Written Contribution to the Proceedings of the Diplomatic Conference on Genetic Resources and Associated Traditional Knowledge

Agenda item 13 | 24 May 2024

FAAAT-FDM *in collaboration with the* **Cannabis Embassy**

We congratulate the Presidents of the Conference and of the Main Committees for their work, as well as the Secretariat, and all delegates from Member States and Observers. The adoption of this **WIPO Treaty on Intellectual Property, Genetic Resources and Associated Traditional Knowledge** (GRATK Treaty) is historic in many regards.

A) Disclosure Requirements under the Treaty.

We would like to provide comments on the text, enlightening the interpretation of the obligations under this new Treaty.

The final definition of the "trigger" for disclosure contained in the Treaty reads:

> **"*'Based on'* means that the genetic resources and/or traditional knowledge associated with genetic resources must have been necessary for the claimed invention, and that the claimed invention must depend on the specific properties of the genetic resources and/or on the traditional knowledge associated with genetic resources."**

The basic proposal included the following definition (terms deleted from the final text are underlined):

> "*'[Materially/Directly] based on'* means that the genetic resources and/or traditional knowledge associated with genetic resources must have been necessary or material to the development of the claimed invention, and that the claimed invention must depend on the specific properties of the genetic resources and/or traditional knowledge associated with genetic resources."

Considering genetic resources (GR) only, the deletion of the terms underlined is significant to the scope of patent applications covered by this Treaty. On the one hand, "materially/directly" and "or material" were deleted. On the other hand, "the development of" was also erased from the final text. Consequently:

1) There are two criteria for considering whether a claimed invention is "based on" a GR:

- The GR must have been **necessary** for the claimed invention,
- The claimed invention must **depend on the specific properties** of the GR.

The draft versions of the Treaty previously contemplated mentions of the qualifier "*direct*" in the trigger. Drafts also contemplated mentions of the qualifier "*material*," both in the trigger itself and in its definition. These qualifiers were deleted by the drafters, leaving **only the criteria of *necessity* and *dependence*** on specific properties.

If a GR was necessary to create a claimed invention, and the invention depends on such GR, **even if indirectly and/or immaterially**, it falls under the scope of this Treaty.

A claimed invention relying on digital sequence information (DSI) obtained from a GR will therefore have to disclose the GR from which the DSI derives. Indeed, if the GR —albeit indirectly and immaterially through a DSI or other means— is necessary for the invention, which also depends on the specific properties of the GR that are present in the DSI, it falls under the disclosure requirement.

2) GRs used in the development of the claimed invention are only exempt from disclosure when they are unnecessary and independent from the specific properties of the claimed invention.

The deletion of "the development of" cannot be construed as an opportunity to evade the disclosure requirement for GRs used in the development of the invention.

B) Partial Retroactivity of the Treaty

We would like to provide comments and reflections on the text, which enlighten the interpretation of this new Treaty under Articles 28 and 32 of the Vienna Convention on the Law of Treaties (VCLT).

Article 4 in particular (formerly Article 5 in draft versions), has the potential to significantly advance international human rights law, in line with the Charter of the United Nations, helping progressively achieve the full realisation of a number of rights set forth in the:

- International Covenant on Civil and Political Rights (ICCPR),[1]
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),[2]

And further recognised in the:

- Universal Declaration of Human Rights (UDHR),[3]
- UN Declaration on the Rights of Indigenous Peoples (UNDRIP),[4] and
- UN Declaration on the Rights of Peasants and Other People Working in Rural Areas (UNDROP).[5]

Article 4 as adopted reads as follows:

> "A Contracting Party shall not impose the obligations of this Treaty in relation to patent applications which have been filed prior to the entry into force of this Treaty with regard to that Contracting Party, without prejudice to existing national laws on disclosure that apply to such patent applications"

[1] UNGA resolution 2200 A (XXI).
[2] UN, *Treaty Series*, vol. 660, No. 9464.
[3] UNGA resolution 217 (A)III.
[4] UNGA resolution 61/295.
[5] UNGA resolution 73/165.

