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COMMENTS ON THE BIOLOGICAL DIVERSITY (AMENDMENT) BILL, 2021

Submission to
The Joint Committee on The Biological Diversity (Amendment) Bill 2021
Parliament of India

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Cover Image: Local villagers going to collect minor forest produce in the forests of Buxa Tiger Reserve (West Bengal), Photo: Debadityo Sinha

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EXECUTIVE SUMMARY AND INTRODUCTION

The Biological Diversity (Amendment) Bill, 2021 (**"the Bill"**) was tabled in the Lok Sabha on 16th December 2021, by the Union Minister of Environment, Forest and Climate Change. The Bill was referred to the Joint Committee of Parliament, which invited suggestions from various stakeholders within 15 days from16th January 2022.

One of the most prominent improvements brought in by the proposed amendment is the acknowledgement of the *Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from their Utilisation, 2010* (**"Nagoya Protocol"**), in addition to the parent convention i.e., the Convention on Biological Diversity (**"CBD"**). The Bill also proposes increased involvement of local bodies in certain provisions. For instance, the proposed amendment to section 37 of the Biological Diversity Act, 2002 ("the Act") now mandates the State Biodiversity Boards (**"SBBs"**) to consult the concerned local bodies and the biodiversity management committee (**"BMC"**) before making recommendation for notifying areas of biodiversity importance as Biodiversity Heritage Sites. Amendment of the section 32(2)(e) of the **the Act** further empowers the BMCs to seek grants or loans from the State Biodiversity Funds.

Adding definitions for certain important terms such as 'access' adds greater clarity as it specifically includes '*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*' within its meaning. Replacing the term 'equitable' wherever used in the Act with the term 'fair and equitable' is another welcome addition to the Act.

Although it does bring clarity in certain aspects, our analysis also indicates that the Bill proposes significant relaxations in regulation of biological resources and the associated knowledge. Several amendments proposed in the Bill create more confusion and lack clarity, leaving adequate scope for wide interpretation and assumptions which may defeat the original intent of the Act.

This document provides a detailed analysis of the major amendments proposed and how they fare against the original provisions under the Act as well as India's obligations under the Nagoya Protocol. This document not just highlights the shortcomings in the Bill but also provides suggestions to improve the language, wherever possible and points out the importance of retaining the existing provisions. A summary of the issues touched upon by this submission is provided below.

In the first chapter, we have highlighted the ambiguity created by deleting the term 'bio-utilisation' in the sense that whether access to biological resources or associated knowledge for purposes of bio-utilisation will be regulated if these amendments come to force. Chapter 2 comments on the restricted scope of entities which need prior approval from the National Biodiversity Authority (**"NBA"**) and the various legal consequences arising from the same. In chapter 3, we analyse the consequences of the amendments which exclude holders of codified traditional knowledge from the definition of benefit claimers. We have also discussed the obligations under the CBD and Nagoya Protocol, and the legal precedents set by the Indian judiciary on sharing of benefits with conservers of biological resources and holders of associated knowledge. The chapter 4 deals with amendments which exempt practitioners of Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy (AYUSH) medicine from taking prior permission from the SBBs and its implications on fair and equitable sharing of benefits with local and indigenous communities. In chapter 5, we have highlighted the amendments to the provision which deal with the transfer of biological resources or associated knowledge and the legal implications which arise from the same. Chapter 6 analyses the proposed amendments to section 40 which exempts certain biological resources from the ambit of the Act. We highlight how the proposed amendments have widened the scope of these exclusions and how such changes conflict with established legal precedent. In Chapter 7, we deal with the amendments regarding constitution and functioning of regulatory institutions created under the Act. One of the important commentaries is on how the amendments curtail the independent decision-making ability of these authorities. In Chapter 8, we lay out concerns with the proposed amendments to the provisions related to offences, especially on the omission of imprisonment for offences, and the absence of crucial guidance to the executive, with respect to the nature of offenses thereunder. With the help of illustrations, we raise concerns that the deterrent effect of the Act would be reduced.

Lastly, we offer some additional comments with respect to potential conflicts with the National Green Tribunal Act, 2010 on the issue of limitation, inadequate oversight of Section 7 entities under the Biological Diversity Act, widening of the scope of the term 'biological resources' and internal disconnects within the Act as it is proposed to be amended.

2 Comments on The Biological Diversity (Amendment) Bill, 2021

1. AMBIGUITIES DUE TO REMOVAL OF THE TERM 'BIO-UTILIZATION'

Under the Section 2(d) of the Biological Diversity Act, 2002 (**"the Act"**) the term 'bio-utilisation' was covered under the term 'bio-survey and bio utilisation' and was defined as follows:

> *"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".*

The Biological Diversity (Amendment) Bill, 2021 (**"the Bill"**) however has narrowed down the scope of this clause and it now only covers 'bio-survey' and removed the term 'and bio-utilization'. The amended Section 2(d) now reads as the follows:

> *"bio-survey" means survey or collection of any taxa, varieties, genes, components and extracts of biological resource for any purpose".*

However, the Bill has inserted a definition of the term 'access' at section 2(a). This was not covered under the Act. The proposed definition of access is provided as follows:

> *"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."*

Thus, the proposed amendment creates an ambiguity whether access of biological resources (or associated traditional knowledge) for the purposes of characterisation, inventorisation and bioassay, as originally included in the Act, would be regulated anymore. One way to resolve the ambiguity can be to amend the current definition of 'research' in section 2(m) which is as follows:

> *"research" means study or systematic investigation of any biological resource or technological application, that uses biological systems, living organisms or derivatives thereof to make or modify products or processes for any use."*

We recommend including the *terms characterisation, inventorisation and bioassay* in the above definition of 'research' to ensure that such purposes are still regulated by the Act.

