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International Economic Law Clinic

# **DISCLOSURE OF THE ORIGIN OF PATENTED GENETIC RESOURCES: WILL A PLURILATERAL AGREEMENT BE A POSSIBLE OPTION?**

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## TABLE OF CONTENTS

Table of Contents.....	4
Abbreviations .....	6
Executive Summary .....	7
1. Introduction.....	9
2. Background.....	10
2.1. Attempts at the protection of traditional knowledge and genetic resources at international fora.....	10
2.2. The role of intellectual property law for protecting traditional knowledge and genetic resources against misappropriation and the different views of the States . .....	14
3. Content of the proposed treaty on the protection of traditional knowledge and genetic resources.....	17
3.1. Option 1: Substantive obligations treaty .....	18
3.1.1. Proposed treaty .....	18
3.1.2. Relationship with other rules of International Law .....	20
3.2. Option 2: Treaty for the enforcement of foreign decisions protective of genetic resources and traditional knowledge .....	22
3.2.1. Proposed treaty .....	22
3.2.2. Challenges to bring the proposed treaty from theory to practice .....	23
3.3. Reasons why a framework treaty cannot address the protection of genetic resources and traditional knowledge .....	27
3.3.1. The example of the Convention on Biological Diversity.....	28
4. The Negotiation of a Plurilateral Agreement on disclosure of origin .....	30
4.1. Can a Plurilateral Agreement address the recognition of an obligation to disclose the origin of GR used in patented inventions within the WTO? .....	30

4.1.1. Plurilateral Agreements within the WTO: Agreement on Trade in Civil Aircraft, Government Procurement Agreement (GPA) and Information Technology Agreement (ITA).....	34
4.2. Plurilateral Agreements outside the WTO. Keys to conclude a successful PA. ....	35
5. Conclusion.....	37
Bibliography .....	i
5.1. Treaties.....	i
5.2. Books.....	i
5.3. Articles and others.....	ii

## ABBREVIATIONS

<b>Abbreviation</b>	<b>Meaning</b>
ACTA	Anti-Counterfeiting Trade Agreement
CBD	Convention on Biological Diversity
DDA	Doha Development Agenda
FAO	Food and Agriculture Organization of the United Nations
GATT	General Agreement on Tariffs and Trade
GPA	Government Procurement Agreement
ICJ	International Court of Justice
IP	Intellectual Property
ITA	Information Technology Agreement
MFN	Most Favoured Nation
NYC	New York Convention
PA	Plurilateral Agreement
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UNCLOS	United Nations Convention on the Law of the Sea
VCLT	Vienna Convention on the Law of the Sea
WEF	World Economic Forum
WIPO	World Intellectual Property Organization
WTO	World Trade Organisation

## EXECUTIVE SUMMARY

The aim of this Report is to address the concerns of developing countries regarding the misappropriation of genetic resources and traditional knowledge by analysing new ways to implement international law obligations upon local patent systems to impose, strengthen or broaden the disclosure obligations of patent applicants. Misappropriation is the unauthorized access and use of these resources<sup>1</sup> for business purposes without a fair and equitable sharing of the profits with the indigenous communities that own or created them. Imposing patent applicants to disclose whether their inventions are related to these resources curbs the incentives to freely obtain a benefit from communities' genetic source or traditional knowledge without proper compensation or authorization.<sup>2</sup>

Consequently, the Report addresses previous efforts to implement a requirement of disclosure within international law, proposes two new treaties to impose them upon States or facilitate the enforcement of decisions that protect genetic resources and traditional knowledge, and explores the options to negotiate and implement these treaties.

The Report starts by briefly going through the previous experiences of the international community in this regard. Specifically, the description of the negotiations and attempts made under the umbrella of the Convention on Biological Diversity, the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, the Treaty on Plant Genetic Resources for Food and Agriculture,<sup>3</sup> and the draft on genetic resources and traditional knowledge currently under discussion within the World Intellectual Property Organization. Notwithstanding they have implied important steps towards addressing the issue of misappropriation, these attempts did not clearly impose a

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<sup>1</sup> WIPO, Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge, 2017, page 11. Available at: [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1047.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1047.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> International Treaty on Plant Genetic Resources for Food and Agriculture, (3 November 2001), S. Treaty Doc. No. 110–19, Available at: <http://www.fao.org/AG/cgrfa/itpgr.htm>

concrete obligation on States to require patent applicants to disclose the origin of their inventions.

Consequently, the Report presents two possible options for the regulation of the matter: a treaty providing substantive obligations and a treaty providing the enforcement of decisions issued in other States concerning the protection of genetic resources and traditional knowledge through disclosure requirements. In each section, the Report details the proposal and elaborates on how it would interact with other sources of international law. Additionally, the Report addresses why a framework agreement does not seem as an interesting way forward to regulate these phenomena.

To implement the proposals, the Report presents a different path for the negotiation of the treaty, particularly such of a plurilateral agreement within the World Trade Organization in light of its previous multilateral failure.

The main conclusion is that the more detailed the obligation to disclose is, lesser States would be willing to become a party to the treaty. As to its negotiation, a treaty whose aim is to establish an obligation to disclose the source of the invention will be better developed in the World Trade Organization, as a plurilateral agreement that reinforces the provisions of the Agreement on Trade-Related Aspects of Intellectual Property Rights.<sup>4</sup>

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<sup>4</sup> TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, (15 April 1994), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197.



## 1. INTRODUCTION

A significant number of developing countries and some developed countries have introduced domestically, in different ways, requirements relating to the disclosure of the source or origin of genetic/biological resources and the associated traditional knowledge claimed in patent applications.<sup>5</sup>

It is worth mentioning that although there is no conclusive definition of traditional knowledge, certain instruments, particularly the Bonn Guidelines,<sup>6</sup> found in article 8(j) of the Convention on Biological Diversity (CBD) a definition. In light of that, at least within the scope of the CBD, traditional knowledge is understood as knowledge, innovations and practices of indigenous and local communities around the world. Nevertheless, there is still work undertaken to achieve a more thorough definition, particularly within the World Intellectual Property Organization.<sup>7</sup> In addition, the CBD defines genetic resources as “genetic material of actual or potential value”.<sup>8</sup>

The incorporation of disclosure requirements into national laws has addressed some of the concerns of developing countries regarding the misappropriation of these resources and knowledge. However, their effectiveness is likely to be limited in the absence of an international rule that sets out the terms of the obligation and the consequences of noncompliance. This limitation is particularly problematic if the obligation is not recognized and enforced in the markets where the commercialization of the protected inventions may be most profitable.

In view of the limitations that the provision of a disclosure obligation at the national level may have, developing countries have actively but unsuccessfully pursued in various multilateral fora the recognition of an obligation to disclose the origin of genetic/biological resources and the associated traditional knowledge.

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<sup>5</sup> WIPO, Disclosure Requirements Table, May 2019. Available at:

[https://www.wipo.int/export/sites/www/tk/en/documents/pdf/genetic\\_resources\\_disclosure.pdf](https://www.wipo.int/export/sites/www/tk/en/documents/pdf/genetic_resources_disclosure.pdf)

<sup>6</sup> Conference of the Parties to the Convention on Biological Diversity, Bonn Guidelines, UNEP/C.B.D./C.O.P./6/20.

<sup>7</sup> WIPO, The Protection of Traditional Knowledge: Draft Articles, WIPO/GRTKF/IC/40/18. June 19, 2019.

<sup>8</sup> Convention on Biological Diversity, (1992), 1760 U.N.T.S. 79; 31 I.L.M. 818, article 2.

The impasse in establishing a disclosure obligation at the international level is unlikely to be overcome in the near future. Although working within multilateral fora may remain the primary option, the absence of concrete outcomes may encourage developing countries to consider other alternatives, such as the negotiation of a binding plurilateral instrument.

