



MAHATMA GANDHI UNIVERSITY

DEPARTMENT OF LIFELONG LEARNING AND EXTENSION & SCHOOL OF ENVIRONMENTAL SCIENCES

ROUND TABLE DISCUSSION

BIOLOGICAL DIVERSITY

[AMENDMENT BILL] 2021



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Date: 16th February 2022 Time: 03:30 P.M

[ONLINE WEBEX MEET]

Join information Meeting link: <https://mgu.webex.com/mgu/j.php?MTID=mad4bbf9fd651f0893002ba16e97ab1a2>

Meeting number: 2517 951 0226 Password: msPe2N6PwP8

Welcome



Dr. Baiju K.R
Director,

School of Environmental Sciences
Mahatma Gandhi University

Inaugural Address



Prof. (Dr.) C.T. ARAVINDAKUMAR

Hon'ble Pro Vice-Chancellor
Mahatma Gandhi University

Vote of Thanks



Prof. (Dr.) Bismi Gopalakrishnan

Head of the Department(i/c)
Department of Lifelong Learning and
Extension

Chaired By



Prof. (Dr.) Jayachandran.K

Professor, School of Biosciences
Mahatma Gandhi University

Former Member State Environmental Assessment
Authority

Round Table Discussion

Anubrotto Kumar Roy [Dunu Roy]

Director

Hazards Centre, New Delhi



Dr. V. S. Vijayan

Founder Director of the Salim Ali Centre for Ornithology and Natural History.

Chairman of the Salim Ali Foundation. Former Chairman Kerala State BioDiversity Board



Prof. (Dr.) Oommen V. Oommen

Hon' Director, Centre for Venom Informatics

Dept. of Computational Biology & Bio information University of Kerala

Chairman, Centre for Sustainable Environment India Biodiversity Action

Former Chairman Kerala State Biodiversity Board



Prof. (Dr.) Sai Ram Bhatt

Professor of Law

National Law School of India University Bangalore

Co-ordinator, Centre for Environmental Law Education, Research and Advocacy





**CENTRE FOR ENVIRONMENTAL
LAW, EDUCATION, RESEARCH
AND ADVOCACY (CEERA)
BENGALURU**



**NATIONAL LAW SCHOOL
OF INDIA UNIVERSITY**
BENGALURU

EXAMINATION OF THE BIOLOGICAL DIVERSITY (AMENDMENT) BILL, 2021

**SUBMISSION OF WRITTEN MEMORANDA/SUGGESTIONS TO
THE JOINT COMMITTEE ON THE BIOLOGICAL DIVERSITY
(AMENDMENT) BILL, 2021**

SUBMITTED BY

**CENTRE FOR ENVIRONMENTAL LAW, EDUCATION,
RESEARCH AND ADVOCACY, NATIONAL LAW SCHOOL
OF INDIA UNIVERSITY, BENGALURU**

**Gnana Bharathi Main Rd, Opp. National Assessment and Accreditation Council,
Teachers Colony, Nagarbhavi, Bengaluru, Karnataka 560072|e-mail: ceera@nls.ac.in|
Websites: nlsenlaw.org|nlspub.ac.in|nlsabs.com**

ABOUT NLSIU

The National Law School of India University, the Nation's premier law university, came into existence through a Notification under the National Law School of India University Act (Karnataka Act 22 of 1986). It signified the culmination of efforts by the Judiciary, the Bar Council of India, the Karnataka Bar Council, the Bangalore University and the Government of Karnataka to reform legal education and to establish a centre of excellence for legal education and research in India. The Law School has undertaken many research projects funded by the UGC, the Government of India, the Government of Karnataka, the Department of Women and Child Development, UN agencies, the World Bank, HIVOS, Department of Justice etc.



The Projects have served to strengthen research and teaching at the Law School. The National Law School of India University, since its inception, has taken proactive steps in organizing conferences, seminars, workshops, refresher courses and certificate courses to update academicians, law teachers, students, industry personnel in different subject areas.

ABOUT CEERA



Centre for Environmental Law Education, Research and Advocacy (CEERA), established in 1997, is a benefactor of the Ministry of Environment, Forest and Climate Change (MoEF&CC), Government of Karnataka, the Bar and the Bench in India and abroad. Building an environmental law database, effectively networking among all stakeholders, building up an environmental law community and policy research in the area of the environment are CEERA's main objectives.

To achieve the aforesaid, CEERA has successfully been able to build functional and professional linkages with governmental agencies and non-governmental organisations in India, the South Asian Region and at International levels. CEERA has been partnering with the Central Pollution Control Board in organising Training Programmes for officers of various State Pollution Control Boards and other industry professionals for over eight (8) years. One of the first research centres in India to be granted a World Bank project and thereafter being a steady choice for the Ministry of Environment Forest and Climate Change, CEERA has been entrusted with research projects and workshops to impart training to Forest Officers, Revenue Officers, and also officers of the Government of Karnataka. CEERA is proud to have completed a two-year Research Project granted by the United Nations Development Programme (UNDP) under the Global Environment Facility (GEF) and as one of the deliverables, organised, convened and conducted over twenty workshops at Institutions of national repute, creating awareness on the Biodiversity Law and Access and Benefit Sharing



(ABS) in less than 2 years. Two research publications on biodiversity laws were also the outcome of this project.

CEERA has several publications in the area of environmental law, contracts, the law and public policy along with Newsletters, CEERA March of the Environmental Law, NLSIU's first e-Journal – Journal

on Environmental Law, Policy and Development. CEERA manages three

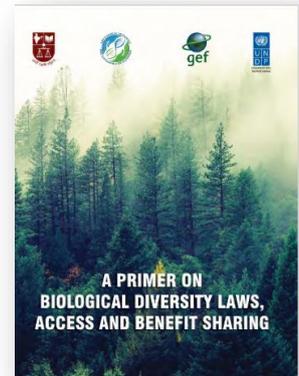
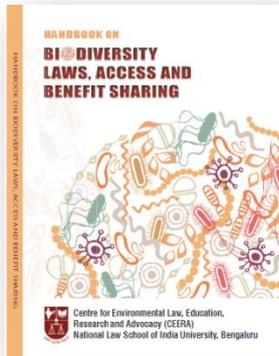
websites viz., www.nlsenlaw.org,

wherein the law and policy on Environment is regularly updated, and

www.nlsabs.com, a dedicated portal wherein the law and policy on

Biodiversity Access and Benefit Sharing is updated periodically. All our publications are duly updated on

our online portal www.nlspub.ac.in, which is open for subscription to all readers.



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THE BIOLOGICAL (AMENDMENT) BILL, 2021: AN EXPOSITORY SCRUTINY

The Indian Parliament passed the Biological Diversity Act, 2002 (hereinafter called BD Act 2002) on February 5, 2003, which seeks to address the preservation of biological diversity, long-term use of its constituents, and equitable distribution of the benefits derived from the use of biological resources occurring in the country, especially when biological resources are accessed for research, patents, transfer of results and commercial utilisation of biological resources. The principal Act has been drafted in pursuance to the country's obligations under the United Nations' 1992 Convention on Biological Diversity, to which India is a signatory. The Act's Preamble deems it important to provide for the protection, long-term sustainable use, and equal distribution of the advantages emerging from the use of biological resources, as well as to give effect to the aforementioned Convention. The objectives of the Act are to be effectuated with the aid of a decentralised three-tiered mechanism comprising the National Biodiversity Authority, the State Biodiversity Boards, and the Biodiversity Management Committees. Nearly twenty years after its enactment, an amendment to the Act was introduced in the Lok Sabha on 9th Dec, 2021, aims to address concerns raised by stakeholders representing Indian system of medicine sector, seed sector, industry sector and research sector.

In line with the demands raised by these interest groups the Amendment Bill seeks to *inter alia* (i) encourage cultivation of medicinal plants so as to reduce pressure on their wild variants; (ii) encourage Indian system of medicine; (iii) decriminalise certain provisions and (iv) encourage greater international investments in biological resources, including exploration, patenting, and commercialization, without jeopardising national interest.¹

Some of the pertinent changes introduced by the Amendment Bill and their implications have been highlighted in the table below:

¹ State of Objects and Reasons, Biological Diversity (Amendment) Bill, 2021
http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/158_2021_LS_Eng.pdf (last visited Jan. 3, 2022).