2. AMBIGUITIES DUE TO AMENDMENT OF SECTION 3(2)(c)(ii)

The Bill has modified the scope of section 3(2) which requires certain persons and entities to obtain a prior approval from the National Biodiversity Authority (**"NBA"**) for accessing biological resources or associated traditional knowledge. Specifically, under Section 3 (2)(c)(ii) of the Act, body corporate or associations or organisations incorporated or registered in India having non-Indian participation in share capital or management required prior authorisation from the NBA.

The Bill replaces these entities with body corporates or associations or organisations which are incorporated or registered in India but is a 'foreign-controlled company'. The Bill further adds that 'foreign controlled company' means *a foreign company within the meaning of the clause Section 2(42) Companies Act, 2013 which is under the control of a foreigner*. According to section 2(42) of the Companies Act, 2013, a 'foreign company is defined as follows:

> *"foreign company" means any company or body corporate incorporated outside India which— (a) has a place of business in India whether by itself or through an agent, physically or through electronic mode; and (b) conducts any business activity in India in any other manner*

Therefore, to qualify as a foreign company, the basic condition is that it needs to be incorporated outside India. By implication, a foreign controlled company will then have to be incorporated outside India as well. Given this interpretation, sub-clause (ii) of clause (c) of section 3(2) will then completely read as:

> *a body corporate, association or organisation incorporated or registered in India under any law for time being in force, which is incorporated outside India which either has a place of business……which is under the control of a foreigner.*

This creates confusion and ambiguity about how a company which is incorporated or registered in India, also be incorporated outside India (to qualify as a foreign company, and therefore as foreign controlled).

To avoid the confusing interpretation as shown above, we suggest that there is no need to amend the particular provision as such. If the intention is to streamline the provisions with the Companies Act, 2013, then the explanation of 'foreign controlled company' in the Bill should

be replaced by giving reference to the meaning of the term 'control' as used in section 2 (27) of the Companies Act, 2013 which states that:

> *"control" shall include the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner;*

The negative implication of the proposed amendment in Section 3(2) of the Act is discussed in detail in the following sections.

A. Curtailing of Regulatory Powers of Statutory Authorities Created Under the Biological Diversity Act, 2002

Under section 3 of the Act, entities incorporated or registered in India having non-Indian participation in share capital or management would require a prior approval from the NBA for accessing biological resources. This was an important provision.

The NBA had used this provision to take legal action against the Maharashtra Hybrid Seed Company (**"MHSC"**) when they obtained indigenous varieties of Brinjal (for development of *Bt. Brinjal*) without taking prior authorisation.[1] 26% of MHSC's ownership lay with the Monsanto Co (which is an American Corporation), even though is registered as a company under Indian law.[2] The same provision was also used by Andhra Pradesh's State Biodiversity Board (**"SBB"**) to seek royalty payments from Monsanto India (of which 72% is owned by Monsanto Co) for developing *Bt. Cotton*. The Board had complained to the NBA that the bacterial genetic information used by the company to develop the Bollworm resistant cotton seeds relates to *Bacillus thuringiensis (Bt.)* bacteria found in the soils of Mahanadi village in Kurnool district. [3] Since this genetic information was indigenous to Andhra Pradesh, the SBB contended that Monsanto India was liable to share benefits with the State of Andhra Pradesh.[4]

If the proposed amendment to Section 3(2)(c)(ii) of the Act comes into force, these companies may argue that they do not fall within the regulatory purview of Section 3, since they are not 'foreign controlled companies' under Section 2(42) of the Companies Act, 2013. Therefore, such companies which are majorly invested in research and development (**"R&D"**) in India may assume themselves exempted from the Act of 2002, making them unaccountable to communities and the NBA, as intended by the Act. Further, the decisions taken by the NBA and Andhra Pradesh SBB against such Multi-National Companies (**"MNCs"**) incorporated in India would also be impacted by the proposed amendments.

B. Lack of Regulatory Oversight Prior to Commercialization

Under section 6 of the Act, any person or entity that is desirous of obtaining an Intellectual Property Right (“**IPR**”) will have to take prior permission from the NBA. This will include all companies registered under Indian laws, regardless of whether they have Indian or non-Indian participation in their share capital ownership or management. However, under the Amendment Bill, such permissions are only required for those covered under section 3(2).

As mentioned above, the proposed amendment to Section 3(2) of the Act creates confusion and ambiguity regarding the entities which would be included within its scope. Hence, many entities, for instance, subsidiaries of MNCs incorporated in India, may now be considered as Section 7 entities, which only come under regulation in cases of access to bioresources or knowledge associated with them for commercial utilization.

As per the proposed Section 6(1A), such Section 7 entities merely need to register with the NBA before the grant of IPR, as opposed to seeking the NBA’s permission. These entities will only have to seek permits at the time of commercial utilization of IPRs, as per proposed Section 6(1B).