This provision lays down the scope of non-retroactivity in relation to the obligations of this Treaty. Article 28 of the VCLT on non-retroactivity clauses provides that:

> "Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."

In the present case, the "act or fact" or "situation" upon which obligations apply, and for which non-retroactivity could be considered, is of two distinct natures. Considering a sample of genetic resources (GR) and/or associated traditional knowledge (ATK) upon which a patent application was based, there are two dates of acts/facts/situations that may be considered to trigger non-retroactivity:

- The date at which the sample and/or TK was collected (hereinafter, "date of access")
- The date at which a patent application based on that sample was filed ("date of application")

In Article 4 addressing questions pertaining to the "Non-Retroactivity" of the Treaty, the text establishes a non-retroactive application only "**in relation to patent applications which have been filed**" in the past. No part of Article 4 extends the non-retroactivity to the "date of access."

The intent stemming from Article 4 does not seem to establish a non-retroactivity applying "to any act or fact which took place [...] before the date of the entry into force of the treaty" but instead seems to limit it besides the scope ofto the date of application.

This aspect was highlighted on several occasions during the Diplomatic Conference, without its acknowledgement being followed by any agreement on textual changes aimed at extending non-retroactivity to the date of access. It is worth noting that this partial retroactivity is present since the earlier stages of the draft (the "Chair's comments" on the basic proposal GRATK/DC/INF/4, page 5, already described this article as establishing non-retroactivity solely in relation to "the patent system") and was already evidenced during the Special Session of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) in September 2023.[6]

It follows from the text of Article 4 that the obligations of this Treaty do not apply retroactively to the date of access.

The potential application of this Treaty's provisions to GRs and ATK accessed in the past represents a historical —albeit first— step in the development of international law, towards the reparation of past and ongoing colonial abuses and wrongdoings. In particular, we highlight the relevance of the partial retroactivity under Article 4 in contributing to the effective

[6] The discussions of the Special Session can be watched at the following link: https://webcast.wipo.int/video/WIPO_GRTKF_IC_SS_GE_23_2023-09-06_AM_120375?startTime=3902

implementation of the normative provisions contained in UNDRIP's Articles 11(2),[7] 20(2),[8] 25,[9] 26(1)[10] & 26(2),[11] 27,[12] 28,[13] 32(3).[14]

UNDROP's Articles 12(1)[15] and 12(5)[16] provide additional, supportive normative guidance for both Indigenous peoples and local communities in relation to the applicability of retroactive measures. Finally, the UN General Assembly's "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law..."[17] could constitute an important tool in addressing the nexus of this partial retroactivity with States' obligations under Article 8 of the UDHR[18] and —where relevant— Article 2(3) of the International Covenant on Civil and Political Rights[19] and Article 6 of the International Convention for the Elimination of Racial Discrimination.[20]

We would like these remarks to be reflected in the proceedings, and respectfully request their circulation to delegations pursuant to Rule 46(3) of the Rules of Procedure of this Conference.

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[7] "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

[8] "Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress."

[9] "Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard."

[10] "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired."

[11] "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired."

[12] "States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process."

[13] "1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."

[14] "States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact."

[15] "Peasants and other people working in rural areas have the right to effective and non-discriminatory access to justice, including access to fair procedures for the resolution of disputes and to effective remedies for all infringements of their human rights. Such decisions shall give due consideration to their customs, traditions, rules and legal systems in conformity with relevant obligations under international human rights law"

[16] "States shall provide peasants and other people working in rural areas with effective mechanisms for the prevention of and redress for any action that has the aim or effect of violating their human rights, arbitrarily dispossessing them of their land and natural resources or of depriving them of their means of subsistence and integrity, and for any form of forced sedentarization or population displacement."

[17] UNGA resolution 60/147.

[18] "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."

[19] "Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted."

[20] "States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination."