

**A GAP ANALYSIS REPORT ON THE AFRICAN MODEL LAW  
ON  
THE PROTECTION OF THE RIGHTS OF LOCAL COMMUNITIES,  
FARMERS AND BREEDERS, AND FOR THE REGULATION OF  
ACCESS TO BIOLOGICAL RESOURCES**

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## CONTENTS

1.	EXECUTIVE SUMMARY .....	5
2.	INTRODUCTION.....	7
3.	THE AFRICAN MODEL LAW in a nutshell .....	9
3.1	Background and Rationale.....	9
3.2	Main features.....	10
4.	DEVELOPMENTS SINCE THE ADOPTION OF THE AFRICAN MODEL LAW .....	13
4.1	Global Fora .....	13
4.1.1	United Nations .....	13
4.1.2	World Intellectual Property Organization.....	16
4.1.3	Food and Agriculture Organization of the United Nations .....	18
4.1.4	UPOV .....	23
4.1.5	World Health Organization.....	24
4.1.6	World Trade Organization.....	27
4.1.7	CBD's Nagoya Protocol .....	29
4.2	Continental Fora .....	41
4.3	Regional Fora .....	42
4.3.1	African Regional Intellectual Property Organization.....	42
4.3.2	Organisation Africaine de la Propriete Intellectuelle .....	45
4.3.3	The Central African Sub-regional Approach on Access and Benefit Sharing .....	47
5.	KEY GAPS AND VARIANCES OF THE AFRICAN MODEL LAW.....	51
5.1	Biological Resources, Genetic Resources, Derivatives and Products.....	51
5.2	Benefit Sharing .....	52
5.3	Transboundary co-operation and transboundary genetic resources.....	53
5.4	Traditional Knowledge Associated with Genetic Resources .....	53
5.5	Special considerations for research, emergencies and PGRFA.....	53
6.	CONCLUSIONS AND RECOMMENDATIONS.....	55
7.	BIBLIOGRAPHY .....	57

## ABBREVIATIONS AND ACRONYMS

ABS	Access and Benefit Sharing
African Model Law	African Model Legislation on the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources
Algiers Convention	African Convention on the Conservation of Nature and Natural Resources
AMCOST	African Ministerial Council on Science and Technology
AU	African Union
ARIPO	African Regional Intellectual Property Organization
COMESA	Common Market for Eastern and Southern Africa
EAC	East African Community
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
CAADP	Comprehensive Africa Agriculture Development Programme
CBD	Convention on Biological Diversity
CGIAR	Consultative Group on International Agricultural Research
FAO	UN Food and Agricultural Organization
IARCs	International Agricultural Research Centres
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICNP	Open-Ended Ad Hoc Intergovernmental Committee for the Nagoya Protocol on Access and Benefit Sharing
IGC	WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IGM-PIP	WHO Intergovernmental Meeting on Pandemic Influenza Preparedness
ILO 169	ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries
IP	Intellectual Property
IPRs	Intellectual Property Rights
LDC	Least Developed Country
MAT	Mutually Agreed Terms
MTA	Material Transfer Agreement
Nagoya Protocol	Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing

	of Benefits Arising from their Utilization to the Convention on Biological Diversity
OAPI	Organisation Africaine de la Propriete Intellectuelle
OAU	Organization of African Unity
PGRFA	Plant Genetic Resources for Food and Agriculture
PIC	Prior Informed Consent
PIP	Pandemic Influenza Preparedness Framework
SADC	Southern African Development Community
SCIT	WIPO Standing Committee on Information Technologies
SCCR	WIPO Standing Committee on Copyright and Related Rights
SCP	WIPO Standing Committee on the Law of Patents
SCT	WIPO Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications
SMTA	Standards Material Transfer Agreement
Swakopmund Protocol	ARIPO Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore
The Plant Treaty	International Treaty on Plant Genetic Resources for Food and Agriculture
TRIPs Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UPOV	International Union for the Protection of New Varieties of Plants
WG-ABS	Open-ended Ad Hoc Intergovernmental Working Group on Access and Benefit Sharing
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

## **1. EXECUTIVE SUMMARY**

Biodiversity and natural resource concerns have always ranked highly amongst Africa's priorities, not least because a large majority of Africans directly depend on these natural assets for their livelihoods. To respond to various challenges posed by globalisation and other developments, and in taking into account the continent's uniqueness, Africa has over the years developed biodiversity instruments specific to its needs. These instruments include, among others, the 2001 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 (the African Model Law).

In October 2010, at its tenth meeting, the Conference of the Parties to the Convention on Biological Diversity (COP 10) adopted the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (the Nagoya Protocol). The Nagoya Protocol is a milestone in the history of the Convention on Biological Diversity (CBD), representing a major step towards realising its third objective - the fair and equitable sharing of the benefits arising out of the utilization of genetic resources. Africa's interest in the implementation of this objective, well before the commencement of the negotiations leading to the adoption of the Nagoya Protocol, was actually one of the key drivers behind the development of the African Model Law.

The 2011 African Union Assembly Decision on Africa's participation in the 10<sup>th</sup> Conference of the Parties to the Convention on Biological Diversity (Assembly/AU/Dec.352(XVI)) marked yet another milestone. By adopting the decision the AU not only included biodiversity work amongst its priorities and programmes, but also encouraged its members to become Parties to international agreements on biodiversity, including the Nagoya Protocol.

The gap analysis contained in the present report is part of the work that the African Union Commission is undertaking pursuant to implementing the decision of the African Union Assembly on biodiversity. The adoption of the Nagoya Protocol in 2010 provided a good opportunity to have a fresh look at the African Model Law and analyze any gaps that may have resulted from subsequent developments relevant to access and benefit-sharing (ABS) at the global, continental and regional levels.

The report contains four main sections. After describing the background and rationale, as well as the main features of the African Model Law, the report examines comprehensively the different developments related to ABS at the global, continental and regional levels since the adoption of the African Model Law. A comparative analysis of the African Model Law against the Nagoya Protocol and other instruments and developments highlights important gaps and variances relating to multiple facets of the African Model Law: scope; intellectual property rights; farmers' rights; benefit sharing; trans-boundary cooperation and trans-boundary genetic resources; traditional knowledge associated with genetic resources; and special considerations for research, emergencies and plant genetic resources for food and agriculture. The report finds that these

issues need to be reconsidered in the light of recent developments, partly because the Nagoya Protocol introduces new concepts, such as a definition of 'utilization of genetic resources', provision for trans-boundary cooperation, a role for community protocols and procedures, as well as special considerations for basic research, situations of health emergencies and plant genetic resources for food and agriculture.

The report therefore concludes with institutional and policy options to redress the situation:

***Improved coordination and closer collaboration between various actors at the continental and regional level:*** This option provides a response to the apparent disconnect between some activities of regional bodies and those of the African Union. It offers an opportunity to ensure an effective alignment of the activities of ARIPO and OAPI aimed at the protection of plant breeders' rights, traditional knowledge, traditional cultural expressions and genetic resources with Africa's position at the WIPO IGC and other fora.

***Harmonized ABS policies:*** The Nagoya Protocol offers considerable flexibilities for implementation. A common African approach can provide an opportunity for the African Union and its members to harmonize various aspects of access to genetic resources and benefit-sharing across economic sectors like agriculture, bio-prospecting and health. Such harmonization should be cognizant of the need to strike a balance between protecting genetic resources from biopiracy, on the one hand, and sustainably using these natural assets for economic development and alleviation of poverty through valorisation of biological and genetic resources, on the other.

Finally, the report identifies two potential approaches to be considered with respect to the future of the African Model Law:

1) ***A thorough review and revising of the African Model Law.*** The Model Law was never intended to have the status of a Convention or Treaty in Africa, like the Algiers or Abidjan Conventions. For this reason a revision leading to a new text document for adoption by the AU Heads of States may not be the most effective way to boost African countries' desire to domesticate the Model Law and implement the Nagoya protocol.

2) ***A complementary guideline document to be used alongside the African Model Law.*** This option is probably more practical for immediate purposes, as it would not only highlight recent developments and the positions that the African Group subscribes to on each of the issues contained in the African Model Law, but would also offer an opportunity for model forms and checklists to be formulated that would aid African countries in the fulfilment of their obligations under the Nagoya protocol. In anticipation that they will be used to guide African countries in their domestic ABS law and policy development processes, the guidelines should consider sectoral approaches, particularly in areas where Africa's biodiversity is most attractive and valuable, and preserve what is best and most useful in the spirit and letter of the African Model Law.

## 2. INTRODUCTION

Towards the turn of the 20<sup>th</sup> Century, various developments and concerns at the international level led to the development and subsequent adoption of The African Model Law for the Protection of Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources (the African Model Law). As adopted the African Model Law provided guidelines that would enable African Countries meet numerous challenges and commitments in biodiversity, intellectual property, trade and related areas that had emerged at the time. However, since the adoption of the African Model Law, significant development at the global, continents and regional level in relation to access and benefit sharing and related activities have occurred.

At the international level, noteworthy developments have occurred at the United Nations (UN), World Intellectual Property Organization (WIPO), the Food and Agriculture Organization of the UN (FAO), the International Union for the Protection of New Varieties of Plants (UPOV), the World Health Organization (WHO), the World Trade Organization (WTO), and at the Convention on Biological Diversity (CBD). At the continental level, the activities and developments of relevance are those that are African Union (AU) driven through its organs such as the African Ministerial Council on Science and Technology (AMCOST) and programmes such as The Comprehensive Africa Agriculture Development Programme (CAADP). The regional level activities of significance have been those concerning intellectual property rights, the protection of traditional knowledge, traditional cultural expressions and genetic resources undertaken by the African Regional Intellectual Property Organization (ARIPO) and the Organisation Africaine de la Propriete Intellectuelle (OAPI). All these activities and developments present challenges to each African country in making efforts to fulfil international commitments and also in co-operation in biodiversity matters.

A result of the aforementioned developments is the emergence of new norms and rules in intellectual property rights, access and benefit sharing, plant genetic resources for food and agriculture, and in international trade. Juxtaposing the African Model Law against these new rules and norms reveals gaps in the model legislation. These gaps touch virtually on all elements of the African Model Law thus necessitating the need for consideration for a review of the model law.

Development of model legislations in Africa and revision of continental instruments are activities that Africa has been engaging in over the years, especially in biodiversity related areas. An African Model Law on Safety in Biotechnology was developed in 2001 with a view to guiding African countries in meeting their commitments on biosafety matters and to enable safe handling and transfer of genetically modified organisms. Further, the 1968 African Convention for the Conservation of Nature and Natural Resources was revised in 2003, bringing it to the level and standard of modern multilateral environmental agreements. These actions demonstrate Africa's strong commitment in biodiversity related matters.

The 2011 African Union Assembly Decision on Africa's participation in the 10<sup>th</sup> Conference of the Parties to the Convention on Biological Diversity (Assembly/AU/Dec.352(XVI)) marked yet another milestone. By adopting the decision the AU not only included biodiversity work amongst its priorities and programmes, but also encouraged its members to become Parties to international agreements on biodiversity, including the Nagoya Protocol on Access to Genetic Resources and Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity (the Nagoya Protocol). By requesting the African Union Commission to report regularly on progress in implementing this Decision, the African Union underscored the importance of biodiversity to Africa's well-being.

The gap analysis contained in the current report is part of the work that the African Union Commission is undertaking pursuant to implementing the decision of the African Union Assembly on biodiversity. The adoption of the Nagoya Protocol in 2010 provides an opportunity for the review of the African Model Law and the outcome of this review is expected to help countries understand and meet their national obligations on access to genetic resources and benefit sharing.

This gap analysis was preceded by a preliminary report. The preliminary report paid more attention to the Nagoya Protocol than the other instruments addressed herein. In writing this report, the drafters have had the benefit of consulting widely with various stakeholders including those who championed the adoption of the African Model Law. Comments and views on the preliminary report that were obtained from African delegates during the 7<sup>th</sup> meeting of the Ad Hoc Open-ended Working Group on 8(j) and Related Provisions have also been infused into this gap analysis.



### 3. THE AFRICAN MODEL LAW IN A NUTSHELL

#### 3.1 Background and Rationale

The process of developing the African Model Law commenced through a number of initiatives in 1997.<sup>1</sup> At the time a number of key issues and concerns relating to or affecting biological diversity were under consideration and negotiations at the international level. Principal among these concerns was the requirement of the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement) for member states to adopt either patents, a sui generis system, or a combination of both, for the protection of new varieties of plants. The patenting of living organisms or their parts or components meant legally granting private monopoly control rights over them and over their offspring.<sup>2</sup> In an African context, patents or other forms of intellectual property rights (IPRs) over living organisms potentially had profoundly negative implications for communal livelihoods. Furthermore, the CBD recognizes the role of local and indigenous communities in the conservation of biological diversity, leading to concerns that granting private, individual and exclusive rights to life forms would create conflict between the TRIPs Agreement and the CBD. Thus the IPR system established by the TRIPs Agreement seemed to undermine the CBD in protecting biodiversity and associated knowledge, and detracted from the full realization of its benefit-sharing regime<sup>3</sup>.

Another concern was that existing IPRs regimes could not protect indigenous technologies, innovations and practices, or biodiversity.<sup>4</sup> IPRs were instead seen as encouraging biopiracy by allowing and protecting private ownership claims over the collective innovations and practices of local and indigenous communities, thereby robbing the community of the economic benefits derived from such products of collective intellectual endeavour. The types of rights that Africa needed were thought to be those that recognized and protected the livelihoods of local and indigenous communities. This necessitated development of a legal system that reflected and protected the essential nature of Africa's rich diversity of cultures, without restricting customary norms and practices related to biodiversity.

Protecting Africa's species diversity from the threats posed by growing internationalisation of trade, climate change impacts and the expansion of industrial models of development, including in agriculture, was another

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<sup>1</sup>See Ekpere J.A., *African Model Law on the Protection of the Rights of Local Communities, Farmers and breeders, and For the Regulation of Access to Biological Resources* in Nnadozie, K., et al, *African Perspectives on Genetic Resources, A Handbook on Law, Policies and Institutions*, Washington DC, 2003 at page 277.

<sup>2</sup> Ekpere, J.A., 2000. *The OAU Model Law: The Protection of the Rights of Local Communities, Farmers and Breeders, and For the Regulation of Access to Biological Resources: An Explanatory Booklet*.

<sup>3</sup> Ibid, note 1.

<sup>4</sup> Ibid, note 2.

contributing concern.<sup>5</sup> Africa's plentiful biological resources had to be protected to ensure that they remained the basis for wealth and security into the future.

At the time of its development, the African Model Law also sought to fulfil two strategic objectives at the international front. First, it was representative of an African common position on the issues at the WTO, at the CBD and also at the International Undertaking on Plant Genetic Resources for Food and Agriculture.<sup>6</sup> Secondly, the African Model Law was facilitative in Africa's strategy to meet international obligations such as those required under the TRIPs Agreement and the CBD. In this context it served also as a framework for African Union (then OAU) member States to craft specific national legislation in compliance with international commitments and consistent with their political orientation, national objectives and level of socio-economic development.

As adopted in 1998 by the OAU Heads of States in Ouagadougou, the African Model Law did not include a chapter on plant breeders' rights. This chapter was later included in the 2001 version of the model law as a specific response to the TRIPs Agreement obligation on parties to have sui generis law for the protection of plant varieties. The plant breeders' rights provisions in the African Model Law were attuned to African concerns, hence the prominence of community and farmers' rights in the model legislation.<sup>7</sup> 'The African Model Law' referred to in this document is the 2001 version that includes a chapter on plant breeders' rights, not the 1998 version.

### **3.2 Main features**

The African Model Law contains eight parts covering objectives; scope; access to biological resources; community rights; farmers' rights; plant breeders' rights; institutional arrangements; and, enabling provisions. The scope of the model legislation articulates what it applies to and what it does not. Article 2 (1) provides that the model legislation applies to biological resources in both in situ and ex situ conditions; derivatives of the biological resources; community knowledge and technologies; local and indigenous communities; and plant breeders. The legislation is not intended to affect the traditional systems of access, use or exchange of biological resources; and access, use or exchange of knowledge and technologies by and between local communities.

