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

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POLICIES, MEASURES AND EXPERIENCES REGARDING INTELLECTUAL
PROPERTY AND GENETIC RESOURCES: SUBMISSION BY KENYA

Document prepared by the Secretariat

1. At its fifteenth session, held from December 7 to 11, 2009, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee'):

“invited Member States and observers to make available to the Secretariat papers describing regional, national and community policies, measures and experiences regarding intellectual property and genetic resources before February 12, 2010, and requested the Secretariat to make these available as information documents for the next session of the Committee.” [...]

2. Further to the decision above, the WIPO Secretariat issued a circular to all Committee participants, dated January 15, 2010, recalling the decision and inviting participants to make their submissions before February 12, 2010.

3. Pursuant to the above decision, the Delegation of Kenya submitted a document entitled “National and Community Policies, Measures and Experiences regarding Intellectual Property, and Genetic Resources in Kenya” and requested it be made available as an information document for the sixteenth session of the Committee.

4. The document is reproduced in the form received and contained in the Annex to this document.

[Annex follows]

ANNEX

NATIONAL AND COMMUNITY POLICIES, MEASURES AND EXPERIENCES
REGARDING INTELLECTUAL PROPERTY, AND GENETIC RESOURCES IN KENYA

Introduction

Genetic resources in Kenya have been considered common property in Kenya and were subject to free use among the communities within which the genetic resources were found. There were systems put in place by the communities to ensure the preservation of the genetic resources. However, due to the increased use of genetic resources in biotechnology, pharmaceuticals products and other related industries, there are issues that have arisen especially in relation to the commercial exploitation, benefit sharing and preservation of the same.

Kenya has diverse genetic resources which include an estimated 35 000 known species of animals, plants and other micro organisms with an estimated 8000 -9000 species of plants of which an estimated 2000 are shrubs or trees.

The Intellectual Property regime in Kenya does not address issues that are deemed to be peculiar to genetic resources (as well as traditional knowledge and traditional cultural expressions). This may be attributed to the fact that this is a recent development and was addressed to a certain extent to the Convention on Biological Diversity of 1992. There is no national policy framework or distinct legal regime on genetic resources but there are various laws and regulations that seek address certain aspects on management of genetic resources.

The country has a unique species of wild animals as well as various species of birds and other microorganisms. The climatic and ecological variations contribute greatly to the diversity although there has been no systematic survey and identification of the status of bio diversity in the country. The economic fortunes depend to a large extent on the availability and management of plant and animal genetic resources. Agricultural activities, forestry related industries as well as tourism have led to the commercial exploitation and subsequent depletion of these genetic resources.

Kenya put in place a national strategic plan for the conservation of bio diversity whose national goals include:

- To ensure and maintain high quality environment that permits a life of dignity and well being for all Kenyans;
- To achieve sustainable utilization of resources and ecosystem for the benefit of the present generations while ensuring their potential to meet the demands of future generations;
- To maintain ecosystems and ecological processes essential for the functioning of the biosphere; and

- To preserve genetic resources and biological diversity in the nations ecosystems and to preserve their cultural value.

National Experience

Conservation of Genetic resources

As stated earlier, there are no specific laws that address the conservation and use of genetic resources but there are several laws and regulations as well as guidelines on the same but under different ministries and departments. These departments and organisations address wider aspects that touch on genetic resources such as agriculture, wildlife management, forestry, marine conservation as well as livestock development.

The *in situ* conservation and management of indigenous forests is done by the Ministry of Natural Resources with the help of other organisations such as the National Museums of Kenya and the Kenya Wildlife Service. These efforts are usually uncoordinated and sector driven.

Ex situ preservation of crops and plant germplasm is done by the National Greenbank of Kenya. It maintains long term storage at commodity centres and currently has 47 000 accessions.

The National Museums of Kenya has custody over prehistoric cultural and biological specimens. In 1992, the National Museums of Kenya established a Centre for Biodiversity whose main functions include research and conservation of plant and animal genetic resources.

The Kenya Wildlife Service is responsible for conservation of wildlife. The Department of Forestry deals with the preservation, protection management and enforcement of forests and forest resources on government land. The relevant legal regime is the Forests Act, Chapter 385 of the Laws of Kenya as (revised in 1992).

Policy and Legal Framework

The Government of Kenya is currently working on the national policy on the National Policy on the Protection of Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions. Lack of a comprehensive legislative and policy framework on genetic resources makes the local communities vulnerable to exploitation of not only these resources but their intellectual property as well. The patent system recognises innovations based on genetic resources and provides the framework for investment in the development of the new products.

It does not however address the issue of acquisition and access and benefit sharing. The Government needed to implement certain measures to address the following issues:

- Communal ownership of rights. The existing intellectual property regime fails to recognise the rights of the indigenous community to create and own intellectual property rights from the genetic resources;

- Access and benefit sharing;
- Conservation and conservation of genetic resources;
- Recognition and promotion of traditional knowledge systems for the conservation and preservation of genetic resources; and
- Misappropriation of genetic resources by third parties.

There are some laws and regulations that have attempted to protect genetic resources including:

(a) National Environmental Management Act, 1998 (Act No. 107 of 1998) Under Section 53 of the Act, NEMA is required to issue guidelines and prescribe measures for the sustainable management and utilisation of genetic resources in Kenya. This includes:

- Putting in place appropriate mechanisms for access to GR of Kenya including issue of licence and fees for such access; and
- Access and benefit sharing of genetic resources in Kenya.

