



# TRADE NOTES

## THE REPORT ON INTELLECTUAL PROPERTY RIGHTS SEMINAR

The Institute of Economic Affairs (I.E.A-Kenya), together with the Ministry of Trade and Industry through Kenya Industrial Property Institute (K.I.P.I) organised a two-day seminar on Intellectual Property, Trade Related Aspects of Intellectual Property Rights (TRIPS) agreements of the World Trade Organisation (W.T.O), and development, at Brackenhurst International Conference Centre, Limuru, on the 8<sup>th</sup> to 9<sup>th</sup> of May 2006. The seminar brought together members of the National Council of the World Trade Organisation (N.C.W.T.O.) for a deliberation on intellectual property, multilateral trade negotiations at W.T.O. and development. The seminar examined the following questions: What is Intellectual Property? What is its role in the development process? And, What is Kenya's position on Trade Related Aspects of Intellectual Property agreement in the W.T.O. process? Finally, what are the issues arising out of this deliberation on Intellectual Property, and Kenya's position in the W.T.O. negotiation process?

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### Overview

The Institute of Economic Affairs noted that holding this seminar was a consultative process, which is in step with its mandate of availing opportunity to various stakeholders, and the wider public in the public policy making process. This is to ensure that decisions taken on public policy reflects the interests of most Kenyans.

Given the diversity of those present at the Seminar, the I.E.A. noted that this seminar, which was jointly organised by the Ministry of Trade and Industry and the I.E.A.'s Trade Information Programme, should focus on Intellectual Property, Development and the Multilateral

Trade Negotiation at the W.T.O. This seminar the I.E.A reiterated, was organised jointly with the Ministry of Trade and Industry, K.I.P.I in particular and members of the N.C.W.T.O.'s sub-committee on TRIPs as a means of establishing networks with other institutions, on public policy.

### Introduction

It was pointed out that on NAMA (Non-Agricultural Market Access), there is a big divide between the developed and developing countries. Whereas the developed countries are proposing the use of a Swiss formula, reduction of tariffs and harmonisation of tariffs, the developing countries fear, this will take away or circumscribe their

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policy space for promoting development based on trade.

The seminar was told that Kenya has bound her tariff at 35 per cent. However, Kenya is expected to raise this to 100 per cent. Should Kenya agree to this, she will take away room for manoeuvring. Moreover, Kenya like other developing countries have expressed concern over sectors key to her development and consolidation of gains from regional trade.

On Non-Trade Barriers, the seminar was told not much was being done by the developed countries, but more needs to be done.

On Trade Facilitation, the seminar was told there are concerns over how to meet the cost of commitment, and that Kenya does need technical assistance.

Finally, it was pointed out that how to incorporate development issues in the trade negotiation process of the W.T.O. is still is a key challenge to developing countries in general, Kenya in particular.

The seminar was informed that the N.C.W.T.O. was established in 1999. Its predecessor was the Inter-Ministerial Committee on Trade, which was dominated by the government. This organ was not inclusive, hence the formation of the N.C.W.T.O.

The N.C.W.T.O. was formed in order to generate a country position that is informed by a broader participation and representation of diverse interests. Whereas it has about 45 members, it is an open-ended committee with sub-committees on each aspect of the W.T.O process: agriculture, market access, trade facilitation, trade-related intellectual property and NAMA.

The N.C.W.T.O. has trained and generated knowledge on multilateral trade negotiations, well-equipped reference and national inquiry centre on W.T.O. However, its efficiency and effectiveness in the multilateral trade negotiations, has also been hampered by frequent transfer of government officers, lack of legal status, and therefore it is unable to access funds from the treasury for its activities.

### *Intellectual Property- An Overview*

The speaker noted that despite the fact that intellectual property is at the core of human progress, and development, the relationship between intellectual property and development is not well understood and appreciated, in developing countries, Kenya included.

To understand the significance of intellectual property, the speaker noted, one needs to ask the following questions: What is intellectual property? What is the relationship between intellectual property and development? What is the trade or non-trade related aspect of intellectual property? Is there non-trade related intellectual property?