Several core principles underlay the African Model Law. First is the principle of food sovereignty and security, based on the fact that indigenous farming systems in Africa produce over 90% of all the food requirements of nearly (now) 1 billion people on the continent. While appreciating the potential and promise of biotechnology regarding crop and yield improvement, there was also concern that the resulting homogeneity in seeds and planting material would have

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<sup>5</sup> Ibid, note 2.

<sup>6</sup> Ibid, note 2.

<sup>7</sup> See Tewolde, B.G.E, The African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resource in Relation to International Law and Institutions, Papers from Ethio-Forum 2002 Conference, February 14, 2002; available at: [www.akababi.org/papers2.htm](http://www.akababi.org/papers2.htm).

adverse effects on smallholder farmers and also contribute to loss of genetic diversity.<sup>8</sup>

The second principle upon which the African Model Law was based is the principle of state sovereignty and inalienable rights and responsibilities.<sup>9</sup> African states considered it necessary to re-assert these principles, as embodied in the UN Charter and also affirmed in Article 3 of the CBD particularly with regard to biological diversity.

The third principle of the African Model Law recognizes that the majority of Africans are dependent upon community-based livelihoods and that legislation is required to protect community rights and responsibilities for livelihood security and to reinforce them against globalisation.

The fourth principle, which is closely related to the third, is on the value of indigenous knowledge. The CBD had not only recognized and institutionalised indigenous knowledge, but had subsequently also called for the same to be valued, given the same respect and considered as useful and necessary as other forms of knowledge.<sup>10</sup> To Africa, indigenous knowledge is valuable and contributes enormously to the continent meeting its medical needs.

The fifth – also related – principle was full-participation of indigenous and local communities in decision-making processes in consonance with international instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), and the ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169). The African Model Law was therefore seen in part as providing an opportunity for AU member states to domesticate these international commitments as well.

The sixth, seventh and eighth principles concerned specific implementation of the third objective of the CBD. Thus the sixth principle is on access to biological resources and genetic diversity. It is important to note that whereas Article 15 of the CBD narrow in scopes to access to genetic resources, the African approach has always been broader, encompassing biological resources. The seventh and eight principles were on prior informed consent, and fair and equitable sharing of benefits respectively. The African view was that the CBD framework was not specific enough on the mechanics of operationalizing these two concepts.

The ninth and tenth principles were specific responses to the TRIPs Agreement's requirements for protection through IPRs and attendant patenting of life forms. With regard to the former, Africa's view was that an effective *sui generis* system for protection of plants was necessary to respond to Africa's unique agricultural production system, under which the management and use of biodiversity, knowledge and technologies were usually collective and farm-saved seeds

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> COP Decision V/16, Annex (Programme of work on the Implementation of article 8(j), Section I (General Principles).

represented 90% of the total planted seed<sup>11</sup>. The options available at the time as *sui generis* systems for protection of plant varieties were considered not sufficient for Africa's needs. On life forms, the principle in Africa has been that they should not be patented as this is seen as privatisation of life forms, which violates the basic right to life. This principle had been reaffirmed earlier in a 1998 OAU Declaration on Community Rights and Access to Biological Resources.<sup>12</sup> The final principle was gender equality, recognizing the crucial role of African women in conservation of biological diversity and food production.

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<sup>11</sup> Ibid, note 2.

<sup>12</sup> Paragraph 10 of the Declaration by the OAU Scientific, Technical and Research Commission (OAU/STRC) Task Force on Community Rights and Access to Biological Resources, which met in Addis Ababa on 20-23 March 1998.

#### **4. DEVELOPMENTS SINCE THE ADOPTION OF THE AFRICAN MODEL LAW**

The scope of the African Model Law is outlined in its Article 2. The matters addressed in the scope of the African Model Law are intertwined. In order to consider the gaps in the model law, it is necessary to examine developments in the biodiversity and related arenas since its adoption. These developments have occurred at the global, continental and regional levels, reflecting different sectoral approaches and strategies. In some, special considerations are outlined for plant genetic resources for food and agriculture and transfer of genetic material eased by way of standard material transfer agreements. In others, the rights of indigenous and local communities over genetic resources are asserted while in others still, discussions continue on the form and manner of protection of genetic resources and traditional knowledge.

The numerous developments that have occurred also attest to the challenge of considering each matter contained in the scope of the model legislation to the exclusion of the other. Thus, rather than examining each development on each matter in the scope, what is looked into are the intergovernmental fora in which these issues have been considered and negotiated since the adoption of the African Model Law. Some of these fora are global whereas others are continental or sub-regional, yet the issues discussed are very similar, albeit from different perspectives and positions.

##### **4.1 GLOBAL FORA**

###### **4.1.1 United Nations**

###### **Introduction**

Several agencies of the United Nations are dealing with various issues covered by the African Model Law. These agencies are the United Nations Human Rights Council which deals with human rights issues, and under its broader oversight the 2007 United Nations Declaration on the Rights of Indigenous Peoples was negotiated and adopted; the Secretariat to the CBD which administers the CBD and is also the secretariat of the Nagoya Protocol; The United Nations Food and Agriculture Organization (FAO), which administers the International Treaty on Plant Genetic Resources for Food and Agriculture and the Commission on Genetic Resources for Food and Agriculture; the World Intellectual Property Organization (WIPO) which addresses intellectual property as it relates to biodiversity, traditional knowledge and traditional cultural expressions through the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore; the World Health Organization (WHO) which, among other issues explores the impact of intellectual property on health-related innovations and related issues such as access to vaccines and in this context is spearheading negotiations towards the sharing of influenza viruses and other pathogens relevant to development of human vaccines and cures; the United Nations Educational, Scientific and Cultural Organization (UNESCO) which among other issues addresses the protection of the world's

cultural and natural heritage. Other UN bodies such as the International Labour Organization (ILO) are addressing indigenous peoples' issues, including specific instruments protecting the rights of indigenous peoples. The UN also hosts the secretariat for the United Nations Forum on Forests in which forest genetic resources form part of the discussions. This section of the report focuses on one particular United Nations breakthrough achieved in 2007: the UN Declaration on the Right of Indigenous Peoples. The mutual supportiveness between this Declaration and the chapters on community rights and farmers' rights of the African Model Law are analysed in brief. Activities of the other aforementioned UN agencies are discussed in other sections of this report.

### **The United Nations Declaration on the Rights of Indigenous Peoples**

Questions relating to the promotion and protection of human rights and fundamental freedoms of indigenous peoples have been under consideration in the UN for at least the last 30 years.<sup>13</sup> The work of the Working Group on Indigenous Populations, which was tasked with developing human rights standards that would protect indigenous peoples, culminated in 2007 with the adoption of the UN Declaration on the Rights of Indigenous Peoples.<sup>14</sup> The 13 September 2007 outcome was the result of protracted negotiations among UN members, which can be presented in key phases. Notable among the key phases of the process, is the adoption in 1994 of the Draft Declaration of the Rights of Indigenous Peoples by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, which was forwarded to the UN Commission on Human Rights for further consideration and development. The United Nations Human Rights Council, which succeeded the defunct UN Commission on Human Rights, adopted a further improved version of the Draft Declaration in June 2006, which was highly expected to be adopted by the UN general assembly in November 2006. However, this did not occur as the African group requested further discussions and clarification on certain issues covered by the Draft Declaration prior to its adoption by the UN General Assembly.<sup>15</sup>

The UN Declaration sets out the individual and collective rights of indigenous peoples, as well as their rights to culture, identity, language, employment, health, education and other issues. Some of the provisions in the Declaration are relevant to biodiversity and access and benefit sharing. Article 31, which is specific to traditional knowledge and genetic resources, asserts indigenous peoples' right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, and the manifestations of their sciences, technologies and cultures including genetic resources and seeds amongst others, and calls for states to take effective

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<sup>13</sup> A working Group on Indigenous Populations (WGIP) was established in 1982 as one of the six working groups overseen by the Sub-Commission on the Promotion and Protection of Human Rights, the main subsidiary body of the UN Commission on Human Rights.

<sup>14</sup> Adopted by General Assembly Resolution 61/295 on 13<sup>th</sup> September 2007.

<sup>15</sup> See doc Assembly/AU/Dec.141 (VIII), 30 January 2007. In brief, in a submission by Namibia, the African group requested further discussions and clarifications aimed at contextualizing in the context of Africa issues like the right of self-determination, ownership of land and resources, the right related to the establishment of distinct political and economic institutions in respect of the principle of national and territorial integrity, all covered by the draft declaration

measures to recognize and protect the exercise of these rights. The development of such measures by states is consistent with the expectation under Article 38 of the Declaration, which stipulates that States 'shall' consult and cooperate with indigenous communities in taking appropriate measures including legislative measures in order to achieve the ends of the 2007 Declaration. It may therefore be the case that, to be comprehensive and oriented towards addressing the interests of indigenous communities, in an ABS regulatory context, the appropriate legislative measures contemplated in Article 38 need to accommodate such rights as the right to redress<sup>16</sup> and the right to Free Prior and Informed Consent (FPIC).<sup>17</sup>

Making operational the wide-ranging rights and interests of African populations – indigenous and local communities in particular – that are crafted in this instrument is certainly a challenge. As indicated earlier, Africa was indeed a principal actor in the negotiations and adoption of the UN Declaration by the UN General Assembly in September 2007. Africa's specific interests in the negotiations led to more discussions and refinement of interpretations of, among other issues, the rights of indigenous peoples to maintain and strengthen distinct political, legal, economic, social and cultural institutions. Eventually, UN member States through the discussions that followed the Namibian submission<sup>18</sup> agreed on the interpretation that the protection of the rights indigenous peoples through any appropriate measures at the national level should be consistent with Article 46 of the declaration which provides that 'nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations'.

Notwithstanding Africa's actions during the negotiation and adoption of the Declaration, in the African Model Law Africa has arguably shown its willingness to take up the challenge of fully recognizing and protecting the rights of vulnerable communities. The African Model law is unique in that it includes, at its core, specific sections on the protection of community rights (Part IV), farmers' rights (Part V) and plants breeders' rights (Part VI) in the African context. The obligations of countries under the Declaration on certain principles such as (and among other obligations) the need to respect the Free Prior and Informed Consent (FPIC) of indigenous peoples makes the Declaration and the African Model Law mutually supportive. However, beyond the mere willingness reflected through the core content of the African Model Law, the real challenge in Africa is the translation of some of its core principles into national measures. It is therefore necessary that concrete moves from African countries be initiated at the national level for the development and implementation of measures

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<sup>16</sup> Article 28 of the 2007 Declaration; one interpretation of this right in Mahop(2010) in the context of ABS legislation is that of the provision of fair and equitable or reasonable compensation to indigenous and local communities when their traditional knowledge associated with genetic resources has been exploited for commercial ends. See Mahop, T.M, *Intellectual Property, Community Rights and Human Rights: the biological and genetic resources of developing countries*, Routledge (Oxford:UK), 2010.

<sup>17</sup> See Articles 10, 11, 19, 28, 29, 32 of the UN Declaration on the Rights of Indigenous Peoples

<sup>18</sup> See Doc. Assembly/AU/Dec.141(VIII), 30 January 2007

consonant with the community rights encapsulated in the 2007 UN declaration and in the Model Law.

While the Declaration is not binding it nevertheless demonstrates a significant global shift on how the rights of indigenous peoples are perceived and their integral role in the preservation of culture and biodiversity in this context.

#### **4.1.2 World Intellectual Property Organization**

As a specialized agency of the UN, WIPO's mandate is to promote protection of intellectual property through cooperation among States. Several noteworthy developments have occurred at WIPO since the adoption of the African Model Law. One of these is the establishment of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), the adoption of the WIPO Development Agenda, and the work of the Standing Committee on the Law of Patents.

#### **Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore**

The IGC was established in 2000 at the 26<sup>th</sup> WIPO General Assembly following recognition by Member States that there were intellectual property issues that arise in the context of access to genetic resources and benefit sharing; the protection of traditional knowledge, innovations and creativity; and in the protection of expressions of folklore, including handicrafts.<sup>19</sup> WIPO was therefore requested to provide a forum where Member States may discuss the intellectual property implications of those linkages, which were then raised, but not fully addressed, in other fora within and outside WIPO. The fora within WIPO where these issues did not seem to quite fit included (then) the Standing Committee on the Law of Patents (SCP), the Standing Committee on Copyright and Related Rights (SCCR), the Standing Committee on Trademarks, Industrial Designs and Geographical Indications (SCT) and the Standing Committee on Information Technologies (SCIT). Outside of WIPO, discussions touching on the matters in question were also taking place at the CBD, at the WTO, at the FAO and also at UNESCO.

Currently the work of the IGC is mainly divided into three broad areas: traditional cultural expressions/expressions of folklore; traditional knowledge; and genetic resources. Prior to 2009, the work of the IGC mainly comprised overviews and syntheses of information received from Member states on these matters. Following a renewed mandate and commitment towards the IGC process in 2009, work has progressed variously in the aforementioned three areas, with work on traditional cultural expressions and traditional knowledge having advanced more than in genetic resources.

Specific to genetic resources, draft objectives and principles relating to intellectual property and genetic resources have been developed<sup>20</sup> as well as

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<sup>19</sup> WIPO/GRTKF/IC/1/3

<sup>20</sup> WIPO/GRTKF/IC/19/6



options for future work in this area.<sup>21</sup> With regard to the latter, three clusters of options have been developed for future work: a cluster on options for defensive protection of genetic resources; a cluster on options on disclosure requirements, and a cluster on IP issues in mutually agreed terms for fair and equitable sharing of benefits.

The IGC mandate for the 2010-2012 biennium was renewed at the 40<sup>th</sup> Session of the WIPO General Assembly in 2011. This mandate includes *“expediting ‘text-based negotiations’ with ‘the objective of reaching agreement on a text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs.’* It is in the context of this mandate that the two draft articles, the draft objective and principles and options for future work have been developed. The new mandate also requires the IGC *‘to submit to the 2012 General Assembly the text(s) of an international legal instrument(s) which will ensure the effective protection of GRs, TK and TCEs. The General Assembly in 2012 will take stock of and consider the text(s) ... and decide on convening a Diplomatic Conference.’*

The next session of the IGC is scheduled in February 2012.<sup>22</sup> Among the agenda items for discussion is a proposal by the African Group on genetic resources and future work.<sup>23</sup> This proposal explicitly states that its development is guided not only by the working documents of the IGC but also the objectives and principles of the CBD and the Nagoya Protocol. In brief, the proposal calls for work of the IGC to be mutually supportive of the CBD and the Nagoya Protocol and not run counter to the objectives of these instruments. The proposal also calls for the IGC negotiations to be without prejudice to the negotiations in the WTO on the mandatory disclosure proposal in the context of the implementation related issues of examining the relationship between the TRIPs Agreement and the CBD. The proposal by Africa seeks to create concordance between the various instruments on genetic resources already developed and those under discussions.

## **WIPO Development Agenda**

Another relevant development at WIPO is the Development Agenda. Adopted in 2007 as a result of WIPO Member States concluding that the development dimension was not properly reflected in intellectual property at the international level, the Development Agenda seeks to ensure that development considerations are reflected in all activities of WIPO. At the 2007 General Assembly, WIPO Member States adopted 45 recommendations to enhance the development dimension of the Organization’s activities. These 45 recommendations are further divided into five clusters.

Recommendation 18 in cluster B (norm-setting, flexibilities, public policy and public domain) explicitly urges the IGC to accelerate the process on the protection of genetic resources, traditional knowledge and folklore, without prejudice to any outcome, including the possible development of an international

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<sup>21</sup> WIPO/GRTKF/IC/19/7

<sup>22</sup> WIPO/GRTKF/IC/20.

<sup>23</sup> WIPO/GRTKF/IC/20/INF/12.

instrument or instruments. This recommendation attempts to create linkages between the Development Agenda and the work of the IGC.