A combined reading of the proposed amendments to Section 6 and Section 7 indicates that many entities would now be able to secure IPRs and conduct scoping, research, and development without any regulatory oversight, beyond a need for ‘registration’ with the NBA.

At the pre-commercialisation stage, IPRs can incentivise pharmaceutical companies to increase their spending on conducting R&D operations. R&D can form the very basis for conceiving high valued products which may be used for activities which fall beneath the threshold of proposed amendments to Section 6, which only requires permission by the NBA or SBBs at the final commercial stage of product development.

Therefore, the legislature must consider regulatory oversight even at a pre-commercialization stage, including where IPRs are secured by companies.

C. No Oversight on Sharing and Transfer of Knowledge for Multinational Company Subsidiaries Incorporated in India

Under section 4 of the Act any person or entity (foreign or domestic) who is desirous of transferring results of research on biological resources (or associated traditional knowledge) to a person mentioned in section 3(2) would require prior approval from NBA. However, if the

proposed amendments come to force, this prior authorisation will not be required if the person or entity transfers or shares their research results to a company which though is registered in India but has non-Indian participation in its share capital or management. This is because such companies are not covered under section 3(2) as per the proposed amendment. Using these new provisions, any researcher can share their research results with MNCs with subsidiaries incorporated in India without seeking prior authorisation. These entities can further use it for conceiving more genetically modified agricultural products without any regulatory oversight.

Thus, we suggest that the provisions under Section 3(2)(c)(ii) of the Act must be retained. The said provision may only be amended for better clarity and not imply exemptions as discussed above.

3. EXEMPTION OF 'CODIFIED TRADITIONAL KNOWLEDGE ONLY FOR INDIANS'

The World Intellectual Property Organization ("**WIPO**") defines codified traditional knowledge as *"traditional knowledge, which is in some systematic and structured form, in which the knowledge is ordered, organized, classified and categorized in some manner."*[5]

Under the present Act, access to traditional knowledge is regulated without any distinction of being codified or otherwise. However, the Bill provides for certain exemptions with respect to *'codified traditional knowledge only for Indians'*. Section 2(aa) of the Bill excludes holders of "*codified traditional knowledge only for Indians*", from the definition of "benefit claimers". This exclusion is problematic.

The Act was promulgated to give effect to the objectives of the Convention for Biological Diversity (**"CBD"**) as is clear from a bare reading of its statement of objects and reasons. It is important to note that neither the CBD nor the Nagoya Protocol on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising from their Utilisation, 2010 (**"Nagoya Protocol"**) distinguish between codified and uncodified traditional knowledge. They emphasize on the need to respect and preserve the traditional knowledge regardless of whether it is codified or uncodified.

Codified Traditional Knowledge includes traditional medicine, agricultural or environmental knowledge systems which have been codified in ancient scriptures and have been passed on from generation to generation based on those scriptures.[6] Such traditional knowledge can be particularly valuable to companies who can use it to guide them to plants, animals and microbes that are already known to indigenous and local communities for having useful properties.[7] If holders of codified traditional knowledge are no longer seen as benefit claimers, it can lead to situations where this knowledge is used for developing commercial products, without obtaining consent or sharing the benefits of such utilisation with the local communities.

Under section 7 of the Act, it is mandatory for Indian companies to obtain a prior permission from the relevant SBB for accessing biological resources or associated traditional knowledge. This provision as it exists, applies regardless of the knowledge concerned being codified or uncodified. However, under the proposed amendments, the prior authorisation from the relevant SBB is not required if the traditional knowledge in question is codified. Once these amendments come into force, pharmaceutical companies registered in India will be able to use such traditional knowledge for manufacturing high valued drugs without seeking prior

authorisation from the state boards. Further, since they will not require an approval, it will not be mandatory for them to share benefits arising out of such utilization.

Further, as a matter of policy, removing 'codified traditional knowledge' from the scope of the term 'benefit claimers' does not connect in any way to the intention behind the Act of 2002, which is to ensure fair and equitable benefit sharing (**"FEBS"**), and is liable to judicial scrutiny on that ground alone. The mandate of FEBS with traditional knowledge holders has also been recognized as a pillar of the Act of 2002 by the Uttarakhand High Court.[8]

Hence, the Bill did not provide any reasoning of how 'codified traditional knowledge' is different from 'uncodified knowledge', and how this difference impacts the veracity of any 'claims' made by 'benefit claimers'. Even if such a distinction was deemed necessary by the legislature, it should have given clarity on the precise scope of each kind of traditional knowledge along with reasons for creating such a distinction.

There is also ambiguity with respect to the scope of the term 'only for Indians', which can lead to unintended consequences. This could entail a 'use' based standard. For instance, if a particular codification is 'used' by a foreign entity, then the benefit sharing requirement would be attracted. This is considering that only codified knowledge 'for Indians' is excluded. It could also entail codified knowledge 'understood' by Indians. For instance, codifications which are not translated in all languages in the eighth schedule of the Constitution would not be 'only for Indians'. In both possible interpretations, arriving at a specific workable standard is burdensome and time and cost intensive for the executive.

The term 'codified traditional knowledge' must be defined in the Act. The Act must also provide a list of ancient literatures under a schedule to prevent any potential misuse or conflict arising out of such a broad exemption. The Bill must also clarify the scope of the phrase 'only for Indians' introduced in proposed Section 2(aa).