According to the speaker, intellectual property refers to the innovative creations of the human mind, as opposed to natural creations of God. Creation of human endeavour, therefore, confers ownership, and entitlements, which have been the basis of human progress in production and reproduction. Human innovative creation can improve life, production and reproduction, just as it can exchange of values or commerce.

This makes intellectual property the most important agreement in the W.T.O. process. It also underlies the difference between the developed countries and the developing countries. While the former has intellectual properties in abundance and in various forms, the latter do not. Intellectual

properties are what drives human progress or civilisation, and defines an economy's or a sector's competitive edge, the speaker reiterated.

Intellectual property can be classified in three categories: Industrial Property, Copyright and related rights, and Plant Breeders rights. Industrial Property refers to those properties capable of industrial application, that is mass production. Patent rights denote invention.

Trade Mark denotes a sign of a product which distinguishes it from similar and other products. It represents three things: quality, manufacturer's reputation and source of information about the manufacturer. Others are industrial design, and geographical indicators.

Copyrights cover literary works, artistic work. It only protects ideas expressed in a permanent form; not ideas per se. Lastly, Plant Breeders rights, protects the new plant varieties.

Each and every intellectual property mentioned above, is covered by a legislation such as Industrial Property Act 2001, Trademarks Act Cap 506, Copyright Act, 2001, Seeds and New Plant Varieties Act Cap 326, as the case may be.

The speaker observed that in the current W.T.O. TRIPs negotiation process, while most owners of Intellectual Property favour strong Intellectual Property regimes, those that own a few, favour a weak regime, under a framework that allows for flexibilities in the application of patents for development purposes.

The speaker also observed that given Kenya's idle capacities such as the Numerical Machine and the Kenya Railways workshop, Kenya could experiment with use of expired patents and reverse engineering. This, the speaker noted was

has been used by developing countries to develop their capacities for innovation.

The speaker further observed that since intellectual property is cross-cutting, every interested party should participate in the formulation of the National Intellectual Policy initiative that K.I.P.I is leading, in order to address the issues of intellectual property and development. The speaker noted that the Bomas Draft Constitution's Chapter 26 did recognise intellectual property issues-what is to be done, and what each actor should do. However, with the defeat of the Draft Constitution, a lot more need to be done.

### ⇒ *T.R.I.P.s and Challenges for Kenya*

The speaker noted that the key challenges Kenya faces are numerous: first, at the national level, there is lack of public awareness, and national intellectual policy. Second, there is the challenge of how to improve innovation, and creativity for development; and how to protect indigenous knowledge. Third, there is lack of proper legal framework for protecting indigenous knowledge, both at the national and international levels. However, the office of the Attorney General has instituted a taskforce to look into this issue.

In addition, Kenya faces the challenge of how to harmonise the interest of the indigenous medical practitioners with the interest of Western-trained counterparts, given the problem of bio-piracy that has caused a bad relationship between the two practitioners.

Kenya is also faced with the challenge of how to create institutions for development around intellectual property. That is, how to fund human resource, research, and venture capital. Moreover, Kenya lacks adequate professional training in Intellectual Property, and patent application

drafting expertise.

Furthermore, Kenya has weak intellectual property enforcement mechanism, and uncoordinated national intellectual property administrative structures. In addition, the universities and public research institutions' emphasises on publication rather than patenting.

At the international level, there are difficulties of implementing stringent requirements such as the TRIPs Agreement Article 27-3 (b) and 31 (1), and the General Council Decision of 30<sup>th</sup> August 2003 on the implementation of the Paragraph 6 of the Doha declaration on TRIPs and Public Health.

Lastly, the speaker noted that K.I.P.I. is faced with the challenge of disseminating information on the importance of innovation and patents. In order to educate Kenyans on these issues, K.I.P.I. is reaching out to Kenyans through seminars and workshops.

### ⇒ *Recommendations*

The speaker made the following recommendation for Kenya on intellectual property rights and development:

There is need to strike a balance between the benefits of the intellectual property right holder and the public, with a view to having a win-win situation for both the holder and the public.

Kenya needs to optimise the TRIPs flexibilities in order to take care of health safety and food security as well as environment for her citizens.

In enacting intellectual property laws, Kenya should ensure the laws simultaneously reflect the needs of the people and ensures the flow of information and technology.