## **2. BACKGROUND**

This section will address the importance of IP law for the protection of genetic resources and traditional knowledge and previous attempts to impose States an obligation to regulate the matter domestically.

### **2.1. ATTEMPTS AT THE PROTECTION OF TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES AT INTERNATIONAL FORA**

Over the last decades, the international community has attempted to establish a successful framework to protect traditional knowledge and genetic resources. However, although some of those efforts have meant the conclusion of different international treaties with long lists of State parties, this has not translated into a high level of protection of these two assets.

The conclusion of the Convention on Biological Diversity can be considered as the starting point of the protection of genetic resources and traditional knowledge at the international level. The CBD imposes on States the obligation to obtain prior and informed consent under mutually agreed terms before they grant access to genetic material.<sup>9</sup> Thus, this obligation is instrumental to other obligations present in treaties for the protection of biological diversity.

Furthermore, article 16(5) of the CBD refers to international cooperation as a tool to ensure that intellectual property rights are supportive of the implementation of the CBD and do not run counter to its objectives. This is relevant considering that the objectives of the CBD include “*the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits*

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<sup>9</sup> Convention on Biological Diversity, (1992), 1760 U.N.T.S. 79; 31 I.L.M. 818, art. 15.4 and art. 15.5.

*arising out of the utilization of genetic resources*".<sup>10</sup> Additionally, article 8(j) of the CBD imposes on States an obligation to respect, preserve and maintain traditional knowledge of indigenous communities which are associated to genetic resources.

In order to broaden the scope of article 8(j) of the CBD, the Assembly of States Parties to the CBD adopted the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization. This is a non-binding instrument which also refers in article 16(d)(2) to the obligation of States to adopt "*measures to encourage disclosure of the country of origin of genetic resources and of the origin of traditional knowledge, innovations and practices of indigenous and local communities in applications for intellectual property rights, measures to prevent use of GRs obtained without prior informed consent, and measures discouraging unfair trade practices*".

Another attempt, also under the umbrella of the CBD, was the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization.<sup>11</sup> This treaty further established the obligations to regulate access to genetic resources and equitable benefit sharing thereof. Article 6(3)(g)(ii) on access to genetic resources states that a State Party requiring prior and informed consent shall take legislative, administrative or policy measures to "*establish clear rules and procedures for requiring and establishing mutually agreed terms. Such terms shall be set out in writing and may include, inter alia: Terms on benefit-sharing, including in relation to intellectual property rights*".

Within the structure of the Food and Agriculture Organization (FAO), the Treaty on Plant Genetic Resources for Food and Agriculture is another attempt aiming to the protection of genetic resources and traditional knowledge. It establishes in article 9 a series of obligations on States to protect farmers traditional knowledge associated to genetic resources which constitutes the basis of food and agriculture production:

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<sup>10</sup> Convention on Biological Diversity, (1992), 1760 U.N.T.S. 79; 31 I.L.M. 818, art. 2.

<sup>11</sup> Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, (2010), UNEP/CBD/COP/DEC/X/1.

equitable benefit sharing and the right of farmers to participate in decisions that affect them.

Furthermore, other efforts to regulate this matter have taken place within the sphere of the WTO and the WIPO, understanding the key role of intellectual property law in connection with this issue. Within the WTO, there was a proposal formally submitted to amend the TRIPS made in 2011 by Brazil, China Colombia, Ecuador, India, Indonesia, Peru, Thailand, the African Group and the African Caribbean and Pacific Group. This proposal specifically providing for the disclosure of the origin of genetic resources and traditional knowledge associated to patent applications.<sup>12</sup> Nevertheless, those efforts have failed to reach to reach a consensus and conclude a treaty.

Within the WIPO, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has been tasked with the production of a treaty aiming to reach the effective protection of genetic resources and traditional knowledge, and currently develops a set of draft articles to protect traditional knowledge. In the relevant part, the articles establish that “7.1 Intellectual property applications that concern [an invention] any process or product that relates to or uses traditional knowledge shall include information on the country from which the [inventor] applicant collected or received the knowledge (the providing country), and the country of origin if the providing country is not the same as the country of origin of the traditional knowledge. The application shall also state whether free, prior and informed consent or approval and involvement to access and use has been obtained.”<sup>13</sup>

Other attempt to establish and obligation for patent applicants to disclose the origin of a genetic material is in relation to the current negotiation of a Convention on Access to and Benefit-Sharing of Marine Genetic Resources Beyond National Jurisdiction, under the umbrella of UNCLOS. The proposed solution is to establish a

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<sup>12</sup> WTO, Draft Decision to Enhance Mutual Supportiveness Between the Trips Agreement and the Convention on Biological Diversity, 19 April 2011, TN/C/W/59, para. 2.

<sup>13</sup> WIPO, The Protection of Traditional Knowledge: Draft Articles, WIPO/GRTKF/IC/40/18. June 19, 2019. Art. 7.1

*juris tantum* presumption against the patent applicant in case he does not provide information or provide inaccurate information about the genetic material origin.<sup>14</sup>

However, these attempts have failed at tackling the relation of genetic resources, traditional knowledge and intellectual property rights. Notwithstanding the CBD, the Nagoya Protocol and the Treaty on Plant Genetic Resources for Food and Agriculture provide different duties upon States, they do not clearly regulate intellectual property in order to prevent the violation of rules protecting genetic resources and traditional knowledge. Although there are references to intellectual property law, for instance article 16(5) of the CBD, these fall short or are too lax to tackle misappropriation. Specifically, neither of these treaties impose on States the duty to require the disclosure of the origin of patented genetic resources or the utilization of traditional knowledge.

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<sup>14</sup> Correa, C. (2017), Access to and Benefit-Sharing of Marine Genetic Resources Beyond National Jurisdiction: Developing a New Legally Binding Instrument, South Center, September 2017, Research Paper 79, P. 18.

## 2.2. THE ROLE OF INTELLECTUAL PROPERTY LAW FOR PROTECTING TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES AGAINST MISAPPROPRIATION AND THE DIFFERENT VIEWS OF THE STATES

General law governing patent law establishes that a patent is “*a legal right granted in relation to an invention*”.<sup>15</sup> A patent confers on the patent holder the right to exclude others without the patent holder’s consent from doing or making anything that falls within the subject matter of the invention. It is considered that patents represent a bargain between the inventor and the society: sharing and publishing an obligation in exchange for protection.<sup>16</sup> This bargain, however, disregards the protection of genetic resources and traditional knowledge of indigenous communities.

Patents are the vehicle for misappropriation, because, as explained, they confer upon the holder a right of exclusion. For instance, if an invention was developed upon undisclosed traditional knowledge, once the patent is obtained the traditional holders cannot obtain anything from the large-scale use of their knowledge. Hence, disclosure requirements become necessary to accomplish the goal of preventing unauthorized access and use of genetic resources and traditional knowledge and their subsequent misappropriation.<sup>17</sup>

If the failure to disclose means not obtaining a patent for an invention, the risk of that failure become too high. Clearly, complying with the existing duties, such as obtaining consent and reaching mutually agreed terms, is a much lesser burden than being unable to actually obtain patent protection. Of course, there will still be cases of misappropriation, however, facing the possibility of not obtaining patent protection, many applicants will have an incentive to comply with existing duties, in order to ascertain that protection.

In light of this, a new disclosure requirement in patent law related the access to genetic resources and traditional knowledge was demanded by developing countries

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<sup>15</sup> WIPO, Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge, 2017, page 11. Available at:

[https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1047.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1047.pdf).

