhra Pradesh and Maharashtra for *in situ* conservation of the medicinal plants diversity in the Western and Eastern Ghats.[62]

The following is a list of the important events that have taken place in the implementation stage of the Convention in India:

Consultation on Biodiversity amongst developing countries	1994
Draft National Action Plan on Biodiversity	1997
All India Co-ordinated Project in Taxonomy	1997
National Environment Appellate Authority Act	1997
Inter-ministerial Task Force to develop Biosafety Protocol	1997

Legislation

It is important to note that most of the environmental legislation and relevant case law in India is pre-1992.[63] There are Constitutional safeguards as well as legislation by Parliament and the state legislatures.[64] The most often cited Article is Article 21, wherein the right to

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60 **See generally**, *supra* n.38.

61 Largest amongst these are the National Bureau of Plant Genetic Resources, the National Bureau of Animal Genetic Resources, the National Bureau of Fish Genetic Resources (of Indian Council of Agricultural Research) and the Tropical Botanical Garden and Research Institute.

62 This medicinal plants conservation network is aimed at conserving the natural resources used by traditional communities.

63 For example, the *Ratlam Municipality Case* was decided in the year 1980, but there has been little change since then. (*Ratlam Municipality* v. *Vardichand*, AIR 1980 SC 1622).

64 The legislation relevant to biodiversity may be summarized as follows:

- The Indian Forest Act, 1927 is a colonial legislation enacted mainly to enable the State to acquire ownership over forests and their produce and, specifically to facilitate trade and timber. The concern here is not on forest biodiversity but on controlling and regulating the timber trade.

life and personal liberty has been provided. However, the extent to which this will aid in conserving biodiversity, and especially in implementing international treaties such as the Convention, is not known, for there has been limited case law on the matter, in the period following the Convention. In addition, Article 48-A of the Constitution has the status of a Directive Principle of State Policy, which has not been seen used extensively in case-law as Article 21.

Enforcement of environmental laws is undertaken by agencies such as the State and Central Pollution Control Boards and Ministries of Environment in various states and the MoEF. The enforcement mechanisms vary, but do not meet with much success in implementation. It is remarkable that there has been no major legislative activity in the area of environmental law since the Convention came into force, with the exception of the Biodiversity Bill of 1998 and the passage of the National Environment Appellate Authority Act of 1997.[65] The government is developing a national legislation to regulate access to biological resources, sustainable use of these resources and equitable sharing of the benefits arising out of their use.

- The Wildlife (Protection) Act, 1972, amended in 1983, 1986 and 1991, provides for the protection of wild plants and animals and regulates hunting, trade and collection of specific forest products. Certain tribes are however allowed to pick, collect or possess specified plants for their personal use. The revised Act also provides a licensing system to regulate cultivation and trade of specified plants in a pattern similar to the trade in fauna. Licensees are required to declare their stocks and follow prescribed procedures.
- The National Wildlife Action Plan, 1973, identified broad goals of establishing a network of representative protected areas and developing appropriate management systems which take into account the needs of local peoples and conservation requirements outside protected areas. The National Forest Policy, as amended in 1989, stressed the sustainable use of forests and the need for greater attention to ecologically fragile, but biologically rich, mountain and island ecosystems.
- The Forest (Conservation) Act, 1980, amended in 1988 primarily deals with using forestlands for non-forestry purposes, mainly industry and mining. It requires state governments to acquire the approval of the Central Government before it degazettes a reserved forest, leases forestland to a private person or corporation, or clears it for the purpose of reforestation. Implementation of this Act has reduced the annual rate of diversion of forestlands for non-forestry purposes to 16,000 hectares a year, compared with 150,000 hectares per year prior to 1980.
- The Environment (Protection) Act, 1986, empowers the Central Government to take appropriate measures for the purpose of protecting and improving the environment. It is authorized to lay down standards for controlling emissions and effluent discharges of environmental pollutants, to regulate industrial locations, to prescribe procedures for managing hazardous substances, to establish safeguards for preventing accidents, and to collect and disseminate information regarding environment pollution. In accordance with this Act, the central government has issued a number of regulations affecting sectors such as hazardous and chemical wastes, genetically engineered micro-organisms, and industrial development of coastal zones.
- The Foreign Trade (Development and Regulation) Act, 1992, is designed to stimulate sustained economic growth and enhance the technological strength and efficiency of Indian agriculture, industry and services. The Central Government regulates the import and export of goods by means of a Negative List of Imports or a Negative List of Exports, depending on the situation. Import and export are prohibited/restricted through licensing or routed through specified agencies.

See generally ***supra* n.31.**

65 Law Commission of India, *One Hundred Seventy First Report on Biodiversity Bill*, http://www.nic.in/lawcom/biod.htm, visited on November 26, 2000.

In 1994, the Government of India through MoEF formally notified the Environmental Impact Assessment (EIA) under the Environment (Protection) Act 1986 and included under this 29 sectors which need to go through the procedure of EIA before implementing their developmental projects. However, MoEF had made EIA mandatory to major projects that were likely to impact the environment adversely. A national contingency plan to deal with oil spill disasters has been prepared. India has ratified Marpol 73/78 and adopted the provisions in the Merchant Shipping Act. These comprise the major notifications in this area.[66]

Ex-situ Conservation

This is very important from the point of view of genetic resources. Therefore, gene banks have been set up by the Indian Council for Agricultural Research, under the supervision of the Government of India. The National Bureau of Plant Genetic Resources supervises the Indian National Gene Bank. Its functions include collection of indigenous germplasm, preservation of seeds, seed increase and maintenance for distribution and exchange, and the safe keeping of duplicate germplasm holdings of other organizations. Other such bodies include the National Bureau of Animal Genetic Resources and the National Bureau of Fish Genetic Resources.

Awareness

The Supreme Court of India has ruled that each day, seven minutes of broadcast time on the national television network should be devoted to environment related programmes. MoEF interacts with the University Grants Commission (UGC), National Council of Educational Research and Training (NCERT) and the Ministry of Human Resources Development (MHRD) for introducing and expanding environmental concepts and issues in the curricula of schools and colleges. The National Environmental Awareness Campaign (NEAC), started by MoEF in 1986, to create environmental awareness at all levels of the society, is another example of an awareness-building exercise.

The Canadian Response

Nature of Territory and Government

Canada is one of the largest countries on the planet, with approximately 13 million square kilometres of land and water. Canadians are stewards of almost 20 percent of the planet's wilderness, 24 percent of its wetlands, 20 percent of its freshwater, and 10 percent of its forests; as well as 244,000 kilometers of coastline and a large arctic ecosystem that covers

66 The compulsory nature of EIA is praiseworthy, but the situation is complicated by the fact that EIA rules and regulations are usually state-specific.

nearly 1/4 of the country's landmass.[67] Under the Canadian constitution and specific administrative arrangements, federal, provincial and territorial governments share legal authority for the management of biological resources and terrestrial, marine and freshwater environments.[68]

Canada was an active participant in the initial negotiations for the Convention, and was also the first developed country to ratify the Convention.[69] Canada's implementation of the Convention has been systematic, and presents several organized strategies to deal with the problems associated with the depletion of biodiversity. Canada's implementation of the Biodiversity Convention has been coordinated by the Biodiversity Convention Office (BCO), housed within Environment Canada. The BCO chairs and manages the work of the Biodiversity Working Group, comprised of officers from within each provincial and territorial government.[70] The vision expressed by Canada while formulating its national programmes and strategies clearly recognizes the principle of inter-generational equity.[71]

An intergovernmental Biodiversity Working Group, with representation from every jurisdiction, was established to develop the Canadian Biodiversity Strategy by the end of 1994.[72]

The Strategy's five goals are:

- conserve biodiversity and use biological resources in a sustainable manner;
- improve our understanding of ecosystems and increase our resource management capability;
- promote an understanding of the need to conserve biodiversity and use biological resources in a sustainable manner;

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67 Minister of Supply and Services Canada, Canadian Biodiversity Strategy - Canada's Response to the Convention on Biological Diversity 1995, document available at http://www.cciw.ca/eman-temp/reports/publications/rt_biostrat/intro.html, visited on December 1, 2000.

68 Biodiversity Working Group, "Biodiversity: Our Living Legacy", http://www.cciw.ca/eman-temp/reports/publications/rt_biostrat/cbs6.html, visited on December 1, 2000.

69 It is noteworthy that Canada had asked for a document that was simple and devoid of "UN jargon", perhaps to avoid the situation of "treaty fatigue" suggested by Edith Brown Weiss. **See** Handl, Gunther, *Yearbook of International Law*, Volume 3, Graham and Trotman, London, 1993, p.359. The intention to sign a treaty such as the Convention is illustrated by Canada's enthusiasm in forwarding suggestions, holding comprehensive consultations domestically prior to the Convention, and the quick signing and ratification of the agreement.

70 May, Elizabeth, "Conservation of Biological Diversity and the Convention On Biodiversity ", http://iisd.net/WORLDSD/CANADA/PROJET/c15.htm, visited on November 28, 2000.

71 Canada's vision is as follows: "A society that lives and develops as part of nature, valuing all life, taking no more than nature can replenish and leaving to future generations a nurturing and dynamic world, rich in its diversity of life." **See** Biodiversity Working Group, "A Vision for Canada", http://www.cciw.ca/eman-temp/reports/publications/rt_biostrat/intro.html/cbs9.htm, visited on December 1, 2000.

72 Biodiversity Working Group, "Doing Our Part to Conserve Biodiversity and Sustainably Use Biological Resources", http://www.cciw.ca/eman-temp/reports/publications/rt_biostrat/cbs11.html, visited on December 1, 2000.

- maintain or develop incentives and legislation that support the conservation of biodiversity and the sustainable use of biological resources; and
- work with other countries to conserve biodiversity, use biological resources in a sustainable manner and share equitably the benefits that arise from the utilization of genetic resources.[73]

Proposed mechanisms for implementing the Canadian Biodiversity Strategy include:

- filing of jurisdictional reports — within one year of the Strategy's approval — on policies, activities and plans aimed at implementing the Strategy;
- coordinating the implementation of national and international elements of the Strategy;
- ensuring that there are mechanisms in place to permit and encourage non-government participation in the implementation of the Strategy; and
- reporting on the status of biodiversity.[74]

Successful implementation of the Strategy will be determined, in large measure, by the degree to which all parts of society adopt its vision and principles and contribute to achieving its goals. The Canadian Government has indicated that its strategy will be composed of programmes in ecological management, and conservation and sustainable use. The first category will contain strategic directions in the areas of research, traditional knowledge, and inventories of landscapes, species and genetic levels.[75]

Inventory remains an extremely important part of the programme because of the scarcity of existing knowledge.[76] The Standing Committee on the Environment of the House of Commons held hearings in November 1992 to identify action for Rio follow-up. The Committee considered that one of the fundamental building blocks of an effective National Biodiversity Strategy would be a National Inventory of Canada's Biological Diversity. Some of the measures to be taken in this area are to improve and enhance biophysical inventories at ecosystem, species and genetic levels, by:

- developing and applying regionally integrated landscape-level classification systems for terrestrial, fresh water and marine areas to provide a framework for the collection of information and the management of resources;
- enhancing linkages between biological inventories and soil, climate and other surveys; and
- enhancing biological inventory efforts, based upon jurisdictional priorities with consideration of vulnerable, threatened and endangered species and ecosystems,

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73 Canadian Biodiversity Strategy - Canada's Response to the Convention on Biological Diversity, *Report of the Biodiversity Working Group - Guiding Principles*, http://www.cciw.ca/eman-temp/reports/publications/rt_biostrat/cbs10.html, visited on November 28, 2000.

74 Minister of Supply and Services Canada, Canadian Biodiversity Strategy - Canada's Response to the Convention on Biological Diversity 1995, document available at http://www.cciw.ca/eman-temp/reports/publications/rt_biostrat/intro.html, visited on December 1, 2000.

75 *Ibid*.

76 It is estimated by scientists that only 50 percent of Canada's species have been discovered, named and classified, according to information provided by the Global Biodiversity Strategy Working Group. *Ibid*.

critical habitats, little-studied taxonomic groups, taxonomic groups of economic importance, areas of high diversity and areas where human development and disturbance are the most significant.

Programme Implementation

Among the administrative action taken by the Government is the Whitehorse Mining Initiative, under which the following actions were taken:

- Accord adopted in September 1994
- Co-operatively developed by members of the mining industry, governments, labour unions, and indigenous and environmental groups
- Elements of the Accord include, among other things: taxation, environmental protection, maximization of community benefits, indigenous lands and resources, and open decision-making processes.[77]

A Federal-Provincial-Territorial Biodiversity Working Group was established with a mandate from parks, environment, and wildlife and forestry ministers to develop a Canadian Biodiversity Strategy within two years. A national Biodiversity Advisory Group, made up of representatives from industry, the scientific community, conservation groups, academia and indigenous organizations, was established to provide advice to the Working Group.

Implementation mechanisms vary among jurisdictions. The directions outlined in the Strategy are to be implemented through existing policies, strategies and plans, in some cases. In other cases, new mechanisms may need to be established. Coordination will be required to promote the effective implementation of national and international elements of the Strategy.

These are some of the stages of implementation that the Canadian Government has visualized for itself:

- Strengthen linkages at the Ministerial level to oversee the implementation and monitoring of the Canadian Biodiversity Strategy.
- Report within one year after the Ministerial endorsement of the Canadian Biodiversity Strategy on policies, programs, strategies and actions that are underway or will be undertaken to implement the Strategy, and subsequently report publicly on progress in implementing the Canadian Biodiversity Strategy at a frequency to be determined.
- Ensure that there are mechanisms in place that permit and encourage non-government organizations and members of the public to participate in the implementation of the Strategy and the development of international biodiversity agreements.

It is noteworthy that the Canadian has aimed to encourage the participation of stakeholders, including non-government organizations, the private sector, and indigenous communities, in international efforts to implement the Convention, as part of its International Cooperation Strategy.

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[77] Canadian Biodiversity Strategy - Canada's Response to the Convention on Biological Diversity, *Report of the Biodiversity Working Group - Biodiversity: Our Living Legacy - Conserving Biodiversity: A Shared Responsibility*, http://www.cciw.ca/eman-temp/reports/publications/rt_biostrat/cbs6.htm visited on November 28, 2000.

Levels of Compliance

An assessment of implementation must necessarily contain some assessment of planning as well.[78] Canada has been one of the countries to develop a well-organized strategy for biodiversity conservation. However, it has not fared well according to non-governmental orgranizations based in Canada. Canadian environmental NGOs have criticized the government, both at the provincial and federal level, for failing to meet the commitments made at Rio. In the first annual "Rio Report Card", the federal government received a "C" for Canada's efforts to implement the Convention and chapter domestically.[79] The Report Card issued by a large number of environmental groups and coordinated by the Forum for Sustainability and the Sierra Club RioWatch project, noted that two new national parks had been created, but that both were in the far north and not in areas of southern Canada where development pressures are more extreme.[80] India has also undertaken several projects, fulfilling aims in the Convention. However, it is of no consequence to discuss these projects in this context. The argument is as follows:

The implementation of the Convention is very difficult to measure, and is a rather in arguable issue at this stage. The reasons are as follows:

- There are no limits on conservation or usage set by the Convention.[81]
- Most of the requirements to preserve biodiversity are not contained within the Convention.
- There are no provisions specifying the consequences of non-implementation.
- There is no provision imposing a perfect obligation on the Contracting Party.[82]

Therefore, even if there is some fair amount of national implementation of the Convention, which as can be seen, is not very difficult to demonstrate, a question mark lies above the implementation of the Convention itself, and the eventual conservation of biodiversity.

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78 World Resources Institute, "National biodiversity planning - Guidelines based on early experiences around the world", http://www.igc.apc.org/wri/biodiv/nbp-steps.html visited on November 27, 2000.

79 *Supra* n.64.

80 *Ibid*.

81 This may not be true of the provisions referring to biotechnology and genetic resources, although even they are for the large part quite vague, stopping at the statement of principle.

82 For example, at the Conference of the Parties to the Convention on Biological Diversity at its Fourth Meeting, under Measures for implementing the Convention on Biological Diversity, the provision concerning implementation on environment impact assessment (Article 14 of tbe Convention) reads: "…Invites Parties, Governments, national and international organizations, and indigenous and local communities embodying traditional lifestyles, to transmit to the Executive Secretary for the purpose of exchanging information and sharing experiences.." Therefore, there does not seem to be any *real* obligation on the Contracting Party. The use of the word "invites" throws some light on the nature of the provision. It is notable that this sort of provision is in the fourth Meeting of the Parties, by which time the specific obligations under the Convention should have been largely configured.

The Comparison

India and Canada are two vastly different countries with different histories. A macro-comparison is now attempted, to provide some idea of scale and development.

India	**Canada**
• Developing economy, mixed system	Developed economy, capitalist system
• Small economy	Large economy
• Very large population	Small population
• Agriculture, industry (hi-tech)	Industry
• Large peninsula, fertile soils	Very large area, most snow-covered
• 1st generation environmental laws moving to 2nd generation	2nd generation environmental laws

A micro-comparison is now done to provide more information about the kind of approach that these countries have used to implement the Convention.

India	**Canada**
Inventorying done with the help of NGOs	Inventory done on a very large scale
Weak NGO contingent	Very strong NGO contingent
Most of the environmental legislation is pre-Convention	Most of the legislation relating to biodiversity is pre-Convention
Supports the world heritage theory for IPRs derived from traditional sources	Is supportive of the traditional IPRs being part of biodiversity
Depends on old strategies to provide impetus for implementation of the Convention	Has formulated new strategies for implementation

Concluding Observations

India seems content on using the old legal regime available for the purposes of the Convention. Few pieces of legislation have been passed since 1992. However, a good deal of administrative activity has taken place. The pre-existing legal regime, which is not without its merits, can do with a little tweaking, and if necessary, some replacement. The kind of implementation that has occurred between 1992 and now is much better than the implementation of the pre-existing legal system in the pre-1992 era, and that is a point that deserves attention. Canada has also focussed most of her attention on planning and inventorying. This is not be faulted, as the greatest disadvantage with the concept of biodiversity is that it is still misunderstood and underestimated. However, the implementation should pick up some more momentum.

Both approaches dwell a great deal on the need to document the biological diversity existing in their territory. This is an encouraging development. However, it is felt that implementation should also involve a substantial amount of restriction on the pollution that is caused due to the conception of development that is popular among the industrialized countries. This

is actually a problem with the Convention itself, for it does not specify any limits. Certain other limitations are inherent in the Convention itself, which restrict its application to future dealings with genetic resources. Hence, germplasm in international gene banks, upto the first 30 ratifications of the Convention, may still be utilized without compensation. Therefore, better implementation does not necessarily mean compliance with the letter of the Convention. The implementation must seek to implement the principles contained in the Convention. The next ten years will have a lot more to say about the strengths of the Convention, for this is where the actual implementation stage begins, after the careful process of planning and inventory.

CONSERVATION OF HERITAGE - AN ANALYSIS OF NATIONAL AND INTERNATIONAL LEGAL REGIMES

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Introduction

Cultural and natural heritage raise questions about human existence.[1] The concept of the common heritage of mankind is the materialization of the common concern of humanity, and is linked with the rights of future humankind.[2] Thus, the legal principles for environmental protection and sustainable development adopted by the world community stipulate that each state has a duty to ensure that the environment and natural resources are conserved and used for the benefit of present and future generations.[3]

The principles underlying the law of conservation of heritage are those of sustainable development and intergenerational equity, which would ensure that the cultural and natural heritage on earth is preserved for future generations. For this purpose, intervention is required both at the national and the international level. This article attempts to examine the law relating to the conservation of cultural and natural heritage at the state and international levels. This will involve an examination of the World Heritage Convention, the Indian law on conservation of heritage, a comparison of the Convention with the legislation and case-law in India, and an examination of the incorporation of the Convention in Australia. The paper concludes with a critique on the effect of the Convention on the sovereignty of States.

Interventions in International Law on the Conservation of World Heritage

Consequent to a growing concern among the international community over the destruction of both cultural and natural heritage, the nations of the world have come together to reaffirm the duty of conserving as well as protecting symbols of heritage. Indispensable to such an effort is the assistance of international organizations involved in the preservation of sites of heritage. The main contributor to this process has been the United Nations Economic, Scientific and Cultural Organization (UNESCO), which has, through its draft conventions and recommendations, attempted to establish the existence of a duty towards national heritage, and to take steps towards adequate conservation. It realizes that many nations' repositories of rich heritage do not have the necessary resources in terms of money and expertise to become involved in heritage conservation. The UNESCO assists such nations by providing resources to effectively deal with preservation activities. While several

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1 "What is World Heritage", http://www.city.nara.nara.jp/english/kokon/isan/about/about_1.htm, visited on June 10, 2001.

2 Kiss, Alexander, "Introduction to International Environmental Law", *Programme of Training for the Application of Environmental law*, UNITAR, Stockholm, 1997.

3 Singh, Nagendra, "Right to Environment and Sustainable Development as a Principle of International Law", 29 *J.I.L.I* 289 (1987). **See also** Valson, M.C., "Biodiversity Conservation: Challenges and Legal Solutions", 23 *C.U.L.R* 135-136 (1999).

international covenants profess the protection of cultural and historic heritage as well as natural heritage,[4] this article seeks to examine the Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, also known as the World Heritage Convention.[5]

Salient Features of the World Heritage Convention

The World Heritage Convention was adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on November 16, 1972. It came into force on 17 December 1975, when 20 countries became parties to it, which was the necessary number for the Convention to come into force, as per Article 3 of the Convention. The adoption of the Convention was in keeping with evolving attitudes towards the importance of protecting cultural and national identity, and with worldwide

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4 For example, with respect to the preservation of historical sites, three international instruments are relevant, viz.:

- Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works, which seeks to enforce the protection of pre-historic, historic and proto-historic cultural property, which may be endangered by public and private works. It realizes that urbanization and development are essential for growth and welfare today. At the same time, preservation of cultural property is essential for a nation's well being. Urbanization should be tempered and in a search for expansion of our living space, regard must also be had to all those sites that represent culture and heritage of a nation, which if ignored and destroyed will cause immeasurable loss to humanity. **See generally** http://www.unesco.org/general/eng/legal/cltheritage/works68.html.
- Recommendation Concerning the Safeguarding and Contemporary Role of Historic Areas, which takes the previous Recommendation forward by explicitly stating the relevance of historic sites even in a modern technology oriented society. Unlike the Recommendation on Public Works, this recommendation reiterates the duty of town planners and architects to ensure that modern construction does not crowd or obstruct the view to and from historic sites. **See generally** http://www.unesco.org/general/eng/legal/cltheritage/areas76.html.
- Charter on the Protection and Management of Underwater Cultural Heritage. This Charter was ratified in 1996, in Bulgaria, by the 11th ICOMOS General Assembly. The main objectives are to protect archeological remains *in situ* and to prohibit commercial exploitation of the same. It covers all submerged sites whether in inland and inshore waters or in seas and oceans. The definition draws upon the definition of "archeological heritage" from the ICOMOS Charter for the Protection and Management of Archaeological Heritage, 1990. The Charter defines "archeological heritage" as "*that part of the material heritage in respect of which archaeological methods provide primary information, comprising all vestiges of human existence, and consisting of places relating to all manifestations of human activity, abandoned structures, and remains of all kinds, together with all the portable cultural material associated with them.*" For the purposes of this Charter, "underwater cultural heritage" is understood to mean the archaeological heritage, which is in, or has been removed from, an underwater environment. It includes submerged sites and structures, wreck-sites and wreckage and their archaeological and natural context. The Charter acknowledges the fact that underwater heritage is threatened by construction activities like deep-sea mining as well as by commercial exploitation. The Charter embodies certain fundamental principles like *in situ* conservation of underwater heritage, preventing unnecessary disturbances to the site, encouraging public access and adopting non-intrusive methods of sampling rather than excavation methods, as per Article 1. **See generally** http://www.international.icomos.org/under_e.htm

5 **See generally** http://sedac.ciesin.org/pidb/texts/world.heritage.1972.html.

concern over environmental deterioration and conservation needs. The purpose of the Convention is to establish "an effective system of collective protection of the cultural and natural heritage of outstanding universal value" currently referred to as "global commons".[6] The Convention is now one of the most strongly supported international instruments – 146 countries (known as States Parties) are signatory to it. In order to qualify for inclusion on the World Heritage List, a nominated area must meet specific criteria,[7] which are contained in the Convention.[8]

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6 McDonnell, Tom, "Technical Review Of The United Nations Environmental, Scientific & Cultural Organization, Convention On World Heritage", http://www.sovereignty.net/p/land/whtanalysis.htm, visited on May 24, 2001. The UNESCO adopted this Convention in 1972 with the following concerns:

- It realizes that natural as well as cultural heritage are being increasingly threatened by traditional causes of decay as well as by changing social conditions that have only aggravated the problem.
- Destruction of heritage is leading to impoverishment, a condition that affects all nations.
- UNESCO understands the limitations of states in preserving natural heritage within their jurisdiction and therefore undertakes to assist states in this task.
- It calls upon states to assist each other in this task of conservation and preservation as well, but with the permission of the state concerned.
- It further stresses that these heritage sites are a source of boundless interest and knowledge and all efforts must go into the protection of such irreplaceable property. Klein, Cyrille de & Shine, Clare, "International Environmental Law: Biological Diversity", *Programme for Training for the Application of Environmental Law*, UNITAR, Stockholm, 1997.

7 The criteria can be summed up as follows:
Properties nominated as natural properties should:

- be outstanding examples representing major stages of earth's history; or
- be outstanding examples representing significant on-going ecological and biological processes; or
- contain superlative natural phenomena or areas of exceptional natural beauty; or
- contain the most important and significant natural habitats for in situ conservation of biological diversity.

Properties nominated as cultural properties should:

- represent a masterpiece of human creative genius; or
- exhibit an important interchange of human values, over a span of time or within a cultural area of the world, on developments in architecture or technology, monumental arts, town-planning or landscape design; or
- bear a unique or at least exceptional testimony to a cultural tradition or to a civilization which is living or which has disappeared; or
- be an outstanding example of a type of building or architectural or technological ensemble or landscape which illustrates (a) significant stage(s) in human history; or
- be an outstanding example of a traditional human settlement or land-use which is representative of a culture (or cultures), especially when it has become vulnerable under the impact of irreversible change; or
- be directly or tangibly associated with events or living traditions, with ideas, or with beliefs, with artistic and literary works of outstanding universal significance (the Committee considers that this criterion should justify inclusion in the List only in exceptional circumstances or in conjunction with other criteria, cultural or natural).

8 Birnie, Patricia W. and Boyle, Alan E., *International Law and the Environment*, in 88 AJIL (1994), pp.408-411.

Duties of Participating States and the Nature of these Obligations

Articles 4-6 of the Convention bear great importance. Nations recognize the duty of ensuring the identification, protection and conservation of World Heritage sites belonging primarily to them, and to do "all it can" to protect these sites.[9] The Convention urges States to legislate on a uniform policy for heritage protection and to develop all scientific, technical know how as it can for counteracting the damage caused to heritage sites[10]. It recognizes the right of the State over its heritage, but reiterates that all nations must co-operate in its preservation. If a State Party requests another Party to assist it in its conservation efforts, the requested State shall provide the necessary help. States are under a clear mandate not to take any deliberate measures that might damage the cultural and natural heritage within its territory directly or indirectly.[11]

Every Member State has to prepare an inventory consisting of such details as the location and significance of the property. Based on the inventory (which is not to be considered exhaustive) and other material, the Committee shall decide to enlist a certain site or monument in the list of World Heritage Sites. In every case the consent of the concerned State needs to be acquired.[12] If the Committee refuses to recognize a certain site as a heritage site the State concerned has to be heard on the matter before the Committee takes a decision.

The Convention is fairly broad, in order to impose general obligations, and allow the States Parties flexibility in how they fulfil those obligations.[13] The nature of the obligations created by the Convention is subject to some interpretation, and it is clearly a matter for individual States Parties to determine how the obligations will be discharged.[14]

Thus, in the final resort, it is for each State Party to accept the responsibility for the conservation of its own heritage. State Parties recognize that the identification and safeguarding of those parts of the heritage which are located in their own territory is primarily their own responsibility. They have further agreed to do all they can, with their own resources and with the international assistance they can obtain, to ensure adequate protection.[15] The High Court of Australia considered the nature of the obligations imposed on State Parties by Articles 4 and 5 in the case of *The Commonwealth of Australia* v. *The*

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9 Article 6 clarifies this statement even further by stating:
"*Whilst fully respecting the sovereignty of the State [nation]...State Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate*."

10 Article 5.

11 Article 6.

12 Article 11(1), (2) and (3). The list is updated every two years.

13 *Supra* n.7.

14 *Ibid.*

15 *Ibid.*

State of Tasmania.[16] This is a landmark decision because it was the forum for the first test of the scope of the Convention in a court of law, and also because the majority of judges stated that each Party has a legal duty to do all it can to protect sites in the World Heritage List, which are situated within its own territorial boundaries. Although decisions of the Australian High Court are not binding on other parties, the case will of considerable importance as and when other parties to the Convention are faced with a similar problem.[17]

The Indian Position on the Law of Conservation of Heritage

Constitutional and Legislative Framework

The Indian Law on the conservation of heritage derives its legitimacy from Article 49 of the Constitution.[18] Further under Entry 67 of List I, of the Seventh Schedule of the Constitution, Parliament is conferred a corresponding legislative power.[19] Power to legislate on lesser ancient and historical monuments lies with the States under Entry 12 of List I[20], while concurrent power is exercised by the States and the Centre to legislate on archaeological sites and remains other than those declared by Parliament to be of national importance, under Entry 40 of List III.[21] Apart from this mandate on the State, every citizen has a fundamental duty under Article 51A[22], to co-operate with the State and to ensure that the rich and diverse heritage within the country is preserved.

Under the aegis of this constitutional framework, legislative initiative has been taken at both the Central and State level. Central laws include the Ancient Monuments and Archaeological Sites and Remains Act, 1958, which is aimed at the preservation of monuments and sites of national importance[23], and the Antiquities and Art Treasures Act, 1972, which seeks to prevent the export and smuggling of art treasures.[24]

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16 *The Commonwealth of Australia* v. *The State of Tasmania*, 46 ALR (1983) at 625.

17 Weiss, Edith Brown, et al., *International Environmental Law and Policy*, Aspen Law and Business, New York, 1998, p.918.

18 Article 49 states:

"*Protection of monuments and places and objects of national importance: It shall be the obligation of the State to protect every monument or place of artistic or historic interest, declared by or under law made by Parliament, to be of national importance, from spoilation, disfigurement, destruction, removal, disposal or export, as the case may be.*"

19 Entry 67, List I: Ancient and historical monuments and records, and archaeological sites and remains decided by or under law made by Parliament to be of national importance.

20 Entry 12, List II: Libraries, Museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by or under law made by Parliament to be of national importance.

21 Archaeological sites and remains other than those declared by or under law made by Parliament to be of national importance.

22 Article 51A(f): "*To value and preserve the rich heritage of our composite culture.*"

23 The Archaeological Survey of India, is the national agency responsible for preserving, protecting and restoring the nationally important sites. For further discussion on laws in this area, **see** Divan, Shyam and Rosencranz, Armin, *Environmental Law and Policy in India*, Oxford University Press, New Delhi, 2001, pp.507-508.