4. EXEMPTION TO AYUSH PRACTITIONERS

Under section 7 of the Act, Indian individuals and corporates or associations or organisations registered in India, require an authorisation from the relevant SBBs before they obtain any biological resource. Indigenous and local communities and practitioners of indigenous medicine are exempted from the same.

The Amendment Bill, however, extends these exemptions to those practicing Ayurveda, Yoga and Naturopathy, Unani, Siddha and Homeopathy (**"AYUSH"**). The Bill, however, does not distinguish between different types of AYUSH practitioners. It does not specify whether this exemption is applicable to individual practitioners or a company, or both. The Bill further states that this exemption is for the purposes of 'sustenance' and 'livelihood'. However, in the absence of any quantifiable criteria, these terms are very subjective and open to interpretation.

Since AYUSH practitioners are exempted from taking prior authorisation from the relevant SBB, they will also not be liable to share benefits with the local and indigenous communities. It is important to note that the AYUSH Industry is dependent on medicinal plants, as it constitutes their primary raw material.[9] Given, their reliance on medicinal plants as a biological resource they have been directed by various SBBs such as Maharashtra SBB[10], Kerala SBB[11], Uttarakhand SBB[12], and Karnataka SBB[13] to comply with the Act by obtaining approvals and sharing benefits. Despite several notices, the AYUSH Industry has resisted compliance and has tried to bypass the access and benefit sharing (**"ABS"**) requirements. For example, the Central India AYUSH Drug Manufacturers Association, in December 2015 had filed a case in the Bombay High Court against the notices issued to them by Maharashtra SBB for recovery of benefit sharing. It was their contention that compliance with ABS regulations is only applicable to foreign entities and not Indian entities.[14] Similar concerns were raised by Divya Pharmacy while challenging the notices (issued to it by the Uttarakhand SBB) in the Uttarakhand High Court.[15] The Court, by relying on the provisions of the CBD and Nagoya Protocol, held that

> *"The concept of Fair and Equitable Benefit Sharing, as we have seen, is focused on the benefits for the "local and indigenous communities", and the Nagoya Protocol makes no distinction between a foreign entity and an Indian entity, as regards their obligation towards local and indigenous communities in this regard.*[16]

Thus, exempting the AYUSH Industry from the regulations under the Act not only goes against the legal precedent established in the Divya Pharmacy case, but also water down the efforts of various SBBs to ensure compliance of AYUSH manufacturers.

The proposed amendment must define the term ‘AYUSH Practitioner’ and must safeguard commercial exploitation of such exemptions which are intended to benefit local communities.

5. ALTERED SCOPE OF SECTION 20 (TRANSFER OF BIOLOGICAL RESOURCES OR ASSOCIATED KNOWLEDGE)

Section 20 of the Act deals with transfer of biological resources or associated knowledge. According to Section 20(1), persons or entities covered under section 3(2) who have already been permitted by the NBA to assess biological resources or associated knowledge for commercial utilisation or bio-survey or bio-utilisation, will have to take further permission from the NBA if they want to transfer these biological resources or associated knowledge. This permission was required regardless of who they were being shared with. The Bill however proposes the following changes.

First, the scope of section 20 itself has been amended. It now only deals with transfer of results of research on biological resources and associated traditional knowledge. This leaves the question open whether prior permission from the NBA will be required for transfer of biological resources and associated knowledge which form the basis of such research. Although section 5 refers to transfer of biological resources and associated traditional knowledge, it merely states that prior permission from NBA is not required for collaborative research projects which involve transfer of biological resources and associated traditional knowledge. This provision alone does not clarify whether the Amendment Bill will regulate the transfer of biological resources and associated traditional knowledge as such.

Second, permission from the NBA is only required when the transfer of research results is being made to persons or entities covered under section 3(2). This means that prior approval from the NBA will not be necessary, if the transfer is being made to companies incorporated in India but having foreign participation. To reiterate, these entities are not covered under the amended section 3(2) proposed in the Bill (*already discussed in Chapter 2 of this submission*).

We therefore recommend that the Bill retain provisions with respect to transfer of biological resources or associated knowledge so that such transfer is still within the regulatory oversight.

6. EXEMPTIONS UNDER SECTION 40

A. Products Derived from Biological Resources Normally Traded as Commodity

Section 40 of the Act exempts biological resources normally traded as commodities from the purview of the Act. At present, the Ministry of Environment, Forest and Climate Change (**"MoEFCC"**) in consultation with NBA, vide notification No. 1352 dated 07.04.2016[17] (read with its amendment dated 07.11.2017[18]) has notified a list of 421 biological resources to which the provisions of the Act shall not apply provided they are traded as commodities. To clarify this exemption, the 2016 notification provides:

> "*This notification is to facilitate trade of items including biological resources which are normally traded as commodities and if any of these items is intended to be used for any other purpose, the relevant provisions of the aforesaid Act shall apply.*"

It is important to point out that that even though the 2016 notification explicitly listed biological resources, and not the products derived from them, it also contains the following provision:

> *"Products that are derived from biological resources listed in the notification and traded as commodities were also treated as normally traded as commodities and in such cases, the onus of substantiation that the said products fall within common practice, shall lie on the claimant."*

Therefore, in the current regulatory framework, derived products can claim exemption from ABS, if there is proof that they are traded as a matter of common practice. For example, cultivated varieties of many medicinal and aromatic plants such as Aloe vera, Lemongrass, Neem, Brahmi and many others used in manufacturing of drugs are biological resources listed in the 2016 notification. By implication, purchase and sale of these biological resources, as it is, would be exempted from ABS. However, drugs derived from these biological resources can then be considered for exemption, subject to a proof that trade of such drugs is a common practice. Submission of proof that derived products are being traded as a common practice is not mandated under the proposed amendment. If the amendment comes to force, it leaves open the question whether drugs manufactured using listed biological resources as raw materials (Aloe vera, Lemongrass, Neem, Brahmi, and many others), will then be qualified as derived products, and therefore be exempted for complying with ABS requirements. However, there is also a need to define the term 'common practice'.

