FTAS: TRADING AWAY TRADITIONAL KNOWLEDGE

Traditional knowledge is increasingly popping up in bilateral and regional free trade agreements. What's going on?

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Traditional knowledge has come up in a dozen or so free trade agreements (FTAs) over the last couple of years. In numerous cases, specific provisions on traditional knowledge were signed. The pattern at play is simple. When facing the US, trade negotiators concerned about "biopiracy" try to put limits on when and how researchers and corporations can get patents on biodiversity or traditional knowledge in the United States. When the US is not involved, governments carve out space to define their own legal systems of "rights" to traditional knowledge. In all cases, however, FTAs are framing traditional knowledge as intellectual property – a commodity to be bought and sold on the global market.

Bilateral and regional free trade agreements (FTAs) should be considered the latest threat to traditional knowledge. While FTAs have been around in their current form since the 1980s, probably the first well-known one was the North America Free Trade Agreement (NAFTA) signed between Canada, Mexico and the United States in 1993. Even so, only in the last couple of years have FTAs become immensely popular with governments disillusioned by the slow pace of trade liberalisation talks at the World Trade Organisation (WTO). It seems as if everyone wants one and that everyone is negotiating: China is in 27 FTA negotiations, Korea two dozen, the US almost a dozen, the Gulf countries several, Chile, New Zealand and Australia quite a few... By the end of last year, there were no less than 240 FTA negotiating processes under way across the globe.[1] While ostensibly aimed at breaking down trade barriers, these agreements are increasingly targeting indigenous peoples' and local communities' traditional knowledge in very real ways.

What does traditional knowledge have to do with "free trade"? It depends. For some people, traditional knowledge can be bought and sold, so it should have everything to do with it. For others, it's something to keep *out* of the market, so it should have nothing to do with it. Yet a lot of people are trudging around the middle grounds and ambiguities of this conflict. While trying to promote some sort of "rights" to traditional knowledge, they stay within the dominant framework of private property and usually end up proposing some adapted form of intellectual property rights. This makes it often misleading to speak of "protection" in relation to traditional knowledge. Protection of what? Corporate

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1 Hong Byeong-gee, "Korea now plans to expand free trade aggressively", JoongAng Daily, Seoul, 1 February 2006. http://joongangdaily.joins.com/200601/31/200601312116006739900090509051.html

rights to exclude, own and sell? Or collective rights to use, share, improve and further develop knowledge in the context of local livelihoods?

At the international level, governments have been debating whether and how to set up globally agreed rules on traditional knowledge for many years. This has been playing out at various institutions like the WTO, WIPO, the CBD and FAO, with occasional spats at UNESCO, the UN Commission on Human Rights or elsewhere. The debate, while technically boring and seemingly far removed from concrete realities, is actually fundamental. Smack in the centre is this monstrous ideological and cultural clash between looking at traditional knowledge as "intellectual property", thereby privatising it to serve corporate economic and development strategies, and looking at it as a collective heritage of peoples and communities that States have no business regulating, much less governing. While industrialised countries block any global agreement on this, because they're happy to profit from the commercial use of traditional knowledge without constraints, the pervasive neoliberal agenda of privatisation is slowly but steadily winning the day. To see it happening, we have taken a look at several of the bilateral and regional FTAs that governments are now signing like mad behind people's backs.

Current patterns

The issue of traditional knowledge has come up in a dozen or so FTA drafting processes over the last couple of years. In half of those cases, specific provisions on traditional knowledge were signed. While the limited number of experiences prevents us from drawing broad conclusions, there is a clear pattern currently at play.

In all cases, the main concern expressed by governments trying to insert traditional knowledge into bilateral or regional free trade agreements is preventing or stopping its "misappropriation" ("biopiracy", as some people call it).[2] And in all cases, they try to do this by proposing new twists and turns for rules on "intellectual property rights" (IPRs) such as patents, copyrights, trademarks and geographical indications. At that point, however, one of two things happens, depending on whether or not the negotiating team across the table is the United States.[3]

2 For a critique of the term "biopiracy", see GRAIN, "Re-situating the benefits from biodiversity: A perspective on the CBD regime on access and benefit-sharing", Seedling, April 2005. http://www.grain.org/seedling/?id=327

3 FTAs initiated by Australia, the EU, EFTA, Japan and Canada-on-its-own have up to now not taken up the issue of traditional knowledge.

Box 1: The magic formula

The magic formula to stop "biopiracy", in the minds of many governments, is composed of three principles. "Disclosure of origin" means patent applicants would have to declare where they obtained biological materials or traditional knowledge involved in their invention. "Prior informed consent" means they have to show that explicit clearance was given for them to take and use these materials or this knowledge. As to "benefit sharing", the patent applicant would need to show that some arrangement had been made with the source of the materials or knowledge to give them something in return. These three principles draw from the Convention on Biological Diversity, which most governments of the world have signed, with the exception of the United States.

The idea behind this formula is the easy notion that "biopiracy" is the *illegal* appropriation, mainly through patents, of biodiversity or TK. Come up with the *legal* ways to appropriate, or to get patents, and the problem magically disappears! Conveniently lost from view here is the rather different notion that appropriation – through any form of intellectual property scheme, no matter the underlying conditions -- is actually the problem, and that by legalising biopiracy governments are just making things worse.

