

Biological Diversity Bill, 2000

A blueprint for the monopolisation of biodiversity or its beneficial use?



The Biological Diversity Bill, 2000, is meant to secure the conservation, sustainable use of and equitable share in benefits arising out of the use of biological resources and the associated knowledge. However, it does not fully measure up to this declared purpose and India's international obligations. The Bill has little to do with conservation and sustainability of biological resources. Neither does it adequately address issues of access and benefit-sharing of biodiversity to the advantage of local communities. Moreover, traditional knowledge, an integral resource in biodiversity, is not covered by it. Instead, the Bill seems more intent on consolidating the requirements of the conventional intellectual property rights (IPR) regime. Overall, there is need to have more substance that would enhance biodiversity conservation, inculcate its sustainability and benefit the local communities.

The Bill at a Glance

Highlights

- ♦ It fulfils some requirements of the United Nations Convention on Biological Diversity (CBD) to legislate for conservation of biodiversity, its sustainability and its equitable benefit sharing (*Preamble*).
- ♦ It attempts to create a framework within which biological resources may be gainfully exploited through the access and benefit-sharing arrangements provided (*Clauses 3, 6 & 7*).
- ♦ It provides for rules to curtail the unrestrained exploitation of Indian biological resources by foreign corporations (*Clause 6*).

Lowlights

- ♦ It threatens to turn Indian biodiversity into a genetic marketplace, as it is more an instrument of commercial exploitation of biodiversity, as opposed to its conservation and protection.
- ♦ It subordinates the goals of the CBD through the encouragement of the conventional intellectual property regime (*Clause 6*).
- ♦ It deals mainly with access to biodiversity by foreigners, yet the property rights framework developed has limited practical impact (*Clause 19*).
- ♦ It denies the fact that biodiversity is tended by various actors, as it places much stress on sovereignty and individual property rights, such that common property arrangements are not provided for (*Preamble*).
- ♦ There is cursory treatment of traditional knowledge associated with biodiversity. It merely requires that the Central Government 'endeavours' to respect and protect this knowledge (*Clause 36 [iv]*).
- ♦ The institutional framework proposed to implement the Bill is highly bureaucratic.

Action Points

- To eliminate areas of overlaps and inconsistencies, the Bill should be reviewed to ensure the co-ordination of all relevant biodiversity legislation for the Bill's effective implementation.
- The stated objectives of conservation and sustainable use of biological diversity should be better addressed and the commercialisation focus of this Bill be reduced.
- Conditions for access to biodiversity should be reviewed to ensure that the local communities are granted more control over negotiation of access and the approval process.
- There should be less emphasis on IPRs, which are being entrenched with respect to genetic resources. The Bill should instead, strive to give the local communities the power to defend their rights as it does to the state to fight bio-piracy.
- Benefit-sharing arrangements should be in favour of the communities and not an instrument to perpetuate private ownership over biological resources. The mechanisms provided should be reviewed.
- The Bill should provide for certain common property arrangements or community rights. Private property arrangements advocated for in the Bill sideline the importance of community rights.
- There should be better protection of traditional knowledge and folklore. The Bill accords them inadequate protection, though they are in public domain.
- The government should reduce the amount of control and involvement in much of the process of exploitation of biodiversity. Otherwise, this may work against the development or innovation of genetic resources.

Bill Blowup

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Introduction

The Indian Biological Diversity (Biodiversity) Bill, 2000, intends to conserve, encourage sustainable use of and regulate access to biological resources of the country. The purpose is to secure equitable share in benefits arising out of their utilisation as well as that of the associated knowledge relating to biological resources.

India is one of the 12 mega-biodiversity countries of the world. With only 2.4 percent of the land area, India already accounts for 7 to 8 percent of the recorded species of the world. India is also one of the 12 primary centres of origin of cultivated plants and is rich in agricultural biodiversity. The country is equally rich in traditional and indigenous knowledge, both coded and informal. Thus the local communities are an integral part of the biodiversity with both dependant on one another, all being part of the same eco-chain.

