
Report on

**Trade Development and Poverty Reduction
(TDP) Policy Round Table**

7th August 2008, Norfolk Hotel

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Acronyms

ABS	Access to Benefit Sharing
AGOA	African Growth Opportunity Act
AoA	Agreement on Agriculture
CBD	Convention on Biological Diversity
CITIL	Centre for International Trade and Investment Law
CITES	Convention on International Trade in Endangered Species
COMESA	Common Market for Eastern and Southern Africa
CUTS	Consumer Unity and Trust Society
EAC	East Africa Community
EPA	Economic Partnership Agreement
GATT	General Agreements on Tariffs and Trade
GMO	Genetically Modified Organism
IEA	Institute of Economic Affairs
IP	Intellectual Property
IPR	Intellectual Property Rights
ITPGRFA	International Treaty for Plant Genetic Resources in Agriculture
KIPI	Kenya Industrial Property Institute
LDC	Least Developed Countries
NEMA	National Environment Management Authority
SDT	Special and Differential Treatment
SSG	Special Safeguard
SSM	Special Safeguard Mechanism
TRIPS	Trade Related Aspects of Intellectual Property Rights
TK	Traditional Knowledge
UPOV	Union for the Protection of Plant Varieties
WTO	World Trade Organization

1.0 Introduction and Opening Remarks

On 7th August 2008, the Institute of Economic Affairs (IEA-Kenya) organized a half day round table meeting on Trade Development and Poverty reduction (TDP) with the theme: “International Initiatives and National Policy Coherence for Development and Poverty Reduction.” This report gives highlights of the presentations and discussions arising from the same on pertinent issues of concern to Kenya in international trade.

Opening remarks by Margaret Chemengich, CEO IEA-Kenya

Kenya is linked to global trade arrangements of World Trade Organization (WTO), African Growth Opportunity Act (AGOA), Economic Partnership Agreement (EPA), Common Market for Eastern and Southern Africa (COMESA) and The East Africa Community (EAC) customs Union Protocol. Policies of such agreements should have coherent effects on the country’s trade and poverty reduction programs. There is also need for coherence between institutions implementing the trade programs. IEA-Kenya through Consumer Unity and Trust Society (CUTS) Project is linking development to poverty reduction and trade.

Session One

Special Safeguard Mechanism and National Policies

David O Ochieng, Centre for International Trade and Investment Law (CITIL)

A safeguard is a form of temporary relief used when imports of a particular product, as a result of tariff concessions or other multilateral trade obligations undertaken by the importing country, increase unexpectedly to a point that they cause or threaten to cause serious injury to domestic producers of “like or directly competitive products.”

Safeguards not only facilitate structural adjustment and tempered trade liberalization but also reduce protectionist pressure. However, they may go against the objective of substantially reducing trade barriers and other barriers to trade” and the elimination of discriminatory treatment in international trade relation.

A safe guard can be applied when:

1. There has been either an absolute increase in imports or an increase relative to domestic production
2. A domestic industry that produces a “like or directly competitive product” has been subject to “serious injury” or the threat of such injury
3. There exists a causal link between increased imports of the product and the serious injury.

Special Safeguard Mechanism (SSM)

Based on Article 5 of the World Trade Organization (WTO) Agreement on Agriculture (AoA) to create an exception wherein the importing members may legally violate its

Schedule of Concessions in order to meet certain emergency situations. These situations are necessarily in the context of the protection of the domestic agricultural producers who might suffer injury occurring for the reason of: sudden surge in the quantity of product available, or artificial fall in prices, owing to imports.

Conditions precedent for innovation of SSM protection

- The products must be those products in respect of which hitherto prevailing non-tariff measures have been converted to ordinary custom duties
- The member requiring invocation of Article 5 must have reserved his right to do so with respect to the product, which is shown by a symbol (SSG) in the Schedule of Concessions of that member
- It must be shown by the member taking recourse to the provision that either the volume of imports have exceeded a trigger level, or the price of imports have fallen below the trigger price
- The member must not have taken recourse to the provisions of Article XIX [Para (1) (a) and 3] of GATT 1994 and Article VIII [Para 2] of the Agreement on Safeguards.