<sup>16</sup> *Id.*

<sup>17</sup> *Ibid*, page 11.

in different international forums.<sup>18</sup> The concept of this new disclosure requirement, means that an applicant of a patent would be required to disclose the source of genetic resources and traditional knowledge that were used in the claimed invention, and to prove that prior and informed consent was given as well as evidence of mutually agreed terms. If an applicant fails to fulfil the aforementioned disclosure requirements or fails to properly make that disclosure, sanctions such as the rejection of the patent application or the invalidation of any resulting patent could be imposed.<sup>19</sup>

As scholars have noted, developed and industrialized countries already have disclosure requirements in their patent systems.<sup>20</sup> However, no obligation is in force to impose the disclosure of the source of origin of the material that was used to make the invention.

Many proposals have been made in different forums, such as the Conference of the Parties to the CBD, the WTO, WIPO Standing Committee on Patents, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, and the WIPO PCT Reform Working Group, among others.<sup>21</sup> Nonetheless, no further advances were made on this topic due to divided positions among states. Indeed, the recognition of that obligation was not successful in multilateral fora.

The discussions that took place show that developing countries are the ones who support the idea of including a new disclosure requirement. Many developing countries from Latin America and the Caribbean, Asia and Africa encourage this

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<sup>18</sup> Dominic Keating, 'Access to Genetic Resources and Equitable Benefit Sharing through a New Disclosure Requirement in the Patent System: An Issue in Search of a Forum' (2005) 87 J Pat & Trademark Off Soc'y 525., page 526.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, The Protection of Traditional Knowledge: Updated Draft Gap Analysis, WIPO/GRTKF/IC/38/6, pages 9-19. Dominic Keating, 'Access to Genetic Resources and Equitable Benefit Sharing through a New Disclosure Requirement in the Patent System: An Issue in Search of a Forum' (2005) 87 J Pat & Trademark Off Soc'y 525, page 528.

proposal to be implemented in national patent laws. Brazil, India and Peru are the strongest voices on this side of the debate<sup>22</sup>.

By contrast, countries like Japan and the United States express concerns about the implications of a disclosure requirements for acquiring patent rights. Their concern is that this new disclosure requirement in patent law would discourage research and development by causing uncertainties in the patent system. Their main argument is that due to the sovereignty principle, each country has the power to exercise control over its resources and also is competent to enter into a contractual arrangement with other States pursuing access to these resources.<sup>23</sup>

Additionally, according to industrialised countries, the promotion of such an obligation has a negative impact on the patent system. They have pointed out that it is rather unclear whether it would be possible to transfer benefits from those who exploit genetic resources to those who provide them, as there could be some cases where an invention is not patented and even if it is, it could not be commercialized.<sup>24</sup> Some authors who support these arguments, further allege that the patent system is designed to provide an incentive for innovation and new technologies. It is not destined to address environmental or development-related issues.<sup>25</sup>

However, by enforcing such disclosure requirements, the right to sovereignty over natural resources of States would be recognized and respected.<sup>26</sup> In addition, it might facilitate fair and equitable benefit sharing.<sup>27</sup>

An analysis of national jurisdictions demonstrates that different approaches can be used in order to impose an obligation to disclose the origin of a GR in a patent application: 1. Voluntary, as occurs in Germany and the European Union;<sup>28</sup> 2. A

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<sup>22</sup> Dominic Keating, 'Access to Genetic Resources and Equitable Benefit Sharing through a New Disclosure Requirement in the Patent System: An Issue in Search of a Forum' (2005) 87 J Pat & Trademark Off Soc'y 525., page 541.

<sup>23</sup> *Ibid.*, page 543.

<sup>24</sup> *Id.*

<sup>25</sup> *Ibid.*, page 546.

<sup>26</sup> Wallace Feng, 'Appropriation without Benefit-Sharing: Origin-of-Resource Disclosure Requirements and Enforcement under TRIPS and the Nagoya Protocol' (2017) 18 Chi J Int'l L 245 page 249.

<sup>27</sup> *id.*

<sup>28</sup> WIPO, Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge, 2017. P. 20. Available at: [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1047.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1047.pdf).



mandatory requirement in relation to formalities, which refers to the presentation of priority documents, imposition of fines and administrative or criminal sanctions, as take place in Viet Nam, Switzerland, Norway, and;<sup>29</sup> 3. A mandatory requirement of substantive nature, which “*aim[s] to promote compliance with the access and benefit-sharing requirements of the CBD, and assist in tracking the commercial use of genetic resources and associated traditional knowledge in order to promote fair and equitable benefit sharing*” as established in South Africa, India and the Andean Community.<sup>30</sup>

Indeed, a path towards achieving consensus on this issue must be found. Specially, taking into account the desire for a binding agreement requiring the disclosure of the origin of patented genetic resources and traditional knowledge and how pivotal it can turn up to tackle misappropriation.

### **3. CONTENT OF THE PROPOSED TREATY ON THE PROTECTION OF TRADITIONAL KNOWLEDGE AND GENETIC RESOURCES**

The content of the proposed treaty may vary depending on the level of protection States are willing to grant to genetic resources and traditional knowledge.

The two proposed options are:

- a treaty providing substantive obligations protecting genetic resources and traditional knowledge and
- a treaty providing the enforcement of foreign decisions protecting genetic resources and traditional knowledge.

Naturally, these treaties could be merged in a more comprehensive one, which could address together substantive obligations and regulate the enforcement of decisions pertaining the protection of genetic resources and traditional knowledge.

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<sup>29</sup> WIPO, Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge, 2017, pages.20-21. Available at: [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1047.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1047.pdf).

<sup>30</sup> WIPO, Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge, 2017, pages. 21-22. Available at: [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1047.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1047.pdf).

The level of protection will have a direct impact on the willingness of the States to ratify the treaty. It is likely that the number of States interested in ratifying the treaty will be inversely proportional to the level of protection granted by the treaty. Consequently, a treaty merging substantive obligations and enforcement obligations would be the option that requires the highest level of commitment and agreement between the Contracting States.

Moreover, it should be noted that, although a framework treaty providing generic obligations could be initially considered as an option, as will be explained below, such path has already proved unsuccessful.

### **3.1. OPTION 1: SUBSTANTIVE OBLIGATIONS TREATY**

#### **3.1.1. *PROPOSED TREATY***

As mentioned, the level of protection that a treaty may grant varies. The first possibility presented is the one that would provide the highest level of protection, *i.e.* a treaty providing substantive obligations.

In this scenario, the treaty would impose specific and thorough obligations on States to prevent the misappropriation of genetic resources and traditional knowledge through the patent system and/or a violation of biodiversity-related legislation. Specifically, the treaty would impose an obligation to disclose the origin of the genetic resource or the associated traditional knowledge.<sup>31</sup>

Moreover, the proposed treaty would regulate different moments in the procedure to apply for the patentability of an invention related to genetic resources and traditional knowledge.

In that regard, according to WIPO, there are three different moments in the elaboration of rules to require the disclosure of the source of the invention: (1) the moment that triggers the obligation; (2) the content of the disclosure and (3) the consequences of non-compliance with the disclosure requirements.

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<sup>31</sup> WIPO, Key Questions on Patent Disclosure Requirements for Genetic Resources and Traditional Knowledge, 2017, page 10. Available at: [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_1047.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_1047.pdf).

Regarding the first moment, certain rules require the provision of a copy of the access contract or the licencing contract.<sup>32</sup>

As for the scope of the obligation to disclose the source, some rules establish that the patent applicant must inform the geographical origin of the material;<sup>33</sup> or indicate the direct or indirect use of genetic resources present in the country where the application is filed, and the traditional knowledge directly or indirectly linked with the resource; to prove the prior informed consent;<sup>34</sup> provide information of the direct and original source of the genetic resources and if it cannot then the applicant must provide the reasons;<sup>35</sup> obtain a certificate of origin and prove the prior and informed consent;<sup>36</sup> depositing the material to an international depository authority under the Budapest Treaty,<sup>37</sup> among others.

