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### **African Union Model Law on 'Community Rights and on the Control of Access to Biological Resources'**

Most of the member states of the Organization of African Union (OAU) have developed national legislation based on a regional model law on 'Community Rights and on the Control of Access to Biological Resources'.<sup>1</sup> The OAU approved the model law during its Summit of Heads of State and Government in June 1998. All African countries except for 8 (Ethiopia; Lesotho; Libya; Mauritania; Rwanda; Somalia; Togo; Tunisia) signed the model law. As at May 2002, 13 African countries had ratified the Model Law, being Botswana, Benin, Burkina Faso, Central African Republic, Congo, Gabon, Ghana, Mali, Niger, Nigeria, Senegal, Sierra Leone and South Africa.

The model law was to be used by OAU states as a framework for drawing up national legislation. The model law deals with access to biological resources, benefit sharing and the rights of farmers and breeders over their knowledge and resources. It is premised on the rejection of patents on life, and its provisions on access to biological resources make it clear that the recipients of biological resources or related knowledge cannot apply for any intellectual property right (IPR) of an exclusionary nature.

The model law focuses mainly on defining the rights of communities, farmers and breeders. Community recognized rights include rights over their biological resources and the right collectively to benefit from their use, rights to their innovations, practices, knowledge and technology and the right collectively to benefit from their use. In practice, these rights allow communities to prohibit access to their resources and knowledge in cases where access would be detrimental to the integrity of their natural or cultural heritage. Farmers' rights include the protection of their traditional knowledge relevant to plant and animal genetic resources, the right to an equitable share of benefits arising from the use of plant and animal genetic resources, the right to participate in making decisions on matters related to the conservation and sustainable use of plant and animal genetic resources, the right to save, use, exchange and sell farm-saved seed or propagating material, and the right to use a commercial breeder's variety to develop other varieties. The noteworthy characteristic of the plant breeders' rights (PBR) regime under the model law is the relatively broad scope of the exemptions granted. Exemptions to the rights of breeders include the right to use a protected variety for purposes other than commerce, the right to sell plant or propagating material as food, the right to sell within the place where the variety is grown and the use of the variety as an initial source of variation for developing another variety. The state is to ensure that at least 50 per cent of the benefits derived from the use of their resources or knowledge is channeled back to the communities. The positive element in the OAU Model Law is that there is a collective effort by a group of countries to pool resources to implement some aspects of the Convention on Biological Diversity (namely, access to genetic resources and the protection of Indigenous Knowledge) and of the Agreement on Trade Related Aspects of Intellectual Property Rights (namely, a *sui generis* protection system for plant varieties).

However, despite its progressive nature, the actual approach adopted by the OAU Model Law in connection to IPR issues is yet to attract the support of the wider international community. For example, in September 2000, African Ministers of Trade invited a delegation from the International Union for the Protection of New Varieties of Plants (UPOV) and the World Intellectual Property Organization (WIPO)<sup>2</sup> to comment on the model law. The result was an attempt to restructure the model law in order to bring it into line with UPOV and WIPO's IPR systems. WIPO noted that the prohibition on patents contained in the model law<sup>3</sup> is inconsistent with TRIPs Article 27.3(b), and further objected to the embodiment of the principle that the collectors of biological resources in Africa are required to assure that they will not apply for patents over such materials or their derivatives, (Art. 4.3(e)) contained in the model law. Underlying this objection is the barrier that it poses to the securing of monopolies on such resources and/or their derivatives. Perhaps the most important objection was WIPO's opposition to the concept that indigenous technology is not transferable to another owner (the concept of inalienability). This concept ensures that no one, including members of a local community, can make exclusive claims over community knowledge or resources. WIPO further suggested that local communities apply for patent protection themselves as a solution to the problem. Essentially, rather than assisting constructively in the development of the model law, WIPO attempted to solve the problem by using existing global IPR conventions that many commentators argue are ill-equipped effectively to protect indigenous knowledge in Africa. In a similar approach, UPOV officials reworked more than thirty articles of the model law to bring it into line with the standards of their own convention.<sup>4</sup>

In response to UPOV and WIPO's involvement, the OAU/STRC task force states that 'the WTO-based approach is predatory in nature and runs counter to the aspirations of communities which are in the first place the innovators of biodiversity.'<sup>5</sup>

## **ENDNOTES**

<sup>1</sup> As at 27 May 2002, 13 African countries had ratified the Model Law [Botswana; Benin; Burkina Faso; Central African Republic; Congo; Gabon; Ghana; Mali; Niger; Nigeria; Senegal; Sierra Leone; South Africa]. South Africa signed the model law on 17 July 1998, and ratified on 27 November 2000. See Ratification Atlas, 'Country-by-Country Ratification Status Report', World Wide Web, <http://www.iccnw.org/html/countryindex.html#africa>

<sup>2</sup>

WIPO is an intergovernmental organization. It is one of the sixteen specialized agencies of the UN system of organizations. WIPO is responsible for the promotion of the protection of IPR throughout the world through cooperation among states, and for the administration of various multilateral treaties dealing with the legal and administrative aspects of IP. The number of States members of WIPO was over 170 in August 1998. See World Intellectual Property Organization, 'What is WIPO', World Wide Web, <http://www.wipo.int/eng/dgtext.htm>

<sup>3</sup>The model law rejects patents on life forms as immoral and contrary to the values of African people.

<sup>4</sup>

GRAIN, 'Africa's Model Law on Community Rights Under Attack', (2000), World Wide Web, <http://www.southcentre.org/info/southbulletin15/southbulletin15-10.htm>

<sup>5</sup> The Organization of African Unity, 'Declaration by the OAU/STRC task force on community rights and access to biological resources', (2001), World Wide Web, <http://www.twinside.org.sg/title/oaui-cn.htm>