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[L'annexe II suit/Annex II follows]

ANNEXII

POSITIONPAPER
OFTHEAFRICANGROUP

Presentedtothe
ThirdSessionoftheWIPOIntergovernmentalCommitteeonIntellectualPropertyand
GeneticResources,TraditionalKnowledgeandFolklore
(June13to21,2002)

I. INTRODUCTION

ThispositionpaperoftheAfricanGroup,presentedtothethirdsessionoftheWIPO IntergovernmentalCommitteeonIntellectualPropertyandGeneticResources,Traditional KnowledgeandFolklore(theIGC),flowsfromthe“DecisiononIntellectualProperty, GeneticandBiologicalResources,TraditionalKnowledgeandFolkloreinAfrica”takenby theCouncilofMinistersandadoptedbytheHeadsofAfricanStatesattheSeventy-fourth OrdinarySession/NinthOrdinarySessionoftheAfricanEconomicCommunityofthe OrganizationofAfricanUnity(theOAU)(July5to8,2001,Lusaka,Zambia),andisthe synthesisofviewsandproposalsdevelopedbyAfricanStatesatseveralmeetingsheldin AfricaandwithinthecontextoftheIGC.Inthiscontext,thepaperreferstothe“Proposal PresentedbytheAfricanGrouptotheFirstMeetingoftheIntergovernmentalCommitteeon IntellectualPropertyandGeneticResources, TraditionalKnowledgeandFolklore” (WIPO/GRTK/IC/1/10)andthepaperentitled“IntergovernmentalCommitteeonIntellectual PropertyandGeneticResources,TraditionalKnowledgeandFolklore”presentedbythe delegationofZambia(WIPO/GRTK/IC/1/12).

II. PREAMBLE

TheAfricanGroup:

(1) recallsthe“DecisiononIntellectualProperty,GeneticandBiologicalResources, TraditionalKnowledgeandFolkloreinAfrica”adoptedbytheCouncilofMinistersand endorsedbytheHeadsofAfricanStatesattheSeventy-fourthOrdinarySession/Ninth OrdinarySessionoftheAECoftheOrganizationofAfricanUnity(July5to8,2001,Lusaka, Zambia),accordingtowhich:

“(The)Council(ofMinisters):

- (1) COMMENDStheSecretaryGeneralonhisinitiativeandeffortsindeveloping thedraftAfricanModelLawontheProtectionoftheRightsofLocal Communities,FarmersandBreedersandfortheRegulationofAccesssto BiologicalResources,aswellasthedraftAfricanModelLawonBio-Safety andanAfrica-wide Bio-SafetySystem;
- (2) SUPPORTStheconveningoftheproposedexpertsmeetingsintendedto furtherexaminethedraftmodellawswithintheframeworkoftheAfrican

common positions on intellectual property, generally, and the Trips Agreement in particular; and

URGES MEMBER STATES TO:

- (i) Participate effectively in the two on-going processes of developing model laws and to use these models as a basis for finalizing their national legislations by adapting their provisions to the national context and within the framework of the WTO negotiations, whilst maintaining, as much as possible, the principle of uniformity of national laws of integrating African economies;
 - (ii) Examine ways and means of raising awareness about the protection of genetic resources, indigenous knowledge and folklore, taking into account the need to protect the rights of local communities;
 - (iii) Identify, catalogue, record and document the genetic and biological resources and traditional knowledge, including expressions of folklore held by their communities, within the framework of national laws, with a view to guaranteeing them protection against misappropriation;
 - (iv) Exchange information and experiences and continue, within the framework of the OAU, with the search for joint solutions of common concern, and, with the efforts aimed at developing common positions, policies and strategies in relation to these issues.”
- (2) recall the decision of the OAU proclaiming 2001 - 10 as the Decade for Traditional Medicine;
 - (3) takes note of the draft African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources adopted by the OAU;
 - (4) emphasizes that the protection of genetic resources, traditional knowledge and expressions of folklore is of great importance to African States. The African region is rich in genetic resources, traditional knowledge and expressions of folklore, which are an important part of the cultural and natural heritage of Africa's peoples;
 - (5) believes that the need for the protection of genetic resources, traditional knowledge and expressions of folklore should be viewed and understood within the context of larger socio-economic, cultural and political processes in Africa striving for sustainable development, socio-economic uplift of particularly rural communities, people-centered development, scientific and cultural endeavors, and the respect for the human dignity and cultural identity of traditional and traditional communities;
 - (6) believes that WIPO has a significant role to develop internationally acceptable and equitable solutions to the *intellectual property issues* related to genetic resources, traditional knowledge and expressions of folklore;
 - (7) notes that issues pertaining to genetic resources, traditional knowledge and expressions of folklore should be addressed equitably by the IGC with due regard to their equal importance;

