



Third World Network

## **WIPO IGC DEFINES PATENT DISCLOSURE TEXT, BUT STRONG DISAGREEMENTS REMAIN**

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**24 February 2014**

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), met in its 26<sup>th</sup> Session from 3-7 February in Geneva to continue its work on a draft international instrument on disclosure of origin of genetic resources and associated traditional knowledge claimed in applications for patents and possibly other forms of intellectual property.

The objective of disclosure is to identify and prevent misappropriation of genetic resources and traditional knowledge, colloquially called biopiracy.

Developing countries are pushing hard for the negotiations to move to their end game (a diplomatic conference to consider the draft text), but significant issues remain unresolved. Most importantly, the United States continues to strongly oppose a disclosure requirement and is intent upon stopping its adoption. Major aspects of the US position have been supported by Canada, Japan, and South Korea.

Although both developing countries and the European Union (EU) agree that an international instrument may require disclosure of origin, the EU and South conceptions of the requirement appear increasingly different. Whereas the EU favors a requirement with minimal detail and relatively weak sanctions for those that violate it, developing countries are seeking more robust requirements and sanctions on violations that include revocation of patents.

The WIPO General Assembly in 2009 provided the mandate for the text-based negotiations, renewing it in 2012 and 2013. The IGC is to submit to the 2014 General Assembly the text(s) of draft international legal instrument(s) that on the legal protection of genetic resources, traditional knowledge and traditional cultural expressions. The Fifty Third session of the Assembly in May 2014 will take stock, consider the progress made on the text(s), and decide on convening a Diplomatic Conference. It will also consider the need for additional meetings, taking into account the budgetary process.

## **ORGANIZATION OF THE MEETING**

Ambassador Wayne McCook of Jamaica chaired the February IGC session, assisted by facilitators from Australia, India, and South Africa, whose role was to follow discussions and prepare text in accordance with the views expressed.

The meeting was organized in plenary and expert group sessions, which were not held concurrently. Representation in the expert group was on a regional basis, and included a small number of representatives of indigenous people. The expert group proceedings were simultaneously transmitted to the plenary room, enabling other delegates to follow the discussions.

New for this session were “informal informals”, as termed by the Chair, wherein the facilitators led discussion open to any Member State, but particularly those taking a strong position on an unresolved issue. The informal informals took place at various times through the meeting when neither the plenary or expert group was in session. The views expressed in these discussions fed into the process of preparing draft texts.

## **OPENING OF THE MEETING**

The meeting opened on February 3<sup>rd</sup> with an ambassadorial level session closed to observers. At the plenary session that followed in the afternoon, the Chair noted that a verbatim report would be made of the morning session that will constitute the official record, but offered an informal summary of key points that arose.

The Chair said there was general agreement that misappropriation was unacceptable but no consensus on what constituted legitimately held knowledge and resources. There was agreement that poor quality and erroneous patents should not be granted, but no agreement on the application of any instrument to forms of intellectual property other than patents. Databases to help patent examination were generally felt desirable but a number of countries drew attention to the need for safeguards on the traditional knowledge potentially contained in them.

On relationships to other work and instruments, there were different views on whether the outcome of the IGC’s work on genetic resources and traditional knowledge (GRTK) should be treated together with that on other issues (cultural expressions and traditional knowledge beyond genetic resources). There were also differences of opinion on whether the IGC’s outcome should be binding or not binding, and whether it should be a framework-type agreement, leaving many items open to national implementation, or a more detailed instrument.

## **INDIGENOUS FORUM**

After the formalities of the opening plenary, the meeting suspended for an indigenous peoples-sponsored panel including comments from James Anaya, the UN Special Rapporteur on the rights of indigenous peoples. Anaya noted that

indigenous peoples' right to prior informed consent in access to their genetic resources and traditional knowledge flows from existing rights under customary and international law, and need not be independently elaborated by the IGC.

Anaya noted that there is no inherent conflict between state sovereignty to genetic resources and the rights of indigenous peoples, but that in creating national access and benefit sharing (ABS) rules that governments needed to respect indigenous peoples rights in a manner consistent with international human rights standards.

Anaya made several general comments on the text, noting that indigenous peoples should be beneficiaries of the agreement and that national disclosure requirements should identify those that have a right to grant access to GRTK. He also noted that traditional knowledge in the public domain (a concept not accepted by many indigenous peoples) should not be excluded from any disclosure requirement, and that databases containing indigenous knowledge "might be helpful" but may not always be appropriate, and that if they are created for intellectual property offices, that they need the consent of indigenous authorities.

