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

**Sixteenth Session
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SUBMISSION OF KENYA: THE NATIONAL POLICY ON TRADITIONAL
KNOWLEDGE, GENETIC RESOURCES AND TRADITIONAL CULTURAL
EXPRESSIONS, JULY 2009

Document prepared by the Secretariat

1. On February 19, 2010, the Delegation of Kenya submitted a document entitled “The National Policy on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions, July 2009” and requested that it be made available as an information document for the sixteenth session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

2. *The document is contained in the Annex to this document.*

[Annex follows]

ANNEX



REPUBLIC OF KENYA

***THE NATIONAL POLICY ON TRADITIONAL KNOWLEDGE, GENETIC
RESOURCES AND TRADITIONAL CULTURAL EXPRESSIONS, 2009***

JULY, 2009

ABBREVIATIONS AND ACRONYMS

ABS	Access and Benefit Sharing
CBD	Convention on Biological Diversity
FAO	Food and Agriculture Organization of the United Nations
MDGs	Millennium Development Goals
GDP	Gross Domestic Product
GoK	Government of Kenya
HYV	High Yielding Variety
IPR	Intellectual Property Rights
MEAs	Multilateral Environmental Agreements
MoU	Memorandum of Understanding
MVs	Modern Varieties
NGOs	Non-Governmental Organizations
PVP	Plant Variety Protection
TRIPS	Trade Related Intellectual Property Rights
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPOV	International Union for the Protection of New Varieties of Plants
WHO	World Health Organization
WTO	World Trade Organization

Preamble

This policy has been developed in response to a growing need to address three main challenges facing the country today: accelerating technological development, integration of the world economic, ecological, cultural, trading and information systems and the growing relevance of intellectual property rights to these areas of activity. The three areas delineated above have immense bearing on traditional knowledge, genetic resources and folklore, which is the principal focus of this policy document.

The policy document recognizes that the three themes of traditional knowledge, genetic resources and folklore/ Traditional Cultural Expressions are closely intertwined and hence need to be addressed together. Their common characteristics, the similar problems they raise, and the question of intellectual property rights (IPR's) for their protection render it difficult to deal with them separately and sequentially. It is thus generally accepted that GR (being one category of biological resources) and folklore are both aspects of traditional knowledge.

The need to develop a proactive policy is further compounded by the realization that traditional knowledge is being created every day, evolving as a response of individuals and communities to the challenges posed by their social environment. As a Japanese writer, Nakashima, has said: "Traditional knowledge is not merely learned by rote and handed down from one generation to the next. Inherently dynamic, it is subject to a continuous process of verification, adaptation and creation, altering its form and content in response to changing environmental and social circumstances". The policy therefore aims to develop a system that does more than merely document and preserve traditional knowledge created in the past which may be on the brink of disappearance. It also envisages a system that contributes to the promotion and dissemination of innovations which are based on the continuing use of tradition, but also about preserving what exists as an indispensable and powerful tool for fostering continuous traditional innovation and creativity to contribute to national development. This will encourage and foster innovation and creativity.

Among the salient features envisaged by the policy are how the three themes mentioned link with other sectors, especially the entry points and opportunities for exploitation by commercial prospectors, the youth, traditional resource managers (especially women) and scientific bodies. This is especially so for genetic resources, to which the label "green gold" was given by the corporate sector of the developed countries. Documented conservative estimates are that the market value of products based on genetic resources alone (genetic resources comprise a part of biological resources) exceeds 800 billion US dollars today, and is comparable only to the market in computers, accessories and software.

There are numerous cases of how expressions of culture have been exploited for gain, with information technology (especially the Internet) acting as a stimulus to market access. This policy aims to further stimulate this, with deliberate efforts made to catalyze cultural sensitivities attached to exercising the right of translation in literary works based on oral traditions and traditional stories. Plagiarism of traditional oral works, including traditional legends, myths, stories, poems and other oral traditions has been addressed, with an aim at protecting the rich oral traditions kept by the elders in various Kenyan communities. This also recognizes that musical expressions, dance, and instrumentation have been copied, evolved or outright disappeared from erstwhile common usage. The policy document recognizes that often, the process of extracting those traditions from their original

communities and transposing them to the “western” world without fully understanding their meaning and purpose erodes, debases and ultimately destroys them.

The Policy also envisages an operational framework which includes diverse stakeholders in the traditional knowledge, genetic resources and folklore/ Traditional Cultural Expressions sectors. These would necessarily include both management and funding issues.

1. Introduction

1.1 Background

1.1.1 Kenya’s people are diverse with very rich cultural heritage. These include but not limited to: traditional literature, traditional arts and crafts, music, visual arts, ceremonies, traditional beliefs, traditional architecture associated with particular sites, as well as forms of traditional knowledge related to traditional-medicines and traditional-medical practices, agriculture, forest management and conservation and sustainable use of biological diversity. Therefore, traditional knowledge and traditional cultural expressions are a body of knowledge vital to the day to day life of local communities derived through generations of living in close contact with nature.

1.1.2 Traditional knowledge and traditional cultural expressions are transmitted in many ways. Most are done through repeated practice, apprenticeship with elders and specialists. Oral tradition including folklore is critical to this transmission. For example, traditional cultural expressions are also used to teach and to entertain. Sayings, proverbs, and metaphors are popular traditional cultural expressions that continue to be used in day to day communication to not only teach young people but also to communicate on issues that the speakers feel should not be directly addressed.

1.1.3 Traditional knowledge and traditional cultural expressions are holistic, inherently dynamic and constantly evolving through experimentation and innovation, fresh insight and external stimuli. A great deal of traditional knowledge and traditional cultural expressions has cultural or spiritual value that cannot be quantified in monetary sense. They embrace information about location, movements and other factors explaining spatial patterns and timing in the ecosystem. Direct links with the land are fundamental and obligations to maintain those connections form the core of individual and group identity. These links between life, land and society have been identified as the sacred balance. Science and technology seldom embrace the values of traditional knowledge and traditional cultural expressions.