Need for the Legislation

a. Response to National Imperatives

The threat to biodiversity is real in India. Much of it stems from the increasing demands of a fast growing large population. Majority of the people in India depend on plants and animals for food, fuel, housing materials and medicine. Also injudicious national and economic development policies have not been friendly to biodiversity. Moreover, in recent years, India has been plagued by the menace of bio-piracy, which has led to the illegal appropriation of the country's biological resources and knowledge.

Bio-piracy refers to the appropriation of biological resources through IP rights without proper agreement with its developers and/or by relevant government authorities. This includes patents on the wound-healing properties of *haldi* (turmeric), hypoglycaemic properties of *karela* (bitter gourd), brinjal, *neem* and basmati rice. The Bill tries to address these concerns by providing a comprehensive framework of protection to counter the effect of bio-piracy. By promoting the use and commercialisation of biodiversity in a regulated framework, it is hoped that an opportunity is created for the local communities to sustainably exploit their biodiversity.

b. Response to International Imperatives

The Biodiversity Bill is also a realisation of India's international obligations. When it is finally enacted, the legislation will signify the end of a 10-year journey since India signed the CBD, which came into force in 1994. The Bill gives effect to the CBD's primary objectives of:

- conservation of biological diversity;
- sustainable utilisation of its components; and
- equitable sharing of benefits arising out of the utilisation of genetic resources.

The CBD's provisions are broad and integrated in urging countries to fulfil these objectives. Hence, India has sufficient leeway to realise these objectives through the adoption of laws suitable to her national circumstances.

Concerns and Suggestions

Despite the laudable efforts by the Government to deal with the above concerns and obligations, certain aspects of the Bill and certain issues relevant to biodiversity protection are not adequately covered. The following are some of the shortcomings and suggestions for change:

Scope of the Bill

The Bill applies to all activities affecting biodiversity (*Clause 2*). Thus, local and indigenous farming communities, farmers and plant breeders fall under the Bill's purview. The broad scope of the Bill sets up the possibility that certain subject matters affecting biodiversity that are governed by other laws such as Protection of Plant Varieties and Farmers' Rights Act, 2001 (Plant Varieties Act), Patent (Amendment) Act, 2000 and the Seed Act, 1966 could also be regulated under this framework.

The Acts and the Bill deal, in part, with the same subject matter, biological resources, e.g., plant varieties are only a part of biodiversity. This will give rise to inconsistencies between the Acts and the Bill, which may affect their interpretation and implementation. For instance, while the procedure for granting benefit-sharing is set out in some details in the more specialised Plant Variety Act, the Biodiversity Bill is much less clear in this regard.

To remove the ambiguity in the scope of the current Bill, a clearer legal and

institutional framework should be established. Clause 2 of the Bill should explicitly exclude subject matter like plant variety that is dealt with by the other laws as well its implementation process. There should also be provisions for co-ordination with other biodiversity and IP laws and agencies for the effective implementation of the Bill.

Conservation

The Bill pledges to conserve and promote the sustainable use of the biological diversity, yet very little is provided to attain this goal. It merely empowers the Government to conserve and develop biological diversity rich areas through national strategies and programmes, which will only be integrated *as far as practicable and wherever appropriate* into relevant sectoral policies (*Clauses 36-39*). This seems inadequate as it grants the government discretionary powers to opt to protect or not protect biodiversity. This approach also ignores and potentially undermines the crucial role that biodiversity plays in sustaining local livelihood systems.

The wording should be changed to make it imperative that the government must integrate all conservation and sustainable use measures into all aspects of national planning. Moreover, it would be better if the strategies to be adopted are outlined in the Bill. To ensure the conservation of biodiversity, certain guiding principles should be included to ensure that the Bill's fundamental objectives are nevertheless realised. For instance, the Costa Rican biodiversity legislation has general principles applicable, including respect for life forms, inter- and intra-generational equity and respect for cultural diversity (see Box 1).

Box 1: Community Rights Champions-I

Costa Rica Biodiversity Law – Law No. 7788

The Costa Rican Biodiversity Law's main objectives include:

- (1) regulating access to biodiversity resources and facilitating the equitable distribution of the benefits to all sectors of society, *with special attention* to local communities and indigenous people.
- (2) recognising and compensating the knowledge, innovations and practices of indigenous people and local communities for the conservation and ecologically sustainable use of biodiversity.