Difficulties in applying SSM by developing countries

- Most of them are ineligible to use the existing special safeguards clause under the AoA because they did not 'tariffy' their various non-tariff border protection measures during the Uruguay Round
- Trigger price levels date back to 1986-1988, and are thus far lower than current import prices
- Article 5 is restrictive and cumbersome to use to protect their ever-threatened trade interests
- Lack of institutional capacities the requirements under both SSM and General Safeguards.

Proposals for reforms of SSM regime by developing countries

- SSM is an integral part of the Special and Differential Treatment (SDT) provisions under the market access pillar and that the SSM therefore should be a fundamental element for addressing the existing imbalances in the agreement
- SSM should provide developing countries and Least Developed Countries (LDC) with an effective and flexible instrument to address their distinct susceptibilities to import surge disturbances and the ruinous effects of down swings in prices
- That the safeguard measure shall be automatically triggered
- That the safeguard measures shall be available to all agricultural products
- That the safeguard measures should be available to address situations of import surges and swings in international prices
- That both additional duties and quantitative restrictions shall be envisaged as measures to provide relief from import surges and decline in prices
- That the mechanism shall respond to the institutional capabilities and resources of developing countries; hence it should be simple, effective and easy to implement.

Response from developed countries

- SSM should be designed to facilitate the overall objective of liberalization and should not be used for defensive purposes
- SSM should operate like the current SSG provision in the agriculture agreement
- SSM should not be extended to all agricultural products. A criterion that limits the number of products that can have recourse to the SSM should be set in place.

Consensus on need to address developing countries concerns

A Special SSM will be established for use by developing country members. Developing country members will have the flexibility to designate an appropriate number of products as Special Products, based on criteria of food security, livelihood security and rural development needs. The criteria and treatment of these products will be specified and will recognize the fundamental importance of Special Products to developing countries.

Options for Kenya

- Integrate trade remedies into trade, industry and agriculture policies
- Strengthen trade intelligence and monitoring mechanisms
- Adopt a legal framework for trade remedies
- Strengthen administrative and institutional framework for applying safeguard measures
- Create public awareness on significance of trade safeguards
- Private sector preparedness
- Continued negotiations on reform of the special safeguards regime
- Trade capacity building
- Engagement of the civil society
- Further research on trade remedies.

DISCUSSION- *Issues, suggestions and concern*

Kenya needs mechanisms to absorb trade shocks as she did not reserve the right to utilize special safeguard mechanism.

There is need to put in place interventions to protect local industries.

Review the Custom Act to incorporate issues of trade remedies.

Money obtained from tax payers should be used to push for Kenya's trade interests.

Safeguard measures put in place by Kenya should be in public interest. There is need to scrutinize possible impact of intended safeguard measures on the consumers, government and revenue.

Put in place institutional and legal frameworks to apply safeguard measures.

There is need for proper scrutiny of WTO, EPA, COMESA and EAC trade agreements for coherence so as to choose the best in the interest of agriculture in Kenya.

There is need to increase resources on research especially the distributional impact of trade liberalization on households. This gives guidance on national policies for social protection.

Kenya requested for special safeguard mechanism (binding within the Uruguay bound rates).

Session Two

3.0 Biopiracy: National Policies vs. Conservation on Biological Diversity

By Lucas Sese, presented by Fred Otswong'o, KIPI

Most valuable genetic resources are located in developing countries. Biodiversity has been luring biological researchers and bio-technologically advanced companies to conduct bio-prospecting activities in these areas. Patents resulting from this illegal bio-piracy are then granted in developed nations. The recent national implementation of the CBD by imposing a relatively restrictive policy on access and benefit-sharing of genetic resources by NEMA in Kenya may correct this unjust situation. But, the CBD is a conservation treaty that cannot govern the national IPR system of countries that are not contracting parties to the treaty. As a result, local communities in Kenya continue to languish in poverty.

Areas of conflict between TRIPS and CBD

Issues	TRIPS	CBD
<i>Patentable subject matter</i>	Emphasises on protection of biological and biotechnological innovations by patents	Emphasises on the principle of national sovereignty to prohibit protection on biological resources
<i>Benefit sharing</i>	Strong private and no mandatory benefit sharing	Promotes Access and benefit sharing
<i>Protection of local knowledge</i>	Recognizes innovation associated only with commercial utility	Recognizes importance of local communities and indigenous knowledge
<i>Role of the State</i>	State to protect private intellectual property	Access to biodiversity governed by principle of PIC

Bioprospecting

Bioprospecting is *in-situ* collection of biological material or samples for medical and other scientific research with permission. Bioprospecting activities have contributed immensely to the discovery of pharmaceutical drugs sometimes using TK of local communities. However, in some cases these activities have been abused leading to exploitation of the custodians of TK.

