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

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PROPOSAL PRESENTED BY THE AFRICAN GROUP TO THE FIRST MEETING OF
THE INTERGOVERNMENTAL COMMITTEE ON INTELLECTUAL PROPERTY AND
GENETIC RESOURCES, TRADITIONAL KNOWLEDGE AND FOLKLORE

Document submitted by the African Group

1. On April 30, 2001, the Permanent Mission of the Republic of Madagascar to the Office of the United Nations and other International Organizations in Geneva submitted a document on behalf of the African Group entitled "Proposal Presented by the African Group to the First Meeting of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore."
2. The document is reproduced and published in the Annex.
3. *The Committee is invited to take note of this document and the Annex to it.*

[Annex follows]

**Proposal Presented by the African Group
to the First Meeting of the Intergovernmental Committee on Intellectual Property
and Genetic Resources, Traditional Knowledge and Folklore**

(30 April- 3 May 2001)

Introduction

- The African Group presents this paper to the first meeting of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The paper highlights the gaps in the current international regime of intellectual property protection in dealing with these three interrelated issues. It also suggests the future course in order to promote fair and equitable sharing of benefits arising from the utilization of genetic resources as well as providing adequate international protection to traditional knowledge and expressions of folklore.

- The *first section* of the paper provides an overview of the issues at stake. It introduces the concepts of intellectual property protection, traditional knowledge and expressions of folklore. The *second section* discusses the extent to which traditional knowledge and expressions of folklore, including access to genetic resources and the sharing of benefits, are treated or recognized by international conventions pertaining to intellectual property protection. The *last section* is on the proposals that African countries wish to see addressed in the future. Emphasis is placed on the need to ensure that an authoritative and inclusive international process is established to negotiate and reach agreement on a comprehensive legal instrument for the protection of genetic resources, traditional knowledge and folklore.

1. Conceptual Issues

- 1.1** Intellectual property protection carves out exclusive rights to an individual (either a natural person or a legal one) to exploit particular creations of human ingenuity. The broadening in recent years of intellectual property protection through the recognition and inclusion of new rights and subjects of protection has been informed by modern economic and technological development interests and has been, in particular, promoted by needs and interests of firms and economies of the industrialized world. It does not take sufficiently into account traditional knowledge and innovations generated by local communities and indigenous peoples around the world.

- 1.2** The concepts of indigenous knowledge and traditional knowledge are widely used yet their meanings rarely provided. Their usage is often subject to confusion and many often use the concept of traditional knowledge interchangeably with that of indigenous knowledge. There have been various efforts to define these concepts, but there are so far no universally adopted definitions. Indigenous knowledge can be considered as that knowledge that is held and used by a people who identify themselves as indigenous of a place based on “a combination of cultural distinctiveness and prior territorial occupancy relative to a more recently-arrived population with its own distinct and subsequently dominant culture” (UNEP/CBD/COP/Inf. 33, Annex 2). Traditional knowledge is, on the other hand, that knowledge which is held by members of a distinct culture and/or sometimes acquired “by means of inquiry peculiar to that culture, and concerning the

culture itself or the local environment in which it exists” (UNEP/CBD/COP/Inf. 33, Annex 2). Indigenous knowledge fits neatly in the traditional knowledge category but traditional knowledge is not necessarily indigenous.

- 1.3** *Traditional knowledge is thus the totality of all knowledge and practices, whether explicit or implicit, used in the management of socio-economic and ecological facets of life.* This knowledge is established on past experiences and observation. It is usually a collective property of a society. Many members of the particular society contribute to it over time, and it is modified and enlarged as it is used over time. This knowledge is transmitted from generation to generation. It is generally an attribute of a particular people, who are intimately linked to a particular socio-ecological context through various economic, cultural and religious activities. In addition, traditional knowledge is dynamic in nature and changes its character as the needs of local people change. Examples of traditional knowledge include knowledge about the use of specific plants and/or parts thereof, identification of medicinal properties in plants, and harvesting practices.
- 1.4** Recent years have witnessed a paradigm shift in the recognition of and appreciation for the role of traditional knowledge in all aspects of human activity. Over the past decade or so, biotechnology, pharmaceutical and human health care industries have increased their interest in natural products as sources of new biochemical compounds for drug, chemical and agro-products development. The decade has also witnessed a resurgence of interest in traditional knowledge and medicine. This interest has been stimulated by the importance of traditional knowledge as a lead in new product development. African countries and their local communities have contributed considerably to these industries. *However, intellectual property rights of these communities are not often recognized and protected. In addition, indigenous and local communities do not share, at least in a fair and equitable manner, benefits arising from the appropriation of their knowledge and its subsequent commercial use.*
- 1.5** The UNESCO-WIPO Model Provisions on Folklore (1982) consider, in Section 2, “expressions of folklore” as “productions consisting of characteristic elements of the artistic heritage developed and maintained by a community or a country or by individuals reflecting the traditional artistic expectations of such a community”.

