Including developing country interests in FTAs: biodiversity

Third World Network
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What is the problem?

- All countries have at least some biodiversity
  - This can be plants, animals, even human DNA
  - Developing countries tend to have more biodiversity than developed countries
  - Biopiracy is a problem for many developing countries
    - Biopiracy: the taking of biodiversity (and/or related TK) without prior informed consent and benefit sharing
- FTAs can be divided into:
  - South-South: these tend to be limited to reducing tariffs on goods
  - North-South: much broader in scope and include intellectual property provisions which can facilitate biopiracy

Scope of patentability

- No patents on life
  - Ethical and religious aspects re patenting DNA, human genetic resources, biological resources
    - Some indigenous communities do not want patents on their knowledge and do not want to commercialise it eg because it is too sacred to share
    - Africa Group and LDCs at WTO do not want patents on lifeforms (plants and animals)
    - Andean Community of Nations (includes Colombia, Ecuador and Peru) does not allow patenting of plants/animals
  - TRIPS does not require patents on plants and animals
  - Nth-Sth FTAs often require plants and animals to be patentable
    - It is a US demand in Andean and Thai FTA negotiations and is found in other US FTAs eg Morocco

Standard of patentability

- TRIPS: must grant patent if invention is new, involves an inventive step and is industrially applicable
- Novelty:
  - Is it known to the public? (so traditional remedies should not be novel)
- Inventive step:
  - does it involve a step that would not have been obvious?
- So there should be no patents for mere discoveries (cf inventions)

Enforceable mechanism for benefit sharing

- Principle:
  - Prior informed consent of indigenous communities should be required and
  - Benefits derived from their knowledge/resources should be equitably shared with them
- So if patents are granted, it should only be if the conditions above are met

UPOV

- Farmers are the direct competitors of seed companies because they can often re-use seed from their harvest and most still do
  - They also select and exchange seeds all of which is allowed under a TRIPS compliant sui generis system but not under UPOV (1991)
  - The exchange of seeds, eg different varieties of corn for different rituals, helps preserve biodiversity
- Patents and UPOV style plant variety protection are intended to stop farmers from saving seed
- Nth-Sth FTAs often require developing countries to accede to UPOV, thus giving up their ability to have a sui generis system
- The world's commercial seed market represents US$30 billion per year

Effect of investment chapter

- Expropriation (requiring compensation) occurs when anything affects the value of an investment which can include
  - Patents (eg a compulsory licence on a seed needed by farmers)
  - A contract to collect biological resources
  - The material collected under such a contract
- Allows investors to sue the state directly

Other provisions in FTAs

- MFN can spread detrimental provisions beyond the immediate parties to the FTA
- Dispute settlement chapter allows cross sectoral retaliation eg
  - For failure to provide or enforce required intellectual property protection
  - For failure to pay compensation under an investor-state dispute settlement
- Dispute settlement chapter allows non-violation complaints

Conclusion

- Patents on life forms are problematic because:
  - They may be against the wishes of indigenous communities
  - They encourage/reward biopiracy if they are not balanced by equally enforceable prior informed consent and benefit sharing requirements
  - They make farming more expensive