	BIOLOGICAL DIVERSITY ACT, 2002	THE BIOLOGICAL DIVERSITY (AMENDMENT) BILL, 2021	IMPLICATIONS OF THE PROPOSED AMENDMENTS
Preamble	<p>The Act's principal goals as enunciated in the Preamble is to provide for conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the use of biological resources, knowledge and for matters connected therewith or incidental thereto.</p> <p>However, the words 'fair and equitable' only appear in the Preamble and not in the bare text of the statute.</p>	<p>In line with the obligations under the Nagoya Protocol, several provisions of the 2002 Act which simply spoke of equitable sharing of benefits have been amended to include 'fair and equitable' sharing. Some of the sections which have been amended to incorporate the word 'fair' are as under:</p> <p>Section 8(4): The words 'fair and equitable' substituted for 'equitable' to clauses (a) and (d) under the definition of Chairperson and appointment of non – official members;</p> <p>Section 18 (3): Under the functions and powers of the National Biodiversity Authority (NBA), clause (a) has substituted the words 'fair and equitable';</p> <p>Section 19 (3A): The sub-section 3A is a new addition which states that if the NBA is of the opinion that if any activity is detrimental and contrary to the objectives of conservation and sustainable use biodiversity or fair and equitable sharing of benefits, the same shall be restricted by the authority;</p> <p>Section 21(1): Determination of 'fair and</p>	<p>One of the three objectives of the Convention on Biological Diversity is for Parties to make genetic resources more accessible while guaranteeing that benefits derived from their use are shared fairly and equitably among providers. Access to and use of traditional knowledge linked with such genetic resources is likewise covered by the concept of fair and equitable benefit sharing.</p> <p>The Amendment Bill draws from India's specific obligations under the Nagoya Protocol to the Convention on Biological Diversity which seeks to ensure that the benefits derived from the use of biological resources and associated traditional knowledge are shared in a fair and equitable manner among the indigenous and local communities.</p> <p>Neither the CBD nor the Nagoya Protocol exemplifies 'fair and equitable' sharing of benefits. While the Amendment Bill has proposed the incorporation of the words 'fair and equitable' to ensure that the benefits derived from the use of biological resources and associated traditional knowledge are shared in a fair and equitable manner among the indigenous and local communities, by failing to define what is 'fair and equitable' or identifying the parameters against which a transaction should be judged so as to be qualified as 'fair and equitable', it leaves room for multiple interpretations.</p> <p>Recommendation: We understand that 'fair and equitable' are to be</p>



		<p>equitable’ benefit sharing by National Biodiversity Authority, substituted for the word ‘equitable’;</p> <p>Section 22(4): Board of State Biodiversity Board (SBA), words substituted under the eligibility requirement of Chairperson;</p> <p>Section 53: Under execution of determination or order, for the words “benefit sharing”, the words “fair and equitable sharing of benefits” shall be substituted;</p>	<p>determined on a case to case basis. It is recommended that a yardstick for determination may be given by means of a proviso to sub-section (1) of Section 21: “Provided that in determining “fair and equitable” sharing of benefits, the following factors may be considered:</p> <ul style="list-style-type: none"> - Quantity of Biological Resources Consumed - Quantity of Commercial Utilisation or Units Produced - Total Annual Gross Sales - and such other factors as may be deemed appropriate”
<p>New Definitions</p>	<p>Not defined</p>	<p>(a) “access” means collecting, procuring or possessing any biological resource occurring in or obtained from India or associated traditional knowledge thereto, for the purposes of research or bio-survey or commercial utilisation;</p>	<p>All the different uses that the BD Act, 2002 envisages for biological resources would need ‘access’ to such resources as a prerequisite. In this regard, the Amendment Bill by defining access has made up for a deficiency which was apparent in the 2002 Act. However, the definition of access in the Amendment Bill also includes ‘possessing’ any biological resource.</p> <p>The Amendment Bill has attempted to water down the penal sanctions under the principal Act and has also decriminalised certain provisions, but the inclusion of the word ‘possession’ could substantially increase the ambit of the Act to include all such entities who may be in possession of biological resources with either no intention of undertaking research or bio-survey or commercial utilisation; or undertaking research or bio-survey or commercial utilisation at a later date. This inclusion definitely needs to be relooked.</p> <p>Recommendation:</p> <p>i. There needs to be clarity in the amendment to distinguish between mere possession, and possession for</p>



			the purposes of research or bio-survey or commercial utilisation.
	Not defined	(fa) “derivative” means a naturally occurring biochemical compound or metabolism of biological resources, even if it does not contain functional units of heredity;’	The revised definition of biological resources replaces the term by-products with the term ‘derivative’ which justifies the inclusion of this definition.
	Not defined	“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;	Before the Convention on Biological Diversity, plant genetic resources were generally considered a “common heritage of mankind,” a common good that is freely accessible to all. The CBD asserted the sovereign rights of states over their natural resources. In line with this, the definition clarifies the territorial extent of India and identifies the areas and topography and the biological resources occurring over which would fall within India’s jurisdiction.
Revised definitions	“benefit claimers” means the conservers of biological resources, their by-products, creators and holders of knowledge and information relating to the use of such biological resources, innovations and practices associated with such use and application.	(aa) “benefit claimers” means the conservers of biological resources, their by-products, creators or holders of associated traditional knowledge thereto (excluding codified traditional knowledge only for Indians) and information relating to the use of such biological resources, innovations and practices associated with such use and application;	Traditional knowledge may be reduced to writing (codified). In India, the Indian systems of medicine or AYUSH have codified knowledge systems including the Ayurvedic system of medicine, the Siddha system, the Unani Tibb systems and others. By excluding codified traditional knowledge this provision has been aligned with the change suggested in Section 7 of the Act. It is appropriate and a welcome move to exclude the holder of codified traditional knowledge and as such AYUSH practitioners would not be eligible to claim benefits under the Act.



	<p>(c) “biological resources” means plants, animals and micro-organisms or parts thereof, their genetic material and by-products (excluding value added products) with actual or potential use or value, but does not include human genetic material;</p>	<p>‘(c) “biological resources” include plants, animals, micro-organisms or parts of their genetic material, derivatives (excluding value added products), with actual or potential use or value for humanity, but does not include human genetic material;</p>	<p>The word ‘includes’ has been substituted for the word ‘means’. Several judicial decisions have clarified that the word ‘includes’ is used by the legislature when the intention is to enlarge the meaning of the expression defined so as to confine it to not only such things as they signify according to their natural import but also those things which the clause declares that they shall include.² Therefore, by using the word ‘includes’ the scope of defining what comes within the definition of biological resources has been enlarged and is no longer restricted to the elements identified in the definition. By making the definition inclusive, the drafters have made scope for the inclusion of more categories of biological resources within the ambit of the term (so long as the nexus of these additional included items with the definition is not lost).</p> <p>There persists ambiguity on what is to be considered as a ‘Value Added Product’ (VAP). Value added products are those that may comprise of portions or extracts of plants or animals in an unrecognizable and physically inseparable form. The distinction of value added product (as defined under Section 2(p) of the Act) from bio-resource (as defined under Section 2(c) of the Act) is essential in determining whether there is a requirement to obtain approval from the NBA in the instance of a patent application. The National Green Tribunal held that ABS shall apply to castor oil, considering it a bio-resource in light of commercial purposes and held that no ABS shall apply to castor oil if it is deemed in the context of agricultural purposes. Similarly, the question of whether waste paper would constitute as bio-resource or not was left unanswered by the Court. The Controller of Patents had granted the applicant and considered that the applicant</p>
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² P. Kasilingam & Ors. v. P.S.G. College Of Technology & Ors 1995 SCC Supl. (2) 348; N.D.P. Namboodripad v. Union of India (2007) 4 SCC 502.



