

Amendment of Biological Diversity Act: A preliminary assessment

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Importance of Biodiversity

- Biological resources constitute a capital asset with great potential for yielding sustainable benefits
- Continued loss of biodiversity at a rate taking place currently would have catastrophic consequences for the global community, especially for the much of the developing world
- Ensuring sustainable use of biodiversity is therefore the best that the humankind to do to prevent a disaster

A Global Agreement to Promote Sustainable Use of Biodiversity

- In December 1993, the Convention on Biological Diversity (CBD) came into force
- CBD adopted in recognition of
 - Intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components
 - Importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere
 - Conservation and sustainable use of biological diversity is of critical importance for meeting the food, health and other needs of the growing world population, for which purpose access to and sharing of both genetic resources and technologies are essential
 - Contributions made by indigenous and local communities through their knowledge systems towards conservation and sustainable use of biodiversity

Objectives of the CBD

- Conservation of biological diversity
- Sustainable use of its components
- Fair and equitable sharing of the benefits arising out of the utilization of genetic resources

including by appropriate

... access to genetic resources and
transfer of relevant technologies,

.... taking into account all rights over
those resources and to technologies, and by appropriate funding

Key Features of the CBD

- States have sovereign rights over their own biological resources
- States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner
- States are to
 - Respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity
 - Promote wider application of the knowledge with the approval and involvement of the knowledge holders
 - Encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices

Concerns About Loss of Biodiversity

- In 2002, the Parties to the CBD committed themselves to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level
 - ... as a contribution to poverty alleviation and to the benefit of all life on Earth
- This target was subsequently endorsed by
 - World Summit on Sustainable Development
 - United Nations General Assembly
 - Incorporated as a new target under the Millennium Development Goals
- 2010 Biodiversity Target: 11 Goals and 21 sub-targets
 - None of the 21 subsidiary targets were completely achieved

Two Fresh Initiatives for Preventing Biodiversity Loss

- At COP 10 (2010), CBD Contracting Parties adopted
 - Nagoya Protocol for Access and Benefit Sharing
 - Enables the rights of the sovereign states over their biological resources to be enforced when used in other jurisdictions
 - Strategic Plan for Biodiversity 2011–2020 and the Aichi Targets
 - 5 Strategic goals and 20 targets

The Key Features of the Nagoya Protocol (NP)

- NP established an international regime that connects all the national legislations on access and benefit sharing established in fulfilment of CBD commitments
- Provides a legal framework for effective implementation of the provisions on access to genetic resources and the “fair and equitable sharing of benefits” arising out of the utilization of these resources in *transboundary situations*
- Help ensure
 - Genetic resources and associated traditional knowledge (ATK) utilized outside national jurisdiction are legally accessed
 - Fair and equitable benefit-sharing, including by appropriate transfer of relevant technologies
 - When genetic resources are utilized outside the jurisdiction of the country providing the genetic resources and ATK

Threat to India's Biodiversity and ATK

- India is one of the 17 megadiverse countries, but faces serious loss of biodiversity
 - 68% of biodiversity lost in 5 decades – WWF for Nature
- Traditional knowledge systems associated with biodiversity are threatened as practitioners have no incentives to continue
- Contrast this with the formal knowledge system driven by the corporates secure their incentives through strong intellectual property protection

Biological Diversity Act: The first step to reverse biodiversity loss and to protect ATK

- India enacted the Biological Diversity Act in 2002 and notified rules in 2004 after wide ranging consultations.
- Act gives effect to India's commitments to CBD, including those relating to ABS
- India one of the first few countries to have enacted such a legislation.
- Act implemented through three-tiered institutional structure
 - National Biodiversity Authority (NBA)
 - State Biodiversity Boards (SBBs)
 - Biodiversity Management Committees (BMCs) at the grassroots

Functions of NBA

- NBA deals with requests for access to bioresources and ATK by foreign individuals/institutions for research and commercial utilisation, and for transfer of results of research by Indians to foreigners.
- While granting approvals, NBA also ensures that the users of the resources agree to equitable sharing of benefits arising from the commercial exploitation of biological resources and associated knowledge.
- NBA's approval also required before seeking patents based on biological material and ATK obtained from India.
- NBA has power to oppose grant of IPRs in any other country on bioresources/ATK obtained from India

Functions of SBBs

- SBBs constituted by State Governments, deal with matters relating to access by Indians for commercial purposes. Indian industry required to provide prior intimation to concerned SBB about use of biological resources
- SBB has power to restrict any such activity which violates principle of conservation, sustainable use and equitable sharing of benefits
- NBA and SBBs are required to consult concerned BMCs on matters relating to use of biological resources and associated TK within their respective jurisdictions
- This mandatory consultation of BMCs by NBA and SBBs ensures formalization of prior informed consent of communities through involvement of BMCs in decision making process

Functions of BMCs

- Local institutions of self government are required to set up BMCs in their respective areas for conservation, sustainable use, documentation of biodiversity, and chronicling of knowledge relating to biodiversity
- Grants prior informed consent for accessing biological resources and ATK
- BMCs to prepare People's Biodiversity Registers (PBRs) containing information on local biological resources and associated TK
- BMCs can also levy collection fee for collecting biological resource from their respective areas