Lastly, Kenya needs to expeditiously enact a technology transfer law, an equivalent of the US's

Bayl-Dole Law of 1980, which allows universities to commercialise their research findings.

### ⇒ *Monopoly Commission and Intellectual Property*

The speaker noted that what is monopolistic is contested, and vary from country to country. In Kenya, a monopoly is said to exist if two or more companies control more than half of the goods or services in a particular market.

In competition, monopoly in itself is not seen as evil; what is evil is the abuse of monopoly. When it delays innovation. The welfare of the consumer is the concern of fair trade.

In competition, the seminar was told, monopolies by virtue of patents are beneficial. They promote technological efficiency and development, since they can be products of competition, and business rivalry.

In competition, the trademark is a friend. Similarly, patents are not seen as evil since they have an in built transparency, are pro-competition and innovation. However, they can be abused to delay or suppress new technology. When suppression of patent does occur, competition is subverted.

Similarly, when a few companies do accumulate patents, the concentration of patents, cross-licensing of patents, patent pooling and restrictive licensing can subvert competition. Moreover, the acquisition of various patents can give a firm a head start for market consolidation.

Moreover, extension of the period of patency through with-drawal and amendment of applications and initiation of interference proceedings, in other words, through legal technicalities which favour large firms, can extend the lifespan of a patent, and therefore of a

monopolist beyond the stipulated 20 year period.

The speaker noted that the Commission cannot compel a monopolist by the virtue of a patent, to license more than one company to produce essential drugs such as Anti-Retrovirals (A.R.V.s). In this sense, too, a patent holder can harm competition. However, the provision of the Restrictive Trade Act that covers abuse of dominance can be invoked, in such instances. But, the speaker noted, in such instances, the judicial process, more than anything else has been the greatest impediment to curbing the abuse of dominance.

The speaker also noted that the Commission has a broad mandate to check on unfair trade practice by any entity, government included. The government, it was pointed out, is a legal person, can sue and be sued. Indeed, the Commission has acted against the government, in the case of Ministry of Agriculture and Macadamia farmers, where the state was guilty of unfair trade practice.

Lastly, the speaker noted that despite the shared goals, Intellectual Property and Competition are not exactly complementary. Hence the need for collaboration between the two offices.

### ➤ *Intellectual Property and Development*

The seminar was told that the institution for protection and nurturing of intellectual property has evolved over the last four hundred years, and T.R.I.P.s. is the most recent multilateral framework.

The seminar was also told that patents are important because of a number of reasons: patents do protect, and encourage creativity, as well as attract investment. They also provide scientific information, promote research and competition, and contain the latest information in a field of

inquiry. Hence, they can stimulate further research, innovation and new industrial application.

A product is considered innovative if it is a new solution to a problem, novel, and industrially applicable.

The seminar was told that until 1990, when the Kenyan patent system began, patents were registered in the United Kingdom, and protected in Kenya. In 1994, the International Centre for Insect Physiology and Ecology (I.C.I.P.E.) registered the first patent. Since 1994, thousands of patents have been registered, by institutions and individuals who include a secondary school student.

An inventor can patent their innovation at the Nairobi K.I.P.I. or the Harare based A.R.I.P.O. (African Regional Industrial Property Organization) or at W.I.P.O. (World Intellectual Property Organization) the choice of where to register, is subject to the investor's cost and convenience considerations.

The seminar was informed that at K.I.P.I. one could at a fee, access information on patents, either from K.I.P.I.'s Kenya database or international database through W.I.P.O. The participants noted that a Kshs. 2000 per search was too high, and may hinder access. K.I.P.I. was asked to re-evaluate the fee, but K.I.P.I. pointed out that for students, who cannot afford this fee, there is a provision for a waiver, if one appeals to the Minister of Trade.

### ➤ *Plant Varieties Protection (Plant Breeders rights)*

The participants were told the Plant Varieties Act covers new plant varieties. For a variety to be

adjudged new, it must be new, distinct, and stable and have an acceptable denomination. It covers all plants except algae and bacteria.

The applicant must be a breeder, and must show the value added. They can be government employees, or employees of a research institute, or institutes. However, employees have in the past felt short-changed in the benefit sharing. Consequently, there is need for a policy on intellectual property and benefit sharing.