			<p>need not seek NBA’s approval after the applicant argued that egg shells do not constitute bio-resource, relying on the definition of sustainable use under Section 2(o) of the Act, thus substantiating that egg shells do not have the potential to cause the decline of any component of biological diversity.</p> <p>The NBA has neither recognised nor provided an exhaustive list of VAP over which exemption can be sought under Sections 2(c) and 2(p) of the Act. There is also no clarification in the Act as to what physically inseparable refers to. This calls for a well-harmonised and established definition by various recognized authorities. For instance, where a patent application was filed by a Section 3(2) company, the Coconut Development Board categorised coconut oil as a VAP, while the NBA considers it as a bio-resource, thus requiring prior intimation/approval.</p>
	<p>(d) “bio-survey and bio-utilisation” means survey or collection of species, subspecies, genes, components and extracts of biological resource for any purpose and includes characterisation, inventorisation and bioassay;</p>	<p>(d) “bio-survey” means survey or collection of any taxa, varieties, genes, components and extracts of biological resource for any purpose.</p>	<p>The Amendment Bill has completely done away with “bio-utilisation.” This implies that anyone who makes use of biological resources for bio-utilisation would not need to comply with the requirements of Act. Some environmentalists have raised concerns about the consequences that this exclusion could lead to and have also termed this move as regressive. The major implication of leaving out bio-utilisation could create greater scope for bio-piracy. A number of activities like characterisation, inventorisation and bioassay, which are undertaken with commercial interest, would remain outside the purview of the Act.³ This could also mean that research undertaken to understand physical, chemical and</p>

³ ‘Bio-resources: Amendment bill dilutes BD Act, raises concerns’, THE INDIAN EXPRESS, Dec. 18, 2021 <https://www.newindianexpress.com/states/tamil-nadu/2021/dec/18/bio-resources-amendment-bill-dilutes-bd-act-raises-concerns-2396807.html>



			other characteristics of a biological resource or the potency of a substance have all been left outside the purview of the Bill, leading to questions about whether they would at all be regulated.
Definition shifted	Definitions of the terms ‘cultivar’, ‘folk variety’ and ‘land race’ included under Chapter X which deals with Biodiversity Management Committees.	Definition of these terms has been shifted to the interpretation clause by the Amendment Bill. Further, the responsibility of conservation of biological resources, including cultivars, folk varieties and landraces, incentive has been given to the Central Government and the State Government in addition to the Biodiversity Management Committees.	
Inclusion of Foreign Controlled Company	<p>3(2) The persons who shall be required to take the approval of the National Biodiversity Authority under sub-section (1) are the following, namely: -</p> <p>(a) a person who is not a citizen of India;</p> <p>(b) a citizen of India, who is a non-resident as defined in clause (30) of section 2 of the Income-tax Act, 1961;</p> <p>(c) a body corporate, association or organization-</p> <p>(i) not incorporated or registered in India; or</p> <p>(ii) incorporated or registered in India under any law for the time being in force which has any non-Indian participation in its share capital or management.</p>	<p>Section 3 sub-section (2) clause (c) sub-clause (ii): incorporated or registered in India under any law for the time being in force, which is a foreign controlled company.</p> <p>(b) “foreign controlled company” means a foreign company within the meaning of clause (42) of section 2 of the Companies Act, 2013 which is under the control of a foreigner.</p>	<p>Section 3(2)(c)(ii) of the Amendment Bill has substituted ‘non-Indian participation in its share capital or management’ for a ‘foreign controlled company.’</p> <p>This could imply that companies incorporated or registered in India which have foreign participation in their share capital or management would not require the permission of the NBA for extracting biological resources from India. This in turn would also deprive the local communities of any benefits that would be derived from the use of biological resources.</p> <p>The amended Section 7 as proposed by the Amendment Bill also does not accommodate this group of entities that have been excluded from Section 3.</p> <p>There is another concern with the inclusion of foreign</p>



			<p>controlled company as proposed by the Amendment Bill. The definition of foreign controlled company is proposed to be the same as defined under Section 2(42) of the Companies Act, 2013. The section defines foreign controlled company to mean any company or body corporate incorporated outside India which—</p> <p>(a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and</p> <p>(b) conducts any business activity in India in any other manner.</p> <p>Clause 3(2)(c)(ii) by placing together “incorporated or registered in India” and “which is a foreign controlled company” creates a dichotomous situation.</p>
<p>Section 4 – Transfer of research results</p>	<p>No person shall, without the previous approval of the National Biodiversity Authority, transfer the results of any research relating to any biological resources occurring in, or obtained from, India for monetary consideration or otherwise to any person who is not a citizen of India or citizen of India who is non-resident as defined in clause (30) of section 2 of the Income-tax Act, 1961 or a body corporate or organisation which is not registered or incorporated in India or which has any non-Indian participation in its share capital or management.</p>	<p>No person or entity shall share or transfer any result of the research on any biological resource occurring in, or obtained or accessed from, India or associated traditional knowledge thereto, for monetary consideration or otherwise, to a person referred to in sub-section (2) of section 3, without the prior written approval of the National Biodiversity Authority, except the codified traditional knowledge which is only for Indians:</p> <p>Provided that the provisions of this section shall not apply if publication of research papers or dissemination of</p>	<p>The Amendment Bill has substituted a new section for the earlier section which requires permission for not only transferring but also sharing of research results with any foreign entity. However, sharing of codified traditional knowledge which is only for Indians cannot be shared for any monetary consideration or otherwise.</p> <p>The requirement laid down in the third proviso introduced by the Bill already finds a mention in the Guidelines on Access to Biological Resources and Associated Knowledge and Benefits Sharing Regulations, 2014.</p> <p>The requirement laid down by the second proviso is a new addition which mandates prior permission from the NBA if the results of the research are used for further research.</p>



	<p><i>Explanation.</i>—For the purposes of this section, “transfer” does not include publication of research papers or dissemination of knowledge in any seminar or workshop, if such publication is as per the guidelines issued by the Central Government.</p>	<p>knowledge in any seminar or workshop involving financial benefit is as per the guidelines issued by the Central Government:</p> <p>Provided further that where the results of research are used for further research, then, the registration with National Biodiversity Authority shall be necessary:</p> <p>Provided also that if the results of research are used for commercial utilisation or for obtaining any intellectual property rights, within or outside India, prior approval of National Biodiversity Authority shall be required to be taken in accordance with the provisions of this Act.</p>	<p>This could imply additional benefit sharing requirements under the Act.</p>
	<p>Section 6 (1) No person shall apply for any intellectual property right, by whatever name called, in or outside India for any invention based on any research or information on a biological Application for intellectual property rights (IPR) not to be made without approval of National Biodiversity Authority resource obtained from India without obtaining the previous approval of the National Biodiversity Authority before making such application.</p>	<p>(1) Any person or entity applying for an intellectual property right, covered under sub-section (2) of section 3, by whatever name called, in or outside India, for any invention based on any research or information on a biological resource which is accessed from India, including those deposited in repositories outside India, or associated traditional knowledge thereto, shall obtain prior approval of the National Biodiversity Authority before grant of such intellectual property rights.</p>	<p>Scope of the section has been expanded to include associated traditional knowledge linked to a biological resource including biological resources deposited in repositories outside India.</p> <p>The extension of this provision to biological resources maintained in repositories outside India could be seen as a positive step towards reducing instances of biopiracy.</p> <p>A distinction has also been introduced between Indian and foreign applicants of Intellectual Property Rights. While a foreign applicant would have to seek prior approval from</p>



	<p>Provided that if a person applies for a patent, permission of the National Biodiversity Authority may be obtained after the acceptance of the patent but before the sealing of the patent by the patent authority concerned:</p> <p>Provided further that the National Biodiversity Authority shall dispose of the application for permission made to it within a period of ninety days from the date of receipt thereof.</p>	<p>(1A) Any person applying for any intellectual property right, covered under section 7, by whatever name called, in or outside India, for any invention based on any research or information on a biological resource which is accessed from India, including those deposited in repositories outside India, or associated traditional knowledge thereto, shall register with the National Biodiversity Authority before grant of such intellectual property rights.</p> <p>(1B) Any person covered under section 7 who has obtained intellectual property right, by whatever name called, in or outside India, for any invention based on any research or information on a biological resource which is accessed from India, including those deposited in repositories outside India, or associated traditional knowledge thereto, shall obtain prior approval of the National Biodiversity Authority at the time of commercialisation.</p>	<p>the NBA, an Indian applicant would have to register with the NBA before grant of IP rights.</p> <p>From the plain reading of the provision the distinction between registration and approval is not very clear.</p> <p>Whether registration with the NBA should also be perceived as ‘prior intimation’ to the State Board which is interpreted as good as a permission of the Board is not clear.</p>
<p>NEW EXEMPTIONS</p>	<p>Section 7: No person, who is a citizen of India or a body corporate, association or organisation which is registered in India, shall obtain any</p>	<p>7(1) No person, other than the person covered under sub-section (2) of section 3, shall access any biological resource and its associated knowledge</p>	<p>The Amendment Bill has restricted the need for prior intimation to the SBB only if biological resource and its associated knowledge are used for commercialisation. Use of biological resource for biosurvey which could lead to</p>



