**DRAFT PIECE FOR DISCUSSION**

# Traditional Knowledge and Genetic Resources in Economic Partnership Agreements: Elements of a Positive Agenda for ECOWAS Countries

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## I. INTRODUCTION

This paper will examine, in brief the assumption made by many that traditional knowledge and genetic resources are areas of offensive interest for African, Caribbean and Pacific (ACP) countries in their Economic Partnership Agreement (EPA) negotiations with the European Union. The inclusion of intellectual property in these negotiations has been the cause of considerable concern, especially considering the fact that IP has been included with the issue of goods as falling under the December 31, 2007 deadline for the conclusion of the EPA agreements. Nevertheless, ACP countries, especially ECOWAS, have committed to negotiating intellectual property. The ECOWAS group has agreed with the EU in the Joint Summary Report of the Technical Thematic Sub-Group on Intellectual Property Rights that one of the priority areas for negotiations is, among others, "protection of genetic resources, traditional knowledge and folklore expressions." As such, ECOWAS countries must put forward a proposal on this subject or be left with whatever the EU puts on the table. But, what should that proposal entail and what are the minimum non-negotiable elements that ECOWAS countries should require from the EU? The answer to this is complex but it begins with making two sets of distinctions:

- between traditional knowledge and genetic resources
- between those issues that can be addressed by national policy and those that have to be negotiated with other countries

This paper will begin with an attempt to focus some definitional issues, sketching some of the subject matter covered by the use of the terms traditional knowledge and genetic resources. This will be followed by considering the particular issues that extend beyond national policy and thus need to be negotiated at the international/EPA level. After an examination of a) the standards to which the ECOWAS

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countries have already committed themselves and b) the standards to which the EU has already committed itself, the paper will then outline some approaches to these issues from the EU and other ACP regions during the EPA negotiations. Finally, the paper will outline the elements of a positive agenda for the ECOWAS region in EPA negotiations, and some additional commitments that have the potential to add further value.

## II. Some Definitional Issues and the Scope of What Needs to be Negotiated

While there is some overlap between traditional knowledge and genetic resources, the concept of traditional knowledge covers a far larger body of knowledge and behaviours (including such things as folklore and folkloric designs). While linked, there are therefore different policy implications.

### II.1 Traditional Knowledge

I will not attempt to define all the subject matter covered by the concept of traditional knowledge. In addition, the definition varies amongst countries quite widely. As a beginning we can see it has the potential to include
Medicinal information
Agricultural informations
Crafts
Music
Literature and stories

Instead, I will attempt to frame the basic problem of traditional knowledge, leaving specific definitions and scope of traditional knowledge to countries to determine. The TK problem is two-fold: heritage and innovation.

#### II.1.1 Heritage

Traditional knowledge is that body of information about processes and products that has been developed in a long-term iterative process. The heritage portion of traditional knowledge is a body of information that is static and has been developed by indigenous/traditional communities and, in and of itself, is not subject to copyright, patents or other elements of intellectual property rights because it does niot meet requirements of novelty, newness, originality etc.

In some countries, indigenous communities are separate polities from the state polity. In many African countries, the indigenous polities are

contiguous or are legitimately included within the state polity. Thus, ownership of TK is not always in the hands of the state and lies in the hands of the indigenous communities. This leads to several problems, some of which are national policy problems and others of which are international policy problems;

- Recognition of ownership of heritage by indigenous/traditional communities (National Policy Challenge)
- Entry and exit rules for individuals from indigenous/traditional communities for sharing heritage with national non-members (National Policy Challenge)
- Use, copying and distribution of heritage by national non-members (National Policy Challenge)
- Use, copying and distribution of heritage by non-nationals (International Policy Challenge)

What are the consequences of this understanding? At the international level we need rules for addressing:

*Use, copying and distribution of heritage by non-nationals:*

The concern here is to prevent the unauthorized and unfair use, copying and distribution of heritage by non-nationals. This requires at a minimum:

- Recognition by other countries of ECOWAS national and/or regional systems of ownership of heritage (be they individual, community-based or state-based)
- Recognition and enforcement of ECOWAS national and/or regional systems of Prior Informed Consent
- A commitment from other countries to ensure the prevention of the patenting or other intellectual property privatization of heritage in other countries, including through databases and disclosure of origin/source requirements

### II.1.2 Innovation

The innovation element of the definition recognises that traditional knowledge is not static and that there is a strong development interest in ensuring that this knowledge is developed. It is up to each country to determine who is best placed to develop that knowledge. There are several challenges posed by both the need to ensure that traditional knowledge develops, while ensuring fairness and equity. These include:

