REPORT OF THE MEETING OF THE EXPERT GROUP ON GENETIC RESOURCES ON 29 MAY 2022

Prepared by

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The Expert Group on Genetic Resources met on 29 May 2022 at the headquarters of the World Intellectual Property Organization (WIPO). The meeting was organised as a hybrid meeting with about 21 experts physically present in the room and about 12 experts participating online.

The meeting started at 9:00am and ended at 4:40 pm with a lunch break from 12:20 to 1:40 pm.

The objective of the meeting was to address specific, legal and policy issues and to report to the IGC the results of the work of the experts. The Group discussed two broad issues, namely, Information Systems and the Disclosure Requirement, with reference to subject matter, trigger, content and sanctions and remedies.

1.0 Disclosure Requirement

1.1 *Subject matter*

Consensus was developed that the instrument should apply to Genetic Resources (GR) and Traditional Knowledge (TK) Associated with Genetic Resources (TKA) even though TK may not always be associated with a GR. A proposal was made to provide a definition of TK to remedy an omission in the relevant part of the Chair's text - a text which many experts found to be useful.

While the Group agreed that the instrument should apply to patents, a strong case was made for its application to other intellectual property rights such as trademarks and plant varieties. It was also pointed out that the earliest reference to the disclosure requirement was in the context of copyright law with reference to the use of folklore as provided for in the Model Law and Draft texts proposed by WIPO in the 1980s. A compromise was developed around the suggestion to proceed on the basis of the application of the disclosure requirement to patents, but to include a provision for review to allow for continuing discussions with a view to amending the instrument to incorporate the other intellectual property rights. To assuage the concerns that a review clause may not be effective (recalling the fate of the TRIPs Agreement Art 27(b)(3)), some delegations stated that a preambular reference to other intellectual property rights would provide a degree of comfort. They cited to provisions in the preamble of the updated Chair's text (as of May 14, 2022) where "IP" is substituted for "patent."

While consensus was developed about including derivatives in the definition of genetic resources, it was also considered necessary to define the term "derivatives" to avoid extending the disclosure requirement to many common types of derivatives that clearly fall outside the

scope of the disclosure requirement.

1.2 *Content*

As to what should be disclosed, there was consensus to include the "country of origin", "providing country", "indigenous peoples and local communities", "research institutions" and "in-situ" locations. One expert made a suggestion which was not supported by others, that the word "source" be defined to refer to the place where an applicant received the genetic resource, in which case the word "source" does not have to mean country of origin or indigenous peoples but could refer even to a chemical store.

While there was not much support for making references in the context of the disclosure requirement to prior informed consent (PIC), mutually agreed terms (MAT) and access and benefit sharing (ABS) there was some support for including any disclosures that may be required under contracts which could include PIC, MAT and ABS. In general, it was felt that any references to PIC, MAT, ABS should not be too prescriptive but should leave some policy space for these matters to be taken up under national legislation. In this context, some experts recommended including language in the instrument identifying PIC, MAT and ABS as options Parties may consider for possible adoption as part of their domestic laws. According to the proponents, this would ensure a balance between the interests of users and suppliers of genetic resources and traditional knowledge associated with genetic resources.

1.3 *Trigger*

There was support for providing for "utilization of" as a trigger as that could also be used in relation to not only patents but would include other intellectual property rights. It was pointed out that early draft international intellectual property instruments used this term with reference to folkore and copyright law. As some experts noted, any use of genetic resources or associated traditional knowledge in an invention should be a trigger for the disclosure requirement.

The was also significant support for "materially based" as a trigger and which was determined to be broader than "directly based" - the latter term described as being too restrictive and a recipe for litigation. However, questions were raised whether the reference to "materially based" would also include digital sequence information (DSI). One expert opined that the reference would cover DSI and a consensus was reached that the relation between "materially based" and digital sequence information merited further examination.

Some experts suggested leaving out altogether the references to either "materially based" or "directly based" and recommended focusing on "utilization of" as the main trigger for the disclosure requirement.

1.4 *Sanctions and Remedies*

On the question of sanctions, there was support for the application of civil and administrative measures for failure to comply with the disclosure requirement. However, some experts were of the opinion that an applicant should be allowed to rectify an unintentional failure to disclose information before the implementation of any pre-grant sanctions.

There was an extended discussion on the subject of revocation as a sanction, with some experts suggesting that it should not be applicable in the context of the disclosure requirement. While some experts proposed that revocation should not be referred to affirmatively in the instrument, others were comfortable with a provision that would preclude revocation as a sanction except in the case of a wilful or fraudulent failure to comply with a disclosure requirement under national law. Some experts noted that to the extent revocation was already part of the laws of some countries, they could support language on sanctions that did not refer to revocation but preserved (and therefore did not limit) the policy space of countries to revoke patents on grounds of a failure to disclose. However, other experts called for further deliberations at the IGC to affirmatively exclude revocation from sanctions and remedies and thereby create a ceiling.

In raising concerns about revocation as a sanction, one expert noted that revocation would be relevant only to patents and could not be applied for other IP rights.

There was support for putting in place adequate dispute mechanisms to allow parties, including indigenous and local communities to reach timely and mutually satisfactory solutions in accordance with national law.

2.0 Information Systems

Due to time constraints, not much discussion was had on this agenda item. A suggestion was made to discuss this at a future date and that for this purpose, the WIPO Secretariat could collect background information on the relevant issues and provide to the IGC for further consideration.