

Opening Statement of Felix Addor for 3rd Roundtable on “*Disclosure Requirements relating to Genetic Resources and Associated Traditional Knowledge*” (27 May 2016)

Ladies and gentlemen, dear colleagues.

My name is Felix Addor. I am the Deputy Director General of the Swiss Federal Institute of Intellectual Property and a Professor of International Negotiation at the University of Bern, Switzerland.

It is my pleasure to moderate the third roundtable on “*Disclosure Requirements relating to Genetic Resources and Associated Traditional Knowledge.*”

As you know, the IGC, for quite a long time, has been working on an international legal instrument. According to the IGC’s mandate, this instrument, I quote, “*will ensure the balanced and effective protection of genetic resources, traditional knowledge and traditional cultural expressions.*”

One of the key elements of our work on genetic resources, and also the topic of today’s seminar, is the disclosure requirement. The disclosure requirement would oblige patent applicants to disclose certain information concerning the genetic resources or the associated traditional knowledge utilized to develop their invention.

A major objective of such a disclosure requirement should be to enhance transparency in the patent system. This increased transparency should not only enhance trust between both users and providers of genetic resources, but also enable traceability of genetic resources and associated traditional knowledge utilized to develop an invention.

This in turn would allow verifying whether prior informed consent was appropriately obtained, and whether benefit sharing has been agreed upon. An additional advantage would be for patent examiners to find more easily information in order to verify technical prior art.

Where do we currently stand in the IGC's work on a disclosure requirement? As one can expect when it comes to such a complex issue, the views expressed differ considerably.

On the one hand, we have those who consider that a mandatory disclosure requirement should be included in the IGC instrument. On the other hand, we have those who believe that other measures such as databases are preferable to a disclosure requirement.

Let us briefly assume for arguments sake that we all agree on the *necessity* of a disclosure requirement. Even so, we would still have to find agreement on several outstanding issues. These are, among others:

- What exactly would the patent applicant have to disclose? The “source” or the “country of origin” or the “country providing genetic resources”? These concepts have different implications, which need to be carefully considered.
- What subject matter should be covered by the disclosure requirement? Is it just genetic resources or also traditional knowledge associated with these resources? What about derivatives of genetic resources?
- What is the mechanism triggering the disclosure requirement. In other words, when would a patent applicant be required to disclose? Because not every genetic resource utilized in the development of an invention is also an essential component to an invention. And legal certainty necessitates that it is clear for patent applicants when they are - and when they are not - subject to the disclosure requirement.

- What forms of intellectual property should be covered by the disclosure requirement? Just patents or other IPRs as well? If so, what other forms of IPRs could be relevant and based on what reasoning?
- What about sanctions for violating the disclosure requirement? Is the revocation of granted patents suggested by some appropriate for the disclosure requirement? How would revocation contribute to the interests of the providers of genetic resources or associated traditional knowledge? On one hand, one could argue that once a patent is revoked, the patent owner is sanctioned by no longer having an exclusive right, which would deter patent applicants from violating the disclosure requirement. On the other hand, one could argue that this would destroy the very basis of benefit sharing, which the disclosure requirement is intended to support. Additionally, the invention that relied on such genetic resources and associated traditional knowledge would fall into the public domain.

These and other issues are at this stage still unresolved in the work of the IGC. Well, should we therefore just throw in the towel and turn to other business?

I don't think we should! The currently existing gaps are in my view bridgeable and I am convinced that we can - and should - reach further agreement on outstanding issues next week. To achieve this, all Member States will need to collaborate in a constructive manner and refrain from positional bargaining.

A negotiation is always a give and take. Not all participants can give and take to the same extent. This is also not reasonable because it would be a zero sum game and such a result would merely lead to a continuation of the current conditions. But this is precisely what does happen if we don't achieve an international solution to the issue of disclosure requirements relating to genetic resources and associated traditional knowledge. This may be in the short-term interest of those parties who perceive themselves to gain benefits from the current legal situation. Yet it is risky for all parties in the long term. It will create a situation with a multitude of national legislations addressing disclosure requirements differently, with different conditions

to fulfil and different sanctions for violating the disclosure requirements. I do not see how such a complicated and intransparent situation should be in the interest of any involved stakeholders - maybe apart from national consultants. If we don't permanently maintain the intellectual property protection systems and adapt them to changing circumstances and needs of parties concerned, then these systems risk eventually to no longer be acceptable and to no longer work – which is in nobody's interest.

So, concessions will have to be made by all in order to find a balanced and practical solution. A solution for the disclosure requirement taking into account the interests of all parties with an internationally harmonized solution. This may mean not only minimum but also maximum requirements, that is, floor and ceiling. In the end, thus, all Parties will have to make adaptations to their national systems.

In this context, I recall that there are already several specific proposals for a disclosure requirement on the table.

We must keep in mind that a new and novel solution may not yet have factual evidence to back up its efficacy. At the same time though, ideas need to be based on sound principles. Does a proposed solution really resolve the issues arising and can it be implemented in practice? Does it increase legal certainty? Can it stand up to scrutiny by others? Are the trade-offs of a solution acceptable to others? Answering these questions honestly is a necessity.

What the IGC must now do is move beyond its current modus operandi, where all sides merely restate their position. Because if we always do what we always did we always get what we always got - and that's not in our mutual interest!