Other presenters at the Indigenous Forum included a representative from the Maori people of New Zealand and from the Kuna of Panama.

At the end of the Indigenous Forum, the plenary quickly reconvened to introduce the negotiating text (wipo/grtkf/ic/26/4) and set a meeting of the Expert Group for Tuesday morning (the 4<sup>th</sup>) to begin discussion of it. Following a question from PERU, it was clarified that several text proposals championed by the United States, and contained in other documents (wipo/grtkf/ic/26/5-7) would not be discussed by the Expert Group.

## **FIRST MEETINGS OF THE EXPERT GROUP**

The first meeting of the Expert Group began on Tuesday morning with the Chair indicating that he wished to skip the text's list of terms and preamble for the time being, and proceed directly to the objectives and scope. He recalled that the Special Rapporteur had emphasized that any agreement could not dilute existing indigenous peoples rights and recalled the Convention on Biological Diversity (CBD) and its Nagoya Protocol.

The **UNITED STATES** quickly intervened to point out that it is not a party to the CBD and while the IGC's output could be complementary to the CBD, that the US could not ensure consistency with the biodiversity agreement.

**NIGERIA** noted that it had ratified the Nagoya Protocol and saw complementarity as a national level issue.

**SWITZERLAND** said the WIPO instrument should be "mutually-supportive", and limited to intellectual property, neither duplicating nor contradicting the CBD.

**IRAN** favored mutual support for other instruments on genetic resources, without a hierarchy between them, including CBD, Nagoya, and the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA).

**ARGENTINA** supported complementarity with other instruments, noted that the WTO TRIPS agreement at Article 27(3) contains possible exceptions to IP requirements, and said that the IGC instrument definitely should cover plant breeder's rights in addition to patents.

**BRAZIL** said its objective was to prevent misappropriation under the patent system and that there was no need to enter into ABS discussions at WIPO. Brazil favored mutual support with other instruments.

**MEXICO** agreed that rules of access shouldn't be in the WIPO instrument as they were addressed in Nagoya (Protocol), however Mexico emphasized the need "to ensure complementarity with [Nagoya in] use of genetic resources under intellectual property rights."

The CHAIR noted that "complementarity" and "mutually supportive" seemed to be closely related concepts and offered that "mutually supportive" might work.

**SOUTH AFRICA** supported the Chair's suggestion and thought that mutual support could be a third objective in the text, following (a) disclosure and (b) improving information flow to patent offices on GRTK. It also noted the need for additional clarity in the disclosure objective.

**INDONESIA, speaking for the LIKE-MINDED COUNTRIES (LMCs)**, emphasized the disclosure objective.

**CANADA** said that patent system isn't the appropriate mechanism to enforce ABS rules and favored defensive measures (e.g. databases) instead. Canada favored the term complementarity over mutual support.

The CHAIR asked if preventing misappropriation should be a goal of the instrument.

The **EUROPEAN UNION** said it was unsure if preventing misappropriation needs to be an objective. It acknowledged that misappropriation could occur but said it did not want this instrument to enforce ABS regimes.

**SOUTH AFRICA** said there had been an exhaustive discussion on this issue that need not be repeated, and that it had been agreed that misappropriation was one of the core issues. It said the concept of preventing grant of erroneous patents was insufficient, and that protections against biopiracy needed to be put into place.

**PERU** said the WIPO instrument needed to complement existing measures, that it sought to prevent misappropriation of its GRTK elsewhere, and noted that coverage of the instrument should include plant breeder's rights.

The **UNITED STATES** agreed that misappropriation can happen, although it has many definitions. While the majority would define misappropriation in relation to ABS system, the US said, it does not support use of patent system to enforce ABS systems.

**NIGERIA** said that if misappropriation was bracketed that a “mess” would ensue. It suggested that some were thinking of misappropriation too broadly.

The **CHAIR** agreed that taking on misappropriation as a goal did not necessarily mean the WIPO agreement was to enforce ABS regimes. That, he said, would depend on the operative paragraphs.

**INDIA** said there was broad agreement on mutual supportiveness of this text and CBD/Nagoya Protocol, and that elements in this instrument should not undermine them. If misappropriation does not appear as a goal, then the IGC was losing the spirit of mutual supportiveness that it just agreed to.

The **INDIGENOUS CAUCUS** said the IGC had legitimacy to deal with IPR grants on genetic resources and that the issue must be dealt with here. It said that its objective is to fine tune patents to prevent improper use. The caucus said that the Nagoya Protocol did not resolve this problem but rather awaited this result.