The general principles for the purpose of the application of this law are:

- respect for all forms of life;
- importance of the biodiversity components;
- respect for cultural diversity; and
- intra- and inter-generational equity.

The definition of biodiversity includes the concept of intangible elements, which refers to traditional knowledge (whether individual or collective), innovations and practices, with current or potential value, associated with biochemical and genetic resources. A mechanism is set out to control access to genetic resources and hence, its intangible components through contracts between parties.

The Law provides for *community intellectual rights*, which refer to the sum total of knowledge, which is of value (though not necessarily priced) in communal control (and not privatised) and is cumulative. The right of local communities and indigenous peoples to oppose any access to their resources and associated knowledge, be it for cultural, spiritual, social, economic or other motives, is also recognised (*Article 66*).

Access to Biological Resources

In allocating rights over resources, the Bill asserts the sovereign right of the Government over the use and exploitation of genetic resources (*Preamble para 4*). The reason of this is to concentrate power in the hands of the government, while alienating communities which use and live near or among biodiversity. This leaves the local community as passive players in management of biodiversity.

The CBD specifically requires that access to biological resources by another party be subject to prior informed consent (PIC) and under conditions of benefit-sharing on mutually agreed terms. The Bill provides for this as it stipulates that access to undertake biodiversity related activities, by both foreign persons and Indian citizens, is subject to PIC of the National Biodiversity Authority (*Clauses 3 & 19*) and prior intimation to the State Biodiversity Board, respectively (*Clauses 7 & 24*). These bodies are established to implement the Bill. Indian citizens use the biodiversity for research purposes, and local people and communities of the area, including *vaids* and *hakims*, are exempted from these requirements.

However, biological resources should be shared. Hence, the emphasis on sovereignty should be tempered in order to vest some property rights for biological resources with the real owners, the local communities. They are in a better position to develop it in a sustainable manner and in a way beneficial to the society. Some laws, like the African Biodiversity Model Law, formalises the inalienable rights of local communities over their biological resources and crop varieties, knowledge and technologies. The state's responsibility is to protect such rights (see Box 3). The Bill could adopt this approach. Thus, with regard to PIC by the bio-prospector, the Bill should unequivocally require the agreement of the relevant community obligatory, in addition to the Authority's and the Board's.

Bio-trade – No Patents, No Benefits

The introduction and strengthening of private property rights constitute one of the most significant elements of the new law. All inventors must now receive the consent of the Authority to apply for intellectual property rights (IPRs) in or outside India for any invention based on any research or information on Indian biological resources (*Clause 6*). The Authority may also oppose the grant of such IPRs in any country outside India (*Clause 19[4]*).

Nevertheless, the practical import of these provisions is likely to be limited. The Authority has no extra-jurisdictional power and, thus, cannot monitor applications for IPRs outside India.

While encouraging IPRs over products of research based on biodiversity, the Bill has failed to grant rights to community innovation, an integral part of biodiversity. This implies that if the rights are not

allocated to private entities through IPRs, then they are in public domain. Foreigners who are the focus of the Bill can generally access these innovations freely. IPR is not an instrument for protecting community knowledge, it is simply an instrument to facilitate benefit-sharing for the bio-prospector. Thus, bio-piracy could easily go on unabated in spite of the new rules.

A way to rectify this would be to provide the Authority with extra-jurisdictional power in order to curb bio-piracy better. Moreover, the focus should shift from the IPR regime to a system that accommodates all innovations, local or foreign, individual or collective. This is exemplified by other laws, which innovate to provide legal protection to local communities' innovations as well (see the Boxes 1 and 3).

Benefit-sharing

A system has been provided by the Bill to share benefits accruing from commercial exploitation of biodiversity and the CBD model of PIC and benefit-sharing has been adopted. The Authority has to ensure that the terms and conditions, subject to which approval is granted, secure equitable sharing of benefits arising out of the use of accessed biological resources and the associated knowledge. This should be in accordance with mutually agreed terms between the applicant, the concerned local bodies and the benefit claimers (*Clause 21 & 41*).