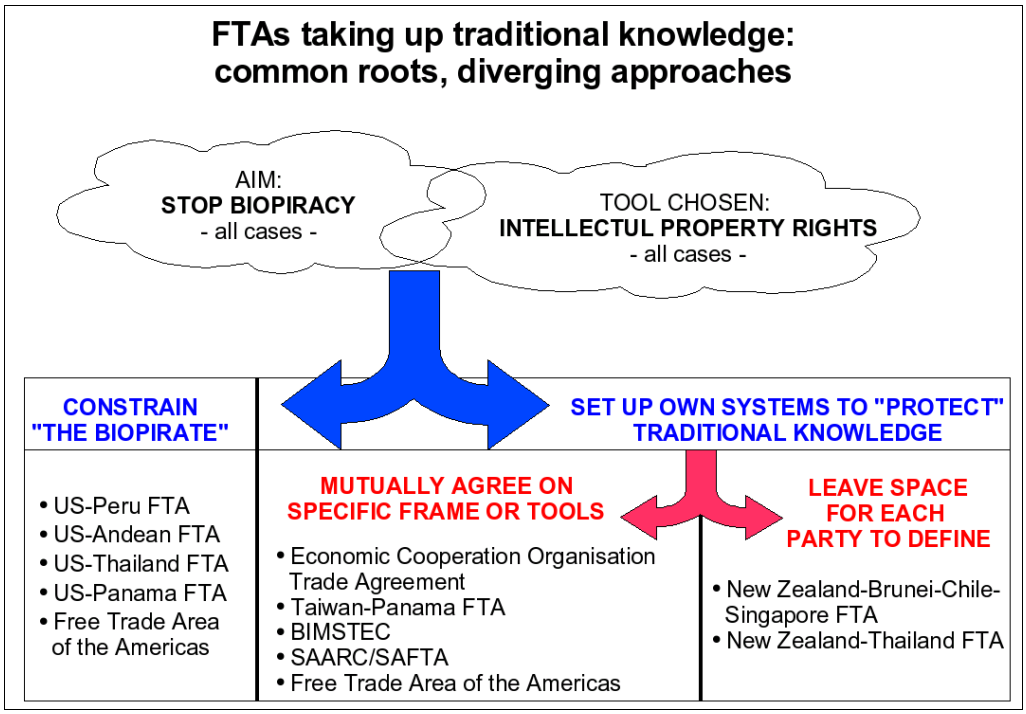
All trade negotiators who manage to get traditional knowledge in an FTA discussion with the United States share the same plan: to create new mutually agreed rules and conditions on how corporations and public researchers get US patents on biodiversity and traditional knowledge coming from their own countries. These are typical "North-South" discussions: Peru facing the US; Colombia and Ecuador facing the US; Thailand facing the US; and 34 Latin American countries facing the US (plus Canada). In these cases, the proposals on traditional knowledge brought forward by the Southern government(s) amount to disciplining the grant of patents in the United States through special provisions on disclosure of origin, prior informed consent and benefit-sharing related to the commercial use of genetic resources and traditional knowledge *(see box 1)*. The US, not surprisingly, rejects this formula. Even if it wanted to accept it, which it does not, the US government is under politically-mandated "advice" from its biotech industry not to.[4]

When the "negotiating" partner across the table is *not* the United States, discussions take a different direction. All the FTAs in this category address the issue by acknowledging a role for independent systems of legal “rights” related to traditional knowledge. In some cases, this means devising common frameworks or tools among the countries involved. In other cases, the parties simply agree that each government may grant rights over traditional knowledge, and may potentially cooperate to that end, but without specifying common rules or tools.

The following graph presents a simplified illustration of these approaches, based on the few country experiences to date.

4 The US Trade Representative's FTA negotiating authority is mandated by Congress. Under this mandate, USTR must clear FTAs through a structure of advisory councils that are made up of major US corporations.

Graph 1: How FTAs are taking up traditional knowledge



So much for the minor differences. The common underlying trend is much more important. Whether or not the US is involved, and whether the agreements are North-South or South-South, all FTAs that address traditional knowledge do it through intellectual property regimes – that is, exclusive monopoly rights to produce, use, buy and sell purported innovations. This uniform bias raises an important question. Are these disconnected but similar agreements setting a trend for international law on traditional knowledge? They certainly are, because they are establishing norms and commitments for individual countries, tying their hands down to what become new legal precedents for other governments. That's why the common thread between them is so important. In all cases, the same unmistakable message coming out of all these various deals is that:

- Traditional knowledge is a trade issue (because it has economic value).
- Traditional knowledge is property or should be property (because it has owners or should have owners).
- Traditional knowledge is suitable subject matter for "intellectual property" law or its commercial use should be regulated under what is commonly known as intellectual property law.
- "Protection" of traditional knowledge can be achieved through the enforcement of existing IPR rules such as those on patents, copyrights, trademarks, geographical indications. Alternatively, it might be achieved through the adoption of special, separate provisions on traditional knowledge, within those same intellectual property regimes.