**SOUTH AFRICA** urged putting the discussion to rest and moving forward in the text.

**BRAZIL** said misappropriation is based on the pillar of sovereignty over genetic resources. Brazil asked those that were unsure about misappropriation as an objective what the source of their objection was. Did they disagree with national sovereignty? Or over the state’s right to control access?

**CANADA** said defensive measures, rather than disclosure, can prevent misappropriation.

**INDONESIA** noted that no country questioned the misappropriation objective in the Ambassadorial session (on the first day) and said that it must be an objective.

**CHINA** and **MOZAMBIQUE** noted their support for the misappropriation objective.

The **CHAIR** proposed to move ahead with the misappropriation objective.

The **US** did not object but said that “ensuring” prevention of misappropriation was too strong a word.

The **CHAIR** concluded that three objectives were agreed: preventing misappropriation, preventing erroneous grant of patents, and complementarity with other instruments.

**IRAN, SOUTH AFRICA,** and the **INDIGENOUS CAUCUS** favored the subject matter article potentially applying to all intellectual property claims whereas the **EUROPEAN UNION** favored restricting the subject matter to patents only.

The CHAIR suggested that perhaps the EU could live with a broad subject matter if the operative articles were more specific. The EU agreed to move ahead with the matter in brackets.

**BRAZIL** said a discussion of what forms of intellectual property should be covered can come later. It also wanted derivatives to remain in the draft subject matter article.

**BOLIVIA**, supporting **PERU**, objected to the EU's proposed language on applying the agreement only to patent applications "directly based upon" genetic resources, and supported a more open focus, including derivatives.

**IRAN** counseled patience, saying that these matters could be addressed in due course.

**SOUTH AFRICA**, supported by **NIGERIA**, indicated its support of a more open subject matter.

In an unexpected and quick moment, the draft text's article on beneficiaries of the agreement (Article 2) was then deleted, after Nigeria asked why the provision was included. The deletion occurred so quickly that some countries could not react, prompting them to revisit the issue later.

Moving on scope, a general discussion began.

The **UNITED STATES** said that a scope article that included the idea of compliance with ABS measures "goes too far".

**SOUTH AFRICA** said it sought disclosure information in order to prevent erroneous granting of patents. The purpose of disclosure was to elicit the necessary information, and that the burden of disclosure should lie with the applicant.

**INDIA** said IPR applicants needed to be aware of prior rights, and to respect those rights, including those over traditional knowledge.

The **INDIGENOUS CAUCUS** said that databases placed the burden of preventing misappropriation on them whereas disclosure placed it on IP applicants. The Caucus felt databases would "never capture all they need to," and asked what proposals opponents of disclosure had that wouldn't place such a burden on indigenous peoples.

**INDONESIA** and **PERU** noted their support of disclosure.

**BRAZIL** said disclosure was not an excessive burden on applicants, who merely needed to declare that GR and/or TK was acquired legally and from where it came.

**PERU** said systems presently provided insufficient disclosure in applications.

**SOUTH AFRICA** asked for interventions from opponents of disclosure, how did they explain their positions?

**AUSTRALIA** agreed with **PERU** that disclosure was presently inadequate and wanted to discuss how disclosure can facilitate application of ABS systems.

The **UNITED STATES** said that the “heart of matter” of its opposition to disclosure was that companies are threatened by consequences of noncompliance. The US said there were cases where investigations were going to the source of genetic resources, “going out to the rainforest... and they are verifying to try to see if things were done right.” This investigation of the source of GRTK, the US said, creates a cloud of uncertainty about patent rights. The US said that the experience with disclosure requirements was limited and that penalties for noncompliance with them created risk for companies.

Observers were puzzled by this explanation, which suggested that the US would protect a patent claimant’s economic interests even in clear cases of misappropriation.

The **EUROPEAN UNION** said that it “can live with” disclosure requirements in patent applications, provided there are safeguards (i.e. a “ceiling” for sanctions).

**CANADA** wanted more evidence on the effectiveness of disclosure requirements.

**NIGERIA** said disclosure was about managing interests of GRTK source communities in the IP system, and to help governments manage biodiversity resources.

**PERU** said disclosure creates balance for a more just system. Peru has positive practical experience domestically with disclosure.

**SOUTH AFRICA** thanked Canada and the US for intervening and said the IGC should be talking at this level, about the fears of opponents. South Africa supported transparency and predictability and said disclosure creates this.

The CHAIR then adjourned the Expert Group and indicated that the facilitators would hold “informal informals” to discuss the disclosure article during the afternoon.