24 In addition, complementary legislation has been undertaken at the State level, such as the Maharashtra Ancient Monuments and Archaeological Sites and Remains Act, 1960 and the Kerala Ancient Monuments

Comparison of legislative framework with the World Heritage Convention

Under the Ancient Monuments and Archaeological Sites and Remains Act, 1958, the Central Government exclusively regulates ancient monuments of national importance. The World Heritage Convention and the Ancient Monuments and Archeological Sites and Remains Act, 1958 differ on certain important and basic aspects:

- There is recognition of the requirement for conservation and protection for natural heritage, in addition to cultural heritage, in the Convention. This recognition is not contained in the Act. As the title of the Act indicates, it protects only cultural property, while the scheme of the Convention with its regulations applies equally to both cultural as well as natural heritage. Thus it would place an obligation on State Parties to protect natural habitats, and sanctuaries, as well as natural formations, which need to be preserved for future generations for their inherent beauty and scientific relevance.
- While the Act makes a distinction between "ancient monuments" and "archeological sites", the Convention covers both as "cultural property".
- The Act limits protection to only those sites or monuments that are over a hundred years old. The Convention grants protection to more recent monuments. The criterion to recognize a monument as "cultural property" does not seem to be its age – the important characteristic is its relevance to the history of a nation.

It is submitted that the lacuna in the Indian law is most marked in the case of protection of natural heritage. While the Water Act, the Air Act, the Environment Act, etc., provide assiduously for the control of various forms of pollution, there seems to be legislative non-application of mind and disregard for the preservation of India's rich natural heritage. Further, it is submitted that the lack of legislation is even more appalling in the light of the clear constitutional mandate. Article 48A of the Constitution provides that "the state shall endeavour to protect and improve the environment and to safeguard the forests and wildlife of the country." While it is conceded that the Wildlife (Protection) Act, 1972, and the Forests (Conservation) Act, 1980, constitute legislative intervention to protect wild animals, plants, and habitats[25] and to conserve forests, it is submitted that neither of these enactments recognizes the subject matter of its jurisdiction as being deserving of conservation as a part of the "heritage" of the nation.

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and Archaeological Sites and Remains Act, 1968. State Departments of archaeology are the agencies in charge of protection of the buildings, monuments and sites recognized under the State Law. *Ibid.*

25 The Wildlife Act prohibits the hunting of scheduled animals and reserves the right to declare any area of adequate "ecological, faunal, floral, geomorphologic, natural or zoological significance" as a sanctuary or a national park. **See** Sections 9,18, 35, 27 and 29. **See also** Kothari, et al, *Management of National Parks and Sanctuaries in India: A Status Report*, 1989, p.107, **cited from** *supra* n.23.

The Forest Act prohibits any State Government or other authority, without prior approval by the Central Government, from ceasing the reservation of any "reserved forest", allowing use of forest land for any non-forest purpose, assigning any forest land by lease or otherwise to private persons or non-governmental organizations, clearing of trees in forest land for reforestation, etc. **See** Section 2 (I-iv).

Judicial Intervention

The principles of sustainable development, inter-generational equity, and the precautionary principle mark the jurisprudence laid down by the Supreme Court of India, in this area.[26] An important case where the Court has drawn upon these principles to preserve Indian cultural heritage is *M.C. Mehta* v. *Union of India* (1997).[27] In this case, responding to a public interest litigation alleging the degradation of the Taj Mahal due to the environmental pollution caused by the use of coke/coal by industries situated within the Taj Trapezium Zone, the court held that the monument, apart from being a cultural heritage site, was also an industry by itself earning huge revenue for the nation through tourism alone. The court invoked the principles of sustainable development and the precautionary principle and directed that the industries operating in the TTZ, must use natural gas instead of coke/ coal, and if not able to do so, must relocate themselves. [28] Furthermore, in *Rajeev Mankotia* v. *Secretary to the President of India*,[29] the Supreme Court in response to a public interest litigation filed for the preservation of the Viceregal Lodge in Shimla constructed by the Earl of Dufferin in 1888, as an ancient and historical monument of national importance, prevented the Government of India from converting a part of the estate into a tourist hotel.[30] In *Niyamvedi* v. *Government of India*[31], the Kerala High Court examined the importance of the "Sage Cages" in Marayur, and ruled that they were pre-historic

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26 The Supreme Court has assimilated these international law norms into the domestic regime. The precautionary principle requires government authorities to anticipate the causes of environmental degradation and shifts the onus of showing that an action is environmentally benign on the developer. Sustainable development and intergenerational equity require the prudent use of natural resources so that economic growth is sustained and the cultural and natural heritage inherited from the previous generation is preserved intact for the next. **See** *supra* n.23.s

27 *M.C. Mehta* v. *Union of India*, (1997) 2 SCC 353.

28 In similar cases, the Supreme Court has issued directions to the ASI to protect the monuments in the Fatehpur Sikri area in *Wasim Ahmed Saeed* v. *Union of India* (1999(1) SCALE 685), as well as the tomb of Mirza Galib, in *M.C. Mehta* v. *Archaeological Survey of India* (1997(5) SCALE 1 (SP)). Again, in *Surendra Kumar Singh* v. *State of Bihar* (1991 SUPP (2) SCC 628), the Supreme Court dismissed a special leave petition against orders passed by the Patna High Court preventing stone crushing operations within a distance of 500 metres of three hills that had been declared as protected monuments.

29 *Rajeev Mankotia* v. *Secretary to the President of India*, (1997) 10 SCC 441.

30 The Court held that the preservation and maintenance of ancient monuments is required not only as a source of pride, but also to give us an insight into the past glory of our structure, culture, sculptural, artistic or archaeological significance, artistic skills and the vision and wisdom of our ancestors, which should be preserved and perpetuated so that future generations learn the skills of our ancestors and our traditions, culture and civilisation. **See** (1997) 2 SCC 441 at 445. Thus, the court has taken into consideration the principle of intergenerational equity.
Further, in *Ram Swarup* v. *State of Haryana* (AIR 1993 P&H 204), the Punjab High Court examined the provisions of the Ancient Monuments and Archaeological Sites and Remains Act, 1958, and upheld the government notification under Section 4 of the Act declaring an area around Brahm Sarover at Kurukshetra to be a controlled area for the purpose of the Act.

31 *Niyamvedi* v. *Government of India*, Writ Petition No. 1427/1994-B of 1995, Kerala High Court, November 6, 1995 **cited from** *supra* n.23.

monuments that needed to be preserved. This was despite the absence of any declaration to this effect by the Central or State Governments under the relevant laws. The court issued a direction prohibiting the respondents from carrying out any quarrying operation in the village of Marayur, the Devikulum Taluk and the Idukki District and directed that appropriate steps be taken to designate the caves as monuments and antiquity under the relevant Acts.[32] As for as natural heritage is concerned, in *Pradeep Kishen* v. *Union of India*,[33] the Supreme Court directed the State of Madhya Pradesh to take urgent steps to complete the procedure of declaring certain areas as Sanctuaries and National Parks under Sections 26A and 35 of the Wildlife (Protection) Act, 1972. This was in response to a petition praying that the entry of villagers and tribals into such areas for the collection of minor forest produce, be prohibited.[34] Thus, it is evident that the courts have been fairly active in implementing the conservation laws, and also in the designation of areas as part of the cultural heritage based on expert recommendations.

Interventions by Non-Governmental Organizations

The lack of initiative by the ASI (Archaeological Survey of India) and the town planning authorities has made the role of NGOs even more indispensable in the preservation of heritage in India. The Indian National Trust for Art and Cultural Heritage (INTACH) has developed models to preserve historic precincts.[35] Furthermore, the Bombay Environmental Action Group (BEAG) has played a key role in introducing the first heritage regulations in India – The Heritage Regulations for Greater Bombay – framed in 1995 under the Maharashtra Regional and Town Planning Act, 1996.[36] These Regulations grade heritage buildings and precincts into three categories based on their importance. Heritage Structures may be repaired or re-developed only after obtaining the prior consent of the municipal commissioner, who is in turn required to consult the statutory Heritage Conservation Committee (HCC). [37]

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32 The Court held that it is the duty of every citizen to protect and preserve the ancient and historic monuments for future generations. Thus, even if there is a possibility of even a remote chance that the ancient monuments would be affected, the court felt that it was its duty to extend its jurisdiction to protect and preserve them. **See** *supra* n.23 at 512.

33 *Pradeep Kishen* v. *Union of India*, AIR 1996 SC 2040.

34 However, this decision does raise an important question as to the rights of the tribals and forest communities living in the area. The dictum laid down by the decision was reiterated in *Animal And Environmental Legal Defence Fund* v. *Union of India*, AIR 1997 SC 1071.

35 One example of such a precinct is Chanderi, a weaving town in Madhya Pradesh and the Varanasi Ghats. **See** Menon, A. G. Krishna, *Cultural Identity and Urban Development*, 1989, p.4.

36 Hyderabad has also introduced similar regulations in December 1995, to protect 152 buildings and 9 precincts. The Ministry of Environment and Forests (MoEF) has encouraged States and Union Territories to adopt suitable local heritage regulations. Following the circulation of model heritage regulations, the MoEF urged the States to quickly frame regulations to conserve the natural and built heritage. **See** Archives, Bombay Environmental Action Group, *supra* n.23.

37 The constitution of the HCC includes an environmentalist and a city historian, as well as structural engineers and architects. Several incentives compensate the owner of a heritage property for the loss of development

The Interventions of Other States with Regard to the Conservation of Heritage

Australia

Australia has been recognized on the international arena for its initiative to advance the protection of the world's natural heritage.[38] The process of implementation involves identifying and nominating places of outstanding universal value for inclusion on the World Heritage List, and of conserving these places for the future through collective international effort.[39]

The Australian Constitution provides limited scope for the Commonwealth to legislate for the day-to-day management of world heritage areas. The Commonwealth has used the external affairs power as a basis for legislation that defines the steps it can take to fulfil some of its obligations under the Convention, though this may not strictly fall within the purview of external affairs as understood in the context of Article 51 of the Australian Constitution.[40] The World Heritage Properties Conservation Act 1983 provides for the protection and conservation of those properties in Australia that are of outstanding natural and cultural value. The Act is seen as a measure of last resort and has only been applied infrequently.[41]

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rights, such as transferable development rights, change from residential to commercial use, and special protection against government schemes for road widening or acquisition for public projects. **See** *supra* n.23 at 509.

38 In August 1974, Australia became the seventh country to ratify the Convention. It served on the World Heritage Committee from 1976-1983 and 1985-1989, and has recently been re-elected for a further six-year term. Australia also served on the World Heritage Bureau in 1980-81, 1981-82, 1982-83, 1984-85 and 1988-89. The first Australian properties were inscribed on the World Heritage List in 1981 – they were the Great Barrier Reef, Willandra Lakes and Kakadu. New Zealander Bing Lucas, a noted international conservation expert who has advised UNESCO on world heritage matters, told the Committee that:

"*... I do not know of any country in the world which is perceived to take its responsibilities under the World Heritage Convention more seriously than Australia. Colleagues worldwide tend to support this view*". **See** "Managing Australia's World Heritage", http://www.aph.gov.au/house/committee/environ/whainq/whirpt/CHAP2.HTM, visited on June 12, 2001.

39 "Valuing Cultures – Case Study: The World Heritage Convention as a Vehicle for Reconciliation", http://www.austlii.edu.au/au/other/IndigLRes/car/1993/3/19.html, visited on June 12, 2001.

40 The legislative power to make laws on external affairs is granted by the phrase, "external affairs" found in Article 51 of the Constitution. This cannot properly be read as a grant of power with respect to international relationships but rather, as the words indicate, with respect to external affairs, which must mean the external affairs of the federation, of the Commonwealth of Australia. An affair of the Commonwealth will be a matter of concern to the federation and if, because of its nature, that matter would need external action to accomplish it, to bring it to fruition, it is an external affair of the federation. An illustration of such an affair would be the national need to make an arrangement with a foreign power or powers, the affair being of intrinsic national quality of what was sought to be done and the external aspect of it provided by the external treaty. **See generally** www.samuelgriffith.org.au/v5chap1.htm.

41 Furthermore, the Australian Government implements its national obligations under the Convention in cooperation with the State and Territory Governments, through the Inter-Governmental Agreement on the Environment (IGAE). The IGAE is not a binding legal document but is intended to set ground rules for the

Australia's world heritage properties in the context of other protected areas

World heritage listing is just one among several ways in which protection is afforded to the environment throughout Australia. It is possible for the same place to be included on the World Heritage List, to be declared a National Park, to be registered in the National Estate,[42] and/or to be listed by the National Trust.[43] Each of these categories was established for a different reason and may be managed by a separate government authority or community organization. Furthermore, the responsibility for protecting Australia's heritage rests with nine different governments (Commonwealth, State and Territory).[44]

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consideration of world heritage matters. Under the IGAE, the States and Territories recognize the Commonwealth's international obligations to protect world heritage properties, and the Commonwealth agrees to consult with the relevant State or Territory concerning possible nominations. In the IGAE, State and Territory Governments agree to consult with local communities or interest groups, which may be affected by a nomination. The World Heritage Unit was established in 1993 to administer world heritage matters for the Commonwealth and, in particular, to develop consistent management arrangements for Australia's world heritage properties. The major responsibilities of the Unit are to:

- provide advice on natural and cultural world heritage values and potential world heritage properties and coordinate preparation and submission of nominations;
- coordinate appropriate legal, financial and management arrangements for the protection and promotion of world heritage values;
- promote awareness and understanding of world heritage in order to enrich appreciation of heritage at home and overseas;
- monitor and report on the promotion, protection and, where necessary, rehabilitation of world heritage properties.

Department of the Environment, Sport and Territories, 1 *Australian World Heritage News*, No.1, 1996, p.3.

42 Some parts of world heritage areas, such as Lord Howe Island and the Great Barrier Reef, are managed for sustainable use, and Australia's world heritage areas also include elements of some of the other categories. The National Estate refers to those parts of Australia's natural, indigenous or historic environment that are identified as worth keeping for present and future generations of Australians. The Australian Heritage Commission is a Commonwealth statutory authority responsible for compiling the Register of the National Estate, and the States and Territories also maintain heritage lists. Under the Commonwealth's legislation, listing does not place controls on the actions of State, Territory and local governments or private owners, but the Commonwealth Government is constrained from taking any decision or action which adversely affects a place on the Register. *Ibid.*

43 The National Trust is a nation-wide community-based organization, which identifies, acquires and conserves places of aesthetic, historic, scientific, social and other values, and lobbies to encourage the conservation of such places. Listing by the National Trust does not confer any legislative protection on an area.

44 Australia's world heritage areas comprise a wide variety of land tenures including freehold, perpetual lease, pastoral lease, town reserve, State forest, national park, nature reserve, Aboriginal reserve and recreational reserve. Ownership rights of areas are not changed after world heritage listing takes place. The management arrangements vary from area to area. Most world heritage properties are managed by State Government agencies while others have joint Commonwealth/State management arrangements with the State Government carrying out on-ground management. Uluru-Kata Tjuta and Kakadu National Parks are owned by the Aboriginal community and leased to the Australian Nature Conservation Agency (ANCA) which manages the properties. Management plans are prepared by either the Commonwealth or State agencies responsible for the properties. However, the status of most of Australia's world heritage areas is that of "National Park", which is defined by the IUCN as natural area of land and/or sea, designated to

Challenges faced in implementation of Convention

Australia faces challenges in implementing the World Heritage Convention, due to the complexity arising from the involvement of the Commonwealth and State Governments. The Commonwealth Government is the State Party to the Convention for Australia, and is the only government, which can submit nominations for Australian world heritage properties. By agreement between the Commonwealth, States and Territories, it is the States and Territories that prepare nominations for properties which are situated within their own boundaries, while the Commonwealth prepares nominations for properties situated in more than one State or Territory. Thus, an important issue while discussing Australia's implementation of the Convention would concern the role of the Commonwealth, the balance of responsibility between the Commonwealth and the States, and the obligations created by the Convention.

The challenge of nominating and managing world heritage areas has raised some important problems in Australia which have erupted into controversial disputes between the Commonwealth and the States, based in part on political and legal arguments. These disputes have included some criticism of the implementation of the World Heritage Convention and the value of inscribing areas on the world heritage list. A review of the problems associated with the implementation of the Convention in Australia found that the use of the Convention in internal political battles neither encouraged community support nor enhanced Australia's international reputation. Furthermore, the concept of world heritage had been discredited within Australia.[45]

The nature and extent of the Commonwealth's role are closely governed by the nature and extent of the Commonwealth's powers under the Constitution, and the responsibilities of the Commonwealth in relation to the World Heritage Convention. It has been suggested that the language of Article 5 of the Convention does not constitute an absolute obligation and only provides for some flexibility and discretion as to the means of implementing the obligations that are referred to, in the provision. This flexibility is given to the Convention Party, Australia, but it is a flexibility that must be exercised in accordance with the international law principle that treaties must be implemented in good faith.[46] Parties are not obliged to enact specific kinds of legal measures; there is a significant deal of flexibility

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- *"protect the ecological integrity of one or more ecosystems for present and future generations,*
- *exclude exploitation or occupation inimical to the purposes of designation of the area and*
- *provide a foundation for spiritual, scientific, educational, recreational and visitor opportunities, all of which must be environmentally and culturally compatible."* **See** *supra* n.11 at 8.

45 **See** Behrens, Juliet, "The Implementation of the World Heritage Convention in Australia: Problems and Prospects", in J.M. Behrens & B. M. Tsamenyi (eds.), *Environmental Law and Policy Workshop: Our Common Future*, University of Tasmania, Hobart, 1991, p.269.

46 As per the principle of *pacta sunt servanda*, under Article 26 of the Vienna Convention on the Law of Treaties.

given to Parties as to the means by which they achieve the required result.[47] There is little doubt that the Convention imposes binding obligations on Australia.[48] Furthermore, the existence of these obligations was confirmed by a majority of the High Court of Australia in the Tasmanian Dams case.[49] In this case, the Tasmanian Government challenged the validity of Commonwealth legislation enacted to prevent the construction of a dam that would have flooded part of the world heritage area in Tasmania. Justice Mason found that various articles in the Convention created clear obligations, even though it contained qualifications such as "will do all that it can" and "in so far as is possible, and as appropriate for each country." He found that the inclusion of these qualifications would not have been necessary unless the Convention imposed an obligation.[50] He stated: "*Despite these features, it seems to me that Art. 5 itself imposes a series of obligations on parties to the Convention, one of which includes ... the taking of legal measures. The imposition of this obligation is an element of a general framework, which has at its foundation (a) the responsibility of each State under Art. 3 to identify and delineate ... "cultural heritage" ... and "natural heritage" ... and (b) the first sentence of Art. 4 which amounts to a recognition of the general or universal responsibility for the protection, preservation, etc. of the heritage ... Article 5 then goes further. What it does is to impose obligations on each State with the object set out in the opening words of the article "to ensure that effective and active measures are taken for the protection, conservation", etc. of the heritage in the discharge of the responsibility acknowledged by Art. 4. Article 5 cannot be read as a mere statement of intention. It is expressed in the form of a command requiring each party to endeavour to bring about the matters dealt with in the lettered paragraphs.*"[51]

Following this case, the powers of the Commonwealth in relation to world heritage matters were tested in two further cases before the High Court. In each case, the High Court re-affirmed that the Convention created duties on Australia that could be carried out by the

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47 Attorney-General's Department, *Submission to the Inquiry by the House of Representatives Standing Committee on Environment, Recreation and the Arts into the Proposal to Drain and Restore Lake Pedder*, (number 166), pp. 7-8 **cited from** supra n.38.

48 The existence of these obligations was acknowledged in the second reading speech by the then Minister for Home Affairs and Environment when introducing the World Heritage Properties Conservation Bill in 1983:

"*In addition to the obligations that the Convention places on individual parties, it provides a system for identifying the world's natural and cultural heritage, and a system of collective protection for items of that heritage that may be in danger. The Convention recognizes that it is primarily the duty of the country where heritage property is situated to ensure its identification, protection, conservation, presentation and transmission to future generations.*"

House of Representatives, 1983, Debates, Vol. HR131, p.46 **cited from** *supra* n.39.

49 *The Commonwealth* v. *Tasmania*, (1983) 158 CLR 1 at 131.

50 *Ibid.*

51 *Ibid.*

Commonwealth pursuant to the external affairs powers of the Constitution.[52] The unanimous view of the High Court in *Queensland* v. *Commonwealth*[53] was that listing of a property as world heritage by the World Heritage Committee was sufficient and conclusive to establish the international duty to protect and conserve that property.[54] In accepting, by a decision of the majority, that the Convention imposed obligations on Australia, the High Court had noted in 1983, that these obligations could be discharged by either the Commonwealth, the States, or partly by both. The majority of the Court opined that when the Parliament legislates to give effect to a treaty, it is for the Parliament to choose the means by which this is achieved.[55] The discretion available to signatory parties arises as a general matter of international law and applies notwithstanding the provision in Article 4 of the Convention that a party "will do all it can" and to the "utmost of its resources" to discharge the duties imposed upon it.[56]

The Convention, at Article 34(a), specifically deals with the situation where the governments of constituent states of a federation are not obliged by constitutional arrangements to take action to protect world heritage. Article 34(a) of the Convention, together with the Australian Constitution, provides that the responsibility for ensuring that the Convention is implemented in Australia rests with the Commonwealth Government, regardless of whatever domestic arrangements are put in place for the implementation of the Convention. It does not preclude a role for the States.[57] The Convention simply obliges the federal

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52 *Richardson* v. *Forestry Commission*, (1987-88) 164 CLR 261 (the *Lemonthyme and Southern Forests Case*); *Queensland* v. *Commonwealth*, (1989) 167 CLR 232 (the *Wet Tropics Case*).

53 (1989) 167 CLR 232.

54 *Supra* n.45.

55 This summation of the Court's view was included in the judgement of Mason C.J. and Brennan J. in the *Lemonthyme and Southern Forests Case*, (1987-8) 164 CLR 261 at 288-9. Two judicial observations highlight the flexibility and discretion allowed to States Parties. Brennan J., in relation to Articles 4 and 5 of the Convention, stated that:
"*The language of these articles is non-specific; the Convention does not spell out either the specific steps to be taken for the protection, conservation and presentation of the cultural and natural heritage situated on a State Party's territory nor the measure of resources which are to be committed by the State Party to that end.*"
Brennan J. also noted the discretion allowed in enacting legislation to protect world heritage areas:
"*... the taking of appropriate legal measures necessary for the protection and conservation of the property is one of the appropriate steps mentioned in Article 5. It is clear, however, that the selection of the appropriate legal measures is left by the Convention to the Party who is to discharge the obligation ...*"

56 Boer, Ben, and Fowler, Robert J., *The Management of World Heritage Properties in Australia - Report to the Department of the Environment, Sport and Territories, Part II*, undated, issued May 1996, p 13.

57 In the *Tasmanian Dams Case*, Brennan J. noted that:
"*The relevant obligation arising under Articles 4 and 5 is imposed upon Australia but, so far as the performance of the obligation calls for legislative or executive action with respect to a property in a State, the obligation may be performed by the Commonwealth or by the State or partly by each of them.*"
The Commonwealth v. *Tasmania*, (1983) 158 CLR 1 at p 225.

authority to inform the states of the provisions of the Convention and make recommendations to them about its implementation. In the *Franklin Dam Case*[58], the High Court found that this provision "*had no effect on the Commonwealth's power to make laws to give effect to Australia's obligations under the Convention*". A review of world heritage legislative and administrative measures prepared for DEST by two of Australia's leading academic environmental lawyers noted that Australia had not consistently recommended action to the States, as envisaged by Article 34 of the Convention. However they suggested that cooperative agreements on environmental matters and the drive for consistency in arrangements created a need for more emphasis on joint Commonwealth/State management arrangements, which can be expressed in memoranda of understanding and in complementary legislation.[59]

The obligation to conserve and protect world heritage areas may, under some circumstances, arise before an area is actually inscribed on the World Heritage List. The Convention creates an obligation to identify world heritage areas. This means that the appropriate time to put measures in place to protect and conserve an area is at the beginning of the assessment of the property for its world heritage values, but the actual obligation to do so is not clear.[60] The High Court has said that to give protection to an area during the assessment phase "*is to carry out and give effect to the Convention*".[61] However, the Court also went on to state that failure to put into place protective mechanisms before an area is identified, would not constitute a breach of the Convention that is enforceable.[62] It has been suggested that when an area is publicly identified as being assessed for world heritage nomination it may well attract protection under the Convention and action may be taken under Commonwealth legislation to conserve and protect the area.[63]

The Convention and the management of world heritage in Australia

The powers of the Commonwealth Government to enter into treaties, and the power of the Commonwealth Parliament to enact legislation implementing these treaties does not easily translate into management arrangements in Australia, because of the basic federal nature of the Constitution. In the case of the World Heritage Convention, the major issue in implementing the objectives of ensuring the "protection, conservation and presentation" of world heritage is the role of the States as land managers of most inscribed areas.

Although the High Court of Australia has affirmed the Commonwealth's responsibilities and powers in relation to world heritage, it seems inevitable that a diversity of management arrangements will persist, given the range of stakeholders, particularly State Governments, who need to be accommodated. It is suggested that the Commonwealth should take a

58 *Supra* n.38.

59 *Supra* n.56.

60 *Supra* n.56 at 7.

61 *Supra* n.49.

62 *Supra* n.56 at 8.

63 *Ibid.*

more interventionist role in the management of world heritage areas, either by doing more to ensure adequate and consistent management arrangements, or by taking more direct responsibility for management.[64] However, a cooperative approach that continues to allow for State involvement is most important. This approach was stressed in submissions from State Governments, even where they also argued that the management of world heritage areas was principally a State responsibility.

Management arrangements for world heritage areas have largely been determined in a political as well as a legal context. The Commonwealth does not have the power to make comprehensive arrangements for the implementation of international treaties. It must rely, in part, on other processes, including cooperation with the States. The political realities of Commonwealth/State relations are unavoidable.[65] The Commonwealth does not have the resources and on-ground presence to manage large tracts of land or to implement other policy measures in the States. Environmental management and protection must therefore be a cooperative effort between all levels of government, even in world heritage areas. However, it bears the ultimate responsibility for ensuring that the obligations of the Convention are satisfied in Australia. In terms of the management of world heritage areas, this means that it must ensure that legal protection is provided, management plans are developed and implemented, management structures are put in place, periodic monitoring occurs, and adequate resources, particularly finance, are provided. The constitutional arrangements and the practicalities of on-ground management in Australia necessitate negotiation and agreement with the States on these matters, and also a significant role for the States in managing those world heritage areas where the Commonwealth does not have direct jurisdiction.

The Commonwealth Government considers that preservation of Australia's natural and cultural heritage, including that done through World Heritage Listing, is best achieved through co-operation with the States and Territories. Nevertheless, it is the Commonwealth which is State Party to the Convention and therefore, the ultimate international responsibility for decisions taken in fulfilling Australia's obligations under the Convention rests with the Commonwealth Government and not with the States and Territories. The cooperative approach can lead to various legal regimes, agreements and management arrangements, and these may be entirely appropriate in the context of the balance between Commonwealth and State responsibilities. The main concerns must be to ensure that the Commonwealth has legislation in place that can be use to ensure the protection of world heritage areas, and the establishment of sufficient monitoring, assessment and reporting processes to guarantee the fulfillment of international obligations.

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64 Bates, Gerry, "Environmental protection – the Commonwealth's role", in *Competitive Edge: Proceedings of the 29th Australian Legal Convention*, Law Council of Australia, 1995, p.410.

65 *Ibid*.

Conclusion

Benefits from the International Regime on the Conservation of Heritage

Knowledge and understanding are the most important immediate benefits. The monuments and sites included on the World Heritage List receive special attention from their own governments and from the international community; this means more money and more protection generally. Increasingly, ICOMOS (International Council of Monuments and Sites), experts and professionals are being requested to give advice or to prepare conservation programmes for the listed properties. Thus the World Heritage Convention will progressively provide a great opportunity for many qualified professionals to exercise their skills on an international level.

Concerns about States' duties under the World Heritage Convention

The proper management of world heritage areas is a concern at regional, national and international levels. Some of the concerns that arise are:

· the extent of the State's responsibilities in meeting its international and national obligations once an area has been inscribed on the World Heritage List;

· the effectiveness of consultative arrangements with local communities in relation to the management of World Heritage areas for which the State is responsible, with particular reference to consultation on social and economic concerns, including changes to land use; and

· the adequacy of funding for management of World Heritage areas to ensure the protection of the identified World Heritage values, and the arrangements under which the State and users share capital expenditure and running costs.

It is suggested that a comprehensive Indian statute be enacted, which would encompass the salient features of the Convention and address these concerns, and extend the realm of heritage protection natural heritage as well.

The Erosion of National Sovereignty

What weight, in terms of authority and influence, does the Convention on World Heritage carry over domestic environmental law? This question has a lot of bearing in the issue of whether the Convention and its administrative bodies are garnered towards eroding the authority of participating States. In seeking to establish an international and collective[66] system, the Convention does not require States Parties to surrender sovereignty over world heritage areas.[67] The nature of the obligations that the Convention places on individual

66 The Preamble to the Convention explains that UNESCO considered that it was essential to "*adopt new provisions in the form of a convention establishing an effective system of collective protection of the cultural and natural heritage of outstanding universal value*".

67 Article 6 of the Convention states that: "*Whilst fully recognising the sovereignty of the states on whose territory the cultural and natural heritage ... is situated, and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.*"

States Parties is established by Article 4. The Convention attempts to balance national sovereignty with international obligations. It has been argued that this means that states that have accepted the Convention are voluntarily conceding some limitation on their sovereign rights over world heritage listed properties within their borders.[68] The impact on sovereignty depends on the willingness of States Parties to accept international obligations or respond to diplomatic pressure. A State Party that has successfully applied to have properties included in the World Heritage List faces no sanction if it fails to properly manage those properties. However, it appears to be generally accepted that the Convention creates obligations that can only be avoided at the risk of international or domestic censure or displeasure. A State Party would not lightly abrogate its responsibilities under the Convention once a nominated area within its borders has achieved the recognition of being worthy of identification as world heritage.

At the nineteenth session of the World Heritage Committee, held on December 4-9, 1995, in Berlin, Germany, the committee began referring to itself and to the Convention as "*emergent tool[s] to assist all State Parties in conservation.*" This statement indicates that regardless of jurisdictional claims of non-interference in sovereignty, the World Heritage Committee is now willing to allowed itself to be used as a tool by which domestic policy can be influenced.[69]

There is widespread opinion in the United States, that environmental groups and the Clinton administration have used the 24-year old treaty to bypass Congressional resistance to environmental legislation.[70] In 1978, Yellowstone National Park was designated as the nation's first World Heritage Site. Since then, the machinery of the United Nations has made its influence known inside and outside the park.[71] It started in 1995, when fourteen private conservation groups in the U.S. used the treaty to petition the World Heritage Committee to list Yellowstone as a World Heritage Site in Danger. They based their concerns

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68 **See** Atherton, Trudie-Ann and Atherton, Trevor C., "The Power And The Glory: National Sovereignty And The World Heritage Convention", 69 The Australian Law Journal 637 (1995).

