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MANAGING INTELLECTUAL PROPERTY, MARCH 2005

GIVEN THE RICHNESS OF MEXICO'S GENETIC RESOURCES, BIOPIRACY IS A SERIOUS THREAT IN THE COUNTRY.

Mexico has the world's fourth most biologically diverse eco-system: every existing biome can be found in the country. The country also contains 34 of 36 identifiable eco-climates and 25 out of 28 categories of recognized soils, is home to 14.4% of all living species and is the region of origin of some 118 plant species.

Protecting access to these copious genetic resources is a top priority for Mexico. Following the path taken by other countries which have established a system of access to their genetic resources, Mexico is exercising its authority to determine access to genetic resources at a time when several activities related to access to biological and genetic resources are taking place in prejudice of indigenous communities and in serious detriment of uses and traditional customs. Reported cases of biopiracy of Mexico's biological and genetic resources include, most notably, that of Larry Proctor, a US citizen who brought a bag of commercial dry bean seeds from Mexico and took them back to the US. Proctor picked out the yellow-coloured bean, planted them and allowed them to self-pollinate. Selecting yellow seeds for several generations, he acquired a uniform and stable population of yellow bean seeds. On November 15 1996, Proctor applied for a patent for his yellow-coloured bean. After obtaining the patent in 1999, the inventor tried to sue Mexican bean importers for patent infringement for what essentially are yellow bean that have been grown in Mexico for centuries, developed by Mexican farmers and more recently by Mexican plant breeders.

LEGAL PROVISIONS ON ACCESS TO GENETIC RESOURCES

Mexico is a signatory state to the Convention on Biological Diversity (CBD), a pioneering agreement that seeks the compromise between the user countries and the countries owning biological resources and requires the signatory states

to establish legislation with respect to access to genetic resources. Specifically, the CBD provides a degree of protection to indigenous peoples with respect to the sustainable use of biodiversity, equitable sharing of benefits arising from their commercial use and the preservation of traditional knowledge and practices.

Mexico is also a member of the Group of Like-Minded Megadiverse Countries, a mechanism of consultation and cooperation comprising 15 member states that hold more than 70% of the planet's biological diversity and 45% of the world's population. The Group's main objectives include the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising from the utilization of genetic resources.

Beyond the commitments in the CBD and the Group of Like-Minded Megadiverse Countries, Mexico's constitution provides certain protection for natural resources and basic rights to indigenous peoples and local communities. In addition, Mexico's General Law of Ecological Equilibrium and Environmental Protection establishes that bio-prospecting requires authorization by both the government and the owner of the property where the resources are located. However, these provisions found in Mexico's national legislation are poorly observed and full of contradictions and gaps.

In the absence of effective and corresponding national legislation on access to genetic resources, Mexico is in the process of developing and passing national legislation that is set to bring sweeping changes.

NEW BILL UNDER DISCUSSION

In what has been labelled the most comprehensive legislative initiative dealing with access to genetic resources in Mexico, the Bill on the Law for the Access and Use of Genetic Resources aims to implement the rules established by the CBD to establish a system of fair distribution of benefits to those communities where genetic resources are extracted and to those that seek to develop these resources. The Bill, which has been before the Mexican Congress since 2003 but has yet to be passed, establishes a normative system respecting and guaranteeing the rights of the communities over their traditional knowledge as well as the rights of those trying to obtain patents for their research and development and seeking to obtain new food, pharmaceutical and industrial use

products. The Bill deals with several aspects pertaining to the access to genetic resources and is divided into three titles.

Title I deals with the basic preliminary norms of the Bill and the provisions involving benefits distribution to be enjoyed by indigenous and local communities over their biological and genetic resources, intangible components and knowledge as well as their innovations and practices.

Its most important provisions are found in Articles 10 and 11. Article 10 sets out that the Environmental and Natural Resources Department will establish and implement a certification system so the rights of indigenous people and communities are protected by a public registry. The recognition of these rights by means of the certificates being in the registry is voluntary and free. The registry will comprise traditional knowledge, innovations and practices as well as products derived from the biological and genetic resources belonging to indigenous people and local communities.