The following morning, Wednesday the 5<sup>th</sup>, the Expert Group reconvened. The facilitators reported that new draft text was not yet available, but that the informal discussions had reduced the text and resulted in consensus on some issues, if not others.

The **EUROPEAN UNION** was unsure if the facilitator was correct in noting consensus on triggers for disclosure including the presence of genetic resources and associated traditional knowledge and derivatives in a patent application. In the ensuing discussion, the EU re-offered its preferred language (mentioning direct claims on genetic resources in patent applications).

**IRAN** chided the EU for reverting to text from prior to the informal informals.

The CHAIR suggested a break to review trigger text given the confusion, but **NIGERIA** opposed, saying it could work with alternative proposals in the expert group.

**NIGERIA** also recalled agreement at the informal discussion for the triggers to refer just to patent applications and to move a paragraph concerning indigenous peoples to the preamble.

The **EUROPEAN UNION** said agreement on triggers was at a broad level whose detail was hard to reduce to text.

The **UNITED STATES** said it opposed disclosure and didn't join any consensus on triggers.

The CHAIR encouraged the proponents of disclosure to work together toward a single text, and for the US, as an opponent of disclosure, to give them room to do so.

The **INDIGENOUS CAUCUS** objected to moving its concerns to the preamble.

**ARGENTINA** reiterated its position that the instrument should cover not only patents but also other forms of IP.

**IRAN** backed Argentina, and said that "If granting erroneous patents is wrong, granting other forms of IPR erroneously is wrong too." **PERU** backed Argentina and Iran.

Discussion then shifted to the article on exclusions, a contentious part of the text wherein some countries have supported eliminating the requirement to disclose for some types of genetic resources and traditional knowledge.

**NIGERIA** said it believed agreement existed to delete the article, except from the US.

The **EUROPEAN UNION** said that it, Canada, and the US wanted it to remain.

**SOUTH AFRICA** said it was confused by the EU's position and that the exclusions should be removed.

The **EUROPEAN UNION** said it had supported exclusions since 2005, including exclusion on human genetic resources, derivatives, and no extension of the WIPO agreement to prior to the entry into force of the CBD among other exclusions.

The **UNITED STATES** said that exclusions like the EU supported could be valuable.

The **INDIGENOUS CAUCUS** supported deletion of all exclusions.

**MOZAMBIQUE** said it made no sense to exclude (from disclosure requirements) resources acquired before entry into force of the Nagoya Protocol, and that this should be left out.



**AUSTRALIA** said it had ABS laws but was not in the Nagoya Protocol, and that access can have occurred in the context of the CBD or not.

**INDONESIA** raised a question about resources outside national jurisdiction versus exclusive economic zones.

**SWITZERLAND** agreed with the EU's position.

**CHINA** and **COLOMBIA** supported deletion of the exclusions. **COLOMBIA** further held that disclosure must include disclosure for derivatives.

The CHAIR moved the discussion on to the elements to be disclosed.

### ***Elements to be disclosed***

**NIGERIA** recalled that there was agreement on some elements but not on the need for an Internationally Recognized Certificate of Compliance (for ABS, a reference to the Nagoya Protocol).

**MEXICO** said there was a need to be flexible about elements.

The Facilitator said that “provide relevant information as required by national laws including PIC as relevant” had been proposed in order address different national procedures.

**IRAN** agreed there was a need for a certificate to ensure GRTK was accessed legally, the problem was just one of the right language.

**SOUTH AFRICA** could agree with flexibility, but that country of origin and source country needed to be required.

**PERU** agreed with Mexico and Iran.

The Facilitator stated that they understood that there was agreement the country of origin and source country would be included, but there was less specific agreement in other areas.

**SWITZERLAND** wanted only the source to be required, and said it understood the country of origin to be included in that.

The **EUROPEAN UNION** said it could not agree to anything in this regard if it wasn't in writing.

The **UNITED STATES** reminded everyone that it opposed disclosure to begin with and hadn't joined any consensus in this area.

### ***Sanctions and remedies***

On sanctions and remedies, **NIGERIA** said the main hang-up was industry's concern about the possible sanction of patent revocation. Some countries favored revocation

as a possible sanctions, others opposed. Nigeria said non-willful, non-fraudulent lack of compliance could be distinguished from other forms.

The **EUROPEAN UNION** was concerned about any post-grant sanction that would affect the enforceability or validity of a patent.