#### Standing Committee on the Law of Patents

The work of the Standing Committee on the Law of Patents (SCP) is also relevant to access and benefit sharing. Created in 1998 to serve as a forum to discuss issues, facilitate coordination and provide guidance concerning the progressive international development of patent law, the SCP's main achievement was the negotiation and adoption in 2000 of the Patent Law Treaty, which entered into force in 2005.

Particularly relevant to ABS has been the SCP's work during the thirteen<sup>24</sup> and fifteenth<sup>25</sup> sessions, which discussed commissioned studies on exclusions from patentable subject matter, as well as exceptions and limitations to patent rights. These studies concluded that some of the exclusion provisions, e.g. Article 27.3 of the TRIPs Agreement, offer more flexibilities and nuance, which ought to be explored more. In this context one can argue that the African Model Law serves as an example of how some of the exclusions and exceptions to patent rights can be made more flexible in their implementation at the national level.

#### **4.1.3 Food and Agriculture Organization of the United Nations**

Within the Food and Agriculture Organization of the United Nations (FAO), two important agencies whose policy making activities have implications for the conservation and sustainable utilisation of genetic resources for food and agriculture are the Commission on Genetic Resources for Food and Agriculture (CGFRA) and the International Treaty on Plant Genetic Resources for Food and Agriculture. This part of the report briefly explores the work of these entities and key developments since the adoption of the 2001 African Model Law.

#### **Commission on Genetic Resources for Food and Agriculture**

The FAO Commission on Genetic Resources for Food and Agriculture (CGRFA) was established by the FAO Conference in 1983. Coinciding with the adoption of the International Undertaking on Plant Genetic Resources for Food and Agriculture, the principal focus of the Commission was plant genetic resources for food and agriculture. In 1995, this focus was broadened by the FAO Conference that called on the Commission to cover, in its policy-making activities, all categories of genetic resources for food and agriculture (GRFA).

In effect, to date the CGFRA represents the only permanent forum where governments discuss and negotiate matters specifically relevant to GRFA. The categories of GRFA under the auspices of the Commission include animals, plants, aquatic organism, forests, microorganisms and invertebrates, and genetic resources for cross-sectoral matters such as those used in biological control.<sup>26</sup>

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<sup>24</sup> SCP/13/3

<sup>25</sup> SCP/13/5

<sup>26</sup> Detailed accounts of the commission's activities on the specific categories of genetic resources are available at: <http://www.fao.org/nr/cgrfa/cgrfa-about/cgrfa-history/en/>

In coordinating the negotiations on conservation and sustainable use policies for these specific categories of GRFA, the Commissions aims to achieve international consensus on such areas as ex-situ conservation, access to, exchange and exploitation of genetic resources for food and agriculture including the fair and equitable sharing of the benefits deriving from these operations.

Since the adoption the African Model Law, a significant development in the Commission's international consensus making from a regulatory perspective is the adoption in 2001 and subsequent entering into force in 2004 of the International Treaty on Plant Genetic Resources for Food and Agriculture. One of the issues not specifically addressed by the African Model Law is ex-situ conservation of plant genetic resources for food and agriculture, the importance of which has been specifically highlighted in the FAO second report on the state of the world's plant genetic resources for food and agriculture.<sup>27</sup>

With community and farmers rights being the cornerstones of its ABS regulatory approach, the African Model Law has not emphasized ex-situ conservation of biological resources broadly, let alone those resources specifically important for food and agriculture. Mechanisms for ex-situ conservation of GRFA therefore need to be provided for in the African Model Law.

### **International Treaty on Plant Genetic Resources for Food and Agriculture**

The International Treaty on Plant Genetic Resources for Food and Agriculture (The Plant Treaty) was adopted by the 31st session of the FAO Conference in 2001. The Treaty, in harmony with the CBD, provides for the conservation and sustainable use of PGRFA as the basis for sustainable agriculture and food security. Save that they are specific to PGRFA, the objectives of the Plant Treaty mirror those of the CBD.

The special nature of PGRFA and the need to seek special solutions for PGRFA as separate from other genetic resources have been recognized by Resolution 3 of the Nairobi Conference that adopted the CBD in 1992, by the Conference of the Parties itself,<sup>28</sup> and in the preamble of the Treaty. Among other characteristics making PGRFA special and therefore different from other genetic resources is the fact that, as genetic material of actual or potential value for food and agriculture contained in plants, they have been used and improved by humankind for more than 10'000 years.<sup>29</sup> Their continued value and importance

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<sup>27</sup> A useful analysis of the state of ex-situ collections of PGRFA held in private or public gene banks and the impact of the ITPGRFA on the sustainability of these collections is provided in chapter 3: 'The State of ex-situ conservation of PGRFA' of the second report on the State of the World's PGRFA. Accessible at: <http://www.fao.org/docrep/013/i1500e/i1500e03.pdf>

<sup>28</sup> Decision II/15 of the second Meeting of the Conference of the Parties starts with the words "Recognizing the special nature of agro-biodiversity, its distinctive features and problems needing distinctive solutions." Also see Gerald Moore and Witold Tymowski (2005). *Explanatory Guide to the International Treaty on Plant Genetic Resources for Food and Agriculture*. IUCN, Gland, Switzerland and Cambridge, UK.

<sup>29</sup> Schloem, M., Louafi, S. and Dedeurwaerdere, T., Access and Benefit Sharing for Genetic Resources for Food and Agriculture- Current Use and Exchange Practice, Commonalities, Differences and User Community Needs: Report from a Multistakeholder Expert Dialogue,

for agriculture and food security, through research and breeding, is dependent on their sustained accessibility and on facilitated exchange among the research and plant breeding communities, whose actions contribute to their further improvement.<sup>30</sup>

The Plant Treaty was prompted by not only the recognition of the special nature of PGRFA but also because the CBD had left unsettled the issue of the *ex situ* collections, such as those held by the International Agricultural Research Centres (IARCs) of the Consultative Group on International Agricultural Research (CGIAR), acquired prior to the entry into force of the Convention.

There are three issues covered by the Plant Treaty that are worth addressing in the context of this report albeit in brief. These are (a) the treaty's approach to the protection of farmers' rights; (b) the Multilateral System of Access and Benefit Sharing and, (c) the Standard Material Transfer Agreement (SMTA) as the tool which plays a central role in the functioning of the multilateral system.

### **(a) Farmers' rights under the Plant Treaty**

Initially mooted in the 1983 International Undertaking (IU) on Plant Genetic Resources for Food and Agriculture of the FAO,<sup>31</sup> States' obligations to protect farmers' right at the domestic level was eventually addressed in a more elaborate fashion under Article 9 of the Plant Treaty. The original 1983 IU raised several concerns amongst both developed and developing countries. The developing countries feared that the universality principle of availability of plant genetic resources for food and agriculture contributed heavily in undermining farmers' rights. On the other hand, the developed countries were of the view that the 1983 IU, by not providing protection to plant breeders' rights was not helpful in the fulfilment of their obligations under UPOV Conventions (then the 1961 and 1978 Acts).<sup>32</sup>

The 1989 General Assembly of the FAO attempted to accommodate the views of the developing and developed countries by adopting two important resolutions. Resolution 4/89 accepted the primacy of plant breeders' rights but allowed member states to impose very limited restrictions on farmers' practices of free exchange of seeds and other cultivation materials. Resolution 5/89 in conformity with the views of the developing countries, recognized the contribution and rights of farmers' in the maintenance of agro-biodiversity.

Farmers' rights are treated with more substance in the Plant Treaty. Article 9.1 mirrors Resolution 5/89 by recognizing the enormous contribution that local and indigenous communities and farmers of all regions of the world have made

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Background Study Paper No.59, Commission On Genetic Resources for Food and Agriculture, July 2011.

<sup>30</sup> For a detailed account on the special nature of PGRFA see, Moore, G. and Tymowski, W. (2005), *Supra* Note 29.

<sup>31</sup> Halewood, M & Nnadozie, K., Giving Priority to the Commons: The International Treaty on Plant Genetic Resources for Food and Agriculture, In Tansey, G & Rajotte, T (eds) *The Future Control of Food: A Guide to International Negotiations and Rules on Intellectual Property, Biodiversity and Food Security*, Earthscan, 2008, p115.

<sup>32</sup> See Mahop, M. T (2010), Note 6.

and will continue to make to the conservation and development of PGRFA. Further, protection of traditional knowledge relevant to plant genetic resources for food and agriculture is called for as part of the fulfilment of Farmers' Rights,<sup>33</sup> and the rights of farmers to save, use, exchange and sell farm-saved seed and propagating material are not limited by the Treaty.<sup>34</sup> As part of implementation of the article relevant to traditional knowledge, the Governing Body of the Plant Treaty in 2009 initiated activities aimed at collecting experiences and views on implementation on the said article.<sup>35</sup> In its resolution 6/2011 the Governing Body encouraged Parties to submit further views, experiences and best practices on the implementation of Farmers' Rights and also requested the Secretariat to the Plant Treaty to compile these views and disseminate the same to Parties.<sup>36</sup> African countries have been at the forefront of not only submitting views on farmers' rights, but also in agitating that farmers' rights become a permanent agenda item for discussion by the Governing Body.

Farmers' rights constitute a subset of the broader entity of community rights which are central to Africa's approach to the regulation of access to biological and genetic resources. Translating the African Model Law into guidelines supporting national ABS processes for the implementation of the Nagoya Protocol in African countries also requires respecting and protecting community rights in light of the Plant Treaty.<sup>37</sup> According to Tewolde, there have been attempts to instigate a revision of the African Model Law in order to favour plant breeders' rights over farmers' rights, which have failed because protecting farmer's rights is of primary importance to Africa in the same fashion that protecting plant breeders' rights is of significant importance to other countries.

### **(b) The Multilateral System of Access and Benefit Sharing**

Another key focus of the Plant Treaty is the Multilateral System of Access and Benefit Sharing established under part IV. This system was established both to facilitate access to genetic resources of major food crops and forage species and to share, in fair and equitable way, the benefit arising from the utilization of these resources, in accordance with multilaterally agreed terms and conditions.<sup>38</sup> This system includes sixty-four important crops (with some notable exceptions like soya) which together account for 84% of human consumption worldwide. Interestingly, this list is expanding beyond the materials listed in Annex I and held by public institutions (the core elements of coverage of the multilateral system) on the basis of voluntary contributions made by Plant Treaty parties.

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<sup>33</sup> Article 9.2

<sup>34</sup> Article 9.3

<sup>35</sup> Resolution 6/2009 and subsequent report on Global Consultations on Farmers' right in 2010, IT/GB-4/11/Circ.1.

<sup>36</sup> IT/GB-4/11/Report.

<sup>37</sup> See Tewolde, B.G.E, The African Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources in Relation to International Law and Institutions, papers from Ethio-Forum 2002; available at: [www.akababi.org/paper2.htm](http://www.akababi.org/paper2.htm)

<sup>38</sup> One of which being the 2008 Standard Material Transfer Agreement briefly addressed in the following section.

Through this system it is estimated that over 1.5 million accessions to plant genetic resources have occurred so far.<sup>39</sup>

The 'Access' dimension of the Multilateral System has been characterised as an 'international genetic resources commons'<sup>40</sup> where facilitated access to the materials is aimed at ensuring utilization for conservation, research, training and breeding for food and agriculture, with the overarching purpose of achieving food security. Specifically, researchers' activities are facilitated through the removal of the need to negotiate bilateral contracts on a case-by-case basis when accessing materials in gene banks through the Multilateral System – hence the Standard Material Transfer Agreement.

With regard to the 'Benefit Sharing' dimension, the fundamental tenet of the system is that those accessing materials for research through the system agree to make them freely available to other participating institutions for further research and breeding. However, should an actor wish to commercialize the products derived from research based on materials accessed through the system it is obliged to pay a percentage of profits to a common fund to support conservation and development of agriculture in the developing world.<sup>41</sup> An interesting feature in the Benefit Sharing provisions of the Plant Treaty is the detailed types of benefit that actors are expected to gain from the utilization of materials accessed through the Multilateral System. Article 13 of the Plant Treaty covers both non-monetary and monetary benefits, including exchange of information, access to and transfer of technology, capacity building and, as indicated earlier, the payment of an equitable share of the profits of commercialization into a common fund.

### **(c) The Standard Material Transfer Agreement**

Central to the smooth and transparent functioning of the Multilateral System of Access and Benefit Sharing, especially its facilitated access and benefit sharing dimensions, is the Standard Material Transfer Agreement (SMTA), which emanates from Article 12.4 of the treaty requiring that the Governing Body shall adopt this instrument as the standard and legal basis for arrangements among parties regarding materials accessed through the Multilateral system. Article 12.4 stresses that the SMTA shall clearly accommodate the Plant Treaty's facilitated access provisions in Articles 12.3(a), (d) and (g) and its benefit sharing provisions in 13.2d(ii), as well as other relevant provisions of the Treaty. The rationale for the SMTA's inclusion of these key provisions was to ensure that, on a global scale, materials accessed freely through the system shall remain freely accessible to stakeholders and that the benefits are poured back for further research, training and conservation of plant genetic resources for food and agriculture.

Negotiations for the proposed STMA commenced in 2004. It was adopted in June 2006 and has been in use since, at least by the IARCs of the CGIAR.<sup>42</sup> Looking at

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<sup>39</sup> IT/GB-4/11/Report.

<sup>40</sup> See Halewood, M. & Nnadozie, K. (2008), *supra*, note 15

<sup>41</sup> <http://www.planttreaty.org/content/what-multilateral-system>

<sup>42</sup> <http://www.sgrp.cgiar.org/?q=node/171>

the provisions of the SMTA, especially those targeting the rights and obligations of providers (Article 5 of the SMTA) and the rights and obligations of recipients (Article 6 of the SMTA),<sup>43</sup> this instrument has the ingredients needed by contracting parties to achieve the objectives of the Plant Treaty, especially the facilitated access and benefit sharing schemes of the Multilateral System.

One related aspect of the Multilateral System worth stressing here is the Trust Fund that receives voluntary contributions as well as payments made by users of PGRFA who engage in some kinds of commercial activities with the materials accessed through the system. The Trust Fund has been operational since 2009 with a few small-scale projects in developing countries funded for the purposes of conservation and sustainable use of PGRFA.<sup>44</sup> The current discussions on Article 10 of the Nagoya Protocol could possibly be informed in part by the aims and utilization of the Trust Fund established under the Plant Treaty.

#### 4.1.4 UPOV

The International Union for the Protection of New Varieties of Plants (UPOV) concerns itself with the protection of plant varieties that are new, distinct, stable and uniform. The first Act of UPOV came into force in 1961 and has been revised substantially since then, with the most recent being the 1991 Act. The 1978 Act and the 1991 Act of UPOV form a relevant point for determining an 'effective sui generis right' under Article 27(3)(b) of the TRIPS Agreement.

Subtle differences exist between the 1978 and the 1991 Acts of UPOV. The scope of protection of the 1978 Act, which is no longer open for new members, covers production for the purposes of commercial marketing, offering for sale and marketing of propagating material for a protected variety, whereas the 1991 Act includes inter alia exporting, importing and stocking of the protected material. Further, the minimum period for protection under the 1978 Act is 15 years while under the 1991 Act it is 20 years which is more in line with the current prescribed minimum period for protection of patents under the WTO TRIPS Agreement. Moreover, the 1978 Act covers only plant varieties of nationally defined species or genera, whereas the 1991 Act covers plant varieties of all genera and species.

The most significant differences between the two Acts lie in the rights breeders have over varieties developed by others and over harvested material. Starting with the former, under the 1978 Act breeders are free to use a protected variety to develop a new variety unless it requires repeated use of that variety. Under the 1991 Act it is not allowed to produce varieties which are essentially derived

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<sup>43</sup> One of those obligations recipients are tied to is the obligation to pay, pursuant to Article 6.7 of the SMTA 1.1% of the sales of the product or products less 30% into the trust fund created under the treaty. But recipients may as well opt for an alternative benefit sharing scheme whereby they choose to pay a royalty of 0.5 of sales over a 10 year period on all PGRFA they commercialize from the crop, whether or not they are available without restriction for further research and breeding.

