



## **Statements on Understanding on Intellectual Property Rights at time of Signature or Ratification of the BBNJ Treaty**

The Agreement under the United Nations convention on the Law of the Sea on the Conservation and Sustainable use of Marine Biological Diversity of Areas Beyond National Jurisdiction (BBNJ)<sup>1</sup> opened for signature on 20 September 2023. The BBNJ does not contain a provision dedicated to intellectual property rights (IPRs). Although there was significant discussion during the early negotiations, a draft provision on the subject was deleted altogether in the final stage of negotiation. **The South Centre encourages developing countries to make statements on IPRs at the time of signature and/or on ratification of the BBNJ.**

The Parties, in their process of signature/ratification of the BBNJ, can provide unilateral statements on their understanding on matters covered by the treaty, including IPRs.<sup>2</sup> It would be important to do so in anticipation to the interpretation that developed country Parties may advance on IPRs in the process of BBNJ implementation. The interpretations expressed in statements to date by developed countries merits to be contested.<sup>3</sup>

The following understanding is proposed to support the drafting of unilateral interpretative declarations by developing countries as part of their process of signature/ratification of the BBNJ:

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<sup>1</sup> The certified true copy of the treaty is available at [XXI-10 CTC \(un.org\)](https://www.un.org/development/desa/poverty/data-inequality/2030/sustainable-development-goals/17/17-10-ctc)

<sup>2</sup> A unilateral statement, however phrased or named, is an “interpretative declaration” made by a State, whereby that State or that organization purports to specify or clarify the meaning or scope of a treaty or of certain of its provisions. See Guide To Practice on Reservations to Treaties, United Nations, 2011, available at [https://legal.un.org/ilc/texts/instruments/english/draft\\_articles/1\\_8\\_2011.pdf](https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_8_2011.pdf)

<sup>3</sup> The United States of America has expressed the following interpretation of IPRs under the BBNJ: “We do not interpret anything in this Agreement as authorizing or permitting any waiver or undermining of existing intellectual property rights and obligations under international or national law; requiring mandatory disclosure of trade secrets, protected undisclosed or confidential information; requiring mandatory disclosure in patent applications of the origin or source of marine genetic resources; or requiring compulsory licenses.” In contrast, Palestine has expressed that “the international community must strive for further progress through the instrument’s governance and implementation, including benefit sharing applied across the entire instrument, disclosure of information on use of MGRs, and engagement on intellectual property rights in alignment with other established biodiversity instruments and the common heritage of humankind.” See A/CONF.232/2023/INF.5, pages 98 and 113, available at <https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=A/CONF.232/2023/INF.5&Lang=E>

1. *All Parties can take measures concerning intellectual property rights (IPRs) to support the implementation of the BBNJ, in accordance with international and national laws.*

a. *Parties can require a mandatory disclosure in patent applications of the origin and/or source of marine genetic resources, to support transparency on the utilization of marine genetic resources and their digital sequence information, for the fair and equitable sharing of benefits arising from such utilization as provided under Articles 9-16 of the BBNJ.*

Comment: Parties can establish disclosure requirements in the national law that mandate the patent applicant to disclose whether the claimed invention utilizes marine genetic resources and digital sequence information that were found in areas beyond national jurisdiction, for the purpose of supporting the BBNJ implementation.<sup>4</sup> This would support in particular Article 12 of the BBNJ, which states that where marine genetic resources of areas beyond national jurisdiction and digital sequence information on such resources are subject to utilization, including commercialization, Parties shall ensure that information on patents granted be notified to the Clearing-House Mechanism as soon as such information becomes available. Article 14(d) requires that information contained in the notifications is provided in publicly searchable and accessible forms.

b. *Parties can exclude certain inventions from patentability as set out in Articles 27.2 and 27.3 of the WTO TRIPS Agreement. Exclusions from patentability can include, among others, discoveries, naturally occurring genetic materials, isolated genes, plants and/or plant varieties and essentially biological processes for the production of plants.*

Comment: As established by the patent laws and case law in many countries (such as the USA), genes or DNA, including isolated genes or DNA, should be excluded from patentability. This is most relevant in the case of marine genetic resources of areas beyond national jurisdiction and their digital sequence information, as they are a common heritage of humankind. Therefore, granting private monopolies -even if temporal- on such resources and information will constitute a violation of the BBNJ. We call all Parties to adopt the necessary policies and regulations to ensure compliance with that basic principle of the treaty.

c. *Parties can also provide exceptions and limitations to patent rights such as for experimental use and research and to obtain regulatory approval from authorities in the case of regulated products (such as medicines). They can also authorize compulsory licensing against an adequate remuneration, within the remit of the Agreement on Trade Related*

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<sup>4</sup> An international mandatory disclosure in patent applications is currently being negotiated at the World Intellectual Property Organization (WIPO). If an agreement is reached, it will apply to genetic resources under national jurisdictions of the Parties to the future agreement.

*Aspects of Intellectual Property Rights and other relevant international and national laws.*

2. *The Access and benefit-sharing committee, as provided for in Article 15 of the BBNJ, should make recommendations to the Conference of the Parties on matters relating to IPRs.*
  
3. *The Capacity-building and Transfer of Marine Technology Committee, as provided for in Article 46, should make recommendations to the Conference of the Parties on matters relating to IPRs and transfer of marine technology. In accordance with Article 42, transfer of marine technology shall take place on fair and most favourable terms, including on concessional and preferential terms, and in accordance with mutually agreed terms and conditions pursuant to the objectives of the BBNJ. The recommendations of the Committee should address how to ensure that the treaty objectives are effectively implemented, including by preventing or addressing instances where IPRs may act as a barrier to transfer of technology on fair and most favourable terms.*