Therefore, we suggest that the Bill must provide criteria for better clarity for terms such as 'biological resources normally traded as commodities', 'common practice', and 'products derived from biological resources.

B. Exemption to Cultivated Medicinal Plants

The amendment to Section 40 now allows cultivated medicinal plants and products derived from them for persons covered under section 7 to be exempted from all or certain provisions of the Act. The amended Section 7 covers persons or entities not covered under section 3(2). By implication of the amendment, section 3(2) (as discussed in previous chapter 2 of our submission), companies incorporated or registered in India but having foreign participation (in share capital or management), would then be considered covered under section 7. Now, under the amended Section 40, if such companies were to access medicinal plants which are not grown in the wild but are cultivated, and then utilize them for manufacturing of drugs, they may do so without taking approval from the relevant SBB. Since approval is not required, such companies will then not be liable to share the benefits with local communities who have grown and conserved these medicinal plants. Payment of these benefits is a must under the Act and the same has been upheld by the Uttarakhand High Court in *Divya Pharmacy v. Union of India*. In the said case, the High Court observed that:

> *"Indigenous and local communities, who either grow "biological resources", or have a traditional knowledge of these resources, are the beneficiaries under the Act. In return for their parting with this traditional knowledge, certain benefits accrue to them as FEBS, and this is what FEBS is actually all about…This benefit the "indigenous and local communities" get under the law is over and above the market price of their "biological resources"*[19].

In view of the above legal precedent, the move to exclude cultivated medicinal plants should be reviewed.

7. FUNCTIONING OF THE AUTHORITIES AND COMMITTEES

The Bill proposes several amendments to the constitution, functions, and coordination for the NBA, SBB and Biodiversity Management Committees (**"BMC"**). The following sections provide our analysis and suggestions for some of the important amendments.

A. Qualification Criteria for The Chairperson of NBA And SBBs

Section 8 and Section 22 of the Act prescribe the qualification criteria for the chairperson of the NBA and SBB, respectively. This criterion is eminence and adequacy of knowledge in the domain of conservation and sustainable use of biological diversity, and equitable sharing of benefits. The Bill retains the same criteria.

The main issue with these criteria is that terms 'eminence' and 'adequacy of knowledge' are very subjective and open to interpretation. Top forestry professionals having expertise in, say, silviculture operations or carbon-sequestration can be interpreted as being experts in forest-centric conservation and may be considered for the position of Chairperson. This may be odd, as a silviculturist or carbon-sequestration expert may not have experience in dealing with matters relating to nature dependent communities, such as their empowerment, conservation practices, knowledge systems and the importance of sharing benefits with them, all which are important elements of the Act.

Rather than having open-ended qualification criteria, some quantifiable criteria can be used. These criteria can be in terms of minimum educational qualification; minimum years of professional experience in dealing with subjects such as biodiversity conservation, community-based conservation, governance, administration; holding leadership positions etc.

B. Powers of Member Secretary

Under section 10 of the Act, the Chairperson of the NBA shall be the chief executive and will exercise powers and perform duties as prescribed. The Chairperson is appointed by the MoEFCC. The Bill retains this provision, but proposes to add another one – clause 10 A(1). According to this clause, the Member Secretary (**"MS"**) shall be the chief coordinating officer and convener of the NBA. The MS is appointed by the Central Government and will perform the functions as prescribed. These amendments create the following issues.

First, if the Chairperson is the chief executive authority, the justification for making the MS the chief coordinating officer and convener is unclear. The difference between different positions of power i.e., 'chief executive', 'chief coordinating officer' and 'convener' are not clear and introduces avoidable jargon. Moreover, if the amendments come into force, there will be two centres of power at the NBA- the Chairman and the MS – and this may give rise to power conflicts within the regulatory authority.

Secondly, under other environmental laws, such as the Air (Prevention and Control of Pollution) Act, 1981 and the Water (Prevention and Control of Pollution) Act, 1974, though there is a provision for the MS of the central and state pollution control boards, they do not grant member secretary powers associated with positions of chief coordinating officer or convener. For instance, section 14 of the Air (Prevention and Control of Pollution) Act, 1981 provides that *"the Member Secretary shall exercise such powers and perform such duties as may be prescribed or as may, from time to time, be delegated to him by the Board or its chairman."*[20] Section 12 of the Water (Prevention and Control of Pollution) Act, 1974 is similarly worded. This creates a disconnect between the Biological Diversity Act and other environmental statutes.

In view of the same, the amendments may be reviewed to ensure uniformity among the statutes.