- Encouraging Innovation using/based on/derived from heritage by members of indigenous/traditional communities (National Policy Challenge)
- Entry and Exit Rules for members of indigenous/traditional communities who have made innovations using/based on/derived from heritage (National Policy Challenge)
- Encouraging Innovation using/based on/derived from heritage by national non-members of indigenous/traditional communities (National Policy Challenge)
- Encouraging Innovation using/based on/derived from heritage by non-nationals (International Policy Challenge

What are the consequences of this understanding? At the international level we need rules for addressing:

*Encouraging Innovation using/based on/derived from heritage by non-nationals*

Most developing countries have populations best placed to pursue the development of innovations based on traditional knowledge. Such innovation can include a range of additions, adaptations, derivatives, new uses etc. However, the capital may not always be available in developing countries. Thus it may be necessary to enable innovators from other countries to innovate on heritage. However, such innovation must be fair and equitable and benefit the communities from which the heritage is drawn. Building on the heritage portion, this requires, at a minimum;

- Recognition and enforcement by other countries of ECOWAS national or regional rules on Access and Benefit Sharing for innovations using/based on/derived from heritage
- The obligation by other countries to prevent the patenting or other IP privatization of innovations using/based on/derived from heritage, if they do not show compliance with the applicable ECOWAS national/regional rules for PIC and ABS.

## II.2 Genetic Resources

In the comparison to traditional knowledge, genetic resources are essentially finite, static and depletable. In analogy, they are similar to mineral and other natural resources. As such they are the subject of state sovereignty, something which Article 15 the Convention on Biological Diversity recognized at the insistence of developing

countries. However, that state sovereignty is modified by obligations to ensure that indigenous/traditional communities receive benefits:

Article 8j notes that each state party shall:
" Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for 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;"
Nevertheless, for international purposes, the state is the only relevant entity under the CBD. This is true for all ECOWAS members as well as the EU because all are parties to the CBD.

For our purposes, genetic resources can be sub-divided into four categories:

- Human genetic resources (not specifically covered by the CBD)
- Animal genetic resources
- Plant genetic resources (TRIPS Agreement Article 27.3.b)
- Plant genetic resources for agriculture (Covered by the FAO Treaty on

The static nature of the pool of genetic resources means that several of the same problems that existed for heritage TK exist for genetic resources as well, with the modification that the state is the primary actor. These include:

- The use, copying and sharing of genetic resources by national non-members of indigenous/traditional communities (National Policy Challenge)
- The use, copying and sharing of genetic resources by non-nationals (International Policy Challenge)

At the same time we also need to encourage, and under the CBD, have an obligation to enable access and innovation utilizing genetic resources. Thus we also have a problem of

- Encouraging innovation using genetic resources by members of indigenous/traditional communities (National Policy Challenge)
- Encouraging innovation using genetic resources by national non-members of indigenous/traditional communities (National Policy Challenge)

- Encouraging innovation using genetic resources by non-nationals (International Policy Challenge)

This will all require at a minimum:

- Enforcement by other countries of ECOWAS state or regional Prior Informed Consent/permission/licensing rules, Materials Transfer Agreements and Access and benefit Sharing systems.
- Prevention of patenting or other IP privatization of ECOWAS genetic resources
- The obligation by other countries to prevent the patenting or other IP privatization of innovations using/based on/derived from heritage, if they do not show compliance with state ECOWAS national/regional rules for PIC and ABS and/or a material transfer Agreement with the ECOWAS state of origin/source.

## II.3 The Minimum Necessary Elements for a Positive Agenda

Internal national policy challenges should not be subject to negotiation or dispute settlement. However if traditional knowledge and genetic resources are to be true positive agenda items there are minimum elements that an agreement must have. Based on the previous sections these entail:

Traditional Knowledge

1. Recognition by other countries of ECOWAS national and/or regional systems of ownership of heritage (be they individual, community-based or state-based)
2. Recognition and enforcement of ECOWAS national and/or regional systems of Prior Informed Consent for heritage
3. A commitment from other countries to ensure the prevention of the patenting or other intellectual property privatization of heritage in other countries, including through databases and disclosure of origin/source requirements
4. Recognition and enforcement by other countries of ECOWAS national or regional rules on Access and Benefit Sharing for innovations using/based on/derived from heritage
5. The obligation by other countries to prevent the patenting or other IP privatization of innovations using/based on/derived from heritage, if they do not show compliance with the applicable ECOWAS national/regional rules for PIC and ABS for heritage.