2. Intellectual Property Protection Regimes

2.1 International Conventions

- a) *The Paris Convention for the Protection of Industrial Property* (1883) covers property rights for patents, utility models, industrial designs, service marks, indications of source or appellations of origin and trademarks. Article 1 of the Convention defines the scope of industrial property. It states in paragraph 3 that “industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products, for example, wines, grain, tobacco leaf, fruit, cattle, minerals, ... beef, flowers, and flour.” It is possible for innovations of indigenous and local peoples to be protected under the trademark, utility models, industrial designs, service marks,

and indications of source or appellations of origin provisions of the Paris Convention. In this respect, Article 7 of the Convention is worth noting. It allows member countries to “accept for filing and to protect collective marks belonging to associations the existence of which is not contrary to the law of the country of origin, even if such associations do not possess an industrial or commercial establishment.” If indigenous and local communities form associations that are legally legitimate in their countries, it would be possible for them as a collectivity to acquire service marks.

- b) i) *The Convention on Biological Diversity (CBD)* explicitly recognizes the importance of traditional knowledge, and the rights of indigenous and local communities in that knowledge. It creates a framework for ensuring that local people share benefits arising from appropriation and use of their knowledge. In its preamble the CBD recognizes: “the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.” Articles 8(j), 10(c) and 18(4) make reference to the rights of indigenous and local communities. Article 10(c), for example, provides that each Contracting Party “shall [p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements.” Article 18(4) defines technologies broadly to include “indigenous and traditional technologies”.
- ii) Article 8(j) is perhaps the most authoritative provision dealing with traditional knowledge. It provides that each Contracting Party shall, as far as possible and as appropriate, “subject to its national legislation, respect, preserve, and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity and promote their 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.”
- iii) There are a number of limitations with Article 8(j) in so far as the question of intellectual property rights in traditional knowledge is concerned. First, the Convention leaves the protection of the knowledge, innovations and practices of indigenous and local communities to the discretion of parties through language such as “subject to national legislation” and “as far as possible and as appropriate”. Second, Article 8(j) does not talk of protection of the knowledge but merely calls on parties to “respect, preserve and maintain” it. It does not guarantee indigenous and local communities any rights in traditional knowledge.
- iv) Parties to the Convention have recognized limitations of Article 8(j). An open-ended inter-sessional working group composed of Parties including indigenous and local communities was established to advance further the work on the implementation of Article 8 (j) and related provisions, in order to, inter alia “provide advice as a priority on the application and development of legal and other appropriate forms of protection for the knowledge, innovations and practices of indigenous and local communities.”

- c) i) *The Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement* aims at “reducing distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.” Countries that ratify the Agreement are expected to establish comprehensive intellectual property protection systems covering patents, copyrights, geographical indications, industrial designs, trademarks, and trade secrets.
- ii) The TRIPS Agreement requires member states to provide patent protection for “any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.” The “inventive step” and “capable of industrial application” requirements are deemed “to be synonymous with the terms ‘non-obvious’ and ‘useful’ respectively.” Traditional knowledge fails the test for patenting on one, or all, of the “new”, “inventive step” and “industrial application” standards. On the “new” standard it will probably fail because by its very nature traditional knowledge has been known for some length of time.
- iii) Article 27.3(b) of TRIPS provides that “[m]embers may also exclude from patentability...plants and animals other than microorganisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes”. However, Members shall provide “for the protection of plant varieties either by patents or by an effective sui generis system or by a combination of thereof”. There is in regard to this article a controversy as to what “an effective sui generis” regime is. “Effectiveness” of the sui generis system is not defined. The nature of a sui generis system is also left to individual members to determine.

On the above mentioned matters, the African Group has made extensive proposals in the framework of the World Trade Organization.

- d) *The International Convention for the Protection of New Varieties of Plants (UPOV)* is the only international treaty focusing on plant variety protection with the specific aim of introducing private property rights on plant varieties. The 1978 version of the Convention allows farmers to re-use propagating material from the previous seasons’ harvest and to freely exchange seeds of protected varieties with farmers. Although, membership of UPOV is currently mainly made up of developed countries, developing countries have been incited, in recent years, to adopt UPOV as a sui generis for plant variety protection system. However, new members can only accede to the 1991 version of the Convention, which does not contain any provisions for recognizing the knowledge and other contributions that indigenous and local peoples make to plant breeding programs.
- e) *The International Undertaking on Plant Genetic Resources* was adopted by the FAO Conference as a non-binding instrument. It covers both traditional cultivars and world species, but also varieties developed by scientists in laboratories. The instrument gives countries sovereign rights over their plant genetic resources. Plant breeder’s rights and farmer’s rights are also recognized. The draft article on farmers’ rights focuses on the protection of traditional knowledge, the equitable sharing of benefits arising from the

exploitation of biological resources and the right to participate in decision-making.