C. Independence of NBA and SBBs

As discussed in previous sections, the proposed amendments to the Act will remove a large quantum of traditional knowledge which is codified from the regulatory sway of authorities created thereunder. The Bill also proposes to remove regulatory powers of such authorities over MNCs with entities incorporated in India and sharing and transfer of knowledge on biological resources.

However, the Bill goes further in taking away from the independence of these authorities via proposed Section 55A, which introduces 'Adjudicating Officers' for the purposes of determining penalties under Section 55 of the Act. According to the Bill, these officers are to be appointed by the Central Government and must have a minimum rank of Joint Secretary to the Government of India or Secretary to State Governments.

Importantly, these officers are neither required to be specialists in the field of biological diversity nor are they required to have any nexus with authorities created under the Act or have any multidisciplinary expertise to handle the penalty imposition process. In fact, statutory authorities such as the NBA or SBBs will cease to have any powers to determine penalties as this function has been delegated to these officers. This is even though clause 8(4)(d) of the Bill specifically provides for legal expertise within the NBA and SBBs. The Bill does not justify this division of work especially since both involve the act of 'determination' by an authority.

This quasi-judicial function delegated to adjudicating officers under proposed Section 55A is also unguided. The provision for adjudicating officers is not novel to the proposed amendments. For instance, the Securities and Exchange Board of India (**"SEBI"**) Act, 1992 also

has provisions concerning such officers. However, by way of Section 15J of the SEBI Act, these officers have been given some guidance by way of illustration, to assist them in arriving at decisions. In the absence of any nexus with statutory authorities under the Act or guidance by way of provisions in the Bill, the discretion exercised by these officers will risk being unfettered and have serious implications for the implementability of the Act of 2002. Further, appointing such officers as an adjudicating authority would also imply excessive interference of the executive, creating risk of bias and arbitrariness.

In fact, even though a minimum penalty is stipulated under proposed Section 55, the power to determine such a penalty has now been given to the adjudicating officer, instead of the NBA. This officer may well choose to not impose any penalty, despite the mandatory nature of proposed Section 55 which uses the word 'shall' before introducing the quantum of penalties.[21]

Rather than an adjudicating officer appointed by the Central Government, the NBA must continue to exercise powers of determining penalties, especially since it has also been given powers to determine benefit sharing under proposed Section 19(3A).

D. Large Committees and Bureaucracy in Statutory Authorities

Under proposed Section 8, the Bill provides for a web of inter-departmental committees within the NBA. These committees represent Ministries of Agriculture, AYUSH, Environment and Climate Change, Earth Sciences, Panchayati Raj, Science and Technology and Tribal Affairs, to name a few. The total number of members of the NBA is proposed to be increased from 16 to 22. The list includes several departments from same Ministry concerned. For e.g. The concerned representatives for Ministries related to Biotechnology, Science and Technology, Scientific and Industrial Research- is Ministry of Science and Technology. Similarly, MoEFCC is represented by three separate representatives under the Bill.

This increase in the membership and representation within the NBA risks creating delays, policy paralysis and conflicting interests, hence directly impacting the effectiveness of these authorities. Furthermore, the issues with large committees and their ineffectiveness have been highlighted to be particularly problematic by the judiciary in the past. For instance, in *Bonani Kakkar v OIL India Ltd*[22], the Supreme Court of India observed that large committee would find it difficult to convene meetings at relatively short intervals.

There should be a limit on the number of members within statutory authorities under the Act to address these issues, particularly with respect to internal conflicts. This can be done by nominating limited number of members from the concerned Ministries.

E. Restricted Constitution of BMCs

Under sub-section (1) of section 41 of the Act, every local body is required to constitute a BMC. The term 'local body' is defined in the Act as Panchayats and Municipalities within the meaning of the Constitution[23]. The Constitution defines Panchayats as an institution of self-governance constituted in rural areas[24]. These institutions are constituted at the village, intermediate and district level[25]. Municipalities, on the other hand, are institutions of self-governance at the urban level. These are constituted at the following levels: Nagar Panchayat for a transitional area; Municipal Council for a smaller area; and Municipal Corporation for a larger urban area.[26] Therefore, there are a total of six levels where local bodies are constituted. By implication, BMCs will then have to be constituted at all these levels. The National Green Tribunal (**"NGT"**) has established the importance of this provision while issuing multiple directions to the MoEFCC, NBA and SBBs to ensure that BMCs are constituted across all local bodies in the country.[27]

The Amendment Bill, however, makes it mandatory to constitute BMCs at only four levels: Gram Panchayat, Nagar Panchayat, Municipal Council/Committee, and Municipal Corporation. It has been left to the discretion of the State governments on whether to constitute a BMC at the intermediate or district panchayat level. The proposed amendment not only goes against the directive of the NGT, but also weakens the provision contained in the Act.

In the three-tier institutional structure created by the Act, BMCs are primarily responsible for carrying out the objectives of the Act.[28] They perform various functions such as conservation of biological resources; eco-restoration of local biodiversity; management of heritage sites; regulation of access to biological resources (and associated traditional knowledge); and conservation of traditional varieties/breeds of economically important plants/animals.[29] If BMCs are not constituted at the intermediate and district level panchayats, it leaves the question open that which institution (at these levels) will dedicatedly take up the above-mentioned functions.