1.1.4 Traditional knowledge and traditional cultural expressions have contributed significantly to the present body of knowledge possessed by scientists, such as ethnobotanists, ethnopharmacologists, and by agriculturists, foresters, and food technologists. The fact that traditional knowledge and traditional cultural expressions are being widely disseminated and commercially exploited, with only a small proportion of the benefits flowing back to provider people and communities, raises the question of ownership and equity.

1.1.5 Generally, knowledge, innovations and practices derived from traditional knowledge, genetic resources and traditional cultural expressions cannot be credited to a single inventor. These are community-based and accrue over time and generations. The traditional knowledge systems, traditional innovations and practices are part and parcel of the

day to day life of the people. The motivation of innovations derived from traditional knowledge, genetic resources and traditional cultural expressions are not for profit or individual gain but the welfare and common good of the entire community and future generations.

1.1.6 Communities possess their own locally-specific systems of jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge and the rights and responsibilities which attach to possessing knowledge, all of which are embedded uniquely in each culture and its language. There has been token acknowledgement. However, the acknowledgement is not tied to legal recognition and protection but more to suppression by law of positive elements of traditional knowledge, for example, traditional medicine as is the case with the Witchcraft Act. Thus, lack of enabling policy and legal framework for the recognition and protection of traditional knowledge, genetic resources and traditional cultural expressions has led to a situation where custodians of knowledge and innovations derived from their traditional innovations and practices are not rewarded for contributions rendered.

1.1.7 Genetic resources, especially those not directly associated with traditional knowledge, have been utilized in bioprospecting. These include microbes, animal, plants, marine biodiversity and other genetic material. The existing policy and legal framework in Kenya are not harmonized in enforcement and are inadequate in addressing issues of access and benefit sharing.

1.1.8 The policy has been informed by the Vision 2030 which has taken cognizance of the Millennium Development goals (MDGS) and the economic Recovery Strategy for Wealth Creation (ERS). The aim of the Vision 2030 is to create “a globally competitive and prosperous country with a high quality of life by 2030”. In its goals and objectives, the Vision 2030 seeks to identify and implement flagship projects which will trigger development in key sectors in the economic, political and social arena. No society can achieve its development goals if it ignores its rich cultural heritage which is imbedded in traditional knowledge, traditional cultural expressions and genetic resources.

1.1.9 It is against this background that the Hon. Attorney General appointed the Task Force for the Development of Laws for the Protection of Traditional Knowledge, Genetic Resources and Folklore to develop the policy.

1.1.10 This Policy, therefore, provides a national framework for recognition, preservation, protection and promotion of sustainable use of traditional knowledge, genetic resources and traditional cultural expressions. This will enhance mainstreaming of such knowledge systems into national development planning and decision making processes at all levels

1.2 Rationale and Challenges

1.2.1 Traditional knowledge, genetic resources and traditional cultural expressions play a very important role in enhancing Kenya’s national cohesion and development. However, there are several challenges that impede their integration in the national development planning and decision making processes at all levels. The main challenges include:

1.2.1.1 Lack of recognition and mainstreaming of traditional knowledge, genetic resources and traditional cultural expressions into national policies and decision making processes: It is generally acknowledged that traditional knowledge and traditional cultural expressions are not recognized in many of the national policy and legal frameworks. The majority of the rural communities rely heavily on the traditional knowledge, innovations and practices for their day to day activities, in particular agriculture and medicines. It is therefore imperative to have the traditional knowledge, genetic resources and traditional cultural expressions integrated into the national policies and decision making processes. By so doing will further the traditional interests of the communities.

1.2.1.2 Lack of a comprehensive traditional knowledge, genetic resources and traditional cultural expressions database: traditional knowledge systems are scattered in different community institutions and in different formats. This makes its access cumbersome. To improve its integration and application, it is important to establish a framework that will facilitate the establishment of a comprehensive national traditional knowledge, genetic resources and traditional cultural expressions database(s) and inter-database linkages. There is also a need for sound mechanisms of documentation for prior art, depository and retrieval taking cognizance of access and benefit sharing issues.

1.2.1.3 High cost of collation and documentation of traditional knowledge, genetic resources and traditional cultural expressions: The cost of collation and documentation of traditional knowledge systems is high. Communities lack the requisite financial resources to undertake such tasks. Consequently, there are inadequate resources to support a comprehensive framework for collation and documentation of traditional knowledge, genetic resources and traditional cultural expressions. This results in low applicability of the traditional knowledge and traditional cultural expressions.

1.2.1.4 Weak community institutional linkages: Different communities have a lot of traditional knowledge, innovations and practices that are neither documented nor packaged in a manner to be shared. Yet, there is no community institutional framework for exchange of information. This problem is compounded by the lack of a national legal mechanisms to facilitate such exchange and sharing of information to protect against illicit and unwanted expropriation, while ensuring equitable sharing of benefits.

1.2.1.5 Inadequate capacities: Whereas communities hold a lot of traditional knowledge, traditional cultural expressions, innovations and practices, much of this information is transmitted through oral traditions. Consequently, most of the communities have inadequate capacities to collate and document the traditional knowledge, genetic resources and traditional cultural expressions.

1.2.1.6 Intellectual property rights: The challenge is how to protect the communal rights of the holders of the traditional knowledge, genetic resources, traditional cultural expressions and associated innovations and practices. Given that current intellectual property rights (IPR) are an inappropriate legal regime for the protection of traditional knowledge and traditional cultural expressions, there are no mechanisms for the protection, access to and benefit sharing arising from traditional knowledge, genetic resources and traditional cultural expressions.

2. Goal, Objectives And Guiding Principles

2.1 Goal

The goal of this Policy is:

To enhance the preservation, protection, and promotion of sustainable use of traditional knowledge, genetic resources and traditional cultural expressions in Kenya.