Biopiracy

Biopiracy is the appropriation or reproduction of the work or ideas of another without permission for one's own benefit or the theft, misappropriation of, or unfair free-riding

on, genetic resources and/or TK through the patent system; and the unauthorized and uncompensated collection of genetic resources and/or TK for commercial use.

Effects of biopiracy

1. Can infringe on the sovereign rights of a nation
2. Decrease the economic wealth of a country
3. Increase poverty and misery among indigenous communities
4. Deplete or destroy species.

Effects of biopiracy on poverty

Private ownership of local TK can:

1. Lead to lack of basic commodities such as food and medicine including the most needed HIV and AIDS ARV drugs
2. Increase commodity prices to the extent that most citizens have no access to these new developments
3. Block technology transfer and local production when the patent owner so chooses
4. Forbid local farmers from accessing agricultural varieties from replanting during the following season.

Policy Recommendations on the prevention of biopiracy

- Develop a policy on Biopiracy that is effective and well coordinated with regulatory mechanism
- Establish appropriate means that can facilitate the preservation, protection, and equitable benefit-sharing of genetic resources and associated knowledge
- Develop or amend domestic laws to include IP, disclosure requirement and ABS
- Establish bioprospecting legislations that meet the country's interests in accordance with the provisions of CBD and other international instruments
- Domesticize the proposed international mechanism for the protection of TK
- Establish community TK registers and documentation
- Develop a policy on coordination of lead agencies
- Capacity building and awareness
- Kenya should go to court over misuse of her biological resources and cancel patents on natural product inventions
- Kenya should demand a share of profits from products discovered through biopiracy due to loss of profits from illegal removal of biological material
- Corporations and research facilities should not accept illegally obtained biological materials from collectors who lack clean title to biological material
- Collection of biological materials without a benefit-sharing agreement should be listed as criminal violation
- Strengthen/establish national coordination body on ABS
- Protect TK through a *Sui generis* system
- Restrict Plant Breeders' Rights to incorporate Farmers' Rights
- Recognize TK under TRIPs Agreement
- Establish awards and prizes to best TK innovators
- Presidential Decree on endangered species.

Although Kenya has various legal tools that may exert greater leverage over the use of her genetic resources, there is poor coordination amongst the key stakeholders and competency authorities. There is need for an explicit national policy on access and benefit sharing building on the existing NEMA regulations that will reduce biopiracy and bring all stakeholders on board. This leverage can be used to earn revenues, promote conservation, and train and educate biochemists and other scientists.

There is need for a policy to enable the private sector improve the reliability and quality of material supplied to them, benefit from access to TK about plants and insects, establish good will which can pay off in present or future markets for the company's products and, distinguish themselves from less green competitors, thus obtaining a competitive advantage and participate in the nation development.

DISCUSSION- *Issues, suggestions and concern*

There is need to coordinate mandate/activities of different organizations mandated to protect bio diversity. All should end up at the NEMA.

Traditional Knowledge should be patented to those who hold it. This will allow for commercialization of the same by the holders of such knowledge.

Formalize strategies to review Article 29 in TRIPS so as to request for disclosure on plant genetic materials and the recognition of TK.

Involve top managers in institutions concerned with trade and bio diversity in future round table talks/workshops.

High rate of turnover of politically appointed managers in government trade institutions mandated to protect bio diversity is a major challenge.

Kenya should endeavour to reverse patents erroneously granted to other countries on its materials. Revocation of such patents should be pursued to the end and compensation sought.

Indigenous patents should be used for economic gain/meaningful value.

Protection of knowledge translates into high prices on commodities/product as patent owners invest a lot of money and have 20 years to recoup.

The law provides for patenting of biotechnological products. A patent can be given to a Genetically Modified Organism (GMO).

Patenting of TK is made difficult by tough conditions that can not be met by locals. However, there is need for awareness creation and capacity building on TK among the locals.

Review the Anti Counterfeit Bill 2008 so as to incorporate bio-piracy issues.

There is need to have curvet on materials so as to protect them from patenting by others.