Further, the primary responsibility of a BMC is preparation of People's Biodiversity Registers (**"PBR"**).[30] These registers are comprehensive records of local biological resources and the traditional knowledge associated with them.[31] The mandatory requirement of preparing PBRs across all BMCs was upheld by the NGT and directives were issued to the Central Government and regulatory authorities to ensure compliance with the same.[32] PBRs prepared by BMCs comprehensively document the presence of local biodiversity and are a crucial tool to verify the veracity of the content of Environment Impact Assessment (**"EIA"**) reports for various projects having ecological implications. However, EIAs prepared by consultants are particularly weak in sections on biodiversity and leave many pertinent issues out of consideration.[33] PBRs can therefore play a critical role in demonstrating the true ecological costs associated which may be concealed in an EIA.[34] All these benefits will be lost at the intermediate and district panchayat level if BMCs are not constituted in the first place.

Importantly, the need for BMCs for each local body also has a constitutional basis. Local self-governance institutions were introduced via the 73rd and 74th Constitutional Amendment Acts, 1992[35] specifically with an aim to bridge the gap between the government and the people. Widespread reach of BMCs is therefore also a mandate traceable to the 73rd and 74th Amendments.

We therefore suggest that the original provision mandating constitution of BMCs across all local bodies in the country be retained.

F. Mandatory 'Consultation' And Not 'Consent' From BMCs

Sub-section (2) of section 41 of the Act requires the NBA and SBBs to consult BMCs while taking decisions relating to their local biological resources and associated traditional knowledge. The Amendment Bill retains these provisions.

It is important to note that mandatory consultation does not necessarily mean prior informed consent. There may be a situation wherein a BMC may have its reservations regarding an application (referred to it by NBA or the relevant SBB) regarding a company which wants to collect certain local medicinal plants for manufacturing drugs. The BMC can raise questions that such commercial-scale collections may have adverse sustainability implications. However, since the regulatory authorities i.e., the NBA or SBB are only required to consult, and not necessarily take consent from the BMC, they may still grant an approval to the company.

The Nagoya Protocol, however, necessitates that a prior informed consent or approval and involvement of the local and indigenous communities is to be obtained when the genetic resources,[36] and the traditional knowledge associated with such resources[37] are accessed. The Preamble to the Bill recognises the provisions of Nagoya Protocol 2010, but the Bill does not take the Protocol into account while dealing with certain specific provisions of the domestic law i.e., the Biological Diversity Act. To bring the domestic law in conformity with the Nagoya Protocol, the Bill must make the following changes to the provisions of section 41(2).

First, the phrase 'shall consult' can be substituted with 'shall obtain prior and informed consent'.

Second, instead of just involving BMCs which represent the interest of local and indigenous communities, the communities themselves can be brought on board. However, since these changes are missing, the Act is yet to get reconciled with the Nagoya Protocol.

G. Curtailing the Independence of BMCs

Section 21(1) of the Act mandates the need for mutually agreed terms when an approval for utilisation of biological resources or associated knowledge is granted. This agreement is

between the users of biological resources, local bodies, and the benefit claimers. While the Bill retains the need for ensuring an agreement, it limits the scope of parties involved in the agreement in two ways.

First, the amendment omits the involvement of benefit claimers. The Act defines benefit claimers as "*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.*" Hence, their involvement at the time of agreement is a must.

Second, the Bill replaces involvement of local bodies with that of BMCs represented by the NBA. Prima facie, this is problematic, because BMCs are independent institutions created under Chapter X of the Act, and therefore have the power to represent themselves. Moreover, consultation with BMCs is a must while making decisions on the use of biological resources or associated traditional knowledge occurring within their territorial jurisdiction.

The Act therefore makes it clear that BMCs are an entity distinct from the NBA as well as SBBs. Given this understanding, the requirement that the NBA represent BMCs in the crucial process of determining FEBS on mutually agreed terms lacks due justification.

H. Issues with Application of National Biodiversity Fund, State Biodiversity Fund and Local Biodiversity Fund

The Act provides for the constitution of a National Biodiversity Fund at the NBA level[38], a State Biodiversity Fund at the SBB level[39], and a Local Biodiversity Fund at the BMC level[40]. One important component of these funds is the benefit sharing received from the access to biological resources and traditional knowledge. Though these funds must be primarily utilized for conservation purposes, the Act allows for spending on socio-economic development of areas from where the resource or the knowledge has been accessed.

The Bill retains these provisions and clarifies that spending on socio-economic development can only be made when the origin of the resource in question or the knowledge is unknown. Prima facie, this provision makes sense. Trade in biological resources is complex and involves various intermediaries between the communities who grow, and conserve biological resources and hold associated traditional knowledge, and the company that uses these resources for commercial purposes. In such scenarios, locating the exact origin of the resource or traditional knowledge is not always practically possible. However, spending on socio-economic development may not always be the only solution in such scenarios. Alternatives can be explored to ensure that spending of benefit sharing is more conservation-oriented.

The Karnataka SBB offers some lessons. In one of its meetings, the SBB had decided that for spending benefit sharing received from use of medicinal plants whose exact location is

unknown, the Principal Chief Conservator of Forest can be requested to identify four biodiversity-rich talukas where benefit sharing can be disbursed.[41] In another meeting, the SBB decided to identify a few BMCs which have large biological resource transactions and develop a proposal for utilization of ABS amount by these identified BMCs.[42] As another alternative, the SBB had decided to take up regeneration and augmentation of species (which contributed to the accrual of benefit sharing) in the place of their natural regeneration.[43]

The key here is that the NBA/SBBs can use their discretion to explore ways to make spending more conservation-oriented when the source of biological resources is unknown. However, if the Bill explicitly proposes a solution which is not very conservation-oriented, the authorities may not have much of an incentive to explore other alternatives.

