

Recent Brazilian Federal Court Decision Involving Genetic Heritage and Traditional Knowledge

Article By:

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On May 22, 2013, the Federal Court from the State of Acre in Brazil (which is North of Brazil) handed down an important decision involving alleged access to genetic resources and traditional knowledge. The State of Acre recognizes the right of indigenous and local communities to determine the use of their traditional knowledge associated with their genetic heritage. “Genetic heritage” refers to information of genetic origin contained in samples of plant, fungal, microbial or animal specimens, in the form of molecules and substances deriving from the metabolism of such living beings within the national territory, on the continental shelf, or in an exclusive economic zone. “Associated traditional knowledge” encompasses information or practices of an indigenous or local community having real or potential value and associated with the genetic heritage. Indigenous and local communities that create, develop, hold or preserve traditional knowledge associated with genetic heritage are guaranteed certain rights to that genetic heritage and traditional knowledge. Among those rights are: **(1) the right to prevent unauthorized third parties from using or carrying out tests, research or investigations relating to associated traditional knowledge; (2) the right to prevent third parties from disclosing or broadcasting data or information that incorporate or constitute associated traditional knowledge; and (3) the right to derive profit from economic exploitation by third parties of associated traditional knowledge—a right which is owned by the community**

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The Federal Public Ministry (FPM) filed a civil lawsuit against five companies that had developed soaps containing an oil having emollient properties obtained from the seed of a palm tree called “murumuru”. *Astrocaryum murumuru* bears edible fruits and is native to the Amazon Rainforest. Murumuru butter extracted from the seeds may be used as a moisturizer.

The FPM alleged that the use of moisturizing oils derived from murumuru is a part of the genetic heritage and associated traditional knowledge of the Ashaninka people (an indigenous group of people living in the rainforests of Peru and in the State of Acre Brazil). According to the FPM, the defendant companies violated several of the rules laid down by Provisional Measure No. 2,186-16 when they improperly appropriated and exploited part of the intangible heritage of indigenous Ashaninka community by using genetic heritage and the associated traditional knowledge of the oil from the murumuru tree to develop soaps. The Brazilian Patent and Trademark Office (INPI) was also included as a defendant in the lawsuit for granting certain patents and trademarks relating to soaps containing murumuru.

Brazilian Provisional Measure No. 2.186-16 of August 23, 2001 (the Measure) seeks to protect the benefits, rights and obligations concerning access to traditional knowledge and components of genetic heritage in Brazil for purposes of scientific research, technological development and biological prospection. It preserves the exchange and dissemination of components of genetic heritage and associated traditional knowledge practiced within indigenous and local communities of the country for their own benefit. The Measure allows access to components of genetic heritage within the national boundaries of Brazil only with the authority of the Union. Furthermore, the use, marketing and exploitation of genetic heritage are subject to inspection, restrictions and benefit sharing as specified in the Measure. Significantly, the Measure primarily regulates “access” to components of genetic heritage and traditional knowledge in Brazil.

The FPM claimed that the companies’ use of the murumuru tree violated several of the rules laid down by the Measure. However, the Federal Judge ruled that there was no violation of the Measure because several of the defendant companies had not carried out any scientific research or technological development related to the genetic heritage that might be characterized as an “access.” The Judge reasoned that there had been no illegal access to genetic heritage or associated traditional knowledge since: (1) the information and properties of murumuru were obtained from scientific documents published during the 1940’s (in other words, this information was in the public domain); (2) one of the companies obtained an authorization for accessing murumuru from another region, the State of Amazonas; and (3) another company obtained murumuru oil from a manufacturer which has obtained such oil from the Ashaninka.

This decision is significant because it holds that a company will not “access” genetic heritage, and thus, will not need an access authorization to share benefits, if it simply explores properties of genetic heritage disclosed previously in the public domain (such as in the scientific literature). Therefore, this decision may have a positive impact on the defense against several fines imposed in 2010-2012 by an environmental authority due to alleged illegal access to genetic heritage. Several of those fines were imposed against companies that were simply using certain Brazilian plants in order to produce products the properties of which were disclosed a very long time ago.

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