69 According to the minutes of the Berlin meeting, there were some individuals on the World Heritage Committee who appeared already willing to take the authoritative role of the Committee one step further. After assurances from the United States representative "*that the State Party does not consider action by the Committee to be an intervention in domestic law or policy*", the minutes note that "*even if the State Party did not request action, the Committee still had an independent responsibility to take action based on the information it had gathered.*" *Ibid.*

70 *Ibid.*

71 On September 9, 1995, the Casper Star Tribune quoted Yellowstone Park Superintendent Mike Finley as saying that in his opinion the Park Service could use the Convention as legal authority for its actions:

"As a prime sponsor of the treaty and its first signatory, the U.S. has a statutory responsibility to ensure that Yellowstone, a designated World Heritage site, is preserved and protected. As ratified by Congress, the provisions of the World Heritage Treaty have the force and statutory authority of federal law. By inviting the committee to visit the park and assess the mine's potential impacts, the Interior Department acted as it was legally required to do." **See** *supra* n.6.

on possible threats to the park's ecology and the inadequacy of U.S. laws to protect it. Further, the listing as a site 'in danger' allows the World Heritage Committee to work in co-operation with the U.S. to develop corrective measures and take the park out of 'danger'.[72]

Under the terms of the treaty, a "World Heritage Site in Danger" requires a buffer zone be established around the perimeter of the site. One of the "corrective measures" recommended by the World Heritage delegation that visited Yellowstone was a 12 million-acre buffer zone around the park. This sparked a widespread outcry, especially from landowners that would be displaced. The delegation publicly backed away from the buffer zone proposal. However, the UN officially listed Yellowstone as a World Heritage Site in Danger in December, 1995 at a meeting in Berlin, Germany. It has been argued that internationalists are using the World Heritage Convention to circumvent the U.S. Congress and the Constitution and that in recent years, the WHC has been attempting to extend the reach of the Convention beyond a World Heritage Site in an effort to regulate economic development around the Site and that the WHC has even interfered in ongoing internal resource development permitting processes of sovereign nations, including the United States. [73] WHC acted quite aggressively in both the New World and Jabiluka mine cases[74] to pressure governments with sound environmental records to discard their normal process for reaching domestic land use decisions.

The argument is that the WHC is striving to create an internationally regulated, *de facto* "buffer zone" around World Heritage Sites by using Article 1 of the Convention.[75] However, it is submitted that Article 1 of the World Heritage Convention obliges the State Party to protect, conserve, present and transmit to future generations World Heritage sites for which they are responsible. This obligation extends beyond the boundary of the site and Article 5(A) recommends that State Parties integrate the protection of sites into comprehensive planning programmes. Thus, if proposed developments will damage the integrity of World Heritage Sites, and other similar protected sites, the State Party has a responsibility to act beyond the National Park boundary.

But a note of caution must be struck at this point. While it is indeed necessary that these laudable provisions of the Convention be incorporated into Indian law, serious problems

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72 Coeur d'Alene Press, August 11,1996. *Ibid.*

73 Congressman Don Young (R-AK), "UN Agency Tramples U.S. Sovereignty in It's War to Stifle American Resource Development", http://www.lincolnheritage.org/Info/TheAddr/Address%2097to99/environ/Young%20Article'99.html, visited on May 27, 2001.

74 Recently, the WHC interfered in an internal mine permitting process in Australia involving the proposed Jabiluka mine, located near Kakadu National Park in Australia's Northern Territory. The WHC is actually trying to force the Australian government to reverse a carefully considered domestic policy decision.

75 In 1995, the WHC interfered with the permitting of a gold mine located on private land in Montana, three miles outside the remote north-eastern corner of Yellowstone National Park, a World Heritage Site. Dr.Bernd Von Droste, Director of the World Heritage Centre, justified the WHC's meddling by invoking Article 1 of the Convention. **See** *supra* n.73.

may arise if the World Heritage Committee is allowed to interfere in the internal domestic processes of sovereign nations, as has been seen in the context of the United States. Financial independence and the absence of an established system of legal procedure complicate this situation.

Ultimate responsibility for domestic government should remain under the control of our own elected legislatures. Delegating a role in making land policy decisions, for lands within sovereign territory, to an international body, has the effect of further centralizing land-use policy-making authority and decision-making by unelected bureaucrats; the individual citizen moves further from land-use decisions – an undesirable consequence. The legislature must act to keep international commitments from interfering with constitutional constraints.

NOTES AND COMMENTS

THE LAW ON WILDLIFE AND PROTECTED AREAS IN INDIA: AN ANALYSIS

Ramya Seetharaman*

Introduction

Environmental concerns regarding flora and fauna came to the forefront in the 1970s as a result of the increasing depredation of wildlife. There grew recognition that the preservation of wildlife is essential not only for the animals themselves, but also for the ecological balance, and the survival of the human race. The Wildlife (Protection) Act, 1972,[1] was passed during the Indira Gandhi *regime*, and was intended to provide a comprehensive national legal framework for wildlife protection. The impetus behind this Act was three-fold:

1. Article 48A part of the Directive Principles of State Policy, in the Indian Constitution, mandates that the State should endeavour to protect and improve the environment and to safeguard the forests and the wild life of the country. This mandate is strengthened by Article 51A, which imposes a fundamental duty on a citizen to protect and improve the natural environment including the forests, lakes, rivers and wild life, and to have compassion for living creatures.[2]
2. Research revealed an immense loss of flora and fauna, due to the destruction of wild life habitats for human uses, hunting, snaring and poaching of all kinds, increasing biotic pressures, increasing demand on resources, and implementation of conflicting natural resource policies and laws.[3]
3. India, as a party to international environmental instruments, is obliged to take steps to fulfill their environmental mandate. Foremost among these conventions is the Convention on International Trade in Endangered Species, which seeks to regulate and prohibit international trade in endangered species. The Convention on Biological Diversity is also vital, inasmuch as it provides guidelines for the conservation of flora and fauna.

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1 Hereinafter referred to as "WLPA" or the " Wildlife Act."

2 Both these provisions were inserted by the Constitution (Forty Second) Amendment Act, 1976.

3 Rangarajan, M., "The Politics of Ecology: The Debate on Wild Life and People in India", *Economic and Political Weekly* 2391 (1996).

Admittedly, the Act has, to an extent, curbed the destruction of wildlife. However, one crucial problem with the Act is its state-centred approach, which has led to the alienation of indigenous communities. The stress was on reducing or eliminating altogether the human sources of biotic pressures with the assumption that any such pressure was detrimental to wildlife resources.[4] The issues are further complicated by the advent of the third, and perhaps the most potent force – increasing commercialization of previously remote areas. As a result of such conflicting interests, there are growing tensions in the protected areas – local people are resentful and unsupportive, the forest department is insensitive to people issues, and remains unequipped to fight the commercial onslaught from outside. Finally, the poachers, and timber and wildlife traders use the situation to wipe out forests and species.

The issue is whether a comprehensive policy that takes into account different interests is feasible or not. This article seeks to evaluate the Wildlife Act, and the policy behind wildlife conservation in India, critique the existing policy framework, and to look at alternate strategies of conservation. Towards this end, approaches in international environmental law have also been examined. The paper is divided into five main parts. The first part looks at the primary legislation – the Wild Life Act. Secondly, international approaches have been contrasted with the policy behind the Wildlife Act. The next part looks at the rights of indigenous communities, *viz.*, models of conservation. Alternatives to the current model have been discussed thereafter. The last section evaluates the legal response to the commercialization of sanctuaries and national parks.

The Wild Life (Protection) Act, 1972

The Wildlife Act, passed at the request of eleven states, was intended to provide a comprehensive national legal framework for wildlife protection.[5] The Act adopts a two-pronged conservation strategy:

- specified endangered species are protected regardless of location, and
- all species are protected in specified areas.[6]

Thus, total environmental protection in the selected areas is central to the strategy of conservation, and the basic assumption is that to ensure conservation, protected areas

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4 It may be argued that this assumption is not necessarily correct. In the majority of the sanctuaries, physical displacement of villagers has not taken place. **See** Kothari, Ashish, Pande. P., Singh, S., and Variave, D., *Management of National Parks and Sanctuaries in India: A Status Report*, Indian Institute of Public Administration, New Delhi, 1989, p.302.

5 Under the Constitution, wildlife was originally a state subject (Entry 20 of List II). So the Centre could make laws only if resolutions were passed by the state legislature under Article 252. Subsequently, the Forty Second Amendment of the Constitution shifted wildlife to Entry 17-B of the Concurrent List. The Wild Life (Protection) Amendment Act, 1991 has extended the 1972 Act to the whole of India except Jammu and Kashmir.

6 This concept is a legacy from the National Parks Act, 1936.

should be free from all human activities. The Act prohibits the hunting of wildlife, protects their habitats, and restrains trade in wild animals, trophies, etc.[7] The key instrument of change is the Ministry of Environment and Forests under the aegis of the Union Government – a highly centralized state-centred mechanism was adopted.[8] The Act provides for the establishment of Wildlife Advisory Boards[9] and Wildlife Wardens and other staff[10] by the state government for effective implementation.

Scope of the Act

The language of the Act is ambiguous. The Act envisages the protection of wildlife. The term "wildlife" is wider than the term "wild animal".[11] However, the Preamble seems to narrow down the scope of the Act, as it refers only to the protection of wild animals and birds, and matters connected therewith.[12] Perhaps the term "matters connected therewith" can be interpreted so as to widen the scope of the Act. However, such an interpretation would be going beyond the ordinary meaning of the terms used. Moreover, the provisions relating to trade or commerce reveal that they are confined to the regulation of wild animals, animal articles and trophies.[13] In addition, the Preamble of the Act states that it is meant for the protection of wild animals and birds. The reference to birds is actually unnecessary as the definition of the term animal in the Act includes birds as well.[14]

Further, various definitions adopted in the Act are imprecise and seem to narrow down the ambit of the Act. For instance, the word "animal" is defined in Section 2(1) to include amphibians, birds, mammals and reptiles. The scientific understanding of the term is much wider and all living organisms that are not plants are considered animals.[15] Likewise, the

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7 In *State of Bihar* v. *Murad Ali Khan* (AIR 1989 SC 1), the Supreme Court explained the object of the WLPA as follows:

"*The policy and object of the Wild Life Laws have a long history and are the result of an increasing awareness of the compelling need to restore the serious ecological imbalances introduced by the depredations inflicted on nature by man…. Environmentalists' conception of the ecological balance in nature is based on the fundamental concept that nature is 'a series of complex biotic communities of which man is an inter-dependent part.*"

8 *Supra* n.3.

9 **See** Section 6 of the Act. In *Centre for Environmental Law, WWF* v. *Union of India* (1997 (6) SCALE 8), the Supreme Court directed states that had not constituted Wildlife Boards to constitute them in two months.

10 **See** Sections .3 and 4 of the Act. In several states, the same person discharges the office of the Chief Conservator of Forests and the Chief Wild Life Warden.

11 As per Section 2(37), the term "wildlife" means any animal, bees, butterflies, crustacea, fish and moths, and aquatic or land vegetation that forms part of the habitat.

12 The Preamble reads thus:

"*An Act to provide for the protection of wild animals, birds and plants and for matters connected there with or auxiliary or incidental thereto.*"

13 **See** Chapter V, Sections 39-49 of the Act.

14 **See** Section 2(1) of the Act.

15 It is to be noted that Section 47 of the Indian Penal Code defines the term more precisely as any living creature, other than a human being. **See** Krishnan, M., "The Wild Life (Protection) Act of 1972 – A Critical Appraisal", *Economic and Political Weekly*, Vol.9, No.15, 364 (1973).

[26] India favours universal accessibility to the special safeguard clause since this was denied to most developing countries, on the ground that it was linked to the tariffication process.

definition of the term "wildlife" in Section 2(37) seems to indicate that the Act covers only certain kinds of fauna. Reading Section 2(1) along with Section 2(37), it is clear that ants, beetles, wasps and other creatures are not included in the definition of wildlife. Further, the term "aquatic or land vegetation that forms part of the habitat" seems to cover only those plants, which are not artificially introduced, but which are natural to the environment in which they are found. If this were the intended meaning, the term "the entire native and uncultivated flora and fauna of the country", is more accurate.[16] Furthermore, various terms like protected areas, tiger reserves, biospheres, buffer zones etc are being used without their being any clear definition in the Act.[17]

Restriction on Hunting

Section 2(16) of the Act defines the term "hunting" to include capturing, killing, etc. of any wild animal; driving any wild animal for any of the purposes specified in sub-clause (a) and injuring or destroying or taking any part of the body of any such animal. The question arises whether destruction of wildlife due to other man made causes comes within the definition of "hunting".[18] The Act does not seek to prohibit the hunting of all animals, but only their unlicensed poaching. Except in preserves, many animals can be hunted on license. There are six Schedules appended to the Act. Till 1991, hunting of animals specified in Schedule I was absolutely prohibited.[19] However, by virtue of the 1991 Amendment, the prohibition on hunting was extended to all animals mentioned in Schedule I to IV.[20] The validity of the ban on hunting was questioned before the Madras High Court on the ground that the animals listed in Schedule I were a threat to property. It was pleaded on this ground that the petitioner had the right to hunt these animals. The Madras High Court rejected these contentions and held that the petitioner's right to property was not affected.[21]

[16] This definition found favour with the expert committee in 1970. Chandrashekaran, N.S. and Chandrashekaran Pillai, K.N., "Legal Aspects of Nationalisation of Trade in Wild Life and Animal Articles", 16 *Cochin University Law Review* 485 (1985).

[17] Singh, Chhatrapati, "Legal Policy for India's National Parks and Sanctuaries", *Reading Material prepared for Training Programme for IFS Officers in Environmental Law*, Centre for Environmental Law Education, Research and Advocacy, National Law School of India University, Bangalore, 2000.

[18] Divan, Shyam and Rosencranz, Armin, *Environmental Law and Policy in India*, 2nd Edition, Oxford University Press, New Delhi, 2001, p.331.

[19] Schedule I lists the animals that may not be hunted wherever found. All the species included in this Schedule are on the verge of extinction. Prior to 1991, Schedule II concerned special game that may be hunted on license issued by the Chief Wild Life Warden. Presumable, these were considered less acutely threatened than the species listed in Schedule I. Schedule III concerned special game that was considered less threatened than the species listed in Schedule I. Schedule IV lists classes and species of small game. Schedule VI lists several animals as vermin, among these the common crow and the Indian fox.

[20] Section 9 of the Act, which prohibits hunting, reads thus:

"*No person shall hunt any wild animal specified in Schedules I, II, III, and IV, except as provided under Section 11 and Section 12.*"

[21] *I.R.Coelho* v. *State of Tamil Nadu*, 1991 (1) Mad. L.Rep. 355 **cited from** Divan, Shyam and Rosencranz, Armin, Environmental Law and Policy in India, 2nd Edition, Oxford University Press, New Delhi, 2001, p.332.

In another case[22] the amendment to Section 62 of the Act, which divested the power of the state government to declare certain animals as vermin, was challenged on the ground that they divested the state government of lawful authority. Since vermin caused damage to crops, it came within the concern of agriculture, a state subject. The Delhi High Court rejected these contentions. Applying the doctrine of pith and substance, the Court held that the provision essentially related to the protection of wildlife (on which the Centre had the competence to legislate) and not agriculture. Many scientists question the veracity of these lists.[23] What is more, such specific enumeration of species frequently creates difficulty in convicting offenders. It is often difficult for the prosecution to prove that the action of the accused related to the species that is given protection under the Act.[24] An alternative may be to include a reverse onus clause placing the burden of proof on the accused to prove that the article did not relate to the species in question.

Sections 11 and 12 empower the Chief Wild Life Warden to sanction the hunting of any animal in Schedule I, II, III and IV, when it becomes a "rogue" animal and a threat to life and limb, or a crop raider, or when it has become diseased or disabled beyond recovery. The statutory prohibition against hunting and trapping of specified species will only partially help in conserving our wildlife. Other forms of activities that have the effect of depleting wildlife like the deprivation of habitat, competition for fodder from domestic animals being allowed to graze in the sanctuary, etc. must be eliminated before the word protection can have any meaning[25].

Protection of Flora

It was only by the Wild Life Protection Amendment Act 1991, that the definition of wildlife in Section 2(37) was broadened to include flora as well as fauna. As far as flora is concerned, Section 17H of the Act declares certain endangered species of plants[26] as the property of the Central Government. The use of plants without a license is prohibited.[27]

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22 *Sukh Dev Singh Roy* v. *Union of India*, 1993 (60) Del. L.T. 319 **cited from** Divan, Shyam and Rosencranz, Armin, Environmental Law and Policy in India, 2nd Edition, Oxford University Press, New Delhi, 2001, p.334.

23 For instance, many of the species listed in Schedule II, such as the sun bear and the wild yak are quite threatened and should be in Schedule I. Further, the Indian Fox, which is categorized as vermin, is exclusive to India, and ought to be protected. Likewise, many common Indian animals like the rhesus monkey and the common langur are not mentioned in any list. **See** Krishnan, M., "The Wild Life (Protection) Act of 1972 – A Critical Appraisal", *Economic and Political Weekly*, Vol.9, No.15, 364 (1973).

24 A case in point is the decision of the Bombay High Court in *Rafique Ramzan Ali* v. *A.A.Jalgaonkar* (1984 (2) Cri.LJ 1460), where the Court set aside the conviction of an accused charged with the trading of skins of lizards and snakes without a license, as the prosecution failed to prove that the articles seized were made of such species of lizards or snakes, which were enumerated in the Schedules.

25 Chandrashekaran, N.S., Chandrashekaran Pillai, K.N., "Legal Aspects of Nationalisation of Trade in Wild Life and Animal Articles", 16 *Cochin University Law Review* 485 (1985).

26 These categories are enumerated in the Schedule VI to the Act.

27 **See** Sections 17A and 17C of the Act.

Declaration of Protected Areas

The State government may constitute any area, other than an area comprised within any reserve forest or the territorial waters, as a sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wildlife or its environment.[28] Similarly, Section 35 gives the power to the state government to constitute any area as a national park. The total area currently for preserves is well under 4.5% of the total land area.[29] Though, in terms of ecological significance, there is hardly any distinction between national Parks and sanctuaries, national parks enjoy more protection than sanctuaries. Public entry is restricted in both.[30] Based on this restriction, a recent decision of the Madras High Court upheld restrictions on plying vehicles in the sanctuaries.[31] Likewise, the destruction of any wildlife or habitat is prohibited in both sanctuaries and national parks.[32] Only registered persons can hold arms even under the Arms Act, 1959, if he/she resides within ten kilometres of a sanctuary or a national park.[33] However, the grazing of livestock is prohibited within a national park,[34] but permitted with a sanctuary.[35]

The role of zoos in wildlife protection has also been recognized by the 1991 Amendment. By virtue of Section 38A, a Central Zoo Authority has been created to regulate zoos and ensure that the activities therein do not result in destruction of wildlife. One of the primary functions of the Authority is to encourage captive breeding of endangered species in zoos.[36]

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28 **See** Section 18 of the Act. In *Centre for Environmental Law, WWF* v. *Union of India* (1997 (6) SCALE 8), the Supreme Court noted several instances where although the intention to establish a sanctuary was declared, the necessary steps were not taken. The Court directed the state government to take necessary steps to notify the sanctuary.

29 Kothari, Ashish, "Is Joint Management of Protected Areas Desirable and Possible" in Kothari, Ashish, Singh, N. and Suri, S., (eds.), *People and Protected Areas: Towards Participatory Conservation in India*, Sage Publications, New Delhi, 1996, p.18.

30 Section 27 restricts the right of entry in sanctuaries. Section 35 (8) states that the provisions of Sections 27 and 28, Sections 30 to 32 (both inclusive), and Clauses (a), (b) and (c) of Section 33, Section 33A and Section 34 shall, as far as may be possible, apply in relation to a national park as they apply in relation to a sanctuary.

31 *Bombay Burmah Trading Corporation* v. *Field Director Project Tiger*, AIR 2000 Mad. 163.

32 Section 29 mandates that no person shall destroy, exploit or remove any wildlife from a sanctuary or destroy or damage the habitat of any wild animal or deprive any wild animal of its habitat within such sanctuary, except under and in accordance with a permit granted by the Chief Life Warden, and that no such permit shall be granted unless the State Government is satisfied that it is necessary for the improvement and better management of wildlife therein, and authorizes the issue of such permit. Similarly, **see** Section 35(6) in the case of a national park.

33 **See** Section 33A in the case of sanctuaries, and Section 35(8) in the case of national parks.

34 Section 35(7) prohibits the grazing of any livestock in a national park.

35 The Explanation to Section 29 states that the grazing or movement of live-stock permitted under Section 33(d) is not an act prohibited under this section, and hence a permit is not required for the same. Section 33(d) empowers the Chief Wild Life Warden to regulate, control or prohibit, in keeping with the interests of wild life, the grazing or movement of livestock.

36 Section 38C, which deals with the functions of the Central Zoo Authority, identifies captive breeding as one of the primary functions. As per Section 38C (d), the Authority should identify endangered species of wild animals for purposes of captive breeding, and assign responsibility in this regard to a zoo.

However, it should be remembered that the conservation of species in their natural habitat, i.e., *in situ* conservation, is far better than caged conservation and captive breeding. This is essential for maintaining the ecological balance. The Government has formulated various schemes for saving particular species.[37] Section 38J prohibits teasing, molesting, etc. in zoos, so that the animals are protected. Furthermore, a person operating a zoo should prove that he had obtained the animals from authorized persons or another zoo. If he fails to do so, the presumption under Section 57 of unlawful possession applies and the person can be convicted.[38]

Regulation of Trade in Wildlife

The Act regulates trade in wild animals, animal articles and trophies[39] and subject to the provisions of Chapter VA, prohibits dealings therein without a license.[40] The Act presupposes that wild animals and animal articles for the purpose of trade would be available from hunting or otherwise, and attempts a programme of regulation through control mechanisms such as permission, certificate of ownership, affixing of identification marks, licensing, and penalties for violations. However, the existence of a parallel trade in animal articles and trophies provides ample scope for destruction of wildlife. Chapter VA contains an absolute prohibition on dealings in certain animal articles irrespective of license granted by the Wild Life Warden.[41]

The validity of the prohibition was challenged in *Ivory Traders and Manufacturers Association* v. *Union of India*[42] , where the petitioners alleged that the ban on ivory violated their fundamental right to trade guaranteed under Article 19(1)(g) of the Constitution. Upholding the provision, the Court held that trade and business at the cost of disrupting life forms and linkages necessary for the protection of biodiversity cannot be permitted. The Court compared trade in ivory to inherently harmful activity like business in intoxicants. In a similar case[43] , the Court upheld the provisions that banned trade in animal skins and prohibited their stocking. The Court held that wildlife formed a part of India's heritage, and that amendments had been inserted on the recommendation of the Indian Board of

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37 Project Tiger was launched in 1973, and covers over 23 tiger reserves in a total area of 3.05 million hectares. By 1993, it had succeeded in increasing the tiger population to 3,750. Project Elephant was launched in 1991–92, and aims to ensure the long-term survival of elephant populations by restoring lost and degraded habitats, mitigating people-elephant conflicts and by establishing a database of the migration and population dynamics of elephants. The Crocodile Project launched in 1976 aims to save the three endangered crocodile species, namely the freshwater crocodile, the saltwater crocodile and the rare gharial. **See** "Biodiversity", http://www.oneworld.org/cse/html/cmp/cmp73.htm, visited on April 4, 2001.

38 **See** *Jaydev Kundu* v. *State of West Bengal*, 97 CWN 403 **cited from** Divan, Shyam and Rosencranz, Armin, Environmental Law and Policy in India, 2nd Edition, Oxford University Press, New Delhi, 2001, p.334.

39 **See** Chapter V of the Act.

40 **See** Section 44 of the Act.

41 **See** Section 49B of the Act.

42 AIR 1997 Del 267.

43 *G.R.Simon* v. *Union of India*, AIR 1997 Del 301.

Wild Life. The provisions were necessary to prevent accumulated stocks being used as a cover for smuggling articles. However, in both these cases, the Court passed orders allowing the traders to continue their business for several years.

Therefore, it is apparent that the Wildlife Act is ambiguous on many crucial issues. As noted earlier, the Act was intended to fulfill India's obligations under various international conventions. Consequently, there is a need to examine the Act from this perspective. For this purpose, the next segment in this paper reviews various international instruments on wildlife protection.

Review of International Standards

Protection of the environment is a global concern today, as evinced by the numerous international conventions in this area. India is a party to several of these international conventions.[44] The most important convention on the preservation of wildlife is the Convention on International Trade in Endangered Species (also known as the Washington Convention) which seeks to regulate and prohibit international trade in endangered species. Further, the Convention on Biological diversity has also been examined, because the Convention has certain important guidelines to offer, for the conservation of flora and fauna.

The Convention on International Trade in Endangered Species[45]

CITES is often proclaimed as a success story on how governmental and non-governmental action has established an effective mechanism for co-operation in conservation. During the 1960s, countries became increasingly aware that over-exploitation of wildlife through international trade was contributing to the rapid decline of many plant and animal species. In 1963, the World Conservation Union (IUCN) began drafting an international convention to regulate the export, transit and import of rare or threatened wildlife species. The international commitment for a convention was established in June 1972, at the UN Conference on the Human Environment in Stockholm, Sweden, which recommended the immediate preparation of an international convention to deal with these issues. The same year, IUCN, the United States and Kenya produced a unified working paper, which became the basis for convention negotiations[46] . The final negotiations were held from 12 February to 2 March 1973 in Washington, D.C. CITES was adopted on March 2, 1973, and entered

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44 These include Antarctic Fauna and Flora, 1964; RAMSAR 1971; CITES 1979; Convention on Migratory Species 1979; Antarctic Treaty Protocol 1997; Antarctic Marine Living Resources 1980; UNCLOS 1982; Regulation of Whaling 1946, **See** Austen, M. and Richards, T., *Basic Legal Documents in International Animal Welfare and Wild Life Conservation*, Kluwer Law International, London, 2000.

45 Hereinafter, referred to as "CITES".

46 **See generally**, Webb, John T. Anderson, R., "Prosecuting Wildlife Traffickers", United States Attorneys' Bulletin, Office of Legal Education, Vol. 47, No.5, 1999, http://www.ussdoj.gov/usao/eousa/foia_reading_room/usab4706.pdf, visited on April 4, 2001.

into force on July 1, 1975. India joined the convention on October 1976. There are currently 152 Parties to the Convention[47] .

The Convention's goals are to monitor and stop commercial international trade in endangered species, maintain those species under international commercial exploitation in an ecological balance, and assist countries towards enabling a sustainable use of species through international trade.[48] The Convention aims to demonstrate that sound management of resources may be beneficial to local communities. CITES Parties regulate wildlife trade through controls and regulations on species listed in three Appendices[49] . The Appendices classify threatened species in three distinct categories.[50] To list a species, a Party has to provide a proposal containing scientific and biological data on population and trade trends for the approval of the Conference of the Parties (COP). The proposal must be supported by a two-thirds majority of Parties present and voting at a COP.[51] CITES only lists species whose populations are obviously impacted by international trade. At present, there are 890 species of flora and fauna in Appendix I, 29,111 in Appendix II, and 241 in Appendix III. Flora species outnumber fauna by approximately seven to one. As the trade impact on a species increases or decreases, the COP decides whether or not the species should be shifted between or removed from appendices.[52]

CITES also regulates international trade through a system of permits and certificates that are required before specimens enter or leave a country[53] . Each Party must adopt national legislation to provide official designation of a Management Authority responsible for issuing these permits and certificates based on the advice of a designated Scientific Authority[54] . Parties maintain trade records that are forwarded to the CITES Secretariat annually, the sum of which enable it to compile statistical information on the world volume

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47 Chasek, P.S. (ed.), "CITES Final Earth Negotiations Bulletin", International Institute for Sustainable Development, http://www.iisd.ca/download/asc/enb2117e.txt, visited on March 26, 2001.

48 **See** Preamble to the Convention. **See also** "A Step Forward", *Down to Earth*, Vol.6, No.13, November 30, 1997.

49 **See** Article 2 of the CITES.

50 Appendix I includes species threatened with extinction that are, or could be, affected by trade. There are about 600 animal and 180 plant species listed in Appendix I including the African Elephant, Cheetahs, Leopards, black and white rhinoceros, whales, sea turtles, orchids and cacti. Appendix II includes species that are not necessarily in danger of extinction, but which could become so, if trade in them were not strictly regulated. Appendix II covers more than 2300 species of animals such as the hippopotamus and the Nile crocodile, all wild cats and clack corals. Appendix III refers to species that individual parties to the Convention choose to make subject to the regulations, and for which the co-operation of the other parties is required in controlling trade.

51 **See** Article 15 of CITES.

52 "On the horns of the rhino", *Down to Earth*, Vol.6, No.4, July 15, 1997.

53 **See** Article 6 of CITES.

54 In India, as per Sections 11, 12, and 35 of the WLPA, the designated authority is the Chief Wild Life Warden.

of trade in Appendix species.[55] These two designated national authorities also enhance CITES enforcement through cooperation with customs, police or appropriate agencies. The operational bodies of CITES include the COP and its Standing Committee, as well as several scientific advisory committees – the Animals Committee, the Plants Committee, the Nomenclature Committee and the Identification Manual Committee[56] . The Conference of the Parties meets every two and a half years to assess the effectiveness of the convention[57] . Located in Geneva, the CITES Secretariat interprets Convention provisions and services the CITES Parties and Committees[58] . However, there are several problems with the implementation of the Convention. CITES has become a battleground for the North and the South. Poorer countries suggest that the richer want to perpetuate their low state of development, and force their version of sustainable development on them.[59] The debate centres on the extent to which trade should be allowed, and the cost of sustainable development. The green lobbies in Australia, the United Kingdom, the United States, and other developed countries believe that species can be saved only if there is total protection. Developing countries believe that every species must pay its way to survive – these countries, which have had to pay for the cost of conservation, believe that they have the right to benefit from the species through the sustainable use of natural resources.[60] Furthermore, the total protection groups argue that importing countries do not have foolproof methods of checking the trade in ivory. However, developing countries respond by stating that this is not an acceptable excuse for demands by these groups that they measure up to the principles of sustainable development and rigorous conservation. Total protection is also likely to maximize human-animal conflict. There is loss of food and productivity as well as social costs.[61] Developing countries claim that the non-governmental organizations of the North bully smaller States into following their ideology. Sanctions have been aimed at smaller countries in the past. The US invoked the Pelly Amendment[62]

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55 **See** Article 8(6) of the CITES.

56 **See** Articles 9 and 11 of the CITES.

57 **See** Article 9 of the CITES, for the functions of the Conference of Parties.

58 **See** Article 12 of the CITES.

59 Sharma, A., "In favour of a lesser good", *Down to Earth*, Vol.6, No.4, July 15, 1997.

60 Valson, M.C., "Biodiversity Conservation: Challenges and Legal Solutions", 23 *Cochin University Law Review* 139 (1999).

61 Social factors include loss of education of children who are afraid to walk to school, and the extra effort put in by women to collect fuel wood and water. **See** De Klemm, C. and Clare, S., *Biodiversity Conservation and the Law*, IUCN, Cambridge, 1993.

62 Section 8 of the Fisherman's Protective Act, 22 U.S.C. 1978, also known as the Pelly Amendment, authorizes the President to prohibit the importation of products from countries that allow fishing operations or engage in trade that diminishes the effectiveness of an international fishery conservation programme for endangered or threatened species.

against Taiwan for trade in tiger parts. However, no action was taken against Norway, which continues its whaling operations.[63]

There is a need to control trade while allowing for sustainable development. For example, in 1997, the total ban on ivory trade was lifted, and trade was partially allowed.[64] CITES has effectively frozen conservation based community management (especially communities existing on marginal agricultural land that supports wildlife) programmes that use resources sustainable to alleviate poverty. In its present state all that CITES does is give the US the right to be a global policeman, and force conservation down the throats of nations more interested in sustainable development. The net resultant status is that despite CITES, the trade in wildlife exists.[65] The cost of conservation must be shared by the United States and European nations.[66]

CITES is not a panacea for all evils. National agencies are responsible for enforcement of anti-poaching measures and efforts against illicit trade. As far as endangered species in India and international trade are concerned, CITES has been ineffective in controlling illegal trade in the Royal Bengal Tiger[67] , the greater one-horned rhinoceros, and the Asian elephant. Unfortunately, there has been no evaluation of CITES, even 20 years after it came into being. Important questions remain unanswered. Going by the figures on illegal trade and poaching, CITES has only succeeded in driving trade underground. State monopoly in the trading of wildlife, animal articles and trophies has been proposed as an alternative.[68] Those countries that have little say in the buying or selling of animal products are strapped for resources for conservation. Overt measures like refusing and granting aid are adopted to pressurize developing countries to adopt particular conservation programmes.