2.2 Objectives

The objectives 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.

2.3 Guiding Principles

The following guiding principles will underpin this Policy:

(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.

3. The National Traditional Knowledge, Genetic Resources And Traditional Cultural Expressions Policy Framework

3.1 Policy Framework

3.1.1. Traditional knowledge and traditional cultural expressions are embedded in the social, cultural and moral aspects of people. Genetic and cultural/spiritual information has been produced over millennia by our people, yet all this information goes unrecognized. Value is added to the knowledge only when resources are manipulated by using modern scientific processes such as biotechnology and genetic engineering, where scientists and corporate owners are responsible.

3.1.2. Over the years, communities have raised concerns about unauthorized reproduction of their fixed and tangible and intangible cultural expressions such as artistic works, handicrafts, designs, dances and musical and dramatic performances. Not only do foreigners frequently neglect to seek authority to do so, but they also fail to acknowledge the source of creativity, and even pass off productions and works as their authentic expressions or products when they are not. In addition, genetic resources and the traditional knowledge associated with them are being appropriated and patented by multinationals, a situation that

conflicts with the tenets underpinning traditional knowledge and traditional cultural expressions.

Policy Statements

The Government in collaboration with stakeholders will endeavour to:

1. Support, promote and protect traditional knowledge, genetic resources and traditional cultural expressions and their associated innovations and practices.
2. Develop mechanisms to facilitate integration of traditional knowledge and traditional cultural expressions into the policy, development planning and decision making processes at the local, national, regional and global levels.
3. Ensure that communities have effective control over traditional knowledge, genetic resources and traditional cultural expressions documentation and database based on their know-how, practices and skills.
4. Establish a registry of inventions in which communities can register their traditional innovations and a clearing house for horizontal networking and innovation market.
5. Establish traditional knowledge, genetic resources and traditional cultural expressions searchable database and networks.
6. Put in place guidelines and laws to govern and regulate material transfer and information transfer agreements for genetic resource materials as well as traditional knowledge-related information for research and application.
7. Develop standards for best practices in traditional knowledge, genetic resources and traditional cultural expressions.
8. Mobilize and harness grassroots technological innovations and traditional knowledge values and institutions.
9. Compulsory Acquisition: where the government or any other international or national body compulsorily acquires TK, TCES, GR for the benefit of mankind, the owners of TK, TCES and GR will be duly compensated in accordance with other national and international laws.
10. Cross-border laws shall apply with regard to TK, GR and TCES which are owned across national borders (ARIPO and other regional bodies).
11. This policy shall propose mechanisms for recovery and/or compensation or acknowledgement of stolen artifacts.

12. This policy takes cognizance of international laws and treaties Kenya is a signatory to in the field of TK, TCE'S and GR.¹

4. The National Traditional Knowledge, Genetic Resources And Traditional Cultural Expressions: Research And Development

4.1. Agriculture and Food Security

4.1.1 According to Strategy for Revitalizing Agriculture 2004, agriculture in Kenya contributes a big part of the Gross Domestic Product (GDP), contributing significantly to the realization of export earnings and employs a majority of the Kenyan people. Moreover, through links with manufacturing, distribution and service-related sectors, agriculture makes a further notable contribution to the country's GDP. Apart from being the country's main source of food, it is a major source of foreign exchange. Despite increasing modernization of agriculture, a great majority of farmers in Kenya are subsistence farmers who still farm the rural landscapes with traditional methods.

4.1.2 Over the millennia, traditional farmers have given us an invaluable heritage of thousands of locally adapted genotypes of food crops and animals that have evolved because of natural and artificial selection forces. A salient feature of traditional farming systems is their degree of plant and animal diversity, generally in the form of polycultures breeds and/or agroforestry patterns. This traditional strategy of minimizing risk stabilizes productivity over the long term, promotes dietary diversity and maximizes returns under low levels of technology and limited resources. Thus, traditional knowledge and cultivation techniques promote long term sustainability. Yields may be lower than from high-yielding crop varieties (HYVs), but overall the practices are more predictable, do not harm people or their environment, and farmers can retain their independence and their cultural identity as they are the innovators as well as the practitioners. Consequently, producers of seeds and agrochemicals have benefited substantially from free access to germplasm and knowledge from biodiversity rich areas.

4.1.3 The enormous agro-biodiversity is being lost mainly due to genetic erosion and unfair competition from Western subsidies. The drivers of this erosion include: deforestation, population pressure and desertification among others. These processes are not mutually exclusive, but are, in fact, operating together, driven by the demand of an increasing population and rising expectations. The decline of agro-biodiversity has made the food system extremely vulnerable. Consequently, future progress in the improvement of crops and animals largely depends on immediate conservation of genetic resources for their effective and sustainable utilization. This is so because the adaptive complex of genetic diversity enables farmers to adopt crops and animals suited to their ecological niches and cultural food production systems and practices. Therefore, the availability of agro biodiversity enables farmers to attain food security in varied ecological regions by reducing their vulnerability to shocks or fluctuation in crop and animal productivity. Thus, agro biodiversity contributes to the stability and sustainability of farming systems and is valued for providing important

¹ The policy also recognizes that some protection is provided for TK, GR and TCE's in the existing Intellectual Property system such as copyright for unpublished works of unknown authors. It also recognizes that databases and compilations of TK and TCE's can be protected under trademarks and GI's.

attributes, including, *inter alia*, agronomic characteristics, biotic and abiotic stresses and other factors of cultural and socio-economic importance.

