

BIODIVERSITY BILL INSISTS ON SOVEREIGN RIGHTS

Bills on Intellectual Property Rights-III

The Hindu, 8 March 2001, p. BS-4

The Biodiversity Bill has been drafted in response to the Biodiversity Convention (CBD). However, the CBD is not as specific and demanding as TRIPS and substantial scope is left to states to adopt laws that fit their needs and priorities. The bill reflects, for instance, the government's strong reaction to biopiracy or the illegal appropriation of resources or knowledge. The bill is also partly informed by the desire to avoid a direct confrontation with WTO obligations in this field.

Focus on access and sovereignty

Generally, the bill does not provide a comprehensive framework for the conservation and sustainable use of biological resources. In fact, it focuses mainly on the question of access to resources. Its response to the current challenges is to assert the country's sovereign rights over natural resources. It therefore proposes to put stringent limits on access to biological resources or related knowledge for all foreigners. While the idea is to stop access by western country nationals and companies and reduce biopiracy, it is surprising to see that all foreigners are treated alike. In fact, there are a number of small and least developed countries which might greatly benefit from facilitated access to India's vast biological resources to foster the fulfilment of basic food and health needs. Restricting access to these countries and reducing the flows of material to international research centres may serve some short-term interests but seems to go, for instance, against the professed solidarity among developing countries.

Generally, the bill's insistence on sovereign rights reflects current attempts by all actors around the world to assert property rights over the resources or knowledge they control. In principle, an isolationist path may constitute a viable alternative for a vast country but the question of access must be seen in a broader context. Over the past couple of decades, a network of international centres (CGIAR) have been set up to foster the exchange and availability of resources for all countries. India has, like many other countries, substantially benefited from the principle of freely sharing knowledge and resources. Indeed, the CGIAR centres provided some of the Green Revolution varieties that had significant impacts on overall food production. The system proposed by the bill is likely to result in fewer flows of resources to CGIAR centres from India, and other countries are likely to adopt a similar attitude in reaction. It is doubtful whether this constitutes an appropriate strategy in a situation where the CGIAR collections over which India has no independent control account for about 40% of the worldwide accessions for food crops. Further, nearly all countries are dependent from moderate to very high degrees on genetic resources from other regions for their main staples. It is therefore unlikely that closing the avenues for sharing resources and knowledge will contribute to solving the widespread problem of malnutrition.

Access within India

While the bill focuses on preserving India's interests vis-à-vis other states in rather strong terms, its main impact within the country will be to concentrate power in the hands of the government. Indeed, Indian citizens and legal persons must give prior intimation of their intention to obtain biological resources to the state biodiversity boards. The bill is even more stringent in terms of intellectual property rights since it requires that all inventors obtain the consent of the National Biodiversity Authority before applying for such rights. The impacts of this clause are, however, likely to be limited since patent applications are covered by a separate clause. Further, the Authority has no extra-territorial authority and cannot monitor applications for intellectual property rights outside of India.

Benefit-sharing

The bill addresses the question of the rights of holders of local knowledge by setting up a system of benefit-sharing. The proposed scheme is innovative insofar as it provides that the Authority can grant joint ownership of a monopoly intellectual right to the inventor and the Authority or to the actual contributors if they can be identified. However, sharing property rights sharing is only one of the avenues that the Authority can choose to discharge of its obligation to determine benefit-sharing. Further, it is in the Authority's power to allocate rights to itself or a contributor such as a farmer contributor and the latter has no right to demand the allocation of property rights. Other forms of benefit-sharing include technology transfers, association of benefit claimers with research and development or the location of production, research and development units in areas where this will facilitate better living standards to the benefit claimers. The focus on non-financial benefits is notable because these tend to be more long lasting than monetary compensation.

Concerns relating to property rights

The bill generally focuses on the rights of the state (sovereign rights) and monopoly intellectual property rights such as patents. The implication is that most property rights will be in the hands of the state and private companies. This has the unfortunate consequence that the bill does not provide a framework for the rights of other holders of biological resources and related knowledge. The proposed system thus implies that resources and knowledge which are not allocated to private entities through intellectual property rights are deemed to be freely available. Further, the bill does not give current rights holders, such as individual farmers or local communities, the capacity to defend their rights in the same way that it seeks to equip the state to fight biopiracy.

This problem is reflected in several ways. First, where benefit-sharing is allocated in the form of money, the Authority has the power to determine whether the money should be paid directly to benefit-claimers or used generally for biodiversity management activities. Thus, even identified benefit-claimers do not have a right to the money that is paid by the entity using their resources or knowledge. Similarly, where the Authority chooses to grant property rights to local innovators, they do not have a right to the allocation but are dependent on the Authority's goodwill. This can be compared with the situation of applicants for patent rights who need the Authority's approval but cannot be stopped from applying for the right. Third, the bill

is conspicuously shy in its treatment of traditional and local knowledge. It only requires the Central Government to 'endeavour to respect and protect' such knowledge. It is unfortunate that the bill does not deal with this aspect directly since it otherwise seeks to provide a comprehensive framework for property rights. Further, the formulation employed implies that the government does not intend to provide individual or common property rights for these types of knowledge.

On the whole, the biodiversity bill provides a property rights framework which seeks to be very firm on the question of access from outsiders even though the practical impacts of this stand will be limited because it cannot apply to resources already outside of the country. The bill accepts the introduction of intellectual property rights over biodiversity provided for in the TRIPS Agreement but does not directly seek to make sure intellectual property rights are subordinated to the goals of the Biodiversity Convention as provided for in the convention. One of the striking features of the proposed regime is that it completely obliterates common property arrangements whose importance and extent in the context of the management of biological resources is still immense.

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