(8) notes the desirability of coordination and synergy between action taken at the national, regional and international levels;

(9) believes that there is a need to develop *suigeneris* rights and systems to provide protection not adequately available under current rights and systems, despite the protection provided in some cases to traditional knowledge associated with genetic resources and expressions of folklore by current intellectual property systems;

(10) notes that States and traditional communities have difficulty in implementing and making effective use of existing rights and systems for the protection of traditional knowledge and expressions of folklore;

(11) affirms the sovereignty of States over their genetic resources, and recognises the principle of fair and equitable sharing of benefits arising from the use of such resources;

(12) notes that the use of genetic resources is inseparable from and an integral part of traditional knowledge.

III. AFRICAN POSITIVE NON-SPECIFIC AGENDA ITEMS OF THE IGC

Access to Genetic Resources and Benefit-Sharing

(1) In view of the alarming rate of loss and misappropriation of genetic resources, States are urged to put in place legislative, administrative and strategic policy measures and mechanisms for the conservation and sustainable use of biological diversity, while protecting the rights of holders and users of genetic resources. Such measures and mechanisms should include:

(a) the preparation of national laws on the protection of the rights of local communities in respect of their genetic resources;

(b) the development of national policies and laws on the protection, conservation, preservation and sustainable use of genetic resources;

(c) the creation of a competent national authority responsible for the regulation, monitoring and coordination of developmental activities, including access to and the fair and equitable sharing of benefits in respect of genetic resources and all other matters relating to traditional knowledge;

(d) regional cooperation among genetic resources supplier States, and the drafting of harmonized regional legislation on the management of genetic resources that are multi-cultural in nature and cut across national borders within regionaleconomic integration areas, such as the draft African Model Law on the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources;

(e) the promotion and recognition of research and development of genetic resources and associated traditional knowledge, and the responsible dissemination of the results of such research;

(f) the design, implementation, monitoring and evaluation of programs of information, education, communication and awareness, particularly at the local community level;

(g) consolidation of regional coordination efforts;

(h) African States, particularly those less developed, should benefit, in case of need, from the assistance of intergovernmental organizations for capacity building and in the areas cited above.

(2) The African Group considers as an important stage the development by the IGC of “guide contractual practices”, guidelines and model intellectual property clauses for contractual agreements on access to and use of genetic resources, and the fair and equitable sharing of benefits. In this regard:

(a) contractual arrangements on access to genetic resources should take into account the following points and principles:

(i) any access to genetic resources for industrial, commercial or research purposes should be the subject of a prior request in writing addressed to the competent national authority or any other relevant body responsible for genetic resources, in accordance with national laws;

(ii) adoption of the principle of prior informed consent in the process of access and the fair and equitable sharing of benefits;

(iii) the subject matter of each contract, the rights and obligations of all parties, the nature of the benefits and the method of their distribution, and the identity of the beneficiaries must be clearly specified;

(iv) the protection of the supplier's interests, subject to assurance of the preservation and permanency of the genetic resource for present and future generations.

(b) the African Group supports enhancing, nationally, regionally and internationally, the negotiating capacity of traditional communities and governmental and research institutions, by, for example, creating awareness, information sharing, and providing targeted legal education.

(c) the African Group supports putting into place national and international regulatory mechanisms and frameworks for monitoring the compliance by the parties of the terms and conditions of contracts relating to access to genetic resources and the fair and equitable sharing of benefits.