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63 It is clear that there is selective action by the United States based on its own economic interests. Though trade sanctions were imposed against Taiwan, none were imposed against China. Chasek, P.S. (ed.), "CITES Final Earth Negotiations Bulletin", International Institute for Sustainable Development, http://www.iisd.ca/download/asc/enb2117e.txt, visited on March 26, 2001.

64 The Indian delegation to the CITES strongly opposed the listing of the African elephant in Appendix I, and the reopening of the trade in ivory, perceiving it as a threat to the Asian elephant. The Indian WLPA has banned the trade in ivory and its products in 1986. In 1991, by an amendment aimed at stopping the sale of Asian ivory under the cover of African ivory, the import and sale of the latter has also been banned. However, poaching cases have increased over the years.

65 For instance, the 1972 Act bans trade in butterflies. The Indian government does not acknowledge that such trade exists. It is not included in the report sent to the secretariat of the CITES although other countries record the import of butterflies from India. "Butterflies Endangered", *Down to Earth*, Vol.6, No.12, Nov. 15, 1997, p.16.

66 "On the horns of the rhino", *Down to Earth*, Vol.6, No.4, July 15, 1997.

67 The Royal Bengal tiger is the symbol of conservation efforts in India. Project Tiger was launched in 1973 amidst great fanfare, and met with some initial success. But after its initial success, things went astray and the tiger population dwindled alarmingly. The Project Tiger approach has since been called into question. The reason for the decline is the international trade in tiger bones (used in Chinese medicines) and skin.

68 Chandrashekaran, N.S. and Chandrashekaran Pillai, K.N., "Legal Aspects of Nationalisation of Trade in Wild Life and Animal Articles", 16 *Cochin University Law Review* 485 (1985).

The Convention on Biological Diversity[69]

At the 1992 Earth Summit in Rio de Janeiro, world leaders agreed on a comprehensive strategy for "sustainable development". One of the key agreements adopted at Rio was the Convention on Biological Diversity. The challenge was to find economic policies that motivate conservation and sustainable use by creating financial incentives for those who would otherwise over-use or damage the resource.[70] India ratified the CBD on February 24, 1994.[71] Techniques to conserve biodiversity and use of natural resources have always been area-based or species-based. The Convention goes beyond this, by adding to the obligation, control of processes and activities that affect biodiversity. Until the adoption of the CBD, the sectoral and the regional gaps in the protection of species and ecosystems resulted in considerable gaps and coverage in both cases.[72]

CBD does not replace existing conventions, but establishes general obligations for the preservation of biological diversity and provision of a coherent framework for action in the future.[73] As a party to the CBD, India is obliged to come up with a national legislation that would ensure conservation and sustainable use of the resources that the country possesses.[74] The legislation is also expected to contain provisions relating to the rights of local communities. The CBD stipulates that every nation has sovereign authority over the resources found in its territory, but can exercise this right only when the legislation is in place.[75]

The agreement covers all ecosystems, species, and genetic resources.[76] It links traditional conservation efforts to the economic goal of using biological resources sustainably. CBD evolved as a result of several concerns: While past conservation efforts were aimed at protecting particular species and habitats, the Convention recognizes that ecosystems, species and genes must be used for the benefit of humans. However, this should be done in a way and at a rate that does not lead to the long-term decline of biological diversity. The conservation of each country's biological diversity can be achieved in various ways. *In situ* conservation[77] focuses on conserving genes, species, and ecosystems in their natural surroundings, by, for example, establishing protected areas, rehabilitating degraded ecosystems, and adopting legislation to protect threatened species.[78] *Ex situ* conservation uses zoos, botanical gardens and gene banks to conserve species.[79] Article 8(j) of the

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69 Hereinafter referred to as the "CBD".

70 **See** De Klemm, C. and Clare, S., *Biodiversity Conservation and the Law*, IUCN, Cambridge, 1993.

71 Valson, M.C., "Biodiversity Conservation: Challenges and Legal Solutions", 23 *Cochin University Law Review* 139 (1999).

72 **See** *supra* n.70.

73 **See** Article 22, for the relationship of CBD with other international conventions.

74 **See** Article 8(k) of the CBD.

75 **See** Article 3 of the CBD. **See also** "A Step Forward", *Down to Earth*, Vol.6, No.13, November 30, 1997, p.13.

76 **See** Article 2 of the CBD for the definition of bio-resources.

77 **See** Article 2, for the definition of *in situ* conservation.

78 **See** Article 8 of the CBD.

79 **See** Article 9 of the CBD.

CBD recognizes the close and traditional dependence of indigenous and local communities on biological resources, and the need to ensure that these communities share in the benefits arising from the use of their traditional knowledge and practices relating to the conservation and sustainable use of biodiversity. Member governments have undertaken "to respect, preserve and maintain" such knowledge, to promote its wider application with the approval and involvement of the communities concerned, and to encourage the equitable sharing of the benefits derived from their utilization. However, this provision in ineffective as it looks to make the role of indigenous communities subject to the national legislation, thereby leaving it to the discretion of the state.[80]

The exact manner in which these benefits are to be shared opens up a fairly complex secondary debate.[81] Although the CBD directs that those who contribute in some way to their discovery should also share in the benefits of their discovery, the exact manner in which this may be achieved is a more difficult question that has remained unanswered.[82] The CBD strongly suggests, and the international community would seem to support this suggestion, that intellectual property regimes are the best way in which such equitable sharing may be achieved.

The Draft Biodiversity Bill

The first draft of the Biodiversity Bill, prepared in 1998, was criticized by experts and non-governmental organizations representing local communities, on the ground that the process of drafting was not transparent.[83] Further, the only enabling authority concerning any issue relating to biodiversity would have been the Ministry of Environment and Forests. This was considered problematic because it led to further centralization of policy-making. The second draft made an attempt to decentralize the Ministry's control over bio-resources. Both drafts aimed at creating a National Biodiversity Authority.[84] This was seen as the nodal agency responsible for all matters relating to the conservation of biodiversity.

The latest draft Bill of 2000 seems to emphasize the issue of benefit sharing with local communities.[85] There is a specific provision for the setting up of a committee, which will supervise the access to genetic resources and benefit sharing to "ensure efficient discharge

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80 Various state governments have set up Boards to advice the government on all aspects of the implementation of the CBD. **See** Pradeep, P.R.J., "Kerala to set up Biodiversity Board", *Down to Earth*, Vol.6, No.14 December 15, 1997.

81 "Sustaining Life on Earth: How the Convention on Biological Diversity promotes nature and human well-being", http://www.biodiv.org/doc/publications/guide.asp?lg=0&id=conclusion, visited on March 20, 2001.

82 **See** Article 19 of the CBD.

83 Shiva, Vandana, Bhutani, Shalini, Prasad, U. and Jafri, A.H., *An Activist's Handbook on Biodiversity*, Research Foundation for Science Technology and Ecology, New Delhi, 1999.

84 Clause 4 of the second Draft Bill.

85 For instance, Clause 15 of the Bill states that the National Biodiversity Authority should protect the knowledge and rights of local communities relating to biodiversity.

of these duties."[86] The stress in the first draft was on the conservation of biological resources, but in the present draft the term "conservation" is brought up only in the context of local communities.[87] However, the Biodiversity Bill only pays lip service to the local communities' right to these resources, and the objective of the CBD of giving them the lion's share of the benefits arising from the use of these resources is negated.[88] The Bill purports to appropriate these resources by corporate bodies with the approval of the Government.[89] Significantly, the Bill compels all Indian citizens to obtain the permission of the National Biodiversity Authority before even applying for a patent based on any research or information on Indian biological resources, and thereby effectively denies them the right to their local biological resources.[90]

Clause 3 of the Bill provides that non-citizens of India, non-residents, as well as corporate bodies not registered in India, cannot "*obtain any biological resource occurring in India or knowledge associated thereto for research or for commercial utilization or for bio-survey and bio-utilization.*" However, this prohibition is bypassed by Clause 5 which states that the above provisions "*shall not apply to collaborative research projects...If such projects...(a) conform to the policy guidelines issued by the Central Government in this behalf; (b) be approved by the Central Government.*" The Bill, therefore, does not really protect the rights of local communities.

The Ashokan and Vendanthangal Models: Convergence of People's Rights and Conservation

The WLPA ignores the traditional linkages between communities and wildlife. Indeed, the traditional practices of local communities often help conserve flora and fauna. The custom of creating sacred groves[91] where no person is allowed to enter is an example of such traditional practices.[92] The government's strategy of conservation has been to go for greater control, greater centralisation and increasing concentration of decision-making

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86 Clause 14 of the Draft Bill.

87 **See** Clause 10, for the functions of the National Biodiversity Authority.

88 Ghosh, A, "Biodiversity Bill: The Great Hoax", *The Hindu Business Line*, October 3, 2000, p.3.

89 *Ibid*. **See** Clause 16 of the Bill for activities that can be performed with the consent of the Authority.

90 **See** Clause 6(1) of the Bill.

91 In the Western Ghats and north-eastern parts of India, the concept of sacred groves is part of a unique tradition that has been responsible for preserving pockets of biodiversity. Sacred groves are usually a part of temple land, and are areas that are important because they represent the original flora of the locality, preserved in its natural form without outside disturbances. These patches of vegetation, and sometimes the fauna within them, such as snakes and monkeys, are considered sacred and are worshipped by people. "Biodiversity", http://www.oneworld.org/cse/html/cmp/cmp73.htm, visited on April 4, 2001.

92 Furthermore, the traditional communities tend to view the forest, not as a means of production or as a source of profit, but as a bountiful goddess. **See** Fernandez, W., Menon, G. and Veegar, P., *Forests Environment and Tribal Economy*, Indian Social Institute, New Delhi, 1988.

power in a few hands.[93] The stress was on reducing or eliminating altogether the human sources of biotic pressures, assuming that such pressure was detrimental to wildlife resources. It is to achieve this end that the WLPA has designated national parks as total protection areas, the implication being that any settlements inside would have to be removed.[94] Community land and forest rights, or access to forest and wetland resources have been extinguished or severely curtailed in protected areas.[95] This approach is criticized by human rights activists who consider that a protection strategy that alienates local communities is unjust and violates their fundamental rights, as also being shortsighted as far as environmental conservation is concerned.[96] The rights to land, dwelling, livelihood, and cultural identity of these communities are inalienable and any attempt to take away these rights in the name of development or conservation is unacceptable.[97]

The two approaches to conservation have existed since historical times. The emperor Ashoka erected pillars that prohibited the killing of certain species of fauna.[98] On the other hand, Vedanthangal in Tamil Nadu was a sacred grove where the tribals themselves regulated the killing of wildlife. Tribal activists argue against protected areas because they deprive forest dwellers of the access to common property resources, uproot communities, and halt development activities.[99] Conservationists fear that due to the integration of traditional communities with the urban industrial economy, there has been a collapse of traditional conservationist values and that it is the local communities who help in exploiting the bio resources in an area.[100] Additionally, due to the population expansion, the biomass is inadequate to meet the requirements of tribal communities and if unrestricted access were allowed, it would result in depredation.[101]

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93 **See** Sections 3,4 and 6 of the Act, which provide for the setting up of Wildlife Boards and the appointment of Wildlife Wardens and other staff.

94 However, this is however the case with sanctuaries, where the Act provided for the continuation of those human activities not in conflict with conservation objectives.

95 **See** Kothari, Ashish, "Is Joint Management of Protected Areas Desirable and Possible" in Kothari, Ashish, Singh, N. and Suri, S., (eds.), *People and Protected Areas: Towards Participatory Conservation in India*, Sage Publications, New Delhi, 1996.

96 **See** Jha, A.K., "Wild Life and Indigenous People", *Economic and Political Weekly*, Vol.29, No.29, 2131 (1994).

97 Saberwal, V., "Rethinking Biodiversity Conservation in India", http://eelink.net./~asilwildlife/saberwal.pdf, visited on March 20, 2001.

98 Divan, Shyam and Rosencranz, Armin, *Environmental Law and Policy in India*, 2nd Edition, Oxford University Press, New Delhi, 2001, p.335.

99 *Ibid*.

100 Krishnan, M., "The Wild Life (Protection) Act of 1972 – A Critical Appraisal", *Economic and Political Weekly*, Vol.9, No.15, 364 (1973).

101 The provisions of the Draft Forest Bill, which introduce the concept of carrying capacity, must be examined in this context. As per Section 12, the Forest Settlement Officer is expected to accept or reject any claims to the forest produce depending on the carrying capacity. **See** Singh, Chhatrapati, "Legal Policy for India's National Parks and Sanctuaries", *Reading Material prepared for Training Programme for IFS Officers in Environmental Law*, Centre for Environmental Law Education, Research and Advocacy, National Law School of India University, Bangalore, 2000.

The conflict can also be looked at in terms of the anthropocentric and deep ecology perspectives of environmental law.[102] Human rights activists adopt the anthropocentric approach to conservation whereas conservationists tend to think in terms of animal rights.[103] The top-down conservation approach, with emphasis on State mechanisms for conservation, and the recent breakdown of the community-wildlife relationship has resulted in hostility between the human rights advocates and wildlife conservationists. The dilemma that exists is whether local communities should be allowed access to protected areas, or whether the current approach followed in the WLPA of excluding local communities should be adopted.

The Rights of Local Communities under the WLPA

Is the problem due to the policy behind the existing law or its ineffectiveness? It is necessary to examine the provisions of the WLPA to answer this question. Sections 18 to 26A indicate the procedure whereby the Collector enquires into the rights of the local people, and acquires or permits the continuance of the same in the sanctuary. There is a re-definition of the relationship between the people and wildlife in the initial stage of creation of protected areas.[104] Section 19 provides that when a notification has been issued under Section 18, the Collector should inquire into, and determine the existence, nature and extent of the rights of any person in, or over, the land comprised within the limits of the sanctuary. It is clear that after the issue of a notification under Section 18, no right shall be acquired in, or over, the land comprised within the limits of the area specified in such notification, except by succession, testamentary or intestate.[105]

The settlement of rights of local people under Section 24(2)(c) has not been done in most sanctuaries.[106] This has created a major problem in determining the occupancy or resource rights of local communities.[107] Furthermore, problems arise because the process in Sections 19-35 is not complied with. There are provisions in the Act that seem to protect the rights of tribal communities. For instance, the Explanation to Section 29 provides that grazing or movement of live-stock permitted under clause Section 33(d) is not an act prohibited by

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102 The Norwegian philosopher Arne Naess coined the phrase "deep ecology" to describe deep ecological awareness. Fritjof Capra defined deep ecology by contrasting it with shallow ecology.

103 For a general discussion on these two approaches, **see** Scrutton, R., and A. Tyler, "Do Animals Have Rights?", *The Ecologist*, Vol.31, No.2, 2000.

104 Jena, N.R., "People, Wildlife and the Wildlife Protection Act", *Economic and Political Weekly*, Vol.29, No.32, 2767 (1994). This article was a rejoinder to the one written by A.K.Jha stating that the Act did not totally exclude the rights of local communities. **See** Jha, A.K., "Wild Life and Indigenous People", *Economic and Political Weekly*, Vol.29, No.29, 2131 (1994).

105 **See** Section 20 of the WLPA.

106 Section 24(2)(c) provides that the Collector may allow, in consultation with the Chief Wild Life Warden, the continuation of any right of any person in or over any land within the limits of the sanctuary.

107 Singh, Chhatrapati, "Legal Policy for India's National Parks and Sanctuaries", *Reading Material prepared for Training Programme for IFS Officers in Environmental Law*, Centre for Environmental Law Education, Research and Advocacy, National Law School of India University, Bangalore, 2000.

Section 29, and is permissible in a sanctuary. The Proviso to Section 17A provides that a member of a Scheduled Tribe may, subject to the provisions of Chapter IV, pick, collect, or possess, in the district he/she resides, any specified plant or part or derivative thereof for his *bona fide* personal use. Furthermore, the traditional hunting rights of scheduled tribes in the Andaman and Nicobar Islands are also protected.[108] The rights of fisher folk are also protected.[109] Sections 15-18 of the Easements Act recognize the customary right over land and resources. The Indian Forest Act grants some concessions over forest produce. The counter argument is that the rights granted are illusory in nature. The rights mentioned under Section 24 of the WLPA do not include traditional customary rights or the right to livelihood.[110] Hence, Section 24, even if properly implemented, would not protect the rights of local communities. Further, the grant of the right under Section 24(2)(c) depends on the pleasure of the state and cannot be demanded. Furthermore, Section 24(2)(c) is applicable only to sanctuaries and not to national parks.[111]

That the rights granted are illusory is also evident from the fact that no consultation is required for identifying an area as a sanctuary. The proclamation under Section 21 is often not made,[112] and if made, serves a limited purpose as the tribals are illiterate. Further, as per Section 35(7), no grazing of livestock is permitted in a national park. States cannot deal with the issue due to lack of legislative competence. For instance, Kerala Hillmen Rules, which attempted to provide protective measures for tribals in Kerala Forests, was struck down by the Kerala High Court for want of legislative competence.[113]

An Attempt to Strike A Balance

The Supreme Court has attempted to balance the rights of tribals with conservation in two cases. In *Pradeep Krishen* v. *Union of India*[114], the notification issued by the government of Madhya Pradesh was challenged as *ultra vires* the provisions of the WLPA as well as Articles 14, 21, 48A and 51A.[115] The notification permitted the collection of tendu leaves

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108 Section 65 provides that nothing in the WLPA shall affect the hunting rights conferred on the Scheduled Tribes of the Nicobar Islands in the Union territory of Andaman and Nicobar Islands by notification of the Andaman and Nicobar Administration No. 40/67/F, No., Vol. III, dated April 28, 1967.

109 **See** Sections 26A and 35 of the WLPA.

110 **See** Dey, S.C., "Protected Areas: Future Management" in Kothari, Ashish, Singh, N. and Suri, S., (eds.), *People and Protected Areas: Towards Participatory Conservation in India*, Sage Publications, New Delhi, 1996.

111 **See** Section 35(3) of the Act.

112 *Supra* n.97.

113 *Eacharan Ittiathi* v. *State of Kerala*, 1970 K.L.T. 1069 **cited from** Leelakrishnan, P., "Tribal People and their Habitat", 14 *Cochin University Law Review* 109 (1990).

114 AIR 1996 SC 2040.

115 Article 14 guarantees the right against arbitrariness and Article 21, the fundamental right to life. As has been observed earlier, Article 48A of the Directive Principles of State Policy states that the state should endeavour to protect and improve the environment and to safeguard the forests and the wildlife of the country. Similarly, Article 51A of the Constitution imposes a fundamental duty on a citizen to protect and improve the natural environment including the forests, lakes, rivers and wildlife, and to have compassion for living creatures.

from sanctuaries and national parks (in respect of which the final notification under Section 26A/35 had not been issued) by villagers in the boundaries thereof, with the avowed objective of maintaining their fundamental rights. The notification recognizes the need to provide sufficient wages to the villagers in the area by providing labour extensive work. According to the petitioner, the presence of human beings in the protected areas was adversely affecting flora and fauna, and has also scared away wildlife. The questions that arose were whether a protected area can be exploited for the collection of minor forest produce in violation of the restriction contained in the WLPA, and whether the state government had such right in view of the fact that protected areas were declared as such to preserve their ecology, flora, fauna, etc.

The state government contended that there was no real danger to wildlife as only pruning operations has been permitted, and that a special cell had been constituted to prevent poaching. In his rejoinder, the petitioner contended that he did not challenge the use of minor forest produce by tribals for their *bona fide* personal use, but challenges their commercial exploitation especially by contractors, as inconsistent with the object and the spirit of the Act. Sanctuaries that were notified before the amendment to Section 18 would continue to be sanctuaries and in respect of those areas, the notification under Section 26A was not necessary. The tribals who intervened contended that they had been enjoying the privilege for generations, and the denial of this privilege to the small tribal population would result in their ruination, as their survival is dependent on minor forest produce.

Ahmadi J. held that as the traditional rights of those living in the vicinity had not been acquired, nor efforts made to compensate or rehabilitate them, the final declaration under Section 26A and 35 has not been possible. As the final notification had not been issued, the state government could not prohibit the entry of villagers, and hence the impugned notification does not violate the provision of any law. By this, the Supreme Court recognized that the rights mentioned under Section 24(2)(c) included traditional rights as well. However, by its next finding, the Supreme Court negated any advantages the tribals may have gained. The Court accepted the contention that human entry into protected areas would cause damage to wildlife, and directed the state government to complete the process for issuance of the notification.[116]

In another similar case, *Animal and Environmental Legal Defence Fund* v. *Union of India*[117] , the grant of fishing permits to the tribals formerly residing in the area was challenged as *ultra vires* the Act and the Constitution. The petitioner contended that in view of Section 26(1)(i) of the Indian Forest Act, the ancestors of the present tribals could not have acquired any fishing rights in the Penchu river, and therefore, the present permits issued *in lieu* of

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116 The direction requiring the Madhya Pradesh government to complete the procedure for declaring protected areas, was extended to other states, by the Supreme Court decision in *Centre For Environmental Law, WWF* v. *Union of India*, AIR 1999 SC 354. **See also** *Kunapuraju Rangaraju* v. *Government of Andhra Pradesh*, 1998 (3) Andh. L.T. 215.

117 AIR 1997 SC 1071.

the traditional right should be set aside.[118] As regards the Pench National Park, as no claims had been received, the government had issued the notification under Section 24. However, the government had not yet issued the final notification under Section 35(3). The villagers claimed that they had not responded earlier due to illiteracy and non-awareness. They claimed a traditional right to fishing, as it was their sole source of livelihood. Sujata Manohar J. held that whereas every effort should be made to preserve the fragile ecology of the forest, the rights of the tribals formerly living in the area to keep body and soul together must also receive consideration. The Court held that every effort should be made to ensure that tribals, when resettled, are in a position to earn their livelihood.[119] The Court reiterated the decision in *Pradeep Krishen* and held that as the forest cover was shrinking due to the entry of human beings, there was a need to expedite the process under Section 35 and issue the final notification.[120]

The Supreme Court has thus attempted to strike a balance between the conflict between communities and wildlife. The Court has implicitly accepted the assumption in the Wildlife Act that allowing access to local communities would lead to destruction of wildlife. However, it is significant that the Court recognized the human rights at stake in this conflict.

Alternatives

As has been observed, existing laws have not been conducive to the involvement of local people and have in many cases alienated the local communities from conservation. They have also been used to authorize serious repression of the local people. Finally, various laws and policies relating to natural resources have been conflicting with each other; those relating to industrial commercial use of resources have undermined those relating to conservation and sustainable use. Thus, there is a need for a model that integrates human needs.[121] This segment of the paper looks at various alternatives like Joint Protected Area Management and the Biosphere Reserve Programme.

Joint Protected Area Management[122] : An Alternative?

JPAM is understood as the management of protected areas and their surroundings with the objective of conserving natural ecosystems and their wildlife, as well as ensuring the

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118 Under Section 26(1)(i) of the Forest Act, 1927, any person who hunts, shoots, fishes, poisons water or sets traps and snares in contravention of the rules made by the state government shall be punished in the manner provided therein.

119 The Court issued detailed directions for the implementation of the license. The directions involved the issue of photo identity cards for licensees, restrictions on the route to be used, prohibition on the lighting of fires, and strict monitoring by the state government to prevent poaching.

120 For similar cases on the displacement of tribals, and the problems created by the expansion of protected areas, **see** *Chandamari Tea Co.* v. *State of Assam* (AIR 2000 Gau 13) and *Nature Lovers Movement* v. *State of Kerala* (AIR 2000 Ker. 131).

121 Currently, World Bank-aided state forestry projects are leading to loss of livelihood security and biodiversity.

122 Hereinafter referred to as "JPAM".

livelihood security of local traditional communities, through legal and institutional mechanisms that ensure an equal partnership between these communities and governmental agencies.[123] Joint Forest Management[124] is an experience to learn from. There is a crucial difference in the objectives of JFM and JPAM. JFM is explicitly oriented towards use and exploitation of forests, whereas JPAM is geared towards biodiversity conservation.

Participatory Management under the Wildlife Act

It has been argued that proper use of the provisions of the WLPA would result in participatory management.[125] However, others disagree and state that the Act allows little scope for people's participation in conservation and for them to meet their needs from protected areas.[126] The proponents of the first view refer to Section 24(2)(c)[127], which permits continuation of rights within sanctuaries at the discretion of the Collector and the Wild Life Warden. Furthermore, Section 29 allows for activities that are not destructive of wildlife. The argument runs as follows: The current potential of the Act for allowing participation and benefit sharing has not been fully used because the wildlife authorities have assumed that human use of protected areas is necessarily destructive. Therefore, Section 29 comes into play. By virtue of Section 29, there has been a move by many state governments to ban the collection of non-timber forest produce from protected areas. Section 29 has also been (mis)used to allow destructive activity.[128]

At the state level, Section 6 provides for the appointment of a Wildlife Advisory Board. The State Government is vested with the discretion to appoint persons (not exceeding ten), who, in its opinion, are interested in the protection of wildlife, including the representatives of tribals (not exceeding three).[129] It is clear that the representation of three tribals in the Boards can hardly be said to be adequate.

The other view is that if JPAM is to be implemented in full form, then the Act will have to be amended. Section 29, which is used to prevent local communities from having access

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123 **See generally** Kothari, Ashish, Singh, N. and Suri, S., (eds.), *People and Protected Areas: Towards Participatory Conservation in India*, Sage Publications, New Delhi, 1996.

124 Hereinafter referred to as "JFM". The main objective of the JFM Programme is that the local communities should be motivated to identify with the protection and development of the forest from which they derive benefits.

125 Krishnan, B.J., "Legal Implications of Joint Management of Protected Areas" in Kothari, Ashish, Singh, N. and Suri, S., (eds.), *People and Protected Areas: Towards Participatory Conservation in India*, Sage Publications, New Delhi, 1996.

126 *Supra* n.110.

127 However, Section 24 has not been implemented. Several million people are dependent on these resources and this is not documented, though the WLPA specifies that this should be done.

128 For instance, in the Shoolpaneshwar Sanctuary of Gujarat, a paper-manufacturing unit was allowed to fell bamboo on the pretext that it was a fire prevention measure, while in the same sanctuary, there has been action against tribals who entered the forest to meet their biomass requirements.

129 **See** Section 6(g) of the WLPA.

to the resources, may be contradictory to Section 24(c), which allows continuation of such rights. The Act gives full control of protected areas to the Chief Wild Life Warden[130] and at present offers no scope for JPAM.[131] Chhatrapati Singh suggested that the Act should balance the needs of state, wildlife and people. He opined that commercial forces are increasingly destroying protected areas, adversely affecting both wildlife and local people.[132] Ashish Kothari advocates recognition of diversity in cultural practices and modes of thinking.[133] He believes that one of the keys to successful participatory conservation strategies would be to return traditional land and the forest rights of local communities in and around wildlife protected areas. Such re-allocation is necessary for ensuring justice and the areas' long-term security. In addition, sharing the benefits of conservation and other measures, which could provide stakes in the protected areas need to be considered. Simultaneously, checks and balances must be instituted. Kothari thus emphasizes the traditional linkages between communities and wildlife and advocates a legal structure that promotes traditional practices that protect wildlife. Chhatrapati Singh, on the other hand, advocates a more prominent role for the state in conservation.

JPAM: How far should it go?

There is also a dispute regarding the scope of JPAM.[134] Some experts opine that though people's support for conservation is essential, if people are partners in management, human interest will come first. Joint effort should essentially be against outside interests, i.e., participatory management is limited to outside the protected areas. Thus, there is room for joint action only if it is with regard to specific grievances like depredation of crops or attacks on people.[135] Therefore, this view emphasizes the notion of rights of nature, and of the limits of carrying capacity. However, the rights of traditional communities and that of nature need not be mutually exclusive.

Efforts towards JPAM

There have been some efforts made towards JPAM in the recent past.[136] A draft Bill for a new Wildlife Protection Act recommended by a Central Government Committee strengthens

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130 **See** Sections 33 and 35(6) of the Act.

131 "Pachyderm v. Human", *Down to Earth*, Vol.6, No.17, Jan 31,1998, p.19.

132 Singh, Chhatrapati, "Legal Policy for India's National Parks and Sanctuaries", *Reading Material prepared for Training Programme for IFS Officers in Environmental Law*, Centre for Environmental Law Education, Research and Advocacy, National Law School of India University, Bangalore, 2000.

133 *Supra* n.29.

134 Sarangai, D., "Struggles Against Sanctuaries", *Economic and Political Weekly*, Vol.34, No.12, 667 (1999).

135 Rangarajan, Mahesh, "The Politics of Ecology: The Debate on People and Wild Life in India", *Economic and Political Weekly*, Vol.31, No. 35, 2391 (1996).

136 These efforts were taken note of in the Third National Consultation on Wild Life and People's Livelihood Rights, a dialogue between those upholding the rights of local communities and those struggling to uphold human rights. The Consultation recognized the fundamental right to livelihood of local communities and the fundamental right of existence of wildlife. It also reinforced the unacceptability of forced displacement from their habitats.

wildlife habitat protection against commercial forces, but makes only token changes in the current Act's inability to include local communities and provide for livelihood rights. The Draft Bill provides for two new categories of protected areas, including community reserves, but as these will not be applied to existing protected areas, the efficacy of the amendment is doubtful. A Committee has been established to rationalize the boundaries of protected areas, to minimise their arbitrariness, and to make them "ecologically more logical".[137] The Panchayat (Extension to Schedules Areas) Act, 1996, has been passed, thereby providing a greater role for local authorities. A Central Committee has also been constituted to draft the National Wild Life Action Plan.[138]

Biosphere Reserve Programme

Another potential attempt to incorporate human concerns into conservation is the creation of Biosphere Reserves, initiated under the Man and Biosphere Programme of the UNESCO in the early 1970s.[139] These reserves were set up with the basic objective of conserving the biodiversity of a region, with the emphasis on humans as an integral part of the ecosystem, and the philosophy that local communities should be involved actively in conservation programmes.[140] The Programme recognized that natural resources cannot be protected simply through attempts to keep all human influences out of it.[141] The focus was on conservation of representative samples of ecosystems and long term *in situ* conservation of genetic diversity including plants, animals and microorganisms. The Ministry of Environment and Forests has identified twelve areas as biosphere reserves.[142] These reserves are complementary to sanctuaries and national parks. However, actual management of the seven Biosphere Reserves created so far continues to be based on the conventional protected area approach, with the Forest Department being in charge. Scientists at the Indian Institute of Science, in a national survey, noted that there are very few attempts to reconcile development activities with conservation, to harness the knowledge of local communities, to involve such communities in management, or in other ways to achieve the objectives originally set for Biosphere reserves.[143] Biosphere reserves

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137 *Supra* n.135.

138 Chhatre, A., "A Socio-Ecological Basis for Natural resource Management", *Economic and Political Weekly*, Vo.31, No.15, 1085 (1996).

139 Prasanna, A., "Legal Protection of Wild Life", 20 *Cochin University Law Review* 45 (1996) at 66-67.

140 Krishnan, B. J., "Legal Implications of Joint Management of Protected Areas", in Kothari, Ashish, Singh, N. and Suri, S., (eds.), *People and Protected Areas: Towards Participatory Conservation in India*, Sage Publications, New Delhi, 1996.

141 *Supra* n.135.