4.1.4 The second half of the 20th Century was witness to the “Green Revolution”. This revolution was characterized by the development of ‘modern’ crop varieties (MVs). Much of the spread and extent of the delivery of MVs to farmers has been governed by the incorporation of qualitative traits such as host-plant resistance to insect pests and disease and host-plant tolerance to abiotic stresses in crop varieties. The plant breeders and biotechnologists have the immense task of developing new crop varieties to overcome problems caused by pests, diseases and abiotic stresses. In doing so, they have to concern themselves with challenges such as sustainable agriculture, environmental protection and satisfaction of the increasing demands for food, fodder, fibre and fuel. Plant breeding has become a fully commercialized and internationally operated business with close links to the biotechnology and chemical industry. These changes in the breeding sector and breeding strategies have been accompanied by an increased demand for stronger intellectual property protection of innovation in plant breeding. This eventually has led to the granting of (industrial) patents for plant material and a widening of the scope of Plant Variety Protection (PVP) (through revision of UPOV in 1991)

Policy Statements:

The Government in collaboration with stakeholders will endeavour to:

1. Increase investment and research in traditional crops, animals and farming practices to run in tandem with biotechnological advances.
2. Establish and strengthen agrobiodiversity gene banks.
3. Strengthen links and cooperation between the government, the private sector, NGOs and communities.
4. Support the establishment of a certification scheme.
5. Enhance regional exchange on traditional agricultural crops, livestock husbandry and practices.
6. Support Research and Development efforts towards alternative and under-utilized/neglected indigenous animal and plant species for food and agriculture.

4.2 Medicines and Public Health

4.2.1 Plant genetic resources play an important role in primary healthcare in Kenya and have the potential to play an even greater role. The use of plant genetic resources as the raw materials for medicines and ethnoveterinary is as old as humanity itself. The World Health Organization (WHO) estimates that 80 percent of the world’s population depends on traditional medicine for primary healthcare and Kenya is no exception. Furthermore, it is well established that majority of traditional livestock keepers in rural areas use traditional medicine derived from plants for cure of their livestock. Another emerging area is in the field of animal genetic resources for application in health which includes the

human genome. The advancement in this area will create opportunities for improvement in public health and diagnostic applications.

4.2.2. The majority of rural populations have limited or no access to modern healthcare facilities, and even where there is access, inadequacies in human, financial, technological and infrastructural capacity often prevents full service provision. In view of this, the importance of traditional medicine for both human and livestock is very high. In traditional medicine, there are three factors that legitimize the healer: the subjective reality of the healer; the objective reality based on his successful cures; and the belief systems of the community. There is a growing market for herbal medicines and other natural health care products in Kenya and the region.

4.2.3. Isolation of chemical compounds of value to the pharmaceutical or cosmetics industries can prove extraordinarily lucrative. Global sales of pharmaceuticals run into billions of US Dollars, of which the component derived from genetic resources account for more than any other raw material. Further, other products including nutraceuticals, tonics, cosmetics and insect repellents from traditional knowledge and associated materials have been commercialized worldwide.

4.2.4. Typically, very few returns, if any, from drug development trickle down to indigenous and local communities where collections are made. However, some pharmaceutical companies in other countries have developed a 'reciprocity' programme that aims to return benefits to indigenous communities from which samples had been collected. Under the programme, various types of benefits are provided to the community regardless of whether a marketable product was developed or whether traditional knowledge was essential for product development.

Policy Statements

The Government in collaboration with local communities and other stakeholders will endeavour to:

1. Regulate and sustainably manage bioprospecting and collection of biological resources.
2. Strengthen partnerships and collaborative efforts in drawing up reliable inventories of the medicinal resources at the local, national, regional and international levels.
3. Promote collaborative research on quality assurance formulation and dissemination of results on safety and efficacy of traditional medicines.
4. Establish national centres of excellence for traditional medicine research and development.
5. Promote safe, effective and affordable traditional medicine and its integration into national health care system and document traditional medicines and remedies.
6. Promote cultivation, improvement and conservation of medicinal plants to ensure their sustainable use.

7. Promote research and development of biodiversity based natural products.
8. Put in place a regulatory framework to regulate research and development in human genetic resources.
9. Promote establishment of national policy and review and harmonize existing legislation on traditional medicine².

4.3 Biodiversity conservation

4.3.1 Kenya is internationally recognized as a megadiverse country in terms of richness in biodiversity. Biodiversity related economic activities, in particular agriculture and tourism contribute more than one quarter of the GDP. Further, it is now acknowledged that there is a strong correlation between sound natural resource management and poverty reduction. The poor, particularly those living in rural areas, often rely on a variety of natural resources (biodiversity) and ecosystem services as a direct source of livelihood. Increasingly, the rural poor live in areas of high ecological vulnerability and relatively low levels of biological or resource productivity. Thus, both environmental conditions and access to a variety of natural resources are crucial to the ability of poor people to sustain their livelihoods.

4.3.2 Before the 1990s genetic resources were generally considered common property, available to all takers. The 1992 Convention on Biological Diversity (CBD) links policy issues through its three objectives: the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits derived from the use of genetic resources. Furthermore, the CBD recognizes the importance of restoring and maintaining traditional ecosystem management practices of indigenous and local communities as an important tool for conserving biological diversity. The CBD recognizes the sovereignty of nations regarding the ownership and management of biodiversity, while at the time emphasizing the role of nation states to facilitate access for the good of mankind².

4.3.3 National sovereignty over genetic resources provides only a limited measure of control. To commercial users of genetic resources, physical possession of genetic material is usually secondary to the big prize: the intellectual property on the resulting invention. Yet, traditional ecological knowledge relies on a complex of ecological processes, management of ecological zones and a variety of habitats to maximize the range of products and services that the ecosystem can provide. These systems are highly site-specific, diverse and ever-changing and generally promote and require the maintenance of ecosystem structure and biological diversity.

4.3.4 Integral to traditional ecological knowledge is the elaborate taboos, myths, folklore and other cultural practices and controlled systems which bring coherence and shared community values to resource use and management. Today, these systems are under pressure from urbanization, cash economy and other socio-economic, political and cultural changes, leading many of them to break down, to the immediate detriment of biodiversity conservation. However, some communities still practice these forms of traditional management systems, for example the Mijikenda people in Coast Province whose protection

² Open access to genetic material is essential for the breeding of future food crops.

of the Kaya forests (sacred groves) has remained effective. Access to Kaya forests is restricted by taboos, codes and custom to particular activities and members of community thus enhancing biodiversity conservation.