As for the consequences of non-compliance, some rules refer to a period of two months to comply with the requirements to disclose the origin, and if not complied, national authorities can consider the application as abandoned, but the confidentiality remains in place;<sup>38</sup> the national authority can *ex officio* declare the absolute invalidity of a patent application if it does not provide information on the consent of the indigenous communities;<sup>39</sup> State authorities can claim ownership of

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<sup>32</sup> Andean Community, Decision No. 486 Establishing the Common Industrial Property Regime (2000), Arts. 26.h and art. 26.i. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=9451>.

<sup>33</sup> European Union, Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions, parr. 27 of the Preamble, Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=1440>; Belgium, Law of March 28, 1984 on Patents, art. 15.1. Available at: <https://wipolex.wipo.int/fr/legislation/details/11665>; Germany, Patent Act as published on 16 December 1980 (Federal Law Gazette 1981 I p. 1), as last amended by Article 2 of the Act of 4 April 2016, Section 34<sup>a</sup>. Available at: <http://www.wipo.int/edocs/lexdocs/laws/en/de/de223en.pdf>.

<sup>34</sup> Burundi, Law No. 1/13 of July 28, 2009 relating to Industrial Property in Burundi, art. 21. Available at: <https://wipolex.wipo.int/en/legislation/details/8324>.

<sup>35</sup> China, Patent Law of the People's Republic of China (as amended up to the Decision of December 27, 2008, regarding the Revision of the Patent Law of the People's Republic of China, art. 26 <http://www.wipo.int/wipolex/en/details.jsp?id=5484>.

<sup>36</sup> Costa Rica, Law No. 7788 of April 30, 1998, on Biodiversity (as amended by Law No. 8686 of November 21, 2008), art. 80. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=11314>.

<sup>37</sup> India, The Patents Act, 1970 (as amended up to Patents (Amendment) Act, 2005), art. Article 10(4)(ii)(D). Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=13104>.

<sup>38</sup> Andean Community, Decision No. 486 Establishing the Common Industrial Property Regime (2000), Arts. 39. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=9451>.

<sup>39</sup> Andean Community, Decision No. 486 Establishing the Common Industrial Property Regime (2000), Arts. 75. Available at: <http://www.wipo.int/wipolex/en/details.jsp?id=9451>.

the invention when the patent applicant does not fulfil the requirements imposed by the law,<sup>40</sup> among other regulations.

There is a clear advantage in proposing a treaty with substantive obligations. Since several States already have in place a regulatory process and patentability requirements, the establishment of a mandatory procedure to deal with patent applications, based on an international treaty, will facilitate the enforcement of access and benefit sharing regulations. In this sense, the tripartite scheme elaborated by WIPO is an example of how the obligations of patent holders can be regulated.

In turn, a clear disadvantage is that the procedure to follow will not be clear in cases where a patent holder in a State that do not ratify such treaty want to apply for a patent in a State that is a party to that treaty and which adopt measures to enforce its substantive international obligations.

### **3.1.2. RELATIONSHIP WITH OTHER RULES OF INTERNATIONAL LAW**

This section addresses how the proposed treaty would interact with other international treaties, especially those concerning intellectual property and the protection of genetic resources and traditional knowledge.

In this regard, the general rules of interpretation of treaties, contained in the Vienna Convention on the Law of the Treaties, play a role.<sup>41</sup> Particularly, Article 31(3)(c) requires that interpretation of treaties must take due account of 'any relevant rules of international law applicable in the relations between the parties'.<sup>42</sup>

Consequently, the obligations set forth in any possible treaty regulating this matter can play into the interpretation of existing treaties and *vice versa*.

A treaty with substantive obligations to disclose the source of the invention will be in line with the treaties whose scope were previously explained. A disclosure requirement as a substantive obligation will complement the obligations set forth in the CBD and the Nagoya Protocol, where the emphasis is in the protection of

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<sup>40</sup> Burundi, Law No. 1/13 of July 28, 2009 relating to Industrial Property in Burundi, art. 406. Available at: <https://wipolex.wipo.int/en/legislation/details/8324>).

<sup>41</sup> Vienna Convention on the Law of Treaties, (23 May 1969), 1155 U.N.T.S. 331.

<sup>42</sup> Vienna Convention on the Law of Treaties, (23 May 1969), 1155 U.N.T.S. 331, article 31(3)(c).

biodiversity and the consent and mutual agreed terms with the local communities. In other words, it would serve as a bridge among those treaties and patent law.

Furthermore, article 30 of the VCLT is a guide to be observed in the application of successive treaties relating to the same subject-matter. Nevertheless, the application and interpretation of this clause in other areas, for example investment law, is not uniform,<sup>43</sup> far away of a unique solution to be applicable when dealing with a case in which several treaties on the same subject matter are in force for the parties.

### ***3.1.2.1. THE CONVENTION ON BIOLOGICAL DIVERSITY AND ITS NAGOYA PROTOCOL***

As mentioned above, the CBD is a framework treaty that has stipulated certain duties upon States concerning the protection of genetic resources and traditional knowledge. In light of that, the CBD and the proposed treaty could contain similar or complementary duties.

Additionally, the Nagoya Protocol, is a more specific treaty, that further regulated on the issue upon the basis of the CBD.

Furthermore, a notable issue, that would concern both the CBD and the Nagoya Protocol, would arise in the case the proposed treaty contains a definition of traditional knowledge. In such scenario, the new definition could make its way into both existing treaties through interpretation, in light of article 31(3)(c) of the Vienna Convention.

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<sup>43</sup> Orakhelashvili, A., 'Article 30 of the 1969 Vienna Convention on the Law of Treaties: Application of the Successive Treaties Relating to the Same Subject-Matter'. (2016). ICSID Review, 31(2), 344–365, 356.

## **3.2. OPTION 2: TREATY FOR THE ENFORCEMENT OF FOREIGN DECISIONS PROTECTIVE OF GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE**

### **3.2.1. *PROPOSED TREATY***

A second option would be promoting a treaty under which the central obligation imposed upon Parties is to recognize and enforce judicial or administrative decisions protecting genetic resources and traditional knowledge issued by authorities of other State Parties. Namely, decisions under which the authority: (a) rejects the patentability of an invention for not properly disclosing related genetic resources and traditional knowledge, or imposes other sanctions such as fees; (b) declares the patent null and void because the applicant did not properly disclose related genetic resources and traditional knowledge; or (c) grants relief (whether specific performance or pecuniary compensation) in favour of local communities who suffered harm due to the improper use of their genetic resources and traditional knowledge.

This proposal raises as a solution considering the diverse approaches that national laws take concerning the protection of genetic resources and traditional knowledge regarding the subject matter of the disclosure, its content, and the consequences of non-compliance.<sup>44</sup> Consequently, the main advantage of this proposal is that, since the treaty would be focused on the enforcement of decisions without addressing substantive obligations, its negotiation would require a lower level of consensus, turning is more likely that a higher number of States would have the political will to ratify it. The disadvantage is that the lower consensus required entails lower protection to genetic resources and traditional knowledge. Consequently, this proposed treaty could contribute with the protection of genetic resources and traditional knowledge but should be complimentary to others imposing substantive obligations.

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<sup>44</sup> WIPO, Disclosure Requirements Table, May 2019. Available at: [https://www.wipo.int/export/sites/www/tk/en/documents/pdf/genetic\\_resources\\_disclosure.pdf](https://www.wipo.int/export/sites/www/tk/en/documents/pdf/genetic_resources_disclosure.pdf).

### **3.2.2. CHALLENGES TO BRING THE PROPOSED TREATY FROM THEORY TO PRACTICE**

The main difficulties to bring the theory to practice lie on (1) specifying which decisions qualify as protective of genetic resources and traditional knowledge and (2) how the proposed treaty would interact with other treaties for the enforcement of foreign decisions. Finally, the report briefly addresses (3) balancing the treaty with the territoriality principle, one of the cornerstones of intellectual property law. In this regard, some solutions may be found following the approach of the NYC Convention.