<sup>44</sup> Bhatti, S., Experiences and Lessons Learned from Implementation of the International Treaty, Personal Communication at the CBD-ITPGRFA Capacity Building Workshop on ABS, Montreal-Canada, 29-30 October 2011; available at: <http://www.cbd.int/doc/meetings/abs/wcbabs-02/other/wcbabs-02-presentation-03-en.pdf>.

from a protected variety or which are not distinguishable from such a variety. This is a constriction of the provision in the 1978 Act. With regard to rights over harvested material, under the 1978 Act farmers are free to use their harvested material from a protected variety for any purpose. However, under the 1991 Act selling or exchanging harvested material for replanting is not allowed and national governments are entitled to decide whether farmers shall be allowed within reasonable limits, and safeguarding the legitimate interests of the rights holder, to reuse the harvest of protected varieties on their own land-holdings without the authorization of the rights holder. This again is a constriction of the equivalent provision in the 1978 Act. In choosing whether the 1978 Act or the 1991 Act is the more effective sui generis model under article 27(3) b of the TRIPs Agreement, countries must be aware of these differences. Further, in the African context, out of the three countries (Kenya, South Africa and Morocco) that are parties to UPOV only Morocco is a party to the 1991 Act, while the others are subscribers to the 1978 Act.

While no formal relations exist between the African Union and UPOV per se, one of the most significant development in Africa in relation to UPOV since the adoption of the original 1998 African Model Law is the inclusion of Annex X in the 1999 Revised Bangui Agreement on the protection of plant varieties, which the 17<sup>th</sup> UPOV Council of April 2000 recognized as being in conformity to the 1991 Act of UPOV. As a result, the OAPI Member States adopted the 1991 Act of UPOV as their sui generis system of protection of plant varieties in accordance with the TRIPS Agreement requirement. While this did not constitute OAPI member states becoming parties to UPOV, their legislation on protection of plant varieties very much reflects standards contained in the 1991 UPOV Act.

Looking at the number of plant breeders' rights applications made in the countries that have in place systems for their protection, one can observe that their use is wide and varied and is dependent upon whether the specific crop for which protection is sought has commercial value. Suffice it to say that plant breeders' rights have therefore become more institutionalized in Africa than they were previously as a result of inclusion of Annex X in the 1999 Revised Bangui Agreement; debate is alive on their effects and impacts on genetic resources access, conservation and benefit sharing.

The African Model Law's provisions on plant breeders' rights strongly favour smallholder-farming conditions in Africa. For example, Article 31 of the African Model Law would enable farmers to fully exercise farmers' rights that are otherwise curtailed in the 1991 UPOV Act. To this end, the African Model Law must be seen as a sui generis regime that would enable countries to fulfil their obligations under article 27.3(b) of the TRIPs Agreement.

#### **4.1.5 World Health Organization**

Access to biological material with human pathogenic potential (pathogen materials) is important because research directed toward the development of



new drugs and vaccines is dependent on scientific analysis of the underlying causes of disease.<sup>45</sup>

At the World Health Organization (WHO) Member States only began to address problems associated with the sharing of pathogen materials in 2007 after controversy arose following Indonesia's decision to withhold samples of biological material containing the H5N1 virus (avian flu) from WHO researchers. Indonesia's decision was based on its assertion of sovereignty over the genetic resources found within its territory, pursuant to Articles 3 and 15 of the CBD as the legal basis of such approach. With a view to setting the grounds for facilitated research aimed at the production of essential vaccines that would be used in the event of another outbreak of an influenza pandemic, the WHO Intergovernmental Meeting on Pandemic Influenza Preparedness: Sharing of Influenza Viruses and Access to Vaccines and Other Benefits (IGM-PIP) was established.<sup>46</sup>

The 64<sup>th</sup> World Health Assembly in May 2011 adopted the Pandemic Influenza Preparedness (PIP) Framework<sup>47</sup> and urged Member States to implement the Framework. The PIP Framework is grounded on a set of 19 principles among which, principle 8 stresses the *'recognition that the benefits arising from the sharing of H5N1 and other influenza viruses with human pandemic potential should be shared with all Member States based on public health need and risks'*. Furthermore, principle 14 of the PIP Framework stresses the *'recognition that the commitment to share on an equal footing H5N1 and other influenza viruses of human pandemic potential and the benefits enables WHO Member states and the Director General to assess the global risk of an influenza pandemic and allows WHO Member States and the Director General to take actions to reduce the risk of the emergence of a pandemic and to facilitate the development and production of vaccines, diagnostic materials and other pharmaceuticals that can assist in rapidly responding to and containing an emerging pandemic'*.

The objective of the PIP Framework is to improve pandemic influenza preparedness and response, and strengthen the protection against pandemic influenza by improving and strengthening WHO global influenza surveillance. The realization of this objective has two pillars: (i) the sharing of H5N1 and other influenza viruses with human pandemic potential, and (ii) access to vaccines and sharing of benefits. In this regards, the PIP Framework includes a Framework for Sharing Influenza Viruses and Access to Vaccines and Other Benefits.<sup>48</sup> In particular, with respect to access to or the exchange of PIP biological materials among national influenza centres and other authorized laboratories, the PIP Framework contemplates a rapid, systematic and timely pursuit of such actions

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<sup>45</sup> Frederick M. Abbott, *An International Legal Framework for Sharing of Pathogens: Issues and Challenges*, ICTSD Issue Paper No 30 (2010).

<sup>46</sup> Further useful details on the processes of the IGM-PIP are accessible and available at: [http://apps.who.int/gb/pip/e/E\\_pip1.html](http://apps.who.int/gb/pip/e/E_pip1.html)

<sup>47</sup> WHA64.5

<sup>48</sup> See in general, section 5 and section 6 of the Pandemic Influenza Preparedness Framework for the Sharing of Influenza Viruses and Access to Vaccines and other Benefits, WHA Document A64/8 Attachment 2; accessible at: [http://apps.who.int/gb/ebwha/pdf\\_files/WHA64/A64\\_8-en.pdf](http://apps.who.int/gb/ebwha/pdf_files/WHA64/A64_8-en.pdf)

by Member States from all cases of H5N1 and other influenza viruses with human pandemic potential. In undertaking to provide the relevant PIP biological materials, Member States provide their consent for an onward transfer of such materials and use by authorized institutions, entities and organizations, subject to one of the Standard Material Transfer Agreements attached annexed to the PIP Framework.

In order to ensure that PIP materials are accessed and exchanged in conformity with the PIP framework, the Framework provides for a tracking and traceability system of the PIP biological materials exchanged and used by the authorized entities. One practical advantage of an effective traceability system is that it can prove instrumental in ensuring that the gamut of benefit-sharing provisions included in the Framework actually work in practice to provide the relevant benefits to stakeholders. Indeed, section 6 of the PIP Framework deals with the sharing of benefits arising from the utilization of the PIP biological materials exchanged according to the terms of the Framework.

The Framework invites member states to work with the WHO Secretariat in making contributions to the pandemic influenza benefit-sharing system and calls upon institutions, organizations and entities, public health researchers, and manufacturers of influenza vaccines, diagnostics and pharmaceuticals to also make appropriate contributions. The Framework provides a detailed list of benefits that are the thrust of the benefit-sharing system, including among others informational benefits useful for pandemic surveillance, risk assessment and early warning services for the countries; the provision of PIP candidate vaccine viruses, the provision of diagnostic reagents and test kits, capacity building and technology transfer (PIP Framework section 6.2 through 6.14).

Like the Plant Treaty SMTA covering the transfer and exchange of PGRFA with the framework of the Multilateral System, the PIP Framework provides for two models of SMTA that will be used to cover the transfer of viruses inside (SMTA1) and outside (SMTA2) the WHO Global Influenza Surveillance and Response System. Having just been established, it is still early to assess the effectiveness of the PIP Framework with respect to addressing emergency cases of pandemic influenza. Nonetheless, the PIP Framework, the process leading to its establishment and its functioning<sup>49</sup> is a case in the hands of the international community to learn from, especially in the context of implementation of Article 8 of the Nagoya Protocol, Article 10 on the global multilateral benefit sharing mechanism and Article 11 on transboundary cooperation.

One downside of the African Model Law in this context is that the model legislation does not accommodate the sort of benefit sharing mechanism contemplated in Article 10 of the Nagoya Protocol. Considering that the PIP Framework through its SMTAs envisages the sharing of benefits in a way that

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<sup>49</sup> It is fair to say that the functioning and success of the PIP Framework is yet to be tested because the first meeting of the 18-member Advisory Committee of the PIP – which is the agency charged with monitoring the implementation of the PIP Framework – was only held in Geneva from 21-23 November 2011. The outcomes of this first meeting are not yet public. See [http://www.ip-watch.org/weblog/2011/11/22/who-pandemic-advisory-group-adjourns-early/?utm\\_source=daily&utm\\_medium=email&utm\\_campaign=alerts](http://www.ip-watch.org/weblog/2011/11/22/who-pandemic-advisory-group-adjourns-early/?utm_source=daily&utm_medium=email&utm_campaign=alerts).

will sustain the Global Influenza Surveillance and Response System, it is necessary that the African Model Law takes this into account, particularly from a community perspective. While this Framework is not binding it is precedent setting, particularly in the area of pathogenic biological material, which was not explicitly addressed in the African Model Law.

#### **4.1.6 World Trade Organization**

As mentioned previously, one of the issues at the heart of the African Model Law was the apparent conflict between the TRIPS Agreement and the CBD. The conflict stems from the TRIPS Agreement requirement under Article 27.3(b) dealing with patentability of plants and protection of plant varieties and was germane to Paragraph 19 of the Doha Declaration wherein the WTO Ministerial Council called on the TRIPS Council to look into the relationship between the TRIPS Agreement and the CBD, the protection of traditional knowledge and folklore. The Declaration also calls for the work of the TRIPS Council on these topics to be guided by the TRIPS Agreement's objectives (Article 7) and principles (Article 8), and to take development issues fully into account.

In pursuit of fulfilment of the Doha obligations, one of the significant proposals to emanate from the examination of the TRIPS/CBD relationship is the 2008 Draft Modalities for TRIPS Related Issues,<sup>50</sup> in which the African Group together with over 50 other countries including India, Brazil, China, the European Communities and ACP Group have proposed, among others, that the TRIPS Agreement be amended to include a mandatory requirement for the disclosure of the country providing/source of genetic resources, and/or associated traditional knowledge. They have also proposed that under this amendment patent applications should not be processed without completion of the disclosure requirement, and that the nature and extent of a reference to Prior Informed Consent and Access and Benefit Sharing should be defined. This proposal was further endorsed in the Dar es Salaam Declaration at the sixth meeting of the Minister of Trade from LDCs (most of whom are African) in 2009.<sup>51</sup> Since this proposal was put forward, not much has happened in terms of progressing negotiations at the WTO. Nonetheless, it is instructive to note that in the 2011 Annual Report of the WTO Council for TRIPs<sup>52</sup> the Council has been briefed on the adoption of the Nagoya Protocol. It is also notable that the Accra Declaration on WTO Issues arising from the African Union Conference of Ministers of Trade<sup>53</sup> fails to explicitly mention resolution of issues relating the TRIPS-CBD relationship as earlier proposed by, among others, the African Group.

The aforementioned proposal at the WTO is complemented by another by Bolivia<sup>54</sup> wherein amendment of Article 27.3(b) in a manner that will disallow patenting of life forms is explicitly called for. It is instructive to note that the Bolivian proposal falls very much in line with the provisions of the African Model Law on patenting of life forms. Article 9 of the African Model Law stipulates that

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<sup>50</sup> TN/C/W/52 dated 19<sup>th</sup> July 2008.

<sup>51</sup> WT/MIN(09)/2 dated 21<sup>st</sup> October 2009.

<sup>52</sup> IP/C/59 dated 7<sup>th</sup> November 2011.

<sup>53</sup> WT/MIN(11)/9 dated 9<sup>th</sup> December 2011.

<sup>54</sup> IP/C/W/554 dated 28<sup>th</sup> March 2011

patents over life forms and biological processes are not recognized and cannot be applied for. Article 9 is based on ethical and moral implications of patenting of life forms, as well as the adverse impacts this has on agriculture, climate change adaptation and health, among others. The adoption of the Nagoya Protocol presents an opportunity for the resolution of the issue in favour of these long held principles, which are shared by other countries as well.

Another significant development at the WTO relates to the exercise by the Council for TRIPs, upon request by LDCs most of whom are African, of its powers under article 66.1 of the TRIPs Agreement. Article 66.1 in recognition of the special needs and requirements of LDCs, their economic, financial and administrative constraints, and their need to create a viable technological base extended the period for implementation of the TRIPs Agreement, including article 27.3(b) for 10 years. In 2005, the Council for TRIPs extended this period further up to 1<sup>st</sup> July 2013.<sup>55</sup> An earlier extension specific to pharmaceutical products had been given under the Doha Declaration, up to 2016. In 2011, the Council for TRIPs was requested by the 8<sup>th</sup> WTO Ministerial Conference to consider a proposal to extend this period beyond 2013 and report back to the Ministerial Conference in 2013.<sup>56</sup> Should this proposal be favourably considered by the Council for TRIPs, LDCs will be given an opportunity to evaluate their national strategies and goals in the context of article 27.3(b) of the TRIPs Agreement and choose ways that best fit these strategies, including taking into account the Nagoya Protocol. For African LDCs, this extension will give them an opportunity to consider further the African Model Law in fulfilment of their requirements under the WTO TRIPs Agreement.

The final development at the WTO relevant to the African Model Law concerns review of national legislation for implementation of the TRIPs Agreement, under article 63.2 of the TRIPs Agreement. This article and related reviews affect developed and developing countries, and in the African context its developing countries. Article 63.2 of the TRIPs Agreement requires Members to notify the laws and regulations made effective by that Member pertaining to the subject-matter of the Agreement to the Council for TRIPs in order to assist the Council in its review of the operation of the Agreement. These notifications are the basis for reviews of implementing legislation carried out by the Council for TRIPs. For African countries these reviews occurred mostly after 2000. It is instructive to note that all African countries that are grouped as developing have successfully had their national laws that implement the TRIPs Agreement reviewed. The extent to which this means that the laws comply with the requirements of Article 27.3 (b) of the TRIPs Agreement is not determinable; suffice it to say that non-compliance with this provision is not an issue that has been raised by other countries during the review. Seen in the context of African countries that have based their plant breeders' rights regimes on the African Model Law, one can therefore infer that the African Model Law fulfils the criteria for a sui generis regime under Article 27.3(b) of the TRIPs Agreement.

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<sup>55</sup> IP/C/40 dated 29<sup>th</sup> November 2005.

<sup>56</sup> WT/L/845 dated 19<sup>th</sup> December 2011.

#### 4.1.7 CBD's Nagoya Protocol

##### Background to and Development of the Nagoya Protocol

The CBD was signed in Rio de Janeiro in 1992 and entered into force in 1993. It aims to achieve three main objectives: the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies and funding.<sup>57</sup> Of the three objectives of the CBD, the implementation of the third objective, which relates 'to appropriate access to genetic resources and the sharing of the benefits arising from their utilization', has attracted considerable attention and efforts from the international community within the CBD processes over the past 10 years. The outcome of these efforts was the adoption in 2010 of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization to the Convention on Biological Diversity (the Nagoya Protocol).

The principal stages<sup>58</sup> in the international community's efforts towards the adoption of the Nagoya Protocol started with the setting up, at COP 5 in 2000, of an Ad Hoc Open Ended Working Group on Access and Benefit-Sharing (WG ABS) pursuant to COP decision V/26. This Working Group was initially mandated to develop guidelines and other approaches for the implementation of the ABS provisions of the CBD and was invited to work in consultation with the Working Group on Article 8(j) and Related Provisions. The first product of the work of WG ABS was the development and adoption at CBD COP6 in 2002 of the Bonn Guidelines on ABS.<sup>59</sup> Broadly speaking, these guidelines were intended for voluntary use by states and other stakeholders – users and providers of genetic resources – in developing ABS mechanisms with the participation of relevant actors based on principles of Prior Informed Consent (PIC) and Mutually Agreed Terms (MAT). Critically, the Bonn Guidelines included an indicative list of MAT and monetary as well as non-monetary benefits. The fact that the Bonn Guidelines are non-binding and their implementation is voluntary was seen as a serious shortcoming by developing countries and countries rich in biological diversity, due to the unenforceability of users' obligations under the guidelines. This resulted in a call by member states for the development of a legally binding international benefit-sharing regime, subsequently endorsed in paragraph 44(o) of the Plan of Implementation of the Johannesburg World Summit on Sustainable Development in 2002.