These are extremely one-sided and controversial boundaries that will limit what governments can do supposedly to "protect" – in their very erroneous view – local and indigenous knowledge. In fact, there is no recognition here of communities' real relations to traditional knowledge. It is nothing but a giant regulatory scheme to do business with traditional knowledge. As the International Indigenous Biodiversity Forum has complained, "Free trade agreements do not recognise the rights of Indigenous peoples, nor do they protect our traditional knowledge. Furthermore, they promote the interests of the market above collective rights."[5] With no consensus on how to "protect" traditional knowledge at the international level, much less in each of these FTA-negotiating countries, governments are fast committing themselves to a one-track approach through these bilateral and regional FTAs: traditional knowledge as a commodity to be bought and sold under the conventional rules of exclusionary private property.

Table 1: Some FTA processes addressing traditional knowledge

SIGNED DEALS	**STATUS**
Trans-Pacific Strategic Economic Partnership Agreement New Zealand, Brunei, Chile, Singapore	Signed 3 June 2005 In force as of 1 January 2006
New Zealand-Thailand Closer Economic Partnership Agreement	Signed 19 April 2005 In force as of 1 July 2005
US-Dominican Republic-Central America Free Trade Agreement (US-DR-CAFTA) Dominican Republic, Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, USA	Signed 5 August 2004 Not yet in force
US-Peru Trade Promotion Agreement	Signed 7 December 2005 Not yet in force
Economic Cooperation Organisation Trade Agreement (ECOTA) Afghanistan, Azerbaijan, Iran, Kazakhstan, Kyrgyz Republic, Pakistan, Tajikistan, Turkey, Turkmenistan and Uzbekistan	Signed 17 July 2003
Panama-Taiwan Free Trade Agreement	Signed 21 August 2003
UNDER NEGOTIATION OR IN PROCESS	**STATUS**
Free Trade Agreement of the Americas (FTAA) All countries of the American hemisphere except Cuba	Since 1994. Last draft agreed in November 2003.
US-Andean Trade Promotion Agreement Colombia, Ecuador and US, with Bolivia as observer. Peru was originally included.	Since 2004. May end in individual bilateral agreements
US-Panama Free Trade Agreement	Since 2004
US-Thailand Free Trade Agreement	Since 2004
Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC-FTA) Bangladesh, Bhutan, India, Nepal, Sri Lanka and Thailand	To come into force 1 July 2006
South Asia Free Trade Agreement (SAFTA) Bangladesh, India, Maldives, Nepal, Pakistan, Sri Lanka	Was supposed to come into force 1 January 2006

5 IIFB opening statement at the fourth meeting of the Convention on Biological Diversity ad hoc open-ended working group on access and benefit sharing (Granada, 30 January-3 February 2006). http://ipcb.org/pipermail/ipcb-net_ipcb.org/2006-February/000043.html

Specific experiences

A survey of several FTA processes that are addressing the issue of traditional knowledge provides us with an idea of what is going on. Some of these agreements have already been signed, while others are still in the pipeline. Some cover entire regions or at least several countries, while others are strictly bilateral.

Free Trade Area of the Americas: The US government launched the FTAA process in 1994, just after NAFTA came into effect. It aims to create one giant free trade zone from Juneau, Alaska down to Punta Arenas, Chile – leaving Cuba out. But after twelve years on the stove, it is still a highly contested project.

The FTAA is often called a hemispheric expansion of NAFTA and this link is an important one. NAFTA was the first lesson in what US-driven FTAs mean for traditional knowledge, because it forced Mexico to join the UPOV system of plant breeders' rights, a kind of patent scheme for plants. All US free trade agreements do that, although in recent years they have gone even further to require the patenting of plants and animals as well. Neither patents nor plant breeders' rights recognise communities' traditional knowledge. Quite the contrary: they assign legal ownership privileges to companies that take crop varieties or livestock breeds developed by farmers or indigenous peoples and give them a tweak. In that sense, they undermine people's rights in relation to biodiversity. The FTAA was intended to go much further than NAFTA in this respect.

The latest draft of the FTAA is dated November 2003. It is a hodgepodge of different proposals from all parties at the negotiating table. From the US side, the proposal is clear. All countries would have to join UPOV (1991 Act) and allow patents on plants and animals, including genetically-modified organisms. Other governments have tried to limit the US proposal. The Andean countries went furthest by introducing a special section, within the intellectual property rights chapter, on traditional knowledge.

The Andean proposals would make the FTAA the first free trade agreement process to call for disclosure of origin, prior informed consent and benefit sharing in relation to all biodiversity-related patents granted by the signatories. But US negotiators, obeying their own industry’s demands, reject this approach. The US will not allow patent law to become a playing field for rules on access to genetic resources or the sharing of profits from their commercial use.

The FTAA has lumbered through a long series of misstarts, delays, blockages, protests and shifting political sands in the region. The US has therefore switched its emphasis to bilateral and subregional FTAs, in a strategy well characterised by the quip: "The FTAA is not dead. It's just had babies."

US-Dominican Republic-Central America FTA: The US-DR-CAFTA, often called CAFTA for short, was signed in 2004. It barely made it through US Congress the following year and still has not been ratified by Costa Rica. The text contains no direct reference to traditional knowledge, but many Central Americans see it as a precedent-setting obstacle to implementation of national policies on traditional knowledge. CAFTA does this in two ways: it puts walls around what governments can enforce as "disclosure" requirements for patents, and it makes clear that bioprospecting falls under its reach.