<p>biological resource for commercial utilisation, or bio-survey and bio-utilisation for commercial utilisation except after giving prior intimation to the State Biodiversity Board concerned:</p> <p>Provided that the provisions of this section shall not apply to the local people and communities of the area, including growers and cultivators of biodiversity, and vaidas and hakims, who have been practicing indigenous medicine.</p>	<p>for commercial utilisation, without giving prior intimation to the concerned State Biodiversity Board, subject to the provisions of clause (b) of section 23 and sub-section (2) of section 24:</p> <p>Provided that the provisions of this section shall not apply to the codified traditional knowledge, cultivated medicinal plants and its products, local people and communities of the area, including growers and cultivators of biodiversity, vaidas, hakims and registered AYUSH practitioners who have been practicing indigenous medicines, including Indian systems of medicine for sustenance and livelihood.</p> <p>(2) The manner of issuing certificate of origin for cultivated medicinal plants shall be such as may be prescribed.</p>	<p>commercialisation has been exempted. No specific reason has been given in the State of Objects and Reasons of the Amendment Bill for this exclusion.</p> <p>BD Act 2002 had exempted certain categories of entities from the need of giving prior intimation. In addition to vaidas, hakims and the local people and communities of the area, including growers and cultivators of biodiversity exemption has been granted to AYUSH practitioners who have been practicing indigenous medicines, including Indian systems of medicine for sustenance and livelihood.</p> <p>While this exclusion seeks to “encourage Indian system of medicine,” it could also lead to the exemption of several ayurvedic product industries which are registered in the name AYUSH practitioners.⁴ Further, this move seems hypocritical since about 90% of the AYUSH medicines are herbal.⁵ By exempting these practitioners, the system of medicine most reliant on biological resources would result in its depletion without any fair and equitable distribution of any benefits arising from their use.</p> <p>The Amendment Bill has also included exemptions on the kind of BR being used. No prior intimation to the SBB would be required if the BR in question is cultivated medicinal plants and its products or codified traditional</p>
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⁴ Bio-resources: Amendment bill dilutes BD Act, raises concerns’, THE INDIAN EXPRESS, Dec. 18, 2021 <https://www.newindianexpress.com/states/tamil-nadu/2021/dec/18/bio-resources-amendment-bill-dilutes-bd-act-raises-concerns-2396807.html>

⁵GENERAL GUIDELINES FOR DRUG DEVELOPMENT OF AYURVEDIC FORMULATIONS, CENTRAL COUNCIL FOR RESEARCH IN AYURVEDIC SCIENCES Ministry of AYUSH, Government of India <https://www.ayush.gov.in/docs/guideline-drug-development.pdf>



			<p>knowledge.</p> <p>This exclusion however, would be an undue advantage to AYUSH companies and practitioners.</p> <p>Recommendation: As such it is recommended that the following be added as a proviso:</p> <p><i>“Provided that the term AYUSH practitioners shall be restricted to understand any person with a qualification under Section 14 of the Indian Medicine Central Council Act, 1970.</i></p> <p><i>Provided further that the said exemption granted to such AYUSH Practitioner shall not be extended to any manufacturing process for purposes of resale.”</i></p> <p>Further, the word ‘prior intimation’ has resulted in a lot of ambiguity and a slew of cases have been filed where Indian entities have sought exemption from seeking permission of the SBBs before accessing biological resources for commercial purposes. The case of <i>Divya Pharmacy</i>⁶ is a striking example of the same. When a comprehensive amendment is being contemplated, it is suggested that the following explanation be added to the section 7</p> <p><i>Explanation: For the purpose of this section prior intimation to the concerned State Biodiversity Board would mean prior permission of the State Biodiversity Board.</i></p>
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⁶ Divya Pharmacy v. Union of India WP 3437/2016, Decided on 21 December 2018



<p>Expanded the constitution of the National Biodiversity Authority by adding new Ministries</p>	<p>(b) three ex officio members to be appointed by the Central Government, one representing the Ministry dealing with Tribal Affairs and two representing the Ministry dealing with Environment and Forests of whom one shall be the Additional Director General of Forests or the Director General of Forests.</p> <p>No representation from State Boards.</p> <p>non-official members to be appointed from amongst specialists and scientists.</p>	<p>(b) sixteen ex officio members to be appointed by the Central Government, representing the Ministries dealing with—</p> <p>(i) Agricultural Research and Education; (ii) Agriculture and Farmers Welfare; (iii) Ayurveda, Unani, Siddha, Sowa Rigpa, Yoga and Naturopathy and Homoeopathy; (iv) Biotechnology; (v) Environment and Climate Change; (vi) Forests and Wildlife; (vii) Indian Council of Forestry Research and Education; (viii) Earth Sciences; (ix) Panchayati Raj; (x) Science and Technology; (xi) Scientific and Industrial Research; (xii) Tribal Affairs;</p> <p>(c) four representatives from State Biodiversity Boards on rotational basis;</p> <p>“specialists, legal experts” added</p>	<p>Inclusion of new ministries aim at mainstreaming biodiversity into national policy making.</p> <p>The representation from the State Boards seems to a positive move as it could help to bridge the imperceptible divide between the NBA and the State Boards.</p> <p>Legal experts have also been explicitly added to the list of specialists.</p>
<p>Composition of SBB expanded</p>	<p>22(b) not more than five ex officio members to be appointed by the State Government to represent the concerned Departments of the State Government; (c) not more than five members to be</p>	<p>(b) not more than seven ex officio members to be appointed by the State Government to represent the concerned departments of the State Government, including departments dealing with</p>	<p>Representation from the Panchayati Raj and tribal affairs could aid in better collaboration with BMCs and the cultivators of biological resources which generally operate in the grass root level. Further, a lot of tribal belts are rich in biological resources, with many tribal communities</p>



	appointed from amongst experts in matters relating to conservation of biological diversity, sustainable use of biological resources and equitable sharing of benefits arising out of the use of biological resources.	Panchayati Raj and tribal affairs; (c) not more than five non-official members to be appointed from amongst specialists, legal experts, scientists having special knowledge in matters relating to conservation of biological diversity, sustainable use of biological resources and fair and equitable sharing of benefits arising out of the use of biological resources.	reliant on these resources for their subsistence. Therefore, representation from the department of tribal affairs could mean that tribal interests are borne in mind before access is granted.
Post of Member Secretary	No post of Member Secretary in the NBA or SBBs	“(e) a Member-Secretary, who shall have experience in matters relating to biodiversity conservation, to be appointed by the Central Government.” “10A. (1) The Member-Secretary shall be the chief coordinating officer and the convener of the National Biodiversity Authority and shall assist that Authority in the discharge of its functions under this Act. (2) The Member-Secretary shall perform such other functions as may be prescribed.”	Inclusion of the post of ‘Member-Secretary for the NBA and the SBBs. While the practice of appointing a Member Secretary for the NBA and the SBBs were already in place, the appointments were made in pursuance of administrative orders and were not statutorily backed. Giving statutory recognition to the post of the Member Secretaries could allow the Central Government to wield more power in the functioning of the NBA with its own appointees.
NBA given power to reject approval	Power only given to State Boards under Section 24(2)	19“(3A) The National Biodiversity Authority shall, while granting approval under this section, determine the benefit sharing in such manner as may be	This would imply that foreign individuals and entities applying to the NBA and Indian IP right applicants could face rejections, if the NBA finds that the activity is detrimental or contrary to the objectives of conservation