Compared to the patent application, breeders rights application is relatively easy, and offer one's varying duration of protection: 18 years for tree and vines, 15 years for others with a possibility of extension for up to 25 years.

It offers one protection against unauthorised (intentional infringement) replication and multiplication of one's breed and conditions of propagation. However, there are exceptions to this rule: one is allowed access to private and non-commercial use; experimentation, breeding other varieties; farmers' privilege, and compulsory licensing.

The seminar was told that by being a signatory to U.P.O.V. (International Union for the Protection of New Varieties of Plants), Kenya has realised the following benefits: increased investment in breeding and commercialisation of new varieties; increased number and range of improved varieties available to farmers; increased collaboration between foreign and local breeders, on the one hand, the international and national institutions on the other.

In addition, there has been increased number and range of improved varieties available to farmers, as well as enhanced access to internationally bred materials. However, Kenya still faces the following

challenges: inadequate facilities for testing ornamental varieties that form the bulk of P.V.P applications, and limited understanding of P.V.P.

### ➤ *Trade Marks*

The seminar was told that a trademark is a distinct sign that identifies goods or services, and its manufacturer. It is both a reminder and a guarantor of quality. It includes words, letters, and slogans of about 20-30 words. Some contain single colour. It also links the consumer to a product and a producer.

Trademarks have various functions: they are used for marketing, differentiating products from others similar to it, creating customer loyalty and can be used as collateral. It is also a source of information on the origin of a good.

For a sign to be registered as a trademark, at a fee, it must be distinct and have no relation with any other existing product in the market. However, it cannot be registered if: it is similar in visual or phonetics. One can also alter a trademark by applying for re-examination. It is then examined if it results in a new sign, and does not extend beyond the existing category of goods it covers. Subsequently, the applicant must notify the consumers of the changes made.

The protections on trademarks, the seminar was told, are territorial. The three East African countries: Kenya, Uganda, and Tanzania have a regional agreement on the protection of Trademarks. Depending on the cost considerations and market choice, one can register a trademark at the national, regional or international organisation. If registered at the International Organisation, one must notify the rest of the countries.

The seminar was told that pharmaceuticals are exempted from the phonetic rules in naming

products, partly because unlike other goods, the choice of names are derived from the chemical formulations, and partly because, most of the products are bought and consumed on doctors advice. This explains the flexibility in brand naming.

The seminar was also told that the subject matter of trademarks has extended into other spheres such as Internet, colour and smell. Consequently, there are more challenges for legislation. For example, the Kenyan law is yet to cover areas such as smell, and sound.

The seminar was told that infringements on trademarks are frequent. Consequently, the owners of trademarks must exercise constant vigilance. However, this is a greater challenge for Internet based trademarks, since they transcend territorial jurisdictions and are therefore hard to detect .

### ➤ *Geographical Indicators*

The seminar was told that geographical indicators refer to the geographical origin of a product, and denotes the particularities of products by the virtue of its place of origin. Geographical indicators can be an appellation. In the multilateral trading agreements, it has been made contentious by the claims of cultural immigrants, and has been an item of GATT negotiation process.

The seminar heard that T.R.I.P.s that has high level of protection for spirits and wines from the European Union, is the most recent multilateral agreement on geographical indicators. Other agreements are the Paris Convention, Madrid, and Lisbon Agreement. These agreements however, have limited members, thus limited territorial protection.

The French-style form of protection is the most favoured, but, the United States has objection.

T.R.I.P.s has a comprehensive definition for geographical indicators.

Kenya should make a case for geographical indicators for its unique products such as coffee and papaya wine, based on its unique geographical location, and climatic conditions.

The seminar was told Kenya has a draft Bill on Geographical Indicators which was submitted to parliament in the year, 2001. However, this Bill was overtaken by events when Parliament prorogued before it was tabled for debate. This Bill should be re-submitted.

### ➤ *Intellectual Property and Counterfeits*

The seminar was told that the counterfeits cost Kenya about Kshs. 6 billion in lost revenue to the government, and about Kshs.30 billion to the industry. However, the cost of counterfeits to the consumer has not been computed.