**BOLIVIA** noted that failure to disclose could result in IP not being granted to begin with. It supported NIGERIA's observation that non-willful, non-fraudulent lack of compliance could be distinguished from other forms. This, it said, was a question for national legislation.

The **INDIGENOUS CAUCUS** wanted traditional forms of dispute settlement to be recognized as possible in the sanctions process.

The **UNITED STATES** said its patent examiners wouldn't be interested in the origin of a genetic resource if, for instance, it can be made in a laboratory. Geographic origin of a resource, the US said, was only pertinent to patentability when the origin is needed in order to "explain how it's done", and that this is the case in only a very small pool of patent applications.

#### ***"No Disclosure Requirement" proposed by the United States***

The discussion then moved to the United States' proposed counter-article to the disclosure requirement, a draft article titled "No Disclosure Requirement", a short provision with a precisely opposite intended effect as disclosure.

The **UNITED STATES** wanted to further refine its "no disclosure" language and would suggest text. Confusingly, the US began speaking of a "disclosure requirement" but one based on its law. The US-style disclosure requirement, based on its existing regulations, is about disclosure in relation to novelty and inventive step in a patent application, and does not require disclosure of the origin of GRTK. It was the existing US regulatory idea of disclosure that WIPO should adopt, the US said.

**MOZAMBIQUE** was incredulous that the US was suggesting that the world adopt US-style regulations, which it identified as mimicking Rule 56 in US patent procedure, in this WIPO negotiation on genetic resources and traditional knowledge.

**NIGERIA** said the US proposal would make 15 years of negotiations "all in vain." The US proposal was fundamentally different than that being discussed by others. This instrument, Nigeria said, was about a new disclosure requirement.

The CHAIR said the US position was unsurprising, but wanted to fix the US option in the text for consideration "at a higher level" (i.e. a diplomatic conference).

**INDIA** said members knew what the US wanted. The US proposal was "trying to wash away" national disclosure legislation in other countries. India said that the US

needed to compromise. India said it was not trying to impose its system on the US and that the US should not attempt to impose its national system on India.

The **UNITED STATES** said it was not trying to export Rule 56, but that it opposed disclosure, and that “being contrary happens”. The US refined its language, proposing: *“Patent applicants may only be required to disclose the source of a genetic resource if the location of the source is necessary for one of ordinary skill in the art to be able to make and use the invention.”*

The CHAIR closed discussion on the item, noting the need for more dialogue. The Expert Group moved on to defensive protections.

### ***Defensive protection via databases***

The discussion on defensive protections mainly revolves around proposals, backed most enthusiastically by the US and some other developed countries, to create databases containing indigenous knowledge, and for those databases to be used by patent offices in prior art searches, perhaps through a central WIPO interface, to try to prevent erroneous granting of patents.

The **UNITED STATES** and **JAPAN** began the discussion by introducing lengthy text on their preferred scheme for creating databases and access to them.

**SOUTH AFRICA** said databases were worth looking into but worried that the US and JAPAN were trying to negate aspects of the disclosure requirement with the database proposals. It also noted that they shifted burdens to indigenous peoples.

In a lengthy and well-received intervention, the **INDIGENOUS CAUCUS** explained deep concerns it has about databases, many of which revolve around consent, and safeguards and long-term security of confidential and sacred information placed in them.

The **UNITED STATES** conceded many of the Caucus’ questions were “interesting” and that it would try to answer them “maybe by next month”.

**IRAN, NIGERIA, and INDIA** did not oppose databases per se but noted the need for consensus around them.

The CHAIR adjourned the session.

In the evening the Plenary briefly reconvened to receive the facilitator’s text so far, in order to discuss it in more detail the following morning.

**PERU** and **BOLIVIA** both noted the deletion of the article on beneficiaries and said they would like it reintroduced. **BOLIVIA** also noted deletion of its language to prevent patenting of genetic resources as found in nature and wanted that restored as well.

## **SECOND PLENARY**

On Thursday morning (the 5<sup>th</sup>), the Plenary reconvened to consider the Rev 1 Facilitator's text (i.e. first revision).

The **EUROPEAN UNION** intervened first with a host of concerns, including the definition of misappropriation, and where necessary restoring language and brackets to the text to reflect its known priorities, e.g. application to patents and not other forms of IP, avoidance of the sanction of patent revocation, and inclusion of a number of exceptions to the disclosure requirement.

Notably, the EU also proposed to delete the requirement for patent offices to publish the disclosure made with the patent application, instead favoring that the disclosure be transmitted to the Nagoya Protocol ABS Clearinghouse.