142 *Ibid*. Biosphere reserves consisting of various zones were created. The natural or core zone was the area where human interference was minimal. The Manipulative or Buffer Zone was the area where traditional activities were allowed. The reclamation zone was the zone where re-introduction of species was attempted. Lastly, the stable or cultural zone attempted to protect ongoing land use and other practices in harmony with the environment.

143 "Economic incentives to communities adjacent to reserves in India", http://biodiversityeconomics.org/incentives/topics-303-40.htm, visited on March 20, 2001.

also continue to have no legal status, as they are not recognized by the Wild Life Protection Act or other law. There is an urgent need for law reform if biosphere reserve programmes are to succeed.

Industrial Pressures And Threats To Protected Areas: Evaluation of Legal Responses

The Problem

Protected areas are becoming increasingly vulnerable to depredation due to the increasing pressure from industry. The same governments, which have declared the protected areas, have neither the will nor the means to protect these areas. These areas are being thrown open for mining, dams, tourism and other allied activities. The WLPA facilitates such destruction of protected areas. By virtue of the 1991 Amendment, which inserted Section 26A (3), States can change the boundaries of protected areas if the legislature of the state passes a resolution approving the alteration. Wildlife and forests are in the Concurrent list of the Constitution. Section 26A(3) of the WLPA permits state governments[144] to denotify various protected areas. This has resulted in state governments issuing notifications indiscriminately and has adversely affected wildlife.[145] Furthermore, Section 18 of the Act defined sanctuaries as forestlands. Subsequent amendments deleted this term. This has brought the sanctuaries outside the purview of the Forest Conservation Act and the permission of the Central Government is not required for denotification.[146]

The Supreme Court has on numerous occasions attempted to strike the balance between industries and parks. The challenge arose for the first time in the *Sariska Case*.[147] The question was whether the mining lease in the notified areas was illegal.[148] The Court interpreted Section 2 of the Forest Conservation Act and held that any mining leases in the protected area without the prior approval of the Central Government were invalid. Even if the protected area is wasteland, it enjoys legal protection against mining as

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144 For instance, Gujarat, Orissa and Maharashtra.

145 Singh, Chhatrapati, "Legal Policy for India's National Parks and Sanctuaries", *supra* n.17.

146 Section 2 of the Forest Conservation Act reads thus:

"*Restriction on the de-reservation of forests or use of forest land for non-forest purpose. - Notwithstanding anything contained in any other law for the time being in force in a State, no State Government or other authority shall make, except with the prior approval of the Central Government, any order directing - that any reserved forest (within the meaning of the expression "reserved forest" in any law for the time being in force in that State) or any portion thereof, shall cease to be reserved.*"

This change has caused major problems in the protection of sanctuaries such as the Narayan Sarovar in Gujarat and Sariska in Rajasthan.

147 *Tarun Bharat Sangh, Alwar* v. *Union of India*, AIR 1992 SC 514.

148 The petitioner argued that as the area where mining was being carried on was notified as a tiger reserve under the Rajasthan Wild Animals and Birds Protection Act, 1951, as a National Park and Sanctuary under the Wildlife Act and as a reserve forest under the Rajasthan Forests Act, the mining leases were contrary to law. In this case, some mines fell squarely within the protected area whereas others were partly inside and partly outside.

protection is meant not just for the existing forest, but also afforestation.[149] The Court directed that the Central Government examine the proposal of the government to delete the mining area and replace it with other lands.[150] Is not the forest swap proposal setting a dangerous precedent? Why wasn't some scheme initiated for the rehabilitation of the miners?

The High Courts also had to grapple with some of these issues. One of the first was the *Jamnagar Marine Park Case*[151] . The permission granted to Reliance Industries to lay a pipeline across the Park was challenged as being *ultra vires* Section 29[152] and other provisions of the WLPA. The Court interpreted Section 29 to mean that it is only in the case of destruction and exploitation of wildlife that the state government need be satisfied that it is for the improvement and better management of the wild life therein. In case of damage to the habitat of animals, the permission of the state government was not required and the Wildlife Warden could grant the necessary permission. Therefore, the Court dismissed the petition. Section 29 was used to defeat the purposes of the Act. If such an interpretation is accepted, it gives unlimited discretion to the Wildlife Warden to allow various activities in the area. Such unlimited discretion would surely lead to arbitrariness. Further, this cannot be reconciled with Sections 27 and 28, which restrict entry into sanctuaries.[153]

In the *Sanghi Cement Case*[154] , the Court had to interpret Section 26A(3), which permitted the denotification of protected areas. The Supreme Court adopted a policy of non-interference, and stated that it was not proper to question the state legislature unless there were substantial and compelling reasons to do so. Even where a decision of the Legislature was taken with haste, the Court ruled that the decision remained valid unless it was shown

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149 Another relevant fact is that the Central Government had issued a notification under Section 3 of the Environment (Protection) Act, prohibiting mining in the Sariska National Park. Hence, the mining leases were also illegal on this ground. The mining lease also violated Rule 4(6) of the Rajasthan Minor Mineral Concessions Rules, 1986.

150 The Court was to pass the final orders based on the recommendations contained in the Report. The Government set up three Committess – one to recommend whether mining should continue in the areas within the Project Tiger reserve, but outside the protected forest; the second to advice on the Rajasthan government's forest swap proposal; and the third to look into the ecological aspects of the proposal. **See** Divan, Shyam and Rosencranz, Armin, *Environmental Law and Policy in India*, 2nd Edition, Oxford University Press, New Delhi, 2001, p.349.

151 *Gujarat Navodaya Mandal* v. *State of Gujarat*, 1998(2) Guj.L.Her. 359.

152 Section 29 reads thus:

"*Destruction, etc., in a sanctuary prohibited without permit: No person shall destroy, exploit or remove any wild life from a sanctuary or destroy or damage the habitat of any wild animal or deprive any wild animal of its habitat within such sanctuary except under and in accordance with a permit granted by the Chief Wild Life Warden, and no such permit shall be granted unless the State Government, being satisfied that such destruction, or removal of wild life from the sanctuary is necessary for the improvement and better management of wild life therein, authorizes the issue of such permit.*"

153 **See** Divan, Shyam and Rosencranz, Armin, *Environmental Law and Policy in India*, 2nd Edition, Oxford University Press, New Delhi, 2001, p.354, for developments subsequent to the case.

154 *Consumer Education & Research Society* v. *Union of India*, 2000 (1) SCALE 606.

that there would be an irreversible adverse effect on the wildlife and the environment. It seems clear that the legal response to the industrialisation of protected areas is inadequate and needs serious reconsideration. The courts have succumbed to outside pressures and have failed to maintain a balance between environment and economy.

In the present scenario, protected areas have become the focus of intense debate. On the one hand is the question of rights of indigenous communities, viz., the model of conservation that alienates them. On the other hand, there is greater commercialization of these previously inaccessible areas. There is an urgent need for a new model of conservation in which conservation, development and social equity go hand in hand. The idea that all human activity in protected areas is detrimental to efficient conservation should be abandoned. As long as this assumption holds fort, the dominant model would be one of separation or exclusion of local communities, rather than their inclusion in the management of protected areas. A model of Joint Protected Areas Management that involves local communities in the planning, management and monitoring of protected areas should be evolved. Such an effort will help integrate traditional and modern ecological knowledge. It should also reduce harmful effects of local people on biodiversity and encourage alternate livelihoods of people outside forests.

Conclusions

In the present scenario, protected areas have become the focus of intense debate. On the one hand is the question of rights of indigenous communities, viz., the model of conservation that alienates them. On the other hand, there is greater commercialization of these previously inaccessible areas. There is an urgent need for a new model of conservation in which conservation, development and social equity go hand in hand. The idea that all human activity in protected areas is detrimental to efficient conservation should be abandoned. As long as this assumption holds fort, the dominant model would be one of separation or exclusion of local communities, rather than their inclusion in the management of protected areas. A model of Joint Protected Areas Management that involves local communities in the planning, management and monitoring of protected areas should be evolved. Such an effort will help integrate traditional and modern ecological knowledge. It should also reduce harmful effects of local people on biodiversity and encourage alternate livelihoods of people outside forests.

PROTECTING TRADITIONAL KNOWLEDGE SYSTEMS

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Protecting Biodiversity

At the national and global levels several efforts have been carried out to evolve the perfect system of biodiversity conservation. The stakeholders in these experiments are on one hand the flora and fauna, and on the other the indigenous peoples. In India, there has been a nascent legislative effort at bringing traditional knowledge systems under the legal protection of an intellectual property rights regime.

Defining Indigenous Peoples

There is a new global interest in and sympathy for endangered ethnicities.[1] In addition to the environmental concerns about endangered species and ecosystems, there is also the parallel concern for endangered cultures and indigenous peoples – a concern perhaps strongest in those parts of the world (such as the Americas) where such entities have been most effectively triturated in the recent past. This retrospective affection has now extended to checking any possibility of the recurrence of such events in other continents, and constituted the category of indigenous people. Funds being forthcoming, entities could not be lacking, and the list of such peoples have duly been generated, helped, of course by the poetic vagueness with which they are often defined. Ibrahima Fall, coordinator of the UN international Decade of indigenous people described them as "*people who have always lived where fate set them down, before other people arrived on the scene to live along side them…*"

In India the groups described as Scheduled Tribes in the Constitution have been classified as indigenous people by international experts, quite regardless of their actual histories. In east Asia an even more bizarre logic prevailed in the selection, with 2900 Russians being listed among the indigenes of China, while the claim of the Han to such status was rejected![2]

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1 Sometimes endangered people are presented as just another endangered species. A delegate at the Second Conference of Indigenous Initiative for Peace, held in Paris from February 13-17, 1995, told a reporter: "if you want to see a Karen in the year 2000 you will have to go to a museum." **See** Sophie Boukhari, UNESCO sources, Issue 67, March 1995.

2 Burman, B. K. Roy, *Indigenous and Tribal Peoples*, Mittal, New Delhi, 1994, pp.17-18.

Many champions of such peoples have a distinctly limited knowledge of their past history – so, for instance, Julian Burger, secretary of the UN working group on indigenous peoples, asserts that in India (and elsewhere in Asia) the colonial process "left these people to their own devices", and it is only after decolonization that their comparative independence was eroded at an alarming rate.[3] Historically informed anthropologists and economists such as G.S.Ghurey and D.R.Gadgil are critical of such ideas.[4]

There is a need for more informed understanding of such categories such as "indigenous peoples" or "aboriginal peoples", especially since such understanding now apparently influences decisions, such as the determination of the entitlements of people displaced by dam projects. So, for example, a reviewer of the Sardar Sarovar Project in central India comments that "*whether or not these people are truly tribal in the terms of World Bank definitions is of great significance to the Bank, the people and the three Indian states…*"[5]

The experts quoted by the Independent Review certainly had some notion that various ethnic groups located on both banks of the Narmada were indigenous in much the same manner as the Indians of the Americas. Felix Padel wrote:

> "*the tribal peoples of India are analogous to those of the Africa and Americas, particularly in the sense of their connection with the land: their religion is based in their relationship with their natural environment, and their economy involves a close dependence on the forest and a high degree of self sufficiency.*"[6]

It is often assumed that "tribal" and "aboriginal" are synonymous. The two terms, however, have quite different meanings; "tribal" refers to the political organization of a community, while "aborigine" means one present from the beginning (*origo*) or literally "of the sunrise". Any identification of any particular group as the aborigines of a particular area implies the existence of a substantial genetic continuity between them and the first human population of that region – a hypothesis of some limited value in the new world, but quite unsubstantiated in the old. The equivalence of tribal and aboriginal originates, in fact in 19th century racial theory, which argued that certain races, notably the Africans, were incapable of progressing beyond "tribal" organizations, unless forcibly integrated into societies dominated by "superior races".[7] It is a consequence of this idea that aboriginal came to be tribal, and tribals aboriginal.

Nor is the World Bank's definition of "tribal peoples" any more coherent than those criticized by the anthropologists – the criteria turn largely on the presence or absence of

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3 Burger, J., *Report from the Frontier: the state of the World's Indigenous Peoples*, Zed books, London, 1987, pp.5-12.

4 Ghurey, G. S., *The Aborigines – 'so called and their Future'*, The Gokhale Institute of Politics and Economics, Poona, 1943.

5 *Sardar Sarovar: Report of the Independent Review* (Chairperson: Bradford H. Morse), Narmada Bachao Andolan, Bombay, p.63.

6 *Ibid.*, p.67.

7 Crawford, John, "The Physical and Mental Characteristics of the African or the Occidental Negro", *The Ethnological Journal* (1865), pp. 66-75.

the infrastructure of a modern state in the territory inhabited by particular groups. Applied to South Asia, it would have resulted in perhaps 90 percent of the population of south Asia being classified as "tribal" at the beginning of the 20th century.

These problems arise from the uncritical adoption of categories from earlier paradigms. In addition, there seems to be a general lack of interest in defining rights, and addressing the problems (lack of recognition) of the indigenous people of a particular area.

Possible Approaches to Protecting Traditional Knowledge Systems

With respect to legal measures, there are various possible ways to approach the task of protecting traditional knowledge[8] at the national level.

- Strengthen existing regulatory regimes or legal instruments. Such regimes and instruments might include: (1) customary law; (2) intellectual property rights (3) concepts existing in civil and common law systems such as unfair competition, breach of confidence, privacy and passing off and (4) contracts such as license agreements and material transfer agreements.
- Develop new categories of existing types of legislation or regimes altogether (*sui generis*). These would aim specifically to protect TK in a general sense or certain aspects of TK within a broader set of objectives[9]. Examples of the latter include biodiversity-related regulations such as access and benefit sharing (ABS) systems and conservation framework legislation[10].

Intellectual Property Aspects of Protection of TK

Whose patent is it anyway?

The modern patent system is based on the requirements of [11]:

1. Novelty
2. Utility
3. Non-obviousness, or "inventive step"
4. Adequate Specifications

The most important element of the concept of novelty is the non-disclosure of the invention to the public. The two requirements to find out whether an invention is disclosed or not are (a) prior publication and (b) prior use.[12] Prior publication includes:

(1) the publication of the information through patent claims already field anywhere in the world or

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8 Hereinafter referred to as "TK".

9 **See for example** The Protection of Plant Varieties and Farmers' Rights Bill, 1999. **See also** Chakrabarti, Leena, "Bill or Bull", *Down to Earth*, August 15, 2000.

10 *Supra* n.1.

11 **See generally** Adelman, et al., *Cases and Materials on Patent Law*, West, St.Paul, 1998.

12 **See** Sections 13 and 25 of the Patents Act, 1970.

(2) the existence of the information in any publication or document available for public examination irrespective of whether any member of the public has read it or not.[13]

The prior use is the use of the information in the course of trade by a person or when it is within the common knowledge of those in the trade. But this does not include the secret use of the information provided it is not possible for a person skilled in the art to identify the information by the examination of the production the market. In order to understand the scope of patent protection for traditional knowledge systems under this system, TK may be classified into[14]:

- Information known to the society with or without documentation and is in constant use by the people. E.g., the common use of neem, tulsi, turmeric, etc.
- Information that is well documented and available to the public for examination and use. E.g., the ayurvedic texts, information in the palm leaves etc.
- Information that is not documented or commonly known outside of small groups of people and not revealed outside the group. E.g., tribal knowledge.
- Information known only to individuals and members of families.

On an examination of the classification of these traditional knowledge categories, it becomes clear that in almost all cases the knowledge for which patent protection is to be sought is in the public domain. In first case, the novelty is lost as the common public is aware of the invention and it is in use, thus failing the prior knowledge and prior use requirements. In the second instance, the knowledge being documented fails the prior publication test. Cases three and four present the possibility of arguing that there is no prior publication, and the use being secret use, passes the requirement of prior use[15].

However even these cases present problems when it comes to the other requirements of the patent system, for example the requirement of "inventive step", under which the courts look into whether there has been any application of the "inventive faculty" by the inventor.[16] When asked this question the holders of traditional knowledge can only say that the knowledge has been passed on to them by the previous generation, which gives a *prima facie* impression that the present custodians of this knowledge are not the creators but only the successors in interest of the earlier creators. It then becomes obvious that the present claimants have not contributed any independent thought, ingenuity or skill to develop this knowledge and therefore cannot establish a valid patent claim.

Furthermore, the requirement of a written description of the invention for which a patent claim is sought would also cause difficulties, for it would be near impossible to describe a

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13 *Lalubhai Chakubhai Jariwal* v. *Chimanlal & Co.* AIR 1936 Bom. 99; *Monsanto Co.* v. *Coramandel Indag Products Ltd.* AIR 1986 SC 712.

14 **See** Gopalakrishnan, N. S., "Impact of Patent System on Traditional Knowledge", (1998) *Cochin University Law Review* 219.

15 *Ibid.*

16 **See** *M/s. Bishwanath Prasad Radhe Shyam* v. *M/s. Hindustan Metal Industries,* AIR 1982 S.C. 1444.

form of traditional knowledge in terms of a patent claim, complete with a description of the prior art and the inventive step.[17] Thus, it is inevitable to conclude that the present patent system is of little use for the protection of traditional knowledge from unauthorized use.

Consideration of *Sui Generis* National Systems of Protection of TK

Three examples of *sui generis* systems[18] that seek, *inter alia*, to protect biodiversity related TK are compared and contrasted with the objective of determining the methodology adopted in these laws to protect traditional knowledge systems, and the lessons other developing countries, such as India have to learn from them.

- The Philippines – The Indigenous Peoples Rights Act, 1997.
- Costa Rica – Ley De Biodiversidad, 1998 (The Biodiversity Law).
- Peru – The Regime Of Protection Of The Collective Knowledge Of Indigenous Peoples, 2000 (Draft Legislation).

Upon a comparison of the three systems, the following common features of the 3 Systems emerge:

- In all three cases, the legislation was developed through broad-based consultative processes.
- In Costa Rica and Peru, protection is intended for biodiversity related traditional knowledge whereas the Philippines model accommodates a broader conception of TK.
- In Peru only collective knowledge is subject to protection under the system, whereas both the Philippines and Costa Rican systems do not preclude the possibility of protecting individual rights.
- In connection with access to TK and benefit sharing, Costa Rican law does not require legal agreements to be drawn up between TK holding communities and research institutions and companies. Peruvian regime requires commercial and industrial users to request a license in the form of a written contract with the TK holders. The Philippines requires collectors of biogenetic material to acquire either an academic or a commercial research agreement. Commercial users must inform affected indigenous communities if they discover a commercial application and are required to pay royalties to communities if commercial use is derived from their biogenetic resources.
- Of the 3 systems only Costa Rica places conditions on applications for intellectual property rights protection. The other 2 systems do not refer to intellectual property rights.
- With regard to capacity building, Costa Rican law provides various measures such as incentives for community participation in the conservation and sustainable use of

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17 *Supra* n.11.

18 *Supra* n.1.

biodiversity, and finance and assistance for community management of biodiversity. The Philippines system establishes an Office of Empowerment and Human Rights to ensure, *inter alia*, that capacity building mechanisms are instituted and indigenous peoples are afforded every opportunity to participate in all levels of decision making. The Peruvian Regime envisages a Fund for the Development of Indigenous Peoples.

- Both the Costa Rican and Peruvian systems provide for the registration of TK as a means of protecting it. In Costa Rican law, it is a defensive measure aimed at blocking attempts to obtain intellectual property rights protection over existing TK. The objective of the Peruvian law is to empower communities to negotiate from a stronger bargaining position.
- It is vital to note that both systems stipulate that the rights of the TK holders do not depend upon registration of their forms of knowledge.

Since none of the systems have actually been fully implemented it is not possible to evaluate the effectiveness of these systems.

The Indian Traditional Knowledge (Preservation and Protection) Bill, 2000.

In India, there has been no official parliamentary draft of a Bill to specifically protect traditional knowledge as yet. However, a draft in private circulation merits attention.[19] The following are some salient features of the draft Bill:

- Definition of "traditional knowledge" as meaning and including all forms of knowledge existing, known and used by the members of the Indian society from generation to generation, excluding knowledge used in secret by individuals and groups.
- The formation of a Community Traditional Knowledge Trust[20],which will have the exclusive right to manage the TK of the community.
- Commercial exploitation of the TK of the trust by persons outside the community whether in collaboration with members of the community or not, shall be with the prior informed consent[21] of the Committee. "PIC" is defined as written consent of the Committee indicating the purpose for which the consent is given together with the terms and conditions of the consent.
- The civil remedies that are provided for include injunctions, damages and accounts of profits. The Bill also provides for a maximum imprisonment of 3 years with a maximum fine of Rs. 2 Lakh.

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19 The Bill has been drafted by N.S.Gopalakrishnan (School of Legal Studies, Cochin University of Science and Technology).

20 Hereinafter referred to as "CTKT".

21 Hereinafter referred to as "PIC".

Conclusions

It may be said that the Bill incorporates many of the desirable principles upon which other national *sui generis* systems for the protection of TK systems are founded. These principles are facilitation of self-management and the use of TK for socio-economic development of communities, collective and decentralized management, and restrictions on the use of TK by non-community members. However, the Bill does not require those seeking to commercially exploit TK to enter into benefit sharing contracts, although it does require prior informed consent. Moreover the Bill does not place conditions - such as the certificate of origin requirement, where every patent derived from traditional knowledge of some sort must state the country of source of the biological resource or genetic material, on applications made by organizations for intellectual property rights protection of TK derived products. Instead, the terms and conditions under which TK is permitted to be exploited are left to be determined by the TK Trust. This approach may be hailed as a lack of legal paternalism. However it is also submitted that the wisdom of this approach is questionable. The implications of the larger intellectual property rights system for their TK may often be incomprehensible for the concerned Trust at the time of entering into an agreement.

Clearly, while the Bill is a positive step, it will remain a mere parchment unless groups responsible for creating and preserving traditional knowledge identify with its objectives. It would not be an exaggeration to say that the success of traditional knowledge protection requires movement at the grassroots level, as much as it does legal reform. While the Bill proposes a community level structure for collating traditional knowledge, there may be a need to address the issue at a deeper level. India has never had a dearth of macro-level planning. It is the poor and corrupted execution at the micro-level that has let the country down. The Convention on Biological Diversity provides sufficient scope for manipulation within its directory framework. Its state-centric approach should not set a binding precedent. In order to make legal reform more effective and thorough, there must be regulation at the level of every indigenous group – a daunting task but a necessary one nevertheless. In effect, the edifice of the Indian Traditional Knowledge (Preservation and Protection) Bill, 2000 must be used as foundation to develop a more detailed body of law. In order to do so, a massive information gathering mechanism, to personalize the legal reform, is necessary.

CASE ANALYSIS

TRIBAL RIGHTS IN SCHEDULED AREAS: THE *SAMATHA* CASE REVISITED

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> "*…I have no doubt that, if normal factors were allowed to operate, unscrupulous people from outside would take possession of tribal lands. They would take possession of the forests and interfere with the life of the tribal people. We must give them a measure of protection in their areas so that no outsider can take possession of their lands or forests or interfere with them in any way except with their consent and goodwill.*"
>
> ***Jawaharlal Nehru***

These words echo the spirit of the Fifth Schedule of the Constitution, incorporated to protect "tribal rights", and to ensure that tribal people, who have traditionally been associated with a geographical tract, continue to have absolute command over the resources of that land. But over the years, there has been an increasing depredation of their rights. The BALCO controversy brought to the fore issues concerning the rights of tribals over their land. In the context of tribal tracts being threatened, a discussion of the *Samatha Case*[1] becomes topical and crucial. It is with this backdrop that this paper examines the legislative history of Scheduled Areas, the provisions of the Fifth Schedule of the Constitution, and delves into issues raised in the *Samatha Case*.

Position of Tribals in Andhra Pradesh: The Case in Context

The north coastal region of Andhra Pradesh has a vast forest area with a large *adivasi* population that depends on agriculture and forest produce for their sustenance. The populace is marred with problems of illiteracy, ill health, ignorance of law, economic exploitation and deprivation of basic amenities. The tracts of Andhra Pradesh are governed by the Fifth Schedule and land transfer regulations framed thereunder, which prevent non-tribal occupation of tribal lands. But these laws have not been followed strictly. Samatha is a small social action group, which works at mobilizing the *adivasi* communities to assert their rights, and in fighting exploitation by the state and other actors.[2] Samatha demanded state implementation of Scheduled Areas laws and restoration of tribal lands from the control of non-tribal landlords and moneylenders.

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1 *Samatha* v. *State of Andhra Pradesh, (1997) 8 SCC 191*.

2 **See generally** *Surviving a Minefield: An Adivasi Triumph*, Samatha, 2000.

Vizag district is rich in mineral resources, including bauxite, limestone, calcite, mica etc. Since the 1960s, mining companies were given leases on tribal and forest lands. These companies used tribals as labourers and exploiting them. These tribals were denied title deeds to their own lands and approached Samatha for assistance.[3] Samatha filed a public interest litigation in the Andhra Pradesh High Court in 1993, seeking issue of the writ of *mandamus* to terminate the mining leases in Borra Gram Panchayat area of Antagiri Mandal, which had been granted and/or renewed in favour of the private respondents. This action was taken on the ground that the government was also a "person" (non-tribal), and hence does not have the power to grant leases in a Scheduled Area to non-tribals, as these leases would violate the Fifth Schedule land transfer regulations for the Scheduled Area. A stay order was granted and the tribals in Borra panchayat resumed cultivation of their own lands. In 1995, the stay order was vacated and the High Court dismissed the case. Accordingly, Samatha filed a Special Leave Petition in the Supreme Court.[4]

The Judgement in *Samatha* v. *State of Andhra Pradesh* [5]

Legislative History of Scheduled Areas

The Court examined in detail the legislative history of laws relating to the tribal areas. The Court noted that at least from the beginning of the 19th century, Scheduled Areas inhabited by aboriginals and tribals had been administered exclusively by the Central Government, through the Governor of the State, by providing for special statutory measures. The tribal areas or Agency areas were, at that time, governed by the Scheduled Districts Act, 1874, under which the executive had power to exclude these areas from the normal operation of ordinary law and give them such protection as they might need.

This had been followed by the Agency Tracts and Land Transfer Act, 1 of 1917. S.4 of the Act provided that any transfer of immovable property in agency tracts by a member of a hill tribe shall be null and void, unless made in favour of another member of a hill tribe, or with the previous consent in writing of the Agent or of any other prescribed officer, and where a transfer was made in contravention of the above prohibition, a decree could be passed against the transferee or those claiming under him, and the property restored to the transferor or his heirs. The Montague-Chelmsford Report of 1918 was of the view that the political reforms suggested for the rest of India could not apply to these backward areas where the people were primitive, and therefore these backward tracts were to be excluded from the jurisdiction of the reformed Provincial Governments and administered personally by the Heads of the provinces. The Simon Commission had recommended that the tribals be educated, and that the Central Government use the Governors as agents for administration of these areas. But these recommendations were not adopted by the constitutional reforms

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3 *Ibid.*

4 *Ibid.*

5 The majority judgment was delivered by Ramaswamy, J., and the minority opinion by Pattanaik, J.

of 1935. Under the Government of India Act, 1935, no Act of the Federal or Provincial Legislature was to apply to these areas, but the Governors had the authority to apply such Acts with such modification as they considered necessary. In independent India, the Fifth Schedule to the Constitution protects tribal rights.

Legislative Intent behind drafting of the Fifth Schedule of the Constitution

The Court referred to the Constituent Assembly Debates, in order to appreciate the legislative intent behind the drafting of the Fifth Schedule. It emerged that the Constitution drafters, in order to protect the land of the tribals, were in favour of prohibiting the transfer of land in the Scheduled Areas from the government to non-tribals.[6] The Draft Constitution on the Fifth Schedule as presented by Dr. B.R. Ambedkar related primarily to draft Articles 215-A and 215-B, which provided for the administration and control of Scheduled Areas and Scheduled Tribes.

- Creation of the Tribal Advisory Council was emphasized, to assist the Governor or the Ruler of every State having a Scheduled Area therein. Their task was to submit an annual report to the Central Government regarding the administration of Scheduled Areas in that State, so that the executive power of the Union could extend to giving directions to the State regarding administration of that area.
- Paragraph 5(2)(a) of the Fifth Schedule prohibited or restricted transfer of land by or among members of the Scheduled Tribes in Scheduled Areas.
- Paragraph 5(2)(b) regulated the allotment of the land to members of Scheduled Tribes in such area.
- Paragraph 5(2)(c) regulated the person who lends money to members of the Scheduled Tribes in such area.
- Paragraph 5(3) empowered the Governor or Ruler to amend any Act of Parliament or State Legislature or any existing law, applicable to that area.
- The Draft Report contained provisions for allotment of the land to non-tribals. But regarding allotment of land for cultivation or residence, the Assembly observed that: "*we are of the view that the interests of the tribals need to be safeguarded in view of the increasing pressure on land everywhere. We have proceeded accordingly that the allotment of vacant land belonging to the State in Scheduled Area should not be made, except in accordance with special regulation made by the Government on the advice of the Tribal Advisory Council.*"[7] Accordingly, the Draft was amended to exclude all reference to the allocation of land of tribals to the non-tribals.

When the Draft Fifth Schedule was introduced in the Constituent Assembly, no member raised any objection that the government should be free to allot its land to non-tribals in the Scheduled Areas, as all members were conscious that the special privileges and special

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6 Brajeshwar Prasad and Jadubans especially forcefully argued that land should not pass out of the hands of the tribal people.

7 **See** *Constituent Assembly Debates*, Vol.9, pp.965-1001.

status enjoyed by the tribals should not be disturbed by allowing non-tribals to enter into that area.

Article 244 of the Constitution makes the Fifth Schedule applicable to the Scheduled Areas and Scheduled Tribes in all States except Assam and Meghalaya. Under paragraph 3 of the Schedule, the Governor of each state having Scheduled Areas therein, has to make a report of the administration of the Scheduled Areas to the President, either annually, or whenever so required by the President. Based on this Report, the President is empowered to give directions, in his capacity as the "final arbiter of the administration of Scheduled Areas". Under paragraph 4(2) of the Fifth Schedule, provision has been made for the Tribal Advisory Council, which is duty bound to advise on such matters pertaining to the welfare and advancement of Scheduled Tribes in the area. The Governor is vested with the entire governmental power with respect to Scheduled Areas within a State, and he is authorized to direct that any Act of Parliament or State Legislature shall not apply to a Scheduled Area, or shall apply only subject to modifications and exceptions. Paragraph 5(2) gives the Governor the power to make regulations for the peace and good government of the Scheduled Areas.

The Court found that the protective measures adopted through legislation for the preservation of tribal life, for the prevention of exploitation of tribals by non-tribals and moneylenders, and to seal infiltration of non-tribals in the Agency tracts or Scheduled Areas rested on three planks:

- Prohibition of transfer of land by tribal to a non-tribal with the stipulation that such transfer will be null and void.
- Prohibiting the Government from allotting land vested in it to a non-tribal.
- Power of Government to evict non-tribal from the tribal's land, coming into his possession through a void sale deed and restoring the land to the tribal or his heirs.

It is noteworthy to mention here that the recommendations of the Dhebar Commission[8] included greater protection of tribals, their land, and way of life, and adoption of a wider and more positive approach than that under the Fifth Schedule.