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<sup>57</sup> Article 1, Objectives of the CBD

<sup>58</sup> A very concise summary of the many initiatives and processes carried out between 1992 (Rio) and 2010 (Nagoya) within the framework of the CBD COP processes aimed at the implementation of the Convention are outline by Kamau, E.C. *et al* in The Nagoya Protocol on Access to Genetic Resources and Benefit Sharing: what is New and what are the Implications for Provider and User countries and the Scientific Community, 6/3 Law, Environment and Development Journal (2010), p.246;

<sup>59</sup> Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization, *In* Report of the Sixth meeting of the Conference of the Parties to the Convention on Biological Diversity, UNEP/CBD/COP/6/20, (2002)

Pursuant to paragraph 44(o) the mandate the WG ABS was revised at COP7 in 2004. Decision VII/19 mandated the WG ABS to elaborate and negotiate, in collaboration with the Working Group on Article 8(j) and Related Provisions, an international regime on access to genetic resources and benefit sharing for the purpose of the implementation of Article 15 and Article 8(j) of the CBD.

After nine meetings of the WG ABS, stretching through three CBD COP gatherings including COP8, COP9 and COP10, as well as several informal consultations and Expert Group meetings, the Nagoya Protocol was adopted on 29 October 2010 by COP 10 of the CBD.<sup>60</sup> The next challenges facing the CBD member States is the implementation of the Nagoya Protocol, which begins with ensuring the Protocol's signature and ratification by the required minimum number the CBD member States.<sup>61</sup> Furthermore, discussions have now begun among the CBD member States under the aegis of the Intergovernmental Committee on the Nagoya Protocol (ICNP), which address some issues very critical to the smooth and effective implementation of the Nagoya Protocol.<sup>62</sup>

As it stands the Nagoya Protocol is meant to be an instrument that implements the third objective of the CBD as well as its Articles 15 and 8j. It contains specific obligations to support compliance with domestic legislation or regulatory requirement of the country providing genetic resource. Contractual obligations reflected in mutually agreed terms present significant progress in providing predictability of conditions for access and benefit sharing.

By promoting the use of genetic resources and associated traditional knowledge, and by strengthening the obligations of users to fairly and equitably share the benefits from such use, the Nagoya Protocol aims to create incentives to conserve biodiversity, sustainably use its components, and further enhance its contribution to sustainable development and human well-being.<sup>63</sup>

The Nagoya Protocol is a significant international development that must be taken into account by the African Union in its exploration of avenues that can best promote the implementation of the African Model Law. Indeed, in driving

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<sup>60</sup> CBD COP Decision X/1: Access to Genetic resources and the fair and equitable Sharing of the Benefits Arising from their Utilization. For more details on the Nagoya Protocol, see section 5 below.

<sup>61</sup> The 2010 Nagoya protocol was open for signature on 02 February 2011 at the United Nations Headquarters in New York and will enter into force on the ninetieth day after the date of deposit of the fiftieth instrument of ratification, acceptance, approval or accession by States or regional economic integrations organizations that are parties to the CBD. As of 20 January 2012, 75 countries had signed and two had ratified the protocol; <http://www.cbd.int/abs/nagoya-protocol/signatories/>.

<sup>62</sup> Worth stressing here is the development of Cooperative Procedures and Institutional Mechanisms to Promote Compliance with the Nagoya Protocol and to Address Cases of Non-Compliance. Pursuant to recommendation 1/4 of ICNP1, parties have submitted their views on elements and options for a compliance regime, the examination of which will begin with INCP2. In addition, INCP2 will begin examination of CBD member states submissions based on a request by the secretariat of the CBD that parties should explore The need for and modalities of a Global Multilateral Benefit-Sharing Mechanism (Article 10). The African Group made timely submissions on these matters.

<sup>63</sup> Secretariat to the CBD, 2011. Nagoya Protocol on Access to Genetic Resources and Their Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity: Text and Annex, Montreal, Quebec.

the implementation of the third objective of the CBD, the Nagoya Protocol has expanded on certain critical areas which had not been covered by the African Model Law, but which are undoubtedly critical to African countries that are embarking on the development of national ABS policies, laws and regulations.

### **Implementation Options and Obligations**

One of the outcomes envisaged from implementation of the Nagoya Protocol is the creation of greater legal certainty for both providers and users of genetic resources and associated traditional knowledge, leading to more investment in creating economic benefits from such utilisation. More benefits and better benefit-sharing are in turn expected to create stronger incentives to conserve biodiversity and sustainably use its components.<sup>64</sup>

In implementing the Nagoya Protocol, countries may take different approaches depending on their national strategic objectives.<sup>65</sup> Regardless of the approaches that any country may choose, there are sets of obligations under the Nagoya Protocol that must be met. Some of these obligations are mandatory and non-flexible, others are mandatory but flexible, and others are non-mandatory. Any country implementing the Nagoya Protocol must take cognizance of these obligations. These implementation obligations are discussed below in more detail. It must be noted that some articles contain a mixture of non-flexible mandatory obligations and flexible mandatory obligations; where this is the case it has been pointed out.

#### **(a) Non-Flexible Mandatory Implementation Obligations**

These obligations are those that countries are not given options to consider in implementing; they are compulsory and binding.

##### **(i) Implementation of the Protocol in a Mutually Supportive Manner**

Article 4.3 of the Nagoya Protocol stipulates that the Protocol must be implemented (also at the national level) in a mutually supportive manner with other relevant international instruments. This article implicitly recognizes that there are other instruments on, or relevant to, access and benefit sharing, and that additional instruments may be developed in future.

Existing instruments include the Plant Treaty and, arguably, various intellectual property treaties. By calling for implementation in a mutually supportive manner, this article suggests that countries must also implement the other international instruments on access and benefit sharing to which they are Parties in a manner that does not conflict with the Nagoya Protocol. A careful balancing act is therefore required in the implementation process, especially at the national level, to ensure as much harmony as possible, particularly for those

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<sup>64</sup> Geoff Burton, *Implementing the Nagoya Protocol: Policy Options for Governments* (2011).

<sup>65</sup> *Ibid.* These include a combination of the market oriented vs protective approach; cross-sectoral vs stand-alone regulatory framework approach; one vs several competent national authorities approach; monitoring vs scrutinizing checkpoints approach; central vs decentralized permitting systems approach.

countries that are parties to other international instruments with benefit sharing arrangements.

Likewise, Parties to the Nagoya Protocol have an obligation, when negotiating new international instruments that may be relevant, to insure that new instruments (for example the genetic resources and traditional knowledge instruments being negotiated in the WIPO IGC) are formulated in such a way that their implementation can be mutually supportive with the Nagoya Protocol.

The African Model Law is not a binding treaty but it was formally adopted by an AU Ministerial Conference; its status as an “instrument” for the purposes of this provision needs further consideration and discussion.

#### (ii) Fair and Equitable Sharing of Benefits

It is obligatory under article 5.1 of the Nagoya Protocol for benefits arising from the utilization of genetic resources and traditional knowledge associated with genetic resources to be shared equitably between the party providing access and the recipient, based on prior informed consent and mutually agreed terms. This mandatory obligation extends to subsequent applications and commercialization of the genetic resources. The sharing of the benefits must be on mutually agreed terms.

#### (iii) Special considerations for research, emergencies and PGRFA

Article 8 of the Nagoya Protocol obligates countries to create simplified or expeditious access measures for non-commercial research; in cases of present or imminent emergencies that threaten or damage human, animal or plant health; and for plant genetic resources for food and agriculture and their special role for food security.

Through special access conditions for non-commercial purposes, the protocol recognizes the contribution of non-commercial research in conservation of biological diversity, for example through creation of biodiversity inventories. In the recent past, scientific progress in seeking solutions in plant health<sup>66</sup> has been hampered by slow and bureaucratic processes delaying transfer of genetic material.

There are however subtle differences in the operative language pertaining to each of these situations (“shall create ... including through”; “shall pay due regard to ... may take into consideration”; “shall consider”) which might influence how implementation measures are ultimately designed.

#### (iv) Information on Traditional Knowledge Associated with Genetic Resources

Article 12 of the Nagoya Protocol deals with indigenous and local communities, and traditional knowledge associated with genetic resources (or associated traditional knowledge, ATK). Article 12.2 calls for parties to establish mechanisms to inform potential users of ATK of their obligations. In establishing

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<sup>66</sup> UNEP/CBD/WG-ABS/5/INF/5 dated 20<sup>th</sup> September 2007.



these mechanisms, parties are again obligated to ensure effective participation of indigenous and local communities in the process.

(v) Designation of National Focal Points and Competent National Authorities

Designation of a national focal point and competent national authority (or authorities) is a mandatory requirement of the Nagoya Protocol. Article 13.1 addresses the national focal point requirement, with references to its functions. The national focal point must be an individual, and their functions include liaising with the secretariat to the Protocol, providing information on the designated national competent authority or authorities, and clarifying access requirements and procedures for prospective applicants.

The requirement for designation of a competent national authority or authorities is found in Article 13.2. A Party may designate one or more competent national authorities and the national focal point and the competent national authority may be in the same entity.

Upon entry into force of the Protocol for a Party it must immediately inform the Secretariat of its designated national focal point and competent national authority or authorities.

(vi) The Access and Benefit Sharing Clearing-House and Information Sharing

The Nagoya Protocol establishes an Access and Benefit Sharing Clearing-House<sup>67</sup> as a means of sharing information related to access and benefit sharing. It is a non-flexible and mandatory requirement for countries to make available to the Clearing-House any information required under the Nagoya Protocol and also any other information required pursuant to decisions taken by the meeting of the Parties. This information shall include legislative, administrative and policy measures on access and benefit sharing; information on the national focal point and competent national authority or authorities; and on permits or their equivalent issued at the time of access, which permits shall serve as prima facie evidence of a national decision to grant prior informed consent and of the establishment of mutually agreed terms at the time of access.

Provision of additional information to the Clearing-House is not obligatory, except where it is available. Such information may include relevant competent national authorities for indigenous and local communities; model contractual clauses; methods and tools used to monitor genetic resources; and codes of conduct and best practices.

(vii) Institution of Compliance and non-compliance Measures during Access for GR and TK associated with GRs.

Compliance with national legislation and/or regulatory requirements governing access procedures is central to the implementation of the Nagoya Protocol. Thus Articles 15.1 and 16.1 obligate Parties to institute legislative, administrative or

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<sup>67</sup> Article 14.1 Nagoya Protocol

policy measures to ensure that genetic resources and traditional knowledge associated with genetic resources are accessed in accordance with prior informed consent rules established by the providing Party, or of the relevant indigenous and local communities, respectively.

Non-compliance with access procedures is addressed in Articles 15.2 and 16.2. These articles obligate Parties to put in place effective and proportionate measures to address situations of non-compliance. Thus not only do parties have to put in place measures for compliance at the national level, but also measures providing how non-compliance could be remedied.

- (viii) Monitoring utilization: the internationally recognized certificate of compliance

One of the measures institutionalized in the Nagoya Protocol to support compliance is monitoring utilization of genetic resources and traditional knowledge associated with genetic resources. While a number of measures to monitor utilization are provided, issuing an access permit as evidence of the decision to grant prior informed consent and of the establishment of mutually agreed terms is mandatory. According to Article 17.2 an access permit issued “and made available to the ABS Clearing-House shall constitute an internationally recognized certificate of compliance”.

How this internationally recognized certificate of compliance should look, or even whether all Parties must issue similar certificates, has not yet been agreed. However, Article 17.4 provides the minimum information that must be contained in this certificate “when it is not confidential”. This information includes the name of the issuing authority; date of issuance; the provider; unique identifier of the certificate; the person or entity to whom prior informed consent was granted; genetic resource covered; confirmation that mutual agreed terms were established; confirmation that prior informed consent was obtained; and, commercial and/or non-commercial use.

In implementing the Nagoya Protocol countries must therefore design their national legislation or policy measures to include an access permit, which must contain the minimum information stipulated for an internationally recognized certificate of compliance.

- (ix) Settlement of Disputes Arising from Mutually Agreed Terms

While dispute settlement provisions must generally be included in all contractual agreements, Article 18.2 of the Nagoya Protocol provides a specific mandatory requirement for parties to ensure that an opportunity to seek recourse is available under their legal systems in cases of disputes arising from mutually agreed terms. This provision is especially important in so far as it provides “access to justice” opportunities for providers to seek legal redress in the jurisdiction where a user is domiciled.

#### (x) Awareness Raising

Awareness raising is a mandatory obligation for Parties to the Protocol. Pursuant to Article 21 of the Protocol, each Party is required to take measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources, and related access and benefit-sharing issues.

#### (xi) Capacity Building

The Protocol recognizes the need to build capacity, including through strengthening human resources and institutional capacities. Article 22.1 thus obligates Parties to cooperate on these issues to effectively implement the Protocol, particularly in least developing countries and small-island developing States. Article 22.2 further calls for the needs of developing countries including least developed countries for capacity building and development to be taken fully into account in implementing the Protocol.

#### (xii) Technology Transfer, Collaboration and Cooperation

Collaboration and cooperation between the Parties in technical and scientific research and development programmes is seen as one means to achieve the objectives of the Protocol. Thus Article 23 obligates Parties to collaborate and cooperate in scientific research activities including biotechnological research. The mandatory obligation under Article 23 is linked to the mandatory provisions in Articles 15,<sup>68</sup>16,<sup>69</sup>18<sup>70</sup> and 19<sup>71</sup> of the CBD. Technology transfer and capacity development are strategically very important for efforts aimed at establishing “green economies” in developing countries, based on their own biological resources, rather than them remaining mere “providers” of GRs and ATK for further development (and benefit capture) in more developed countries.

#### (xiii) Financial Mechanism

The financial mechanism for the implementation of the Protocol is the financial mechanism of the CBD, i.e. the Global Environment Facility (GEF) and Article 25.1 of the Protocol instructs Parties to take into account Article 20 of the CBD, which requires each Party to provide financial support and incentives necessary to achieve the objectives of the CBD in accordance with its financial capabilities.

Under Article 20.1 of the CBD developed country Parties are obligated to provide new and additional financial resources to enable developing country Parties to meet the agreed full incremental costs of implementing measures to meet their obligations under the CBD.

Further, under Article 20.5 Parties are required to take full account of the specific needs and special situation of least developed countries with regard to funding and transfer of technology. This recognizes that whereas least developed

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<sup>68</sup> Access to genetic resources

<sup>69</sup> Access to and transfer of technology

<sup>70</sup> Technical and scientific cooperation

<sup>71</sup> Handling of biotechnology and distribution of benefits

countries are the neediest recipients of technology, at the same time they are the ones that cannot afford the same technology.

Other mandatory considerations under Article 20 include special conditions resulting from the dependence on, distribution and location of, biological diversity within developing country Parties, in particular small island states<sup>72</sup> and, special situation of developing countries, including those that are most environmentally vulnerable, such as those with arid and semi-arid zones, coastal and mountainous areas.<sup>73</sup>

### **(b) Flexible but Mandatory Implementation Obligations**

Flexible but mandatory implementation obligations in the Nagoya Protocol are those which countries must fulfil, but where they are allowed to take into consideration their own objectives and conditions.

#### **(i) Fair and Equitable Sharing of Benefits**

While Article 5.1 of the Nagoya Protocol is worded in a non-flexible and mandatory manner, the rest of the articles on fair and equitable sharing of benefits are worded in a flexible yet mandatory manner. Thus countries must institute measures to ensure that benefits arising from utilization of genetic resources and traditional knowledge associated with genetic resources that are held by indigenous and local communities are shared in a fair and equitable way.<sup>74</sup> However, such benefit sharing is only required as determined by domestic legislation – the Protocol does not give prescriptive specifics beyond saying that the benefits should be shared in a fair and equitable way, subject to mutually agreed terms and in accordance with domestic legislation.