The CAFTA text limits what the signatories can require in terms of "disclosure" of patented inventions by defining when that disclosure is "sufficiently clear and complete".[6] A "megadiverse" country like Costa Rica therefore cannot add further conditions such as the disclosure of origin of a biochemical element or proof of prior informed consent from indigenous peoples. Broadening disclosure requirements, however, is precisely what developing countries which form the Megadiverse Group have been fighting for since years at international fora like the WTO, CBD and WIPO.[7] Under CAFTA, failure to indicate the origin of a plant or show proof of consent for its use from a local community may never be grounds for rejecting a patent application.

This is no accident. It is the result of strong lobbying from the biotech and pharmaceutical industries. In its assessment of the US-Australia FTA, which was hammered out just before CAFTA, the US government's main corporate advisory group on intellectual property, representing big business, told the US Trade Representative:

> The United States should take the opportunity of future FTA negotiations to clarify that no disclosure requirements beyond those in Article 29 of TRIPS may be imposed on patent applicants. Such a provision would explicitly prohibit countries from imposing special disclosure requirements regarding the origin of genetic resources or comparable grounds that could be used as a basis either to refuse to grant the patent or to invalidate it.[8]

The other way that CAFTA attacks efforts to keep traditional knowledge under some form of local control is by undermining Costa Rica's Biodiversity Law. Costa Rica's law, which was adopted in 1998, imposes measures such as the obligation to present a certificate of origin as a condition for filing a patent application, the right of indigenous peoples and local communities to oppose any access to biological materials or knowledge from their territories for cultural, spiritual, social, economic or other reasons, and the power of a special technical office to veto any patent or plant breeders' right infringing the law. This will be dismantled if CAFTA is ratified by all parties and comes into force.

Upon signing CAFTA, the Costa Rican government indicated that one single provision of the Biodiversity Law -- its requirement for foreign bioprospectors to name a local

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6 See CAFTA Articles 15.9.9 and 15.9.10: "Each Party shall provide that a disclosure of a claimed invention shall be considered to be sufficiently clear and complete if it provides information that allows the invention to be made and used by a person skilled in the art, without undue experimentation, as of the filing date. Each Party shall provide that a claimed invention is sufficiently supported by its disclosure if the disclosure reasonably conveys to a person skilled in the art that the applicant was in possession of the claimed invention as of the filing date."

7 The Group of Like-Minded Megadiverse Countries was set up in 2002 as "a mechanism for consultation and cooperation to promote their interests and priorities related to the conservation, sustainable use of their biological resources, especially with regard to the fair and equitable sharing of benefits arising out of the use of biodiversity". Members include Bolivia, Brazil, China, Costa Rica, Colombia, Democratic Republic of Congo, Ecuador, India, Indonesia, Kenya, Madagascar, Malaysia, Mexico, Peru, South Africa, the Philippines and Venezuela. See http://www.megadiverse.org.

8 "The US-Australia free trade agreement (FTA): The intellectual property provisions", Report of the Industry Functional Advisory Committee on Intellectual Property Rights for Trade Policy Matters (IFAC-3), Washington DC, 12 March 2004. http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Reports/asset_upload_file813_3398.pdf)

representative -- shall not be overruled by the new free trade agreement.[9] In legal terms, that means that all the rest of the law becomes subject to challenge as inconsistent with the FTA. A corporation like Pfizer could thus take the Costa Rican government to court – that is, private arbitration at the World Bank -- for enforcing whatever aspect of the law that Pfizer says stands in the way of its anticipated profits.

If it is ratified, communities in Costa Rica may soon find that the Biodiversity Law's provisions are deemed to be "trade barriers", an impediment to investment, a "market access restriction" or unduly imposing some "performance requirement" in violation of the now superior US-DR-CAFTA.[10]

US-Andean process: Colombia, Ecuador and Peru, three of the five members of the Andean Community of Nations, started FTA talks with the US in 2003. They were pushed by Washington's announcement that the US would not renew market access preferences under the unilateral Andean Trade Promotion and Drug Eradication Act once it expired in December 2006. While the three Andean countries had been negotiating as one bloc towards what was to be a US-Andean FTA, Peru broke ranks and signed a deal on its own with the US in December 2005.

Among the most important issues for the Andean countries in their FTA talks with the US have been biodiversity and intellectual property concerns. Until recently, the three countries worked together to secure a commitment from the US requiring patent applicants to present a certificate of origin for any invention based on genetic resources or traditional knowledge. This position had a legal basis in two decisions of the Andean Community. Decision 391 on access to genetic resources, adopted in 1996, establishes that biodiversity is a "national and regional heritage" and recognises the traditional knowledge of indigenous peoples related to the use of local genetic resources.[11] Decision 486 on industrial property, adopted in 2000, rules that the granting of patents on inventions developed on the basis of material obtained from the region's biological heritage or traditional knowledge "shall be subordinated to the acquisition of that material in accordance with international, Andean Community, and national law."[12] Furthermore, it says that any such patent will be declared null or void if the applicant fails to submit a copy of the access permit or the certificate of authorisation for the use of traditional knowledge belonging to indigenous, Afro-American or local communities in the member states. Quite importantly, Decision 486 also states that plants and animals are not patentable in the Andean Community.