Interpretation of the Fifth Schedule

After going through the Constituent Assembly Debates, the Supreme Court concluded that members of the Constituent Assembly deliberated to protect tribal land for their economic empowerment, economic justice, social status and dignity of their person. This entailed retention of the land with the tribals – not only the land belonging to them, but also government land in Scheduled Areas. The Court noted that, after restructuring of the Fifth Schedule, in its present form, the specific provision in the Draft Report to allot land to non-tribals was omitted, and that this was accepted by the members of the Constituent Assembly without any demur or discussion. According to the majority, this manifested

8 Under Article 339 of the Constitution of India, the President is empowered to appoint a Commission to report on the administration of Scheduled Areas and welfare of Scheduled Tribes. While this appointment is discretionary, it was mandatory for the first time in 1960.

the legislative intent of the founding fathers to prohibit transfer between tribals and non-tribals and provided for allotment of land to the members of the Scheduled Tribes in such area. The Court concluded that this legislative intention of the drafters of our Constitution needed to be preserved.[9]

The Court then relied upon two earlier judgments, which dealt with fact situations that were quite similar to *Samatha's Case.* The Court had ruled in *Lingappa Pochanna's Case*[10] that under the scheme of the Constitution,

> "*the Scheduled Tribes as a class require special protection against exploitation. (Their) very existence as a distinctive class and the preservation of their culture and way of life, based as it is upon agriculture which is inextricably linked with ownership of land, which requires preventing an invasion upon their lands.*"

It stated that the power of the State legislature to make a law under Entry 18 of the State List in the Seventh Schedule, in respect of "*transfer and alienation of agriculture land*", includes not only the power to prohibit such transfers and alienations, but also the power "*to reopen such transfers and alienations*". Thus the Supreme Court had upheld as constitutionally valid the Maharashtra Restoration of Lands to Scheduled Tribes Act, 1974, annulling transfers made in favour of non-tribals.

The Court also relied upon *P. Rami Reddy's Case*[11] , wherein the Court had held that *"A legislation which in essence and substance aims at restoration to the tribals of the lands which originally belonged to the tribals but passed into the hands of non-tribals...certainly cannot be characterized as unreasonable."* The court stated that in the absence of protection, the economically stronger non-tribals would in course of time *"devour all the available lands and wipe out the very identity of the tribals... It is precisely for this reason that the architects of the Constitution have with far sight and foresight"* enacted the Fifth Schedule, empowering the Governor to prohibit or restrict by regulations the transfer of tribal land.

The Supreme Court, in *Samatha's Case*, interpreted the Fifth Schedule of the Constitution to provide for the following:

1. Total prohibition of transfer of immovable property from a tribal to a non-tribal.[12] Any such transfer is regarded as null and void; the non-tribal transferee acquires no right, title and interest by such transfer.[13]
2. Preserve peace and good government in these Scheduled Areas.

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9 *Supra* n.1 at paragraphs 32, 35 and 48.

10 *Lingappa Pochanna* v. *State of Maharashtra,* (1985) 1 SCC 479.

11 *P. Rami Reddy* v. *State of A.P.,* (1988) 3 SCC 433.

12 *Supra* n.1 at paragraph 48. **See also** *P. Rami Reddy's Case, ibid*.

13 *Supra* n.1 at paragraph 43. **See also** *Manchegowda* v. *State of Karnataka,* (1984) 3 SCC 301; *Lingappa Pochanna's Case, supra* n.10.

3. Protect possession, right, title and interest of Scheduled Tribes, which they once held in these lands.
4. Declare that non-tribals have no legal or valid title to immovable property in Agency tracts, unless acquired with prior sanction of the Government and saved by any law made consistent with the Fifth Schedule.[14]
5. Regulate the allotment of land to members of the Scheduled Tribes in such areas. The word "regulate" in paragraph 5(2)(b) should be construed to mean regulation of the land only to, and among, the members of the Scheduled Tribes in the Scheduled Areas. The wider interpretation of "regulation" to include "prohibition" would prohibit the allotment of government land to non-tribals, and would subserve the constitutional objective of regulating the allotment of land in Scheduled Areas exclusively to Scheduled Tribes.[15]
6. Enjoins the Governor to make regulations for the peace and good governance of the scheduled area, based on his personal satisfaction.[16]
7. Paragraphs 5(2) (a) and (c) embody legislative power, whereas paragraph 5(2)(b) combines both executive and legislative power.[17]

Therefore the court interpreted the executive power of the state to dispose of its property under Articles 298 and 245, as being subject to these provisions of the Fifth Schedule, in order to preserve paramount tribal interest in the Scheduled Areas, so as to achieve constitutional goals.[18] The Fifth Schedule is unique, and was described in *Samatha* to be:

> "*an integral scheme of the Constitution with directions.... philosophy in which the anxiety is to protect the tribals from exploitation and to preserve the valuable endowment of their land for their economic empowerment to elongate social and economic democracy with liberty, equality, fraternity and dignity of their person and our political Bharat.*" [19]

Transfer of lands owned by the government in Scheduled Areas to non-tribals

The Court, in *Samatha*, dealt with the issue of transfer of land owned by the government in Scheduled Areas to non-tribals against the backdrop of all legal provisions applicable to such transfer in Andhra Pradesh. These included:

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14 *Supra* n.1 at paragraph 47.

15 The term "regulation" has been consistently held to include total prohibition in the context of Article 19(1)(g) in *Narendra Kumar* v. *Union of India*, AIR 1960 SC 430; *Fatehchand Himmatlal* v. *State of Maharashtra*, (1977) 2 SCC 670; *State of U.P.* v. *Hindustan Aluminium Corpn.*, (1979) 3 SCC 229; *K. Ramanathan* v. *State of T.N.*, (1985) 2 SCC 116.

16 *Supra* n.1 at paragraph 51.

17 *Supra* n.1 at paragraph 87.

18 *Supra* n.1 at paragraphs 87 and 88.

19 *Supra* n.1 at paragraph 71.

- Section 3 of the A.P. Scheduled Areas Land Transfer Regulation, 1970[20], read with paragraph 5(b) of the Fifth Schedule
- Section11(5) of the Mines and Minerals (Regulation and Development) Act, 1957
- The Forest Conservation Act, 1980, read with the Environment (Protection) Act, 1986

Section 3 of the A.P. Scheduled Areas Land Transfer Regulation, 1970

This section declares as void any transfer[21] of immovable property in the Agency tracts by a "person" (whether or not such person belongs to the Scheduled Tribe), unless such transfer is made in favour of a member of a Scheduled Tribe, or a registered society, comprised solely of members of the Scheduled Tribes. The issue that arose in *Samatha* was whether the meaning of the word "person" in Section 3 would include the State Government or whether the State was exempt from this Regulation. The Court observed that the word "person" must be construed broadly to include the State Government[22], in light of the aim and object of the Act, and to effectuate the constitutional goal of establishing an egalitarian social order and preserving the integrity of Scheduled Areas. It further noted that by virtue of paragraphs 5(2) (a) and (b) of the Fifth Schedule, there existed a prohibition of transfer of land from tribals to non-tribals. Therefore, the Government has to be bound by the constitutional scheme sought to be enforced through the Regulations made by the Governor under paragraph 5(2) of the Fifth Schedule, and cannot be permitted to transfer its own properties in favour of non-tribals, so as to allow infiltration in the Scheduled Area. Therefore, the judges purposively constructed the word "person" to mean natural as well as juristic persons and the government. Hence, there was an express prohibition on the state's power to transfer, by way of lease[23] or any other form known to law, government land in Scheduled Areas, to a non-tribal person, be it natural or juristic, except to its instrumentality, or a cooperative society composed solely of tribes as is specified in the second part of Section 3(1)(a).

The court also examined the circumstances in which the property of Scheduled Tribe member or any other person on the Scheduled Area becomes the property of the State Government, *viz.*:

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20 Hereinafter referred to as the "Regulation".

21 Section 2(g) of this Regulation defines the term "transfer" as mortgage with or without possession, lease, sale, gift, exchange, or "any other dealing" with immovable property, not being a testamentary disposition, and includes a charge on such property in respect of all the above.

22 The court cited with approval from several cases for this proposition. This included *Madras Electric Supply Corpn. Ltd.* v. *Boarland (Inspector of Taxes)*, [1995] 1 All ER 753, wherein it was held that the word "person" in its ordinary and natural sense includes the Crown, which was reiterated in *IRC* v. *Whitworth Park Coal Ltd.*, [1958] 2 All ER 91. The court also referred to the principles stated in *State of South Carolina* v. *United States*, 199 US 437: 50 L Ed 261 (1905); *State of Georgia* v. *Hiram W. Evans*, 316 US 159: 86 L Ed 1346 (1941); *United States of America* v. *Cooper Corpn.*, 337 US 426: 93 L Ed 1451 (1949) and Keeton, *Elementary Principles of Jurisprudence* 151-55 (1949).

23 The definition of "transfer" in Section 2 of the Regulation includes giving of a lease.

- If a person is not able to sell his property either because a member of the Scheduled Tribe is not willing to purchase it, or not willing to purchase it with the terms under which it is proposed to be sold, then the Agent, or the Agency Divisional Officer or any Prescribed Officer can, by order, acquire the property on payment of compensation.
- If, on a decree for ejectment being passed against a person in occupation of the property belonging to a Scheduled Tribe under a sale deed which is void, the property is sought to be restored to the transferor or his heirs, but they are unwilling to take back the property or their whereabouts are unknown, it would be open to the Government to assign or transfer the property to any other member of the Scheduled Tribe or otherwise dispose of it, as if the property was at the disposal of the State Government.

In these circumstances, when the property either comes to vest in the State Government or becomes property at the disposal of the State Government, the Government cannot transfer the property to a "person" of its own choice but has to transfer, by way of sale, lease, allotment or otherwise to a member of the Scheduled Tribe or a cooperative of the Scheduled Tribes. Thus, the court opined that if this restriction applies to transfer of properties, which the government has acquired in the above two circumstances, then it would definitely apply to properties that are already government properties. To this limited extent, the court held that government has to be treated as a "person".[24]

Section 11(5) of the Mines and Minerals (Regulation and Development) Act, 1957

Section 11(5) of the Mines and Minerals (Regulation and Development) Act prohibits the grant of mining lease in Scheduled Areas in favour of the non-tribals.[25] The judges looked at *State of Assam* v. *O.P. Mehta*[26] where it had been held that no person could claim any right to any mines in any land belonging to the Government except under, and in accordance with, the Act and Rules, or any right except those created and conferred by the Act. It was argued that this Act was prospective in nature, but the Court held that this was irrelevant, since Section 11(5) simply reinforces the position already established by the Fifth Schedule and the Regulations made thereunder.[27]

The Forest Conservation Act, 1980 read with Environment (Protection) Act, 1986

Section 3 of the Environment (Protection) Act enjoins the Central Government to take measures to protect and improve the quality of the environment and to prevent, control and abate environmental pollution. The court took note of its earlier judgment in *Rural*

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24 *Supra* n.1 at paragraphs 187-89.

25 Section 11(5) of the Act reads:

Notwithstanding anything contained in this Act no prospecting license or mining lease shall be granted in the Scheduled Areas to any person who is not a member of the Scheduled Tribes, provided that this sub-section shall not apply to an undertaking owned or controlled by the State Government or to a society registered under the Andhra Pradesh Cooperative Societies Act, 1964, which is composed solely of members of the Scheduled Tribes.

26 *State of Assam* v. *O.P. Mehta,* AIR 1973 SC 678.

27 *Supra* n.1 at paragraphs 192 and 193.

Litigation and Entitlement Kendra v. *State of Uttar Pradesh*[28] , where it had held that the Act protects to upkeep the forest land or reserved forest, prevents deforestation, encourages forestation and enables steps as are necessary to preserve the ecology. It also held that mining activity was uncongenial to preserve ecology. It is significant to note that the Court ruled that whether mining activity is carried out in areas designated as Reserve Forests or other forest areas, it is the miner's duty to ensure that the industry or enterprise does not denude the forest and become a menace to human existence, nor destroy biodiversity.[29] This was one of the first cases wherein the Court was required to balance environmental and ecological integrity against industrial demands on forest resources. This case arose as public interest litigation, against the severe environmental damage that had been done by the haphazard limestone quarrying practices in Dehradun valley. The Court in *Samatha* relied on this case, and held that large scale mining activities within the Scheduled Areas pollute the environment in the tribal area, and that the Central Government is under a statutory obligation to protect the environment and coordinate the activities of the State Government in the grant of mining leases within the tribal area. It went on to conclude that since the State Government had not taken any steps in this regard, the leases granted were invalid.

The Court further decided that mining is for a non-forest purpose, so this would necessitate prior permission by the State Government of the Central Government for granting and renewal of mining leases. In *T.N. Godavarman Thirumulkpad* v. *Union of India*[30] , it was held that mining activities being a non-forest purpose should be restricted, and in case it is intended to be continued in any "forest", designated as Reserved Forest or otherwise, the same can be done only after referring the matter to the appropriate authority of the Central Government and obtaining requisite permission. Furthermore, it was held that even if the State Government was inclined to grant a renewal of the lease/license, the Central Government would be entitled to refuse any such renewal, and such a decision of the Central Government was final and not open to challenge.[31]

In *Ambika Quarry Works & Anr.* v. *State of Gujarat*,[32] a three judge Bench of the Supreme Court held that the renewal of a mining lease, without prior approval of the Central Government, was in violation of Section 2 of the Forest Conservation Act, because renewal of a mining lease was akin to the grant of a fresh lease. This was endorsed in *State of*

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28 *Rural Litigation and Entitlement Kendra* v. *State of Uttar Pradesh*, 1989 Supp. (1) SCC 504.

29 **See** *State of Himachal Pradesh* v. *Ganesh Wood Products*, (1995) 6 SCC 363.

30 *T.N. Godavarman Thirumulkpad* v. *Union of India*, WP (C) No. 202 of 1995.

31 In *M/s Serajuddin & Co.* v. *Union of India*, AIR 1982 Cal 400, the court held that: *"…..in the matter of development of mines and minerals in the country, the Central Government will have an ultimate control and such control is not fettered by the decision of the State Government……..the power of the Central Government under the Act and Rules is very wide and the same is not fettered by the desire or the decision of the State Government….."*

32 *Ambika Quarry Works & Anr.* v. *State of Gujarat*, (1987) 1 SCR 562.

Andhra Pradesh & Ors. v. *Krishnadas Tikaram*[33] , *Tarun Bharat Singh, Alwar* v. *Union of India*[34] and *Divisional Forest Officer* v. *S. Nageswaramma*[35] . The Court in *Samatha* cited all the above cases with approval.

A combined reading of all the above legal provisions prohibits the transfer, by way of a mining lease, in favour of non-tribals. Section 23 of the Indian Contract Act, 1872 prohibits and renders invalid any contract, which is contrary to law. Thus, the contract to grant leases in this case by the government, in the Scheduled Areas, violated all the above provisions. It will be in order to examine the salient features of the judgment at this stage.

Sailent Features of the *Samatha* Judgment

- Government land, forest lands and tribal lands in the Scheduled Area cannot be leased out to private non-tribals or private industries for mining, as it contravenes the Fifth Schedule of the Constitution.
- A direction was given to the State Government to immediately issue title deeds to tribals in occupation of tribal lands in reserve forest enclosures in Borra panchayat, and ruled that the government had no right to grant mining leases for land in these enclosure lands belonging to tribal people.
- Only the State Mineral Development Corporation or a cooperative of tribals can take up mining activity in the Scheduled Areas of Andhra Pradesh, provided that they comply with the Forest Conservation Act and the Environment (Protection) Act. Government land can be transferred in favour of State instrumentalities, like the APSMD Corporation Ltd., because in the eye of law, this is not really a transfer but an entrustment of property for public purpose. Since, admittedly a public corporation acts for public interest and not private gain, such transfer stands excluded from the prohibition under paragraph 5(2) of the Fifth Schedule and Section 3(1)(a) of the Regulation.
- By a Constitution Amendment, the principle of local self-governance based on democratic principles at Gram Panchayat level and upwards through Article 343A-343ZG had been introduced, consequent to which the Panchayats (Extension to the Scheduled Areas) Act, 1996 was enacted. Section 4(d) of this Act states that notwithstanding Part IX of the Constitution, every Gram Sabha shall be competent to safeguard and preserve the traditions and the customs, their cultural identity, community resources. Under clause 4(m)(iii), the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully

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33 *State of A.P. & Ors.* v. *Krishnadas Tikaram,* (1995) Supp.1 SCC 587.

34 *Tarun Bharat Singh, Alwar* v. *Union of India,* (1993) Supp.3 SCC 115. In this case, it was held that for mining operations even outside the Tiger Reserved Forest, declared as protected area, prior permission of the Central Government was necessary.

35 *Divisional Forest Officer* v. *S. Nageswaramma,* (1996) 6 SCC 442.

alienated land of a Scheduled Tribe has been entrusted to the Gram Sabha and Panchayats at the appropriate level.[36] The Court appreciated this development by stating that the Gram Sabhas shall be competent to safeguard and preserve community resources and thereby reiterated the need to give the right of self-governance to tribals.

- The State Government was directed to stop all industries from mining activities except where the mining lease had been granted to the state instrumentality, i.e., the APSMD Corporation, and these industries were to report compliance to this order within 6 months to the Registry of the Supreme Court. Lessees were directed not to break fresh mines, and given 4 months time to remove minerals already extracted.
- The Court held that transfer of land is not *per se* prohibited in those states that have not formulated Regulations in this regard. But any such transfer is liable to be challenged, since the constitutional mandate as enshrined in the Fifth Schedule is to prohibit transfer of any tribal land, and transfer can be justified only by an equally competing purpose, which is open to judicial scrutiny. If such States granted leases to non-tribals for mining in the Scheduled Areas, the licensee or lessee had to contribute to the social, economic and educational empowerment of the tribals, by keeping aside 20% of their net profits for development of these areas[37], which would include maintenance of roads, communication facilities and sanitation, supply of potable water, establishment of schools, hospitals and houses, providing tribals training and employment in their establishment, etc. The necessary sanction for tax exemption could be obtained for this expenditure. Besides this 20% allocation, these lessees/ licensees were responsible for afforestation and maintenance of the ecology in these areas.
- The Court observed that the Chief Secretary of Andhra Pradesh should constitute a committee consisting of himself, the Secretary (Industry), the Secretary (Forests), the Secretary (Tribal Welfare/Social Welfare) to collect facts and consider whether it is feasible to permit the industry to carry on mining operations. If the committee so opined, then the matter had to be placed before a Cabinet sub-committee, consisting of the Minister for Industries, the Minister for Forest and the Minister for Tribal Welfare to examine the issue of whether licenses could be allowed to continue until the licenses expired or whether it was expedient to prohibit further mining operations in light of Section 11(5) of the Mining Act, and to take appropriate action in that behalf and submit a report to the Supreme Court on the action so taken.[38]
- The Court also held that in other States where similar Acts do not totally prohibit grant of mining leases of the lands in the Scheduled Areas, similar committees of Secretaries and State sub-Committees should be constituted and decision taken thereafter.

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36 *Supra* n.1 at paragraph 93.

37 *Supra* n.1 at paragraph 113.

38 *Supra* n.1 at paragraph 128.

- The Court also unequivocally stated that before granting a lease, it would be obligatory for the State government to obtain concurrence of the Central Government, which would constitute a sub-committee consisting of the Prime Minister of India, the Union Minister for Welfare, and the Union Minister for Environment, to see that the State's policy is consistent with the policy of the nation as a whole.[39]
- The Court also felt that the appropriate legislature (after holding a debate with all the Chief Ministers, Ministers of the concerned Ministries, the Prime Minister and the Central Ministers concerned) should explore the possibility of enacting a suitable legislation to ensure a consistent scheme throughout the country, regarding tribal lands rich in mineral wealth.

Critical comments on *Samatha*

- The majority judgment echoed the spirit of the founding fathers of the Constitution and in particular the Fifth Schedule, in reinforcing that land in the Scheduled Area vests with the tribals, and any transfer of such land to non-tribals, even by the government, would be void. The minority judgement, delivered by Pattanaik, J. stated that the constitutional scheme or the drafting of the Fifth Schedule does not suggest that alienation of government land within the Scheduled Area was intended to be prohibited in favour of a non-tribal person.[40] It is submitted that this reasoning seems to be based on a misreading of the Fifth Schedule, the legislative history behind it, and the intention of the drafters of the Constitution. The majority judgment is based on sound reasoning and seeks to give effect to not only the Fifth Schedule, but also several critical principles in the Constitution, namely liberty, equality, fraternity, and a just and egalitiarian society.
- The word "person" in Section 3 of the Andhra Pradesh Land Transfer Regulations, was rightly given a broad and purposive construction by Ramaswamy, J. and Saghir Ahmad, J, to include within its ambit the government. In light of the object and purpose of these Regulations, which is to ensure that tribals have control of their land, and to ensure that non-tribals are not allowed any title in this land, this is the appropriate interpretation. If the word "person" were interpreted not to include the government, as stated by Pattanaik, J., in his minority opinion[41] , then the government would be able to transfer land in the Scheduled Areas to non-tribals and the entire purpose of the Fifth Schedule and these Regulations would be defeated.
- The majority judgment also rightly declared that the transfer of mining leases by the state government to non-tribals was null and void, in the context of the relevant statutory and constitutional provisions. The counter argument in the minority judgement was that it has to be first ascertained by the Forest Department as to

39 *Supra* n.1 at paragraph 129.

40 *Supra* n.1 at paragraph 149.

41 *Supra* n.1 at paragraphs 156-63.

whether mining activities are being conducted on forest land. Only then, Section 2 of the Forest Conservation Act would get attracted.

- The majority correctly ruled that mining in this area by the private sector should not be allowed, which would plunder away the natural wealth, without much care for the environment, or the rights and needs of the local community. The majority also unequivocally stated that mining in the Scheduled Area should only be carried out by a State instrumentality, which would hold the property of the tribals in trust for a public purpose, or by a cooperative consisting of tribals themselves. Since the minority judgement took the view that the word "person" did not include "State", the logical fallout would have been that the mining leases granted do not contravene the Provisions of the Andhra Pradesh Regulations. However, as pointed out earlier, this is an incorrect position. It is submitted that the underlying premise of the majority judgment is that in all situations, the land in Scheduled Areas belongs to the tribals, they are not simply the beneficiaries of any land or activity carried on therein, but they are the actual right-holders. In recognizing that the tribals are the best suited to carry out any commercial activity also in their area, the Court is recognizing the right and the ability of the tribals to manage their local resources in the most appropriate and environment-friendly manner. Decision-making must rest with a team that knows nature and is familiar with the ecology and the socio-economic and cultural context of that area, i.e., with the tribals themselves, as correctly held in this case.
- An extremely beneficial and far-reaching consequence of the case is that it has recognized and endorsed the principles enshrined in the Andhra Pradesh Panchayat Raj (Extension to Scheduled Areas) Act, which seeks to reinforce the system of local governance for the tribals, by the constitution of Gram Sabhas, which will be responsible for preserving their culture, identity, etc, and for the prevention of the alienation of tribal land, and for the restoration of any unlawfully alienated land.
- Though the case concerned only the State of Andhra Pradesh, the Court proactively made it applicable to the Scheduled Areas in Haryana, Gujarat, Madhya Pradesh, Bihar, Orissa, Rajasthan and Maharashtra as well, since the problems faced by tribals in Scheduled Areas is common to all these states. An extremely important ruling in this regard was to provide that in states where there were no Regulations prohibiting such transfer of land for mining to non-tribals, the mining entrepreneur should set aside 20% of his profits to improve the living conditions of tribals by setting up schools, hospitals, water supply, roads, communication facilities, better sanitation, etc. Besides, there was a recognition by the court that mining causes great harm to the environment. So, in order to make mining sustainable, these entrepreneurs would also have to be responsible for reforestation and maintenance of ecology in these areas. This was a ruling given unanimously by the Court.[42]

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[42] *Supra* n.1 at paragraph 167.

- The Court also recognized that even after this ruling, the problem was far from solved, so it directed that committees be set up at the State and Central level, to come out with a suitable, uniform legislation in this regard. But later in the paper, it shall be seen how the government has paid no heed to the advice of the Court.

Shortcomings of the judgment

1. The judgment fails to resolve conflicting laws.

- A major reason for the failure of the *Panchayati Raj* system, is the multiple and contradictory laws in force in the area of forests in India. The ownership of the forest is unclear because of conflicts in different statutes. While the Panchayati Raj Act clearly states that in Scheduled areas, water, forest and land belongs to the Gram Sabha, the Indian Forest Act, 1927 and Forest Safety Act bestow the ownership on the forest department.[43]
- Another problem concerns the right over forest produce. Major changes have been introduced in the sale laws, which say that produce has to be sold to certain contractors without taking Gram Sabhas into confidence. In reality, the tribals (men only) are used only as gatherers and contractors and officials take most of the profit.
- Several experts feel that the Joint Forest Management (JFM) programme is not effective, due to the lack of a sound legal basis. According to Anil Garg, who has been fighting for tribal rights over the forests, "*In reality, forests are under the singular management of the forest department but the claim is made that it is jointly run by tribals and government. Tribals are merely a medium in the system.*"[44] Under JFM, land has been leased out mindlessly for mining, and the mixed character of forests changed by planting commercial trees.

2. Another major shortcoming of the judgment is that it did not specifically address the effects of mining of a mineral property.[45] The court should have examined these effects and given a direction to all those mining in that area to follow certain minimum precautions, so as to protect the environment, and to ensure that development does not become destructive.[46]

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43 Mukul, A., "Forests Felled by Plethora of Laws", *Times of India,* February 23, 2001, p.3.

44 Garg feels that the JFM programme is an administrative attempt to glorify the archaic *begar* system where labour was done by tribals but the benefits went to outsiders.

45 **See for example** *Rural Litigation and Entitlement Kendra's Case, supra* n.28, wherein the court noted the harmful effects of haphazard limestone quarrying, namely cave-ins and slumping; deforestation of hillslides; landslides, which killed villagers and destroyed their homes, cattle and agricultural land; imbalanced the hydrological system in Dehradun, causing drying up of springs and acute water shortage and floods during monsoon caused due to clogging of river channels by mining debris. **See also** Divan, Shyam, and Rosencranz, Armin, *Environmental Law and Policy in India*, Oxford University Press, New Delhi, 2001, pp.294-327.

46 Sahu, K.C., "Minerals, Mines and Metals for Habitats-An Ecological Issue", in Rai, K.L. (ed.), *Environmental Issues in Mineral Resource Development*, Gyan Publishing House, New Delhi, 1993, pp.31-32.

3. Another possible flaw in the judgment is that it allows mining leases to be granted in States that have not framed regulations to prohibit such transfer of land to non-tribals, though it does sound a note of caution that such transfers could also be challenged. In giving a detailed list of welfare and afforestation measures to be undertaken by such miners, the Court almost seems to be endorsing the same. It is extremely unfortunate that even though the Court had reached the conclusion that the land of the tribals had to be preserved and their interests safeguarded, after going through an extremely exhaustive study of the legislative history of the Fifth Schedule, the legislative intent behind its drafting and the entire constitutional scheme, it was not bold enough to hold that such mining leases cannot be granted in Scheduled Areas of even those States that have not framed Regulations to expressly prohibit this. It is true that after the Mines and Minerals (Regulation and Development) Act was enacted, Section 11(5) prohibited all such prospective mining leases. But for the period prior to enactment of the Act, there exists a discrepancy between the protection accorded to tribals in States where such Regulation to prohibit transfer exists and tribals in those States where there is no such Regulation. This seems to be an obvious violation of Article 14 of the Constitution.

The Approach of the Government after *Samatha*: A Critique

The *Samatha* judgment is a great victory for *adivasis* who have been struggling to protect their Constitutional right to life and livelihood in the face of increasing alienation from their lands, owing to unchecked industrialization and commercialization. The Union Government approached the Supreme Court twice for a review of the decision, but the Court rejected their petitions on both occasions. While the judgment has only served to reassert the rights of tribals, powerful commercial interests led by large corporations have been putting pressure on the Union Government to protect their interests, and find a way around the *Samatha* judgment.

Amendment to the Fifth Schedule

In order to cater to the commercial interests, the Ministry of Mines in a secret note, No.16/48/97-M.VI, dated July 10, 2000 had proposed to the Committee of Secretaries, amendments to the Fifth Schedule of the Constitution. The amendment proposed was that an explanation be added after paragraph 5(2) of the Schedule removing prohibition and restrictions on the transfer of land by *adivasi*s to non-*adivasi*s for undertaking any non-agricultural operations including prospecting and mining. A senior official of the Ministry of Mines, who aided in drafting the note admits that "*once the mining sector is privatized, there will be pressure from the industries. We will have to take care of their (industry) needs. Interestingly, most of our mines are in scheduled areas.*" The attitude of the Government is best summed up in its active endorsement of the Attorney General of India's statement, that the way forward is to "*effect the necessary amendments so as to overcome the said Supreme Court judgment by removing the legal basis of the said judgment*."

The crux of the debate is the ownership of thousands of square kilometres of resource-rich land in tribal areas. In today's age of capitalism and globalization, the State views the tribal tracts as non-productive assets unless there is industrial activity in those areas. Using the principle of eminent domain, according to which the ultimate right of ownership of all land lies with the State, the government desires to facilitate the exploitation of the resources by the private sector. To argue its case, the note states that

> "*it would never have been the intention of the framers of the constitution that no economic activity should take place in the scheduled areas or the tribals should always remain isolated from the mainstream of the society. Mining activity being temporary, can never be understood to be deprivation of all rights of tribals.……a balance has to be struck between exploitation of mineral resources and advanced technology, keeping in mind the ecology and environment on one hand and development of tribals on the other…..Participation of the tribals in these activities, where mineral resources are found, will encourage them to think of economic development. Mere provision of land without any other help will not in any way advance their status; socially or economically. Tribals must be made to slowly get into the national mainstream.*"

But who decides what the tribals need for their "development"? The government needs to shift from its mainstream definition of "development" to an alternative paradigm of development. Safe drinking water, inputs to increased agricultural productivity, primary healthcare and primary education are more suitable as goals for development of tribals lands. It also has to be noted that development has to be sustainable, and what the government conveniently chooses to ignore is the fact that the tribal populations have protected biodiversity, especially agro-biodiversity, and forest wealth.

This proposal to amend the Fifth Schedule seeks to deprive the tribal communities of their constitutional rights over their land and other natural resources in the scheduled areas. It is a breach of the letter and spirit of the Constitution. The government essentially wants to facilitate the transfer of government land to private sector entrepreneurs, like it has done in the case of the BALCO situation, without being hindered by the Fifth Schedule, or the *Samatha* judgment based on it.

Rehabilitation and Resettlement Policy

In the past half-century, about 8.5 million tribals have been evicted from their lands to make way for development projects, of which only 2.1 million have been resettled. There exists no comprehensive rehabilitation and resettlement (R&R) policy, despite suggestions that R&R concepts be incorporated into the Land Acquisition Act, 1894. Several non-governmental organizations suggested that the principle of eminent domain to be replaced with the principle of trusteeship, which implies that the government will only be a trustee of the common property of natural resources. The government should have a clear moral

and legal responsibility for greater good; and as an extension, land acquisition for private enterprise would not be permitted, as it was not for a public purpose.[47] A glaring example of this problem is the Sardar Sarovar Project. With the Supreme Court recently having assented to the legality of the building of the dam, rehabilitation and resettlement of the displaced people is a major issue.[48] It is in this context that it becomes imperative to develop a comprehensive R & R policy.

The BALCO Issue

The Union Government on March 2, 2001, sold 51% of its stake in Bharat Aluminium Company Ltd. (BALCO) to Sterlite Industries for a highly undervalued sum of Rs.551.5 crores, which gives Sterlite control of the company and its assets. The workers of BALCO, fearing massive layoffs, went on strike.[49] The sale was challenged by the wokers' union and the Chattisgarh government. Chief Minister Ajit Jogi's actively supported the striking workers, and had even offered to purchase Sterlite's stake in BALCO for Rs.552 crores, but this was not accepted by the Centre.[50] The Supreme Court transferred the petitions from the Delhi and Chattisgarh High Courts to itself, as the case had national ramifications. BALCO, which was set up in 1965 at Korba in Madhya Pradesh to manufacture aluminium rods and semi-fabricated products is the third largest player in India's aluminium industry today. The Korba facility includes bauxite mines, an alumina refinery, a smelter and a fabrication unit, besides a 270 MW power plant, and a fully built-up township spread over 15000 acres in which over 4000 families live.[51] All these constitute land[52] in Scheduled Areas, which was acquired by BALCO from tribal people and Dalits, and in its application in 1971, BALCO had stated that the government wanted this land for "public purposes". Since the management of Sterlite comprises of private people and not tribal entities, the land held by the erstwhile public sector undertaking could not be transferred to the new

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47 Warrier, S.G., "Let Museum Pieces Speak for Themselves", *The Hindu*, February 12, 2001, p.4.

