The Brazilian Biodiversity Law: Progress or Threat?

On May 20th 2015, then Brazilian president, Dilma Rousseff, approved Law 13.123/2015, which was published as the new Brazilian Legal Framework on Biodiversity. In an interview given minutes before the launch ceremony, the Minister of the Environment at the time, Izabella Teixeira, said that about 40 country governments had already requested a copy of the Bill, as if this "proved" it was an innovative law. However, human rights organizations and traditional, indigenous and peasant community movements and organizations in Brazil have strongly challenged the law; in particular because it denies the rights of peasants, farmers, indigenous peoples and traditional communities, and benefits above all pharmaceutical and agribusiness companies.

Creation of a law that favors business

Unfortunately, official discussions on the protection of the genetic heritage and associated traditional knowledge occur in spaces very distant from the reality of affected people. In the preparation of Law 13.123/2015 and Bill 7735/2014 which preceded it, there were hundreds of meetings and discussions in Federal Government offices, behind closed doors, with pharmaceutical, chemical, cosmetic and seed industries; these meetings were organized under the title of the Business Movement for Biodiversity (MEB, by its acronym in Portuguese). At least three of the thirteen participating companies have been sued for practicing "biopiracy."

It is important to note that these meetings took place before the draft law had been reviewed by the Ministries of Environment (MMA), Industry and Commerce (MDIC), and Science, Technology and Information (MCTI). The National Council on Sustainable Rural Development (CONDRAF), the National Commission for Agroecology and Organic Production (CNAPO), the National Commission on Indigenous Policy (CNPI) and the National Commission on Traditional Peoples and Communities (CNPCT) were not consulted. All of these are official spaces that represent farmers, peasants, indigenous peoples and traditional peoples and communities, spaces provided by the Federal Government itself.

The lack of dialogue with a broad majority of civil society revealed the interests behind the proposed regulation on access to the genetic heritage and associated traditional knowledge. This became even clearer when civil society gained access to the explanatory memorandum of the proposal, and found that the principal reason behind the proposal was that existing regulations were ineffective at imposing "a set of restrictions on access." (1)

Thus, facilitating companies' access can mean nothing other than diminishing the rights and sovereignty of those who have traditional knowledge about the national genetic heritage. This is clearly why the proposal was not previously discussed with those who bear this knowledge; this is happening in one of the most diverse countries in the world in terms of plant and animal species.

Content of the Law

In summary, the law seeks to facilitate private sector access to the diverse genetic heritage, such as

to traditional seeds or medicinal plants. This is explicit in cases where it should be obligatory to obtain free, prior and informed consent from those who possess this traditional knowledge. However, the law decouples certain genetic heritage from traditional knowledge, as if the majority of living beings in nature were untouched by humans; as if they had not interacted with indigenous peoples for thousands of years. In this sense, the law creates separate categories of traditional knowledge: knowledge of identifiable origin and of unidentifiable origin.

In the latter case the company can access the genetic heritage, without having to prove a connection between its research and the "product" it is trying to develop, or to pre-existing traditional knowledge; or they can use certain traditional knowledge, claiming that its origin is unidentifiable.

In both cases the company is exempt from the obligation to obtain free, prior informed consent. This violates:

• The right to Free, Prior Informed Consent, provided in ILO Convention 169 on Indigenous and Tribal Peoples;
• The rights provided in articles 8 "j" and 10 "c" of the Convention on Biological Diversity;
• The rights provided in article 9 of the International Treaty on Phytogenetic Resources for Food and Agriculture; and
• It conflicts with the Nagoya Protocol itself, which Brazil had signed but not ratified prior to the Law coming into effect.

It is important to state that neither the law, nor the decree regulating it (2) solves the historical problem of traditional knowledge belonging to more than one indigenous group or peoples, or to traditional, farming or peasant communities. This can trigger conflict between said groups. Furthermore, there is no legal provision for the right to prohibit companies' access; only the possibility for companies to respect the content of community protocols.