Document TK in public domain to block individuals who want to patent knowledge held by others for selfish gain.

Document Traditional Knowledge (TK) for future use.

Trade institutions involved in the protection of Kenya's bio diversity should come up with a digital information system. This will enable TK holders to provide information in a structured manner.

Session Three

4.0 Access and Benefit Sharing-National vs. International Policies

Veronica Kimutai, NEMA

The flow of genetic resources of actual or potential value-is increasing. New technological developments particularly in the domain of biotechnology are making it possible to transfer genes across species and kingdoms. Local and indigenous communities that in many cases are the custodians of much of the wild and domesticated biodiversity, including the farmers who have developed new varieties of genetic resources through their on-farm breeding and plant selection, rarely receive a fair share of the benefits derived from this expanding commercial and industrial use. This undermines efforts to conserve biological diversity and ensure sustainable use of its components.

Regional Agreements to address the imbalances above include;

- The Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region (1985)
- The African Model Law for the protection of the rights of the local communities, farmers and breeders and for the regulation of access to biological resources.

International Treaties and Agreements which have issues related to Biological resources ABS:

Convention on Biological Diversity of 1992 -objectives; to conserve, to utilize the biodiversity sustainably and share benefits from genetic resources.

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1973 -regulates the international trade in species of wild fauna and flora based on a system of permits and certificates.

RAMSAR: The Convention on Wetlands of International Importance especially as waterfowl habitat provides a framework for international cooperation.

Union for the Protection of Plant Varieties (1978 & 1991) - Gives plant breeders rights.

United Nations Convention on the Law of the Sea (1982) - established property rights for coastal states within which they have sovereign rights.

The Cartagena Protocol on Biosafety-geared towards promoting the risk assessment and risk management in biotechnology.

MIKE Lusaka agreement on cooperative enforcement operations directed at illegal trade in wild fauna and flora.

The International Treaty on Plant Genetic Resources for Food and Agriculture (2004) - Creates a framework for national strategies and international cooperation regarding the conservation, use and exchange of PGRFA.

TRIPS agreement- has a provision for protection of plant varieties through an effective *sui-generis* system.

The Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)

Convention for the Protection of World Cultural and Natural Heritage 1972

Convention on the Conservation on Migratory Species of wild animals 1979

The Bonn Guidelines- Voluntary guidelines for the operationalisation of Article 15 of the CBD.

Convention on Biological Diversity-The Convention establishes an elaborate framework of objectives, principles and obligations relating to access and benefit sharing.

Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of Benefits Arising out of their Utilization- Assist parties, governments and other stakeholders in developing overall access and benefit-sharing strategies and in identifying the steps involved in the process of obtaining access to genetic resources and benefit-sharing.

International Regime on Access to Genetic Resources and Benefit Sharing- Of importance to note in the proposed regime are; Nature of the regime (binding, non-binding or mixture of both) and disclosure of origin/source/legal provenance of genetic resources and associated TK in applications for intellectual property rights.

National Laws and regulations concerning Access Benefit Sharing in Kenya

The Government is making attempts to consolidate her resources with the understanding that they will contribute to national economic development as is reflected in the Access to Genetic Resources Regulations that have recently been gazetted. The following are some of the laws relevant to ABS that have been put in place;

Constitution of Kenya This is the basic law of the land, which states that every person is entitled to protection of the privacy of home and other property and protects the person from deprivation of property without compensation.

The Wildlife Conservation and Management Act (Cap 376) of 1976, provides for the protection, conservation and management of wildlife in Kenya.

The Forest Act of 2005 provides for the establishment, development and sustainable management, including conservation and rational utilization of forest resources for the socio-economic development of the country.

The Antiques and Monuments Act of 1978 provides for controlled access to and development or use of any place or site that has been declared a protected area for the protection of the antiques and monuments thereon.

The Fisheries Protection Act (Cap 379), revised in 1977, provides for the protection of national fisheries resources and controlled exploitation of fishery resources, including pearls, and shells.

The Seeds and Plant Varieties Act (Cap 325) of 1979, regulates access to plant genetic resources as well as the protection of rights of plant breeders.

The Plant Protection Act (Cap 324) as revised in 1979 provides for the prevention of the introduction and spread of diseases destructive to plants.

The Agricultural Act (Cap 318) revised in 1986 provides for promotion and maintenance of a stable agriculture, conservation of the soil and its fertility and to stimulate the development of agricultural land in accordance with the accepted practices of good land husbandry.