Policy Statements:

The Government will

1. Strengthen the decentralization of environmental and natural resource management.
2. Ensure sustainable utilization of biological resources, including terrestrial and marine resources.
3. Ensure that bioprospecting is governed by clear Access and Benefit Sharing (ABS) procedures and processes established in accordance with the applicable law, the Convention on Biological Diversity, the International Treaty on Plant Genetic Resources for Food and Agriculture, the Global Plan of Action on animal genetic resources, the Cartagena Protocol on Biosafety, the Bonn Guidelines, Akwe-kon guidelines and the National Biosafety Act 2009, among others.
4. Ensure that benefits arising from access to genetic resources such as intellectual property rights, knowledge and technology are shared equitably with the relevant local communities where the genetic material originated.
5. Ensure equitable sharing of benefits from biotechnological research through use of contracts and covenants.

4.4 Traditional Knowledge and Traditional Cultural Expressions (Folklore)

Kenya is rich in traditional knowledge and traditional cultural expressions (folklore). This is derived from different communities with unique languages, cultures, experiences and ways of life. Over time this has spawned a rich galore of traditional knowledge and traditional cultural expressions most of which is undocumented. The expressions of culture integrate a complex array of tangible and intangible heritage including architecture, musical and performance equipment, verbal expressions, narratives, musical expressions, plays, ceremonies and rituals among others.

There has been an ad hoc approach towards research, documentation, protection and development of TK and TCE's mainly due to an absence of formal institutionalized rules and processes to guide the same. Governmental and non-governmental bodies and individuals have been involved in various efforts in the research and management of TK and TCE's resulting in a non-integrated approach, despite the existence of legislation guiding access, benefit sharing, transfer procedures and Intellectual property rights. There is need to recognize TK, TCE's with the aim of developing a system for preservation, research, documentation and dissemination for sustainable development and posterity.

Policy Statements

The Government in collaboration with other stakeholders will endeavour to:

1. Create awareness on the importance and the value of TK and TCE for, education, conflict resolution³, posterity and socio-economic development.

2. Document for preservation and protection (include extinct, endangered and threatened languages).

3. Promote Research & Development in TK and TCE's.

4. Protect the various rights of holders of TK and TCE's.

4.5 Intellectual Property Rights and Access

4.5.1 Intellectual property rights (IPRs) are recognized as human rights in the Universal Declaration of Human Rights, 1948 and in other international and regional human rights Treaties and instruments. IPRs serve to protect private and corporate property but not the collective wisdom of the past, present and future generations of local communities. However a great deal of traditional knowledge is not traceable to a specific individual, community or geographical area and is ineligible for patent protection. Thus there is an increasing demand for *sui generis* systems to enhance, protect and honour traditional knowledge, innovations and practices.

4.5.2 The existing IPR regimes are inadequate and do not address all the issues involved in the protection of traditional knowledge and folklore. Yet there is widespread unfair exploitation of the cultural heritage for commercial and business interests. Furthermore, important elements of traditional knowledge and folklore are being lost and will continue to be lost in the absence of a proper legal protection mechanism.

4.5.3 The World Trade Organization (WTO) is the main forum for consideration of all trade-related issues, including IPRs. Furthermore, the WTO is important as it administers the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), which is the only international agreement that specifically mentions the possibility of a *sui generis* alternative to patents. Article 27.3(b) of TRIPS specifically allows for an 'effective *sui generis* system for plant variety protection as an alternative to patents'. This is an opportunity for introduction of an appropriate IPR system that is consistent with traditional knowledge systems. However, no such system currently exists for animal genetic resources

Policy Statements

The Government will endeavour to:

1. Through a *sui generis* system, protect, integrate, enhance and validate traditional knowledge know-how and practices while ensuring that the owners of the traditional

³ In traditional societies there were conflict resolution and management institutions as well as governance institutions.

knowledge directly benefit on a equitable basis and on mutually agreed terms from any commercial exploitation of it or from any technological development derived from it and its derivatives.

2. Protect traditional knowledge systems from unauthorized intellectual property claims based on traditional artistic, literary and cultural works.

3. Ensure mandatory disclosure of source of origin of genetic resource and traditional knowledge in intellectual property applications.

4. Develop mechanisms for certification, labeling, trademark, geographical indication, tracing or an appellation of origin authorized by the communities' concerned.

5. Protect the economic rights of performers in their unfixed performance⁴.

5 Legal And Institutional Framework

5.1 Legal Framework

5.1.1 There is no harmonized legal framework on the protection of traditional knowledge, genetic resources and traditional cultural expressions. To facilitate the protection and utilization of traditional knowledge, genetic resources and traditional cultural expressions, it is imperative that an appropriate legal framework is put in place.

Policy Statement

The Government will endeavour to:

Put in place a comprehensive enabling legislation on traditional knowledge, genetic resources and traditional cultural expressions with the legislation being implemented concurrently with relevant laws.

5.2 Institutional Arrangements

5.2.1 Institutions are enduring patterns of relationships that provide rules and processes to guide the implementation of the policy. Kenya has a range of institutions dealing with various aspects of traditional knowledge, genetic resources and traditional cultural expressions. Most these are either in administration, research or conservation and many have parallel activities with no common linkage. Consequently, there is no single institution responsible for the protection of traditional knowledge, genetic resources and traditional cultural expressions.

⁴ Under the Industrial Property Act, 2001 some aspects of TK and GR can be protected as utility models. See also protection of TK under the ARIPO Draft Protocol.