In terms of the law and decree, community protocols are documents that farmers, indigenous peoples, or traditional peoples and communities develop through their own customs, traditions and practices; and which are valid as procedural rules in cases of access to associated traditional knowledge.

Furthermore, companies have the obligation to share benefits if they obtain some "financial benefit" from this use; such as a new drug, a cultivated variety or seed, transgenics or cisgenics, etc. In such cases the company may or may not be subject to benefits-sharing requirements.

The law creates a series of mechanisms to exempt companies from benefits-sharing, such as:

(I) decoupling genetic heritage from traditional knowledge; (II) creating categories like associated traditional knowledge and unidentifiable origin; (III) Restricting benefit-sharing to what is called 'finished products', if these are the main value-added element of the product; (IV) exempting small or micro enterprises from benefits-sharing; (V) exempting benefits-sharing in cases of local or locally-adapted native seeds and varieties that are part of international treaties on food and agriculture.

And in spite of everything, if the company were forced to share benefits on the genetic heritage, it would be at most 1% of the benefits generated, a percentage that can be reduced to as low as 0.1%. Furthermore, it would be at the company's discretion to share the value in money, or through social projects or other non-monetary means.

Another point of concern is the composition of the Genetic Heritage Management Council. This should have been a step forward, since it was open to civil society, especially peasants, and traditional peoples and communities. However, those individuals hold a minority of seats, while the majority unfortunately goes to the federal government and its ministries, companies and members of scientific academia.

Why the interest in access to genetic information?

This law is the first step to allow the patenting of native products of Brazilian biodiversity and the knowledge arising from scientific research. Its approval comes in the midst of an international discussion on new genetic engineering technologies, and the regulation of new products created through synthetic biology—the bases of the rumored fourth industrial revolution.

Therefore companies' interests were not only to avoid fines or clean up their image in biopiracy cases; but primarily to make market prospects viable for a new series of products they use in their production, genetic information on biodiversity and new technologies.

Progress

The discussion process for this new law was marked by complaints about restrictions to participation by main stakeholders. This generated a large and unprecedented mobilization wherein farmers, peasants, indigenous peoples, traditional peoples and communities — with the support of over 150 movements and non-governmental organizations — carried out several demonstrations. In one of these directed toward President Dilma in 2015, they succeeded in obtaining three vetoes and a series of changes in the decree that regulated the law.

In spite of all the criticism that this law deserves — both because of how it was developed and because of its content — it does include new aspects that can be considered as progress.

Both the law and the decree recognize the right of farmers, peoples and communities to freely sell products of socio-biodiversity, and to use, preserve, manage, store, produce, change, develop and improve reproductive material that contains genetic heritage or associated traditional knowledge.

It also recognizes these groups' contribution to the development and conservation of the genetic heritage in any form of publication, use, exploitation and dissemination. And it indicates the origin of access to the associated traditional knowledge in all publications, uses, exploitation and dissemination. And it gives them access to samples of genetic heritage, kept in ex situ collections in national institutions generated with public resources and the information associated with them.

Many of these items were secured only as a result of the joint advocacy and struggle of farmers, indigenous peoples and traditional peoples and communities.

Decree 8772/2016 which regulated the law, was one of Dilma Rousseff's final acts as president of the republic, before she was removed from office through the parliamentary coup authored by her vice president—who now occupies her former position. In this context, it is difficult to assess the outcome of this process. All the decrees Rousseff published in the final days of her management are undergoing review, in a process clearly oriented toward an ultra-neoliberal policy favoring agribusiness and international corporations in general.

Conclusions – To Commercialize is not to Protect!

Biodiversity protection should be the overriding focus of debates on access to the genetic heritage and associated knowledge. Protecting biodiversity is a consequence of protecting the ways of being, doing and living of peoples who have depended on it as part of their ancestral heritage. Unfortunately, the overriding perspective in the Brazilian debates was focused on economically exploiting tangible and intangible goods, which little by little are becoming private property.

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(1) EMI nº 00009/2014 MMA MCTI MDIC. Paragraph 11, p. 2.
(2) Decree 8772/2016