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**INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL
PROPERTY AND GENETIC RESOURCES, TRADITIONAL
KNOWLEDGE AND FOLKLORE**

First Session
Geneva, April 30 to May 3, 2001

INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND
GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

Document submitted by the Delegation of Zambia

1. On May 2, 2001, the Delegation of Zambia, at the first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, submitted a document to the World Intellectual Property Organization (WIPO) entitled "Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore."
2. The document is reproduced in the Annex.
3. *The Committee is invited to take note of this document and the Annex to it.*

[Annex follows]

**Intergovernmental Committee On Intellectual Property And Genetic Resources,
Traditional Knowledge And Folklore**

April 30 – May 3, 2001; Geneva, Switzerland

Submission by the Zambian Delegation

1.0 INTRODUCTION

The People and the Government of Zambia welcome and commend the World Intellectual Property Organisation (WIPO) for establishing the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. Zambia is endowed with an abundant heritage of a diversity of cultures, languages, biological diversity and traditional governance systems. It is estimated that Zambia has more than 5 500 species of flowering plants, 233 species of mammals, 731 species of birds 145 species of reptiles and over 200 fish species. The population of Zambia is approximately 10 million comprising 73 distinct ethnic groups and some settler groups from other African countries, Asia and Europe.

The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore is the first step in putting traditional knowledge systems, traditional knowledge and innovations in their rightful place in human development.

Traditional knowledge systems are the institutional structures within Indigenous and Local Communities. These include traditional authorities, traditional natural resource management, traditional health practitioners, storytellers, singers, dancers, etc. Traditional knowledge is body of knowledge built by Indigenous and Local Communities through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use.

Most international instruments use the term Indigenous and Local Communities. In the Zambian context, Indigenous and Local Communities refers to people who by necessity or own desire depend on living off their ancestral land and/or live under traditional authorities and share common cultural values. These must include communities in urban and peri-urban areas of Africa. Some members of urban and

peri-urban communities have strong ties with people who live off their ancestral land and/or live under traditional authorities and share common cultural values.

Traditional knowledge systems, traditional knowledge and innovations are manifested through traditional practices and lifestyles. The introduction of foreign values, foreign religions, changing lifestyles and the legacy of colonialism have contributed greatly to lowering the status of traditional knowledge systems, traditional knowledge and innovations in Zambia. Traditional practices and lifestyles have always had a deep-rooted element of fair and equitable sharing of benefits from the use of natural resources.

Folklore is part and parcel of knowledge systems, traditional knowledge and innovations. Folklore (or traditional and popular culture) is the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognised as reflecting the expectation of a community in so far as they reflect its cultural and social identity, its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architectures and other arts.

2.0 INTERNATIONAL INSTRUMENTS AND INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

A number of intergovernmental organisations and agencies are now taking steps to address issues relating to the protection of the knowledge and innovations derived from traditional knowledge systems and traditional knowledge. There is a need to avoid unnecessary duplication of effort and to promote synergy and harmony among ongoing processes.

The United Nations Food and Agriculture Organisation (FAO) is addressing this issue through the Commission on Genetic Resources for Food and Agriculture which is negotiating the Revision of the International Undertaking on Plant Genetic Resources. The Convention on Biological Diversity (CBD) is addressing the issue through the *Ad Hoc* Open-ended Inter-sessional Working Group on Article 8(j) and Related Provisions of the Convention on Biological Diversity. It is widely believed that the World Trade Organisation (WTO) could address the issue through the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).

There are gaps in existing legal and non-legal techniques and mechanisms with regard to the protection of traditional knowledge systems, traditional knowledge and innovations. Considerable effort is now focused on evaluating the potential of existing IPR regimes to provide protection for traditional knowledge systems, traditional knowledge and innovations, there are indications that other forms of protection, such as *sui generis* systems, integrating the customary laws, values and world-view of indigenous and local communities are required. There are therefore

indications that a combination of legal and non-legal forms, existing and novel techniques and mechanisms should be considered for the protection of the traditional knowledge systems, traditional knowledge and innovations.

3.1 *The CBD and TRIPS*

The CBD and TRIPS are two significantly separate multilateral approaches to the use of biological resources. The CBD seeks to facilitate access to biological and genetic resources, while focusing on conservation and sustainable use as well as the fair and equitable sharing of benefits arising from such use. In addition, the CBD includes the development and transfer of technology in its concept of the fair and equitable sharing of benefits arising from such use biological and genetic resources. TRIPS seeks to promote and foster technological innovation by ensuring the certainty of intellectual property protection and of world markets.

TRIPS requires member states to harmonise their national intellectual property laws for them to conform to those of industrialised countries, and sets standards for intellectual property and minimum requirements for intellectual property coverage of living organisms.

The Preamble of the CBD categorically reaffirms that nations-states have sovereign rights over their own biological resources, recognises the desirability of sharing the benefits arising from the use of these resources as well as traditional knowledge, innovations and practices relevant to the conservation and sustainable use of biological diversity. The concept of Community or Communal Rights should be built around this.

The Preamble of TRIPS, on the other hand, recognises IPRs as private rights. Article 27.3 incorporates specific obligations on the issue of patenting of life forms to the extent that it obliges Members to provide product patents for microorganisms and for non-biological and microbiological process. TRIPS can hinder the implementation of the CBD.

3.2 *International Undertaking on Plant Genetic Resources*

The International Undertaking on Plant Genetic Resources (IU) is a multilateral instrument adopted by the United Nations Food and Agriculture Organisation (FAO) in 1983. It is a voluntary agreement intended to provide an international framework for the collection, conservation, exchange and utilisation of plant genetic resources for food and agriculture. One of the principles it based on was that plant genetic resources were a common heritage for mankind that should be available freely for anyone who wanted to access them.