Essentially, the benefit-sharing arrangements recognise the contribution of the local managers of biodiversity, without granting them property rights. One such form is through a grant of joint ownership of IPRs to the Authority, or to the actual contributors, if they can be identified (*Clause 21*). The Authority has the power to allocate rights to itself or the local contributors, but the latter have no power to demand, as a right, these

property rights. This leaves them dependent on the Authority's goodwill.

The types of benefit-sharing mechanisms (*Clauses 27 & 32*) reflect the imposition of monopoly rights, such that only one person gets all the benefits concerning a given invention. This is a denial of the fact that various people manage biodiversity. Cases have been documented where disputes have risen regarding the acceptability of sharing knowledge that was considered sacred by some members of the community. This is exactly what happened to the Kani tribe of Kerala over a fruit known as Arogyapacha, (See Box 2).

The benefits accruing from exploitation of biological resources of people should not be considered a privilege or a concession to them. The Bill should provide for the local community's rights to these benefits and not merely grant a fund that provides compensation. At least half of the benefits obtained from the commercial use of biodiversity should be channelled to the concerned local community. Moreover, the proposed mechanisms should provide immediate incentives, e.g., user-fee and milestone payments, rather royalties or potential development schemes, as is presently the case.

Moreover, the benefit-sharing system should include a wider participatory process, as well as redefining the system from the perspective of the managers of biodiversity and not the bio-prospector. The Plants Variety Act recognises the role of the non-governmental organisations in determining the benefit-sharing arrangements. This Bill could explore a similar scheme to make the system more participatory and less dependant on the whims of a detached organisation. It is important to include as many interested parties, since biodiversity affects a wide range of interests and peoples.

Box 2: Arogyapacha and the Kanis

The Kani tribe of Kerala has always eaten the seeds of the wild plant 'Arogyapacha', to give them energy when they were tired. A standardised drug, 'Jeevani', based on the knowledge of 'Arogyapacha' of the people of the Kani tribe, was developed for commercial production in 1995. While transferring the technology for production of the drug to a pharmaceutical firm, it was agreed to share the licence fee on a 50:50 basis with the community plus a 2-percent of royalty from sales. The Kanis have, since then, registered a Trust they fully own and manage in which they transfer 50 percent of the royalty received annually.

However, the arrangement has not gone as smoothly as assumed since a culture of exclusive deals can easily create mistrust and confusion within and between communities. Disputes arose regarding the acceptability of sharing the knowledge considered sacred by some members of the Kani community. The

deal "contributed to animosities within an already divided tribe, and the problem of how to share benefits with those who oppose the programme remains largely unsolved."

Some people are of the opinion that the Kani model should not be replicated. It is akin to stating that commercial bilateral biodiversity dealings as *the* model for benefit-sharing. Instead, they argue for a national level, or even regional level, Fund with revenues collected on behalf of local communities. Exceptions can be made where individuals are clearly identified with an innovation or some special knowledge. This receptacle could be termed the Community Knowledge Fund, only to be accessed collectively by communities.

Sources: Dr. Suman Sahai, "Protection of Indigenous Knowledge and Possible Methods of Sharing Benefits with Local Communities" and GRAIN, "Global Trade and Biodiversity in Conflict: Biodiversity for Sale" Issue no 4-April 2000, Barcelona.

Community Property Rights, not Privatisation

The appropriation of biological resources and related knowledge, through sovereign rights and private property rights, sidelines the role of common property. It does not also give the current right holders or the local communities the capacities to defend their existing rights, as it does to the state. Though the CBD states that countries should “protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable requirements,” (Article 10 [c]), the Bill does not provide for any common property arrangements or community rights.

To address the common property arrangement issue, the Bill could emulate the African Biodiversity Legislation, which acknowledges the customary practices and intellectual rights of a local community. The community is expressly empowered to control its genetic resources and related knowledge through the PIC and the benefit-sharing regime (see Box 2). Hence, the present position should be reviewed. Local communities should have the right to exclude any access to their biological resources, innovations, practices, knowledge and technologies, as they deem fit. As IPR regime over community resources and knowledge is not a viable option, the African Legislation offers a way out.

