USTR criticizes Guatemalan intellectual property law: proposal legal reforms could impede implementation of the UN Convention on Biological Diversity

By Steve Suppan January 2006

In November 2005, the Office of the U.S. Trade Representative (USTR) surveyed Guatemalan intellectual property law and drafted a "Preliminary List of Implementation Deficiencies," i.e. laws that would need to be changed in order for Guatemala to implement the Central American Free Trade Agreement (CAFTA). USTR is presumably drawing up lists of laws to be changed pertaining to each CAFTA chapter for each of the Central American CAFTA Parties plus the Dominican Republic. However, the "Preliminary List" on intellectual property laws posted at www.tradeobservatory.org is the only one thus far made public.

The laws that USTR wants Guatemala to change cover a wide range of patent and data protection, trademark, copyright and enforcement issues. Among the demands for changes to Guatemalan law that are likely to raise controversy concern are those pertaining to "protection for plants, animals and the environment, which goes beyond necessary [sic] to protect the public, which is the only exception permitted by CAFTA Article 15.10," (paragraph 1 e) according to the USTR analysis.

Since Article 15.10 concerns keeping from the public ("third parties") safety data from pharmaceutical product and agricultural chemical regulatory approvals for patented products, the purpose for the changes that USTR wishes to make to Guatemalan environmental protection laws is not clear. However, in view of the U.S. opposition to making the WTO agreement on intellectual property support the objectives of the United Nations Convention on Biological Diversity (CBD)[1], the proposed changes could require Guatemala contravene its commitments to the CBD.

Guatemala has ratified the CBD. The United States has not and has sought to impede the Convention's implementation. Among its other objectives, the CBD seeks to ensure that holders of the patents on plants disclose the origin of the genetic material used to make patented products and traditional knowledge that is part of the prior art of the patent. The disclosure requirement is linked to the CBD's provision of prior informed consent before genetic material and traditional knowledge in the stewardship of biodiversity are used in patented products. The U.S. is strongly opposed to such disclosure requirements and prefers that many benefit sharing from patents incorporating genetic materials and traditional knowledge be a contractual arrangement between unequal parties, e.g. an indigenous tried and a transnational corporation, rather than the subject of international law.

The USTR's insistence that Guatemalan law change to enable patenting of plants (paragraph 2), together with its opposition to the CBD that is legally binding for Guatemala, may place Guatemalan legislators in the contradictory position of having to violate its CBD commitments in order to conform to the USTR interpretation of CAFTA.

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[1] "Biotech Firms Form Alliance to Fight Office Possible TRIPS Amendments," *Inside U.S. Trade*, January 6, 2005 and "The Relation Between the TRIPS Agreements and the CBD: The Case of Disclosure Requirements," in *South Centre and CIEL IP Quarterly Update* (Third Quarter 2005), 1-11 at www.ciel.org