The Agricultural Produce (Export) Act, 1979 (Cap 319); prohibits the export of any agricultural produce or produce of any animal for human consumption if such produce is unsound, that is, infected with any disease rendering it unfit for human consumption.

The Crop Production and Livestock Act of 1979 (Cap 321) provides for the control and improvement of crop and livestock production as well as their marketing and processing.

The Environmental Management and Coordination Act of 1999 establishes an institutional framework for the management of the environment.

Science and Technology Act (Cap 250) of 1977 provides for the establishment of machinery for providing advice to the government on all relevant scientific and technological activities and research necessary for proper coordination of research and experimental development.

The Industrial Property Act of 2001- provides for the promotion of inventive and innovative activity as well as facilitates the acquisition of technology through the grant and regulation of patents, utility models, rationalization models and industrial designs. .

The Suppression of Noxious Weeds Act (Cap 325) of 1945, revised in 1983- empowers the Minister to declare a plant to be a noxious weed in any area or in the whole of Kenya.

The Environmental Management and Co-ordination Act (1999) - legislation coordinating all environmental management activities in the country. The Act further elaborates the issue on genetic resources more explicitly through Section 53, which mandates NEMA to “issue guidelines and prescribe measures for the sustainable management and utilization of genetic resources of Kenya for the benefit of the people of Kenya.”

Environmental Management and Co-ordination (Conservation on Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations 2006- presents the most comprehensive attempt by the government to date to put in place a regulatory framework for access to genetic resources and benefit sharing.

Challenges in implementation and Enforcement Issues under Access to Benefit Sharing

Domestication of access and benefit-sharing rules is a complex exercise requiring the collaboration of experts in science, law and business. Many countries lack the capacity to bring these experts together and so face challenges in implementing the ABS provisions of the CBD.

Technological changes are making it possible for bio-prospectors to analyze the genetic makeup of any given kind of genetic material using smaller and smaller quantities. These rapid technological developments have a number of implications for efforts to regulate access to genetic resources, and share the benefits derived from their use. Further more small quantities make smuggling easy and monitoring of bio trade more difficult.

Country providing access to genetic resources frequently faces difficulties in monitoring how the resources are used once they leave the country’s jurisdiction and in enforcing compliance with ABS rules and negotiated terms.

It is often difficult to identify a particular person or group of persons as inventor of a plant-based traditional cure or useful crop variety. This discrimination in the coverage of IPRs frustrates benefit sharing, since the contributions of informal innovations carried out collectively over time by the people of a particular community are not rewarded by the IPR system in the same way that an industrial plant-breeder or pharmaceutical firm is rewarded.

There is widespread frustration in seeking PIC, negotiating mutually agreed terms and sharing of benefits associated with the use of genetic resources.

Recommendations

Continued and effective participation of Kenya in regional and international meetings relevant to ABS

There is need to build capacity and should include the ability to:

1. Assist communities, private land owners, and other organs of the state in the negotiation of access and benefit sharing agreements
2. Analyze benefit-sharing agreements and understand the provisions they contain
3. Develop an understanding of opportunities and risks associated with bio-prospecting.

NEMA should embark on comprehensive sensitization exercise at a variety of levels as The ABS system will only work in an environment of well sensitized communities and policy makers.

DISCUSSION- *Issues, suggestions and concern*

Use lead agencies mandated to protect bio diversity when coming up with an inventory of TK.

Contravention of regulation conditions may lead to imprisonment not exceeding 18 months or a fine.

Need for stakeholders meeting for sensitization on bio-piracy.

Capacity building on bio-piracy issues should be done from the community level.

NEMA is to sensitise District Environment Officers and District Environment Committee members to disseminate information to locals on the protection of genetic resources and benefits that accrue from the same.

There is need to address the challenge of enforcement of regulations and the brain drain in NEMA.

Bio-piracy is being done in small quantities that are not easy to detect.

No applications for permits have been received by NEMA. Most institutions make enquiry but do not apply. NEMA should stop projects that have not applied for permits.

5.0 Way Forward

- Trade is the engine of growth. It should be the main vehicle for development in Kenya
- Put in place policies targeting bio-piracy
- Create a digital database of available Traditional Knowledge (TK)
- Create awareness on bio-piracy.