#### **3.2.2.1. THE CHALLENGE OF DETERMINING WHETHER THE DECISION TO BE ENFORCED IS PROTECTIVE OF GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE**

While certain decisions are clearly protective of the genetic resources and traditional knowledge of the local communities (e.g. decisions rejecting the patentability of an invention where the applicant did not disclose related genetic resources and traditional knowledge, or declaring a granted patent null and void for this reason) other examples are not as clear.

For instance, a decision granting a pecuniary compensation in favour of the community instead of declaring the patent null and void would allow the misappropriation of the knowledge but may be considered protective depending on the value of the compensation. In addition, a decision may favour a local community but harm another. For instance, if relief is granted to only one of two communities claiming the ownership of the genetic resources and traditional knowledge, it will be arguable whether the decision is protective or not.

A possible solution would be setting forth on the treaty that the decision may not be enforced if it defeats the purpose of protecting the genetic resources and traditional knowledge of the local communities, but this allows for a great discretion that may be used to dismiss decisions that are actually protective. Therefore, the treaty should specify the reasons for rejecting the enforcement and in a restrictive manner, following the approach of the NYC. Pursuant to the NYC, the recognition and enforcement of an arbitral award may be refused if the subject matter of the

difference is not arbitrable under the law of that country or if the enforcement of the award would be contrary to the public policy of that country.<sup>45</sup>

This report suggests that the proposed treaty may follow a similar approach regarding these exceptions: defining which decisions would be protective of GR and TK and provide certain discretion to the authorities to dismiss the enforcement of the ones not meeting the threshold. Therefore, not only would the proposed treaty facilitate the enforcement of decisions protective of GR and TK; it would also provide a way for preventing the dissemination of decisions that may harm them and which would be enforceable under other treaties. The proposed treaty could even go further and include an obligation to deny the enforcement of decisions harmful for GT and TK, even if these decisions were enforceable under other treaties. In this sense, the treaty would dispose that the authority in the place of enforcement “must” reject the enforcement if a party argues or if the authority finds that the decision is harmful of GT and TK (instead of choosing the word “may” as the NYC does). Regarding the issue of multiple sources of international law providing for conflicting obligations, please refer to point 3.2.2.3 below.

### ***3.2.2.2. RELATIONSHIP WITH OTHER TREATIES FOR THE ENFORCEMENT OF JUDICIAL DECISIONS***

The proposed treaty would provide for a specific framework for the enforcement of decisions protecting genetic resources and traditional knowledge, considering its particularities. Thus, it would be different and complimentary to other treaties for the enforcement of foreign judgments with a more general scope of application.<sup>46</sup>

The proposed treaty would be different from other existing treaties: the proposed treaty would only be applicable to decisions protective of the genetic resources and traditional knowledge owned by local communities. In this regard, it may set forth an obligation for the Contracting States not to enforce decisions that may harm such rights. In case the decision is enforceable under a different treaty, the proposed

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<sup>45</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards [hereinafter “NYC”], (7 June 1959), 330 U.N.T.S. 3, article V.

<sup>46</sup> For instance, the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, applicable in the European Union.



treaty would prevail under the *lex specialis derogat legi generali* principle,<sup>47</sup> elaborated with more detail in section 3.2.2.2. above.

Additionally, considering that the aim is to promote the fair and equitable sharing of inventions based on genetic resources and traditional knowledge owned by local communities, the treaty should provide for fee waivers facilitating the enforcement of these decisions.

Moreover, while treaties for the enforcement of foreign decisions are generally regional, the proposed treaty would have a more extensive reach, independent from the geographical position of each Contracting State.

### **3.2.2.3. THE TERRITORIALITY PRINCIPLE AND THIS PROPOSED TREATY**

The principle of territoriality provides that IP rights granted or protected by a state are independent from those granted or protected by other states.<sup>48</sup> Accordingly, it entails that the rights conferred under each state's IP law are limited to the territory of that state.<sup>49</sup> The foundation underlying the principle is the right of each state to determine the extent to which IP rights exist and are protected within its own territory to fulfil its own economic, social and cultural policy goals.<sup>50</sup> Consequently, each state exercises jurisdiction over the infringement of its own rights and applied its own domestic IP law.<sup>51</sup>

The Paris Convention creates a Union for the protection of industrial property (composed by the States that ratify it). Its article 4<sup>bis</sup> embraces the territoriality principle by setting forth that patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union or not.

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<sup>47</sup> International Law Commission Study Group on Fragmentation Koskenniemi, Fragmentation of International Law: Topic (a): The function and scope of the *lex specialis* rule and the question of 'self-contained regimes': An outline. Available at:

[http://legal.un.org/ilc/sessions/55/pdfs/fragmentation\\_outline.pdf](http://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf).

<sup>48</sup> Lundstedt, Lydia, Territoriality in Intellectual Property Law, Stockholm University, 2016.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

However, it grants a priority period for the purpose of filing the same patent applications in other jurisdictions.

Most importantly for the purposes of this Report: the Convention provides that patents applied for during the period of priority are independent as regards the grounds for nullity and forfeiture, and as regards their normal duration. As a consequence, if a patent application is declared null and void, this fact would not affect the priority that the patent applicant holds in other jurisdictions.

This obligation collides with the proposed treaty, which would authorize the dismissal of the priority under the Paris Convention if the first application is rejected or reduced for not having properly disclosed related GR and TK. In this scenario, the proposed treaty would prevail under the *lex specialis derogat legi generali* principle, derived from Article 31(3)(c) of the VCLT.<sup>52</sup> This is based on the fact that most of international law is dispositive, and thus a special law may be used to apply, clarify, update or modify as well as set aside general law.<sup>53</sup> Naturally, the proposed treaty would only prevail with regards to the Contracting States (decisions issued in States which are not Contracting States are not covered by the proposed treaty).

The limits of the *lex specialis* principle are *ius cogens* and other considerations such as: “*Whether such prevalence may be inferred from the form or the nature of the general law or intent of the parties, wherever applicable; Whether the application of the special law might frustrate the purpose of the general law; Whether third party beneficiaries may be negatively affected by the special law; and Whether the balance of rights and obligations, established in the general law would be negatively affected by the special law.*”<sup>54</sup> None of these exceptions would be applicable to the proposed treaty.

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<sup>52</sup> International Law Commission Study Group on Fragmentation Koskenniemi, Fragmentation of International Law: Topic (a): The function and scope of the *lex specialis* rule and the question of 'self-contained regimes': An outline. Available at: [http://legal.un.org/ilc/sessions/55/pdfs/fragmentation\\_outline.pdf](http://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf).

<sup>53</sup> International Law Commission Study Group on Fragmentation Koskenniemi, Fragmentation of International Law: Topic (a): The function and scope of the *lex specialis* rule and the question of 'self-contained regimes': An outline. Available at: [http://legal.un.org/ilc/sessions/55/pdfs/fragmentation\\_outline.pdf](http://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf).

<sup>54</sup> International Law Commission Study Group on Fragmentation Koskenniemi, Fragmentation of International Law: Topic (a): The function and scope of the *lex specialis* rule and the question of 'self-contained regimes': An outline. Available at:

Additionally, international conventions do not prohibit contracting states from respecting foreign IP rights.<sup>55</sup> First, Paris Convention does not prevent contracting states from recognising foreign patent rights. In fact, some developing countries issue revalidation and importation patents in order to create incentives for foreign companies to exploit their inventions in the developing countries.<sup>56</sup>

Second, Article 6<sup>quinquies</sup> of the Paris Convention also establishes limits to the territoriality principle: a *telle quelle* rule which obligates the contracting states to accept for registration trademarks that have been duly registered in their state of origin, subject to certain reservations listed in the article including conflict with prior local rights or lack of distinctiveness.<sup>57</sup>

Consequently, the territoriality principle and the obligations under the Paris Convention would not hamper the implementation in practice of the proposed treaty.