Genetic Resources

6. Enforcement by other countries of ECOWAS state or regional Prior Informed Consent/permission/licensing rules, Materials Transfer Agreements and Access and benefit Sharing systems.
7. Prevention of patenting or other IP privatization of ECOWAS genetic resources
8. The obligation by other countries to prevent the patenting or other IP privatization of innovations using/based on/derived from heritage, if they do not show compliance with state ECOWAS national/regional rules for PIC and ABS and/or a material transfer Agreement with the ECOWAS state of origin/source.

From the totality of minimum requirements this we understand:

- There is no point in negotiating if there are no national systems of recognition of ownership traditional knowledge or genetic resources.

- There is no benefit to be gained in negotiating if there are no national or regional prior informed consent systems for traditional knowledge and genetic resources.

- There is no benefit to be gained in negotiating if there are no national or regional access and benefit sharing rules for traditional knowledge and genetic resources.

## III. Existing Systems of Protection of TK and GR in the ECOWAS region

It is clear that, on a factual basis, ECOWAS countries have differing endowments of TK and genetic resources and that they may also have some differing opinions on the relationship between indigenous communities and the state. Those differences suggest that ECOWAS countries should look to maintain policy space to determine their policies and look to further integration and harmonisation in the future but not yet at this stage. The fact that ECOWAS members belong to different regional groups with differing commitments and authority should also give pause in seeking out a positive agenda on TK and GR. Some belong to the African Intellectual Property Organisation (OAPI); Benin, Burkina Faso, Cote d'Ivoire, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Senegal and Togo. Three countries belong to the African Regional Intellectual Property Organisation (ARIPO); the Gambia, Ghana and Sierra Leone. Cape

Verde, Liberia and Nigeria are not members of either of the two organisations.

These are governed by several agreements and commitments in this area:

## III.1 The Bangui Agreement (OAPI)

### *III.1.1 Traditional Knowledge*

Annex I, which covers substantive patents contains no requirement for disclosure of origin/source, or for proof of compliance with PIC and ABS for patent applications using/based on/derived from traditional knowledge.

### *III.1.2 Genetic Resources*

Annex I, which covers substantive patents contains no requirement for disclosure of origin/source, or for proof of compliance with PIC and ABS for patent applications using/based on/derived from genetic resources.

*Plant Genetic Resources*
Annex X of the Bangui Agreement (1999) covers plant variety protection, and by definition plant genetic resources and their uses in breeding plant varieties. Nothing in the agreement addresses the issue of misappropriation of plant genetic resources endemic to the OAPI membership. The adoption of the UPOV 1991 model of implementation also means that OAPI states have made a choice to allow nationals to utilize plant genetic resources without any system for fair and equitable benefit sharing or prior informed consent for use of such resources.

## III.2 The Harare Protocol (ARIPO)

The agreement contains no rules on traditional knowledge or genetic resources nor any provisions for preventing their misappropriation.

This examination of the primary regional agreements in the ECOWAS region suggest that any extant models are at the national level, I they exist at all and that these are likely to vary according the expertise, aims, goals. This re-emphasizes the dangers of pushing to negotiate issues such as traditional knowledge and genetic resources in the absence of coherent national and regional policies on these issues. Given this gap, it is difficult to see how a full positive agenda might be achieved. However, there may be some hope in reliance on existing or

developing international standards, while leaving policy space to continue work at the national and regional level in ECOWAS.

## IV. The Governing International Framework: Commitments and Areas from which to draw

### IV.1 Traditional Knowledge

The Convention on Biological Diversity may have the clearest iteration of the treatment of traditional knowledge in its article 8j. The ECOWAS negotiators may wish to strengthen the CBD language and simply state that "Each state shall ***recognize***, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and ***enforce*** the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices;

The OAU Model Law (available at http://www.grain.org/brl_files/oau-model-law-en.pdf) "Legislation for The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources" may also be a source of provisions that ECOWAS countries can use. It explicitly addresses the relationship between access to resources and to benefit sharing and prevention of misappropriation. While the language is focused on genetic resources, it can also be applied to traditional knowledge if appropriately modified.

### IV.2 Genetic Resources

The CBD is the governing international agreement on genetic resources, although there concerns about how it interacts with the TRIPS Agreement. It has extensive provisions but is still working on elaborating the issue of access and benefit sharing in a working group and on article 8j in a working group. Article 15 is the primary article on access to genetic resources:

Article 15.5 notes that "Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party." ECOWAS may want to add that this obligation also entails an obligation on the part of the EU to ensure that use of genetic resources by their nationals is properly authorized under such agreements.