#### **(ii) Access to genetic resources**

Access to genetic resources is one of the core elements of the Nagoya Protocol. Throughout Article 6 it is clear that access to genetic resources must be subject to prior informed consent. However, no standards for establishing prior informed consent are prescribed – these are to be determined by countries providing the genetic resource in their national legislation or other regulatory measure. Similarly, Article 6.2 requires the involvement (approval or consent) of indigenous and local communities, particularly where these communities have established rights to grant access, but the extent to which they must be involved is left to be determined by countries.

Notwithstanding this flexibility, Article 6.3 of the Protocol is fairly detailed about prior informed consent measures: at the very least they must provide legal certainty, clarity, transparency and fairness, and be non-arbitrary. They must also contain clear information on how to apply for access, particularly where there are more than one designated competent national authorities. A dispute settlement mechanism (whether judicial or administrative) must also be

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<sup>72</sup> Article 20.6 CBD

<sup>73</sup> Article 20.7 CBD

<sup>74</sup> Article 5.2 and 5.5 Nagoya Protocol

provided for, as well as terms for benefit sharing, subsequent third-party use of the resource, and change of intent by users.

(iii) Access to traditional knowledge associated with genetic resources

With respect to access to traditional knowledge associated with genetic resources, the only mandatory obligations are that the prior informed consent or approval and involvement of indigenous and local communities must be obtained, and that mutually agreed terms must be established prior to granting access. However, measures to ensure that this occurs and also the constituent elements are left to be determined by domestic law.<sup>75</sup> Article 6.3 which lays out the minimum requirements that prior informed consent considerations must meet may therefore provide guidance in implementation of Article 7.

(iv) Contribution to conservation and sustainable use

At a minimum the Nagoya Protocol requires Parties to “encourage” users and providers of genetic resources to direct benefits towards the conservation of biological diversity and the sustainable use of its components.<sup>76</sup> This is in conformity with the first and second objectives of the CBD. However, the exact measures used to encourage these outcomes, and the extent to which it is done, are left to Parties to decide.

(v) Global Multilateral Benefit-Sharing Mechanism

The Nagoya Protocol does not establish the Global Multilateral Benefit-Sharing Mechanism. Article 10 only obliges Parties to consider “the need for and modalities of” such a mechanism to deal with benefits arising from the utilisation of resources or associated traditional knowledge that occur in transboundary situations, or for which it is not possible to grant or obtain prior informed consent. If Parties do agree to establish such a mechanism, the benefits shared under its auspices must be used to support the conservation of biological diversity and the sustainable use of its components globally.

The idea of a Global Multilateral Benefit Sharing Mechanism came from a proposal by the African Group. A satisfactory resolution of the issues it is meant to address – in particular the issues of ex situ collections of genetic resources and publicly available traditional knowledge, for which there can no longer be *prior* informed consent – is of central importance to the African Group’s interests. In this regard it is crucial to recall that the Nagoya Protocol does not so much seek to regulate access (in the sense of physical possession) per se, as it does utilisation (as defined in Article 2).

(vi) Transboundary Cooperation

Transboundary co-operation<sup>77</sup> is called for in two situations: where the same genetic resources are found in situ within the territory of more than one country or where traditional knowledge associated with genetic resources is shared by

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<sup>75</sup> Article 7 Nagoya Protocol

<sup>76</sup> Article 9 Nagoya Protocol

<sup>77</sup> Article 11 Nagoya Protocol

two or more indigenous and local communities in different countries. The nature, manner and extent of co-operation are left to countries to decide.

Recognizing that boundaries between and amongst countries especially in Africa are only recent, and genetic resources and traditional knowledge associated with genetic resources are sometimes shared between countries, this is another issue in which the African Group has a particular interest. Regional co-operation platforms may be one way of encouraging co-operation between countries.

(vii) Procedures for dealing with traditional knowledge associated with genetic resources

While establishment of mechanisms to provide information about their obligations to potential users of traditional knowledge associated with genetic resources is a non-flexible and mandatory obligations (see. 6.2.1.4 above) other procedural obligations under Article 12 are mandatory but flexible. This means that the Nagoya Protocol is not explicitly prescriptive in every detail on these procedures and a lot is left to be determined by countries in accordance with domestic law. Consideration of customary laws, community protocols and community procedures with respect to ATK is one such flexible yet mandatory obligation.<sup>78</sup> Whether customary law should apply to such access is something that the Nagoya Protocol leaves to a country to determine in accordance with domestic law.

The development of community protocols, minimum requirements for mutually agreed terms, and model clauses for benefit-sharing arising from utilization of ATK are again matters which countries are left to determine. Similarly, restriction on customary use and exchange of genetic resources and ATK within and amongst indigenous and local communities is qualified.<sup>79</sup>

(viii) Compliance Measures

The Nagoya Protocol approaches compliance with the domestic access and benefit sharing legislation or regulatory requirements of provider countries from a mandatory perspective. However, some components of compliance are mandatory and non-flexible (see 6.2.1.7 above), while others are mandatory but flexible, including those related to measures to address situations of non-compliance and to co-operation between Parties in cases of alleged violation of domestic access and benefit sharing requirements.<sup>80</sup>

(ix) Monitoring utilization: transparency measures

One of the reasons to monitor utilization of genetic resources is to support compliance. Parties are obliged to take monitoring measures but have some flexibility as long as those measures meet the following conditions: designation of at least one checkpoint; inclusion of provisions to share information on implementation of mutually agreed terms, including through reporting; and use

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<sup>78</sup> Article 12.1 Nagoya Protocol

<sup>79</sup> Article 12.4 Nagoya Protocol

<sup>80</sup> Articles 15.2, 15.3, 16.2 and 16.3 the Nagoya Protocol

of cost effective communication tools and systems.<sup>81</sup> Other monitoring measures, such as issuing a permit that can also serve as an internationally recognized certificate of compliance, are obligatory and non-flexible, as discussed above.

(x) Compliance with mutually agreed terms

The Nagoya Protocol treats compliance with mutually agreed terms<sup>82</sup> primarily as a matter of contract law. Article 18 spells out that “each Party shall encourage” inclusion of dispute resolution provisions (jurisdiction, applicable law, and application of alternative dispute resolution mechanisms such as arbitration and mediation) in such contracts. It also obliges each Party to ensure that an opportunity to seek recourse is available under its legal system when disputes arise from MATs, and to “take effective measures, as appropriate” regarding access to justice, and mutual recognition and enforcement of foreign judgments and arbitral awards. Because these provisions were highly contentious during the negotiations, their effectiveness shall be reviewed by the meeting of the Parties four years after entry into force (as per Article 31).

(xi) Model contractual clauses, codes of conduct, guidelines, best practices and standards

In recognition of the value of model contractual clauses, codes of conducts and similar tools that are developed by ABS actors, the Nagoya Protocol encourages their use. Thus Articles 19 and 20 obligate countries to encourage development, updating and use of these tools in and across sectors. Further, there is a requirement for countries periodically to take stock of the use of these tools, and consider the adoption of specific codes of conduct, guidelines and best practices or standards where necessary.

(xii) Non-Parties

The Nagoya Protocol requires Parties to the Protocol to encourage non-Parties to adhere to the Protocol and more particularly, to contribute appropriate information to the Access and Benefit Sharing Clearing-House.

**(c) Non-mandatory (or optional) implementation obligations**

The Nagoya Protocol contains a number of optional provisions, but most of these are not stand-alone, so that only some aspects of implementation are optional. For example, whereas benefit sharing is mandatory, whether these benefits are monetary or non-monetary is optional, and the list of possible benefits in Annex 1 is not limiting. Other provisions relate to designation of focal points and competent national authorities, awareness- raising, capacity, and financial mechanisms and resources.

(i) Designation of national focal points and competent national authorities

Designation of national focal points and competent national authorities is not in itself optional – it is a non-flexible and mandatory obligation. What is optional

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<sup>81</sup> Article 17.1 Nagoya Protocol

<sup>82</sup> Article 18 Nagoya Protocol

relates to the entities that may be designated as national focal points and competent national authorities. While one or more entities may be designated, there is no prohibition of a country designating a single entity to fulfil the functions of both focal point and competent national authority.

(ii) Awareness raising

Taking measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources is mandatory. Optional are the measures that countries use to raise awareness. Article 21 enumerates these measure, which may include organization of stakeholder meetings; establishment and maintenance of help desks for stakeholders; promotion of voluntary code of conduct, guidelines and best practices or standards; promotion of exchanges of experience at all levels; education and training; and, awareness-raising of community protocols and procedures of indigenous and local communities.

(iii) Capacity

While some of the provisions relating to capacity building, capacity development and strengthening of human resources and institutions are worded in non-flexible and mandatory language, others are options. For example, developing countries are requested to identify their national capacity needs and priorities through national capacity self-assessments as a basis for appropriate measures in relation to the implementation of the Nagoya Protocol.<sup>83</sup> Further, an indicative list of the areas which may be addressed through capacity building and development is given in a non-exhaustive manner, as well as a list of capacity building and development measures that may be taken.<sup>84</sup> Finally, countries may provide information on capacity-building and development initiatives undertaken to the Access and Benefit Sharing Clearing-House. The purpose of providing this information is to promote synergy and coordination on capacity building and development for access and benefit sharing.

(iv) Financial mechanisms

Article 25.2 explicitly links the financial mechanism of the Nagoya Protocol to the mechanism of the CBD. The non-mandatory elements of the text on the financial mechanism relate to how developed countries may provide developing countries with financial and other resources for the implementation of the Nagoya Protocol. Under article 25.6 the developed countries may do so through bilateral, regional or multilateral channels. In sum, developed countries are not bound to provide financial and other resources to other countries, and if they do so, the manner of provision is left for them to choose.

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<sup>83</sup> Article 22.3 Nagoya Protocol.

<sup>84</sup> Article 22.4 and 22.5 Nagoya Protocol.



## 4.2 CONTINENTAL FORA

At the continental level, the activities that are of relevance are those that have mainly been driven by the African Union itself. At the African Union a key development with respect to the protection of traditional knowledge, community rights and intellectual property rights has been the adoption in 2007 of a Consolidated Framework on the Protection of Traditional Knowledge, Intellectual Property, Individual and Community Rights.<sup>85</sup> The development of this framework by the AU was motivated by the concern that Africa lacked a simple instrument that could guide AU Member States and regional institutions in their efforts to develop laws and policies at the national and regional level aimed at protection traditional knowledge and community rights within the framework of intellectual property law.

Like the African Model Law, this Consolidated Framework reiterates Africa's position on no patenting of life forms. In a forward looking and progressive approach, as compared to the African Model Law, the 2007 Consolidated Framework makes a number of recommendations to AU Member States including but not limited to the necessity to formulate the necessary policies and enact legislation on TK, IP and individual and community rights; to centralize all matters related to TK, IPR and individual and community rights in one institution, ensuring that such institution has the identified expertise to handle matters related to TK, IPR individual and community rights.

Another noteworthy development in the AU since the adoption of the African Model Law is the revision of the 1968 African Convention on the Conservation of Nature and Natural Resources (the Algiers Convention). The Algiers Convention had introduced innovative approaches for the conservation of nature and in many ways was a precursor to modern international wildlife law, including acknowledging early on the principle of common responsibility for environmental management by African States. It also called for the conservation and rational use of natural resources for the welfare of present and future generations – still a key principle in the current international understanding of sustainable development.<sup>86</sup>

While the Algiers Convention focused on living resources, calling for the creation of protected areas and for specific conservation measure for species that are listed in its Annex, it also provided grounds for the conservation of other natural resources such as soil and water, for the consideration of environmental concerns in development plans, and for research and education.<sup>87</sup>

The Convention had several shortcomings that necessitated its revision, which was completed with the adoption of a Revised Algiers Convention by the African Union Heads of States in 2003.

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<sup>85</sup> *African Consolidated Framework for Intellectual Property, Individual Rights and Community Rights*, African Ministerial Conference on Science and Technology (AMCOST III), 12-16 November 2007, Mombasa, Kenya, Document: AU/EXP/ST/12(III).

<sup>86</sup> Mekour A.M. and Burhenne-Guilmin F., (2004). *An Introduction to the African Convention on the Conservation of Nature and Natural Resources*. IUCN, Gland, Switzerland and Cambridge, UK. xii + 60 pp.

<sup>87</sup> *Ibid.*

Several provisions of the revised Algiers Convention are relevant to genetic resources and access and benefit sharing. Article IX calls for *in situ* and *ex situ* conservation of species and genetic diversity and for the sustainable use of harvestable plants and animals, whether terrestrial, fresh-water or marine. It also provides for the preservation of as many cultivated or domesticated varieties of animals and plants as possible and the control of both international and accidental introduction of exotic species, as well as genetically modified organisms. This provision is very much in line with the objectives of the CBD, the Plant Treaty and the Nagoya Protocol. The second relevant provision is Article XVII on traditional rights of local communities and indigenous knowledge. This article obligates Parties to take legislative and other measures to ensure that traditional rights and intellectual property rights of local communities including farmers' rights are respected. It also calls for Parties to ensure that access to indigenous knowledge and its use are subject to the prior informed consent of the concerned communities and to specific regulations recognizing their rights to, and appropriate economic value of, such knowledge. Finally, Parties are requested to take measures necessary to enable active participation by local communities in the process of planning and management of natural resources upon which such communities depend, with a view to creating local incentives for conservation and sustainable use of such resources. It can therefore be seen that the revised Algiers Convention is forward looking and aligns itself as much as possible to other instruments dealing with conservation of biodiversity and access and benefit sharing of genetic resources, including the African Model Law.

### **4.3 REGIONAL FORA**

Activities at the regional level can largely be sub-categorized into developments and occurrences at the African Union itself; secondly, developments within two regional bodies, the African Regional Intellectual Property Organization (ARIPO) and the Organisation Africaine de la Propriete Intellectuelle (OAPI) and thirdly, developments pertaining to the creation of the Central African Forest Commission (COMIFAC) and its adoption of a sub-regional ABS Strategy in 2010.

#### **4.3.1 African Regional Intellectual Property Organization**

ARIPO was established pursuant to the Lusaka Agreement in 1976. The objective of ARIPO includes promotion and harmonization and development of intellectual property laws, and related matters of its members.<sup>88</sup> With a membership of eighteen (Anglophone) countries, ARIPO's work has been registration of patents, trademarks and designs. However, in recent years, the institution has adopted a programme of work on the protection of genetic resources, traditional knowledge and folklore mirroring the work at WIPO. A regional policy and legal framework for plant variety protection<sup>89</sup> is also at an advanced stage of development. ARIPO's activities in the registration of patents; in genetic

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<sup>88</sup> Article 3, Lusaka Agreement as amended.

<sup>89</sup> ARIPO/CM/XIII/8 dated 30<sup>th</sup> September 2011.

resources; and in the development of legislation on plant breeders' rights are relevant to the African Model Law.

#### (a) Patents

ARIPO's Harare Protocol on Patents and Designs<sup>90</sup> and the enabling regulations<sup>91</sup> thereto provide the basis for ARIPO's system of registration of patents. Through this instrument, individuals from within and outside ARIPO are able to make single filings for patent applications covering all the ARIPO countries. If upon ARIPO's examination of the patent application no objection is received from the designated ARIPO countries, then the patent is issued and deemed to apply to all ARIPO countries.

The ARIPO patent registration system is cost-effective, especially when utilized by residents of the ARIPO member countries. However, this is not usually the case as the majority of the ARIPO patent filings are made from abroad. The no-objection system that is provided for under the Harare Protocol in designating patents is not effective.