Policy Statements

The Government will endeavour to:

1. Establish a National Authority/Agency to implement this Policy and to spearhead the preservation, protection and development of traditional knowledge, genetic resources and traditional cultural expressions in the country.
2. Harmonize the various policies and legislation dealing with traditional knowledge, genetic resources and traditional cultural expressions.
3. Promote building of partnerships between government, private sector, NGOs and local community institutions in the documentation, archiving, access to and utilization and development of the traditional knowledge, genetic resources, traditional cultural expressions and associated innovations and practices.

5.3. Capacity Building

5.3.1 Human resource capacity building encompasses aspects of creating awareness, education and training, attitude change, confidence building, participation in decision-making and action. A critical goal of human resource development is that of maximizing people's potential to contribute to development by participating fully in all its activities. Through capacity building, individuals and groups are empowered to expand their abilities to fully participate in the development process. As people increasingly direct and control the process of change that they themselves are bringing about, then the knowledge, skills, attitudes and behaviors they require also change.

5.3.2 For efficient and effective protection of traditional knowledge, genetic resources and folklore considerable development of human capacity in this area is required. Empowering institutions and local communities to enable them collate and document their own traditional knowledge, genetic resources and traditional cultural expressions is essential in ensuring that these resources are not lost.

5.3.3 The educational system is expected to make a significant contribution in this regard so that the esteem for traditional knowledge, genetic resources and traditional cultural expressions begins to take shape in the lives of the citizenry right from an early stage.

Policy Statements

In order to enhance capacities of local communities in protection and application of traditional knowledge, genetic resources and traditional cultural expressions, the Government in collaboration with other stakeholders will endeavour to:

1. Strengthen communities' capacity to document, protect, develop, teach and apply all aspects of their heritage and traditional knowledge, genetic resources and traditional cultural expressions.

2. To develop a wide range of education and training opportunities and modules including co-curricula activities in diverse traditional knowledge, genetic resources and traditional cultural expressions from communities and in the education system.

3. Build the capacity of individuals, communities and national institutions in negotiations and conflict resolution.

4. Encourage the dissemination of traditional knowledge, genetic resources and traditional cultural expressions while actively developing mechanisms to acknowledge, protect and benefit the sources of that information.

5. Facilitate access by local communities to appropriate information and technology.

6. Enhance capacity through peer - to - peer exchanges.

5.4. Financing

5.4.1 Developing an effective framework for the protection, preservation, application and development of traditional knowledge, genetic resources and folklore requires a lot of financial resources. This calls for innovative mechanisms for achieving financial stability from a balanced mix of funding sources to support the preservation, protection and development of traditional knowledge, genetic resources and folklore.

Policy Statements

In this regard, the Government in collaboration with other stakeholders will endeavour to:

1. Provide adequate resources for the preservation, protection, conservation and development of traditional knowledge, genetic resources and traditional cultural expressions through the annual Government of Kenya budgetary allocation.

2. Mobilize resources from relevant government agencies, private sector, civil society, individuals and development partners to support and enhance the preservation, protection, conservation and development of traditional knowledge, genetic resources, traditional cultural expressions and associated innovations and practices.

3. Create incentives for communities and private sector to support the promotion of sustainable use of traditional knowledge, genetic resources, traditional cultural expressions and associated innovations and practices.

4. Establish a Trust Fund to support conservation of traditional knowledge, genetic resources and traditional expressions-related activities.

6. Linkages with other Sectors

6.1 Inter-sectoral Linkages

6.1.1 Inter-sectoral linkages are important as traditional knowledge systems transcend various sectors. Given that people's day to day activities are largely influenced by

the traditional knowledge systems, their protection and application calls for a multi-sectoral approach.

6.1.2 Cross-sector linkages between different public policies have an immediate or indirect influence on the behaviour of holders of traditional knowledge, genetic resources and traditional cultural expressions; governmental agencies, private sector and civil society. The fact that public policies are complementary and have a considerable number of linkages among each other has far-reaching consequences for the way in the Government is able to steer political decision and implementation processes.

Policy Statements

The Government in collaboration with other stakeholders will endeavour:

1. Establish an inter-ministerial committee that will bring together representatives of the relevant government agencies and traditional knowledge/ traditional cultural expression holders so as to ensure linkage and harmonization of the collation, documentation, archiving, access to and utilization of traditional knowledge, genetic resources and traditional cultural expressions.

2. Promote establishment of traditional knowledge, genetic resources and traditional cultural expressions networks among the various local community groups.

3. Promote the development and implementation of binding instruments between the holders of traditional knowledge, genetic resources and traditional cultural expressions with government and other stakeholders.

4. Promote active and effective participation of local communities in the activities of the National Council of Science and Technology and other relevant lead agencies to ensure that research priorities and criteria integrate traditional knowledge, genetic resources and traditional cultural expressions aspects.

6.2 Public-Private Partnerships

6.2.1 Owing to increasing demands on public sector financial resources, public-private partnerships are becoming crucial in the leverage of resources. Developments of technologies are increasingly being spearheaded by private sector actors with modern infrastructure and critical masses of human and financial resources.

6.2.2 Public private partnerships enable each party to do what it does best and can result in a 'win-win' solution to providing services. Depending on the nature of the arrangement, a public private partnership may be able to capitalize on a number of private sector resources.

Policy Statements

The Government in collaboration with other stakeholders will endeavour to:

1. Facilitate and encourage private sector to invest in traditional knowledge, genetic resource and traditional cultural expressions research and development.

2. Promote and facilitate public - private partnerships in the preservation and sustainable utilization of traditional knowledge, genetic resources, traditional cultural expressions and associated innovations and practices.

3. Promote and facilitate partnerships between local community institutions, government agencies, inter-governmental organizations, universities, private sector and civil society through formal mechanisms such as Memorandum of Understanding (MoU) and Codes of Conduct to enhance the preservation, protection and development of traditional knowledge, genetic resources, traditional cultural expressions and associated innovations and practices.