Experiences of Implementing the Biological Diversity (BD) Act

- As with any new legislation, implementation of the Act has been plagued with uncertainties
- The three-tiered structure remained incomplete until recently
 - National Green Tribunal issued several strictures to the NBA and SBB before steps were taken to establish BMCs in all states
- Provisions of the Act lacked clarity
- India's accession to the Nagoya Protocol (NP) had to be formally incorporated in the Act
- BD Act needed amendments keeping in view
 - India's commitments to the CBD/NP for reversing biodiversity loss and protecting ATK
- Bill proposed in 2021 – referred to the Joint Committee on the Biological Diversity (Amendment) Bill, 2021

Focus of the Joint Committee regarding BD Act Amendments

- Biological Diversity (Amendment) Bill, 2021, inter alia, seeks to
 - Reduce the pressure on wild medicinal plants by encouraging cultivation of medicinal plants
 - Encourage Indian systems of medicine
 - Bring more foreign investments in the chain of biological resources, including research, patent and commercial utilisation, without compromising the national interests

Important Amendments

- Companies registered in India and controlled by Indians however having foreign shares are now treated as Indian companies
- Indian entities accessing raw materials derived from cultivated medicinal plants are now exempted from payment of access and benefit sharing
- Indians accessing ***codified knowledge*** are exempted from the purview of payment of access and benefit sharing
- Indian entities have to register with National Biodiversity Authority, instead of approval, while applying for patents
- Decriminalisation provisions are incorporated in the section on penalties for effective regulation and implementation of the provisions of the Act
- To facilitate fast-tracking research, patent application processing, transfer of research results while utilising the biological resources available in India without compromising the objectives of United Nations Convention on Biological Diversity and its Nagoya Protocol

Assessing the BD Act Amendments

- Some provisions clarify existing provisions, facilitating the implementation of the Act
- Several others militate against the spirit of the CBD and the parent Act
 - Sustainable use of biological resources could be seriously affected
 - Interests of the traditional knowledge holders could be undermined
 - Powers of the BMCs have been circumscribed

Examples of Provisions Lending Additional Clarity

- Regarding jurisdiction of the Act
 - “India” means the territory of India as referred to in Article 1 of the Constitution, its territorial waters, seabed and sub-soil underlying such waters, continental shelf, exclusive economic zone or any other maritime zone as referred to in the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, and the air space above its territory
- NBA has been vested with formal powers to take any measures necessary to oppose the grant of intellectual property rights in any country outside India on any biological resource or ATK accessed from India
- None can transfer any results of the research on any biological resource accessed from India or ATK to foreign controlled company without prior approval of the NBA

Examples of Provisions Undermining the Objectives of CBD/Parent Act

- Introduction of a separate category of “codified traditional knowledge” - knowledge derived from authoritative books specified in the First Schedule to the Drugs and Cosmetics Act, 1940
 - No benefit sharing with holders/practitioners of “codified traditional knowledge”
- Definition of biological resources
 - Plants, animals, micro-organisms or parts of their genetic material and derivatives (excluding value added products), with actual or potential use or value for humanity, but does not include human genetic material
 - Excludes digital sequence information, the digitised forms in which information regarding biological resources are increasingly available
- Regulations on access would not apply in cases of
 - Collaborative research projects involving transfer or exchange of biological resource or traditional knowledge associated thereto between institutions, including Government sponsored institutions of India, and such institutions in other countries
- Distinction made between wild and cultivated medicinal plants - exemption granted to cultivated medicinal plants from the purview of access and benefit sharing mechanism
 - AYUSH companies can *de facto* avoid sharing the benefits with local communities, claiming that the resources they use are accessed from cultivated plants

Examples of Provisions Undermining the Objectives of CBD/Parent Act

- Establishing BMCs
 - ***Every local body at the Gram Panchayat level*** in the rural areas and at the Nagar Panchayat or Municipal Committee at Municipal Corporation level in the urban areas ***shall constitute*** a Biodiversity Management Committee
 - State Government ***may constitute*** Biodiversity Management Committees at the intermediate or district Panchayat level for achieving the objectives of the Act.
- Pre-amendment guidelines for operationalising BMCs
 - Process of BMC formation would involve all the stakeholders in the gram sabha including tribal groups and other marginalized communities to ensure an effective consultative process to meet the requirements of the state and local conditions
 - ... ***BMCs could lose their autonomy***

Examples of Provisions Undermining the Objectives of CBD/Parent Act

- BD Act amendment decriminalizes the offences and makes them punishable with a penalty
 - Penalty between ₹ one lakh and ₹ 50 lakh; in case of continuing contravention, there may be an additional penalty of up to ₹ one crore
 - Contrast this with the provisions of the Patents Act under which violations are punishable with imprisonment for a term which may extend to two years, or with fine, or with both
- Justification for the amendment given by the government
 - It would attract more foreign investments in the chain of biological resources including research, patent and commercial utilization

- Thank you