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### **Life Patenting Proposals in the Draft FTAA Chapter on Intellectual Property Rights**

For years, the negotiating documents for the Free Trade Area of the Americas (FTAA) have included a chapter on intellectual property rights (IPR) that, like every other chapter, is full of square brackets indicating disagreement among the participating governments. The new IPR text released August 14 remains almost entirely bracketed: several different options or positions on every issue remain on the negotiating table.

With the patent rules of the World Trade Organization (WTO) serving as a baseline, the IPR proposals in the FTAA range from further tightening the already highly restrictive terms of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) to extending considerably greater flexibility than that allowed under TRIPs. However, none of the current proposals would specifically prohibit patents on life, as has been advocated by numerous civil society organizations around the world and the African Group of WTO members.

Prior to the TRIPs Agreement, intellectual property rights (IPRs) – which generally take the form of patents, trademarks or copyrights and grant exclusive monopolies over an invention or other useful knowledge for periods of time ranging from 3-20 years or more – had fallen under the domain of national law. Different countries had different IPR laws, each one a balance between industry's desire to capitalize on its investments and the rights of society to benefit from the knowledge and resources of the nation. India, for example, denied patents on agricultural and pharmaceutical products, on grounds they are essential to the public welfare – although it did allow patents on the formulae and mechanics of food and drug processing. Brazil and Argentina used their IPR laws to encourage a strong pharmaceutical sector and affordable drugs. Ultimately, each nation's economic and social development strategy was at stake.

Upon the advent of TRIPs<sup>1</sup> in 1995, at the conclusion of the Uruguay Round negotiations, all members of the WTO were required to bring their national laws into conformity with the new international treaty – either by 2000 or by 2004, depending on their level of development.

While the current FTAA draft text on IPR includes the option of reiterating exactly what is in the WTO TRIPs agreement, several critical variations to those terms are now on the FTAA negotiating table:

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<sup>1</sup> The TRIPs Agreement text in full can be reached at:  
[http://www.wto.org/english/tratop\\_e/trips\\_e/t\\_agm0\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm)

- 1) Several options would allow nations to limit patents on living creatures and material because they are not "inventions," but there is NO option that would prohibit such patents.
- 2) Regarding microorganisms, there is one small paragraph noting that microorganisms should be patentable until different measures are adopted as a result of the review underway in the WTO TRIPs Council. This implies that such an amendment has support at the WTO, such as the proposal put forward by the African Group of WTO members last June.
- 3) The United States' proposal to limit the flexibility in TRIPs regarding plants is also present, stipulating that UPOV specifically be considered an "effective sui generis system" for IPRs on plants and requiring its implementation.
- 4) Recognition of the Convention on Biological Diversity continues in several sections of the text, but one formulation would transfer the right to manage access to genetic resources not only to the country of origin but also to any country possessing the material that has acquired it legally.
- 5) Still present is the condition requiring prior informed consent from Indigenous, African-American and local communities that have offered their resources or knowledge, innovations and traditional practices, as well as the duty of compensation and a just and equitable distribution of the benefits derived from them. Governments would have the responsibility to document and prove compliance with this requirement.

In addition to these elements, there are several changes in Part I of the IPR Chapter concerning "General Provisions and Basic Principles" that increase the standards of protection in the entire chapter, in detriment of development concern. Thanks to Maria Julia Oliva of the Center for International Environmental Law (CIEL) in Geneva <joliva@ciel.org> for these examples:

- a) Article 1 on "Nature and Scope of Obligations" now proposes that Parties not only establish IPRs consistent with TRIPs in their national legal systems, but that they ensure that protection. This language is also being pursued by the US in bilateral free trade negotiations.
- b) In the article on "Transfer of Technology," a key paragraph has disappeared. Earlier drafts stipulated "the promotion of technological innovation and the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge in a manner conducive to social and economic welfare." This language is gone.
- c) The article requiring transparency, that all IPR laws and regulations be publicly available and in national languages has also disappeared.

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