A problem with this proposal, aside from the fact that many WIPO members are not Nagoya Protocol Parties, is that information deposited in the ABS Clearinghouse may be confidential, thus the EU proposal could have the effect of making the disclosure secret from the public, and that secrecy could potentially extend to include other countries and indigenous peoples, whose involvement in PIC and MAT may frequently be needed.

In side discussions, delegates from one large EU country denied that they were seeking not to publish the disclosure made with patent applications. They did not explain, however, why they proposed to delete the requirement to do so, except to say that it was "inconsistent with the EU position".

**SWITZERLAND** shared the EU's concern about the definition of misappropriation and it did not support a policy objective of "enhancing transparency of the IP system".

The **UNITED STATES** proposed an alternate definition of misappropriation and stated that "Lawful acquisition from failure to take reasonable protective measures is not misappropriation."

**CANADA** made several proposals to change text consistent with its position that defensive measures are sufficient to prevent misappropriation and to reduce use of binding language throughout the text.

A number of countries said they had insufficient opportunity to reflect on the US and JAPAN's lengthy proposals on defensive measures.

**SOUTH AFRICA** welcomed simplified subject matter, scope, and disclosure language and emphasized that misappropriation was central to the policy objective. Speaking for the **AFRICA GROUP**, South Africa said that the article (3.7) on amending the Patent Cooperation Treaty and Patent Law Treaty should be deleted. (This was proposed by Switzerland at the February 2013 session of the IGC.)

South Africa welcomed use of the term "due diligence" in proposals by the US, but rather than applying it in a restricted context related to defensive measures, thought

it should apply to the whole document. In general, South Africa sought for the text on defensive measures to reflect high level principles and not operative details.

**NORWAY** wanted the subject matter and scope articles to be deleted from the text or, in the latter case, moved to the preamble. Norway supported disclosure and was flexible on the details. It supported pre-grant sanctions, such as preventing or refusing IP grant, but opposed post-grant sanctions, such as fines and revocation. Norway viewed ABS law as the main place for sanctions to be defined.

**INDONESIA, speaking for LMCs**, welcomed advances on disclosure and said it looked forward to talking more on sanctions and exclusions. On databases, there were questions about how, practically, they would work.

**IRAN** reiterated need to include derivatives and thought defensive measures could be merged with disclosure requirements. In the present case, Iran said, they appear as possible alternatives, but they are not. Iran also wanted to discuss exclusions further.

**INDIA** supported sanctions including revocation, noting that patents are not inviolable and can be revoked for violation of the public interest.

**JAPAN** supported Canada and the US.

**INDIGENOUS CAUCUS** remained concerned about removal of its items to the preamble, particularly wanting reference to PIC in the disclosure.

**CHINA** welcomed the Rev. 1 text and did not understand the need for an article on exclusions. It had many questions about the defensive measures text.

**NIGERIA** said that patent offices agree that fraud can be reason to invalidate a patent. But there are relevant levels, willful, negligent, and repeated. Nigeria echoed South Africa's call for due diligence to be applied to the text as a whole.

The CHAIR then adjourned the Plenary.

## **RESUMED EXPERT GROUP MEETINGS**

On Thursday afternoon, the Expert Group resumed to discuss defensive measures.

The **US** reintroduced its text and countries including **ARGENTINA, BOLIVIA, and INDIA**, along with **INDIGENOUS CAUCUS**, began questioning aspects of the US text. The US offered to make clarifications at a later date, in an informational document for a future meeting, although the CHAIR noted progress needed to come more quickly.

**SOUTH AFRICA** reiterated its belief that the defensive measures text needed to focus on high level principles and not implementation details.

**MOZAMBIQUE, GRULAC, KENYA**, and later **PERU** added to the questions about the details of the US proposal.

**AUSTRALIA** rejected a provision in the US and JAPAN proposal for development of voluntary codes of conduct to prevent erroneous grant of patents. Australia said it had ABS legislation and didn't need to encourage codes of conduct. Australia was concerned that databases were complicated in reality and where they exist perhaps not best for governments to operate. **INDIA** echoed Australia's position on codes of conduct.

**ARGENTINA** again reiterated that the text must refer to all IP and not just patents.

The **UNITED STATES** attempted to answer concerns raised but did not allay them. The US asserted that patent offices could maintain confidentiality of indigenous peoples' traditional knowledge.

**SOUTH AFRICA** said it was not going to negotiate implementation details on defensive measures and wanted to stick to high principles, like the rest of the text.

The CHAIR ended the meeting, directing further discussion to another round of after lunch "informal informals" led by the Facilitators.