(3) In respect of the protection of biotechnology and biological resources, there should be:

(a) in accordance with the precautionary principle, endeavours for respect for the rights of biotechnology inventors and innovators, with due regard to the rights of the owners of genetic resources;

- (b) the protection of all inventions and innovations with due regard to the rules of bio-ethics;
- (c) the establishment of national biosafety regulatory frameworks;
- (d) assistance to researchers and innovators in the protection of their inventions.

Traditional Knowledge

(1) The African Group believes that in considering *sui generis* forms of protection for traditional knowledge, attention should be paid to determining and identifying the subject matter of protection; the type of protection desired; the content of the rights to be granted; the duration of rights granted; and, the identity of the owners of the rights. In this respect:

(a) in developing effective national, regional and international systems of protection, it is necessary to develop flexible *sui generis* systems that take customary laws, protocols and practices into account, to provide protection not adequately provided by existing rights and systems;

(b) strategies for identifying the subject matter to be protected could inter alia include compiling inventories of traditional knowledge and the natural heritage, with the assistance of ethics committees; the better organization of the sector comprising traditional knowledge; cooperation between traditional medicine and modern medicine suppliers; and, the teaching of traditional knowledge at primary, secondary and tertiary levels. National authorities should be continuously and fully involved in all phases of the development and implementation of these activities;

(c) the owners of traditional knowledge are at the outset the individuals, families and/or local communities from which the knowledge has come. If these cannot be identified, then the States should stand in for them.

(2) In respect of the IGC, the African Group:

(a) favors the development of a legally binding international instrument that recognizes, protects and rewards traditional knowledge and innovations;

(b) supports the development by the IGC of a working definition of "traditional knowledge" that is illustrative and inclusive, and which establishes characteristic features and the criteria according to which it should be protected;

(c) supports the compilation of an inventory of documents related to traditional knowledge for inclusion in the minimum documentation list of the Patent Cooperation Treaty (the PCT), and the classification of relevant traditional knowledge documentation for patent search purposes;

(d) notes with interest this step of the development and publication of appropriated databases of traditional knowledge that is already in the public domain, taking into account, however, the characteristics and needs of African Traditional Knowledge Systems, which are largely orally held, as well as the use of databases to

provide positive protection for traditional knowledge, particularly “secret knowledge.” Further, the Group encourages African States to establish traditional knowledge databases and make them available, in cases where “defensive protection” of disclosed traditional knowledge is desired. The Group also calls upon WIPO to provide intellectual property assistance to African documentation initiatives in this regard, particularly in respect of the intellectual property implications of such documentation.

(3) More generally, States should:

(a) speed up the formulation of national policies and legislation in regard to the recognition, preservation, development and popularization of the inherent elements of traditional knowledge which impact on the life of the people and the environment;

(b) create national competent authorities for the management and promotion of traditional knowledge;

(c) intensify efforts to create public awareness among all stakeholders on all issues relating to the development, promotion and protection of traditional knowledge;

(d) translate regulatory texts linked to traditional knowledge into the local languages with a view to the involvement of all the communities.

(4) The African Group also believes that traditional communities have a key responsibility for identifying, preserving, and promoting their knowledge systems, and national governments should support and assist them in these endeavours.

Expressions of Folklore

(1) The African Group believes that existing intellectual property rights, such as copyright, trademarks (including certification and collective marks), and industrial designs, may provide adequate protection for expressions of folklore in respect of tradition-based creations where the creator (or creators) of the expression is (or are) identifiable. In such cases, the creator should be the owner and beneficiary of the rights. On the other hand, where there is no identifiable creator, recourse should be had to a *suigeneris* intellectual property system, which should provide for the State to hold the rights. In such cases, the States should pay any financial proceeds either to the relevant community or to a fund for the promotion of cultural heritage.

(2) In respect of the IGC:

(a) the IGC should examine the means by which intellectual property registration systems, particularly the trademark and industrial design systems, could be adapted to enhance the protection provided to expressions of folklore, without prejudice to the examination of these questions within other organs of WIPO.