### **3.3. REASONS WHY A FRAMEWORK TREATY CANNOT ADDRESS THE PROTECTION OF GENETIC RESOURCES AND TRADITIONAL KNOWLEDGE**

It could be argued that the treaty could take the form of a framework agreement, establishing a generic obligation of protecting genetic resources and traditional knowledge.

Framework agreements are exemplified, for instance, by the Convention on the Conservation of Migratory Species of Wild Animals,<sup>58</sup> the Paris Convention for the Protection of Industrial Property<sup>59</sup> or the UN Framework Convention on Climate Change.<sup>60</sup> Moreover, these treaties are distinguished because they establish broad commitments and a system of governance, leaving detailed and specific rules to be stipulated either through subsequent agreements or national legislation.<sup>61</sup>

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[http://legal.un.org/ilc/sessions/55/pdfs/fragmentation\\_outline.pdf](http://legal.un.org/ilc/sessions/55/pdfs/fragmentation_outline.pdf).

<sup>55</sup> Lundstedt, Lydia, *Territoriality in Intellectual Property Law*, Stockholm University, 2016, page 91.

<sup>56</sup> *Ibid*, page 89.

<sup>57</sup> *Id*.

<sup>58</sup> Convention on the Conservation of Migratory Species of Wild Animals, (1983), 1651 U.N.T.S. 333.

<sup>59</sup> Paris Convention on the Protection of Industrial Property, (1883), 828 U.N.T.S. 305.

<sup>60</sup> Framework Convention on Climate Change, (20 June 1992), 31 I.L.M. 849.

<sup>61</sup> Nele Matz-Lück, 'Framework Conventions as a Regulatory Tool' (2009) 1(3) *GoJIL* 439, 440-441; D. Bodansky, *The Framework Convention/Protocol Approach*, WHO/NCD/TFI/99.1, 15.

Consequently, States can tackle complex and wide subjects, regulating incrementally through framework agreements and subsequent protocols.<sup>62</sup>

A framework agreement is a suitable path if, at the given time, the parties are unwilling or unable to enter into a treaty setting stricter rules.<sup>63</sup> Through framework agreements, States establish a basis for further cooperation and the subsequent setting of further, more comprehensive, stricter and specific rules.<sup>64</sup>

In this case, a framework treaty for the protection of genetic resources and traditional knowledge could impose upon States an obligation to protect these two resources, particularly in the area of intellectual property rights. For instance, the treaty could provide that States should align their national intellectual property laws with the objective of the Agreement.

However, a framework agreement is not the path to establish a detailed and clear obligation imposing the disclosure of the origin of patented genetic resources and traditional knowledge. Although further steps could lead to establishing stricter rules, either through subsequent protocols or domestic legislation, it would fail to tackle the regulation gap between countries.

### **3.3.1. THE EXAMPLE OF THE CONVENTION ON BIOLOGICAL DIVERSITY**

Another example of a framework agreement is the Convention on Biological Diversity, which stipulates in its article 28 that 'Contracting Parties shall cooperate in the formulation and adoption of protocols to this Convention'.<sup>65</sup> The CBD is relevant to our present analysis because it states as one of its objectives the 'fair and equitable sharing of the benefits arising out of the utilization of genetic resources'.<sup>66</sup>

The example of the CBD and the Nagoya Protocol exemplify why a framework agreement is not a suitable path to address this issue. It shows that although more

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<sup>62</sup> Nele Matz-Lück, 'Framework Conventions as a Regulatory Tool' (2009) 1(3) *GoJIL* 439,47-448; D. Bodansky, *The Framework Convention/Protocol Approach*, WHO/NCD/TFI/99.1, 15-17.

<sup>63</sup> Nele Matz-Lück, 'Framework Conventions as a Regulatory Tool' (2009) 1(3) *GoJIL* 439, 440-450-451; D. Bodansky, *The Framework Convention/Protocol Approach*, WHO/NCD/TFI/99.1, 35.

<sup>64</sup> Nele Matz-Lück, 'Framework Agreements' (2011) *M.P.E.P.I.L.* Available at: <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e703?prd=EPIL>

<sup>65</sup> Convention on Biological Diversity, (1992), 1760 U.N.T.S. 79; 31 I.L.M. 818, article 28.

<sup>66</sup> Convention on Biological Diversity, (1992), 1760 U.N.T.S. 79; 31 I.L.M. 818, article 1.

parties are initially interested on an issue, that does not guarantee those parties will enter into subsequent treaties setting stricter rules nor establish them domestically. While the CBD has 196 state parties,<sup>67</sup> the Nagoya Protocol, which establishes stricter rules regarding GR access and benefit sharing, has 119.<sup>68</sup> Furthermore, subsequent State practice shows that only 39 out of 196 parties to the C.B.D. and the Nagoya Protocol introduced benefit-sharing into their national legislation.<sup>69</sup> Moreover, it shows that the setting of stricter rules can end up taking a long time, in this case the Protocol was opened for signature in 2011, 19 years after the CBD was signed in 1992.

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<sup>67</sup> See <https://www.cbd.int/information/parties.shtml>.

<sup>68</sup> See <https://www.cbd.int/abs/nagoya-protocol/signatories/>.

<sup>69</sup> Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing to the C.B.D., Note by the Executive Secretary, UNEP/CBD/WG-ABS/5/4, para. 11; C.o.P. C.B.D., Note by the Executive Secretary, UNEP/CBD/COP/6/INF/10, paras. 118-119; C.o.P. C.B.D., Synthesis of Information contained in Third National Reports, UNEP/CBD/COP/8/23\*, para. 8; N. Pauchard, 'Access and Benefit Sharing under the Convention on Biological Diversity and its Protocol: What Can Some Numbers Tell Us about the Effectiveness of the Regulatory Regime?' (2017), 6 RESOURCES 1, 7.

## **4. THE NEGOTIATION OF A PLURILATERAL AGREEMENT ON DISCLOSURE OF ORIGIN**

This section provides a brief summary of the evolution of Plurilateral Agreements' negotiations within and outside the World Trade Organisation (WTO), how they operate, as well as their possible legal and substantive constraints. Moreover, an explanation of the crucial role that they can potentially play in addressing an obligation to disclose the origin of patented genetic resources and traditional knowledge will be proposed.

### **4.1. CAN A PLURILATERAL AGREEMENT ADDRESS THE RECOGNITION OF AN OBLIGATION TO DISCLOSE THE ORIGIN OF GR USED IN PATENTED INVENTIONS WITHIN THE WTO?**

As it was mentioned on section 2.2, the discussions that took place in different international forums related to the recognition of an obligation to disclose the origin of patented genetic resources and traditional knowledge were not successful. Therefore, alternative options other than multilateral negotiations should be explored. As will be demonstrated below, negotiating a Plurilateral Agreement (PA) could be a possible solution.

In the context of the WTO, a PA allows sub-sets of the WTO members to negotiate and agree to commitments in specific policy areas applying to signatories only. Thus, a PA allows for what is known as "variable geometry" in the WTO.<sup>70</sup>

The WTO Establishing Agreement contains a number of provisions that address the link between the WTO and a PA, how the latter operates, as well as the procedures and requirements that need to be fulfilled for a PA within the WTO to exist and cease to be.<sup>71</sup>

Article II.3 of the WTO Agreement defines them in the following way:

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<sup>70</sup> Bernard M Hoekman and Petros C Mavroidis, 'WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements', (2015), *The European Journal of International Law*. Vol. 26 no. 2, page 319.