The FAO Commission on Genetic Resources for Food and Agriculture is currently negotiating the revision of the IU to make it compatible with the CBD. The CBD recognises that States have sovereign rights over their biological resources thus accepting the concept of Farmers Rights.

The principle of Farmers Rights was endorsed by the FAO in 1989. It recognises the fact that farmers and rural communities as past, present and future *in situ* agricultural innovators collectively have conserved and developed agricultural genetic resources around the world. Farmers and rural communities are recognised as innovators entitled to intellectual integrity and to compensation whenever their innovations are commercialised.

3.3 *Intellectual Property Rights*

Intellectual Property Rights (IPRs) refers to a group of laws (patents, plant breeders' rights, copyrights trademarks and trade secrets) which grant legal protection to whomever create new ideas or knowledge. IPRs only recognise and reward a single inventor, who can be a named individual or a group of named individuals.

Requirements for intellectual property rights are consistence, novelty and creativity. The element of communal benefit is, therefore, removed. Today, industrial laws and plant breeders' rights legislation allows for exclusive monopoly control of virtually all biological processes that meet standard patent criteria (novelty, utility and non-obviousness).

IPRs do not recognize the traditional knowledge systems, traditional knowledge and innovations of Local Communities and Indigenous People. Therefore, the implementation of IPRs is in direct conflict with traditional practices and lifestyles of Local Communities and Indigenous People. As they stand now, IPRs regimes do not recognise, protect and reward traditional knowledge systems, traditional knowledge and innovations.

3.4 *Community Rights*

Traditional knowledge systems, traditional knowledge and innovations cannot be credited to a single inventor. They are community-based and they accumulate over time and generation. Traditional knowledge systems, traditional knowledge and innovations are part and parcel of the day to day life of the people. The motivation of innovations derived from traditional knowledge systems and traditional knowledge is not profit or individual gain but the welfare and common good of the entire community and future generations. This essentially renders intellectual property rights alien to Local Communities and Indigenous People.

3.5 *Sui Generis*

Sui Generis is a Latin phrase, which in literal sense means "of their own kind" but in this case it means, "what is appropriate to a particular country". It has become part of the day to day vocabulary of IPRs discussions as a result of TRIPS.

Section 27.3(b) of TRIPs states that members exclude from patentability: "plants and animals other than microorganisms, and essentially biological processes for the

production of plants and animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this paragraph shall be reviewed four years after the date into of the WTO Agreement”.

The option of a *sui generis* system in TRIPs opens the way for developing countries to legislate intellectual property rights laws which take into consideration the rights of Local Communities and Indigenous People, their traditional practices and lifestyles.

3.6 *The UNESCO - WIPO Model Provisions*

In 1985, the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and WIPO produced Model Provisions for National Laws on Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions. The intention was to go beyond conventional copyright by protecting intangible expressions as well as fixed works. The document avoids a definition of folklore, but in Section 2 it does explain what the term expression of folklore should encompass.

According to the model provisions, certain uses of expressions of folklore are subject to prior authorization by a competent authority or the community itself. If they are made both with gainful intent and outside their traditional or customary context this would, therefore, constitute "illicit exploitation" if used without this authorisation. In addition, it gives four types of prejudicial action could be subject to criminal sanctions.

The model provisions give the meaning of traditional as the proper artistic framework based on continuous usage by the community. It also explains the term Customary in that it means in accordance with the practices of everyday life in the community.

3.7 *The Covenant on Intellectual, Cultural and Scientific Resources*

The Global Coalition for Bio-cultural Diversity developed the Covenant on Intellectual, Cultural and Scientific Resources (Covenant). It is based on the view that protecting traditional knowledge is central to any negotiation between local communities and outside institutions.

The Covenant is intended to guide negotiating partners into an ethical and equitable association of mutual benefit. It establishes a basic set of principles to be adopted by all partners, while emphasising that to strengthen local communities and the conservation of biological diversity, a long-term commitment is necessary.

3.8 *African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources*

The Organisation of African Unity (OAU) Head of States Summit which was held in Ouagadougou in June 1998, endorsed the report on Community Rights and the Control of Access to Biological Resources (DOC. CM/2075 (LXVIII)) ADD.1. This

paved the way for the development of the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources.

The objectives of the Model Legislation are to ensure the conservation, evaluation and sustainable use of biological resources, including agricultural genetic resources, and knowledge and technologies in order to maintain and improve their diversity as a means of sustaining all life support systems.

4.0 RECOMMENDATIONS TO THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

1. The Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore should establish a Standing Committee on Genetic Resources, Traditional Knowledge and Folklore. The mandate of the Standing Committee is to develop an international instrument whose scope will cover genetic resources, traditional and folklore. In addition, it must be legally binding and enforced through some form of dispute settlement mechanism.
2. The UNESCO-WIPO Model Provisions for National Laws on Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions be amalgamated with the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources.
3. TRIPS must be revised to make it compatible with the CBD by the infusion of relevant provisions of the CBD and the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources.
4. WIPO should play a leading role in promoting synergy and harmony with other intergovernmental organisations and agencies that are addressing some aspects of protecting and rewarding knowledge and innovations derived from traditional knowledge systems and traditional knowledge.
5. WIPO should secure the required funding to facilitate the participation in meetings of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, by at least two (2) representatives from each of the Small Island States, Least Developing Countries and Developing Countries.

[End of Annex and of Document]