(b) the African Group supports the study of the relationship between customary laws, protocols and practices governing custodianship, use and transmission of expressions of folklore, on the one hand, and the formal intellectual property system, on the other, in relation *inter alia* to the establishment of *suigeneris* systems of protection and so as to ensure that intellectual property rights do not preclude continued customary creation and use of expressions of folklore;

(c) the WIPO/UNESCO Model Provisions, 1982 provide a useful reference point for the development of effective national, regional and international systems of protection, although they could be updated and improved upon;

(d) the African Group favors the establishment of a comprehensive international binding instrument on the protection of expressions of folklore, with some form of dispute settlement mechanism either similar to that which is obtainable under the TRIPS Agreement or a mediation process as provided by the WIPO Arbitration and Mediation Centre.

Specific recommendations to WIPO

(1) WIPO should provide greater legal -technical assistance for the putting in place and effective implementation of systems for the protection of expressions of folklore at national and regional levels. Such assistance should include awareness -raising, institution -building, and training and information for traditional communities on enforcement.

(2) WIPO should conduct empirical studies on the economic effects of the exploitation of tangible and intangible expressions of folklore, particularly handicrafts, in developing and the least developed countries, and particularly in the light of new technologies for the reproduction and dissemination of such folkloric works.

Specific recommendations to African States

(1) As a matter of urgency, expressions of folklore should receive more effective and appropriate protection at national levels, in order that African peoples derive the maximum social-economic benefits from such protection. In this regard:

(a) appropriate national legislation, institutions and structures should be put in place, to ensure protection of expressions of folklore as a strategy for cultural development;

(b) national measures and systems for the protection of expressions of folklore should take into account the WIPO -UNESCO Model Provisions, 1982 as a useful possible starting point;

(c) African States should also explore and encourage use by their traditional communities of existing intellectual property rights for the protection of traditional culture and expressions of folklore;

(d) African governments should devote more attention and resources to folklore issues and to intellectual property generally, and involve relevant communities and civil societies in raising awareness of the value of expressions of folklore and the importance of protecting them;

(e) African States should devote attention to the urgency of creating an African Regional framework for the preservation, protection, and maintenance of the integrity of expressions of folklore, including the establishment of national and regional documentation centers.

General Statements

The African Group:

- (a) encourages the continued coordination of the work of WIPO with the ongoing processes underway in the Secretariat of the Convention on Biological Diversity (the CBD), the Food and Agricultural Organisation (the FAO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) to enhance synergies;
- (b) remains convinced of the necessity for the establishment of a WIPO Standing Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, in order that these important issues be taken into account within a framework designed to achieve specific results, in line with how other substantive issues are dealt with by WIPO;
- (c) considers that the mandate of the IGC be continued beyond the WIPO Program and Budget for 2002-03 and that consideration be given to constituting it as a Standing Committee at that time, if not before;
- (d) calls upon WIPO to continue to support and make possible the full and well-informed participation of developing and least developed countries in the various meetings and consultation process in this regard;
- (e) requests the WIPO Program and Budget Committee to approve and expedite the funding of the participation of traditional communities at the IGC sessions;
- (f) strongly encourages officials from African States, through the coordination of the OAU, and in consultation with their correspondences from other developing countries, who participate in IGC sessions and other meetings relating to intellectual property and genetic resources, traditional knowledge and folklore, to report back to and consult with all relevant governmental and non-governmental stakeholders so as to enrich the participation of developing countries in such meetings;
- (g) encourages WIPO to enhance cooperation with sub-regional and regional organizations involved in intellectual property rights;
- (h) expresses its deep gratitude to WIPO for the assistance provided to African States and requests that it continue to provide opportunities to African and other developing countries to engage with and contribute meaningfully to the IGC process.

IV. CONCLUSION

The African Group intends to continuously refine and build upon these proposals as the work of the IGC and national, regional and other international processes develop. The African Group looks forward to working with the other regional groups in the IGC to ensure the positive protection of genetic resources, traditional knowledge and folklore.

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