Last August, the Ecuadorian government publicly disclosed the Andeans' negotiating position on traditional knowledge and biodiversity in their FTA talks with the US *(see box 2)*. The bottom line, it was said, was not to contradict Andean law. As evident from Ecuador's report, the US was willing to discuss some language on biodiversity, but only if there were no compulsory link to the granting of patents.

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9 See Annex I, Schedule of Costa Rica, available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/asset_upload_file686_3945.pdf

10 For a discussion of how bioprospecting activities may be treated under FTA investment rules, see Carlos Correa, "Bilateral investment agreements: Agents of new global standards for the protection of intellectual property rights?", August 2004, available at http://www.grain.org/briefings/?id=186.

11 Available in English at http://www.comunidadandina.org/INGLES/treaties/dec/d391e.htm.

12 Available in English at http://www.comunidadandina.org/ingles/treaties/dec/D486e.htm.

Box 2: The Andean negotiating position as of August 2005 (including Peru and Colombia at the time)

The fundamental goal of the Andean countries is to ensure that no patents are granted in the United States without the authorisation of the holders of genetic and biological resources (in other words, access regulations must have been complied with) or of the holders of traditional knowledge (prior informed consent must been obtained) be they of indigenous, Afro-American or local communities.

We have presented various proposals to meet this objective, in particular the exchange of information between patent offices and the creation of a tight link between these offices. This could be the best way to prevent the "biopiracy" that is going on with respect to our genetic resources and our traditional knowledge.

We must stress that these issues are fundamental for the Andean countries negotiating the FTA and that we cannot conceive of a chapter on intellectual property rights that does not cover these issues.

In the last round in Miami, we perceived a positive signal from the US on the general principle of protecting genetic resources and traditional knowledge and on the mechanisms needed to ensure collaboration and information exchange between our patent offices. We hope that in the next round in Cartagena, the US will make a firm commitment on these important issues.

Source: "Jefe negociador informo a Congresistas sobre la situacion de las negociaciones del TLC", Ministerio del Comercio Exterior, Quito, 17 August 2005, freely translated by GRAIN. Available at http://www.tlc.gov.ec/prensa/boletin.php?action=mas&autono=2522

The reason for the US position to resist any move from FTA partners to link disclosure of origin to patent law is clear: pressure from the biotech industry, which affirms that any such linkage "will weaken and in some instances abolish patent rights."[13] And if the US gave in to the Andeans, it would logically have to give in to all developing countries making the same demand at WTO, WIPO and CBD too.

As the US-Andean FTA talks went on, the Colombian and Ecuadorian trade negotiators started facing coercion not only from the US but from Peru as well to withdraw their proposals on biodiversity and TK. President Alejandro Toledo declared in September 2005 his intent to sign with the US if the other Andean states did not speed things up.[14] By early December, Peru went ahead, leaving Ecuador and Colombia in a difficult position to continue fighting for what Peru had given up *(see next section)*. Many observers quickly assumed that Ecuador and Colombia would now also sign individual bilateral treaties with the US. The question was how much these would be based on the text that Peru had accepted. That question will soon be moot. Late February 2006, Colombia concluded its own FTA with the US which, judging by the limited information currently available, appears to be a carbon copy of the US-Peru deal as far as biodiversity and traditional knowledge are concerned.[15]

US-Peru debacle: Until recently, Peru had been seen as one of the standard-bearer developing countries fighting for things like prior informed consent or proof of origin for the grant of patents involving biodiversity or traditional knowledge. For that reason, the

13 Biotechnology Industry Organization, "Letter to the Honorable Robert Portman", Washington DC, 6 December 2005, at http://www.bio.org

14 ICTSD, "Andean negotiators call for flexibility on Ag, IPRS in FTA talks with US", BRIDGES Weekly Trade News, Geneva, 14 September 2005. http://www.ictsd.org/weekly/05-09-14/story2.htm

15 Office of the US Trade Representative, "Free trade with Colombia: Summary of the agreement", USTR, Washington DC, 27 February 2006. http://www.bilaterals.org/article.php3?id_article=3992

Toledo government's capitulation to Bush's agenda through the US-Peru Trade Promotion Agreement, signed on 7 December 2005, was a disappointment to some. To others, it was a shock, as Peru could no longer say anything consistent with its historic views at WTO, CBD or elsewhere. To yet others, it was no surprise at all.

Source: Translated from Diario La República, Lima, edición del 27 de septiembre del 2005. http://archivo.larepublica.com.pe/index.php?fecha_edicion=2005-09-27.

Biodiversity and traditional knowledge come up several times in the US-Peru agreement. In the environment chapter, the parties make an innocuous commitment to the conservation and sustainable use of biodiversity and preservation of traditional knowledge. In the intellectual property chapter, Peru accepted the US demand to make "all reasonable efforts" to start patenting plants – and once it does patent plants (or animals, the US adds), to never go back on this policy. But the parties also signed a separate "understanding" on biodiversity and traditional knowledge, disconnected from the IPR or any other chapter of the agreement *(see box 3)*. This is where Peru let go of everything it ever defended in the Megadiverse Group and related multilateral fora.

The text of the understanding politely recognises the importance of prior informed consent, benefit sharing and appropriate examinations to ensure the quality and validity of patents granted on inventions regarding biodiversity or traditional knowledge. But it then goes on to say that access to genetic resources or traditional knowledge can be adequately addressed through contracts. There is no obligation for the US patent office to look at Peruvian databases of traditional knowledge before granting patents to Diversa or DuPont. And the whole idea of requiring proof of prior informed consent or disclosure of origin was simply dropped.