However, the clearest guide for ECOWAS countries in the negotiations may the Bonn Guidelines on Access and benefit sharing adopted by the CBD Conference of parties (available at http://www.cbd.int/decisions/default.aspx?m=cop-06&d=24).
ECOWAS countries should include these as the operational and substantive implementation in the EPAs of access and benefit sharing for genetic resources. It should be noted that the guidelines explicitly exclude human genetic resources. Of particular interest are sections 16.b

"In the implementation of mutually agreed terms, users should:

i. Seek informed consent prior to access to genetic resources, in conformity with Article 15, paragraph 5, of the Convention;
ii. Respect customs, traditions, values and customary practices of indigenous and local communities,
iii. Respond to requests for information from indigenous and local communities;
iv. Only use genetic resources for purposes consistent with the terms and conditions under which they were acquired;
v. Ensure that uses of genetic resources for purposes other than those for which they were acquired, only take place after new prior informed consent and mutually agreed terms are given;
vi. Maintain all relevant data regarding the genetic resources, especially documentary evidence of the prior informed consent and information concerning the origin and the use of genetic resources and the benefits arising from such use;
vii. As much as possible endeavour to carry out their use of the genetic resources in, and with the participation of, the providing country;
viii. When supplying genetic resources to third parties, honour any terms and conditions regarding the acquired material. They should provide this third party with relevant data on their acquisition, including prior informed consent and conditions of use and record and maintain data on their supply to third parties. Special terms and conditions should be established under mutually agreed terms to facilitate taxonomic research for non-commercial purposes;
ix. Ensure the fair and equitable sharing of benefits, including technology transfer to providing countries, pursuant to Article 16 of the Convention arising from the commercialization or other use of genetic resources, in conformity with the mutually agreed terms they established with the indigenous and local communities or stakeholders involved;"

And section 16.d

"Contracting Parties with users of genetic resources under their jurisdiction should take appropriate legal, administrative, or policy measures, as appropriate, to support compliance with prior informed consent of the Contracting Party providing such resources and mutually agreed terms on which access was granted. These countries could consider, *inter alia*, the following measures:

i. Mechanisms to provide information to potential users on their obligations regarding access to genetic resources;
ii. Measures to encourage the disclosure of the country of origin of the genetic resources and of the origin of traditional knowledge, innovations and

practices of indigenous and local communities in applications for intellectual property rights;

iii. Measures aimed at preventing the use of genetic resources obtained without the prior informed consent of the Contracting Party providing such resources;

iv. Cooperation between Contracting Parties to address alleged infringements of access and benefit-sharing agreements;

v. Voluntary certification schemes for institutions abiding by rules on access and benefit-sharing;

vi. Measures discouraging unfair trade practices;

vii. Other measures that encourage users to comply with provisions under subparagraph 16 (b) above."

### *IV.2.1 Human Genetic Resources*

The TRIPS Agreement notes that there is no requirement to provide patents for plants and animals. However, the US and EU do not interpret that to mean that human genetic resources cannot be patented. This can enable misappropriation of individual and community genetic traits. It may be desirable to attempt to achieve a ban on patenting of human life forms in the EPAs or at least to achieve a ban on patenting of human genetic resources originating in the ECOWAS region.

### *IV.2.2 Animal Genetic Resources*

These resources are largely governed by the CBD.

### *IV.2.3 Plant Genetic Resources*

These are governed by an overlapping set of agreement beginning with TRIPS Article 27(3)(b), which requires some form of protection for plant varieties to the CBD. However the TRIPS agreement is seen as enabling misappropriation not preventing it. As such, there is a proposal in the TRIPS Council to add an amendment that ensures that disclosure of origin requirement are put in place that prevent such misappropriation. That proposal puts forward a new article 29bis:

***"****Disclosure of Origin of Biological Resources and/or Associated Traditional Knowledge*

1. For the purposes of establishing a mutually supportive relationship between this Agreement and the Convention on Biological Diversity, in implementing their obligations, Members shall have regard to the objectives and principles of this Agreement and the objectives of the Convention on Biological Diversity.

2. Where the subject matter of a patent application concerns, is derived from or developed with biological resources and/or associated traditional knowledge, Members shall require applicants to disclose the country providing the resources and/or associated traditional knowledge, from whom in the providing country they were obtained, and, as known after reasonable inquiry, the country of origin.

Members shall also require that applicants provide information including evidence of compliance with the applicable legal requirements in the providing country for prior informed consent for access and fair and equitable benefit-sharing arising from the commercial or other utilization of such resources and/or associated traditional knowledge.

3. Members shall require applicants or patentees to supplement and to correct the information including evidence provided under paragraph 2 of this Article in light of new information of which they become aware.

