

BRAZIL  
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INITIAL COMMENTS OF BRAZIL  
ON THE FIRST DRAFT OF THE  
“EXAMINATION OF ISSUES RELATING TO THE INTERRELATION OF ACCESS  
TO GENETIC RESOURCES AND DISCLOSURE REQUIREMENTS IN  
INTELLECTUAL PROPERTY RIGHTS APPLICATIONS”  
(DOCUMENT WIPO/IP/GR/05/01), PREPARED IN RESPONSE TO  
THE INVITATION OF THE 7<sup>TH</sup> COP OF THE CBD

Brazil agrees generally with the approach taken by the International Bureau in preparing document WIPO/IP/GR/05/01. It is important for the response to the CBD to be inclusive of all positions. The following are some initial remarks by Brazil on specific aspects and language contained in the first draft of the response. Brazil reserves the right to make additional comments and proposals on the draft response in the next stages of the exercise.

Comments on specific sections of DOCUMENT WIPO/IP/GR/05/01:

*Part I: INTRODUCTION*

Paragraph 21: A reference in this paragraph is made to the study commissioned jointly by WIPO and UNEP. Brazil is of the view that the response to the CBD should be based on the submissions and proposals made by WIPO Member States. We question, therefore, the convenience of including references to studies, such as the one mentioned in Paragraph 21, which have been commissioned to individuals from outside of WIPO, without the approval of Member States, and which do not necessarily reflect the views of Member States.

This remark applies to all places in document WIPO/IP/GR/05/01 where the abovementioned study is referred to.

Paragraph 28: In accordance with the CBD, traditional knowledge is linked to biodiversity, instead of genetic resources.

Paragraph 29: In dealing with CBD provisions concerning ABS, the document refers to Article 16 when we believe the intention was to mention Article 15.

Paragraph 37: The paragraph should also clarify that discussions on genetic resources also took place in the 9<sup>th</sup> session of the SCP, when the Standing Committee considered Article 5 of the draft SPLT.

### *PART III: TECHNICAL AND LEGAL BACKGROUND*

Paragraph 74: This paragraph contains inadequate characterizations of the disclosure proposals, including those put forward by developing countries, and should therefore be either deleted or considerably redrafted. Contrary to what the paragraph suggests, the disclosure proposals do not constitute an attempt to use the patent system to enforce non-patent legal requirements or for the pursuit of objectives of distinct legal mechanisms. Rather, the objectives of the disclosure proposal, as formulated by Brazil and other developing countries, are quite germane to the patent system, as they essentially seek to ensure that the international patent system operates in a more equitable and balanced manner. A basic concern of most proponents of disclosure requirements is to ensure that the patent system does not reward inequitable behavior, and, in particular, does not reward patent applicants for violating the laws of the countries of origin of genetic resources utilized in developing the invention. The disclosure requirement, as proposed by Brazil and other developing countries, would, in effect, be fully in line with existing principles and objectives of the existing patent system, such as those enshrined in Articles 7, 8, 27.2 and 27.3 of the TRIPS Agreement. It is improper, therefore, for this Paragraph of document WIPO/IP/GR/05/01 to state that “some uncertainty surrounds this kind of mechanism in international policy debate”, since the fundamental question and concern of developing countries with respect to this issue are in fact crystal-clear. Simply put, Brazil and other countries proposing disclosure of origin/PIC/benefit sharing requirements believe that the patent system, in order to retain its credibility and robustness, should not reward this kind of inequitable behavior. Other countries, however, have yet to provide a straightforward answer to this basic and simple question.

Paragraph 79: This paragraph states that the patent application plays a secondary role in providing evidence of the legitimacy of the research or commercial behavior that makes use of the GBMR/TK. In our view, this statement is improper as it overlooks the fact that disclosing information about access to GBMR/TK in the patent application helps assessing whether the research activity was carried out in accordance with the applicable rules and, thus, whether it can be considered legitimate.

### *PART IV: SPECIFIC ISSUES IN THE CBD COP INVITATION*

Paragraphs 86 and 87: Brazil does not agree with the characterization of its disclosure proposals as “entirely new”, since some of these disclosure mechanisms are already being implemented in some national jurisdictions, as is pointed in document WIPO/IP/GR/05/01 itself. Disclosure of origin, prior informed consent and benefit sharing requirements can only be considered “new” insofar as there is not yet an international mandatory disclosure requirement that can be implemented in all countries. On the other hand, though disclosure of origin/PIC/benefit sharing could be described as a “specific” disclosure mechanism, Brazil believes that such a mechanism would be fully in line with the existing principles and objectives of the patent system and, if adopted and

implemented at the international level, would only work to improve the functioning of the existing international patent system.

Paragraph 99: Brazil concurs with the African Group that it would not be appropriate for WIPO to examine “model provisions for disclosure requirements”, since model provisions do not constitute an effective measure for combating the misappropriation of genetic resources. Like the African Group, Brazil believes that an effective solution to the global problem of “bio-piracy” would be, among other measures, to adopt and implement a mandatory universal disclosure requirement in all countries alike.

Summary of triggers for disclosure requirements (pages 44 to 45 of document WIPO/IP/GR/05/01): it is inappropriate to characterize different trigger mechanisms as falling into the categories of either adaptations of existing patent law principles or as “further forms of linkage, beyond existing patent law principles”. This is not a neutral formulation, and should be deleted. As explained previously, Brazil believes that the triggers of disclosure requirements that it and other developing countries have proposed, including those listed in the summary as extending “beyond existing patent law principles”, are in effect grounded in principles and objectives enshrined in provisions of existing international IP instruments, such as Articles 7 and 8 of the TRIPS Agreement.

Paragraph 119: The CBD is being quoted out of context on the issue of perverse incentives, and this may give rise to considerable confusion. In our opinion, the CBD does not endorse the “perverse incentive” argument that a few countries have tried to use to oppose disclosure of origin proposals. Still with respect to the issue of “perverse incentives”, Brazil would like to point out, as it has done in submissions tabled at the WTO TRIPS Council, that the currently existing patent system itself has not been able to prevent cases of misappropriation of genetic resources. The numerous documented cases of bad and questionable patents may suggest that “perverse incentives” may be at play in the existing patent system that one should modify. In this regard, Brazil believes that a universal mandatory disclosure of origin requirement would prove an effective safeguard against misappropriation of genetic resources and associated traditional knowledge, and should, therefore, be seen as a measure destined to rectify a “perverse incentive” inherent to the existing patent system.

Paragraph 128: We believe the document should not reflect personal opinions, as is the case with this paragraph. Therefore, as stated previously, references to the study commissioned by WIPO and UNEP should be avoided, as it does not reflect the views of WIPO Member States.

Summary of incentives, pages 49 and 50:

The list of “perverse” incentives should also include a reference to the fact that the lack of a mandatory universal disclosure of origin obligation provides a “perverse incentive” for misappropriation within the patent system.