		<p>specified by regulations made in this behalf:</p> <p>Provided that if the National Biodiversity Authority is of the opinion that such an activity is detrimental or contrary to the objectives of conservation and sustainable use of biodiversity or fair and equitable sharing of benefits arising out of such activity, it may, by order, for reasons to be recorded in writing, prohibit or restrict any such activity:</p>	<p>and sustainable use of biodiversity or fair and equitable sharing of benefits arising out of such activity.</p> <p>This power was already vested on the NBA under Rule 16 of the Biological Diversity Rules 2004 and Regulation 16 of the ABS Regulations.</p>
<p>NBA and SBBs has to also notify rejections in the public domain</p>	<p>19(4) The National Biodiversity Authority shall give public notice of every approval granted by it.</p>	<p>Section 19“(4): The National Biodiversity Authority shall place in public domain details of every approval granted or rejected under this section.</p> <p>Section 24(4): The State Biodiversity Board shall place in public domain the details of every approval granted or rejected under this section.”.</p>	<p>As per the Amendment Bill, the NBA and SBBs would be obligated to give mandatory public notice of approvals and rejections of requests.</p> <p>This can be seen as a positive development since public intimation about rejections could aid in improving transparency of the process of approvals and rejections.</p>
<p>Determination of fair and equitable benefit sharing by National Biodiversity Authority</p>	<p>21(1) The National Biodiversity Authority shall while granting approvals under section 19 or section 20 ensure that the terms and conditions subject to which approval is granted secures equitable sharing of benefits arising out of the use of accessed biological resources, their by-products, innovations and practices associated with their use and applications and knowledge relating</p>	<p>21(1) The National Biodiversity Authority shall, while determining benefit sharing for the approval granted under this Act, ensure that the terms and conditions subject to which the approval is granted secures fair and equitable sharing of benefits arising out of the use of accessed biological resources, their derivatives, innovations and practices associated with their use and applications</p>	<p>The explicit mention of Biodiversity Management Committee represented by the National Biodiversity Authority and the exclusion of benefit claimers seems to imply that the benefit claimers who are in fact conservers and creators of biological resources and associated knowledge would have no role to play in negotiating the terms and conditions of access and benefit transfers. Further, the Amendment Bill provides that the BMC represented by the NBA would arrive at the mutually agreed terms. This in essence would mean the NBA</p>



	<p>thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, local bodies concerned and the benefit claimers.</p>	<p>and knowledge relating thereto in accordance with mutually agreed terms and conditions between the person applying for such approval, and the Biodiversity Management Committee represented by the National Biodiversity Authority.”;</p>	<p>deciding on behalf of the BMC, which could completely suppress the voice of the local community from where the BR is sourced. This is in contravention of the principles of the Nagoya Protocol which recognizes the importance of promoting equity and fairness in negotiation of mutually agreed terms between providers and users of genetic resources.</p> <p>There is a hierarchy that has been established to implement what the Act seeks to achieve. This governance is exercised by National Biodiversity Authority (NBA), State Biodiversity Boards (SBB) and Biodiversity Management Committees (BMCs). An analysis of the functioning of these bodies, apparent from the provisions of the Act, reveals that local bodies have very little to no say in the decision making process. While consultation of local communities to formulate benefits sharing arrangements post the decision of allowing access is permitted by the Act, the decision of whether or not to allow access solely vests in the NBA and SBBs. The local communities are not made well-aware of their rights regarding IPR or commercial use of such traditional knowledge, thus giving rise to a centralised mechanism which may not yield the due benefits. Further, the role of the BMCs is not expanded. The proposed modifications will allow the NBA/state biodiversity boards to represent BMCs in determining benefit-sharing arrangements, diluting the role of the BMCs.</p> <p>Recommendations:</p>
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			<p>A proviso to be added:</p> <p><i>“Provided that the National Biodiversity Authority shall take into consideration the recommendations provided by the Biodiversity Management Committee”</i></p>
<p>National Biodiversity Fund</p> <p>State Board Fund</p> <p>Local Fund</p>	<p>27(1)(b) all charges and royalties received by the National Biodiversity Authority under this Act;</p> <p>32(1) (c) all sums received by the State Biodiversity Board from such other sources as may be decided upon by the State Government.</p> <p>43(1)(e) all sums received by the Local Biodiversity Fund from such other sources as may be decided upon by the State Government.</p>	<p>“27(1)(b) all sums including charges and benefit sharing amount received by the National Biodiversity Authority;”</p> <p>Section 32 (1) (c) all sums including charges and benefit sharing amount received by the State Biodiversity Board and from such other sources as may be decided by the State Government;</p> <p>43(1)(e) benefit sharing amount and all other sums received by the Local Biodiversity Fund from such other sources as may be decided by the State Government.”</p>	<p>All amount collected in pursuance of benefit sharing would have to be deposited in the Funds of the NBA, SBBs and BMCs.</p>
<p>Utilization of Funds of NBA and SBB – Section 27</p>	<p>27(2)(b) conservation and promotion of biological resources and development of areas from where such biological resources or knowledge associated thereto has been accessed;</p>	<p>27(2) (b) conservation and sustainable use of biological resources;</p> <p>(c) socio-economic development of areas from where such biological resources or</p>	<p>The Amendment Bill has replaced promotion of biological resources with sustainable use of biological resources. Literally interpreted this would imply that the Funds would not be used for promotion of biological resources, but rather for its sustainable use/sustainability.</p>



<p>and 32 and Section 44 – Local Fund</p>	<p>(c) socio-economic development of areas referred to in clause (b) in consultation with the local bodies concerned.</p> <p>32(2) (c) conservation and promotion of biological resources;</p> <p>(d) socio-economic development of areas from where such biological resources or knowledge associated thereto has been accessed subject to any order made under section 24, in consultation with the local bodies concerned;</p> <p>(e) meeting the expenses incurred for the purposes authorised by this Act</p>	<p>associated traditional knowledge have been accessed in consultation with the Biodiversity Management Committee or local body concerned:</p> <p>Provided that when it is not possible to identify the area from where the biological resources or associated traditional knowledge have been accessed, the fund shall be utilised for socio-economic development of the area where such biological resources occur;</p> <p>(d) activities to meet the purposes of the Act.”</p> <p>32(2)“(aa) channelling benefits to the benefit claimers;”;</p> <p>(c) conservation and sustainability of biological resources;</p> <p>(d) socio-economic development of areas from where such biological resources or associated traditional knowledge have been accessed in consultation with the Biodiversity Management Committee or local body concerned:</p> <p>Provided that when it is not possible to identify the area from where the biological resources or associated traditional</p>	<p>It is however unclear how, the funds would be utilized to bring in “sustainability.”</p> <p>Further, the distinction made in the provisos to sections 27 and 32 between places from where such biological resources or associated traditional knowledge have been accessed and area where such biological resources occur for utilization of fund for socio-economic development is also not clearing allowing greater discretion in the hands of the fund managers to utilize the funds in areas they deem fit.</p> <p>By vesting the responsibility of restoring areas on BMCs, the Amendment Bill seeks to place a heavy burden on the BMCs, especially considering that the BMCs would not enjoy complete freedom in the utilization of the local fund which would have to be in consultation with the State Government.</p>
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	<p>44(1) Subject to the provisions of sub-section (2), the management and the custody of the Local Biodiversity Fund and the purposes for which such Fund shall be applied, be in the manner as may be prescribed by the State Government.</p> <p>(2) The Fund shall be used for conservation and promotion of biodiversity in the areas falling within the jurisdiction of the concerned local body and for the benefit of the community in so far such use is consistent with conservation of biodiversity.</p>	<p>knowledge have been accessed, the fund shall be utilised for socio-economic development of the area where such biological resources occur;”;</p> <p>(e) making grants or loans to the Biodiversity Management Committees;</p> <p>(f) the activities to meet the purposes of the Act</p> <p>“44. (1) The Local Biodiversity Fund shall be utilised in accordance with the regulations and the guidelines made in this behalf, for—</p> <p>(a) the conservation of biodiversity including restoration of areas;</p> <p>(b) the socio-economic development of the community without compromising the conservation concerns; and</p> <p>(c) the administrative expenses of the Biodiversity Management Committee.</p> <p>(2) The Fund shall be utilised in such manner as may be prescribed by the State Government.</p>	
<p>Amendment to Section 36</p>	<p>. (1) The Central Government shall develop national strategies, plans, programmes for the conservation and promotion and sustainable use of</p>	<p>(1) The Central Government shall develop national strategies, plans, programmes for the conservation and promotion and sustainable use of biological diversity</p>	<p>Sub-section (6) introduced by the Amendment seeks to ensure that the Central Government shall involve the National Biodiversity Authority or State Biodiversity Boards to undertake measures for conservation and</p>



	<p>biological diversity including measures for identification and monitoring of areas rich in biological resources, promotion of in situ, and ex situ, conservation of biological resources, incentives for research, training and public education to increase awareness with respect to biodiversity.</p> <p>(3) The Central Government shall, as far as practicable wherever it deems appropriate, integrate the conservation, promotion and sustainable use of biological diversity into relevant sectoral or cross sectoral plans, programmes and policies.</p>	<p>including measures for identification and monitoring of areas rich in biological resources, promotion of in situ, and ex situ, conservation of biological resources, including cultivars, folk varieties and landraces, incentives, for research, training and public education to increase awareness with respect to biodiversity.</p> <p>(3) The Central Government shall, as far as practicable wherever it deems appropriate, integrate the conservation, promotion and sustainable use of biological diversity into relevant sectoral policies or cross-sectoral plans and programmes</p> <p>“(6) The Central Government shall involve the National Biodiversity Authority or State Biodiversity Boards to undertake measures for conservation and sustainable use of biological diversity or associated traditional knowledge thereto.</p>	<p>sustainable use of biological diversity or associated traditional knowledge.</p>
<p>International Commitments and strategies and</p>	<p>New addition</p>	<p>Section 36A. The Central Government may authorise National Biodiversity Authority or any other organisation to take any measures necessary to monitor and regulate within the territory of India, the access and utilisation of biological</p>	<p>Section 36A is a positive addition by the Amendment Bill since this requirement was largely lacking. The extant BD Act, 2002 made no mention of the biological resources sourced from foreign countries which fall under the obligations of all Member States who are signatories to the Nagoya Protocol.</p>



<p>plans for conservation and sustainable use of biological diversity</p>		<p>resources obtained from a foreign country in order to meet the international obligations to which India is a signatory.</p> <p>36B. (1) The State Government shall develop strategies, plans, programmes for the conservation and promotion and sustainable use of biological diversity, including measures for identification and monitoring of areas rich in biological resources, promotion of in situ and ex situ conservation of biological resources, including cultivars, folk varieties and landraces, incentives for research, training and public education to increase awareness with respect to biodiversity, in conformity with the national strategies, plans and programmes.</p> <p>(2) The State Government shall, as far as practicable, wherever it deems appropriate, integrate the conservation, promotion and sustainable use of biological diversity into relevant sectoral policies or cross-sectoral plans and programmes.”</p>	<p>Section 36B introduced by the Amendment Bill may be seen as the provisions that seeks to make good the deletion of the word ‘promotion’ of biological resources to be achieved through the utilization of NBA, SBB and BMC funds. This new provision seeks to give additional roles to the State Government in conservation and promotion and sustainable use of biological diversity something that was earlier the sole responsibility of the Central Government.</p>
<p>Biodiversity Heritage Sites</p>	<p>37(1) Without prejudice to any other law for the time being in force, the State Government may, from time to time in consultation with the local bodies, notify</p>	<p>37“(1) Without prejudice to any other law for the time being in force, based on the recommendations of the State Biodiversity Board, the State Government</p>	<p>The proviso added to the section 37(1) makes it mandatory for the SBBs to consult the local bodies and the BMCs before declaration of biodiversity heritage sites thereby mainstreaming their role in important aspects of</p>



	<p>in the Official Gazette, areas of biodiversity importance as biodiversity heritage sites under this Act.</p>	<p>may, from time to time, notify in the Official Gazette, areas of biodiversity importance as biodiversity heritage sites under this Act:</p> <p>Provided that the State Biodiversity Board shall consult the local body and the Biodiversity Management Committee concerned before making such recommendations.”;</p> <p>Addition of Section 59 A which exempted companies from special provision of the principal Act</p>	<p>decision making.</p>
<p>Section 40 – Normally Traded as Commodities</p>	<p>Notwithstanding anything contained in this Act, the Central Government may, in consultation with the National Biodiversity Authority, by notification in the Official Gazette, declare that the provisions of this Act shall not apply to any items, including biological resources normally traded as commodities.</p>	<p>Notwithstanding anything contained in this Act, the Central Government may, in consultation with the National Biodiversity Authority, by notification in the Official Gazette, declare that all or any of the provisions of this Act shall not apply to biological resources when normally traded as commodities or to the items derived from them, including agricultural wastes, as notified and cultivated medicinal plants and their products for entities covered under section 7, registered as per the regulations made or as prescribed:</p> <p>Provided that no exemption shall be made for the activities referred to in sub-</p>	<p>Amendment to Section 40 has expanded the list of commodities which are normally traded by adding agricultural wastes, medicinal cultivated plants, etc to its list. No exemptions for these commodities could be mandated under Section 6 (1) and (2) (Application for intellectual property rights not to be made without approval of National Biodiversity Authority).</p> <p>This provision further dilutes the categories of biological resources that come within the purview of the Act and the resources for which the benefit sharing requirement would apply.</p>



		sections (1) and (2) of section 6.	
BMC at the intermediate level	Section 41 (1): Every local body shall constitute a Biodiversity Management Committee within its area for the purpose of promoting conservation, sustainable use and documentation of biological diversity including preservation of habitats, conservation of land races, folk varieties and cultivars, domesticated stocks and breeds of animals and microorganisms and chronicling of knowledge relating to biological diversity.	Section 41 (1): Every local body at the Gram Panchayat level in the rural areas and at the Nagar Panchayat or Municipal Committee or Municipal Corporation level in the urban areas shall constitute a Biodiversity Management Committee (by whatever name called) within its area for the purpose of promoting conservation of landraces, folk varieties, farmers' varieties, and cultivars, domesticated stocks and breeds of animals and microorganisms and chronicling of knowledge relating to biological diversity sustainable use and documentation of biological diversity. Provided that the State Government may constitute Biodiversity Management Committees at the intermediate or district Panchayat level for achieving the objectives of this Act. (1A) The functions of Biodiversity Management Committee so constituted shall include conservation, sustainable use and documentation of biological diversity, including conservation of habitats,	The amendment proposed has added clarity about the different levels at which BMCs are to be constituted. Further, the possibility of establishing BMCs at the intermediate level can also be seen as a positive move since it could increase the coverage of authorities which in turn could mean greater coverage of areas from where biological resources could be sourced; eventually leading to conservation of biodiversity including restoration of areas and socio-economic development of the community.



		landraces, folk varieties, cultivars, domesticated breeds of animals, and microorganisms, and chronicling of associated traditional knowledge thereto relating to biological diversity. (1B) The composition of the Biodiversity Management Committee shall be such as may be prescribed by the State Government: Provided that the number of members of the said Committee shall not be less than seven and not exceeding eleven.	
Annual Statement and Audited Accounts – BMC	45. The person holding the custody of the Local Biodiversity Fund shall prepare, in such form and during each financial year at such time as may be prescribed, its annual report , giving a full account of its activities during the previous financial year, and submit a copy thereof to the concerned local body	45. The custodian of the Local Biodiversity Fund shall prepare, in such form and during each financial year at such time as may be prescribed by the State Government, its annual statement giving a full account of its activities during the previous financial year, and submit the same to the local body concerned with a copy to the State Biodiversity Board.	According to the amended Section 45, there is change in the extent of accountability of the Biodiversity Management Committees. In the earlier provision, there was just a need of an annual report giving a full account of the activities undertaken by the local body. In the amended Section, there is a need for annual statement of accounts to be furnished in addition to the list of activities undertaken. This again seems to be a positive addition, since introducing financial accountability would improve performance of the BMCs, give an overview of the beneficiaries reached out, provide oversight and ensure that there is no misappropriation of the local funds.
Execution of determination or order	Every determination of benefit sharing or order made by the National Biodiversity Authority or a State Biodiversity Board under this Act or the order made by the High Court in any	In section 53 of the principal Act, (ii) after the words “order made by the High Court”, the words “or the National Green Tribunal” shall be inserted;	The amendment to this Section includes the insertion of the National Green Tribunal to the clauses of this Section. Thus, the execution of determination or order may also come from the National Green Tribunal.



	<p>appeal against any determination or order of the National Biodiversity Authority or a State Biodiversity Board shall, on a certificate issued by any officer of the National Biodiversity Authority or a State Biodiversity Board or the Registrar of the High Court, as the case may be, be deemed to be decree of the civil court and shall be executable in the same manner as a decree of that court.</p>	<p>(iii) after the words “Registrar of the High Court”, the words “or the Registrar of the National Green Tribunal” shall be inserted;</p>	
<p>Penalties - 55</p>	<p>55(1) Whoever contravenes or attempts to contravene or abets the contravention of the provisions of section 3 or section 4 or section 6 shall be punishable with imprisonment for a term which may extend to five years, or with fine which may extend to ten lakh rupees and where the damage caused exceeds ten lakh rupees such fine may commensurate with the damage caused, or with both.</p> <p>(2) Whoever contravenes or attempts to contravene or abets the contravention of the provisions of section 7 or any order made under sub-section (2) of section 24 shall be punishable with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.</p>	<p>55. If any person or entity covered under sub-section (2) of section 3 or section 7 contravenes or attempts to contravene or abets the contravention of the provisions of clauses (a) and (b) of sub-section (1) of section 3 or section 4 or section 6 or section 7, such person shall be liable to pay penalty which shall not be less than one lakh rupees, but which may extend to fifty lakh rupees, but where the damage caused exceeds the amount of penalty, such penalty shall be commensurate with the damage caused, and in case, the failure or contravention continues, an additional penalty may be imposed, which shall not exceed one crore rupees and such penalty shall be decided by the adjudicating officer appointed under section 55A.</p>	<p>The earlier distinction in penalty is based on the kind of violator - Indian or foreign entities and the nature of provision contravened has been done away with.</p> <p>The Bill has also introduced a minimum penalty of one lakh which was missing in the principal Act.</p> <p>However, the introduction of an adjudicatory officer to decide on penalties could dilute the penal provisions of the Act.</p>