48 The judgment leaves it to the R&R sub-group to monitor the rehabilitation process – the same sub-group that had failed miserably in the past. A grievance redressal authority, headed by retired judges has been set up, but the R&R sub-group of Narmada Control Authority has only to consult them before permitting the work on the dam. Also, there exists no R&R package for the people affected by the canal network of the project, or for the families downstream of the dam. It is also feared by many that Madhya Pradesh, a State which bears 80% of the displacement, does not have enough land for the people who are going to be displaced.

49 Sridhar, V., "The BALCO Struggle", *Frontline*, Vol.18, No.8, 2001, http://www.frontlineonline.com/fl1808/fl18080990.htm, visited on May 1, 2001.

50 "Chattisgarh Government Keen to Buy BALCO", http://www.rediff.com/money/2001/mar/12/balco.htm, visited on May 1, 2001; "Chattisgarh vows to pay 5.5 bn for BALCO", http://www.rediff.com/money/2001/apr/05/balco.htm, visited on May 1, 2001.

51 "BALCO Divestment Controversy Rages On", http://www.rediff.com/money/2001/mar/06/balco.htm, visited on May 1, 2001.

52 The Supreme Court in *P.Rami Reddy's Case*, *supra* n.11, had clearly stated that the expression "land" in the Fifth Schedule is not confined to land *per se*. "Land" in its legal sense is a comprehensive expression wide enough to include buildings, structures raised thereon.

management, as it would be in violation of the Fifth Schedule, the Madhya Pradesh Land Revenue Code, 1959, and the *Samatha* judgment, all of which prohibit such transfer of government land in Scheduled Areas to non-tribals.

A three-judge Bench of the Supreme Court heard the case.[53] The workers' union finally accepted the offer of the management to resume work, with no job cuts and payment for the time that they went on strike.[54] But this payment is essentially a loan advance, to be adjusted later. Daewoo Power Ltd. and Essar Steel Ltd. have also been issued notices to show cause as to why their leases granted by the government on tribal land in Scheduled Areas, similar to BALCO, should not be cancelled.[55]

What is the Position Today?

By far, the most important result of *Samatha* has been the rising consciousness and consequent self-empowerment of the tribal communities, who are increasingly fighting harder for their rights, and against the injustice that has been meted out to them for centuries. Some interesting examples that illustrate this change are given below.

- The tribals and the safety committees set up by Gram Sabhas in different panchayats in Betul, Madhya Pradesh, decided the forest areas that belonged to them. They prevailed on the Gram Sabhas to pass resolutions against mining by Western Coalfields Ltd. and took it upon themselves to mine in the area.[56] The state has not yet responded to this action.
- A contempt of court petition was filed in the Kerala High Court in *P. Nalla Thampy Thera* v. *B.P. Singh & Anr.*[57], for the willful disobedience of the writ of *mandamus* issued by the Kerala High Court in 1993, directing the State of Kerala to implement the Scheduled Tribes (Restrictions on Transfer of lands and Restoration of Alienated Lands) Act, 1975. The state tried to argue that after the Kerala Restriction on Transfer by and Restoration of land to Scheduled Tribes Act, 1999, had been enacted, the 1975 Act was meaningless, and therefore there arose no question of contempt for failing to comply with it. But the Court looked at Regulations in Andhra Pradesh and Madhya Pradesh, similar to the 1975 Act, the *Samatha* judgment and Article 46 of the Constitution, and decided that the object common to all of them was the social and economic welfare of the tribals in Scheduled Areas and preservation of their

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53 The Bench comprised of Ruma Pal, B.N. Kirpal, and Brijesh Kumar, JJ.

54 "BALCO Union to Press on with 2 Month Old Strike", http://www.rediff.com/money/2001/may/05/balco.htm, visited on May 1, 2001; "SC Asks BALCO Workers to Call Off Strike", available at http://www.rediff.com/money/2001/may/02/balco.htm, visited on May 9, 2001.

55 "BALCO Issues Engulfs Daewoo Power, Essar Steel", http://www.rediff.com/money/2001/may/08/balco.htm, visited on May 9, 2001.

56 The Sarpanch of Chatarpur panchayat, Sita Dhurve, has stated that they were inspired by the *Samatha* judgment in passing this Resolution.

57 *P. Nalla Thampy Thera* v. *B.P. Singh & Anr.*, http://www.keral.com/Hcourt/fulltext/sc_st_1.htm, visited on May 12, 2001.

land. Therefore, the Court stated that the 1975 Act enacted under Entry 6, List III (in the Seventh Schedule to the Constitution), was unaffected by the 1999 statute, enacted under Entry18, List II.

- The *adivasi*s in Bihar in fighting for the separate state of Jharkhand, had based their arguments on the need to establish self-rule based on their value system of communitarianism, decisions by consensus, equality and a regime where they would have compete control over their resources. Their agenda for the first government of Jharkhand, i.e., the "People's Agenda", had stipulated that the Chief Minister, as well as most officers interacting with the local people should be Jharkhandis, that there should be no dams constructed, and that they should get complete control over the management over their resources. They also aimed for the discontinuance of programmes like the JFM, desired that all land should be re-transferred to the *adivasi*s from the non tribals who had acquired such land in clear violation of existing law, and the cancellation of all mining leases given to non-tribals and that mining, if required, was to be undertaken by cooperatives of tribals, as laid down in *Samatha*.
- The representatives of tribal communities across the country adopted the "Vishakapatnam Declaration" in March 2001.[58] In this, they recognize that the issues concerning the institutional form for use of resources in consonance with natural rights of the people as provided for in the Act, constitutional provisions such as the Fifth Schedule, recommendations of the Bhuria Committee and Supreme Court verdict such as the *Samatha* judgment, have all been ignored by the Central and State governments. In fact, in flagrant violation of the principles enunciated in all the above, the Central Government has proceeded to transfer ownership of public sector ventures to private parties as in the case of BALCO in Chattisgarh. Thus the tribal community calls upon the Union and State governments, aided by non-governmental organizations, to abide by the dictum in *Samatha,* to refrain from amending the Fifth Schedule, and to help create an institutional set up in these areas, namely the Gram Sabhas, which will facilitate a system of self-governance. They advocate that the entire process of development at the village level should be so adapted that it is centred on the use of local resources and community action, and is not market driven.

Some Suggestions for Promoting Tribal Rights in Scheduled Areas

- The government should recognize the tribals' right over their local resources, and the fact that it has no power to transfer its land in these Scheduled Area to non-tribals, as laid down in the *Samatha* judgment. It has to be recognized that "development", as desired by the government cannot be at the cost of the environment, or tribal rights. The State should abandon its notions of trying to subvert the *Samatha* judgment by amending the Fifth Schedule, and to work with the tribal community and non-governmental organizations like Samatha for the benefit of the tribal community.

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58 http://www.oxfamindia.org, visited on April 20, 2001.

- There should be recognition by the government of an alternative paradigm of development for these areas, and a focus on education and health, rather than the pursuit of the mainstream ideology of development, which seeks to deny tribal people their land and resources.
- The government should ensure that appropriate steps are taken to safeguard the environment, even when mining is proposed to be undertaken in these areas by the state instrumentality, or by the tribals themselves. This would include a detailed and systematic assessment of the effect on the environment of that area by mining, and if mining is permitted, to ensure continuous afforestation and reclamation of land, take measures to prevent soil erosion, siltation, landslides, and install pollution control devices, etc.
- The government should also develop a comprehensive R&R policy, so that people displaced by deforestation and mining activities do not remain homeless.
- There should be empowerment of the Gram Sabha in these areas, in keeping with the spirit of the Panchayat Raj (Extension to Scheduled Areas) Act. This is essentially a merger of the traditional councils with the system of statutory panchayats, wherein the tribals themselves will be responsible for preserving their culture and way of life, besides regulating matters of alienation of tribal land and shaping their development.
- The government should also take steps to remove the multiplicity of laws concerning forests. Programmes like the JFM should be modified to make the tribals the right-holders and not merely beneficiaries, which is their framework at present.[59]
- There should be better coordination with the Tribal Advisory Council and Commissions should be set up under Article 339, to continuously assess the position of the Scheduled Areas.

Concluding Thoughts

The Indian government has a duty to promote and protect the right to social, economic, civil and cultural rights of the people, in particular the rights of tribals, as it is enjoined by Articles 38, 39 and 46 of the Constitution read with the right to life enshrined in Art.21 of the Constitution, so as to raise their standard of living, ensure the dignity of person and equal status. *Samatha* is clearly a commendable judgment towards that end, one that has enlightened and inspired tribals across the country. To go back to the words of Pandit Jawaharlal Nehru:

> *"I would prefer being a nomad in the hills to being a member of stock exchanges, where one is made to sit and listen to noises that are ugly to a degree. Is that the civilization that we want the tribal*

[59] Anil Agarwal and Sunita Narain, eco-journalists, argue in favour of giving real and tangible control to local communities over forest resources. They fear that until forest dwellers are made stakeholders in the forest, corruption of the forest officials and exploitation of these indigenous communities will continue.

> *people to have? ...I am quite sure that the tribal folk, with their civilization of song and dance, will long last after stock exchanges have ceased to exist.*"

Nehru was perceptive to have realized very early on, that the State would try and subject the tribal community to capitalist notions of "development", and emphasized that this should not be so, and that the tribal community should be allowed to preserve their traditions, their culture and their way of life.[60]

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60 **See also** Gupta, A., "Samatha Shadow Across BALCO Sale Deed", *The Tribune*, March 26, 2001, p.3.

LAW IN THE MAKING

PROTECTION OF PLANT VARIETIES AND FARMERS' RIGHTS BILL, 2000

Poornima Sampath*

"In periods of rapid technological transformation, it is assumed that society and people must adjust to change, instead of technological change adjusting to social values of equity, sustainability and participation."[1]

A primary concern in developing countries is the lack of appropriate mechanisms to recognize and reward traditional farmers. While breeders are able to secure property rights over the varieties they create, the value added by traditional farmers seldom receives recognition. This formed the basis of the concept of "Farmers' Rights"[2], in the Resolution adopted by the Food and Agricultural Organization (FAO), wherein the need to "provide a counterbalance to intellectual property rights"[3] was recognized. The Resolution was borne out of the fact that while a commercial variety could generate returns to the commercial breeder (notably on the basis of plant breeders' rights), no system of compensation or incentives for the providers of germplasm had been developed. In 1998, the International Undertaking on Plant Genetic Resources recognized the role of farmers as custodians of biodiversity, and helped to call attention to the need to preserve practices that are essential for sustainable agriculture.[4] The fallout of the Undertaking was increased

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1 Shiva, Vandana, "Biotechnology Development and the Conservation of Biodiversity," in Shiva V., Moser, I., (eds.), *Biopolitics*, Zed Books Limited, London, 1995, p.193.

2 The concept of "farmers' rights" was first incorporated in the International Undertaking on Plant Breeders' Rights, 1983, (adopted by the FAO Conference). The thrust of the Undertaking is on "free access" to the plant genetic resources within the territory of the member states. This point was later developed by the Convention on Biological Diversity, which made access (although not restricted to non-commercial purposes) conditional upon "mutually agreed terms" and the sharing of benefits obtained as a result of the access. For further details, **see generally** http://www.southcentre.org/publications/farmersrights/farmersrights-02.htm, visited on August 15, 2001.

3 FAO, 1994, paragraph 41. It was first introduced by FAO Resolution 4/89, unanimously approved by more than 160 countries, and was further defined by FAO Resolution 5/89.

4 In accordance with Article 5b of Resolution 4/89, the benefits to be derived from the Undertaking are "*part of a reciprocal system, and should be limited to countries adhering to the International Convention.*"

The Parties undertook "*to allow access to samples of such resources, and to permit their export, where the resources have been requested for the purposes of scientific research, plant breeding or genetic resource conservation. The samples will be made available free of charge, on the basis of mutual exchange or on mutually agreed terms.*" (Article 5 of the International Undertaking). *Ibid.*

In addition, in accordance with Resolution 4/89, "*A state may impose only such minimum restrictions on the free exchange of materials covered by Article 2.1(a) of the International Undertaking as are necessary for it to conform to its national and international obligations.*" (Article 2 of the Agreed Interpretation).

concern in developing countries on private control over resources that were once considered common property. The World Trade Organization[5] has brought this issue to the fore, and protection of farmers' rights has become a pressing issue for developing countries like India that have rich traditional knowledge systems.

India is a signatory to the Agreement on Trade-Related Intellectual Property Rights and Counterfeit Goods[6]. TRIPS provides that developing countries must introduce mechanisms for plant variety protection. Over the years, India has appointed numerous committees to examine and address the impact of the TRIPS on Indian farmers, and to take protective measures. The Gujral Committee[7] was appointed as early as in 1993, and more recently, the Sahib Singh Committee,[8] and the Arjun Singh Committee[9] have submitted reports. In 1999, the Protection of Plant Varieties and Farmers' Rights Bill, 1999[10] was expected to be enacted by Parliament. However, it was criticized from several quarters[11], as being exceedingly friendly to commercial breeders, and in effect, paying only lip service to farmers. A Joint Parliamentary Committee was appointed to look into these concerns.[12] Subsequently, the 1999 Bill was revised, and the result is the Bill on Protection of Plant Varieties and Farmers' Rights Bill, 2000.[13] The TRIPS does not mandate any particular system – it gives countries some margin of appreciation in deciding how to implement their obligations.[14] Accordingly, India is free to choose between[15]:

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5 Hereinafter referred to as "WTO".

6 Hereinafter referred to as "TRIPS".

7 The Committee published its Report in Parliament on November 13, 1993, warning that the GATT arrangement may be harmful for India, as it was biased towards to the developed countries, and there was no level playing field.

8 The Committee submitted its Report in Parliament in 1999.

9 The Report of this Committee has not been made public. Dhavan, Rajeev, "The Right to Seed", *The Hindu*, March 21, 2001, p.8.

10 Bill No.123 of 1999.

11 **See generally** http://www.twnside.org, visited on 9/8/2001.

12 **See** Lok Sabha, *Report of the Joint Committee on the Protecting of Plant Varieties and Farmers' Rights Bill, 1999*, Lok Sabha Secretariat, New Delhi, 2000.

13 The salient features of the Bill are as follows:
- Farmer, who has bred or developed a new variety, to be entitled for protection as a breeder of a variety.
- Farmer, who is engaged in conservation of genetic resources of land races, wild-relatives, etc., entitled for recognition and reward from the National Gene Fund.
- Farmers will be entitled to save, use, sow, re-sow, exchange, share, or sell his farm produce including seed or a variety, protected under this Act, with the exception that he will not be entitled to sell branded seed of a protected variety.
- Rights of communities in the evolution of any variety for the purpose of staking a claim will be accepted.
- Protection extended to farmers for innocent infringement of provisions of this Act.
- Compensation to be given to farmers if the registered variety does not meet the promised level of performance under given conditions.
- National Gene Fund to be utilized for making payment for benefit sharing, compensation to communities etc. and supporting the activities relating to conservation and sustainable use of genetic resources.

14 Unlike, for instance, the case of pharmaceuticals, where all member states are under an obligation *to* introduce product and process patents, and no option of evolving a different scheme is possible.

15 **See** Article 27(3), TRIPS.

- A patent regime
- An "effective" *sui generis* law
- A combination of both to protect plant varieties.

It appears from the Preamble to the Protection of Plant Varieties and Farmers' Rights Bill[16], that India has chosen to provide a *sui generis* system. This paper attempts to examine to what extent the Bill provides effective protection to farmers, keeping in mind the Indian socio-economic context.[17] In response to the representations from various organizations, the Bill contains a chapter exclusively on farmers' rights. This article studies the provisions of the Bill, and examines whether it is a marked improvement over the 1999 Bill. At a broader policy level, issues of benefit sharing and licensing are discussed. As farmers and environmentalists struggle against the dangers of "modern agriculture", there is an increased realization that modern methods should at best supplement indigenous and local knowledge rather than displace it.[18] The paper will attempt to demonstrate further that the Bill does not seem to take any stand on such larger issues, and is bereft of any discernible policy.

A Critical Study of the Bill

Registration

The Bill of 2000 offers protection to three varieties:

- extant variety[19]
- farmer's variety[20] and
- "essentially derived variety"[21]

The primary mode of protection in the Bill is registration, i.e., the applicant is to register a variety in the National Register of Plant Varieties.[22] The Bill contains fairly detailed provisions on the modalities for the same.

Registration of *new* varieties by farmers

Clause 39(1)(i) provides that farmers have a right, like other commercial breeders, to have varieties registered – the plant breeder and farmer are entitled to file for registration of a

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16 Hereinafter referred to as "the Bill."

17 Admittedly, Indian farmers operate in a context markedly different from farmers and breeders in the developed countries. Even among developing countries, agricultural practices differ.

18 For details on "modern agriculture", **see generally** Shiva, Vandana, Moser, I., (eds.), *Biopolitics*, Zed Books Limited, London, 1995.

19 Clause 2(j) defines "extant variety" to include a variety available in India which is notified under Clause 5 of the Seeds Act, 1966, or a farmers' variety, or a variety about which there is common knowledge or any other variety which is in public domain.

20 Clause 2(l) defines "farmers' variety" to mean a variety which has been traditionally cultivated and evolved by the farmers in their fields, or is a wild relative or land race of a variety about which the farmers possess the common knowledge[20].

21 Clause 2(i) defines "essentially derived variety" to include a variety predominantly derived from a variety protected under the law.

22 **See** Clause 2(s).

new variety. What is incongruous about the Bill is that while it purports to develop a *sui generis* system, the criteria for registration of a new plant variety (novelty and distinctiveness) have been derived from the patent regime.[23] The problem with this is that it assumes that farmers operate like commercial breeders. Hence, the Bill in effect equates farmers and breeders to patentees.[24] In practice, this misrepresents the situation.[25] Clause 18(1)(b)(i) further specifies conditions for application of registration of a new variety:

- it must be accompanied by an affidavit (sworn by the applicant)[26]
- the relevant form must be filled (presumably a technical form)[27]
- the parental lines from which the variety has been obtained has to be stated[28]
- there must be a written statement of the description of the new variety[29]

The above registration criteria may be suitable for breeders, but will be difficult to fulfil by farmers. The other criteria of uniformity and stability are also taken from the International Convention for the Protection of New Varieties of Plants, 1991 (the UPOV Convention),[30] which caters to commercial breeders only; typically these are situations where innovation and "discoveries" of plant varieties take place in laboratories. In India, innovations take place in fields after repeated trials and errors over a long period of time.[31] There is no documentation. Moreover, the farmer may be illiterate. Hence, the conditions for registration of new varieties are almost impossible for the farmer to prove.

Criteria for registration of farmers variety

For registration of the extant variety, the condition of novelty is not required and the criteria of distinctiveness, uniformity and stability are somewhat flexible, depending on the specification cited in the regulations made by the Authority.[32] There is no specific provision for the conditions for registration of farmers' variety. In the absence of a specific provision, it would appear that the general must apply.[33] This would point to Section

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23 Clause 15(1) reads: "*a new variety shall be registered under this Act if it conforms to the criteria of novelty, distinctiveness, uniformity and stability.*"

24 **See** Clause 2 (k). The term "farmer" is also defined to include persons who actually cultivate crops, as well as persons cultivating land through other persons. A person who conserves, preserves severally or jointly with any person, any wild species or traditional varieties, or adds value to it through selection and identification of their useful properties are also treated as farmers.

25 Cullett, Philippe, "Protection of plant Varieties," *The Hindu*, March 1, 2001, p 4.

26 **See** Clause (18)(1)(c).

27 **See** Clause (18)(1)(d).

28 **See** Clause (18)(1)(e).

29 **See** Clause (18)(1)(f).

30 Article 5 of the UPOV Convention provides for conditions for the grant of the breeder's right. It reads: "*Conditions of Protection: (1) The breeder's right shall be granted where the variety is (i)new, (ii)distinct, (iii)uniform and (iv)stable.*"

31 Kothari, Ashish, "Agro-Biodiversity: The Future Of India's Agriculture," http://www.mtnforum.org, visited on March 15, 2001.

32 **See** Clause 15(2).

33 The definition of "variety" includes farmers' variety, as well as extant variety.

15(i), thereby implying that novelty, distinctiveness, uniformity, and stability must be proved. However, the definition of extant variety also includes farmer's variety, so it appears that either procedure can be followed, i.e., a farmer's variety can be registered either as an extant variety or as a new variety. This point is unclear in the Bill. Were it to be treated as a new variety, it would be almost impossible for a farmer to prove his claim – the strict conditions of novelty cannot be met at all, as the seeds will have been in use for quite some time. Therefore, the Bill must have greater clarity on registration of farmers' varieties. Additionally, the procedure for the farmer to claim his rights is highly complicated, and perhaps, may be beyond reach of the common farmer.[34]

Renewal of registration

Clause 24(6) provides for renewal of varieties from time to time, until the end of the period of protection. There is no exclusion of farmers' varieties and extant varieties from this provision**.** It must be noted that renewal can *per se* apply only to new varieties; it is inconceivable that farmers' and extant varieties be renewed. What emerges is that the Act has failed to properly recognize the differences between new varieties, farmers' varieties and extant varieties.

Exemptions from registration

Clause 29 of the Bill confers on the Central Government the power to "*exclude any genus or species from the purview of protection in public interest*." [35] In addition, the Central Government has the power to take away *genera* or species from the list once notified on the ground of public interest. The problem arises because there is no definition of public interest, and hence this power is unrestricted. One fairly reasonable view is that a definition would only serve to be restrictive in nature – admittedly, it is not possible to envisage situations in which the government may need to use this power. However, this provision is an extremely important one. There are a number of genera or species in the area of rice, wheat, pulses etc. that are important for the purpose of protecting the food security of the country.[36] A most

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34 **See** Clause 17. This clause lays down the detailed procedure for registration of plant varieties. The form of application, the documents and fee which may accompany an application, and the manner in which such application shall be made will be specified by the Central Government by rules.

35 Clause 29 provides that registration of a variety will not be allowed in cases where prevention of commercial exploitation of such variety is necessary to protect public order or public morality or human, animal or plant life and health, or to avoid serious prejudice to the environment.

36 Improvements in food availability at national and regional levels have not eliminated chronic and often severe food insecurity in regions throughout the country. Child malnutrition rates in India are still very high. According to the United Nations Development Programme, 53 percent of children under the age of five in India were underweight during the period 1990-97, the highest rate of any of the 174 developing countries listed. Second, national food aid programmes are designed to address the problem of scarcity of resources, which are allocated to target the food insecure. Since it was launched in 1954, India's food aid programme is ranked as the world's largest non-emergency food programme. The challenge is to create sufficient countervailing power to succeed in making food security an overriding requirement in revising and implementing the agreements. **See generally** http://www.twnside.org, visited on July 15, 2001.

real problem would arise if varieties of species that constitute the poor man's food were afforded protection.[37]

Since the Bill comes under the purview of the WTO, ostensibly its purpose, among others, is to promote foreign investment. [38] A conflict may very well arise between the food security needs of India, and the need to enhance foreign investment. It would be disastrous to permit monopoly rights over species of rice[39] , wheat, and pulses.[40] Hence, it is submitted that the government must have a list of items clearly excluded – there is no such List at the moment in the Bill in its present form.

Also, a simple reading of the Bill gives the distinct impression that the basic philosophy is not so much to protect Indian species from monopoly rights, as much as to encourage monopoly rights and increase foreign investment. The drafters have not envisaged problems such as the one stated above. This thrust itself is inappropriate for India, and needs to be reconsidered.

Essential Derived Varieties

Clause 2(i) contains a detailed definition of essential derivation.[41] Varieties will only be essentially derived when they are developed in such a way that they retain virtually the whole genetic structure of the earlier variety. Any protected variety may be freely used as a source of initial variation, and the authorization of the breeder of the protected variety is required only if a resulting variety falls within the defined concept of essential derivation. This has been adopted from the UPOV Convention.[42] Essential derivation in the 1991 Convention is designed to provide adequate incentive for plant breeding.[43] Article 14(5)

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37 Surendra, Lawrence and Gopalakrishnan, N.S., "Intellectual Property, Seeds: The Future of Farmers and Farming", (1995) 5 SCC (Journal) 10.

38 Clause 6 (ii) of the Statement of Objects and Reasons of the 1999 Bill reads: "*to facilitate the growth of the seed industry in the country through domestic and foreign investment, which will ensure the availability of high quality seeds and planting material to Indian farmers.*"

39 The richness of Indian traditional systems cannot be adequately emphasized. A single species of rice collected from the wild some time in the distant past has diversified into 50,000 varieties as a result of a combination of evolutionary/habitat influences and the ingenuity and innovative skills of farming communities. Many tribal villages in the hills of North-East India have been known to grow over 20 rice varieties within a single year in their terraced fields. In one region of Koraput district of Orissa alone, scientists identified over 1500 rice varieties. *Supra* n.30.

40 Recent research in the Garhwal Himalaya of Uttar Pradesh indicates the extent of crop diversity erosion. Traditionally, over 40 crop species and hundreds of varieties of cereals, millets, pseudocereals, pulses, oil seeds, tubers, bulbs, and spices have been cultivated in these hills. *Supra* n.31.

41 A variety (B) is essentially derived from another variety (A), when (B) is predominantly derived from that variety (A), and except for the differences which result from the act of derivation, (B) conforms to (A) in the expression of the essential characteristics that result from the genotype or combination of genotypes of that variety (A).

42 **See** Article 14(5) of the UPOV Convention.

43 Under the 1978 Convention, any protected variety could be used as a source of initial variation to develop further varieties, and any such variety could be exploited without any obligation on the part of its breeder

provides that a variety which is essentially derived from a protected variety and which fulfils the normal protection criteria of novelty, distinctness, uniformity, and stability may be the subject of protection but cannot be exploited without the authorization of the breeder of the protected variety.

This system poses some problems in the Indian context. As is seen in the requirements for essentially derived varieties, major changes or genetic modifications have to be made for a plant to be recognized as a new variety. These kind of significant changes put the major corporations with their vast resources and research budgets at a distinct advantage, whereas on the other hand, the small farmer or breeder would not be able to make the necessary changes so as to constitute a substantial change. Moreover, in most farming activities, a substantial quantity of resources are borrowed from other farmers, and a few changes are made so as to suit personal and local conditions. This practice has led to an abundance of new varieties, and forms the basis for the free growth of knowledge among small breeders, and is the backbone of any agrarian economy. To strike at the very root of this system would be completely disastrous.

Further, the issue of essentially derived varieties hinges on the permission to be given by the breeder, who has got the protection for the variety. Assuming that a farmer gets possession of such a variety, and is desirous of using such variety to breed another variety, seeking permission from a corporation will not be easy, given that farmers dwell typically in rural settings, and will find it difficult to communicate with corporations, that may not even have an established place of business in India.

Period of Protection

The Bill provides for different terms of protection for different items of registered varieties.

- For trees and vines it is 18 years from the date of registration
- For extant varieties, it is 15 years from the date of notification of that variety by the Central Government under Clause 5 of the Seeds Act 1966.
- There is no specified term of protection for farmers' varieties.

Clause 24(6) states that in all other cases it is 15 years from the date of registration of the variety. So it appears that farmers' varieties, registered as a new variety. are covered by this provision. Nevertheless, it is suggested that a specific provision be made to this effect.

The Bill has included provisions for farmers' varieties. But the general scheme of the Bill indicates that they more or less merit similar treatment as *new* varieties. It is submitted that a specific chapter dealing exclusively with farmers varieties needs to be included. It is not enough to merely include farmers' varieties in a Bill, and then treat them as *new* varieties – recognition of a farmers' variety without adequate protection achieves little.

Diffrential Treatment of Varieties

Clause 14(3) provides that a new variety is deemed to be novel:

(a) if at the date of filing of the application for registration for protection, ….the variety

has not been sold, or otherwise disposed, by or with the consent of its breeder or his successor, for the purposes of exploitation of such variety
(b) in India, earlier than one year; or
(c) outside India, in the case of trees or vines earlier than six years, or in any other case, earlier than four years, before the date of filing such application:
Firstly, there appears to be no good rationale for the differential treatment to varieties available abroad and in India. This means that varieties introduced in the foreign market four years prior to the commencement of the Act can be protected in India, but the protection for varieties introduced in the Indian markets can be extended only a year prior to the commencement of the Act. This clause gives preferential treatment to foreign breeders and must be reconsidered. It is perplexing that such a provision has been incorporated at all. Notably, it has been borrowed verbatim from Article 6 of the UPOV Convention.[44]

Compensation & Benefit-Sharing [45]

Both the 1999 and 2000 Bills adopt a different approach from that of the UPOV in terms of rewarding an innovation. The concept of intellectual property rights is replaced by a form of financial compensation whose allocation is to be decided unilaterally and freely by the Authority. The concept of benefit sharing is that actors who have contributed to the development of a protected variety, but cannot claim property rights, are awarded monetary compensation. Under Article 26[46] of the 1999 Bill, once a variety is registered, the

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and users towards the breeder of the variety which was used as a source of initial variation. This irked the major corporations (breeders) and the required change was introduced in the 1991 Act, which has been adopted in the Bill.

44 Article 6 of the Convention reads:
"*(1)The variety shall be deemed to be new if, at the date of filing of the application for a breeder's right, propagating or harvested material of the variety has not been sold or otherwise disposed of to others, by or with the consent of the breeder, for purposes of exploitation of the variety:*
(i) in the territory of the Contracting Party in which the application has been filed earlier than one year before that date and
(ii) in a territory other than that of the Contracting Party in which the application has been filed earlier than four years or, in the case of trees or of vines, earlier than six years before the said date."

45 In the 1999 Bill, benefit sharing is for the use of genetic material, while compensation is for the contribution to the evolution of the variety. In the 2000 Bill, compensation is to be given to farmers if the registered variety does not meet the promised level of performance under given conditions, while the understanding of benefit sharing remains the same.

46 Clause 26 of the Bill lays down the detailed procedure for determination of benefit sharing by the Authority. The amount of benefit sharing determined by the Authority is required to be deposited by the breeder of the Plant Variety in the National Gene Fund constituted under Clause 52. Sub-clause (7) of this clause provides that the amount of benefit sharing determined by the Authority shall, on a reference made by the Authority in the manner as may be provided by rules, be recoverable by the District Magistrate from the breeder liable for the benefit sharing as arrears of land revenue.

concerned Authority must invite claims and decide whether benefit sharing[47] is due, and accordingly fix the quantum of financial compensation to be given.[48]

- The objection is not really directed at the system, as much as the modalities – compensation for knowledge was not recognized, only the material contributed was. This virtually implies that intellectual contribution to the development of a variety by farmer-breeders is ignored.
- It took cognizance of, and formalized the fact that farmers cannot easily obtain property rights, though in principle, the possibility for them is open.[49]
- Mere financial compensation is hardly commensurate with the actual contribution made. The Bill could have conceived of other sharing schemes.

The Bill of 2000 retains the following provisions on benefit sharing.