About 80 per cent of all leading products are counterfeited. Indeed, counterfeits are pervasive and cover almost each and every well-known brand in the market. The Middle East is fast overtaking the Far East as the source of counterfeits found in the Kenyan market. Some of the goods counterfeited include computers and batteries.

Locally, there exist a small cottage counterfeits industry, in places like Kariobangi South, and Kibera in Nairobi. Moreover, a good number of counterfeits are sold in the supermarkets, that through court injunctions have blocked inspectors from their premises, where these goods are stored or sold.

While there are laws such as Trade Act, Copyright Act 2002, Weight and Measures Act,

the Penal Code, these laws are lacking in various ways in dealing with counterfeits. These laws and institutions are riddled with conflicting jurisdictional overlaps and omissions that impede the successful prosecution of offenders.

Moreover, the penalties spelt-out in these laws are too low to act as deterrence. This coupled with porous borders, and absence of a single law, and enforcement agency, are the greatest challenges in the fight against counterfeits. Indeed, in a sense, the judicial process, more than anything else, with its frequent grants of injunctions, has been an impediment to the fight against counterfeits.

Furthermore, the fight against counterfeit has been made difficult by the fact that the distinction between substandard goods and counterfeits is blurred.

The fight against counterfeit requires a single law, that clearly defines what a counterfeit is, and a single enforcement authority with trained officers, it was suggested. Whereas the judicial officers have been trained, the current law is wanting because of low penalties for these offences.

### ***Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement***

The seminar was told that the T.R.I.P.s is a product of the international political economy. Mostly, the United States based pharmaceutical and entertainment industries, drive the negotiation process.

Kenya was given four years within which to comply. However, Kenya can sue for extension of the period within which to comply. While this is useful, successful re-negotiations, depends on the capacity, human resource and finances are needed for re-negotiation.

The importance of T.R.I.P.s is that unlike WIPO where one could exclude some inventions, under T.R.I.P.s patents shall apply and be availed in all fields of technology. Moreover, under T.R.I.P.s both the industrial process, and the product of such a process, shall be patented. The following therefore are key concerns for Kenya:

Since Kenya is a signatory to U.P.O.V. there is need to harmonise the incoherent positions between the demands of the W.T.O.-TRIPs and the U.P.O.V. commitments.

That the judicial system needs to be responsive to the demands of the Intellectual Property protection. Presently, it is not, due to low fine and cumbersome judicial procedures.

### ***➤ Intellectual Property and Health Concerns for Kenya***

The seminar was told that the Intellectual Property concerns for Kenya covers medical implements, reagents, and medicines. In the Doha Round developing countries, Kenya included, underscored the need for flexibility on the following: parallel importation, voluntary compulsory licensing and exhaustive rights.

However, the benefits from some of these measures have not been satisfactorily realised: whereas the Multinational Corporations can license local producer, lack of manufacturing capacities that is Global Fund Complaint, has hampered the effectiveness of this measure. Parallel importation has not had great effect on price of medicine either; Moreover, frequent court injunctions have hampered the effectiveness of this measure.

In spite of these drawbacks, in order to improve the local manufacturing capacity for drugs, the



Ministry of Health is proposing a number of incentives for the local manufacturers. These measures include the exemption of pharmaceutical material or products from pre-shipment inspection, and tax waiver on manufacturing equipment. This is critical for raising the standards of a number of industries in order to meet the Global Fund requirements. Presently, only seven industries in Kenya do meet these standards.

In addition, the Ministry of Health is encouraging patent holders to license as many agents as they can. While parallel importation does harm agents, it does not harm patent holders because parallel importation is legal, and does reflect fair return of the patentee in the market of origin. Consequently, parallel importation is compatible with patent rights, and should be encouraged.