<sup>71</sup> Chang-fa Lo, 'A Milder but Effective WTO Reform - Possible Plurilateral FTAs and Plurilateral DSU within the WTO', (2019), *14 Asian J WTO & Int'l Health L & Pol'y* 331, page 9.

*The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as "Plurilateral Trade Agreements") are also part of this Agreement for those Members that have accepted them and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members that have not accepted them.*

Hence, PAs unlike Multilateral Agreements within the WTO, are negotiated, accepted and concluded by some WTO members but not all of them.

According to Article III, the WTO shall provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements. Article IV states that the bodies provided for under these types of agreements shall carry out the functions assigned to them under those Agreements, shall operate within the institutional framework of the WTO and shall keep the General Council informed of their activities on a regular basis. As for the decisions taken under a PA, amendments, accession, non-application of a PA between parties to that Agreement, acceptance, entry into force, withdrawal and reservations shall be governed by the provisions of the PA. PAs operate separately from the operation of Multilateral Agreements.<sup>72</sup>

In addition, Article X.9 states that:

*The Ministerial Conference, upon the request of the Members parties to a trade agreement, may decide exclusively by consensus to add that agreement to Annex 4. The Ministerial Conference, upon the request of the Members parties to a Plurilateral Trade Agreement, may decide to delete that Agreement from Annex 4.*

According to some scholars, this provision could be interpreted in a sense that if a trade agreement is merely to be considered as a PA without the intention to be added to Annex 4, such WTO wide consensus might not be necessary.<sup>73</sup> The Information Technology Agreement could serve as an example. While it was not added to Annex 4 and its conclusion was not based on the consensus of all WTO members, its operation and implementation are included under the WTO.<sup>74</sup>

In case there is any member that objects the inclusion of such an agreement into the WTO Agreements as an Annex 4 Agreement, the consequence would simply be its

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<sup>72</sup> *Ibid*, page 10.

<sup>73</sup> *Ibid*, page 11.

<sup>74</sup> *Ibid*, page 12.

non-incorporation. However, it is still attainable for some WTO members to conclude such an Agreement that operates within the WTO.<sup>75</sup>

The reason why a PA would not require such consensus, as in the case of the ITA, is because it is an inclusive agreement. PAs within the WTO can be inclusive or exclusive. The first ones encompass conditional, unilateral and sectoral liberalization conducted on a most favoured nation basis. The main advantage of this kind of PA is that the consent by all WTO members via the Ministerial Conference, required on article X.9 of the Marrakech Agreement, is not necessary. Nevertheless, a “critical mass” is needed to launch the plurilateral negotiation in order to avoid free riders.<sup>76</sup> The concept of critical mass is flexible, and it depends on the subject of the PA and who the main actors are. Exclusive plurilaterals on the other hand, imply liberalization only for those WTO members that are part of the PA, like the Government Procurement Agreement (GPA). This category of PA falls under the aforementioned consensus requirement to be added to Annex 4, as they do not apply on an MFN basis.<sup>77</sup> This type of PA is considered to be more challenging since members who have the intention to launch a plurilateral negotiation need to take into account whether there are other WTO members who may object the arrangement or not.<sup>78</sup>

After the conclusion of the Uruguay Round, the single undertaking principle was applied, which means that nothing is agreed until everything is agreed. Membership of the WTO was made subject to accepting all of treaties as a package. Unlike the previous GATT regime, all members are bound, in principle, by the same set of rules under the WTO. The Tokyo Round Codes were incorporated to Annex 1 Agreement, becoming universal rules, with only few exceptions contained in Annex 4 Agreement. Government Procurement Agreement and the Civil Aircraft Agreement have

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<sup>75</sup> *Id.*

<sup>76</sup> Draper, Peter and Memory Dube, ‘Plurilaterals and the Multilateral Trading System’, (2013), E15Initiative, Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, page 2-3. [www.e15initiative.org/](http://www.e15initiative.org/)

<sup>77</sup> *Ibid*, page 3.

<sup>78</sup> *Ibid*, page 4.



remained as Plurilateral Agreements and thus its obligations are only imposed to their members.<sup>79</sup>

As we can observe, at present, only two PAs are still in force within the WTO framework. This small number contrast with the hundreds of Preferential Trade Agreements that exist, opening the debate as to why PAs are not as extended in practice.<sup>80</sup>

Nevertheless, much ink has been spilled over how a plurilateral approach might help address the current difficulties encountered by the WTO.<sup>81</sup> PAs have been considered as a possibility to promote a commonly shared agenda among a group of countries, especially after the lack of progress of the Doha Development Agenda.<sup>82</sup> After the Doha deadlock, a Plurilateral approach has been proposed as a useful tool, since it appears difficult to reach an agreement by a multilateral basis. A range of new issues contained at the Doha Development Agenda (DDA) accepted by all members in a multilateral agreement do not seem to be viable. Moreover, the World Economic Forum (WEF) has recently suggested adopting a plurilateral approach in pursuance of addressing a necessary WTO reform and new emerging issues.<sup>83</sup>

The same approach could apply to the disclosure requirement's issue, especially taking into account its previous multilateral's failure. Negotiating a PA that addresses this subject, would mean that only the States that are interested in the recognition of an obligation to disclose the origin of patented GR and TK would be part in it. Accordingly, its voluntariness could be seen as a valuable and convenient aspect,

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<sup>79</sup> Nakatomi, M, 'Plurilateral Agreements: A Viable Alternative to the World Trade Organization?', (2013), ADBI Working Paper 439. Tokyo: Asian Development Bank Institute, page 3. Available at: <http://www.adbi.org/working-paper/2013/10/24/5914.plurilateral.agreements.alternative.wto/>.

<sup>80</sup> Bernard M Hoekman and Petros C Mavroidis, 'WTO 'à la carte' or 'menu du jour'? Assessing the Case for More Plurilateral Agreements', (2015), The European Journal of International Law Vol. 26 no. 2, page 321.

<sup>81</sup> See Nakatomi, M, 'Plurilateral Agreements: A Viable Alternative to the World Trade Organization?', (2013), ADBI Working Paper 439. Tokyo: Asian Development Bank Institute. Available at: <http://www.adbi.org/working-paper/2013/10/24/5914.plurilateral.agreements.alternative.wto/>. Rudolf Adlung and Hamid Mamdough, "Plurilateral Trade Agreements: an escape route for the WTO?", (2016) WTO Working Paper ERSD-2017-03.

<sup>82</sup> Rudolf Adlung and Hamid Mamdough, "Plurilateral Trade Agreements: an escape route for the WTO?", (2016) WTO Working Paper ERSD-2017-03, page 5.

<sup>83</sup> *Ibid*, page 7.

particularly due to the fact that only developing countries have shown an interest in negotiating an agreement that deals with disclosure requirement.

**4.1.1. PLURILATERAL AGREEMENTS WITHIN THE WTO: AGREEMENT ON TRADE IN CIVIL AIRCRAFT, GOVERNMENT PROCUREMENT AGREEMENT (GPA) AND INFORMATION TECHNOLOGY AGREEMENT (ITA).**

Support on PAs is divided among states. During the 8th Ministerial Conferences when the future of the DDA was discussed, some WTO members promoted the idea to seek PAs within the WTO so that it could maintain its centrality and universal coverage.<sup>84</sup> It is feasible to highlight, that the United States in particular has supported this proposal by promoting a PA in Services.<sup>85</sup> This support for a plurilateral approach by developed countries can be considered as an advantage in order to negotiate the proposed treaty since they are considered key players in any negotiation.

In the opposite side, many countries have expressed their concern about United States' proposal, arguing that the inclusion of new issues would exceed the existing mandate of the DDA. Emerging economies and Least Developed countries have defended this position stating that transparent and inclusive negotiations should be pursued. In order to avoid criticism and promote trust in PAs, some scholars have proposed the negotiation of a code of conduct to regulate PAs, as well as a set of rules that include more transparency.<sup>86</sup>

Notwithstanding this division between WTO members, some existent PAs could serve as an example of how such agreements could be concluded between developed and developing countries. One may conclude that their success is due to its content, which has attracted both developed and developing countries.