4. Ensure that access to traditional knowledge and traditional cultural expressions as well as genetic resources and traditional knowledge associated with them are subject to the prior informed consent of the concerned communities or parties and to specific regulations requiring respect for their rights and appropriate benefit sharing.

6.3 Gender

6.3.1 Gender equity is an essential principle that the Kenya Government has adopted to ensure sustainability, fair management and participatory decision – making. In most rural areas in Kenya, the conservation and use of biological resources begins with women. For example, within the household, women are responsible for food needs and welfare, including cultivation or gathering of food, fodder, fuel, medicinal plants and fibre. In those roles, women often play a key role in determining which biological resources to conserve and use, which crop varieties to grow, which food products to keep for home consumption and which to sell at the local market.

6.3.2 The women play an important role in the society and hence in the application of the traditional knowledge systems. Acknowledgement is made to the importance of the traditional knowledge, innovations and practices of women and their role in the protection, maintenance and development of their knowledge systems. In spite of women's specialized knowledge, innovations and practices, they are frequently restricted by their society and remain outside decision-making processes. Yet, women play a fundamental role in the conservation and sustainable use of biological diversity and therefore have a right to a fair share of the benefits derived from the use of such resources.

6.3.3 Recognition and protection of women's rights in relation to biological resources and traditional knowledge is necessary to meet international obligations on the rights of women. Recognizing and supporting women's role in management of biological resources and traditional knowledge and the benefits derived from their use is closely linked to realization of the Millennium Development Goals (MDGs), including those related to poverty reduction, maternal and infant health and environmental protection.

Policy Statements

The Government will endeavour to:

1. Mainstream gender issues and equity at all levels of decision-making regarding traditional knowledge, genetic resources and traditional cultural expressions.

2. Protect the rights of women over their traditional knowledge in an eventual sui generis traditional knowledge system.

6.4 Youth

6.4.1 Respect for the environment, and the precarious balance between culture and nature is manifested in cultural values, beliefs and taboos and expressed in all manner of ways, from local language, taxonomy, proverbs, songs, traditional cultural expressions and stories, to dances, myths, rituals, to totems and agricultural practices. However, with the changing times, the younger generations are often not inheriting this wealth of knowledge which is passed on from generation to generation. The inherent concern for sustainable conservation of biological diversity.

6.4.2 The youth are, therefore, an important group in the society to be nurtured in furthering traditional knowledge, genetic resources and traditional cultural expressions in the future. Engaging the youth will ensure that the old generations pass on the wealth traditional knowledge, innovations and practices from one generation to another. The old generation has the traditional knowledge which they can disseminate to the youth. In any case, their lifetime experiences are a great resource for learning to the youth.

Policy Statement

The Government in collaboration with other stakeholders will endeavour to:

Mainstream youth into the preservation, protection, conservation and sustainable utilization of traditional knowledge and traditional cultural expressions as well as genetic resources and the traditional knowledge associated with them.

6.5 Regional and International Obligations

6.5.1 A number of international and regional governmental organizations and agencies are now taking steps to address issues relating to the recognition and the protection of the knowledge and innovations derived from traditional knowledge systems. Examples of such efforts include those by the United Nations Organizations in particular Food and Agricultural Organization (FAO), World Intellectual Property Organization (WIPO) and the multilateral environmental agreements (MEAs).

6.5.2 UNESCO adopted the Convention on the Protection and Promotion of the Diversity of Cultural Expressions in 2005 which entered into force in 2007.

The objectives of the convention are to protect and promote the diversity of cultural expressions and to create conditions for cultures to flourish and to freely interact in a mutually beneficial manner.

The convention recognizes that cultural activities, goods and services have both on economic and cultural nature and that they must not therefore be treated as solely having a commercial value. The convention also takes into account the importance of intellectual property rights in sustaining cultural creativity and emphasizes the vital role of cultural interactions and creativity which nurture cultural expressions and their role in the society at large.

6.5.3 Kenya is also a state party to the 2003 UNESCO Convention on the safeguarding of the Intangible Cultural Heritage (ICH) following the government's ratification of the convention in October 2007.

The convention recognizes ICH as a mainspring of the cultural diversity and a guarantee to sustainable development. Individuals and communities play an important role in the production, safeguarding, maintenance and recreation of ICH thus helping to enrich cultural diversity and human creativity. Considering the invaluable role of the ICH as a factor in bringing human beings closer together and ensuring exchange and understanding among them, there is need to build greater awareness of the importance of ICH and its safeguarding among the younger generations.

6.5.4 Cultural landscapes and their links to conservation of biological diversity are now recognized under the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (The World Heritage Convention). Cultural landscapes are common in most parts of Kenya. Protection of cultural landscapes can contribute to modern techniques of sustainable land use and can maintain or enhance natural value in the landscape. The protection of traditional cultural landscapes is therefore helpful in maintaining biological diversity.

6.5.5 The Convention on Biological Diversity is one of the major international forces recognizing the role of local communities in in-situ conservation. The preamble recognizes the:

“close and traditional dependence of many ... local communities embodying traditional life-styles on biological resources and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovation and practices relevant to the conservation of biological diversity and the sustainable use of its components.”

6.5.6 Furthermore, Article 8 and in particular Article 8(j) of the CBD spells out a specific obligation of each Contracting Party:

“...subject to its national legislation, (to) respect, preserve and maintain knowledge, innovations and practices of ...local communities embodying traditional life-styles relevant for the conservation and sustainable use of biological diversity and promote the wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”

Policy Statements

The Government will endeavour to:

1. Establish and implement mechanisms for recognizing and protecting traditional knowledge, genetic resources and traditional cultural expressions at national, regional and global levels.
2. Develop, promote and protect all aspects of cultural diversity, intangible cultural heritage for sustainable development for the benefit of present and future generations.