Late in the afternoon the Expert Group reconvened and the Facilitators reported that they felt they would be able to condense the defensive measures text into three sections, a) purpose and structure of databases, b) safeguards for the database, and c) due diligence. The CHAIR allowed quick comments on disclosure.

**BOLIVIA**, supported by the **INDIGENOUS CAUCUS**, re-raised the issue of the article on beneficiaries that had been quickly deleted near the outset of the Expert Group.

The **UNITED STATES** proposed new language in the core section of the text dealing with disclosure, including the notion that disclosure would only be needed in instances where an invention was "consciously derived" from GRTK.

The **EUROPEAN UNION** moved to maintain its preferred language on triggers and sanctions, also reiterating its proposed deletion of the requirement for the disclosure to be published.

**IRAN** moved to include "parts and components", language it favors from ITPGRFA, and reiterated its preference to delete exclusions altogether.

Discussion moved to the remaining articles of the text.

**SOUTH AFRICA** expressed its rejection of an EU-favored exclusion of genetic resources acquired before national implementation of the CBD.

The CHAIR expressed concern that countries were undoing the progress of the past several days and suggested that the US might refrain from altering the disclosure text in view of its status as an opponent to the whole idea.

The **UNITED STATES** replied that it has defensive interests in changing the text and would continue to propose to do so, and then offered more amendments to the

exceptions article, also focusing on applicability of the WIPO instrument vis-à-vis entry into force of the CBD.

The CHAIR then adjourned the meeting for evening informal discussions, to resume in Expert Group on Friday morning, the final day of the meeting.

## **FINAL DAY**

After the setbacks in the text on Thursday afternoon, interest was high when the Chair reconvened the Expert Group on Friday morning. The Facilitators introduced new text, reporting the Australia, the US, Canada, and Japan had together looked at the defense measures text and achieved some simplification.

The LMCs noted that they had held a discussion, open to WIPO Group B (developed) countries, on the topic of exclusions.

The CHAIR noted that the issue of the strong sanction of revocation remained very sensitive and may not be resolved until the end game of the negotiation (i.e. a diplomatic conference).

The **INDIGENOUS CAUCUS** drew attention to the unresolved issue of defining “traditional knowledge in the public domain,” to which the CHAIR replied that this was a cross-cutting issue that might be addressed at the next IGC meeting.

**BRAZIL** reported that the LMCs wished to change the text in exclusions to use the phrase “found outside” rather than “from areas beyond” national jurisdiction. Brazil also said the LMCs wished to use the term “accessed” rather than “acquired” in reference to a possible temporal exclusion of the requirement to disclose.

The **UNITED STATES** responded that it preferred to link the disclosure requirement to patent applications on genetic resources acquired after implementation of the WIPO instrument (rather than to timeframes related to the CBD, Nagoya Protocol, or with no temporal limitation at all, as varyingly preferred by others).

Pressed by the CHAIR on the logic of ignoring the previous agreements on GRTK, the US stated that “The more time the better for preparing companies to be compliant.”

The **EUROPEAN UNION** responded to the LMC suggestion by saying it wanted both “accessed” and “acquired” in brackets.

The CHAIR pressed the EU, noting that accessed was well discussed, and suggested the EU should talk to Brazil.

**NIGERIA** said there were Vienna Convention conflicts with some proposals to exclude genetic resources and would add “to the extent consistent with the Vienna Convention and not inconsistent with the CBD or obligations there under.”

The discussion evolved into a series of small edits by various countries as the Chair expressed frustration at the “chaos of insertion all the time”. The Facilitators were left with a variety of confusing proposals to sort out for the Rev. 2 text.

The discussion moved again to defensive measures.

**CANADA** immediately moved to make changes to the text it had modified with the US, Japan, and Australia in the previous day’s informal, drawing in SOUTH AFRICA, who raised a point of procedure, objecting that the Expert Group hadn’t even seen the new Facilitator’s text on defensive measures before Canada was changing it.

The CHAIR then moved the discussion to the previously unreviewed beginning of the text, the List of Terms and Preamble. The Facilitators noted that a US-proposed option for the definition of misappropriation would be included as an option in the Rev. 2 text.

**NIGERIA** immediately objected, noting that the US definition was drawn straight from US law, but that in British-derived legal systems the common law tort of misappropriation had various “flavors”, and it was not appropriate to exclusively impose the US one.

The CHAIR said that the definition of misappropriation needed discussion but time simply did not remain in this session. The two options would remain. Switzerland, the EU, and South Africa expressed interest in that discussion.