The fact that the Harare Protocol is silent of patenting of life forms, unlike the African Model Law, provides one point of potential conflict between the African Model Law and the Harare Protocol. For countries that hold the view that life forms should not be patented, the no-objection principle of designation of patents by ARIPO requires those countries to be vigilant to ensure that undesirable patents are not designated to apply to them through the ARIPO patenting system. In revisiting the African Model Law in light of the Nagoya Protocol it is also necessary for the ARIPO member states to review the Harare Protocol so as to ensure that there is concordance and to ease national implementation, more so if the patent system is found to provide opportunities for checkpoints for disclosure of origin or source of genetic material.

#### (b) Genetic Resources

ARIPO commenced work on genetic resources following the ARIPO Council of Ministers' 8<sup>th</sup> Session in 2002. Initially, most of the work focused more on expressions of folklore, traditional knowledge and traditional cultural expressions, and less on genetic resources. However, with the WIPO IGC process advancing text-based negotiations in some areas, the work of ARIPO on genetic resources has equally advanced. In this regard, the ARIPO Secretariat has developed a Draft Policy Framework on Access and Benefit Sharing Arising from the Use of Genetic Resources from ARIPO Member States.<sup>92</sup> It is noteworthy to mention that the work of the WIPO IGC on genetic resources has so far only reached a point where draft principles relating to intellectual property and genetic resources have been developed,<sup>93</sup> indicating that the ARIPO process on

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<sup>90</sup> Protocol on Patents and Industrial Designs within the Framework of the African Regional Intellectual Property Organization as amended.

<sup>91</sup> Regulations for Implementing the Protocol on Patents and Industrial Designs within the Framework of the African Regional Intellectual Property Organization as amended.

<sup>92</sup> ARIPO/CM/XIII/6-Annex.

<sup>93</sup> WIPO/GRTKF/IC/19/6

the issue is moving in tandem with the WIPO IGC. The draft policy framework contains a set of objectives and principles similar to those contained in the WIPO IGC proposed principles, albeit crafted from a regional perspective. In terms of scope and coverage, prominent proposals include a regional ABS Clearing-house Mechanism and fund. A call is also made to ensure that the draft Framework is supportive of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore.

As mentioned earlier, ARIPO's work on protection of traditional knowledge similarly started in 2002, when ARIPO's Council of Ministers at its 8<sup>th</sup> Session extended ARIPO's mandate of work on traditional knowledge to include genetic resources. One of the products from the extended mandate was the adoption of the Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore in August 2010. Article 15 of this Protocol specifically addresses access to traditional knowledge associated with genetic resources providing that authorization to access protected knowledge associated with genetic resources does not imply authorization to access the genetic resources related to the associated traditional knowledge.

Recognizing the inextricable link between traditional knowledge and genetic resources, the Swakopmund Protocol as a whole is relevant to access and benefit sharing. However, it treats traditional knowledge on one hand and expressions of folklore on the other separately, providing different criteria for protection of each. Traditional knowledge associated with genetic resources is not considered.

The Swakopmund Protocol is yet to enter into force. It is open for signature to any country that is party to the African Union or the United Nations Economic Commission for Africa.<sup>94</sup> The programme of work on traditional knowledge associated with genetic resources is yet to be exhausted.

Going forward, the main challenge appears to lie in completing the programme of work on traditional knowledge associated with genetic resources and in completing the policy on ABS, in a manner that reflects harmony between these instruments and the Nagoya Protocol. Further, risk remains that the development of these regional instruments against a background of international negotiations may be seen as institutionalisation of negotiation positions. Further, clarity is necessary on the extent to which these regional instruments and processes reflect the needs and desires of African countries as reflected in the African Model Law.

### (c) Plant Breeders' Rights

In the area of plant breeders' rights, ARIPO's activities can be traced to the 12<sup>th</sup> Session of the ARIPO Council of Ministers, which adopted proposals for ARIPO to develop regional frameworks on Access and Benefit Sharing Arising from the Use of Biological Resources and Protection of New Variety of Plants. In pursuit of this

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<sup>94</sup> ARIPO/CM/XIII/7 dated 4<sup>th</sup> November 2011

mandate, ARIPO has developed a draft regional policy and legal framework for a plant variety protection system.<sup>95</sup>

The draft legal framework has been developed on the basis of the 1991 Act of the UPOV Convention, which ARIPO is in the process of joining.<sup>96</sup> In the draft policy it is observed that the UPOV system is the only international sui generis system that provides effective mechanism for the protection of new varieties of plants. As such, the provisions of the legal framework are based on the 1991 Convention. The draft policy framework makes no reference at all to the African Model Law's provisions on plant breeders' rights. Neither are the principles in the African Model Law reflected.

Farmers' rights are mentioned in passing in the policy document, but only in the context of the provisions of the 1991 UPOV Act. Hence the article on farmer's rights is limiting without taking into account the peculiarities of farming systems in the ARIPO member states.<sup>97</sup> As mentioned earlier, the concerns of smallholder farmers (i.e. most African farmers) about the negative effects on them of plant breeders' rights forms the basis of the farmers' rights article in the Plant Treaty. Article 31 of the African Model Law also enumerates exemptions to the rights of breeders' in a manner that accommodates the needs of smallholder African farmers to save, use, sell and exchange seed with their neighbours – rights that the draft ARIPO Framework on Plant Varieties Protection seeks to take away.

#### **4.3.2 Organisation Africaine de la Propriete Intellectuelle**

OAPI is an organisation with sixteen member states (mainly from Francophone Africa) that deals with protection of intellectual property. It was created pursuant to the 1977 Bangui Agreement, which was revised in 1999 to include new types of intellectual property that the organization considered needed protection, including geographical indications (Annex VI of the Bangui Agreement), layout-designs (topographies) of integrated circuits (Annex IX of the Bangui Agreement) and plant varieties (Annex X of the Bangui Agreement).

The responsibilities of OAPI are set out in Article 2 of Section I of the Agreement and include implementing and applying the common administrative procedures deriving from a uniform system for the protection of industrial property, as well as the provisions of international agreements in the field of industrial property to which the member States of OAPI have acceded, and providing services related to industrial property.

A significant development in OAPI's promotion and development of IP policy is the adoption in 2007 of the instrument *Africain Relatif a la Protection des Savoirs Traditionels*. This instrument is similar to ARIPO's Swakopmund Protocol for the Protection of Traditional Knowledge and Expressions of Folklore, except that the OAPI instrument does not address the protection of folkloric expressions. These two regional instruments stipulate that access to and exploitation of traditional knowledge should be based on the prior informed consent of local communities.

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<sup>95</sup> ARIPO/XXXIV/9 dated 14<sup>th</sup> November 2010

<sup>96</sup> ARIPO/CM/XIII/8 dated 30<sup>th</sup> September 2011

<sup>97</sup> Ibid. draft Article 22

Furthermore local communities are entitled to benefit from the exploitation of the traditional knowledge which they have authorized access to. Local communities are also allowed to pursue legal challenges against any actor who violates their rights in the context of access and exploitation of TK. Interestingly, these two instruments have attempted to separate access to TK from access to the genetic resources to which such TK is associated, by stressing that access to TK does not imply a right to access the corresponding GRs. This raises the possibility that OAPI and ARIPO plan to develop separate mechanisms targeting the regulation of access to and legal protection of genetic resources within the framework of IP.

#### (a) Patents

Annex 1 of the 1999 Revised Bangui Agreement provides for the regulation and protection of patent rights within OAPI. As in the TRIPs Agreement, the substantive criteria for patentability of a new invention are based on the novelty,<sup>98</sup> inventiveness<sup>99</sup> and industrial applicability<sup>100</sup> of the invention over which legal protection through patents is sought. This approach has been questioned elsewhere<sup>101</sup> because it reflects the patent regimes of industrialized and technologically capacitated countries.

In particular, Article 6 allows limited patenting of life forms – an issue long opposed by the African Group. Addressing non-patentable subject matters, Article 6(c) stipulates that patents shall not be granted on inventions having as their subject matter plant varieties, animal species or essential biological processes for the breeding of plants or animals, other than microbiological processes and the products of such processes. By allowing patenting of biotechnology inventions based on microbiological processes the OAPI patent regime contradicts the African Model Law’s categorical prohibition of patents on life forms, as contained in its Article 9.

Faced at national and regional level in Africa with the need to develop patent regimes that can clearly accommodate biotechnology inventions, it is necessary to consider development of a common understanding on the “no patenting of life forms” principle.

#### (b) Plant Breeders’ Rights

The inclusion in the 1999 Bangui Agreement of Annex X on plant variety protection, which is aligned to the standards of protection of plant breeders’ rights contained in the 1991 UPOV Act, is considered within the OAPI circle as a positive step, especially its potential contribution to the development of

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<sup>98</sup> Article 3 of the revised 1999 Bangui agreement

<sup>99</sup> Article 4 of the revised 1999 Bangui agreement

<sup>100</sup> Article 5 of the revised 1999 Bangui Agreement

<sup>101</sup> See Mahop, M.T, Are the African Organization of Intellectual Property Patent Approach and Cameroonian National Biodiversity Regulations at a Crossroads? Suggesting Alternatives Tailored to National and Regional Interests, *Review of European Community and International Environmental Law (RECIEL)*, 14(3), 2005, PP.283-292. This article questions the fact that the Bangui Agreement is more attuned to the level of infrastructural, technological and human skills development of industrialised countries than to OAPI member states overall development level.

agricultural research and innovations, and boosting food security. Annex X also brings this regional instrument into conformity with the WTO TRIPS agreement Article 27.3(b) provisions on the protection of new plant varieties.<sup>102</sup> However, it is questionable whether the strong alignment of Annex X to the UPOV Act 1991 is to the advantage of OAPI member states, considering low regional levels of skills and infrastructure in agricultural research and innovation, and in seed production. Like the UPOV 1991 Act, Annex X of the Bangui Agreement makes protection of plant breeders' rights over new plant varieties conditional on these new varieties being distinct, uniform and homogenous. Annex X of the 1999 Bangui Agreement and the UPOV 1991 Act provide similar limited exceptions to plant breeders' rights, e.g. farmers can plant materials harvested from proprietary seeds only in their own holdings and only for non-commercial reproduction or multiplication purposes; even these limited exceptions do not apply to fruits trees, plantation crops and ornamental plants.

Part VI of the African Model Law also uses distinctiveness, uniformity and homogeneity as criteria for granting protection over new varieties of plants, but in contrast with Annex X of the Bangui Agreement and the UPOV 1991 Act it provides an elaborate list of exceptions to plant breeders rights, consistent with its core concerns of protecting community rights and farmers' rights.

From fairly recent discussions with OAPI staff, it appears that since the entry into force of Annex X of the 1999 Bangui Agreement on 1<sup>st</sup> January 2006, only 16 new plant variety protection certificates have been issued. Of these, only one was issued to an application not originating from an OAPI member State. A further 120-odd application for plant breeders' rights are currently under examination at the OAPI office, with more than 100 of these coming from agricultural research institutions in OAPI member States.

At OAPI there is a view that it is too early to properly assess the impacts of these certificates on the primary purposes of Annex X, such as improvement of agricultural research and innovations in member States, and increased availability of affordable seed to farmers in member States. Nonetheless, unlike patents in the OAPI system, which are largely held by foreign actors, under Annex X nationals of OAPI member states hold more than 90% of issued PVP certificates and represent about 90% of pending applications. This may be due to the fact that the agricultural sector plays a central role in the development strategies of OAPI member States, making it the most accessible research area for scientists in these countries.

### **4.3.3 The Central African Sub-regional Approach on Access and Benefit Sharing**

#### **(a) COMIFAC: Coordinating Body for Forest Matters in Central Africa**

In Central Africa, the coordination of all forest-related conservation and sustainable management matters is the responsibility of the Central African

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<sup>102</sup> See Gazaro, R., Plant Variety Protection in Africa: Opportunities and Prospects, Newsletter of the West Africa Seed Network (WASNET), No. 10, December 2002, Available at: <http://old.iita.org/cms/details/wasnet/WASNET10english.pdf>

Forest Commission (COMIFAC).<sup>103</sup> This includes the initiation of major policy processes pertaining to sustainable management of forest resources of the Congo Basin Ecosystems, the harmonisation of national forest related policies including tax policies related to forest exploitation in Central Africa and the development of sub-regional tools aimed at enhancing stakeholders' –including local communities'–participation to the development and implementation of forest related policies.<sup>104</sup> COMIFAC is an intergovernmental organisation established by the 2005 Brazzaville Treaty for the Conservation and Sustainable Management of the Forest Ecosystems of Central Africa. Commonly known as the COMIFAC Treaty, this instrument is the major outcome of the second meeting of Central African heads of states that was held in Brazzaville, Republic of Congo, in February 2005. The 2005 COMIFAC treaty is in turn an instrument that materialises the political willingness of Central African heads of States to tackle the rapid degradation of the forest resources of the Congo Basin in a coordinated manner through harmonised policies and approaches in the sub-region. The COMIFAC treaty is based on the 1999 Yaoundé Declaration, which it enshrines and which includes a twelve point's statement of political intent that arose from the first summit of the head of Central African States on the Conservation of the Central African Forest in 1999.<sup>105</sup> COMIFAC's actions in forest conservation in Central Africa are guided by an action plan *Plan de Convergence*, which was adopted by the Central African Conference of Ministers in charge of forestry issues in 2000 and revised in 2003.<sup>106</sup> This action plan is articulated in ten strategic action points all of which are based on the political statement of the 1999 Yaoundé declaration.<sup>107</sup>

With regard to the implementation of international environmental treaties, point 1 of the strategic action of the COMIFAC convergence plan calls on COMIFAC to guide countries to pursue a harmonised approach at the sub-regional level. With respect to the Nagoya Protocol, the COMIFAC Council of Ministers adopted its

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<sup>103</sup> A comprehensive overview of the rationale for the establishment of COMIFAC in Central Africa has been published by Tamasang, C.F., *Legislation for Sustainable Forest Management in the Central African sub-Region: What Prospects for Effective Implementation*, in Paddock, L. *et al* (eds.) *Compliance and Enforcement in Environmental Law: Toward More effective Implementation*, IUCN Academy of Environmental Law Series, Edward Elgard, 2011, pp501-518.

<sup>104</sup> The responsibilities of COMIFAC emanate from the political statement of head of states in the form of the Yaoundé declaration in 1999 which is the outcome of the first summit of Central African heads of states dealing with the sustainable management of the Central African forests. They are further crystallised and summarised in article 5 of the 2005 Brazzaville Treaty that formally established the Central African Forest Commission.

<sup>105</sup> It is worth stressing that, the move initiated by the Central African heads of States in favour of sustainable forest management in Central Africa through the Yaoundé Declaration, received a significant, but rather symbolic acknowledgement from the international community, with the adoption of UN Resolution 54/214 –Conservation and Sustainable Development of Central African Forests- during the 54<sup>th</sup> Session of the United Nations General Assembly.

<sup>106</sup> *Conférence des Ministres en Charge des Forêts d'Afrique Centrale, Plan de Convergence pour la Conservation et la Gestion Durable des Ecosystèmes Forestiers d'Afrique Centrale, Juillet 2004.*

<sup>107</sup> The ten strategic action points of the COMIFAC Convergence plan are: (1) harmonisation of forestry and tax policies; (2) knowledge of the resources; (3) Ecosystems management and afforestation; (4) conservation of biological diversity; (5) valorisation of forests resources; (6) poverty reduction and alternative income generating activities; (7) capacity building, stakeholders participation, information and training; (8) research and development; (9) development of financial mechanisms and (10) regional cooperation and partnerships.



Sub-regional Strategy on ABS in November 2010, a month after the adoption of the Nagoya Protocol.

### **(b) The COMIFAC Sub-regional Strategy on ABS**

The COMIFAC ABS Strategy)<sup>108</sup> is the proposed sub-regional common approach of member states of the Central African Forest Commission as guide for national ABS policy processes. As a framework instrument, the COMIFAC strategy is very broad and flexible in its content and thus opens for adaptation to national circumstances and on a voluntary basis. It is therefore not a binding instrument, but rather a voluntary guide available to all the Central African States that belong to the COMIFAC system.