4. Members shall publish the information disclosed in accordance with paragraphs 2 and 3 of this Article jointly with the application or grant, whichever is made first. Where an applicant or patentee provides further information required under paragraph 3 after publication, the additional information shall also be published without undue delay.

5. Members shall put in place effective enforcement procedures so as to ensure compliance with the obligations set out in paragraphs 2 and 3 of this Article. In particular, Members shall ensure that administrative and/or judicial authorities have the authority to prevent the further processing of an application or the grant of a patent and to revoke, subject to the provisions of Article 32 of this Agreement, or render unenforceable a patent when the applicant has, knowingly or with reasonable grounds to know, failed to comply with the obligations in paragraphs 2 and 3 of this Article or provided false or fraudulent information.

ECOWAS members may wish to adopt this language in the EPA.

### *IV.2.4 Plant Genetic Resources for Agriculture*

The primary international process covering plant genetic resources for agriculture is the FAO International Treaty on Plant Genetic Resources for Agriculture (ITPGRFA) at http://www.fao.org/ag/cgrfa/itpgr.htm. The treaty set up a multilateral depositary system for sharing plant genetic resources and establishes a method for access and benefit sharing using a Standard Materials Transfer Agreement. ECOWAS countries may wish to adopt some of its principles to govern the transfer and sharing of genetic resources with the EU. However, its usefulness as a model remains to be seen because of several outstanding issues such as compliance, enforcement and the scope of intellectual property rights over deposited material. At the very least, ECOWAS countries can require that the EU ratify and implement those provisions of the treaty that are in operation.

## V. The European offer in its Draft EPA Text for IP

Article 12, Section 2 Chapter 2 Title IV covers genetic resources, Traditional Knowledge and folklore. It is empty. It offers no substantive commitment from the EU, not even to the commitments it has already made in the CBD.

## V.1 Traditional Knowledge

Article 12.1 simply reiterates article 8j of the CBD. Article 12.2 presumes that an international agreement on a system to protect TK is necessary before an agreement in the EPA can be reached. This is, of course, not true. Initial steps can be taken to recognize ECOWAS national systems of ownership and to prevent misappropriation. Such an approach is a delaying tactic rather than an offer for real substantive engagement.

Article 12.3 sidesteps the issue of the fact that the TRIPS Agreement is in conflict with the CBD and that it must be amended to not be in conflict. This statement extends that avoidance to the EPAs.

## V.2 Genetic Resources

In addition, the EU offer enables further misappropriation of ECOWAS genetic resources by asking ECOWAS countries to ratify or accede to the 1991 act of UPOV, instead of creating a sui generis model more appropriate to the region and each countries needs. However, since many OAPI members have already implemented this under the Bangui Agreement, it only pulls in those states that will not. ECOWAS states should retain the freedom of non-OAPI members to implement their own models of plant variety protection.

# VI. An Alternative Approach: the ESA Proposed Text to the EU (August 2006)

## VI.1 Traditional Knowledge

Under Objectives:

- Article 65.3 "Ensuring the implementation of the flexibilities as are provided under the TRIPS Agreement and CBD and the International Agreement on Plant Genetic Resources"

- Article 65.5 "To ensure adequate and effective protection of genetic resources, traditional knowledge and folklore of ESA countries and prevent bio-piracy". I would suggest changing the word biopiracy to 'misappropriation to cover the wider problem.

Under Areas of cooperation:

- Article 66.1.d "effective protection of ESA countries genetic resources, folklore and traditional knowledge and bio piracy;"

## VI.2 Genetic Resources

Under Objectives:

- Article 65.8 "To ensure that claims of ownership of seeds and plant products cannot be transferred onto similar natural resources endemic to the ESA region". This section needs clarity but the intention is good.

Under Areas of cooperation:

- Article 66.1.e "in granting patents utilising genetic resources from ESA countries, the EC and its Member States will require the disclosure of origin and proof of prior informed consent of the indigenous community concerned and equitable sharing of benefits; where a genetic resource is derived from a genetic material of an individual and the rights conferred by this paragraph are conferred on that individual"

- Article 66.1.f "Exploitation of genetic resources from ESA countries by EU shall take due regard to the principle of prior-informed consent to ensure indigenous communities holding such genetic resources benefit from such exploitation."

## Conclusion

It will not be easy implementing a positive agenda. It is clear that ECOWAS will have difficulty making even the minimal demands to make negotiating TK and GR worthwhile. Nevertheless it is possible for some progress to be made by focusing on the inclusion of existing and developing international standards.