Traditional Knowledge

There is immense contribution of traditional knowledge (TK) and practices of local and indigenous communities to biodiversity conservation. These knowledge systems need to be effectively maintained. The Bill seeks to afford a comprehensive framework for property rights, yet this is disregarded in relation to TK. The Bill only requires that the Central Government shall endeavour to respect and protect the knowledge of local people relating to biological diversity (Clause 36 [iv]). This implies that there is no intention to grant any individual or community, property rights for TK and folklore. Since these are in public domain, they are liable to be exploited for commercial interests by other actors, to the detriment of their rightful owners.

In spite of that, the CBD recognises the strong link between biodiversity and TK, (Article 8 [j]). The fact that TK is outside the ambit of the trade regime means that the Bill could have stipulated provisions without regard to the Trade Related Aspects of

Box 3: Community Rights Champions-II

The African Model Biodiversity Legislation

The model is based mainly on the CBD and was adopted in 1998. The Legislation has centred its objectives on the rights of local communities by promoting fair and equitable sharing of benefits and prior informed consent of the concerned community.

It provides for the *inalienable rights of local communities* over their biological resources and crop varieties, knowledge and technologies. This is based on the principle that these resources are the result of the tried and tested practices of several past generations, held in trust by the present

generations for future generations and no one has the right to create exclusive monopoly rights over them. Customary practices and community intellectual rights of a local community are, thus, acknowledged.

The state has to recognise the rights of the communities over their biological resources and associated knowledge; their right to collectively benefit from the resources utilisation; and their right to use their innovations, practices and knowledge in the conservation and sustainable use of biological diversity. Hence it is recognised that the communities have a right to exercise their collective rights as legitimate custodians and users of their biological resources.

Intellectual Property Rights Agreement (TRIPs) requirements and embraced the CBD's conditions that are more attuned to India's needs.

The term “intangible component” could be inserted into the Bill to refer to knowledge, innovations and practices (whether individual or collective) of actual or potential value, that are associated with biogenetic resources. This removes non-IPR protected knowledge from public domain and provides legal support to indigenous communities in contesting the misappropriation of their knowledge, and in negotiating access agreements with users.

The Costa Rican Biodiversity Law innovates by providing for community intellectual rights, which grant legal recognition to knowledge associated with traditional biological or cultural practices in public domain, even without formal declaration. This course could be adopted to provide protection to current right holders of indigenous knowledge, while a more comprehensive system is being set in place.

Institutional Framework

At all the stages of access and benefit-sharing of biological resources, the government has to grant approval permits, oversee the working of contracts, impose certain compliance procedures and, generally monitor the entire process. This can easily stifle any development or innovation of biodiversity activities. This is done through a proposed three-tier system consisting of the National Biodiversity Authority established to implement the Bill, the State Biodiversity Boards and the Biodiversity Management Committees at the local community level to be

created to supplement the Authority's activities. The Authority is to be bound by the directions of the Central Government in the discharge of its functions and duties, (Clause 48).

Regulation by the government tends to lead to complicated procedures and delays. The cumbersome government bureaucracy may deter genuine bio-prospectors and users of knowledge and biological resources. In addition, the ‘green gold rush’ (the enthusiasm to commercially exploit biodiversity) is declining. These should encourage the government to set up a strong independent regulatory framework with minimum bureaucracy. For instance, in recognising the rights of local communities over their knowledge and their right to enjoy benefits collectively, it could then allow the use of the contracts as legal instruments of benefit-sharing with the communities negotiating the PIC document themselves.

Conclusion

The current Biological Diversity Bill seems set to turn the Indian biodiversity into a genetic marketplace. The challenge for the government is to promote the sharing of the benefits through improving the public and community use of these resources. The communities' interest and needs, and not the bio-prospectors, should take precedence.

The Bill should strive to recognise and reward them, as they are the starting point of sustainable livelihood development and income generation. Their unqualified participation in decision-making ought to ensure the effective regulation of access and sharing of benefits accruing from the utilisation of their biological resources, knowledge, technologies and practices.