<p>Adjudication of penalties – Section 55 A</p>	<p>New provision</p>	<p>55A (1) For the purposes of determining the penalties under section 55, the Central Government may appoint an officer not below the rank of Joint Secretary to the Government of India or a Secretary to the State Government to be the adjudicating officer, to hold inquiry in the prescribed manner and to impose the penalty so determined:</p> <p>Provided that the Central Government may appoint as many adjudicating officers as may be required.</p> <p>(2) While holding an inquiry, the adjudicating officer shall have power to summon and enforce the attendance of any person acquainted with the facts and circumstances of the case to give evidence or to produce any document, which in the opinion of the adjudicating officer, may be useful for, or relevant to, the subject-matter of the inquiry and if, on such inquiry, he is satisfied that the person concerned has failed to comply with the provisions of clauses (a) and (b) of subsection (1) of section 3 or section 4 or section 6 or section 7, he may impose such penalty as he thinks fit in accordance the provisions of section 55:</p> <p>Provided that no such penalty shall be</p>	<p>The introduction of adjudicating officers who are to be appointed by the Central or State Government from the ranks of bureaucrats could bring into question the fairness of the adjudicatory process.</p> <p>Concerns are bound to be raised especially since the Government is trying to favour Indian systems of medicine, has brought in several exemptions to BRs covered under the Act. Having an adjudicator from the executive could create conflict of interest, especially when the application for access to biological resources would also be considered an evaluated by the NBA and the SBBs that have a strong presence of officers from the executive wing of the government.</p> <p>Further, having officers of the ranks of Joint Secretary and Secretary who are already overburdened with other responsibilities to conduct inquiries and then decide whether provisions of the Act have been complied with or not seems preposterous.</p>
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		<p>imposed without giving the person concerned an opportunity of being heard in the matter.</p> <p>(3) Any person aggrieved by the order made by the adjudicating officer under sub-section (2) may prefer an appeal to the National Green Tribunal established under section 3 of the National Green Tribunal Act, 2010.</p> <p>(4) Every appeal under sub-section (3) shall be filed within sixty days from the date on which the copy of the order made by the adjudicating officer is received by the aggrieved person.</p> <p>(5) The National Green Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such order as it thinks fit, confirming, modifying or setting aside the order appealed against.</p>	
<p>Power to enter, inspect, survey, etc- Section 55 B</p>	<p>New Provision</p>	<p>55B Any authority or officer empowered by the Central Government may, for the purposes of carrying out inspection, survey or any such activity, have all or any of the following powers, namely: —</p> <p>(a) the power to enter upon any land, vehicle, or premises and to inspect, investigate, survey, and collect</p>	<p>Such powers have already been given to other authorities under other environmental statutes and this can also be perceived as a positive addition to the Act.</p>



		<p>information and make a map of the same and seize the materials and records;</p> <p>(b) the powers of a civil court to compel the attendance of anyone, including witnesses and production of documents and material objects;</p> <p>(c) the power to issue a search-warrant;</p> <p>(d) the power to hold an inquiry and in the course of such inquiry, receive and record evidence;</p> <p>(e) such other power as may be prescribed.</p>	
Offences to be cognizable and non-bailable	58. The offences under this Act shall be cognizable and non-bailable	Section 58 of the principal Act shall be omitted .	This amendment if incorporated could serve a heavy blow to the penal provisions which are already being sought to be diluted.
Cognizance of offences - Section 61	<p>No Court shall take cognizance of any offence under this Act except on a complaint made by-</p> <p>(a) the Central Government or any authority or officer authorized in this behalf by that Government; or</p> <p>(b) any benefit claimer who has given notice of not less than thirty days in the prescribed manner, of such offence and of his intention to make a complaint, to</p>	<p>(a) in the opening portion, for the word “complaint”, the words “written complaint” shall be substituted;</p> <p>(b) in clause (b), for the words “any benefit claimer”, the words “any person or a benefit claimer” shall be substituted.</p>	<p>Persons other than benefit claimers have also been added to the list of persons who can institute complaints.</p> <p>While this provision is comparable to Section 19 of the Environment Protection Act, 1986, the infrequent use of section 19 bears testimony that such provisions have seldom served their purpose. Further, the benefit claimers and other persons do not get to directly file complaints but have to route it through the Central Government or authorized officers who may or may not decide to pursue the matter.</p>



	the Central Government or the authority or officer authorized as aforesaid.		
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The Biological Diversity Amendment Bill 2021 has been introduced to facilitate trade and enhanced use of biological resources as opposed to the promotion of biological diversity. The 2002 Act has greatly focused on access to biological resources, thus failing to take into account the collective opinion of the local community that is affected. The Amendment Bill does little to improve community participation in the decision making processes under the Act. Further, the principal Act of 2002 does not specify the over-riding effect on the existing laws on wildlife and forests, and thus creating ambiguity as to which law will prevail over the others in the instance of a dispute. This especially holds true when biological resources are sourced from forests. The (Amendment) Bill has failed to clarify this.

The Amendment Bill might enable corporate interests to trump public concerns, and the development of exclusive rights would stymie the delivery of a wide range of products, such as medicine, and conservation of biodiversity, and ecological sustainability. Despite its abundance of medicinal herbs, India falls behind in finding medicinal plants for novel medication discovery, which is linked to a lack of research and development expenditure. The private sector's use of traditional knowledge and the relaxation of benefit-sharing rules for the encouragement of Indian medicine could result in indiscriminate use of biological resources. Current and future policies must promote the conservation of biodiversity and related cultural traditions as opposed to commercialization by a few corporate enterprises.

While the Amendment Bill seeks to bring about some positive changes, additions which are particularly disconcerting are the exemptions granted to practitioners of Indian medicine, the exclusion of several categories of biological resources from the ambit of the Act, the dilution of the criminal sanctions; the missing voice of the local communities from the prior informed consent procedure and the mutually agreed terms and conditions of benefit sharing and the conspicuous lack of emphasis on "promotion" of biological resources. The extant Biological Diversity Act, 2002 has its share of loopholes, but amending it to incorporate the changes proposed by the 2021 Bill would be similar to throwing the baby out with the bathwater.



THE BIOLOGICAL DIVERSITY (AMENDMENT) BILL, 2021

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I have looked at THE BIOLOGICAL DIVERSITY (AMENDMENT) BILL, 2021 and see just one problem. In section 41 of the principal Act for sub-section (1) as also in sub-section (2), for the words “and knowledge associated with such resources”, the words “or associated traditional knowledge thereto” shall be substituted. I believe this is inappropriate since knowledge is not stagnant and it is not as if people do not possess any knowledge other than the so-called traditional knowledge. Moreover, it is often impossible to define what is traditional and what is not. In fact, the knowledge of local people is a conglomeration of what may be traditional and what is experiential, i.e. generated through day-to-day experiences while pursuing their livelihoods. As an example, the knowledge of insecticidal properties of neem leaves can be considered as traditional knowledge. At the same time, I have heard people report that the bark of *Acacia auriculiformis*, an exotic newly introduced plant, has similar insecticidal properties. This knowledge may be of value to them and there is no case for disregarding it.

There are other serious problems with implementation of the Biological Diversity Act. The original intention of the Act was to empower people to be involved in management of their own ecosystems as stipulated in the ecosystem management principles of the Rio de Janeiro Convention on Biological Diversity. This has been totally sabotaged with the rules promulgated in 2004 and through the whole operation of State and National Biodiversity Authorities dominated by anti- people Forest Department by exclusively emphasizing access and benefit sharing. It is this that needs to be changed.

Reprehensible implementation of Biological Diversity Act 2002

The objectives of the Convention on Biological Diversity (CBD) included conservation, sustainable use, and equitable sharing of benefits. The convention emphasised the importance of the pertinent knowledge and traditions of local communities and resolved that they should be given an important role in the follow-up activities. India was one of the first nations to sign the CBD and commit to enacting a national Biological Diversity Act to implement the objectives of the convention.