The broadness of the COMIFAC ABS Strategy is already signalled from the title of the strategy itself as it clearly targets regulating access to and utilisation of both the 'biological' and 'genetic' resources, similar to the approach taken by the African Model Law. This broadness continues with the vision of the Strategy which among other things contemplates the development and adoption of a harmonised sub-regional policy on ABS by the COMIFAC member States by 2012. Furthermore the harmonised policy that is envisioned is expected to enshrine such principles as PIC, MAT and participation of local and indigenous communities so that its implementation is able to provide concrete benefits to all stakeholders especially local and indigenous communities. It is therefore the intent of the prospective harmonised ABS policy to be an instrument that will assist COMIFAC member states in their realisation of sustainable development. The realisation of sustainable development by COMIFAC through the implementation of the ABS strategy is further visible in its aim which is the '*conservation and sustainable use of the biological resources and the promotion of the fair and equitable sharing of the benefits arising from the utilisation of the biological and genetic resources of the COMIFAC member States*'. In order to achieve this aim, the strategy sets out a number of objectives (general and specific objectives) and has identified four strategic pillars around which some specific activities are to be implemented.

Broadly speaking, the general objective of the Strategy is to provide guidance to countries of the COMIFAC system in their national ABS processes. The specific objectives include: (a) guiding COMIFAC countries in the development of their national ABS regimes; (b) contribute to the capacity building of relevant stakeholders on ABS issues and; (c) assist countries in the implementation of their national ABS laws and regulatory measures. From the aim and the objectives of the strategy, four pillars emerged around which specific activities will be deployed with respect to the realisation of the strategy. These pillars are: (i) capacity building, (ii) definition of the ABS administrative procedures, (iii) setting up of the legal framework and, (iv) design of mechanisms for stakeholders' participation.

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<sup>108</sup> COMIFAC, *Stratégie des Pays de l'Espace COMIFAC relative à l'Accès aux Ressources Biologiques/Génétiques et le Partage Juste et Équitable des Avantages découlant de leur Utilisation*, Commission des Forêts d'Afrique Centrale, 2010.

The 2010 COMIFAC ABS Strategy is a fairly recent sub-regional development after the adoption of the African Model Law, and in deed after the adoption of the Nagoya Protocol. It is early to assess the impact of the strategy on COMIFAC member countries' engagement with ABS processes at the national level. Cameroon is in the process of developing its national ABS strategy and is said to be paying attention to and seeking guidance from the COMIFAC sub-regional Strategy. It is therefore critical that other countries of the COMIFAC system follow suit in making use of the strategy at the national level. While conclusions at this stage cannot be made on whether the implementation process is keeping with the objectives of the Strategy, this instrument should be hailed for attempting to bring together many countries around a common vision on a specific environmental and development policy area. Its broadness looks to be its strength rather than a weakness for a number of reasons. First, countries can exploit that broadness in adapting the Strategy to their national realities. Secondly, at the sub regional level, the broadness of the ABS Strategy provides COMIFAC member states with the opportunity to accommodate the best of the African Model Law with which is its approach to the protection of community rights, when designing ABS strategies, policies, legal and administrative measures at the domestic level. Thirdly, in designing ABS policy as stipulated in the Strategy, COMIFAC has the opportunity to contextualise and lead the way, at the sub-regional level, on the implementation of some provisions of the Nagoya Protocol such as Article 10 on the Multilateral Benefit Sharing Mechanism and Article 11 on the Transboundary Cooperation which are currently being explored at the multilateral level within the framework of the Nagoya Protocol implementation process.<sup>109</sup>

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<sup>109</sup> Such process include the Intergovernmental Committee on the Nagoya Protocol (ICNP).

## **5. KEY GAPS AND VARIANCES OF THE AFRICAN MODEL LAW**

The African Model Law stands out, worldwide, among regional instruments on access and benefit sharing by virtue of its community-centered approach, its special treatment of community rights (Part IV) and the strong role that local and indigenous communities are accorded in granting PIC for access (Part III). The provisions on prior informed consent of local communities (Article 18); the right of local communities to refuse consent (Article 19); and the right of local communities to withdraw or place restrictions on consent (Article 20) combine to make the African Model Law a powerful statement against the global developments it was designed to counter (as explained in the Introduction). However, despite its progressive approach to the protection of community rights the African Model Law was primarily designed to set standards and norms – it was never intended to be implemented “as is” at the level of national legislation.

On the other hand the Nagoya Protocol and the other international agreements on ABS, very clearly requires country Parties to put in place national ABS laws or regulations before it can start working for them. Considering these instruments side-by-side, one question that arises is how the African Model Law can be used to inform the national measures that are needed to trigger the workings of the Nagoya Protocol and the other international ABS Agreements such as the Plant Treaty. A second question is whether and how the African Model Law, or rather the thinking behind the development of the model law, can be used to bring about a coordinated African approach to ABS implementation. To answer these questions – and ensure that the model legislation continues to be an instrument of reference for Africa in the field of biodiversity and access and benefit sharing – it is necessary to examine and address key gaps and variances between the African Model Law and these other instruments, particularly the Nagoya Protocol.

### **5.1 Biological Resources, Genetic Resources, Derivatives and Products**

The African Model Law, in addition to dealing with traditional knowledge and other intangible rights, explicitly states that its subject matter is biological resources, defined largely as in the CBD. The African Group’s position during the Nagoya Protocol negotiations was therefore that the Protocol should apply to “biological resources, genetic resources, their derivatives and products” (and associated traditional knowledge).

As the negotiations progressed it became clear that the inclusion of “biological resources” in the Protocol text had no support from other Parties, not even Africa’s traditional G77 allies in the developing world.

The issue of derivatives caused similar disagreements, although in this case the developing world was unanimous in supporting their inclusion. Very late in the negotiations it became clear that much of the apparent disagreement originated in talking about two very different kinds of derivatives at the same time without making a clear distinction between them.

One kind of derivative is now defined in Article 2 of the Nagoya Protocol as a “naturally occurring biochemical compound resulting from the genetic

expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity". This definition would include some of the derivatives mention in the African Model Law, such as oils, resins, gums and proteins (which in most cases would actually contain functional units of heredity), in addition to purified extracts.

The other kind of "derivative" is more properly described (as indeed it is in the African Model Law) as a "product developed from" a biological resource; e.g. plant varieties or, synthetic analogues of natural compounds. This class of derivatives is included – at least for purposes of benefit sharing – under the "subsequent applications and commercialization" language in Article 5.1 of the Nagoya Protocol.

In the end the Nagoya Protocol negotiators agreed to resolve these issues by using language taken directly from the third objective of the CBD, namely "utilisation of genetic resources". Article 2 of the protocol defines "utilisation of genetic resources" to mean conducting "research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology as defined in Article 2 of the Convention". This definition in turn includes using "derivatives ... to make or modify products or processes for specific uses".

The adoption of the Nagoya Protocol therefore creates a clear need to reflect on these subtle differences and how they relate to the scope of the African Model Law insofar as access and benefit sharing is concerned.

## **5.2 Benefit Sharing**

The Nagoya Protocol addresses benefit sharing in its Article 5 and deals with the sharing of benefits arising from the utilization of genetic resources on the one hand and on the utilization of traditional knowledge associated with genetic resources on the other. The benefits that are expected to be shared equitably may be monetary and/or non-monetary, with an elaborate list of the types of monetary and non-monetary benefits provided in the annex<sup>110</sup> to the Nagoya Protocol.

While the African Model Law addresses Benefit Sharing under Article 12 and community right to benefit in Part IV Article 22, the African Model Law does not elaborate on the non-monetary aspect of the benefit-sharing equation, seemingly stressing only the monetary dimension of benefit sharing. African counterparts in benefit sharing agreements are likely to benefit a great deal from non-monetary benefits and this aspect has to be worked into an African ABS framework instrument like the model law. It is widely accepted that non-monetary benefits are as important as monetary benefits, and are in many cases the 'low-hanging fruits' in benefit sharing arrangements, particularly in situations where there is uncertainty during early phases of bioprospecting.

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<sup>110</sup> This Annex is a general adaptation of the Bonn Guidelines earlier adopted at the 6<sup>th</sup> Conference of the Parties to the CBD in 2002.

### **5.3 Transboundary co-operation and transboundary genetic resources**

Transboundary co-operation and transboundary genetic resources are important issues in access and benefit sharing, especially in Africa. The African Group's position on these issues during negotiation of the Nagoya Protocol is reflected in Articles 10 and 11 of the Protocol. Article 10 recognizes that there are genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations and calls on Parties to consider the need for and modalities of a global multilateral benefit sharing mechanism for such genetic resources. Article 11 deals with instances where the same genetic resources are found in situ within the territory of more than one Party, and where the same traditional knowledge associated with genetic resources is shared by one or more indigenous and local communities in several Parties. The article then calls on Parties to cooperate in these situations.

The African Model Law does not address issues of transboundary cooperation for the regulation of access to and exploitation of transboundary genetic resources and traditional knowledge. It is also silent on possible mechanisms for the fair and equitable sharing of benefits derived from the utilization of genetic resources and traditional knowledge associated with genetic resources that occur in transboundary situations or for which it is not possible to grant or obtain prior informed consent. The COMIFAC Sub-regional Strategy on ABS provides potential for learning on transboundary cooperation and it would be worthwhile if a continental approach towards co-operation on genetic resources issues could be taken, if not encouraged through continental-wide, or sub-regional strategies.

### **5.4 Traditional Knowledge Associated with Genetic Resources**

Another area where the Nagoya Protocol improves on the African Model Law is in relation to Traditional Knowledge Associated with Genetic Resources (Article 12 of the protocol). Despite being heavily community-centered the African Model Law is silent about the actual mechanisms through which local communities can ensure that collectors of TK associated with genetic resources will respect the rights and customary rules of communities. The Nagoya Protocol proposes the development of community protocols and calls on parties to endeavor to support their development by indigenous and local communities. There is a need to incorporate this aspect in guidance to African countries about the implementation of national ABS measures.

### **5.5 Special considerations for research, emergencies and PGRFA**

Article 8 of the Nagoya Protocol addresses the need to take into account some special considerations in the development and implementation of access and benefit sharing legislation or regulatory requirements. These special considerations relate to research that contributes to conservation and sustainable use of biological diversity; present or imminent emergencies that damage or threaten human, animal or plant health; and plant genetic resources for food and agriculture and their special role for food security. The Protocol

requests Parties to consider simplified and expeditious access measures in these situations.

The African Model Law mentions access by academic and research institutions, public agencies and intergovernmental institutions, but largely leaves it to national authorities to devise measures tailored to these categories of actors. The African Model Law does not expressly suggest that access procedures for these categories of actors must be 'simplified' in order to promote and encourage research. Furthermore, the African Model Law does not address emergency situations, especially in the context of health, for which expeditious access measures may be needed. Such situations have in recent years emerged in human and animal health, implying that the African Model Law may need to consider special arrangements as foreseen in Article 8 of the Nagoya Protocol.

The special nature of plant genetic resources for food and agriculture (PGRFA) is well recognized at the international level since the adoption of the Plant Treaty in 2001. They are a common concern for all countries in that all countries depend on PGRFA that originated elsewhere. Article 4 of the Nagoya Protocol, recognizes that specialised ABS agreements may be set up to address specific needs. The Plant Treaty is one such a specialized ABS agreement addressing ABS needs in PGRFA, among other needs.

While some of the matters addressed in the African Model Law such as farmers' rights are reflected upon in the Plant Treaty, there are other concepts born of the Plant Treaty that are not considered in the African Model Law. Concepts such as the Multilateral System

## 6. CONCLUSIONS AND RECOMMENDATIONS

Africa's current approach to dealing with matters related to biological diversity in general and ABS in particular indicates strong commitment on the continent in this regard. In each and every forum where biodiversity issues have been discussed, Africa's voice has been heard. Africa's quest, both at pan-African and sub-regional levels, for home-grown solutions that suit its unique circumstances and level of socio-economic development has not waned.

At continental level these solutions include the Algiers Convention, the successful revision of which provides further evidence of the African Union's ability to adapt to the changing needs of the continent.

At the sub-regional level activities of industrial property institutions such as ARIPO and OAPI, the emergence of regional economic blocks such as the Economic Community of Central African States (ECCAS), East African Community (EAC), the Economic Community of West African States (ECOWAS), the Common Market for Eastern and Southern Africa (COMESA) and the Southern African Development Community (SADC) attests to Africa's diversity, but also its co-operative approach to seeking solutions.

In marine biodiversity regional instruments such as the Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern Africa Region (the Nairobi Convention) and the Convention for Co-operation in the Protection and Development of the Marine and Coastal Environment of West and Central Africa (the Abidjan Convention) are in place.

Yet Africa's approach to confronting challenges on the biodiversity front still faces several issues. For example, there appears to be a disconnect between some of the activities carried out by regional bodies and those of the African Union. The activities of ARIPO and OAPI aimed at the protection of traditional knowledge, traditional cultural expressions and genetic resources appear to be weakly aligned with Africa's position at the WIPO IGC and other fora. Similarly, efforts by ARIPO and OAPI to establish regional plant breeders' rights protection systems appear to run counter to aspirations expressed by the African Group in negotiations or documents<sup>111</sup> including the African Model Law.

Another apparent challenge is duplication of efforts. The development of similar instruments for the protection of traditional knowledge and traditional cultural expressions with only linguistic differences attests to this point. Similarly, opening the Swakopmund Protocol for signature to parties beyond members of ARIPO is likely to cause further confusion not only of mandate, but also in national implementation efforts.

The policy developments that have been driven by regional organisations such as OAPI and ARIPO suggest that efforts to co-operate, between these regional

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<sup>111</sup> See the African Union Commission Communiqué on Integrated Seed Sector Development under the auspices of the AU-African Seed and Biotechnology Programme, 2010 and document IT/GB-4/11/Circ.1-Input paper submitted by Ethiopia based on Global Consultations on Farmers' Rights in 2010.

institutions themselves and also with the African Union require more optimization. More effective collaboration is therefore necessary. Consideration should be given at the African Union level for greater deployment of personnel to follow and monitor progress in genetic resources and intellectual property policy at other levels. This will enable the creation of synergies and the establishment of conditions for mutual learning between the AU-centered policy making processes and other initiatives. The development, improvement through reviews and/or implementation of the instruments produced by these various organizations is likely to benefit greatly from such increase in synergies.

The African Model Law is very strong and detailed in its approach to the protection of community rights, farmers' rights and plant breeders' rights. It has made the interests of local and indigenous communities into a central concern to be taken into consideration by stakeholders in regulating access to and utilization of biological resources, as well as in the sharing of benefits derived from such activities

However, the model legislation also clearly contains prominent gaps, especially when seen in the context of the Nagoya Protocol. It is necessary to keep in mind here that one of the core purposes of the African Model Law was to give effect to the third objective of the CBD and its Article 15 in particular. The adoption of the Nagoya Protocol, an instrument that reflects some if not most of the aspirations contained in the African Model Law, is a milestone in the achievement of the objectives of the model legislation. It has therefore become necessary to devise a way to use the positive characteristics of the African Model Law to help African countries meet their international obligations, including implementation of the Nagoya Protocol.

Two potential approaches can be considered in this regard. One is a thorough review and revising of the African Model Law. In this regard it is however useful to recall that the African Model Law is in essence a model – a guide to follow – that was never intended to have the status of a Convention or Treaty in Africa, like the Algiers or Abidjan Conventions. For this reason an overhaul of the African Model Law, leading to a new text document for adoption by the AU Heads of States, may not be the most effective means of bringing the African Model Law up to date.

A second, probably more practical, option is to prepare a complementary guideline document to be used alongside the African Model Law. Such a guide would not only highlight the developments and positions that the African Group subscribes to on each of the issues contained in the African Model Law, but would also offer an opportunity for model clauses to be formulated in response to the numerous obligations that African countries have to fulfill. The guide could also consider sectoral approaches, particularly in areas where Africa's biodiversity is most attractive and valuable. Such an approach would preserve what is best and most useful in the spirit and letter of the African Model Law, while also ensuring that African countries had access to updated guidance on how to turn noble principles and high aspirations into practical, workable policy, laws and regulations.



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