As previously stated, the Agreement on Trade and Civil Aircraft is one of the current PA concluded by a small number of WTO members contained in Annex 4(a). Despite

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<sup>84</sup> *Ibid*, page 23.

<sup>85</sup> *Id.*

<sup>86</sup> Draper, Peter and Memory Dube, 'Plurilaterals and the Multilateral Trading System', (2013), E15Initiative, Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum, page 1. [www.e15initiative.org/](http://www.e15initiative.org/), page 4.

its reduced quantity of members, it has not been terminated. Another example of a PA within the WTO is the GPA which is also included in Annex 4. It is based on three principles: non-discrimination, openness and transparency that apply to Parties' government procurement covered by the Agreement.<sup>87</sup> GPA is attractive for other WTO members who have not participated in negotiations not only because of its aforementioned principles, but also due to its membership's growth and also as a result of public infrastructure investment's increasingly role.<sup>88</sup> Furthermore, this agreement provides two independent mechanisms for settling procurement-related disputes, "domestic review mechanisms" at the national level that permit suppliers to challenge breaches of the GPA and the national legislation that gives effect to the Agreement; and the WTO dispute settlement mechanism which applies to disputes under the GPA between the parties.<sup>89</sup>

The ITA, for instance, was signed by only 29 WTO members at the Singapore Ministerial Conference in 1996. Even though it was negotiated by what is known as a "critical mass" of countries, it was then universally applied since its commitments were undertaken on an MFN basis, hence all benefits must be extended to all WTO members. Its membership has increased from 29 members to 81, partly because of its product coverage's expansion.<sup>90</sup> Although the vast majority of them are developed countries with a high income, many developing countries have also joined the agreement, making it a successful PA.<sup>91</sup>

#### **4.2. PLURILATERAL AGREEMENTS OUTSIDE THE WTO. KEYS TO CONCLUDE A SUCCESSFUL PA.**

A plurilateral agreement is not exclusively adopted in the WTO context; it could also be negotiated within other forums. Examples of that are the India, Brazil, South Africa Dialogue Forum (IBSA), as well as BRICS constituted by Brazil, Russia, India, China

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<sup>87</sup> CSEND, 'Policy Brief Nr.7 Plurilateral Agreements: Key to solving impasse of WTO/Doha Round and basis for future trade agreements within the WTO context', page 11. Available at <http://www.csend.org/trade-policy-governance>.

<sup>88</sup> *Ibid*, page 13.

<sup>89</sup> WTO, Agreement on Government Procurement. Available at: [https://www.wto.org/english/tratop\\_e/gproc\\_e/disput\\_e.htm](https://www.wto.org/english/tratop_e/gproc_e/disput_e.htm)

<sup>90</sup> *Ibid*, page 17.

<sup>91</sup> *Id*.

and South Africa, among others. Its importance lies in the fact that these countries have used a plurilateral approach in order to centralize their advantages and leverage their global influence and power.<sup>92</sup>

The so-called "emerging markets" have also recently promoted and developed strategic geopolitical alliances with a view to increase their power status and to strengthen their position at the international level. Plurilateral agreements are seen as a strategy to pursue advantages from other countries and a way to act as a union.<sup>93</sup>

Nonetheless, criticism and opposition to PAs outside the WTO context have also been faced. For instance, countries like India have expressed their concern about the negative impact that ACTA the Anti-Counterfeiting Trade Agreement can have not only on developing countries but also on the developed ones.<sup>94</sup> It has criticised its lack of involvement with developing countries and transparency. This agreement was concluded in 2011 with the aim of enforcing intellectual property rights at an international level so that fighting against counterfeiting and piracy could be more efficient.<sup>95</sup> It establishes the possibility for any WTO member to accede on a voluntary basis and provides a new international framework outside WTO and WIPO. It further sets up its own governing body.<sup>96</sup> At present, only Japan has ratified the agreement and the EU has expressly rejected it.

All in all, for a PA to be successful, it should be consistent with the already existing international rules and provisions on that matter and should not be disadvantageous for those countries that are not part of it. In addition, it should include a substantial number of members, among which key players must be present. Considering that most developed countries have shown reticence to participate in negotiations dealing with the recognition of an obligation to disclose the origin of patented genetic resources and general knowledge, countries that are interested in pursuing such negotiation should opt for a content that can potentially attract them to join it. Notably,

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<sup>92</sup> *Ibid*, page 5.

<sup>93</sup> *Ibid*, page 5.

<sup>94</sup> *Ibid*, page 24.

<sup>95</sup> *Ibid*, page 20.

<sup>96</sup> *Id*.

because the main obstacle to launch the negotiation of the proposed treaty would not be the forum or the kind of negotiation, as developed countries have already expressed support for a plurilateral approach within the WTO and the countries that are against it are at the same time interested in the recognition of an obligation to disclose the origin of patented genetic resources and traditional knowledge.

Besides, the agreement should be open to accession by any country that wishes to become part of it and include an MFN clause in order to avoid the consensus requirement from article X.9 of the Marrakech Agreement, if negotiated within the WTO. If a PA addressing the disclosure requirement issue is well designed, even developed countries that would probably not participate in the negotiations, would eventually have an incentive to be part of it.

## **5. CONCLUSION**

As mentioned at the beginning of this Report, the relevance of intellectual property related to the misappropriation of traditional knowledge and genetic resources is undeniable. In light of that and unsuccessful previous attempts, any new path towards addressing it must be channelled through a development within intellectual property law. Specifically, the disclosure of the origin of patented genetic resources and traditional knowledge puts forward a possibility to prevent misappropriation and encourage compliance with existing duties. Therefore, this path entails a way to go forward, setting a new barrier against misappropriation, that attempts to prevent it and address it *ex post*. Moreover, it builds upon existing frameworks within international law that regulate this issue, complementing them.

This Report presented two possible models of treaties that could be concluded to regulate the matter: a treaty with substantive obligations or a treaty to facilitate the enforcement of decisions concerning patent filings related to genetic resources and traditional knowledge. Each has its own advantages and disadvantages, but both options are a way forward, understanding that further regulation must particularly consider intellectual property. A conclusion from that analysis shows that both treaties or a combination of them could be concluded without clashing with other existing international obligations. It also concludes that these are viable treaties to foster the fair and equitable sharing of the profits arising from inventions related or

associated with genetic resources and traditional knowledge. Furthermore, the Report also explains why, contrary to these other options, a framework agreement is not a way forward, but backwards.

As previously mentioned, the issue of where States stand on the matter is key to both the question of the model of treaty to pursue and where to negotiate the treaty. As to the first question, the higher level of protection, i.e. a strong obligation stipulating the disclosure requirement, the lesser States would be willing to become a party to the treaty. As to the second question, the chosen forum may depend on where States stand on the issue because with too much opposition the negotiations can become stagnated. The most feasible option would be such of a plurilateral agreement within the WTO framework for the following reasons:

- they offer a mechanism for a group of WTO members to engage in rule making on certain areas, applying to signatories;<sup>97</sup>
- its voluntariness can be considered as a significant and distinctive feature since at the moment only a group of states have shown an interest in negotiating an agreement that deals with disclosure requirement;
- as was demonstrated in the previous section, despite the critics, states have not been prevented to conclude such type of agreements;
- its negotiation could be seen as more transparent compared to a negotiation of an agreement outside the WTO framework;
- a plurilateral approach has been supported by many key players, particularly the United States.

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<sup>97</sup> Bernard M Hoekman and Petros C Mavroidis, 'Embracing Diversity: Plurilateral Agreements and the Trading System', (2015), 14 World Trade Rev 101, page 115.

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