The seminar noted that the Kenyan health-sector is faced with numerous challenges. These are:

- ✎ Under developed manufacturing capacity; lack of capacity to inspect and check the in flow of counterfeit drugs, only two entry points have inspection teams, that is the Jomo Kenyatta International Airport in Nairobi and Moi International Airport in Mombasa. This leaves several routes, uncovered.
- ✎ Kenya also faces the challenge of how to effectively finance health care, and the increase in number of quacks in the practice of medicine. In addition, abuse of anti-biotic is on the rise, fuelled by over -the- counter prescriptions. Moreover, the judicial process is slow and the punishment for quacks is too lenient to deter these practices.
- ✎ The seminar was also told that the case of herbal medicine is contentious. First, unlike Western-

trained medical practitioners the Department of Culture and Social Service register them. While the Ministry of Health allows the use of herbal preparations, it does not regulate its training, and is yet to decide whether or not, and how to integrate the two practices. Presently, the Ministry of Health is examining how to address the issues of alternative medicine and its practitioners.

- ✎ The Ministry noted that there is need for a National Drug Policy. The Ministry has suggested that drug prescription should, in most instances be done by generic names. However, referral hospitals may prescribe using brand names.
- ✎ The Ministry noted that there is need to harmonise the Ministry of Health Act in line with Intellectual Property Act, W.T.O.'s TRIPs agreements; educate healthcare providers and the public on the Intellectual Property Act; and strengthen the regulatory structures.

The seminar was also informed that the Ministry of Health, in recognition of the demands on intellectual property and provision of sound health care has undertaken a number of measures. These include:

- ✎ The appointment of Deputy Director of Medical Services in charge of Trade Affairs. This office liaises with other relevant Ministries and departments on drugs and trade.
- ✎ Trade officers have been appointed to the Dentist and Pharmacist Board. The inspection capacity of the Pharmaceutical Board has been improved in terms of human resource, currently, it has 50 person, up from 3.
- ✎ The Ministry has also shortened the

recommended period for registration of Malarial drugs. While the recommended period for registration of drugs is 12 months, anti-malarial drugs can now be registered after three months. Indeed, the process of registration of drugs, it was noted, depends much more on how first the applicant can provide the required sample, and information on the drug to be registered, than on the registration process per se.

- ✎ The ministry is considering introducing direct price controls as a means to improving access to healthcare.

### ➤ *Copyrights and Intellectual Property Rights*

The seminar noted that the Copyrights protect any form of expression of ideas, not the ideas themselves. Whereas Kenya's Copyrights Act 2001 is W.T.O complaint, the protection of owners of Copyrights is still a difficult task, due to the following reasons:

*First*, there is lack of public awareness, and lack of training and awareness on the part of right holders as well as lack of a national policy on Intellectual Property.

*Second*, there is lack of co-ordination amongst the enforcement agencies (the Kenya Revenue Authority, the Police, and officers of the department of Weight and Measures) as well as lack of training on the part of the enforcers: the magistrates, and the police.

*Third*, the law of evidence on Copyright infringement are very stringent. They are detailed and complex. However, the awards for damages suffered, is low; and the cost of litigation is high.

*Fourth*, there is fragmentation and wrangles in

most of Copyright holders associations as well as lack of national data of Copyrights, has hampered vigilance against infringement.

*Lastly*, the pace of technology transformation is fast and hard to keep up with in terms of legislation.

### ➤ *Protection of Genetic Resources in the Context of the W.T.O.*

The seminar noted that Article 27-3 (b). allows for the members to exclude from patentability plants and animals other than micro-organism, and essential biological process for the production of plants or animals other than non-biological and micro-biological processes. However, Members shall provide for protection of plant varieties either by patents or by effective *sui generis* system or by any combination thereof.

However, it was noted that the provisions of Article 27. 3. (b) lacks clear definitions or common understanding of terms, its concepts, such as what a micro-organism is, what genetic material or resource is? In essence, it provides a wide room for varied definitions and use of these concepts. Its provisions are ambiguous, broad and open-ended.

The seminar noted that Kenya is yet to decide what value should inform her policies, regulations or legislation on access to plant and genetic resources. Is it equity? Is it development? Or is profit for the state or individual?

In addition, Kenya must decide what it wants to protect, is it the genetic resources itself? The socio-cultural interests in the genetic resources? Or is it the profits accruing from access to and use of search materials or to maintain the public good in the genetic resources?

Whatever, it is that will form Kenya's policy or laws on genetic resources, it ought to be realistic expectation of benefit sharing, which encourages investment, transparent bio-prospecting, and exchange of educational opportunities. Indeed, in light of Kenya's inability to satisfactorily monitor the bio prospecting, and strictly enforce the terms and conditions of access to genetic resources, this is an important consideration.