Failure to pay benefits

The 1999 Bill envisaged revocation of the registration after hearing the breeder.[50] There was no express provision for revocation due to a failure to share benefits or pay compensation to the community. Significantly, Clause 26(7) of the 2000 Bill provides as a remedy, recovery as arrears of land revenue, for the failure to pay the amount due as benefits. The issue is whether this provision will benefit farmers, who dwell in rural, often remote parts of India. If the violator is a multinational corporation, its offices will be in urban areas. How then will the farmer benefit from land arrears? Worse still, the corporation may not even have a place of business in India, and their connection with India may be purely economic, not territorial. Any Bill on farmers' rights in India must adopt a more pragmatic approach – to address concerns from the perspective of an urban breeder is highly inappropriate. A comprehensive policy is needed, before the preparation of a Bill. Once a perspective is taken in the policy, a Bill should follow along agreed lines.

Inviting claims from farmers

Clause 26(1) of the Bill provides that the concerned Authority must notify the details of the protected variety and invite the claims for benefit sharing.[51] This clause will have little

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47 Clause 2(b) defines "benefit sharing" in relation to a variety, means such proportion of the benefit accruing to a breeder of such variety, or such proportion of the benefit accruing to the breeder from an agent or a licensee of such variety, as the case may be, for which a claimant shall be entitled as determined by the Authority under Clause 26.

48 The Protection of Plant Varieties and Farmers' Rights Authority to be set up under the Bill is to be entrusted with operationalizing this provision. Another provision allows communities to file claims for the contribution that they have made for the development of a protected variety. The Authority is vested with the discretion to dispose of the claim.

49 Cullet, Philippe, "Protection of Plant Varieties," *The Hindu,* March 1, 2001, p.4.

50 **See** Clause 34. The grounds in addition to the non-fulfillment of statutory requirements for registration include failure to provide seeds or propagating materials to the holder of compulsory license, failure to comply with any of the directions issued by the Authority under the Act and public interest.

51 **See** Clause 26(1).

effect – it is highly improbable that a farmer will make such claims, given the average literacy level among farmers in India. In addition, the farmer will typically be unaware of such a possibility – given India's social conditions. It is for the law-enforcers to ensure that there is public awareness of the provisions for benefit sharing. Even assuming that a farmer may be aware of the provision, the Act makes his task no easier –there are no offices at the District level, let alone at the *taluka* level, to facilitate his claims.[52]

A similar problem is encountered in the provision on claims for compensation.[53] Clause 41(1) of the Bill provides that interested persons on behalf of any village or local community should apply to the centres created for this purpose, to stake their claim for compensation for the contribution of the people of that village or local community in the evolution of any variety.[54] The compensation is given to the person who approaches the Authority, from a Gene Fund into which the breeder deposits the compensation amount.[55] This provision also assumes that the villager is both knowledgeable and literate – an assumption often controverted. The crucial issue is that of implementation, and the law is very obscure on this point.

Rights of Farmers Over their Own Seeds

Clause 31 of the 1999 Bill protected the rights of farmers to save, use, exchange, share, or sell their produce of a protected variety.[56] This provision was very specific - it dealt only with the rights over the crops grown by the farmers. The provision achieved nothing – the clause was almost redundant.

The Proviso to Clause 31 went a step further.[57] It excluded the farmers' rights insofar as it involved a "commercial marketing arrangement." This provision in the 1999 Bill was criticized from various quarters.[58] This was primarily because the provision completely overlooked the practice that has prevailed in India for centuries.[59] Apart from merely

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52 Clause 3(3) provides for the establishment of regional offices.

53 Clause 41 provides for compensating the village or local community for their contribution in the evolution of any variety.

54 **See** Clause 41(1).

55 **See** Clause 41(4).

56 Clause 31 reads:
"*Farmer's right: Nothing contained in this Act shall affect the right of a farmer to save, use exchange, share, or sell his farm produce of a variety protected under this Act.*"

57 The Proviso to Clause 31 reads:
"*Provided that a farmer shall not be entitled for such right in case where the sale is for the purpose of reproduction under a commercial marketing arrangement.*"

58 **See generally** Dhavan, Rajeev, "The Right to Seed", *The Hindu*, March 21, 2001, p.8.

59 Villages and towns have their own markets, and trading in seeds takes place there. The provision therefore introduced an alien concept – the exclusive sale of seeds by corporations. Also, farmers, depending on the crops they have grown and plan to grow, trade one variety of seed for another. Such barters were made illegal under the 1999 Bill, as it would have amounted to a marketing commercial arrangement.

overlooking farming practices in India, the benefits of this practice were considered too important to lose, e.g., there is no wastage of seeds.

Were corporations to be given exclusive marketing rights, it would be their prerogative to decide which crop should be cultivated. Driven by the profit motive, the primary concern in deciding the type of crop to be grown would be its commercial viability.[60] This would have slowly effaced many traditional varieties. Also, over centuries, farmers have come up with their own systems of mixed cropping. These would have also been eliminated. Many crops consumed as food for centuries are no longer popular due to low commercial viability. Corporate control would have aggravated this loss.

The drafters were compelled to revise this provision. Clause 39(1)(iv) of the Bill of 2000 now provides that the farmer has a right to save, use, sow, re-sow, exchange, share, or sell his farm produce, including seeds of a variety protected under the Act, in the same manner as he was entitled before the commencement of this Act.[61] The provision now goes a step further, and prohibits the farmer from selling branded seeds of a protected variety.[62] The first part of the provision is perhaps just declaratory in nature – it confers no substantive right, as such a right is inherent in the Indian context. The fact that the farmer can now sell his own seeds of a variety protected under the Act is also a significant improvement over the previous Bill. Admittedly, this provision fits into the scheme of this Bill, whose basic philosophy seems to be protect multinational agro-corporations, and encourage their entry into India.[63]

Utter Confusion for Farmers' Varieties

The proviso to Clause 28(1) provides that for an extant variety, the ownership of rights granted will be with the Central Government or the State Government (as the case may be) if the breeder or his successor failed to establish his right. There is no such provision on farmers' varieties (registered as extant varieties). Presumably, this Clause will apply. The result then will be undesirable – a farmer will be treated a breeder for these purposes as the definition of breeder includes farmer. It is suggested that a proviso be added in the Bill expressly excluding the farmers' variety from this provision.

No Participation

- It is notable that the farming community was not consulted before drafting the 1999 Bill. However, for the revised draft, currently pending before Parliament, many non-

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60 Such control has been exercised for centuries. For instance, in the British era, Indian farmers were compelled to grow indigo and tea, (as opposed to their traditional varieties) due to the prices they fetched through exports.

61 **See** Clause 39(1)(iv). This is based on the UPOV Convention.

62 **See** the proviso to Clause 39(1)(iv). The Explanation to Clause 39(1)(iv) states that "*….branded seed means any seed put in a package or any other container and labeled in a manner to indicate that such seed is a protected variety.*"

63 Corporations operating in the seed sector were permitted into India in 1995.

governmental organizations presented their cases. Nevertheless, no direct opinion was ever solicited by the government.

- States were not consulted before the Bill was drafted. "Agriculture" is a state subject, and non-consultation is inappropriate.[64]
- Claims can only be made after a variety is registered. There is no participation before that stage and no right to intervene at the point at which a commercial breeder is making an application for registration.[65] In this regard, the procedure followed in the Indian Patents Act, 1970, should be followed – pre-registration challenges to the claim.

Burden on Claimants

Under the scheme of the Bill, the burden of claiming benefit sharing[66] and compensation[67] is on the claimant. This is problematic, because it is far from certain whether information concerning the registration of a given variety will easily reach the people and communities that may have a claim for compensation or benefit sharing. Furthermore, Clause 41(1) provides that the approval of the Central Government must be sought by the person(s) claiming a contribution. There is no rationale for such approval to be sought in the first place. It may also lead to prolonged delay, if the Authority were to take time to respond.

Prior Informed Consent

The breeder, in his application form for registration of new varieties, must show that consent is obtained lawfully to use the materials,[68] and where the material was collected. However, the Bill contains no provision of prior informed consent of the community for the use of their traditional knowledge.

Highly Centralized

As mentioned earlier, the problems in implementation are scarcely appreciated in the 2000 Bill. The Bill appears to be highly centralized on numerous counts:

- The Bill envisages the creation of a National Gene Fund by the Central Government, leaving modalities to be worked out through Rules made under the Act.

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64 Admittedly, the counter argument is that once an international agreement is signed and ratified, under Article 253 of the Indian Constitution, the states are subservient to the Centre, even in matters in List II.

65 Clause 26 provides that "*…….[t]he Authority shall publish such contents of the certificate and invite the claims of the benefit sharing to the variety registered under such certificate in the manner as may be prescribed.*"
Clause 26(2) provides that "*On invitation of the claims under sub-Clause (1), any person or group of persons or non-governmental organization shall submit its claim of benefit sharing to such variety in the prescribed.*"

66 **See** Clause 26(1).

67 **See** Clause 41(1).

68 **See** Clause 18(e) and (h).

- The Authority constituted for purposes of entertaining claims to benefit sharing is to have regional offices – there is no linkage with the *taluka* and village levels.
- The centres to be constituted for purposes of entertaining claims for compensation suffer from the same malady.

A most basic issue that the Bill completely fails to recognize is that of the position of the typical farmer in India:
He/she is illiterate.
He/she lives in rural areas, often remote and far from urban places.
He/she has land holdings in villages.
Given this, the administrative set up closest to the farmer would be the *panchayati raj* institution. Alternatively, the centres could tie up with the Commissioners for Agriculture, and the Commissioners for Horticulture who have offices at *taluka* levels. At present, it is a highly centralized and state controlled mechanism, implementation is difficult, and no benefit will reach the communities.

Penalties

The 1999 Bill provided for both civil and criminal remedies to ensure conformity with its provisions. Clause 57 provided that if any person, who is not the original breeder of a variety or a licensee of a variety, sells, exports, imports or produce such a variety, will cause an infringement of the right of the breeder. On the civil side, dealt with in clauses 57-60, a farmer could be injuncted from a particular activity, unless and until he could show good faith. On the criminal side, contained in Clauses 69-70, imprisonment and fines were contemplated.
There were strong objections to these provisions on infringement and remedies. It was considered absurd, almost preposterous that a farmer could be imprisoned and fined for selling his surplus seeds in this market, something that he has been doing for centuries. Also, cases by corporations against poor farmers would have highlighted the unequal grounds from which the two operate – it was eminently possible and probable that it would have worked to the detriment of the farmer.
The Bill makes a significant departure from the 1999 Bill – criminal remedies are minimal. Notably, the Bill provides that protection be extended to farmers for innocent infringement of provisions of this Act.[69] This is a remarkable change; at the very least, farmers will not be unduly prosecuted.

Unsuitable Model for the Bill

Most of the developed countries have ratified the UPOV Convention, in order to fulfil their obligations under Article 27(3) of the TRIPS. India has taken the consistent stand that the UPOV Convention is unsuitable for the conditions prevailing in this country. Despite this stand taken by it, India seems to have adopted the UPOV model in formulating

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69 **See** Clause 71(c).

the Bill. This is evident from the commonalties in the Bill and the UPOV Convention – the provisions on essentially derived varieties, the conditions and term of protection, etc. The problem with this is that the UPOV caters to breeders in developed countries, and is absolutely unsuitable to India's socio-economic conditions.

- The Bill fails to address the suitability of the system to India. It is highly unlikely whether any preliminary inquiry was conducted prior to the preparation of the draft.
- Perhaps the most problematic part of the Bill, adopted verbatim from the UPOV Convention, is the section on the conditions of protection. Article 5 of the 1991 Convention exhaustively enumerates the conditions to be fulfilled by each new variety for which protection is sought, and forbids the imposing of other conditions (except formalities and payment of fees). The stated conditions are:
    - Novelty[70]
    - Distinctness[71]
    - Uniformity[72]
    - Stability[73]
    - Denomination[74]

These criteria would lead to a situation of genetic erosion and thus have an adverse impact on food security for the country.[75] The effect on food security would be because genetically diverse and local seeds will be pushed out of the market by genetically uniform seeds, and this in turn will have a direct impact on the sustainable biological diversity of a country. Nevertheless, India has adopted the same criteria in the Bill.[76]

It is also imperative to realize that the UPOV grants the commercial breeders an extremely powerful weapon. On one side, the criteria of distinctness and uniformity allow them to protect any basic variety, and on the other side no breeder or farmer, with limited resources at his disposal, can use this variety to create another variety, as it would be an essentially derived variety.

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70 Novelty implies that the variety must not, or where the law of a State so provides, must not for more than one year, have been offered for sale or marketed with the consent of the breeder in the State where the applicant seeks protection, nor for more than four years (six years in the case of grapevines and trees, including rootstocks) in any other State.

71 Distinctiveness implies that the variety must be clearly distinguishable by one or more important characteristics from any other variety whose existence is a matter of common knowledge

72 This condition necessitates that subject to the variation that may be expected from the particular features of its mode of propagation, the variety must be sufficiently uniform.

73 This implies that subject to the variation that may be expected from the particular features of its mode of propagation, the variety must be stable in its essential characteristics.

74 The variety must be given a denomination enabling it to be identified; the denomination must not mislead or cause confusion as to the characteristics, value or identity of the new variety or the identity of the breeder.

75 **See generally** http://www.panda.org/resources/publications/sustainability/ind/ind_sg.html, visited on July 10, 2001.

76 **See** Clause 15(1).

The UPOV model is wholly unsuitable to India because:

- The basis of UPOV Convention is to provide incentives to the private sector to enter the seed business. This is the aim of the Convention. In other words, the assumption is that a market-based structure will benefit breeders. In India, agriculture is predominantly subsistence, where surplus seeds are exchanged between farmers in the local markets, or simply stored and used for the following year.
- The 1978 and 1991 revisions to the Convention aimed at strengthening the rights of commercial breeders, and consequently reduced the rights and privileges of farmers. In the Indian context, "breeders" seems to refer to multinational agro-corporations, and not to farmers, who have over centuries of practice developed new strains of species. The focus of the Convention is on breeders and not on farmers. Plant breeders' rights negate the contribution of Third World farmers as breeders and hence undermine farmers' rights.[77]
- The UPOV Convention constitutes an alternative to patents, insofar as plant breeders' rights provide slightly weaker rights to commercial breeders. However, it does not recognize farmers as breeders, it does not provide for rights of farmers over their varieties. This implies that plant varieties are developed in laboratories and assumes that the development of plant varieties is only undertaken for commercial gain. Thus, it provides only a partial framework that is inherently incapable of granting rights to farmer-breeders despite the fact that an overwhelming majority of seeds planted in India are farm-saved seeds.
- It is significant that the UPOV Convention was developed specifically to suit the conditions and needs of European agriculture, which differ markedly from those of a majority of the developing countries where agriculture constitutes the central economic activity.

It is perplexing why India has chosen this model, particularly when there is no such obligation to do so under the TRIPS. This definitely points to the Bill being an outcome of the pressure of the foreign players in the Indian market, using the WTO as an effective tool.[78] UPOV is a monopoly system that embodies the philosophy of the industrialized north who want to protect the interests of corporate biotechnology and powerful seed companies. If India does not evolve its own *sui generis* system centred on community intellectual rights of farmers and adopts the UPOV model, a rights regime will have been created that protects the rights of the seed industry, but offers no protection to the rights of farmers. This in turn will allow a free flow of agricultural biodiversity based on centuries of breeding from the fields of Indian farmers, while the farmers have to pay royalties to the seed industry for the varieties derived from farmers' varieties.[79]

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77 **See generally** http://www.indiaserver.com/betas/vshiva , visited on August 26, 2001.

78 **See generally** Cullet, Philippe, "Revision of the TRIPS Agreement Concerning the Protection of Plant Varieties: Lessons from India Concerning the Development of a *sui generis* System"' 2/4 J.W.I.P (1999); **See also** Cullet, Philippe, "Farmers' Rights in Peril", *Frontline,* April 14, 2000, p.24.

79 *Supra* n.77.

Conclusion

The 1999 Bill devoted only a single short provision to the definition of farmers' rights while it defined plant breeders' rights at length. Further, the rights provided for farmers were weak. The aim of the drafters of the 2000 Bill was ostensibly to address farmers rights in a substantive manner. Admittedly, the 2000 Bill is a marked improvement over the 1999 Bill. It is more comprehensive, it permits registration of farmers' varieties, and constitutes a Gene Fund whose proceeds are to benefit the local farmer. However, as explained above, it is still wanting on many fronts.

Notable in the context of farmer's rights is the contribution made by Gene Campaign, which has prepared an alternative draft to the UPOV Convention, keeping in mind the needs of developing countries. Titled the Convention of Farmers and Breeders (CoFaB), its primary purpose is to protect farmers' and breeders' rights in countries that are the source for the germplasm.[80]

The most striking defect in the Bill is the manner in which it deals with farmers' varieties. The definitions contained in Clause 2 give the distinct impression that the differences between the three varieties (farmers', extant and essentially derived) are recognized. Having done this, the Bill fails to make separate provisions for all varieties, for purposes of registration, period of protection, etc. Also, farmers' varieties are covered both as new varieties as well as extant varieties. This is a rather confusing state of affairs.

The Bill of 2000, like its predecessor, continues to keep as its base the UPOV Convention. It seems certain that the Convention purports to support multinational corporations and private commercial breeders. The need to devise a system of protection adapted to local conditions cannot be emphasized enough.

The objective in the Bill is "*to recognize and protect the right of farmers, in respect of their contribution made …in conserving, improving…plant genetic varieties.*"[81] Whether adequate protection has been provided is a moot question. The concept of benefit sharing is assumed to be sufficient for compensation. However, it is questionable whether mere financial compensation by the breeder to the farmer(s) for the efforts of the latter can be

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[80] The CoFaB envisages the following:

- Each Contracting State will recognize the rights of farmers by arranging for the collection of a Farmers' Rights fee from the breeders of new varieties.
- The Farmers' Rights fee will be levied for the privilege of using land races or traditional varieties either directly or through the use of other varieties that have used land races and traditional varieties in their breeding program.
- Farmers' Rights will be granted to farming communities and where applicable, to individual farmers. Revenue collected from Farmers' Rights fees will flow into a National Gene Fund (NGF), which will be administered by a multi-stakeholder body set up for the purpose.
- Rights granted to the farmer and farming community under Farmers' Rights are granted for an unlimited period.

[81] **See** the Preamble to the Bill of 2000.

considered as commensurate and fair. A serious study of such basic assumptions is imperative.

Licensing is the system envisaged in the Bill. There is nothing unique about it. *Prima facie*, it appears almost too simplistic. It is submitted that India may need to delve into other systems of protection for plant varieties, and decide on a mechanism suitable to its socio-economic conditions.

Overall, it is clear that the Bill should be given a new direction if it is to benefit all actors involved in plant variety management, including farmers and farming communities. Plant breeders' rights like patents tend to reward only innovations, which are the most advanced technologically, and grant all the benefits to a single actor. They also participate directly in the process, leading to the privatization of common and state resources and will thus have a dramatic impact on food security for India.[82] At a minimum, a framework recognizing more clearly the distinction between plant breeders' rights and farmers' rights should be developed.

82 *Supra* n.77.

BOOK REVIEW

Stolen Harvest: The Hijacking of the Global Food Supply
Vandana Shiva
India Research Press, New Delhi, 2000, 146 pages, Rs.195.

M.K. Ramesh*

The need to meet the challenges of agro-bio-piracy, food insecurity and threats to biosafety form the *leitmotif* of the majority of the efforts of Vandana Shiva.[1] The book under review is no exception. What stands out in this effort and that further sustains the relentless battle of the author against consumerist tendencies and practices that are ecologically unsustainable, is the painstaking effort put into marshalling her arguments, well supported by an overflowing wealth of statistics, and the incisive analyses of factual situations. One is amazed at her ability to piece together what appears to be a jig-saw-puzzle of apparently unconnnected incidents, and weave together very cogent and convincing arguments against the World Trade Organization(WTO)-led movement to "steal" the "harvest" of the world. The book has made its appearance at the right time. A time when starvation deaths of indebted farmers are being reported with increasing and alarming frequency,[2] and at a time when the highest legislature in India is busy finalizing a law concerning the farming community.[3] The book is a searing commentary, nay, indictment, of the emerging and evolving international legal regime concerning agriculture, under the aegis of the WTO, which is seeking to legitimize corporate monopoly and control over global food production, distribution and consumption.

The book is a depiction of a decade long effort in finding ways "*to prevent monopolies on life and living resources, both through resistance and by building creative alternatives.*"[4] Likening her campaign against "*the corporate hijacking of our seed and food*" to the "Quit India" Movement launched by Mahatma Gandhi, against the British rule,[5] the author

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* Of the Board of Editors. An annotated version of this book review appeared in *Deccan Herald* (*Sunday Herald*), Articulations, October 14, 2001.

1 Some of the works of Vandana Shiva that address these issues are: *Biopiracy: The plunder of the Nature and Knowledge*, South End Press, 1997; *The Violence of the Green Revolution*, 2nd Edition, 1992; *Staying Alive*, St. Martin's Press, 1989.

2 A report of the study carried out by the students of the National Law School of India University in 1999 that probed into the causes of farmers' suicides in a few districts of the state of Karnataka, is available in *mimeo* form in the Law School.

3 On August 9,2001, the Lok Sabha (the Lower House of the National Parliament), passed the Plant Variety Protection and Farmers Rights Bill.

4 **See** p.3.

5 **See** pp.3-4.

narrates her struggle against genetically engineered crops and foods. She does this by effectively narrating and examining stories of destruction of food and agricultural systems by global corporations.

Divided into seven chapters, the book covers a very wide range of issues that include genetically engineered seeds, patents on life, mad cows, and shrimp farming.[6] At the outset, the book takes us through the moving images of the Bengal famine of 1943. The famine was the direct result of the appropriation of food from the peasants by the colonial system, as contribution to the Empire's war.[7] What was overtly achieved through the device of colonial rule, the author avers, is now covertly attempted to be accomplished through the myth of "free trade" and corporate monopoly over "seed". To Vandana Shiva, the mysterious adulteration of mustard oil in Delhi, the introduction of new hybrid seeds that are vulnerable to pests, the shooting of farmers protesting the fall of oil prices by the police in Sira (Karnataka), and the Government decision of free import of soy bean oil following the loss of lives due to mustard oil adulteration[8] are not stray and unconnected incidents.[9] These are clear well-orchestrated moves for take over of the Indian market by global players to the detriment of the Indian people. The author asserts that the much lauded "Green Revolution", which has resulted in increase in the yields of certain varieties, greater emphasis given to cash crops and to industrial agricultural production, would become ecologically unsustainable over a long period of time. Destruction of diverse sources of food, stealing of food from other species, and the use of huge quantities of fossil fuels, water and toxic chemicals in the process, have robbed the farmer's freedom of choice of crop and consumer's choice of food. Through this critique, the author tries to explain the paradox of inverse proportionality of the increase in global production and trade of grain, with the incidence of large number of people going hungry in the third world.[10]

The author then turns her attention to the "blue revolution", which involves intensive prawn culture, industrial fishing and research on transgenic fish (fish that have been engineered to grow rapidly and tolerate the cold) – all of them promising surplus food and freedom from hunger.[11] The author cautions against the substitution of traditional systems of farming shrimp and fish with "modern" technologies, as such a shift would lead to the

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6 Chapter 1: The Hijacking of the Global Food Supply; Chapter 2:Soy Imperialism and the Destruction of Local Food Cultures; Chapter 3: The Stolen Harvest Under The Sea; Chapter 4: Mad Cows and Sacred Cows; Chapter 5: The Stolen Harvest of Seed; Chapter 6: Genetic Engineering and Food Security and Chapter 7: Reclaiming Food Democracy.

7 **See** pp.5-6.

8 The author refers to the mustard oil tragedy as a perfect "market opening" for the dumping of the genetically engineered soybeans by U.S. Companies. The irony of the entire episode is the "official" welcoming in India of something that was rejected by the European Consumers. **See** p.27.

9 **See** pp.10-11 and Chapter 2 (pp.21-33).

10 **See** pp.11-17.

11 **See** Chapter 3: The Stolen Harvest Under the Sea, pp.37-56.

ecological risk of depletion of fish stock, ruination of aquatic ecosystems and serious affect the flora and fauna of the entire area.[12]

The "Mad Cow" disease that sounded the death knell of the non-sustainable livestock economy in Britain, according to the author, is a product of "border crossings" (between herbivores and carnivores, and between ethical treatment of other beings and violent exploitation of animals to maximize profits and human greed) in industrial agriculture.[13]

The current craze in this part of the world, in transforming the "sacred cow", to produce more, like its European Counterpart, is an effort in globalizing non-sustainable and hazardous systems of food production. The result is that the "White Revolution", instead of viewing livestock as ecologically integrated with crops, reduces the cow to a mere milk machine.

Vandana Shiva is at her best when she questions and critiques the intellectual property regime that enables the patenting of life forms.[14] This international legal development, under the aegeis of the WTO, in her opinion, is a licence to promote biopiracy, facilitate the use of monocultures, and centralize control over the production and distribution of food. In a detailed analysis, the author demonstrates that the system would treat plants and seeds as corporate inventions and transform the traditional farmers' practice of saving and exchange of seeds into crimes.[15] Genetic engineering, resorted to by seed companies, would affect biodiversity, biosafety and food security.[16] The controversial introduction of "terminator" technology, by seed companies, besides giving them an iniquitous capacity to control the world's food production, would also make the traditional farmer dependent on the corporations for the seed.[17]

According to the author, the exercise in the book is to "reclaim food democracy" from "food dictatorship", in which the global corporations control global supply, for their own economic advantage and empowerment. To achieve the same, the author prescribes a four-point programme of action:

1. reining in the "unaccountable power of corporations", and unveiling an ecological and just system of food production and distribution that protects the interests of both farmers and consumers;[18]
2. reclaiming the "rights of all species to their share of nutrition"(including those of earth worms and cows!) and the "rights of all people" (including future generations);[19]

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12 The Supreme Court of India, in *S.Jagannath* v. *Union of India* (AIR 1997 SC 811), has recognized this fact and permitted only traditional or its improved methods of aqua- farming in India.

13 **See** Chapter 4: "Mad Cows and Sacred Cows", p.72.

14 **See** Chapter 5: "The Stolen Harvest of Seed", pp.79-93

15 **See** p.90.

16 **See** Chapter 6: "Genetic Engineering and Food Security", pp.95-116.

17 **See** pp.82-83.

18 **See** p.117.

19 **See** p.118.

3. ensuring "food safety" by promoting ecological and organic agriculture[20] and
4. "reclaiming the seed from the destructive control of corporations"[21].

She calls for a global networking and alliance of labourers, farmers, consumers and public interest scientists, to implement the programmes of action.[22] The book emphasizes that the movements and programmes of action, are part of our "*ecological and social duty to ensure that the food that nourishes us is not a stolen harvest*", and an opportunity to work for the liberation of all living species, in the democratic spirit.[23]

Vandana Shiva has dared to take on the corporate moguls to rescue food democracy from their totalitarian hold. The book attempts to rudely shock the very foundations of the ill-advised processes of policy making and implementation, that neither take cognizance of, nor prepare the country for, the diabolical international designs that "steal the harvest" of the people. A must read for all those who have concern for the plight of the Indian farmer. A curriculum on globalization in academic and research institutions would be incomplete without this book.

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20 **See** pp.118-119.

21 **See** pp.20-121.

22 **See** Chapter 7:"Reclaiming Food Democracy", pp.117-124.

23 **See** p.4.

ENVIRONMENTAL CRUSADER

Rajendra Singh: A Profile in Courage, Conviction and Perseverance

Rajendra Singh, a post-graduate in Hindi from Allahabad University, a qualified Ayurvedic Physician from Ayurvedic Mahavidyalaya, and Project Co-ordinator for Youth Education in Jaipur, was called "nalayak" (good for nothing) by his parents and in-laws. Unable to bear this humiliation, his wife, from an affluent family of landlords, left him and returned to her parents!

He began talking of going to rural India "to do something for the people". He drew a line on the map of Rajasthan and marked a fifty-kilometre stretch in the Aravali foothills to begin his work there. He quit his position in the government, sold all his personal effects and boarded the bus along with four associates to Kishori, a dry and dusty village in Rajasthan.

He then joined Tarun Bharat Sangh (TBS), a non-governmental organization that was committed to community service, environment, rural and urban development and welfare. This was the organization built by a few intellectuals soon after the devastating fire in the Rajasthan University campus, in 1975. Three years later, he had become its general secretary and was travelling to the first destination of his mission: Gopalpura, a village, to bring water to the people. The village had experienced a severe drought for five consecutive years. Many young men had left the village to go to Gujarat in search of work. The Aravalli riverlet had a little water, but only during the monsoon, and there was no water holding capacity in the check dams that were already silted. The government did not seem to do anything about it, nor did it aid TBS. TBS mobilized the village through *Shramadan* (voluntary service) programmes, and undertook the desilting and deepening of ponds and the recharging of neighbouring wells.

At last count, TBS had facilitated the building of over 4000 *johads* (crescent-shaped ponds), check dams and water harvesting structures in over 600 villages spread over seven dry districts of Rajasthan. The unique nature of the water harvesting structures built has been their ability to trap rain water and increase groundwater level from about 60 to 90 metres. They are built without the help of engineers and scientific support, and at a relative low total cost in comparison with similar structures built with modern technology and expert advice. They still hold a substantial quantity of water, despite persisting drought conditions. Today, the lives and land of these people have been transformed, underground water tables have been recharged. Villagers fondly address Rajendra Singh as *Johad Wale Baba* (builder of ponds).

Singh and his team have had to experience consistent hardships in the form of an insensitive administration and bureaucracy. TBS and the villagers have been slapped with 377 cases by State agencies in the last fifteen years, for building "illegal" structures to store water. One such notable example is a 220 metre long and 15 metre high *johad*, built by the villagers of Lava Ka Bass, with technical assistance form TBS, in a record time of four

months. The Department of Irrigation objected to the construction and its management by the local community, on the ground that the structures were unsafe and built in violation of existing laws, and that the *johad* would adversely affect water availability downstream. Notices were served, and the State agency prepared to demolish the structure. The Centre for Science and Environment (CSE), a New Delhi based non-governmental organization, on call from TBS, organized a team of experts to study the situation. The group dismissed the contentions of the agency as ill founded, and recommended that State agencies encourage and co-operate with such community efforts. The demolition was consequently cancelled after meetings with the Chief Minister.

When illegal mining leases were granted by the State Government, in the Sariska National Park area, TBS commenced legal action (*Tarun Bharat Sangh Alwar* v. *Union of India*[1]), protesting against widespread open-cast mining for limestone and marble that disturbed the water holding capacity of the Aravalli. A committee was appointed to study and report. Singh was physically assaulted and injured by miscreants from the influential mining underworld when he accompanied the committee during its site inspection. Undeterred, he heroically continued the battle. A series of orders by the Supreme Court upheld TBS's contentions, forced closure of a number of mines, and instructed the State Government to review and revise its decisions to grant mining leases in the protected areas.

Amidst governmental apathy, "Sisterhood for Water", a recent TBS initiative, has begun the process of networking women in villages spread over five states, to overcome the problem of water scarcity in the region. The effort is testimony to Rajendra Singh's enterprise to bring women to work together on water harvesting and other conservation aspects, based on the recognition of their close affinity with the scarce natural resource. Broadening the perspective of the fight for the right to water, TBS is also addressing other conservation and livelihood aspects covering a wide range of issues that deal with every aspect of natural resources, in its *Jal, Jameen, and Jangal* (water, land and forest) movement. Singh's has been a life of courage, conviction, perseverance and sacrifice for environmental conservation and community development, now internationally recognized with the Magsaysay award conferred on him this year. IJEL's editorial team salutes the missionary.

[1] AIR 1992 SC 5114.

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