2.2 Regional Instruments

- African countries have under the auspices of Organization of African Union (OAU) prepared a model law on community rights and access to biological resources. The African Model Legislation for the Protection of Rights of Local Communities, Farmers, Breeders and for the Regulation of Access to Biological Resources aims at establishing a framework for national laws to regulate access to genetic resources. It is premised on the rejection of patenting of life or the exclusive appropriation of any life form, including derivatives. Its provisions on access to biological resources make it clear that the recipients of biological resources or related knowledge cannot apply for any intellectual property right of an exclusionary nature. Community rights recognized include rights over their biological resources and the right to collectively benefit from their use, rights to their innovations, practices, knowledge and technology and the right to collectively benefit from their utilization. In practice, these rights allow communities the right to prohibit access to their resources and knowledge but only in cases where access would be detrimental to the integrity of their natural or cultural heritage. Further, the state is to ensure that at least fifty per cent of the benefits derived from the utilization of their resources or knowledge is channeled back to the communities. The rights of farmers are slightly more precisely defined.

2.3 The protection of expressions of Folklore

- The WIPO-UNESCO Model Provisions (1982) establish some definitions and criteria that would be useful in the subsequent work of the Committee. Consideration should also be given to the Plan of Action of the World Forum on the Protection of Folklore held in Thailand (April 1997) and the recommendations of the four regional consultations held by WIPO and UNESCO on the protection of expressions of folklore which highlighted the need to create an appropriate framework to facilitate work in this area.
- A number of African countries use copyright legislation to protect their folklore. In Ghana folklore rights are vested in the Republic. Where a person intends to use any such folklore other than for a use permitted under the law, he has to apply to the Secretary to do so and shall pay a prescribed amount of money. Money generated from using folklore is paid into a fund established by the Secretary and shall be used for the promotion of institutions for the benefit of authors, performers and translators. In Nigeria, the copyright council has been established to oversee protection of folklore. In Tunisia, Article 7 of the Tunisian Copyright Act (Law n94 –36 of February 1994) provides adequate protection to expressions of folklore and make its commercial exploitation dependent on an express authorization by the Ministry of Culture. Egypt's new draft intellectual property currently under discussion includes specific provisions relating to the protection of artistic forms of expression related to folklore asserting the collective ownership by local communities and the state.

3 Proposals of the African Group

- 3.1** As it has been highlighted by this paper, the protection of traditional knowledge under current forms of intellectual property protection is incomplete and inadequate and has

its limitations because of the rigidities built in these forms and the very nature of traditional knowledge. The African group considers that the establishment of this Inter-governmental Committee constitutes a historic opportunity to redress the imbalance in the current international property protection regime and improve it in order to *make it work to the benefit of all the members of the international community*.

3.2 In consequence, the African Group of countries therefore *requests the establishment of a Standing Committee on genetic resources, traditional knowledge, and folklore*.

3.3 This Committee would, *inter alia*, engage in the following tasks:

- a) *Examine the means by which intellectual property registration systems could be adapted to enhance the protection provided to traditional knowledge and expressions of folklore.*
- b) *Examine the relationship between customary laws governing custodianship, use and transmission of traditional knowledge, on the one hand, and the formal intellectual property system to ensure that intellectual property rights don't preclude continued customary use of genetic resources and related knowledge.*
- c) *Examine the emerging processes to develop sui generis legislation and model legislation on access to genetic resources and protection of community rights such as the African Model Legislation for the Protection of the Rights of Local Communities, farmers and breeders and for the regulation of access to biological resources.*
- d) *Examine issues concerning the regulation of use and exploitation of genetic resources and biodiversity including the misappropriation of genetic resources and traditional knowledge related to those resources.*
- e) *Exchanging views and information with a view to negotiating a comprehensive international binding instrument on the protection of genetic resources traditional knowledge and expressions of folklore*
- f) *Submit its work in the above mentioned areas to the Governing bodies of WIPO for discussion and adoption.*
- g) *Coordinate its work with that of other relevant international and regional organizations*

3.4 In accomplishing the tasks mentioned above, the Committee could examine the following non-exhaustive list of issues:

- a) Discuss and reach an agreement on the international level on a common *definitions* to the terms and concepts relating to genetic resources, traditional knowledge and folklore.
- b) Developing *documentation* of traditional knowledge, expressions of folklore and genetic resources, especially through the formation of databases on traditional knowledge and expression of folklore at a national and international level to disseminate concise information on these matters.

- c) Examine the *expansion of intellectual property protection requirements* in order to enhance intellectual protection given to genetic resources, traditional knowledge and expressions of folklore.
- d) Examine the *current international framework* for access to and benefit sharing of genetic resources in a view to harmonize and standardize it in a way favorable to the equitable sharing of resources and the protection of traditional knowledge associated with these resources.
- e) Examine the *practical measures to address the misappropriation of genetic resources* and traditional knowledge associated with it.
- f) In collaboration with other relevant international and regional organizations, examine the means *to further assist developing countries, particularly LDC's in building their institutional and human resources capacities necessary for the preservation, protection and use of their traditional knowledge, expressions and related resources* with a view to advancing the socio-economic development of these countries.
- g) Assistance to traditional knowledge holders by providing training and information on intellectual property matters, in particular in relation to the *enforcement* of intellectual property rights towards strengthening their capacity to enforce their rights.

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