Significantly, the decision on the above concerns should be informed by critical assessment of Kenya's needs and this process should be consultative, involving all the lead institutions, and widest possible community participation.

The seminar noted that Kenya needs a stricter definition of invention and novelty in Article 27-3 (b). Presently, the 2001 Act has no specific exclusions relating to life forms. This is at odds with Kenya's international position. Nevertheless there are other Acts that can possibly be used to cover life forms such as the Health Act, or the 1989 Act, in particular section 21(3) (a) which excludes discovery from patentability.

The 2001 Act does not define discovery. Although section 21(1) does define invention, the definition is still ambiguous. Nor is there a definition of micro-organisms. Section 58 (6) suggests a broad interpretation of micro-organisms and liberal interpretation of what is a discovery and invention.

Lastly, the seminar noted that Kenya need to negotiate for broader prohibition of life forms and the incorporation of the recognition of Traditional Knowledge as a distinct form of Intellectual Property Right.

The seminar was further told that the following are the key challenges Kenya faces in the protection of genetic resources:

- ✘ The lack of co-ordination of the multiple agencies that have overlapping mandates. This creates problem for potential applicants as well as monitoring and evaluation of access to and research on genetic resources.
- ✘ That Kenya should not adopt the international position on intellectual property wholly, without due regard to her concerns. Presently, Kenya has adopted international positions that reflect little that is Kenyan.
- ✘ While the establishment of a Committee on Traditional Knowledge is commendable, albeit without a budget line, areas of initiatives on intellectual property rights are still few and highly dependent on individuals. There is no significant political will for greater commitment to intellectual property rights initiatives.

Moreover, Kenya lacks a national policy, regulatory framework, that govern access to genetic resources, which addresses issues of benefit sharing, prior and informed consent, and community rights on genetic resources.

Whereas the Environmental Management and Co-ordination Act (1999) has provisions that can address some of these concerns on accesses to genetic resources, none of the regulations, guidelines or measures specific on genetic resources have been promulgated or drafted. This is partly because the National Environmental Management Authority (NEMA) is a new institution, with broad mandate and limited resources. And partly, because the concerns on genetic resources are lowly ranked in its priority.



**INSTITUTE OF  
ECONOMIC AFFAIRS**

ACK Garden House  
1st Ngong Avenue  
P O BOX 53989  
00200 - Nairobi  
Kenya

Phone: 254-020-2717402, 2721262  
Fax: 254-020-2716231  
Mobile: 0724-256510, 0733272126  
Email: admin@ieakenya.or.ke  
Website: www.ieakenya.or.ke

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PROGRAMME

**DIRECTORS:**

DR. JAMES KARUGA  
MR. JOE GICHUKI  
MR. EVANS OSANO  
MS. MUSABI MUTESHI  
MS. BETTY MAINA

**EDITORIAL:**

MIRIAM OMOLO  
MARY ODONGO  
ALBERT MWENDA

**WRITTEN BY:**

MIRIAM OMOLO

**DESIGN & LAYOUT:**

NELLY KIBATHI

## *Recommendations on W.T.O and T.R. I. Ps*

There is need to review the provisions of Article 27.3 (b), the relationship between the TRIPS Agreement and Convention on Biological Diversity (CBD), protection of Traditional Knowledge (TK) and expression of folklore, as well as the decision on the implementation of paragraph 6 of the Doha Declaration on the TRIPs Agreement and public health.

- ✎ In addition, there is need to address issues of technical corporation and capacity building, the utilisation of provisions of agreement of the amended TRIPs agreement (Notification), and the extension of transitional period for least developed countries (LDCs) to 2016.
- ✎ There is need to re-examine the Non-violation and situation complaints, special and differential treatment proposals referred to the Council, review the implementation of TRIPs Agreement under Article 71.1. Lastly, review the application of the provisions of the section on geographical indication (G.I.) under Article 24.2 on extension of G.I. protection beyond wines and spirits.
- ✎ The National Committee on TRIPs needs to re-examine Article 27, 3(B). in light of the provisions of UPOV, and other relevant policy documents, and that this be done within 30 days from the date of this conference.



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