3. Facilitate regional cooperation for purposes of identifying the common traditional cultural heritage and promoting exchange of genetic resources and associated information.
4. Ensure domestication of the international and regional instruments relating to traditional knowledge, genetic resources and traditional cultural expressions.
5. Collaborate at the international level to develop an appropriate sui generis system to protect and enhance the preservation, protection and development of traditional knowledge, genetic resources and traditional cultural expressions.
6. Collaborate with international organizations, community institutions and private sector in supporting the preservation, protection, conservation and development of regional and global traditional knowledge networks for the exchange of information and experiences.

Implementation Strategies And Stakeholder Roles

The Government will develop an Implementation Plan for this policy, involving a wide range of Government, non-government stakeholders and communities in order to define the various roles and responsibilities. Developing this Plan will provide an important step towards ensuring that the actions outlined in the Policy are addressed systematically and effectively.

The Implementation Plan will also emphasize performance measures for the actions and initiatives outlined in the Policy, which can then be used to gauge the overall progress towards the protection and application of traditional knowledge, genetic resources and traditional cultural expressions in national development planning and decision making processes at all levels in Kenya.

The implementation plan will take cognizance of the creative industry that produces high quality goods and services for local and international markets by tapping on traditional knowledge, genetic resources and TCEs. Through programmes and activities that harness cultural and national heritage potential, the policy can contribute to the improvement of socio-economic livelihoods through empowerment. In regard to environment, there are linkages between culture and environment, where communities are involved in safeguarding the environment by tapping on traditional knowledge systems and genetic resources.

To facilitate effective implementation of the policy, several flagship projects and specific initiatives in the economic, political and social arena will be initiated and supported. These will include transfer of technology, knowledge and information as well as strengthening cultural creativity and innovations which will significantly contribute to economic growth. Embracing traditional knowledge genetic resources and TCEs in the development process will strengthen and promote national pride and cohesion.

Glossary of terms

“Access to genetic resources” means the acquisition of biological resources, their derivatives, indigenous knowledge, innovations, technologies or practices as authorized by the national competent authority

“*Benefit sharing*” means the sharing of whatever accrues from the utilization of biological resources, indigenous knowledge, technologies, innovations or practices

“*Biodiversity*” means the variability among living organisms from all sources including ecosystems and the ecological complexes of which they are a part. Accordingly, biodiversity encompasses three levels: ecosystem diversity, species diversity and genetic diversity

“*Bioprospecting*” refers to the exploration of biological diversity for commercially valuable genetic and biochemical resources

“*Biotechnology & technology*” means any technological application that uses biological systems, living organisms, or derivatives thereof, to make or modify products or processes for specific use

“*Community*” means a group of people living together in a particular region with common traditions, cultural heritage, history, cause, interests and who collaborate by sharing ideas, knowledge and resources

“*Country providing genetic resources*” means the country supplying genetic resources collected from *in-situ* sources, including populations of both wild and domesticated species, or taken from *ex-situ* sources, which may or may not have originated in that country

“*Folklore*” means traditional cultural expressions (both words are used interchangeably)

“*Genetic material*” means any material of plant, animal, microbial or other origin containing functional units of heredity

“*Genetic resources*” means genetic material of actual or potential value

“*Indigenous innovation*” means any generation of new or improvement methods of using traditional knowledge

“*Indigenous knowledge*” means the local knowledge that is unique to a particular culture and society, it is synonymously used with TK

“*Intellectual property rights*” are property rights over creations of the mind, both artistic and commercial, and the corresponding fields of law. Under intellectual property law, owners are granted certain exclusive rights to a variety of intangible assets, such as musical, literary, and artistic works; ideas, discoveries and inventions; and words, phrases, symbols, and designs. Common types of intellectual property include copyrights, trademarks, patents, industrial design rights and trade secrets

“*Material transfer agreement*” means a special type of contract defining the rights and obligations of all parties, including third parties, during the transfer of biological material from a provider to a recipient

“*Performers*” refers to actors, singers, musicians, poets, dancers and other persons who act, sing, deliver, declaim, play in, interpret or otherwise perform literary or artistic works or expressions of folklore

“*Prior informed consent*” means the consent of a party to an activity that is given after receiving full disclosure regarding the reasons for the activity, the specific procedures that activity would entail, the potential risks involved and the full implications that can realistically be foreseen or the giving by a collector of complete and accurate information, and, based on that information, the prior acceptance of that collector by the government and the concerned local community or communities to collect biological resources, or indigenous knowledge, or technologies

“*Sui generis*” means original system of its own kind

“*Sustainable use*” means the use of components biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations

“*Traditional cultural expressions*” means any forms whether tangible and intangible, in which folklore and traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof

(a) Intangible expressions such as:

(i) Verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives including words, signs, names and symbols

(ii) Musical expressions, such as folk songs and instrumental folk music

(iii) Expressions incorporating movement or action, such as dances, plays, ceremonies, rituals and other performances; whether or not reduced to a material form; and

(b) Tangible expressions, such as

(i) Productions of folk art, drawings, designs, paintings (including body-painting) carvings, sculptures, pottery, terracotta, mosaic, metalwork, woodwork, jewelry baskets, needlework, beadwork, textiles, glassware, carpets, costumes; handicrafts

(ii) Musical instruments; and

(iii) Architectural forms which are the products of creative intellectual activity, including individual and communal creativity

“*Traditional knowledge*” means a body of knowledge vital to the day to day life of indigenous and local communities derived through generations of living in close contact with nature

“*Traditional knowledge systems*” means the totality of traditional knowledge, innovations and practices, whether explicit or implicit, used in the management of socio-economic, cultural and ecological facets of life. These include traditional administration authorities, traditional natural resource managers, traditional health providers, storytellers, singers, dancers, etc.

“Traditional medicine” means the health practices, approaches, knowledge and beliefs incorporating plant, animal and mineral-based medicines, spiritual therapies, manual techniques and exercises, applied singularly or in combination to treat, diagnose and prevent illnesses or maintain well-being.

[End of Annex and of document]