The Convention on Biological Diversity is guided by six principles of ecosystem management: (1) The objectives of management of land, water and living resources are a matter of societal choice; (2) Management should be decentralised to the lowest appropriate level; (3) Ecosystem managers should consider the effects (actual or

potential) of their activities on adjacent and other ecosystems; (4) Recognising potential gains from management, there is usually a need to understand and manage the ecosystem in an economic context; (5) Conservation of ecosystem structure and functioning, in order to maintain ecosystem services, should be a priority target of the ecosystem approach, and (6) Ecosystems must be managed within the limits of their functioning.

As a party to CBD, India enacted the Biological Diversity Act (BDA) 2002. Aligning itself to the CBD guidelines, the BDA incorporated the provision that every local body would “constitute a Biodiversity Management Committee within its area for the purpose of promoting conservation, sustainable use and documentation of biological diversity including preservation of habitats, conservation of land races, folk varieties and cultivars, domesticated stocks and breeds of animals and microorganisms and chronicling of knowledge relating to biological diversity”. The documentation to fulfil these objectives would be in the form of People’s Biodiversity Registers.

It should be stressed that the documentation is meant to serve as a basis of promoting conservation and sustainable use of biological diversity including preservation of habitats and is not merely for its own sake. Through its empowerment of BMCs, the BDA actualises four of the six CBD principles of ecosystem management listed earlier: decentralisation, conservation of ecosystem structure and functioning to maintain ecosystem services, clear expression of societal choices, and consideration of the economic context. Besides its role in ecosystem management, a BMC is authorised to collect a fee from any person for accessing or collecting any biological resource for commercial purposes from areas falling within its territorial jurisdiction.

However, the rules formulated by the Government of India two years later, in 2004, blatantly violate the CBD guidelines that India is honour-bound to adhere to as a signatory to the Convention. The rules state:

The main function of the BMC is to prepare People’s Biodiversity Register in consultation with local people. The Register shall contain comprehensive information on availability and knowledge of local biological resources, their medicinal or any other use or any other traditional knowledge associated with them. ... The other functions of the BMC are to advise on any matter referred to it by the State Biodiversity Board or Authority for granting approval, to maintain data about the local vaid and practitioners using the biological resources. ... The Authority shall take steps to specify the form of the People’s Biodiversity Registers, and the particulars it shall contain and the format for electronic database. ... The Authority and the State Biodiversity Boards shall provide guidance and technical support to the Biodiversity Management Committees for preparing People’s Biodiversity Registers. ... The People’s Biodiversity Registers shall be maintained and validated by the Biodiversity Management Committees. ... The Committee shall also maintain a Register giving information about the details of the

access to biological resources and traditional knowledge granted, details of the collection fee imposed, and details of the benefits derived and the mode of their sharing.

The rules thus nullify any role of BMCs in ecosystem management, in violation of the CBD Guidelines. All that the BMCs are now asked to do is to record information in the People's Biodiversity Registers. The Registers are still to be maintained and validated by the BMCs, and they are still authorised to impose fees for collection of both resources and knowledge.

One of the many serious problems that the rules pose concerns intellectual property rights. A People's Biodiversity Register is supposed to be the property of the concerned Biodiversity Management Committee, which should decide on the material to be made public. In particular, the committee may not wish to make public the community knowledge of the medicinal uses and properties of biological resources. However, the rules do not provide for the protection of such information.

Thus the rules framed in 2004 effectively destroyed the motivation of people to institute Biodiversity Management Committees and to prepare People's Biodiversity Registers. Other devices were also deployed to disempower them. For instance, it was stipulated that the local gramsevak or forester be appointed as the secretary of the BMC. People distrusted these government functionaries and were reluctant to allow them to take charge. As is to be expected, therefore, the BMCs were either never constituted or if constituted remained meaningless. Yogesh Gokhale, who works for The Energy and Resources Institute (TERI) and is responsible for a number of projects throughout the country, informed me in early 2021 that while, as a result of the 2016 public interest litigation (see below), BMCs have been quickly formed on paper in all local bodies throughout the country, he believes that all of them exist only on paper. My friends from many states – Maharashtra, Karnataka, Kerala, Tamil Nadu, Andhra Pradesh, Odisha, Jharkhand, West Bengal, Rajasthan, Madhya Pradesh, Himachal Pradesh, Bihar – have informed me that where BMCs were supposedly constituted, none of the members listed on paper had any idea that they were members of such a committee, nor any notion as to what the committees were expected to do. The Secretary of Goa Biodiversity Board was an exception and in that state several BMCs were constituted and prepared meaningful PBRs. Some of these were in fact used by the local communities to try to resist interventions that adversely affected local biodiversity resources.

Around 2016 Shri Chandra Bhal Singh, an environmental activist from Pune, approached National Green Tribunal (NGT), which is meant to handle expeditious disposal of cases relating to environmental issues, with a request that steps must be initiated to rectify this deficiency. In response the NGT ordered that BMCs should be set up and PBRs prepared in all local bodies in the country by early 2020, failing which the delinquent panchayats would have to pay substantial fines. Nothing was done for a few years and then in 2019 a sham began to be enacted. While PBRs have to be prepared by the concerned local bodies themselves, there was no attempt to involve them in any

way; instead outside agents, some of them competent scientists, but also many others who are experts at preparation of bogus EIAs, were commissioned to prepare the material and submit it to the state biodiversity authorities – which are under the tight control of the anti-people Forest Department.

Two of the outside experts so employed, and who were attempting to do an honest job, had been my PhD students and shared their experiences with me. Amit Setiya had prepared PBRs for four panchayats with a grant from a German aid agency. These were genuine PBRs prepared with the involvement of the local residents and were in the public domain with the consent of the concerned gram sabha. Several outside agencies participating in the spree of preparing PBRs for submission to the NGT simply copied from these four PBRs and submitted them as their own. Other so-called PBRs were prepared by gramsevaks in a most arbitrary fashion.

M.D. Subash Chandran was another outside expert employed to generate the PBRs for submission to NGT. He had himself worked for many years with local panchayats and was able to prepare a number of PBRs based on earlier data. Nevertheless, he reported that none of the BMCs were shown the PBRs supposedly prepared in their names. He stated that the PBRs of the gram panchayats of Kumta taluk, Sirsi taluk and Ankola taluk were done by various other agencies and submitted to the DCF Social Forestry, Karwar, who sent copies to the Karnataka State Biodiversity Board.

The Secretary of Goa Biodiversity Board was not aware of this process under way following the NGT order. He informed me that none of the Board's genuine PBRs were used for this purpose and apparently outside experts had prepared some bogus PBRs that were sent on to the NGT to report compliance.

Finally, H.S. Pabla, a retired Indian Forest Service official, informed me that in his state of Madhya Pradesh the PBRs were not prepared by the villagers (or in consultation with them). Instead, they were prepared hurriedly by some young consultants on the basis of secondary information.

Nevertheless, all these bogus PBRs have been put on record and the compliance report has been accepted by the NGT. This is wholly deplorable.

[An alternative democratic set up to manage India's Biodiversity](#)
Our constitution and various acts provide space for a democratic pro-people, pro-

knowledge, pro-nature framework for nurturing our biodiversity to replace the current Forest Department dominated set-up which is patently anti-nature, undemocratic, and anti-people.

The 73rd and 74th constitutional amendments provide for ward / grama sabha level citizens groups to prepare environmental status reports. These reports could incorporate information on the local biodiversity elements as well as their ecosystems. These ward / grama sabha level Reports would be amalgamated to constitute Panchayat / NagarPalika / MahanagarPalika level reports. The Biological Diversity Act (BDA) provides for the constitution of Biodiversity Management Committees (BMC) at the level of local bodies, namely, Panchayats / NagarPalikas / MahanagarPalikas. The Act leaves the choice of the number and identity of the members of BMC to the local citizens. Therefore, the BMCs of the various local bodies would constitute the first tier of a democratic system for management of biodiversity in the country. The set of these members could elect the members at successively higher levels, namely, as members of district level, state level the national biodiversity authorities. The higher-level authorities would coordinate the functioning of their constituents. Such a democratically constituted National Biodiversity Authority would then serve to interact at the international level. At all levels the BMCs and Biodiversity Authorities would have administrators serving them to carry out secretarial functions, but not exert any authority. Such a set-up would nurse back our biodiversity heritage to a healthy state.