In the Preamble, **FRANCE** raised its standard objection to using the term “indigenous peoples”. The **EUROPEAN UNION** said other EU members might share that objection, allowing that “indigenous and local communities” (a phrase used in the CBD context) was acceptable.

**AUSTRALIA** saw the terms “indigenous peoples” as cross-cutting. It was then left for further discussion.

Countries then made a series of small edits and re-insertions of preferred text (e.g. IP offices vs. patent offices) consistent with previously explained positions.

An attempt was made to simplify draft Article 6, on relationships with other instruments, however, it became clear that members’ positions on the issue were dependent on the ultimate shape of the disclosure requirement.

Articles 7, 8, and 9 on international cooperation, transboundary cooperation and technical assistance passed similarly, with the **UNITED STATES** proposing language to water down the provisions of the first two, however, the Expert Group did not endorse any significant changes at this point.

A final pass through of Articles 1 (subject matter) and 2 (scope) saw predictable attempts by the US to insert preferred language, objected to by SOUTH AFRICA.



More importantly, a discussion on what was entailed by the term “genetic resources” took place briefly. **IRAN** preferred to include “parts and components” (in addition to derivatives). **AUSTRALIA** agreed with Iran’s intent, but said that its understanding of the term genetic resources was that it includes everything that Iran sought to include with “parts and components”, therefore the addition may not be necessary.

The Chair adjourned the Expert Group to reconvene the Plenary late in the afternoon, one hour after the Rev. 2 text was made available.

At the final Plenary, the Chair and Facilitator introduced the Rev. 2 text and encouraged countries to only propose changes that reflected errors in the draft, rather than any new proposals.

**GHANA** raised several points of law with respect to the draft, but veered into substantive proposals, which the Chair sought to avoid. While delegations were interested in GHANA’s analysis, only brackets were placed in the text to reflect it, and the Chair encouraged GHANA to raise the points later.

**SWITZERLAND** sought to restore the language “human genetic resources” in exclusions, which had been changed at the suggestion of the **UNITED STATES** to read “all genetic resources taken from humans”. (“Including human pathogens” follows, and remains bracketed in both proposals).

The **INDIGENOUS CAUCUS** again drew attention to its strong concerns on the issue of safeguards for any traditional knowledge placed in intellectual property office databases, and to its demand that prior information consent be referenced in the operative portion of the disclosure requirement.

**CANADA** welcomed the US definition of misappropriation and reiterated its view that defensive measures were sufficient, rather than a disclosure requirement.

**SOUTH AFRICA** considered the Rev. 2 text a “reasonable basis” for further discussion, noting that its call for the defensive measures section to reflect high level principles had not yet been fully achieved, and that this section needed further shortening and simplification.

Several countries imposed options in brackets consistent with previous positions, and had it noted that their view was that the instrument should apply to all intellectual property.

The **EUROPEAN UNION** delivered a lengthy list of brackets to reflect their position, reiterating its limited notion of disclosure, for example, maintaining that it could not accept revocation as a sanction, only wished to apply the agreement to patents, and supported a number of exclusions.

Like **PERU** and others, the EU said the text on defensive measures was new and needed more review.

The **KUNA indigenous people (Panama)** took France and the EU to task for their resistance to the term “indigenous peoples”.

**INDUSTRY** then made a rare intervention, on behalf of BIO, the IP Owners Association, IFPMA, and Croplife International. Industry said that misappropriation can be countered with due diligence rather than disclosure. Industry said that it supported the CBD, and that it saw many regions dependent on genetic resources from other regions. Industry argued that disclosure requirements would introduce uncertainty and discourage investment in research and development. This, it said, would undermine benefit sharing. Therefore, it did not want a disclosure requirement and would instead be happy to work with others to “enhance prevention of erroneous grant of patents.”

**BRAZIL** said that the text had been improved by the meeting and noted the need for it to reflect a “consistent and mutually supportive relationship between IP and ABS systems.” Brazil had concerns about the exceptions and limitations to disclosure that some had proposed, and suggested that the defensive measures proposal may overlap with work already to be done in the Nagoya Protocol Clearinghouse Mechanism.

After a brief discussion of a study proposed by the United States and co-sponsors (decision deferred), the CHAIR adjourned the meeting after noting that the text will be transmitted to the WIPO General Assembly for consideration.

Certain cross cutting issues (e.g. traditional knowledge in the public domain) will be further discussed by the IGC at its next meeting in July, which will be dedicated to traditional knowledge (but not in relation to genetic resources).+