Some have said that the mere acceptance by the US of a number of controversial concepts regarding biodiversity and traditional knowledge in a bilateral free trade agreement is an achievement. This is rubbish. It was the Peruvian government that caved in, through a bilateral treaty, to positions long hawked by the US in the corridors of the multilateral fora.

So where does this leave the Andean Community and its rules -- currently valid in five countries -- that prohibit patents on plants and require proof of prior informed consent, benefit sharing and disclosure of origin for patent grant? According to Margarita Flórez, a Colombian lawyer with the Bogota-based Institute of Alternative Legal Services, "if these countries change their position and accept the US FTA proposals, they will have to change Andean law through a collectively agreed derogation. In our view, the

Andean countries cannot sign anything conflicting with Andean law until that happens."[16] Which is what Peru (and now possibly Colombia) did.[17]

Box 3: The US-Peru understanding on biodiversity and traditional knowledge

The Governments of the Republic of Peru and the United States have reached the following understandings concerning biodiversity and traditional knowledge in connection with the United States of America - Peru Trade Promotion Agreement signed this day:

The Parties recognize the importance of traditional knowledge and biodiversity, as well as the potential contribution of traditional knowledge and biodiversity to cultural, economic, and social development.

The Parties recognize the importance of the following:

(1) obtaining informed consent from the appropriate authority prior to accessing genetic resources under the control of such authority;

(2) equitably sharing the benefits arising from the use of traditional knowledge and genetic resources; and

(3) promoting quality patent examination to ensure the conditions of patentability are satisfied.

The Parties recognize that access to genetic resources or traditional knowledge, as well as the equitable sharing of benefits that may result from use of those resources or that knowledge, can be adequately addressed through contracts that reflect mutually agreed terms between users and providers.

Each Party shall endeavour to seek ways to share information that may have a bearing on the patentability of inventions based on traditional knowledge or genetic resources by providing:

a) publicly accessible databases that contain relevant information; and

b) an opportunity to cite, in writing, to the appropriate examining authority prior art that may have a bearing on patentability.

Source: Draft of 6 January 2006, subject to legal review, available online at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Peru_TPA/Final_Texts/asset_upload_file869_8728.pdf

But Flórez also points out that if the Andean countries do change Andean Community law to accommodate US demands under these FTAs, the rights of local communities will be completely decimated. Their rights were to some extent recognised under the Andean Community rules. But they are not parties to the FTAs, nor do they have any role in the patents that this change would accommodate. In that sense, the Toledo administration sacrificed much more than the interests of Peru's citizens.

Panama: The Panama-Taiwan FTA is one of the first cases of a South-South FTA trying to establish common rules on "protection" of traditional knowledge. It was signed

16 Personal communication, 6 February 2006.

17 The Andean Community is currently imploding from several sources of FTA-related pressures. Colombia, Peru and Ecuador want the group to change its shared legislation on drug data protection to suit Washington's FTA demands. Colombia has already changed its national law to meet the FTA requirements and Peru will soon have to do the same. Venezuela refuses to change Andean law to suit these bilateral deals with the US, while the Bolivian patent office also opposes such changes. In the meantime, Venezuela and Bolivia were both recently granted voting membership in the Mercosur (Common Southern Market), a move that could also weaken the Andean Community. The legal contradictions they are now creating over life patenting and traditional knowledge will only exacerbate existing splits.

in 2003, presumably as part of Taiwan's drive to gain more access to the US market though bilateral FTAs with Central American countries. It commits both countries to "protect the collective intellectual property rights and the traditional knowledge of indigenous people over their creations, subject to commercial use, through a special system of registration, promotion and marketing of their rights." This provision is part and parcel of the agreement's chapter on intellectual property, along with plant breeders' rights, another "special system" of industrial property rights.[18]

The FTA specifically says that traditional knowledge of indigenous people and local communities "shall not be subject to any form of exclusivity by unauthorized third parties applying the intellectual property system". It adds that the licensing of patents on inventions developed from material obtained from people's cultural and biological heritage should be subject to relevant national and international laws and regulations.

Three years before signing this agreement, Panama adopted Law No. 20 on a Special Intellectual Property Regime for the Collective Rights of Indigenous Communities. This was probably a reason to include traditional knowledge in its FTA with Taiwan, as was Taiwan's own history of attempting to set up domestic laws on traditional knowledge. The Panama law states that traditional knowledge of other countries will have "the same benefits set forth in hereon, whenever they are made by means of reciprocal international agreements with these countries".[19] Panama's definition of traditional knowledge specifically includes genetic resources and seeds.

Right now, the US and Panama are trying to finalise their own FTA. As far as anyone knows, there has been no discussion of traditional knowledge in these talks. According to Nelson De León Kantule of the Kuna people's association Napguana, nothing positive should be expected from the FTA and there have been absolutely no consultations with them.[20]

If the Peru experience is any indication, the chances are high that the US-Panama FTA will send Panama's law on traditional knowledge into the dustbin, at least as far as US corporations operating in Panama are concerned.