8. CHANGES IN PENALTIES

A. Removal of Imprisonment

Section 55 of the Act prescribes a penalty of imprisonment extending up to 5 years or/and with fines extending to those commensurate with the damage caused, in cases of contravention or abetment of contravention of Sections 3, 4 or 6. For similar violation of Section 7, an imprisonment extending up to 3 years or/and fine extending to Rupees 5 lakh is provided for.

These penalties, especially that of imprisonment, have been instrumental in providing the Act with deterrent effect. This is demonstrable in actions of Forest Departments across the nation as well as decisions of courts. For instance, in 2009, two Czech nationals were arrested[44] for illegally collecting rare insects in Singalila National Park in West Bengal. The penal provisions under the Act of 2002 formed an essential part of the case made out against the accused, by the West Bengal Forest Department.[45]

However, the amendment proposes to completely do away with any imprisonment via proposed Section 55, prescribing only a monetary penalty extending to Rupees One Crore or as commensurate with the damage caused in connection with proposed Sections 3, 4, 6 and 7.

Section 58 which provides crucial guidance to executive authorities and police with respect to offences being cognizable and non-bailable under the Act is also proposed to be omitted. This is particularly worrisome, because the Act is a special enactment, where the provisions of the Code of Criminal Procedure, 1973 do not apply by default, and the process mentioned under Section 61 must be followed instead. These omissions create the risk of adverse consequences, where the executive and police are left unguided as regards implementation of penal provisions under the Act.

Although criminal prosecution under the Act is not commonplace, Forest Departments have used its provisions in addition to those of the Wildlife Protection Act, 1972. Considering the gravity and extent of violations possible under the Act, the removal of provisions concerning imprisonment have a serious impact on the Act of 2002, potentially making it far less effective than it already was.

9. ADDITIONAL COMMENTS

A. Disconnect Between Section 19(1) And Section 3(1)

Section 19(1) of the Act states that persons or entities covered under sub-section (2) of section 3 will make a mandatory application to the NBA for obtaining biological resources and traditional knowledge for commercial utilisation, bio-survey and bio-utilisation or for transfer of research results relating biological resources. This provision, therefore, reiterates the provisions of section 3(1) and that of section 4.

Section 19(1) of the Bill, however, makes two changes. First, it only reiterates the provisions of section 3(1) and not those under section 4 relating to transfer of research results. Second, within the provisions of section 3(1) itself, amended section 19(1) reiterates the need for NBA approval only for the purpose of commercial utilisation, whereas section 19 of the parent Act, reiterate the need for NBA approval not only for commercial utilisation but also for bio-survey and bio-utilisation.

We therefore suggest that the disconnect between amended section 19(1) and section 3(1) be resolved, and the reference to section 4 in section 19 (1) be retained.

B. Ambiguity Regarding the Scope Of 'Biological Resources'

Section 2(c) of the Bill has expanded the scope of 'biological resource' by including derivatives into it. The proposed definition of 'derivative' as provided in the Bill is as follows

> 2 (fa) "*derivative means a naturally occurring bio-chemical compound of a biological resource, even if it does not contain functional units of heredity*".

The inclusion of the term 'derivative' creates confusion and ambiguity as regards the scope of the Act. This is because a biochemical compound that is naturally occurring is proposed to be considered a biological resource even if there is no functional unit of heredity that connects it to living genetic material.

The NGT has clarified that the presence of heritable genetic material, or DNA (established to be the functional unit of heredity), is essential to the makeup of a biological resource.[46] In proposing to remove this requirement, the scope of the Act widens in a way the legislature did not intend and dilutes its specific focus on conservation of living genetic resources.

Therefore, we suggest replacing the proposed definition of 'derivative' with the definition as provided in Article 2(e) of Nagoya Protocol which states:

> "*Derivative means a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity.*"

C. Provisions Contradicting with the NGT Act, 2010

The proposed Section 55A (4) prescribes a limitation period of 60 days to file an appeal against an order made by adjudicating officers before the NGT. This provision conflicts with Section 16 of the NGT Act, 2010 which prescribes a cumulative limitation period of 90 days to file an appeal against determinations or orders made by statutory authorities under the Act of 2002.

By providing a fixed period of 60 days to appeal against any orders passed by adjudicating officers, the legislature has also ignored the mandate of Section 59 of the Act of 2002 which requires that its provisions shall not be in derogation of any other law relating to forests or wildlife.

D. Inadequate Oversight of Section 7 Entities

Section 7 of the Act mandated prior intimation to SBBs for obtaining biological resources for purpose for commercial utilization, bio-survey or bio-utilization.

The Bill amends this section not only by removing the terms 'bio-utilization' and 'bio-survey', but it has also further narrowed the scope of the term 'access' (as defined in the Bill) to only be limited to 'commercial utilisation'.

This leaves considerable scope of unregulated R&D by various Section 7 entities. Hence, the threshold of 'commercial utilization' under Section 7 should be reconsidered to align it with the wide definition of 'access' under the proposed Section 2(a).

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