Article 11 establishes that a fair and equitable participation in the benefits for the use and commercialization of the genetic or biological resources can be in the form of economic, technical, biotech, scientific, environmental or social means including:

- the payment of access fees for a specimen, extract or test;
- an amount previously stipulated for the access:
- knowledge and technology transfer used in the research by someone accessing the resource;
- national scientific capacity development and generation;

- royalty payment participation or economic benefits for the commercial use;
- other proposed means by the parties involved, and
- means established by the dispositions related to the subject matter.

Title II deals with the management, administration and access to genetic resources, particularly the setting of terms, conditions and procedures to follow for the granting of access to genetic resources. Its most relevant provisions are found in several Articles including Articles 15, 26, 31, 32 and 33.

Article 15 sets out the requirements for the access of genetic resources. These requirements include:

- prior and informed consent must be expressly granted by the owner, legitimate holder and indigenous and local communities providing the genetic resources and or intangible component, and if the case, the state, for use and enjoyment of the genetic resource;
- consent by the indigenous and local communities must be granted in accordance with the authorities and procedures established by the Agrarian Law and, in the case of indigenous people, by means of their representative institutions, in accordance with Convention 169 of the International Labour Organization and the applicable regulations of this Law;

- the ratification of the consent by the Department;
- obtaining authorization from the Department;
- the obligation to make a deposit of two samples of the collected species in the national or regional collections established by the authorities for that purpose;
- the identification of possible environmental impact of the access project;
- the establishment of the manner in which the possible benefit will be distributed;
- an indication as to the duration and timeline of the access activities; and
- publication of an abstract of the access application in two newspapers of national circulation and in a newspaper of the place where access is sought out.

Coupled with the above-mentioned requirements is the proscription on importing or exporting any biological or genetic resource or derived product that incorporates the knowledge or innovation of indigenous or local communities unless the Department corroborates the applicable consent to do so. Article 26 is another essential provision of the Bill as it establishes the minimum requirements to be included in an access contract after negotiation has been completed.

Article 31 and 32 are probably the most novel legal propositions since they both impose upon the Department the obligation to carry out coordination actions with the Mexican Institute of Intellectual Property (IMPI). Article 31 establishes that when seeking the examination of a patent application using biological or genetic resource material, the applicant is required to show proof of registration of the corresponding access contract and the authorization. Article 32 provides that the showing of the proof of registration has been determined to be a prerequisite for the granting of the respective right when there is evidence or certainty that the products or processes whose patent protection is being sought have been obtained or developed with biological or genetic resources or its deriving product in which Mexico is the source of origin and exercises its sovereignty and jurisdiction. Article 32 also imposes upon the Department and the Mexican Institute of Intellectual Property to establish an information exchange system pertaining to access contracts and authorizations.

Title III deals directly with surveillance, security measures and fines and criminal punishment for those parties violating the law. Its most fundamental provisions are found in Articles 48 and 52. Article 48 lists several types of sanctionable conduct including:

- the lack of possession of the access authorization and documentation that guarantees the legal use, enjoyment and origin of the genetic resources;
- the performance of acts that harm or affect the uses and customs of indigenous and local communities or their cultural rights;
- the mobilization, import or export of a biochemical or genetic resource without the access authorization and permit provided in the law and other applicable legislation;

- the use, enjoyment or commercialization of a biochemical or genetic resource without the consent of its legitimate owner or holder or without the corresponding authorization or permit; or
- the transfer of genetic resources accessed by a third party, without the authorization of the Department.

Similarly, Article 52 specifically imposes harsh sanctions on those parties involved in sanctionable conduct, most notably a fine equivalent to between 100 and 50,000 days of the minimum wage or criminal punishment from two to 15 years in prison.

A MAJOR STEP

Mexico is in the process of taking a major step in filling the voids of its national legislation in protecting and providing access to its genetic resources. If the Bill on the Law for the Access and Use of Generic Resources eventually passes, Mexico will have come a long way in protecting and providing access to its biodiversity