Thailand-US talks: The Thai government has already signed FTAs of varying complexity with Japan, China, India, New Zealand, Australia and others. It is in the process of negotiating numerous others. The most important of these right now is the negotiation, if you can call it that, with the United States in which both biodiversity and traditional knowledge are key concerns for Thailand.

Thai academics, politicians and social movements have relentlessly voiced their concern that the US will force Thailand to change it patent laws to assure monopoly rights over seeds, medicinal plants and traditional knowledge for Monsanto and other US companies in Thailand. The US already provides such rights at home, under its own laws. Thailand has been trying to prevent foreigners getting monopoly rights over Thai crop varieties and traditional knowledge in the US through patents, plant breeders' rights, trademarks or geographical indications, with special concern for jasmine rice. If

18 The text is available online at http://www.sice.oas.org/trade/PanRC/PANRC1_e.asp#16.05
19 Article 25. The text is available online at http://www.grain.org/brl/?docid=461&lawid=2002
20 Nelson De León Kantule, personal communication, 25 January 2006.

the US-Thai FTA goes through, American corporations will be able to get such rights in Thailand itself. This a whole new level of threat.[21]

In the narrow frame of the FTA talks, Thailand has two objectives. One is to resist US pressure to expand the scope of its industrial property legislation providing for control over life forms. The US is demanding that Thailand accede to the Union for the Protection of New Plants Varieties based on the 1991 Act of the UPOV Convention.[22] It is also demanding that Thailand allow for patents on plants and animals.[23] Both of these demands are typical of all bilateral FTAs promoted by the US. They come from the Congressional mandate on the US Trade Representative to ensure that any bilateral trade agreement entered into by the United States "reflect a standard of [intellectual property] protection similar to that found in United States law." If the FTA process is to proceed, it will be next-to-impossible for Thailand to skirt an issue as fundamental as this one.

Thailand's second objective is the same as that of Ecuador, Colombia and Peru in their initial FTA positions toward the US. Thailand is proposing that patents related to biological diversity or traditional knowledge may not be granted, by either party to the agreement, without proof of disclosure of origin, prior informed consent and benefit-sharing arrangements. By the fourth round of talks, in 2005, the US reportedly informed Thai negotiators that this proposal is not credible since Thailand does not have such a provision in its own national patent law. (That argument is without meaning, since Peru having such provisions in its own patent law was no obstacle to the US getting Peru to scrap them.) But by the sixth round of talks with Thailand, in early 2006, the US simply rejected the idea.[24]

New Zealand's policy: The New Zealand government makes a point of including traditional knowledge in all FTAs that it signs.[25] The idea is supposedly not to create new obligations for the parties to these agreements, but to affirm that each government can develop its own domestic laws. Although Wellington pursues this entirely as a matter of intellectual property rights, its FTA negotiators claim they understand that countries could do things to "protect" traditional knowledge outside the sphere of patents and the like.

New Zealand’s bilateral FTA negotiations with Thailand were the first experience for New Zealand to try this out. According to trade ministry officials, New Zealand put the issue on the agenda, not the Thais. To play it safe, they opted to stick to proposals under discussion at WIPO at the time. The text therefore boils down to a commitment to the WTO TRIPS Agreement and a promise to cooperate on drafting further measures to "protect" traditional knowledge. The next experience came with the Trans-Pacific Strategy Economic Partnership Agreement, involving New Zealand, Chile, Brunei and Singapore. Here again the agreement makes a commitment to TRIPS and

21 See, for instance, the report from Thailand's National Commission on Human Rights, "The Thai-US free trade agreement and its impacts on Thai jasmine rice and biological resources", Bangkok, 14 June 2005. Available at http://www.bilaterals.org/article.php3?id_article=2485.

22 Leaked draft of the US proposal, available at http://www.bilaterals.org/article.php3?id_article=3723.

23 Leaked draft of the US proposal, available at http://www.bilaterals.org/article.php3?id_article=3677.

24 Xinhua, "Thailand takes US to task over intellectual property rights", China View, Beijing, 13 January 2006, available at http://etna.mcot.net/query.php?nid=5851.

25 Rowena Hume, Coordinator, Trans-Pacific SEP, Trade Negotiations Division, New Zealand Ministry of Foreign Affairs and Trade, personal communication, 20 December 2005.

recognises the right of all parties to develop further domestic measures to protect traditional knowledge.

For some native Maori, the whole "intellectual property" approach to what is strangely termed "protecting" indigenous culture is wrong. Worse, FTAs are now a tool for the New Zealand government to systematically export such policies to other lands.[26]

Australia's non-policy: Australia has no policy to include traditional knowledge in its bilateral and regional FTAs. While this may seem normal, or even good, it has actually become a bone of contention at home. Senate hearings on the US-Australia FTA complained of negative implications for indigenous cultures in Australia, with specific concern over the lack of any "protection" for Aboriginal and Torres Straits Islander communities' traditional knowledge and moral rights.[27] Indigenous lawyers have filed submissions to Australia's Parliament on this matter. Even the Australian copyright industry has lodged a formal proposal with the Department of Foreign Affairs and Trade to include traditional knowledge in the upcoming Australia-ASEAN-New Zealand FTA.[28] In all these cases, the complainants are equating rights over traditional knowledge with intellectual property rights, for the specific purpose of generating financial returns from the commodification of indigenous culture.