(b) The Environmental Management and Co ordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations provide the guidelines for implementation of the law.

Research processes are a serious conduit for loss of our genetic resources as these processes are largely unregulated. There are various researchers who come to the country on account of the available genetic resources without declaring their intentions or purposes. This is facilitated by the permissive monitoring systems and lack of coordination in monitoring these activities. At the moment, there are three government entities that give permits for research and they fall under three different ministries. The guidelines and policies in existence do not protect the country against bio piracy. There is a need to establish a proper legislative and administrative framework to ensure the protection of genetic resources.

Establishment of a Policy and Legal Framework

In 2006, the Honourable Attorney General appointed a task force whose terms of reference were as hereunder:

- To develop a policy framework of traditional knowledge, genetic resources and traditional cultural expressions which would promote economic development and environmental sustainability;
- To develop a legal framework of traditional knowledge, genetic resources and traditional cultural expressions and to recommend legislation which would address, *inter alia*, the following:
 - Definition of traditional knowledge, genetic resources and traditional cultural expressions;

- Access and benefit sharing of resources;
- Compensation of custodians of traditional knowledge genetic resources and traditional cultural expressions;
- Institutional, Structural and legal framework for the conservation of traditional knowledge genetic resources and traditional cultural expressions; and
- Structural framework for the settlement of disputes relating to traditional knowledge, genetic resources and traditional cultural expressions;
- Incorporate into such new legislation, if thought desirable in the interest of the people of Kenya, with or without modifications, the provisions of international and regional laws and policies as well as the national laws and policies of other countries on traditional knowledge genetic resources and traditional cultural expressions;
- Establish linkages with on going processes and projects in traditional knowledge genetic resources and traditional cultural expressions;
- Prepare a draft legislation(s) as may be necessary to implement the recommendations of the Task Force; and
- Develop a plan of action on the monitoring, evaluation and enforcement of policies and laws on traditional knowledge genetic resources and traditional cultural expressions;

The Task Force concluded its work and prepared a draft national policy that will be presented to the Cabinet for approval and give way to the formulation of laws and setting up of legal structures for the protection and preservation of traditional knowledge, genetic resources and traditional cultural expressions.

The objectives of the policy are:

- (a) Provide a legal and institutional framework to support the integration of various aspects of traditional knowledge, genetic resources and traditional cultural expressions in national development planning and decision making processes.
- (b) Promote the preservation, protection and development of traditional knowledge, genetic resources and traditional cultural expressions for multiple applications and use.
- (c) Promote and foster the documentation, use and dissemination of traditional knowledge, genetic resources and traditional cultural expressions with mechanisms to acknowledge, protect and benefit the sources and/or custodians.
- (d) Promote the protection of traditional knowledge associated with conservation and sustainable use of biological diversity and equitable sharing of accrued benefits.
- (e) Enhance collaboration and partnership in the generation, access to and utilization of traditional knowledge, genetic resources and traditional cultural expressions.

The policy is based on the following underlying principles:

(a) Principle of Respect. This principle obligates all actors to respect, support and facilitate continuing customary use, development, exchange and transmission of traditional knowledge and traditional cultural expressions; and support and augment customary custodianship of knowledge and associated genetic resources.

(b) Principle of Full Disclosure. This principle recognizes the importance of full disclosure of all information in recognition of the traditional knowledge, genetic resources and traditional cultural expressions' intrinsic value and for the dignity of the concerned peoples and communities who conserve, develop and maintain these systems.

(c) Principle of Prior Informed Consent. This principle recognizes that prior informed consent of the custodian people and communities must be obtained prior to the proposed activity or action in relation to traditional knowledge, genetic resources and traditional cultural expressions.

(d) Principle of Confidentiality. This principle recognizes that communities, at their discretion, have the right to exclude from publication and or to be kept confidential any information concerning their culture, traditions, and mythologies and that such confidentiality will be observed by all.

(e) Principle of Good Faith. This principle recognizes that all persons having access to traditional knowledge, genetic resources and traditional cultural expressions will at all times conduct themselves with utmost good faith.

(f) Principle of Compensation. This principle recognizes that communities and the State should be fairly, appropriately and adequately remunerated or compensated for access to and use of their traditional knowledge, genetic resources and traditional cultural expressions.

(g) Principle of Equitable Benefit Sharing. This principle recognizes the right of communities to share in benefits accruing from products or publications developed or derived from access to, and use of, their traditional knowledge, genetic resources and traditional cultural expressions.

(h) Principle of Access. This principle recognizes the importance of TK, GR and TCE's in research and development thus the need to facilitate access to TK, GR and TCE's.

(i) Principle of Sustainable Development. This principle recognizes traditional knowledge, genetic resources and traditional cultural expressions as rich assets for individuals and societies. Their protection, promotion and maintenance is an essential requirement for sustainable development for the benefit of present and future generations.

(j) Principle of International Cooperation. This principle calls for respect for and cooperation with relevant international agreements and processes, in particular regimes that regulate access to and benefit sharing from genetic resources which are associated with that traditional knowledge.

With the work of the task force complete and the publication of the policy, the next step for the Government of Kenya will be to set up the legal and administrative framework to ensure protection and preservation of genetic resources in Kenya.

[End of Annex and of document]