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

Sixteenth Session
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**POLICIES, MEASURES AND EXPERIENCES REGARDING INTELLECTUAL
PROPERTY AND GENETIC RESOURCES: SUBMISSION BY THE INTERNATIONAL
INSTITUTE FOR ENVIRONMENT AND DEVELOPMENT (IIED)**

Document prepared by the Secretariat

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

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

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

3. Pursuant to the above decision, the International Institute for Environment and Development (IIED), an accredited observer to the Committee, submitted a document entitled “Policies, Measures and Experiences on Intellectual Property and Genetic Resources” and requested it be made available as an information document for the sixteenth session of the Committee.

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

[Annex follows]

ANNEX

POLICIES, MEASURES AND EXPERIENCES ON INTELLECTUAL PROPERTY
AND GENETIC RESOURCES

This paper responds to the invitation to participants to submit papers to the Secretariat describing regional, national and community policies, measures and experiences regarding intellectual property and genetic resources before February 12, 2010.

It draws on research and activities undertaken with indigenous and local communities in India, China, Peru, Panama and Kenya, as part of the project “Protecting community rights over traditional knowledge: Implications of customary laws and practices”. See <http://www.iied.org/pubs/display.php?o=G02583>.

1. Community Registers and Databases of Genetic Resources:

Over the last decade or more, thousands of indigenous and local communities have documented their local bio-genetic resources, seeds and related traditional knowledge in Biodiversity Registers. These local registers are intended (among other things) to help communities assert their rights over bio-genetic resources which they have domesticated and improved (eg. traditional crop varieties), and about which they have a rich traditional knowledge (eg. traditional crops and medicines). In some cases, they have been developed as electronic databases – eg. of medicinal plants of Mijikenda communities in coastal Kenya, seeds of smallholder farmers in Guangxi SW China, and potato varieties of Quechua farming communities in the Potato Park, Peru. The Potato Park database has recently joined the FAO Treaty on PGRFA’s Multilateral System, thus recognising a community managed database alongside those of governments and ex situ gene banks.

Community databases could be linked to the WIPO portal and other patent system prior art searches, along with national databases, in order to:

- identify additional genetic resources not included in national databases
- identify local communities which have developed/improved genetic resources and hence have intellectual rights over them (eg. traditional crop varieties or landraces).

WIPO could explore the feasibility of allowing communities to include their databases in the WIPO portal and other patent searches, and examine any potential risks of this for communities. Safeguards would be needed to ensure the information cannot fall in the hands of potential users of genetic resources and ensure control remains in the hands of communities. These would need to be discussed/developed in collaboration with ILCs.

2. Community protocols for access and benefit-sharing:

A number of ILCs have also developed protocols setting out rules for access and benefit-sharing to local genetic resources which are used and conserved by them and form part of their cultural heritage, passed down from generation to generation. For example, a Kuna ABS protocol for research on biodiversity in Panama, an inter-community agreement

for Equitable Benefit-Sharing in the Potato Park (Peru); and others supported by Natural Justice¹. Such protocols can help communities protect their traditional knowledge and genetic resource rights, and have gained recognition in the Biodiversity Convention negotiation of an International ABS Regime as a tool to facilitate PIC and benefit-sharing with ILCs

(see submission by the Africa Group to ABS Working Group 8, which recommended that governments should recognise community protocols). Just as disclosure requirements could be used to ensure compliance with national ABS laws, they could also ensure compliance with community protocols. With respect to IP, such protocols may not allow the patenting (or acquiring of any IP) of community genetic resources or products derived from their use.

3. Recognising community rights over genetic resources

The CBD recognises the sovereign rights of states over their natural resources – however ‘state sovereignty’ is not the same as government ownership – rather, it means shared ownership amongst state actors. Thus, alongside state sovereignty over genetic resources, the customary rights of ILCs over genetic resources that form part of their heritage should also be recognised. This notion is embedded in the CBD article 10 (c) which requires states to protect and encourage customary use of biological resources by ILCs. It is also evident in the FAO Treaty on PGRFA provisions on Farmers’ Rights, which recognise the enormous contribution of ILCs to the conservation and development of PGRs, and require Parties to take measures to protect traditional knowledge and equitably share benefits from the use PGRs. Furthermore, the UN Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007 by a majority of 144 states, recognises the rights of indigenous people of their bio-genetic resources such as seeds and medicinal plants. Most traditional knowledge has genetic resources associated with it – and the two are intrinsically linked, as recognised by the recent CDB Expert Group on Traditional Knowledge.

In 2004, the International Potato Centre (CIP) in Lima agreed to return traditional potato varieties it had collected in the 1960s back to the Potato Park communities, thus recognising the rights of the communities over these genetic resources. The CIP also agreed to return a percentage of benefits from the past use of these potatoes, and to not allow patents to be taken out on the potatoes from the park or derived products. Following its success, this pioneering agreement is now being renewed. Similarly, the entry of the Potato Park’s collection into the FAO Treaty MLS effectively recognises this collection of genetic resources as belonging to the community.

Given the difficulty of monitoring collection in the field, and of enforcing the CBD provisions in the absence of ABS legislation in most user countries, disclosure requirements offer one of the few ways of promoting compliance with ABS laws. When the invention uses TK directly or substantially, the possibility of a joint inventor should be considered. In the growing practice of Participatory Plant Breeding (eg. in China and Nepal), formal breeders collaborate with farmers to develop improved varieties; however under current IP laws, farmers get no benefits for their contribution of seeds and knowledge. For example under China’s Plant Variety Protection law, only breeders can register PPB varieties, not farmers. Thus, joint rights over the resulting PPB varieties are needed, along with systems to assess the

¹ Abrell E. *et al* (2009). Bio-Cultural Community Protocols: A community approach to ensuring the integrity of environmental law and policy. Natural Justice and UNEP.

relative contribution of formal breeders and farmers to the resulting product to enable equitable benefit-sharing (Song and Li, 2009²). The value of the contribution of different actors can be scored at each step of the PPB process, which becomes the benefits accruing in percentage terms (LI-BIRD, 2007³).

4. Use of 'soft' IPRs

Patents and plant variety protection recognise individual/exclusive commercial rights, and so are unsuitable for protecting rights over collectively owned traditional knowledge and related genetic resources. But 'soft' IPRs, such as collective trademarks and Geographical Indications, allow for collective ownership and links to particular cultural practices, peoples and geographic locations, thus supporting the cultural values that help maintain TK and genetic diversity. The Potato Park has acquired a collective trademark to protect all products from the park (eg. medicinal plants and potato varieties). It would be useful to assess experience and potential of using different 'soft' IPRs for protecting intellectual property of ILCs over genetic resources – eg. the use of G.Is for protecting traditional rice varieties from the Himalayas. They could be assessed in terms of market protection/returns, practical utility/accessibility for ILCs, and support for ecological sustainability and cultural integrity. Such a study could compare collective trademarks, G.I.s, collective branding and copyrights, and suggest ways to improve existing tools, in collaboration with ILCs.

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See Traditional Knowledge and Biocultural Heritage Project:
<http://www.iied.org/natural-resources/key-issues/biodiversity-and-conservation/protecting-community-rights-over-traditio>.

[End of Annex and of document]

² China case study sheet. IIED, Asociacion ANDES, Fundacion Dobbo Yala, Centre for Chinese Agricultural Policy, ICIPE and KEFRI, Ecoserve and HFRC (India) (2009). Protecting community rights over traditional knowledge. Key findings and recommendations 2005-2009.

³ LI-BIRD – Local Initiatives for Biodiversity, Research and Development Newsletter, Vol 2 Issue 3 (2007). Nepal