BIMSTEC and SAARC brewings: The BIMSTEC and SAARC cases are quite different from the other experiences.[29] Here, two overlapping clusters of developing countries have adopted their own regional FTAs. Both of them are simultaneously working to set up legal tools to recognise and administer rights over traditional knowledge. The question is whether, in either or both cases, these groups will actually harmonise their domestic laws and incorporate common provisions into the FTAs at a later stage, especially given the scope of many trade agreements today.

BIMSTEC is a group of countries straddling the Bay of Bengal formed to boost economic cooperation several years ago. In 2004, BIMSTEC adopted an FTA that will first cover goods and then expand to services and investment. Alongside this, BIMSTEC countries are working together to jointly develop systems of legal rights over biodiversity and traditional knowledge. Thailand has the lead responsibility for pushing this cooperation forward. As part of the plan, governments are specifically looking into expanding their intellectual property regimes to

26 Cherryl Smith, personal communication, 19 December 2005.
27 Senate Select Committee on the Free Trade Agreement between Australia and the United States of America, report and submissions, Canberra, 5 August 2004.
28 Copyright Agency Limited, Sydney, 4 February 2005.
29 BIMSTEC stands for Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation and involves Bangladesh, Bhutan, Burma, India, Nepal, Sri Lanka and Thailand. SAARC stands for South Asia Association for Regional Cooperation and involves Afghanistan, Bangladesh, India, Maldives, Nepal, Pakistan and Sri Lanka.

cover traditional knowledge. Whether this will lead to common rules within the wider FTA is yet to be seen.

SAARC has been on a similar track for years. The predominantly South Asian club has evolved its own free trade agreement from an earlier preferential trade agreement. Beyond the FTA, SAARC members are working together to develop systems of documenting local and indigenous knowledge "to safeguard intellectual property." India is quite advanced in this area, convinced as it is that electronic databases of local knowledge are the best way to assure economic rights over that knowledge in the global marketplace, despite the huge controversies that this has been raising. Whether this approach becomes more widespread in other SAARC countries and finds its way into a future version of their trade agreement, through harmonised intellectual property rules, is still a question. The seeds for such a scenario, however, are certainly there.

ECOTA's agenda: The Economic Cooperation Organisation, covering Central and West Asia,[30] adopted a regional FTA in 2003. The agreement's chapter devoted to intellectual property rights specifically includes traditional knowledge within its scope. The agreement says that all parties will enforce these rights, raising the standards of such protection to a level similar to that provided in multilateral agreements by 2011. Right now, there are no such standards for traditional knowledge at the multilateral level, but the vision is clear. In fact, the agreement specifically refers to WIPO and the WTO as arenas where ECOTA members will cooperate for the harmonisation of intellectual property policies.

If you find yourself in a hole, stop digging

The barrage of free trade agreements that governments are scrambling to sign[31] raises serious issues for anyone concerned about the future of biodiversity and traditional knowledge, and people's rights in relation to them. FTAs are negotiated in secret, behind closed doors. They are hammered out one by one, pitting countries against each other, although they follow and build on the same uniform prescriptions. The North-South FTAs generally push developing countries into much worse rules and commitments than does the WTO, especially on services, investment and intellectual property. The South-South agreements, while usually more modest in scope, are just as bad and can have immediate and devastating impacts on people's livelihoods.[32]

As the few cases show, Southern governments are trying to use FTAs to retip the scale of recent multilateral accords, especially the WTO TRIPS Agreement, with respect to rights over biodiversity and traditional knowledge. They believe they have something special to demand in a bilateral trade deal with a country like the US, as they see themselves sitting on a pot of green gold that the US needs access to. So far, they have failed. More than failing, however, they are actually strengthening the North's hand and fostering its objectives. Far from achieving their stated aim of reducing biopiracy, developing country governments are formally legalising the privatisation and

30 Afghanistan, Azerbaijan, Iran, Kazakhstan, Kyrgyzstan, Pakistan, Tajikistan, Turkey, Turkmenistan and Uzbekistan.

31 See http://www.bilaterals.org to keep track or get an overview.

32 Witness the impact of the Thailand-China agreement on Thai garlic growers or that of the Chile-Korea agreement on Korean fruit producers.

appropriation of genetic resources and related local knowledge through these FTAs, be they North-South or South-South.

Peru is the crudest example of how this works. Not only did it drop its own demands as it bowed to those of the US, it tossed its longstanding international agenda out the window. No one will take Peru seriously if it tries to speak at the next CBD meeting about requiring disclosure of origin in patent applications. Lima has adopted Washington's stance that bilateral contracts are all a bioprospector needs. As a result, the government would now have to get Andean Community law changed, or withdraw from the Community or find some other way to manage its contradictions. (So much for regional integration!) This kind of mess is exactly what divide-and-conquer tactics, which are at the heart of bilateralism, will create. In many cases, these not even bilateral agreements, but unilateral bulldozing. For a country like the United States, FTAs are about getting everyone "in line" with its own policies and its own visions one by one, from the bottom up – and it's working.

As we have seen, no government is taking meaningful steps to defend traditional knowledge in these FTAs. Southern states in particular are accepting intellectual property rights as their own tool of choice to stake out divisive property claims and put traditional knowledge on the global market. By adopting the very source of the problem as its solution, these governments are declaring victory for the US and other industrialised powers from square one.